

**Towards an Effective Class Action
Model for European Consumers:
Lessons Learnt from Israel**

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of Philosophy

by
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The class action is an important instrument for the enforcement of consumers' rights, particularly in personal actions for low sums known as Negative Expected Value (NEV) suits. Collective redress actions transform NEV suits into Positive Expected Value suits using economies of scale by the aggregation of smaller actions into a single legal action which is economically worthwhile pursuing. Collective redress promotes adherence to the law, deters illegal actions and furthers public interests. Collective redress also helps in the management of multiple cases in court.

The introduction of a new class action model in Israel has proven to be very workable in the sense that it has improved access to justice, albeit that this system currently suffers from over-use, referred to in this work as the "flood problem".

The purpose of this research is to introduce a class action model which brings with it the advantages of the Israeli model, as well as improvements upon it so as to promote consumer confidence in low figure transactions by individuals with large, powerful companies.

The new model suggested in this work relies on the opt-out mechanism, monitored by regulatory bodies through public regulation or by private regulators. The reliance on the supremacy of public enforcement and follow-on actions over private stand-alone actions should make the system of collective redress more efficient than the current Israeli model, reducing the risk of a flood of actions whilst at the same time improving access to justice for large groups of claimants. Thus far, no unified European class action mechanism has been developed, and only some member states have developed their own systems. The model discussed in this work may be implemented as a unified set of rules in Europe, with some additional adjustments, such as those covering cross-border trade, to promote confidence in trade within the European Union.

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I would like to take this opportunity to thank my tutor, Dr. Christine Riefa, who showed me the way through all these developments and helped me to transform the wealth of information gathered from different jurisdictions into a single body of research work which is aimed to assist in the enforcement of consumer rights through collective redress. Dr. Riefa also assisted me in presenting parts of my research during a presentation held at Brunel University in June 2011.¹

I would like to thank my second tutor, Dr. Federico Ferretti, for advising me to write a reply to the European consultation paper on collective redress.² This exercise proved to be very helpful in shaping my research structure.³

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No acknowledgement could ever be complete without thanking my much loved and very special parents, Mati and Michaela Flavian, who stand behind any of my success and have done so since the day I was born.

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¹ "Protecting Consumers in Economic Recessions", 13th International Conference of the IACL, available at <http://www.brunel.ac.uk/law/news-and-events/events/ne_41734> accessed 23 September 2012.

² "Towards a Coherent European Approach to Collective Redress – consultation paper", available at <http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm> accessed 2 September 2012.

³ See Ariel Flavian, "Response to the consultation paper on coherent European approach", available at <http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html> accessed 2 September 2012.

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Preface

Collective redress seems to me to be the appropriate method to empower consumers to combat abuse from large and powerful companies. It creates equality between actors in the consumer markets and it is perhaps the only proper way to bring small claims to court on a large scale.

In the early years of this century,¹ the striking fact was that collective proceedings were not in use at all in the European market, supposedly the largest market in the world.

However, from the time that I decided to study the absence of a European collective redress mechanism, the legal environment in Europe changed dramatically.

The Netherlands developed a new act for settling collective claims in 2005,² followed by Denmark in 2008,³ and Italy in 2009.⁴ In France, a committee was set up in order to suggest a new framework for collective proceedings,⁵ and in the U.K., one such committee was followed by another.⁶ In 2007, the European Community's Consumer Commissioner, Magdalena Kuneva, published her strategy for the coming years,

¹ My first proposal on this topic was submitted in 2004, but due to a lack of resources, I began my research in 2007.

² On 27 July 2005, the Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade) came into force.

³ Act no. 181 of 28 February 2007 on Collective Redress came into force on 1 January 2008.

⁴ Through legislative decree no. 78 of 2009, which entered into force on 5 August 2009, converted with amendments into the law of 3 August 2009 no. 102, the government replaced the wording "upon the expiry of 18 months" with the wording "upon the expiry of 24 months".

⁵ A working group of ministers, consumer organisations, companies and lawyers was formed to prepare draft legislation for collective consumer actions (*actions de groupe*) in France. The recommendations of the working group were introduced in November 2006, in a bill presented by French finance Minister Thierry Breton. The bill was introduced at a cabinet meeting as part of a new consumer protection programme.

⁶ The Right Honourable the Lord Woolf, Master of the Rolls, "Final Report to the Lord Chancellor on the civil justice system in England and Wales" (July 1996).
Lord Chancellor's Department, Consultation Paper, "Representative Claims: Proposed New Procedures" (February 2001).
Office of Fair Trading, "Private actions in competition law" (Discussion paper, November 2007) at <http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf> and <http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf> accessed 17 September 2012.

In July 2008, the Civil Justice Council made a series of recommendations to the Lord Chancellor at <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Action_s.pdf> accessed 23 September 2012.

which included a recommendation for establishing a European mechanism for collective redress.⁷

Under these circumstances, I found myself conducting research time and again in order to keep abreast of the latest developments in the different states examined, and continually amending the text of my work.

In order to become familiar with the features of the Israeli model and to keep track of developments in this system, I read books, articles both in English and Hebrew and attended several seminars.⁸ I analysed the Israeli Class Actions Registry, including all the claims listed until 31 December 2009. Later on, I published a short article on the Israeli class action system in the Haifa Law Gazette, a publication of the local bar association.⁹ In order to understand the different European models, I read articles in English about all the states examined, attended an ERA seminar relating to collective redress,¹⁰ and in 2010 presented a paper on this issue at the City University conference on legal practice.¹¹

⁷ See <http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf> and <http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_leuven_29062007_en.pdf> accessed 23 September 2012.

⁸ Seminar on the issue of securities class actions (Tel Aviv University, 18 November 2009), Judge Kogan, (Seminar on class actions in labour law, 27 April 2010). Prof. Klement, (Seminar on advanced matters in civil procedure, Interdisciplinary Center, Herzeliya, 2009-2010).

⁹ Ariel Flavian 'The Tnuva Case and the Flood of Class Actions in Israel', The Local Bar Association Gazette, p. 54 (March 2009) Published in Hebrew. See <<http://www.israelbar.org.il/uploadfiles/Doors-28b.pdf>> accessed 23 September 2012.

¹⁰ "Collective Redress: Towards a system of class actions in Europe?" (Florence, 30-31 October 2008).

¹¹ "The Role of the Lawyer in Class Actions" (International Conference on Practising Law, 15-17 July 2010).

Introduction:

Learning Lessons from the Israeli Class Action Model ahead of Shaping a New European Model

A new model for collective actions was introduced in Israel in 2006 (Israel's "CAL"). The rationale behind it was to improve access to justice in certain situations where the personal action consists of only low sums lost, though the action concerns many people who have suffered from the same wrongdoing.

Six years after the new enactment in Israel, some conclusions may be reached from the use of the Israel's class action model, and some lessons may be learnt. These can prove useful ahead of shaping a new collective action model for the European Union.

The European Community indeed has been considering its position in relation to collective proceedings for many years, with sixteen member states having adopted their own measures so far. These measures vary from state to state, and there is no single coherent European framework. In Europe, the search for a collective redress model seems to be entering its final stages following the European Commission's consultation paper in 2011 and the European Parliament's publication of a resolution recommending the introduction of a collective redress mechanism for European consumers.¹

It is beyond the scope of this work to offer a new coherent model for Europe as the European Union is facing a wide variety of obstacles which derive from the traditional cultures in some member states and which prevent the use of an effective class action model. Furthermore, the European market's features differ from those of the Israeli market which is not yet a multinational market. Nevertheless, the Israeli example together with improvements suggested in this work mainly relating to cross-border trade, could prove useful for devising a European class action.

¹ European Parliament resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress" available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>> accessed 21 September 2012.

A. The Purpose of this Research

The European Union and its member states are now in a search for a collective redress measure catering to European consumers. The Israeli model is certainly one that functions and produces many collective actions on an opt-out basis every year. This work examines the Israeli experience and studies its advantages and its problems, in order to bring this experience to the EU debate.

In the course of this work, it will be suggested that the European Community should not abandon its plan for a new coherent collective redress measure. Before developing such a procedure, it is suggested that the EU consider the lessons learnt from the Israeli experience.

The main purpose of this research is to examine the positive provisions of the Israeli Class Action model and to suggest some changes so as to mitigate the negative consequences of bringing a collective action.

In order to achieve the above purpose, the main questions addressed in this research are as follows:

- Is a class action in the consumer area a welcomed procedure at all, and how has it affected Israel's field of consumer law?
- What are the characteristics which make the Israeli class action model work?
- What features are required to safeguard against possible abuses of collective redress?
- What changes may be introduced to the Israeli model in order to bring it to a level whereby it can be considered a useful starting point for a European consumer collective redress model?

The ultimate aim of this work is to produce an improved Israeli model which may be considered by European scholars and legislators ahead of shaping a new European collective redress model.

B. Methodology

The work is based on comparative research, and the developments in Israel are weighed against the different objections and options raised in some European member states and in Europe generally.

Class actions have already become enshrined as an integral part of Israel's jurisdiction, and Israel has followed the U.S. class action model to some extent. Israel's experiences may be a source for allaying some of Europe's hesitations vis-à-vis the procedure, in order to determine whether class actions should be welcomed at all.

To this end, the author has examined the concept of collective redress, its advantages and disadvantages under the Israeli regime, and features of the Israeli model which make this model so workable for consumers. Evidence and statistics regarding the use of the Israeli model have been gathered in order to emphasise the dramatic developments class actions have produced since their introduction in Israel. This is in contrast to Europe, where an evaluation study on the effectiveness and efficiency of collective redress mechanisms in the European Union² found that systems of collective redress are used very little.

The comparative work led to the revelation that there are major differences between the concepts of enforcement of consumer rights in Israel and in Europe respectively. In Europe, enforcement is carried out by well-established public enforcement bodies, whereas in Israel, the main emphasis is on the private realm.

The problems of collective redress in Israel are reviewed, as well as the need to maintain strict boundaries in order to safeguard the procedure from possible abuses which may result from private enforcement and contingency fees. The study of collective redress in some leading European models demonstrated that inconsistency currently exists as regards collective redress proceedings in European member states.

² The European Commission, *Study on the evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* (26 August 2008) at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 29 January 2011.

This inconsistency proves that there is a need to produce a unified European model of collective redress.

Since research into the Israeli model and its practical application demonstrates that problems do exist and that there is therefore room for improvement, changes are recommended for its improvement, with some references to possible changes which may fit a new European model.

C. Terminology

Collective actions are a means of enforcing the rights of victims, and such actions are particularly appropriate where victims are not expected to sue the wrongdoer under existing legal proceedings. For the purposes of this research, collective actions are procedures whereby legal actions pertaining to many injured parties are tried by a representative in the same legal proceeding.

The American English terminology for such a procedure is a "class action." In British English terminology, the term "representative action" describes these types of proceedings, while in Europe, the term "collective redress" is generally used. In this work we will use all expressions where appropriate although we have tended to prefer 'class action' as a means to refer to collective actions. Where proceedings are managed by a representative without the permission of the group members, they are known as "opt-out" proceedings. Where group members provide their explicit permission for such representation, the proceeding is known as "opt-in."

D. The Need for Collective Redress in Europe

The European market caters to over 500 million citizens from twenty-seven member states. The EU generates an estimated 30% share of the nominal gross world product.³ Yet in the whole European market, the collective redress mechanism has been used

³ The Oxbridge Writers, 'European Union' available at <<http://www.oxbridgewriters.com/essays/international-relations/the-european-union.php>> accessed 29 June 2012.

very little to protect consumers, to enforce their rights and to challenge infringements of their consumers rights.⁴

The European market is probably the largest market in the world, yet without mechanisms for quick and cheap dispute resolution, it cannot be efficient. If consumers are to have sufficient confidence in shopping outside their own Member State and in taking advantage of the internal market, they need assurance that if things go wrong they have access to effective mechanisms to seek redress.⁵ Consumer disputes require tailored mechanisms that do not impose costs and delays which are disproportionate to the value at stake.⁶

Collective redress may provide European consumers with exactly such a mechanism to resolve large scale disputes concerning many consumers in one legal action. Such a legal instrument will save time, make the procedure more efficient, and may vindicate small claims disputes which affect a large number of consumers.

At the European level the European Commission has recently recognised the importance of collective redress mechanism at European level on several occasions. However, thus far there is no one coherent mechanism in Europe. European Commission officials have stressed the importance of collective actions for the confidence of consumer trade within the European Community⁷ time and time again.

⁴ Civic Consulting, DG SANCO: '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: Main Report' see at page 9.

⁵ Commission of the European Communities, Communication from the Commission on "widening consumer access to alternative dispute resolution" Brussels, 4 April 2001 at <http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just11_en.pdf> accessed 23 September 2012 .

⁶ OECD Recommendation on Consumer Dispute Resolution and Redress at <<http://www.oecd.org/dataoecd/43/50/38960101.pdf>> page 6, accessed 23 May 2012.

⁷ The first collective measure was Commission Regulation EC 1768/95 (implementing rules on the agricultural exemption for the purposes of safeguarding agricultural production). But later in 1998, the E.C. Commission introduced Directive 98/27/EC empowering consumer organisations to apply to courts in fellow member states for an injunction against an infringement of any of a, consumer credit, package holidays, and consumer guarantees, committed in the organisation's own state by an entity based in another member state.

A statement of policy was published in 1997⁸ by the former Consumer Commissioner, Magdalena Kuneva who stated that one of the European Commission's plans for the period from 2007 to 2013 was to introduce a European system of collective redress for consumers. This statement of policy was followed by a public consultation paper⁹ and a green paper.¹⁰ In February 2011, the European Commission issued a Public Consultation Working Document noting the need for a coherent European approach to collective redress and soliciting comments on how to structure such a mechanism. These developments¹¹ indicated that the Commission was closer than ever to introducing a collective redress mechanism for European consumers. However, no real substantial progress has been made in developing a unified class action system in Europe since this statement of policy was published.¹² In his recent speech on group actions, John Dalli, the current European Commissioner for Health and Consumer Policy, underlined the necessity of collective redress systems for EU consumers as a mechanism for ensuring the enforcement of their rights.¹³ The Single European Market confers many rights on individuals, but such rights remain worthless where there is no effective means for their enforcement.¹⁴

⁸ Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'EU Consumer Policy strategy 2007-2013, Empowering consumers, enhancing their welfare, effectively protecting them' COM(2007) 99 final <http://ec.europa.eu/consumers/overview/cons_policy/doc/EN_99.pdf> accessed 7 November 2011.

⁹ <http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf> accessed 7 November 2011.

¹⁰ Commission of the European Communities, 'Green Paper on Consumer Collective Redress', COM(2008)794 final, <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf> accessed 7 November 2011.

¹¹ European Commission, Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011) available at <http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf> accessed 25 February 2012.

¹² The European Parliament stressed in its recent report that the Commission has still not put forward convincing evidence that, pursuant to the principle of subsidiarity, action is needed at EU level in order to ensure that victims of unlawful behaviour are compensated for damages. See: European Parliament Committee on Legal Affairs 'Draft Report on Towards a Coherent European Approach to Collective Redress 15 July 2011 (2011/20899INI), (Para D (3) at page 4).

¹³ Commissioner John Dalli, 'Commissioner Dalli delivers a speech on "Group Action: A necessity for consumers"' <http://ec.europa.eu/commission_2010-2014/dalli/docs/20101115_group_action.pdf> accessed 7 November 2011.

¹⁴ Commission Staff Working Public Consultation, 'Towards a Coherent European Approach to Collective Redress' (SEC(2011)173). Sec 1 at page 1.

In the European Union, only sixteen member states have developed systems for such actions, and these vary from one member state to another.¹⁵ The European Commission recently published a consultation paper seeking the development of a coherent European collective redress procedure. The Commission has stated that:

[...] given the diversity of existing national systems and their different levels of effectiveness, a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights. A coherent European framework drawing on the different national traditions could facilitate strengthening collective redress (injunctive and/or compensatory) in targeted areas [...]¹⁶

The issue of collective redress was left thus far to the discretion of the member states and is currently being addressed in many European member states in different ways. The Netherlands developed a new act for settling collective claims in 2005,¹⁷ Denmark in 2008,¹⁸ and Italy in 2009.¹⁹ In France, a committee was established in 2005 to suggest a new framework for collective proceedings.²⁰

In the U.K., the matter of collective redress has been subject to an ongoing debate over the last 15 years, and has been addressed in many professional committees. A 1995 report by the Law Society was followed by a full chapter in L.J. Woolf's

¹⁵ Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden and UK (in England and Wales). See European Parliament, Directorate General for Internal Policies, *Policy Department A: Economic and Scientific Policy Overview of existing collective redress schemes in EU Member States* (European Parliament, July 2011).

¹⁶ Commission Staff Working Public Consultation, 'Towards a Coherent European Approach to Collective Redress' (SEC(2011)173).

¹⁷ On 27 July 2005, the Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade) came into force.

¹⁸ Act no. 181 of 28 February 2007 on collective redress came into force on 1 January 2008.

¹⁹ Through legislative decree no. 78 of 2009, which entered into force on 5 August 2009, converted with amendments into the Law of 3 August 2009 no. 102, the government replaced the wording "upon the expiry of 18 months" with the wording "upon the expiry of 24 months."

²⁰ A working group of ministers, consumer organisations, companies and lawyers was formed to prepare draft legislation for collective consumer actions (*actions de groupe*) in France. The recommendations of the working group were introduced in a bill by French Finance Minister Thierry Breton in November 2006. The bill was introduced at a cabinet meeting as part of a new consumer protection drive.

“Access to Justice Report.”²¹ Lord Woolf observed that group action procedures were necessary, since they provide expeditious, effective and proportionate methods for resolving complex multi-party litigation. In 2000, the Civil Procedure Rules of 1998 came into force introducing Part 19 (3) dealing with group litigation.

The Civil Procedure Rules (CPR) Part 19.3 provides the courts with a tool known as a "Group Litigation Order" (GLO), which enables the courts to group claims exhibiting the same issues of fact or law together. However, since these new CPR rules concerning Group Litigation could only be applied to previously submitted claims, in reality, they merely constitute a tool by which to manage these claims.²² In a survey conducted by Prof. Rachel Mulheron, it is noted that the "opt in" nature of the GLO is an impediment to the procedure.²³

A more suitable framework for class actions exists in Rule 19.6 of the 1998 Civil Procedure Rules, which deals with representative actions. The new rule of procedure adopted the old mechanism of representative actions, allowing such actions only in cases in which individuals hold the “same interest” in the claim.²⁴ Subsequently, the courts’ strict adherence to the “same interest” requirement led to the following result in the vast majority of cases: whenever there is a claim for damages, the machinery of a representative suit was held to be absolutely inapplicable.²⁵ Thus, there seems to be a lack of coherence after the enactment of Rule 19.6.²⁶

²¹ The Right Honourable the Lord Woolf, Master of the Rolls, 'Access to Justice Final Report to the Lord Chancellor on the civil justice system in England and Wales', July 1996.

²² Practice Direction 19 B – Group Litigation. See also Neil Andrews, 'Multi-Party Proceedings in England: Representative and Group Actions' (2001) 11 Duke Journal Of Comparative and International Law Vol 249.

²³ Prof. Rachael Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (2008, Civil Justice Council).

²⁴ Part 19 ii (Rule 19.6).

²⁵ *Market & Co` Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021. Though a more relaxed construction was applied in *Prudential Assurance Co. Ltd v. Newman Industries Ltd* [1979] 3 All ER 507 and followed in *EMI Records v. Riley* [1981] 2 All ER 838.

²⁶ See more recent cases that prove the inconsistency: *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd* [1999] EWCA Civ 856, *The Times Law Report* 15 March 1999, [1999] E.T.M.R. 1020, [1999] R.P.C. 826 and in *Emerald Supplies Ltd & Anr v. British Airways Plc* [2009] EWHC 741(Ch) , where the court denied representation as opposed to the decision in *Indepiente Ltd. v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch D), where representation was allowed.

A consultation paper in 2001 suggested that the U.K. is heading towards an opt-out English class action.²⁷ However, the responses to this consultation paper indicated sheer resentment for the opt-out mechanism. Since then, one committee followed another and the legal position remained unchanged.²⁸ The three most recent developments worth mentioning were introduced when the Civil Justice Council made a series of recommendations to the Lord Chancellor in July 2008 and offered a combined opt-in opt-out mechanism with possible cy pres distribution²⁹, notions that we will explore later on. The government issued a response and reverted back to its 2002 stance, providing that collective redress should be introduced in specific sectors where there is a clear need for such a procedure.³⁰ In February 2010, the Civil Justice Committee offered a new model for practice directions³¹, introducing state-of-the-art provisions.³² Despite all these developments thus far these recommendations and their governmental replies have not been enacted and the issue of collective redress remains generally unchanged in England and Wales.

It is on this background of inconsistency amongst the member states that the Commission has decided to develop a unified European measure to better serve European consumers and replace the different measures which are currently in use in various member states. The search for an appropriate European collective redress model is far from reaching its end goal of finalising and implementing a Europe-wide

²⁷ Lord Chancellor's Department, Representative Claims: Consultation Paper (February 2001).

²⁸ Office of Fair Trading, Private actions in competition law: effective redress for consumers and business, Discussion Paper (April 2007) <http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf> and <http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf> accessed 21 September 2012.

²⁹ The Civil Justice Council made a series of recommendations to the Lord Chancellor in Civil Justice Council, 'Improving Access to Justice Through Collective Actions' (2008) at <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf> accessed 23 September 2012..

³⁰ Ministry of Justice, "The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'" (2009) available at <http://www.lawcentres.org.uk/uploads/Government_Response_20th_July_2009.pdf> accessed 18 July 2012.

³¹ According to this most recent set of rules, the Civil Justice Committee suggested that the judge in each case determine whether the procedure be conducted on an opt-in or opt-out basis, that such proceedings be made pertinent to non-domiciled class actions, and that they be subjected to a certification procedure. The suggested practice directions offered a broad view on cost management, allowing even conditional fee agreements. However, all rules are subject to the court's approval.

³² Civil Justice Council, 'Draft Court Rules for Collective Proceedings' (2010) available at <<http://www.docstoc.com/docs/43542510/DRAFT-COURT-RULES-FOR-COLLECTIVE-PROCEEDINGS>> accessed 30 June 2012.

collective redress system. There is no European state that has a workable and effective model which benefits its consumers.³³

In contrast to the EU, the Israeli experience with collective redress is now well-established and is worthy of study in order to identify some building blocks useful in the development of a European Class action.

E. The Israeli Collective Redress Mechanism: A Basis for a New European Model?

The Israeli model was developed gradually, and finalised in 2006 when Israel's CAL was introduced.³⁴ From the time of its introduction, it has revolutionised Israeli consumer law, improving access to justice in relation to consumer cases which otherwise would not been submitted to the courts. Banks have been ordered to repay unlawful charges,³⁵ insurance companies have been forced to refund consumers who had paid excessive charges for insurance premiums,³⁶ the size of crisp packets have been enlarged³⁷ and consumers have become much better off in many other respects using class actions following the introduction of the CAL in Israel. Following the enactment of CAL in Israel, for the first time, the courts have awarded damages in favour of the general public.³⁸

There are also other examples to the contribution that class actions have made to the benefit of consumers, the procedure set down in the Israeli legislation has increased access to justice so substantially, that it has brought with it a flood of actions. In the

³³ European Commission – DG SANCO, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' (2008) <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#cr> accessed 7 November 2011.

³⁴ The Class Action Law 5766-2006 (Israel).

³⁵ For example, Case no. 1805-09 (District Court of Tel Aviv) Bashan v. Bank Hapoalim (2009), concerning overcharging for the production of documents.

³⁶ For example, Case no. 1251/07 Keidar v. Dikla (District Court of Tel Aviv) (2007), concerning unlawful payments for insurance to which the insured were eligible by law. Payments were refunded to the insured.

³⁷ For example, Case no. 1953/06 (District Court of Tel Aviv) Amar Ashaer v. Osem (2006), where the packets of crisps known as *bisli* were enlarged due to the defendants' misleading behaviour of making the packets smaller without changing the weight on the packet or the price of the product.

³⁸ Appeal No. 10085/08 (Supreme Court) Tnuva v. Rabi (2011) (as yet unpublished).

last year (2011) alone, 700 new actions were brought to the Israeli courts,³⁹ each action amounting to extremely high figures due to the large classes which the representatives claim to represent. The strong impact of such court procedures on the Israeli economy has had an adverse effect on the market. Companies must concentrate more on legal defence than on production, with resources being spent on legal actions most of which are unsubstantiated. The fact that voluntary dismissal is a very popular way to end the procedure in Israel⁴⁰ is showing that many submitted actions are not legally sound. In Israel there is no barrier which filters the actions before they are brought to court, a major downside of this system as we will further explore. Nevertheless, despite room for improvement, it is our goal to show that the many positive facets of the Israeli action as well as some improvements could provide an excellent basis for consumer class actions in the EU as well. In order to make this demonstration, we will structure this thesis as suggested below.

F. Structure

In Chapter One, the advantages and problems of the collective procedure for European consumers are discussed. The first chapter supports the argument that collective actions may assist European consumers to enforce their rights. The chapter ends with the suggestion that the Israeli model can be used in order to assist in setting down a coherent European model.

Chapter Two introduces the Israeli class action model, and explains the stages of development which led to the enactment of the Class Action Law in 2006. Further in the chapter, the effects of this law are discussed, including the types of collective actions which are submitted to the courts in Israel, the volume of class actions, and their effect on the economy.

³⁹ According to the Israeli Class Actions Registry available at http://elyon1.court.gov.il/heb/tovanot_y/list.htm accessed 30 June 2012.

⁴⁰ Adini R., 'This is also a Way to End Up - On Voluntary Dismissals in Class Actions' due to be published in the Hapraklit Journal, Volume Nun Bet (1) available at www.ronenadini.co.il/news/list.aspx?newscatid=38 accessed 4 May 2012

The pillars of the Israeli model are discussed in detail and compared with some current collective redress provisions in Europe in Chapter Three. These pillars are the opt-out mechanism, the opening of the gates to private enforcement, together with organisational and public actions. The latter two pillars are less influential in Israel and their use should be promoted. Other pillars discussed are the incentives introduced in order to activate the class action machinery and the wide scope of possible collective actions permissible in Israel.

The possible abuses that may arise when using the class action, and the relevant safeguards imposed in Israel are discussed in Chapter Four. These safeguards include the class action certification stage which exists to filter the actions submitted to the courts; the supervision of settlements and voluntary dismissals which are arrangements reached between the representative plaintiff and the class' lawyer together with the defendant; the possibility of replacing the representatives; and the use of a public registry and provision of notices to class members and others who may be interested in the outcome of the action as a means of assuring transparency of the procedure. Finally, the loser pays principle which is also used in current European models is discussed.

Finally, Chapter Five introduces suggested changes to the Israeli model, the first step to potential adoption of the model within a coherent European model. These changes include the introduction of an additional filter mechanism to exclude unsubstantiated private stand-alone actions from the courts and the combining of private-led collective actions with a regulatory supervising body. The role of the supervising body will be to keep unmeritorious actions out of the boundaries of the legal procedure. The other way to prevent large scale court disputes is to introduce a collective ADR instrument enabling dispute settlement in a collective albeit supervised system. This chapter also deals with the fact that the Israeli model lacks a cross-border provision which is required in order to allow the Israeli model to be considered as the basis for the new European coherent model. The way in which the United States has coped with cross-border issues in its multi-state model is examined here in order to address the cross-border issue.

Finally, the conclusions of this work suggest a new path in which the Israeli model can be improved and then used as a guide as well as a basis for a consumer class action system in Europe.

Chapter One:

Considering the Benefits of Collective Action Models for European Consumers

The first question to tackle in the search for a European collective action model, is whether the constant search for such a procedure for European consumers is worth the effort.

Class actions are well-established in the United States, Canada, Australia and Israel. Taking a global perspective, the advantages of adopting such a procedure are evident, yet it is also clear that some problems and abuses must be avoided. In this chapter, the advantages of collective proceedings and the types of disputes which lend themselves to such proceedings will be considered. The problematic aspects of collective proceedings and the need to adopt safeguards so as to prevent issues arising which bring the procedure into disrepute will then be examined. Finally, the needs of a European collective procedure system will be considered, so that these may be borne in mind in the chapters that follow, dealing with the lessons which the European Union may learn from Israel's experience in relation to class actions.

The collective procedure has some clear advantages which outweigh the problems that may arise through the use of this machinery. Collective redress empowers consumers to combat abuse from large and powerful companies. It creates equality between the actors in the consumer markets and it enables bringing court disputes for cases involving low amounts of personal damage both by individuals and by large scale consumers who have suffered damages. When small personal actions are aggregated, it becomes economically viable to bring a class action. In the following part of this chapter, the advantages and problems of the collective procedure will be discussed so as to decide whether collective redress is a desirable phenomenon at all and if so, on which terms it should be introduced.

A. *The Importance of Class Actions in the Field of Consumer Protection*

Consumer protection cases are generally "Negative Expected Value suits",¹ otherwise known as "NEV suits." This phrase is intended to describe actions where the expected award to the claimant in pursuing the action to judgment is lower than the expected litigation costs. The reason for this is that the majority of consumer protection cases amount to small sums of compensation and involve many consumers. As plaintiffs, consumers are weak when compared with businesses, therefore, consumers are reluctant to complain, and are unwilling to go to court for small amounts of damages. The need to improve the efficiency of enforcement is obvious in cases where normal legal actions are deemed to cost more than the expected profit for each claimant. The value of each action is based on the following calculation: the chances of success are multiplied by the expected award to the claimant. The expected costs should then be deducted from this result.

Some scholars, including Bebchuk and Klement,² have found that this calculation is even suitable for multiple claims involving higher sums, and not only for low-value multiple claims. The mathematical explanation for this finding is that there are legal cases where the expected personal award is high but the chances of success in pursuing an individual action are low.

Class actions are used to turn NEV suits into Positive Expected Value (PEV) suits by using economies of scale. The chances of success in a claim may remain similar regardless of whether the action is individual or collective. However, the costs of collective actions may be dramatically lower than an individual action, due to factors

¹ Lucian A. Bebchuk and Alon Klement, 'Negative-Expected-Value Suits' (2009) in Chris Sanchirico (ed), *Procedural Law and Economics* (2011); Harvard Law and Economics Discussion Paper No. 656. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534703> accessed 7 June 2011. See also Alba Conter & Herbert B. Newberg, *Newberg on Class Actions* (Section 2, §5:7, 4th ed., West Group, 2002). See also Warren F. Schwartz, Abraham L. Wickelgen: "Advantage Defendant: Why Sinking Litigation Costs Makes Negative Expected Value Defenses, but not Negative Expected Value Suits Credible" (2007) available at: <<http://www.law.virginia.edu/pdf/olin/0708/wickelgren.pdf>> accessed 2 March 2012. See also JC Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 U Chi L Rev 877, 904-906.

² Lucian A. Bebchuk and Alon Klement, *ibid.* See also: Amy Farmer and Paul Pecorino: "Pretrial Signaling with Negative Expected Value Suits" (July 2002) available at <<http://www.jstor.org/pss/20111976>> accessed 2 March 2012.

such as the use of a single expert to advise the class as a whole. The aggregation of claims may also improve the chances of success in such an action, since the economic advantages of such actions make it more viable for representatives to invest more money and labour in order to obtain better information and skills to succeed in the action.³ If the case is managed for large sums of money, it is worthwhile for the lawyer representing the class to invest many hours to secure its success and to secure expert opinions to assist in proving the class claims.

In certain areas of law, such as consumer protection, competition, environment, securities, and welfare, normal individual actions are regarded as NEV suits due to the low level of expected income per claimant. In the United States (U.S.), class actions are also used to vindicate civil rights infringed by unlawful actions.⁴ A collective procedure is needed where each individual action has a low value, and only aggregation will serve to reduce the cost of the action and improve the chances of success.

Private plaintiffs are driven only by private gain. Therefore, since the expected personal damages in consumer cases are generally lower than the expenses of their claims, it is perfectly rational from the private consumer's point of view not to bring any claim. This problem is known as 'rational apathy'.⁵

Consumer enforcement suffers from rational apathy as private consumers find it too costly to get involved in legal proceedings; individual victims might prefer to take a free ride on the efforts of those consumers who decide to act as plaintiffs, or to simply

³ Prof. Alon Klement, 'Class Action as a tool to neutralize the advantages of a single defendant against multiple plaintiffs – following the decision in *The State of Israel v. E.Sh.T*' (1994), 21 *Mechakrei Mishpat* <www1.idc.ac.il/klement/HebArt/EST.pdf> accessed 3 June 2011.

Steven Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' (1982) 11 *J. Leg. Stud.* 333.

⁴ Deborah R. Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gains* (Rand Corporation, Santa Monica, 2000) 10.

Arthur Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Rule Problem' (1979) 92 *Harv. L. Rev.* 664.

⁵ Roger Van den Bergh & Louis Visscher, "The Preventive Function of Collective Actions for Damages in Consumer law" available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101377> accessed 23 June 2012. See at page 1. Also see W. van Boom and M.B.M. Loos (eds.), 'Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention', Groningen: Europa Law Publishing, 2007, 231-254.

abandon their action. The combined effect of rational apathy and free-riding will produce a sub-optimal level of enforcement in consumer cases.⁶

The assumption that consumers' claims do not reach the courts is supported by a survey which analyses consumer behaviour in Canada.⁷ This survey shows that Canadian households generally prefer to handle their own minor problems without the assistance of any third parties. Seventy percent of households surveyed did not complain at all, and of the 30% which did complain, 28% had no success in their complaint. These figures lead to the conclusion that most of the complaints in question were not remedied at all.

Looking in greater depth at the issue of complaints, it is clear that the low number of complaints concerned minor grievances valued up to 37 Canadian dollars. Only a small number of consumer disputes (up to 5%) reach the judicial decision stage, while the rest are settled prior to legal action.

The survey shows that the vast majority of minor consumer disputes are not pursued and only on rare occasions will such transactions end in legal proceedings. It seems that most consumer disputes are dealt with either by negotiation or using internal complaints procedures. This demonstrates that the position of a consumer is weak where a dispute arises with a business for low sums, since the possibility of going to court in order to bring a justified action against the trader is unlikely.

Similarly, a more recent Eurobarometer survey⁸ stated that:

Most Europeans do not take a further action if they are dissatisfied with the way their complaint was handled - The majority of European respondents (51%) whose complaints were not dealt with in a satisfactory manner did not take any further action.

⁶ Roger Van den Bergh & Louis Visscher, *ibid.*, 7.

⁷ Neil Vidmar, 'Seeking Justice: An Empirical Map of Consumer Problems and Consumer Responses in Canada' (1988) 26 Osgoode Hall L.J. 757 <[http://eprints.law.duke.edu/520/1/26_Osgoode_Hall_L.J._757_\(1988\).pdf](http://eprints.law.duke.edu/520/1/26_Osgoode_Hall_L.J._757_(1988).pdf)> accessed 10 November 2011.

⁸ European Commission, *Special Eurobarometer 298: Consumer protection in the internal market* (European Commission, October 2008) page 54 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 23 September 2012.

This means that in cases involving low levels of damage, European consumers feel undefended. In order to increase confidence in cross-border trade of low-value goods, the European Community is looking to introduce a system of collective redress.

The European Community, in its Green Paper on Consumer Collective Redress of November 2008, mentioned that the main barriers to consumers enforcing their rights are the cost of litigation and the complexity of procedures. These barriers are, in particular, high litigation costs and complex and lengthy procedures. According to the survey, one in five European consumers will not go to court for a sum of less than 1000 euros (EUR). Half of those surveyed said that they would not go to court for a claim of less than EUR 200.⁹

According to the survey, many consumers view the lack of a proper legal procedure as the most important challenge to European cross-border trade, and when asked what problems they might encounter when shopping cross-border, consumers rated the difficulties of resolving problems with traders most highly, at 33%. Hence there is a lack of faith in current systems as far as complaint resolution is concerned, and there is low confidence in cross-border trade within the community due to the lack of available remedies when things go wrong.

In the U.K., a study by the OFT on consumer detriment shows that on average, only 62% of consumer's harmed make a complaint, and this percentage drops to 54% for purchases of less than ten English pounds (hereafter GBP).¹⁰ This means that consumers are apathetic, especially where low sums are concerned, and these cases will not go to court unless an incentive is introduced. Through economies of scale, collective actions ought to render such low-value cases economically viable.

If many consumers join their claims, the costs per claim decrease which may serve to overcome the problem of rational apathy. Collective actions may reduce the

⁹ Commission of the European Communities, 'Green Paper on Consumer Collective Redress', COM(2008)794 final, <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf> accessed 7 November 2011. See at page 4, section 9.

¹⁰ Office of Fair Trading: 'Consumer detriment assessing the frequency and impact of consumer problems with goods and services', April 2008 OFT 992 mentioned in footnote 15 of the Commission of the European Communities' Green Paper on Consumer Collective Redress COM(2008)794 final, Brussels, 27 November 2008.

individual claimant costs and thus improve the cost-benefit ratio and spread the risk of uncertainty over a large number of affected individuals.¹¹

Class actions may therefore contribute dramatically to improving access to justice in such NEV claims. Collective actions aggregate all small figure claims into one action saving expenses and making the case more profitable for lawyers who enjoy less expenses due to economies of scale. Thus, when adopting a new measure for a collective action, special attention should be paid to mechanisms which facilitate bringing low value cases which do not usually reach judicial resolution unless incorporated into a class action.

Professor Giussani of the University of Urbino in Italy uses a metaphor to explain the necessity of class actions.¹² She claims that a civil justice system which has no collective redress system is like a city with no public bus transportation system. In such a system, individuals who can afford to do so may use taxi services, while those who cannot afford a taxi remain without transportation. Similarly, class actions provide access to justice for large groups of consumers who have suffered damage and cannot afford to bring an individual action for such petty damage against a powerful defendant with disproportionately large financial resources and relatively high quality legal representation.

The bus analogy may be taken further to explain the different mechanisms possible within the context of class actions. The first is the opt-in system, whereby a bus which leads the class action will only allow on board those passengers who have raised their hands and actively asked to join the ride. The other system is the opt-out system, whereby the bus will allow all passengers on board, including those who are passive and did not ask to join the ride. However, in this case, each passenger has the right to leave the bus at any stop.

As the bus illustration indicates, collective actions may make access to justice easier, especially in consumer disputes where victims have suffered small amounts of damage. In such circumstances, it is unreasonable to expect a single consumer to

¹¹ Roger Van den Bergh & Louis Visscher, (n 5).

¹² Professor Andrea Giussani, 'Enter the Damage Class Action in European Law: Heading towards Justice on a Bus' (2009), 28(1) *Civil Justice Quarterly* 132.

expend time and money on pursuing a court case against a powerful trader. Therefore, consumer actions suffer from the rational apathy problem. However, by grouping actions together and decreasing individual costs, it is easier to encourage victims to seek vindication of their rights and provide compensation for those plaintiffs.¹³

B. The Advantages of a Collective Procedure

Collective redress has several advantages, albeit that there are also obvious dangers involved. A model which maximises the advantages of the procedure, while minimising its abuse through the imposition of safeguards, can be developed.

An example of such a model is Israel's Class Action Law 5766-2006.¹⁴ Section 1 of this law specifies the four major goals of this enactment as follows:¹⁵ To promote access to justice in general, with particular regard to segments of the population not expected to bring individual actions; to enforce the relevant law in the areas subject to such actions and to deter infringements of this law; to impose appropriate remedies to benefit injured parties; and to assist in the fair and effective management of claims.

The parts of this section that follow will explore the four goals mentioned above which demonstrate the advantages of collective proceedings.

1. The Role of Collective Actions in Improving Access to Justice

Collective actions play a crucial role in improving access to justice, and create opportunities to litigate matters which would not have otherwise been submitted to court. Normally such actions function to aggregate a cluster of smaller actions into a single legal action which is economically worthwhile pursuing.¹⁶

¹³ Tiana Leia Russell, 'Exporting class actions to the European Union' (2009), 28(141) Boston University International Law Journal 145. See also Roger Van den Bergh and Louis Visscher, (n6).

¹⁴ Published in Hebrew on Israel's Department of Trade and Industry website, <<http://www.tamas.gov.il/NR/exeres/C2B5FF40-FE01-4D04-A5DC-155A9511D9A5.htm>> accessed 12 May 2011.

¹⁵ The Ontario Law Reform Commission in Canada (1982) [Vol 1 Ch 2] in its report on class actions provided that the goals of class actions are improved access to justice, judicial economy, and behaviour modifications.

¹⁶ Steven Goldstein and Yael Efron, 'The Development of Class Actions in Israel' (1999) 27 Alei Mishpat 31.

By combining all possible claims against the same defendant, the action becomes economically justifiable and worthwhile both for the plaintiffs and lawyers provided that a share of the action income will be paid to these representatives or some form of remuneration is paid to them.¹⁷

Access to justice is also improved in collective proceedings by creating equality between the parties.¹⁸ Such proceedings are aimed at assisting the weak individual in challenging large companies. Defendant companies in such cases are often very powerful and may have unlimited resources to commit to defending their case against an individual plaintiff. By allowing the aggregation of small claims, collective proceedings serve to balance out the power differential between the parties.¹⁹

In general, therefore, collective redress is needed in cases where a large group of people has suffered minor damage, allowing representation of an injured party by another. Such aggrieved parties are not likely to bring individual proceedings for such a minor degree of damage. If representative proceedings were not allowed in these circumstances, no action would likely be brought against the company which caused the damage.

Various European scholars, among them Professor Andrea Giussani²⁰, as well as judicial officials, have appraised collective procedures as a means to improving access to justice.²¹ Lord Justice Woolf was appointed by England's Ministry of Justice to examine English civil procedure and to suggest ways to improve access to justice. In his final "Access to Justice" report published by the Ministry of Justice's Department

¹⁷ Owen M. Fiss, 'The Political Theory of the Class Action' (1996) 53 no. 1 *Washington & Lee L.Rev.* 21.

¹⁸ See Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business, Discussion paper, April 2007 OFT916'. <www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf> accessed 5 August 2011.

¹⁹ See Leave to Appeal Request No. 3126/00 (Supreme Court) *The State of Israel v. Eshet Project Management*, P"D Nun Zain (3) 220 (2003), Judge Beinisch at page 278.

²⁰ With regards to the bus example, see Professor Andrea Giussani, 'Enter the Damage Class Action in European Law: Heading towards Justice on a Bus' (n 12).

²¹ See also Prof. Rachael Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (2008) Research paper for the Civil Justice Council, 38 <http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf> accessed 10 November 2011. The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions' available at the Ministry of Justice site, July 2009. <<http://www.docstoc.com/docs/38408988/REPRESENTATIVE-ACTIONS-IN-CONSUMER-PROTECTION-LEGISLATION>>.

for Constitutional Affairs,²² he stated that group action procedures are required since they provide expeditious, effective and proportionate methods of resolving complex multi-party litigation. As these commentators noted, collective procedures are used in order to improve access to justice and to enable victims of an unlawful actions who suffered only minimal damages to group their actions and to bring them together to the court in order to obtain a remedy.

The Israeli and the U.S. examples show that access to justice is improved dramatically where class action mechanisms adopt certain features, such as bonuses and aggregation of many victims into one action using the opt-out mechanism. The use of class actions in these jurisdictions demonstrates that cases are brought to court and victims awarded redress in circumstances where individual damage was low and the claimant would not have otherwise sought redress through the courts. For example, in Israel more than 2400 applications for collective actions have been submitted since the introduction of CAL.²³

2. The Role of Collective Actions in Improving Law Enforcement and in the Deterrence of Violations

It is the public interest that a wrongdoer be punished for his improper behaviour. Collective redress has a deterrent effect and may prevent the improper behaviour by making the wrongdoer aware of the damage and the cost that he has inflicted on others.²⁴ Some commentators claim that the main purpose of class actions is to use private litigation not primarily for compensatory purposes, but rather as a procedural device to assure adherence to substantive legal norms.²⁵ This is in fact the role of the public dimension in society which, in collective redress procedures, is transferred to private hands which normally deal with obtaining remedies rather than furthering public policies.

²² See <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>> accessed 9 May 2011.

²³ See the Israeli Registry of Class Actions available in Hebrew at <http://elyon1.court.gov.il/heb/tovanot_y/list.htm> accessed 29 January 2011.

²⁴ Prof. Alon Klement, 'Class Action as a tool to neutralize the advantages of a single defendant against multiple plaintiffs – following the decision in *The State of Israel v. E.Sh.T*' (n 3).

²⁵ S. Goldstein, "Class Actions in Israel" (1990) 13 Int. Cong. Comp. Law 45, 65. See also Tezet v. Zilbershatz [26 May 2006] Supreme Court, Leave to Appeal Request No. 4556/94, P"D Mem Tet (5) page 774.

In terms of the legal enforcement of rights which are conferred on class members, there are public enforcement methods on the one hand, which may be costly to society, and private enforcement methods financed by private means on the other. Remedies for any breach of a legal right may also vary depending on the enforcer, from injunctions, damages and restoration in private actions, to criminal proceedings and fines in the field of public enforcement. Private enforcement is generally less costly to society in that it does not rely on public funds. It is regarded as more useful and efficient as private enforcers have a personal interest in the result of the action.²⁶ Private persons acting for their personal gain may further common interests shared by represented class members.

Broadly speaking, it is often argued that while public enforcement is concerned primarily with deterrence and punishment, private enforcement is concerned with obtaining compensation and justice for victims. The normative idea is that "if someone breaks your arm you call a policeman; if he breaks a window or a contract, you call a lawyer."²⁷ However, scholars²⁸ argue that this may not be the optimal solution. This idea reflects that public bodies are traditionally seen as the optimal law enforcers whereas private bodies are regarded as suitable to assist in recovering personal damages only. However, the dichotomy is not so sharp. Private remedies such as injunctions or compensation can replace fines and penalties, create deterrence and further goals which are important for the general public. On the other hand public enforcement is based on public funds which are normally very restricted. Furthermore traditional punishments such as imprisonment are very costly to society.

Injunctive collective redress exists to prevent or to stop an illegal action, and it is therefore relevant before or while the unlawful action is ongoing. Collective redress for damages is a remedy born after the mischief was made. Actions for damages in tort law cannot prevent the tort from occurring, since the remedy comes only after the

²⁶ See, for example, Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' 3 J. Legal Stud. 1 (1974) 13.

²⁷ David Friedman, 'Efficient Institutions for the Private Enforcement of Law' (Jun. 1984) 13(2) The Journal of Legal Studies 379-397 <http://www.daviddfriedman.com/Academic/Efficient_Inst_For_Priv_Enf/Private_Enforcement.htm> accessed 11 November 2011.

²⁸ See David Friedman, *ibid.*

event. However, tort actions work as a type of market mechanism, increasing the expected cost of an offence by imposing economic sanctions on the wrongdoer.²⁹

In that respect, tort actions and even actions for damages in general have a deterrent effect similar to that of criminal fines, where the fine, more than the moral connotation of a criminal sanction, acts as a deterrent. This means that actions for damages may attain exactly the same results as fines imposed by the state. In employing such a utilitarian approach, society is less concerned with the rights of the victim and more concerned with obeying the law.³⁰ Criminal proceedings may lead to fines or imprisonment. Fines may be considered preferable to imprisonment and other types of punishment because they are more efficient in the sense that they have a deterrent effect whilst at the same time saving public money. Punishing offenders with a fine also produces revenue for the state whereas imprisonment is costly to society.³¹ Actions for damages are in that sense designed to reach the optimal level of deterrence necessary for the benefit of society, and thus the use of damages is only meant as an incentive to reach society's goals.³² Therefore, it is said that the optimal sanction takes the form of damages from civil actions rather than fines imposed in criminal proceedings.

In her work, Sonja Elisabeth Keske³³ refers to philosophers writing as early as 1788 writing about the rational behind committing a crime e.g Bentham who wrote about the decision of a criminal in terms of “profit of the crime” and “pain of punishment”³⁴ and other classic writers, such as Beccaria and Montesquieu who applied such logic to

²⁹ Steven Shavell, *Economic Analysis of Accident Law* (2003), NBER Working Paper Series, Vol. w9694, 2003. Available at SSRN: <http://ssrn.com/abstract=379802>. Israel Gilad, 'On the Ambits of Effective Deterrence in Tort Law' (1993) 22 *Mishpatim* 421.

³⁰ Prof. Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (2003) 34(2) *Mishpatim* 301.

³¹ Gary S. Becker, 'The Economic Way of Looking at Life', (Nobel Lecture, 9 December, 1992), (1993) 101 *Journal of Political Economy* 385 available at <<http://home.uchicago.edu/~gbecker/Nobel/nobellecture.pdf>> accessed 7 June 2011.

³² Guy Halfteck, 'General Theory Regarding the Social Value of Class Actions as a Mean for Law Enforcement' <<http://portal.idc.ac.il/He/lawreview/volumes/volume03/Documents/Halfteck.pdf>> accessed 7 June 2011.

³³ Sonja Elisabeth Keske, '*Group Litigation in European Competition Law - A Law and Economics Perspective*' <[http://publishing.eur.nl/ir/repub/asset/17790/Sonja%20Keske%20Thesis\[Ir\].pdf](http://publishing.eur.nl/ir/repub/asset/17790/Sonja%20Keske%20Thesis[Ir].pdf)> accessed 13 May 2011. See pages 68, 70.

³⁴ Jeremy Bentham, *Principles of Penal Law. The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843), 399 ff.

individual behaviour.³⁵ Sonja Keske analyses this theory and argues in the context of private enforcement that an offender acts rationally and therefore the decision whether or not to commit an illegal act is based on rational grounds, weighing up costs and benefits. Keske's conclusion is that civil actions and criminal penalties may lead to similar results simply because the offender makes the calculation that acting illegally is not profitable no matter what the punishment, civil or criminal, as long as an appropriate punishment is imposed on unlawful behaviour and makes such behaviour unworthy.

The idea to be borne in mind when searching for the optimal punishment in cases of collective harm, is that the offender acts rationally in order to gain profit. This idea raises the question of what means are best used to deter offenders from engaging in unlawful actions. In other words, since we presume that an offender acts rationally, the measures to deter the offender from committing the offence may be calculated based on logical assumptions. The solution offered by collective redress is a financial penalty which will deter others from obstructing fair trade in the market.

The benefits to society resulting from prevented offences must be balanced against enforcement costs. Society should try to minimise the costs of enforcement activities.³⁶ When there is no cost for imposing a fine, and the detection of an infringement requires expenditure, society would fare best to increase the fine as much as possible, reduce detection efforts and thereby save money on costs, while retaining a constant level of deterrence.³⁷

³⁵ Cesare Beccaria, 'On Crimes and Punishments' in S. Grupp (ed) *Theories of Punishment*, (Bloomington, Indiana University Press, 1971), 117.

³⁶ Gary S. Becker, 'The Economic Way of Looking at Life' (n 31).

Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (n 26) 1.

William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *University of Chicago Law Review* 652.

Jonathan B. Baker, '*Private Information and the Deterrent Effect of Antitrust Damage Remedies*' (1988) vol. 4(2), Fall, *Journal of Law, Economics and Organization* 385.

Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183.

Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *The Journal of Political Economy* 169.

George J. Stigler, 'The Optimum Enforcement of Laws' (1970) 78 *The Journal of Political Economy* 526.

Gary S. Becker and William M. Landes, *Essays in the Economics of Crime and Punishment*, (New York, Columbia University Press, 1974).

³⁷ Sonja Elisabeth Keske, '*Group Litigation in European Competition Law - A Law and Economics Perspective*' (n 33).

There are classical areas of law where the resources spent on enforcement are much higher than the expectation of personal gain from such actions. Optimal enforcement is achieved where the total cost of activities which are harmful to society, including the cost of law enforcement, is minimised. This requires that any increases in resources spent on enforcement be offset by a reduction in costs resulting from violations. Where this is not the case, over-enforcement occurs, and resources are wasted. Under-enforcement occurs where the costs resulting from infringements exceed the cost that law enforcement measures would have incurred. Class actions are used in order to achieve the optimal rate of enforcement so as to convince potential offenders that acting unlawfully will not result in any gains. Optimal deterrence may be reached through claims brought by private individuals as well as by public enforcers who may be regarded as being more reliable albeit that their performance in achieving damages for consumers has not proven to be ideal. Therefore a combination of these two methods of enforcement should be considered.

3. The Combination of Private and Public Enforcers in Collective Actions

In order to reduce society's costs in enforcing civil rights, the role of the state was privatised and a new notion was introduced in the U.S. known as the private attorney general³⁸ which is a private citizen whose lawsuit, while perhaps benefitting himself, also works to the advantage of the public by eliminating discriminatory behaviour.³⁹ Class proceedings may save public funds especially where private lawyers are allowed to act as entrepreneurs in the legal action. In class proceedings there is in fact "privatization" of the law enforcement service, from public bodies and criminal proceedings to private individuals and civil remedies. Yet, such legal privatisation may give rise to issues of conflicts of interest and collusive settlements that merely provide class members with symbolic awards while attorneys gain large monetary fees.⁴⁰

³⁸ The definition of "Attorney General" in *Black's Law Dictionary* (6th edn, 1990) states as follows: "The 'private attorney general' concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorney's fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons."

³⁹ Michael Waterston, 'A New Vision of Public Enforcement' (2007-2008) 92 *Minn. L. Rev.* 434, 442.

⁴⁰ Prof. Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' <<http://www.faculty.idc.ac.il/klement/EngArt/TROL.pdf>> accessed 14 May 2011.

The goal of imposing the optimal sanction could be achieved by bundling claims together into one action. Such action may be brought by public bodies, organizations, or through privatisation by collective redress proceedings, where enforcement costs are lower than the cost of multiple cases due to the advantages of economies of scale. The merged actions become financially viable for court action and for subsequent enforcement.

The privatisation of class actions is achieved mainly through the introduction of incentives provided to both lawyers and class representatives, and such actions have the advantage of lowering litigation costs. The large sums of money involved and the wide publicity generated by the outcomes of such cases motivate private individuals to bring class actions which result in deterring potential violators.⁴¹ As far as collective redress for damages are concerned, the procedure itself may act as the financial incentive because successful actions create a pool of money from which the representatives may take their share.

With regard to making an injunctive collective redress mechanism workable, a system of funding should be introduced and financial resources should be allocated to finance the action. The distinction between injunction relief and claims for damages is that the latter creates a fund which may finance the procedure.

The Israeli system of collective redress is indeed based on the privatisation of enforcement, and allowing private individuals to bring collective redress cases in order to further public goals. However, the general view in Europe is to favour public enforcement or organisational claims for collective issues over private enforcement.

The question of who should act as a representative is crucial when shaping a new model for collective redress. On the one hand, there are calls to concentrate on public enforcement and to empower public enforcers with more financial sanctions in order to prevent the abuses that are associated with enforcement measures led by private lawyers.⁴² On the other hand, private enforcement measures which do not rely on

⁴¹ Sinai Deutsh, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model' 2004 27(2) *Journal of Consumer Policy* 179. See also T. Bourgoignie (ed), *Group Actions and Consumer Protection*, 179-209 (Brussels, Story Scientia, 1992).

⁴² Prof. Christopher Hodges, 'From class actions to collective redress: a revolution in approach to compensation' (2009) *Civil Justice Quarterly* 41.

public funds are less costly to society and may also reach the required deterrence levels.

The Israeli class action model has awarded some preferential treatment to the private enforcer over public enforcement, as the Israeli legislator - following the U.S. example - was aware that private individuals would take the lead in driving Israel's class action machinery due to the financial incentives which were introduced into the Israeli system. The legislation in Israel allows for organisational or public collective action only where it is proved that a private individual may have difficulties in bringing a class action.⁴³ In practice public bodies did not take the role of leading class actions in Israel and in fact all actions are now led by private individuals and private lawyers. Organisational class actions are also very limited in Israel. The emphasis in Israel on private enforcement improved access to justice dramatically though it also raised new questions, particularly on account of the massive volume of claims which followed the new legislation.

In Europe, the privatisation of consumer enforcement is far from being adopted. However, the emphasis in Europe is on the broad existing infrastructure of organisations operating for the general good of consumers. The existing infrastructure in Europe has failed to bring real benefits to consumers through collective redress thus far. Therefore, when looking at the Israeli model following three years of operation, it is evident that private enforcement in Israel has led to massive improvement in consumers' access to justice. This may point to the need for some changes in the view of most European member states. Although some member states allow for private actions, such as the U.K. representative actions or the Portuguese popular actions, almost no actions are brought to court due to a lack of incentives and proper finance. In this research, it is argued that European jurisdictions should adopt the Israeli system with some variations, the most important of which is to reconcile public and private enforcement by looking at the United Kingdom's competition model, which distinguishes "stand alone actions" from "follow on actions," in order to offer a workable European model.

⁴³ Class Action Law 5766-2006, s 4 (A) (3), (Israel).

Follow-on actions are actions submitted following a conviction or a finding by regulatory authority whereas stand-alone actions are actions submitted directly to the courts with no previous findings against the defendant. Where such a distinction is made between "stand alone actions" and "follow on actions," private individual actions may be submitted only subsequent to a criminal or disciplinary conviction by a public body or in a stand-alone proceeding by an organisation which is permitted to bring a collective action. Stand-alone actions by private individuals would be subject to very restrictive criteria and safeguards on one hand, but also should benefit from financial incentives on the other hand.

Private enforcement in Europe should not be completely disregarded, since it may also act as a tool to attain public goals, and not only to obtain damages for injured parties. In fact, private collective actions may promote public goals by inflicting financial sanctions on wrongdoers. The financial sanctions will deter wrongdoers from acting unlawfully and in addition the financial remedies in collective actions may be used as a tool to bring benefits to the injured parties or to the general public. Private damages action may follow a public action relying on the findings in the public process. Damages imposed in collective actions both following a public action and in a stand-alone action may take different forms in order to reach the goal of collective actions in improving law enforcement and in the deterrence of violations and to some extent as explained in the following part of this chapter to remedy the injured class members for their losses.

4. The Relationship Between Collective Actions and Remedies

Damages should be paid to the victim of a wrongful act not only in the interests of justice, but also to enable the parties to allocate their risks and insure against damages.⁴⁴ In class actions, damages are not always imposed in order to remedy losses suffered by group members. Sometimes they are imposed in this type of proceeding as a means of disgorgement. Disgorgement is a remedy used to deprive wrongdoers of their ill-gotten gains and to deter violations.⁴⁵

⁴⁴ Prof. Alon Klement, 'Class Action as a tool to neutralise the advantages of a single defendant against multiple plaintiffs – following the decision in *The State of Israel v. E.Sh.T*' (n 3).

⁴⁵ See, for example, The Securities Exchange Act 1934, s.78u-2(e) and 78u-3(e) from the U.S. See also Sasha Kalb and Marc Alain Bohn, 'An Examination of the SEC's Application of Disgorgement in

In its paper on private actions, the U.K.'s Office of Fair Trading (OFT) found that civil actions are complementary to public actions, and may increase the possible damages that the wrongdoer may be asked to pay.⁴⁶ For example, in certain circumstances the courts may award restitutionary damages, which aim to strip away some or all of the gains made by a defendant arising from a civil wrong. Exemplary damages might also be available in class action.

A. *Fluid Class Recovery under Israel's Class Action Regime*

Damages in collective proceedings may be calculated by aggregating all personal actions. This calculation may be useful in cases where the personal damage is minimal and it is doubtful that group members will step forward to claim their share of the damages because their individual share may be very small, or where it is difficult or impossible to ascertain the group of aggrieved persons.⁴⁷ In these cases, the collective procedure may allow the imposition of damages on the defendant for the public good. This type of damages is also known as fluid class recovery⁴⁸ which replaces the usual damages awarded to each plaintiff based on actual personal damage suffered.

The fluid class recovery mechanism in Israel is based on U.S. jurisdiction principles and it consists of three stages. In the first stage, a sum of damages is fixed for the whole group. In the second stage, the members of the group are invited to claim their share.⁴⁹ In the third stage, the court may order the distribution of any unclaimed funds.⁵⁰

FCPA Resolutions' < <http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/> accessed 10 June 2011.

⁴⁶ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business, Discussion paper, April 2007 OFT916' (n 10).

⁴⁷ Case No. 1372/95 (District Court of Tel Aviv) *The Heirs of Mr. Rabi v. Tnuva* (2008), Judge Binyaminy.

⁴⁸ Anna L. Durand, 'An Economic Analysis of Fluid Class Recovery Mechanisms' (1981-1984) vol. 34 *Stanford Law Review* 173;

Michael Malina, 'Fluid Class Recovery as a Consumer Remedy in Antitrust Cases' (1972) 47 *N.Y. L. Rev.* 477;

J.R. McCall, 'Greater Representation for California Consumers - Fluid Recovery, Consumer Trust Funds and Representative Actions' (1995) 46 *Hastings L.J.* 797.

⁴⁹ There are cases where the court finds that there is no room to call the members to step forward in order to claim their small share and it may then directly order for cy-pres distribution. See, for example, *In re Vitamin Cases*, 107 Cal. App. 4th 820, 831-832 (2003).

⁵⁰ *State of California v. Levi Strauss & Co.* 41 Cal. 3d 460, 472 (1986).

In Re: Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) 1176, 1190 (1982).

The imposition of fluid class recovery enables the court to reach three goals, namely, the payment of damages to injured class members, the disgorgement of ill-gotten gains, and deterrence of future violations.⁵¹

Fluid class recovery takes two main forms. The first is a payment to class members who claim their share, and payment of the remaining funds to a state body with orders to use such funds for a specific purpose or to pay them into a special fund. Secondly, fluid recovery may be used to reduce the prices of goods or services for a certain period.

These distributions are also known as cy-pres distributions.⁵² Cy-pres is a term meaning "as close as possible." In class actions it means that the court may order that the funds be used for grants to benefit the class members indirectly or as near as possible to this purpose in order to remedy or compensate for the harm to the class members.⁵³ The cy-pres approach to unclaimed funds (which it should be noted differs from an award) is already standard practice in class action settlements in the U.S.⁵⁴ and in Israel.

Such damages were introduced in the U.S. "Yellow Cab"⁵⁵ class action case in the State of California. In this case, a taxi company which operated in San Francisco charged its passengers excessive and unlawful tariffs. The court in this case decided that since it was unlikely that those who suffered losses would come forward to claim their low level of personal damages, it would impose damages on the taxi company by ordering them to lower their tariffs for a certain period. In this way, future passengers would enjoy lower tariffs and this sanction would act as a deterrent to violations by the taxi company.⁵⁶ Such a remedy is one of the possible outcomes of class actions

⁵¹ K. Barnett, 'Equitable Trusts: An Effective Remedy in Consumer Class Actions' (1987) 96 Yale L. J. 1591, at pp. 1594-1597.

⁵² 28 U.S.C. § 1712(e) CAFA authorizes federal courts to redirect funds unclaimed by class members to charity or to the government.

⁵³ See Alba Conter & Herbert B. Newberg, *Newberg on Class Actions* (Section 10:17, 4th ed., West Group, 2002).

⁵⁴ Michael P. Tremoglie, 'Class action cy pres awards give judges a slush fund, critic argues' (*Legal Newsline.Com*, 2 June 2011) <<http://www.legalnewsline.com/spotlight/232861-class-action-cy-pres-awards-gi>> accessed 15 November 2011.

⁵⁵ *Daar v. Yellow Cab Co.* 67 CAL. 2D 695, 433 P. 2D 732, 63 Cal RPTR 724 (1967).

⁵⁶ The discretion of the court to order damages for the general public was adopted in section 20(c) of Israel's Class Action Law 5766-2006.

but it is not the only possible solution. The regular case remains that the court awards damages to class members.

The Israeli legislator was concerned with the question how damages would be distributed to class members. There was a fear that once the action reached its end, an additional procedure would begin on the question of how to divide damages between class members.⁵⁷ Therefore, the new act gave courts the authority to order that damages be based on an individual basis as either a stipulated sum⁵⁸ or a sum subject to examination before apportionment,⁵⁹ or on a cumulative basis to the class as a whole.⁶⁰

In cases where the court invites each member to prove his own damage, the court may provide criteria as to the division of the uncollected damages, and may appoint a supervisor to be in charge of and supervise the distribution of the fund to class members.⁶¹ In addition, the court or the supervisor may order the payment of costs for the distribution process.⁶² Each decision by a supervisor may be appealed to the court.⁶³ If the court finds that the distribution of damages to class members is not practical in the circumstances of the case, it may order the payment of damages in favour of the class in general or in favour of the general public.⁶⁴

Normally, the uncollected damages are awarded to public bodies acting for the general good in the field most relevant to the field of the class action. This provision was strongly influenced by the aforementioned decision in the "Yellow Cab"⁶⁵ case.

The possibility of awarding damages in favour of the general public is very relevant to collective proceedings as normally such cases concern very small damages to each class member and it is impractical to order a minimal loss for each and every class member. Furthermore class members may have difficulty proving damage since they may not have kept a receipt or the actual goods until the time of the action.

⁵⁷ See Knesset Protocol 14 dated 6 January 2006.

⁵⁸ Class Action Law 5766-2006, s 20A(1), (Israel).

⁵⁹ Class Action Law 5766-2006, s 20A(2), (Israel).

⁶⁰ Class Action Law 5766-2006, s 20A(3), (Israel).

⁶¹ Class Action Law 5766-2006, s 20B(1), (Israel).

⁶² Class Action Law 5766-2006, s 20B(2), (Israel).

⁶³ See Class Action Law 5766-2006, s 20B(1), (Israel).

⁶⁴ Class Action Law 5766-2006, s 20C, (Israel).

⁶⁵ Daar v. Yellow Cab Co. 67 CAL. 2D 695, 433 P. 2D 732, 63 Cal RPTR 724 (1967).

The operation of damages for the general public is well illustrated in the Israeli, District Court decision in the "Tnuva case".⁶⁶ In this case, the Israeli court dealt with a class action by a plaintiff who claimed that the largest milk producer in Israel, Tnuva, mixed silicone into one of its long life ultra-high temperature (UHT) milk products in the years 1994 and 1995. It was found that during this period, the relevant dairy produced a total of 13 million litres of 1% fat UHT milk into which it mixed an additive known as demethylpolysiloxane, commonly known as silicone.

Silicone is presumed to prevent milk from foaming. However, Israeli standards forbid the use of silicone as a food additive. At first Tnuva denied the use of silicone in its UHT milk and published a denial in the newspapers which later turned out to be false. When the truth was revealed, all UHT milk products were taken off the shelves and Tnuva, together with some of its directors (the Director General and some directors of the specific dairy in question) were charged with various criminal offences of which they were all convicted⁶⁷.

The convictions were followed by an interesting petition to allow a class action on behalf of all those who used this Tnuva UHT milk product.

Throughout the proceedings, Tnuva argued that silicone is not a harmful additive, and that it certainly did not cause any damage to the plaintiff. Until this point, there was a clear cause of action against Tnuva for consumer deception and misrepresentation relating to its UHT milk. However, the Israeli Courts (both the District and Supreme Courts) were unanimous in rejecting the action for restitution, mainly because the plaintiff and all class members had already consumed the milk, thus rendering restitution impossible. Nonetheless, the motion to allow a class action was decided in the Tel Aviv District Court in June 1996, and affirmed in the Supreme Court of Israel in May 2003 (by a split majority of two judges in favour of allowing a class action - Judges Levin and Naor - and one judge - Judge Prokachia - against).⁶⁸

⁶⁶ Civil case No. 1372/95 (Tel Aviv District Court) *The Heirs of Mr. Rabi v. Tnuva*, (2008), Judge Binyaminy.

⁶⁷ Criminal Case No 3031/95 (District Court of Rehovot) *The State of Israel v. Tnuva and others* (District Court of Rehovot) Judge Hartal Judgment dated 4 March 1996.

⁶⁸ Appeal No. 1338/ 97 (Supreme Court) *Tnuva v. Rabi Padi N.Z* (4) 673, (2003).

The problem with allowing compensation in this case was that the plaintiff had failed to prove that he or any of the class members had suffered any physical loss and thus there seemed to be no action for physical or even financial damages. Thus the plaintiff argued that he had suffered from the intangible damage of hurt, distress and a loss of enjoyment upon hearing that Tnuva's UHT milk contained silicone.

Tnuva's bad behaviour certainly made an impression on the Supreme Court,⁶⁹ which was prepared to go very far in order to assist the plaintiff by making an unprecedented decision. The court faced two main difficulties with this case. The first difficulty was the question of whether it could recognise class proceedings where it was argued that the class of victims suffered only intangible damage. This type of damage is normally experienced by consumers in different ways, and thus feelings vary among group members. The second difficulty was that of assessing the damage.

As for the first difficulty, the Supreme Court had already taken the view when affirming the motion to allow class proceedings that the plaintiff's claim for intangible damages for hurt, distress and the loss of enjoyment may give rise to class action proceedings. The deception regarding the content of the UHT milk resulted in an invasion of the individual consumer's autonomy and caused intangible damage to all class members who consumed Tnuva's UHT milk in the relevant period.

Invasion of the individual's autonomy is a principle which is new to Israeli law, and was introduced initially in relation to medical negligence which inflicts no damage on the patient other than the lack of a proper explanation prior to surgery.⁷⁰ The District Court decided to accept as evidence a survey presented by the plaintiff showing that a majority of the class members (consumers who used this type of UHT milk) were disturbed by the invasion of their autonomy and a majority of those suffered further negative emotions when they found out that Tnuva's UHT milk contained silicone.

With regard to the class size, the District Court decided to use the expert opinion of a professor specialising in economics and marketing, inter alia. The expert estimated the number of people who used this type of UHT milk according to consumption and

⁶⁹ Ibid.

⁷⁰ Appeal No. 2781/93 (Supreme Court) Daka v. Carmel Hospital Padi N.G (4) 526, (1999).

production data. This opinion led the court to decide that the number of group members who purchased UHT milk at the relevant time stood at 220,000 people, half of them suffering from negative emotions.

Having determined the size of the class, the court went on to deal with the amount of damages in question. The court was aware that all or some of the class members were unable to prove their personal damage since most people would not retain receipts for milk purchases. Thus the court favoured a system of damages for the general public good. Israeli law does not recognise the notion of punitive damages, thus the court was troubled by the question of how to assess the damages. The court stressed that class actions in principle should serve limited goals, namely, compensation, deterrence and disgorgement of ill-gotten gains.

The question of what sort of damages would be suitable in such collective proceedings puzzled the Israeli court. In the end the court assessed damages for the whole class based on the American principle of fluid class recovery. According to this principle, the court sets an amount to be paid to class members and the residue (cy-pres) is distributed for a public goal. In this case, the court ruled that an unprecedented amount of damages (55 million New Israeli Shekels - approximately GBP 9 million) be granted in favour of the class, to be paid in three ways:

1. Reduction of milk prices;
2. Payment to a research fund; and
3. Distribution of milk free of charge to the poor.

In December 2011, the Israeli Supreme Court reduced the damages to the sum of NIS 38,500,000 providing that the class should include only 154,000 members who used the affected milk.⁷¹ Such a result, involving the distribution of funds to the general public, is very appropriate in class proceedings since the personal damage is very small and is very difficult to prove entitlement to damages.

⁷¹ Appeal No. 10085/08 (Supreme Court) *Tnuva v. Rabi* (2011) (as yet unpublished).

B. Price Reduction and Cy-pres Distributions in Europe

Another type of award in a collective action would involve a reduction in the price of the goods subject to the action. The reduction is not necessarily awarded to the class members, but to a larger group or to the general public as seen in the above-mentioned Yellow Cab case and the above-mentioned Tnuva case.

A further illustration of the operation of damages by way of a price reduction is the U.K. case of *The Consumer's Association v. JJB Sports PLC*⁷² which led to a fairly similar result reached under section 47 of the English Competition Act 1998 (introduced by the Enterprise Act 2002, and in force as of 20 June 2003). In this case, the OFT found the manufacturers and distributors of football shirts guilty of price fixing, and they were fined the substantial sum of GBP 18.6 million. It was thought that hundreds of thousands of consumers had bought these shirts. However, the action brought by the Consumer Association was only joined by 144 consumers.⁷³ The outcome of the case was nonetheless very impressive and the whole group of aggrieved customers was compensated:

"Fans who bought one of the shirts for up to £39.99 and joined the Which? case against JJB will each receive £20.

Fans who still have one of the affected shirts but did not join the action can walk into any JJB store before February 5 2009 and fill out a form to claim £10 back, provided the customer can produce proof of purchase or a shirt with its label intact.

Even if the label is missing, customers can claim £5 back per shirt. "⁷⁴

Cy-pres distributions is also known in other European countries. Article 22 of the Portuguese Law 83/95, for example, provides that in cases where some funds remain

⁷² Case number 1078/7/9/07. A notice of the action is published at <<http://www.catribunal.org.uk/>> accessed 15 November 2011.

⁷³ See Caroline Binham, 'Which? Action to settle' *The Lawyer* (London, 10 December 2007) and Prof. Rachael Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (n 7) 38 <http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf> accessed 10 November 2011.

⁷⁴ Angela Monaghan, 'JJB agrees to payout over football shirts' *The Telegraph* (London, 8 January 2008) <<http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2008/01/09/bcnjib109.xml>> accessed 10 November 2011.

undistributed after three years, they are to be handed to the Ministry of Justice to be directed to cover attorney fees in successful actions,⁷⁵ to support access to justice.⁷⁶

The advantage of a cy-pres distribution in a collective action is that it deprives the offender of illegal gains, as the payment of damages is not dependent on the actual demand made by group members. Thus, cy-pres distributions assist in promoting adherence by businesses to appropriate legal norms.

The above examples from the U.K. and Portugal clearly demonstrate that cy-pres distributions are not foreign to European jurisdictions and therefore may fit into any new model for European class actions. Therefore the advantages of the diverse types of damages that can be imposed in collective proceedings eliminate fears that once the action is finalised, group members will not step forward to collect their personal share. When the damages are aggregated, the action enjoys economies of scale and personal actions exhibiting a negative value transform into actions which are worthwhile pursuing.

5. Collective Actions as the Promoter of Fair and Effective Claim Management

When the Israeli legislator referred to the fair and effective management of claims as one of the goals of introducing a class action system, the idea was to tackle the problem of multiple actions. Such a phenomenon occurs where many actions on the same issue are submitted to the court. Multiple actions are problematic as they may lead to contradicting judicial decisions, may be very costly, and may burden the legal system.⁷⁷

Collective redress may facilitate claims by large groups of people who have suffered substantial damage and whose claims raise similar questions of fact or law. However, collective redress systems are not only there in order to cater to large groups of plaintiffs that each suffer small amounts of damage. They should also serve groups of plaintiffs who suffer large amounts of damage. In this case, it is undesirable for many

⁷⁵ Article 21 of Law 83/95 (Portugal).

⁷⁶ Article 22(5) of Law 83/95 (Portugal).

⁷⁷ Prof. Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (n 30) 382.

injured parties to bring similar court proceedings since these will burden the courts and may lead to contradicting judgments, a consequence which is undesirable in any legal system.⁷⁸

Furthermore, in cases of substantial damage, there is also a risk that the initial claims will exhaust the defendant's funds, leaving them with nothing with which to compensate parties to subsequent legal actions. Representative proceedings in these circumstances are primarily aimed at enabling the judicial system to cope efficiently with the large scale of actions brought to the courts.

The management aspect of handling multiple claims exists in different European jurisdictions. In England for example, such multiple actions are known as group actions.⁷⁹ The English GLO (Group Litigation Order) merely serves as a case management umbrella under which a conglomeration of individual actions is managed.⁸⁰ One advantage of such a managerial procedure is that it saves public funds, since massive disputes may be decided in a single court action rather than the courts contending with many different cases.⁸¹ A second advantage of collective redress in mass litigation, is that it may prevent a multiplicity of claims hearing as well as conflicting judgments even in cases concerning large sums which by their nature do not have negative expected value and thus the economies of scale issue is not relevant to these actions. Yet, bundling all claims into one procedure is advantageous and adds certainty even for defendants and may assist them in deciding whether to settle a case or not.

As seen above, there are many advantages to collective procedures, yet the question remains as to why the European Union has not yet adopted a class action mechanism for collective actions. In fact, thus far, only sixteen member states have adopted or intend to adopt such proceedings, albeit proceedings which differ from one member state to the next with no single coherent collective redress mechanism operating

⁷⁸ Prof. Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (n 30) 343.

⁷⁹ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures – European Debates' (2009) 58 *International and Comparative Law Quarterly* 379.

⁸⁰ Prof. Rachael Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (n 21).

⁸¹ See Leave to Appeal Request No. 8268/96 (Supreme Court) *Reichart v. Shemesh P"D Nun Hei* (5) 309 (2001). See also Leave to Appeal Request No. 4556/94 (Supreme Court) *Tezet v. Zilbershatz, P"D Mem Tet* (5) page 784 (2006).

Europe-wide.⁸² The answer to this question lies, in this author's opinion, in the problems and fears that are an integral part of the procedure.

The "privatization" of the law enforcement service, transferring power from public bodies and criminal proceedings to private individuals and civil remedies, creates many challenges for the private sector, especially for lawyers who in some jurisdictions are the real driving force behind the procedure. Legal privatisation may give rise to issues of conflicts of interest and collusive settlements that merely provide class members with symbolic awards while attorneys gain large monetary fees.⁸³

C. The Problematic Aspects of Collective Proceedings

The collective procedure itself has been highly criticised⁸⁴ even in the U.S. where it is most frequently used. The U.S. model is viewed with apprehension in many jurisdictions in Europe.⁸⁵

The most criticised feature of the U.S. class action is the provision which allows one private representative to represent all other group members even where such representative has not been granted a power of attorney. This is known as the opt-out mechanism. The danger here is that group members will be bound by a single judgment even though they were not aware of the procedure that was filed in their favour. Claims may be submitted for ulterior motives such as extortion, competition, or hostile takeovers, and still bind the whole class of injured people. In a worst case scenario, a collective action could be brought by way of a conspiracy between the plaintiff and the defendants in order to bar other potential plaintiffs from bringing the action.

⁸² The European Commission, Study on the evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union (26 August 2008) at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 29 January 2011.

⁸³ Prof. Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (n 40).

⁸⁴ Richard A. Epstein, 'Class Actions: The Need for a Hard Second Look' (2002) No. 4 Civil Justice Report, Manhattan Institute for Policy Research, Center for Legal Policy <http://www.manhattan-institute.org/html/cjr_4.htm> accessed 7 June 2011>.

⁸⁵ See Commissioner Kuneva, 'Collective Redress: Moving the Debate Forward' (Speech at ALDE Seminar, 4 March 2009, 3pm-6.30pm) <http://www.dailymotion.com/video/x99ya8_alev-collective-redress_news> accessed 10 June 2011.

In the U.S., it was noted that frivolous class actions might be brought due to the possibility of obtaining treble damages, the use of contingency fees for lawyers, and the absence of the loser pays principle which requires the losing party to pay the defendant costs and legal fees.⁸⁶

Unmeritorious claims may force defendants to compromise and settle the case solely to save the huge costs that may be incurred in running a defence in such an action. Such claims may cause severe damage to the economy of certain states. In his speech to the U.S. Congress of 18 February 2005, former U.S. President Bush cited the effect of unmeritorious claims on the U.S. economy as one of the reasons for introducing the new Class Action Fairness Act:

Overall, junk lawsuits have driven the total cost of America's tort system to more than \$240 billion a year, greater than any other major industrialized nation. It creates a needless disadvantage for America's workers and businesses in a global economy, imposes unfair costs on job creators, and raises prices to consumers⁸⁷.

This situation is understood well in Israel where the market is currently swamped with hundreds of actions each year following the 2006 Class Actions Act, each action involving huge sums due to the aggregation of large classes of people and the high amounts of money claimed by each individual. The position is worsened by the fact that no court fee is required for filing an action. In addition, where the application fails the certification stage, the court expenses imposed on the plaintiffs are usually low.

Some class actions have an adverse effect on consumer benefits. In consumer class actions in the insurance market for instance, such actions may give rise to higher

⁸⁶ Fabio Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union' (University of Chicago Law School, 28 August 2006), page 34 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927001> accessed 5 August 2011. See also Gottfred P. Olsen, 'Enhancing Private Antitrust Litigation in the EU', 20-Fall Antitrust 73.

⁸⁷ George Bush, (Remarks by the President at Signing Class-Action Fairness Act of 2005, February 18, 2005) available at <<http://rncnyc2004.blogspot.com/2005/02/president-signing-class-action.html>> accessed 26 May 2011.

insurance policy prices for companies, directors, accountants and other potential plaintiffs.⁸⁸

The other major problem with collective proceedings led by private individuals involves the representatives who lead the class.⁸⁹ Such agency problems may arise either with the representative plaintiff or with the attorney representing the class. It should be borne in mind that in practice both in Israel and in the U.S., most private class actions are motivated by lawyers due to the financial incentives associated with successful actions of this type.⁹⁰ In examining the issue of representation, most collective redress proceedings involve conflicts of interest between the class members and their lawyers or between the class members and the class representatives.⁹¹ The class representative or the class lawyer bears the costs of litigation, including payments for expert evidence, court expenses, hours worked and expenses such as photocopying. These representatives only expect to obtain a share of the outcome of a successful action at the end of the day. Therefore, the class representatives will seek a compromise even if it does not reflect the highest expected outcome of the action.⁹²

The class representatives who act for their own profit may prefer to reach a compromise even if such a compromise is not the best possible result for the class. Thus a control mechanism over settlements reached by the representatives should be part of any system of collective redress. The Israeli model contains a very detailed procedure for dealing with the problem of unfair compromises. The procedure is aimed to check every suggested compromise and its benefit for the class members. Furthermore the compromise approval procedure is transparent published to the

⁸⁸ An Ingo Vogelsang, Nishal Ramphal, Stephen J. Carrol, Nicholas M. Pace, 'Economic analysis of consumer class actions in regulated industries', (2007) 32 *Journal of Regulatory Economics* <<http://ideas.repec.org/a/kap/regeco/v32y2007i1p87-104.html>> accessed 20 April 2012.

⁸⁹ Eric A. Posner 'Agency Models in Law and Economics' (2000) University of Chicago Law School, John M. Olin Law and Economics Working Paper No. 92. <<http://www.law.uchicago.edu/node/1294>> accessed 4 June 2011.

Jean-Jacques Laffont and David Martimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton University Press, 2001). M.D. Whinston, J.R. Green, A.Mas-Colell, *Microeconomic Theory* (OUP, 1995).

⁹⁰ Prof. Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (n 40).

⁹¹ Geoffrey P. Miller, 'Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard' (2003) NYU, Center for Law and Business Research Paper No. 03-16 <<http://papers.ssrn.com/abstract=446942>> accessed 26 May 2011.

⁹² Prof. Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (n 30).

general public including some safeguards to prevent concealed profits for the representative lawyer or to the class lawyer.

D. The Need for Proper Safeguards in Building a European Collective Action Model

As illustrated above, class actions may be problematic and they carry with them the risk of abuse. Therefore, such proceedings require the imposition of safeguards. These safeguards should act to bar unmeritorious actions at the early stages of the action. If the safeguard mechanism does not filter out abuses from the outset, then the defendant may be willing to settle an unmeritorious claim just in order to avoid expensive legal proceedings.

Israel's regime provides a range of safeguards. Fears that the mechanism may be abused led the Israeli legislator to introduce a series of safeguards in order to make the procedure more credible. Under the Israeli regime, courts must examine whether the representatives can properly represent the interests of the class, and some preconditions must be met and examined in the preliminary stages of the case in a certification procedure. The preconditions for allowing class actions involve examining the prima facie merits of the case, the conduct of the representative including whether he or she is acting in good faith, and the suitability of the action for collective proceedings. In addition, every important step in the action is subject to the court's examination. Attorney and plaintiff representative fee agreements are subject to court inspection and termination of the action - whether by voluntary dismissal or by way of a compromise - is subject to court approval.⁹³

The following additional safeguards which are employed in the Israeli regime in order to prevent abuses of the collective procedure are also worth considering for integration at European level:

⁹³ See also section 64 on page 16 of the Civil Justice Council's reply to the European Commission's public consultation 'Towards a Coherent European Approach to Collective Redress' <http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html> accessed 27 May 2011.

1. A certification process is imposed to filter out unmeritorious claims. As part of this process, the judge will have to examine the prerequisites for an action.⁹⁴ These include whether the action is sound on its merits, whether it appears that the action was filed in good faith, and whether there are sufficient common questions of law or fact.
2. The requirement that notice be given to members containing information relating to all the crucial stages of the action,⁹⁵ as well as an online registry containing information on all the crucial stages of the trial⁹⁶ may also operate as a barrier to unmeritorious claims. Management of the case is open to public scrutiny, and no hidden arrangements between the representatives and the defendants are permitted without granting class members or the Attorney General the opportunity to express their views.
3. Compromises,⁹⁷ and voluntary dismissal of the action,⁹⁸ are regarded as carrying the risk of abuse. Representatives may act in bad faith or for their own benefit at the expense of class members. The law therefore imposes strict supervision on compromises and voluntary dismissals which include using expert evidence⁹⁹ in order to examine the economic benefits of the suggested settlement to the class members. Judges should not allow arrangements between the parties unless they benefit the class members who are not normally present at trial. In addition, the parties and the lawyers on both sides are required to confirm by sworn affidavit that there are no additional agreements which remain undisclosed to the public.
4. Where the judge finds that a representative is not acting in the interests of the class members, but the nevertheless claim seems to be meritorious, he may replace the representative.¹⁰⁰

⁹⁴ Class Action Law 5766-2006, s 8 (Israel).

⁹⁵ Class Action Law 5766-2006, s 28, (Israel).

⁹⁶ Class Action Law 5766-2006, s 25, (Israel).

⁹⁷ Class Action Law 5766-2006, s 18 and s 19, (Israel).

⁹⁸ Class Action Law 5766-2006, s 16, (Israel).

⁹⁹ Class Action Law 5766-2006, s 19(b), (Israel).

¹⁰⁰ Class Action Law 5766-2006, s 8(c)(2), (Israel).

5. Where the court finds that conflicts of interest exist between class members, due process allows the judge to divide members into subclasses.¹⁰¹
6. In order to prevent the misallocation of funds, the judge has the power to appoint trustees in order to supervise the collection of damages.¹⁰²
7. The principle of the "loser pays," which refers to a mechanism whereby the loser pays the expenses of the winning party, applies to class actions other than in special circumstances where the action, though dismissed, has brought some benefit to the members or to the general public.¹⁰³
8. The requirement to introduce an online registry which was recently adopted in Israel is quite innovative. A registry of Group Litigation Orders (GLO) exists in the U.K. and Norway also has such a registry. In Canada a voluntary database system is operated by the Canadian Bar Association.¹⁰⁴ This innovative idea will be examined in due course as one of the positive aspects of the Israeli model. The registry also includes information (mainly decisions or settlements) on new decisions for cases submitted before March 2007.

However, these safeguards do not appear to be sufficiently robust to prevent the huge numbers of claims which are now flooding the Israeli market. It is therefore necessary to examine the consequences of using these safeguards in Israel in order to fine-tune the model before transposing it to Europe. The main change required in the Israeli system is the introduction of a mechanism to filter the flood of claims which is currently inundating the Israeli court system following the introduction of Israel's new class action law in 2006. The aim of the improved safeguard mechanism is to filter out unmeritorious actions right from the outset and create a barrier even before such actions reach court. The filtering may be achieved by prioritising out of court dispute settlements and introducing a compulsory procedure for submitting a claim to a public body even before allowing the dispute to be submitted to court.

¹⁰¹ Class Action Law 5766-2006, s 10(c), (Israel).

¹⁰² Class Action Law 5766-2006, s 20, (Israel).

¹⁰³ Class Action Law 5766-2006, s 22(c), (Israel).

¹⁰⁴ For the Canadian Bar's database, see <<http://www.cba.org/classactions/main/gate/index/about.aspx>> accessed on 26 May 2011.

E. Introducing a Collective Action Model for European Consumers

1. The Position of European Consumers vis à vis Enforcing their Rights

The basic problem in regard to consumer transactions in Europe is that enforcement measures are not efficient. The European market is huge, yet consumers remain weak when dealing with businesses which have the finances and power to exert their will over transactions with consumers.¹⁰⁵

The efficiency of consumer protection measures do not depend only on the creation of rights, but also upon the availability of efficient and appropriate means to assert them.¹⁰⁶ The core reason for the lack of legal enforcement of consumers' rights is that the amounts of money involved are generally too small to be worth litigating. The area of anti-trust represents only one section of the largest consumer law cases which are almost always characterized by being NEV cases. In the context of antitrust actions, the ECJ has ruled that citizens of the European Union have the right to damages even where such a right is not expressly provided for in the treaty itself.¹⁰⁷ On the other hand, reports have shown that the number of anti-trust private enforcement court cases in the E.U. constitute only 10% of all E.U. competition law enforcement cases.¹⁰⁸

¹⁰⁵ Hans W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of the Social Elements in Civil Law. A Bittersweet Polemic' European University Institute, The Department of Law, EUI working papers law 2012/03 available at: <<http://cadmus.eui.eu/handle/1814/3/browse?type=dateissued>> accessed 23 September 2012. See at page 2.

¹⁰⁶ Nicole L'Heureux, "Effective consumer access to justice: Class actions" (1992) 15(4) *Journal of Consumer Policy* 445-462, DOI: 10.1007/BF01014122.

¹⁰⁷ See the *Courage* case: C-453/99 *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage and others* [2001] ECR I-6297 s 24. and joined cases C-295/04-C-298/04 *Manfredi v. Lloyd Adriatico Assicurazione Spa* [2006] ECR I-6619 s 61.

¹⁰⁸ Luiss Guido Carli Centre for European Policy Studies, Erasmus University Rotterdam, *Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios'* (Brussels, Rome and Rotterdam, 21 December 2007) <ec.europa.eu/competition/antitrust/actionsdamages/files/impact_study.pdf> accessed 5 August 2011.

See also Charlotte Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. The Opt-Out Model' (IE Law School Working Paper 10-03, 26 April 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612731> accessed 5 August 2011.

Thus, even though such rights exist in the E.U., and despite the fact that such measures have direct effect in national courts,¹⁰⁹ the question arises as to why private enforcement is not influential at all in the anti-trust area. The answer to that question lies in the weak foundations of the enforcement mechanism in Europe. On the contrary in Israel's case, once a class action mechanism was introduced into consumer protection legislation, court cases on consumer issues began to emerge in the Israeli courts. Prior to this legislation, there were no such cases due to the dangers of running a court case for small sums and with no incentives.¹¹⁰ If a collective action system is introduced in Europe, it is very likely that the enforcement of consumers rights will improve dramatically as was the case in Israel following the introduction of the new class action law in 2006.

2. The Potential Role of a Collective Procedure in Assisting European Consumers to Enforce their Rights

The collective procedure has many advantages and may assist European citizens in enforcing legal rights and norms conferred by member state and European legislation especially in NEV cases where an individual consumer is not expected to enter complicated legal proceedings in order to gain a very small amount of damages.¹¹¹ Collective redress is one of the forms of settling disputes between traders in the internal market and it completes other out of court mechanisms such as complaint settlements, ADR and mediation which already operate in Europe.¹¹² The aims of collective proceedings fully match the needs of the Single European Market, since law enforcement, improving access to justice, imposing fair procedures in court proceedings, and providing remedies for injured parties are all required to ensure the effectiveness of this market. It is in the interests of the European Community that consumers are empowered with proper tools to resolve their claims so as to boost confidence in trade between member states.

¹⁰⁹ Case 127/73 *BRT v. Sabam* [1974] ECR 51.16.

¹¹⁰ Sinai Deutch, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model' [2004] 27(2) *Journal of Consumer Policy* 179.

¹¹¹ C.G. Lang, 'Class Actions and US Antitrust Law: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims' (2001) 24(2) *World Competition* 285-302.

¹¹² 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. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT>>.

3. *The Search for a European Collective Proceedings Model*

The search for a proper European mechanism to bring effective consumer collective actions, incorporating sufficient safeguards to eliminate possible abuse of collective proceedings, is now underway.

One may ask whether the imposition of collective redress should be governed by broad principles which leave the implementation to individual member states. Such an approach may encourage the introduction of a new model and render it more acceptable for adoption by member states. On the other hand, a detailed piece of legislation benefits from certainty and coherence.

At the moment there is great confusion on the matter of collective redress in Europe, where even the terminology used differs from one member state to the next. Member states have different litigation cultures and the introduction of certain aspects of collective actions, such as an opt-out mechanism, runs against principles enshrined in the legal norms of many member states.

The term collective redress as used by the European Commission may include all kinds of models, from opt-in models to opt-out models. However, several member states use collective redress proceedings merely as a form of gathering claims (such as the Group Litigation Order in England), while other member states have introduced representative actions either where the representative sues in its own capacity, as in France, or where the representative sues on behalf of its members,¹¹³ as is the case in French joint actions. There are also test case models and models for the skimming of profits, such as those used in Germany.¹¹⁴

In addition to differing approaches by member states as a result of varying European collective action models, there are also differences in the foundational features of the procedure. Some member states such as Portugal use the opt-out mechanism whereas

¹¹³ Actions for collective interests of consumers under *la loi d'orientation du commerce et de l'artisanat du 27 décembre 1973* (the Royer Act 1973).

Action en représentation conjointe des consommateurs (French joint actions).

¹¹⁴ Gerhard Wagner, *Collective Redress – Categories of Loss and Legislative Options* available at: <<http://ssrn.com/abstract=1960904>> accessed 21 September 2012.

others such as France object strongly to the opt-out machinery. Furthermore, it seems that even broad principles may contradict traditional jurisdictional norms in several member states, such as the French principle of *nul ne plaide par procureur* (no-one shall plead by proxy), or the prohibition which exists in numerous member states against contingency fees or payments to lawyers by non-clients.¹¹⁵

It should be borne in mind that the majority of the sixteen member states which have already introduced a model of their own have each developed differing systems. If these member states try to adapt their own mechanisms to the broad principles that the Community drafts, there will be no unified coherent procedure and consumers may feel more confident purchasing goods in some member states rather than others. Some of these state models may be more workable than others and cross-border trade within the community will not be as legally redressable as it should be.

In order to provide coherence, the European Community should provide for a binding procedure that includes a unified registry, opt-out mechanism and incentives for lawyers and representatives. Such a binding procedure should take the form of a clear and effective regulation on collective redress adopted by all member states. A directive which leaves room for implementation by member states will not be binding until its implementation, and it is likely that the interpretation and the implementation will not be unified across Europe on view of the current differences regarding collective proceedings within member states.

The regulation must be sufficiently clear and should be directly applicable to individuals in all member states, so that the Community avoids running the risk of inconsistent implementation.

In 1998, the European Commission introduced Directive 98/27/EC empowering consumer organisations¹¹⁶ to apply to courts in other Member States for an injunction against an infringement of any of a number of consumer trading directives committed

¹¹⁵ Veronique Magnier, 'Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters France' available at <<http://globalclassactions.stanford.edu/content/class-actions-group-litigation-other-forms-collective-litigation-protocol-national-reporters>> accessed 23 September 2012.

¹¹⁶ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51, Article 7(2).

in the organisation's own state by an entity in another member state. The directives in question cover areas such as misleading advertising, unfair contract terms, consumer credit, package holidays and consumer guarantees. Unfortunately, since then only two cross-border cases have been brought, the main reason for this being the financial risk for the entity bringing the case, as well as the complexity of national injunctive proceedings.¹¹⁷

Directive 98/27/EC lacks basic provisions on the implementation of collective redress, including an opt-out mechanism, claims by individuals and a mechanism for settlements. It requires a wider scope of possible plaintiffs as well as incentives to use the procedure. In addition to enlarging the scope of Directive 98/27/EC incentives or a system of European funding are needed in order to assist in operating the injunctions procedure under that regulation. It therefore seems that directive Directive 98/27/EC could not form the basis of a collective redress model and a new measure should be introduced following the above-mentioned consultation on a search for a coherent European model published in February 2011.

It is argued¹¹⁸ that such a European intervention could be based on Article 81(2) of the Treaty on the Functioning of the European Union which allows legislation on, inter alia:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

[...]

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

However, Fairgrieve and Howells claim that competence is usually restricted to cross-border matters leaving purely domestic procedures undisturbed. Furthermore, with

¹¹⁷ See report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest <http://ec.europa.eu/consumers/enforcement/injunctions_en.htm > accessed 15 November 2011.

¹¹⁸ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures – European Debates' (2009) *International and Comparative Law Quarterly* 379, 406.

regard to the recognition of foreign judgments between member states,¹¹⁹ there are strong fears that a judgment based on the opt-out mechanism would be regarded as manifestly contrary to public policy and therefore unenforceable.¹²⁰ This is because group members in an opt-out mechanism scenario do not have their day in court, which may run against the fundamental right to a fair trial. Therefore, a procedure which is to be introduced in Europe should also be concerned with the matter of cross-border disputes and mutual recognition of judgments within member states. This matter will be dealt with further in the fifth chapter of this work.

4. The Relevance of Israel's Class Action Law in the Search for a European Model

Israel's new Class Action Law 5766-2006 is particularly significant in the search for a new European binding instrument because it is more detailed than similar existing and operating class action frameworks. It contains 45 sections (by comparison, US Federal Rule of Civil Procedure 23 contains only 8 sections),¹²¹ each of which was considered in great detail by the legislator. Unlike the US system¹²² and the rules of procedure in England and Wales which has influenced the Israeli system in the past, class actions in Israel are now enshrined in legislation, rather than rules of civil procedure. In Israel, primary legislation prevails over secondary legislation allowing the Israeli enactment to defeat any pre-existing contradicting rules of procedure. Israel's new legislation sets norms for private enforcement which were not previously used in the country.

The Israeli model may be much more acceptable in the eyes of European legislators as it has not adopted all the class action features which are so objected in Europe such as punitive damages and settlement which benefit only the class lawyers.

¹¹⁹ Based on Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, art 33(1).

¹²⁰ The authors Duncan Fairgrieve and Geraint Howells refer to article 34(1) of the above regulation.

¹²¹ United States Federal Rules of Civil Procedure, rules 23(a)-(h).

¹²² United States Federal Rules of Civil Procedure, rule 23 <<http://www.law.cornell.edu/rules/frcp/>> accessed 24 September 2012.

In order to advance the search for a Europe-wide mechanism, the Israeli model should be considered, since it offers a new and very effective model based on legal norms which are familiar to Europe.

The new Israeli model is based on legal principles rooted in English law, and it is therefore not foreign to the European legal culture. The Israeli model does not follow the problems attributed to the U.S. model and which are so criticised in Europe. Therefore, the Israeli model may take the lead in the introduction of a new collective redress mechanism in the European Union, yet the Israeli model itself needs some changes in order to combat problems which have become evident in the five years since its creation.

Chapter Two:

The Significance of the Israeli Class Action Model

In our previous chapter, we have explained that there are a number of compelling reasons for European legislators to reflect on the Israeli class action model before they finalise a European collective action framework. Although there are many differences between the E.U. and Israel, an analysis of the Israeli class action experience, including both its negative and positive effects, would assist the creation of an accessible and efficient class action system in Europe for consumers.

In order to discuss the significance of the Israeli model, the roots of this model and its history will be reviewed. Furthermore, the effect of the new class action legislation in Israel is explored.

A. The Importance of the Israeli Class Action System to the European Debate on Collective Proceedings

It may not be immediately clear why the evolution and effect of the CAL 2006 is pertinent to the development of a class action system in Europe. However, there are several factors which make consideration of the Israel class action system both relevant and valuable. Firstly, the Israeli legal system has certain features in common with major European jurisdictions, such as England and Wales, since it is based on the English legal system. The similarity in jurisdictions means that legal tools such as collective actions may result in similar effects in Europe and in Israel. Secondly, Israel has an up-to-date opt-out model, albeit that in specialist cases, such as claims for large individual damages including mass tort actions, claims can be made on an opt-in basis. The Israeli model was created having studied the experiences of other places in the world such as the U.S. Thirdly, many of the provisions at the core of the ongoing E.U. class action debate¹ have already been tried and tested in Israel. These

¹ European Commission, Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011) available at

issues include the identity of the class representative, introduction of an opt-out mechanism, implementation of appropriate safeguards to ensure that actions are submitted in good faith and financial incentives to encourage representatives to bring class actions and reward lawyers with contingency fees. Thus, in this respect the Israeli experience may supply some useful answers. Fourthly, the Israeli model has proved to be much more accessible to consumers than its European counterparts and has allowed aggregated consumer power to prevail over the power of huge corporations operating in consumer-related areas, such as communications, the food industry, and banking. Finally, the CAL is considered to be more reasonable than the U.S. class action framework, which alarms many E.U. officials and legislators because of its reputation for treble and punitive damages and extremely high attorneys' fees, while bringing little benefit to class members.²

Despite the useful precedent offered by the CAL, the Israeli class action system could not be transposed directly into the E.U. without adaptation. For example, the Israeli model, unlike a future European class action system, does not need to accommodate consumers located in multiple jurisdictions or address issues of cross-border trade between member states. In addition, the Israeli system still has certain flaws, which have led to class actions flooding the Israeli courts. These issues would need to be addressed in a future European model and this work attempts to provide some solutions to these problems.

The CAL also adopts an opposite standpoint on many of the core issues of collective redress compared to the position taken by the majority of European member states in their existing class action provisions. For example, the Israeli model favours the opt-out model, rather than the opt-in mechanism which is preferred in most European jurisdictions such as France, Italy, and England. The Israeli class action framework also relies mainly on private enforcement by individual representatives, as opposed to the European emphasis on organisation-led claims.

<http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf> accessed 2 June 2011.

² See the Speech of Commissioner Kuneva, 'Collective Redress: Moving the Debate Forward' (ALDE Seminar, Brussels, 04 March 2009) at <http://www.dailymotion.com/video/x99ya8_alev-collective-redress_news> accessed 10 June 2011.

Before examining the details of the CAL, it is helpful to review the way in which the Israeli model evolved. The Israeli class action system has passed through three main stages which represent three different class action options that could also be introduced in Europe. In Israel, difficulties were encountered at each of these stages and learning the lessons of these challenges could help European legislators to avoid the same pitfalls. Aspects of a class action system in respect of which Europe has expressed hesitation, such as limiting class actions to specific laws, have been tried and tested in Israel with no success and this is likely to be relevant given that the Israeli jurisdiction shares many features of its substantive and procedural law with European jurisdictions.

B. Historical Development of the Class Action Framework in Israel

The class action system in Israel is based on the English legal concept of 'representative actions'. Israel then moved towards a more U.S.-influenced approach favouring private enforcement and finally created its own class action framework with the enactment of the CAL. The evolution from a European to a more American approach towards class actions provides an interesting precedent and suggests that the European Union could also adopt new legislation to encourage private enforcement and improve the effectiveness of consumer law based on provisions in the Israeli model.

1. Foundations in English Law

From 1918 until 1948, Israel was governed under the British Mandate and elements of Israeli civil law are thus rooted in the English legal system.

The general rule under English law was that all parties interested in a matter had to be present in court so that a final decision could bind all the parties to the dispute. However, where the parties were so numerous that it was impractical to bring all of

them to court, this rule was not allowed to stand in the way of a decision.³ It was, therefore, a rule of convenience.⁴

Rule 29 of the Israel Civil Law Procedure Regulations 5744-1984 ('Rule 29') (previously known as Rule 65 of the Civil Law Procedure Regulations 1938) adopted the provisions of R.S.C Ord. 15 r.12 (1) with slight changes.⁵

Rule 29 stated that:

(a) where a great number of persons are interested in one action, a portion of them may, at the request of a plaintiff if they are plaintiffs, or at the request of a defendant if they are defendants, and with the permission of the court or the registrar, represent in that action all the interested persons (...)

This rule, imported from the English jurisdiction, forms the basis of class action proceedings in Israel.

2. The Beginning of Representative Proceedings in Israel

It has been suggested that Rule 29 (which was based on the English concept of representative proceedings),⁶ in conjunction with Rule 19 of Israel's Civil Law Procedure Regulations 5744-1984 (which permitted joinder of multiple claims where a common question of law or fact might arise), could have enabled claimants to bring American-style class actions for damages.⁷ In effect, one person would have been allowed to represent all class members, even though they were not party to the legal proceedings. This is, in fact, the genesis of the Israeli opt-out machinery.

³ *Duke of Bedford v. Ellis* [1901] A.C 1.

⁴ See also *John v. Rees* [1970] 1 Ch. 345.

⁵ R.S.C Ord. 15 r 12 (1) stated that, 'Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them representing all or as representing all except one or more of them.'

⁶ Representative actions in England were rare and ineffective because of the requirement in R.S.C Ord. 15 r 12 (1) that all the members of the represented group have the 'same interest' in the action.

⁷ Steven Goldstein, 'Collective Representative Action: What and for What' (1978) 9 *Mishpatim* 416.

However, U.S.-style class actions appear to have been prevented by the reliance that Israeli courts placed on English judicial interpretation of R.S.C Ord. 15 r 12 (1) upon which Israel's Rule 29 was based. Although, unlike R.S.C Ord. 15 r 12 (1), Rule 29 did not expressly require that the members of the class have the 'same interest in any proceedings', Rule 29 was nevertheless construed by the Israeli courts in the same way as its English counterpart. Consequently, judicial decisions in Israel tended to follow English case law.⁸

In *Frankische Pelzindustrie Markle & Co. v. Rabinovich*⁹ the Court was asked to allow one party to represent 43 fur merchants who suffered losses as a result of series of fraudulent actions made by the same defendants. The Supreme Court in Israel held that although the wording of Rule 29 was different from R.S.C Ord. 15 r. 12, in essence, the two provisions had the same effect. Consequently, the court found that the 'same interest' requirement should be applied, even though it was not expressly stated in Rule 29. In reaching its decision, the Supreme Court denied the right of the plaintiffs to represent all aggrieved persons who had suffered financial loss and stated that Rule 29 could only be used where the plaintiff was seeking an injunction or a declaration, but not where the group of plaintiffs was seeking damages. The reasoning for this decision was that the damage to each potential plaintiff was different and, therefore, did not satisfy the 'same interest' requirement.

As a consequence of this judicial reasoning, Rule 29 was rendered obsolete and the door was effectively closed to American-style class actions until a number of legal decisions interpreted Rule 29 less restrictively.

The movement for change began in the district courts (the highest courts in Israel other than the Supreme Court), which interpreted Rule 29 in such a way as to broaden the scope of class actions. The district court judges who began to apply a more liberal interpretation of Rule 29 did so out of frustration at the many restrictions to which

⁸ *Duke of Bedford v. Ellis* [1901] A.C 1; *Prudential Assurance Co. v. Newman Industries Ltd* (1979) 3 All E.R 507; *EMI Records Ltd v. Kudhail* [1985] F.S.R 36 C.A.

⁹ Appeal Case 79/69 (Supreme Court) *Frankische Pelzindustrie Markle & Co. v. Rabinovich*, P"D Kaf Gimel (1) 645.

class actions were subject.¹⁰ However, in other district court decisions judges denied Rule 29 motions because of the absence of a statutory provision permitting a more relaxed application of the Rule.¹¹

Consequently, a great deal of confusion surrounded Rule 29 and its legal authority was very unclear¹² until the Israeli legislator decided to intervene by introducing specific class actions provisions.

3. Introduction of Class Action Provisions in Specified Areas

As a result of judicial frustration with Rule 29 and its English interpretation, the Israeli legislator's conviction was that American-style class actions would improve scrutiny and advance policies of good trade in specific areas. Israel gradually began to move away from the English 'representative actions', towards U.S.-style class actions. This move was the second step in the development of class actions in Israel and was made very gradually and cautiously because of concerns about the U.S. system, particularly large damages awards. There were also concerns that class actions would lead to high costs for defendants that could cause financial ruin with little benefit for consumers.¹³ However, these concerns were alleviated by the fact that punitive damages and statutory treble-damages could not be awarded under Israeli law (as is the case in the E.U.) and Israeli cases were heard by a professional judge, rather than a jury (similar to some E.U. member states).¹⁴

¹⁰ See for example Case no. 1472/95 (District Court of Tel Aviv) Shimshi v. Psagot; Case no. 109/94 (District Court of Jerusalem) The Israeli Student Union v. The University of Jerusalem (unpublished); Case no. 1165/97 (District Court of Jerusalem) Shimonov v. The Kadisha Company (unpublished); Case no. 16/97 (District Court of Tel Aviv) Zimber v. The Council of Tel Aviv, (unpublished); Case no. 1682/95 (District Court of Tel Aviv) Doron v. Secum, (unpublished); Case no. 2604/99 (District Court of Be'er Sheva) Avital v. The College of Management Be'er Sheva, Dinim Mechozi Lamed Bet (5) 23 (1999); Case no. 28680/97 (District Court of Haifa) Haim Dadon v. Israel Land Administration, Dinim Mehozi (6) 709 (1999); Case no. 3259/95 (District Court of Haifa) Meirson v. The Electricity Company.

¹¹ See for example Case no. 545/91 (District Court of Jerusalem) Atiya v. The Council of Jerusalem, (1991) and Case no. 1279/96 (District Court of Jerusalem) Givon v. Shaarei Zedek Medical Center (1996).

¹² See Dr. Chemy Binun 'The Position of Rule 29' 4(1) Shaarey Mishpat 193, and Steven Goldstein and Yael Efron, 'The Development of Class Actions in Israel' (1999) 27 Alei Mishpat 31.

¹³ Sinai Deutch S, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model' 2004 27(2) Journal of Consumer Policy 179.

¹⁴ Ibid.

For more than ten years, Israel's Ministry of Justice sought to introduce a collective redress mechanism based on U.S. Federal Rule of Civil Procedure 23, specifically Rule 23(b)(3) which deals with damages class actions.¹⁵ The search for a new model began with a report submitted to the Israeli Consumer Council, which recommended the introduction of class actions into Israeli Law.¹⁶ The Ministry of Justice alternatively suggested a gradual recognition of class actions in specific areas, which would be limited to specific plaintiffs.¹⁷

As a first step towards this latter model, the Israeli legislator identified specific areas of law where there was the potential for a large number of people to suffer minimal losses for which they were unlikely to sue unless they were given an incentive to do so. The existing legislation in these areas was then amended to enable class actions for violations of the law. The new enactments were selected on the basis of special need and in all of the amending legislation, except for one,¹⁸ there were criminal sanctions for non-compliance, despite the fact that the new class action provisions were also intended to encourage enforcement.¹⁹

These enactments were introduced gradually between 1988 and 2005 and were inserted into either existing or new legislation. The Amendment to the 1981 Consumer Protection Law 1994 is the most relevant provision for this thesis. However, the other amendments are also referenced briefly as evidence of the Israeli legislator's view at the time that enforcement should be promoted through the use of collective redress. Furthermore the differences between the enactments also indicate which types of legislation and which provisions were most effective. The areas where the Israeli legislator sought to improve enforcement by introducing collective actions tended to be low value individual actions which had to be bundled together in order to make the bringing of an action feasible and worthwhile. The areas affected were the

¹⁵ Steven Goldstein, 'Class Action in Israel' in C. Wasserstein Fassberg (ed) *Israel Reports to the XIII International Congress of Comparative Law* (1990), 45.

¹⁶ Steven Goldstein, *Developments of Class Actions as Consumer Protection Devices* [1978], Report submitted to the Israeli Consumer Council 1978 (Hebrew).

¹⁷ Sinai Deutch, (n 13).

¹⁸ Male and Female Workers Equal Pay Law, 5756-1996 (Israel).

¹⁹ Sinai Deutch, 'A Decade of the Consumer Class Action – Interim Summary and a Look at the Future' (2005) 4(1) *Shaarei Mishpat* 9.

securities market,²⁰ the environment,²¹ competition claims,²² consumer protection claims,²³ banking,²⁴ employment discrimination,²⁵ insurance,²⁶ actions concerning shareholders interests,²⁷ equal rights for disabled persons²⁸ and the pensions market.²⁹

The new rules provided for opt-out class actions, except for the environmental legislation which contained an opt-in provision³⁰ that allowed a plaintiff to seek an injunction or order to remove the act provided that 60 days prior notice was given to the defendant to enable him to correct the offence. However, the special opt-in rule in environmental cases did not promote any collective actions. This point should be borne in mind by the European Commission before enacting its new framework for class actions, as it proves that collective claims for injunctions in the environment area in Israel were not effective at all.

All the new laws contained similar, but not identical, provisions for certification. Thus, in order to bring a collective action, the representative had to satisfy the court that a class action was appropriate and that the collective procedure prevailed over all other court procedures. The claim also had to be brought on behalf of an identifiable class of victims and in good faith by a suitable representative.

As a result of these enactments, the number of class actions in Israel rose significantly. However, most of the actions failed to pass the certification stage, since class actions were limited to breaches of the specific laws and the causes of action contained within them. For example, it was held that an action against a bank for unlawful interest charges should be dismissed because the cause of action was based on Israeli interest law³¹ and not on the amendment to the Banking law³² which set out the class action procedure and conditions.³³

²⁰ Amendment to the 1968 Securities Act 5748-1988 (Israel).

²¹ The Prevention of Environmental Hazards (Civil Suits) Law 5752-1992 (Israel).

²² Amendment to the 1988 Business Restrictions Law 5752-1992 (Israel).

²³ Amendment to the 1981 Consumer Protection Law 5754-1994 (Israel).

²⁴ Amendment to the 1981 Banking (Consumer Services) Law 5756-1996 (Israel).

²⁵ Male and Female Workers Equal Pay Law, 5756-1996 (Israel).

²⁶ Amendment to the 1981 Oversight over Financial Services (Insurance) Law 5756-1996 (Israel).

²⁷ The Companies Law 5759-1999 (Israel).

²⁸ The Equal Rights of People with Disabilities Law 5758-1998 (Israel).

²⁹ Supervision of Financial Services (Pension Funds) Law 5765-2005 (Israel).

³⁰ Prevention of Environmental Hazards Act (Civil Actions) 5752-1992, s 5 and s 6 (Israel).

³¹ The Interest Law 5717-1957 which limits the permitted interest rates.

The Securities Act 1968 was the first area where class actions were introduced. The legislator took the view that it was in the public interest to allow class actions in order to improve scrutiny and preserve the efficiency and credibility of the market. The typical action in the securities field is similar to that of consumer law. The investor who suffers only minimal loss is in a weak position vis à vis a powerful company's institutions. This position is similar to the position of the consumer who has dealt with a rough trader and has suffered minimal personal damages. In this case, only the aggregation of all claims makes the action worthwhile.

The Securities Act amendment was implemented even though the Israel Securities Authority already had considerable powers of public enforcement. For example, the Securities Authority had the power to investigate and initiate legal proceedings in relation to different kinds of wrongdoing and to finance class actions submitted by civilians or groups, or where there was a public interest and a reasonable probability that the class action would be approved.³⁴ Nevertheless, public enforcement by the Securities Authority was not considered sufficiently effective on its own.

However, the new class action measure introduced in the Securities Act 1968 resulted in very few class actions.³⁵ The only explanation for the limited number of claims is the complexity of the securities market and the difficulty of proving that a loss was due to factors other than normal market fluctuations. However, in that sense, the area of securities differs from that of consumer issues where a normal action is not so complicated and typical consumer disputes are familiar to every person.

The Banking (Service to Customer) Law 1981 which was amended in 1996 included a new and different provision allowing the courts to order compensation for the general public against the wrongdoer in certain circumstances. This will be the case where the

³² Amendment to the 1981 Banking (Consumer Services) Law 5756-1996 (Israel).

³³ Application No. 2188/04 (District Court of Nazareth) Tfahot Bank v. Migrish, (2005) (unpublished, Judgment by Judge Avraham dated 24 May 2005)

³⁴ Companies Act 5759-1999, s 209(b) (Israel).

³⁵ There is no accurate data on the precise number of actions.

court concludes that monetary compensation for all or some members of the group is not practical and the payment cannot be effected at a reasonable cost.³⁶

Similar provisions were added to Section 46I(b) of the Restrictive Trade Practices Law 1988 and Section 62I(b) of the Insurance Business (Control) Law 1981 which was amended in 1997. The introduction of a clause which allowed general damages in favour of the public was very significant. In many cases, the individual claim in such actions was very small and members of the class were not expected to come forward to collect their share. However, the general damages provision also promoted deterrence by restoring the financial benefits that the wrongdoer had acquired from his unlawful actions.

With regards to consumer protection legislation, despite the wide range of issues covered by the Consumer Protection Law 1981 (CPL), such as misrepresentations, extortion, consumer credit transactions, door-to-door sales and labelling of goods, virtually no consumer protection actions were brought under the CPL prior to the introduction of a class action mechanism.³⁷ The CPL was cited in several cases, but until 1994 it was never a substantive factor in decisions. Individual claims were costly, time consuming, risky due to their uncertain results and the remedies awarded were usually inadequate. Individual consumer claims that reached the courts were scarce and even the percentage of consumer claims in the Small Claims Courts was relatively low. Furthermore, consumer claims were often complicated as they concerned promises made by dealers/sellers, which were often undocumented. Consequently, until the mid-1990s, consumer law in Israel was hardly enforced.³⁸ A major change was required to turn the CPL from a symbolic piece of legislation into an efficient tool of consumer protection.

In order to rectify this situation, the CPL was amended in 1994 by adding a new chapter authorising consumer class actions. The 1994 CPL provision³⁹ was an opt-out provision which enabled a consumer or consumer organisation to sue in the name of a group of consumers, on the same grounds for which he could sue in his own name, for

³⁶ Previous Sec 16 I of the Banking Services Act 5741-1981.

³⁷ Sinai Deutch, (n 13).

³⁸ Ibid.

³⁹ Consumer Protection Law, as amended in 1994, Sec 35A.

causes specified in the CPL. The class action provision required certification by the court in order to proceed and was subject to the satisfaction of certain conditions based on U.S. Rule 23 (b), which were similar in principle to the prerequisites set out in the Securities Act.⁴⁰

The main issue with the 1994 amendment to the CPL was that consumer class actions were limited to CPL causes of action. Section 35A(a) of the CPL stated that the plaintiff could sue, 'in the name of a group of consumers on grounds according to which he can sue under this law.' Consequently, even a well-grounded consumer claim against a 'dealer' could be dismissed at the preliminary certification stage if the particular cause of action was not one of the causes of action set out in the CPL. For example, in *Yaary v. Israel Land Administration*,⁴¹ a class action based on Section 35 of the CPL was dismissed as it was based on contractual and negligence grounds which were outside the scope of the CPL. Similar problems also existed in relation to other enactments, which were confined to specific areas other than consumer protection law.

The 1994 amendment to the CPL led to more than eighty published cases between 1995 and 2001 that dealt with and analysed substantive issues of the CPL.⁴² As a result, the CPL became a meaningful source of court decisions on consumer issues.⁴³ At that time there were hardly any collective claims in Europe although the possibility of consumer collective or class actions was first raised in the EU context in a Commission paper of 1984.⁴⁴

⁴⁰ The class must be so large as to make individual suits impractical (numerosity).

There must be legal or factual claims in common (commonality).

The claims must be typical (typicality).

The representative parties must adequately protect the interests of the class (adequacy).

The court should find at this stage that common issues between the class and the defendants will predominate the proceedings, as opposed to individual fact-specific conflicts between class members and the defendants and that a class action instead of individual litigation, is a superior vehicle for resolution of the disputes at hand.

⁴¹ Case no. 388/96 (District Court of Tel Aviv) *Yaary v. Israel Land Administration*, (unpublished). See also Case no. 1228/00 (District Court of Tel Aviv) *Alroy v. Tnuva* (2001) (unpublished, Judgment dated 21 June 2001).

⁴² *Sinai Deutch*, (n 13).

⁴³ *Ibid.*

⁴⁴ European Commission, Memorandum: Consumer Redress COM(84) 692, 12 December 1984.

Although the amendment to the Consumer Protection Law led to cases that for the first time tackled consumer issues, new case law closed the gate in cases relating to reliance on misrepresentations and false advertisement. In the Barazani⁴⁵ case, the majority opinion of the Israeli Supreme Court was a serious setback to the potential use of consumer class actions in cases of mass deceptive advertising.⁴⁶ In this case, the court held that the class representative had to prove that every member had seen, read and understood a deceptive advertisement and had changed his behaviour in reliance upon the deceit. The court refused to allow the action by the representatives who did not provide an affidavit themselves and the court was afraid that the plaintiffs' real intentions when bringing the action was to try and force the bank to reach a personal settlement with the plaintiffs. That decision was considered a serious setback to the development of class actions in Israel since the court decision means that each member has to prove personal reliance. Such reliance may differ from one class member to the other and therefore the case is not suitable for collective hearing due to the requirement that common questions should prevail over personal issues. This decision was followed in *Adv. Shtendel v. Bezeq International*,⁴⁷ where the applicant claimed that Bezeq International - one of the leading phone companies in Israel - deceived the public by advertising that its rates for long distance calls were the cheapest, when, in fact, customers had to become subscribers to obtain the cheap rates. The Supreme Court reverted back to the old Barazani decision and held that since the applicant did not prove his personal claim and his reliance on the misleading advertisement, the requirement for a personal action was not satisfied and the application failed.

However, other issues, such as defective products or unlawful charges, did develop under the new class action system which was limited at that time to consumer protection legislation and not to related areas, such as tort or contract law. As a result of this limitation of the class action provision in specific enactments, a new law, which permitted class actions in a wider number of consumer areas, was required.

⁴⁵ Request for Additional Hearing no. 5712/01 (Supreme Court) *Barazani v. Bezeq, Padi Nun Zain* (6) 385.

⁴⁶ *Sinai Deutch*, (n 13).

⁴⁷ Appeal no. 458/06 *Shtendel v. Bezeq International* (Supreme Court) (2009) dated 6 May 2009.

C. Introduction of the Class Actions Law (CAL) 2006

As a result of frustration with the existing provisions⁴⁸ and in the absence of general class action legislation, consumers and representative plaintiffs tried to bring claims under Rule 29 of the Israeli Civil Procedure Rules 1984 in order to circumvent the restrictions in the specific enactments.

However, on 2 April 2003, in the *The State of Israel v. E.Sh.T* case, the Israeli Supreme Court decided (in a split decision) that Rule 29 could not be relied upon to bring class actions.⁴⁹ The case concerned employers of foreign workers who were opposed to the State of Israel's requirement that they deposit bank guarantees in order to secure the exit of the foreign workers on termination of employment. The decision to reject the use of Rule 29 as a class action mechanism was adopted by a majority of three justices (against two), who opined that Rule 29 lacked some of the essential characteristics required for a class action mechanism. The judges went on to state that these requirements should only be imposed by legal enactment.⁵⁰ For example, Judge Beinisch proposed that court supervision on submission of the action, rules of procedure, ways to claim the personal damages and court supervision on the termination of the action should be adopted for any class actions provisions.⁵¹ The majority also provided that, in principle, class actions against the state could be allowed but the matter should be considered in the light of the existing mechanisms in Israel to obtain recourse from the state.

It was in this context that the Israeli legislator decided to look for an alternative system, even though the Ministry of Justice feared that general class action legislation would lead to a flood of claims that would inundate the courts.⁵² As a result, the CAL was drafted and enacted in 2006 after extensive and detailed debate on each section

⁴⁸ Prof. Alon Klement, 'Class Action as a tool to neutralize the advantages of a single defendant against multiple plaintiffs – following the decision in *The State of Israel v. E.Sh.T*' (1994), 21 *Mechakrei Mishpat* <www1.idc.ac.il/klement/HebArt/EST.pdf> accessed 3 June 2011.

⁴⁹ Case no. 3126/00 (Supreme Court) *The State of Israel v. Eshet Project Management, Tak El. Nun Zain* (3) 220, (2003).

⁵⁰ *Ibid* at page 271 of the judgment.

⁵¹ See n 49 at page 270 of the judgment.

⁵² Sinai Deutch, (n 13).

and following consultation between the government and scholars.⁵³ The details and specific provisions of the CAL will be discussed in subsequent chapters, but in essence, the Act favours private actions based on the opt-out mechanism and offers financial incentives for representatives and lawyers in successful actions, while also integrating various safeguards to discourage the bringing of unmeritorious cases and unfair settlements.

However, five years after its enactment, the CAL has given rise to a flood of claims led by private individuals encouraged by the accessibility and financial incentives offered by the opt-out mechanism. In fact the Israeli courts are swamped with class actions in many areas and since 2011, there have been approximately 700 claims per year, about 80% of which are consumer related.⁵⁴ On the other hand, the volumes of actions in Europe are very small and there are very few actions for damages in the differing jurisdictions in Europe. The different features of the Israeli system and those features which are employed in major European member states should explain the sharp difference in the outcomes of collective actions as dealt with in the following paragraphs of this chapter. The comparison between the features employed in Europe and in Israel will be further explored in Chapter Three.

1. The Number of Class Action Claims Brought in Israel Compared to Individual European Member States

There is a very marked difference between the numbers of collective claims made in Israel since the enactment of the CAL, compared with the number of collective actions brought in several European jurisdictions. In Israel the system is based on the opt-out model whereas in Europe very few jurisdictions have introduced an opt-out model. There are also differences in the incentives and the funding mechanisms.

⁵³ Prof. Alon Klement of the Interdisciplinary Centre Herzliya appeared before the legislative committee in three of its meetings at the Knesset (Israel's legislature) on 20 April 2005, 17 August 2005, and 22 September 2005. Dr. Peretz Segal of the Ministry of Justice, appeared before the committee on the 20 April 2005. Dr. Hadara Bar-Mor and Dr Michal Horovitz from the Netanya Academic College appeared on 20 April 2005. Guy Halfteck and Dr. Issachar Rosen-Zvi from the Tel Aviv University appeared before the committee on 20 April 2005. Dr Michael Wigoda from Sha'arei Mishpat College appeared before the committee on 31 May 2005.

⁵⁴ According to the Israeli Registry of Class Actions available in Hebrew at <http://elyon1.court.gov.il/heb/tovanot_y/list.htm> accessed 29 January 2011.

Nonetheless the comparison shows that the Israeli system is very workable, arguably too workable, as many actions for damages are brought before the courts.

Israel class action registry shows that between March 2007 and the end of 2007, about 130 collective actions were brought (approximately 13 new actions each month). In 2008, the number of actions rose to 246 actions per annum (approximately 20 new actions each month). In 2009, there were more than 270 claims (approximately 22 new actions every month). In 2010, there were about 360 new actions (approximately 30 actions per month) and the numbers rose to 715 in 2011 (approximately 60 new actions per month).⁵⁵

These numbers prove that the Israeli jurisdiction is producing many actions. The Israeli system improves dramatically access to justice whereas the European models are stuck with low numbers and thus far do not bring any financial benefits to consumers. Once it has been proved that there are substantial differences in case volumes, there should be analysis of the features that make the Israeli model so accessible, though the problems of the Israeli market should also be studied. The existing safeguards will be examined in particular in Chapter Four, to ascertain whether they function effectively in Israel, and whether they are relevant for European jurisdictions.

⁵⁵ See Table 1 below.

TABLE 1

The number of collective actions brought in individual EU member states and Israel:

	Country	Year collective proceedings were introduced	Average number of collective actions per annum	Total number of collective actions brought since collective proceedings introduced
1	Austria	2000	1-2	15
2	Bulgaria	2006	1-2	5
3	Denmark	2008	1	1
4	Finland	2007	0	0
5	France	1992	10	196
6	Germany	2004	3	29
7	Greece	2007		
8	Italy	2009		
9	Portugal	1995	Less than 1	6
10	Spain	2000	5	49
11	Sweden	2003	1	8
12	Netherlands	2005	Less than 1	3
13	U.K	2000	1-2	14
14	Israel	2007	700* ⁵⁶	2,418* ⁵⁷

⁵⁶ An average of 214 per annum in the first three years following the new act and later the average rose to approximately 400 claims a year. In 2011 the number rose to 700.

⁵⁷ There were 608 (in 34 months) and 1204 by 30 May 2011.

The average number of collective actions was calculated using the information in the 'Study on the Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union'⁵⁸ and the data set out in Israel's online class action registry.

Israel's online class action registry has been in existence since March 2007 following the entry of the CAL into force. Between March 2007 and December 2009, 608 new applications to certify class actions were submitted (and reported in the registry). These actions were studied throughout this research in order to draw conclusions with regards to the areas of law susceptible for collective actions and the numbers of compromises reached. In order to calculate the number of new claims made between March 2007 and 31 December 2009 (a period of 34 months), 38 claims which appeared on the register, but which were submitted before the relevant period, were subtracted from the total number of claims during the relevant period.

These figures do not include class action cases that were commenced, but not reported to the registry, usually because they were dismissed at an early stage in proceedings.⁵⁹ Looking at the registry, it seems as though many of the cases were settled and thus ended up with some benefit to the consumer class members bearing in mind that the majority of actions (around 80%) concern consumer issues.

The rise in the numbers of claims in Israel shows that the concept of class actions is still developing in Israel, with new case law being made on a daily basis. The increased use of class actions in Israel has also empowered consumers much more and has made defendants much more cautious about consumers' rights. Potential plaintiffs are now observing the conduct of the largest companies in order to find more causes of action.

If class actions were introduced in Europe there is no reason to think that a similar model would not produce better outcomes and boost consumer confidence there too.

⁵⁸ The European Commission and DG SANCO, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union' (2008) <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#cr> accessed 29 January 2011.

⁵⁹ See (n 54).

The introduction of collective actions may improve consumer confidence in cross-border trade within the European Union member states. Consumers may be able to presume that the introduction of class actions will make large firms more careful about their consumer rights, thus making trade in the internal market much safer.

According to the data in Table 1, France and Spain are the only European member states where a significant number of collective actions has been brought (although less than in Israel). There are certain features of the Spanish and French systems which have made collective redress actions more accessible for consumers than in other E.U. member states, while preventing a flood of actions, as occurred in Israel. However, the numbers of collective actions for damages are still very low even in France and Spain. In France, an action under Article L.422 of France's Consumer Code for joint representative action may only be submitted by approved associations representing consumers or investors at a national level and only five such actions have been submitted since its creation in 1992.⁶⁰ These are opt-in actions for damages where each individual grants the organisation a mandate to act as his representative.

On the other hand, according to the evaluation study (French Final Report)⁶¹ a total of 196 claims in the 'interest of consumers' were brought by organisations in France under Article L.421-1 of the Consumer Code in the last decade. These are non-personal damages actions, mainly for injunctions, which are totally financed by the consumer organisations.⁶² Therefore, the French system is not producing compensation for class members, but rather deals mainly with the prevention of illegal actions by injunctions. Class actions for damages in France are rare and ineffective. The French system would not form an effective basis for a new class action model for damages in Europe in light of its current performance.

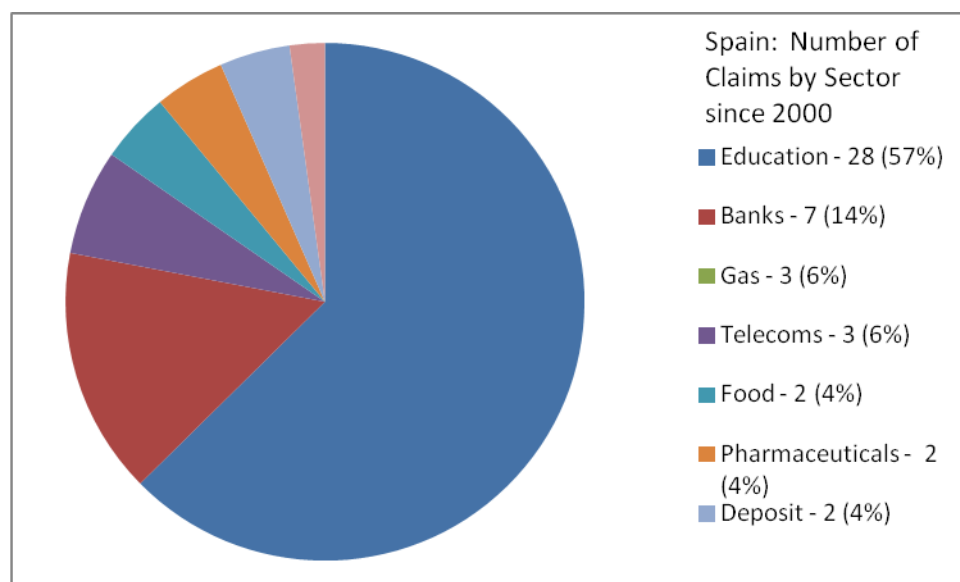
⁶⁰ BEUC, 'Where does collective redress for individual damages exist?' in *Country Survey of Collective Redress Mechanisms* (BEUC, July 2010) available at <<http://www.beuc.org/Content/Default.asp?PageID=2140>> accessed 17 November 2011.

⁶¹ Véronique Magnier and Dr. Ralf Alleweldt, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report France' (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf> accessed 17 November 2011.

⁶² European Parliament, Directorate-General for Internal Policies 'Policy Department A: Economic and Scientific Policy: Overview of existing collective redress schemes in EU Member States' (July 2011) <www.europarl.europa.eu> accessed 6 October 2011.

Forty-nine representative claims have been submitted to date in Spain. Spain has had two collective redress procedures for damages since 2000 and Spanish legislation has defined two separate types of interests: quasi-class actions, where the members of a group are unidentified or unnamed⁶³ and multi-party actions, where the members are identified or easily identifiable (also known as collective action groups of consumers).⁶⁴

The Spanish system is based on a special kind of opt-in procedure which has proved to be more successful than others, probably because it allows representation by a group of consumers and not just registered and qualified organisations. It is not a regular opt-in action because it may affect members of the group who are not present in court. All claims affecting a significant number of consumers may be solved through the collective action in defense of rights and interests of consumers.⁶⁵ The Spaniards have introduced a funding system in order to encourage access to justice⁶⁶ and are tolerant, to some extent, of contingency fees.⁶⁷ Examination of the 49 actions mentioned in the evaluation study reveals that 28 actions were brought in the area of education, and the remaining 21 actions were brought in other consumer-related areas as reflected in the following chart:



⁶³ Ley de Enjuiciamiento Civil, Article 11(3) (Civil Procedure Law, Spain).

⁶⁴ Ley de Enjuiciamiento Civil, Article 11(2) (Civil Procedure Law, Spain).

⁶⁵ BEUC, (n 60).

⁶⁶ In order to encourage access to justice, Ley 1/1996, de 10 de enero, de Asistencia Jurídica Gratuita (Law 1/1996, of 10 January 1996, on Legal Aid) (Spain).

⁶⁷ Prof. Fernando Gomez and Marian Gili, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Spain' <ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> accessed 17 November 2011.

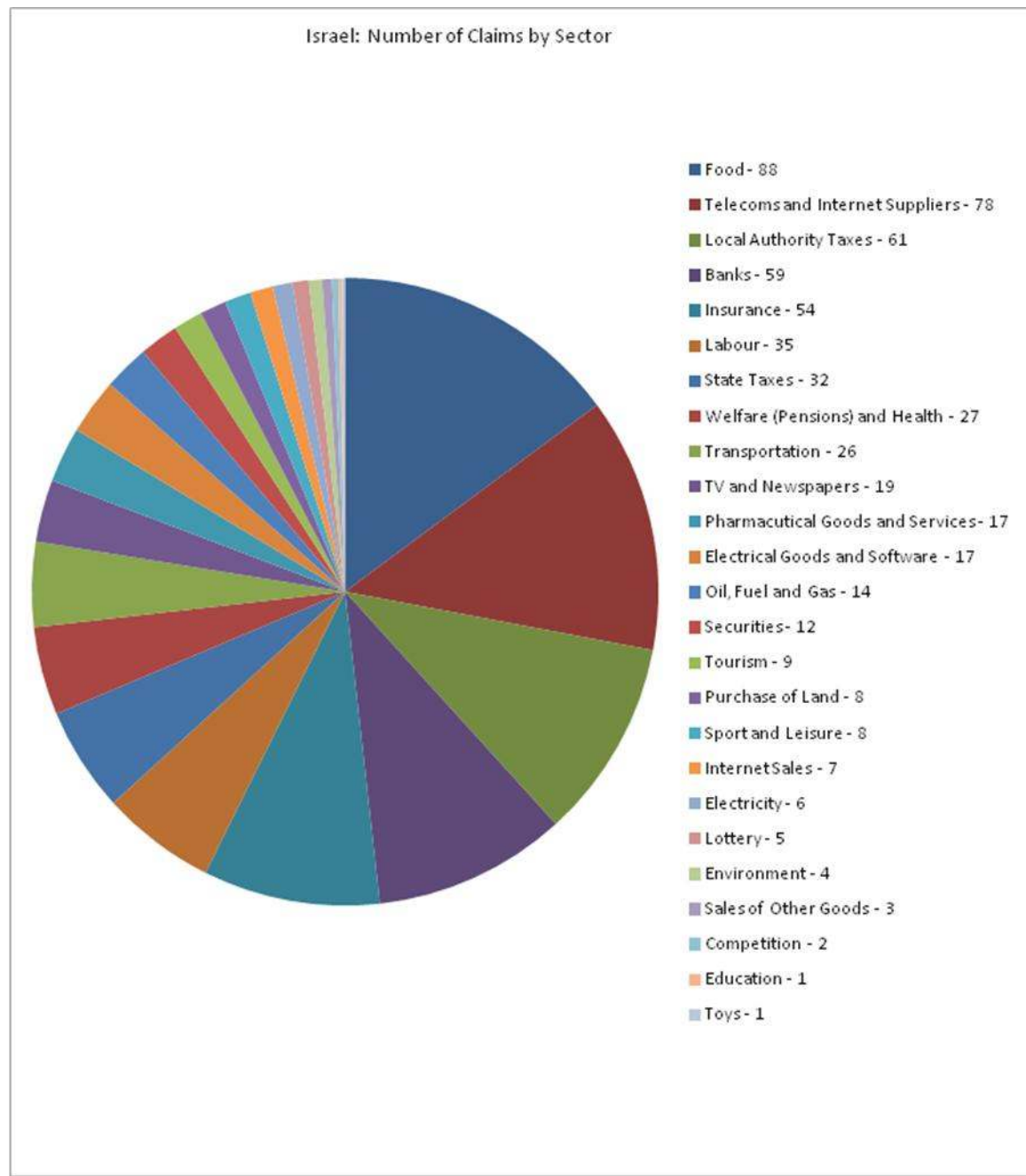
The education-related actions all followed the bankruptcy of a Spanish chain of language schools and the subsequent breach of financing contracts. If this action is removed from the list of actions, the result is that very few actions were brought in Spain and the Spanish model does not improve access to justice, as would appear to be the case from a first glance at the statistics. However the special features of the mixed collective opt-in and opt-out action will be reviewed in Chapter Three and compared with other available mechanisms.

2. The Markets Subject to Class Action Claims in Israel

Traditionally in collective actions, some markets are more amenable to class actions. Areas that are characterized by many small actions, such as consumer cases, are most suitable for collective actions. Indeed, an examination of the Israeli registry reveals that after implementation of the CAL, most actions related to consumer issues (approximately 78%), whereas prior to the CAL they comprised only 40% of class action applications.⁶⁸

⁶⁸ Sinai Deutch, (n 13).

Diagram No 1 - The Division of Claims to Markets



A survey published in the Israeli financial newspaper ‘Globes’⁶⁹ revealed that 217 applications for class actions were submitted in the Tel Aviv district in 2010 and 149 applications were submitted in the first six months of 2011.

⁶⁹ ‘Sharp Increase in Class Action Suits Submitted, particularly against Communications Companies’ Globes News (Israel, 6 July 2011) at <<http://www.globes.co.il/news/article.aspx?did=1000661350?>> accessed 7 July 2011.

Fifteen percent (15%) of the actions were submitted against communication and internet companies in 2010 and this number rose to 19% in the first six months of 2011.

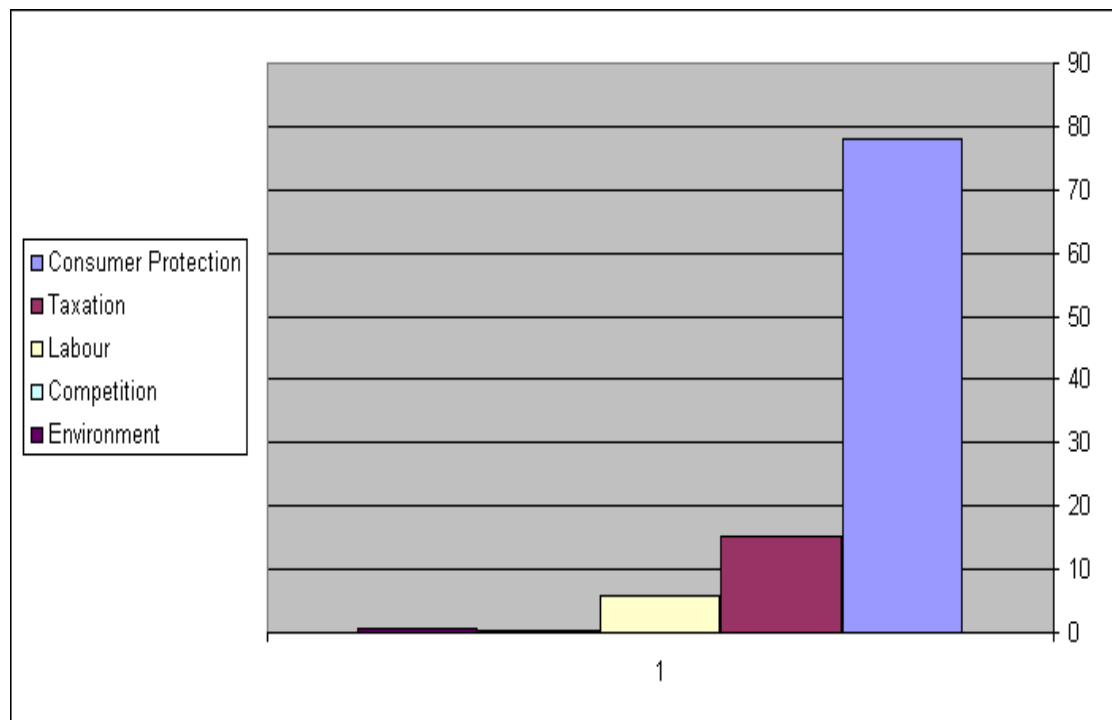
Seven percent (7%) of the actions in 2010 were pursued against local authorities or their bodies for restitution of unlawful levies of taxation and this number had risen to 8% in the first six months of 2011.

This information, which was supplied to the newspaper from Tel Aviv District Court, is approximately in line with the data collected from the general registry which is based on the numbers of claims in all six districts in Israel.

Therefore, on the basis of this data, the claims may be divided into the areas of law shown below:

- Seventy-eight percent (78%) of actions are consumer related, which includes the food industry 14.4% , telecoms and internet providers 12.8%, banks 9.7%, insurance 8.8%, and transportation and other areas related to the purchase of goods or services.
- Fifteen point three percent (15.3%) of the actions are connected to taxation.
- Five point seven percent (5.7 %) of the actions are labour actions.
- Less than 1% of the actions are related to competition or environmental issues.

Diagram Two – The Areas of Law Covered by Collective Redress Actions in Israel from 2006



This information demonstrates that consumers in Israel are eager to bring their disputes before the courts and many new consumer questions which would have never reached the courts previously were resolved by collective proceedings.⁷⁰

If a similar system is imported into the European Union, there is no reason to suspect that European consumers will react any differently once the gate to consumer collective redress has been opened in Europe, provided they are equipped with an equally accessible collective redress framework. Indeed, according to the evaluation study, most French collective actions relate to food, telecommunications and pharmaceutical goods,⁷¹ whereas in Spain, banking, telecommunications and the gas industry are the leading sectors to be challenged with collective redress proceedings.⁷²

⁷⁰ Sinai Deutch, (n 13).

⁷¹ Véronique Magnier and Dr. Ralf Alleweldt, (n 61), see Annex 1 on page 32.

⁷² Apart from Education, which has been the subject of many actions in recent years in Spain. See Prof. Fernando Gomez and Marian Gili, (n 67).

Generally consumers do not go to court when they are in an ‘underdog’ position compared to wealthy defendants. A recent Eurobarometer survey showed that 51% of consumers did not take any action when they were dissatisfied with the way their complaint was handled. The survey also showed that 76% of European citizens would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same issue.⁷³ This survey explains the high numbers of consumer collective redress. Once the law creates a proper infrastructure for bringing consumer cases, consumers tend to respond immediately and use the collective action machinery quickly and in high numbers.

The flood of claims following the enactment of the CAL in Israel suggests that rather than lacking the will to pursue class actions prior to 2006, Israeli consumers simply lacked the means to do so due to the inherent difficulties of the class action model prior to the CAL. The number of consumer claims has doubled annually in comparison with the position before the 1996 Act. Other areas of law such as securities and competition were very complicated prior to 2006 and could result in lengthy proceedings. In fact, the first case to go through all class action stages in Israel reached its final judgment in the Court of Appeal after a 15-year legal battle.⁷⁴

The CAL has certainly made class actions into a more efficient tool for consumers. It has made the procedure more accessible and many of the cases indeed do not go through lengthy proceedings and are settled in the early stages. The aggregation of claims creates a real threat and provides an incentive for defendants to settle the case.

3. High Value Damage Claims under the CAL

Since class actions are exempt from payment of court fees in Israel, claims are submitted for extremely high sums.

⁷³ European Commission, Special Eurobarometer 298: Consumer protection in the internal market (European Commission, October 2008) page 54 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf> accessed 7 November 2011.

⁷⁴ *Reichart v. Shemesh* – the decision to approve the action as a class action was given in the Israeli Supreme Court in Appeal no. 8332/96 concerning fraud in securities.

A survey that was published by the Israeli financial newspaper 'Globes'⁷⁵ showed that in 2010, the average claim was for NIS 564,000,000 (approximately GBP 100 million) and the average claim in the first six months of 2011 was NIS 131,000,000 (approximately GBP 22 million).

The highest value claims were against telecommunications and internet companies. The average claim in 2010 was for NIS 283,000,000 (approximately GBP 65 million) and the figure for the first six months of 2011 was NIS 100,000,000 (approximately GBP 16 million).

According to the above-mentioned Globes survey the average figures for claims against local authorities in 2010 were NIS 22,000,000 (approximately GBP 3.5 million) and the figure for the first six months of 2011 was NIS 26,000,000 (approximately GBP 4.5 million).

These large sums of money involved in class actions can be very threatening for defendants, potentially pushing them to settle a case despite having a strong defence. A further result of fighting such a large claim is that resources are diverted to defending the action rather than being used for production. In addition, the fear of potential defendants from being sued in collective actions may result in such companies developing restrictive practices which may lead to a rise in insurance premiums due to the potential for large-scale attacks through class actions.

4. Settlement Rates in Israeli Collective Actions

It seems that there are areas in which it is easier to reach settlements. These areas and percentages of cases settled are as follows:

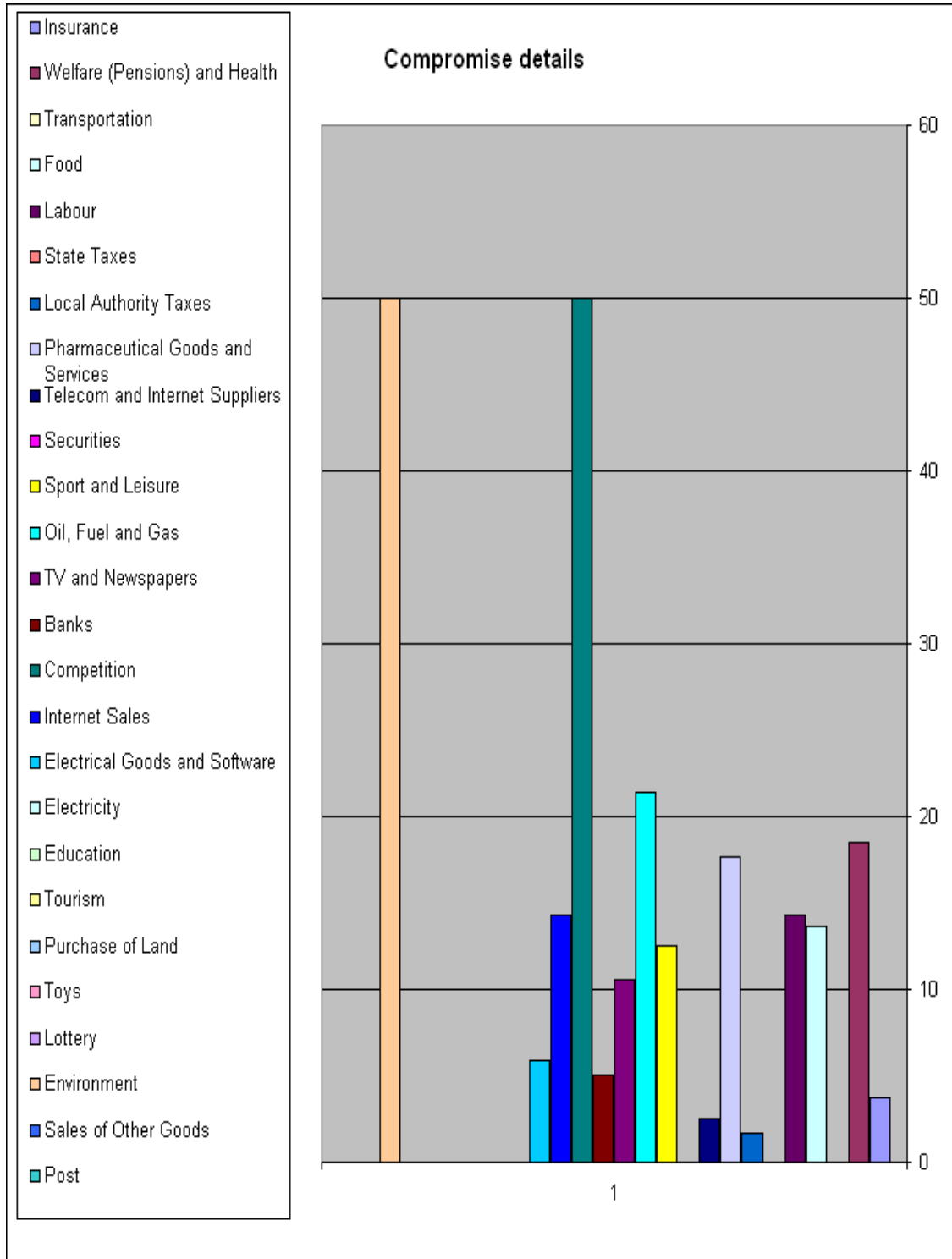
- Environment - 50% of the actions were finalized by a settlement (probably due to the small number of claims)
- Competition - 50% (probably due to the small number of claims)
- Welfare (pensions) and Health - 18.51%

⁷⁵ See Globes, (n 69).

- Oil and Fuel - 21.4%
- Labour - 14.2%
- Food - 13.6 %
- Sports and Leisure - 13.1%
- Telecommunications - 12.8%
- Pharmaceuticals - 17.6%
- Internet Sales - 14.2 %
- TV and Newspapers - 10.5%

As a consequence, there are likely to be more claims in these fields than in other areas where defendants tend to fight until a court judgment is handed down, since the chances of achieving a settlement are higher. The rates of settlement are shown in Diagram Three.

Diagram Three (A and B) – The Rate of Settlements



This diagram represents the percentages of settlements in each area of law. In environment claims and competition claims, rates of settlement were highest for the period from March 2007 to December 2009.

The statistics on the rates of settlement show that class actions in Israel are not submitted in vain. It is difficult to assess the exact benefit for each action. However, the fact that many cases are settled shows that the procedure benefits consumers, while also rewarding representatives. It should be borne in mind that the fairness of settlements are monitored under the Israeli system and, in principle, the courts will not approve a settlement which has no benefit for class members.

The Israeli precedent exemplifies both the strengths and weaknesses of the collective action system and therefore should be studied before the introduction of a European model. The rationale behind allowing class actions in Israel is to assist in improving access to the courts and law obedience by financial sanctions. The Israeli legislator has succeeded in achieving these goals. Indeed, there are many class actions in Israel, and many new consumer law issues have been settled through collective proceedings. Such case law would not have been submitted to the courts without the introduction of the very important machinery of class actions.

The features of Israel's new legislation differ from those of standard collective redress legislation existing in Europe. Should some of these central characteristics be imported into a coherent European model, they may result in a system which is more accessible for European consumers.

In Chapter Three the features of the Israeli model will be discussed in detail, including the accessibility of the system. These features will be compared with the existing collective redress models in several European member states so as to identify the distinctions between the Israeli model and the models currently operating in Europe.

Chapter Three:

The Pillars of a Workable Model for Collective Actions

Introduction

The introduction of Israel's Class Action Law (CAL) led to a sharp increase in the number of collective redress actions brought before the courts. Although it could be argued that the increase in cases had a negative impact on the Israeli economy, for example, by causing a rise in insurance premiums, the CAL has proved to be more workable and accessible than any comparable European class action framework. The increase in the volume of collective actions has enabled consumers to merge their personal claims and transform them into weapons fit to challenge large firms operating in the consumer market. On the other hand, the perverse effects of accessibility can be controlled through the use of safeguards and 'brakes' as well as additional filters as we will further explore in Chapters 4 and 5 respectively.

At this stage, we want to focus on the reasons why the Israeli model succeeded in opening the filed for consumers bringing actions. In this chapter those features which affect the accessibility and workability of the Israeli model will be discussed in more depth. The aim of this chapter is to isolate the elements which may transform a model of collective redress into a workable model bringing benefit to consumers at large. In an effort to create a practical European model for collective redress that will improve access to justice for European consumers, it is interesting to compare the effectiveness of the Israeli provisions with the existing European models. In order to do so, the key elements of the Israeli model should be examined and compared with the features of systems operating in some European Union member states.

In essence, the workability of the Israeli system rests on four main pillars enshrined in the CAL: an 'opt-out' provision, which enables large classes to group together with a wide range of possible representatives both from the private and public sector, financial incentives, possible funding, and the wide scope of the CAL which allows

class actions to be brought in many areas of law. These elements will be reviewed in turn in the next parts of this chapter. In Part A of this chapter, the opt-out mechanism operating in Israel will be reviewed and compared with the opt-in machinery which is the most common collective redress mechanism used in Europe. In Part B of this chapter, the nature of the representative that leads the action will be examined. Part C of this chapter deals with financial incentives and their contribution to the collective procedure. The last part of this chapter, Part D, deals with the scope of actions suitable for collective redress cases.

Part A. The Opt-Out Mechanism as the Basis for a Workable Model

The Israeli collective redress system relies almost entirely on the opt-out machinery. This is the default provision in Israel, although opt-in cases are also possible under the Israeli system, the latter never having been used in Israel thus far. In the following sections of this part of the chapter, the essence of the two systems will be examined, and the importance of the distinction between the two systems will be emphasised.

1. The Debate over the Opt-Out versus the Opt-In Mechanism

In an opt-out system, every class member is automatically considered to be a member of the group in the court proceedings, unless they elect to opt-out of the class during a specified period of time, often referred to as the opt-out period. Thereafter, anyone who has not excluded himself from the class by giving express notice will be bound by the decisions in the action. Conversely, in an opt-in system, the judgment in the proceedings binds all members of the class provided they were named as parties to, or actively joined, the legal proceedings. Once a class member has elected to join the class he is bound by any decision in the proceedings. The opt-in model could be described as a more conservative approach than the opt-out system, since it requires each member of the group to actively elect to become a member of the class.

The choice between an opt-in or opt-out mechanism is critical to the success of any collective redress framework. As the English Civil Justice Council (CJC) stated:

An essential feature of any court-based collective redress system is the possibility that proceedings can be brought on an opt-out basis. The failure to provide such a mechanism, as an option alongside an opt-in mechanism, will ensure that any collective redress system introduced will fail to become fully effective.¹

The question whether to design an “opt in” or “opt out” regime was described by the Ontario Law Reform Commission as “one of the most controversial issues in the design of a class action procedure.”²

In the European context, Professor Mulheron has claimed that ‘piercing the river of ink that has poured forth on this topic of collective redress..., there is one question which hovers above all others, namely, whether European member states implement an opt-out mechanism.’³

The European Commission Green Paper on Consumer Collective Redress also recognised the importance of this issue for a future European collective redress model.⁴ In fact the decision between the opt-out and the opt-in mechanism is one that makes the system function. Lessons from the U.S. and Israel have taught that the opt-out mechanism renders the system workable, albeit raising questions of fair trial and representation of victims without having a power of attorney to do so. The Israeli system is one of the most modern opt-out models capable of combating some of the problems which were so evident in the U.S. The Israeli model does not allow punitive damages, and therefore avoids one of the most troubling features of the U.S. regime. It is the Israeli model, set down in the CAL 2006, that will be reviewed in the following part of this chapter.

¹ Civil Justice Council, *Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC (2011) 173 Final)* available at: <http://ec.europa.eu/competition/consultations/2011_collective_redress/cjc_en.pdf> accessed 28 July 2011.

² Ontario Law Reform Commission, *Class Actions* (Report, 1982) 306 see at page 454.

³ Professor Rachael Mulheron, ‘*The Case For an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*’ [2008-2009]15 Colum. J. Eur. L. 409.

⁴ European Commission ‘Green Paper On Consumer Collective Redress’ COM(2008) 794 final. <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf> accessed 26 October 2011.

2. *Theoretical Background: Interest v. Consent Theories*

The opt-out mechanism is strange to conservative types of two party litigation. Normally it is the parties to the case who choose their representatives. However, in the opt-out system, there is no choice of representative. The opt-out machinery may be explained along the lines of the interest theory presented by Prof. Yeazell⁵ which is based on the debate around the issue of parliamentary representation which took place in the early 19th century prior to the enactment of the Reform Bill.⁶ According to this theory, the representative (like parliamentary representatives) does not have to be appointed by the represented group and they may still act as proper representatives as long as they are acting in the interests of the group's members. There is no need for Parliament to represent all the residents in all counties - it is sufficient that all the interests of such residents are represented in Parliament. The concept at hand is that in a capitalistic society all rational people will act for their economic benefit, and thus the representative will act in the interests of the entire group of residents sharing his interests, even though they did not elect him. With regards to representative actions, the interest theory does not require that the group members appoint their representative. This theory only requires that the representative claimant represents the interests of the group members properly. The interest theory emphasises the proper representation of the group by a representative who has the same interests and who is acting for the group's benefit. Yet, the problem with this theory is that not all groups of persons have the same interests. The theory regards it as sufficient that the interests are represented and thus disregards the idea that every person has the right to choose his own representative.

In relation to collective redress, this interest theory has the power to rebut one of the major arguments against the opt-out mechanism, namely, that each person has the right to be present in his case and decide when to commence legal proceedings. The theory implies that if citizens agree that someone else with the same interests will represent them in parliament, why should court proceedings be any different?

⁵ Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation* 27 UCLA L. Rev 1067 (1980) p. 1068.

⁶ Gil Lotan and Eyal Raz, *Class Actions Part I* (2006) 36.

By contrast, the opt-in theory is based on consent. This theory is based on the consent of all group members to be joined in one procedure. It is more joinder than representation.⁷ This theory is considered part of a due process requirement theory.⁸ It was argued⁹ that this theory is suitable for group members in large scale actions who do not have the necessary resources to file an action against a large company which has acted as the wrongdoer. In these cases after the core common questions have been decided in favour of the group, a notice should be given to enable all potential group members to join in the legal proceedings in order to benefit from the judgment in favour of the group. In return for joining the action, these new group members will be required to pay a share of the costs of the class in managing the action. This offer is based on the consent theory which provides that only those members who have actively elected to join the action will be bound by the decision in the proceedings.

The consent theory is regarded as unfair to defendants, since members of the group may elect to opt in once a court decision has been made in favour of the group. The defendants will not know the amount of damages they are facing until the process is complete. On the other hand, if judgment is made against the group, group members will not join the action and the defendant may be sued in the future by other group members.

In the debate over the proper mechanism to use, the interest theory may be persuasive in demonstrating that the opt-out mechanism is not foreign to European culture and since persons act by representatives in Parliament, so too such an approach may be taken in the courts.

3. The Hybrid Opt-Out Solution in Israel

The CAL includes an opt-out mechanism and provides that once a motion to allow class proceedings has been approved, each class member is considered part of the proceedings unless he indicates within 45 days, or a period of time determined by the

⁷ Stephen C. Yeazell, (n 5).

⁸ See J. E Kennedy "Class Actions: The Right to Opt Out" 25 Ariz. L. Rev 3, 35.

⁹ H. Kalven, Jr. & M. Rosenfield "The Contemporary Function of The Class suit" 8 U. Chi. L. Rev. 684 (1941).

court, that he wishes to opt-out of the action.¹⁰ The opt-out period aims to give each member a reasonable period of time to consider his individual circumstances and to decide whether to opt-out of the proceedings. The definition of ‘class action’ under the CAL provides that it is an action on behalf of a group of persons who have not granted a power of attorney to the representative plaintiff. This definition indicates in itself that the procedure in Israel is based on the opt-out mechanism. In an opt-out system, the plaintiffs are not identified from the outset and thus they cannot grant a power of attorney to their lawyer. The provisions of the CAL provide that opt-in actions are intended to be used in large personal claims, thus demonstrating that the legislator intended opt-out actions to be used in circumstances involving many small actions of the same kind. It is only the aggregation of these small claims which make it rational to deal with court actions in these circumstances. The CAL provides that the judgment in a class action binds all the class members, unless explicitly provided otherwise.¹¹ This provision is at the heart of the opt-out mechanism and it provides that unless the class members opt-out of the class, they will be bound by the judgment.

However, with regards to opt-in claims, the CAL preserves the court's right to decide in exceptional circumstances that the class of persons represented should include only those members who have given notice that they wish to become part of the class.¹² The opt-in procedure in Israel is an exception to the default opt-out mechanism in the Israeli class action, and only applies if the process of ascertaining all members of the group and notifying them of the proceedings can be carried out at a reasonable cost.¹³ The exceptional circumstances in which the court may allow an opt-in action include, inter-alia:

1. Where there is a reasonable probability that many of the class members will submit claims for the same cause of action; and
2. Where the amount of each action is substantial, including negligence claims.

¹⁰ Class Action Law 2006, s 11 (Israel).

¹¹ Class Action Law 5766–2006, s 24 (Israel).

¹² Class Action Law 5766–2006, s 12 (Israel).

¹³ *Ibid.*

The Israeli legislator took the view that 'big sum' claims were not suited to regular opt-out class action proceedings. Consequently, the CAL provides that where such claims are approved, the court may provide that they will be managed as opt-in class actions and that the expenses will be shared by all the members of the class. The Israeli legislator was of the opinion that the opt-in system was suitable for cases involving substantial sums where the plaintiff could bring and manage his own action.¹⁴ Class actions in these cases assist in the management of the proceedings and may prevent contradicting judgments which could result from several actions on the same issue. Although the opt-out mechanism has led to more class actions in Israel, it is questionable whether such a provision should be adopted in Europe as in some member states such as representation without power of attorney contradicts fundamental principles of the jurisdiction. The opt-in collective action has the advantage that it preserves the liberty of an individual to choose whether to bring the action or not.¹⁵ On the other hand, the opt-out mechanism in typical consumer cases is the only mechanism which may be useful to consumers. Consumers are normally apathetic as regards their rights, making the right to opt-out or object less meaningful for class members. Opt-outs from class participation are very rare. On average less than 1% of class members opt out.¹⁶

In the search for a new European coherent model, the European Commission must decide which mechanism best suits consumer interests in the European Union. In order to address this point, it is helpful to examine the empirical evidence on the effect of opt-out class actions, the legal arguments both in favour and against the opt-out model, and the current use of such instruments in Europe. Further, we will investigate the reasons why the Israeli jurisdiction, despite having put in place and opt-in mechanism¹⁷ has never acknowledged it and made use of it. All collective claims in Israel, without exception, have been based on the opt-out model. One of the main reasons the Israeli law based its mechanism on opt-out stems from the experience

¹⁴ S. Goldstein and T. Fisher, *'The Interaction Between Mass Actions and Class Actions – Procedural Aspects'* [2004] *Mishpatim Lamed Dalet* 21.

¹⁵ R. Mulheron: 'Some difficulties with group litigation orders- and why a class action is superior' *C.J.Q* 24 (Jan), 2005 p. 40-68 at p. 50.

¹⁶ T. Eisenberg and G. Miller, *'The role of opt-out Objectors in Class Action Litigation: Theoretical and Empirical Issues'* [2004] 57 *Vand. L. Rev* 1530 at page 1532. See also Myriam Gilles and Gary B. Friedman: *'Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers'* 155 *U. PA. L. REV.* 103, 106-08 at page 133.

¹⁷ *Class Action Law* 2006, s 12 (Israel).

learnt from the U.S. which, as we will shortly demonstrate in the next part of the chapter, clearly shows that the opt-out mechanism dramatically improves access to justice.

4. Gathering Evidence from the U.S. on the Importance of the Opt-Out Mechanism

In 1938, the U.S. Congress promulgated the Federal Rules of Civil Procedure, which introduced a new, significantly different class action system. Rule 23 of the Federal Rules of Civil Procedure imposed a new set of requirements for certifying a class action and divided class actions into three different categories: ‘true’, ‘hybrid’ and ‘spurious’.¹⁸

Rule 23 was silent on whether all potential class members were excluded from an action unless they affirmatively opted in, or whether all potential class members were included unless they affirmatively opted out.¹⁹ Despite this lack of clarity, the default standard in the U.S. before 1966 was the opt-in model and a judgment was not binding upon those who were not explicitly included in the class.

The argument against this system was that many people may not have realised that they had been harmed, and it was difficult to communicate effectively with large numbers of potential class members. In addition, an affirmative opt-in requirement was seen as a substantial obstacle to class formation and could leave large numbers of claimants, who were unaware of the proceedings, with no remedy.

There were difficulties for defendants as well as potential plaintiffs, since an opt-in system could lead to serial litigation, with claimants waiting for the outcome of a group action before deciding to join their personal action to the proceedings. One

¹⁸ True class actions were available where the owner of the primary right of action refused to enforce it. Hybrid class actions were permitted when the rights among class members were several and the object of the action was the adjudication of claims affecting specific property involved in the action. Spurious class actions were available when the rights among class members were several and when there was a question of law or fact affecting the several rights and when common relief was sought. This category caused confusion due to the unclear requirement for common relief and it could only bind those who were named as parties.

¹⁹ Benjamin Kaplan, ‘*Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*’ [1967] 81 Harv. L. Rev. 356.

District Court observed, ‘Prior to the 1966 amendment to the Rule, an individual could wait to see the outcome of the litigation before deciding whether or not to become a party’.²⁰

However, as a result of a recommendation by the Advisory Committee on Rule 23, in 1966 this Rule was revised to permit opt-out class actions.

The opt-out regime appeared to resolve these problems by creating large classes, preventing multiple litigation and providing an incentive in the form of bonuses to plaintiffs and lawyers who wanted to represent large classes. It also allowed classes to be created more quickly since it abolished the need to wait for many members to opt-in and it facilitated the prompt adjudication of claims in one action.²¹

The introduction of the new opt-out rule seemed to be the most advantageous change of the 1966 amendments, since it brought with it a change in the use of class actions in the U.S.²² From 1938 and until the 1966 amendments, the use of class actions in the U.S. had been very low, with actions being few and far between.²³ The supporters of the amendments expected that consumers would benefit most from the changes to Rule 23 and did not anticipate that lawyers would become the real entrepreneurs of class action litigation.

As the Ninth Circuit explained,

There is nothing in the Advisory Committee’s Note that suggests that the amendments had as their purpose the authorization of massive class actions conducted by attorneys engaged by near-nominal plaintiffs.²⁴

²⁰ *Chrapliwy v. Uniroyal, Inc.*, 71 F.R.D. 461, 463 (N.D. Ind. 1976).

²¹ Richard A. Nagareda, ‘The Preexistence Principle and the Structure of the Class Action’ [2003] 103 *Colum. L. Rev.* 149, 226.

²² In *Amchem Products, Inc. et al. v. Windsor et al.* 521 U.S. 591 592 (1997) it was said that ‘Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out’.

²³ Edward F. Sherman, ‘American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems’, 215 F.R.D. 130, 132 (2003) see at page 133.

²⁴ *La Mar v. H & B Novelty & Loan Co.* 489 F.2d 461, 465 (9th Cir. 1973). See Thomas B. Leary, ‘The FTC and Class Actions’ available at: <<http://www.ftc.gov/speeches/leary/classactions Summit.shtm>> accessed 18 November 2011.

The effect of the 1966 amendment and, more particularly, the introduction of the opt-out mechanism, was a much greater than expected increase in the number of class actions.²⁵ Under this revised rule, classes “were almost certain to be larger – and the sum of their potential damages, therefore, much larger – than classes certified under the old rule.”²⁶ Consumer rational apathy meant that consumers did not opt-out, thus creating actions with large classes. It turned class actions into profitable business and thus attracted lawyers to taking on such actions. The new opt-out system exacerbated pre-existing principal-agency problems by permitting lawyers to speak for immense phantom classes of people who had not selected them, and who may have been entirely unaware that they were parties to a lawsuit.²⁷ The large number of claims brought after 1966 renewed the debate on the most appropriate class action mechanism and a reversion to the opt-in model was contemplated in 1998 by a subsequent Advisory Committee on amendments to Rule 23 due to the abuses that were so evident following the adoption of the opt-out class action system in the U.S. However, the Advisory Committee took the view that people generally do not tend to respond to invitations to join court cases and therefore left the opt-out model intact.²⁸ Furthermore, the opt-in system could lead to smaller classes which would be less attractive for representatives and thus less effective, especially in consumer cases, since one of the aims of the opt-out mechanism was to maximise economies of scale by gathering all the claimants into a single proceeding.²⁹

The developments in the U.S since 1966 provide a very significant example for European legislators, demonstrating that the opt-out mechanism transformed an

²⁵ Edward H. Cooper, ‘Class Action Advice in The Form of Questions’ [2001] 11 Duke J. Comp. & Int’l L. 215.

²⁶ Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132 (2003) see at page 133.

²⁷ Tiana Leia Russell, ‘Exporting Class Actions to the European Union’ (2009) available at: <http://works.bepress.com/tiana_russell/1/> accessed 21 March 2012

²⁸ In a speech to the National Press Club in Washington, D.C. on May 20, 1998, the then-chair of the Civil Rules Advisory Committee, Judge Paul V. Niemeyer, observed, ‘The inertia of not responding [to notice] has been identified as the cohesive force behind the viability of plaintiff class actions. [Requiring individuals to opt in] is. . . the change to the rule that could be made to eliminate most of the class actions or radically reduce their size’ Deborah R. Hensler, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, Erik Moller. Hensler, Deborah R., Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Corporation, 2000) Chapter 16 ‘The objectives of rule 23(b)(3) Class Actions’ 16 (477 fn 10).

²⁹ T. Eisenberg and G. Miller, ‘The Role of Opt-Out Objectors in Class Action Litigation: Theoretical and Empirical Issues’ [2004] 57 Vand. L. Rev 1530.

unused tool of legislative class action machinery into a workable system albeit with some deficiencies which should be dealt with separately. The fact that the flourishing of the U.S. class action occurred after the opt-out system was introduced in 1966 may emphasise the importance of the opt-out system in dramatically improving access to justice.

5. Empirical Examination on Participation Rates in Opt-In and Opt-Out Cases

The main argument that one can put forward in order to convince the European Commission to include an opt-out provision in the new collective redress model is the improvement of access to justice which results from large classes engaging in typical consumer actions that would have never gone to court, rendering such actions economically viable for lawyers to take on. Plaintiffs would never go to court against a powerful defendant for a petty amount of damage. The only way to bring such actions to court where no other collective solution is available is by aggregating the claims into a single large legal action.

Empirical studies are of great assistance when considering whether the the opt-out model leads to better rates of participation and larger classes. The differences between the two systems of collective actions may be only exemplified from data gathered from the U.S. or Canada where the opt-in and opt-out mechanisms were in use. Once the empirical data has been studied, conclusions may be reached in relation to the recommended model for European consumers.

A. Opt-In Rates

With regard to opt-in statistics, information from several sources demonstrates that the rates of participation in opt-in cases are extremely low. In the U.S., a study from 1974³⁰ cited by Prof. Mulheron³¹ referred to three cases where judges were required to manage the action on an opt-in procedure, reducing the class size by 39%, 61%, and

³⁰ Bruce I. Bertelsen, Mary S. Calfee, and Gerald W. Connor, 'The Rule 23(b)(3) Class Action: An Empirical Study' [1974] 62 Geo. L.J. 1123, 1145.

³¹ According to statistics collected by Prof. Rachael Mulheron, see at page 155 of The Perspective of Need report.

73% respectively. Thus the median level of participation was between 27% and 61%. This data shows that use of the opt-in mechanism caused the size of the group to drop considerably.

With regard to opt-in cases, Prof. Mulheron examined a number of European collective redress cases and their participation rates in her Perspective of Need report for the CJC.³² In the majority of the English cases examined, which were managed under a Group Litigation Order, the opt-in rate was less than 50 percent. This information was gathered by Prof. Mulheron from practitioners dealing with these matters who were asked to fill out a questionnaire in order to study the participation rates in the opt-in cases which were tried in the U.K.³³ With regard to other European jurisdictions, Prof. Mulheron found a low figure of participation in opt-in cases and cited³⁴ an example from the Italian courts where Italian investors were invited to sue for wrongdoings in the financial market. The class in this case included hundreds of thousands of investors. Only 3000 members opted in.³⁵ In a case in France, only 12,521 class members opted in from a class of 20 million telephone subscribers.³⁶ These cases demonstrate a rate of participation as low as 0.03% of all class members.³⁷

Prof. Mulheron goes even further to prove that opt-in actions have low participation rates even in "follow-on cases". These actions are well-founded on their merits, with a first instance finding that the complaints were justified in an early ruling. Prof. Mulheron refers specifically to the follow-on actions³⁸ which are conducted under the U.K. regime in antitrust cases and are generally less risky for consumers and carry a higher chance of success since the defendant has already been convicted for misconduct. Consequently, the low rates of participation in follow-on opt-in cases suggest that it is not the fear of having to bear heavy expenses that deters consumers

³² See Prof. Rachael Mulheron (n 31) at pages 154-156.

³³ See Prof. Rachael Mulheron (n 31) at pages 154-155.

³⁴ See Prof. Rachael Mulheron (n 31) at pages 155-156.

³⁵ *Altroconsumo v. Parmalat*, published in the Dow Jones News on 15 January 2004 available at <http://www.milanofinanza.it/news/dettaglio_news.asp?id=2004011527124&chkAgenzie=PMFNW&sez=news&testo=Altroconsumo&titolo=Parmalat:%20Altroconsumo%20valuta%20possibilita'%20azione%20legale> accessed on the 24 March 2012.

³⁶ *UFC Que choisir v. Orange France, SFR and Bouygues telecom* press release available at <<http://www.ufcquechoisir-iledefrance.org/fcporange.htm>> accessed 24 March 2012.

³⁷ *Ibid.*

³⁸ Prof. Rachael Mulheron (n 31) at page 42.

from opting-in, but rather consumers are unwilling to intervene positively in legal proceedings when they only stand to recover a small share of the damages award. This is the result of the so called 'rational apathy' of consumers³⁹ and financial rewards have been suggested as the solution to overcome this apathy.⁴⁰

In order to prove that there is also a low rate of participation in English follow-on cases, *The Consumers Association v JJB Sports plc* case was examined.⁴¹ This case concerned price-fixing arrangements between the manufacturers and distributors of replica Manchester United and England football shirts, as a result of which potentially hundreds of thousands of consumers paid inflated prices for the shirts. The Office of Fair Trading (OFT) found the defendant guilty of price-fixing and imposed a substantial fine of GBP18.6 million. However, in the civil suit that followed brought by the consumer association 'Which' against the trader JJB, only 130 consumers joined the opt-in proceedings and were named in the claim form. The only explanation that can be given for such a low level of participation in a follow-on case is consumer rational apathy. Where the level of personal loss is very low, consumers do not care and do not wish to get involved. This corollary is particularly true in NEV suits, also referred to as "Group B" consumer litigation, where the costs of litigation exceed the personal value of the claim.⁴²

Prof. Mulheron's findings are substantiated by a more recent report which agreed with previous findings that individuals in opt-out procedures remain in the class more often than individuals who join opt-in procedures. Individuals in opt-in procedures fail to file a claim more often than individuals in an opt-out procedure. This study also found that knowledge of the outcome of the class action impacts upon individuals' decisions and preferences. More specifically, individuals who know the result of the class action consider filing an individual complaint more often (and actually do so) than

³⁹ Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions taken by Associations' [2000] 9(3) *European Journal of Law & Economics* 183.

⁴⁰ Sonja Elisabeth Keske, 'Group Litigation in European Competition Law: A Law and Economics Perspective' at <[http://publishing.eur.nl/ir/repub/asset/17790/Sonja%20Keske%20Thesis\[1r\].pdf](http://publishing.eur.nl/ir/repub/asset/17790/Sonja%20Keske%20Thesis[1r].pdf)> accessed 18 November 2011 at page 297.

⁴¹ *The Consumers Association v JJB Sports plc*, CAT Case number 1078/7/9/07. <<http://www.catribunal.org.uk/238-640/1078-7-9-07-The-Consumers-Association.html>> accessed 16 July 2011.

⁴² Maria Ioannidou, 'Enhancing the Consumers' Role in EU Private Competition Law Enforcement: A normative and practical approach' (Dec 2011) 8(1) *The Competition Law Review* 59-85, see at page 69.

individuals who do not know the result. Similarly, those aware of a class action outcome are less likely to file no complaint than individuals who are unaware of the outcome. Certainty regarding the outcome of the class action results in more individuals filing claims.⁴³ Yet the participation rates in opt-in collective actions are very low.

B. Opt-Out Rates

A U.S. survey from 1974 showed that 58% of cases in a national study had one or more opt-outs.⁴⁴ A subsequent survey of four federal district courts found that one or more class members opted out in only 42-50% of class actions for damages brought under Federal Rule of Civil Procedure 23 b(3).⁴⁵ In all the four districts that were examined, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership. In 75% of the opt-out cases, 1.2% or fewer class members opted out.

The 1974 survey suggests that the smaller the average individual claim, the greater the number of cases in which low figures of opt-outs were registered. This data stresses the assumption that in consumer claims, class members are apathetic, and incentives must therefore be introduced in order to make the actions economically viable. The opt-out mechanism is not an incentive per se, but since it creates large classes making the action worth undertaking.

With regard to opt-out systems, the CJC's report on 'Improving Access to Justice through Collective Actions' sets down statistics collected by Prof. Mulheron from various countries which show that the opt-out classes examined were almost full.⁴⁶

⁴³ Gijs van Dijck, 'Class Membership in Class Actions: An Experimental Study of Opt In and Opt Out Models' (2011) 142 nr. 6912 Weekblad voor privaatrecht, notariaat en registratie 1105-1112.

⁴⁴ Bruce I. Bertelsen, Mary S. Calfee, and Gerald W. Connor, 'The Rule 23(b)(3) Class Action: An Empirical Study' (n 30).

⁴⁵ Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 1996* (Federal Justice Center, 1996) at <<ftp://ftp.resource.org/courts.gov/fjc/rule23.pdf>> accessed 18 November 2011.

⁴⁶ Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* [2008] Final Report, 153. <<http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/CJC%20papers/CJC%20Improving%20Access%20to%20Justice%20through%20Collective%20Actions.pdf>> accessed 16 July 2011.

For example, in Victoria State (Australia), the rate of participation was 87%,⁴⁷ in the U.S. it was 99.8%,⁴⁸ in Canada it stood at between 60-100%,⁴⁹ in Australia, 59-98%,⁵⁰ in Portugal, 100%,⁵¹ and in the Netherlands, 97%.⁵²

The Manitoba Law Reform Commission's Paper on Class Proceedings⁵³ cited by Professor Mulheron,⁵⁴ which referred to the above-mentioned survey of four districts by Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, reached the same conclusions, namely that participation rates are much higher in opt-out regimes. This is also the conclusion reached by Prof. Mulheron.⁵⁵

This evidence suggests that opt-in actions are characterised by low participation rates, since consumers and those with small damage claims are apathetic and prefer not to participate in legal actions where they have little to gain by doing so. In contrast, it would appear that this same sense of apathy leads to high rates of participation in opt-out class actions as potential claimants are not sufficiently motivated to exercise their right to opt-out. Therefore, in claims involving low sums, it is essential that the European Commission favours an opt-out model which better serves consumers who trade in the European market.

⁴⁷ Based on information published in Prof. Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council, 2008), hereafter, *The Perspective of Need report*, <<http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-justice-council/cjc-research-need-consumer-redress>> accessed 18 November 2011 which referred to the Morabito's National Report: 'Group Litigation in Australia — "Desperately Seeking" Effective Class Action Regimes: National Report for Australia Prepared for the Globalisation of Class Actions Conference, Oxford University, December 2007', available for perusal at <http://www.law.stanford.edu/display/images/dynamic/events_media/Australia_National_Report.pdf>

⁴⁸ Based on Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, (n 45).

⁴⁹ According to statistics collected by Prof. Mulheron from five cases see at page 150 of *The Perspective of Need report*.

⁵⁰ Prof. Mulheron based her conclusions on four cases and information received from practitioners in Australia from Clayton Utz Solicitors in Sydney.

⁵¹ The Portuguese information was gathered by Prof. Mulheron from three collective redress cases managed by the Consumer Association, DECO. *DECO v Portugal Telecom*, *DECO v Academia Opening*, *DECO v Water provider company*.

⁵² This information is mentioned in *The Perspective of Need report* and is based on the Dexia case in the Netherlands and published in BEUC, *Private Group Actions — Taking Europe Forward* (8 October 2007), p 15.

⁵³ Manitoba Law Reform Commission, 'Class Proceedings' (1999) Report 100, 27 available at <www.gov.mb.ca/justice/mlrc/reports/100.pdf> accessed 22 March 2012.

⁵⁴ Prof. Rachael Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' [2007] 70 (4) *The Modern Law Review* 550, 557 fn 75.

⁵⁵ Civil Justice Council, (n 46).

It may be mistakenly presumed that if proper notices were given, the opt-out mechanism would result in the same rates of participation as opt-in cases. This presumption is based on the assumptions that if consumers were acting rationally, they would opt out of unjustified cases and opt in to cases with a good chance of success. However, the studies mentioned above (Mulheron, Gijs van Dijck, Bertelsen, and Willging) demonstrate that class members do not care sufficiently about the legal proceedings, probably due to the small personal sums which are at stake.

Therefore, class members are usually indifferent to the outcome of class action proceedings and in most instances will not bother to opt in or opt out of an action. This apathy may explain why opt-out classes are always larger than opt-in classes. In view of Prof. Mulheron's conclusion that the rates of participation in opt-out cases are much higher than opt-in cases,⁵⁶ a proportionate opt-out mechanism should be introduced with some brakes and safeguards in order to prevent possible abuses of the system. Yet, the case in Europe is that many member states, having weighed the arguments in favour and against the opt-out mechanism, prefer the opt-in model. These arguments will be discussed in the following part of this chapter.

6. The Opt-In Mechanism is Expensive and Has More Administrative Requirements

One of the issues associated with an opt-in system is that the organization seeking to bring the case must seek potential claimants to join the action, for example, through the press. It can be very difficult to identify and name all class members allegedly affected by the defendant's conduct where identifying potential class members may be easily within the defendant's knowledge but not within the group's knowledge.⁵⁷

In addition to the expense and administrative burden of locating potential claimants, the representative (which is bringing the action) has to keep records of all members of

⁵⁶ Civil Justice Council, (n 46).

⁵⁷ European Commission, SANCO, The Study Centre for Consumer Law, Centre for European Economic Law Katholieke Universiteit Leuven, Belgium, 'An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings Final Report' Leuven (January 2007) available at <http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm> accessed 24 March 2012 see at page 289.

the class and keep track and maintain complete files on them, which might dissuade an organisation from bringing a collective action. In opt-out cases the members are not personally identified at this stage and consequently, the administrative burden is much less than in opt-in cases. The European Consumers' Association (BEUC) noted the high expenses of running an opt-in collective action in the Forum-Afinsa cases,⁵⁸ where the Spanish consumer organisation OCU had to hire nine full-time members of administrative staff to collect all the necessary information, record and store all the documents and follow up with consumers.⁵⁹

The expenses relating to opt-in litigation prove to be a burden on the claimants and reduce the amount of actions brought substantially. The management and the organisation costs make the opt-in procedure unworthy and risky. On the other hand, in opt-out proceedings there are less expenses, there is no need to trace the class members from the outset of the case, and there is no need to keep a constantly updated file on all class members. Furthermore, due to the large size of the class there is better utilization of economies of scale. Therefore the expenses arguments favour use of the opt-out model and should be taken in consideration for the new European model.

7. Under-Compensation in Opt-In Proceedings

It is thought that the opt-in system may result in under compensation, and would therefore provide compensation to fewer victims,⁶⁰ since many potential class members do not join the action. The small classes of victims mean that the defendant will not account for the full damage caused by his actions. Consequently, some of the illicit gain may remain in the hands of the wrongdoer.⁶¹

⁵⁸ <<http://www.adicae.net/international/classactions.asp>> accessed 20 November 2011.

⁵⁹ BEUC, Towards a Coherent European Approach to Collective Redress, European Commission Consultation: The European Consumers' Organisation (BEUC)'s response (2011) available at: <<http://www.beuc.org/Content/Default.asp?PageID=2140>> accessed 20 November 2011. See at page 12, footnote 25.

⁶⁰ Robert Gaudet, Earth to Brussels: Lessons Learned From Swedish, Norwegian, Danish, and Dutch Class Actions for the European Union debate on collective redress, Stockholm University (June 2008) available at: <www.stanford.edu/group/lawlibrary> accessed 25 November 2011 see at page 64.

⁶¹ European Commission 'Commission Staff Working Paper Accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}' 2008 SEC(2008) 404

Potential defendants would tend to favour the opt-in mechanism as they are more likely to be sued for smaller amounts and will not have to provide full compensation for the damage caused by their wrongful actions. On the other hand, opt-out class actions usually involve a larger class and the defendant is therefore more likely to be held accountable for the full damage caused.

This argument is also the main objection to the opt-out mechanism. The fact that there are large classes in opt-out proceedings is due to the fact that these actions sweep in even those who are not interested in joining.⁶² This is because many class members may not be aware of the proceedings or, on account of consumer rational apathy, will not exercise their right to opt-out. As a result, opt-out classes tend to be large and include members who are often not interested in suing the defendant for his misconduct.

If many disinterested members are inadvertently included in the class, the defendant may pay higher damages than he would have paid in an opt-in proceeding. However, this argument is also an advantage of the opt-out system, as it ensures that the damages award is based on the full loss caused and not merely on the number of class members who have joined the action. There is no doubt that consumers' interests are better served if large firms are held accountable for the full amount of harm they have caused.

In order to deal with this objection to the opt-out mechanism, Israeli legislation requires all members interested in the action to join at the end of the case in order to claim their share of the compensation paid to the class (except where compensation is granted for the general good at large). Therefore once an Israeli court has held in favour of a class, it sets down criteria for distributing the fund and appoints a trustee to monitor the distribution process.⁶³ This means that only those who are interested in the action will step forward at the end of the case to collect their share of the compensation. This is preferable to the opt-in model which requires all members to be

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0404:EN:NOT>>
accessed 28 July 2011 (See section 58).

⁶² Professor Rachael Mulheron, (n 54) 550.

⁶³ Class Action Law 5766–2006, s 20(B)1 (Israel).

part of the case from the outset. In the opt-out class action, the class members who join the proceedings at the end of the case need only collect their share of the compensation, and are not subject to cross examination or payment of costs.

Professor Hodges seems to object to the type of provision which enables class members to come forward in order to collect their share at the end of the case, claiming that there is strong empirical evidence that consumers do not step forward in many cases, since the sums involved are too small to be worth collecting.⁶⁴ Therefore, a solution is required to deal with uncollected funds. In Israel, this solution takes the form of a *cy-pres* distribution whereby the court directs distribution of the uncollected funds. In Israel, damages are distributed among the class members but no member is permitted to receive more than his allocated share, and the remaining funds are handed to the Treasury without any limitation as to the purpose for which such funds may be used.⁶⁵ The court may also order damages for the benefit of the public in general or the distribution of funds for good causes.⁶⁶ In this way, the defendant remains accountable for the full damage that he had caused.

Looking at the European market, the opt-out provision should be preferred in our view. The opt-out mechanism will make defendants accountable in full for their actions and will compel them to adhere to consumer protection legislation in the long run, given that the full amount of any unlawful gain will be paid back to the victims. In opt-in cases, defendants are not accountable in full for their actions, and will therefore lack a real incentive to refrain from unlawful behaviour in the future.

8. Better Treatment of the "Free Riding" Problem in the Opt-Out Mechanism

In an opt-in situation, the potential plaintiffs may choose not to opt-in, but rather to wait for the outcome of the action and then decide whether to join it or not. In the event that the litigation succeeds, the waiting member may ride on the success and

⁶⁴ Professor Christopher Hodges, '*Response to consultation: Towards a Coherent European Approach to Collective Redress:*' available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> accessed 28 July 2011.

⁶⁵ Class Action Law 5766–2006, s 20 (A) 3 (Israel).

⁶⁶ Class Action Law 5766–2006, s 20 (C) (Israel).

expenses of the other party and bring their own action.⁶⁷ This situation is different from the follow-on action discussed earlier, because in a follow-on action, none of the class members sue before the outcome of the regulatory or disciplinary proceedings is announced. The problem with free riding is that fewer plaintiffs form a party to the action, and with fewer economies of scale, the legal proceedings become more expensive. The plaintiffs in these situations are fewer and less powerful than the defendants. The other problem with free riding is that it entails subsequent satellite litigation by members of the class who have decided to bring proceedings following the outcome of the trial.

Opt-out proceedings, however, eliminate the free riding issue since those who do not opt-out remain members of the class and enjoy the outcome of the action without having to pay any expenses.⁶⁸ The opt-out mechanism prevents the satellite litigation which may arise where consumers hold back until the judgment in the case. Avoiding satellite litigation is preferable from a defendant's perspective, since it removes the cloud of uncertainty that might otherwise hang over the defendant's business activities. In addition, if further proceedings are possible in the future, it may render the possibility of a settlement less likely, since a settlement could be seen as a sign of weakness, which might encourage other parties to bring similar actions.

In contrast to opt-out actions, the opt-in mechanism carries the risk of additional proceedings from those who did not join the class in the proceedings. Therefore, in terms of the free riding issue, the opt-out mechanism is a better option as it leads to a binding decision that will apply to class members who did not opt-out of the action.

9. Objections to the 'Opt-Out' Mechanism on the Basis that it Contradicts the Tradition of Litigation

⁶⁷ Roger Van Den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Thompson - Sweet and Maxwell, 2006); M. W. Friedman, 'Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing before Opting Out of a Federal Class Action' [1990] *The Yale Law Journal* 100 745; George J Stigler, 'Free Riders and Collective action: An appendix to theories of economic regulation' [1974] *The Bell Journal of Economics and Management Science* 5 359.

⁶⁸ Michael A. Eizenga and Daniel E.H. Bach, Siskinds, LLP, 'Recent Developments in Pension Class Actions: an Obvious Trend', (Pension Fund Invitational Forum, October 27, 2006), see at page 2, available at <www.derivativelitigation.ca/content/publications/index.asp> accessed 20 November 2011.

On balance, an opt-out mechanism would appear to offer a more workable collective redress model for Europe, since it creates large classes, making the action more economically viable. Yet such actions are rarely pursued in Europe. There are certain objections to the opt-out model based on traditional litigation habits which need to be addressed. Generally, it is thought that the opt-out mechanism runs contrary to the existing litigation systems in most member states, such as France, Italy and the U.K. The objection to the opt-out model is that it enables the court to deal with a plaintiff who is not present at court and who may be not interested in the litigation.

Indeed, the Commission has expressed a preference for the opt-in model because it is more similar to existing litigation systems in Europe and would probably be easier to implement than an opt-out model.⁶⁹

The opposition of European member states to the opt-out model was well illustrated in Ireland where the Law Commission initially advocated an opt-out mechanism and then changed its mind,⁷⁰ preferring an opt-in mechanism where all parties would have to appear before the court. The opt-in principle was followed even though the Commission knew that it would influence the number of collective redress cases that would be brought before the courts.⁷¹ The Irish Commission claimed that:

2.13 The tradition of litigation in this jurisdiction follows an opt-in model. In general, the onus lies on the litigant to institute proceedings, in the absence of which it will be assumed that no such intention exists.

2.14 One of the attractions of an opt-in system lies in its familiarity or, conversely, in the unfamiliarity of the opt-out approach. An opt-out regime would require a dramatic shift away from the traditional voluntary method of instituting litigation. The idea of compelling an individual to take steps to

⁶⁹European Commission 'Commission Staff Working Paper Accompanying the White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}' 2008 SEC(2008) 404 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0404:EN:NOT>> accessed 5 August 2011.

⁷⁰The Irish Law Reform Commission, *Consultation Paper on Multi-Party Litigation (Class Actions)* (LRC CP 25-2003).

⁷¹Ibid.

withdraw from litigation that they never undertook sits uneasily with the traditional concept of litigation. Thus, the real possibility arises that individuals may become involved unwittingly in litigation.⁷²

The opt-out model also runs against fundamental principles in other jurisdictions, such as France.⁷³ An opt-out model is contrary to the French principle of law *nul ne plaide par procureur* or no one shall plead by proxy, which requires an individual to have a personal interest in the case that they have initiated.⁷⁴ According to this principle, a representing party can act on behalf of someone by obtaining an explicit mandate, but can never act instead of someone. In addition, the French Civil Code stipulates that a judge may not decide on general provisions, because only parliament may make decisions that are applicable to the general public.⁷⁵ In particular, Article 1351 of the French Civil Code allows people to benefit from a court decision only if they were party to the proceedings.⁷⁶ Article 1351 of the French Civil Code states that the force of *res judicata* applies only with respect to the subject matter of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against

⁷² The Irish Commission also raised other arguments for rejecting the opt-out mechanism in Ireland, such as the existence of a small claims court as an alternative dispute mechanism, the fact that in Ireland the pool of potential litigants is relatively small so that an opt in notice could be effective and might reach all group members and the geographic and demographic profile of Ireland.

⁷³ In their article entitled *Collective Redress Procedures – European Debates*, (2009) *International and Comparative Law Quarterly* 379, Duncan Fairgrieve and Geraint Howells cite Guy Canivet, the former Lord Chief Justice of France, who argued that "an opt-out regime would run contrary to fundamental elements of French law." He cited the following reasons which militated against such an approach: the right to choose whether to bring legal proceedings or not, and if so, to elect one's legal representative; the French maxim of '*nul ne plaide par procureur*' (a prohibition on actions by proxy); rights of defence; the French concept of *autorité de la chose jugée* (*res judicata*) and constitutional law guarantees. See references 120 and 121 from this article: G Canivet, '*Des Obstacles Juridiques à L'action de Groupe*,' paper delivered at the conference on 10 November 2005 on the topic of '*Pour de Véritables Actions de Groupe: un accès efficace et démocratique à la justice*.' See also G Canivet, '*Introduire l'action collective est une évolution inéluctable*' *La Tribune* (16 May 2006).

On the impact of the case law of the French Constitutional Council, as well as that of the European Court of Human Rights, see S. Guinchard, '*Une Class Action à la Française?*' (Dalloz, 2005, 2180). One decision in particular of the French Conseil Constitutionnel is seen by some as presenting a serious obstacle to an opt-out system: Conseil Constitutionnel N°89-257 DC of 25 July 1989 (group action by a trade union). See Guinchard, *ibid*, and contra S Cabrillac, '*Pour l'Introduction de la Class Action*' *Les Petites Affiches*, 18 August 2006, N°165, 4.

⁷⁴ Thomas Rouhette and Amanda Croushore, '*Proposing to take action*' *Legal Week* (27 January 2005).

⁷⁵ *Ibid*.

⁷⁶ James D. Rosener, '*Class Actions A La Francaise: Are U.S.-Style Class Actions Coming to France?*' (28 December 2005) <http://www.pepperlaw.com/publications_article.aspx?articlekey=599> accessed 20 November 2011.

them in the same capacity.⁷⁷ Thus it is difficult to benefit from the outcome of a French court case unless one becomes a party to the case.

The French system distinguishes the individual interest from the collective interest. According to the French *Cour de Cassation*,⁷⁸ the collective interest is different from the individual interest of victims who have suffered personally and can request compensation. As a result, there are two different systems for group actions that now operate in France, both of which are strange to the operation of the opt-out machinery: one being a system for the collective interests of consumers, and the other a system for joint actions on an opt-in basis. Article 46 of The French Law of 25 December 1973, the *Loi Royer*, introduced a mechanism enabling consumer organisations to bring a collective action in circumstances where the collective interest of consumers is directly or indirectly harmed by the activity of a supplier. This type of action can be used only to pursue the collective interests of consumer organisations, which are considered to be different from those of individual consumers under French law. This development was a move towards developing a system of class actions under French law. The French Consumer Code⁷⁹ allows consumer-approved⁸⁰ associations⁸¹ to join proceedings in civil courts or to commence representative actions to stop wrongful behaviour or remove unlawful clauses from contracts. The Consumer Code also allows consumer-approved associations to initiate proceedings in civil courts without any criminal offence having been committed and to request the cessation of illegal behaviour or to remove illegal clauses.⁸² This claim should be distinguished from any opt-in or opt-out model because it is the action of the organisation itself and not its members.

⁷⁷ Mario-Pierre Stasi, 'Class Actions in French Law' (International Association of Lawyers, Germany, 13 March 2010).

⁷⁸ Véronique Magnier, 'Class Actions, Group Litigation & Other Forms of Collective Litigation, Protocol for National Reporters, France' at <<http://globalclassactions.stanford.edu/content/class-actions-group-litigation-other-forms-collective-litigation-protocol-national-reporters>> accessed 20 November 2011.

⁷⁹ C. Cons. Article L. 421-7 (The Consumer Code).

⁸⁰ C. Cons. Article L. 421-1 (The Consumer Code).

⁸¹ According to the French National report from 2007, only 20 organisations were recognised. See the Leuven study (n 58) at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 21 November 2011.

⁸² C. Cons. Article L. 421-6 (The Consumer Code).

Although actions brought by consumer organisations are on the increase in France, they are not as powerful as class action suits in gaining significant awards for victims. Their principal purpose is to stop illegal practices, rather than to obtain damages, since damages only compensate the association as a whole and not its individual members. Such a model may operate alongside a true opt-out collective redress model, which is more workable as the evidence shows.

Consequently, the preference of main European jurisdictions for an opt-in model suggests that there may be a very long way to go until new European opt-out model is introduced. However, in recent years there have been positive moves towards the implementation of a new type of opt-out model in Europe. These include the introduction of a new opt-out settlement model in the Netherlands, and a mixed opt-out opt-in model in some other member states albeit some member states remain devoted to the traditional opt-in model. The different types of models are examined in the next part of this chapter in order to determine whether there any model can operate as a sample workable model to improve access to justice in the way that Israel's opt-out class action model has done.

10. Existing Mechanisms Currently Operating in Europe

In the search for a suitable European collective redress provision, it is instructive to examine the current models in operation in the European member states, since one of the existing systems might be replicated in a unified European model. It is also helpful to consider the Israeli model, which has been in operation for several years. A comparison of all these models should lead to a conclusion regarding which of these models is most appropriate to cater to European consumers.

The majority of existing collective redress frameworks in Europe are based on the opt-in principle with some exceptions. The European systems can be classified as follows:

- A. "Complete" opt-out models, for example, in Portugal;
- B. Mixed opt-in/opt-out models, such as Denmark;

- C. Quasi opt-out and quasi opt-in models, such as Spain where the judgment in opt-in actions may bind other parties that were not part of the action; and
- D. Strict opt-in models, such as the French, Italian⁸³ and Swedish models.⁸⁴

A. *The Complete Opt-Out Model*⁸⁵

This provides that every plaintiff may bring proceedings on his own initiative and without the need for a mandate or express authorization from all the other rights-holders, save those class members who have decided to opt-out. The advantage of such a model is that class members are not required to take any action in order to benefit from the collective action.⁸⁶

An essential requirement of such a system is a provision that sets down the procedure for class members to opt out⁸⁷ and a section that provides that the judgment in the action binds all the members of the class except those members who have opted out.⁸⁸

Portugal has a complete opt-out scheme for collective actions and its system has some similarities to the Israeli opt-out model, except for financial incentives which are lacking in Portugal. The Portuguese model has been in operation since as far back as 1995.⁸⁹ The Portuguese Law provides that every plaintiff may represent all other right holders on his own initiative and without the need for a mandate or express

⁸³ Legge 99/2009, Art. 49 (Law 99/2009).

⁸⁴ Per Henrik Lindblom, 'National Report: Group Litigation in Sweden' (December 2007) <http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf> accessed 27 October.2011. With regard to the Swedish Act, it should be noted that this was a compromise Group Proceedings Act which was introduced in 2002 and came into effect in 2003. The Act included no incentives and the primary emphasis was changed from an opt-out to an opt-in mechanism. Still, it must be remembered that this procedure has hardly been used since its introduction, which is similar to the experience in other opt in jurisdictions.

⁸⁵ For example, Article 14 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁸⁶ R. Mulheron, 'Some Difficulties with Group litigation Orders – and why a Class Action is Superior' [January 2005] C.J.Q 24 40.

⁸⁷ For example, Article 15 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁸⁸ For example, Article 19 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁸⁹ Law No. 83/95 Right of Proceeding, Participation, and Popular Action and Law 24/96 Establishing the Legal System Applicable to Consumer Protection.

authorization, unless such class members with the same interests have decided to opt out.⁹⁰

The Portuguese system requires a notice to be given to all the holders of the interest in question. The notice is aimed at allowing the class members to exercise their right to opt out, failing which they are deemed to approve the representation.⁹¹ Opting out is possible until the stage where evidence is produced. Notice is given by advertisement in the media or press depending on the circumstances and the geographical distance between class members.⁹² The judgment in the action binds all members of the class except those who have opted out.⁹³

According to a survey published by the Commission, only six actions for damages were brought between 1995 and 2009.⁹⁴ Commentators concluded that the use of Popular Actions in its civil phase was very scarce. In her report for the CJC,⁹⁵ Prof. Mulheron cites commentary from Nuno Oliveira, former legal advisor at Deco (the Portuguese Consumer Organisation) on the Portuguese model. According to Oliveira, one of the problematic elements of the Portuguese model is that

the law should state clear rules for calculating different types of damages (liquidated, general, reliance, restitution, punitive, expectation, etc), and include also a provision for damages distribution between consumers as well as a partial distribution for the plaintiff consumers' association.⁹⁶

The Portuguese law almost fully resembles the Israeli model but for the lack of a provision for financial incentives for the plaintiffs which is allowed in Israel. Thus, the fact that there are very few actions in Portugal indicates that an opt-out

⁹⁰ Article 14 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁹¹ Article 15 (1) of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁹² Henrique Sousa Antunes, *Class Actions, Group Litigation & Other Forms of Collective Litigation - Portugal* (2007) at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf>

⁹³ Article 19 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

⁹⁴ European Commission - DG SANCO, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Main Report' (Civil Consulting and Oxford Economics, 2008) see at page 88 at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

⁹⁵ Prof. R Mulheron (n 31).

⁹⁶ Prof. R Mulheron (n 31) at page 99.

mechanism per se without any financial incentives for the representative leading the actions does not improve access to justice. The investigation of this model leads to the conclusion that the lack of positive financial incentives for the representative who has led the action and has taken the risk of paying the costs, is the reason for the relatively small number of opt-out actions in Portugal.

Another complete, albeit unique, opt-out model has existed in the Netherlands since 2005.⁹⁷ The Dutch model was created in order to ensure that a settlement binds all parties in one legal action.⁹⁸ The settlement, which must be reached out of court, is a prerequisite for the parties to apply to the court. Where there is no agreement, no class action for damages is available.⁹⁹

The Dutch system is unique and cannot form the basis of a coherent European model because it does not provide for a solution where a dispute may have to be tried failing a settlement between the parties.

The Dutch and the Portuguese models are the only opt-out models that exist in Europe. Having looked through them, it is clear that these models on their own cannot form the basis of a new coherent model as they stand at the moment. The Portuguese model has little success in improving access to justice due to a lack of financial incentives. The Dutch model only deals with settlements and not with collective claims. On the other hand, both systems together may be incorporated within a new European enactment and these features could take the leading role in dealing with European collective settlements. This may be done by providing for an opt-out model which encompasses a provision which deals with approving settlements. Yet such a model would lack incentives to overcome consumers' rational apathy.

⁹⁷ The Dutch Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade) came into force on the 27 July 2005.

⁹⁸ Dr. I.N. Tzankova, 'Class Actions in the Netherlands (*Parts 1 & 2*)' [2007] and [2008]. <<http://globalclassactions.stanford.edu/taxonomy/term/65>> accessed 29 July 2010.

⁹⁹ Article 7:907 par. (1) Civil Code (Netherlands).

B. Mixed Models

The complete opt-out model may be distinguished from those systems which combine both opt-out and opt-in mechanisms.

Denmark has developed a mixed opt-in/opt-out model.¹⁰⁰ The system is based primarily on the opt-in mechanism which is the default procedure for all disputes. However, there is an exception which enables the use of the opt-out mechanism by the Consumer Ombudsman.¹⁰¹ Both individuals and associations can bring opt-in proceedings, whereas at present,¹⁰² opt-out proceedings may only be brought by the Consumer Ombudsman.¹⁰³

Under the Danish opt-in system, once a claim has been submitted, the court specifies a deadline for joining the class action by written submission. In contrast, in opt-out actions the court specifies a deadline for opting-out of the class action by written notification. With both mechanisms the court decides to whom notice (either to opt-in or opt-out) should be given and, in exceptional circumstances, the court can permit joining after the deadline.¹⁰⁴

At the request of the Consumer Ombudsman, the court may decide that a group action should be opt-out, provided two conditions are satisfied.¹⁰⁵ The case must concern claims that are so small that it is evident that they generally would not be expected to be brought in individual actions, because the inconvenience and financial risk for the individual would be disproportionate to the amount of the individual claim (in other words, these are NEV claims). According to the Act, this condition will normally be

¹⁰⁰ The current position in Denmark has its roots in report No 1468/2005 of the Standing Committee on Procedural Law (Retsplejerådet). This reform was introduced by Act no. 181 of 28 February 2007 on collective redress which came into force on 1 January 2008.

¹⁰¹ Section 254 e (8) of the Administration of Justice Act (Denmark).

¹⁰² For the time being, the Consumer Ombudsman is the only 'public authority' authorised to act as a class representative. See Henrik Øe, Danish Consumer Ombudsman, 'Collective Redress in Danish law and perspectives at EU level' (The Oxford/Stanford conference on the globalization of class actions) December 2007 at <http://www.law.stanford.edu/display/images/dynamic/events_media/Danish_Conference_Presentation.pdf> accessed 27 October 2011.

¹⁰³ Section 254e(8) of the Administration of Justice Act (Denmark).

¹⁰⁴ Prof. Erik Werlauff, 'Class actions in Denmark' (Aalborg University) at <http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf> accessed 27 October 2011.

¹⁰⁵ Sec. 254 e, s 9 of the Administration of Justice Act (Denmark).

satisfied if a consumer's individual claim does not exceed an amount of approximately 2,000 Danish Krone (DKK) (equivalent to EUR 264). The second condition is that a group action based on the opt-in model must be considered an inexpedient way of dealing with claims, particularly if the case includes a large number of persons so that the administration of opt-in notices will require disproportionate resources.¹⁰⁶

Professor Hodges expresses satisfaction with the Danish model¹⁰⁷ which leaves opt-out actions in the hands of the Consumer Ombudsman alone. However, in fact there are no signs that the Danish model has brought significant progress as far as rates of access to justice are concerned. Public sector enforcement alone may lead to very scarce use of collective redress. Public enforcement has proved thus far to be very unsuitable for collective actions. Consequently, other representatives should also have the power to bring actions in the event that the designated public authority refuses to do so.

There are also other possible mixed opt-out, opt-in systems which give the judge discretion to decide when to apply the opt-in mechanism and when to order the action to be managed using the opt-out mechanism. The Irish Law Commission also mentioned a mixed approach¹⁰⁸ which would give the court the discretion to decide which mechanism ought to be used on a case by case basis. Such a model was also recommended by the English CJC in its response to the European consultation paper, since it gives the court the flexibility to decide which model will better serve each case.¹⁰⁹ The problem with this model is that it undermines the certainty which is so necessary for the representatives who take risks when deciding to undertake the representation of a class in an action themselves. The cost of finding a representative

¹⁰⁶ Peter Møgelvang-Hansen, Copenhagen Business School, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – Country report Denmark' (Civic Consulting, 2008)
<http://ec.europa.eu/consumers/redress_cons/da-country-report-final.pdf> accessed 27 October 2011.

¹⁰⁷ See, for example, Professor Dr Christopher Hodges, (n 64) at pages 5, 9, 20.

¹⁰⁸ Irish Law Reform Commission (n 70) at pages 82-83 available at
<<http://www.lawreform.ie/archives/consultation-paper-on-multi-party-litigation.237.html>> accessed 30 March 2012.

¹⁰⁹ Civil Justice Council, *Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC (2011) 173 Final* (Section 42) available at
<http://ec.europa.eu/competition/consultations/2011_collective_redress/cjc_en.pdf> accessed 28 July 2011.

who does not intend to represent other class members from the outset may lead to unfair situations. This was one of the main reasons for the Irish Commission's rejection of such a flexible model.

It is clear that if the representatives are potentially going to spend their own time and resources on the case, they will want to know from the outset that the case involves large classes of represented persons so as to take the advantage of economies of scale.

Another disadvantage of granting the judge the discretion to decide whether to use an opt-in or an opt-out model is that it might unnecessarily burden judges and could invite additional litigation challenging the judge's decision.

C. Quasi Opt-In Opt-Out Models

The Spanish introduced collective litigation in the Civil Procedure Act (LEC) of 2000.¹¹⁰ The Spanish system is an opt-in system but the judgment in the proceedings may have a binding effect on non-participating parties. The Spanish model differs from the U.S., Israeli and Portuguese class action systems because it is based on the opt-in model and contains no opt-out mechanism.

The interesting part of the Spanish legislation is that it defines two separate types of interests:

Collective (diffuse) actions, under Article 11(3) of the LEC, are appropriate where it is difficult to determine the composition of a group of people in a similar legal position. When victims are not individualized or easily individualized, the diffuse interests' suit, in the name of consumers, will correspond exclusively to consumer associations that are representative according to the law. Such actions, where the members of a group are unidentified or unnamed, are also known as quasi-class actions.

¹¹⁰ Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Civil Procedure Law, Law 1/2000, passed on 7 January 2000).

Multi-party actions, where the members are identified or easily identifiable, are also known as consumer collective actions for groups of consumers. Article 11(2) of the LEC provides that groups of consumers can be represented by consumer association organisations which defend specific interests or even the group of affected consumers itself (as long as it represents the majority of the affected consumers).¹¹¹

The multi-party procedure is quite similar to the procedure for quasi-class actions, but there are some specific points to note regarding the former procedure. Firstly, before the claim is filed, the claimant or claimants must notify each affected consumer of the impending filing of a claim to defend their collective interests. Once the claim has been filed and admitted by the court, the affected consumers are notified in accordance with specific rules so that they can join the proceedings. Unlike quasi-class actions, the notification does not suspend the proceedings. Affected consumers may join the proceedings at any time but may participate only in those parts of the action that have yet to take place.¹¹² As is the case in quasi-class actions, affected consumers who have not joined the proceedings cannot ask for the provisional enforcement of the judgment in their favour and will be bound by the final result of the proceedings. Any individual claimant wishing to be compensated must wait until the final judgment, which will then be fully applicable to him, though he is unable to take individual action during or after the group proceedings.¹¹³

The main issue with the Spanish model is that it provides that judgments will affect all the parties to the proceedings, including their heirs, as well as non-litigants with similar rights. This rule applies regardless of the outcome of the case,¹¹⁴ even where the claim fails.¹¹⁵ Therefore, the procedure which is not an opt-out model turns into an opt-out model once affected consumers are bound by the judgment.

¹¹¹ Prof. Fernando Gomez and Marian Gili, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Spain' <ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> accessed 1 August 2011.

¹¹² Freshfields Brackhaus Deringer, '*Class Actions and Third party Funding Litigation an Analysis Across Europe*' [2007] <<http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf>> accessed 27 October 2011.

¹¹³ Ibid.

¹¹⁴ Ley de Enjuiciamiento Civil, Article 222 (3) (Civil Procedure Law, Spain).

¹¹⁵ Pablo Gutiérrez de Cabiedes Hidalgo, '*Group Litigation in Spain: National Report*' <[http:// globalclassactions.stanford.edu/content/group-litigation-spain-national-report](http://globalclassactions.stanford.edu/content/group-litigation-spain-national-report) > accessed 22 November 2011.

The judgments handed down in connection with consumer claims for monetary compensation filed by consumer associations with standing to sue should specify which consumers and users can benefit from the judgment.¹¹⁶ Where such a determination is impossible, the judgment will establish the details, features and requirements necessary to demand payment and, where appropriate, to apply for or take part in the enforcement of the judgment, if requested by the claimant association.¹¹⁷ Consequently, consumers who do not participate will neither be bound by, nor able to enforce, the judgment.

However, if the claim is brought by a consumer organisation and not by a group of affected consumers then any affected consumer (including those who do not participate) may benefit from the judgment.¹¹⁸ In this way the system achieves a similar effect to the opt-out mechanism.

The opt-in part of the Spanish model creates several severe problems:

Firstly the requirement that in order to bring a collective action, the group of affected consumers wishing to bring such action must include most of the affected members causes difficulties in bringing the action.¹¹⁹ The majority requirement increases the burden of proof for the potential claimants since they must be traced from the outset of the case.¹²⁰ Secondly, the problem of funding payments for bringing the action to the public by mass media as demanded in Spain is very problematic. No public funds are available for this purpose, and the representatives gain no profit from such an action so they have no incentive to do so.¹²¹ Thirdly, even where the outcome of the action is favour of the class, the award is made personally, not to the whole group. Therefore, each individual class member must come forward in order to collect his or

¹¹⁶ Ley de Enjuiciamiento Civil, Article 221 (1) (Civil Procedure Law, Spain).

¹¹⁷ Pablo Gutiérrez de Cabiedes Hidalgo, (n 115).

¹¹⁸ Clifford Chance, *Collective actions in Europe* [2010] <http://www.cliffordchance.com/content/dam/cliffordchance/PDF/collective_actions_europe_2010.pdf> accessed 27 October 2011.

¹¹⁹ Ley de Enjuiciamiento Civil, Art. 6(1)(7) (Civil Procedure Law, Spain).

¹²⁰ Charlotte Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-in V. The Opt-out Model' (IE Publishing Department, 2010) 16, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612731> accessed 30 March 2012.

¹²¹ Pablo Gutiérrez de Cabiedes Hidalgo, (n 115). See also Prof. Fernando Gomez and Marian Gili, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Spain' 9 (Civic Consulting, 2008) at <ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> accessed 1 August 2011.

her share. However, consumer actions normally concern low sums and it is expected that few will come forward in order to prove and collect their share of the compensation.¹²²

Looking at the Spanish model, the inevitable conclusion is that in small figure claims any opt-in proceedings will not perform well. This is due to the rational apathy of consumers. The other problem that this model encounters is that personal claimants are required to step forward in order to collect their share, and they are not likely to do so due to the small individual sums at stake. Therefore, a provision for damages for the general public or as a lump sum should be introduced. If not, consumers are unlikely to come forward to collect small sums of damages, unless the procedure for private collection is made very simple.

D. The Strict Opt-In Models

Most European models are based on the opt-in mechanism. This is due to the fact that opt-in systems are in line with traditional European court proceedings.

As mentioned above, the Irish Law Commission which initially favoured an opt-out mechanism ultimately recommended an opt-in mechanism because it fitted in with traditional litigation habits.¹²³ Similarly, a compromise opt-in act, the Group Proceedings Act (the Swedish Act) was introduced in Sweden in 2002 and came into effect in 2003. The Swedish Act includes no incentives and the primary emphasis was changed from an opt-out to an opt-in mechanism.¹²⁴ This procedure has hardly been used since its introduction and this fact is in line with other opt-in jurisdiction outcomes.

¹²² Denis Waelbroek, Donald Slater, and Gil Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules - National report on Spain' (Ashurst, 2004) 7 available at <<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>> accessed 30 March 2012.

¹²³ Irish Law Reform Commission (n 70) at pages 82-83 available at <<http://www.lawreform.ie/archives/consultation-paper-on-multi-party-litigation.237.html>> accessed 30 March 2012.

¹²⁴ Professor Per Henrik Lindblom, (n 84).

The French *action en représentation conjointe des consommateurs* (joint action) enables an organization, instructed by at least two individuals (consumers, investors) who have given such organization their prior *authorisation* or mandate, to sue in their name and on their behalf. The instruction must be given in writing and can be dismissed by these individuals without explanation. This is a strict opt-in model which requires any consumer to positively elect to join the action. The claimants must have suffered damage which was caused by the same person and having a common origin. Organisations may seek potential claimants to join in the action through the press but they are not allowed to advertise, send mailings or make public announcements on television or on the radio. Very few actions of this kind have been brought.

In Italy, a new law from 2010,¹²⁵ remained very faithful to the opt-in model. The new procedure is an opt-in procedure and thus consumers who want to join the action must express their intention to join the action (*adesione*)¹²⁶ within 120 days of the notice.¹²⁷ Consumers can join in the class action through an act called *adesione* (adhesion) which can take place also through telefax or authenticated electronic mail. Class members joining the action do not become full party to the proceedings and cannot appeal the final decision. However, once such consumers opt to be joined into the proceedings, they are bound by the outcome of the proceedings.¹²⁸

In England, the Amendments to the Civil Procedure Rules 1998 which were adopted in 2000 are contained in Civil Procedure Rules Part 19, Section III and in a Practice Direction entitled Group Litigation. The procedure adopted in 2000 deals mainly with the management of group claims which give rise to common or related issues of fact or law. A Group Litigation Order (GLO) is normally suitable for managing existing cases and thus differs from a representative action. The unified management of the case means that all common questions will be dealt in one proceeding and one lead

¹²⁵ Legge 99/2009, Article 49 (Law 99/2009).

¹²⁶ Remo Caponi, 'The Collective Redress action in the Italian Legal System' (ERA Conference entitled Collective Redress Towards a system of class Actions in Europe?, Florence 30-31 October 2008).

¹²⁷ Codice del consumo, Art. 140-bis (The Consumer Code, Italy).

¹²⁸ Prof. Dr. Remo Caponi, 'Collective Redress in Europe: Current Developments of "class action" suits in Italy' available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2100448> accessed 27 September 2012.

solicitor may be appointed by the managing judge. In this way there are no conflicting judgments and judicial time and financial resources are saved. However, there is neither a representative plaintiff, nor incentives such as receiving a share of the proceedings. The appointed solicitor must consult the Law Society's "Multi-Party Action Information Service" and obtain information about other cases which might give rise to a proposed group action. If there are a few solicitors dealing with the same matter, it is expected that the group or the court will appoint a leading solicitor.

The English Group Litigation Order provides for an opt-in system. Those wishing to join and take advantage of group litigation must either affirmatively register as parties to the relevant claim or at least have their particular claims adjoined by judicial consolidation with the group action.

Thus the GLO regime does not merely require litigants to opt in, it also requires each litigant to serve a claim form by virtue of paragraph 6.1A of Practice Direction 19B. The GLO serves as an umbrella under which a number of claims are managed.

A decision made with respect to a GLO binds all parties on the group register at the time the decision is given, unless the court orders otherwise. Latecomers are also bound. A party who is adversely affected by a judgment or order may seek permission to appeal. The court may give directions as to the extent to which that judgment or order is binding upon claims entered on the registry after the date of judgment. An aggrieved late claimant cannot appeal against the relevant judgment or order, but must instead apply to the court for an order that the judgment or order does not bind him.

GLOs have been issued in a range of areas, including product liability (*McDonalds Hot Drinks, Sabril Group Litigation*) and the compatibility of UK tax provisions with EC law (*Thin Cap Group Litigation*). A list of GLOs is published on the court website.¹²⁹ According to the GLO registry, from 2001 to 30 March 2012, only 75 GLOs were made. But in her 2008 report to the CJC, Prof. Mulheron noted that the majority of GLOs concerned care-home and school abuses and maltreatments (21%), environmental claims (15%), taxation disputes (13%), and product liability cases

¹²⁹ See <<http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>> accessed 30 March 2012.

(11%).¹³⁰ The low numbers of orders given in the last eight years is surely the result of the GLO opt-in system. Furthermore, relevant issues of class action claims such as investors or shareholders claims are totally absent from the list of GLO as well as other core class action issues such as product liability cases show only minimal ratios due to the opt-in system employed. Prof. Mulheron noted that in most GLO cases, the opt-in mechanism did not suit the action. According to a practitioner's survey, this was the case for several reasons:

- In 82% of GLO cases, the reason was the sheer number of class members who had to be identified at the outset of the action.
- In 84% of GLO cases the "opt-in" mechanism caused difficulties due to the low – value recovery per class member.
- In 87% of GLO cases, the "opt-in" mechanism caused difficulties due to the actual or perceived barriers (whether economic, social, etc.) to class members coming forward at the outset of the action.¹³¹

The English GLO system is a very problematic opt-in model as it requires each class member to bring his own action to court and not only to sign a power of attorney. It is not suitable for consumer actions as it is unreasonable to expect each consumer to bring his personal action to the courts.

11. Conclusions on the Opt-Out Mechanism - The Most Appropriate Provision: A Mixed Opt-Out Mechanism

Israel's opt-out model, together with evidence collected from the U.S., demonstrate that an opt-out mechanism can improve access to justice dramatically. The numbers show that once the opt-out system was introduced in the U.S., the class action machinery started to operate more effectively. In Israel, the numbers have risen to 700

¹³⁰ Prof. Rachael Mulheron (n 31) at pages 9-14.

¹³¹ Prof. Rachael Mulheron (n 31) at page 24.

new actions in 2011, all of them based on the opt-out mechanism. By comparison, traditional opt-in collective redress models suffer from scarce use.

A flood of actions is not an inevitable consequence of an opt-out mechanism, as the systems in the Netherlands and Portugal demonstrate. In those jurisdictions, the opt-out system has not led to a deluge of collective actions, even though the victims are unified in single court proceedings and benefit from economies of scale. The Dutch mechanism is unique in the sense that it only serves settlements reached by the parties and the Portuguese model is rarely used due to a lack of a provision for financial incentives. The Dutch and Portuguese experiences also indicate that the introduction of an opt-out mechanism per se, with no further financial incentives for the representatives, will not render a model workable. The corollary that should be learnt from these models is that the opt-out mechanism may be controlled and should not be feared. The other necessary conclusion is that in order to promote the use of this very important legal tool, some financial incentives such as financial bonuses to the representatives and the class lawyers should be introduced in order to drive collective redress forward. Thus, in the third part of this chapter, the proper financial incentives will be discussed.

The opt-out mechanism should not be feared as it is the only mechanism which may deal with small value claims. The opt-out mechanism overcomes consumer rational apathy and ensures that rough traders pay for the damage caused by their unlawful actions. Therefore, the opt-out model is an appropriate deterrence mechanism to prevent traders from acting unlawfully.

With regard to the argument that the opt-out mechanism contradicts traditional legal proceedings in Europe, the interest theory supplies a good explanation that agents with the same interests may represent the group's members. Representation is a mechanism employed in a parliamentary system, so there why should it not be the same in relation to collective actions? To these arguments one may add that in consumer actions, the personal economic interest is very small so there is no reason not to allow a representative to act in favour of all group members.

Looking at the existing opt-out models in Europe, the Danish principle of imposing a maximum value for each individual claim in opt-out cases may lead to a better result, since it is important to distinguish small claims from those involving large sums of money. However, the problem with the Danish mixed mechanism is that the opt-out action under this model is vested solely in the public hands of the Consumer Ombudsman. In contrast, the Israeli complete opt-out model distinguishes between cases involving small and large claims, granting the judge discretion to decide whether an opt-out or opt-in action is more appropriate based on the amount of the claim in question. If the personal amount of the action is high, then the action would suit individual proceedings based on the opt-in mechanism rather than a collective opt-out action. In cases involving large amounts, the opt-in mechanism is useful, since there is no real fear of rational apathy with plaintiff consumers likely to take their action to court.

The recommended model both for Israel and for Europe will need to distinguish small claims from large sum claims as the Danish model suggests, without limiting them to public sector claims as is the case in Denmark. The opt-out mechanism should be introduced for cases involving small claims, with the adoption of an opt-in scheme for those claims involving larger sums.

Part B. The Question of Standing - Who Should Act as Class Representatives?

The possible representatives in collective redress actions are private representatives who are class members who have suffered damage and their lawyers, or public bodies or associations that are relevant to the dispute concerned. Each one of the possible representatives carries some advantages and disadvantages. The Israeli model puts emphasis on private enforcement. In Europe on the other hand, public enforcement and organisations take the leading role.

In the following part of this chapter, we will try to observe these agencies and find an appropriate frame for their operation in the new suggested model.

1. The Israeli Emphasis on Private Enforcers

Under Israel's CAL, the three agencies - private individuals, organisations and public bodies - are allowed to bring class actions. However, in practice, about 99% of the class actions submitted in Israel are initiated by private individuals. The standard case in Israel is initiated by an individual private consumer who purports to bring the claim on behalf of a group of consumers using the opt-out mechanism.¹³² This is also the case in the U.S. class action model.¹³³ In Europe there are some jurisdictions that allow all three agencies to bring collective actions (for example, Portugal¹³⁴). However, the majority of member states rely solely on organisational actions. Organisational actions are safe from abuses yet are not sufficiently used mainly due to a lack of resources. As seen in the Israeli model, the question of agency is crucial for the workability of the collective redress mechanism and thus it constitutes one of the pillars of the Israeli model which is based on private enforcement.

In Israel, the debate concerning private and public enforcement has led to a broadening of the possible agents that can bring a class action, which has resulted in allowing all three agencies to operate under the CAL.¹³⁵ Previously, only individuals could bring a collective action. Under the CAL, organisations and public bodies as well as individuals are given the power to commence proceedings. However, the broadening of the range of agencies has not brought with it any change in the litigation mentality which has remained entirely in the private realm. Thus the Israeli legislator places the emphasis on private enforcement, the reason being that organisations and public bodies have been less proactive than private individuals in leading collective actions.

¹³² Class Action Law 5766–2006, s 4 (a) 3 provides that an action may be represented by an organisation (except the Israeli Consumer Council) only if it is proven that a private plaintiff faces difficulties in bringing the action.

¹³³ See Federal Rule 23 (a) which provides that one or more of the class members may represent the others.

¹³⁴ L.Tortell, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Portugal' (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf> accessed 27 October 2011

¹³⁵ Class Action Law 5766–2006, s 4.

Individuals are allowed to lead the action under the CAL provided that they have a personal cause of action and have suffered prima facie personal damage.¹³⁶ By contrast, organisations and public bodies must demonstrate that bringing a private individual class action is difficult under the circumstances of the case as we will now discuss.

A. The Requirement from Organisations and Public Bodies to Show that Private Individual Action is Difficult

The requirement which proves that the Israeli regime has a clear preference for private actions brought by individuals rather than organisational or public actions is the requirement to allow organisational or public actions only where there is a difficulty in bringing a private individual action. Consequently, an organisation is allowed to bring an action only where the court is satisfied that it is difficult for individuals to bring the action.¹³⁷ The Council for the Protection of Consumer Rights in Israel is exempt from this requirement following an amendment to the CAL in 2008, since Israel's legislature has welcomed the Council's intervention as a secure agent subject to no abuse. The Israeli Council is funded by the government and thus far has been party to four collective actions and has intervened in many other consumer-related cases not dealt with by collective actions. The Israeli Council is established by law¹³⁸ which also provides that the Council should act independently¹³⁹ to further consumer interests inter alia by bringing legal actions in favour of consumers.¹⁴⁰

This pre-requisite stands for other organisations and public bodies and allows them to intervene only where it is difficult for consumers to bring an action. In this author's opinion, this requirement is an unjustified barrier, preventing organisations and public bodies from bringing class actions. It is difficult to understand why the Israeli

¹³⁶ Class Action Law 5766–2006, s 4(B)1 (Israel).

¹³⁷ Class Action Law 5766–2006, s 4(B) 3.

¹³⁸ Consumer Council Law 5768-2008.

¹³⁹ Though set out in a separate budget, it is completely government funded. See section 4 of the Consumer Council Law 5768-2008.

¹⁴⁰ The independence is presumably achieved by the appointment mechanism which is led by a retired Supreme Court Judge and two other figures from academia or from the market who suggest a list of ten recommended directors from which the relevant Minister must choose five directors. See section 3 of the Consumer Council Law 5768-2008.

legislator decided to adopt a hurdle that makes organisational claims in Israel so complicated. The only justification seems to be that the Israeli legislator wanted to give preference to private individual claims over organisational claims in order to ensure the workability of the system, since public bodies and organisations are generally regarded as less effective at pursuing claims. This approach has proven to be correct, with only four actions having been submitted or joined by the consumers' organisation in Israel since the enactment of the CAL in 2006.¹⁴¹ However, in this author's opinion, such a requirement should not have been adopted and claims by organisations should have been welcomed and promoted in Israel as they are not subject to any abuse. Organisations have their own filtering mechanisms, and thus the actions they bring are regarded as more professional and are believed to be brought in good faith for the members' benefit. Nonetheless the Israeli model puts full emphasis on private individual actions which undergo no filtering mechanisms before being submitted to the courts.

B. The Requirement to Show Personal Interest

Under the CAL, private individuals who ask to represent a class of injured members should form part of that class. The requirement for private representatives to show that they have a personal interest in the action is currently the major obstacle to the certification of class actions by individuals in Israel. The problem with this requirement is that legitimate proceedings may be dismissed simply because the specific representative cannot prove a personal interest in the action and not because the case lacks merit. However, on the other hand this requirement may be seen as part of the interest theory. It means that since the representative has suffered personal damage as every class member has, there is no conflict of interest and the other group members may rely on him to represent their interests properly.

In *Luk v. Bank Hamizrachi*,¹⁴² the court found that the bank had unlawfully applied certain charges to its clients. The bank had also acted unlawfully by not revealing such charges when clients opened their accounts. However, the court refused to allow

¹⁴¹ Claim Nos. 295, 464, 766 and 1123 in the Israeli class actions registry available at <http://elyon1.court.gov.il/heb/tovanot_y/list.htm> accessed 25 November 2011.

¹⁴² *Luk v. Bank Hamizrachi* [December 2008] District Court of Tel Aviv, Case no. 7515/08.

the action brought by individual representatives since they had failed to prove their own personal damage. The court was afraid that the plaintiffs' real intentions in bringing the action were to try and force the bank to reach a personal settlement with them rather than to properly represent the class interest.

In *Adv. Shtendel v. Bezeq International*,¹⁴³ the applicant claimed that Bezeq International, a leading telephone company in Israel, had deceived the public by advertising that its rates for long distance calls were the cheapest when in fact, in order to obtain these cheap rates, customers had to become subscribers. The Supreme Court referred to an old authority¹⁴⁴ and held that since the applicant had not proven his personal claim and personal reliance on the misleading advertisement, he had failed to show that he had a personal interest in the action and the application consequently failed. This case demonstrates that Israel's courts require the representative to show that they have suffered personal damage.

This requirement is strictly adhered to even though theoretically the action may be led by other representatives who have not suffered the minimal amount of damage which each class member has suffered. The rationale behind these decisions by the Israeli courts is to maintain the boundaries of the class action so that it remains within the framework of what appears to be a traditional legal action. In no other civil proceedings may a plaintiff with no personal damage bring an action on behalf of his friends or on behalf of a third party. This requirement is part of the interest theory which requires the representative to have similar interests as the interests of the class members.

The requirement for personal interest is intended to filter out unmeritorious claims and blackmail claims brought by private individuals. The rationale here is that if a person brings an action in which he does not have a personal interest there may be an ulterior motive involved rather than the recovery of the personal damage inflicted on the plaintiff. Consequently, public bodies and associations are exempt from the requirement to show that they have suffered damage or that they have a personal interest in the action. The rationale is that these bodies are representative in their

¹⁴³ *Adv. Shtendel v. Bezeq International* [6 May 2009] Supreme Court, Appeal No. 458/06.

¹⁴⁴ *Barazani v. Bezeq* [2001] Supreme Court, Appeal No. 1977/97, P"D Nun Hei (4) 584.

nature. The organisation is deemed to represent the interests of its members or act according with its terms of association, and any relevant public body is deemed to act on behalf of the public. Under the Israeli model, organisations and public bodies are assumed to be acting in good faith in most cases. Therefore the requirement applied to show personal interest in the action which is imposed in Israel in order to maintain proper representation by private individuals is unnecessary as far as organisations and public bodies are concerned.

C. The Lawyer who Represents the Class

With regard to private enforcement, the role of lawyers should not be disregarded. Private lawyers in Israel are seen as guardians of the market and enforcers of private rights. Lawyers may work on a conditional fee basis taking as their salary a share of the damages in the case and may also initiate proceedings in order to obtain damages for consumers, while also profiting from the action.¹⁴⁵ In such cases, the private representative assumes the role of the entrepreneur and initiates the legal proceedings. In most cases it is the lawyer of the class who stands behind the case. The traditional image of a lawyer sitting in his office independent from his client does not apply in class actions. The absence of client control means that there is a risk that the attorney will act for his own personal benefit rather than for the benefit of the class. The lawyer may prefer to settle a case with good merits in order to secure high remuneration for himself even though the class members will only get a small share of the income. Where lawyers are the real entrepreneurs of the action there is a very high risk of a conflict of interest between the lawyer and the class he represents.

Yet private litigation in class actions is initiated in most cases by lawyers who identify the cause of action and then look for the proper client to represent the class. It has been suggested that, since the requirement to find a representative is a mere formality, the class lawyer should be allowed to act as the class representative as he is behind the representative and in fact initiates the action.¹⁴⁶ In this way, a private attorney

¹⁴⁵ S. Macaulay suggests that lawyers may not be professionally good enough to protect the interests of consumers. See S. Macaulay, 'Lawyers and consumer protection laws' [1979] 14 *Law and Society R* 115.

¹⁴⁶ Jean Wegman Burns, 'Decorative Figureheads: Eliminating Class Representatives in Class Actions' [1990] 42 *Hastings L.J.* 165.

assumes the role of a quasi attorney-general, pursuing the public interest by bringing an action for an injustice that might otherwise be disregarded.¹⁴⁷

The assumption that lawyers will take a very active role in collective actions in Israel proved to be correct. Lawyers have opened new practices based on collective actions. Lawyers' intervention in private enforcement is not regarded as a negative phenomenon as it is thought that lawyers are bound by their professional rules of conduct which operate as safeguards against possible abuses. The rules of conduct are aimed at controlling lawyers' behaviour and protecting clients from any abuses on the lawyers' part.¹⁴⁸ On the other hand, the professional rules of conduct are aimed at controlling such conduct in the context of a lawyer's traditional role, and not within the role as an entrepreneurial initiator of class actions. As a consequence of this unique role, it could be argued that, 'the ethics rules cannot be mechanically applied to class actions',¹⁴⁹ as there are certain situations such as solicitation or conflict of interest where a relaxation (or special application) of the ethics rules might be necessary to accommodate the unique needs of a class action lawsuit. An example of this would be to relax advertising rules to allow lawyers to advertise in order to reach as many class members as possible. Furthermore, in order to enable the lawyer to initiate an action, a conditional fee mechanism should be introduced with some supervision and limits imposed by the local Bar association.

Yet leaving the role of the attorney-general who enforces consumer rights to private lawyers is problematic. The problem with the Israeli model allowing lawyers to act as entrepreneurs in class actions (as is the case in the U.S.) is that there is a risk that private lawyers may abuse the collective action mechanism. There is no filtering system to bar lawyers from submitting unmeritorious class actions before such actions are brought to court. The control of the action by the judge in the certification stages may be too late as, until that stage is reached, defendants may have to deal with bad publicity and high legal costs. The costs and risks of defending a claim are very high

¹⁴⁷ William B. Rubenstein, 'On What a "Private Attorney General" Is-And Why It Matters' [2004] 57 Vand. L. Rev. 2129.

¹⁴⁸ Jonathan R Macey and Geoffrey P Miller, 'The Plaintiffs Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 U. Chi. L. Rev, see at page 97.

¹⁴⁹ See, for example, Susan Koniak, 'Feasting While the Widow Weeps: Georgia v. Amchem Products Inc.' [1995] 80 Cornell L. Rev. 1045.

and, in many instances, commercial defendants may find it cheaper to settle. This effect is known as ‘the blackmail effect of class actions’¹⁵⁰ because such actions are brought by lawyers in order to force the defendant to settle the case rather than to vindicate claims by class of members on account of unlawful behaviour by the defendant. In such cases, settlements are favourable for the class lawyer and class representative but the class members are entitled to only minimal sums. For this reason, strict safeguards should be imposed on settlements led by private lawyers and private representatives.¹⁵¹

2. The European Emphasis on Organisational and Public Actions

Conversely to the Israeli model, there is reliance on private enforcement in all the European Union member states which have introduced some sort of collective redress system, consumer organisations are the leading authority for initiating class actions.

Fabrizio Cafaggi and Hans-W. Micklitz conducted a survey on administrative and judicial collective enforcement of Consumer Law in the U.S. and in the European Community. In their survey, they noted that in some European countries such as Austria and Germany, consumer organisations are the sole enforcers in areas such as unfair terms and unfair commercial practices. In other European countries, such as the Scandinavian countries, administrative bodies - such as the Consumer Ombudsman in Denmark - play a major role in consumer law enforcement while consumer organisations play only a subsidiary role. There are no unified criteria regarding which organisations should defend consumer's interests in Europe. There are some minimal criteria which may be gleaned from the existing directives¹⁵² but it is clear that there is a need to set full unified standards for organisational agency in order to serve best the interests of consumers.¹⁵³

¹⁵⁰ Bruce Hay and David Rosenberg, 'Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy' (1999-2000) 75 *Notre Dame L. Rev.* 1377.

¹⁵¹ The importance and effectiveness of such safeguards will be discussed in Chapter Four.

¹⁵² See, for example, Council Directive (EC) 98/27 on injunctions for the protection of consumers' interests [1998] OJ L166/51 which will be further discussed in this chapter.

¹⁵³ Fabrizio Cafaggi and Hans-W Micklitz, '*Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Union*' [August 2007] 17, EU Law Working Paper No. 2007/22 at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024103> accessed 4 December 2011.

Organisations are regarded as more credible enforcers than individuals. Organisations possess the required expertise and have better access to evidence and information than private individuals.¹⁵⁴ However, their performance thus far in presenting collective redress cases in Europe has been very weak, since such performance depends on the resources and powers granted to the organisations, and in most cases, European organisations lack the necessary resources to be active enough in enforcing consumer rights.¹⁵⁵

Looking back at the European trends, the European Union puts its emphasis on organisational cooperation in order to enforce consumer rights. Lawyers and private actions are not regarded as the proper enforcers of consumer rights in Europe. However, the European Commission has so far not done enough to align consumer organisation behaviour: no effective system of cooperation has been set up, and no licensing criteria have been established at Community level.

The European approach is aimed at preventing abuses which are caused by private enforcement. However, as proven thus far in Europe, organisational enforcement has not resulted in sufficient benefits to consumers and has not been as active as private litigation in Israel and the U.S. Therefore, in the course of this chapter, it is necessary to look at promoting organisational and public actions alongside private actions. However, with regard to private actions, it should be noted that although the Israeli model has proven that access to justice has been enhanced, there remains a clear need to improve the safeguard mechanisms in private litigation as we will see in further details in chapters 4 and 5. For the time being we ought to concentrate on understanding the reasons for such preference towards organizational enforcement and such enforcement should be permitted.

¹⁵⁴ Orit Dayagi-Epstein, Representation of Consumer Interest by Consumer Associations – Salvation for the Masses? (March 2007) 3(2) *The Competition Law Review* 209-249, see at page 211.

¹⁵⁵ W.H. van Boom, M.B.M. Loos (eds.), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention*, (Groningen, Europa Law Publishing, 2007), p. 231-254 see at page 12 of the article available at <www.professorvanboom.eu/pdf_files/Consumer_interests_TOC.PDF> accessed 7 April 2012.

A. *Why is Organisational Enforcement Preferred in Europe?*

The principal-agent problem is inherent in collective redress, since the agent who represents the class, being either the representative plaintiff or the class lawyer, could potentially have a conflict of interest with the class members especially where conditional fees are concerned. This is particularly the case since agents prefer to allocate as much of the funds as possible to themselves at the expense of the class. The principal-agent problem results from information asymmetries between the representative (the agent) and the class member (the principal). This information asymmetry prevents proper control on the agent's actions because, for example, the class member will not have enough information to decide whether a settlement is suitable, and whether the agent has made his best efforts to extend the class members' share of the damages. The problems of information asymmetries and conflicts of interest increase the risk of opportunistic behaviour, which leads to frivolous suits.¹⁵⁶ The best solution for the elimination of agency problems is to promote secure agents to act.

Professor Rachael Mulheron, prefers organisational claims. She uses the phrase 'ideological claimant' when referring to 'a body that has a special expertise or background that enables it to be an appropriate and adequate class representative'.¹⁵⁷ Other scholars mention that legal actions taken by associations may offer a way to mitigate problems surrounding a potential principal-agent conflict, which is particularly true in cases of widespread damage.¹⁵⁸ Organisations are regarded as capable of reducing the risk of frivolous actions since they are authorised and supervised to bring representative actions and because organisations do not have a financial interest in the outcome of the litigation.¹⁵⁹

The argument in favour of associations as secure representatives is that associations are repeat players and need to retain their credibility. Associations are not deemed to act for their own benefit and thus they minimize the principal-agent problem, which

¹⁵⁶ Roger Van den Bergh and Louis Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1(2) *Erasmus Law Review* 5 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101377> accessed 7 April 2012.

¹⁵⁷ Professor Rachael Mulheron, (n 54) 550.

¹⁵⁸ Hans-Bernd Schaefer, (n 39) 183.

¹⁵⁹ Charlotte Leskinen, (n 120).

exists in collective redress proceedings.¹⁶⁰ Commentators reach the conclusion that if certain conditions are met such as accountability, independence, and member control over the association's behaviour, then consumers will be much better off if the organisation controls both the action and the lawyer who represents the class. When this is the case, the costs of the action to the class members are lower and the outcome is preferential to the class of injured members.¹⁶¹

With regards to organisational enforcement, the results of a survey carried out by the European Community has shown that consumers prefer private collective redress mechanisms, followed by independent organisations rather than public authorities.¹⁶² According to this survey, 76% of European citizens prefer individual collective actions. Only 64% of European citizens have confidence in independent consumer organisations. Public authorities are trusted by only 54% of European citizens to be able to protect the rights of consumers.¹⁶³ In some of the new member states like Romania and Bulgaria, the level of trust in independent organisations and in public bodies is lower than in other states. In the Nordic countries where such institutions have existed for the longest time, public authorities are more trusted. However, it should be noted that according to the same Eurobarometer survey, people from member states who are sceptical about independent and public authorities tend to purchase less outside their countries. Consumers in twenty out of the twenty-seven member states preferred organisational enforcement over public agency enforcement.¹⁶⁴ In a more recent Flash Eurobarometer survey entitled 'Consumer attitudes towards cross-border trade and consumer protection' published in March 2011, 79% of European consumers said that they would be more willing to defend their rights in court if they could join other consumers complaining about the same

¹⁶⁰ Sonja Elisabeth Keske, (n 40) 133; Orit Dayagi-Epstein (n 148) 209.; Hans-Bernd Schaefer, (n 39) 183.

¹⁶¹ Hans-Bernd Schaefer, (n 39) 198.

¹⁶² European Commission, *Special Eurobarometer 298: Consumer protection in the internal market* (European Commission, October 2008) at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf>.

¹⁶³ Ibid.

¹⁶⁴ The following seven nationalities preferring public enforcement are the Finns, Cypriots, Hungarians, Maltese, Latvians, Romanians and Bulgarians, who trust their public authorities more in protecting their rights as a consumer.

issue.¹⁶⁵ These studies ought to lead to a switch in the minds of European legislators who tend to rely only on public or organisational collective redress. The European emphasis on organisational actions should be reconsidered as it has not proven effective in a number of jurisdictions. Instead, the Commission should encourage the introduction of a system combined with features of the Israeli model which favours private enforcement. Indeed, even the English National Consumer Council (NCC) has expressed its concern that limiting representative actions to organisations would mean that class actions would have little use in practice.¹⁶⁶ The NCC also expressed its doubt that consumer organisations would be prepared to bear the financial risks of bringing an action and whether the procedure would be likely to exclude valid consumer claims.¹⁶⁷

Looking at the performance of organisational claims in Europe and thus far in Israel, the inevitable conclusion is that organisations as representatives do not create a workable system on their own. Organisations have neither the incentives nor the budget, and would not take the risks of very expensive litigation in order to bring an action for damages for a group of injured members.

On the other hand, independent organisations are reliable agents, ideological claimants and therefore they should be further encouraged to bring collective actions for damages. In order to promote organisational collective redress, a new vision is required. There should also be intervention from the Commission to decide which organisations should be deemed to be reliable and how cooperation between these bodies should take place. The Commission should set new criteria for representative collective redress which require accountability, independence and credibility from licensed cooperation as well as an agenda for cooperation in cross-border cases.

¹⁶⁵ See European Commission, *Special Eurobarometer 342: Consumer empowerment*, (April 2011) p. 45; see also Council of the European Union, Commission Staff Working Paper, Consumer Empowerment in the EU, SEC (2011) 469, (Brussels, 7 April 2011) p. 5: EUR 1000.

¹⁶⁶ The English National Consumer Council (NCC) is part of the "Consumer Focus", merging consumer councils from Scotland, Wales and England. See <<http://www.ncc.org.uk/>>.

¹⁶⁷ National Consumer Council and Scottish Consumer Council, *Representative actions - Response to the DTI Consultation* (2006).

B. Which Organisational Enforcement Should be Permitted?

The idea for preferring organisation actions over private actions is based on the credibility of organisations as secured agents. As seen in Israel, the Consumer Council, an organisation established by law, is trusted to bring collective actions as are other organisations which comply with certain conditions. However, thus far there have been no organisational actions in Israel, and the Israeli legislator would have to consider how to promote such actions.

On the other hand, not all organisations may be regarded as secured agents. There are different features that may risk the credibility of organisations such as the system of governance, the extent to which the members can control the association and prevent the association from pursuing goals of its own which conflict with objectives of the class members, the extent to which the association can control the lawyer acting on its behalf, and the possible influence of third parties on the association. Looking at the above features, it seems that there are certainly some organisations which are more secure than others for the purpose of leading class actions for damages. Therefore, in order to decide which organisations should be allowed to act as representatives in collective actions in Europe it is important to look at the different types of organisations operating in Europe and their distinct features.

Currently, the organisations that are permitted to bring collective actions in Europe can be categorised as follows:

- The first category of organisation that may bring a collective action is an organisation based on membership, such as football associations, jockey clubs, and associations of certain producers, such as farming organisations based on farmer participation in value chains. These associations are well-known in the world and they are generally regarded as suitable agents.
- The second category is an organisation with a broad purpose, such as a consumer organisation.

- The third type of organisation is an ad hoc organisation which is formed in order to bring an action following a certain event.¹⁶⁸

These categories may all be authorised to bring collective actions but the main question is what standards of reliability should be imposed in order to ensure that organisations which are allowed to bring collective redress cases on behalf of their members can be trusted.

i. Existing Criteria for Organisations Engaged in Collective Actions

Generally, in most member states, an organisation's articles of association are examined before certifying its standing. Some jurisdictions require additional elements, for example, a minimum number of members¹⁶⁹ or length time in operation.¹⁷⁰ In addition, some jurisdictions require that an association is not acting for profit¹⁷¹ and in some jurisdictions, ad hoc groups formed specifically to bring an action may also act as claimants.¹⁷²

In Israel, any non-political organisation which acts consistently to further a certain public goal for a minimum period of a year may bring an action in relation to a public goal with which the organisation is dealing.¹⁷³ The requirement that an organisation should act consistently means that ad-hoc groups of class members are in effect excluded as representatives of class actions in Israel. The reason for this is that ad-hoc groups are not supervised and there is insufficient control over such bodies, hence they may be subject to abuse. The Israeli law does not put its emphasis on organisational actions, and thus the CAL lacks any requirements relating to the organisation's system of governance, the number of members and previous conduct of the organisation and its directors.

¹⁶⁸ One of the better known farming organizations involves the milk industry in India: more than 70% of India's milk is produced by households who own only one or two dairy animals, and these producers form part of a nationwide network of dairy cooperatives.

¹⁶⁹ For example, Denmark.

¹⁷⁰ For example, Denmark.

¹⁷¹ For example, Portugal.

¹⁷² For example, The Netherlands.

¹⁷³ The Class Action Law 5766-2006, s 2.

In Europe, the infrastructure for organisations operating as consumer representatives is much more established and open towards organisations. In Spain, for example, where the interests of the class members are diffuse and it is difficult to determine the composition of the group of class members, the only consumer associations entitled to bring such actions at national level are those which are members of the Council of Consumers and Users (*Consejo de Consumidores y Usuarios*), which are in turn designated by the Ministry of Health and Consumer Affairs (*Ministerio de Sanidad y Consumo*). This is due to the higher credibility of such organisations which are supervised by the Ministry. In different types of Spanish collective actions i.e. actions for groups of consumers where members are identified or easily identifiable, other organisations may also act as representatives provided that these organisations represent the majority of relevant consumers.¹⁷⁴

The main advantage of the Spanish system is that group actions can be commenced by a wider range of entities in cases involving identified consumers, since both consumer organisations and groups of consumers themselves may bring an action, provided that the majority of the group consists of affected consumers.¹⁷⁵ The Spanish system is more sophisticated than the Israeli mechanism in that it distinguishes organisations by their level of licensing and credibility. The Spanish system improves organisations' access to justice by increasing the number of organisations which may represent class members while taking a much more cautious approach towards non-party members who may only be represented by special and more reliable designated and licensed organisations. Indeed, statistics show that in Spain, opening the doors to a variety of organisations (together with the funding options discussed in the next part of this chapter and the quasi opt-out model discussed in the earlier part of this chapter) resulted in the number of collective actions there being the highest in Europe and brought most benefits to consumers through collective actions.¹⁷⁶

¹⁷⁴ Ley de Enjuiciamiento Civil, Article 11 (2) (Civil Procedure Law, Spain).

¹⁷⁵ Laurel J. Harbour and Marc E. Shelley, 'The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World' (ABA Annual Meeting, Section of Litigation, August 3-6, 2006) <www.shb.com/attorneys/Shelley/TheEmergingEuropeanClassAction.pdf> accessed 2 September 2011.

¹⁷⁶ European Commission - DG SANCO, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Main Report' (Civil Consulting and Oxford Economics, 2008) see at page 88 at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>

In the Netherlands¹⁷⁷ and France¹⁷⁸ only associations may initiate collective claims. The associations may take several forms including groups of individual victims (groups of consumers). Consumer associations can also initiate proceedings to defend their members' interests, as well as their own interests and the general interests of consumers. The French adopted a different approach to the Spanish legislator, distinguishing between actions taken by organisations where the collective interest has been harmed and actions where a group of consumers has given a specific mandate to the organisation to sue on their behalf on an opt-in basis. The latter action is enshrined in the Royer Act which was codified in the Consumer Code in 1993, and this instrument allows associations whose aim is the protection of consumer interests to take actions in the collective interests of consumers. Furthermore, non-profit organisations are allowed to act before civil or criminal courts to protect the collective interests of consumers.¹⁷⁹

In its Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, the European Commission recommended, that qualified entities should take two forms. Firstly, it recommended organisations authorised by member states and which meet certain criteria, designated in advance to represent a certain interest. These organisations may bring collective actions for damages in the name of identified members or even in certain cases in the name of identifiable members who are not part of the organisation. Secondly, ad hoc organisations were recommended, which are set up and certified by member states to bring a representative action in relation to a particular infringement. Such organisations should provide sufficient assurances that abusive litigation will be avoided.¹⁸⁰

However, thus far the European Commission has left the criteria for approving qualified agencies for bringing actions open and vague, allowing each member state

¹⁷⁷ Burgerlijk Wetboek, art. 3:305a-c CC (The Dutch Civil Code).

¹⁷⁸ Under the French Consumer Code, C. Cons. Article L. 421-1, action for collective interests of consumers regarding actions under the Royer Act introduced the "Action for collective interests of consumers and *action en représentation conjointe des consommateurs* (joint actions) under Article L. 422-1 of the French Consumer Code.

¹⁷⁹ According to the Leuven study – French national report from 2007, only 20 organisations were recognised. Available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 26 November 2011.

¹⁸⁰ European Commission (n 62) 19 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0404:EN:NOT>> accessed 28 July 2011.

to authorise any organisation it finds fit. The problem with the performance of organisations in Europe is that they have different powers which vary from one member state to another and that they perform differently.

The European legislator gave a very vague definition to the phrase “qualified entities” in its Council Directive 98/27 (EC) on injunctions for the protection of consumers' interests, as follows:¹⁸¹

- (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or
- (b) Organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law.

Such a vague definition left the decision on how to authorise organisations for this purpose to the discretion of each member state.

Looking at these poor guidelines for certifying organisations at Community level, it is clear that a collective redress representative would be better monitored by the European Commission and, at least as far as cross-border actions are concerned, the Community should step forward and set down appropriate criteria for certifying consumer organisations licensed to submit collective actions. This leads us to making our own propositions for a set of viable criteria.

ii. Current Criteria Governing Representative Organisations

When dealing with organisational representation, preference should be given to organisations that are deemed to be more accountable to their members. The system of governance of the organisation should be such that the voice of the injured members is heard and that the organisation will be accountable to its

¹⁸¹ Council Directive (EC) 98/27 on injunctions for the protection of consumers' interests [1998] OJ L166/51, art. 3.

members.¹⁸² There is always the fear that the organisation will act in its own interests,¹⁸³ in the interests of a third party, or under government pressure (where funds are received from the government or where the government is licensing the organisation). Thus the organisations should prove their independence and intention to pursue the wishes of their members in the legal actions which the organisation brings. These independent organisations should be regarded as more credible and accountable to their members.¹⁸⁴

The other relevant requirement is that the organisation possesses the appropriate funding necessary to manage independent legal proceedings for the benefit of the injured class members. The organisation would have to prove that it has the required expertise necessary in order to deal with the matter and that it has control over the lawyer chosen to represent the class.

Furthermore, organisations that have a proven track record of bringing successful actions should be given preference over ad-hoc associations that are formed only to bring a specific action. Such organisations are deemed to act in a manner which will maintain their good reputation and preserve their integrity.¹⁸⁵ In the U.K. the only organisation which has been granted the power to bring representative actions is 'Which?'. However, in most cases 'Which?' preferred to refer the matter to the OFT rather than take action itself.¹⁸⁶ The enforcers in the U.K. undergo a very detailed examination which is set under the guidance of the DTI. This examination may be summarised as follows:¹⁸⁷

- (1) The management of the organisation is such that it is expected to act independently, impartially and with complete integrity.
- (2) The organisation possesses experience and expertise in promoting or protecting the collective interests of consumers.

¹⁸² Fabrizio Cafaggi and Hans-W Micklitz, (n 153) 18.

¹⁸³ Roger Van den Bergh and Louis Visscher, (n 156).

¹⁸⁴ Department of Trade and Industry, 'Enforcement of consumer protection legislation' (2008) available at <http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf> accessed 9 April 2012.

¹⁸⁵ Ibid.

¹⁸⁶ Prof Rachael Mulheron (n 31).

¹⁸⁷ The Department of Trade and Industry (n 184). The guidance includes 6 criteria with some overlap between them.

- (3) Capability to investigate infringements and carry out the enforcement procedures;
and
- (4) Cooperation with the OFT and other general enforcers.

On the other hand, in France, associations must meet various criteria in order to be approved. They must obtain government approval, must have been in existence for at least six months and must have a minimum number of members. Once these criteria have been met, an administrative agreement for five years may be granted by a local or national authority (*Préfet* (Prefect), or *Ministre de l'Economie, de l'Industrie et de l'Emploi* (Minister of Economy, Industry and Employment)). Only twenty such agreements have been concluded in France. The rules of standing therefore limit the effectiveness of this action.¹⁸⁸

In Italy,¹⁸⁹ independent Italian public bodies and certain organisations recognised in other EU member states and registered on an official list,¹⁹⁰ may act to protect the collective interests of consumers and users,¹⁹¹ provided that it meets the following requirements:¹⁹²

- 1) The association must have been in existence for at least three years;
- 2) The association must be not-for-profit;
- 3) A list of members must be maintained and updated annually;
- 4) The number of members must not be less than 0.5 per thousand of Italy's population;
- 5) The association must have a presence in at least five regions or autonomous provinces, with a number of members no less than 0.2 per thousand inhabitants in each region;

¹⁸⁸ Véronique Magnier and Dr. Ralf Alleweldt, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report France' (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf> accessed 27 October 2011.

¹⁸⁹ See Prof. Dr. iur. Hans-W. Micklitz and Dr. Cristina Poncibò, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Italy' (Civic Consulting, 2008) <http://ec.europa.eu/consumers/redress_cons/it-country-report-final.pdf> accessed 11 April 2012.

¹⁹⁰ The Ministry of Productive Activities keeps a list of all consumers' and users' associations.

¹⁹¹ Codice del consumo, Art. 139 (Consumer Code, Italy).

¹⁹² Codice del consumo, Art. 137 (Consumer Code, Italy).

- 6) A statement of income and expenditure must be produced each year;
- 7) Continuous activities must have been carried out during the three previous years;
and
- 8) The association's legal representatives must not have been convicted of any offences in relation to the association's activities and the representatives must not be businessmen or directors of manufacturing or service companies for the sectors in which the association operates.

These requirements are intended to be sufficiently strict to exclude unsuitable representatives, but they may also reduce the number of authorised associations, strengthen the power of the few accredited ones, and ultimately make them detached from individual members of the community.

In Portugal, standing is granted to associations, even those which do not have a direct interest in the claim, albeit that their statutes or articles have a connection with the interests that they are pursuing in the Popular Action. With regards to associations,¹⁹³ the criteria set down¹⁹⁴ provide that the associations be legally registered and that their operations be not for profit. The memorandum of association must prove that one of the association's objectives is the protection of the rights and interests of consumers in general or their members as consumers.

In view of the current differences in procedure between the European Union member states discussed above, it is clear that the Commission needs to set its own criteria for 'qualified entities' in order to create a unified and coherent collective redress system for consumers.

iii. Suggested Criteria for Qualified Entities

The Relevant Criteria Suggested may be Categorised and Grouped as follows:

¹⁹³ Associations are allowed to bring popular actions under Article 17 of Law 24/96 of 31 July 1996 (Portugal).

¹⁹⁴ Article 13 of the Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

The Goals of the Association: The memorandum of association should indicate that the suggested legal action falls within the targets of the associations as suggested in the Israeli provision.¹⁹⁵ The importance of this condition is that the organisation gains expertise in the areas most familiar to the organisation. Moreover, operating in the regular field mitigates the fears of conflicts of interests as the interests of the organisations are similar to the interests of the injured class members.

Accountability: Accountability is reached by appropriate management. The organisations that have listed members and run an election process are deemed to be more accountable to their members. Such an organisation maintains a list of its members.¹⁹⁶ The members are updated by the board of directors from time to time in order to show their activities. In most cases the budget is subject to the general assemblies approval each year (as required in Italy).

Therefore, associations based on membership will qualify best under the accountability criterion. General organisations such as government-funded consumer organisations are less accountable to injured members. However, they normally have to undergo a licensing procedure which may require such bodies to update their members as a good practice requirement. Ad hoc associations are less accountable as they do not normally need to follow good practice management, they do not require government approval and they cannot show previous successful conduct.

Length of Operation: The law in Israel requires the organisation to operate for a year before bringing the action. The U.K. guidance indicates that two years' previous experience is required¹⁹⁷ and the Italian legislation requires a minimum period of three years of experience. This provision is aimed to disqualify ad hoc groups which are set up especially for the specific actions in question. Such organisations do not maintain records of previous positive conduct, their previous actions cannot be examined, and thus they may lead abusive litigation or may be dangerous to the injured parties.

¹⁹⁵ Class Action Law 5766-2006 (Israel), s 2.

¹⁹⁶ Maintaining a list of members is a criterion set down in the Italian Consumer Code.

¹⁹⁷ Department of Trade and Industry, (n 184).

Funds Available: The criteria in the U.K. provide that the organisation should produce evidence that it possesses financial resources and the capability to properly investigate complaints.¹⁹⁸ The other relevant criterion is that the organisation is acting independently with no commitment to any third party. In order to maintain its independence, funds should be available from sources which do not seek to exert their will on the organisation by financing it. It is therefore important that associations be allowed to maintain capital in order to obtain high level expert advice and consulting services before bringing the action. The activities of the organisation would be very limited if the organisation lacked funding and if one unsuccessful action were capable of financially destroying it.¹⁹⁹ On the other hand, associations may have better means of finance than private individuals and therefore they may bear the risk of losing individual lawsuits, although scholars suggest exempting organisations from litigation fees unless they act unreasonably.²⁰⁰

Reputation: Some member states²⁰¹ require that the organisation be a non-profit organisation in order to ensure that it maintains its integrity. This requirement also stipulates that the organisation itself and its directors have no previous criminal convictions.²⁰² The reputation requirement is important in order to prove credibility which is very important where an organisation suggests representing victims, especially in opt-out actions where the group members are absent and the organisation is deemed to act for their benefit. Reputation also includes looking at the organisation's track record and its achievements in protecting its members' rights.²⁰³

Number of Members: In Italy, the number of members in an organisation which may bring an action must not be less than 0.5 per thousand of the Italian population. The association must be present in at least five regions or autonomous provinces, with a number of members no less than 0.2 per thousand inhabitants in each region; A minimum number is also required in other jurisdictions such as France. The idea

¹⁹⁸ Department of Trade and Industry, (n 184).

¹⁹⁹ Peter Rott, 'The Protection of Consumers' Interest After the Implementation of the EC Injunctions Directive into German and English Law' 24 *Journal of Consumer Policy* 401.

²⁰⁰ *Ibid.*

²⁰¹ Such as Sweden, Italy, France and Portugal. See sec 13 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

²⁰² As required by the Department of Trade and Industry guidelines in the U.K and the Italian criteria.

²⁰³ Department of Trade and Industry, (n 184).

which underlies these requirements is based on the interest theory. The organisation has to be representative in the relevant area. On the other hand, a requirement such as that in Portugal that the organisation must prove that it represents the majority of the injured class is problematic in opt-out actions as it is difficult to precisely predict the size of the class of injured members from the outset. The minimum requirement is not relevant to general consumer organisations which are established by the government to deal with consumer complaints. Such organisations normally supervise a certain geographical area. In so far as organisations which are aimed to supervise a certain market (e.g. gas consumers, electricity consumers etc) are concerned, the representation requirement should provide that the organisation reflect the interests of the players in the area. There is no logic in limiting the number of members (apart from the minimum number of members required for establishing an association) as the minimum number may change from one area to another.

Licensing and Cooperation: When dealing with cross-border cases, cooperation between organisations is very important in gaining as much relevant information as possible. The cooperation between member states should be compatible with Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, albeit that organisations should be allowed to bring collective redress cases for damages and not just for injunctive relief. Acting in accordance with this regulation means that when a competent authority becomes aware of an infringement committed in the EU, it must notify the authorities of other member states as well as the Commission. It must also supply, at the request of another competent authority, all relevant information required to establish whether an infringement has occurred. In addition, it must take all necessary enforcement measures to bring about the cessation or prohibition of the infringement.²⁰⁴

Currently the requirement of mutual cooperation provides that the competent authorities inform the Commission of the existence of an infringement, the measures taken and the effects thereof, and the coordination of their activities. The Commission

²⁰⁴ Cooperation between Member States for consumer protection as explained by the Commission with regards to regulation (EC) No 2006/2004 available at <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32047_en.htm> accessed 26 November 2011.

stores and processes the information it receives in an electronic database. All requests for mutual assistance must contain sufficient information to enable the authority to fulfil the request.²⁰⁵

Currently, cooperation is limited to investigation and injunctions to stop infringements. However, there is a clear need to enlarge this field to allow qualified entities which conform with the above-mentioned criteria to deal with collective actions.

Such organisations should have a cooperation agenda in cross border cases within the Community,²⁰⁶ which would include publishing important information, such as:

1. New cases of collective redress;
 2. Complaints about businesses;
 3. Any abuse in collective redress cases;
 4. Relevant judgments;
 5. Compromises in collective redress cases;
 6. Distribution of damages to class members; and
 7. Licensed collective redress authorities and organizations;
- (hereinafter referred to as ‘relevant information’).²⁰⁷

The relevant information would appear on the internet websites of all the organizations at a place designated for the publication of all relevant information on collective redress cases.²⁰⁸ This would enhance cooperation where the members of the

²⁰⁵ Cooperation between Member States for consumer protection as explained by the Commission with regards to regulation (EC) No 2006/2004 available at <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32047_en.htm> accessed on the 26 November 2011.

²⁰⁶ The information suggested is different from the current information which the competent authorities have to provide under Decision 2007/76/EC of 22 December 2006 which implemented Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance [Official Journal L 32 of 6.2.2007]. This Decision provides the information requirements, which include the minimum information to be included in requests for mutual assistance and in alerts, the time limits to be complied with, access to information and the use of languages.

²⁰⁷ The relevant information and cooperation may be monitored by community central organisations such as BEUC (Bureau Européen des Unions de Consommateurs) and ANEC (European Association for the Co-ordination of Consumer Representation in Standardisation).

²⁰⁸ A public registry of collective cases is operated in several countries, for example, The Class Action Registry in Israel at <http://elyon1.court.gov.il/heb/tovanot_y/list.htm>;

class are scattered geographically or where additional information in relation to a rough trader is required. Registration of any action should be mandatory immediately on submission of every collective redress case in order to prevent multiplicity of actions and in order to allow maintaining centralised information in this respect.

3. Promoting Public Enforcement Combined with Private Individual Actions for Damages

The state is another player in the area of enforcement. The establishment and enforcement of legal norms to secure the market from unlawful behaviour is the traditional role of the state. The traditional division between public and private enforcement is that public enforcement is concerned primarily with deterrence and punishment, whereas private enforcement is concerned with obtaining compensation and justice for victims.

However, there have been some attempts to involve the state in the damages process and allow the state to act as a representative in class actions. For example, according to the Israeli model, the state acting through authorities and public bodies has the authority to bring class actions in order to claim damages for groups of injured members. However, to date in Israel no collective actions have been submitted by a public authority. The fact that the performance of public authorities is very weak insofar as actions for damages are concerned, even where financial incentives for successful actions are available, suggests that public authorities are apathetic towards financial incentives. Instead, public enforcers are traditionally concerned with the prevention of unlawful behaviour.

The GLO registry in the U.K. at <<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/queens-bench/group-litigation-orders.htm>>;

The Class Actions Registry, (for members who opt in) under Sec 35 of the Dispute Act (Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes) in Norway;

The Class Proceedings Registry in Ontario, Canada at <<http://www.ontariocourts.on.ca/scj/en/notices/pd/classproceedings.htm>>.

A. *Enforcement of Consumer Law by Public Bodies in some Major European Jurisdictions*

In Europe, the involvement of the state through its agencies in the collective redress process is much more natural than in Israel where private individuals are seen as the major drivers at the fore of the collective redress machine. In fact, in Europe some member states, such as Denmark, the U.K. and Portugal, have granted powers to the administrative authorities to initiate collective actions. However, the powers vary from state to state, although in general public authorities in Europe have not brought collective redress cases.

Looking at some examples it becomes clear that in Europe, the interaction between public consumer protection agencies and private consumer associations is not homogenous and varies depending on the rules in each individual member state.²⁰⁹ There is no proper supervision at Community level. According to the principle of subsidiarity,²¹⁰ the E.U. may intervene in the enforcement proceedings of public agencies only if it is able to act more effectively than member states in enforcing consumer rights. The fact that the E.U. generally leaves enforcement of consumer rights to the determination of each member state has led to an inconsistent approach between member states.²¹¹

In the U.K. for example, consumer organisations designated by the Secretary of State (such as the Consumers' Association) submit 'super-complaints' to the OFT.²¹² A super-complaint is used where there is a risk that consumer interests are significantly harmed. The OFT may take enforcement action, launch a market study or refer the

²⁰⁹ Fabrizio Cafaggi and Hans-W Micklitz, (n 153).

²¹⁰ The principle of subsidiarity is established in Article 5 of the Treaty on European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>> accessed 7 October 2011.

²¹¹ Under Article 4 of the The Treaty on the Functioning of the EU (Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47), the EU and Member States are authorised to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence. See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>> accessed 7 October 2011.

²¹² Enterprise Act 2002, s 11.

complaint to the Competition Commission or a sector regulator. A representative organisation may also complain to the OFT that a contract term drawn up for general use is unfair under the Unfair Terms in Consumer Contracts Regulations 1999. The OFT will decide whether to bring proceedings for an injunction in order to stop an illegal action. This procedure does not allow damages claims but yet is for the benefit of a class of injured members who suffer from the unlawful action which the OFT is aiming to stop. Since the OFT has the authority to deal with super-complaints, this raises the question as to why the OFT is not entrusted to deal with consumer class actions for damages.

There are currently other public authorities which represent consumer interests and their power may potentially be enlarged to deal with consumer collective redress for damages. In Italy for example, the *Publico Ministero* (Attorney General) has been entrusted with the role of protecting consumers by instigating criminal proceedings. The Consumer Code adopted in 2005 did not include any mechanism for consumer protection by collective redress. However, the Italian Consumer Code assigned various functions to governmental organisations such as the National Council of Consumers and Users (*Consiglio Nazionale dei Consumatori e degli Utenti*). The Italian Consumer Code²¹³ gives this Council powers to represent consumer associations nationwide. The Council is composed of 17 recognised associations. Thus far the performance of the Council has been very limited and its main role has been to carry out bureaucratic work for the Italian government. Another relevant governmental authority is the Italian Antitrust Authority which has the power to impose fines according to Articles 18-37 of the Consumer Code. The Antitrust Authority in Italy has only recently been given this power in order to comply with the Unfair Commercial Practices Directive.²¹⁴ The Authority is also responsible for the application of the Regulation on Consumer Protection Cooperation.²¹⁵

In Sweden, public enforcers such as the Consumer Ombudsman or the Swedish Environmental Protection Agency may bring a public collective action on broad

²¹³ Codice del consumo, Art. 136 (Consumer Code, Italy).

²¹⁴ Council Directive (EC) 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, available at <<http://ec.europa.eu/consumers/rights/>> accessed 25 November 2011.

²¹⁵ Council Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L364/1.

grounds which are not limited to consumer law.²¹⁶ The Swedish class action legislation has had minimal use, much less than expected by the legislators, which is mainly attributed to the opt-in nature of the procedure. There are indeed some member states that permit representation by public bodies or private individuals, but such claims are very rare in Europe. In Sweden, only twelve cases have been brought in the first five years since the law was enacted in 2003. One action was brought by the Consumer Ombudsman²¹⁷ and 11 cases were submitted by group members (assisted, in some instances, by organisations).²¹⁸ None of the actions were initiated by an organisation. However, it was also anticipated that the public authorities would bring many more actions than the single case which has been reported thus far.²¹⁹ The scarce use of public actions in Sweden is additional evidence that public authorities cannot be solely responsible for claiming damages for consumers. There should be better mechanisms for making public enforcement more effective.

In Denmark²²⁰ the only eligible class representative that can bring an opt-out action is the public authority authorised for this purpose by law, which at present is the Consumer Ombudsman.²²¹ The Danish jurisdiction is the first jurisdiction to allow a state body to act as representative in collective redress cases and bring such actions (up to a limited amount of money) on an opt-out basis.²²² Thus far this model has not resulted in higher rates of collective redress cases than in other European member states. However, the interaction of the state in actions for damages has been warmly welcomed and praised by commentators, and may form the basis for a European development²²³ with some modifications to improve the interaction with private enforcement as suggested later in Chapter Five.

²¹⁶ Laurel J. Harbour and Marc E. Shelley, 'The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World' (n 175).

²¹⁷ The Consumer Ombudsman v. Kraftkommission I Sverige AB, Umel Dist. Ct., T 5416 (2004).

²¹⁸ Per Henrik Lindblom, (n 84).

²¹⁹ Robert Gaudet, (n 60).

²²⁰ Section 254e(8) of the Administration of Justice Act (Act no. 181 of 28 February 2007) on collective redress which came into force on 1 January 2008 (Denmark).

²²¹ For the time being, only the Consumer Ombudsman has been appointed to carry out this role. Henrik Øe, Danish Consumer Ombudsman, '*Collective redress in Danish law and perspectives at EU level* (The Oxford/Stanford conference on the globalization of class actions, December 2007) at <http://www.law.stanford.edu/display/images/dynamic/events_media/Danish_Conference_Presentation.pdf> accessed 27 October 2011.

²²² The Danish mixed opt-in opt-out model is explained in more detailed in part A(7)(B) above.

²²³ Henrik Øe, Danish Consumer Ombudsman (n 221). See also Professor Christopher Hodges, (n 64) at pages 5, 9, 20.

B. The Advantages of Public Enforcement

Public enforcement has not yet proven to be fruitful insofar as damages actions are concerned. However, public enforcement should not be neglected since it has some clear advantages over private enforcement.

These advantages include special powers conferred on public bodies of investigation and discovery²²⁴ which may assist in proving consumer cases. These powers are not shared by consumers who normally lack sufficient financial resources to prove business misconduct. In addition, where misconduct also constitutes a criminal offence or, in other special matters such as competition, a legal infringement, public bodies might have additional powers to confiscate documents, conduct searches and to enforce formal inquiries and interrogations.²²⁵

Public enforcers appear to be more objective and will look at the general good of all players in the market, whereas private enforcers may look at their own pocket.²²⁶ In addition, private enforcement has a smaller range of sanctions and the damages claimed generally cover the individual losses of the plaintiffs who have brought the action.

In the American system, private claimants have been said to act as a 'private attorney general'.²²⁷ The meaning here is that private enforcement is led by lawyers who are acting as private attorney generals. Commentators have criticised the role of private enforcement, at least insofar as civil rights actions are concerned.²²⁸ Professor Coffee has criticised the idea of a private attorney general and noted that lawyers representing class actions may have different interests to those of their clients, which

²²⁴ Klaus-Heiner Lehne Report for the Committee on Legal Affairs of the European Parliament on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0047&language=EN&mode=XML>> accessed 12 April 2012.

²²⁵ See, for example, the powers of the OFT in investigating criminal cartels and competition cases in The Office of Fair Trading, 'Powers for investigating criminal cartels- guidance. The Enterprise act 2002' available at <http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft515.pdf> accessed 12 April 2012. See also 'A Guide to the OFT's investigation procedures in competition cases – Guidance' OFT1263 (March 2011) available at <www.offt.gov.uk/shared_offt/policy/oft1263.pdf> accessed 12 April 2012.

²²⁶ Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' [March 2009] 2(1) World Competition 3-26. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458> accessed 24 November 2011.

²²⁷ William B. Rubenstein, 'On What a "Private Attorney General" Is-And Why It Matters' (n 147).

²²⁸ Michael Waterstone 'A New Vision of Public Enforcement' [2007] 92 Minn. L. Rev. 434.

could result in either poor representation (where plaintiffs' lawyers sell out their clients) or excessive litigation (as the parties to litigation do not bear the costs)²²⁹ whilst the lawyer tries to burden the defendants with excessive litigation or works on an hourly basis.

In addition, Professor Michael Selmi analysed a survey of high-profile employment class actions with large settlements (in which the issue examined was the benefit of private enforcement in lawyer-driven class actions). All of these cases were brought by private plaintiffs' lawyers. Professor Selmi concluded that these class actions produced only modest financial benefits for class members, despite the fact that the remedial focus of the cases was monetary relief. Therefore, Professor Selmi claimed that one of the few things that these cases accomplished was enriching the lawyers involved. In addition, the lawyers did not stand to gain any substantial benefits from deterring future wrongdoings.²³⁰ Therefore private enforcement led by private lawyers, though highly praised in Israel and in the U.S., may lead to abuse and may not lead to the maximum benefit to the class of injured members.

Looking back at some European scholars' views on the issue of enforcement, the general view in Europe gives precedence to public enforcement. Willem van Boom and Marco Loos argue that whatever the enforcement culture of each E.U. member state, public enforcement is indispensable.²³¹ They base their argument, inter alia, on more recent European legislation such as the Cooperation Regulation and the Unfair Commercial Practices Directive which designate 'competent administrative authorities' and 'public bodies' with the task of enforcing and cooperating in the collective interests of consumers.

²²⁹ Professor John C Coffee Jr, 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working' [1983] 42 MD. L. REV. 215 see at page 220.

²³⁰ Michael Selmi, 'The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects' [2003] 81 Tex. L. Rev. 1249.

²³¹ Willem van Boom and Marco Loos 'Effective enforcement of consumer law in Europe Private, public, and collective mechanisms' in W.H. van Boom, M.B.M. Loos (eds.), *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention*, (Groningen, Europa Law Publishing, 2007), available at <www.professorvanboom.eu/pdf_files/Consumer_interests_TOC.PDF> accessed 25 November 2011.

Professor Hodges, also prefers public enforcement and notes that: "Unlike the United States, the "big stick" would not be that of private class litigation, but would primarily be that of public authorities, which would operate on a far more immediate, flexible and responsive basis, involving incentives for restitution rather than delayed weighty financial penalties."²³² Professor Hodges considers public enforcement to be a better system than private collective redress because it involves lower costs as there are no intermediaries (such as lawyers and class representatives), and quicker procedures. Therefore, he suggests that before introducing a new private collective redress system, the outcome of the public regulatory mechanism should be examined. Professor Hodges recommended a new approach, preferring public enforcement to civil enforcement, claiming that efficient use of public authorities may be more effective in eliminating any financial gain or benefit from non-compliance.²³³ His new approach is based on the Hampton Report on reducing enforcement burdens on businesses²³⁴ and the Macrory Report on penalties policy,²³⁵ both of which are not directly connected to 'collective redress,' but which Professor Hodges considers a good starting point for his new and innovative approach. The Macrory Report encouraged settlement of infringements through restorative justice, a process whereby those most directly affected by a wrongdoing come together to determine what needs to be done to repair the harm and prevent a recurrence. This is in line with Professor Hodges' view that disputes should be settled more quickly, cheaply and effectively thus making recourse to the courts the last resort. These reports led to new regulations in the U.K., the Regulators Compliance Code,²³⁶ which is made under the Legislative and Regulatory Reform Act 2006. Section 21 of this Act enacts the principles of good regulation mentioned in the Hampton Report which require good regulation to be transparent, accountable, proportionate and consistent. The Regulatory Enforcement and Sanctions Act 2008²³⁷ gives the regulator the power to impose sanctions on the offender aimed to ensure that the offence will not recur and the position is restored so far as it is

²³² Professor Christopher Hodges, 'From Class Actions to Collective Redress' (2009) 28 *Civil Justice Quarterly* 41.

²³³ *Ibid.*

²³⁴ P. Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005).

²³⁵ R. Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006).

²³⁶ See The Legislative and Regulatory Reform Act 2006 <http://www.doncaster.gov.uk/environment_and_planning/envirn_health/regulation_and_enforcement/regulators_compliance_code.asp> accessed 13 July 2012.

²³⁷ See The Regulatory Enforcement and Sanctions Act 2008 <<http://www.legislation.gov.uk/ukpga/2008/13/contents>> accessed 13 July 2012.

possible. In cases where the offender refuses to comply with a discretionary requirement, the enforcer may decide to prosecute the original offence. The restoration order may be brought by a civil action by the injured parties but this is unlikely to happen where the damage to each individual is low. The restitution order is aimed at eliminating any financial gain which the offender has gained from non-compliance. Otherwise, the authority may negotiate a settlement with the offender. In this case, the public authorities can promote payment to the injured members for any infringement without the intervention of public enforcement bodies.

However, in practice, public authorities have, thus far, not been very successful in obtaining damages for individuals as seen in Israel and in the member states which allow collective redress by public authorities.²³⁸ It should be borne in mind that public bodies are working under budget constraints and may not be able to deal with all cases brought to their attention. Therefore, there is a risk that the selection of cases and the investment of time and effort in preparing cases may also be biased towards more prestigious causes, rather than focusing on market correction. Thus even though public, rather than private, enforcement is the preferred option (it is safe from abuses, less costly to society, needs no intermediaries or lawyers), due to its poor record of achievement to date, it should not be designated as the sole enforcement method. Cooperation between public and private enforcement systems may therefore allow each of these methods to complete one another.

Indeed, the OFT takes the view that private enforcement is complementary to public enforcement, since the latter is more suited to dealing with wrongful activities and practices, while the former has a deterrent effect on businesses due to the magnitude of the possible damages.²³⁹ The OFT stated in a discussion paper relating to competition that private actions are an essential complement to public enforcement. The OFT stated that public enforcement and private actions work alongside and in harmony with one another to the best effect for consumers and for the economy.²⁴⁰ The ideas related to enforcement of competition law, which is also a consumer related

²³⁸ Such as Denmark, Portugal and Sweden.

²³⁹ The Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Discussion paper OFT916, (April 2007) at

<http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf> accessed 17 September 2011.

²⁴⁰ Ibid.

area, the enforcement mechanism of the regulatory bodies, as well as private enforcement, are similar to general consumer cases.

C. Combining Private and Public Enforcement

A solution proposing that private actions should only be used as a supplement to public enforcement may combine the best of both enforcement systems. There are several advantages of public enforcement which make it superior to private enforcement. Public enforcement, through its reliance on state power, benefits from more effective investigative and sanctioning powers. Public enforcement is also superior because it entails more effective sanctions - it is not limited to the imposition of monetary sanctions in the form of fines, but also encompasses other types of sanctions, such as director disqualifications and prison sentences. Public enforcement is also cheaper than private enforcement, because it requires fewer resources to be spent in the determination and allocation of the damages.²⁴¹ Public enforcement has the additional advantage of allowing better control in setting the optimal amount of the sanction.²⁴² Public enforcement may also generally be cheaper because of the higher degree of expertise and the generally lower cost of administrative procedures compared to civil litigation.²⁴³ Public enforcement is also regarded as more neutral in comparison with private actions for damages which are driven by the private interests of the parties concerned, which may be different from those of the general public.

However, public enforcement has not improved access to justice or provided any substantial remedy to consumers thus far. On the other hand, as far as the pursuit of personal compensation is concerned, private actions for damages appear to be superior to public enforcement. In Israel, the private agency mechanism has proven to be very workable, although it has been subject to excessive use and subject to abuse by lawyers trying to obtain a share of the damages rather than bringing compensation to the injured class members.

²⁴¹ K.G. Elzinga and W. Breit, 'The Antitrust Penalties: A Study in Law and Economics' (1978) 31(2) *Vanderbilt Law Review* 427-444

²⁴² Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', (n 226) 3-26.

²⁴³ Wernhard Moschel, 'Should Private Enforcement of Competition Law Be Strengthened?' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds) *Conferences on New Political Economy* (Mohr Siebeck, 2007), vol. 24, pp 101-113(13) see at page 106.

The question is whether these two mechanisms should be combined, reaping the advantages of both while preventing the hazards as much as possible.

As Wouter P.J. Wils argues in his article in relation to antitrust actions,²⁴⁴ public antitrust enforcement is the superior instrument for pursuing the objectives of clarification and development of the law and deterrence and punishment of infringements, whereas private actions for damages are superior for the pursuit of corrective justice through compensation. Therefore to Wils' mind,²⁴⁵ the optimal antitrust enforcement system would appear to be a system in which public antitrust enforcement aims to clarify and develop the law and to deter and punish infringements, while private actions for damages aim to achieve compensation. This approach of separating the tasks of different enforcement systems corresponds to the classic, time-honoured concept of the different roles of public enforcement and private actions for damages, not just in the area of antitrust but in the law in general.²⁴⁶

It seems that the English approach, which distinguishes follow-on actions from stand-alone actions²⁴⁷ in competition cases, should be adopted as the basis of the new collective redress model.²⁴⁸ Such a model gives preference to public enforcement and allows private stand-alone actions only following a public authority action.

According to this system, private claims for damages can take two different forms. Firstly, they can be conducted in the footsteps of public enforcement as follow-on suits, or they may be pursued where no public action has been taken as stand-alone suits. Follow-on actions for damages submitted by private individuals are much easier to bring than stand-alone actions for damages, because the public enforcement action will have established the existence of an antitrust violation, and may also have generated useful evidence which may be open for the individual to use in his subsequent action.²⁴⁹

²⁴⁴ Wouter P.J. Wils, (n 226) 15.

²⁴⁵ Ibid.

²⁴⁶ Wouter P.J. Wils, (n 226) 16.

²⁴⁷ Competition Act 1998, s 47.

²⁴⁸ In the Civil Justice Council Report, *'Reform of Collective Redress in England and Wales: A Perspective of Need'* Professor Rachael Mulheron sets out on the advantages of the follow-on procedure as compared with stand alone actions. <http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf> accessed 27 November 2011.

²⁴⁹ Wouter P.J. Wils, (n 226) 19.

If this approach is adopted, public enforcement will act as a filtering mechanism for private enforcement. It will resolve the problem of excessive private litigation as seen in Israel and the U.S. Under the suggested model, public enforcement is left to take precedence over private enforcement of consumer's rights. Yet private enforcement for damages claims which is favoured by the general public and may raise the confidence of consumers in cross-border trade remains available for consumers.²⁵⁰

This mechanism makes it clear that public enforcement is superior to private enforcement as it avoids the risks of unmeritorious claims and the extortion of defendants. Every complaint is examined by the relevant public authority and only when the public authority finds that the complaint is justified may a follow-on action be available.

It should be made clear that follow-on actions are not sufficient on their own and they must be supplemented with stand-alone actions to be used where the relevant public enforcer fails to take proceedings within the specified time limit. This approach does not shut the door completely on private actions. The best solution would be to bring every private action to the desk of the relevant public body, allowing a private person to bring a representative stand-alone action only if the public body decides not to commence group proceedings within a reasonable period. The stand-alone actions would be treated with caution and the representatives would have to comply with financial conditions and the viability of each case on its merits. The application for a stand-alone action would undergo a filtering process to allow the action to be certified.

Individuals, rather than public bodies, are best placed to know of situations where an abuse leading to damage has occurred. If a complaint leads to public action which results in compensation for a group of consumers, it seems only fair that a private individual or organisation which has referred the matter to a public body should be remunerated with a share of any financial award in return for initiating the process that led to compensation for the group's members. Such a procedure does not exist in

²⁵⁰ Special Eurobarometer 298 "Consumer Protection in the Internal Market", October 2008. (ante at 199).

Israel. However, there are several examples that may be followed such as the super-complaint mechanism operated by the OFT in the U.K.²⁵¹ Another source for such a complaint mechanism is Article 16(1) of Regulation 1/2003²⁵² which gives binding effect to some of the findings of the Commission in relation to competition infringements following an investigation on its own initiative or by acting on a complaint,²⁵³ so as to create uniform application of Community competition law. Such a complaint can be lodged by any natural or legal person who can show a legitimate interest, having suffered harm as a result of the infringement which certainly qualifies as a legitimate interest. The claimants in the follow-on action for damages need only establish the harm they have suffered and the causal link between the infringement and the harm suffered.

This is a change which should be introduced into the Israeli model to rebalance the enforcement mechanism and put more weight on public enforcement with possible complementary proceedings by private individuals. If the Israeli model were to adopt this change, it would benefit from more careful public enforcement with possible complementary private follow-on private damages. This way the flood problem which is caused by private stand-alone actions would have been seriously mitigated.²⁵⁴

However, thus far the Israeli jurisdiction lacks proper infrastructure for public enforcement and lacks organisations to deal with class actions. Indeed very few actions have been brought in Israel by organisations.

On the other hand organisational intervention is very welcomed in most European member states albeit organisations in Europe have failed to bring collective redress actions and the European Commission has failed to develop a unified system for the licensing of organisations to deal with collective actions for damages. The European Union is capable of accepting a collective redress mechanism led by organisations and private follow-on actions.

²⁵¹ For the Super-complaints mechanism, see the OFT guidance available at <http://www.of.gov.uk/OFTwork/markets-work/super-complaints/> accessed 14 April 2012.

²⁵² Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, last amended by Council Regulation No 1419/2006 [2006] OJ L269/1.

²⁵³ Article 5 of Council Regulation No 1/2003 mentioned above.

²⁵⁴ The solution offered will be elaborated upon in Chapter 5 of this work.

Part C. Should a Class Action Model include Financial Incentives?

Under the Israeli model, collective actions led by private individuals are most popular. This can in part be explained by the fact that under the Israeli system, financial incentives are offered to private claimants. It is thus crucial to analyse the role that those incentives play in the decision making of private individuals engaging in class actions and assess if financial incentives should form an integral part of any private class action. In the European context, it should be noted that, whilst Europe would tend to favour public enforcement, a mixed regime enabling private actions as well as public agencies and organisations would, in our view, bring the best benefits, as already demonstrated. The intervention of private individuals in a representative claim for damages may be very risky for the representative who may be liable to pay the court fees and other party expenses at the end of the case. Therefore some incentives should be introduced in order to convince such representatives to take the risks of handling a collective action. There are various types of incentives that may be offered to encourage private individuals to engage in representing groups of consumers in claims for damages. On the other hand if financial incentives were unlimited and the risk of paying costs very low, this may carry the risk of excessive use of the class action machinery. For this reason, commentators regard financial incentives for private plaintiffs as the source of the multiplicity of claims.²⁵⁵ Professor Hodges claims that if financial incentives for private litigants are combined with collective proceedings, there is an inherent risk of abuse.²⁵⁶

In the search for a new European model, Professor Hodges reached the frustrating conclusion that either collective redress mechanisms do not work effectively or they work too much:

Most of the existing collective procedures that exist in EU Member States are little used, because of the problems of funding and the costs rules. But if those features were to be changed, the system would quickly attract many claims (a)

²⁵⁵ Professor Christopher Hodges, (n 64).

²⁵⁶ Ibid.

that could be dealt with in other ways and (b) in which the merits were lowered. Increasing the financial incentives would merely attract intermediaries to capture the procedures [...]²⁵⁷

This is certainly a correct analysis when looking at the Israeli model where the introduction of financial incentives for individuals has led to an increased number of class actions. However, before giving up the idea of collective redress and looking for other workable mechanisms, an in-depth study of the various types of financial incentives which may be offered to private plaintiffs is required. There are various cumulative incentives and measures employed in the Israeli regime which together have made the Israeli model too accessible. However, the different types of incentives should be inspected one by one and compared with other European member state mechanisms in order to decide which of the incentives should be adopted as part of the new collective procedure.

The different types of financial incentives in use under the Israeli CAL may be classified into two main categories. Firstly, the negative expenditure incentive. . This incentive which is preventative in its nature, exempts the representative plaintiff from making extensive payments. This might deter him or her from submitting a justifiable action. Secondly, positive incentives which are a financial bonus paid to the representative to encourage the representative to act positively and bring justifiable actions.

1. Positive Incentives and Negative Expenditure

In the first category of negative expenditure, the representative is exempted or enjoys reductions in expenditure which may be the outcome of bringing the action and the out-of-pocket payments that he might be liable to pay. This category includes court payments that the representative is expected to pay and costs that may be imposed on the losing party if the action is unsuccessful. The latter is also known as the ‘loser pays’ principle. If the representative is expected to pay high court fees and the other

²⁵⁷ Professor Christopher Hodges, (n 64).

party's expenses, the risk of running the action may be higher than the profit that the representative stands to gain from the action.

In Israel, class actions are almost totally exempt from court fees. In the past, before the certification process existed, a minimal fee was paid and court fees would only be paid from the proceeds of the action if the action was successful. However, the courts decided that court fees should be paid in class actions only in respect of personal actions by a representative plaintiff.²⁵⁸ This decision meant that in fact court fees were very low as the normal case in class actions is that the cost of the personal action is very low, hence the court fees which the representative had to pay for his personal action were minimal.

The legal position changed under the CAL in Israel which provided that the matter of court fees is subject to further enactment.²⁵⁹ This enactment never came into force and the result is that since the introduction of CAL in 2006, class actions are completely exempt from court fees.²⁶⁰ As a consequence of this exemption, the doors are open to every individual consumer who wants to file an action, even on weak merits, as there is no barrier of paying court fees. The position would have been different had the courts required full payment of court fees in relation to the total value of the collective actions. If that would have been the case, representatives would have been asked to pay 2.5% of the total value of the collective action which, due to the aggregation of all personal claims, usually amounts to an extremely high figure. Had representatives been required to pay court fees according to the total value of the collective action, these fees would surely form a serious barrier to representatives, even if they had been promised that the losing party would repay this amount in a successful action.

It is important to consider the effect of lowering costs and whether an exemption from court fees is a useful incentive for the submission of class actions. After examining jurisdictions other than Israel, the conclusion is that high court fees may deter plaintiffs from bringing class actions, but low court fees do not act as a real incentive to bring class actions. That means that if Europe is considering a new coherent

²⁵⁸ Leave to Appeal Request No. 7633/98 (Supreme Court) *Discount Bank v. Shemesh* [23 September 1999].

²⁵⁹ Class Action Law 5766–2006, s 44 (Israel).

²⁶⁰ Class Action Law 5766–2006, s 45 (D)(1) (Israel).

collective redress model, the incentive of lowering costs would not cause any improvement in so far as access to justice is concerned. In reaching this conclusion some concessions from the rigid rules of cost payments in some jurisdictions were examined.

In Portugal for example, plaintiffs in Popular Actions are exempt from prepayment of costs²⁶¹ and pre-payment of stamp duty.²⁶² If the action fails, the judge will determine the costs which will be low - probably between 10 and 50% of the normal costs. This means that the reduction on legal fees may be as much as half of the normal fees.²⁶³ The Portuguese law provides that the judge in the case takes into account the complexity of the case, the amount in question,²⁶⁴ the financial situation of the representative plaintiff and the reasons for the dismissal of the action. As mentioned earlier,²⁶⁵ there are very few collective actions in Portugal, which means that negative expenditure provisions, such as lowering court fees, do not per se improve access to justice. Some positive incentives are also needed. It is not sufficient to lower costs. It should be borne in mind that the Portuguese model is an opt-out model which lacks positive incentives and the system remains almost totally unused. The problem with the Portuguese model of reduced legal fees is that an individual consumer who wishes to initiate a collective action does not know from the outset how much money he will have to secure and the level of fees that he might have to pay when the case comes to an end. Thus, even if the judge decides to reduce the amount of costs dramatically at the end of the case, it does not reduce the risk which the representative has had to undertake from the moment of submission of the claim and until the judge's decision on costs. Therefore the representative is at risk of paying the full costs until the judge makes a decision on exemption from court fees.

On the other hand, the Danish approach creates greater certainty and ought to be carefully considered as it could provide an interesting starting point for any class action model. The Danish introduced new rules²⁶⁶ relating to the payment of costs, including the requirement to deposit a surety imposing a cap on the amount a party to

²⁶¹ Article 18 of Law 24/96 (Portugal).

²⁶² Ibid.

²⁶³ Henrique Sousa Antunes, (n 92).

²⁶⁴ Article 21 of Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

²⁶⁵ See Chapter 2 Part C section 1.

²⁶⁶ The Administration of Justice Act (Denmark)

a class action may have to pay. Indeed, according to this requirement, representatives and class members (in opt-in proceedings) are required to provide security for costs. In the event that the action fails, they are not required to pay legal costs in excess of the amount specified²⁶⁷ i.e. the security provided plus any sum owing to the class member as a result of the case.²⁶⁸ In addition, the court may require that any group member wishing to join the action provide security for the legal costs if the costs are not insured under Section 325 of the Danish Act or the costs are not covered by legal aid. The costs are paid by the state if the class action fulfils the terms for free legal aid under Sections 327-329 of the Administration of Justice Act, but at a maximum calculated according to Section 254e(7) of the latter Act.²⁶⁹ These measures have the effect of mitigating the risk of bringing a collective action as, from the beginning of the case, the representative knows the amount of the expenses which will be charged should the action fail. Therefore, these measures assist in calculating the risk that the representative might face.

In an opt-out action, members of the opt-out collective redress action can only be ordered to pay the amount of money which they stand to recover if the proceedings are successful.²⁷⁰ Again, here the Danish model exhibits an interesting feature, as it gives the representative parties the information required when considering whether to bring a collective action.

Features of the U.K. system, though different from the financial concessions in the Danish model, may lead to the same result. This system is known as the protective costs order which may allow claimants, in certain cases against a public body and in which the claimant lacks funds, to apply to the court for the costs of the action to be capped or to be indemnified against costs entirely. Thus, there is clear recognition that in exceptional circumstances, some types of litigation which are in the public interest

²⁶⁷ Under Section 254e(7) of the Administration of Justice Act (Denmark).

²⁶⁸ Prof. Erik Werlauff, (n 104).

²⁶⁹ Prof. Erik Werlauff, (n 104).

²⁷⁰ The Danish Consumer Ombudsman, Henrik Øe, 'Collective Redress' (Speech at the Leuven Brainstorming event on collective redress, 29 June 2007) available at <http://ec.europa.eu/consumers/redress_cons/docs/collective_redress_danishOmbudsman.pdf> accessed 26 November 2011.

should not be constrained by cost pressures on the claimants.²⁷¹ The advantage of protective costs orders is that they provide clarity on the issue of costs from the outset²⁷² in the same way the Danish surety provision does.

However, such incentives to class actions in circumstances where the public interest is not at stake may be abused and thus safeguards are needed. If these incentives are abused, the utility of the system disappears. As a result, in the England for example, the Court of Appeals has set down some very stringent criteria for allowing protective costs orders, which take into account the public interest of the case and whether the plaintiff is acting for private gain.²⁷³ The effect is similar to the Danish concept of a costs surety and it provides some security to the plaintiff by limiting his expenses from the outset of the case. This idea is excellent for consumers who sue for a small amount and may run the risk of having to pay huge costs.

However, there is a disadvantage to the surety requirement. It may deter representatives from bringing just actions because they have to incur out-of-pocket expenses at the outset of the case, even if the case is strong on its merits. Nonetheless, the advantages of capping the costs from the outset outweighs the burden of depositing the surety as its gives the representative security from the risk of further payments at the end of the case, and enables the discontinuation of the action if the surety required is too high.

A further consideration which should be taken into account is that in follow-on actions, the case is more substantiated as the public authority had already ruled against the defendant. Therefore, in these cases, a further concession from the surety requirement may be awarded, or a lower cap of costs should be imposed. In stand-alone actions where the action is much more complicated and may be less

²⁷¹ John Peysner and Angus Nurse, *Representative Actions and Restorative Justice: A Report for the Department for Business Enterprise and Regulatory Reform (BERR)* [December 2008] Professor Lincoln Law School BERR ITT No.101/08 BERR Ref:01.05.05.02/71P

<<http://www.berr.gov.uk/files/file51559.pdf>> accessed 23 September 2011.

²⁷² Philip Havers QC, *Protective Costs Orders Fair play in Action or a Complainer's Charter?*

<www.1cor.com/1155/records/1212/PH%20public%20law%20handout.pdf> accessed 23/9/2011;

The Pilch Organisation, *Protective Costs Orders in Public Interest – Jurisprudence Review 2011*

<<http://pilch.org.au/>> accessed 23 September 2011.

²⁷³ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600.

substantiated, a higher security cap is justified. Therefore, the suggested rule should not follow the Israeli full costs exemption from court fees and the decision on costs at the end of the case. The new European mechanism should adopt a cost capping measure which gives private individuals security from excessive costs at the end of the trial. The cap should be higher in stand-alone actions than in follow-on actions. A full exemption from the surety requirement may be considered in follow-on cases.

Furthermore, in considering the question of costs generally (not only court fees), it is important to consider that where the action has brought a benefit to the class or to the general public, the judge should have the discretion to relax the costs incurred by plaintiffs, for example, by exempting payment, or rewarding the losing party where the action has brought the violating behaviour to an end, or by reversing a cost order. This discretion is very important in cases where the action has brought some general benefit even if has not resulted in payment of compensation to class members. Such cases may occur where the defendants undertake to stop illegal actions in the future or where the action has ended in reparations for misconduct which will benefit the class of consumers indirectly.

For example, under Section 22(c) of Israel's CAL, the court may reverse a costs order and grant the losing party an award of costs after considering the following factors:

1. The extent of work and the risks which the representative had to undertake;
2. The benefits that the action has brought; and
3. The importance of the action to the public.

However, as seen above, the relatively small number of actions that have been brought in European member states (even those that offer costs concessions) demonstrates that lowering costs on its own does not provide an incentive for the submission of class actions. This is in fact the position with all negative preventive financial incentives.

In order to be effective, negative expenditure incentives should be dealt with in the preliminary stages of the case, prior to filing a defence, in order to give some certainty to the representative parties and to enable them to calculate their expenses in advance.

A provision similar to Section 22(c) of Israel's CAL, enabling a court award to the representative plaintiff for payment of expenses where the case has brought some general benefit or where reparations for unlawful conduct is justified, should be retained in the new model.

Such a provision has the effect of lowering the risk in paying lawyers' fees where the action has brought some benefit, even if the class members did not receive a payment of monetary compensation.

2. Imposing Positive Financial Incentives in order to Gear Collective Actions

Positive financial incentives are legal measures that encourage potential representatives to submit collective redress cases despite the dangers of bearing the costs of the process. Such measures should be distinguished from negative expenditure incentives, such as exemptions from court fees that may reduce the danger of paying high costs. The best example of a positive incentive is a measure that allows the court to award the representative a share of the action's outcome.

According to the Israeli model, such a reward is subject to the court's discretion, bearing in mind certain criteria²⁷⁴ which are generally dependent on the contribution that the action and the representative have made to the general public or to the class members. In fact, the idea that the representative should be rewarded in return for assuming the risk of costs and the burden of representing the group of injured members is at the heart of the Israeli model. This reward is the reason that so many actions are brought by individuals in Israel. It is important to note that organisations and public bodies are also entitled to a reward under the Israeli Act, although, their performance in submitting class actions thus far in Israel has been comparatively weak. The CAL went as far as providing that organisations or public bodies be allowed to participate in a collective action²⁷⁵ and, if they decide to participate in the

²⁷⁴ Class Action Law 5766–2006, s 22 (A). The criteria include the extent of work and the risks that the representative had to take, the benefit that the action brought and the importance of the action to the public.

²⁷⁵ Class Action Law 5766–2006, s 15.

action and express their views in the matters which are relevant to the legal proceedings, they may be entitled to a reward even though they were not parties to the court case.²⁷⁶ The low figure of participation of these bodies in class actions in Israel, despite the financial incentives offered, leads one to the conclusion that organisations and public bodies in Israel are apathetic towards positive financial incentives.

There are cases that lead to no financial benefit for class members, for example, where the wrongdoer has understood that his behaviour was wrong and rectifies his wrongful action. The Israeli legislator provided that in such exceptional circumstances, even if the motion was not accepted, the court may reward the representative with a sum of money having regard to the above-mentioned criteria set down in Section 22 of the CAL.²⁷⁷ The purpose of this rule is to encourage representatives to bring collective actions which benefit the general public, even if the damages claim for the group's members does not ultimately succeed. Positive financial benefits are very important for the promotion of private enforcement. The bonus should be allowed in both types of cases, both follow-on and stand-alone actions, provided that the action results in the payment of damages and creates a fund from which legal expenses and the bonus for the representative party are paid. There is a case for making a higher bonus payment to a representative of parties in stand-alone actions who have assumed the risk of the legal proceedings and have succeeded in the action.

3. Lawyers' Fees as Incentives for Collective Actions

Another positive incentive is allowing the group's counsel to receive a share of the proceeds in a successful action. In consumer cases each personal action is generally very small and only the aggregation of claims makes such an action economically viable for lawyers. The representative plaintiff cannot usually pay the lawyer's fees as his own personal claim is very small. Despite some reservations about the structuring of lawyers fees, the Israeli legislator took the view that since the lawyer has an entrepreneurial role in bringing a collective action, he should have a financial incentive for doing so. However lawyers' fees may be problematic and lead to abuse.

²⁷⁶ Class Action Law 5766–2006, s 22(C)2.

²⁷⁷ Class Action Law 5766–2006, s 22(C).

A. *The Problems with Lawyers' Fees*

With regard to private lawyers, whilst indeed seeking their own private gain, they also serve the public good. Notwithstanding that class actions have been repeatedly 'criticized for allowing class attorneys to appropriate more than their rightful and efficient share of the common fund and for providing much less compensation and deterrence than alleged. Lawyers' gain has often come at the price of class members' loss.'²⁷⁸ Professor Deborah Hensler from the RAND institute in the United States tried to survey the financial gains of lawyers in ten consumer and mass tort cases and found that it is difficult to evaluate the outcome precisely for the class lawyers. However, the estimate was that the lawyers' share was between five and 50% of the money generated by the action.²⁷⁹ This study shows that lawyers' fees are not predictable and may vary from case to case. There is no proper control over lawyers' fees and in some cases, fees may reach unreasonable figures which leave the group of class members with no real benefit from a successful action.

The problems with fee structures mainly arise due to collusive settlements that award class members mere coupons to buy the defendants merchandise, while providing lawyers with large monetary fees.²⁸⁰ There are even settlements known as 'sweetheart deals,' whereby the court is led to believe that the benefit of the settlement to the class is higher than it is in reality. For example, the settlement may include a reduction in price or coupons to buy the defendant's merchandise, which benefits the defendant but does not bring real benefits to the group's members, while the lawyer gets a high percentage of a theoretical sum that the parties claim is for the benefit of the class. The normal practice in the U.S. is to award the lawyer a contingency fee at a rate equal to one third of the damages for all the class members.²⁸¹ However, not all cases

²⁷⁸ Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' [2002] Vol. 21 *The Review of Litigation* 25.

²⁷⁹ Hensler, Deborah R., Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Corporation, 2000).

²⁸⁰ Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (n 278).

²⁸¹ Deborah Hensler, Nicholas Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross and Erik Moller, (n 279); H. M. Kritzer, *Reputations and Rewards: Contingency Fee Legal Practice in the United States* (Stanford 2004).

end with the strict payment of compensation to the class members. Settlements may result in granting consumers a future reduction to purchase the defendant's products ("coupon settlements") or with general payments to a fund managed by the defendant's lawyers or with some donations. Other cases may result in future undertakings which the defendants may take upon themselves. For example, in the Tnuva case,²⁸² the judge ordered that compensation be provided in three different ways. One third of the sum was to be awarded by way of a general price reduction of the defendant's milk products (for a period set by an expert) or by an increase in the contents in the milk carton with no price increase. Another third was to be donated by the defendant to a special fund for research in the area of food in connection with public health issues. The remainder of the compensation was to be divided amongst the poor by special organisations.

In another case, a bakery which stated that the bread it baked did not contain salt, but which in fact did so, agreed in a settlement to donate 12 tons of its products and to amend its labels from no salt to low salt.²⁸³ A distributor of 5% vinegar who claimed that the vinegar was "natural" but which also contained unnatural products agreed in a settlement to change the label by deleting the word "natural," as well as to reduce the price by 30% for a period of three months.²⁸⁴

In all these cases, it is difficult to estimate the exact benefit to the class by the reduction offered or by the future undertaking undertaken by the defendant. It is questionable how many class members would have stepped forward in order to prove their small sums of personal damage granted by the settlement and collect their share. Therefore, it is very difficult to calculate the lawyer fees as a share of the settlement. Normally in such cases, the lawyer will suggest a fee calculation which is beneficial to himself.

Looking at the issue of lawyers' fees, it seems that there is an inherent conflict of interest between the class and the lawyer or class representative in most collective

²⁸² Tnuva v. Rabi [2008] District Court of Tel Aviv, Case No. 1372/95.

²⁸³ Cooper v. Angel [2010] District Court of Tel Aviv, Case No. 10978-06-10. Settlement approved on 16 June 2011.

²⁸⁴ Turgeman v. Israko [2010] District Court of Tel Aviv, Case No. 33108-08-10 (Judgment dated 4 September 2011).

redress proceedings. The lawyer has an interest in making a profit and reaching a good settlement with a high sum for his own fees, while the client's interests is to maximize the income for the class members.

It is the class representative or the class lawyer who bears the costs of litigation, including payments for expert evidence, court expenses, photocopies and hours of work. These representatives can expect to obtain only a share of the outcome of a successful action. Therefore, the class representative and the litigator lawyer are interested in obtaining a compromise even when it is not the optimal outcome for the group.

Professor Klement²⁸⁵ emphasises this problem in the following way:

Assume that the expected litigation costs for obtaining a compromise are 10, the expected costs of a full procedure are 100 and the expected fee is 10 percent of either outcome, whether settlement or judgment. If the value of the action is estimated at 2000, then the representative's expected profit for pursuing a ruling (10 percent. of 2000 minus 100 for expenses) comes to a total of 100. If, however, the procedure ends in a lower compromise of 1100, then the representative's profit is equal to the amount that would have been obtained by pursuing the judgment. However, the class itself could have earned 1800 but only 990 on the lawyer-led compromise, which is the outcome preferred by the lawyer.

Hans-Bernd Schaefer²⁸⁶ argues that there is a direct link between the lawyer's effort in the case and his readiness to settle the case. The problem with contingency fees is that the lawyer does not work in order to get the best financial result for the class, but rather to maximise his fees.²⁸⁷ Given these problems the question is now how to structure lawyers' fees in a way which will act as an incentive for the lawyer to reach

²⁸⁵ Professor Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (2003) 34(2) *Mishpatim* 301 (in Hebrew).

²⁸⁶ Hans-Bernd Schaefer, (n 39) 183.

²⁸⁷ J.C. Coffee Jr, 'Understanding the Plaintiff's Attorney: The Implication of Economic Theory for Private Enforcement of Law through Class Action and Derivative Actions' [1986] 86 *Columbia Law Review* 669.

the best result for the class, while avoiding the danger that the lawyer will prioritise making his own profit.

B. Structuring Lawyers' Fees

Under the Israeli regime, high remuneration for class action lawyers is considered necessary in order to cover a lawyer's expenses and to motivate other lawyers to initiate class actions for good causes.

In the Knesset (Israel's legislature) debate it was even argued that judges are not generous enough in respect of lawyers' fees, thereby preventing lawyers from fulfilling their entrepreneurial role in leading class actions.²⁸⁸ The chairman of the Knesset Commission on the CAL, Knesset Member Chen, suggested introducing a system of fixed percentages for the lawyer to be divided between the class members and the defendants. The percentage was 30% up to NIS 1,000,000 (about GBP 160,000) and 15% for amounts above this sum. The chairman also recommended that in compromise agreements, the fees should be 80% of the suggested fees.²⁸⁹ Unfortunately this proposal was later changed and the Israeli legislative committee decided to draw up broad criteria which would enable the court to decide how to structure lawyer fees on a case by case basis.²⁹⁰ This system lacks certainty and often results in inconsistencies between different judges.

The criteria set out in the CAL relate to the benefit that the class action brings to the class members,²⁹¹ the complexity of the procedure, the time and effort that the lawyer

²⁸⁸ Protocol No. 12 of the Class Action Legislative Committee dated 12 December 2005 (Ms .Tami Sela, Speaker, representing the State) at <http://www.gorodeisky.co.il/_Uploads/dbsAttachedFiles/d.rtf> accessed 24 September 2011.

²⁸⁹ Protocol No. 12 of the Class action Legislative Committee dated 12.12.2005. (The Chairman, Reshef Chen, Speaker).

²⁹⁰ The cutback in the initial proposal was made gradually. On 26 December 2005, the committee decided to reduce its initial proposal and suggested that the fees would be 20% for the first NIS 1,000,000, and 15% for amounts above this sum. The sums should be paid by the defendants unless the court decides to order that part of the lawyer fees should be paid by the class members <http://www.gorodeisky.co.il/_Uploads/dbsAttachedFiles/h.rtf > accessed 24 September 2011. (See Yacov Enoch, Speaker, and the Chairman Reshef Chen). However, in a meeting which took place on 26 January 2005, the State's decision to draw broad criteria was accepted. See Protocol no. 16 of the Legislative Committee dated 26 January 2006 available at <http://www.gorodeisky.co.il/_Uploads/dbsAttachedFiles/p.rtf> accessed 24 September 2011 (Speaker Tami Sela and Chairman Reshef Chen).

²⁹¹ Class Action Law 5766–2006, s 23 (B) (1) (Israel).

has invested and the risks that the lawyer assumed in dealing with the case.²⁹² The court should also consider the way in which the lawyer has managed the case,²⁹³ the difference between the remedies which were claimed and the result that was achieved²⁹⁴ and the importance of the action to the general public.²⁹⁵

Professor Klement divides these criteria into three main categories:²⁹⁶

- **The Lawyer's Investment in the Case:** This category examines the expenses incurred by the lawyer and the time invested in the case instead of investing in other cases. In addition, Professor Klement argues that the risk which the lawyer assumes should be a very important factor in deciding the lawyer's fees under this category. In fact, Professor Klement argues that the chances of success should be multiplied by the risk factor and the lawyer's expenses in order to reach a suitable lawyer's fee. The risk multiplier is equal to one divided by the chances that the lawyer will recover fees from a judgment or from a successful settlement. Thus if the chances of success are 0.4 and the lawyer's expenses are 100, then the risk multiplier is $1/0.4 = 2.5$. The fee should be set, according to this example based on the risk multiplier theory, at a minimum of 250.²⁹⁷ The idea of this system of fee structuring is to compensate the lawyer for the investment and expenses incurred in case management. Normally the expenses should be examined by the court registrar at the end of the case, and by the winning party for coverage of expenses. The problem with this system is that in Israel, the general rule is that the lawyer is not allowed to pay expenses instead of his clients, and thus this system of fee structuring may lead to unethical conduct. The other problem with this system of fee structuring is that since the representative plaintiff has no risks and no financial involvement in the case, and the case management

²⁹² Class Action Law 5766–2006, s 23 (B) (2) (Israel).

²⁹³ Class Action Law 5766–2006, s (B) (4) (Israel).

²⁹⁴ Class Action Law 5766–2006, s (B) (5) (Israel).

²⁹⁵ Class Action Law 5766–2006, s 23 (B) (3) (Israel).

²⁹⁶ Prof. Alon Klement, 'Guidelines for Interpreting the Class action Act 2006' 49 Hapraklit 131, page 159 (Hebrew) at

www.hapraklit.co.il/_Uploads/dbsAttachedFiles/memtet1_6.pdf accessed 24 September 2011.

²⁹⁷ Prof. Alon Klement, 'Guidelines for Interpreting the Class action Act 2006' (n 296) 160. See footnote 107 therein referring to Peter H Huang, 'A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation' [1998] 73 N.Y.U.L Rev. 1943.

falls solely in the hands of the lawyer without any client control, then it may lead to over expenditure by the class lawyer in order to obtain higher fees at the end of the day.

- **The Output to the Class Members:** According to this mechanism, lawyers' fees are structured according to the expected gain for the class members. The reasoning here is that the class members should pay for the services which the lawyer provides, especially where the action succeeds in creating a fund to compensate the class members.²⁹⁸ The lawyer should get incentives to use his best endeavours for the success of the action. On the other hand, there is a conflict of interest if lawyers' fees are paid from the fund designated for the class members, since high lawyers' fees will be awarded at the class members' expense. This system of fee structuring is more accepted in Israel despite the fear of conflicts of interest as stated above. There is also a common interest between the lawyer and the class members to use best endeavours in order to create as large a fund as possible for the class of which the lawyer will be granted a portion.
- **The Benefit to the General Public:** It is very important to look at the advantages of the class action for the general public, because the aim of collective redress is to assist in promoting legal obedience and to deter potential defendants from acting illegally. Professor Klement argues that this category should be used only in cases where lawyers' fees based on a percentage of the income would provide a small income for the lawyer, even if the action brings great benefit to the general public. This is to say that others who are neither class members nor the lawyer's clients in the case have benefitted from the action. However, Professor Klement argues that if the action benefits class members but not the general public, the lawyer's fees should not be lowered simply because others have not benefitted from the action.²⁹⁹

²⁹⁸ Alan Hirsch and Diane Sheehey, *Awarding Attorneys Fees and Managing Fee Litigation* (2nd edn, Federal Justice Center, 2005).

²⁹⁹ Prof. Alon Klement, 'Guidelines for Interpreting the Class action Act 2006' (n 296) at page 162.

In Israel, the criteria for lawyer's fees have been inconsistently applied by the courts. However, it is possible to say with certainty that the sums that the courts in Israel have awarded have been much lower than in the U.S. For example, if awards in the U.S. are generally on average equal to one third of the damages paid to the class members in the action,³⁰⁰ in Israel they are normally between eight and ten percent of a successful action (mainly in compromise cases). However, fee structuring not only concerns how much the lawyer should be paid, it also aims to ensure that the lawyer uses his best efforts to achieve a successful outcome for the class and receives reasonable fees. In order to ensure that the lawyer will do the best for the success of the action, the lawyer's actions must be supervised.

Professor Klement suggests adopting a private monitoring system that will ensure that lawyers perform their role for the benefit of the class they represent.³⁰¹ The idea is that the monitor will perform the role that a client would have in a “normal” case. This means that the monitor will choose the class lawyer, negotiate his fee, examine the performance of the lawyer and have the power to object to settlement offers. The monitor may even petition the court to replace the lawyer. The monitor would be appointed on an auction basis. The problem with such a monitoring system is that it would raise the costs of managing the class action. Thus one should ask whether employing a private monitor paid from the proceeds of the action will cost more with no real benefit to the class, since the monitor and the class lawyer have the same interest in increasing their share at the expense of the class members.

C. Contingency Fees in European Member States

Positive incentives which may drive lawyers and representative claimants to get involved in the action are based on contingency fees arrangements. However, in most European jurisdictions, conditional fee agreements which are necessary to motivate

³⁰⁰ Thomas E. Willging et al., 'Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 69' (Federal Judicial Center, 1996); see also *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 77 (S.D.N.Y. 2000) (stating fee awards generally range from 20% to 30% of the total fund).

³⁰¹ Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (n 278).

See also Alon Klement, 'Private Monitoring in Common Fund Class Actions' (Harvard John M. Olin Center For Law, Economics, and Business Discussion Paper No. 310 2/2001) available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=262336> accessed 24 September 2011.

lawyers to get involved in collective actions are not currently permitted. Contingency fees operate as a positive incentive to persuade lawyers to manage a class action. Since class actions primarily involve claims for high overall losses with low individual damages, it is difficult to motivate each member of the group to bear part of the financial risk or to contribute an advance payment towards costs.³⁰² Consequently, someone else may need to assume this financial burden, but rewards need to be forthcoming for a lawyer or other third party to take on the action.

The problem with contingency fees is that it is foreign to the litigation culture of some states in central European jurisdictions. The objection to contingency fees may prevent the lawyer from engaging in the entrepreneurial job of managing the legal proceedings.

In some jurisdictions which object to contingency fees, alternative solutions have been found. In the Netherlands, lawyers who are members of the bar are not permitted to charge contingency fees, so entrepreneurs fill the gap in financing the expenses of managing the action.³⁰³ The fact that ‘no win no fee’ agreements are not allowed may deter lawyers from becoming involved in collective proceedings in those member states, although they can agree with their clients that they will be paid a reasonable higher hourly rate if the action is successful. In Sweden, ‘no win no fee’ arrangements with lawyers are not allowed but the law permits risk management agreements. These agreements are based on an uplift of the hourly fee paid for the lawyer in the case of success, but they are not based on paying a share of the action proceeds to the lawyer or the representative plaintiff. The defendant is only bound to pay the customary fee and is not bound by the risk agreement. Group members are bound by risk agreements only if the agreement is approved by the court.³⁰⁴

Certain developments were introduced in other member states, such as Italy. In Italy, a prohibition on lawyers' contingency fee arrangements existed until quite recently. However, the statutory provision prohibiting contingency fees in Italy was abrogated

³⁰² Hans-Bernd Schaefer, (n 39) 183.

³⁰³ Ianika Tzankova, ‘Class Actions, Group Litigation and Other Forms of Collective Litigation - Dutch Report’

< <http://0-www.law.stanford.edu.lawlib.nyls.edu/calendar/details/1066/> accessed 27 November 2011.

³⁰⁴ Per Henrik Lindblom, (n 84).

by Law Decree no. 223 of 4 July 2006. The law was amended to allow lawyers a certain latitude in taking on cases on a conditional fee basis.³⁰⁵ However, the Italian Lawyer's Code of Conduct contains the principle that 'fees have to be proportionate to the activity carried out.' In Spain, the civil division of the Supreme Court has acknowledged³⁰⁶ the validity of contingency fee agreements (*pactum de quota litis*) between lawyers and clients, although the scope of permissible agreements needs clarification. The view of the *Consejo General de la Abogacía Española*, the Spanish bar, is that contingency fees may be used but an engagement on a 'no win no fee' basis is forbidden.³⁰⁷ The result is that contingency fees may be used only as long as a minimum fee to cover the costs of the legal advice is agreed.³⁰⁸

In Portugal, there are no provisions allowing payment of a share of the damages in the action to the lawyers or to the plaintiffs. Contingency fees are forbidden. Lawyers' fees are usually based on an hourly rate as per Article 65 of the Code of Conduct. According to Article 66 of the Code of Conduct, lawyers may not claim as their fees a percentage of the amount obtained as a result of a legal suit (*quota litis*).³⁰⁹ Lawyers are also forbidden from making their fees dependent on the success of the action (*palmarium*). However, lawyers may receive a fee bonus subject to success.³¹⁰

In England 'no win no fee' arrangements are currently subject to a review as part of a wider review of civil litigation costs carried out by Lord Justice Jackson³¹¹ and a suggested reform of fee arrangements.³¹² The OFT has already recommended the introduction of a contingency fee scheme in the U.K. in

³⁰⁵ Professor Elisabetta Silvestri, 'The Globalisation of Class Actions - Italian report' <http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_National_Report.pdf> accessed 23 September 2011.

³⁰⁶ Judgment of the Supreme Court No 5837/2005 of 4 November 2008.

³⁰⁷ Rule 16 of the Professional Rules of Conduct, 2000.

³⁰⁸ Freshfields Brackhaus Deringer, 'Class Actions and Third Party Funding Litigation: An Analysis Across Europe' [2007] at <<http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf>> accessed 27 October 2011.

³⁰⁹ Article 101 of Law No. 15/2005.

³¹⁰ 'International Comparative Legal Guide to Competition Litigation 2011 – Portugal' (ICLG, 2011) <http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=162&chapters_id=3928> accessed 25 September 2011.

³¹¹ The BBC, 'No-win, no-fee' changes announced by Ken Clarke' *BBC News* (London, 29 March 2011) available at <<http://www.bbc.co.uk/news/uk-12890256>> accessed 25 September 2011.

³¹² *Ibid.*

competition cases³¹³ and the CJC has suggested a contingency fee system in collective redress cases.³¹⁴ However, these recommendations have yet to be enacted.

Under French law, contingency fees are illegal.³¹⁵ There are also some related prohibitions, for example, a lawyer cannot engage in professional work solely on a 'no win no fee' basis. Moreover, French lawyers are allowed to receive payment only from their clients.³¹⁶ Lawyers' fees are either a fixed sum or (more often) a percentage of an hourly rate. In limited circumstances, complementary fees ('success fees'),³¹⁷ whereby fees are conditional on liability, are accepted. However, the complementary salary can only represent a small proportion of the total fees.

The current opposition to contingency fees by the majority of member states is an obstacle to the introduction of an effective collective redress mechanism in Europe. It is difficult to see why member states are so opposed to contingency fees. Indeed, scholars who have investigated the effect of contingency fees have found that contingency fees give rise to significantly more frivolous or fraudulent claims.³¹⁸ On the other hand, the CJC's research on this issue concluded that contingency fees improve the quality of claims brought to justice.³¹⁹

³¹³ The Office of Fair Trading, (n 239).

³¹⁴ Civil Justice Council recommendations to the Lord Chancellor available at <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf> accessed 25 September 2011.

³¹⁵ Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, Article 10 (Act n°71-1130 of December 31, 1971 on the reform of certain legal professions).

³¹⁶ Regiment Interior National, Article 11.3 (The French Bar rules).

³¹⁷ V. Magnier, 'The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe' in Hensler, Hodges & Tulibacka (eds.), *The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*, Volume 622, (Sage Publications (CA), 2009), pp 114-124, p 122, note 20.

³¹⁸ Helland and Tabarrok cited in note 12; Kevin M. Clermont and John D. Currihan 'Improving on the Contingency Fee' [1978] 63 Cornell Law Review 529J; Dana & K. Spier, 'Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation' [1993] 9 J Law Econ Org 349; H. M. Kritzer *Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004).

³¹⁹ Moorhead, Richard Lewis, 'Improving Access to Justice' Contingency Fees: A Study of Their Operation in the United States (November 17, 2008) available at: <<http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/costs-and-funding.htm>> accessed 6 October 2011.

There is no doubt that without contingency fees, there is no incentive for lawyers to perform their entrepreneurial role. Contingency fees are particularly appropriate for collective redress cases because the individual representative cannot pay the legal fees and other expenses necessary to fight a case against large companies, normally the defendants in class actions. Moreover, it is reasonable that lawyers should be compensated for the risk that they may not be paid at all if the action fails and that lawyers who had to finance the action remain with no coverage of their expenses.

Consequently, any future E.U. framework for collective redress will have to include a binding measure that compels member states to allow contingency fees in collective actions in order to enable lawyers to participate actively in conducting collective redress cases for damages. Contingency fees will enable lawyers to perform their entrepreneurial role.

D. Lodestar v. Percentage Fees

Lawyers' fees should be high enough to encourage lawyers to act as entrepreneurs. The question to be asked is how fee structure could assist in getting lawyers to perform their important role as the driving force in class actions. There are two common types of fee structure in operation. The first one, known as the percentage system, is based on awarding the lawyer a share of the profit. The other system, known as the lodestar system, is based on an uplift in the lawyer's hourly rate.

Critics of the lodestar system argue that it may encourage lawyers to exaggerate the number of hours that they have worked on a case, while making it difficult for a judge to determine whether the time spent by the lawyer is reasonable.³²⁰ It is also argued that the lodestar mechanism may induce lead counsel to prolong the litigation beyond the optimal point from the plaintiff's perspective simply in order to accrue more hours, or to engage in unnecessary work, such as submitting motions that have little chance of success.³²¹ In addition, the risk multiplier used in the lodestar mechanism is

³²⁰ Jonathan R Macey and Geoffrey P Miller, (n 148) 105.

³²¹ See *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 77 (S.D.N.Y. 2000).

calculated at the end of the trial when the risk inherent in the case appears very different to the perceived risk of representing counsel at the early stages of the action.

The advantage of the percentage system is that it is simple and does not require complicated calculations and a monitoring system. On the other hand, critics of the percentage approach say the method might lead the plaintiff's attorney to settle the case prematurely as soon as counsel's opportunity costs begin to mount. Early settlement allows counsel to collect a large fee after investing relatively little time in the case, rather than continuing the litigation in order to maximise plaintiff's recovery but receiving a lower marginal rate of return on his work.³²² Furthermore, it is argued that the percentage system overlooks the lawyer's investment in the case. For example, in cases involving large sums, the lawyer will be better remunerated on the percentage system than in low sum cases, even though the time invested in both cases may be equal. This is because the share in the outcome of a case relating to high sums is higher than a calculation based on hourly fee in such a case. Since collective redress actions reach high amounts due to the accumulation of personal claims, contingency fees on percentage will normally lead to a higher result than the normal calculation of hourly fees. Research conducted in the U.S. which compared the two fee systems in different cases found that court cases where the fees were based on the percentage system did not lead to dramatically different results than other cases which used the lodestar mechanism.³²³ This means that the results will be similar, regardless of which fee structure is chosen.

On the whole, commentators prefer the percentage system over the lodestar system because it reduces uncertainty and establishes reasonable expectations on the part of the plaintiff's lawyers regarding their expected recovery. The reduction in the risk of litigation might induce additional private enforcement.³²⁴ Others prefer the percentage system because it induces the lawyer to fight for the best result for the class, though it is argued that in settlements the percentage should be lower than in cases where the

³²² Laural L. Hooper and Marie Leary, 'Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study' (29 August 2001) reprinted in 209 F.R.D. 519 (2002).

³²³ William Lynk, 'The Courts and the Plaintiff's bar: Awarding Attorney Fees in Class Action Litigation' [1994] 19 J. Legal Stud. 247.

³²⁴ Jonathan R Macey and Geoffrey P Miller, (n 148) 105.

case proceeds to judgment, in order to reduce the temptation to settle cases prematurely.³²⁵

Under the Israeli law, the court may also award the class lawyer interim payments on account of his fees. These payments are intended to assist the lawyer with expenses that are necessary in order to manage the case properly.³²⁶ However, another way of assisting the lawyer to calculate his actions is to make preliminary decisions regarding fees at the certification procedure. In this way, the lawyer may calculate the expected income and weigh it against the predicted expenses and make better decisions with regard to compromise. At the preliminary stage, the court should also decide on the question of the fee structure, whether percentage or lodestar, in order to allow the case to continue in a normal way where the client makes a fee agreement with his lawyer.

E. Other Possible Models of Financing the Action

Collective redress funding may also be secured in ways³²⁷ other than by contingency fees. For example, in Israel, a special fund ('The Fund for the Financing of Class Actions') was established under the CAL to finance class actions with public and social importance.³²⁸ The fund was only recently formed and, consequently, statistics on the fund's performance have not yet been published. The fund receives some governmental support, but is also funded by the diversion of money from other successful class actions or from uncollected funds in successful class actions. Yet such a fund cannot replace conditional fees, which act as an incentive for private individuals to bring class actions. However, such funds may still assist in covering the costs of the action. The fund was set up for an initial period of seven years after which time the Minister of Justice may extend the fund's period of operation. The idea was to open a new source of class actions which will finance itself in future by the allocation of funds.

³²⁵ Alon Klement, 'Guidelines for Interpreting the Class Action Act 2006' (n 296).

³²⁶ Class Action Law 5766–2006, s 23 (C) (Israel).

³²⁷ The Civil Justice Council, 'Improved Access to Justice – Funding Options & Proportionate Costs. The Future Funding of Litigation - Alternative Funding' (June 2007)
<<http://www.costsdebate.civiljusticecouncil.gov.uk/updocs/client12/Improved%20Access%20to%20Justice%20pdf.pdf>> accessed 4 December 2011.

³²⁸ Class Action Law 5766–2006, s 27 (Israel).

The Fund accepts applications for class action finance from the outset of the case and as the case progresses. The fund receives applications from organisations which have been operating for at least twelve months prior to the application and that operate legally. Individuals may also receive finance from the fund, provided that their personal financial situation demonstrates a need. The applicant should not act for political causes and should not be bankrupt or have any criminal convictions.

The finance usually covers up to 50% of the expenses which are needed for managing the case, but in special circumstances the finance may reach even 90% of the expenses. However, there is no finance to cover lawyer's fees. The finance is limited to NIS 80,000 (approximately EUR 15,000) or 80% of the actual costs, whichever is the lower. In the event of any of the following, the applicant must reimburse the fund:

1. The claim was successful and the applicant received his expenses.
2. The applicant used the finance which was received from the fund for other causes or in contravention of the conditions subject to which the finance was granted.
3. If the applicant or his lawyer were replaced, the fund may require information concerning the reason for the replacement. If the replacement involves any wrongdoing, the fund may require the applicant to return the sum which he received.
4. The applicant decided to voluntarily abandon the action.
5. The applicant provided the fund with misleading information.

The Israeli solution of a designated fund is more appropriate than a general legal aid fund for collective redress cases. The reason for this, is that the former takes into account the interests of the general public or the interests of the larger group in bringing the action, whereas general legal aid schemes consider the merits of the specific action in question and the financial means of the applicant which are less important issues in collective redress cases where the applicant is merely an agent for a wide class of injured members.

Calls for the establishment of such a fund have been raised in the U.K.³²⁹ In the U.K., finance can be raised by insurers, another form of third party finance, where the insurer agrees to cover the legal expenses in return for a share of the profits generated by the action.³³⁰ Such insurance can be secured by way of an insurance policy before the event or an agreement with the insurers after the event. The only relevant way of securing insurance in collective redress cases is after the event, where the insurer feels that the collective case is profound on its merits. The CJC has taken the view that where ‘after the event’ insurance is unavailable, the Legal Services Commission should give further consideration to a Conditional Legal Aid Scheme (CLAS). Such a fund would operate without additional costs to government and would provide financial support to claimants in return for a share of any award or the income following a settlement, thereby providing a solution for both claimants who are ineligible for legal aid and those who can afford to pay but who wish to access private funding rather than legal aid.

In addition, the provision of finance would also promote organisational actions in preference to individual private actions.³³¹ In Portugal, for example, finance for collective redress proceedings is available only to consumer organisations from the State, via the central, regional or local administration.³³² The result of such special funding in Portugal is very impressive. According to an evaluation study,³³³ all six collective actions in Portugal were brought by consumer associations (five claims by Deco and one action by Acop). The Portuguese system demonstrates that legislators may achieve policy goals providing collective redress funding to preferred agents, which in Portugal are consumer associations.³³⁴ The only difficulty with this idea is that consumer organisations in all jurisdictions have not pursued many collective redress actions. Even such funding for organisations is probably not enough to offer a real incentive to bring many class actions.

³²⁹ The Civil Justice Council, (n 327).

³³⁰ This is also known as legal expenses insurance (LEI) which originated in Germany. See Civil Justice Council, (n 327).

³³¹ Article 18 of Law 24/96, Rights of consumers’ associations (Portugal).

³³² Henrique Sousa Antunes, (n 92).

³³³ Dr. Lisa Tortell, ‘Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Portugal’ (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf> accessed 27 October 2011.

³³⁴ The Portuguese Act also provides the right to exemption from the payment of costs, prepayments and stamp duty, under the terms of Law 83/95.

Legal aid is also available in Spain.³³⁵ Such legal aid covers lawyers' fees, publication of announcements or edicts, copies, certificates and notaries' fees. The Spanish scheme provides assistance both to consumers who have insufficient funds³³⁶ and to organisations.³³⁷ A comparison between the Spanish collective actions and the Portuguese collective actions show that the agents who brought actions in Spain are more diverse, as representation was by both organisations and consumers.³³⁸ This is the result of the wider variety of funding in Spain.

Legal aid may cover only expenses or it can also cover lawyers' fees. Funds which only cover expenses do not create real incentives to fight the case and win it. Such funding requires an additional supplement by way of contingency fees to create an incentive for the lawyer to fight the case for the class members in order to obtain the highest possible remuneration. The Spanish and Portuguese experiences show that consumer organisations are more active when their expenses are covered.

Another form of expense coverage is provided by third party funding. Third party funding should be recognised as an acceptable supplement to legal aid and to contingency fees which should be permitted in Europe as a general principle. Third party funding is similar to after the event insurance. In third party funding, the funder assesses the case and finances the action against payment of a share of the successful action. The problem with third party funding is that it may interfere in the management of the case as the funder's interests may be different from those of the plaintiff who may prefer to proceed until the end of the case.

³³⁵ European Parliament, Directorate-General for Internal Policies 'Policy Department A: Economic and Scientific Policy: Overview of existing collective redress schemes in EU Member States' (July 2011) <www.europarl.europa.eu> accessed 6 October 2011.

³³⁶ Ley 1/1996, de 10 de enero, de Asistencia Jurídica Gratuita (Law 1/1996, of 10 January 1996, on Legal Aid) (Spain).

³³⁷ According to Section 2.2 of Ley General 26/1984, de 19 de julio, para la Defensa de los Consumidores y Usuarios (General Law No 26/1984 of 19 July 1984 for the Protection of Consumers and Users, Boletín Oficial del Estado No 176, of 24 July 1984, Law No 26/1984) (Spain).

³³⁸ Prof. Fernando Gomez and Marian Gili, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Spain' (Civic Consulting, 2008) e<c.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> accessed 1 August 2011.

As suggested in the English CJC report,³³⁹ third party funding should be subject to regulation. Scholars who favour this option agree.³⁴⁰ The first draft code of conduct on the issue was published on 23 November 2011.³⁴¹ The code provides that litigation funding agreements should contain restrictions on the termination of funding without reasonable cause and the independence of legal advice. The code lacks regulations on funds of third party funders and on minimal capital for third party fund providers in order to ensure that such funders do not abandon consumers in the middle of a case, leaving them to pay high legal expenses without the financial resources to do so. The code should be amended in order to prevent financing where it is being sought by a party due to an ulterior motive, such as to bypass the course of justice.

Third party funding is currently developing in Europe and serious fund providers are now operating in the market. According to a recent report by a private law firm, the list of funders in the U.K. includes insurance companies.³⁴² The availability of such funding may push the use of collective redress forward, especially in those member states which have not yet introduced a system of contingency fees.

In Israel, funding is available mainly through the introduction of contingency fees, though partial expenses may also be recovered from a special designated fund.

On the other hand, the traditional view in Europe is against contingency fees as they may create abuses and lead to conflicts between the lawyer and the class members. Despite the above-mentioned disadvantages, contingency fees have many advantages such as filling the gap where public funds for legal aid are lacking, and creating incentives for lawyers to act as a driving force in bringing the action. This would be of particular importance in collective actions where claimants do not have the expertise and experience required to act as group representatives. Contingency fees

³³⁹ The Civil Justice Council, (n 327).

³⁴⁰ Maya Steinitz, 'Whose Claim Is This Anyway? Third Party Litigation Funding' (2011) 95(4) *Minnesota Law Review* at <minlr.stereointeractive.com/files/2011/04/Steinitz_PDF.pdf> accessed 27 October 2011.

³⁴¹ The Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (November 2011), <<http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/third-party-funding#headingAnchor1>>.

³⁴² Freshfields Bruckhaus Deringer, *Developments in Class Actions and Third Party Funding of Litigation* (2009).

would also give an incentive to lawyers to achieve the best possible recovery for their clients since their own recovery would depend on that of their clients.³⁴³

In Europe, funding other than contingency fees is available from legal aid or from private insurers. However, such funding is normally very limited.

The lack of funding in Europe is very unfortunate because in normal cases, consumer actions concern very small amounts and the defendant is a trader with the financial resources to fight a case. In those cases, it is little wonder that consumers will be apathetic as to their rights. Therefore, if funding is not available, there will be no incentives for class members and lawyers to deal with a collective action.

Thus a designated legal aid fund should be available in the new European framework, similar to the Israeli collective action fund³⁴⁴ to cover the costs of litigation. In addition, third party funding may assist in financing class actions, especially where there is no legal aid available for private actions based on a lawyer's initiative. However, these methods of funding should be accompanied by a system of contingency fees which is a very cheap way to raise funding through lawyers' work.

Part D. The Scope of the Action

In Israel, prior to the introduction of the CAL, consumers could have brought class actions under the specific provisions of the Consumer Protection Law 5741-1981, which covers misrepresentations, extortion, various duties of disclosure, misleading advertisements, consumer credit transactions, door-to-door sales, labeling of goods, standard contracts and goods' return policies. Until the introduction of the CAL, class actions in Israel were limited to specific laws, for example, Section 35 of the Consumer Protection Law³⁴⁵ which allowed Israeli consumers to bring class actions

³⁴³ Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (December 2011) 8(1) *The Competition Law Review* 87-121 (ISSN 1745-638X).

³⁴⁴ Council Directive (EC) 2002/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2002] OJ L 26/41 which lays down an obligation for Member States to achieve effective access to justice and representation mainly through legal aid.

³⁴⁵ Consumer Protection Law 5741-1981 (Israel) at <http://www.wipo.int/wipolex/en/details.jsp?id=2389> accessed 29 November 2011.

only for causes included in the Act. However, cases were often dismissed because the causes of action were connected to other causes that were not covered by the Consumer Protection Law.³⁴⁶

In order to remedy this problem, the Israeli legislator could have adopted the U.S. system which does not restrict class actions to specific enactments. In the U.S., there is no limitation on the scope of the action. Instead, the types of possible action are divided into three categories and there are prerequisites which operate as safeguards and are examined in the certification process. The first category is known as the 'anti-prejudice' class action because the court examines the prejudicial effect of running multiple individual claims.³⁴⁷ For example, multiple individual claims might cause inconsistent judgments harmful to class members or if portions of the fund are distributed in individual suits on a first come first served basis, thereby exhausting the fund³⁴⁸. The second category of class action is used most often for civil rights suits and in other constitutional litigation.³⁴⁹ For example, where the plaintiff alleged that the University of Michigan Law School used race as a 'predominant' factor in its admission process, giving minority applicants a 'significantly greater chance of admission than students with similar credentials from disfavored racial groups'.³⁵⁰ The third type of class action³⁵¹ is 'the common question' or 'damage' class action, which provides that two elements are necessary in order to permit a class action. Firstly, the court must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and, secondly, that a class action is superior to other available methods. This is in fact the most common and most criticised class action for damages.

³⁴⁶ Sinai Deutch, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model' [2004] 27(2) *Journal of Consumer Policy* 179.

³⁴⁷ Federal Rule of Civil Procedure 23 (b) 1.

³⁴⁸ Nicholas M. Pace, 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature' at <http://www.law.stanford.edu/library/globalclassaction/PDF/USA__National_Report.pdf>.

³⁴⁹ Federal Rule of Civil Procedure 23 (b) 2.

³⁵⁰ *Grutter v. Bollinger*, C.A. No. 97-CV-75928-DT, U.S.D.C. Eastern District Mich., Southern Division at <<http://www.vpcomm.umich.edu/admissions/legal/grutter/grcborop.html>> accessed 8 October 2011.

³⁵¹ Federal Rule of Civil Procedure 23 (b) 3.

All categories are subject to the prerequisites listed in Rule 23(A) of the Federal Rules of Civil Procedure, which provides that one or more members of a class may sue or be sued as representative parties on behalf of all if:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

When the Israeli legislator examined the practical consequences of the U.S. model, it decided to take a different approach on the scope issue, due to fears of uncontrolled actions, collusive settlements, and frivolous actions. Instead, the Israeli legislator decided to allow class actions in specific and targeted areas, which were drafted very widely to include various kinds of possible actions.

The CAL sets out a list of rules and causes of action which facilitate class actions with the permission of the court.³⁵² Professor Klement divides the list of causes that may lead to class actions under the CAL into three categories.³⁵³

The first category is new causes of action relating to labour law.

The second category is the list of laws that were not changed and permitted class proceedings before implementation of the CAL, such as competition law and company law.³⁵⁴

The third category includes a list of laws that were enlarged in the new Act, such as consumer law (class actions are now allowed under the Israeli CAL even where the consumer did not make the transaction), banking, insurance and environmental law

³⁵² Class Action Law 5766–2006, Annex B (Israel).

³⁵³ Professor Alon Klement, *'Guidelines for Interpreting the Class action Act 2006'* (n 296).

³⁵⁴ The full list of specific laws was mentioned in Chapter Two, part B (3) of this work.

(where in the past class actions were only allowed on an opt-in basis and for remedies other than damages).

The rules and causes of actions are listed in the second schedule to the CAL and are defined in broad terms:

1. An action of a customer against a dealer having contractual relations or even where no contract exists between them.
2. An action against an insurance company or agent in relation to a contract of insurance or benefits from contractual relations or even where no contract exists between them.
3. An action against a bank in relation to matters between banks and customers whether business has been transacted between them or not.
4. An action relating to restrictive practices and fair trading.
5. Actions relating to securities.
6. Actions relating to protection of the environment.
7. An action relating to discrimination in goods, services and entering to public places.
8. Actions in relation to sex discrimination at work.
9. Actions in relation to fair access for disabled persons.
10. Actions in relation to the TV Broadcasting Act (signs and written notices).
11. Actions in the jurisdiction of the Employment Appeal Tribunal, except in relation to increased damages for late payment of salary or compensation.
12. Actions in relation to minimum pay.
13. Actions against state bodies for recovery of payments, such as taxation duties.

In so far as consumer actions are concerned, it should be noted that the ambit of the possible claims are substantially enlarged by the CAL and include claims against a wide range of possible defendants who normally engage in small scale value transactions with many clients. These include banks, insurance companies, provident funds and any 'dealer', which, under the Consumer Protection Law's wide definition ,

includes every person who sells property or a service through his or her practice, including manufacturers.

The former Section 35 of the Israeli Consumer Protection Law provided that only causes of action which arose before the agreement between the consumer and the dealer could be a cause for a class action.³⁵⁵

Commentators criticised the narrow view of the old law prior to CAL.³⁵⁶ Consequently, when the CAL was introduced in 2006, the causes of action included relations of the parties prior to contractual relations, for example misrepresentations, and not only contracting parties. The enlargement of the scope of consumer class actions was the result of the new approach taken by the legislator in looking at the transaction rather than at the specific enactment. Under the new Act any customer transaction with a dealer could give rise to class action even if the transaction was not carried out and a contract of sale was not created.

The consumer to dealer transaction test which operates now in Israel may lead to some strange results. For example, in *Taib v. Camel Restaurant*,³⁵⁷ the district court in Haifa was ready to certify a class action against a pub-restaurant because customers complained that the non-smoking laws were not observed by the restaurant owners. The action was certified under the provision that allows any customer to bring a class action against a dealer even though it does not concern any breach of the Consumer Protection Law, but merely because it is an alleged infringement of other legislation (in this case, smoking protection legislation) which was breached during a transaction between a customer and a dealer.

³⁵⁵ See Civil Appeal no. 3613/97 (Supreme Court) *Ezov v. The Jerusalem City Council P"D Nun Vav* (2)b 787.

³⁵⁶ Moshe Bar Niv (Bronovsky), 'The Ambits of the Consumer Class Action' [1994] 19 *Eyune Mishpat* 251; Sinai Deutch, *The Law of Consumer Protection, Vol. 1, Foundations and Principles*, (The Israel Bar Publishing House, 2001) (Hebrew) 403; Hillel Sommer, 'A Hand Grenade With its Pin Removed? The First Decade of the Consumer Class Action', (2004) 1 *Haifa Law Review* 347, 353 (2004).

³⁵⁷ Case no. 53364-11-10 (Haifa District Court) *Taib v. Camel Restaurant* (2011), decision dated 30 August 2011.

1. The European Implications on the Scope of Areas of Collective Redress

The debate about whether class actions should be restricted to specific enactments or should be part of more general legislation has also taken place in several European member states.

In Europe there is inconsistency between member states with regard to the ambit of legislation that may give rise to collective actions. Collective redress action is allowed in some states in relation to investments, consumer and environmental actions. In other cases, the application is wider and may include public health or public rights and even actions against the state. The question arises as to what the necessary scope of areas suitable for collective actions is in order to create a workable model.

In 2009, the British government rejected the CJC's recommendations³⁵⁸ to introduce a combined opt-in–opt-out mechanism, which would not be limited to a specific area of law. The government took the view that rights of action should be introduced only in specific areas of law where there is evidence of need and following an assessment of economic and other impacts and after considering alternative approaches.³⁵⁹

The Swedish opt-in class action model was the first class action law in Europe.³⁶⁰ The Swedish legislator followed the U.S. model with regards to the scope of the action and did not limit the enactment to consumer law or environmental law, but rather decided to allow collective actions of any kind. However, the Swedish group claims brought by non-profit organisations are limited to consumer law and environmental law

³⁵⁸ In July 2008, the Civil Justice Council made a series of recommendations to the Lord Chancellor at <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf>.

³⁵⁹ The Government's Response to the Civil Justice Council's Report, 'Improving Access to Justice through Collective Actions' (2009) available at <http://www.lawcentres.org.uk/uploads/Government_Response_20th_July_2009.pdf> accessed 24 July 2012.

³⁶⁰ Robert Gaudet, 'Turning a Blind Eye: The Commission's Rejection of Opt-out Class Actions overlooks Swedish, Norwegian, Danish and Dutch Experience' [2009] Vol 30 Issue 3 ECLR 2009 107.

only.³⁶¹ This restriction on non-profit organisations is unnecessary. As mentioned earlier in this chapter, organisations which are licensed are ideological claimants and their operations should not be limited to specific causes of action. On the other hand, the Portuguese popular actions model has a wide scope³⁶² and includes investment,³⁶³ public health, the environment,³⁶⁴ quality of life, consumer rights, cultural heritage³⁶⁵ and the public domain. The 1995 Act in Portugal³⁶⁶ the extended ambit of popular actions and even allows actions on the prevention and prosecution of offences and to claims for damages.³⁶⁷ Portuguese Law 24/96 empowers consumers to apply for damages caused by defective products or services.

The French have limited collective actions to specific areas such as consumer actions,³⁶⁸ investments³⁶⁹ and actions for the protection of health.³⁷⁰

In Spain³⁷¹ the law allows for class actions in the consumer sector,³⁷² most of which are derived from EU Directives, such as the Directive on Unfair Competition and Electronic Commerce,³⁷³ which empowers consumer organisations to apply to the courts for an injunction, and, in some cases, for monetary claims in defence of

³⁶¹ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures – European Debates' [2009] *International and Comparative Law Quarterly* 379.

³⁶² Article 1 (2) of the Law No. 83/95 Right of Proceeding, Participation, and Popular Action (Portugal).

³⁶³ Decree no. 486/99 which enables investors in securities the right to bring Popular Actions in that field (Portugal).

³⁶⁴ Article 45 of Law 11/87 amended in Law 13/2002 which provides for Popular Actions in the Environment area (Portugal).

³⁶⁵ Law No 107/2001 Heritage Protection Law (Portugal).

³⁶⁶ Law No 83/95 Right of Proceeding Participation and Popular Action (Portugal).

³⁶⁷ Until then, the popular action was confined to supervision on acts of the administration.

³⁶⁸ C. Cons. Articles L. 421-1 and L. 422-2 (The Consumer Code, France).

³⁶⁹ Since 1994, securities investors may also act jointly through approved associations of shareholders or investors under Article L. 452- 1 of the French Financial and Monetary Code or under Article L. 452- 2 of the French Financial and Monetary Code if several identified investors have suffered personal prejudice having a common origin through the action of the same defendant. Any approved association of investors may also act if it received the mandate of two or more investors to bring an action on behalf of those investors. As in consumer cases, the organisation must have a written power of attorney (*mandat*) from at least two investors. It may then seek remedies for common losses suffered by those investors.

³⁷⁰ According to Article L.1114-2 of France's Code de la Santé Publique (Public Health Code) 12.

³⁷¹ Pablo Gutiérrez de Cabiedes Hidalgo, (n 115).

³⁷² Ley General 26/1984, de 19 de julio, para la Defensa de los Consumidores y Usuarios (General Law No 26/1984 of 19 July 1984 for the Protection of Consumers and Users, Boletín Oficial del Estado No 176, of 24 July 1984, Law No 26/1984) (Spain).

³⁷³ Council Directive (EC) 2000/31 on Certain Legal Aspects of Electronic Commerce in the Internal Market, (2000) OJ. L 178/1.

consumers' rights.³⁷⁴ Collective redress actions in Spain are also allowed under different acts relating to the environment.³⁷⁵

In Italy, consumers are allowed to bring actions in relation to a variety of consumer transactions on issues such as contractual rights, unfair commercial practices and anticompetitive conduct.³⁷⁶ Italy also permits collective actions in relation to anti-discrimination legislation based on gender, race, ethnic background, religion, personal beliefs, disability, age, or sexual orientation³⁷⁷ and also claims against the state.³⁷⁸

Under the Israeli system almost 80% of the actions are consumer-based, which leads to the inevitable conclusion that any collective redress model should be based on consumer class actions. Taking this conclusion a step forward, the question is whether collective action in consumer cases should be limited to specific enactments or should have a general application to all consumer or consumer-related cases. This question

³⁷⁴ Misleading advertising: Ley 34/1988, de 11 de noviembre, General de Publicidad (General Advertising Law 34/1988, of 11th November).
Unfair commercial practices: Ley 3/1991, de 10 de enero, de Competencia Desleal (Unfair Competition Law 3/1991, of 10th January).

Standard Terms in Contracts (with a special regulation): Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (Standard Terms in Contracts Law 7/1998, of 13th April).
Ley 34/2002 de 11 Julio de servicios de sociedad de info y comercio electronico (Law 34/2002, of 11th of July, Governing Information Society and Electronic Commerce Services (LSSI-CE).)

Ley 39/2002, de 28 de octubre, de transposicion al ordenamiento juridico espanol de diversas directivas comunitarias en materia de proteccion de los intereses de los consumidores y usuarios. (Law 39/2002, of 28th of October, for the transposition into the Spanish legal system of some community Directives on protection of the interests of consumers and users).,

Ley 23/2003, de 10 de julio, de Garantías en la Venta de Bienes de Consumo (Law on Guarantees for Consumer Goods 23/2003, incorporating Directive 99/44, 25 May 1999, on Certain Aspects of Sale of Consumer Goods and Associated Guarantees).

³⁷⁵ Under Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa (Law 29/1998 of July 13th on Administrative Jurisdiction), access is possible whenever there is a breach of any specific environmental legislation. Law 27/2006 expressly recognises the right to *actio popularis* whenever a public authority acts or fails to act in breach of environmental legislation. Articles 22 and 23 lay down the scope of this *actio popularis*.

³⁷⁶ Codice del consumo, Art. 140-bis, Section 2 (Section 2 of the 140-bis Consumer Code, Italy).

³⁷⁷ Professor Elisabetta Silvestri, 'The Globalisation of Class Actions: Italian report' <http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_National_Report.pdf> accessed 23 September 2011.

³⁷⁸ Attuazione della legge 4 marzo 2009, n. 15, in materia di ottimizzazione della produttività del lavoro pubblico e di efficienza e trasparenza delle pubbliche amministrazioni. (09G0164) (Law no. 15 of 4 March 2009, known as the "Brunetta law") sets out the principles and criteria for a class action to be brought against Public/Government Entities and the public services providers who harm interests deemed legally relevant to many users or consumers. The Legislative Decree of 20 December 2009 no. 1985, which laid down provisions for the implementation of a class action against public bodies, formally entered into force on 15 January 2010 although actual implementation is still subject to further legislation.

has troubled the 2007 DTI Committee in the U.K.³⁷⁹ which took into considerations three options on this area.

Option One: The scope of representative actions will cover all ‘business’ to ‘consumer’ infringements.

The proposal would allow cases to proceed that satisfy the definition of business to consumer transactions. It is possible that some products or services should be excluded from this definition. For instance, some products or services are already highly regulated and offer high levels of consumer protection.

This option was preferred by the committee since it defines the scope clearly without being unduly unwieldy. For instance, new legislation within the definition would automatically fall within scope, unless specifically excluded.

Option Two: The scope of representative actions will cover all ‘business’ to ‘consumer’ infringements of Acts or regulations which are specifically listed

The list could be amended by order of the Secretary of State if additional legislation needed to be included at a later stage. The court would not permit a representative claim, unless the detriment suffered resulted from a breach of specifically listed legislation.

The committee regarded this option as having clear borders however at the price of bureaucracy and a limitation in scope. The committee argued that there is a great deal of consumer legislation and producing an exhaustive list may be very difficult. Keeping the list up to date via secondary legislation may also prove a burden on parliamentary time.

Option Three: The scope of representative actions will all be ‘business’ to ‘consumer’ infringements within broadly defined areas. The court will be

³⁷⁹ The Department of Trade and Industry, Representative Actions in Consumer Protection Legislation – Consultation paper 7/2006 < <http://www.bis.gov.uk/files/file31886.pdf> > accessed 24 July 2012, see at page 14.

allowed to determine whether a case falls within the scope at the permission stage.

Under this proposal, broad areas of consumer protection legislation or contract law would be specified in secondary legislation. It would then be a matter for the court to consider whether a case falls within the scope.

The committee regarded this option as lacking clarity as a court would decide on a case by case basis whether areas of consumer protection legislation should fall within the scope.

As mentioned before, the Israeli legislator decided to adopt the wide scope provision in relation to consumer cases, allowing collective redress for every business to 'customer' transaction. The legislator intentionally ignored the legal wording of the word 'consumer' which is defined under the consumer protection legislation in Israel as a person who buys property or receives services from dealers for use which is primarily personal, or for his household or family. The Israeli law did not adopt the word 'consumer' but preferred to adopt the word 'customer' which has no legal definition in the act. Therefore, the legislator meant to give this phrase the broadest possible meaning to include even a business plaintiff that may act as a customer despite not being a consumer under the definition in the Consumer Protection law.

The Israeli legislator did not specify the legislation which could have the effect of being consumer protection legislation because there is no defined 'consumer protection legislation' in Israel and consumer rights may derive from other legislation. This does not mean that in Europe the Israeli solution is the optimal solution, but this option leaves room for marginal cases where the action is related to consumers albeit connected to other areas of law. The Israeli approach to include business plaintiffs is very reasonable taking into account that where a business is involved in a consumer transaction, the same rational apathy will apply with regard to its tendency to bring a court action.

2. Should Collective Actions Comply with a List of Consumer Protection Legislation?

The answer to this question depends on the existence of a firm body of legislation which may be regarded as consumer law in a jurisdiction. In the European context, the Maastricht Treaty came into force on 1 November 1993 and it was the first time that consumer protection was recognised as an independent principle. The relevant provision introduced at Maastricht was a new Article 129a EC., which was later renumbered as Article 153 E.U.³⁸⁰

Following the introduction of Article 153,³⁸¹ E.U. law-making may take two forms: through harmonization provisions: by Article 153(3)(a) or by virtue of Article 153(3)(b) i.e. special European consumer legislation aimed at improving national legislation on consumer protection issues. Those measures adopted by the E.U. in accordance with Article 153(3)(b) operate as a minimum level of protection. Member states may regulate more intensively however the rules act as minimum requirements.

Geraint Howells and Stephen Weatherill claim that there is a firm body of directives that form consumer law in Europe.³⁸² This body of legislation touches both private and public law and covers the safety of consumers and their economic interests.³⁸³

³⁸⁰ Treaty Establishing the European Community (Nice consolidated version)

Part Three: Community policies Title XIV: Consumer protection Article 153 available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E153:EN:HTML>> accessed 28.July 2012.

³⁸¹ Ibid.

³⁸²

1. Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.
2. Council Directive 90/314/EEC on package travel, package holidays and package tours.
3. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
4. Council Directive 88/378 on the approximation of the laws of the members states concerning the safety of toys.
5. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.
6. Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (84/450/EEC). Directive 97/55/EC OF European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising.

The list which is offered by the authors should be implemented by all member states in their domestic legislation by national implementing measures.³⁸⁴ The measures are binding but each member state has the authority to decide on the way to implement these measures. Once the directives are implemented, domestic legislation should be interpreted in light of these directives.

There are some problems with making a list of directives, for example, where consumer matters do not fall under the specific provisions of these articles or where the rights derive from other legislation. The other way of looking at scope is the Israeli method of looking at the transactions and not at the specific enactment. In this case the scope would cover:

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7. Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC).
 8. Council Directive of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC). Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. Directive 98/7 of the European parliament and of the Council of 16 February 1998 amending Directive 87/102 for the approximation of the laws regulations and administrative provisions of the members states concerning consumer credit.
 9. Directive 94/47 of the Parliament and Council of 26 October 1994 on the Protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.
 10. Directive 97/7 of the European Parliament and of the Council of 20 May 1997 on the protection of Consumers in respect of distance contracts.
 11. Directive 99/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guaranties.
 12. Directive 98/27 of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.
 13. Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on a certain Legal aspects of information society services, in particular electronic commerce in the internal market.
 14. Directive 2002/65 of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

³⁸³ Geraint Howells and Stephen Weatherill *Consumer Protection Law* (2nd edn, Ashgate Publishing Ltd., 2005) page 124.

³⁸⁴ Article 10 (ex 5) EC and Article 249 (ex 189) EC.

1. An action of a customer against a dealer having contractual relations or even where no contract has been entered into.
2. An action against an insurance company or agent in relation to the contract of insurance or benefits within contractual relations or even where no contract has been entered into.
3. An action against a bank in relation to matters between banks and customers whether business has been transacted between them or not.
4. An action relating to restrictive practices and fair trading.

The combined way to tackle the scope definition is to list all relevant enactments, as well as the transactions as mentioned in the Israeli legislation. In this way, even if a certain infringement is not covered by a certain enactment, it may fall within the widely drafted list of transactions (for example every action of a customer against a bank) therefore such an infringement will still be a possible cause of action for collective redress.

The problem with this approach is that the scope may be too broad and many actions may be submitted on grounds which are indeed consumer transactions, but for which the legislator did not intend to provide collective redress, such as where the customer is a large business which needs no protection or where the sum of the action is substantial (for example in a claim for infringement of advertisement by a competing businesses). The view of the Israeli legislator on these issues is to allow a wide scope provision with breaks which will be examined in the certification process to ensure that a class action is suitable for the claim.

It is also possible to draft a new provision on scope to allow all consumer-related transactions to constitute a cause of action for collective actions provided that the personal damage does not exceed a certain low figure. This suggested enactment has some similarities to the Danish provision that allows opt-out actions provided that the

personal action does not exceed DKK 2000.³⁸⁵ However, the limitation on actions due to the sum may lead to undervaluation of claims by representatives only to certify their action by way of collective redress.

3. Claims Against the State

Another very interesting and very appropriate field for collective actions is the defence of citizens' rights against their states. This means that if states fail to comply with their obligations to their citizens, they could be sued for their failure to do so.

States and local authorities operate in the economic markets, they monitor the economy and they have duties which they are expected to carry out for the good of their citizens. States and state bodies may act unlawfully or may levy unlawful minor payments from individuals. States also levy charges from citizens and supply them with services.

The Israeli legislator restricted claims against the state to repayment of uncollected levies by the state, and in addition provided state and local authorities with special defences. The first special defence is that a state cannot be sued in collective actions to repay an unlawful levy for a period exceeding 24 months.³⁸⁶ The other defence is that the state or local authority may undertake to stop the unlawful levy before trial and, if such a notification is given, a collective action on this matter is barred.³⁸⁷

The problem with such a defence is that it allows the state to retain the fruits of unjust enrichment in its hands instead of paying back money which was unlawfully collected.

However, it is clear that the provision in the CAL in Israel which allows collective actions to be brought against the state only for repayment of unlawful levies is too narrow as the interaction between the state and its citizens is much wider and relates to many areas of law as well as administrative actions relating to administrative

³⁸⁵ Prof. Erik Werlauff, (n 104).

³⁸⁶ Class Action Law 5766–2006, s 21 (Israel).

³⁸⁷ Class Action Law 5766–2006, s 9 (Israel).

decisions. In all these actions the state is much more powerful than each individual citizen separately. Therefore there is a strong argument in favour of allowing broad collective actions against state.

On the other hand, governments may be sued in judicial review proceedings, though these actions only deal with the administrative side of governmental decisions and not with payment of damages for damage caused by governmental actions. Public bodies which are controlled by the state, or organisations which are licensed or financed by the state, are not likely to sue the government in collective proceedings. Thus it is crucial to allow private independent individuals to bring such actions against the state or local authorities in order to balance the legal strength of the state against any individual member.

Other possible grounds for bringing collective actions against States (apart from unlawful levy of different duties) are:

1. Negligence in supervising markets e.g. on the collapse of banks;
2. Negligence in taking action against wrongdoers;
3. Negligence in implementing community directives;
4. Unlawful demands for taxes; and
5. Failure of a member state to implement a European Community measure.

A state may breach any of its obligations or act negligently and will have to compensate many individuals who have suffered loss resulting from such a failure. This may also be a cause for collective redress. Unfortunately the Israeli collective redress provision does not contain such a provision.

In Europe, member states are under an obligation to implement these directives in their domestic legislation. The EC treaty envisages that directives will become part of

national law through national implementing measures.³⁸⁸ The failure to implement a Commission measure may result in payment of damages³⁸⁹ and an individual may demand this if there is a sufficiently serious breach of a superior rule of law for the protection of the individual³⁹⁰ and provided that certain conditions are met.³⁹¹

Non-implementation of binding European law may result in serious harm to many of the member states citizens. Therefore, there is a very strong argument for allowing private organisations to bring collective redress cases against a member state for a failure in its duty to implement the law which has had a sufficiently serious effect on the group of injured people. It is important to include such claims against member states in the scope of the suggested European collective redress mechanism to enable members of the European community to challenge their state in court. If such collective proceedings are not permitted then it seems that individuals will not be able to challenge their state on an equal footing in court proceedings.

It should be noted that under Italian Law no. 15 of 4 March 2009 (known as the "Brunetta law") there are new principles and criteria for a class action to be brought against public/government entities and public service providers who harm interests that are deemed legally relevant to many users or consumers.

The Italian Legislative Decree of 20 December 2009 no. 1985, which laid down provisions for the implementation of class actions against public bodies, formally entered into force on 15 January 2010, although actual implementation is still subject to further legislation.³⁹²

³⁸⁸ Article 226 (ex 169) – 228 (ex 171) EC, which empowers the Commission to start proceedings against Member States failing to comply with their obligations under EC law. Article 227 (ex Article 170) EC allows every member state to bring proceedings against another member state for breach of their treaty obligations.

³⁸⁹ Case 39/72, *Commission v. Italy*, [1973] ECR 101, [1973] C.M.L.R. 439, at par. 11.

³⁹⁰ Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities* [1971] ECR 975; Case 45/96 *Bayerische Hypotheken und Wechselbank Ag v. Dietzinger* [1998] ECR I-1199.

³⁹¹ *Francovich and Others v. Italian Republic* Cases C-6 & C-9/90 [1991] ECR 1-5357.

³⁹² Lia Campione, Fabio Guastadisegni 'Class actions in Italy' (Clifford Chance, 27 January 2010) at <http://www.cliffordchance.com/publicationviews/publications/2010/01/class_action_in_italy.html> accessed 27 October 2010. See also Franco Bassanini, 'Twenty years of administrative reform in Italy' (Rome, 2009) at <http://www.astrid-online.it/Riforma-de1/Studi-e-ri/Bassanini_Review_Economic_Conditions_Italy_3_09.pdf> accessed 27 October 2011.

Part E. Conclusions on the Pillars of a Workable Model

In this chapter the elements that have brought improvements in access to justice in Israel have been reviewed. Firstly, the adoption of the opt-out machinery as the default procedure assisted in creating large groups of claimants under the Israeli system. The creation of large groups enables representative to benefit from economies of scale and make the action more profitable. On the other hand, looking at other European models such as the Portuguese model, it becomes obvious that opt-out mechanism alone does not make a system more accessible.

Secondly, the Israeli experience shows that most actions are brought by private individuals and thus the European emphasis on organisational claims alone results in less class actions being initiated. With regard to public bodies, their position as the preferred enforcers should take precedence over private individual actions. Therefore it is suggested that individual private actions be allowed to bring only follow-on opt-out or opt-in actions, or stand-alone actions where the authorities refuse to intervene for unjust reasons or delay their action for an unreasonable time.

Thirdly, the importance of funding and introduction of incentives to encourage representative to impose damages on large defendants through class actions is crucial. Preventive incentives such as exemptions from payment of costs proved to be insufficient in order to encourage representatives to break with rational apathy and engage in lengthy and costly legal proceedings. The result is that positive incentives such as conditional fees and financial bonuses to representatives (both lawyers and representative claimants) should be introduced in the new suggested model as far as private individual actions are concerned. Other funding such as after the event insurance and third party funding are also very welcomed in collective redress cases, so as to persuade representatives to take on the risks of bringing a court case.

Fourthly, the wide scope of class actions in Israel enables representative plaintiffs to submit collective redress cases for almost all consumer actions and in addition, class actions are allowed in very broadly defined areas of law. In Europe, consumer law may be defined with more precision with reference to specific enactments and

directives but some additional areas should be allowed in order to assist in the supremacy and imposition of Community law. In addition, the Israeli model should contain a provision which enables bringing damages claims against the state as the availability of actions for repayment of unlawful levies alone is too limited. In Europe a new model may allow collective actions for damages against member states for breach of their European Union obligations where such member states fail to comply with their Community obligations so as to further the enforcement of the European Union's provisions amongst member states.

Having examined the features which have improved access to justice in Israel through class actions, the next chapter will examine the problems that the Israeli model creates and the possible solutions and safeguards which may prevent abuse and excessive use of the system.

Chapter Four:

Safeguarding the Collective Redress Procedure from Abuse

Having dealt with the ingredients that make a collective redress mechanism workable and effective in Chapter Three, it is now important to deal with some possible negative side effects which may lead to abusive litigation which is so criticised in the U.S.

Collective redress may give rise to agency problems where the agent tries to gain personal profit to the detriment of the class.¹ Sometimes representatives may try to bring unmeritorious claims in order to blackmail the defendants and force a convenient settlement for the representatives. There is also the problem of information asymmetries between the agent and the class members which representatives may use for their own benefits by entering into an agreement with the defendant which is beneficial to the representatives rather than to the group of class members.

In this chapter, the safeguards used under the Israeli model will be viewed in order to examine whether these safeguards may be amended so as to prevent the flood of claims problem which is now threatening the existence of the Israeli model. In the first part of the chapter, the certification procedure will be reviewed in order to examine whether it operates effectively to bar unmeritorious claims from reaching the courts. Thereafter, the limitations on the power of the representatives to dismiss or settle the action will be viewed in order to prevent situations where the agent profits from a settlement on the account of the absent class members. Safeguards reviewed include provisions aimed to bridge the gap in information between the representatives and the class members. In the end, the review of safeguards will also include the imposition of financial sanctions by way of costs in order to deter representatives from bringing unmeritorious claims.

¹ Jonathan R. Macey and Geoffrey P. Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) Faculty Scholarship Series Paper 1717 available at <http://digitalcommons.law.yale.edu/fss_papers/1717> accessed 6 May 2012>, see at page 3.

The review of the current safeguards is aimed at preserving the Israeli model's central features, and producing an opt-out model secure from abuse which is led by reliable agents, minimising the flood of claims problem as much as possible.

A. General View on Safeguards

There are certain characteristics of consumer collective proceedings that require special safeguards in order to prevent misuse of the procedure.² The first problem is the information asymmetry between the class representative and the class members. The representative has more information than the class members. In the context of collective redress, it means that the representative better understands the chances of success, the quality of the arguments put forward, and the advantages and disadvantages of certain alternatives and choices. In collective redress cases there is also investment asymmetry between the representative and the class members. In regular actions, the clients have a greater interest than their representatives in the outcome of the action. However, in collective actions, the representative financial interest is much greater than the class members' interests. Such asymmetry may lead to abuse as the representative may prefer their own personal interests over the class member's interests.³ In the U.S., there are abuses due to large payoffs offered to lawyers. Class actions in the U.S. are largely lawyer-driven exercises in which the idea to bring a suit comes not from an injured consumer or investor, but rather from an entrepreneurial lawyer who sees an opportunity for profit. U.S.-style litigation imposes crippling costs on the national economy. The explosion of U.S. class actions over the past four decades has imposed a substantial cost on American business. Not only are U.S. companies forced to allocate billions of dollars to legal fees and litigation costs every year, but the overall litigation climate in the United States deters significant foreign investment in U.S. businesses and impedes research and development.⁴

² Ianika Tzankova and Jeroen Kortmann,(2010) 1 'Remedies for Consumers of Financial Services: Collective Redress and Improvements of Class Representation' *European Journal of Consumer Law* 117 at page 121.

³ *Ibid* at page 124.

⁴ Lisa Rickard, '*The Class Action Debate in Europe: Lessons from the U.S. Experience*'

One of the principal objections to the introduction of the CAL was that Israeli class actions would suffer from the same problems as the American class action system, such as lawyers motivated by their own personal gain⁵ and inadequate redress for class members.⁶ In addition, class actions have proven to be detrimental to the U.S. economy⁷, with companies forced to divert financial resources to defending class actions instead of developing their products.

Some writers have referred to the class action phenomenon as Frankenstein's Monster,⁸ arguing that lawyers in such cases act as entrepreneurs without real clients and engage in a form of legalized blackmail. This is due to the fact that defending class actions can be very costly and may force the defendants to reach a settlement even where the merits of the action are weak.⁹ Lawyers tend to sue whoever they believe may be vulnerable to a settlement and capable of paying large lawyers' fees,¹⁰ without paying much attention to the question of the case's merits.¹¹

The European Commission was ready to consider an EU collective redress mechanism which would facilitate meritorious claims and benefit consumers. At the same time, it stated that such procedure needs to discourage a "litigation industry."¹² The term "litigation industry" is describing the class action litigation abuse in the U.S.

The European Business Review (4 December 2008) at <<http://www.europeanbusinessreview.com/?p=273>> accessed 20 October 2011.

⁵ Lisa Rickard, (n 4).

⁶ Lisa Rickard, (n 4). The problem is especially acute in securities class actions which represent about 50% of federal actions in the U.S. according to U.S. Chambers of Legal Reform, *Securities Class Action Litigation: The problem, its impact, and the path to reform* (July 2008) <www.instituteforlegalreform.com> accessed 20 October 2011.

⁷ George Bush's speech dated February 18, 2005 available at <<http://rncnyc2004.blogspot.com/2005/02/president-signing-class-action.html>> accessed 2 December 2011.

⁸ Arthur R. Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem' [January 1979] Vol. 92, No. 3 *Harvard Law Review* 664-694. See also Deborah R. Hensler, 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation' 11 *Duke Journal of Comparative and International Law* 179 at <<http://www.law.duke.edu/shell/cite.pl?11+Duke+J.+Comp.+&+Int'l+L.+179>> accessed 2 December 2011.

⁹ Samuel Estreicher, 'Forward: Federal Class Actions After 30 Years' [1996] 71:1 *N.Y.U.L Rev.* 1 at 2.

¹⁰ Lawrence Schonburn, 'The Class Action Con Game' [Fall 1997] *Regulation* 50-51.

¹¹ Debora Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica CA, Rand Institute for Civil Justice, 2000) 402.

¹² Commission of the European Communities, 'Green Paper on Consumer Collective Redress', COM(2008)794 final, <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf> accessed 20 April 2012, see at paragraph 52.

The Commission expressed its view that a European model should refrain from abusive elements, such as punitive damages and contingency fees which would benefit lawyers rather than consumers and create high costs for defendants.¹³ Discussions in Europe over controlling abuse in class actions are fuelled by various features of the U.S. class action system. The European Commission claimed that the U.S.- style class action is based on ‘toxic cocktail’ which is a result of a combination of several elements: punitive damages, contingency fees, opt-out system, pre-trial discovery procedures and that it should not be introduced in Europe.¹⁴

It is claimed that the U.S. class action system produces excessive volumes of litigation, that cases often have little merit, that if a case is certified by a court as a class action the defendants have little commercial alternative but to settle (known as ‘blackmail settlements’). The system is claimed to encourage and fail to prevent frivolous, fraudulent or abusive claims, thereby wasting the resources of defendants and courts, leading to deleterious effect on the economy, and potentially bringing the legal system into disrepute.¹⁵

The Civil Justice Council in England has warned that one of the most significant concerns regarding collective actions is the possibility that so-called blackmail suits may proliferate. Such actions are typically unmeritorious and are prosecuted with a view to procuring a settlement from a defendant. Settlement is procured due to the possible large-scale cost consequences that might be incurred in the proceedings combined with the prospect that such costs, from a successful defendant’s perspective, would be in practice irrecoverable.¹⁶

¹³ Commission of the European Communities, (n 12), see paragraphs 48-53.

¹⁴ European Commission and DG SANCO, Green Paper on Consumer Collective Redress – Questions and Answers MEMO/08/741 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/741&format=HTML&aged=0&language=EN> accessed 20 April 2012.

¹⁵ Professor Christopher Hodges, ‘Response to Consultation: Towards a Coherent European Approach to Collective Redress’ (28 April 2010) available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> accessed 28 July 2011.

¹⁶ The Civil Justice Council, Civil Justice Council, ‘Improving Access to Justice Through Collective Actions’ Developing a More Efficient and Effective Procedure for Collective Actions. Final Report. A Series of Recommendations to the Lord Chancellor (Civil Justice Council, 2008) at <http://www.civiljusticecouncil.gov.uk/index.htm> pp156-158.

In order to avoid the possibility of abuse of a collective redress the EU Commission offered some safeguards which would prevent unmeritorious claims. The judge can play an important role by deciding whether a collective claim is unmeritorious or admissible. Certification of the representative entity acts as a gatekeeper, as does the loser-pays-principle in the Member States where it exists. Public authorities could be potential gatekeepers when funding collective redress, refusing to allocate resources to unmeritorious claims. The consumer's position in collective redress court procedures could be reinforced by giving legal standing to pursue a representative action to qualified entities such as consumer organisations or ombudsmen.¹⁷

The European Commission has provided that the effective safeguards to avoid abusive collective actions is the 'loser pays' principle, meaning that the losing party pays the court and lawyers fees of both parties.¹⁸ The Civil Justice committee argued that the proper safeguards are: the certification process, security for costs by imposing an order against a representative costs-shifting, the ability for a defendant to bring an application that claimants provide security for costs, and court approval of settlements.¹⁹ Professor Hodges argued that the proper safeguards should operate at the earliest time, that the merits of the claims should be made clear and evaluated as early as possible, and that claimants should be required to use negotiation or public oversight procedures before going to court, especially for aggregate claims. Professor Hodges explains that the type of safeguard depends on the type of abuse that it is sought to guard against. If this is the case, then the highest degree of safeguards should be imposed on private stand-alone actions, and there is no need for such safeguards on organisational or public actions which are secure from any abuses. Since the new European collective redress framework will be set against the background of the strong regulatory and organisational infrastructure which exists in Europe, many of the safeguards that exist in Israel should be relaxed or removed altogether if an action is led by a secure agent, such as government approved organisations or public bodies.

¹⁷ Commission of the European Communities, (n 12), see paragraphs 48-53.

¹⁸ The European Commission, Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011), para 22–23 available at <http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf> accessed 2 June 2011.

¹⁹ See The Civil Justice Council, (n 16) p156-158.

The Israeli legislator included several safeguards in the CAL in an attempt to avoid the abuses which appeared to accompany lawyer-driven litigation in the U.S.

The need for safeguards in Israel arises due to some of the elements of the 'toxic litigation'²⁰ which are the opt-out mechanism and the contingency fees which are allowed in Israel. These safeguards operating in Israel have so far prevented some of the possible abuses of the collective redress system in Israel. The Israeli model is based on private collective actions using contingency fees and yet, there are no reported instances in Israel of an action being brought in bad faith (for example actions led by the plaintiffs themselves). The merits of the claims in Israel are checked in the certification procedure and actions in bad faith or unmeritorious actions are not supposed to go beyond the certification process. Furthermore, the judge at that stage will give orders with regards to the fair hearing of the trial. However, the safeguards in the CAL have failed to prevent collective actions from flooding the Israeli courts. Consequently, the improved model suggested in this work should take note of the Israeli experience and include additional safeguards to prevent a similar deluge of collective actions.

During the course of this chapter, it is proposed to adopt a number of safeguards that operate in Israel, such as the certification process, the supervision of compromises and voluntary dismissals, and a public registry which could be integrated into the future model advocated in this work.

B. Safeguards Operating in Israel

1. The Certification Procedure as a Barrier to Unmeritorious Claims

The certification procedure is an important safeguard which filters out claims that are unsuitable for collective redress at a relatively early stage in proceedings. One Israeli court has referred to the certification procedure as 'the corridor which leads to the

²⁰ The term mentioned above by DG SANCO. See (n 14).

parlor²¹; the certification procedure should be efficient and should not be used to deter legitimate plaintiffs from bringing collective actions, yet it should prevent unsuitable representatives from bringing actions. In the Israeli model, the first filtering procedure is the certification procedure. Therefore any action starts with a motion to certify the action as a class action. Only if the action is certified by the court at this initial stage, may it proceed to a collective procedure.

However, once the claim form has been submitted, it becomes public knowledge and may have a detrimental impact on the defendant's business. For example, if the defendant is a public company, it must give immediate notice of the action to its shareholders and its share value may fall. Furthermore, banks and potential investors will regard the company as being at financial risk due to the threat of the class action. Consequently, companies often prefer to pay compensation, even if the action has a low chance of success on its merits, rather than suffer the negative impact of a threatened collective action.

In this part of the chapter, the Israeli certification procedure will be viewed in order to recommend the adoption of a similar procedure in the new model with some additional recommendations. These recommendations relate to improving the filters employed in Israel at the certification stage, as these come into operation too late once the case has been submitted to the courts. An additional filtering mechanism to stop unmeritorious claims from being submitted to the courts should be introduced.

A. *The Decision of whether to Certify a Class Action*

In Israel, a representative has to submit his personal claim form together with a motion to certify the claim as a class action.²² The court then hears the motion and decides whether the claim is suited to a class action. In Israel, the role of the judge at this stage is to decide if the claim should be approved as a class action. Once the motion is certified, the court gives orders relating to the management of the class

²¹ Leave to Appeal Request No. 4556/94 (Supreme Court) Tezet v. Zilbershatz, P"D Mem Tet (5) page 774, 784 (2006).

²² Class Action Law 5766–2006, s 5 (Israel).

action, which may include a representative replacement,²³ the definition of the class,²⁴ setting a time limit to opt-out of the action²⁵ and, in exceptional cases, turning the action into an opt-in action.²⁶ The ruling judge may also certify the action with such changes as he sees fit.²⁷ The management orders are aimed at ensuring the fair hearing of the trial.

The ruling judge must decide whether the action raises similar questions of fact or law and whether there is a reasonable chance that the substantive questions of law and fact common to the class will be determined in favour of the class.²⁸ This is a merits examination which filters out actions that have little chance of success and protects defendants from being blackmailed into settling unfounded cases rather than pursuing long and protracted actions.²⁹ The Israeli prerequisite was not imported directly from its American counterpart³⁰ and although it was intended to prevent abuse of the class action procedure,³¹ it has not prevented a flood of applications from being made before the Israeli courts. This is because the courts in Israel have loosened their belts since the introduction of CAL, and now allow many actions to successfully pass through the certification procedure. Many actions give rise to similar questions of fact or law. In Israel, there has been a relaxation of the requirements to approve the action, mainly since there is ambiguity regarding the required burden of proof at this stage. It is unclear whether the burden of proof at this preliminary stage is higher than in non-class actions, but the court has ruled that a plaintiff must convince the judge *prima facie* that the similar questions will be decided in favour of the class. The level of persuasion required on the merits of the case and the chance of success should be higher than in any other preliminary proceedings in any other type of action.³² The level of precaution

²³ Class Action Law 5766–2006, s 8 (c) (Israel).

²⁴ Class Action Law 5766–2006, s 10 (Israel).

²⁵ Class Action Law 5766–2006, s 11 (Israel).

²⁶ Class Action Law 5766–2006, s 12 (Israel).

²⁷ Class Action Law 5766–2006, s 13 (Israel).

²⁸ Class Action Law 5766–2006, s 8 (A) 1 (Israel).

²⁹ Geoffrey P. Miller, 'Review of the Merits in Class Action Certification' [2004] 33 Hofstra L. Rev 51.

³⁰ Rule 23 of the Federal Rules of Civil Procedure. Eran B. Taussig, 'Prerequisites to Class Action Certification: A Comparison of New Israeli Law and Rule 23 (A) of the Federal Rules of Civil Procedure' (2007) 5 J. INT'L L. & POL'Y 3:1 at <http://www.law.upenn.edu/journals/jil/jilp/articles/5-1_Taussig_Eran.pdf > accessed 6 January 2012.

³¹ S. Goldstein, 'Class Action in Israel' in Wasserstein Fassberg C. (ed) *Israel Reports to the XIII International Congress of Comparative Law* (1990), 45.

³² CA 2967/95 (Supreme Court) Magen and Keshet v. Tempo, Padi Nun Alef (2) 312, 329-30 (1997).

needed in collective proceedings is higher than any normal procedure so as to enable the court to perform the role of gatekeeper and prevent unmeritorious claims as the earliest stage possible once the action has been filed. This is why the courts in Israel have looked at the merits of the case even before CAL was adopted, even though at that time there was no requirement to do so.³³ The reasoning behind this decision was that an unmeritorious claim against a commercial company could cause severe harm to its commercial and financial standing and should be barred as soon as possible.

A further preliminary condition that the Israeli courts are required to examine at the certification process stage is whether a class action would be the most efficient procedure and the most appropriate means of resolving the dispute in light of the circumstances of the case.³⁴ Under this condition, the court is required to look at other available measures to resolve the dispute. The alternative measures are joinder of personal actions which are submitted to the courts on the same issues, or adjudicating of the individual personal claims separately.³⁵ The court should also examine whether other legal measures such as criminal penalties or administrative proceedings could achieve the same goals more efficiently than a class action.³⁶ If the class action concerns a large number of members, dealing with each case separately would be impracticable and costly and a class action would be preferable.³⁷

Class actions are most commonly denied on this ground because there appear to be special circumstances that apply to class members, for example, where it is necessary to prove the reliance of all group members on a specific misrepresentation. Rather than a collective action, the court may prefer joinder of personal actions (similar to the GLO in the U.K. where many personal court actions are joined to one procedure but each personal action has to be submitted to the court). The decision may be dependent on the number of class members and the existence of common issues to all class members (commonality). For example, in *Adv. Shtendel v. Bezeq International*³⁸ the Supreme

³³ Leave to Appeal no. 6567/97 (Supreme Court) *Bezeq v. Gat Padi* Mem Bet 2, 719-720 (30 June 1998).

³⁴ Class Action Law 5766–2006, s 8(A)2 (Israel).

³⁵ Eran B. Taussig, (n 30) at 3:11.

³⁶ Professor Alon Klement, 'The Ambits of Collective Actions in Mass Tort Actions' (2003) 34(2) *Mishpatim* 380-381.

³⁷ Professor Alon Klement, '*Guidelines for Interpreting the Class Action Act 2006*', (2006) 145-146 <www.hapraklit.co.il/_Uploads/dbsAttachedFiles/memtet1_6.pdf> accessed 15 December 2011>.

³⁸ Appeal no. 458/06 *Shtendel v. Bezeq International* (Supreme Court) (6 May 2009).

Court took the view that a class action was not the most efficient or appropriate way to deal with the dispute, as the reliance placed on a misrepresentation was potentially different for each class member. In this case, the plaintiff argued that Bezeq (Israel's leading telecoms company) deceived the public in its advertisement whilst claiming that its international telephone rates are the cheapest. Bezeq's advertisement was misleading because it did specify that in order to enjoy the cheap rates, one had to subscribe to Bezeq. The District Court and the Supreme Court in Israel decided that the action should not be permitted on a collective basis, since personal questions of reliance existed (each person would have to prove that he/she made telephone calls in reliance on the misleading advertisement) and that these questions outweighed the collective issues.

Indeed, where the representative represents a class of members with different characteristics, collective proceedings are usually not the most efficient and appropriate means of resolving the dispute as the court will have to examine the circumstances of each class member. For example, in *Barkan v. Ayalon Insurance Company* the Israeli High Court of Employment refused an appeal against an employment tribunal's decision not to certify an action brought by six hundred and fifty of the defendant's employees who were claiming non-payment of overtime hours of work. The court stated that payment of overtime work depended on each employee's individual hours of work and thus a class action was not the most efficient and appropriate means of resolving the dispute.³⁹ Thus the court did not approve the collective proceedings due to the different causes of action which each plaintiff might have.

Thus it is possible to say that the court's examination at the certification stage will be both on procedural matters, i.e. that the collective procedure is the most appropriate and that the common question prevails over personal issues, and in addition, a merits examination in which the court will decide whether the case *prima facie* has a good chance of success.

³⁹ Appeal no. 686/09 (High Court of Employment) *Barkan v. Ayalon Insurance Company* (30 May 2011) (unreported) available at <www.glima.info/verdicts/30-5-2011.pdf> accessed 16 December 2011.

B. Different European Views on Certification

There are European models which do not provide for a certification process and the case is treated as a collective action from the outset. For example, the law in Portugal does not require certification before submission of a Popular Action.⁴⁰ Nonetheless, the judge dealing with the case has broad discretion to strike down cases which he considers unsuited to collective proceedings.⁴¹ Article 13 of Law 83/95 provides that a Popular Action should be dismissed where the judge finds that it is highly improbable that the action will proceed having heard the Public Prosecutor and made the preliminary inquiries that he considers justified or that the claimant or the Public Prosecutor's request.⁴² Before making the decision, the judge hears the public prosecutor's position and makes preliminary inquiries. Thus, there are no strict criteria to be examined in the preliminary hearing in Portugal and the matter of the suitability of the procedure is left to the discretion of the hearing judge. Under such a model, the action does not go through any filter and may proceed even if it is not sound on its merits. Since the adequacy of the representation is not examined, the Portuguese model carries a severe danger of abuse without a certification procedure.

There are, however, European jurisdictions which see the certification procedure as a necessary part of any collective procedure model. In England, for example, the CJC reviewed the possible mechanisms of collective redress and recommended the introduction of a certification procedure as a safeguard to ensure fairness to all parties.⁴³ In its response to the CJC recommendations, the government agreed that there should be a certification process.⁴⁴ The Civil Justice committee claimed that the

⁴⁰ Dr. Lisa Tortell, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal' (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 4 December 2011.

⁴¹ Article 265-A of the Code of Civil Procedure (Portugal).

⁴² Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)' at <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> accessed 8 November 2011, see at page 11. See Article 16(3) of Law 83/95 (Portugal).

⁴³ Civil Justice Council, (n 16).

⁴⁴ Ministry of Justice, "The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'" (2009) available at <http://www.lawcentres.org.uk/uploads/Government_Response_20th_July_2009.pdf> accessed 18 July 2012.

certification procedure is an absolutely mandatory element of any collective action certification procedure and is consistent with the general approach to case management. In a certification procedure, the court will be best able to maintain strict control of any collective action process and in so doing, it acts as a diligent gatekeeper at the outset of any such action. In the Italian model, the judge may refuse to allow the action if the claim has a low chance of success, there are conflicting interests between the plaintiff and the class members, and there is a fear that the representative is not adequate or the collective interest in question is not recognised under Italian Law.⁴⁵ The public prosecutor is served with the petition and he may decide to intervene in the admissibility decision.⁴⁶ At this stage, the court hears the motion and decides whether the claim is suited to a collective action. The suitability of the claim refers to both the cause of action and the suitability of the representatives in leading collective redress proceedings. Therefore, it seems that a certification procedure is necessary in all collective redress systems, the rationale being that no party should be able to use a heavy weapon such as collective redress without court supervision and approval. In these circumstances, the court acts as a guardian for the missing parties, a role which is not fulfilled in actions involving two parties.

The certification procedure is also important in defending the rights of defendants by filtering actions and preventing claims which are brought in bad faith or which have a low chance of success. The other function of the certification process is that it provides the judge with an opportunity to give precise orders for the management of the case. If a certification procedure is adopted as part of the new European model, it may quell some of the current fears among European legislators regarding abusive litigation in collective proceedings as such a procedure will act as a barrier to abusive litigation.

⁴⁵ Prof. Dr. iur. Hans-W. Micklitz and Dr. Cristina Poncibò 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Italy' (Civic Consulting, 2008) at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 4 December 2011.

⁴⁶ 'Newsletter Class Action' *Chimkent Studio Legale*, 18 January 2010. <http://www.chiomenti.net/CMS/upload/attach/NEWSLETTER/Class%20Action%202009_18.1.10_EN.pdf> accessed 6 January 2012.

C. *Creating a New Certification Procedure – Pre-Legal Action*

The problem with the certification procedure is that from the defendant's perspective, conducting the merits examination at the certification stage sometimes comes too late. The certification itself may be very lengthy and costly and harm may already have been caused to the defendant's business by the mere submission of a large class action against the defendant.⁴⁷ Conversely, a lengthy examination of the merits may sometimes be very detrimental to the plaintiffs, as the defendants will try to prolong the certification hearing, exhausting the little funds available to the class representatives. Therefore in small claims proceedings the defendants tend to resist class certification.⁴⁸

Consequently, an additional safeguard is required to filter out unmeritorious actions before certification proceedings are commenced in order to ease pressure on the court system and to protect defendants. This could be achieved if public enforcers of the type that exist in Europe would be more active in promoting the use of collective actions. Ideally, if these regulatory bodies were required to take action first, only allowing a private action afterwards if necessary, the first action would have a filter effect since it takes place before the dispute reaches the courts. In this way many costs would be saved, and the benefits to the consumer class could be similar to those of a court decision.

Professor Hodges refers to several existing European regulatory mechanisms where the regulator has extensive powers to bring collective redress cases on behalf of consumers, such as Finland⁴⁹, Denmark⁵⁰, Sweden⁵¹ and Norway.⁵² Even in England there are calls to appoint a Consumer Advocate, to monitor cases where a large

⁴⁷ The U.K government in its reply to the CJC recommendation stated that the merits examination should take place in the certification process, exactly as the case is currently under Israeli legislation. Ministry of Justice, (n 44).

⁴⁸ John C. Coffee, Jr., 'Class Wars: The Dilemma of the Mass Tort Class Action' (1995) Colum. L. Rev. 1343 at page 1352.

⁴⁹ Act 444/2007 on Class Actions in Finland in force since 1 October 1 2007 allowing the Consumer Ombudsman to bring collective cases.

⁵⁰ Administration of Justice Act 2007 (Denmark).

⁵¹ Group Proceedings Act 2002 (Sweden).

⁵² Dispute Act 2005 (Norway).

number of consumers have been affected.⁵³ Under this recommendation, a business found in breach of the law would have to liaise with relevant enforcers which would help the business in question to propose a satisfactory compensation package on a voluntary basis.

Professor Hodges also refers to possible approaches which would give public regulators the power to reach private solutions, such as restorative justice, which is primarily concerned with repairing the harm caused to victims and less concerned with penalties and deterrence.⁵⁴

However, a regulatory body could not replace the representative role in leading the class action. Public enforcement is not as efficient as private enforcement. Regulatory bodies are not likely to deal with collective redress cases for damages due to their limited resources and their traditional role as investigators and supervisors rather than damages collectors. An excellent example of good practice by a regulatory body is that of the OFT which has been granted powers under U.K. legislation to investigate 'super-complaints.'⁵⁵ Under this special procedure, certain designated bodies which represent consumers are allowed to submit super-complaints to the OFT and to other regulators which may be relevant for consumers in the circumstances of the case if a certain business behaviour significantly harms the interests of consumers.⁵⁶

The OFT considers the evidence and has to publish a response within 90 days from the day after which the super-complaint was received stating what action, if any, it proposes to take in response and giving the reasons behind its decision. Alternatively, the OFT may refer the complaint to the Competition Commission for further investigation, or take any other action available to it.⁵⁷ This procedure is very convenient and may be the basis for follow-on class actions because the procedure acts as a preliminary barrier to a merits examination before the case reaches the

⁵³ Department for Business Innovation & Skills, *Consultation: The Role and Powers of the Consumer Advocate* (2 December 2009) <www.bis.gov.uk/files/file53816.pdf> accessed 15 December 2011.

⁵⁴ Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' [2010] *Civil Justice Quarterly* 383-384.

⁵⁵ Enterprise Act of 2002, s 11 (U.K.).

⁵⁶ For example, super-complaints to the Director General of Telecommunications, the Gas and Electricity Markets Authority, the Northern Ireland Authority for Energy Regulation, the Director General of Water Services, the Rail Regulator and the Civil Aviation Authority.

⁵⁷ The OFT's guidance on Super-Complaints at <<http://www.of.gov.uk/OFTwork/markets-work/super-complaints/>> accessed 16 December 2011.

courts, and thus may filter out unmeritorious claims and save defendants from strike suits which have no real merits but are aimed at threatening the defendants.

The process of bringing super-complaints is currently not sufficiently efficient as such complaints are only available to certain designated bodies⁵⁸ such as the consumer organisation ‘Which?’⁵⁹ and the Citizens Advice Bureau.⁶⁰ Thus far, no super-complaint has led to any income for affected consumers and, from a financial perspective, the current super-complaint has proved to be toothless. It is clear that if a new model is to be based on the existing foundations of the OFT super-complaint and the prior examination of a public regulatory, it will need to amend Section 11 of the Enterprise Act so as to allow every individual to bring a complaint to the regulator for prior inspection. Indeed, the super-complaint mechanism operates only in the U.K. However, there are foundations for strong regulatory bodies in Europe, such as the Consumer Ombudsman in Denmark. These regulatory bodies might even cooperate in cross-border cases within the European Community.⁶¹ Such a safeguard ensures that actions are brought only where a public authority has examined the facts and has found that the defendant has acted wrongly. A good example of the operation of such a mechanism is the follow-on action brought in the U.K. by the consumers’ organisation ‘Which?’ against JJB Sports Plc.⁶² In this case, JJB was found guilty of price-fixing by the Office of Fair Trading and was fined GBP 18.6 million. Following conviction, a follow-on action for damages was submitted. The follow-on action fits the idea of a prior filtering procedure by a regulatory body to determine whether the

⁵⁸ Designated by the DTI according to section 11(5) of the Enterprise Act: The Consumers' Association, National Consumer Council and Citizens Advice Bureau were designated in July 2004. Energywatch and the Consumer Council for Water (formerly known as Watervoice) were designated in January 2005. Postwatch, CAMRA and the General Consumer Council of Northern Ireland were designated in October 2005. The list is available at: <<http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/consumers/enforcement/super-complaints/page17902.html>> accessed 15 December 2011.

⁵⁹ For example, just recently Which? submitted a super-complaint to the OFT relating to surcharges that are payable when customers use a debit or credit card. See the OFT site <<http://www.offt.gov.uk/news-and-updates/press/2011/45-11>> accessed 16 December 2011.

⁶⁰ For example, the Citizens Advice Bureau submitted a complaint alleging consumer detriment caused by two practices in credit brokerage and debt management and the OFT reacted by warning 129 businesses and asked the government to issue new guidance. See <<http://www.offt.gov.uk/OFTwork/markets-work/super-complaints/cita>> accessed 15 December 2011.

⁶¹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

⁶² *The Consumers Association v JJB Sports plc* (case number: 1078/7/9/07). <<http://www.catribunal.org.uk/238-640/1078-7-9-07-The-Consumers-Association.html>> accessed 16 July 2011.

action stands on solid merits. Only then will a further collective damages action be available. Such a mechanism is more capable of managing the fears of European legislators of a U.S.-type of procedure and in fact it will further good practice in trade within the European Union.

The Israeli law allows stand-alone actions as a first recourse and there is no need to take any prior action. The private stand-alone actions are the source of the Israeli flood of actions. Thus the new model should filter stand-alone actions and should provide that stand-alone class actions are not the most appropriate or efficient way to deal with a collective consumer dispute, unless secure claimants such as organisations and public bodies are taking on the representation of the class.⁶³ Adopting this view in the new model would prevent the courts from being flooded with cases.

The new regime should therefore provide that if a complaint, similar to a super-complaint, to a public body or a regulator results in a conviction or a disciplinary ruling, then a follow-on action should be available to all potential plaintiffs. Such a provision would minimise the volume of unmeritorious collective cases which reach the courts.

At the certification stage, the court would then take into consideration the fact that a complaint had been submitted to the relevant public body or regulator and such body's response. This being the case, follow-on actions will go through fairly easy. In addition, since consumers do not incur any expenses in bringing a complaint, there is no need to introduce incentives for making such a complaint. The incentives should be available only if the case goes to court with the approval of a public body or following a conviction and is represented by private individuals.

⁶³ In its response to the CJC's recommendations, the British government stated that at the certification stage the court should consider issues such as whether the claim could be achieved more cost-effectively by a non-court mechanism (such as regulatory action or via an ombudsman), whether the representative body or party is likely to be able to meet the defendant's costs if unsuccessful (from insurance, its own resources or otherwise), whether to order the payment of security for costs and, depending on the statutory provisions in the particular sector, authorisation or approval as appropriate of the proposed representative body or party.' Ministry of Justice, (n 44).

D. Appeals on Certification

The question of allowing an appeal on the certification decision is a very important one as regards the certification stage being a safeguard against unmeritorious cases. On one hand, the defendant would want to appeal if the certification of an unmeritorious action is granted, whilst on the other hand, defendants have the tendency to appeal even if the motion for certification relates to a substantiated action. The latter appeal by the defendant is made for tactical reasons to exhaust the representative plaintiff's funds in a bid to force the representative to settle the case cheaply.

The defendant's fear that an unmeritorious action may be approved may bring the defendant to settle a 'strike suit', a case with no real merits which is aimed at intimidating the defendant. In the absence of the possibility of an appeal on the decision at the certification stage, a defendant may be under a great deal of pressure from the very beginning of the action as the action, if certified, will have to be heard in its entirety up until judgment in the first instance, even if the first instance court has incorrectly certified the claim as a class action. Allowing the courts to deal with a class action risks a bad reputation for the defendant, and fewer possibilities of raising funds since the filing of the action must appear as a threat to the company on the company's balance sheet. In addition, defending the class actions means extensive discovery of the company's documents, and high legal costs. This means that once the motion to certify the action is approved, in most cases the defendant will try to settle the case in order to escape lengthy and costly proceedings.

The question of appeal on a certification decision arose before the Israeli Supreme Court in the case of *Celcom v. Tal Fatal*.⁶⁴ In this case, Celcom, a mobile telephone provider, began charging its subscribers for providing an itemised telephone bill detailing the calls made which it sent its subscribers by post, despite having agreements with the subscribers as to the amounts they would charge which did not include such charges and despite the fact that the service had been provided free of charge in the past. The Israeli Supreme Court indicated that it would allow an appeal

⁶⁴ Leave to Appeal no. 8761/09 (Supreme Court) *Celcom v Tal Fatal* (6 May 2010).

against a certification decision only in exceptional circumstances, for example, where the decision raises a new question of law or where the hearing of the case may cause the defendant very severe damages mainly due to the amounts in question or where it is clear that the court of first instance mistakenly certified the action. This decision to allow appeals on the certification decision only in exceptional circumstances seems to run contrary to the current U.S. trend. The Advisory Committee on the Federal Rules of Civil Procedure promulgated an amendment to Rule 23 of the Federal Rules of Civil Procedure that would provide litigants with an additional means by which to seek an interlocutory appeal. The new provision which came into force in 1998, when Federal Rule of Civil Procedure 23 was amended to include a new subdivision (f), provides the court with the power to grant a discretionary appeal in relation to class certification decisions. Under the new rule in the U.S., appellate judges must now decide whether to hear such appeals.⁶⁵ The U.S. approach reduces the pressure on defendants to settle a case once certification has been approved, because it gives the defendant a second chance to prevent an unjustified action. However, on the other hand, past experience in Israel and in the U.S. shows that defendants will make an appeal knowing that the funds of the representative claimant are limited and therefore plaintiffs may be pressurised into agreeing to an unfavourable settlement.

During the debate in England on this issue, the Civil Justice Council (CJC) expressed its concern about the appeal on certification. The CJC felt that the Quebec model, which does not allow an appeal on certification (appeals are allowed only on refusals), would be the right model. The CJC observed that⁶⁶:

The main problem with appeals on certification is their automatic use, in particular by defendants to delay proceedings and unnecessarily increase costs in order to try to apply pressure on claimants, leading to withdrawal of claim or forced settlement. Extensive appeals, especially where they are prosecuted for tactical reasons, are therefore to be deprecated, not least because they subvert the aim of the litigation process away from the determination of cases according to their substantive merits.

⁶⁵ Michael E. Solimine, and Christine Oliver Hines, 'Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Court of Appeals under Rule 23(f)' [2000] Vol. 41 William & Mary Law Review 1531-1600. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264342> accessed 8 November 2011.

⁶⁶ Civil Justice Council, (n 16).

There is a case for proposing that the appeal rights be altered in collective actions, such that for instance there will be no right of appeal from a positive certification, although appeals are permitted from refusals to certify. This is the position in Quebec.

The Quebec model is in accordance with the recent Supreme Court decision in Israel which allows appeals only in exceptional circumstances.⁶⁷ This approach seem to be preferable as it does not enable defendants to drag plaintiffs into lengthy appeals which will increase costs, unless there are exceptional circumstances in which refusing an appeal would lead to an unfair result. In such cases, the court should allow the appeal.

Since a certification procedure is the recommended path for a coherent collective redress model, there should also be a provision relating to the appeal on certification in the new model, so as to retain the certification procedure in tact as a useful safeguard against unmeritorious cases. Retaining the appeal on certification eases the pressure on defendants so as not to agree to settle a suit under blackmail conditions.

2. Representative Replacement

An additional precondition under the CAL is the requirement that a reasonable basis for concluding that the interests of the class will be represented and managed in an appropriate manner⁶⁸ by the representative exists, and that the interests of the whole class will be represented appropriately and in good faith.⁶⁹ However, this precondition, which in fact consists of two distinct preconditions (i.e. adequate representation and good faith), is not necessary where the representatives are public or organisational agencies. The reason for this is that there is no real danger that public authorities and organisations will bring unmeritorious claims. Therefore, in fact these two preconditions dealing with the adequacy of representation are aimed at private

⁶⁷ See (n 64).

⁶⁸ Class Action Law 5766–2006, s 8(A)3 (Israel).

⁶⁹ Class Action Law 5766–2006, s 8(A)4 (Israel).

individual representatives both in follow-on actions and especially in stand-alone actions.

With regard to lawyers who represent the class, there are commentators who argue that representation in class actions demands particularly good qualities and levels of professionalism, and thus the class lawyer should be more than merely adequate.⁷⁰ It should be noted that in class action cases the group representative is unable to properly monitor the activities of the group's counsel.⁷¹ The counsel is regarded as the class representative and not the representative lawyer. The CAL provides that the lawyer owes his duties to the class in general.⁷² Therefore it was recently held by the district court that the representative plaintiff cannot dismiss the class lawyer even if there are serious disagreements between them.⁷³ Consequently, where the court doubts counsel's ability to represent the group adequately, certification of group proceedings may be denied or the representing lawyer may be replaced. Normally the courts are reluctant to disqualify a lawyer from representing the class. Replacement of the representing lawyer should only occur in very rare circumstances where the court finds that counsel does not have the ability to adequately manage a class action. The court may also replace the representative plaintiff if it finds that the representative plaintiff does not have a personal action. In this case, the court may approve a class action conditional on replacing the representative or on condition that an additional representative is be appointed.⁷⁴

Other circumstances where CAL provides for replacement of the class representative plaintiff or the class lawyer is in cases where these representatives have requested voluntary dismissal of the action. In such cases, the court may approve the dismissal,

⁷⁰ Debra Lyn Bassett, 'When reform is not enough: Assuring more than merely "adequate" representation in class action' [2004] 38 Ga. L. Rev. 927.

⁷¹ Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' [2002] Vol. 21 The Review of Litigation 25 at <<http://www.faculty.idc.ac.il/klement/EngArt/TROL.pdf>> accessed 29 October 2011; Alon Klement, 'Private Monitoring in Common Fund Class Actions' Harvard Law and Economics Discussion Paper No. 310 (02/2001).

<http://www.law.harvard.edu/programs/olin_center/> accessed 29 October 2011.

⁷² Class Action Law 5766–2006, s 17 (Israel).

⁷³ Case No. 4263-03-11 (Central District Court) Eshel Hayeor v. Adv Shilo and Partner (5 March 2012) (Judge Groskopf).

⁷⁴ Class Action Law 5766–2006, s 8(C)1 (Israel).

though appoint other representatives to continue the action⁷⁵ if the action seems to be meritorious or beneficial to the public.

It is said that the lawyer should be replaced where there is a conflict of interest. However, it is undeniable that conflicts of interest are inherent in class actions, as it is inevitable that there will be divergent interests among the various members of the class, particularly at the remedy stage. Such a conflict may be dealt with by dividing the class into subclasses and appointing a lawyer for each subclass.⁷⁶

The aim of this provision is two-fold. Firstly, it ensures that meritorious claims will not be struck down simply because the representative claimant or the representative lawyer is an unsuitable class representative. Secondly, it reduces the number of actions where the defendants might launch a tactical personal attack on the representative claimant or on the class lawyer in an attempt to have the action struck down.⁷⁷ Indeed, lawyer replacement may run contrary to the interests of the defendant because the assumption is that the court will replace the representatives with individuals who are better qualified.

The Israeli law is silent on the question of how to decide who will replace the representative. It only provides that a notice should be published to the general public and a suitable representative or a lawyer may put himself forward as a class representative.⁷⁸ The notice aims to find a lawyer who will best serve the interests of the class. As yet, there is no authority in Israel on this issue, and the lawyers who bring the initial action tend to reach an arrangement between themselves and do not have any interest in searching for another lawyer.

Thus, according to the Israeli law, where numerous actions have been submitted in the same matter,⁷⁹ or where the court finds that the representative lacks the required

⁷⁵ Class Action Law 5766–2006, s 16(D) (Israel).

⁷⁶ Class Action Law 5766–2006, s 10(C) (Israel).

⁷⁷ Alon Klement, Guidelines for Interpretation of the 2006 Class Action Law (2007) 49 Hapraklit 131 available at <www.hapraklit.co.il/_Uploads/dbsAttachedFiles/memtet1_6.pdf> accessed 18 December 2011.

⁷⁸ Class Action Law 5766–2006, s 16 (Israel).

⁷⁹ Class Action Law 5766–2006, s 7(b) (Israel).

features or has misbehaved,⁸⁰ or where a representative asks to terminate the action, the court may decide to replace the representing claimant or the representing class lawyer.⁸¹ However, if the court has to make an appointment there are no criteria in Israel for doing so.

Representative replacement is an important safeguard that prevents abuse of the collective redress process by corrupt representatives. The power to replace representatives also exists in several European jurisdictions, even though private actions are very rare in Europe and organisations or public bodies are the main potential representatives.

In Portugal, the Public Prosecutor has the power to review the legality of proceedings and settlements in collective actions. In this capacity the Public Prosecutor may replace the plaintiff in the case of withdrawal from the action or when the plaintiff acts in a manner which is contrary to the interests of the class members.⁸²

In Denmark, following the appointment of the representative, the new members may require appointment of another representative. The court must decide whether it is necessary to appoint a new class representative if at least half of the class members who have joined the class action so request and the request is accompanied by a proposed new representative who is willing to undertake the task.⁸³

In Sweden, the court may appoint other representatives on certain occasions, either on specific issues or to conduct the whole action in addition to, or instead of, the suggested representative. The new representative should be a member of the group or, if there is no such suitable person, someone from outside the group.⁸⁴

However, in all these jurisdictions as well as in Israel, the law is silent on how to decide who will replace the representative. It is very important to equip the court with

⁸⁰ Class Action Law 5766–2006, s 8(C) (Israel).

⁸¹ Class Action Law 5766–2006, s 16(D) (Israel).

⁸² Henrique Sousa Antunes, (n 42).

⁸³ Section 254 of the of the Danish Administration of Justice Act as amended by Act 181/2008 (effective 1 January 2008) para 6. subparagraph 6.

⁸⁴ According to Sections 20 and 21 of the Group Proceedings Act (GPA) of 2002 which came into force in Sweden on 1 January 2003.

a procedure for appointing an adequate representative to lead the action and this is clearly a shortcoming that any new class action rules should address. If the court wishes to appoint a new representative, it should be clear which procedure should be employed in order to ensure that a skilful lawyer is appointed and that the class members will receive professional standards at a reasonable price. In the event that the representative lawyer does not possess the required skills to take on the action, the claim may be rejected due to malpractice. Furthermore, if the lawyer's fees are too high then the class members' share in any award will be reduced. Therefore, a practice was developed in the U.S. to auction off the role of the lawyer on any court appointment.

A. *The Auction Mechanism to Select a Lead Lawyer*

The auction procedure to choose the lead lawyer without selling the action is practised in the U.S. in a number of situations.

Firstly, the practice applies where there are several actions concerning the same issue and the judge must appoint a lead lawyer. In these circumstances, the law in Israel provides that if actions, which raise similar questions of fact or law, are submitted to different courts, then the subsequent actions should be transferred to the place where the earlier action was submitted.⁸⁵ Once the actions are joined, the court may decide to replace the representative or the lead lawyer, as the court may find appropriate, for the best management of the action. Secondly, it applies where the lawyer who represents the class is not suitable and needs to be replaced.⁸⁶ The Israeli law is silent on the question of how to decide who will replace the representative. As mentioned above, it only provides that a notice should be published to the general public and a representative who has the suitable characteristics or a lawyer may suggest himself to represent the class.⁸⁷

The notice aims to find a lawyer who will best serve the interests of the class. However, if the court has to make an appointment there are no criteria for doing so.

⁸⁵ Class Action Law 5766–2006, s 7(A)(1) (Israel).

⁸⁶ As provided in the Israeli Class Action Law 5766–2006, s 8(a)4 (Israel).

⁸⁷ Class Action Law 5766–2006, s 16 (Israel).

The need to appoint a lead lawyer is not unique to Israel; it is a common issue in a number of jurisdictions and there is often a lack of coherent criteria for a lawyer's appointment.

A good example is the English Group Litigation Order (GLO), which was introduced in the amendments to the 1998 Civil Procedure Rules.⁸⁸ A GLO is a way of managing existing cases and differs from a 'representative action' which is the English term for a class action (although representative actions are not in use in England). In GLO proceedings, a common solicitor may be appointed by the managing judge, although there is no representative plaintiff or incentives.

The appointed solicitor has to consult the Law Society's 'Multi-Party Action Information Service' and obtain information about other cases which might give rise to a proposed group action.⁸⁹ If there are several solicitors dealing with the same matter, it is expected that the group or the court will appoint a leading solicitor. Any interested party may apply to the court for a GLO, although the court may issue such an order at its own motion.⁹⁰ The appointment of a lead solicitor is usually left to the discretion of the groups of claimants, subject to the court's approval. However, there are no criteria to guide the court on whether to approve the appointment.

In the U.S., the criteria for appointment of lead counsel provide that the court:⁹¹

(A) must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

⁸⁸ Contained in Civil Procedure Rules Part 19, Section III and in a Practice Direction entitled Group Litigation.

⁸⁹ Neil Andrews, 'Multi-Party proceedings in England: Representative and Group Actions' 11 *Duke J. of Comp. & Int'l L.* 249.

⁹⁰ Practice Direction 19 B- Group Litigation para 4.

⁹¹ Rule 23(g), Federal Rules of Civil Procedure.

- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class;
- (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
- (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
- (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
- (E) may make further orders in connection with the appointment.

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.⁹²

These provisions are in the best interests of consumers, since the lead lawyer is crucial to the success of the action. The U.S. criteria may be divided into several categories:

Work Carried Out Before the Appointment: This is the 'entrepreneurial' stage where the lawyer identifies the relevant class action, presumably after examining several ideas. The entrepreneurial lawyer has to examine the facts and legal material and should be paid for this work, regardless of whether he leads the legal proceedings. Indeed, although the entrepreneurial lawyer may have initiated bringing the action, another lawyer may be better placed to present the case in court. Therefore, it is fair to award a share of the fees to the lawyer whose idea it was to bring proceedings.

⁹² Rule 23(g)(2), Federal Rules of Civil Procedure.

The Lawyer's Reputation: This includes the lawyer's experience in the relevant field and in collective redress cases, as well as his record of conduct.

The Lawyer's Resources: Finance is crucial to class actions. A lawyer who has insufficient resources to fight the case to its end may be tempted to settle the case at the expense of the class members. One possible solution which exists in the Israeli system is for the court to permit the lawyer to receive interim payments.⁹³ However, in the absence of interim payments, the court should not appoint a lawyer that has no proven resources to finance the proceedings until judgment.

The criteria for appointing lawyers are very important and will form a crucial part of a collective redress framework. The issues of resources, reputation and work completed prior to submission of the action should be taken into consideration in any future legislative instrument in order to serve the best interests of consumers represented in collective proceedings.

In the event that there are a few candidates well-suited to leading the action, an auction for the best fee agreement provides a possible solution. The auction procedure is an approach which appeared in the U.S. in 1990. The first judge to use an auction procedure was Judge Vaughn Walker of the Northern District of California, in *In re Oracle Securities Litigation*.⁹⁴

In some states in the U.S. it is common to conduct an auction in order to find a replacement representative.⁹⁵

Once a judge has decided to auction the lead counsel position, the judge will develop guidelines for the bidding process. Once all bids have been received and evaluated, the court selects a winning bidder. The auctioning method is a judicial substitute for the free market factors that would control attorney selection in traditional litigation.

⁹³ Class Action Law 5766–2006, s 23(C) (Israel).

⁹⁴ *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 689–90 (N.D. Cal. 1990).

⁹⁵ Laural L. Hooper and Marie Leary, 'Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study' August 29, 2001 reprinted in (2002) 209 F.R.D. 519.

Considerable commentary has been written about the advantages and disadvantages of using an auction method.⁹⁶ For example, the auction procedure opens the market to more law firms and creates a competitive process which lowers attorneys' fees and costs, thus creating a benefit for the class of represented consumers. In fact, in a U.S., study, twelve securities and two antitrust actions in which the auction process was used were studied and the conclusion was that attorneys' fees were generally less than the reported percentages in other class actions in the respective circuits.⁹⁷ The majority of fee awards were less than 9 per cent (either including or excluding expenses depending on the case) of the total recovery and ranged from a low of approximately 5 per cent in *In re Auction Houses*⁹⁸ to a high of 22.5 per cent in *In re Oracle*. In two cases, *In re Amino Acid Lysine* and *In re Bank One*,⁹⁹ the winning bid contained a voluntary cap on the total amount of attorneys' fees. In both cases, fee awards were approximately 7 per cent. of the total class recovery.¹⁰⁰ This means that generally class members were better off once the auction procedure was employed, due to the reduction in agency costs.

With regard to the auction procedure, it should be remembered that the first stage of the auction concerns the quality and reputation of the lawyer – the fees are not in question. Therefore, before the auction takes place, the judge must decide on minimum standards required from lawyers who may participate in the auction. This way the quality of representation is not harmed due to the employment of the auction procedure. The other issue with the auction procedure is that the involvement of the judge in the process of selecting the lead counsel threatens the court's neutrality. Therefore, the auction may be conducted by the registrar or the monitor, roles which

⁹⁶ R. S. Thomas and R.G. Hansen, 'Auctioning Class Action and Derivative Lawsuits, A Critical Analysis' [1992] 87 North Western University Law Review; and J. R. Macey and G. P. Miller, 'Auctioning Class Action and Derivative Suits: A Rejoinder' [1993] Northwestern University Law Review 458. Jill E. Fisch, 'Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA', 64 Law & Contemp. Probs. 53, 101 (2001);

Andrew Niebler, 'In Search of Bargained-for-Fees for Class Action Plaintiffs' Lawyers: The Promises and Pitfalls of Auctioning for the Position of Lead Counsel', 54 Bus. Law. 763 (1999); and Randall S. Thomas and Robert G. Haugen, 'Auctioning Class Action and Derivative Lawsuits: A Critical Analysis', (2003) 87 Nw. U. L. Rev. 423 (1993). See also *In re Cendant Corp. Litig.*, Nos. 00-2520, 00-2683, 00-2708, 00-2709, 00-2733, 00-2734, 00-2769, 00-3653, slip op. at 78–81 (3d Cir. Aug. 28, 2001).

⁹⁷ See Loral L. Hooper and Marie Leary, (n 95).

⁹⁸ *Re Auction Houses* 197 F.R.D. 71 (S.D.N.Y. 2000).

⁹⁹ *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp 1190 (N.D. Ill. 1996) and *In re Bank One Shareholders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000).

¹⁰⁰ Loral L Hooper and Marie Leary, (n 95).

will be discussed in Chapter Five. The auction procedure should be considered a viable option for appointing a lead lawyer in a new model.

B. The Sale of the Action in an Auction Procedure

Academics in the U.S. have suggested that the action is sold in an auction procedure for the best lawyer bidder. Under this model, Macey and Miller¹⁰¹ suggest that the action should be sold in an auction either to a lawyer or to any person who will own the action.¹⁰² According to this recommendation, the trial judge would conduct the auction and if the original lawyer who brought the proceedings was replaced as a result of the auction, fair compensation should be paid for the initiative efforts and the costs. The auction system is more suitable in cases where few actions are brought for the same cause. Macey and Miller claim that the advantage of selling claims to entrepreneurial lawyers is that agency costs would be reduced. The winning bidder would not look for collusive settlements, but rather, would be expected to prosecute the action to its final conclusion and maximise the class profits. The lawyer simply buys the action and hence the whole income of the action becomes his. In such cases, the lawyer acts as his own agent.¹⁰³

Another advantage is that this system would avoid any potential conflict of interest between the lawyer and the class members since the lawyer who won the right of action would be acting in his own interests and would be unlikely to agree to a quick or unfavourable out of court settlement because he would want to maximise his profits.

¹⁰¹ Jonathan R. Macey and Geoffrey P. Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' [1991] 58 U Chi L Rev 1, 105.

¹⁰² The auction procedure is also raised by some other scholars: Leo Herzel and Robert Hagan 'Plaintiff Attorneys Fees in Derivative and Class Action' (1981) 7. No. 2 Litigation. 25 ; J C Coffee Jr, 'Understanding the Plaintiff's Attorney: The Implication of Economic Theory for Private Enforcement of Law through Class Action and Derivative Actions' [1986] 86 Columbia Law Review 669; Janet Cooper, 'Do the Merits matter? A study of settlements in securities class actions' [1991] 43 Stanford Law Review 497; R. S. Thomas and R.G. Hansen, (n 96); J R Macey and G P Miller, (n 96); Jill E. Fisch, 'Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction, (2002) 102 COLUM. L. REV. 650;. Alon Harel and Alex Stein, 'Auctioning for Loyalty: Selection and Monitoring of Class Counsel' (2004) 22(69) Yale Law & Policy Review available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=497342> accessed 27 April 2012.

¹⁰³ See Jonathan R Macey and Geoffrey P Miller, (n 101) at page 108.

Although the lawyer might want a quick turnover, such a move would be in most cases for the class' benefit, assuming that the class action was auctioned for a reasonable price.

It should be noted that the auction procedure is not suitable in all cases and it may be the case that the action does not succeed, with the case then reverting to the initial lawyer who raised the idea. Indeed, if the court forced an auction, even if the case were unsuitable, the action might fail and the injured consumers would be left with no remedy. Therefore auctions should be used only in appropriate cases where there are a number of lawyers who are interested in the case.

According to Schaefer, the auction procedure should be as follows:¹⁰⁴

1. A lawyer brings the class action before a court. The role of the representative plaintiff is abandoned and, instead, it is assumed a priori that the lawyer is acting solely in his own interests as a fee entrepreneur. The court decides whether the claim is suitable for auctioning. The criteria that should be taken into account are:

Does the claim have a sufficient chance of success? If not, there is no reason to auction an action for which no reasonable lawyer would bid.

Does the case contain large scale claims or small-scale claims? If the former, the case is not suited generally to class actions as class members may sue in their own name if the personal claim is for substantial sums. In the event that several lawsuits are filed, it supports the auction procedure¹⁰⁵ because there is a good chance that the lawyers will compete to be the lead lawyer.
2. If an auction is appropriate, the authorisation to conduct the lawsuit will be auctioned off to the highest bidding lawyer. The entire claim is subsequently transferred to the lawyer who wins the auction.

¹⁰⁴ Hans-Bernd Schaefer, 'The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions taken by Associations' [2000] 9(3) *European Journal of Law & Economics* 183, see at pages 196-197.

¹⁰⁵ Jonathan R Macey and Geoffrey P Miller, (n 101).

3. The proceeds of the auction are used to compensate the lawyer who originally brought the action for his costs, including a risk premium. The remaining amount is paid to members of the group.
4. The winning lawyer conducts the lawsuit at his own risk but with a real chance of profit.

The auction system for selling the action is academic only at the moment¹⁰⁶ and it is difficult to see how selling an action could be justified to the general public. Such a sale may undermine legal procedure, as it looks only at the financial aspects of the case and not at other issues that class actions are deemed to address, such as deterrence and the promotion of public interests. Yet if the auction procedure were introduced, it might reduce the cost of lawyers' fees. Such a procedure should be distinguished from bidding for the role of the lead lawyer in a class action, which was discussed in the previous part of this chapter and has been used several times in the U.S.

In Europe there are circumstances in which a class of represented persons needs to appoint a lawyer to represent the class. As in the case of the GLO, in the U.K there are no criteria shaping the court's appointment of this kind. Yet, the European Court of Justice (ECJ) treats the appointment of a lawyer as indispensable for a fair civil proceeding according to Article 6 of the European Human Rights Convention. Therefore, the right to be represented by lawyers must not be limited.¹⁰⁷ Furthermore, in the *Eschig* case (C-199/08 *Eschig*),¹⁰⁸ the legality of the so-called, 'mass claims clause' used by Austrian legal protection insurers (as in other EU countries) was questioned. The mass claims clause allows insurers to select the legal team when several insured parties in similar situations wish to pursue claims against the same opposing party. The ECJ ruled that the Austrian legal expense insurers' practice of selecting the lawyers to represent their clients in collective redress proceedings is an inadmissible limitation of the rights of the insured. Article 3(2)(c) of Directive 87/344

¹⁰⁶ Hans-Bernd Schaefer, (n 104) at page 197.

¹⁰⁷ ECJ, Case C-305/05, *Ordre des barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles, V. Conseil des Ministres*, - Judgment of 26 June 2007.

¹⁰⁸ Case C-199/08 *Erhard Esching v. Uniga Sachversicherung AG* Judgment dated 10 September 2009.

allows conflicts of interests to be avoided by granting the insured person the freedom to choose his representative as soon as an insured claim is made.

The recommendation for the new model would therefore need to be that any party should be entitled to choose a lawyer as a representative without any limitations. This provision is in line with the decisions of the ECJ on the rights of any litigant to select their own lawyer. The problem arises in circumstances in which the court finds that the class lawyer should be replaced or if a few lawyers are involved in similar cases. In these circumstances, the court may allow the parties to suggest a new lawyer or apply the auction procedure after deciding on suitable criteria for leading the action. In such cases, the court should demand that the lawyer has previous experience and suitable finances to manage the action.

Representative replacement is one of the powers which the court maintains in order to prevent abuse of the procedure by improper representation. However, there are also other safeguards which are aimed to bridge information asymmetry and thus supervise the suggestion of the representative to bring the action to an end by a settlement. In the following part we shall examine the need to supervise such settlements.

3. Supervision of Compromise Agreements

The law in Israel regards representative suggestions to bring the action to an end as dangerous. It is in these circumstances that the representative may make use of his/her information advantage and recommend a solution which is less preferential for the class members, in a bid for personal gain.

Supervision of settlements is also familiar in Europe where actions are led by organisations, and one should ask if the organisation is trustworthy, or whether a settlement offered by an organisation should be treated with the same caution as private-led settlements.

In this part, the importance of this safeguard will be viewed so as to decide if the Israeli mechanism of supervision should be adopted or other methods of supervision should be suggested.

A. *European Review on Settlements Prior to Legal Proceedings*

The European Commission concentrates on settlements prior to legal proceedings in order to prevent the parties from having to litigate in court. There are two Commission Recommendations which already exist at European level to facilitate alternative dispute resolution through simple and inexpensive procedures. Both recommendations set out principles for the good functioning of out of court settlements.¹⁰⁹ These principles are not relevant to supervision of court settlements in collective redress, but rather to ADR agreements which are aimed at facilitating agreements so as to prevent court proceedings. The European Parliament has given precedence to ADR proceedings which are generally regarded as providing for a quick and fair settlement and should be more attractive for resolving a dispute than court proceedings. Thus the European Parliament has recommended that these proceedings be made obligatory to seek out-of-court settlements before bringing collective actions.¹¹⁰ The Netherlands has introduced a Collective Settlements Act of 2005 which allows a U.S.-style settlement for all members of the class who do not actively opt out. It has been used to settle class action suits initiated in the United States on behalf of foreign investors who were excluded from the class in U.S. actions.¹¹¹ However, the Dutch legislation does not facilitate settlements during trial as there is no procedure for collective actions for damages yet in the Netherlands.

The Israeli model lacks procedures to deal with out of court settlements which precede the legal proceedings. Thus all collective disputes must go to court and

¹⁰⁹ Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998, p. 31 and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.04.2001, p.56.

¹¹⁰ European Parliament, Committee on Legal Affairs, 'Draft Report on Towards a Coherent European Approach to Collective Redress' (European Parliament, July 2011) (2011/2089INI), (Para D (3) at page 4) dated 12 January 2012.

¹¹¹ Ianika Tzankova in Lucy Trevelyan, 'Power to the people: collective redress for consumers' (International Business Association) available at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=97f4a814-acd2-42b9-993b-d1bebb2c46fa>> accessed 27 April 2012.

impose a burden and costs on the litigating parties. A change in this respect in the Israeli model may assist in easing the flood of cases which reach the courts in Israel. Suggested amendments to the Israeli model will therefore be examined in Chapter Five of this work.

B. The Need to Supervise Settlements

Settlements and voluntary dismissals are the most volatile junction in collective disputes. The agency problems of collective proceedings reach their boiling point as the agent is dealing with the question of what amount of funds will be allocated as lawyer and representative fees, and how much should be paid to the class. The settlement procedure is also the point at which the defendants are blackmailed to pay compensation for unmeritorious claims. Therefore it is said that in settlements, the agency costs to the class may be too expensive due to the agency problems, or may be too high due to the extortion of the defendant to pay money in unmeritorious claims.¹¹²

Where private enforcement is involved, a settlement which is reached during the trial may not be in the interests of the class members. The interests of class lawyers and representative claimants may conflict with their clients' interests, since the class lawyer or representative may try to achieve a compromise which is more for their own financial benefit than that of the members. One additional problem of the settlement and voluntary positions in collective proceedings is that there is asymmetry in information. Class members do not know how to evaluate the risks of the action, the chances of success, and the reasonable amount of compensation which they deserve. In a settlement or voluntary dismissal, the agent could conceal a private profit paid by the defendant to the representatives. It is often difficult to estimate the benefit of compromise settlements to the class members, and as such, the representative may argue that the value of the benefit paid to class members is higher than it is in reality. Such a compromise is also known as a 'sweetheart settlement' where the representative evaluates the value of the action as being higher than the benefit in the

¹¹² Prof. Alon Klement, *Compromise and Voluntary Dismissal* (2011) *Mishpatim Alef 777* at page 781 available at <www1.idc.ac.il/klement/HebArt/SettlementClass.pdf> accessed 30 April 2012.

reality, in order to obtain a share of the alleged benefits in contingency payments.¹¹³ A good illustration of the problem of benefit to the class assessment arises in coupon settlements. In 'coupon settlements' which are common in the U.S. and to some extent also in Israel, the defendant sells his merchandise for a low price or for free to class members instead of paying damages. There is a danger that the settlement may benefit the defendants without bringing any real economic benefit to the class. For example, in an antitrust class action case which concerned an unlawful agreement between the importer of Crocstm shoes¹¹⁴ (which are very popular in Israel) and the shop owners to fix the price of such shoes, the outcome was that the shoes were sold for a reduction of NIS 25 for a period of nine months. The reduction was given to any customer who could demonstrate that he owned Crocstm of specific types included in the unlawful agreement. The compromise included clear orders to advertise the reduction in each of the twenty two Crocstm shops in Israel and on the Israeli Crocstm website. In addition, the court awarded the representatives (lawyers who were representing themselves) a payment of NIS 425,000 (on the judgment date equivalent to EUR 90,000). The judge in this case mentioned that coupon settlements are far from satisfactory, though common practice in class actions. Furthermore, in this case the court followed an expert opinion and found that the price reduction period should be extended from six months to nine to cover the sales period for such shoes. The shoes constitute a perishable product and thus there is good chance that consumers will come forward to use the production coupon. In general, the court mentioned that the settlement saves legal proceedings and benefits the relevant class of consumer. In a different case, price reduction coupons for meat products were awarded to consumers who had bought chicken products for which the expiry date had passed in the same chain of stores.¹¹⁵ In this case, the representatives' fees amounted to NIS 1 million (approximately EUR 200,000) of which NIS 900,000 constituted lawyers' fees and NIS 100,000 for the representative plaintiff. The settlement was checked by an expert who found that it benefitted the class members.

¹¹³ Bruce Hay and David Rosenberg, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy", (2000) 75 Notre Dame L. Rev. 1377.

¹¹⁴ Class Actions Case 9227/07 (District court of Jerusalem) Adv. Oren v. New Cinema Ltd (Judge Inbar) judgment dated 20 December 2010.

¹¹⁵ Civil Case no. 1084/06 (District Court of Tel Aviv) Amsalem v. Tiv Taam (judgment dated 15 January 2009) (Judge Agmon Gonen).

Prof. Klement¹¹⁶ criticised the latter compromise, arguing that it left many questions unresolved, such as how many of the reduction coupons would be used in practice, and the fact that price increases were possible in the defendant chain store, which could result in the store raising prices before offering the price reduction. Prof. Klement claims that the settlement was missing a provision that keeps the reduction in force even where the shop has a sale. Prof. Klement argues that in such coupon settlements, lawyers' fees should be limited to the coupons used in practice or paid to the lawyers in coupons which they can sell on the market.¹¹⁷

In light of the danger that lawyers will prefer their own interests over the class members' interests, it is essential that a number of safeguards be built into any class action system as a means of protecting consumer interests. Such a system could include the features of the Israeli class action framework that already exist in some of the European jurisdictions which permit collective proceedings. The safeguards offered in Israel are aimed at resolving settlement hazards such as these. The benefit to the class is examined by expert testimony. The prevention of hidden profits by the representative's agents is dealt with by the submission of affidavits by lawyers and parties and settlement content is subject to court approval, notice, and publication and further objections as examined in the following part of this chapter.

C. Special Considerations in Court Approval of Settlements in Collective Redress Cases

Settlements or voluntary dismissal should be approved by the court to prevent an unfair settlement and to protect class members who are not a party to the action.

In Israel, every compromise agreement in a class action is subject to the court's approval and must be published prior to its consideration by the court. The court has to ensure that the suggested compromise is proper, fair and reasonable considering the interests of the absent class members.¹¹⁸ Court approval is needed in every two-party case in order to examine the legality of the agreement. However, since collective

¹¹⁶ Prof. Alon Klement, 'Appropriate Settlements for Consumers' Globes News (Israel, 27 May 2008) available at <<http://www.globes.co.il/news/docview.aspx?did=1000346097&fid=>> accessed 27 April 2012.

¹¹⁷ Ibid.

¹¹⁸ Class Action Law 5766–2006, s 19(A) (Israel).

proceedings may affect individuals who are not a party to the action, additional safeguards are needed to protect absent class members. For example, in *Gelnic v. Harel Insurance Company*¹¹⁹ the plaintiffs argued that the defendant had acted wrongly towards all class members when reducing the value of cars that had been ‘written-off’ in accidents. The defendants argued that the reduction was based on terms in insurance policies to which the insurers had agreed by telephone. The suggested compromise included a future correction of the defendant's behaviour so as to enable insurers to cancel insurance policies agreed by telephone once the documentation had been received by post. In addition, the settlement included a suggested payment to the class lawyer and to the representative lawyer of approximately EUR 40,000s altogether. The district court in Israel refused to approve a compromise which did not require the defendant to pay damages to class members and barred class members from suing the defendants personally in the future. The court explained its refusal to approve a settlement which benefits only future class members and does not include any benefit for the class of injured class members. The court decision reflects the additional role that judges play in collective procedures to guard the interests of absent class members whilst the lawyers representing the class are engaged in a conflict of interests, looking to maximise their personal income.

The supervision on settlements in Europe is primarily vested in the hands of each member state's courts. In Denmark¹²⁰ for example, a settlement entered into by the class representative only becomes valid once it has been approved by the court.¹²¹ The court will not approve the settlement if it discriminates against some class members or is otherwise patently unfair. Class members who are parties to the action must be advised of the court's approval of a settlement.¹²²

In Portugal, where all class actions to date have been led by consumer organisations, any compromise agreement between the parties is subject to court approval.¹²³

¹¹⁹ Case no. 001697/06 (Tel Aviv District Court) *Gelnic v. Harel Insurance Company* Motion No. 12356/06 (decision dated 8 November 2007) (Judge Ronen).

¹²⁰ Class Action Law 5766–2006, s 19(A) (Israel).

¹²¹ Section 254(h) of the Administration of Justice Act (Denmark).

¹²² Professor Erik Werlauff, ‘*Class actions in Denmark – from 2008*’ <http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf> accessed 28 November 2011.

¹²³ According to Article 300 (3) of the Code of Civil Practice (Portugal).

In Spain, the court will only withhold its approval to an agreement if it is ‘forbidden by law’ or ‘limited by public interest reasons or a third party interest.’¹²⁴ The court has the opportunity to examine the agreement and ensure the fairness of the negotiated outcome.

In the Netherlands, court approval of a settlement is subject to the following criteria:¹²⁵

- (i) The amount of compensation should not be unreasonable;
- (ii) The defendant’s performance must be sufficiently guaranteed (the court investigates whether the plaintiff is insured);
- (iii) The representative organisation must sufficiently represent the class; and
- (iv) The number of class members must be sufficient to warrant certification.

The court in Netherlands can employ the help of a legal expert¹²⁶ to examine the terms of the settlement agreement. If the court finds that the settlement does not meet the criteria, it may order the parties to make the necessary changes to the settlement in order to obtain the court’s approval.¹²⁷

As seen above, the safeguards in Europe are not as detailed and severe as are those in Israel. However, generally settlements in Europe are not as problematic as in Israel and the U.S., mainly due to the trustworthiness of the representative leading the action. Organisations licensed by the government are more trustworthy and thus settlements which are led by organisations licensed by the state are clear of any ulterior motive or conflict of interest. Yet the European system does not provide sufficient benefits to the class members due to the constraints of the current model, especially the deficiency of the opt-in mechanism.

D. Prevention of Hidden Profits to the Representatives

¹²⁴ Article 19 LEC (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, the Civil Procedure Law) (Spain).

¹²⁵ Article 7:907(3)(b)-(h) Civil Code (Netherlands).

¹²⁶ Article 1016(1) Code of Civil Procedure (Netherlands).

¹²⁷ Article 7:907(4) Civil Code (Netherlands).

An application to approve a settlement in collective proceedings must be accompanied by affidavits from the lawyers who are representing the parties in which they reveal all the relevant information relating to the suggested compromise and from the parties themselves.¹²⁸ The production of lawyers' affidavits by both parties prevents the lawyers/representatives from making a hidden agreement which benefits the representatives rather than the class members. The affidavit requirement is unique to the Israeli class action system and is aimed at requiring personal accountability of the class lawyers in providing all the important information known to them about the suggested compromise.¹²⁹ The requirement to present a lawyer's affidavit is a good safeguard in order to prevent the representative from concealing benefits unknown to the class members. The reasonable presumption is that a lawyer would not run the risk of disciplinary and criminal charges for an untruthful affidavit and therefore the court may rely on such affidavits to allay fears of secret payments made to the class lawyers or to the class representative.

E. Publication of the Settlement Content for Objections

The Israeli jurisdiction is based on the adversarial system. Under the adversarial system, the parties to a controversy develop and present their arguments, and gather and submit evidence. A judge or jury usually remains neutral and passive throughout the proceeding. However, in class action settlements, the litigating parties present a united front in appraising the settlement reached, and in most cases the judge also approves. The adversarial system is not suitable to deal with such situations as there are no arguments presented by other interested parties such as the absent class members.

In the U.S., the new CAFA settlement rules require a proposed settlement to be served on appropriate governmental officials to give them an opportunity to comment on the suggested settlement before it is approved.¹³⁰ Government officials must be given notice of the proposed settlement and copies of the complaint, notice of pending hearings, the proposed or final notification to class members of their right to opt-out

¹²⁸ Class Action Law 5766–2006, s 18(B) (Israel).

¹²⁹ Prof. Alon Klement, 'Settlement and Voluntary Dismissal in Class Actions' (2011) *Mishpatim* Mem 777 at page 814.

¹³⁰ 28 U.S.C. Section 1715.

or a statement that no such right exists, the proposed or final settlement, details of any side agreements between class counsel and defendants, any final judgment or notice of dismissal, the names of the class members residing in each state and that state's percentage share of the settlement, and any relevant judicial opinions.¹³¹

The suitable safeguard at that stage requires a voice to be given to those who object to the suggested settlement, and a right to opt-out from the settlement for those members who are not satisfied by the compromise reached by the representatives.¹³²

Under the Israeli model, the suggested compromise must be published in the class action registry, and notice should be given to the class members, to the Attorney General and to any other person the judge orders in order to enable them to present their objections.¹³³ Every class member, relevant group or the Attorney General may object to the compromise.¹³⁴ Any member of the class who does not wish to be bound by the compromise may opt-out at that stage.¹³⁵

This safeguard allows class members, the Attorney General and other relevant bodies and organisations to investigate the proposed compromise and object to its contents if it does not benefit the class members or it awards excessive funds to the representatives. The court may ask the opinion of relevant organisations if the matter is in their interests, such as a trade union's opinion in a labour law case or the opinion of consumer organisations in consumer-related cases.¹³⁶ The views of such organisations should be warmly welcomed, since normally they have the required expertise to recognise matters which the representative parties have omitted in their suggested settlement. Currently the most active intervener in class action settlements

¹³¹ 28 U.S.C. Section 1715(b).

¹³² John C. Coffee Jr., 'Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation' (2000) 100 Colum. L. Rev. 370.

¹³³ Class Action Law 5766-2006, s 18(C) (Israel).

¹³⁴ Class Action Law 5766-2006, s 18(d) (Israel).

¹³⁵ Class Action Law 5766-2006, s 18(f) (Israel).

¹³⁶ In Class action Case no. 44211-05-10 (Tel Aviv District Court) Cohen v. Partner, the Israeli Consumer association objected to the suggested settlement arguing that the compensation offered to class members by awarding free talks was of no benefit to many class members who are not charged by time spent on telephone use according to their telephone package programme.

in Israel is the Attorney General who objected to one third of the suggested settlements in 2010.¹³⁷

Some safeguard provisions to prevent hidden agency profits can be found in Europe. In Portugal, for example, the Public Prosecutor has the power to review settlements and to replace the representative where he finds that the settlement is not in the interest of the class.¹³⁸ He also has the power to review the legality of proceedings and settlements and may reject the settlement or even ask for representative replacement.¹³⁹ These powers which exist in Portugal are similar to those in Israel, namely, the public prosecutor must examine the benefits of the suggested settlement for the class members.

In most cases, the public Attorney General's view is insufficient. The Attorney General deals with many civil and criminal cases. The traditional role of the Attorney General is not to supervise the damages paid to consumers, but rather to deal with the general interests of the state. Therefore the availability of an unbiased expert opinion is essential to reviewing the compensation included in any settlements and the benefits of the suggested settlements to the class. Such a provision has been introduced in Israel and will be reviewed in the following paragraphs of this chapter.

F. Expert Opinions

In order to deal with 'sweetheart settlements' and with problems of evaluations of certain coupons and undertakings that the defendant may undertake in such settlements, the courts in Israel are obligated to hear every objection to the agreement and must obtain an expert opinion in the relevant field on the suggested compromise, in order to ensure that the compromise is beneficial to the class. The court may conclude that an expert opinion is unnecessary only for 'special reasons', for example, where the compromise requires evaluation of the legal position or the strength of the arguments of the parties.¹⁴⁰

¹³⁷ The Calcalist, Newspaper (30 May 2011) available at <http://www.calcalist.co.il/local/articles/0,7340,L-3519248,00.html> accessed 4 May 2012.

¹³⁸ Article 16 (3) of Law 83/95 (Portugal).

¹³⁹ Henrique Sousa Antunes, (n 42).

¹⁴⁰ Class Action Law 5766–2006, s 19 (b).

The expert opinion is employed in order to examine the contents of the suggested compromise and the court may refuse to approve a compromise where the action seems to be unmeritorious.¹⁴¹

The Israeli court may require the appointment of two experts if the case is connected to more than one field. For example, in *Lazar v. Strauss and Tnuva*,¹⁴² the defendants were sued for false advertisement in relation to a 'probiotic yoghurt' which was advertised as having the effects of strengthening the immune system and assisting in digestion. The suggested compromise agreement contained several provisions. Firstly, the defendants were required to change the advertisement. Secondly, they had to reduce the price of the product for a certain period. Thirdly, the defendants were asked to supply the yoghurt to organisations for the needy. The parties argued that the value of these two elements of compensation was approximately NIS 5,754,544. In addition, the defendants undertook to pay the representative NIS 25,000 and the representative lawyers NIS 675,000. The parties asked the court to exempt them from the requirement to appoint an expert. The court upheld in part the Attorney General's position opposing the suggested agreement until an expert was appointed. The Attorney General took the view that it was necessary to appoint two different experts; a medical expert to examine the suggested wording of the modified advertisement and a second expert on economics and marketing to ensure that the reduced price would benefit the end users and not the company itself. In the end, the court appointed only a medical expert who opined that the advertisement was misleading as the alleged effects of the yoghurt were incorrect, and that the suggested settlement would therefore not be of great assistance to the general public. On the basis of this opinion, the court decided to approve the settlement but reduced the payment to the plaintiff's lawyers from NIS 675,000 to NIS 300,000.

There have been other cases where the appointed expert's opinion has led to substantial changes in the suggested compromise. For example, in *Asher v. Osem*, the representative plaintiff argued that the size of packets of certain crisps produced by the defendants had been reduced without any corresponding change in price. The

¹⁴¹ *Sher v. Strauss and the Elite* decision of the Court of Appeal, Judge Baron dated 24 May 2009 (refused to approve payment of NIS 25,000 for the plaintiff's lawyer and a reduction of the price of the product since the action was unmeritorious).

¹⁴² Case no. 002335/07 (Tel Aviv District Court) Motion no.17343/07 *Lazar v. Strauss and Tnuva* (decision dated 22 September 2009).

parties reached an agreement and produced their own expert opinion to prove that the agreement was fair and beneficial for consumers at large. The court, following the opinion of the Attorney General, found that a neutral expert opinion should be sought.¹⁴³ Following the appointment of an external expert, the compensation awarded was increased by 20% and the period for the reduction offered to consumers was extended.¹⁴⁴

However, the requirement to seek an expert opinion was criticised by lawyers and judges. Judge Pilpel from the Tel Aviv District Court argued that there is much sense in appointing an expert where questions of economic calculations arise, whereas in many other cases, for example in cases of restitution of payments, the judge has the required knowledge and expertise to decide on the matter without the need to appoint an expert.¹⁴⁵ Other judges also objected to the appointment of an expert to check the content of a suggested settlement due to the extended time that such an examination would take or the additional costs which may be incurred by the parties.¹⁴⁶ Indeed, there is no point in appointing an expert where the compromise is reached as a result of legal problems which the judge may review using his own knowledge, and where the sums concerned are low.¹⁴⁷ In practice, this criticism has led to low use of the external expert examination provision in Israel. According to a survey led by Prof. Klement between 2007 and 2009, there were 31 cases in which the court had to decide on a settlement and only one expert was appointed.¹⁴⁸ This low figure reflects the antagonism which the provision on the compulsory appointment of an expert has faced in its early days. There are no later statistics on this issue. However, due to intense pressure from the Attorney General, experts are now appointed in many cases.

¹⁴³ Civil Case no 1953/06 Application no. 16615/06 (Tel Aviv District Court) Amar Asher v. Osem (decision dated 13 March 2008) (Judge Binyaminy).

¹⁴⁴ Civil Case no 1953/06 (Tel Aviv District Court) Amar Asher v. Osem (decision dated 25 January 2010) (Judge Binyaminy).

¹⁴⁵ Noam Sharvit, 'We Are Not Trusted' Globes News (Report from the Eilat conference on class actions, 3 June 2007) available at <www.faculty.idc.ac.il/klement/NewsClips/Globes3607.pdf> accessed 4 May 2012.

¹⁴⁶ Civil case no 1953/04 (Tel Aviv District Court) Shechter v. Carmel (Judge Binyaminy) (15 July 2007). See also Case no. 5590/08 (Tel Aviv District Court) Krinstein v. Turkiz Restaurant (Judgment dated 30 March 2009) (Judge Ronen).

¹⁴⁷ Case 2296-09-08 (Central District Court) Levi v. Pizza Hat (Judge Shtemer - Published in Nevo 9 November 2011).

¹⁴⁸ Prof. Alon Klement, 'Settlement and Voluntary Dismissal in Class Action' (2011) *Mishpatim Mem* 777 at page 817.

The provision in a class action law which orders the appointment of an expert is welcomed and should not be opposed. The expert only provides a recommendation to the court, with the final decision remaining in the hands of the courts. The expert primarily assists in the evaluation of the settlement benefit to the class and is necessary especially in certain types of compromises such as coupon settlements, or settlements where the defendant undertakes to correct their behaviour instead of paying damages etc.¹⁴⁹

The duty to appoint an expert is not strange to European culture. It exists in the Netherlands, for example, where under the Collective Settlements Act¹⁵⁰ the court must appoint an expert in order to examine whether the compensation for the class members in a compromise is unfair. The courts in the Netherlands are very active in the settlement review process in order to satisfy the main purpose of the WCAM, which is an efficient legal device to deal with mass damages.

In the *Dexia* case¹⁵¹ for example, the court appointed an expert panel on its own initiative with regard to issues that were brought up by some objectors. The court established a team of 30 people including ten judges to deal with the individual claims of those who opted out.¹⁵² In addition, the court charged Dexia with the costs associated with notifying interested parties and those of the appointed expert.

However, the lack of an expert opinion may be problematic and cause problems of under-evaluation of settlements in other European regimes. For example, in the *JJB* case mentioned above¹⁵³ which was led by the Which? consumer organisation in England, the compensation was aimed to reach class members by actual repayment of funds to the fans who were members of the different classes mentioned in the settlement. According to the *JJB* settlement, fans who joined the action could claim a GBP 20 repayment. Others who presented either proof of purchase at a *JJB* store before February 5, 2009, the shirts themselves, a till receipt, credit card statement or

¹⁴⁹ Ibid at 818-820.

¹⁵⁰ *Wet collectieve afwikkeling massaschade* (WCAM), The Act on Collective Settlement of Mass Damage enacted on 27 July 2005, see Article 1016(1) CCP.

¹⁵¹ *Dexia* Case, Amsterdam Court of Appeal 25 January 2007, JOR 2007, 71.

¹⁵² M.-J. Van der Heijden, 'Class Actions/les actions collectives' (Dec 2010) vol 14.3 Electronic Journal of Comparative Law at <<http://www.ejcl.org/143/art143-18.pdf>> accessed 4 May 2012.

¹⁵³ *The Consumers Association v JJB Sports plc* (case number: 1078/7/9/07) (n 62).

bank statement showing proof of purchase during the relevant periods in 2000 and 2001, obtained a GBP 10 repayment coupon per shirt. Fans who brought the shirts themselves were entitled to a GBP 5 repayment if the label was missing. Customers could claim a payment from JJB Sports even if they bought the replica shirts from Allsports Ltd, Blacks Leisure Group plc, Manchester United plc, Sports Soccer Ltd or JD Sports. Under the terms of the agreement, JJB Sports also had to pay the reasonable legal costs of the case. All information regarding the settlement was published in the press and on the Which? website. The problem with this settlement was that the expected return to consumers in 2008 (seven years after the alleged price fixing arrangements) was minimal and valued at GBP 18,000, whereas the legal costs were estimated to amount to several hundred thousand pounds.¹⁵⁴ The low figure of actual distribution could have been predicted by an expert and the compensation should have been confined by actual figures with an order to distribute the remainder.

The introduction of an expert in collective redress cases under a new coherent regime is crucial to overcome questions of evaluation and benefits to consumer class members. As seen above, it is already employed in the Dutch collective settlements mechanism and should also be adopted in other European jurisdictions. Such a provision enables the courts to supervise a wide variety of settlement types, including coupon settlements and undertakings by defendants, and may even be used to supervise lawyer fees vis à vis the benefit to the class members.

G. Problems with the Israeli Settlement Provisions

The Israeli safeguards on compromise supervision cover all existing measures in order to prevent abuses at the compromise stage. Indeed, in his response to the European consultation paper on collective redress, Professor Hodges cited several of Israel's 'interesting controls on the scrutiny of settlements'.¹⁵⁵ The Israeli measures are aimed at dealing with problems which may arise where litigation is led by private representatives.

¹⁵⁴ Slaughter and May, *Competition Briefing*, January 2008 available at <<http://www.slaughterandmay.com/search.aspx?search=competition+briefing+january+2008>> accessed 27 April 2012.

¹⁵⁵ Professor Christopher Hodges, (n 15).

Looking at the Israeli model the strict supervision of compromise agreements is enshrined in the provisions of the CAL and compromise supervision plays a very important role in safeguarding private collective actions. The safeguarding mechanisms in Israel are suitable to combat some potential problematic features of collective redress. Problems of evaluation and 'sweetheart settlements' are dealt with by the use of expert opinions, while problems of conflicts and hidden profit by the representatives are dealt with by lawyer and representative affidavits. Unmeritorious actions and blackmail actions are presumably barred from getting through the certification process. Information asymmetries are dealt by wide notice requirements and publication of suggested settlements. In addition, there is general supervision by interested class members, the Attorney General, and relevant organisations which are given a voice in objecting to settlements which are not beneficial.

However, these safeguards do not prevent many other cases from getting to court. The operation of the safeguards begins once the case is in the legal process. Thus class actions in Israel are submitted to the courts in huge numbers and cause real economic hazards to the Israeli economy. Furthermore, the Israeli safeguards on settlements do not distinguish between secure agents such as public bodies and organizations on the one hand and private actions which may lead to risky actions for personal gain on the other. Where secure agents are concerned, there is no need for any safeguards because there is no risk of abuse. The only relevant provisions for secure agent actions would be the publication and notice of the suggested settlement in opt-out actions and a right to opt-out of the class. An expert opinion may be optional even where secure agents lead the action in order to assist the parties in shaping a beneficial compromise. Representative and lawyer affidavits in order to combat hidden profits are not necessary where secure agents lead the action because fear of representatives looking to make hidden profits is not an issue.

It is possible to change the Israeli safeguard model by adding a few more provisions. Adding these provisions will make the Israeli safeguards suitable for a new coherent European model.

Firstly, the Israeli model lacks provisions which allow the parties to settle the dispute prior to any court proceedings, such as the Dutch provisions which allow settlements

of collective actions in out-of-court proceedings. Under the Dutch model, the courts only supervise the suggested out-of-court settlement and there is no need to go into long legal proceedings. ADR proceedings as known in Europe may be adopted to fit collective redress cases.

Secondly, under the Israeli regime the first time that a merits observation takes place is at the certification stage. Until this stage in the proceedings, the defendant may have incurred heavy expenses and may have had to spend a lot of time and funds on an action with little merit which may force the defendant into a blackmail compromise. It is recommended that an additional filtering mechanism be added in order to block actions from getting to the courts. Such a filtering mechanism may involve requiring every action to first undergo a regulatory examination by way of a complaint and only allowing those complaints which are found to be substantiated to continue to a collective action.

Private agents may make a system very workable, though they are less credible than public or organisational representative plaintiffs in collective redress cases. The interaction between a public regulator and private representatives is crucial and happen at the outset of the case, before the case goes to court. Both the Israeli model and the U.S. model fail to bring the action to the regulator's scrutiny at a sufficiently early stage. However, the operation of regulatory bodies does exist in Europe, for example the OFT in England. Requiring a prior complaint to a regulatory body may prevent abuses and extortion, phenomena that may occur in collective actions led by private representatives. Therefore, it is recommended that a regulatory authority consider the merits of the case before it goes to court.

Thirdly, the supervision of settlements in Israel is suited to the Israeli regime where collective actions are lawyer-driven or led by private individuals.¹⁵⁶ However, in Europe there is strong history of organisations and public bodies leading cases. In these cases it would be recommended to exempt such secure agents from the stringent

¹⁵⁶ Rule 23 (e)(a), Federal Rules of Civil Procedure, therefore provides that the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable and adequate.

rules relating to compromise supervision. Such an exemption may promote secure agents to be more active in submitting collective redress cases.

4. Supervision of Voluntary Dismissals

A. The Need to Supervise Voluntary Dismissals

Having seen the defendant's evidence, the representative may find out that the claim is not substantiated or that a genuine dismissal may take place after the judge has commented on the weak basis of the action. However, the fear with voluntary dismissal is that the representatives have received a personal benefit and may therefore decide to abandon the collective action.

The legislative scrutiny relating to voluntary dismissal is different from the supervision on settlements. This is because voluntary dismissals do not bar the class members from bringing a later action on the same cause of action. However, similarly to the requirements due to fear of defendants receiving hidden profits in compromise agreements, the CAL requires some supervision of an application for voluntary dismissal. The representative plaintiff must apply to the court to request dismissal of the action¹⁵⁷ and must present an affidavit from the applicant, representative, plaintiff or lawyer which includes all information relevant to the dismissal. In addition, a voluntary dismissal does not bar other plaintiffs from bringing the same action in the future.¹⁵⁸ In practice, most actions that have been dismissed in Israel were not submitted again by other claimants.¹⁵⁹ This is because a reasonable representative will not ask for voluntary dismissal unless it is clear that the action is weak on its merits. In practice, in most actions in Israel the courts either approve the voluntary dismissal with either payment to the representative, a decision to lower the payment, or even not to make a payment to the representatives.

An additional safeguard introduced in Israel to deal with problems of voluntary dismissals is the authority to replace the representatives once they have decided to

¹⁵⁷ Class Action Law 5766–2006, s 16(A) (Israel).

¹⁵⁸ Class Action Law 5766–2006, s 16(B) (Israel).

¹⁵⁹ Ronen Adini, 'This is also a Way to End Up - On Voluntary Dismissals in Class Actions' due to be published in the Hapraklit Journal, Volume Nun Bet (1) available at <www.ronenadini.co.il/news/list.aspx?newscatid=38> accessed 4 May 2012, see at page 5.

discontinue the action if the voluntary dismissal is not appropriate or genuine.¹⁶⁰ This provision reduces the risk of hidden agreements between the defendants' and the plaintiffs' representatives, because any attempt to bribe representatives will be fruitless if the court can decide to replace them.

The voluntary dismissal safeguard is intended to prevent the parties, i.e. the representative plaintiff and the defendant, from reaching an agreement that is of no benefit to the class members or a settlement which benefits the representatives at the expense of the class members. The main issue with the voluntary dismissal mechanism is that the parties may reach a secret compromise, but make an application for voluntary dismissal to circumvent the more complicated procedure for court approval of a compromise agreement.

Bearing in mind these issues, the court is guided by the need to protect absent class members when deciding whether to approve an application for voluntary dismissal. Consequently, the courts are especially active in preventing dismissal of actions where only the representatives stand to profit if the action is dismissed. This is a very important safeguard which prevents abuses such as bribing the representatives in order to obtain their consent to dismissal of a rightful action.

In Europe, the necessity of these safeguards is questionable according to the current models. The safeguards relating to voluntary dismissals are mainly related to opt-out mechanisms where the class members are not part of the action, allowing the representative to decide to dismiss the action on his own motion. Furthermore, where the action is led by secure agents, there is no need to question the genuine motives of the representatives. Thus in the existing opt-out models in Europe there are some references to the situation of voluntary dismissal. In Portugal,¹⁶¹ the Public Prosecutor (the *Ministério Público*) has the power to replace the claimant in the case of withdrawal from the suit or if he behaves in such a manner that could put the claim at risk.¹⁶²

¹⁶⁰ Class Action Law 5766–2006, s 16(D) (Israel).

¹⁶¹ Henrique Sousa Antunes, (n 42), see at page 17.

¹⁶² Article 16(3), Law 83/95.

In Denmark, if questions of withdrawal or dismissal of the group action arise, group members participating in the action must in principle be notified and be given time to react. The court also has discretionary power to decide that the group members be notified about essential matters other than the withdrawal or dismissal of the case, including if questions of settlement approval where such questions arise.¹⁶³

B. The Operation of the Safeguards on Voluntary Dismissals in Israel

Voluntary dismissals may be divided into several categories. The first and simplest category is where the plaintiff decides to withdraw the action as it has become clear to the representative that the chances of success are very weak.

The safeguards relating to voluntary dismissals should not be operated rigorously to prevent such a dismissal where the representatives genuinely decide to dismiss the action, for example, where the defendant presents new facts or legal arguments which were not known to the representatives before submission of the action¹⁶⁴ in his reply, or where the court has expressed its view on the meager merits of the actions.¹⁶⁵ In these cases voluntary dismissal is justified and should be approved as the dismissal is not prejudicial to the class members.

The second type of dismissal is where the action, albeit dismissed, has brought a benefit to the class members or to consumers at large. Sometimes the voluntary dismissal is a result of the defendant undertaking to correct a wrongful behavior, and thus the action brings a certain benefit to the class members or to the general public despite there being no payment of damages to the class members. In such cases where the action has brought some benefit to the class members or to future consumers, the courts should allow the voluntary dismissal even if it contains a payment to the representatives who have brought their action to correct the defendant's wrongful

¹⁶³ Chapter 23 (a) § 254 (G) of the Administration of Justice Act (Denmark) as amended by Act 181/2008 (effective from 1 January 2008).

¹⁶⁴ See, for example, Class action Case 12275-09-08 (Central District Court) Itay Lanuel v. Tnuva (unpublished) (Judgment dated 26 January 2009).

¹⁶⁵ See, for example, Class action Case 1075-06-08 (Central District Court Miller v. Barak e.T.C (unpublished) (Judgment dated 31 December 2008) and Application no. 4567/07 (District Court of Jerusalem) Brachya v. Bezeq (unpublished) (Judgment dated 12 January 2009).

behaviour.¹⁶⁶ A good illustration of the dismissal of the case with a justified payment of fees to the representatives due to a benefit to the class members is the case of *In Azury v. 013 Netvision*.¹⁶⁷ In this case, the court was asked to approve dismissal of an action where the defendant was ready to correct a misleading advertisement in relation to the price of telephone calls abroad. The court provided that the major factors to consider when approving such an agreement were the merits of the action and its prospects of success. The court found that the action brought some benefit to the general public as the misleading advertisement was corrected, thus the court approved the dismissal and awarded the representatives' fees; namely NIS 15,000 to the representative and NIS 30,000 to the class lawyer. The court was troubled with the damages to the injured class members who relied on the misleading advertisement but when the court analysed the prospect of success in the damages action, it found that that reliance on the misleading advertisement would be difficult to prove. Consequently, it found that voluntary dismissal of the action was reasonable in the specific case.

The third possible dismissal which is a more problematic situation is where the parties present a voluntary dismissal application to the court which is in fact a compromise agreement disguised as a voluntary dismissal in order to avoid the additional safeguards such as expert opinions to which compromise agreements are subject. Such voluntary dismissals contain elements of a settlement, for example, asking for a payment to the representatives or awarding benefits to class members. In the latter case, allowing a voluntary dismissal will exempt the parties from the need to appoint an expert to examine the benefits of the settlement to the class.

The criteria for court approval of voluntary dismissal, which contains elements of a compromise, were suggested in *Goldstein v. Bank Hapoalim*¹⁶⁸ where the court considered whether a dismissal request (which included correction of the defendant's conduct and a financial donation to agreed public bodies) was a hidden compromise agreement. The court stated that before approving a request for dismissal, it should consider whether any payments had been made to the plaintiff or his lawyer. In the

¹⁶⁶ See, for example, Case no 1507/08 (District Court of Jerusalem) *Frid v. Magdanyat Neeman* (unpublished) (Judgment dated 7 October 2008).

¹⁶⁷ Case no. 13801-02-09 (Central District Court) (decision dated 7 January 2010).

¹⁶⁸ Civil Case No. 1373/07 (Tel Aviv District Court) *Goldstein v. Bank Hapoalim* (14 December 2009).

absence of such payments, or where only minimal payments had been made, it would assume that there was little danger of conflict between the representatives and the group members. In the event that payments had been made to the representatives, the court might still approve the dismissal after examining the merits of the case and the possibility that more claims would be brought in the future on the same issue.

The Israeli safeguards on voluntary dismissals are partly legislative, deriving from the provisions of the CAL, and partly based on court decisions. The CAL sets out the procedural requirements for voluntary dismissals, such as sworn affidavits, to ensure that all information is produced in court,¹⁶⁹ and requires court approval for a voluntary dismissal¹⁷⁰ with the special power to replace a representative who has asked to dismiss an action which he submitted.¹⁷¹ The other criteria have been set out in court decisions such as *Azury* and *Goldstein*, mentioned above,¹⁷² which provide that the court should distinguish compromises which require special scrutiny and even expert opinions from voluntary dismissals. The latter will be allowed generally where no payments are paid to the representative.¹⁷³ If there is a payment to the representative, then the application should be examined carefully in order to ensure that payment is not in fact a representative bribe to persuade him to dismiss the action. Where the court finds that the dismissal is not appropriate it may order continuation of the action and the engaging of other representatives.

According to a recent study which examined one hundred and seventy seven dismissal applications (which constitute approximately 10% of the collective actions which were submitted to the courts in Israel), about 50% of the applications were for dismissals without any payment to the representatives. In 45% of the cases, the parties asked the court for a payment to the representatives and in only 5% of the cases did the parties leave the matter of such payment to the court. In 67% of the cases where parties asked for payments to the representatives, the court approved the motion and

¹⁶⁹ Class Action Law 5766–2006, s 16(B) (Israel).

¹⁷⁰ Class Action Law 5766–2006, s 16(A) (Israel).

¹⁷¹ Class Action Law 5766–2006, s 16(D) (Israel).

¹⁷² See (n 170).

¹⁷³ See, for example, Class action Case No. 41418-05-10 (Central District Court) *Edry v. Shlomo Engel* (decision dated 8 December 2011 and Case No 1600-09 (Central District Court) *Shukrun v. Gat Givat Chaim* (Judgment dated 20 December 2009) where the court approved the voluntary dismissal of cases with no real merits but refused to accept the mutual application of the defendants and the plaintiffs representatives to award costs to the plaintiffs representatives.

ordered the dismissal with payment to the representatives. In the other 33% of dismissal applications with payments to the representatives, the courts intervened and ordered a low payment to the representatives or no payment at all.¹⁷⁴

The assumption is that the courts allow some financial benefits to the representatives if the action has brought with it some benefits. Therefore the conclusion from the above-mentioned statistics is that most collective actions have brought some benefits and thus the courts have awarded payments to the representatives. The class action instrument may bring change in traders' behaviour even if the legal proceedings reach an early end with a voluntary dismissal.

Voluntary dismissal is a very popular way to end a collective action. About 10% of the actions in Israel end by way of voluntary dismissal. These safeguards concerning voluntary dismissals are very important in order to prevent private representatives from making hidden profits whilst withdrawing the actions. The opt-out mechanisms which operate in Europe such as the Portuguese and the Danish models have employed safeguards on withdrawal. However, these safeguards should be enlarged to allow dismissal with payments to the representatives, representative replacement where appropriate, and representative and lawyer declarations to confirm that no concealed profits have been made.

5. *Notices and the Registry*

A. *The Importance of the Online Registry in order to Bridge the Information Asymmetry*

Collective actions are characterised by information asymmetry between the representatives and the class members. This is because group members in opt-out class actions are usually not identified and there are difficulties in contacting the group members personally. The representative plaintiff and the class lawyer are generally in possession of information which should be shared with all class members

¹⁷⁴ Ronen Adini, (n 159) see at page 30.

in order to give them some scrutiny over the action and enable them to make informed decisions in relation to the proceedings. When the real clients (i.e. the class members) do not possess the relevant information, they cannot assess the results of the case and cannot properly scrutinise the actions of the representatives in the same way that a client would supervise his lawyer in a two party action.

The CAL established an online registry which tracks and publishes developments in each collective action.¹⁷⁵ This registry is quite a novel idea, although not unique. Indeed, there is a registry of Group Litigation Orders (GLO) in the U.K.¹⁷⁶ and a registry in Norway, while in Canada a voluntary registry system is operated by the Canadian Bar Association.¹⁷⁷ The Israeli registry contains all the relevant information about individual class actions commenced after March 2007, including the date the action was submitted, the court where it is managed, the essence of the action, the representing plaintiff and the defendant, the description of the represented class, the certification decision, proposed compromise agreements, applications for voluntary dismissal, and any notices to group members. In addition, decisions in the case are published on the registry.

The documents in the registry may be viewed in 'pdf' format enabling class members and the general public to follow all the developments and issues in every filed case. A copy of every new application to certify an action as a class action must be filed with the court's central management and is listed there in a new 'class action registry'.¹⁷⁸ Once sent to the registry, it is open to the general public.

Prior to filing a new action, each representative must check the registry in order to ensure that there are no similar previous class actions.¹⁷⁹ Consequently, the register makes the collective redress process more transparent, and helps to avoid multiple claims and contradictory decisions on the same issue.

¹⁷⁵ Class Action Law 5766–2006, s 28 (Israel).

¹⁷⁶ Available at <<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/group-litigation-orders.htm>>.

¹⁷⁷ For the Canadian Bar Registry see <<http://www.cba.org/classactions/main/gate/index/about.aspx>> accessed 26 May 2011.

¹⁷⁸ Class Action Law 5766–2006, s 6 (Israel).

¹⁷⁹ Class Action Law 5766–2006, s 5 (Israel).

In the event that there are several similar actions, either involving a similar class of represented persons or similar questions of fact or law, the court may order the new action to be transferred to the court where the earlier action was submitted.¹⁸⁰ The court which deals with the former action may join the two actions or may strike down the subsequent action.¹⁸¹

B. Notice Requirements in European Jurisdictions

In addition to the online registry which is aimed at reducing information asymmetry, at some critical stages of the action the CAL requires that notices be given to class members, the Attorney General, and if the judge finds it is appropriate, to relevant bodies. The rationale for giving notices is to keep the procedure transparent and to prevent the representatives and the defendant to conspire together against the interests of the absent class members. With regard to notices, the CAL sets out a list of circumstances in which the court must provide notice to class members, for example, the decision to approve a class action and submission of a petition for approval of a compromise agreement.¹⁸² In addition, the CAL gives the court discretion to issue further notices.¹⁸³

Publication of a notice is required if the court decides to certify the action,¹⁸⁴ dismiss the action or order replacement of the representative plaintiff or the group's lawyer¹⁸⁵ as well as on an application for,¹⁸⁶ or approval of, a compromise.¹⁸⁷ In addition, the judgment in the action should also be published.¹⁸⁸ The court must approve the draft notice before its publication,¹⁸⁹ but the form of publication is left to the discretion of the judge in each case,¹⁹⁰ bearing in mind the costs of the action,¹⁹¹ the damages that

¹⁸⁰ Class Action Law 5766–2006, s 7 (Israel).

¹⁸¹ Class Action Law 5766–2006, s 7(b) (Israel).

¹⁸² Class Action Law 5766–2006, s 25(a) (Israel).

¹⁸³ Class Action Law 5766–2006, s 25(b) (Israel).

¹⁸⁴ Class Action Law 5766–2006, s 25(a)(1) (Israel).

¹⁸⁵ Class Action Law 5766–2006, s 25(A)(2) (Israel).

¹⁸⁶ Class Action Law 5766–2006, s 25(A)(3) (Israel).

¹⁸⁷ Class Action Law 5766–2006, s 25(A)(4) (Israel).

¹⁸⁸ Class Action Law 5766–2006, s 25(A)(5) (Israel).

¹⁸⁹ Class Action Law 5766–2006, s 25(D) (Israel).

¹⁹⁰ Class Action Law 5766–2006, s 25(E) (Israel).

¹⁹¹ Class Action Law 5766–2006, s 25(E)(1) (Israel).

may be involved,¹⁹² the number of members in the group and the ease of identifying them,¹⁹³ the cost of giving them personal notice¹⁹⁴ and any special characteristics of the group's members, including different languages.¹⁹⁵

The notice should include the details specified in Section 14 of the CAL, namely the definition of the class, the identity of the representative plaintiff and the group's lawyer, the causes of action and the remedies which are being sought.

The notice requirement reflects the need to share the procedures in court with the class members and enables the latter to have an opportunity to comment on the action that is being pursued in their name, though without their participation. Once the notice reaches individual class members, then they may opt-out from the action or have a say in the management of the action, for example by raising objections to a suggested settlement.

The involvement of class members in the procedure is vital for the fairness and credibility of the legal proceedings. A good and effective notice may blur the distinction between an opt-out mechanism and an opt-in mechanism because in theory, it may allow all class members to become involved in the action. It should be noted that views may change about how many notices should be sent to class members in opt-out cases, as opposed to opt-in systems, and at which stage of the action. However, there should be differences in the notice requirement in opt-out regimes and opt-in jurisdictions. In an opt-in action, the lawyer meets his client and they agree on the extent of the information that should be provided to the client in the terms of representation. However, in opt-out mechanisms, the law regulates the extent of information and the stages at which the representative should update the class members, since the class lawyer does not meet all class members.

This requirement can cause many difficulties, especially where the class is large and the members are scattered across a wide geographical area.¹⁹⁶ For example, in the

¹⁹² Class Action Law 5766–2006, s 25(E)(2) (Israel).

¹⁹³ Class Action Law 5766–2006, s 25(E)(3) (Israel).

¹⁹⁴ Class Action Law 5766–2006, s 25(E)(4) (Israel).

¹⁹⁵ Class Action Law 5766–2006, s 25(E)(5) (Israel).

¹⁹⁶ In the *Federal* Courts, notice is required to be given to each class member whose identity is ascertainable with reasonable effort. See *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974).

well-known case of *Eisen v. Carlisle & Jacquelin*, the Supreme Court, upholding a judgment of the Second Circuit, held that Federal Rule of Civil Procedure 23 (C) (2) requires that individual notice be sent to all identifiable class members. In that case, the plaintiff class numbered 6,000,000 of whom over 2,000,000 could be ‘easily identified’ through the analysis of computer tapes. The cost of individual notice was estimated at USD 225,000. Notice by publication plus individual notice to a portion of the class was held to be inadequate, and the cost of sending notice could not be transferred to the defendant, despite the trial court’s determination of the likely success of the plaintiff class on the merits.

It should be noted however that in other cases financial considerations were found to be relevant in deciding the form of notice required by due process.¹⁹⁷

Some provisions for notices can be found in existing European provisions. For example, in Spain,¹⁹⁸ the law provides that once the court has admitted the claim, notice should be published in the media in the area where in which rights giving rise to the action arose. The notice must give affected consumers a maximum of two months (which suspends the proceedings) to join the claim (the opt-in mechanism). Once this period has elapsed, the proceedings will continue with the participation of consumers that have responded during that period. No further intervention in the proceedings will be permitted thereafter. Parties not intervening in the proceedings will nevertheless be bound by the final judgment of the Spanish court.¹⁹⁹

In Sweden, even though the system is based on the opt-in mechanism notice is given by the court (or paid for by the court) to all the members of the group. Payment by the court assists the plaintiffs and reduces the risk that the representative plaintiff will be forced to settle the case due to a lack of resources. The members of the class are allowed to join the proceedings and, if so, the judgment will bind them. Settlements, judgments and some other developments of the case require further notices. Court expenses are paid only by the parties and not group members.²⁰⁰

¹⁹⁷ *Mullane v. Central Hanover Bank & Trust Company* 339 U.S. at 313-20, 70 S.Ct at 657-60.

¹⁹⁸ Art 15 (3) LEC.

¹⁹⁹ Art 221 and 519, LEC.

²⁰⁰ Professor Per Henrik Lindblom, 'National Report: Group Litigation in Sweden' (December 2007) at <http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf> accessed 4 May 2012.

In Portugal, a notice must be given to all the parties that have an interest in the case. The notice allows the members of the class to exercise their right to opt-out otherwise they are deemed to approve the representation.²⁰¹ Opting out is possible until the stage at which evidence is produced. The advantage of the Portuguese notice requirement is that it may be given by an advertisement in the media or press, depending on the circumstances and the geographical distance between the class members.

The Dutch enactment on collective settlements which also provides for an opt-out mechanism requires direct notice to the ‘known’ interested persons, and public notification through advertisements in Dutch and foreign newspapers to the ‘unknown persons.’ Notice must be given via hardcopy newspapers and websites.²⁰² To the extent that the known persons are domiciled in the EU, direct notice is governed by Council Regulation No. 1393/2007²⁰³ and a public notice may be published in newspapers worldwide. In the Netherlands, notice is given at two stages in proceedings: firstly, when negotiations start between the representative organisations, and secondly, where an out-of-court settlement has been agreed and is filed for court approval. After approval of the settlement, the notice requirement must also be met on an individual basis. However, individual notice to known injured parties can be sent by ordinary post unless the court provides otherwise.²⁰⁴

The importance of the notice procedure in the Netherlands is that the collective settlements are based on the opt-out machinery. All interested members are notified of the negotiations and may raise their objections which should then be determined in a court hearing. At this point, the court approves the settlement agreement and determines the opt-out period. The second notification is then sent and following the opt-out period, the settlement becomes legally binding. If the persons have not opted out within the requisite time period, in principle no legal action can be taken concerning the same legal issue.²⁰⁵

²⁰¹ Article 15 (1) of Law 83/95 (Portugal).

²⁰² Article 1013(5) Rv, WCAM (Netherlands).

²⁰³ Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters OJ L 324/79, which supersedes the former Council Regulation No. 1348/2000, 29 May 2000, OJ L 160, 37.

²⁰⁴ Article 1013(5) CCP (Netherlands).

²⁰⁵ M.-J. van der Heijden, (n 152).

Personal notification of the decision is arranged by providing a copy of the decision to the parties entitled to compensation. The decision and the settlement agreement must be filed at the court registry and the parties have the right to inspect and receive a copy of the documents.²⁰⁶

C. The Content of the Notice

Under the Israeli law, the content of the notice is left to the discretion of the judge.²⁰⁷ However, in the U.S., the relevant provision provides that the notice must concisely and clearly state in plain, easily understood language the following: the nature of the action, the definition of the certified class, the class claims, issues, or defenses, the procedure for joining the action, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3) of the Federal Rules of Civil Procedure.

Looking at the approaches of the above-mentioned legal systems, it is clear that in all jurisdictions notice is an integral part of the collective redress system. The representatives in collective redress actions have a great advantage over class members since they are in possession of a great deal of information to which class members are not privy. Indeed, in opt-out cases, potential class members are sometimes not even aware of the existence of the case.

The notice requirement requires that the best possible notice should be given to all class members so as to provide them with all the relevant information concerning the case. Personal notice is the most assured form of notice as it is the only way to ensure that information reaches the group's members.

However, there are cases where there are many members or the members are scattered and personal notice is not relevant or may be too costly. It should be borne in mind that opt-out cases normally consist of many small individual claims and the difficulties of giving personal notice in cross-border actions in Europe would be

²⁰⁶ Article 1017 CCP (Netherlands).

²⁰⁷ Class Action Law 5766–2006, s 25(D) (Israel).

similar to the problems which arose in the U.S., as illustrated in the *Eisen* case mentioned above.²⁰⁸

It is essential that class members are given notice of any suggested termination of the action, either by dismissal or compromise, to allow the members to opt out of the compromise or to object to its suggested contents or, in the case of voluntary dismissal, to allow the members to continue the case where previous representatives have decided to leave the case.

From the jurisdictions researched, it is clear that there are several potential ways to keep class members updated about case developments. The CAL gives the court the discretion to choose the most suitable way to give notice to class members in each case. With regard to the form of notice, the suggested draft publication should be brought before the court for approval prior to publication.

D. Increased Notice Requirements in Opt-out Cases

The distinction between notices in opt-out cases and opt-in cases is crucial with regard to the requirement of notice. In opt-in cases there is a direct connection between the class members and the class lawyer. It is therefore possible to leave the issue of notice and its extent to the terms of representation between the lawyers and their clients, as is the practice in two-party cases.

The Israeli CAL fails to make a distinction between opt-in cases and opt-out cases in terms of the need for sending a notice. This failure is not important under the Israeli system as no opt-in cases have been brought due to class member apathy and an aversion from taking part in proceedings. However, when looking at a new model, there should be a distinct provision with regard to notices in opt-in actions as opposed to opt-out actions. For example, most European member states prefer the opt-in mechanism over the opt-out systems and there is therefore no need to send a personal notice at every stage of the case, and no need to allow any member to opt out of the action. The aim of the notice is to make class members aware of the cases which have

²⁰⁸ *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974).

been brought on their behalf and to enable them to get involved in the case as much as possible. The notice is of crucial importance in opt-out cases where the class members are not part of the action and should be given the opportunity to opt out or to object to any actions made on their behalf by the representatives.

6. Should the "Loser Pays" Principle Remain in Force?

In contrast to the U.S. where each party has to bear his own costs in class actions, the CAL provides that the losing party must pay the other party's expenses. The purpose of the "loser pays" principle is to deter potential representatives from bringing actions in bad faith, intended to blackmail defendants into settling an unsubstantiated case.²⁰⁹ The imposition of costs is at the discretion of the judge at the end of each case²¹⁰ and the amount is subject to a minimal tariff which is recommended by the local bar association, unless provided otherwise by the ruling judge.²¹¹

However, under the CAL, in certain circumstances the court in Israel may reverse a costs order and grant the losing party an award of its costs from the winning party after considering the following factors:²¹²

1. The extent of work and the risks that the representative has assumed;
2. The benefits that the action has brought; and
3. The importance of the action to the public.

A reverse costs order should only be made where there is some fault on the part of the defendant. This view is shared by the Bar Council of England and Wales, which stated in its reply to the EU consultation paper 'Towards a Coherent Approach to Collective Redress':

The only circumstances in which the "loser pays" principle should be overridden are when the behaviour of the winning party is such as to require

²⁰⁹ Charles Silver, 'We're Scared to Death: Class Certification and Blackmail' [2003] 78 N.Y.U. Law Review 1357.

²¹⁰ The Civil Law Procedure Regulations 5744-1984, Rule 511 (Israel).

²¹¹ The Civil Law Procedure Regulations 5744-1984, Rule 512 (Israel).

²¹² Class Action Law 5766-2006, s 22(c) (Israel).

the principle not to be applied e.g. when the winner refused unreasonably to enter ADR or when its conduct was abusive of the applicable domestic process. Such circumstances should be left to the assessment of the courts on a case-by-case basis.²¹³

Many European jurisdictions also adopt the "loser pays" principle, but in most cases, unlike Israel, the threat of having to pay the reasonable expenses of the winning party is not balanced with financial incentives that encourage the bringing of an action. According to the "loser pays" principle, a claimant must pay certain fees in advance. Victims may be discouraged from bringing an action if the outcome of the action is uncertain and the possible damages awards are modest.²¹⁴

For example, the "loser pays principle" operates rigorously in France and Italy.²¹⁵ In Italy, the losing party may have to pay the other party's costs of proceedings and there are no incentives, such as bonuses for the class representative and lawyers to bring an action.²¹⁶ Similarly, the operation of the "cost risk" principle in France means that the loser may have to pay a part, or all, of the opponent's costs,²¹⁷ depending on the judge's decision.²¹⁸ Such provisions bar the operation of collective redress because the costs may be imposed on the representative if the action fails, and if the action is won, the representative is not entitled to a share of the compensation. Thus there is no incentive for representatives to take on the risks of bringing collective redress cases under such a system.

²¹³ The Bar Council of England and Wales, 'Response of the Bar Council of England and Wales to the EU Commission's public consultation *Towards a coherent European approach to collective redress*' [May 2011]. Reply to question 21. <http://ec.europa.eu/competition/consultations/2011_collective_redress/bcew_en.pdf> accessed 22 October 2011.

²¹⁴ Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) 8(1) *Competition Law Review* 87-121, see at page 88.

²¹⁵ Section 91 of the Italian Civil Procedure Code.

²¹⁶ Prof. Elisabetta Silvestri, 'The Globalisation of Class Actions: Italian report' <http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_National_Report.pdf> accessed 23 September 2011.

²¹⁷ Article 700 of the Code of Civil Procedure (France).

²¹⁸ Véronique Magnier, 'Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters - France' (see page 5) <http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf> accessed 2 December 2011.

Other jurisdictions in Europe have less rigid rules on the payment of costs and they allow cost concessions so as to reduce the risk which the representatives take upon themselves. For example, in Portugal the judge will determine the costs, which may be reduced to between 10%-50% of normal costs if the value of the action does not exceed the monetary competence of the first instance court.²¹⁹ In Spain the basic principle is that the loser pays the expenses (which may not exceed one-third of the value of the claim), including fees for lawyers, expert witnesses and certain public officials, which are included in the concept of *costas*.²²⁰

The problem with the Portuguese and Spanish approaches is that although concessions from the rigid loser payer rule are offered, the decision on costs is not made from the outset of the case and thus the representative cannot calculate the risk of costs which may be imposed.

In Sweden, the general rule is that the losing party must pay the winning party's costs and lawyer's fees, except in small claims cases where the value of the personal claim does not exceed EUR 2,000.²²¹ However, although this approach discourages the bringing of unmeritorious claims, it does not offer incentives to encourage the bringing of well-founded collective redress actions. Such a system is much preferred as the representative knows with certainty that if the case concerns a low value, no costs will be imposed.

There is no doubt that the "loser pays" principle is an important safeguard in collective redress actions as the representative has to make a careful decision whether to put forward a case because they may be liable to pay the other party's expenses. On the other hand, where the action has brought a benefit to the class or to the general public, the judge should have the discretion to overturn the principle by making a reverse costs order where the plaintiff's actions (including actions taken before the

²¹⁹ Article 14(4) of the Law 24/96. See Henrique Sousa Antunes, (n 42) page 6.

²²⁰ Pablo Gutiérrez de Cabiedes Hidalgo, 'Group Litigation in Spain: National Report' (The Globalization of Class Actions, Oxford Conference, December 12–14, 2007) at <http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf> accessed 28 November 2011. See also Fernando Gomez and Marian Gili, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Country report Spain' <ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> 9 (Civic Consulting, 2008) accessed 28 November 2011.

²²¹ Per Henrik Lindblom, (n 200).

case was commenced) have brought the violating behaviour to an end. For example, the Dutch have adopted cost shifting machinery which includes a wide discretion for the court to order the shifting of costs.²²²

The existing measures in Israel and in Europe fail to distinguish between the application of the "loser pays" principle between private-led litigation and litigation led by organisations and public bodies. Furthermore, there is no distinction in the relevant legislation between stand-alone and follow-on actions which are more risky than follow-on actions. Such a distinction is necessary because the risk which the "loser pays" principle is trying to shield against, namely unmeritorious claims, is not relevant to organisations, public bodies and follow-on actions which follow a conviction by a disciplinary or judicial body. There is no evidence and there are no allegations of abusive litigation led by organisations and public bodies. Therefore, as a matter of policy and in order to encourage claims from public bodies and organisations rather than private individual stand-alone actions, the general rule that the loser pays the other party's expenses should only operate where the representative plaintiff is a private individual bringing a stand-alone action.

Public authorities, organisations and representatives in follow-on actions, should not have to pay the other party's expenses, except in exceptional cases where it is shown that the representative's action was in bad faith and, in addition, where the representatives acted negligently or did not check the case properly, thus causing expenses to be incurred by the other party. Only in exceptional cases where the representative has acted in bad faith or negligently should a penalty in the form of costs be available. Acting in bad faith in such circumstances occurs where the action is brought only to threaten the defendants and cause them to pay damages in a weak action.²²³ It is said that if the action is brought for external causes other than winning the action, for example an action aimed to cause damage to a competitor or to make the competitor reveal confidential documents, then the action should be treated as an action brought in bad faith.²²⁴

²²² Lord Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009), p. 574 at <<http://www.csls.ox.ac.uk/documents/SCOTLANDchapter57.pdf>> accessed 22 October 2011.

²²³ Case no. 21558/92 (Tel Aviv District Court) *Analist E.M.S. v. The State of Israel and Bezeq, Dinim Mehozi* (1) 359.

²²⁴ Dr. Zohar Goshen, 'Good Faith in Submitting Class Action' *Globes* (Israel, 12 October 1994).

In a recent decision, the Supreme Court in Israel overturned a district court decision and held that where a representative plaintiff had not approached the defendant prior to submitting the class action in order to check the facts or to enable the defendant to right the wrongdoing, the action should not be presumed to have been submitted in bad faith. The Supreme Court expressed the opinion that if a representative did not ask to receive his personal share of the proceeds, it should prevent such representative from bringing a class action in favour of a group of injured class members.²²⁵ In a different decision, the Tel Aviv District Court noted that the representative plaintiff's good faith should endure for the entirety of the legal procedure.²²⁶

The exemption from the "loser pays" principle as suggested above will act as an incentive for submitting secure actions which are actions brought by public bodies, organizations, and follow-on actions. Private actions remain available and are welcomed as follow-on actions. Such actions will only bare costs in exceptional circumstances of bad faith or severe negligence in conducting the action. On the other hand, stand-alone actions cannot be exempted from costs in the first stage unless it has been decided that the action is well-founded in the certification process. The reason for this is that it would be unfair on a defendant to exempt the plaintiff from costs where the action has not passed through any filtering process and the merits have not been examined by a regulatory body or the organisation's institutions before being submitted.

The question of costs is critical in consumer cases where the representative plaintiff normally has limited financial resources to combat powerful traders which normally act as the defendants in such cases.

Therefore, on the one hand the plaintiff is faced with the very severe hurdle of the "loser pays" principle. On the other hand, it is a very important safeguard against unmeritorious claims, since it is reasonable to think that the plaintiffs in unfounded cases will not fight the case when they run the risk of having to pay high costs.

²²⁵ Appeal Case 10262/05 (Supreme Court) Aviv Legal Services v. Bank Hapoalim (decision dated 11 December 2008).

²²⁶ Case no. 3006/00 (District Court of Tel Aviv) Dani Danosh and Others v. Chrysler Corporation (Judgment dated 17 November 2003), (Judge Gerstel).

With regard to the problem that the "loser pays" principle may also deter plaintiffs in well-founded cases from bringing their action because of the fear of an unfavourable decision on costs at the end of the case, the solution offered is to totally exempt actions by secured agents such as public bodies, organizations, or representatives in follow-on actions from costs. Stand-alone actions should remain subject to costs.²²⁷ In this way, the "loser pays" principle remains an effective safeguard in stand-alone actions only where it is needed, and may prevent unfounded actions which bring no benefit to consumers.

C. Conclusions

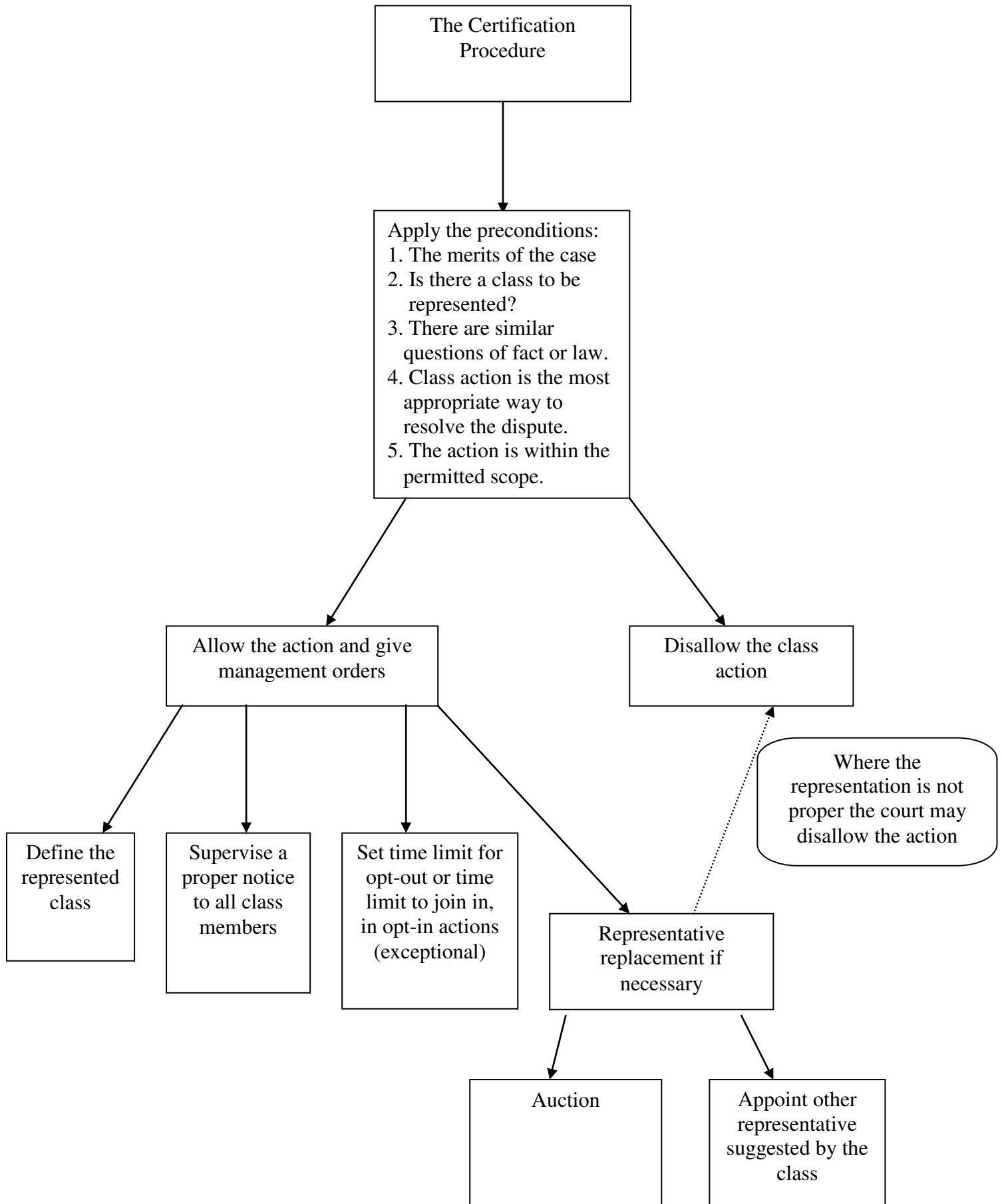
The collective redress mechanism is a very important tool to remedy wrongdoings that would otherwise not go to court due to the small personal damages involved in such actions. Collective actions may also change the balance of power between the individual consumer and the large companies normally acting as the defendants in such cases.

In order to make a collective redress system workable, if public actions or organisational actions are not submitted in a certain case, private actions should be permitted. The problem with private actions is that they may lead to abuses. The idea which stands behind private class actions is that private persons who are acting for their own benefit are promoting public goals and promoting important policies of safe trade which will be secure from unlawful behaviour. However, since private actions often result in litigation which abuses the process, the imposition of additional filters is recommended.

²²⁷ With regard to stand-alone actions, the powers of the court to cap costs or reverse cost orders remain relevant as discussed in Chapter Three, Part C (relating to Positive Incentives and Negative Expenditure).

Israel's implementation of a number of important safeguards offers a useful insight into controlling and fighting the inevitable abuses of private collective litigation. The "loser pays" principle and the certification process act as barriers to unmeritorious cases and actions brought in bad faith. The central role of class proceedings plays out at the certification procedure, both in terms of filtering out unmeritorious claims and in terms of preventing procedural unfairness. The operation of the certification procedure is exemplified in the following Chart 4A.

Chart 4A
The Decisions of the Court at the Certification Procedure:



In addition to the certification procedure the Israeli model regards settlement agreements and voluntary dismissals as very dangerous stages in collective proceedings where the representative plaintiffs and the defendants may collaborate in order to deceive the class members by reaching hidden agreements with personal benefits to the representatives but with no real benefit to the class. Therefore, the CAL has introduced procedural requirements such as affidavits from both parties' lawyers and an expert examination of the suggested settlement.

The Israeli mechanism also requires transparency by establishing a public registry of class actions open to every interested person, and by sending notices to the class members and to the Attorney General when the case reaches its critical stages, such as voluntary dismissal or a compromise agreement.

Looking at European needs, the importing of Israeli safeguards is highly recommended if private actions are to be permitted under a new collective action procedure subject to a filtering examination by a regulatory body. However, it should be borne in mind that there is no real need for safeguards in organisational or public actions, which are common in Europe, simply because these actions are rare and carry with them no risk of abuse.

However, even if a new opt-out model is introduced for private collective actions, the Israeli safeguards will not be sufficient. A flood of actions which could be detrimental to the economy is still possible. Thus, some changes and improvements are needed in relation to the Israeli model and its safeguard mechanism in order to avoid a similar flood of cases in the suggested new model. The following chapter deals with the proposed amendments to the Israeli mechanism to enable it to cater to European consumers.

Chapter Five

A New Suggested Model – Implementing Lessons from the Israeli Model

Introduction

One of the European Union's most important goals is to merge Member States' economies, and to further free trade between them. The European Union has proclaimed the importance of secure trade between Member States on various occasions. The existence of a collective redress mechanism is crucial to improving confidence in cross-border trade within the community, providing consumers with the option of bringing their dispute before the courts should things go wrong. The search for a coherent system of collective redress in Europe is on its way,¹ and the Israeli collective redress model is certainly a very useful case study in helping to structure a coherent and unified European model.

The Israeli class action model has proven to be very workable, with many collective actions having been launched since the introduction of the new system under the Class Action Law in 2007. As emphasised in previous chapters, this author would recommend adopting the Israeli model with some changes which address problems which have come to light following several years of operation. The most troubling problem is the flood of actions which Israel is now seeing. The number of actions in Israel is higher than that of any other European jurisdiction due to the special features of the Israeli model as analysed in Chapter Three, namely, the opt-out mechanism, financial incentives for representatives, provisions allowing private individuals to act as representatives in stand-alone actions, and the wide scope of the action available.

¹ European Commission, Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011) available at <http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf> accessed 4 February 2011.

The safeguards in Israel do not preclude a flood of actions, and this author has therefore suggested the adoption of a model which includes additional filters limiting the actions which may proceed to court. The mechanism offered is based on the distinction between stand-alone actions and follow-on actions,² the latter of which features in the area of competition law in England.

The Israeli experience shows that 99% of Israel's class actions are stand-alone actions brought by private individuals, and thus the European emphasis which is mainly on organisational claims results in less class actions being initiated. With regard to public bodies, their position in most European Member States as preferred enforcers should take precedence over private individual actions due to their credibility and high powers of investment. This author has therefore suggested that private individuals be allowed to bring only follow-on opt-out or opt-in actions, or stand-alone actions only in exceptional circumstances where the authorities unjustly refuse to intervene.

Adopting this view in a new model would prevent the courts from being flooded with cases, since the entrusted public regulatory body would act as a barrier to certain cases. A new regime should only make a follow-on action available to all potential private plaintiffs where a complaint such as a super-complaint to the OFT in the U.K.³ was justified. Once a complaint to a public body or to a regulator appointed to deal with consumer complaints has resulted in a conviction, a disciplinary ruling, or an opinion that an infringement of consumer law has occurred, then a follow-on action should be available. If a public body or regulator does not take any action within a certain period of time following the submission of a super-complaint of this kind, and has not opposed private collective redress on the grounds that the claim is unfounded, then a private representative should be permitted to initiate a stand-alone action. However, this stand-alone action would be subject to depositing a surety and subject to financial requirements and examination of the adequacy of the representative's qualifications at the certification stage, in order to disqualify opportunistic private actions.

² Competition Act 1998, s 47.

³ The existing practice is explained in Chapter Four, Part B at section 1 (B) relating to the court decision at the certification stage on page 218.

Such a process would compel public authorities to deal with every complaint within a reasonable time limit to avoid having to explain their failure to do so to the court. Although this process would require public bodies to work more efficiently, and may require more manpower, the costs would be outweighed by the benefits of preventing the economic damage caused by an overwhelming number of collective actions. These benefits may revert to the regulator as part of the benefits of the successful actions.

In addition, some amendments are also recommended in relation to financial incentives in order to adapt the incentives to the new suggested model. The incentives should be available only for cases which require court proceedings and representation by private individuals. This is because as shown, public bodies and organisations are not motivated by financial incentives. The incentives would be available where the complaint was checked and approved by a certified regulator such as the OFT, and the class action was found to be appropriate in the circumstances of the case. The other type of case which may qualify for a payment for the complaining consumer is a case in which the trader changes his unlawful behaviour as a result of the complaint.

A. Rebalancing Private and Public Enforcement

The Israeli law allows stand-alone actions as a first recourse and there is no need to take any prior action. Private stand-alone actions are the source of Israel's flood of actions, and thus the new model should filter out such actions while continuing to ensure access to justice for private individuals where no other public measures are available.

In order to supervise stand-alone actions, a public control role is needed, combining a secure public supervisor with an ambitious private representative. The combination of these two roles would result in a solution which ensures that the law remains workable, while preventing a flood of actions. This is the additional filter which should prevent the flood problem which undermines the many advantages of the Israeli model. The new filter is aimed at dealing with the flood problem and is based on a new balance between private actions for damages and public enforcement.

1. The Operation of the Additional Filter in the New Model

In Israel, any private individual may go to court as their first recourse, bringing a high-value class action without needing to pay court fees or to produce a surety. The claim may be unfounded on its merits, such as a claim brought against a producer simply because the customer was not content with the service or the products purchased. Such an action is extremely inconvenient to the producer, requiring him to invest funds and time in fighting the action. The earliest time at which the producer becomes directly involved in challenging such an unmeritorious action in Israel is at the certification stage. Until that stage, the producer will most likely have to recruit the services of expensive legal counsel. Due to the sum of the action, a reasonable producer will probably need to employ the services of a leading law firm. In addition, if the producer is a public company with shares listed on the stock market (as is the case with most large defendants, such as telephone companies, internet providers, large pharmaceutical companies, banks and so forth) an immediate notice must be served on the shareholders and the general public. Following such notice, a serious drop in the value of such a company is expected. In addition, news of a very large action will normally reach the front pages of the financial newspapers. The publicity may harm the good reputation of the defendant and may bring a fall in sales of its products or services. Furthermore, the defendants will need to report the action for the purposes of the company balance sheet as a standing conditional commitment. This may harm the defendant's potential to raise funds from banks and other lenders due to the possibility that the action may succeed, thus having a severe negative effect on the defendant's viability.

The suggested filter should operate by putting stand-alone actions brought by private individuals in the back seat as second in line after public action has been taken and by ensuring that private actions are supervised by public scrutiny. Such an additional filter may be based on the English approach in competition cases, which distinguishes "follow on" actions from "stand-alone" actions, and gives preference to public enforcement when it is available. This should be adopted as the basis of the new collective redress model, while not totally abandoning private actions which are much

more frequent.⁴ In fact, in Israel, 99% of actions are brought by those in the private sector. If no such actions were brought, the Israeli class action mechanism would remain almost totally ineffective and unused.

Under the English system, private claims for damages may take two different forms. Firstly, they may be conducted following public enforcement, as so-called "follow-on" suits, or they may arise where no public action has been taken, such actions being referred to as "stand-alone." One problem with the English competition model as it stands today, is that representative collective actions, brought by a body which represents the interests of those harmed by an unlawful practice on behalf of those who have suffered loss, is limited to "follow-on" actions only. In such proceedings, those who have been harmed are not themselves party to the action and are not required to pay the other side's costs where the case is lost (although the representative body may be required to do so). Currently in the U.K, representative actions on behalf of named consumers are only allowed in follow-on cases under section 47B of the Competition Act 1998.⁵ However, the OFT itself has recommended allowing representative bodies to bring both stand-alone and follow-on actions on behalf of consumers and businesses in the area of competition law.⁶ This recommendation is crucial because it will enable appropriate representatives, such as organisations which are deemed to be secure agents, to bring stand-alone collective actions relevant to the organisation in order to defend consumers. If this is the case, then it is expected that few new actions will be brought by organisations. On the other hand, the number of actions will remain low as private plaintiffs are still restricted from bringing collective actions and the cases of Israel and the U.S. demonstrate that the vast majority of actions are private individual actions. Thus, in order to improve the OFT recommendation, this author would argue that private individuals should be allowed to bring follow-on actions, as well as private stand-alone actions (the latter in

⁴ In the Civil Justice Council Report, 'Reform of Collective Redress in England and Wales: A Perspective of Need', Professor Rachael Mulheron sets out the advantages of the follow-on procedure compared to stand-alone actions at <http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf> accessed 27 November 2011.

⁵ The Office of Fair Trading, Private actions in competition law: effective redress for consumers and business - Recommendations from the Office of Fair Trading, Discussion Paper OFT916resp (November 2007) available at <<http://www.offt.gov.uk/OFTwork/publications/publication-categories/reports/competition-policy/>> accessed 5 November 2011.

⁶ The Office of Fair Trading, (n 5), see section 5.13 on page 17 and section 6.2 on page 18.

exceptional circumstances only), where no other action is available and the case, prima facie, looks very strong.

Indeed, follow-on actions are superior to stand-alone actions in several respects. A follow-on action entails a prior procedure in front of a regulatory body or a tribunal which has examined the facts and merits of the case and has found that the defendant has breached its duty. This means that the follow-on action will be based on facts which were examined by a responsible public body. The follow-on action should be more manageable in court as there is no need to engage in discovery for documents which have already been disclosed to the public body. The main aim of the procedure is to set the amount of damages. In follow-on actions, questions of liability or breach require less attention as they have already been decided by the regulatory body or the relevant tribunal.⁷ The problem of the follow-on action is that public bodies are slow and have limited financial resources, thus the number of investigations is very low. However, in the suggested model, time limits would be imposed and the regulatory body would have to give its decision within a specified time-frame failing which a stand-alone action would become available.

This author suggests combining public and private enforcement, particularly as private enforcement is favoured by the general public and would raise the confidence of consumers in cross-border trade. The suggested mechanism makes it clear that public enforcement is superior to private enforcement as it avoids the risks of unmeritorious claims and the extortion of defendants. This author believes that follow-on actions are superior to stand-alone actions, though they are not in themselves sufficient to provide consumers with the required confidence in consumer transactions. The follow-on actions must be supplemented with a form of stand-alone action which will be used where the relevant public regulator fails to take proceedings within the specified time limit. This approach does not completely exclude the possibility of bringing private actions.

⁷ *Enron Coal Services (in liquidation) v. English Welsh & Scottish Railways* [2009] CAT 7 and the Court of Appeal in *Enron Coal Services (in liquidation) v. English Welsh & Scottish Railways* [2009] EWCA Civ 47. The Competition Appeal Tribunal and the Court of Appeal held that the plaintiffs in the follow-on action must prove causation and not merely their damages.

This author recommends that private actions for collective redress be allowed only where there is no possibility of intervention by a public authority. Private claims for damages should be an additional and possibly a suitable complement to public enforcement. The best solution would be to bring every private action to the relevant public regulator. This regulator would be appointed by the member state government similarly to the way in which the OFT in the U.K or the Danish Ombudsman in Denmark is appointed. At Community level, the task would be handed to D.G. SANCO which will have similar powers to those exercised by D.G. Competition (the European Commission's Directorate General for Competition) in competition cases. A private person would only bring a representative stand-alone action where the public body decided within a reasonable period, such as within 60 days, not to commence group proceedings but rather, to allow the private individual to do so. The private stand-alone action should be allowed in extraordinary circumstances and should be treated with caution. In addition, the representatives in stand-alone actions would have to comply with financial conditions and consider the viability of each case on its merits. The application of this model means that stand-alone actions would undergo a filtering process before the action could be submitted to court and even prior to the certification process, in addition to the adequacy of representation test imposed at the certification stage.

With regard to incentives, it seems fair that a private individual or organisation which refers the matter to a public body should be remunerated with a share of any financial award in return for initiating the process that led to compensation for the group's members.

A. Examples of Combinations of Private and Public Enforcement in Criminal Proceedings

Unfortunately, this suggested model which combines private and public enforcement does not exist in Israel in relation to actions for damages in general, nor in relation to class actions. Nonetheless, Israel's criminal legislation⁸ provides an example of a procedure which allows individuals to bring a criminal complaint against a suspect for

⁸ Sec 68 of the Criminal Procedure Law 5742-1982 (Israel).

violations which are regarded as having less public interest than other criminal offences.⁹ Once an individual private accusation is brought to the court, a copy is sent to the Attorney General's office in the relevant district where the claim was submitted. The Israeli Attorney General must declare whether his office will deal with the case within 15 days.¹⁰ If the Attorney General decides to pursue the case, the private criminal accusation is replaced with a formal criminal charge.¹¹

Such a procedure gives preference to public enforcement, yet if the public authority is not efficient enough to deal with the action or it does not object to allowing a stand-alone action within a certain period, then the private individual may continue with the proceedings. The procedure of bringing private criminal charges has been criticised in Israel, and in 2011 the government suggested cancelling this avenue for bringing private criminal charges.¹² The main reasons for suggesting the abolition of this procedure were to prevent harassment, to ensure skilled and professional management of the criminal process, and to promote the coherence of the enforcement of legal proceedings against criminal offences.

The combination of public and private enforcement is also illustrated in England where there is a history of allowing the private prosecution of criminal offences. In England's early history, the victim of a crime had the right to bring criminal charges against an offender.¹³ An individual private prosecution¹⁴ is still available under English law. The right to bring private prosecutions is preserved by Section 6(1) of the Prosecution of Offences Act, 1985. There are, however, some controls which exemplify the coordination of public and private enforcement. The Director of Private Prosecutions (DPP) has power under Section 6(2) of the Prosecution of Offences Act, 1985 to take over private prosecutions and either to continue or discontinue them. In

⁹ The list of offences which are allowed for individual criminal accusations are listed in the second annex of the Criminal Procedure Law 5742-1982 and include defamation, violations of privacy, nuisance of various kinds and even some offences which are listed in the Consumer Protection Law 5742-1981.

¹⁰ Sec 71 of the Criminal Procedure Law 5742-1982 (Israel).

¹¹ Sec 72 of the Criminal Procedure Law 5742-1982 (Israel).

¹² The cancellation suggestion is available in Hebrew at: <<http://www.justice.gov.il/MOJHeb/News/SederDinPlily.htm>> accessed on 25 November 2011.

¹³ David Friedman, "Making Sense of English Law Enforcement in the 18th Century" available at <http://www.davidfriedman.com/Academic/England_18thc./England_18thc.html> accessed 5 January 2011.

¹⁴ A prosecution led by a prosecutor who is not acting on behalf of the police or any other prosecuting authority or body.

some cases, the private prosecutor must seek the consent of the Attorney General or of the DPP before the commencement of proceedings.¹⁵ In order to decide how to proceed, the Crown Prosecution Service (CPS) may ask both parties to supply information within 14 days, inform each party of their examination of the case, and receive full disclosure from the private prosecutor even of documents which were not disclosed to the defendant. There is no obligation for the private prosecutor to inform the CPS that a private prosecution has commenced. However, in practice, the CPS may find out about the legal proceedings from the prosecutor, the defendant, the judge dealing with the case, or through other channels such as the press.

The mechanism which is suggested in this work for bringing private collective actions may be similar to the criminal procedure for a private prosecutor who is acting as a private attorney general.¹⁶ It is in the public interest that the rogue trader be punished and the representative consumer and his/her lawyer have the opportunity to achieve this by suing for damages as a private litigant. The public interest is served where public goals are pursued by private litigants. The problem with private actions is that they may be abusive and uncontrolled and therefore harm the public interest instead of serving it. The search for a mechanism to control the use of private stand-alone collective actions has brought to light the degree of public control over private criminal prosecutions. In such cases, the prosecution supervises proceedings brought by public interested parties. Private criminal proceedings are rare because criminal proceedings do not result in receiving an income at the end of the trial, unlike civil proceedings where some damages are expected.¹⁷ However, consumer cases may be similar to criminal actions in the sense that where an action is for minimal or low sums, the machinery will rarely be used if no incentive is introduced. Therefore the system of incentives should not be abandoned under the improved model.

¹⁵ The Crown Prosecution Service on Private Prosecution available at: <http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an01> accessed 28 January 2012.

¹⁶ William B. Rubenstein, 'What a "Private Attorney General" is—And Why it Matters' (2004) 57 Vand. L. Rev. 2129, 2148. See also John C. Coffee, Jr., 'Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working' (1983)42 Md. L. Rev. 215, 216.

¹⁷ David Friedman, (n 13).

B. Leaving Incentives Intact

In order to motivate private litigants to bring consumer collective actions, an incentive should be introduced. Yet, as seen in Israel, financial incentives can be the source of a flood of actions and the regular safeguards introduced in Israel have not succeeded in resolving this problem. Therefore, the incentives system should be adapted to the solution offered in this work.

An interesting and innovative illustration which involves combining private collective actions with a public regulatory body and with incentives paid to successful actions is taking place in California in the field of employment law. California has adopted a new approach to enforcing the state's Labor Code by enacting the Private Attorney General Act 2004 (PAGA).¹⁸ This law allows a private citizen to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency (LWDA) provided that the formal notice and waiting procedures set down in the law are followed.¹⁹ This law grants a private citizen the right to pursue fines as an attorney general where such fines would normally only be available to the State of California. The interaction between the private prosecution and the regulatory body are very interesting in this context. The first pillar of this action is the reward granted to the representative plaintiff as an incentive for representatives to bring actions where it is proper to do so. Thus the fines which are obtained through an action under this law are split between the LWDA and the employee, with the State Fund and the LWDA receiving 75% of the penalties and the employee receiving 25%²⁰ in addition to their lawyer's fees. Secondly, the procedure under the PAGA preserves the preference of the regulatory body²¹ (in this case the LWDA), and thus the private person should inform the LWDA of the alleged violations. A private individual may only issue the proceedings where the LWDA does not pursue the allegations or does not issue a citation within a certain time period.²² As a private attorney general, the

¹⁸ Cal. Lab. Code § 2698.

¹⁹ Private Attorney General Act of 2004 available at: <http://www.privateattorneygeneral.com/paga_law.html> accessed 5 February 2012.

²⁰ Cal. Lab. Code § 2699(i).

²¹ Douglas A. Wickham, 'The Private Attorneys General Act of 2004: One of California's Newest Laws Threatens to Flood Employers with Class Action Lawsuits when an Ounce of Prevention Could Avoid Them' available at <<http://library.findlaw.com/2003/Oct/1/133315.html>> accessed on 5 February 2012.

²² Cal. Lab. Code § 2699.3.

aggrieved employee is allowed to seek civil penalties not only for violations that he has suffered personally, but also for violations of "other current or former employees".²³

2. The Suggested Combined Procedure

Having considered the PAGA model above, the need to have private enforcement monitored by a regulatory body and the system of private prosecution actions available both in Israel and in England, this author suggests a system of control based on a combination of the private representative and the regulatory body. The combination is based on the prior examination of the suggested action by a public body similar to the CPS in the U.K. or the Attorney General in Israel, having the authority to allow the criminal action to continue through the initial representative or to take the action on themselves. The regulatory authority may have the power to order that the action be stopped where the action is not serving the public or has little merit.

The model offered in this work is based on adding a filter mechanism on to stand-alone private actions. This filtering mechanism is not necessary in actions led by secure agents such as public bodies or organisations which are entrusted with the role of bringing collective actions for the state. The filtering mechanism is also irrelevant to follow-on actions which have already been examined by a tribunal or a public regulatory authority. The aim is therefore to promote follow-on actions led by private enforcement as much as possible, though actions of organisations and public bodies are very welcomed despite being perceived as rare due to the nature of these enforcers.

The new filtering mechanism in stand-alone actions should therefore operate in the following way:

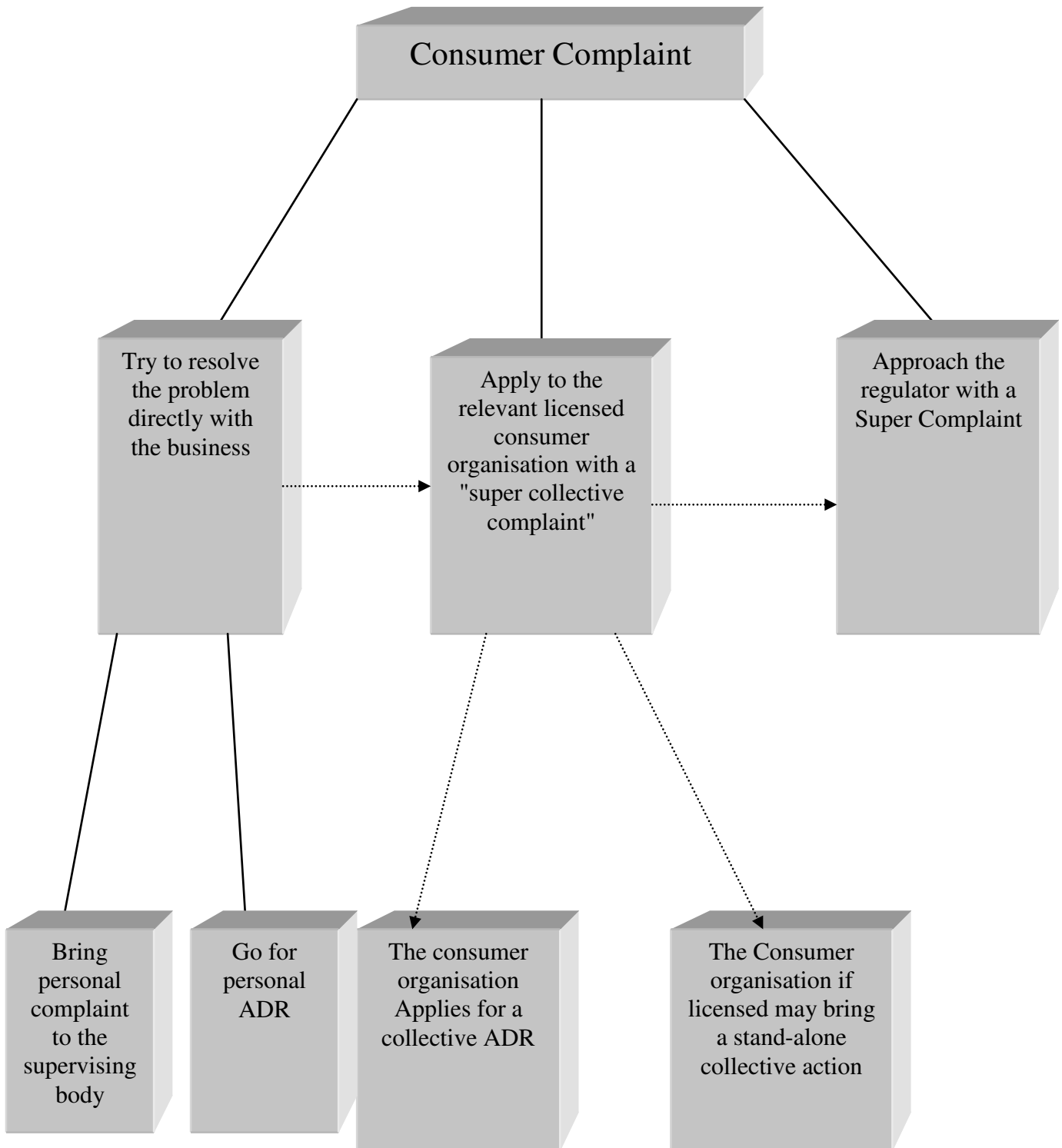
Every consumer wishing to bring a collective action should apply to the regulatory body, producing all the information that he possesses regarding the matter.

²³ Cal. Lab. Code § 2699(a).

Alternatively, the consumer may approach the relevant licensed consumer organisation which may bring a stand-alone action.

This root of action to regular personal actions either by solving the dispute directly by direct dialog with the business or by bringing further personal proceedings. The consumer may apply to the supervisor of the business e.g the ombudsman acting in that particular area, or bring a personal action or a personal ADR. All these ways of actions are not relevant to small claims which have negative in their natures, as the expected personal income is very low. The options available to consumers with a complaint are illustrated in Chart 5A annexed to this chapter.

Chart 5A
Options Available to Consumers with a Complaint



The regulatory body would have a certain time period in which to examine the complaint, following which it may decide on one of three actions. It may take the action itself, it may order that the representative cease taking any further action on the matter, or it may allow the representative to proceed with his stand-alone action. The possible decisions which the regulatory body may take are further explained in the following subsection.

A. *Suggested Considerations for Ceasing the Action in the New Model*

Looking at criminal private prosecutions in England, the DPP will take on the action in order to bring it to an end where the prosecution interferes with the investigation or prosecution of a criminal, where it can be said that the prosecution is vexatious²⁴ or malicious,²⁵ or where the prosecuting authorities have promised the defendant that he will not be prosecuted.²⁶

These grounds are also relevant to civil collective proceedings led by private individuals. Thus, if the regulatory authority considers a complaint to be vexatious or malicious, it should intervene in order to prevent a class action being filed against the defendant. Similarly, if the regulatory body has previously dealt with a similar complaint and reached an agreement with the trader for the benefit of the public, it should not allow a private action to proceed since this may hamper the pre-existing agreement reached with the trader. There should be some additional criteria similar to the grounds which the court takes into account at the certification process. Therefore the regulatory authority should be permitted to examine the merits of the action and disallow an action which is unsound on its merits. Furthermore, the regulatory body should examine the size of the class, and the adequacy of representation in order to decide whether it is appropriate to intervene so as to prevent the action from being filed. When the class of members is very small there is no reason to allow a class action, and where representation is unsuitable the regulator may order a replacement of representation. The regulatory body should adopt guidelines regarding when to

²⁴ Within the meaning of section 42, Supreme Court Act 1981, as amended by section 24, Prosecution of Offences Act 1985.

²⁵ According to the Public Prosecutor's view.

²⁶ The Crown Prosecution Service on Private Prosecution, available at: <http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an01> accessed on 28 January 2012.

certify an action, and the guidelines should be published in order to assist consumers in deciding when a super-complaint should be filed. Once the regulatory authority has brought proceedings to a halt, no class action should be filed. At least in theory, the regulator's decision to cease collective proceedings should not prevent a personal action from being filed. In practice, a private action for a minimal sum is not reasonable due to the hazards and costs involved and thus the decision of the regulator brings the matter to an end.

B. Suggested Considerations for a Regulatory Body Undertaking and Leading Proceedings

In the field of criminal law in England, the DPP will take on an action where evidence shows that a crime has been committed and there is public interest in bringing charges as well as a particular need for the CPS to take over the prosecution. Applying these considerations to civil procedure, the regulatory body should take on the action mainly to protect a public interest. Thus if the relevant case has a wide application to many class members and the action has good merits, then the public may lose if private hands lead the action. This may occur due to the abuse which can characterise private proceedings or due to inadequate representation or the lack of funds experienced by the representing plaintiff when dealing with a complex case and using expert opinions. If the case concerns large groups, or the decision may lead to a very important precedent, and there are good merits, then the regulatory body may continue with the action as the class representatives. If the regulator decides to take on the action, some remuneration should be paid to the persons who brought the super complaint. This remuneration is important in order to convince consumers to break with their apathy and submit proper complaints to the regulatory body.

C. Suggested Considerations for Allowing the Action to Proceed by the Same Representative

In the field of English criminal law, the relevant guidelines state that where there is sufficient evidence to demonstrate that a crime was committed, as well as public interest in bringing proceedings, and where there is no particular need for the CPS to take over the prosecution (either to stop it or to continue pursuing it) then the case

may proceed with the representative suggested unless there are exceptional circumstances. These guidelines may also be used in civil cases. Thus, if the complaint is found to be substantiated with evidence, it does not involve an important precedent, the representative can be trusted, and the suggested lawyer is adequate, then there is no reason to intervene and public funds may be saved by allowing the private action to proceed.

D. Failure to Respond within a Certain Time Limit or Decision not to Intervene:

The regulatory body should act efficiently. The examination of consumer complaints may require some additional manpower and resources; however, the regulatory body may be financed by the successful actions.

Consumer complaints should be dealt with in a reasonable time, otherwise the damages inflicted by the trader's misconduct may increase.

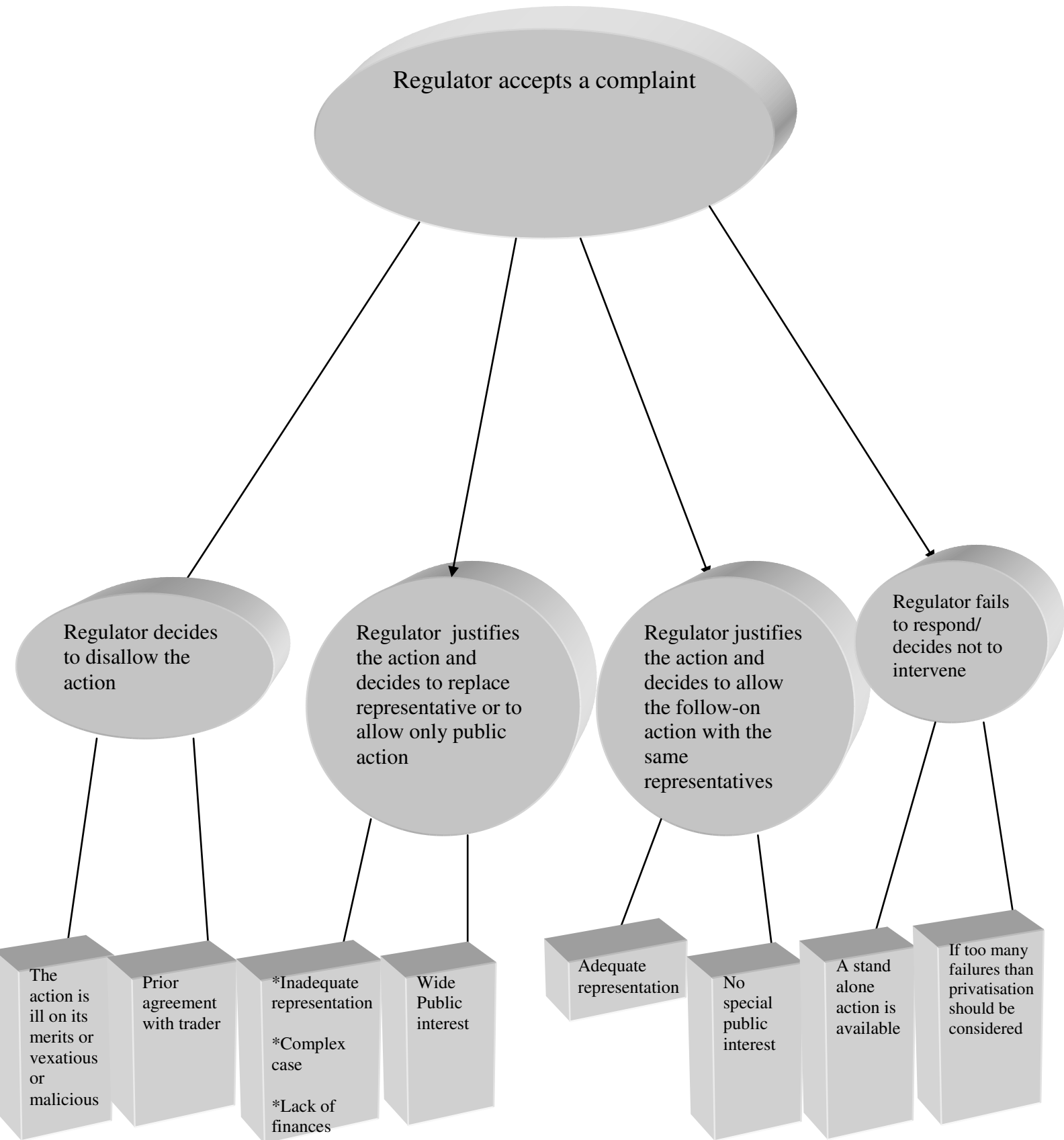
Therefore a time limit should be imposed. Where the trader fails to intervene within that time limit, a private stand-alone action should be available.

Where the state regulatory body cannot carry out the task of regulating collective actions itself, the privatization of this task should be considered.

The regulatory body may have the discretion not to intervene where it finds that the action may go through the courts procedure without inflicting too many costs or where the regulator finds that there is no need for further investigation and thus intervention is unnecessary.

The operation of the regulatory body may be exemplified in the following Chart 5B.

Chart 5B
The Operation of the Regulatory Body



3. *Privatising the Role of the Supervising Authority²⁷ to Allow the Action to Proceed with the Same Representative*

Professor Hodges suggests that if ADR proceedings do not bring the parties to a consensual solution, a regulatory public body should intervene.²⁸ He argues that Europe has come to the realisation that public enforcement may have a significant role in delivering consumer redress.²⁹ The supervising public authority should have various powers, the first power being to bring collective damages claims on behalf of a group of consumers and distribute the sums of damages amongst the class members at the end of the action. Such powers are already familiar to some European Member States, such as the powers vested in the consumer ombudsman under the Finnish Act,³⁰ and those invested in the Swedish Consumer Ombudsman.³¹ Another power is that which allows the regulatory body to impose damages on a business under its supervision. Some good examples are provided by the Italian telecoms complaints authority which has the power to award damages, as well as the U.K.'s telecommunications regulator, Ofcom, and the medical regulator, the MHRA.³² The new approach which is suggested by Professor Hodges³³ is based on restorative justice, and on the Hampton Report³⁴ on reducing enforcement burdens on businesses and the Macrory Report on penalties policy.³⁵ Though both these reports are not directly connected to collective redress, Professor Hodges considers them a good starting point for his new and innovative approach. The Macrory report encourages the settlement of infringements through restorative justice, a process where those most directly affected by a wrongdoing come together to determine what needs to be done

²⁷ Prof. Alon Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' [2002] Vol. 21 The Review of Litigation 25 <<http://www.faculty.idc.ac.il/klement/EngArt/TROL.pdf>> accessed 14 May 2011.

²⁸ Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (2010) 7 Civil Justice Quarterly 370.

²⁹ Professor Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008). F. Cafaggi and H.-W. Micklitz (eds.), *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement* (Intersentia, 2009).

³⁰ Act on Class Actions (444/2007), in force from 1 October 2007.

³¹ Group Proceedings Act 2002 (2002:599).

³² Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (n 28).

³³ Professor Christopher Hodges, *From Class Actions to Collective Redress: A Revolution in Approach to Compensation*, (2009) 28 Civil Justice Quarterly 41.

³⁴ P. Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury, 2005).

³⁵ R. Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006).

to repair the harm, to prevent a reoccurrence, and to give preference to restitution of illicit gains. The U.K. English legal system has proposed establishing a Consumer Advocate to liaise with relevant enforcers and seek to help the business in question to propose a satisfactory compensation package on a voluntary basis.³⁶

In this work, this author suggests vesting other important powers in public regulatory hands. These are mainly monitoring powers rather than enforcement powers. These new powers require the public regulator to decide when and how a collective action should proceed either by public enforcement or by follow-on private action. The regulator also has the power to decide to bring a complaint to an end when appropriate. These tasks may be too much to ask from the public sector in some states. Yet, it does not bring the model advocated in this work to its end. It is very much envisaged that in many instances the monitoring role of the regulator will be privatised and transferred into the hands of a private monitoring agency.

Professor Klement deals with a private monitoring system to ensure that lawyers perform their role for the benefit of the class they represent.³⁷ Prof. Klement's approach entails privatising the monitor's role in class actions in order to prevent abuses which are related to lawyer-driven litigation. Thus public regulatory bodies are not required in order to supervise class actions. The monitor will choose the class lawyer and negotiate his fee. The monitor will examine the lawyer's performance and may object to settlement offers. The monitor may even petition the court to replace the lawyer where this is necessary. The monitor will be appointed on an auction basis and will be remunerated from the income generated by the action. Private monitoring will therefore save a regulatory body's public funds. The problem with this model of

³⁶ HM Government, Consumer White Paper "A Better Deal for Consumers: Delivering Real Help Now and Change for the Future" (July 2009) available at <<http://www.berr.gov.uk/files/file52072.pdf>> accessed 20 April 2012. See further Department for Business Innovation & Skills, Consultation: The Role and Powers of the Consumer Advocate, (2 December 2009) at <<http://www.berr.gov.uk/consultations/page53813.htm>>

³⁷ Prof. Alon Klement, (n 25); Prof. Alon Klement, 'Private Monitoring in Common Fund Class Actions' (Harvard J. M., Olin Center For Law, Economics, and Business Discussion Paper No. 310 2/2001) available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=262336> accessed 24 September 2011.

privatisation, is that it does not prevent the problem of flooding the system with cases since the monitor is only chosen once the action has been submitted to court.

Therefore, Professor Klement's model may be modified and the monitoring task enlarged to include privatisation of the regulatory body which filters the actions before such actions are submitted to court. The appointed privatised body should give its written opinion on every proposed action and should be permitted to refuse the action, or propose that the relevant parties enter negotiations with a view to reaching a settlement. Where a settlement is reached, it would be approved by the privatised body. Furthermore, the privatised body could suggest adequate representation with proper remuneration to the entrepreneur.

If such a system of private monitors with extended powers is adopted, states may run a system of tenders in order to appoint private organisations to filter and supervise the management of class actions, both before and after they are submitted to the courts. The private body may be chosen in an auction procedure and may be funded by the successful actions exactly as Professor Klement suggests with regard to a monitor's remuneration even though the powers are extended to include the supervision of suggested actions (consumer complaints) before they are submitted to court.

In this author's opinion, Professor Hodges' proposal to monitor the proceedings using a regulatory body is preferable, since it enables the court to enjoy the advantages of public enforcement including very wide powers requiring discovery of information as well as wide powers of investigation. Public enforcers appear to be more objective and will look at the general good of enforcement, whereas private enforcers may look at their own pockets.³⁸ A further objection to the private monitoring system lies in the traditional powers of states. According to this view, it is the state that should maintain authority regarding when to prosecute its citizens.³⁹ Therefore, if the regulator is to

³⁸ Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' [March 2009] 2(1) World Competition 3-26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458> accessed 24 November 2011.

³⁹ Jody Freeman, 'The Private Role in Public Governance' (2000) 75 N.Y.U.L. Rev. 543, 632-633 (2000). See also Clifford J. Rosky, 'Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States' (2004) 36 Connecticut Law Review 879 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402522> accessed 9 February 2012.

decide when an action should be submitted or when it should be dismissed or settled, then the state retains its powers to supervise the proceedings. This objection to private regulation is not convincing because theoretically, collective proceedings are merely the bundling of civil actions which are in any case dealt with by the private sector. Furthermore, in Europe, public enforcement of consumer complaints may rely on the existing infrastructure mentioned above, such as the Consumer Ombudsman under the Finnish Act⁴⁰ the Swedish Consumer Ombudsman,⁴¹ the Italian telecoms complaints authority, the U.K. telecommunications regulator, Ofcom, and the medical regulator, the MHRA.⁴²

For the purposes of this work, it is sufficient to conclude that whatever system of regulation is to be employed, it is clear that in order to prevent the flood problem which is so evident in Israel, some scrutiny is required prior to the submission of the action to the judicial system. Thus, even if the regulatory body finds that there are good grounds for the submission of a case, it should still try to keep the case out of court using available ADR systems (as explained in the next part of this chapter) or try to settle it where a settlement is possible.

B. The Introduction of ADR in Collective Disputes

A different mechanism which could be used to deal with the flood of legal actions in Israel would involve enlarging the existing system of out of court procedures. These procedures are commonly known as ADR procedures.

1. ADR Procedures

ADR procedures are generally and internationally defined as out-of-court dispute resolution processes conducted by a neutral third party. ADR may be agreed upon by the parties or initiated by the court which then refers the dispute to a third party.⁴³

⁴⁰ Act on Class Actions (444/2007), in force from 1 October 2007.

⁴¹ Group Proceedings Act 2002 (2002:599).

⁴² Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (n 28).

⁴³ Commission of the European Communities, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' COM(2002)196 final (Brussels, 19 April 2002) available at

Certain out-of-court decisions bind one of the parties to the dispute, such as the decisions of an ombudsman which bind the companies subject to his supervision, including insurance companies or banks. Other ways to settle cases out of court involve adopting the recommendation of a non-judicial body such as complaint board.⁴⁴ ADR procedures are aimed at reaching a decision agreed upon by the parties with the assistance of a third party. These procedures should be distinguished from arbitration which is a less formal adjudicative procedure leading to a binding decision by a third party.

The most common type of ADR procedure is mediation. The international characteristics of mediation are that it is an informal, non-coercive procedure, based on the voluntary participation of the parties who engage in assisted, confidential negotiations in order to reach an agreed solution.⁴⁵

The mediation process is informal and completely confidential so that the parties may speak more openly than in court. In Canada, the Attorney General of Ontario adopted a mandatory mediation scheme⁴⁶ arguing that⁴⁷

Many people find mediation more satisfying than a trial because they play an active role in resolving their dispute, rather than having a solution determined by a judge.

The procedure is less costly and prevents years of legal proceedings. The legal costs are reduced as there is no need for lengthy litigation and no need to prepare long statements or witnesses for cross-examination. Many parties negotiate during the course of litigation. Over 90 percent of all lawsuits in Canada settle before getting to

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0196:FIN:EN:DOC>> accessed 14 January 2011.

⁴⁴ Commission of the European Communities, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' (n 43). See the reference to the consumer complaint boards which operate in the Scandinavian countries mentioned at footnote no. 8.

⁴⁵ See the Department of Justice in Canada, 'Dispute Resolution Reference Guide' available at <<http://www.justice.gc.ca/eng/pi/dprs-sprd/ref/res/drrg-mrrc/04.html>> accessed 13 January 2012.

⁴⁶ The Ontario Mandatory Mediation Program came into operation on 4 January 1999 in Toronto and Ottawa, and on 31 December 2002 in Windsor.

⁴⁷ Ontario Ministry for the Attorney General, 'Public Information Notice Ontario Mandatory Mediation Program' available at <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp>> accessed on 13 January 2011.

the trial stage.⁴⁸ Mediation assists in finalising the action by a settlement in the earliest stages of the process.

Generally, the best solution to a problem is one carved out by the parties themselves. Mediation often leads to resolutions that are tailored to the needs of all parties. The solutions in mediation proceedings are flexible and are particularly suited to situations where the parties have an ongoing relationship, and wish to resolve the dispute whilst preserving this relationship.⁴⁹

2. ADR Developments in Europe

In Europe, ADR is generally preferred over legal proceedings since it is thought that the best solution to a problem is one fashioned by the parties themselves, rather than a decision imposed by the court which may be subject to appeal and further legal proceedings. The European Commission has taken various initiatives over the last decade to promote ADR solutions in general, and mediation in particular, in order to build consumer confidence at EU level.⁵⁰ The European Commission has financed certain bodies entrusted with the task of promoting consensual out-of-court settlements.⁵¹ Online dispute resolution systems, generally known as ODRs have also been developed.⁵²

⁴⁸ Ontario Ministry for the Attorney General, 'Public Information Notice Ontario Mandatory Mediation Program' (n 47).

⁴⁹ Ontario Ministry for the Attorney General, 'Public Information Notice Ontario Mandatory Mediation Program' (n 47).

⁵⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), a Joint Declaration by the Council and the Commission made when the "Brussels I" Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was adopted.

Directive 98/10/EC on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment provides that "easily accessible and in principle inexpensive procedures shall be available at a national level to resolve such disputes in a fair, transparent and timely manner" in the Member States.

Directive 2002/21/EC (Framework Directive) on a common regulatory framework for electronic communications networks and services provides for non-judicial structures to settle disputes between professionals.

⁵¹ See the Commission Recommendation 2001/310/EC of 4 April 2001 on the principles applicable to the extrajudicial bodies charged with the consensual resolution of consumer disputes, OJ L 109, p.56.

⁵² See Melissa Conley Tyler, 'More than 1.5 million disputes resolved online', (2004) Vol. 7(3) ADR Bulletin, Article 5. Available at <<http://epublications.bond.edu.au/adr/vol7/iss3/5>> accessed 17 January 2012. See also Jason Krause, "Settling It On the Web New technology, lower costs enable growth of online dispute resolution," The ABA Journal, posted 1.10.2007 at 12:12 PM CST.

The European Commission issued a Green Paper on Alternative Dispute Resolution in 2002, once many Member States had already passed legislation encouraging such practices. In its Green Paper, the European Commission explained the growing interests of the community in ADR mechanisms due to increasing awareness of ADR as a means of improving general access to justice in everyday life.⁵³

The European Commission recommended that parties reach a mutually-agreed out-of-court settlement using procedures based on the principles of impartiality, transparency, effectiveness and fairness.⁵⁴ In its "Consumer Policy Strategy 2002-2006," the European Commission emphasises ADR as an ideal means for cross-border conflict resolution.⁵⁵

The European Commission has also established two European networks of national bodies both aimed at facilitating consumer access to out-of-court procedures for the resolution of cross-border disputes. The European extra-judicial network (EEJ-Net) was launched in October 2001 to co-ordinate out-of-court-settlement procedures throughout Europe.⁵⁶ The EEJ-Net provides a communication and support structure made up of national contact points (or "clearing houses") established by each Member State. The clearing houses are aimed to help consumers with information and support in making a claim to an appropriate out-of-court alternative dispute resolution system. The EEJ-Net is complemented by FIN-NET, which is a network of the competent national ADR bodies which provide consumers with direct access to an ADR facility for problems relating to financial services, such as banks, insurance companies and investment services. FIN-NET, which was established in February 2001, has a wide out-of-court network for dealing with such complaints.

Available at: <http://www.abajournal.com/magazine/article/settling_it_on_the_web/> accessed 17 January 2012.

⁵³ Commission of the European Communities, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' (n 43).

⁵⁴ Commission of the European Communities, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' (n 43).

⁵⁵ Commission of the European Communities, 'Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and the Committee of Regions Consumer Policy Strategy 2002-2006' COM(2002) 208 final (Brussels, 7 May 2002).

⁵⁶ See in particular, on the EEJ-Net, Commission working document SEC(2000) 405, <http://ec.europa.eu/consumers/redress/out_of_court/eej_net/acce_just07_en.htm> accessed 14 January 2012. See also Council Resolution of 25 May 2000, OJ C 155, p.1, available at <<http://eur-lex.europa.eu/en/legis/latest/chap152010.htm>> accessed 14 January 2012.

With regard to mediation, the European Commission launched a Code of Conduct for Mediators in July 2004,⁵⁷ which was approved and adopted by a large number of mediation experts. In October 2004, the European Commission and the European Parliament issued a Directive on certain aspects of mediation in civil and commercial matters.⁵⁸

ADR schemes have also been developed on national levels, including the following:

Spain has adopted a system of consumer arbitration.⁵⁹ The Consumer Arbitration Board cannot intervene when the claimant is not a final consumer, or where there is a reasonable suspicion that a crime is involved. Consumer arbitration is only relevant where both parties have agreed to settle their dispute⁶⁰ before the Arbitration Board and the arbitration prevents a claim being brought to the courts or a court hearing the case.⁶¹

In England, the Ministry of Justice has already announced that financial and child custody disputes must initially go through mediation before continuing, if unresolved, in court. This initiative is aimed at reducing expensive, lengthy and often stressful litigation which ends in a judgment. "For far too long, access to justice has been equated with 'having one's day in court.'"⁶² Mediation aims to resolve the difficulties involved in lengthy, stressful and costly legal proceedings.

⁵⁷ Available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm accessed 14 January 2012.

⁵⁸ 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] OJ L136/3. Available at <<http://translate.google.co.il/translate?hl=iw&sl=en&tl=iw&u=http%3A%2F%2Feur-lex.europa.eu%2FLEXUriServ%2FLEXUriServ.do%3Furi%3DOJ%3AL%3A2008%3A136%3A0003%3A0008%3AEN%3APDF&anno=2>> accessed 14 January 2012.

⁵⁹ Royal Decree 231/2008 of 15 February, 2008, <<http://www.uclm.es/centro/cesco/english/legislacion.asp>> accessed 16 December 2011.

⁶⁰ Eduardo Vazquez de Castro, 'Mediation in Consumer Matters. An Approach in European and Spanish Law' (June 2010) 1(2) Journal of Conflictology 1 available at <<http://journal-of-conflictology.uoc.edu/ojs/index.php/journal-of-conflictology/issue/view/vol1iss2>> accessed 15 December 2011.

⁶¹ Spanish National Consumer Arbitration Board, <<http://www.ukecc-services.net/SpanishNationalConsumerArbitrationBoard.cfm>> accessed 15 December 2011.

⁶² The Justice Minister, Jonathan Djanogly, (Civil Mediation Council conference, Lowry Hotel, Manchester, 11 May 2001) at <<http://www.justice.gov.uk/downloads/about/moj/our-ministers-board/speeches/djanogly-110511-mediation.doc>> dated 11 May 2011.

The new Italian law which incorporates the EU Directive on mediation for cross-border civil disputes requires those involved in most civil cases to attempt mediation initially. There has been much criticism from Italian lawyers, particularly over the fact that mediation will now be compulsory. Yet the general public in Italy has welcomed the initiative because they consider that their civil justice system does not work well. The introduction of mediation was seen as a positive way of avoiding waiting two years for trial and paying costly lawyers' fees. On the other hand, many lawyers fear they will lose business. Commentators have pointed out that lawyers' opposition to the Italian reforms has resulted in further damage to their reputation.⁶³

In Israel, the courts may recommend that parties settle their dispute by methods which include mediation, arbitration, or a third party examination of the merits of the case.⁶⁴

In Israel, mediation is defined as a procedure where a third party tries to bring the litigating parties to an agreement. The mediator has no authority to decide the dispute, nor to compel the parties in any way.⁶⁵ These out-of-court proceedings are regarded as ADR proceedings. They are not compulsory and are based on the consensus of the parties to enter into ADR proceedings and to settle the case out of court.

With regard to collective proceedings in Israel, any party may bring a stand-alone action without paying court fees. They will have a reasonable chance of obtaining a bonus if the action succeeds or if a settlement is imposed on the defendant. Consumers in Israel have no incentive to try and settle their disputes using ADR mechanisms prior to submitting the action to court. ADR procedures are not common in collective actions, either before or after the commencement of the action. However, compromises during the legal procedure (following the submission of an action) are a well-established practice once the collective action has been submitted to court. Such

⁶³ Owen Bowcott, 'Compulsory mediation angers lawyers working in Italy's unwieldy legal system - Industrial action by the country's advocates' union has tarnished the reputation of lawyers further in the eyes of the general public', *The Guardian Newspaper*, (23 May 2011) at <<http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/may/23/italian-lawyers-strike-mandatory-mediation>> accessed 16 December 2011.

⁶⁴ A certain court department was established in 2002 to refer cases for mediation under the Bylaws for the Courts Department for Directing Cases 2002, available in Hebrew at <<http://elyon1.court.gov.il/heb/laws/manat.htm>> accessed 14 January 2012.

⁶⁵ Sec 79 C (A) of the Courts Law (Consolidated version) 5744-1984 (Israel) as amended in 2001.

compromises are subject to detailed legal provisions which deal with the approval of settlements.

Whilst in Israel a collective legal action is the first port of call for consumers, Professor Hodges repeatedly recommends that recourse to the courts in collective proceedings should be the last resort once ADR and regulatory procedures have been exhausted.⁶⁶ He argues that voluntary settlements should be encouraged, with the main questions being how best to encourage parties to settle their collective dispute without court proceedings and how to supervise such a settlement.

3. Encouraging Parties to Participate in ADR

According to recent data provided by the Irish Chamber of Commerce, there are currently 750 ADR schemes operating in Europe relating to business-to-consumer disputes. Sixty-four percent of these ADR processes are voluntary. Yet only 9% of retailers were reported to have used ADR schemes and only 6% of traders are members of ADR schemes.⁶⁷ According to a report by the London-based National Consumer Council (NCC), entitled the Availability and Usage of Consumer-to-Business Alternative Dispute Resolution in the United Kingdom,⁶⁸ the availability of ADR for consumer problems is "ad hoc and presents a lottery for the consumer." Moreover, the report noted that the provision of ADR services varies widely according to the type of dispute in question and when it arises. It found that "microscopically small fractions of consumer complaints are referred to an ADR service". The usage was found to be very low even where the ADR schemes were free. The NCC found that the major reasons for the low take-up rates are a lack of awareness of the procedures, the unenforceable nature of the outcome of the

⁶⁶ Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (n 28). Professor Christopher Hodges, 'Response to consultation: Towards a Coherent European Approach to Collective Redress:' available at: <<http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>> accessed 28 July 2011.

⁶⁷ Lynnsey Delaney (European Consumer Centre) Speech on Alternative Dispute Resolution (Dublin Chamber of Commerce, 11 May, 2011), available at <<http://www.slideshare.net/PatrickKing1/alternative-dispute-resolution-7922508>> accessed 20 January 2012.

⁶⁸ Margaret Doyle, Katrina Ritters and Steve Brooker, *Seeking Resolution: The Availability and Usage of Consumer-to-Business Alternative Dispute Resolution in the United Kingdom* (National Consumer Council, 2004) available at <www.ncc.org.uk/protectingconsumers/seeking_resolution.pdf> accessed 20 January 2012.

procedure, the quality of the scheme, and the fee to be paid. The payment of a fee in consumer cases is very problematic since normally the value of the damage suffered is very small.

A dispute may be settled quickly and easily using ADR proceedings. These proceedings are less costly than litigation and do not require the intervention of lawyers and other experts. ADR procedures do not bear the risk of abuse which is attributed to court class actions. Yet they are very rarely used and the question remains as to how to encourage the use of ADR mechanisms, especially in collective redress cases which may run the risk of abuse.

In relation to collective disputes, scholars including Professor Hodges claim that ADR procedures should be encouraged and given preference over court proceedings which should remain the last recourse.⁶⁹ However, one should ask how to realise this ideal. Professor Hodges answers this question by explaining that a court procedure would act as a stick if parties (especially the defendants) knew that failure to settle the case would result in a class action being launched against them.⁷⁰

In Israel, some steps were taken to encourage ADR schemes in party to party cases. Since 2007, every action for an amount not exceeding 50,000 NIS (approximately GBP 12,000) is subject to a compulsory informal meeting where the possibility of settling the case through mediation is examined.⁷¹ Judges cannot deal with such claims unless the informal meeting has taken place. The informal meeting takes place following submission of both the claim and the defence papers by the respective parties. The advantage of this system is that mediation takes precedence, and parties may not proceed with the action unless the possibility of mediation is seriously discussed with them. Furthermore, if the case is settled either by mediation, arbitration, or in the early stages of the process before the hearing, the court may return a claimant's court fees.⁷²

⁶⁹ Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (n 28) at page 374.

⁷⁰ Professor Christopher Hodges, 'Collective Redress in Europe: The New Model' (n 28), see at page 376.

⁷¹ Sec 99(a)-99(j) of the Civil Procedure Rules 1994 as amended in 2007.

⁷² Sec 6 (B) of the Court Fees Regulations as amended in 2007.

The problem with Israel's ADR incentive model is that it is a court-driven procedure, requiring that a legal action be brought before the informal meeting is imposed on the parties. The negotiations begin too late, once both parties have already expended substantial legal costs on the preparation of their claim or defence. The repayment of court fees provides little incentive where substantial costs have already been paid. Furthermore, the defendant has no real incentive to settle the case in mediation before the case goes to court, as court fees are only paid by the plaintiff.

In this author's opinion, an effective ADR mechanism should operate from the outset, once a dispute has arisen. At that stage, the parties are not as angry as in later stages. They have not suffered substantial legal costs.

ADR procedures should be mandatory in consumer cases and may be imposed at two levels.

The first level should be based on direct negotiations between the consumer and the business, such as disputes involving small- or medium-sized businesses, since it is not logical to impose an in-house complaint settlement mechanism in these cases. However, if the small- or medium-sized company is a member of a certain union, it should be subject to the union's complaint resolution system. In-house complaint resolution systems should be imposed on large companies by the European Union.

A second level is necessary when a business requires the customer to participate in an ADR procedure. Such a mechanism should appear in the contract between the parties, and such clauses should not bar the consumer from bringing legal action if ADR procedures fail. In Sweden, France, and the U.K., consumer contracts that contain arbitration clauses are invalid where they prevent consumers from pursuing court proceedings should they wish to do so. In this regard "the 1998 and 2001 recommendations of the European Commission on out-of-court settlements in consumer cases, provide that ADR procedures may not deprive consumers of their

right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised."⁷³

A further protective measure which does not exist in Israel but could be integrated into a new model of collective redress is based on Part 36 of the Civil Procedure Rules of England and Wales. Under this provision, an English court may exempt one party from the full payment of costs if the other party unjustifiably refuses to accept an offer to settle the case.⁷⁴ This provision could be adopted in relation to ADR procedure in collective redress cases so as to act as an incentive for parties to settle their dispute without the need for a court decision. The only problem is that such a provision might encourage a defendant to settle a weak case in order to minimise their legal costs. The advantage of making an offer to settle in consumer cases is that it may save legal costs that sometimes may be higher than the benefits to the class of consumers.⁷⁵

4. ADR in Collective Redress Cases

The problem with using dispute settlement in collective redress cases run by private representatives is that the representative plaintiffs and the defendants may reach an agreement which does not benefit the whole class. ADR procedures are mainly aimed at bringing the defendant and the plaintiff to an agreement. In their normal form, such proceedings are inappropriate for settling collective disputes.

The question is how to ensure that an out-of-court settlement does not overlook the interests of absent members. This author believes that a solution lies in the Dutch mechanism of collective settlements introduced in 2005.⁷⁶ The Dutch model was

⁷³ OECD, 'Consumer dispute resolution and redress in the global market place' (2006) available at <www.oecd.org/dataoecd/26/61/36456184.pdf> accessed 20 January 2012, see page 19.

⁷⁴ Professor John Peysner and Angus Nurse 'Representative Actions and Restorative Justice: A Report for the Department for Business Enterprise and Regulatory Reform' [December 2008] BERR ITT No.101/08 at <<http://www.berr.gov.uk/files/file51559.pdf>> accessed 22 October 2011.

⁷⁵ See for example in *Solutia UK Ltd v. Griffiths* [2001] EWCA Civ 736, 165 where residents near a factory claimed damages as a result of a leak of noxious gas. The claimants' solicitors incurred costs of £210,000 in a dispute that settled for damages of £90,000.

⁷⁶ The Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade) which came into force on 27 July 2005.

created in order to ensure that a settlement binds all parties to a single legal action.⁷⁷ The settlement must be reached out of court, and the agreement is a prerequisite for the parties to apply to the court.⁷⁸

This model was the result of a case relating to the use of the drug DES (diethylstilbestrol) in pregnant women. A settlement was reached and a fund of EUR 35 million was established,⁷⁹ half of it financed by the pharmaceutical industry, and the other half by the insurers. The settlement came with the condition that it should be a final settlement for all Dutch victims. The settlement was approved by the court and a decision that it binds all other victims was reached.

In a collective settlement, the main advantage for the injured parties is that the liable party is generally more willing to reach an agreed settlement because he/she can negotiate the amount of damages that will be paid out, and the action will be concluded in one procedure without any further satellite proceedings.⁸⁰

The Dutch system sits well with collective disputes pertaining to large classes. The opt-out period for class members in this system is at least three months.⁸¹ In other words, class members become parties to the settlement agreement and are entitled to receive payment of the stipulated compensation amount even if they are not aware of the existence of a settlement. Thus, the defendant may opt-out only if this is explicitly stipulated in the settlement and, in any case, the opt-out period for the defendant should be no longer than six months after the expiry of the opt-out period for class members. Such a provision is reasonable and should be included in any new collective redress framework, since a settlement which is not preferred by a majority of class members is no longer "representative" and should be dismissed as a collective action and allowed to proceed as a personal action.

⁷⁷ Dr. I. N. Tzankova, 'Class Actions in the Netherlands (Parts 1 & 2)' [2007] and [2008]. <<http://globalclassactions.stanford.edu/taxonomy/term/65>> accessed 29 July 2010. Dr. I.N. Tzankova, 'Class Actions, Group Litigation and Other Forms of Collective Litigation Dutch Report' available at: <<http://www.law.stanford.edu/calendar/details/1066/>> accessed 22 October 2011.

⁷⁸ Article 7:907 par. (1) Civil Code (Netherlands).

⁷⁹ Willem H. van Boom, 'Collective Settlement of Mass Claims in The Netherlands' (18 August 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456819> accessed 29 July 2011.

⁸⁰ Prof. Dr. M.B.M. (Marco) Loos, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report The Netherlands' (Civic Consulting, 2008) at <ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf> accessed 27 October 2011.

⁸¹ Article 7:908(2) Civil Code (Netherlands).

The Dutch system has been found to be very useful in approving U.S. class action settlements in the Netherlands in order to prevent European consumers from bringing further actions against the same defendant.⁸²

The collective settlements agreements are reached in negotiations between the parties and are then examined by the court. Under Dutch law, the court examines the suggested settlement, ensuring that various criteria are met so as to protect class members from an unfair settlement. The most important requirements that must be met in order to obtain court approval for a settlement are as follows:⁸³

1. The amount of compensation should not be unreasonable;
2. The defendant's performance must be sufficiently guaranteed – the court may look into the question of whether the plaintiff is insured.
3. The representative organisation must sufficiently represent the class. The number of class members must be sufficient to warrant certification.

The court in the Netherlands may appoint an expert in order to give his opinion as to the benefit of the settlement to class members. If the court approves the settlement, it binds all those class members who did not opt-out on time. In other words, class members become parties to the settlement agreement and are entitled to receive payment of the stipulated compensation amount even if they are not aware of the existence of such settlement. There is no possibility for appeal and only the petitioning parties can jointly present their case to the Supreme Court under restricted conditions.

5. *Conclusions on ADR*

Looking at the Dutch model, it is certainly possible to use a system of settlements which are reached as a result of ADR proceedings prior to any legal action being

⁸² Annemieke Hendrikse and Simone Hoogeveen, 'The Netherlands: US Style Glass Action Settlement Creates Alternative Forum for Resolution of Mass Disputes' at <www.vandoorne.com/Global/Publicaties/Hendriksehoogeveenharmonie.pdf> accessed 29 July 2011. See also the Koninklijke Ahold N.V (The Ahold Case) JOR 2010, 225, judgment on 23 June 2010.

⁸³ Article 7:907(3)(b)-(h) Civil Code (Netherlands).

taken. The Dutch Collective Settlements Act should be incorporated into the new model in order to assist in preventing the flood of actions which is occurring in Israel as a result of private stand-alone actions being brought as an initial recourse without any prior negotiations between the parties and without any examination of the merits of the claim until the certification stage. The Dutch model examines the benefits of the suggested model to the class members and to those who are absent from the proceedings.

As far as ADR is concerned, in order to encourage parties to settle their case using ADR procedures, some new measures should be considered. A Mandatory ADR should be imposed in consumer collective redress actions. The introduction of a mandatory ADR scheme would reduce the flood of actions and increase the number of settlements. Defendants should feel an incentive to settle the case on the basis that if the case is not settled, the class action which follows would be submitted with all the hazards and bad publicity it entails. Plaintiffs could be awarded a reasonable bonus for their efforts to reach a successful settlement, which would be appropriate when a settlement benefits the class members.

The argument against introducing a mandatory ADR mechanism in collective redress cases is that mandatory ADR may result in a prejudicial delay being suffered by consumers. Thus, opponents of mandatory ADR in collective redress proceedings argue that the judge hearing the case may encourage the parties to try to resolve matters through ADR if he thinks it appropriate.⁸⁴ Furthermore, ADR proceedings are less costly and quicker than collective court actions, and thus the argument that defendants may use the procedure in order delay matters is not a convincing argument for opposing mandatory ADR.

⁸⁴ Deborah Prince, Head of In-House Legal Which?, 'Consultation Response to the Public Consultation: Towards a Coherent European Approach to Collective Redress' (Which!, 26 April 2011) available at <http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html> accessed 23 January 2012.

C. Cross-border Issues

Questions of cross-border trade and applicable law remain unanswered with respect to the Israeli model. When looking to adopt the Israeli mechanism of collective redress, one clear adaptation that must be made is the need to deal with the issue of different jurisdictions. The Israeli model is reticent on the question of how consumers whose domicile is not in Israel may enforce a judgment in collective redress proceedings.

Furthermore, the Israeli model is not suitable to cater to questions of "forum shopping" which may arise in Europe. The questions on forum shopping were found to be crucial in the U.S. where many states fall under federal jurisdiction, and thus this may be of great importance to any European debate.

The lessons learnt from the Israeli model may be most relevant to a new European model. However, in Europe it is also important to resolve questions of differences in jurisdictions, an issue not covered by the Israeli model. Although these questions fall outside the scope of this work, it is still important to take a glimpse at some jurisdictional issues so as to enlarge the scope of the lessons learnt from Israel to cover the issue of jurisdiction through lessons learnt from the U.S. as these will form a crucial part of any future European collective redress instrument.

Historically in the U.S., state decisions created inconsistency in class action treatment between different state courts. As a result, class representatives preferred to bring their cases in states where they were met with favourable treatment.

Therefore, the only proper example to consider when examining the issue of how to deal with problems resulting from having different jurisdictions within one area is that of the United States.

1. The Problem of Different Models in the European Community

In order to maximise the advantages of the European Union, the European Commission wants citizens to take full advantage of the internal market. The European Union institutions have come to the conclusion that they must do more to

ease cross-border transactions.⁸⁵ In her policy strategy, Commissioner Kuneva stated that by 2013, the objective of promoting the internal retail market by making consumers and retailers as confident shopping cross-border as in their home countries is to be achieved.⁸⁶

In its recent consultation paper on coherent collective redress, the European Commission noted the following issues:

[...] the current divergence of national legal systems notably as regards compensatory collective redress, the need for effective cross-border enforcement and the need to avoid abusive litigation, including "forum shopping."⁸⁷

Indeed, it is problematic that in Europe there are sixteen different types of collective redress mechanisms, and there is no coherent model for collective redress. The lack of a single collective redress mechanism results in uncertainty as regards trade between Member States, and causes difficulties to consumers when purchasing goods in other Member States.

The importance of improved enforcement in the European Union has also been mentioned in the European Commission's consultation paper on collective redress which stated that:

Effective enforcement of EU law is of utmost importance for citizens and businesses alike... Rights which cannot be enforced in practice are worthless.

⁸⁵ Commission of the European Communities, 'Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses' COM(2010)348 final (Brussels, 1 July 2010).

⁸⁶ Commission of the European Communities, 'EU Consumer Policy Strategy 2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them' COM(2007) 99 final (Brussels, 13 March 2007).

⁸⁷ Commission of the European Communities, Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011) available at <http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf> accessed 2 June 2011.

Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation.⁸⁸

The lack of confidence in cross-border trade within the community and the need for an improved mechanism to settle cross-border disputes was also dealt with in the Flash Eurobarometer survey which analysed the problems of consumer confidence between August and September 2002.⁸⁹ According to this survey:

- Three in four Europeans see all measures to increase confidence in cross-border purchases named in the survey as very or fairly important.
- The top places among measures to increase confidence in cross-border purchases are occupied by:
 - strengthening consumer protection laws in all EU countries (by 80% seen as very or fairly important);
 - harmonisation of consumer rights and protection (by 79% seen as very or fairly important); and
 - allowing national authorities to intervene on behalf of consumers in other EU countries" (43%)

As emphasised in this survey, it is crucial to allow European consumers from one Member State to pursue their rights against traders in another Member State in order to improve certainty in cross-border trade. The possibility of gaining redress will certainly empower and encourage trade amongst Member States. Consumer redress in cross-border trade is in line with the Community's interests. It is an important step in making consumers feel more confident that they can achieve proper and inexpensive redress should something go wrong. Without such a system, consumers will prefer to

⁸⁸ Commission of the European Communities, 'Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses' (n 85).

⁸⁹ Flash Eurobarometer (EB) 57.2 – Spring 2002, at <http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf>.

shop in their own countries where they feel more secure rather than buying goods in other Member States.

A further problem with the existence of different types of redress models in different Member States is that consumers may prefer to pursue their claims under a jurisdiction which boasts a more attractive system, rather than bringing the action in the proper jurisdiction.

In order to resolve this problem of "forum shopping" for a convenient jurisdiction, the new model should provide a unified set of rules which does not prefer one state over another.

2. Problems with Cross-border Proceedings within the Community

Collective redress in Israel was found to boost Israeli consumer powers. However, in Europe, collective redress is likely to have an additional role which is to further cross-border trade within the European Community, by increasing confidence in cross-border transactions. The European Union has made enormous progress in addressing individual cross-border disputes in a series of recent pieces of legislation.⁹⁰ However, as cross-border trade increases, there are many situations in which European citizens from different Member States may be affected and suffer damage as a result of the wrongful action of one trader. Citizens from one Member State may purchase goods in another Member State or may order goods produced in another state electronically. The common question which arises in such a situation is which court should have jurisdiction if a collective action is submitted, and which law should be applied, given that collective redress mechanisms differ from one state to the next.

⁹⁰ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L 364 of 9 December 2004.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143 of 30 April 2004.

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399/1-32 of 30 December 2006.

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1-22 of 31 July 2007.

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] OJ L136.

Ideally, if all collective redress mechanisms in Europe resulted in a similar outcome, it would not matter where the case was managed, provided that the judgment was recognised in all Member States.

With regard to mutual recognition, it is the European Commission's role to ensure that a judgment given in one Member State is enforceable in another Member State.⁹¹ Article 81 ex Article 65 TEC of the Treaty on the Functioning of the European Union provides that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of Member States.⁹² The article provides that such measures include the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases,⁹³ effective access to justice,⁹⁴ and the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.⁹⁵

The existing measure on jurisdiction and recognition and enforcement of judgments in civil and commercial matters⁹⁶ provides that the general rule regarding recognition is that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required.⁹⁷ The Brussels Regulation provides for some exceptions as outlined in Article 34 of the Regulation giving power

⁹¹ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures – European Debates' (2009) *International and Comparative Law Quarterly* 379, 406.

⁹² Art 81 (1) ex Article 65 TEC, Consolidated version of the Treaty on the Functioning of the European Union. See Consolidated version of the Treaty on the Functioning of the European Union/Title V: Area of Freedom, Security and Justice available at <http://en.wikisource.org/wiki/Consolidated_version_of_the_Treaty_on_the_Functioning_of_the_European_Union/Title_V:_Area_of_Freedom,_Security_and_Justice#Article_81> accessed on 17.2.2012.

⁹³ Art 81 (2) (a) ex Article 65 TEC, Consolidated version of the Treaty on the Functioning of the European Union.

⁹⁴ Art 81 (2) (e) ex Article 65 TEC, Consolidated version of the Treaty on the Functioning of the European Union.

⁹⁵ Art 81 (2) (f) ex Article 65 TEC, Consolidated version of the Treaty on the Functioning of the European Union.

⁹⁶ Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 [2001] OJ L12/1 entered into force on 1 March 2002. It has substituted the Brussels Convention from 1968 which contains the same subject matter and continues to apply vis-à-vis Denmark.

⁹⁷ Article 33(1) of Council Regulation No 44/2001. See (n 93).

to Member States to refuse to recognise a judgment which is contrary to public policy in the Member State in which recognition is sought, or where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

With regard to the recognition of foreign judgments between Member States,⁹⁸ there are strong fears that a judgment based on the opt-out mechanism would be regarded as manifestly contrary to public policy and therefore unenforceable.⁹⁹ These fears are also shared by the CJC, which stated that problems can arise where a collective claim conducted on an opt-out basis in one state is not recognised or enforceable in another state on the grounds that such proceedings are either contrary to public policy, breach Article 6 of the European Convention, or breach a constitutional due process guarantee.¹⁰⁰ Duncan Fairgrieve and Geraint Howells claim that it is certainly arguable that opt-out cases might infringe on fundamental values as they concern judgments relating to persons who are not present in court proceedings.¹⁰¹ Thus the authors suggest that some European guidelines on collective redress which accord with the jurisprudence culture in Europe be introduced even if they include an opt-out mechanism for non-viable claims.

Further problems arise because consumers in Member States do not know where to bring their claims and they may not always understand the language of the trader's state.¹⁰² The Regulation on jurisdiction¹⁰³ is highly complicated and sets out different places where a defendant may be sued on matters relating to insurance, consumer

⁹⁸ Based on Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, art 33(1).

⁹⁹ The authors Duncan Fairgrieve and Geraint Howells refer to Article 34(1) of Council Regulation No 44/2001 above (n 98).

¹⁰⁰ Civil Justice Council, 'Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress' (SEC (2011) 173 Final) available at <ec.europa.eu/competition/consultations/2011_collective.../cjc_en.pdf> accessed 28 July 2011.

¹⁰¹ Duncan Fairgrieve and Geraint Howells, (n 91), page 379.

¹⁰² European Commission, Special Eurobarometer, 'Consumer Redress in the European Union: Consumer experiences, perceptions and choices' (August 2009) available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Green> accessed 18 February 2012.

¹⁰³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L12/1 of 16 January 2001.

contracts and individual contracts of employment. In consumer contracts, the general principle is that a consumer may bring proceedings either in the courts of the EU country in which the defendant is domiciled or in the courts of the place where the consumer (plaintiff) is domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the EU country in which the consumer is domiciled.¹⁰⁴

In the recent Green Paper on collective redress,¹⁰⁵ the European Commission mentioned that with regard to cross-border cases, the Regulation on jurisdiction would be applicable to any action including an action brought to court by a public authority, if it is exercising private rights (such as an ombudsman suing on behalf of consumers).¹⁰⁶ Representative actions would have to be brought to the trader's court or the court of the place of performance of the contract. However, in mass cases where consumers come from different Member States, the court would have to apply the various national laws of the consumers in question to the contractual obligations in the case.¹⁰⁷ This would cause practical problems. The solutions offered in the Green Paper are either to introduce an amendment to the rules imposing the law of the trader in collective redress cases, or to apply the law of the market most affected or of the Member State where the representative entity is established.¹⁰⁸ The solutions offered in the Green Paper will not prevent the main problem from occurring, namely, the existence of divergent legislation in different Member States. This means that even if the question of a proper venue for the dispute is settled, questions will remain as to how to apply different laws to a similar transaction involving the same trader to different places within the European Union.

Indeed, the European Union has mentioned that a horizontal instrument should prevent a rush to the courts and that forum shopping cannot be excluded by

¹⁰⁴ The European Commission Summaries of E.U. Legislation, 'Jurisdiction, recognition and enforcement of judgments in civil and commercial matters ("Brussels I")' available at <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm> accessed 18 February 2012. See also Article 16 of the regulation.

¹⁰⁵ Commission of the European Communities, 'Green Paper On Consumer Collective Redress' COM (2008) 794 Final (2008) at <http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf>.

¹⁰⁶ See paragraph 58 of the Green Paper above (n 105).

¹⁰⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177Art.6 of 4 July 2008.

¹⁰⁸ See at paragraph 59.

establishing that the courts where the majority of infringement victims are domiciled or where the major part of the damage occurred are the relevant courts, since these are flexible measures that will not prevent the problem of forum shopping and abusive litigation.

The European Parliament has therefore expressed its preference for a provision that will establish the jurisdiction in the place where the defendant is domiciled.¹⁰⁹ The provision which the European Parliament has suggested will render a certain coherence with respect to the proper venue for bringing the action.

However, it still leaves unanswered some important issues such as where an action should be brought if there are few defendants with domiciles in different Member States. Another question arises as to which law should be applied if the class of injured persons includes many consumers from different Member States. The European Parliament's response to the question of applicable law is that the law of the place where the majority of the victims are domiciled should apply. This answer is insufficient as, in most cases, plaintiffs do not know with certainty from the outset where the majority of class members are domiciled. Such information is in the hands of the defendants and may be revealed only later at the discovery stage.

Furthermore, even if the question of jurisdiction and applicable law were to be decided on the basis of the majority of the plaintiffs in the action and not all class members in an opt-in action, it would still not prevent forum shopping. This is due to the fact that plaintiffs could decide to only include members in the action which would result in the case being heard in their preferred jurisdiction.¹¹⁰

Another suggestion raised in the parliamentary report involved forming different subclasses, each of which would be treated according to its relevant applicable law. This suggestion may complicate matters as there could be members from many Member States (even from 28 states, which would require the court to apply 28 different laws).

¹⁰⁹ European Parliament Committee on Legal Affairs, 'Draft Report on Towards a Coherent European Approach to Collective Redress', (European Parliament, July 2011) (2011/20899INI), 15 July 2011.

¹¹⁰ *Ibid.* See European Parliament Committee on Legal Affairs, 'Draft Report on Towards a Coherent European Approach to Collective Redress', explanatory remarks at page 13.

It is worth looking at developments in the U.S. in order to gain some insights in relation to this issue. The issue of different judgments was a cause for great concern in the U.S., and in 2005, new legislation was developed there which may be used as an example for a new European model.

3. American Lessons on Jurisdictional Issues

The experience in the U.S. has shown that there must be a "supervising" court in cross-border disputes, such as the federal courts, in order to render coherency to the proceedings and judgments in collective redress. Where this is lacking, plaintiffs may shop around for a convenient forum, resulting in all or most cases being heard in a preferred court of a certain member state.

In the U.S., the fact that each state has dealt with class actions differently in the past has caused a lot of harm. Some courts have awarded higher damages than others. The various outcomes of cases in different states in the U.S. has caused plaintiffs' lawyers to file their actions in preferred jurisdictions, such as in Madison County:

Madison County has gone from two in 1998 to 82 in 2004 -- even though the vast majority of the defendants named in those suits are not from Madison County. Trial lawyers have already filed 24 class-actions in Madison until February in 2005.¹¹¹

Against this background, the U.S. adopted a new mechanism for coherency between Member States in the new Class Action Fairness Act ("CAFA"). The new Act contains provisions relating to jurisdiction. For example, CAFA includes provisions that have the effect of widening the scope of federal courts' jurisdiction to deal with class actions and with mass actions in general (over 100 plaintiffs). Defendants

¹¹¹ See George Bush, Speech introducing CAFA (February 18, 2005), available at <<http://www.youtube.com/watch?v=qR2fqSTHZNs>> accessed 12 February 2012.

obviously prefer to litigate their cases in the federal courts so as not to be dragged through different state courts and different jurisdictions, hiring lawyers in each state to deal with the same matter. The CAFA provisions attempt to prevent forum shopping in class action cases and thus are very important as input for the suggested model for a unified European Community class action mechanism.

A. *CAFA's New Jurisdictional Rules*¹¹²

CAFA creates jurisdiction for classes with more than 100 class members if at least one class member's jurisdiction differs from that of at least one defendant and where more than USD 5 million in total is in controversy, exclusive of interest and costs. The idea behind the Act is to direct all large sum cases to the federal courts.

B. *CAFA's New Removal Rules*¹¹³

CAFA has introduced new removal rules as follows:

- a. In diversity cases that fit within the jurisdictional requirements of CAFA, any defendant, including in-state defendants, can remove cases from state courts to the federal courts;
- b. Any defendant can ask to remove the case to federal court even if all defendants do not consent;
- c. There is no one year limit on the timing of removal; and
- d. District court decisions to remand are reviewable if review is sought within 7 days and must be decided within 60 days of acceptance (with a possible 10 day extension).¹¹⁴

¹¹² Prof. William B. Rubenstein, Harvard Law School, 'Understanding the Class Action Fairness Act of 2005' (2005) at <<http://www.billrubenstein.com/Downloads/cafa-analysis.pdf>> accessed 20 April 2012.

¹¹³ These rules are in fact a liberalisation of the conventional rules.

¹¹⁴ Jacob R. Karabell, 'The Implementation of "Balanced Diversity" Through the Class Action Fairness Act' (April 2009) 84 *New York University Law Review* 300 at <http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__law_review/documents/documents/ecm_pro_061540.pdf> accessed 20 April 2012.

The CAFA example could be implemented in Europe, meaning that a provision should be adopted in the European Union allowing massive cross-border cases to be submitted to the European Court of Justice (ECJ) at first instance, or deciding which law should be applied and where the case should be tried, such as by deciding on the most affected market. Such provisions should allow the ECJ to define the class represented in each matter or to set up several sub-classes, and to then leave the management of the case to the Member State's relevant court. Furthermore, where there are actions on the same matter submitted to courts in different Member States, such European court should have jurisdiction to refer the case to one court (i.e. removal power) where the majority of the class members are represented. The applicable law in such cases should be the law of the defendant. Though collective procedures may differ from one state to another, the substantive law to be applied in each matter is the substantive law of the European Commission which should be similar in all Member States.

4. Trading with States Outside the European Union

Another very different problem is the issue of trading in a jurisdiction which differs from the home state. As mentioned earlier, the Israeli model does not deal with this issue although consumers from Israel may form part of a group of consumers who are included in collective proceedings abroad following a purchase outside Israel. The question arises as to whether the new model should recognise class action judgments delivered in countries which are outside the state's jurisdiction.

The rules of respecting foreign judgments are based on reciprocity.¹¹⁵ Thus, if a European citizen trades in the U.S., the U.S. courts would certify a class which includes foreign members (who are not domiciled in the U.S.) only if it considers that the judgment will be respected in their countries of origin. For example, the U.S. court

¹¹⁵ Beligh Elbalti, 'The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments' (Tunis, 2008) available at <<http://www.memoireonline.com/12/08/1678/The-role-of-the-reciprocity-requirement-in-the-harmonization-of-standards-for-the-recognition-and-en.html>> accessed 22 February 2012. See also Francesco Parisi and Nita Ghei, 'The Role of Reciprocity in International Law' (2003) 36(1) Cornell International Law Journal 93, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307141> accessed 22 February 2012. Joon Mok, 'The Principle in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958', (1989) 21 CASE W RES. J. INT'L L 123, at 124.

was faced with a securities case in which the defendant was a Canadian corporation and the class of members included foreign buyers of the corporation's shares. The U.S. court, following expert opinions from law professors, found that a judgment based on the opt-out mechanism would not be recognised in English, German, French, and Italian courts. It concluded that it should not certify a class whose members were subject to the courts of those jurisdictions.¹¹⁶ However, in a later decision, a U.S. court held that a decision based on the in opt-out rule was no longer seen in some European jurisdictions as contradicting public policy. It therefore allowed the inclusion of foreign plaintiffs from France, the Netherlands and the U.K. as members of the represented class. Commentators argue that the hostility of European legal systems towards granting the effect of *res judicata* to U.S. class action judgments is progressively declining due to the development of systems for consolidating individual claims into collective proceedings even if the action is based on the opt-out mechanism.¹¹⁷ However, a judgment which awards punitive or multiple damages is not likely to be accepted in Europe though other parts of the judgment are likely to be enforceable.¹¹⁸

The current position is not similar with regard to the recognition of foreign judgments in all Member States and it is difficult to draw a clear conclusion on the issue of recognition of foreign judgments from the existing enactments on collective redress in Europe.

Therefore, in order to protect consumers trading in other states, especially in the U.S., a provision should be inserted into the new model to provide for the respect of foreign judgments even where they are based on the opt-out mechanism.

¹¹⁶ *Bersch v. Drexel Firestone Inc.*, 519, West Federal Reporter, second series 974 (1975).

¹¹⁷ The argument is that judgment based on the opt-out mechanism does not comply with the requirement of a fair trial mentioned in Article 6 of the European Convention on Human Rights which is part of national law, and thus the judgment runs against public policy and cannot be recognised. *US v. Montgomery* (No 2) [2004] UKHL 37, [2004] 1 WLR 2241. See also Andrea Pinna, 'Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems' (2008) 1 *Erasmus Law Review* 31; Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement' (1997) 46 *ICLQ* 134.

¹¹⁸ Andrea Pinna, 'Recognition and Res Judicata of U.S Class Action Judgments in European Legal Systems' (2008) 1 *Erasmus Law Review* 31.

If the matter of recognition of foreign judgments in Europe is left to the state courts, the fear is that European consumers will be excluded from foreign class actions which deal with victims of different nationalities, including European citizens.

5. *Conclusions on Jurisdiction*

The U.S. experience seems to warn against having different pieces of legislation in each Member State, as this is likely to lead to forum shopping.

Commentators¹¹⁹ have suggested that the European Commission adopt guidelines (such as the IBA guidelines)¹²⁰ in order to institute a system of good practice to be followed by Member States. However, given the diversity of views on this issue, it is clear that courts in Member States will give different constructions to the principles set down. With no supervision by the ECJ or a specially developed new section of the European Court, it is unlikely that a unified approach towards jurisdictions and applicable law will be developed. The CAFA mechanisms in the U.S. may be adopted in order to grant state courts the power to remove a cross-border case which concerns complicated issues, large financial sums, or internationally diverse groups to a new section of the European Court which could deal with questions of jurisdiction in cross-border collective redress actions. The U.S. exemplar demonstrates that with no overarching supervising body, it is impossible to prevent diversity of decisions and forum shopping in cross-border actions. The European Commission should impose a system of supervision over first instance state courts which are not removed to the central European Court in order to decide points of jurisdiction, and the relevant law to be applied in such cases.

Only a collective redress measure aimed at creating coherency and harmonisation, which is subject to centralised inspection by the ECJ, will prevent forum shopping. This measure will create equality between jurisdictions for collective cross-border cases, and ECJ supervision will need to ensure that the decisions on collective redress issues do not differ widely from one Member State to another.

¹¹⁹ Duncan Fairgrieve and Geraint Howells, (n 91) page 379.

¹²⁰ International Bar Association, Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress (16 October, 2008) available at <www.ibanet.org/LPP/Dispute_Resolution_sectionguidelines/Arbitration/Projects.aspx#>.

With regard to trading outside the jurisdiction of the consumer's home state, a new collective redress mechanism should specify the conditions for mutual recognition of claims outside the jurisdiction, and in addition, allow class members who are domiciled outside this jurisdiction to become part of any class action, with opt-out rights similar to any other class members. In the European context, notice of such a claim should be given through the consumer organisations' internet site and via the new registry which will form part of a new class action model.

Conclusion

As discussed in Chapter One of this work, collective redress has some very important advantages. It improves access to justice, especially in large scale low-value cases, by turning Negative Expected Value suits into Positive Expected Value suits¹ using economies of scale by aggregation of smaller actions into a single legal action which is economically worthwhile pursuing.² Collective redress promotes adherence to the law, deters illegal actions³ and furthers public interests. Collective redress also helps in the management of multiple cases in court.⁴

The lessons learnt from the Israeli model generally are that class actions should be introduced and that an opt-out model with some 'brake' mechanisms would be very welcome in a jurisdiction such as Europe. The Israeli model is generally praised in this work, though some improvements are advocated mainly to reduce the volume of the actions which currently swamp the Israeli market.⁵ With this in mind it is clear that an Israeli model is not one that can be directly transposed in a European context. The European Union is a very large market which is interested in furthering free trade between Member States, a far cry from the small state of Israel. But in both jurisdictions, the efficiency of consumer protection measures depends not only on the creation of rights, but also upon the availability of efficient and appropriate means to enforce them. Collective redress may fill the existing gap in enforcing consumers' rights in the European Union in the same way it did in Israel, especially where large scale low-value actions are concerned and personal actions otherwise result in negative outcomes (Negative Expected Value suits).⁶

¹ C.G. Lang, 'Class Actions and US Antitrust Law: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims' (2001) 24(2) *World Competition* 285-302.

² Steven Goldstein and Yael Efron, 'The Development of Class Actions in Israel' (1999) 27 *Alei Mishpat* 31.

³ Prof. Alon Klement, 'Class Action as a tool to neutralize the advantages of a single defendant against multiple plaintiffs – following the decision in *The State of Israel v. E.Sh.T*' (1994), 21 *Mechakrei Mishpat* available at <www1.idc.ac.il/klement/HebArt/EST.pdf> accessed 3 June 2011. S. Goldstein, 'Class Actions in Israel' (1990) 13 *Int. Cong. Comp. Law* 45, 65. See also *Leave to Appeal Request No. 4556/94 (Supreme Court) Tezet v. Zilbershatz*, (26 May 2006, P"D Mem Tet (5) page 774.

⁴ See Chapter One, Part B, Sections (2) and (5) on pages 35 and 50 respectively.

⁵ See Chapter Five for the recommended improvements.

⁶ See Chapter One, Part D (2) on page 55.

Israeli legislation in this field is important because it introduced a model which has dramatically improved the enforcement of local consumer law, increasing access to justice in relation to consumer cases which would not otherwise have been submitted to the courts. Consumers in Israel have also become much better off in many other respects following the introduction of the CAL such as in the fields of banking, telecommunications and the food industry where the result of class actions have led to changes in the behaviour of large companies operating in these markets.⁷

The Israeli precedent exemplifies both the strengths and weaknesses of the collective action system. The Israeli legislator has succeeded in achieving the goals of improving access to justice yet the Israeli system has not avoided some of the difficulties which accompany private enforcement, in particular the problem of a flood of cases inundating the courts. Therefore, in the course of this work, some central characteristics of the Israeli model have been recommended whilst others such as adding a pre-action filter were suggested.

The solution advocated in this work to improve the Israeli model and possibly make it workable in a European environment, is to add a pre-action filter which does not currently exist under the Israeli model. This filter mechanism is aimed at barring unmeritorious stand-alone cases from being filed with the courts. The solution suggested is aimed at preventing the flood of stand-alone actions which, as shown in the Israeli example, results from provisions allowing private individuals to bring stand-alone private actions as their first recourse. The suggested model only permits follow-on opt-out or opt-in actions, as well as stand-alone actions in exceptional circumstances where the authorities have failed to intervene.⁸ This could be achieved if public enforcers of the type which exist in Europe are required to take action first.⁹ Only after the action has been subject to a first filtering process prior to the dispute reaching court, if necessary, would a private action be allowed. In this way, costs would be saved and the benefit to the consumer class could be similar to the benefit of pursuing a court proceeding.

⁷ See Introduction, Part E on page 23.

⁸ As discussed in Chapter Five, Introduction, page 277.

⁹ In Chapter Five, Part A, Section 3 on page 294 we gave as examples of the Consumer Ombudsman under the Finnish Act, the Swedish Consumer Ombudsman, the Italian telecoms complaints authority, the U.K.'s telecommunications regulator, Ofcom, and the medical regulator, the MHRA.

The new regime should only make a follow-on action available to potential private plaintiffs where a complaint such as a super-complaint is filed with a public body, or where a complaint is filed with a regulator appointed to deal with consumer complaints and this has resulted in a conviction, a disciplinary ruling, or an opinion that an infringement of consumer law has occurred. If a public body or regulator does not take any action within a certain period of time following the submission of a consumer complaint, and has not opposed private collective redress on the grounds that the claim is unfounded, then a private representative should be permitted to initiate a stand-alone action. However, this stand-alone action would be subject to financial requirements such as a surety, with the adequacy of the representative's qualifications examined at the certification stage in order to disqualify opportunistic private actions. Under the new model, at the certification stage the court would take into consideration the fact that a complaint had been submitted to the relevant public body or regulator, as well as such body's response and therefore follow-on actions are likely to go through fairly easily. With regard to incentives for private representatives, these should be available only if the case goes to court with the approval of a public body or if the regulator allows for a follow-on private action following a finding that the complaint is justified and the case is represented by private individuals.

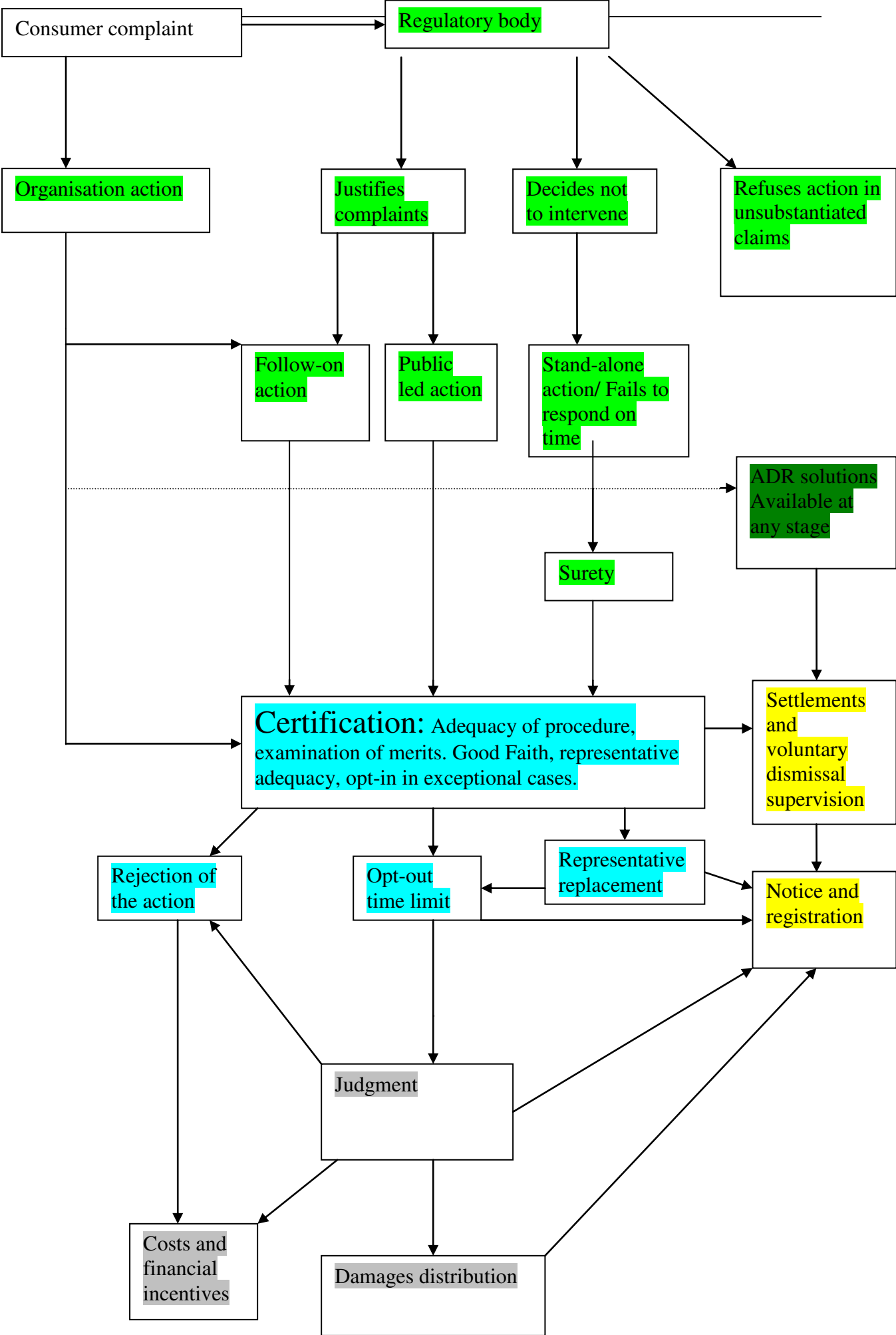
Such a process would compel public authorities to deal with every complaint within a reasonable time limit in order to avoid having to explain their failure to do so to the court. Although this process would require public bodies to work more efficiently, and may require more manpower, the costs would be outweighed by the benefits of preventing the economic damage caused by an overwhelming number of collective actions. These benefits may revert to the regulator as part of the benefits of the successful actions.

In order to understand how such key points need to imbricate in practice we put forward the following chart (Final Chart) which maps out a class action model that will not only function better in Israel but can also bring about valuable changes for European consumers. We will further below proceed with explaining its main features

and practical characteristics. This chart summarises the possible outcomes marked in all previous charts.¹⁰

¹⁰ Chart 4A and Charts 5A and 5B on pages 273, 287, and 291 respectively

Final Chart - The Suggested Model



A. The Commencement of the Action (marked green on the annexed chart - Final Chart)

The main trigger for commencing a consumer dispute is by way of a complaint made by a consumer who was subject to wrongful behaviour.

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This complaint may be dealt by the consumer and the business by direct negotiations at the first stage as exemplified in Chart 5A of Chapter Five. However, if one consumer problem is resolved it may mean that many other consumers who have suffered the same wrong (for example, being subjected to unlawful charges by their bank or telephone company) remain untreated, they may never know of their right to be reimbursed for the sum with which they were unlawfully charged. For this reason, from the market point of view it is much better to deal with consumer complaints concerning petty damages collectively, aiming for a solution with a wide effect which resolves the problem for all consumers, even those who have not complained or are unaware of their rights.

In the course of this work, the three possible starting points for commencing a consumer large scale small claim battle were discussed.¹² Complaints to a private enforcer, i.e. the class representative, was found to be the most active solution in the sense that such actions are the most used in Israel. Most collective actions in Israel (99%) are based on stand-alone actions. However, these actions are also the source of the current flood of claims, and this work therefore advised adding an additional filter to stand-alone actions and to give preference to public enforcement and follow-on private actions.¹³

The first filter would then be a public regulatory body which may be privatised if necessary if the public sector lacks funds or manpower. The operation of the regulatory body was exemplified in Chart 5B of Chapter Five¹⁴. A regulatory body

¹¹ See Chapter Five, Chart 5A on page 289.

¹² See Chapter Three, Part B on page 130.

¹³ See Chapter Five, Part One, Section A on page 279.

¹⁴ See Chapter Five, Chart 5B on page 293.

appears to be more objective and will look at the general good of all players in the market, whereas private enforcers are likely to look at their own pockets.¹⁵ The operation of a public regulatory body (or privatized and publicly scrutinised body) has some clear advantages which include special powers of investigation and discovery conferred on public bodies¹⁶ which may assist in proving consumer cases. These powers are not shared by consumers who normally lack sufficient financial resources to prove business misconduct. In addition, where the misconduct also constitutes a criminal offence, or in other special matters such as competition infringements, public bodies might be granted additional powers to confiscate documents, to conduct searches and to force formal inquiries and interrogations.¹⁷ There are some good examples of existing regulatory bodies in member states which we mentioned earlier.¹⁸ We also recommended a supervising authority to be engaged in cross-border issues. This task may be handed over to a section of D.G. Sanco which will operate to establish a breach or appoint the proper regulator in cases involving multiple countries. In antitrust cases, Article 15 of Regulation 1/2003 provides for some sort of cooperation in antitrust cases where the European Commission plays a supervisory role. The Commission may¹⁹:

- transmit information in its possession or procedural information (Article 15(1)); The right of a national court to ask the Commission for an opinion pursuant to Article 15(1) of Regulation 1/2003 does not prejudice the national court's right or obligation to request a preliminary ruling under Article 267 TFEU from the Court of Justice.

¹⁵ Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' [March 2009] 2(1) World Competition 3-26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458> accessed 24 November 2011.

¹⁶ Klaus-Heiner Lehne, Report for the Committee on Legal Affairs of the European Parliament on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0047&language=EN&mode=XML>> accessed 12 April 2012.

¹⁷ See, for example, the powers of the OFT in investigating criminal cartels and competition cases in The OFT, 'Powers for investigating criminal cartels- guidance. The Enterprise act 2002' available at <http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft515.pdf> accessed 12 April 2012. See also A guide to the OFT's investigation procedures in competition cases – Guidance March 2011 OFT1263 available at <www.of.gov.uk/shared_of/policy/oft1263.pdf> accessed 12 April 2012.

¹⁸ See above at footnote no 9.

¹⁹ See The European Commission – competition internet website available at: <<http://ec.europa.eu/competition/court/antitrust.html>> accessed 25 September 2012.

- give its opinion on questions regarding the application of the EU competition rules (Article 15(1));
- The Commission (and national competition authorities) may submit observations to national courts as *amicus curiae* under (Article 15(3)).

National courts are obliged to submit a copy of any written judgment to the Commission where Article 101 or Article 102 of the Treaty has been applied (Article 15(2)) in order to consider taking proper Community actions.

These powers are complementary to other powers vested in the competition field such as powers of investigation and the imposition of fines in cases of a breach.²⁰

The suggested state regulatory body will have the authority to deal with the action itself as a public enforcer or appoint another public enforcer to deal with the case. Public enforcement should take place if the relevant case has a wide application to many class members and the action has good merits. In such cases, the public may lose if private hands lead the action. Where the regulator decides to take on the action, some remuneration should be paid to the persons bringing the super-complaint. This remuneration is important in order to convince consumers to break with their apathy and submit proper complaints to the regulatory body.²¹

The state regulatory body may refuse to allow any further action taken against the defendant if the action is not substantiated or where the regulatory authority considers a complaint to be vexatious or malicious.²² Similarly, if the regulatory body has previously dealt with a similar complaint and reached an agreement with the trader for the benefit of the public, it should not allow a private action to proceed since this may hamper the pre-existing agreement reached with the trader. Once the regulatory authority has brought proceedings to a halt, no class action should be filed. Yet as seen in Chart 5A of Chapter Five, a personal action is still available for consumers yet it is not reasonable that such personal actions would be brought given the small amount of damages at stake.

²⁰ See for example the imposition of fines for price fixing on Belgian brewers available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1739&format=HTML&aged=1&language=EN&guiLanguage=en>> accessed 25 September 2012.

²¹ See Chapter Five, Part A at Section B (2) at page 291.

²² See at Chart 5B in Chapter Five, page 293.

The state regulatory body may justify the action and allow for a follow-on action or decide to take the action to public hands where there is significant public interest in the case. The follow-on action is a combined public and private action, since the following private action relies on the findings of the regulatory public body. Such actions are based on the rationale that private enforcement is complementary to public enforcement, since the latter is more suited to dealing with wrongful activities and practices, while the former has a deterrent effect on businesses due to the magnitude of the possible damages.²³

It was also recognised in Chapter Five that in exceptional circumstances where the authorities refuse to intervene but do not disallow the action, or where the regulator fails to respond on time, a stand-alone should be available. Stand-alone actions should be conditional upon an adequacy requirement being fulfilled by the representative, who will have to prove himself as capable and must have the required resources to deal with the action.

The representative in stand-alone actions would be asked to provide a surety. The surety requirements would take a form similar to the current Danish provision. The advantage of the Danish surety requirement is that it imposes a cap on the amount which a representative party for a class has to pay.²⁴ In addition, the court may require that any group member wishing to join the action should provide security for the legal costs if such costs are not insured under Section 325 of the Danish Administration of Justice Act or where they are not covered by legal aid. The costs are paid by the state if the class action fulfils the terms for free legal aid under Sections 327 to 329 of the Administration of Justice Act, up to a maximum calculated according to Section 254e(7).²⁵ These measures have the effect of mitigating the risk of bringing a collective action as the representative knows from the outset of the case the amount of expenses which would be charged should the action fail.

²³ For support for the combined private and public enforcement, see: The Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business Discussion paper* (OFT916)

<http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf> accessed 17 September 2011.

²⁴ Prof. Erik Werlauff, 'Class actions in Denmark – from 2008' (Aalborg University) at <<http://globalclassactions.stanford.edu/content/class-actions-denmark>> accessed 19 September 2011.

²⁵ Prof. Erik Werlauff, *ibid.*

Consumer organisations are another example of trustworthy enforcers dealing with consumer complaints. During the course of this work,²⁶ it was noted that if a consumer organisation satisfies certain criteria, it may also represent in stand-alone collective actions with no need to go through the regulatory body, since it is sufficiently trustworthy to regulate the complaints itself. Thus a consumer may bring his collective complaint to both enforcers the regulator or the licensed organisation which may both deal with collective actions.

Unfortunately, the Israeli jurisdiction lacks proper infrastructure for organisations to deal with class actions. Indeed, very few actions in Israel have been brought by organisations. On the other hand, organisational intervention is very welcomed in most European member states albeit such organisations in Europe have failed to bring collective redress actions for damages thus far. Consumer organisations have neither the incentives nor the budget, and would not take the risk of very expensive litigation in order to bring an action for damages for a group of injured members. In this work, it is supposed that if organisations go through the licensing process and there are less private stand-alone actions, such organisations will be more active in bringing collective actions.

We explored the licensing of organisations dealing with collective actions²⁷ and put forward key criteria that ought to be considered for their selection:

- The Goals of the Association: The Memorandum of Association should indicate that the suggested legal action falls within the targets of the associations as suggested in the Israeli provision.²⁸
- Accountability: The organisation's system of governance will be accountable to its members. The organisations must have listed members and run an election process.

²⁶ See Chapter Three, Part B beginning on page 130 .

²⁷ See Chapter Three, Part B (2)(b)(iii) on page 149.

²⁸ Class Action Law 5766–2006, s 2 (Israel).

- Funds Available: This means that the organisation is financially independent with no commitment to any third party.
- Reputation: Reputation entails looking at the organisation's records and achievements in protecting the rights of its members.²⁹ Furthermore, organisations that have a proven track record of bringing successful actions should be given preference over ad-hoc associations that are formed only to bring a specific action. Such organisations are deemed to act in a manner which will maintain their good reputation and preserve their integrity.³⁰
- Number of Members: The organisation must be representative in the relevant field in which it is active. The organisation should reflect the interests of the players in that specific field. There is no logic in limiting the number of members (apart from the minimum number of members required for establishing an association) as the minimum number may change from one area to another as there are markets with many operators and some other markets which have less operators to be represented in the relevant organisation.

B. The Certification Procedure (marked in blue on the Final Chart)

Under the current model in Israel, once an action has been submitted, the court needs to address the suitability of the action for collective proceedings at the certification stage procedure. This is the procedure which is aimed to filter out unmeritorious actions, or actions brought with poor merits and to ensure the fair hearing of the trial. As shown in Chapter Four and in Chart 4A,³¹ at this stage the court will look at the prima facie merits of the case in order to filter out unfounded actions. The court will ensure that the collective procedure is the most effective procedure and the most

²⁹ Department of Trade and Industry, 'Designation As Enforcer For Part 8 of the Enterprise Act 2002: Guidance for Private Bodies Seeking a Designation under Section 213' available at <<http://www.dti.gov.uk/enterpriseact/pdfs/sec213guide.pdf>> accessed 9 April 2012.

³⁰ Department of Trade and Industry, 'Designation As Enforcer For Part 8 of the Enterprise Act 2002: Guidance for Private Bodies Seeking a Designation under Section 213', *ibid*.

³¹ See Chapter Four, Section 1 of Part B on page 215 and Chart 4A on page 275.

appropriate means of resolving the dispute in light of the circumstances of the case and that questions which are common to the class prevail over personal issues.³² An additional precondition under the CAL is the requirement that there is a reasonable basis for concluding that the interests of the class will be represented and managed in an appropriate manner³³ by the representative and that the interests of the whole class will be represented appropriately and in good faith.³⁴ This precondition, which in fact consists of two distinct preconditions (i.e. adequate representation and good faith), is not necessary where the representatives are public or organisational agencies which are presumed in this work to be secure agents and thus exempt from many of the safeguards operating in Israel which aim to deal with abusive private litigation.

The certification procedure operating in Israel is important in defending the rights of defendants by filtering actions and preventing claims which are brought in bad faith or which have a low chance of success. The other function of the certification process is that it provides the judge with an opportunity to give precise orders for the management of the case.

The problem with the certification procedure is that, from the defendant's perspective, conducting an examination of the case's merits at the certification stage sometimes comes too late. The certification itself may be very lengthy and costly and harm may already have been caused to the defendant's business by the mere submission of a large class action against the defendant.³⁵ Conversely, a lengthy examination of the merits may sometimes be very detrimental to the plaintiffs, since the defendants may try to prolong the certification hearing, exhausting the limited funds available to the class representatives.

Therefore, the problem with the certification procedure which currently operates in Israel is that it operates following the submission of the action to the courts, requiring

³² Class Action Law 5766–2006, s 8 (A) 2 (Israel).

³³ Class Action Law 5766–2006, s 8 (A) 3 (Israel).

³⁴ Class Action Law 5766–2006, s 8 (A) 4 (Israel).

³⁵ The British government, in its reply to the Civil Justice Council's recommendations on collective actions, stated that the merits examination should take place in the certification process, exactly as the case currently stands under Israeli legislation. Ministry of Justice, 'The Government's Response to the Civil Justice Council's Report: Improving Access to Justice through Collective Actions' (July 2009) <<http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf>> accessed 6 January 2012.

the defendants to fight unworthy cases or blackmail suits which should have been barred at the court gates. Consequently, a filtering mechanism in addition to that which exists in Israel is required to filter out unmeritorious actions before certification proceedings are commenced in order to ease pressure on the court system and protect defendants. This filter is offered now by the establishment of the regulatory body which we advocated for.

The outcome of the certification procedure as shown in our final chart (marked in blue³⁶ and in Chart 4A which is part of our conclusions to Chapter Four) is that the court may allow the action and grant case management orders.³⁷ These orders may include the definition of the class,³⁸ a representative replacement if the court finds that the representative or the class lawyer are not adequate,³⁹ setting a time limit to opt-out of the action for members who do not wish to remain part of the class⁴⁰ and, in exceptional cases, turning the action into an opt-in action.⁴¹ The ruling judge may also certify the action with such changes as he finds fit.⁴² The other possible outcome of a certification procedure would be that the court decides that the action has no prima facie merits, in which case the case would be denied and the action rejected. The court may also reject the collective nature of the action, for example where the personal questions outweigh the common questions, in which case the collective action is rejected while the personal action remains a possible option (though such actions are likely to be merely hypothetical where very small sums are concerned). The court may also reject the collective action, leaving the plaintiff with the option of bringing a personal action in cases where the application falls outside the scope of class actions. However, the wide scope of class actions in Israel, as discussed in Chapter Three, Part Four of this work, enables representative plaintiffs to submit collective redress cases in almost all consumer actions, and class actions are permitted in very broadly-defined areas of law resulting in wide use of the mechanism.

³⁶ See also Chart 4A on page 275.

³⁷ See Chapter Four, Part B section 1 (A) on page 213.

³⁸ Class Action Law 5766–2006, s 10 (Israel).

³⁹ Class Action Law 5766–2006, s 8 (C) (Israel).

⁴⁰ Class Action Law 5766–2006, s 11 (Israel).

⁴¹ Class Action Law 5766–2006, s 12 (Israel).

⁴² Class Action Law 5766–2006, s 13 (Israel).

1. *Setting Time to Opt Out of the Class Proceedings (marked in blue on the Final Chart).*

As shown in Part One of Chapter Three, the Israeli model is based on the opt-out system, which enables large classes to group together. The opt-out mechanism renders the defendant fully accountable for the damages caused by his behaviour, prevents satellite litigation, and deals better with the free riding problem which is so evident in opt-in litigation.⁴³

The CAL includes a default opt-out mechanism and provides that once a motion to allow class proceedings has been approved, every member of the class is considered to be part of the proceedings, unless he indicates within 45 days, or a period of time determined by the court, that he wishes to opt-out of the action.⁴⁴ The opt-out period aims to give each member a reasonable period of time to consider his individual circumstances and to decide whether to opt-out of the proceedings. The CAL also provides that the judgment in a class action binds all the class members, unless explicitly provided otherwise.⁴⁵ This provision is at the heart of the opt-out mechanism and it provides that unless the class members opt-out of the class, they will be bound by the judgment.

Consumer cases are generally characterized by their negative expected value and thus, class members are usually indifferent to the outcome of class action proceedings and in most instances will not bother to opt out of the action in opt-out cases or opt in in opt-in cases. This consumer apathy may explain why opt-out classes are always larger than opt-in classes. The conclusion reached in this work is similar to Professor Mulheron's⁴⁶ conclusions that a proportionate opt-out mechanism should be introduced with some brakes and safeguards in order to prevent possible abuses.

⁴³ See Chapter Three, Part A on page 94.

⁴⁴ Class Action Law 2006, s 11 (Israel).

⁴⁵ Class Action Law 5766–2006, s 24 (Israel).

⁴⁶ Civil Justice Council, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* [2008] Final Report, 153. <<http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/CJC%20papers/CJC%20Improving%20Access%20to%20Justice%20through%20Collective%20Actions.pdf>> accessed 16 July.

This work rejects the argument that the opt-out mechanism sweeps in even those who are not interested in joining the class action⁴⁷ because many class members may not be aware of the proceedings or, because of consumer rational apathy, will not exercise their right to opt-out and thus opt-out classes tend to be large and include members who are often not interested in suing the defendant for his misconduct. Consumers who do not opt-out do so because of their rational apathy and not because they object to the legal proceedings. One of the major advantages of the opt-out system, is that it ensures that the damages awarded are based on the full loss caused and not merely on the number of class members who joined the action. There is no doubt that consumers' interests are better served if large firms are held accountable for the full amount of harm they have caused.

The European objections to the opt-out mechanism are unsubstantiated, and experiences learnt from the Dutch and Portuguese opt-out models clearly indicate that the introduction of an opt-out mechanism per se, with no further financial incentives for the representatives, would not result in a flood of cases.

The corollary that should be learnt from these models is that the opt-out mechanism may be controlled and should not be feared. The opt-out mechanism is the only mechanism which may deal with small value claims. The opt-out mechanism conquers consumer apathy and makes rough traders pay for the damage caused by their unlawful actions. The opt-out model is equipped with the appropriate deterrence mechanism to prevent traders from acting unlawfully. Yet, it may be controlled by proper safeguards.

With regard to opt-out actions, this author recommends distinguishing small claims from those involving large sums as the Danish model suggests.⁴⁸ It is this author's view that in cases of low-value personal actions, the opt-out mechanism should be introduced and should not be feared. On the other hand, where large personal sums are involved, an opt-in scheme should be adopted. This is in fact a combined

⁴⁷ Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Civil Justice Council, 2008), <<http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-justice-council/cjc-research-need-consumer-redress>> accessed 18 November 2011.

⁴⁸ Although in the course of this work we did not agree with the Danish provision that allows only public enforcement opt-out actions.

procedure similar to the procedure in Israel which provides that large scale actions may be joined and managed on an opt-in basis, utilizing the management advantages of the class action provisions.

2. *Turning the Class Action into an Opt-In Action*

The CAL preserves the right for the court to decide, in exceptional circumstances, that the class of persons represented should include only those members who have given notice that they wish to become part of the class.⁴⁹ The opt-in procedure in Israel is an exception to the opt-out mechanism which is the default position in the Israeli class action and only applies if the process of ascertaining all members of the group and notifying them of the proceedings can be carried out at a reasonable cost.⁵⁰

The exceptional circumstances in which the court should impose an opt-in action include inter-alia:

3. Where there is a reasonable probability that many of the class members will submit claims for the same cause of action; and
4. Where the amount of each action is substantial, including negligence claims.

The Israeli legislator took the view that 'big sum' claims were not suited to regular opt-out class action proceedings. Consequently, the CAL provides that where such claims are approved, the court may provide that they will be managed as opt-in class actions and that the expenses will be shared by all the members of the class. The Israeli legislator was of the opinion that the opt-in system was suitable for cases involving substantial sums where the plaintiff could bring and manage his own action.⁵¹ Class actions in these cases assist in the management of the proceedings and may prevent contradicting judgments which could result from several actions on the same issue.

The Israeli jurisdiction has acknowledged the opt-in mechanism, though such provision has remained totally unused. All collective claims in Israel have been based

⁴⁹ Class Action Law 5766–2006, s 12 (Israel).

⁵⁰ Ibid.

⁵¹ S. Goldstein and T. Fisher, 'The Interaction Between Mass Actions and Class Actions – Procedural Aspects' [2004] *Mishpatim Lamed Dalet* 21.

on the opt-out model without exception albeit that the new Israeli CAL includes a provision which thus far has never been used for opt-in actions involving large sums.⁵² In our suggested model, we left this option intact so as to leave opt-in actions as a possible root for action. Such a provision is familiar in some European jurisdictions and may be used as a complementary provision to the opt-out default provision which will be limited to certain personal actions with small values.

3. *Representative Replacement*

As seen under the Israeli model, another outcome of the certification procedure may be that the court replaces the class lawyer where the representative lawyer asks to terminate the action. In such cases, the court may approve of the dismissal and appoint another representative to continue the action⁵³ if the action seems to be meritorious or beneficial to the public.⁵⁴

Thus, according to the Israeli law, where numerous actions have been submitted in the same matter⁵⁵ or where the court finds that the representative plaintiff does not fulfil the requirements for an action (not adequate or has no personal action) or has misbehaved,⁵⁶ or where a representative asks to terminate the action, the court may decide to replace the representing claimant or the representing class lawyer.⁵⁷

The replacement of representative plaintiffs or lawyers in cases of voluntary dismissal reduces the risk of hidden agreements between the defendants' and the plaintiffs' representatives, because an attempts of representative bribery by the defendants will be useless where the court decides to replace the representatives.

However, in cases of the court making such a replacement, there are no criteria in Israel governing the appointment of a new lawyer.

⁵² Class Action Law 2006, s 12 (Israel).

⁵³ Class Action Law 5766–2006, s 16 (D) (Israel).

⁵⁴ See Chapter Four, Part B (2), Representative Replacement on page 226.

⁵⁵ Class Action Law 5766–2006, s 7 (b) (Israel).

⁵⁶ Class Action Law 5766–2006, s 8 (C) (Israel).

⁵⁷ Class Action Law 5766–2006, s 16 (D) (Israel).

In Part 2 of Chapter Four, some methods for appointing a lead lawyer to represent the class were discussed. The procedure advocated in Chapter Four is based on establishing criteria and obtaining offers from lawyers relating to fees. The criteria should take into consideration the reputation of the lawyer, his experience in the relevant field, his experience in collective redress cases, and his record of conduct. The lawyer's resources for financing such an action should also to be examined. A lawyer who has insufficient resources to fight the case to its end may be tempted to settle the case at the expense of the class members.

The power to replace the representative, as permitted under the Israeli regime, is a crucial part of any class action model and acts as a safeguard to abusive litigation. Under the new model, such a provision should include instructions to assist the courts in deciding how to appoint adequate representatives to lead the action where an order to replace class counsel is granted. It is suggested in the course of this work that tenders are conducted for lead lawyer roles once the minimum qualification standards have been set by the managing judge.

C. Safeguards which are Required to Prevent Abuses Resulting from Private Enforcement (marked in yellow on the above Final Chart)

It is clear from our exploration of class actions that an ideal model needs to include ways to safeguard against the worst abuses in private enforcement. Two main features have proven particularly useful in Israel and other jurisdictions and seems fit to serve the needs of a European class action well:

- The use of the loser pays principle
- The certification process.

This is because both are able to act as barriers to unmeritorious claims and actions pursue in bad faith. In addition to these, we found that there are safeguards needed to save the procedure from possible abuses which may occur as a result of information asymmetry. The representatives possess information which is not known to the class members and thus such representatives are at risk of being bribed or may act where

there are conflicts of interest in order to enter into a covert agreement with the defendant. The representative may also evaluate the benefit of the settlement wrongly in order to obtain a higher rate of remuneration. Therefore we advocate that the procedure should be transparent and open for class members and other interested bodies especially when the private representative wishes to finalise the procedure with a settlement.

1. Supervision of Settlements and Voluntary Dismissals

We have noted that settlement agreements and voluntary dismissals as very dangerous stages in collective proceedings, since the representative plaintiffs and defendants may collaborate in order to deceive class members by reaching covert agreements resulting in personal benefits to the representatives but with no real benefit to the class. Therefore, Israel's CAL has introduced procedural requirements such as the submission of affidavits from both parties' lawyers and the examination of the suggested settlement by an expert.

We have found that the new model should implement Israeli provisions which require that the compromise arrangement be published in the class action registry, and a notice should be given to the class members, the Attorney General and to any other person the judge may order to enable these parties to voice their objections.⁵⁸ Every class member, relevant group or the Attorney General may object to the compromise.⁵⁹ Any member of the class who does not wish to be bound by the compromise may opt-out at that stage.⁶⁰

This safeguard allows class members of the public, the Attorney General and other relevant bodies and organisations to investigate the proposed compromise and object to its content if it does not benefit the class members or it awards excessive funds to the representatives. The court may ask relevant organisations for their opinions if the matter is in their interest, such as trade unions in labour law cases or consumer

⁵⁸ Class Action Law 5766–2006, s 18 (C) (Israel).

⁵⁹ Class Action Law 5766–2006, s 18 (d) (Israel).

⁶⁰ Class Action Law 5766–2006, s 18 (f) (Israel).

organisations in consumer-related cases.⁶¹ The views of such organisations should be welcomed as they usually have the required expertise to identify matters which representative parties have omitted in their suggested settlement.

In order to deal with 'sweetheart settlements,' with problems of evaluations of certain coupons and undertakings by defendants in such settlements, the courts in Israel are obliged to hear every objection to the agreement and must obtain an expert opinion from the relevant field in relation to the suggested compromise to ensure that the compromise is beneficial to the class. The court may conclude that an expert opinion is unnecessary only where 'special reasons' exist, for example, where the compromise requires evaluation of the legal position or the strength of the arguments of the parties.⁶²

The expert opinion is employed in order to examine the content of the suggested compromise and the court may refuse to approve a compromise where the action seems to be unmeritorious.⁶³

Like the Israeli requirement, it is desired that any new model should provide that an application to approve a settlement in collective proceedings be accompanied by affidavits from the lawyers who are representing the parties and by the parties themselves. Such affidavits must reveal all the relevant information relating to the suggested compromise.⁶⁴ The production of lawyers' affidavits by both parties prevents the lawyers/representatives from making a hidden agreement which benefits the representatives rather than the class members.

Having seen the defendant's evidence, the representative may realise that the claim is not substantiated and apply for a voluntary dismissal. A genuine dismissal may take place after the judge identifies the weak basis of the action. However, the fear with

⁶¹ In Class action Case no. 44211-05-10 (Tel Aviv District Court) Cohen v. Partner, the Israeli Consumer association objected to the suggested settlement arguing that the compensation offered to class members by awarding free talk minutes was of no benefit to many class members whose mobile telephone package did not charge them according to time spent on the telephone.

⁶² Class Action Law 5766–2006, s 19 (b).

⁶³ Sher v. Strauss and the Elite decision of the Court of Appeal, Judge Baron dated 24 May 2009 (The court refused to approve payment of NIS 25,000 for the plaintiff's lawyer and a reduction of the price of the product since the action was unmeritorious).

⁶⁴ Class Action Law 5766–2006, s 18 (B) (Israel).

voluntary dismissal is that the representatives have received a personal benefit and therefore decide to abandon the collective action.

The voluntary dismissal safeguard is intended to prevent the parties, namely, the representative plaintiff and the defendant, from reaching an agreement that is of no benefit to the class members or a settlement which benefits the representatives at the expense of the class members. The main issue with the voluntary dismissal mechanism is that the parties may reach a covert compromise, but make an application for voluntary dismissal to circumvent the more complicated procedure for court approval of a compromise agreement.

We found that the requirements set down in the Israeli CAL should be welcomed in the new model. The Israeli CAL sets out the procedural requirements for voluntary dismissals, such as submission of an application to the court accompanied by sworn affidavits, to ensure that all information is produced to the court⁶⁵ and requires court approval for a voluntary dismissal⁶⁶ with the special power to replace a representative who has asked to dismiss an action which he himself submitted.⁶⁷

In addition, a voluntary dismissal does not create a "*res judicata*" and thus does not bar other plaintiffs from bringing the same action in the future.⁶⁸ The problem with this provision is that in practice as seen in Israel, most actions dismissed in Israel were not submitted again by other claimants.⁶⁹ This is because a reasonable representative will not ask for voluntary dismissal unless it is clear that the action is weak on its merits. Yet, the provision that voluntary dismissal does not exhaust the cause of action is important in order to prevent the representative parties from reaching a concealed agreement which does not bar a third party from bringing the same action.

⁶⁵ Class Action Law 5766–2006, s 16 (B) (Israel).

⁶⁶ Class Action Law 5766–2006, s 16 (A) (Israel).

⁶⁷ Class Action Law 5766–2006, s 16 (D) (Israel).

⁶⁸ Class Action Law 5766–2006, s 16 (B) (Israel).

⁶⁹ Ronen Adini, 'This is also a Way to End Up - On Voluntary Dismissals in Class Actions' due to be published in the Hapraklit Journal, Volume Nun Bet (1) available at <www.ronenadini.co.il/news/list.aspx?newscatid=38> accessed 4 May 2012. see at page 5.

The new model should also adopt the criteria which have been set out in Israeli court decisions such as *Azury* and *Goldstein*⁷⁰ which provided that the court should distinguish compromises which require special scrutiny and even expert opinion from voluntary dismissals. The latter are allowed generally where no payments are made to the representative.⁷¹ If there is a payment of some sort of remuneration to the representative, the application should be examined carefully in order to ensure that payment is not in fact bribery aimed at persuading the representative to dismiss the action. Where the court finds that the dismissal is not appropriate it may order continuation of the action and the replacement of representatives.

2. *Notices and Registry*

Another Israeli provision which we found that should be adopted is the provision that requires transparency by establishing a public registry open to every interested person, and the requirement to send notices to the class members and to the Attorney General when the case reaches critical stages, such as voluntary dismissal or a compromise agreement.

Thus a copy of every new application to certify an action as a class action must be filed to the court's central management and is registered there in a new 'class action registry'.⁷² Once sent to the registry, it is open to the general public.

Prior to filing a new action, each representative must check the registry in order to ensure that there are no previous similar class actions.⁷³ Consequently, the register makes the collective redress process more transparent, and helps to avoid multiple claims and contradictory decisions on the same issue.

⁷⁰ Case No. 13801-02-09 (Central District Court) *Azury v. 013 Netvision* (decision dated 7 January 2010); Civil Case No. 1373/07 (Tel Aviv District Court) *Goldstein v. Bank Hapoalim* (14 December 2009). See at Chapter Four, Part B (4) (b) on pages 256 and 257.

⁷¹ See for example Class action Case No. 41418-05-10 (Central District Court) *Edry v. Shlomo Engel* judgment dated 8 December 2011 and Class action Case No 1600-09 (Central District Court) *Shukrun v. Gat Givat Chaim* judgment dated 20 December 2009 where the court approved the voluntary dismissal of cases which had no real merits but refused to accept the mutual application of the defendants' and the plaintiffs' representatives to award costs to the plaintiffs' representatives.

⁷² Class Action Law 5766–2006, s 6 (Israel).

⁷³ Class Action Law 5766–2006, s 5 (Israel).

In the event that there are several similar actions, either involving a similar class of represented persons or similar questions of fact or law, the court may order that the new action be transferred to the court where the earlier action was submitted.⁷⁴ The court which deals with the former action may join the two actions or may strike down the subsequent action.⁷⁵

In addition to the online registry which is aimed at reducing information asymmetry between the representative and the class members, at some critical stages of the action the CAL requires that notices be issued to class members, the Attorney General and, if the judge finds it appropriate, to relevant bodies.

The rationale for issuing such notices is to maintain the transparency of the procedure and to prevent the representatives and the defendant from acting together against the interests of absent class members. With regard to notices, the CAL sets out a list of circumstances in which the court must provide a notice to class members, for example, the decision to approve a class action and submission of a petition for approval of a compromise agreement.⁷⁶ Similarly to this CAL provision, the court should have the discretion to issue further notices where such notices are relevant in order to maintain transparency.⁷⁷ Such a provision makes collective proceedings similar to other situations where a lawyer represents a client and should inform his clients as a matter of good practice on any developments in the case.

Publication of a notice is also required, a requirement similar to that under the Israeli law if the court decides to certify the action,⁷⁸ allows the dismissal of the action, or orders replacement of the representative plaintiff or the group's lawyer⁷⁹ and on an application for,⁸⁰ or approval of, a compromise.⁸¹ In addition, the judgment in the action should also be published in the registry.⁸² The court must approve the draft

⁷⁴ Class Action Law 5766–2006, s 7 (Israel).

⁷⁵ Class Action Law 5766–2006, s 7 (b) (Israel).

⁷⁶ Class Action Law 5766–2006, s 25 (a) (Israel).

⁷⁷ Class Action Law 5766–2006, s 25 (b) (Israel).

⁷⁸ Class Action Law 5766–2006, s Sec 25 (a) (1) (Israel).

⁷⁹ Class Action Law 5766–2006, s 25 (A) (2) (Israel).

⁸⁰ Class Action Law 5766–2006, s 25 (A) (3) (Israel).

⁸¹ Class Action Law 5766–2006, s 25 (A) (4) (Israel).

⁸² Class Action Law 5766–2006, s 25 (A) (5) (Israel).

notice before its publication,⁸³ but the form of publication is left to the discretion of the judge in each case,⁸⁴ bearing in mind the costs of the action,⁸⁵ the damages that may be involved,⁸⁶ the number of members in the group and the ease of identifying them,⁸⁷ the cost of giving them personal notice⁸⁸ and any special characteristics of the group's members, including different languages.⁸⁹

The suggested model adopts the notice and registry provisions of the Israeli law to ensure that the parties in court do not reach a settlement which is preferential to them at the expense of the class members. Under the new model we recommend distinguishing opt-in actions from opt-out actions. There should be differences in the notice requirements for opt-in and opt-out regimes because in an opt-in action, the lawyer meets his client and they agree on the extent of the information that should be provided to the client in the terms of representation. However, in opt-out mechanisms, the law regulates the extent to which information is shared and the stages at which the representative updates the class members as the class lawyer does not meet all members.

D. The Judgment and Subsequent Decisions (marked in grey on the above Final Chart)

1. Damages Distribution

As shown in Chapter Three, Part A, Section 6 (B), once the court in Israel has held in favour of a class, it sets down the criteria for distributing the fund and appoints a trustee to monitor the distribution process.⁹⁰ This means that only those who are interested in the action will step forward at the end of the case to collect their share of the compensation. This is preferable to the opt-in model which requires all members to be part of the case from the outset. In the opt-out class action, the class members

⁸³ Class Action Law 5766–2006, s 25 (D) (Israel).

⁸⁴ Class Action Law 5766–2006, s 25 (E) (Israel).

⁸⁵ Class Action Law 5766–2006, s 25 (E) (1) (Israel).

⁸⁶ Class Action Law 5766–2006, s 25 (E) (2) (Israel).

⁸⁷ Class Action Law 5766–2006, s 25 (E) (3) (Israel).

⁸⁸ Class Action Law 5766–2006, s 25 (E) (4) (Israel).

⁸⁹ Class Action Law 5766–2006, s 25 (E) (5) (Israel).

⁹⁰ Class Action Law 5766–2006, s 20 (B)1 (Israel).

who join the proceedings at the end of the case only need to collect their share of the compensation and are not subject to questions on cross examination and costs. Professor Hodges seems to object to the type of Israeli provision which enables class members to come forward in order to collect their share at the end of the case. He claims that there is strong empirical evidence that consumers do not step forward in many cases, since the sums involved are too small to be worth collecting.⁹¹ Therefore, a solution is required to deal with uncollected funds. In Israel this solution takes the form of a *cy-pres* distribution whereby the court directs on how to distribute the uncollected funds.

Under the suggested model damages are to be distributed among the class members as long as they can be traced. In any case no member is allowed to get more than his share. With regards to the remaining funds, these should be disgorged from the defendant and handed to causes which the court may find fit. The Israeli provision that the Treasury is to obtain the remaining funds without any limitation on the purposes for which it may use the collected funds⁹² should not be adopted per se. The court should first take into consideration the requirements of the regulatory body which we offered to employ. As noted in Chapter One, in collective proceedings the court may also order damages for the benefit of the public in general or the distribution of funds for good causes or may require the reduction of prices.⁹³ In this way, the defendant is accountable for the full damage that he has caused.

2. *Financial Incentives and Costs*

The conclusion which can be gleaned from non-functioning opt-out European models such as the Portuguese opt-out model is that in order to promote private enforcement, financial incentives and bonuses should be introduced for both representatives and class lawyers in order to drive collective redress forward. Financial incentives should be available only where private enforcement is concerned. In these cases, private enforcement should be led by lawyers who may profit from managing collective cases

⁹¹ Professor Christopher Hodges, 'Response to consultation: Towards a Coherent European Approach to Collective Redress:' available at: <<http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>> accessed 28 July 2011.

⁹² Class Action Law 5766–2006, s 20 (A) 3 (Israel).

⁹³ Class Action Law 5766–2006, s 20 (C) (Israel).

rather than by class members whose share in the total action is very small. In order to convince lawyers to act as a 'driving force' for collective actions, contingency fees should be introduced. Contingency fees would also provide lawyers with an incentive to achieve the best possible settlement for their clients, since their own reward would depend on that of their clients.⁹⁴

Furthermore, in cases where the regulatory body examines the consumer complaint and finds that it is justified, disallowing a private action and instead appointing a public enforcer to deal with the collective action, the consumer who initiated the action should be entitled to a share of the proceeds should the action succeed.

With regard to costs, the court should have the power to reverse a costs order and to impose costs on the winning party where the court finds that the action brought some benefit to class members or to the public in general, for example where the defendant ceased acting illegally following a collective action.

The suggested model first requires covering all expenses associated with the action, as well as providing good remuneration for those who have contributed to the successful action, namely, the consumer who made the initial complaint, the regulatory body, the representing party and the class lawyer. However, the principle that the loser pays the costs should remain a general principle which the court may detract from in appropriate circumstances so as to act as a deterrent for unsubstantiated actions.

E. Additional Collective Redress Issues

1. Alternative Dispute Resolution (ADR) as an Additional Filter (marked green on the annexed Final Chart)

We noted that the Israeli model created much pressure on the judicial system and therefore any provision which eases the burden on the courts should be very welcomed. The Israeli model lacks procedures to deal with out of court collective settlements which precede the main legal proceedings. Thus, all collective disputes

⁹⁴ Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) Volume 8 Issue 1 The Competition Law Review 87.

must go to court and impose a burden and costs on the litigating parties. A change to the Israeli model in this respect may assist in easing any flood of cases as experienced by the courts in Israel. This change may come by the introduction of mandatory ADR proceedings.

As we saw the European Commission concentrates on settlements prior to legal proceedings in order to prevent the parties from having to fight their case in court. Two Commission Recommendations already exist at European level to facilitate Alternative Dispute Resolution using simple and inexpensive procedures. Both recommendations set out principles for the good functioning of out-of-court settlements.⁹⁵ The European Parliament gave precedence to ADR proceedings which are generally regarded as providing a quick and fair settlement and are likely to be more attractive for resolving disputes than court proceedings. Thus the European Parliament recommended that these proceedings be made obligatory in seeking out-of-court settlements before bringing a collective action.⁹⁶ These measures are not relevant to collective disputes but may be useful when looking for a proper mechanism to resolve collective disputes out of court.

Looking at ADR mechanisms for collective disputes we found the Dutch Collective Settlements Act of 2005 which allows a US-style settlement for all members of the class who do not actively opt out. It has been used to settle class action suits initiated in the United States on behalf of foreign investors who were excluded from the class in American actions.⁹⁷ However, the Dutch settlement mechanism does not facilitate settlements during trial as there is no procedure for collective actions for damages as yet in the Netherlands. However, the Dutch mechanism is surely a proper mechanism

⁹⁵ European Commission, 'Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes' (1998) OJ L 115/31 and European Commission, 'Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR' (2001) OJ L 109/56.

⁹⁶ European Parliament Committee on Legal Affairs, Report on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0012&language=EN>> accessed 4 June 2012.

⁹⁷ Ianika Tzankova in Lucy Trevelyan, 'Power to the people: collective redress for consumers' (International Business Association) available at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=97f4a814-acd2-42b9-993b-d1bebb2c46fa>> accessed 27 April 2012.

to settle disputes by alternative means before they go to court and later obtain the court's approval so as to bind all class members.

We found that as far as ADR is concerned, in order to encourage parties to settle their cases using collective ADR procedures, some measures should be introduced on a European scale, including the mandatory imposition of ADR in consumer collective redress actions. The introduction of a mandatory ADR scheme is likely to reduce the flood of actions and increase the number of settlements. Defendants would feel an incentive to settle the case on the basis that if the case were not settled, the class action which followed would be submitted with all the hazards and bad publicity that such an action entails. Plaintiffs could be awarded a reasonable bonus for their efforts to reach a successful settlement, which would be appropriate when a settlement benefits the class members. Therefore, and following the Dutch example, the courts should be equipped with powers to approve a settlement reached by the parties so that it becomes a legally binding decision. As we noted in the Final Chart, the parties should be able to apply for ADR at any stage of the case, regardless of which representative is leading the action, provided that any solution reached would be subject to court approval with the required supervision on settlements.

2. Cross-Border Issues

In order to consider the model suggested in this work in European context it is necessary to look at cross-border consumer transactions.

We noted that there is co-operation between organisations in cross-border cases in Europe. Such co-operation is essential for the enforcement of consumer rights in cross-border cases so as to make as much relevant information as possible available. The co-operation between member states relating to collective redress issues should be compatible with Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws albeit that the organisations should be allowed to bring collective redress cases for damages and not just for injunctive relief. Acting in accordance with this regulation means that when a competent authority becomes aware of an infringement committed in the EU, it must

notify the authorities of other Member States and the Commission. It must also supply, at the request of another competent authority, all relevant information required to establish whether an infringement has occurred. In addition, it must take all necessary enforcement measures to bring about the cessation or prohibition of the infringement.⁹⁸

Currently the requirement of mutual co-operation provides that the competent authorities inform the Commission of the existence of an infringement, the measures taken and the effects thereof, and the coordination of their activities. The Commission stores and processes the information it receives in an electronic database. All requests for mutual assistance must contain sufficient information to enable the authority to fulfil the request.⁹⁹

Co-operation is currently limited to investigation and injunctions to stop infringements. However, there is a clear need to enlarge the scope to allow qualified entities which conform to the licensing criteria which we have offered to be licensed to deal with collective actions. Such organisations should have a co-operation agenda in cross border cases within the community,¹⁰⁰ which would include publishing important information.¹⁰¹ We recommended the publication of relevant information¹⁰² which would appear on internet websites where all relevant information on collective redress cases would be published.¹⁰³ This would assist in co-operation where the

⁹⁸ Cooperation between Member States for consumer protection as explained by the Commission with regards to regulation (EC) No 2006/2004 available at <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/132047_en.htm> accessed 26 November 2011.

⁹⁹ Ibid.

¹⁰⁰ The information suggested is different from the current information which the competent authorities have to provide under Decision 2007/76/EC of 22 December 2006 which implemented Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance (Official Journal L 32 of 6 February 2007). This Decision provides the information requirements, which include the minimum information to be included in requests for mutual assistance and in alerts, the time limits to be complied with, access to information and the use of languages.

¹⁰¹ The relevant information and cooperation may be monitored by Community central organisations such as BEUC (Bureau Européen des Unions de Consommateurs) and ANEC (European Association for the Co-ordination of Consumer Representation in Standardisation).

¹⁰² See Chapter Three, Part B (2) (b) on page 138.

¹⁰³ A public registry of collective cases is operated in several countries, for example, The Israeli class action registry at <http://elyon1.court.gov.il/heb/tovanot_y/list.htm>; The GLO registry in the U.K at <<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/queens-bench/group-litigation-orders.htm>>; Class Actions registry, (for members

members of the class are scattered geographically or where additional information in relation to rough trader is required. Registration would be mandatory immediately upon submission of every collective redress case in order to prevent a multiplicity of actions and in order to allow centralized information in this respect.

Therefore we recommend that in our suggested model the consumer approaches either his or her state's regulatory body or state licensed organisation. These entities should share information with each other and include all relevant information on their websites. Organisations may bring stand-alone collective actions for all the class members from all over Europe. Private consumers may bring follow-on actions after finding of the state regulatory body representing all European consumers.

We have had to discuss the issue of proper jurisdiction in these collective cases. Following the American experience, we raised concerns of forum shopping in these types of actions. The US example demonstrates that with no overarching supervising body, it is impossible to prevent a diversity of decisions and forum shopping in cross-border actions. In view of the current position in Europe, and given the diversity of views in Member States relating to collective redress proceedings, it is clear that courts in Member States will give different constructions to the principles set down in any new collective proceedings. With no supervision by the European Commission, it is unlikely that a unified approach towards jurisdictions and applicable law will be developed in Europe. We suggested that a system of supervision over first instance state courts in collective cases to decide points of jurisdiction and the relevant law to be applied in such cases. Such a measure would prevent forum shopping and create equality between jurisdictions in collective cross-border cases. The Commission's supervision would need to ensure that the decisions on collective redress issues do not differ from one Member State to another.

It looks as if the time is near for the introduction of a new European model and therefore the European Commission should step in and impose co-operation between organisations and state regulators as we suggested in collective redress cases in order to ensure conformity within the European Union. In this work,¹⁰⁴ it is recommended

who opt in) under Sec 35 of the Dispute Act in Norway and the Class proceedings registry in Ontario, Canada at <<http://www.ontariocourts.on.ca/scj/en/notices/pd/classproceedings.htm>>.

¹⁰⁴ See Chapter Three, Part B beginning on page 129.

that binding criteria be introduced in order to license organisations which will be permitted to deal with collective redress issues and issues of jurisdiction will be set in place in order to prevent forum shopping so as to ensure that the outcome of the case is similar no matter where the collective case is tried.

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