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# European Consumer Day “Consumer Redress” General Presentation

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# Outline

- The problem
- Recent studies and opinions at the EU level
- Out of court ADR
- Collective redress - EU legislation
- Collective redress - Procedures in the member states
- Collective redress - Pros and cons of an opt out
- Collective redress: some basic questions
- Collective redress: some practical questions
- Legal basis for EU legislative action
- Conclusion



# The problem

- General:
  - ✓ access to justice for consumers
  - ✓ specificity of consumer disputes:
    - ✓ often small and dispersed damage
    - ✓ diffuse interests
    - ✓ information asymmetry
    - ✓ consumers are not repeat players
- Three main types of consumer disputes:
  - Individual consumers with a small claim: *small claims procedures*
  - Situations where potentially a large group of consumers can suffer damage, e.g. unfair commercial practices: *injunctions procedures*
  - A large group of consumers with each an individual and small damage: collective actions for damages (*class actions*) examples: *product liability, antitrust, investment services*



## Recent studies and opinions at the EU level

- Leuven DG SANCO Study January 2007: comparative study of all non traditional judicial procedures for consumers (including ADR and collective redress) in EU 25, US, Australia, Canada
- “Leuven Event” DG SANCO 29 June 2007 with Commissioner M. Kuneva
- Two new studies commissioned by DG SANCO specifically on collective actions
- The expected White Paper by DG Competition



# The Leuven DG SANCO Study : the continuum

<b>No Action</b>	<b>ADR In Its Broadest Sense</b>					<b>Ordinary Court Action</b>	
	<i>Direct</i>		<i>Indirect (Third Party)</i>				
	<i>Consensual Decision Process</i>			<i>Adjudicative Decision Process</i>			
	<i>Voluntary Proceeding</i>			<i>Involuntary Proceeding</i>			
	<i>Individual Action</i>				<i>Collective Action</i>		
	<i>Conciliation Pursued</i>		<i>Damages Pursued</i>		<i>Injunctive Relief</i>		
	<b>Direct Negotiation</b>	<b>Mediation / Arbitration</b>		<b>Small Claims Procedures</b>	<b>Collective Actions for Damages</b>		<b>Actions for Injunctive Relief</b>

<b>CHAPTER II</b>	<b>CHAPTER III</b>	<b>CHAPTER IV</b>	<b>CHAPTER V</b>	<b>CHAPTER VI</b>
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# Main findings out-of-court arbitration & mediation

## VARIETY !!

- Public – private / combination
- General scope of application (mainly public)– sector specific / combination (eg Denmark)
- Scandinavian countries: municipal consumer advisors, consumer complaint boards with general competence, (Consumer ombudsmen)
- Common law jurisdictions: mediation
- Sector specific arbitration schemes in many countries (e.g. NI – Geschillencommissies – binding advice)
- Combination of market surveillance with competence to settle individual claims in some of the new M.S. (Lt, Lit, Ma)
- Value of claims:
  - wide variation
  - indications that also used for small claims (< 500 EUR)
  - but most schemes not appropriate for very small claims (< 50 EUR)

## ADVANTAGES AND DRAWBACKS

- Advantages: flexibility and innovation, possibilities for specialization
- Drawbacks:
  - ✓ Gaps in availability & geographical coverage: a lottery
  - ✓ Lack of awareness
  - ✓ Independence and impartiality are major concerns



## Collective redress – Legislation at the EU level

- Directive 98/27/EC injunctions in the consumer interest
  - Only actions for a cease and desist order
  - Few cross-border cases
  - Typical application: unfair commercial practices
- Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection



# Some collective redress procedures in the member states

- ✓ *Representative action*: a state body, private organisation (or individual) acts on behalf of several individuals)
- ✓ *Joint actions*: grouped individual actions (e.g. UK Group Litigation Order)
- ✓ *Group actions*: one action on behalf of a defined group of persons (e.g. Sweden: Lag om grupperättegång)
- ✓ *Test cases* (“Musterklagen”)
  - Examples: KapMuG (D 2005)(investor protection);  
§ 1(3)8° RBerG “Musterprozess” (D 2006)
- ✓ *Skimming off* (German UWG) (not compensatory)
- ✓ *Class actions* (US: opt out); Denmark, but only on behalf of KO; Dutch law 2005 collective settlement of mass damage (opt out based on out-of-court settlement)



# Pros and cons of opt out

- Pros

- ✓ One shop settlement for defendant
- ✓ Improvement access to justice
- ✓ Procedural economies
- ✓ Better evaluation total damage

- Cons

- ✓ Absence mandate
- ✓ Triggering claims
- ✓ Risk that opt-out leads to individual actions
- ✓ No solution for inhibition



## Disadvantages (especially of US style) “class actions”

- ✓ The pursuit of non collective interests
- ✓ Risk of unfounded claims
- ✓ Specific criticism of US class actions from an EU perspective:
  - ✓ Discovery
  - ✓ Contingency fees
  - ✓ Art. 6 ECHR



## Collective redress - Some basic questions (general)

- Benefits of aggregate litigation: procedural economy, regulatory policy, fairness (S. Issacharoff 1999);
- Agency problems: minimum requirements for associations to act; accountability
- Negotiation or dispute resolution/ADR or judicial procedures;
- General instrument or sector specific? E.g. German KapMuG;
- Opt-in or opt-out (see recently R.Mulheron, Reform of Collective Redress in England and Wales, Civil Justice Council, 2008)

*See also F.Caffagi- H.-W. Micklitz, Collective enforcement of consumer law : a framework for comparative assessment, EPLR 3/2008, forthcoming*



# Collective redress - Some basic questions in the EU

- The constitutional/fundamental rights issue (art. 6 ECHR)
- The public-private divide
- Instrument covering only cross-border claims or cross-border and domestic claims
- Binding force of judgments (out-of-court settlements) especially in cross-border situations



# Collective redress – Some practical questions

- (both in an opt-out and an opt-in regime); publicity and notification
- Financing/ financial incentives?
- Judicial procedure or out-of-court settlement? The role of the judge
- Distribution of proceeds, form of compensation



## Non Cross-border disputes: legal basis issue

- Can the EU adopt an instrument applying both to cross-border and domestic actions?
- Compare: the discussion regarding Regulation 861/2007 small claims, based on Article 65 EC, eventually only dealing with cross-border claims
- Possible legal grounds
  - ✓ Art. 95 EC? (limits, see C-380/03 Germany v EP and Council); but can cross-border claims be effectively isolated?
  - ✓ Art. 65 EC: idem
  - ✓ Article 153(3)(b) EC: Community measures that “support, supplement and monitor the policy pursued by the member states” - broader than seems to have been assumed until now



# Conclusion

- Improvement access to justice for consumers is necessary
- This can best be achieved by a mix of voluntary and mandatory systems and a mix of national and EU law



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Thank you

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