



DELIVERING COLLECTIVE REDRESS IN EUROPE: *NEW TECHNOLOGIES*

Professor Dr Christopher Hodges

Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford

Head of the Swiss Re Research Programme on Dispute Resolution Systems, Centre for Socio-Legal Studies

Fellow, European Law Institute

Collective Redress in the EU

- 2006 Leuven Report on Alternative Means of Consumer Redress
- EU Consumer Policy Strategy 2007-2013
- 2008 Green Paper on Consumer Collective Redress
- 2009 Consultation Paper for Discussion on the Follow-Up to the Green Paper
- 2010 Joint Information Note
- 2011 Public Consultation
- 2012 European Parliament Resolution Towards a Coherent European Approach to Collective Redress
- 2018 Proposal on Representative Actions

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

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

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

Safeguards in Collective Actions

<ul style="list-style-type: none"> • Stand-alone instead of follow-on • Opt-in instead of opt-out • Restriction of standing to certified personnel • Independent governance 	<ul style="list-style-type: none"> • Certification by Court • Certification criteria • Notice to class members • Judge not jury 	<ul style="list-style-type: none"> • Identify common issue(s) • Adequacy of representation • Superiority of the collective procedure • Prioritisation of other pathways • Evaluation of merits 	<ul style="list-style-type: none"> • Loser pays • No contingency fees or third party litigation funding • Identical damages • No punitive damages 	<ul style="list-style-type: none"> • Court approval of settlement • Court approval of lawyers' fees
---	---	---	---	---

R. Money-Kyrle and C. Hodges, 'Safeguards in Collective Actions' (2012) 19.4 *Maastricht Journal of International and Comparative Law* 477-504

Horizontal or Sectoral?

- 2018 Recommendation: “in [all] areas where Union law grants rights to citizens and companies: consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection”
- antitrust: 2014 Directive on Antitrust Damages Actions
- data protection: 2016 General Data Protection Regulation and Directive
- Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims, COM/2018/096 final - 2018/044 (COD)

Class actions: Belgium, Bulgaria, Denmark, England and Wales, Finland, France, Israel, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden

Group proceedings: Austria, England and Wales, Germany, Switzerland

Each national model is different!



Jurisdiction	Year of Introduction	Number of Cases
Portugal	1995	179 (2007 – 2015)
Spain	2000	N/A
Lithuania	2015	3 (2015 – 2016)
Sweden	2003	17 (2003 – 2014)
the Netherlands	2005 (WCAM)	9 (2005 – 2016)
Finland	2007	0
Bulgaria	2008	N/A
Denmark	2008	2 (2008 – 2012)
Norway	2008	N/A
Italy	2010	58 (?) (2010 – 2016)
Poland	2010	210 (2010 – 2016)
Belgium	2014	5 (2014 – 2016)
France	2014	9 + 1 (2014 – 2016)
England & Wales CAT	2015	2 (2015 – 2016)
England & Wales GLO	1999	101 (1999-2017)

Other Mechanisms

- Several Mechanisms
 1. Collective litigation
 2. Civil piggy-back on criminal
 3. Spontaneous
 4. ADR
 5. Consumer Ombudsmen
 6. Personal injury administrative redress schemes
 7. Regulatory redress

- The consequences of Pluralism:
 - Ability to compare: What are the results?
 - Are the opportunities being seized?

The Ombudsman Model:

Consumer ADR as market regulation

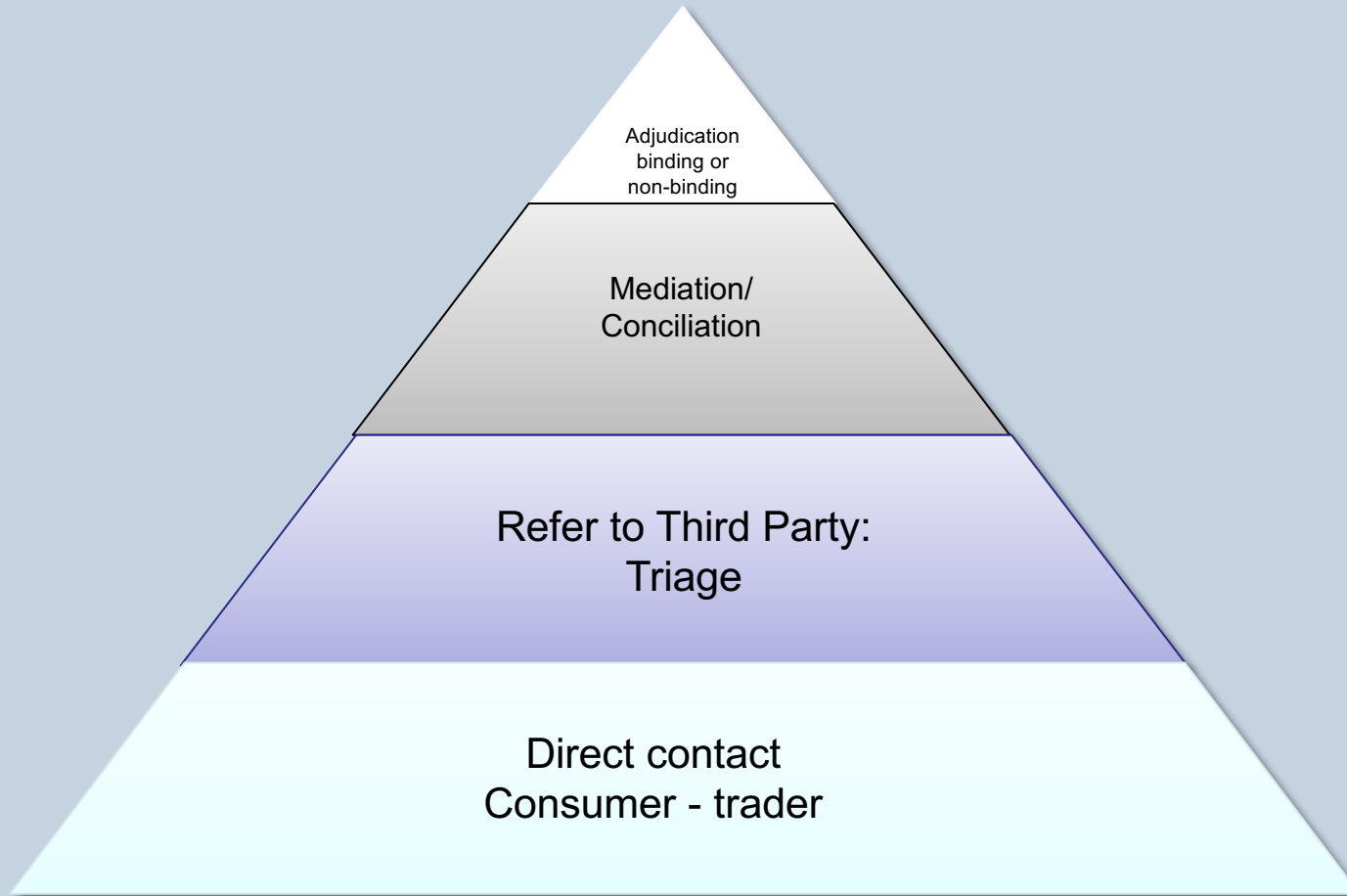
Some CADR mechanisms deliver redress and behavioural effects, some do not – it depends on *system design*; UK Ombudsmen do collective redress as an integral aspect of individual redress

Pan-EU CDR: Directive 2013/11/EU and the ODR Regulation

The Functions that Consumer Ombudsmen can deliver:

1. Consumer information and advice/Triage
2. Dispute resolution: individual redress and automatic collective redress
3. Capture and Aggregation of data
4. Feedback of information
 - a) Identification of issues and trends
 - b) Publication
5. Pressure on market behaviour; NB Dir 2013/11 art 17

Techniques: an escalating pyramid



Financial Ombudsman Service

	Initial enquiries & complaints	New cases	Cases resolved informally by adjudicators	Cases resolved by ombudsmen
2016/17	1,394,379	321,283	297,762	38,619
2015/16	1,631,955	340,899	398,930	39,872
2014/15	1,786,973	329,509	405,202	43,185
2013/14	2,357,374	512,167	487,749	31,029
2012/13	2,161,439	508,881	198,897	24,332
2011/12	1,268,798	264,375	201,793	20,540
2010/11	1,012,371	206,121	147,434	17,465
2009/10	925,095	163,012	155,591	10,730
2008/09	789,877	127,471	105,275	8,674
2007/08	794,648	123,089	91,739	7,960
2006/07	627,814	94,392	104,831	6,842
2005/06	672,973			
2005	614,148			
2004	562,340			
2003	562,340			

Personal Injury Compensation Schemes

- New Zealand Accident Compensation Scheme
- Swedish Road Traffic Injuries Commission
- Swedish Patient Compensation
- Swedish Drug Insurance
- Danish Industrial Injuries Board
- Danish Road Traffic Injuries Commission
- Danish Patient Compensation
- Danish Drug Compensation
- Finnish Workers Compensation
- Finnish Motor Vehicle Insurance Commission
- Finnish Patient Insurance
- Finnish Drug Insurance
- Norwegian Patient & Drug Compensation
- Norwegian Workplace Insurance
- *L' Office National d'Indemnisation des Accidents Médicaux, des affections iathrogènes et des infections nosocomiaux (ONIAM)*
- Polish No-Fault Medical Liability Scheme
- German Pharmapool
- German medical Schlichtungsstellen
- Irish Personal Injuries Assessment Board
- Japanese Pharmaceutical Injury Compensation Scheme
- U.S. no fault motor vehicle injuries schemes:
Florida, North Dakota, Colorado
- Vaccine Injury Compensation Schemes: eg UK, USA, Ebola,
- The Industrial Injuries Disablement Benefit (IIDB)
- The Armed Forces and Reserve Forces Compensation Scheme
- The Criminal Injuries Compensation Scheme
- The Mesothelioma Compulsory Insurance Fund and Compensation Scheme
- The Coal Workers Pneumoconiosis Scheme 1974
- The Coal Health Compensation Schemes
- The Thalidomide Trust
- The Skipton Fund for Hepatitis C and HIV
- The vCJD Trusts
- The ABPI *Guidelines for Compensation in Clinical Trials and Healthy Volunteers*
- The ABHI Clinical Investigation Compensation Guidelines
- The General Dental Council's dental Complaints Service
- The NHS Injury Costs Recovery (ICR) scheme
- NHS Complaints
- The Parliamentary and Health Service Ombudsman
- NHS Redress Act 2006
- ICI Eraldin
- Dow Corning breast implant scheme
- Trilucent breast implant scheme
- J&J ASR hip reimbursement programme

CIVIL JUSTICE SYSTEMS

Consumer ADR in Europe

Civil Justice Systems

Christopher Hodges
Iris Benöhr and
Naomi Creutzfeldt-Banda

C.H. Beck - Hart - Nomos

CIVIL JUSTICE SYSTEMS

Redress Schemes for Personal Injuries

Sonia Macleod
Christopher Hodges

CH Beck - Hart - Nomo

Regulatory Redress

Denmark

- Consumer Ombudsman: unique opt-out class action since 2008 and antitrust 2010; no action yet brought, but the power constantly influences discussions and resolution of cases

UK

- Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006)
→ Enforcement and Sanctions Act 2008
- Redress powers:
 - Financial Services and Markets Act 2000, s404 [consumer redress scheme] and s404F(7) [single firm scheme]
 - Energy Act 2013
 - Competition: CRA 2015: CMA power to approve a scheme
- Redress through licence conditions: water, gambling ...
- Consumer: Consumer Rights Act 2015: *Enhanced Consumer Measures*

EU

- Competition: Deutsche Bahn rail access pricing settlement
- Financial services: cases by Central Banks in Ireland, Italy
- EU harmonisation of enforcement policy and powers
power to seek or accept commitments: CPC Regulation 2017/2394 art 9.4

Jurisdiction	Year of introduction	Act	Number of cases
Portugal	1995	Law 83/95 of August 31, 1995 on the right to take part in administrative proceedings and the right of popular action	179 filed (2007 – 2015) 29 pending in 2015
Lithuania	2002	2015 Amendments to the Code of Civil Procedure (introduction of group legal actions)	- 3 dismissed - 2 pending (January 2015 – August 2017)
Sweden	2003	2003 Group Proceedings Act	30-50 (2003 – 2017)
the Netherlands	2005	2005 Dutch Collective Settlement Act	9 (2005 – November 2017)
Finland	2007	2007 Class Action Act	0
Denmark	2008	Chapter 23a (§ 254a-254k) Administration of Justice Act	- 66 decided cases before the district courts - 3 decided cases before the courts of appeal (2008 – 2016)
Italy	2010	2009 Law no. 99 – Article 140bis Italian Consumer Code	50-100 (January 2010 – November 2016)
Poland	2010	Class Actions Act of 17 December 2009	227+7 (2010 – 2017)

Jurisdiction	Year of introduction	Act	Number of cases
Belgium	2014	2014 Act Introducing a Consumer Collective Redress Action in the Code of Economic Law	- 1 settled - 1 withdrawn - 4 pending (September 2014 – April 2018)
France	2014	Articles L.623-1 et seq. and R.623-1 et seq. of the French Consumer Code (Code de la Consommation) and the similar procedures in health, discrimination, environment, privacy and data protection law	- 2 settled - 9 pending - 1 pending in appeal (October 2014 – November 2017)
England & Wales	2015	2015 Consumer Rights Act (Competition Class Action)	- 1 dismissed - 1 withdrawn (2015 – August 2017)

Case	Year	Nature	Number of class members	Funding	Settlement	Fee for association
Des	2006 2014	Product liability	N/A (17.000 registered)	Subsidies & donations	€ 38 mil	N/A
Dexia	2007	Financial product	300.000 (25.000 opt-outs)	€ 45 Contribution per class member	€ 1 bil	N/A paid by Dexia
Vie d'Or	2009	Financial product	11.000	Funding by regulator	€ 45 mil	€ 8,5 mil (max) paid by regulator
Shell	2009	Securities	500.000	Funding by Shell	\$ 448 mil	\$ 12 mil (association) \$ 47 mil (U.S. lawyers)
Vedior	2009	Securities	2.000	Contributions	€ 4 mil	€ 212.000 (maximum)
Converium	2012	Securities	12.000	Funding by defendants	\$ 58 mil	€ 1,6 mil \$ 11,6 mil (U.S. lawyers)
DSB Bank	2014	Financial product	345.000 (300 opt-outs)	Funding by DSB Bank	€ 500 mil maximum	N/A paid by DSB Bank

The Netherlands Class Settlement Act WCAM

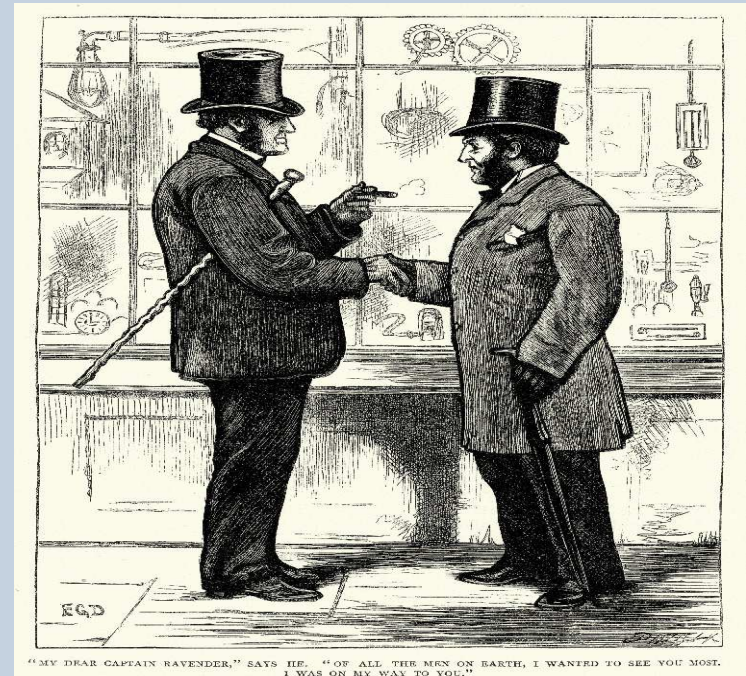
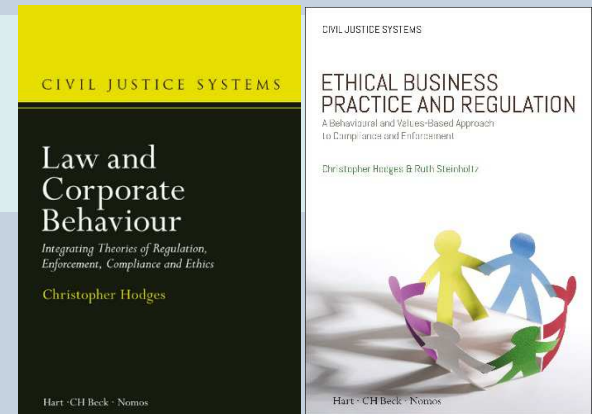
Source: Ilja Tillema, "Tien jaar WCAM: een overzicht" (2016) 3 & 4 MvO 90, at 91-92.

Performance Indicators for Collective Redress Mechanisms

- 1. Advice.** To what extent does the mechanism enable consumers to access advice before or during the processing of their complaint? To what extent also does the system provide advice to traders, especially small traders who may not be familiar with the law or dispute resolution options or processes, so as to achieve swift, cost-effective and fair resolutions?
- 2. Identification of infringement and harm.** How is it that a problem involving breach of law and/or damage has occurred is identified?
- 3. Identification of people harmed and due redress.** Must individuals come forward, or can they be identified without coming forward?
- 4. Access.** To what extent is the mechanism user-friendly for consumers or claimants to access?
- 5. Cost to access.** What cost must a person who claims to have suffered harm pay, and fund, in order to access the process? Or is access free?
- 6. Triage.** To what extent does the mechanism act as a triage to prevent unmeritorious cases or unnecessary cases proceeding further? This may include, at one extreme, preventing fraudulent claims being advanced and, at the other extreme, to swiftly resolving cases that should be resolved one way or the other?
- 7. Duration.** How long does the mechanism take from start to conclusion? How long does it take to resolve issues, from when they first arose (i.e. when damage occurred, before a claim was made) to final resolution?
- 8. Costs.** How much are the gross transactional costs of a collective procedure, and the standing costs of a process? Who bears the costs, both initially, and finally?
- 9. Outcomes.** What is achieved? Are the outcomes the ones desired by the parties, the law, or society?
- 10. Compensation for loss: making whole.** Is a person who has suffered harm fully recompensed? How much of an award is lost in transactional costs, e.g. of intermediaries? Are extra emotional or other costs incurred and recompensed?
- 11. Changes in Behaviour.** Does the mechanism directly produce changes in systemic behaviour that reduces the incidence or future risk of non-compliance with the law? To what extent does the mechanism, therefore, act as a regulatory mechanism?

Mechanism	Collective Action	Piggy-back	Regulatory Redress	Simple ADR	Consumer Ombudsman
1. Advice	2	1	1	0	3
2. Identification of infringement	0	0	1	0	3
3. Identification of people harmed	2	0	2	0	2
4. Access	2	3	3	2	3
5. Cost to access	1	3	3	2	3
6. Triage	1	0	0	0	3
7. Duration	1	2	3	-	3
8. Costs	1	2	3	-	2
9. Outcomes	3	3	3	-	3
10. Compensation	2	3	3	-	3
11. Behaviour change	1	1	3	0	3
Total	16	18	25	4	31

Models of Regulation and Compliance



The Aviation Safety Model

To achieve data flow, you need a **no blame culture**

- *Open culture* of *questioning* decisions and sharing knowledge of mishaps – extensive free sharing of information
- *Just culture* of *no blame*, non-punitive environment and response
- Maintain *accountability* by constantly, visibly *contributing*
- Aims
 - constant monitoring of *performance*
 - constant learning and improving the *system* and its human operation.
- ‘No blame’ must operate in *every context*: system regulation, professional regulation, employment discipline, liability for harm, social

A Picture of the Future

A Perfect Storm

1. National Class Actions
2. Cross-border EU model Class Actions
3. Claims Management Companies & Litigation Funders
4. Regulatory Redress
5. Some ADR

Suggestion

1. Lower 261 amounts
2. Voluntary customer electronic refund
3. Backed by a simple Ombudsman system
4. Withdraw the Collective Litigation Proposal!

CIVIL JUSTICE SYSTEMS

Delivering Collective Redress

New Technologies

Christopher Hodges
Stefaan Voet

Hart · CH Beck · Nomos

Thank you!