NEW FRONTIERS OF CONSUMER PROTECTION

The Interplay Between Private and Public Enforcement

Fabrizio CAFAGGI
Hans-W. MICKLITZ
(eds.)

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INTRODUCTION

Fabrizio CAFAGGI and Hans-W. MICKLITZ*

1. THE FRAME

Consumer law is evolving rapidly under the combined pressure of increasing market integration and risk interdependency.[1] Consumer protection has become the keystone of effective market regulation. It regulates entry and exit of market products and services.[2] Enforcement of consumer laws is not only a key regulatory question when it comes to designing and implementing efficient markets but it triggers a broader set of theoretical questions concerning the relationship between states and markets and the combination of centralized and decentralized strategies.[3] It concerns public and private enforcement or, more precisely, administrative and judicial enforcement.[4] In Europe the conventional distinction between public and private enforcement, while rooted in a long-lasting tradition, does not capture the current state of affairs since judicial enforcement is sought by both public and private claimants and administrative enforcement is strongly

* This book develops out of a broader project that the two editors are carrying on in collaboration with NYU law school, in particular with Samuel Issacharoff and Geoffrey Miller. It was made possible also by the institutional support of the RSCAS and ALI which the authors gratefully acknowledge.

1 The definition and domain of consumer law differs in North America and Europe. In North America it is a combination of common and statutory law, and state or province and federal law. In Europe, it is also a combination of state judge made and statutory law (considering the UK and Ireland) but primarily a system which includes European and Member State laws.

2 At this level of generality, there seems to be higher convergence than in the past between US and Europe. Compare in this volume Issacharoff and Samuel, p. 4 ff. with Cafaggi and Micklitz, p. 357 ff.

3 We adopt a broad definition of enforcement in order to encompass the different forms in the area of judicial and administrative enforcement. While the focus is judicial dispute resolution mechanisms, we have considered different forms of alternative dispute resolution and arbitration which is ever growing in the field of consumer protection. See F. Cafaggi and H. Micklitz, Collective enforcement of consumer law: a framework for comparative assessment ERPL, 2008, p. 391 part. p. 396 ff.

4 On the relationship between public and private enforcement, see A. Ogus, Better regulation, better enforcement, in S. Weatherill (ed.) Better regulation, Hart Publishing, Oxford and Portland, 2007, p. 107 ff. Ogus, Costs and cautionary tales: economic insights for the law, Hart Publishing, Oxford and Portland, 2006, S. Shavell, Foundations of the Economic Analysis of Law, 2004, p. 445 ff. and M. Polinsky and S. Shavell, The Economic Theory of Public Enforcement of Law, J. Econ. Lit., Vol. 38, p. 45 (2000).

have actually been harmed. Courts that focus on deterrence, in contrast, consider the aggregate harm caused by the defendant's conduct, which is likely to be substantial, and thus perceive strong reasons of public policy to encourage class action litigation. For these courts, the fact that class actions often inaccurately allocate the benefits of the litigation among class members is unimportant. What matters is that the defendant be made to pay for the total harm caused.

A class action litigation in the United States is lately based on concepts of deterrence – hence the existence of devices such as opt-out actions, fluid and cy-pres recoveries, and the conferral of standing on all class members. As yet, the general approach in Europe focuses on compensatory rather than deterrent goals, but the early state of play in European class action procedures suggests that necessary adjustments may need to be made as these new regimes mature.

THE REFORM OF DIRECTIVE 98/27/EC

Cristina PONCIBÒ*

1. SETTING THE SCENE

All the Member States provide for an injunction procedure to protect the collective interests of consumers as a result of the implementation in their national laws of Directive 98/27/EC of the Council and Parliament, governing injunctions for the protection of collective interests of consumers ("Injunctions Directive").[1]

The major concern which led to the enactment of the Injunctions Directive was that the consumer rights laid down by means of the Community legislation during the last thirty years, needed to be efficiently enforced. The purpose of the Injunctions Directive has been made clear in the preamble:

> "Whereas current mechanisms available both at national and at Community level for ensuring compliance with (...) Directives do not always allow infringements harmful to the collective interests of consumers to be terminated in good time" (Recital 2).

The Injunctions Directive was indeed introduced to address what was perceived to be a gap in the enforcement of existing consumer protection regulations. The lack of speedy remedies and relief for consumers meant that a new approach was required.

Without mechanisms to bring about swift, certain and adequate enforcement of consumer law, those laws would not be respected.

In the light of its objective, the Injunctions Directive indeed provides for injunctions against businesses that infringe the collective interests of consumers,[2]

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1 Council Directive (EC) 98/27 of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] OJ L 166/51–5.
On the implementation of the Injunction Directive: J. Stuyck, E. Terryn, T. Van Dyck, V. Colaert, N. Peretz and P. Tereszkiewicz, *Study on alternative means of consumer redress other than redress through ordinary judicial proceedings (for the EU-25, Australia, Canada and the US*, 17.01. at 324.

2 Additional remedies are the publication of the decision, where appropriate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement (cf. Article 2(b) of the Injunctions Directive); insofar as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into

without the need to show any actual harm to individual consumers: it was regarded as an important mechanism to correct market failures, where the collective harm that is caused by the defendant's action is more than the sum of the individual losses involved.[3] In this respect, an important development was that the Injunctions Directive allows "qualified entities" to bring such actions before the competent court or administrative bodies *in other Member States*. This means that "qualified entities" have standing before the competent courts or other public bodies in all Member States to seek an injunction. In other words, Member States are obliged to accept the legal standing of foreign "qualified entities" that fulfil the requirements established by their national laws in order to take action, in case an infringement of the collective interests of consumers has a cross-border dimension.

After ten years since its adoption, there is a growing consensus within the European legal scholarship about the need to rethink the system of consumer protection designed by the Injunctions Directive.[4]

This issue is deeply related to the ongoing reform of the Consumer Law Acquis: in the last year, the European Commission adopted a Green Paper and launched a consultation on some key issues on the future developments of EC consumer law. Recently, the European institution has issued a staff working document which summarises the outcome of the consultation and briefly indicates the debate about the revision of the Injunctions Directive.[5]

Empirical evidence recently gathered has shown that this action is scarcely used before national courts: for example, the data available from the "EC Consumer Law Compendium" reports only sixteen cases of application of national laws implementing the Injunctions Directive.[6]

the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions (Article 2(c) of the Injunctions Directive).

3 The scope of application of the Injunctions Directive is restricted. It does not apply to infringements of consumer protection legislation in general, but only to infringements of provisions of the directives listed in the Annex, as they are incorporated in the internal legal order (see at paragraph 1.3).

4 F. Cafaggi and H.-W. Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment', (2008) 16 *ERPL* 391, 425; W. H. Van Boom and M.B.M. Loos, 'Effective Enforcement of Consumer Law in Europe: Synchronizing Private, Public, and Collective Mechanisms' [2008], http://ssrn.com/abstract=1082913, accessed 26 June 2008.

5 Commission (EC), DG Health and Consumer Protection, 'Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis, Analytical Report on the Green Paper on the Review of the Consumer Acquis' submitted by the Consumer Policy Evaluation Consortium, http://ec.europa.eu/consumers/rights/cons_acquis_en.htm, accessed 26 June 2008.

6 H. Schulte-Nölke (ed.) in co-operation with C. Twigg-Flesner and M. Ebers, 'EC Consumer Law Compendium, Comparative Analysis', [2007], http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf, accessed 26 June 2008.

Some criticism also comes from the study of the University of Leuven that, *inter alia*, underlines the various inconsistencies in the ways in which the Community measure has been implemented at national level.[7] The study notes that the lack of uniformity makes it difficult for a foreign "qualified entity" to act against a trader in another Member State.

Given that this instrument suffers a series of shortcomings both at theoretical and practical level, national initiatives concerning consumer collective redress have emerged in the last years. Experiments in the Member States may be considered to follow three main solutions: the test case (England and Wales[8] and Germany[9]); the model of action provided by the Injunctions Directive with some improvements (Italy,[10] Spain[11] and France[12]); and the model offered by the class actions with some modifications (Sweden[13]).

In consideration of the proliferation of various mechanisms at national level, a common European core regarding the collective judicial enforcement of consumer law is needed to assure the "same" level of protection to the European consumers. Urged by the mushrooming of national initiatives, the European Commission recognised the importance of effective mechanisms for seeking redress in its Consumer Policy Strategy for 2007–2012 and it announced it would consider action on collective redress mechanisms necessary for consumers: "If consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress. Consumer disputes require tailored mechanisms that do not impose costs and delays disproportionate to the value at stake."[14]

7 Stuyck and others, *Study on alternative means of consumer redress other than redress through ordinary judicial proceedings*, Catholic University of Leuven, January 17, 2007, published by DG SANCO, April 2007.

8 R. Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England', (2007) 70:4, *Modern Law Review* 550–580; 'Some difficulties with Group Litigation Orders – and Why a Class Action is Superior', (2004) 24 *CJQ* 40,68 and *The class action in common law legal systems: a comparative perspective* (Hart Publishing, Oxford 2004).
CJS Hodges, *The Reform of Class and Representive Actions in European Legal Systems. A New Framework for Collective Redress in Europe* (Hart, Oxford, 2008).

9 M. Sturner, 'Model Case Proceedings in the Capital Markets – Tentative Steps Towards Group Litigation in Germany', (2007) 26 *CJQ* 250–267.

10 Article 140-bis Legislative Decree September 6, 2005, No. 206 ("Consumer Code" "Azione collettiva risarcitoria").
For an introduction to Article 140-bis, C. Poncibò, 'Consumer Collective Redress in the European Union: The 'Italian Case', in G. Howells, A. Nordhausen, D. Parry and C. Twigg-Flesner (eds.), *The Yearbook of Consumer Law*, (Ashgate, London).

11 Artículo 11. Legitimación para la defensa de derechos e intereses de consumidores y usuarios, Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

12 L. Boré', 'L'action en représentation conjointe: class action française ou action mort-née?', (2005) *Dalloz*, III, chr., 267.

13 The Swedish Group Proceedings Act entered into force on 1 January, 2003.

14 Commission (EC), 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy strategy

In consideration of the above, the European Commission launched, in March 2007, two studies on collective redress. The first of these studies will evaluate the effectiveness and efficiency of the national collective redress systems that currently exist in the Member States, assess whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available, and examine the existence of negative effects for the Single Market and distortions of competition. The second study will analyse in detail the problems faced by consumers in obtaining redress for mass claims, as well as the economic consequences of such problems for consumers, enterprises and the market. After receiving the results of these studies, the Commission will consider a Communication on consumer collective redress in December 2008.

Developments about collective redress also arise from the White Paper "Damages actions for breach of the EC antitrust rules" issued on 2 April, 2008 (the "White Paper") that I will introduce at paragraph 2.1.[15]

On such basis, the Commission has recently launched the Green Paper on Consumer Collective Redress[16] to consider whether, and if so, to which extent an initiative on consumer collective redress is necessary at European level. In particular, these efforts are directed to evaluate a possible new measure and/or to improve the existing framework provided by the Injunctions Directive. This article, by taking into consideration the proposals indicated in the Green Paper, discusses the possibility to enlarge the standing of the consumer associations. under the Injunctions Directive.

1.1. THE COLLECTIVE INTERESTS OF THE CONSUMERS

The Injunctions Directive protects the collective interests of the consumers that can be distinguished from the accumulated interests and rights of the single consumer.[17]

2007–2012, Empowering consumers, enhancing their welfare, effectively protecting them', COM (99), 13 March, 2007, at 11.

15 Commission (EC), 'White Paper on Damages actions for breach of the EC antitrust rules', COM (165) 2 April 2000, at 4; and 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels, 2 April, 2008, SEC (404), 2 April 2008.

16 Commission (EC), 'Green Paper on Consumer Collective Redress', COM (794) 27 November 2008.

17 Whereas 2 of the Injunctions Directive: *"Whereas current mechanisms ... for ensuring compliance with [consumer protection] Directives do not always allow infringements harmful to the collective interests of consumers to be terminated in good time; whereas collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement; whereas this is without prejudice to individual actions brought by individuals who have been harmed by an infringement; Parliament and Council have adopted this Directive.".*

In doing so, it assumes that a group of consumers provides an identity distinct from that of its individual members, an identity that makes sense only in the context of the consumers' relationship to one another and to other actors in the social world. In few words, consumers share in an identity separate from and irreducible to their identities as isolated individuals.[18]

The collective interest of consumers is a collective good, so that an injury to that good cannot damage a single consumer's rights.

Many years ago, the Cour de Cassation clarified this point by openly stating that: "(...) *le préjudice direct ou indirect qui est cause par une infraction à l'intérêts collectif des consommateurs ne se confond pas avec le préjudice subi personnellement par les victimes directes de l'infraction qui seules peuvent en demander réparation*".[19]

Because a collective good consists in being shared among people, those individuals also share the harm of any impediment to its achievement: thus, no single consumer can claim the injury as one to him alone and the possibility to recover the "collective damage" is discussed in the literature (see paragraph 1.2).

An immediate objection to the construction adopted in the Injunctions Directive is that there is no strong commonality of interest among consumers.[20]

Consumers' identity is composed of a wide range of different characteristics such as: religion, class, profession, ethnic origin and sex. Actually, consumers do not construct their identity as members of the social group of "consumers" simply by acquiring goods: the said attributes tend to be stronger than our consumer attribute and thus it is not possible to establish a distinctive consumer identity.[21] Further complexity to this picture has been added by the proliferation of the consumer identities in the social sciences.[22]

In consideration of the multiple – but uncertain – dimensions of the identity of the consumers, it is really problematic to say what their collective interests are and who may represent them. Thus, it is possible to question "what right or ability

18 M. Cappelletti, *'Vindicating the Public Interest Through the Courts: A Comparativist's Contribution'*, in M. Cappelletti and B. Garth (eds.), III *Access to justice: Emerging issues and perspectives*, (Alphen aan den Rijn, Netherlands and Milan: Sijthoff/Giuffre, 1979). 513, 564.

19 Cour de Cassation, crim., 20 mai 1985, *Bull. crim.*, 1985, 485.

20 Before the adoption of the Community measure, the same concept was present in the Verbandsklage. H. Koch, 'Class and Public Interest Actions in German Law', (1986) 4 *CJQ* 66, 79.

21 R. Keat, N. Whiteley, N. Abercrombie (eds.), *Introduction, The Authority of the Consumer*, (Routledge, London, 1994) at 8.

22 W.H. Van Boom, 'Introduction: Collective Interests, 'Prêt À Porter' Justice?' (2008) 1:2 Erasmus Law Review, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101427#PaperDownload, accessed 26 June 2008.
K. Soper, 'Re-thinking the "Good Life"', (2007) 7:2 *Journal of Consumer Culture*, 205, 229. (2007); R. Harrison, T. Newholm, D. Shaw (eds.), *The Ethical Consumer*, (Sage, London, 2005).

a body staffed by professional consumer advisers has to claim to be able to determine what is in the consumer interest".[23]

1.2. THE "COLLECTIVE DAMAGE"

The adoption of the notion of "collective interests" in the Injunctions Directive implies a major question: the possibility for the associations to claim the 'collective damage' for the infringement of the collective interests of the consumers: a damage that is not the simple accumulation of numerous individual claims, but rather a nominal or a non-material, lump sum that cannot be exactly calculated and proved.[24] The "collective damage" represents damage to the collectivity of the consumers, i.e. all citizens in the act of consumption. Given that this is different from the damage individually suffered by the consumers, it may also be considered within the shadow of the "punitive or exemplary damages", that have recently been admitted, only in principle, by the European Commission in cases of infringement of EC competition law.[25]

The difficulty in admitting the collective damage is mainly a consequence of the unsatisfactory conceptualisation of the collective interest of the consumers. In any case, I believe that the collective – as opposed to individual – interests of consumers should be vindicated by damages only under certain circumstances and, particularly, in the case below described.

When associations have to claim damages on behalf of a group of consumers, this does not pose any particular problem (the "named consumers"). In such case, the group of injured play an active role in the suit and is highly interested in the action (e.g. for example in the case of severe health injuries caused by chemicals or pharmaceutical products). The compensation claimed will often be high enough to provide incentives to the injured consumers to notify their individual losses to the association. The suing association submits a list of all the injured parties and the judge should be able to substantiate the individual damage suffered by each injured.

This is not actually possible in the case of truly widespread damage and where it is difficult to substantiate the individual damage because it may be very small and diffused over a large number of consumers (the "unnamed consumers"). Here, it is conceivable to award the "collective damage" for the benefit of the consumers, in general. In such case, the damages would be awarded to the

23 G. Howells, 'Opinion: Consumer Representation' (1993) 17 *Consum. LJ*, 18.

24 H. Koch, 'Non-class group litigation under EU and German Law', (2001) 11 *Duke J. of Comp. & Int'l L.* 355, 361.

25 Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', *SEC* (404), 2 April 2008, at 59.

organisation and the amount recovered, instead of being directed to the individual plaintiffs harmed in a particular case, could be directed to a specific fund designed to offset the type of harm at issue in the case or more generally to promote *specific* consumer initiatives.

In this regard, French courts have developed a set of criteria to allocate the "dommage collectif", to include, for example, the legal costs sustained by the organisation-claimants.[26] The proposed solution aims to avoid the risk of the juxtaposition of the individual and the collective damages, which results in an over-compensation of the damage occurring in the case in issue.

The critiques to the notion of collective interests are relevant also in this respect and I have serious concerns about the manageability of such damage.

1.3. THE LIMITS OF THE INJUNCTIONS DIRECTIVE

Apart from the theoretical shortcoming arising from the adoption of the concept of consumers' collective interests, the Injunctions Directive also presents practical limitations.

The first limit of this measure is the constraint on the number of claimants who may bring an action.[27] The "qualified entities" of the Community measure vary greatly in number and power in the Member States,[28] while this article focuses on the consumer organisations (i.e. private institutions that are created on a voluntary basis or established by the national governments, with the aim of pursuing collective purposes on behalf of large groups of consumers).

In most cases, organisations are allowed to sue for the protection of collective interests only when they have particular characteristics defined by the law and concerning the number of members, the presence in the territory, the internal organisation and so forth. The existence of these conditions is normally checked by an official entity (i.e. a Ministry) and then the approved association is included in an official list. On the basis of the strict bureaucratic control exercised by the government, only a few officially authorised associations may actually have a role in consumer litigation. Unfortunately, the accreditation system before the government lacks flexibility in granting access to justice to newly established groups of consumers.

26 J. Frank, 'Pour une véritable réparation du préjudice causé à l'intérêt collectif des consommateurs', in C. Albigès, J.F. Artz, J.M. Badenas Carpio, J. Beauchard (eds.), *Etudes de droit de la consommation. Liber amicorum Jean Calais-Auloy*, (Dalloz-Sirey, Paris, 2004) 409–419.

27 R.B. Cappalli, C. Consolo, 'Class Actions for a Continental Europe? A Preliminary Inquiry', (1992) 6 *Temp. Int'l & Comp. L.J.* 217, 220.

28 Note 7 at 14.

This mechanism does not accommodate the inherent tensions about how to represent consumers. In theory, consumers do not participate to a large extent in organisations because, as individuals, they are self-interested in their own welfare and therefore will not make any sacrifices to help the group to attain its political objectives. This is so because once the public good is achieved it is available to everyone regardless of who contributed to its provision. Accordingly, some consumers will try to free ride on the efforts of others and will have no incentive to contribute to the provision of the public good, hoping that others will shoulder the burden. Such problem becomes acute once everyone attempts to free ride and no one is left to take any action.[29] In practice, there are sociological studies confirming the relatively small public support for national consumer organisations in the Member States.[30]

The second limit concerns the domain in the Injunctions Directive, which applies only to the matters indicated in the Annex (e.g. misleading advertising, consumer credit practices, television broadcasting, package holidays, advertising of medicines and unfair terms in consumer contracts)[31] and the lack of action for damages to complement injunctions. The European Commission explained this solution by stating that this measure has been designed to prevent damages: "as distinct from actions for damages which are designed to 'make good' the consequences" and that "clearly an action for an injunction can play a preventative role only provided it is part of an effective and rapid procedure".[32]

On such basis, this action has been considered as a policy-oriented remedy based on the fact that it does not vindicate individual rights but it pursues the policy-goal of consumer protection.[33] This policy-oriented action has therefore proven to be quite ineffective in preventing the wrongful behaviour of the businesses in the Single Market.[34]

1.4. A LACK OF COURAGE: THE ISSUE OF STANDING

In light of the above, one may conclude that the failure of the model of action introduced by the Community measure is primarily the result of the lack of understanding of the notion of the collective interest of consumers.

29 M. Olson, *The Logic of Collective Action Public Goods and the Theory of Groups* (HUP, Cambridge 1965), at 126.

30 V. Kendall, *EC Consumer Law* (Wiley Chancery, London, 1996) at 19.

31 Annex to Directive 98/27/EC, List of Directives covered by Article 1.

32 Commission (EC), 'Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers' Interest', COM 712() 712, 1995, 3.

33 M. Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective', (2001) 11 *Duke J. Comp. & Int'l L.* 405.

34 Note 7 at 347.

The Injunctions Directive has expressly introduced such concept, but it has failed to go further in adopting a "communitarian" vision of such problems and, particularly, in providing an adequate protection of such interests in terms of access to justice.[35]

Usually, an individual claimant must have suffered a legally cognisable injury to bring an action before national courts. When the claimant is an association, rather than a single individual, the doctrine has always had serious problems in reducing the interests that the association seeks to protect to an interest that can be construed individualistically.

Despite the acknowledged importance of such concerns in the Consumers Law Acquis, the current standing doctrine before the courts in the Member States – and particularly before the European Court of Justice[36] – grants a very limited judicial protection to associations and other groups.

This prevents courts from redressing an injury to any interest best modelled as a collective one. Often, such interests take shape just because a group of people form an association to share a joint concern: alone, no one member embodies the interest at stake, but in banding together, all of the members create a vehicle that does possess a distinct, potentially vulnerable interest. The association serves as such a vehicle not because the organisation is like any single individual, but specifically because it is unlike an individual.

The tension in the judicial system between acknowledging these benefits and sticking to an individualistic model of interest manifests itself in inconsistent grants of associational standing. And consequently, real collective interests worthy of judicial protection fall by the wayside for want of a framework to accommodate them.

If European institutions intend to maintain the idea of the collective interest of consumers and to make the Injunctions Directive really work for consumers, it is necessary to "take courage" in order to re-conceptualise the doctrine of standing in cases involving the collective interests of consumers, investors and employees.[37]

A new conceptualisation is possible and may ground on the recognition of the identity of a collective. When collectives seek to solve problems regarding shared goods, they face concerns pertinent exclusively to themselves, rather than to any single individual. The collective possesses its own identity that may grow from members' relationships with one another and the members' relationships with

35 M. Cappelletti, 'Formazioni sociali e interessi di gruppo davanti alla giustizia civile', (1975), *Riv. dir. proc.*, 361.

36 O. De Schutter, 'Public Interest Litigation Before the European Court of Justice', (2006) 13:1 *Maastricht Journal of European and Comparative Law*, 9–34.

37 C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects', (1972) 45 S. *Cal. L. Rev.* 450.

non-members, but it is distinct from members' individual identities and singular concerns.

In the words of Teubner: "If (...) a systems-theory approach is chosen, the very distinction between individualism and collectivism becomes questionable. Systems theory neither reduces collective action to individual action nor vice versa, but interprets both as different forms of social attribution of action. [W]e would suggest that the social reality of a legal person is a 'collective': the socially binding self-description of an organized action system as a cyclical linkage of identity and action".[38] Concrete, corporate law recognises this by defining a corporation as a legal person, apart from its directors, shareholders and employees. Labour law also acknowledges distinctive collective identity by institutionalising the status of unions. The law in these areas has responded to the reality of contemporary social life: business and labour require definitively collective identities to pursue their goals. In fact, courts already recognise interests other than those unique to individual persons, allowing corporations and associations to argue their claims, even at the expense of a particular individual's interest.

If we agree to give a central role in our society to consumer organisations, we may consider them as the main bearers of standing for the protection of the collective interests of the consumer. This means to assign to the courts the technical (and political) task to recognise these organisations as representatives of particular collective interests according to the association's degree of formal organisation and demonstrated commitment to the claimed interest.[39]

2. THE REFORM OF THE INJUNCTIONS DIRECTIVE: ENLARGING ASSOCIATIONAL STANDING?

A possibility to reform the current European framework consists of enlarging the standing of the "national consumer bodies" and, particularly, the consumer organisations to recover damages on behalf of consumers.

Clearly, in this case, it is not the collective interests as in the Injunctions Directive that is vindicated by the organisation, but the rights of a certain group of consumers collected together for purposes of procedural economy. This idea is present in the work by Cappelletti and Garth who drew a distinction

38 G. Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence of the Legal Person" (1988) 36 *American Journal of Comparative Law*, 130.

39 M. Shapiro and A. Stone Sweet, *On law, politics, and judicialization* (OUP, 2002); A. Stone Sweet, *Governing with Judges* (OUP, 2000).

between the mechanisms designed to protect the collective aspects of certain rights and those designed to protect the individual ones.[40]

The model of action here considered represents a case of representative litigation – a tool that plays an important role in modern civil adjudication, being used in a number of different procedural settings to justify imposing the effects of a lawsuit on a person who had no opportunity to participate personally in the litigation and sometimes no knowledge that the suit was even pending.

In the last years this device has been largely discussed both in the United States (where the class actions are generally conceived by the literature as representative lawsuits[41]) and in the European Union (e.g. LDC Consultation Paper on Representative Claims[42]).

My point is that, nowadays, the success of the representative litigation is not the expression of a corporatist vision of society as it was in the past,[43] but it finds an explanation due to efficiency reasons, especially in mass tort cases, involving a large number of individual suits and raising many common issues: in such case, as the number of consumers involved grows, this device has proven to be more efficient than voluntary joinder of parties and consolidation.

2.1. DEVELOPMENTS IN EC COMPETITION LAW

The White Paper mentioned at paragraph 1 before expressly considers a representative action brought by consumer organisations.[44] In particular, it clearly states the necessity to introduce a mechanism allowing the aggregation of the individual claims of victims of antitrust infringements: consumers, especially those who have suffered a relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these they currently remain uncompensated.

Thus, the White Paper suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust. A representative action for damages brought by entities with certain

40 M. Cappelletti at note 17.

41 R. Mulheron, at note 9. J. Bronsteen and O. Fiss, 'The Class Action Rule', (2003) 78 *Notre Dame L. Rev.* 1419, 1420.

42 LDC, *Representative Claims: Proposed New Procedures*: Consultation Papers, February 2001 quoted by R. Mulheron, 'From representative rule to class action: steps rather than leaps', (2005) 24 *CJQ*, 425.

43 S.C.Yeazell 'Group Litigation and Social Context', (1977) 77 *Colum. L. Rev.* 866, 867, 877.

44 Commission (EC), 'White Paper on Damages actions for breach of the EC antitrust rules', COM (165) 2 April 2000, at 4.

characteristics[45] – such as consumer organisations, trade associations and State bodies – on behalf of identified or, in rather restricted cases, identifiable victims (not necessarily their members) and an opt-in collective action where the claims from individuals or businesses are combined in one single action. In such model of action, as opposed to representative actions as defined above, the claimant himself has suffered harm. Moreover, the opt-in collective action system envisaged by the European institution is a system where the victims have to express their intention to be included in the action.

According to the European Commission these two types of action complement each other for two main reasons: first, the qualified entities will not be able or willing to pursue every claim; second, it is important that consumers are not deprived of their right to bring an individual action for damages if they so wish.

This proposal is therefore not fully convincing in consideration of the risk that the duplication of the actions will produce an over-compensation of the antitrust damages. It is evident that the proposed solution implies the putting in place of safeguards to avoid the same harm being compensated more than once.[46]

Anyway, these suggestions on damages actions in the field of antitrust are part of the European Commission's wider initiative to strengthen collective redress mechanisms and may develop further within this context.

2.2. NATIONAL EXPERIMENTATION: ARTICLE 140-*BIS* OF THE CONSUMER CODE

Among the cases of national experimentation it is interesting to comment on the action provided for by the new Article 140-bis of the Italian Consumer Code ("azione collettiva risarcitoria") granting associations the standing to recover damages or to bring an action for restitution on behalf of consumers.[47]

The new action would enter into force, subject to integrations and/or amendments, on July 1, 2009.[48]

45 Qualified entities should include (i) entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests; and (ii) other existing entities whose primary task would be to protect the defined interests of their members, other than by pursuing damages claims, which would be certified on an *ad hoc* basis in relation to a particular infringement according to national procedures.

46 Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', *SEC* (404) 2 April 2008 at 18–20.

47 Similar solutions are present, for example, in France (see at paragraph 2.3) and Spain (see at paragraph 1).

48 Article 140-bis Legislative Decree 6 September, 2005, no. 206 ('Consumer Code').
The Article was introduced by Article 1, sections 445–9 of the Law on 24 December, 2007 No. 244 (*'Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato. Legge finanziaria 2008'*) [2007] OJ No 300, Supplement No. 285.

This action relies on a bureaucratic accreditation,[49] but leaves to Italian judges the possibility to grant standing to other organisations and committees that are sufficiently representative of the collective interests in issue; it is clear that this solution aims not to exclude valuable voices from consumer litigation: consumers, who believe they have interests in common with others are likely to establish *ad hoc* organisations with the aim of bringing collective actions seeking compensation for damages.

The model of action of Article 140-bis provides an opt-in mechanism: those consumers and users who intend to benefit from the protection afforded by this Article must notify the association in writing of their intention to join the collective action. Consumers may join the action even during the appeal and up until the hearing scheduled in order for the parties to specify their conclusions.[50]

The claimant may act in order to request (i) the ascertainment of the right to be compensated for damage, (ii) an order to return any due amounts to the individual consumers or users within a legal relationship relating to standard agreements. The action may also arise as a consequence of tort liability, unfair trade practice or anti-competition behaviour, providing that such unlawful acts damage the rights of a plurality of consumers and users.

The Article introduces a sort of "filter": at the first hearing the court shall declare the admissibility or inadmissibility of the claim by way of an order that may be challenged before the Court of Appeal, which shall rule in Chambers. The claim is declared inadmissible when it is clearly groundless, when there is a conflict of interest or whenever the judge does not ascertain the existence of any collective interest deserving protection pursuant to this Article.[51]

Should the judge accept the claim, he or she shall also set the criteria to be used in order to calculate the amount to be paid to the individual consumers and users who have joined the collective action or who have intervened in the

The Italian government has recently postponed the entering into force of this provision to July 1, 2008.

49 The associations of consumers and users registered on the list pursuant to Article 137 of the Consumer Code are entitled to act before the courts under Article 140-bis of the Consumer Code. Such list is kept by the government and, precisely, by the Ministry of Productive Activities.

50 The commencement of the collective action or the fact of joining it afterwards shall interrupt the statute of limitations pursuant to Article 2945 of the Italian Civil Code.

51 The judge is entitled to postpone the assessment of the admissibility of the claim when preliminary investigations concerning the same subject matter are underway before an independent authority (primarily the Italian Antitrust Authority). Moreover, should the judge declare the admissibility of the claim, then the party who has initiated the collective action is ordered to duly advertise the content of the claim and actions are also taken for the continuation of the proceedings.

proceedings.[52] Within 60 days of the service of judgment, the company shall make its offer for payment by way of a written deed to be served upon any entitled party and to be filed with the clerk's office.[53]

When the company fails to make its offer within the period indicated or should its offer remain unaccepted after 60 days of its service, the chief judge of the court shall appoint a sole Camera di Conciliazione (that is, conciliation committee) in order to set the amounts to be paid to consumers and users who have joined the collective action and who so request.[54] The decision that brings the proceedings to an end also has legal effects for those consumers and users who have joined the collective action. Those individual consumers or users who have not joined the collective action shall continue to have their right to bring individual actions. The judgement is binding only for the consumers, who have opted-in by conferring the mandates to the organisations.

2.3. CONSUMER ASSOCIATIONS AND LAWYERS

In the model of action considered in the previous paragraphs, the consumer associations are "intermediaries" in the provision of access to justice for individuals. The relationship between the consumer and the association poses a principal-agent problem:[55]

In cases of legal actions taken by associations, the agency chain between the consumers and the lawyer(s) is lengthened: the client is the association, whose members are known and whose standing is based on the consent of its members, and this may decrease the ability of an 'otherwise self-interested' lawyer to act contrary to the interests of the consumers he or she purports to represent.

The intermediation of the organisations may therefore create a series of specific shortcomings to the action.

In particular, the associations represent their own interests, which may diverge from those of the injured consumers they seek to represent. In the Green Paper "Damages Actions for the breach of EC antitrust rules" the European Commission highlighted these concerns and stressed that collective actions in antitrust law may be abused by consumer associations in order to advance their own interests, which might be different from those of the individuals who have suffered from an

52 The judge shall also establish the minimum amount to be paid to each consumer or user should this be possible on the basis of the documents at his or her disposal.

53 Any form of proposal accepted by the consumer or user shall be enforceable.

54 The conciliation committee is composed of a lawyer indicated by the claimant and by a lawyer indicated by the defendant, and it is chaired by a lawyer appointed by the chief judge of the court, chosen from among those entered in the special register for higher jurisdictions.

55 H.B. 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 and Economics*, 183, 213.

infringement of the competition rules.[56] For instance, if consumer associations are awarded damages for their own benefit, consumer associations might have an incentive to settle the dispute, although this would not necessarily be in the best interest of the consumers, since they may gain more benefit should the procedure proceed. The Green Paper urged the necessity to ensure that damages awarded by the courts are not used for the personal benefit of the representatives, but are rather designated to a particular project that will benefit consumers as a whole.

In addition, the consumers whom the association seeks to represent may have internal conflicts which make it impossible to represent the group: some individuals who purchased a product already have suffered an injury while others may be concerned that their ingestion of the product will cause them to develop an injury in the future. Moreover, some may have serious or life threatening injuries or may have only minor complaints and some may have been warned by their doctors of potential side-effects, while others may have received no warnings. Evidently, it is difficult to represent a large group of consumers who are in different situations.

Moreover, in comparing lawyers and organisations as litigation intermediaries, it is necessary to consider the key issue of funding of the action.

Lawyers, as entrepreneurs, are obviously incentivised to act before the court by the prospective of obtaining remuneration and thus they are available to initially fund the costs of litigation. Consumer associations are, therefore, reluctant to initiate judicial proceedings due to the high costs involved in such proceedings and the risk that they will incur substantial costs should they lose the case.

The funding may be provided by the victims launching the action themselves or by the entity representing the latter by legal aid mechanisms or other publicly or privately administered funds, by insurance companies or other players on the market, or by the claimants' lawyers working under a contingency fees agreement. Another possibility is to create a special fund which will assist in financing the costs of the proceedings.[57]

Moreover, the organisations are exposed to liabilities in terms of claims by consumers if they do not exercise their mandate properly and by producers if they damage their reputations unfairly. Under certain circumstances, they may also be held liable for the defendant's legal costs of the action. The way to overcome this reluctance is by limiting the potential costs and liability that consumer associations could incur in legal proceedings. In light of the above, it has been proposed that

56 Commission (EC), Green Paper 'Damages actions for breach of the EC antitrust rules', COM (672) 19 December 2005.

57 O. Dayagi-Epstein, 'Representation of Consumer Interest By Consumer Associations – Salvation for the Masses?', (2006) 3:2 *Competition Law Review*, 209, 249, 224–225 also quoting S. Smismans, *Law, Legitimacy and European Governance Functional Participation in Social Regulation* (OUP, Oxford 2004).

the consumer associations should not be liable for the other parties' costs where their claim was unsuccessful, unless it was proved that they had acted unreasonably.[58]

In the Member States there are already examples of the practical and financial difficulties incurred by these organisations. In France, since 1992, a non-profit, government-authorised consumer organisation may seek compensation for damages that must have been caused by the same person and have a common origin, suffered on behalf of consumers ("action en représentation conjointe" – Article L. 422–1 of the French Consumer Code).[59] However, very few actions of this kind have been brought (that is, 3 cases in about twenty years). The reason is that this mechanism suffers serious shortcomings: the difficulty in collecting the mandates without adequate instruments of advertising, the costs of running the collective actions, the complexity in managing a large group of consumers and the risk of liability. In 2005 the French President asked the government to propose legislation on collective actions and a working group of ministers, consumer organisations, companies and lawyers was formed to prepare draft legislation for collective consumer actions ('actions de groupe').[60] The aim of the proposed new law was to introduce a 'French-style' collective action for consumers by reforming the action en representation conjointe or by introducing a new instrument.[61]

A more recent example comes from the Netherlands,[62] where any incorporated interest group, even if it has been founded on an *ad hoc* basis, has standing to sue in the interest of their members and may file for injunction to stop and desist from orders. Notwithstanding the above, the organisations hardly ever appear in civil courts and one of the main reasons for this absence of consumer organisations in civil procedures is the lack of funds to pursue civil litigation.

58 BEUC, (BEUC/190/2006), 'Damages Actions for breach of EC antitrust rules BEUC position on the Commission's Green Paper', 21 April 2006, http://ec.europa.eu/comm/ competition/ antitrust/others/actions_for_damages/129.pdf, accessed 26 June 2008.

59 L. Bore at note 12.

60 A lively debate took place on such reform. In April 2006 two bills were submitted to the Parliament – Sénat and Assemblée Nationale – one by socialist Members of Parliament and the other by a Member of Parliament from the current majority right-wing party ('UMP'), to incorporate a system of collective action into the French legal system. However, the new bill on consumer rights, which comprised some provisions on collective consumer actions, was withdrawn from Parliament's agenda at the end of January 2007. The debate on the introduction of class actions in France is still open.

61 The parallelism with Article 140-bis of the Italian Consumer Code is evident.

62 W.H. Van Boom and M.B.M. Loos, *Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention'* (Europa Law Publishing, Groningen 2007).

3. AN IMPACT ASSESSMENT OF THE REFORM

The proposal to enlarge the standing of consumer associations under the Injunctions Directive will have an impact on European society.

In particular, there are at least two wider questions, deeply related to the aims of European consumerism,[63] lying behind the reform of such instrument and/or the introduction of mechanisms for consumer collective redress in the European Union.

The first regards the role that the consumer-citizen may play in the de-centralised enforcement of EC Consumer Law, while the second concerns the evolution of the consumer organisations in European society: do we agree to grant a central position to these organisations in consumer litigation? Are they to be seen as quasi-public organisations funded by (and part of) the European institutions and the Member States as in the Nordic countries or as private watchdogs funded by their members? The answer evidently has practical consequences: a solution to the resources problem is for the State to fund consumer associations, but an excessive proximity to the government could create an undesirable degree of dependency by consumer associations on the governments and the need to please those sponsors. This could in turn lead to loss of support from their constituents and the loss of their social role.

3.1. EMPOWERING THE CONSUMER-CITIZEN

The possible expansion of the scope of liability for widespread damages under the Injunctions Directive (or under the national mechanisms mentioned at paragraph 1) contributes to empower the consumer, who is viewed as an important agent of consumer policy, contributing to achieving a high quality and competitive business climate in the Single Market: this conceives of the consumer as an active player in the market rather than a victim who needs to be protected. More importantly, the effects of a new instrument will not be limited to the domain of EC consumer law and this is due to the recent convergence in the social sciences of the notions of consumer and citizen.[64]

Traditionally citizenship and consumption have been considered to belong to separate areas of study: whether their consumption choices have been theorised as authentic expressions of selfhood or as socially constructed, individuals qua consumers have most often been presented as obedient to forms of self-interest

63 J.Q. Whitman, 'Consumerism Versus Producerism: A Study in Comparative Law', (2007) 117 *Yale L.J.*, 340.

64 F. Trentmann, 'Citizenship and consumption', (2007) 7:2 *Journal of Consumer Culture*, Vol. 7, No 2, 147–158.

that either limit or altogether preclude the capacity for the reflexivity, social accountability and cultural community associated with citizenship. Only in their role as citizens do they supposedly look above the parapet of private needs and desires or could be said to aim for the public good.[65]

This perception is further reinforced in the theoretical division between a public domain of citizenship – and its concerns with rights, duties, participation and equality – and the private domain of the supposedly purely self-interested consumer.

This picture, however, relies on the implausibly abstract and egoistic homo economicus of neo-classical and rational choice theory that has been roundly criticised by economists.[66]

These developments should be taken into consideration in the legal construction of the consumer.[67] This notion is important in sensible economic legislation where it is common to insist on the relevance of consumer welfare: "[T]he only legitimate goal of American antitrust law is the maximization of consumer welfare."[68] But, the idea of the citizen-consumer is not limited to pure economic law because it also deals and intersects with many other areas of law and policy, including the social and health policies.[69] For example, the interplay between consumer law and the protection of the environment has emerged in the legal scholarship where – in contradiction to those who see the goals of these disciplines as being totally incompatible – an author has underlined the necessity to transcend the traditional boundaries. He suggested replacing the consumer by the citizen, who is interested not only in his own consumption but in all aspects of social life and supported the idea that the development of certain consumer law measures can be used to raise the awareness of consumers regarding environmental issues.[70]

Evidently, the evolution of the consumer into a master category of collective and individual identity is relevant for consumer litigation: the consumer-citizen will bring cases before the Courts not only to advance the fairness of the contractual terms and the safety of the products but also to pursue their social rights and the goals of environmental protection and fair trade. As the historian of the book "A Consumers' Republic" confirms, in the United States consumerism

65 F. Trentmann (ed.), *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Berg, Oxford and New York 2006).

66 A. Sen, 'Beyond Self-Interest, in *'Rational Fools'*, J.J. Mansbridge (Chicago University Press, Chicago 1990) 25–43.

67 See note 65 before.

68 R. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, New York 1978), 51.

69 M. Everson and C. Joerges, 'Consumer Citizenship in Postnational Constellations?' European University Institute Working Paper LAW No. 2006/47, http://ssrn.com/abstract=964187, accessed 26 June 2008.

70 T. Wilhelmsson, 'Consumer Law and the Environment: From Consumer to Citizen', (1998) 21 *JCP*, 45–70.

has opened up political possibilities for women and racial minorities: "Citizen consumers are people who are ready to make vigorous demands for rights."[71]

3.2. THE EVOLUTION OF THE CONSUMER MOVEMENT

The enlargement of associational standing under the Injunctions Directive will grant the consumer associations the role of principal intermediaries between the consumers and the courts and, consequently, it will definitively assign them a central role in European society.

Social scientists underline that the consumer movement has gained influence within the European Community's headquarters in Brussels (i.e. the Bureau Européen des Unions des Consommateurs and the European Association for the Coordination of Consumer Representation in Standardisation), while the status of organisations at national level is very different in the Member States in size, background and capacity, according to each country's history.[72]

Recently, the "European Consumer Policy Strategy 2007–2012" has demonstrated an overarching concern with guaranteeing a more powerful voice for the consumer, even though that voice is already far from going unheard (in particular, at Community level).[73] The document also compels the national governments to provide support for their consumer organisations and it takes the lead in creating such organisations in the new Member States.

What is surprising is that the empowerment of the consumer movement is occurring as a top-down approach rather than bottom-up process in the sense that it is driven from the European institutions more than consumers.

Actually, the construction and the promotion of the economic interests of the consumers have often been dependent on wider national and international interests and ideologies.

An author quotes historical studies suggesting that many of the postwar measures protecting the consumers' interests in the United Kingdom were introduced because they served the goals of the government players who wished to break down trade restrictions and that consumer protection laws essentially "piggy-backed" on the achievement of this scope.[74]

71 L. Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Post-war America* (Vintage Books, New York 2003), 18–51.

72 More details from Consumer Law Enforcement Forum at www.clef-project.eu/cms/project.php.

73 Commission (EC) Communication to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy Strategy 2007–2012, Empowering consumers, enhancing their welfare, effectively protecting them", COM (99) 13 March 2007, 99.

74 I. Ramsay, *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets'* (Hart, Oxford 2007) 25.

Focusing on the last years, sociological studies confirm that: "But more careful examination of the dynamics behind the new consumer culture suggests that it cannot simply be understood as driven from below by an 'empowered' consuming public."[75]

This may be explained by the fact that the development of EC Consumer Law has been driven by the process of market integration. In constructing a single market, the European institutions have restricted the extent to which States can insist upon regulations that limit imports from other Members States and, at the same time, they have made many efforts to avoid the risk that the ending of all indirect national trade restrictions may undermine the level of consumer protection. Within these efforts there is the political and economical support granted to consumer organisations at both European and national level.

The point here made is how much proximity with European and Member States institutions and bureaucracies is desirable?

While historically most consumer groups in the United States have been privately financed, government funding has been commonplace in Europe where – in Scandinavian countries, France and Germany – consumer groups were created and funded by the governments confirming that the potential role of such organisations is to manage consumer matters.[76]

Nowadays, it is still not clear if European consumer organisations are developing as private watchdogs, pressuring the governments and European institutions into action from below or as "government officials" appointed from these institutions and expressing their views.

Some issues proper of consumer litigation – I think those concerning the funding of actions and the standing requirements in consumer litigation – will be fundamental to determine the very nature of the consumer movement.[77]

4. CONCLUSIONS

For a long time, the private enforcement of EC Consumer Law has been undeveloped in the Single Market and this has been so primarily because the model of action designed by the Injunctions Directive failed to assure an adequate level of consumer protection.

I argue that this is mainly due to the lack of understanding of the notion of the collective interests of the consumers and to the practical consequences of this

75 A. Burgess, 'Flattering Consumption: Creating a Europe of the consumer', (2007) 1 *Journal of Consumer Culture*, 93–117.

76 A. Burgess at note before.

77 Some improvements to the state of the art have been recently proposed by Dayagi-Epstein at note 56.

unmanageable concept on the issues of associational standing and remedies (I think, for example, of the notion of "collective damage").

According to the model of action described in the White Paper, a reform of the Injunctions Directive may consist of granting consumer associations standing to recover damages on behalf of consumers (some Member States have adopted such instrument (France and Spain) while other countries, such as Italy, are seriously considering this mechanism).

The current system needs to be reformed, but I believe that this solution presents serious shortcomings: in particular, having an association as the named plaintiff will not automatically eliminate the difficulties proper of the relationship between the principal and the agent, but will introduce some specific problems (see paragraph 2.3 before).

The "centrality" of the consumer associations in the model of action here examined grounds on what remains, nowadays, of the "communitarian idea of justice":[78] an ideology that has been maintained – to the limited extent that I have discussed before – in Commission Directive (EC) 98/27.

Anyway, if we are aiming to develop the Injunctions Directive by considering the consumer associations as the intermediaries between consumers and lawyers, we should ensure that these organisations have *not only* the opportunities, but *also* the ability to adequately represent the consumer interest. Some practical issues – e.g. funding, liabilities and incentives – are crucial to assure effective consumer protection. In the lack of these conditions, the solution here discussed and envisaged in the Green Paper on Consumer Collective Redress[79] will not have the results hoped for by the European institutions.

78 M.J. Sandel, *Liberalism and the Limits of Justice* (CUP, Cambridge, second edition 1998, first edition 1988).

79 Commission (EC), 'Green Paper on Consumer Collective Redress', COM (794) 27 November 2008, at p. 13 point no. 53.