

CONSUMERS PROTECTION AND COLLECTIVE REDRESS

A COMPARATIVE STUDY BETWEEN GERMANY AND SPAIN

DISSERTATION

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Vorgelegt von:

Juan Jacobo Martín Cerezo
Abogado, LL.M. Eur (Dresden)
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Erstgutachter: Prof. Dr. Dr. Dres. h.c. Franz Jürgen Säcker

Zweitgutachter: Prof. Dr. Ignacio Czeguhn

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Methodology

The methodology for this work has followed the ordinary uses for a broad research like this, namely:

There have been researched doctrinal publications of the different legal systems at stake, specially Spain and Germany, but also United States, as an example of a country which counts with well-developed collective redress instruments. For the achievement of this work there have been used information sources available at the Univ. Autónoma de Madrid (UAM), Univ. Complutense de Madrid (UCM), Real Centro Universitario del Escorial, (RCUEMC), Freie Univ. Berlin (FUB), Humboldt Univer. Berlin (HUB) and of the Univ. Autónoma de Barcelona (UAB), as well as publications of specialized reviews in internet. It has been found, that in the literature, the ongoing discussions about legal protection of consumers are often linked to other fields of humanistic study such as the economical sciences. I do not consider that the legal analysis shall be limited to the positive Law, (otherwise the trees would not allow us to see the forest), but to other aspects of the tangible reality. Not a single chapter of this work has been dedicated to different analysis than the legal one, but the very legal argumentation has resort to different areas of knowledge. Especially relevant in connection with the legal analysis contained in this work are the economical models that serve as basis for the calculation of damages to consumers in anti competitive scenarios. These models are relevant to understand how the reparation of damages is recognized in the different legal systems, which is a capital factor of the consumer protection and the response provided by the civil Law.

The current regulation on antitrust Law has been included in this research about consumers' protection and collective redress, which is a consequence of the actual *state of art* in the positive Law, that links consumers' protection to the antitrust policy. The analysis of the positive antitrust regulation and its links to consumers' protection has showed up that the judicial procedures (both civil or administrative) are based on regulations that need of legal presumptions in order to succeed.¹ Such presumption has been criticized in this work as incompatible with essential principles of a State based on the rule of Law such the principle of innocence, but also in aspects such as the assessments of damages, as it seems unrealistic to compare prices in hypothetical scenarios (one competitive market vs a market with anti competitive behaviours). Especially complicated seems to consider as paradygm to compare a free market when the State regulation reults in barriers to acces or participate in that market.

In the front line of this work, there have been considered multitude of resolutions from European, Spanish and German Courts as well. It has been considered both first instance decisions for its innovative character as well as decisions of the highest courts that configure the current case law in force. I've tried to establish general criteria that are common to consumers' interests, so general considerations to this figure can be later observed in different legal jurisdictions. The above-mentioned method has allowed me to propose at the end of this work specific proposals for a better defense of consumers' interests and rights by means of collective redress instruments both in Germany and Spain, as well as a general proposal for the harmonization task of the EU.

¹ Exhaustiver on the matter see i.e. *Bailey*, ECLR 2010, 20-27 and *Jacobs*, Ind. L Review, 1998, 125-142.

This work has taken as reference any legislation, case law of publication available until the 1st February of 2017.

Literature is included following APA standards.

Part I Introduction to the Work

Historically the civil Law, based on a two parties' procedure, has provided response to conflicts among individuals in those aspects where the human being projects its freedom of choice. The developing of the modern society, especially the improvement of the communications and of the economic relationships, has led to a reality where a single act may affect the legal sphere of many other individuals. Thereby the exercise of subjective rights nowadays acquires a dimension that overpass the historically conditions in which the liberal ideas were born and incorporated into the civil Law. Considering this historical change, the civil Law needs to offer proper response to the modern times where it exists a challenge to make compatible massive inter-personal relationships with the respect to the subjective rights. A good place to observe this dialectic between massive relationships and the exercise of individual rights is the regulation of the relationships between purchasers and offerors: that is to say consumers and corporations. In consumers Law, due to the special significance of the role of consumers in the market economy, the protection of common goods tends to overpass the civil postulates of the two parties' procedure. Therefore, the figure of the consumer has acquired a special treatment in many legal venues with special protection and privileges before its counterpart in the market: the corporations. One of the capital aspects that justify special treatment for the consumers is the so called asymmetry of information and the inequality of arms that consumers suffer in their market relationships with corporations. In this sense, there are different proposals and approaches to fight this issue and to improve the position of consumers in the market. One essential aspect which has been since many years in the middle of academia discussions in Europe is the suitability of the solutions offered by collective redress instruments to mitigate the weak positions that consumers suffer in the market. This discussion is not limited to the defense of subjective rights, but it is also considered that the exercise of collective redress instruments in the civil procedure could improve the general observance of the material Law. The suitability of the collective redress instruments in these 2 different aspects shall be tested.

This work's scope covers the legal configuration of the consumer's figure, its recognized rights in the positive Law, as well as the procedural tools at its disposal to obtain full reparation for any damage suffered acting in a regulated market economy. The focus of this research is the suitability of the different collective redress instruments available to defend consumers' interests, both in Germany and in Spain, in the frame of the European Community. It is aim of this work to study the responses offered by the civil Law to one of the capital aspects of the actual life and of the manifestation of the freedom of choice of the individuals: the relationships between consumers and corporations.

For a comprehensive analysis of the legal configuration of the consumer, it shall be proper defined who enjoys such legal consideration, which legitimate rights are attributed to this figure in the positive Law, and if a plurality of consumers' rights or interests can be treated as a single legal good which could be brought to the court in a single procedure. In this sense, it will be analyzed the nature of the individual, collective, and common goods or interests associated to the figure of consumers in a modern, -even ideal- free market economy in the frame of the so-called social and welfare State. Once all the legal-subjective aspects of this figure are well defined, it will be analyzed the current legal redress instruments available both in Germany and in Spain, where substantial differences have been found.

One of the major aspects to be treated in this work is the relationship of the available instruments offered by the civil Law for the protection of consumers and their connection to the public enforcement. As in other areas of Law, there are arguments and a trend of thought that supports the privatization of this specific matter. Beyond the traditional instruments available for a better private defense of individual rights beyond the ordinary civil claim, such negotiation, facilitation, mediation or arbitration, in the last years, -mainly with origin in the EU antitrust policy- the private enforcement appears at European level as an instrument which shall contribute to the realization of the substantive Law.

As example of this dialectic between the defense of subjective rights and the enforcement of material law, the antitrust policy shows private and public interests that mix together, where private litigants shall be co-enforcers of antitrust rules.² Anticompetitive practices, as collusive agreements or abusive behaviors are –theoretical- able to cause both damages of the public goods (subvert the competition of the market), as well as the private patrimony. Traditionally, antitrust regulations were mainly oriented to the imposition of fines in proceedings followed by public authorities. In this sense, developing private enforcement mechanisms serves not only as an instrument for a better defense of the individual rights, but also as an indirect tool for a higher enforcement of the public goods or the *ordre public's values*. This trend took a major impulse years ago with the case law of the CJEC which recognized the direct application of the competition rules between particulars,³ stake enshrined with the approval of the Regulation 1/2003 EC,⁴ and consolidated with the last European developments in consumers and competition Law. If at the European level the previous legal regime shall have facilitated the so-called follow-on claims,⁵ where the plaintiff based its civil claim in previous administrative decisions-, the last European developments shall improve the private enforcement, even when there is not previous administrative decision available. The so called private enforcement in Europe has been traditionally behind other jurisdictions such as the North-American one. In this sense, special characteristics of the European tort Law do not present such advantages for the private claimant as the North-American model. Capital aspects as the limitations to access evidence or the absence of punitive damages or the lack of a well-developed collective (opt-out) redress system have been pointed out in the literature as the main obstacles for a successfully private enforcement system in Europe. The last efforts of the European legislator shall mitigate such handicaps for the private claimant.⁶

Nevertheless, it is quite significant to observe and analyze the material realization of this tension between the public and the private enforcement at the light of the mentioned last European activity and the spirit behind the rules. In principle, it could be reasonable to defend that the private enforcement shall be put in the first place, as it has major advantages: among others, the main reason to encourage the private enforcement over the public one is the direct compensation of the victims, which puts the citizen in the center

2 “While competition authorities are likely to remain the driving force of competition law enforcement in the years to come, follow-on litigation has significantly increased in recent years and has a bright future ahead”, Geradin, GMLR 2015, 1079 (1079).

3 CJEC Judgment of 21 March 1974, Case C-127/73, *BRT/SABAM*, ECLI:EU:C:1974:25; CJEC Judgment of 14 December 2000, C-344/98, *Masterfoods Ltd. vs HB Ice Cream, Ltd.* ECLI:EU:C:2000:689.

4 Council Regulation (EC) 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. OJ L 1, 4.1.2.3, p.1-25.

5 Follow-on litigation has significantly increased in recent years and has a bright future ahead. For instance, while there were only 18 ongoing damages claims in 2009, the number had increased to 59 by 2015. A. Gambhir, Private Enforcement and Damages Directive: The Claimant's Perspective, Power Point Presentation Delivered at the George Mason Law Review's 18th Annual Antitrust Symposium (Feb.19, 2015).

6 For a perspective on the matter see *Herrero Suárez*, CDT 2016, 150-183; reference to statistics in *H.Hovenkamp*: Federal Antitrust Policy., The Law of Competition and its Practice, 2011, p. 652 ff. Updated statistics see www.uscourts.gov/library.

of the picture. Such stake seems to be more compatible with the liberal character of the civil Law; citizens shall be aware of their rights, and they shall count with the proper means to enforce their rights if they want to. On the other hand, if the focus remains in the public enforcement rather than in the private one, there exist the risk of an excess of tutelage from the State; furthermore, any use of the public monopole of the force to watch for public goods which are not based on individual rights, creates the risk to enforce specific politics positions or ideologies rather than a *ordre public* based on actual individual rights. The public enforcement of competition Law, if it is separated from the tutelage of individual rights, can lead to a factual war between public institutions that defend indirect measures of the planned economy (such as the price control) and successfully corporations. Thus, in the middle of the tension about what shall prevail, if the public or the private enforcement lies the following question: shall our society focus on the equality before the Law, or shall the Law be used as an instrument to reach equality of those groups which are in situations of inferiority or subordination by means of a positive discrimination- as the consumers are?

In this sense, the European Union, published many years ago a research under the name of Green Paper⁷ about actions for damages, where obstacles for the private claims were identified and general proposals were incorporated. Later, the Commission published the *White Paper on Damages Actions*⁸ for Breach of the EU antitrust rules, where collective redress instruments were pointed out as the necessary instrument in order to compensate victims of damages derived from breach of EU -and national- competition rules. Such European activity raised expectations about the early incorporation into the common market of a well harmonized collective redress system in order to improve the private enforcement.⁹ Nevertheless, the Commission has finally renounced to harmonize the collective redress in the common market by resorting to a compulsory instrument such a Regulation or a Directive, and has limited its legal activity to a soft law instrument, a Recommendation for a collective redress.¹⁰ At the same time, if the collective redress has been shifted off the focus, the Directive 104/2014 EC¹¹ enters into the member countries procedural rules to ensure that improving the private enforcement remains a subsidiary instrument to the public enforcement. Thereby, instruments of the public enforcement such as the access to evidence in the frame of leniency programs prevail over the access to evidence of injured parties in civil claims. It could explain why the European Commission has recovered the approval of a project that after the expectations raised by the White Book was many years abandoned. Since the publication of the Green Book the European authorities showed their concern about the incompatibility of the leniency programs with the improvement of the private enforcement. This concern increased when the CJEC answered to 2 preliminary orders for reference in the Pfeiderer case¹². As per the ruling of the CJEC, there is no need for an absolute protection of such information obtained in the

⁷ Green Paper - Damages actions for breach of the EC antitrust rules {SEC (2005) 1732} /* COM/2005/0672 final */.

⁸ White Paper on Damages actions for breach of the EC antitrust rules, {SEC (2008) 404} {SEC (2008) 405} {SEC (2008) 406}.

⁹ *Herrero Suárez*, CDT 2016, 151 (152). Specific to the European Directory on Competition see *Almunia*, *Notas comunes sobre el recurso colectivo en la UE*, en *Velasco /et al/*; (Eds.): *La aplicación privada del Derecho de la Competencia*, p. 43.

¹⁰ Commission Recommendation of 11 June 2013 on Common Principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, pp. 60–65.

¹¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, pp. 1–19.

¹² CJEC Judgment of 14th June 2011, *Pfeiderer AG v Bundeskartellamt*, Case C-360/09, ECLI:EU:C:2011:389.

frame of a leniency program and this matter shall be appreciated by the national courts, which shall ponder interests upon the specific characteristics of the case. The *Donau Chemie*¹³ decision goes further beyond, as the Court established that one national regulation that makes almost impossible to access evidence in the frame of leniency programs is incompatible with the European Law. This decision may have rung the alarms in the Commission that saw how one of its big instruments to exercise an indirect control of the market could be jeopardized. This circumstance has been pointed out as one of the most important reasons to re-activate the Directive on private enforcement, where the leniency program prevails over the access to evidence of potential claimants.¹⁴

By giving priority to the public enforcement rather than creating the proper harmonized frame for an effective enforcement across Europe, European institutions reveal that they give more importance to the legal tutelage of the *ordre public* rather than the private defense of individual rights.¹⁵ Nevertheless, there is a positive aspect in the lack of harmonization of the collective redress. The Directive 104/2014 EC establishes some common procedural principles that shall increase the lightness of significant procedural aspects of such kind of claims, and at the same time it lets enough room to EU member countries to compete with each other in order to develop the most attractive judicial venue, and thereby to attract more claims to its jurisdiction. In this sense, the forum shopping is not a negative aspect. Furthermore, the competition between member countries to develop the most efficient procedural instrument could be an effective way to complement the principle of subsidiarity. The EU shall establish a minimum harmonization, essential for the defense of the common market and at the same time it could let room for member countries to develop their own legal instruments according to their specific legal tradition.

Despite the fact that this work will only consider legal arguments, in the background of this analysis relies the idea that an effective collective redress system in favor of consumers could contribute to increase the freedom of choice and safeness of consumers as well as the well governance of corporations in the market, in such manner that the public enforcement or the general State intervention in the economy -for instance by means of the antitrust policy and its associated competition authorities- shall play a less important role, and maybe remain as a relic of the past. Nevertheless, the original liberal ideas that inspired our current legal systems were based in the autonomy of the individual, and the limitation of the constraint role of the State to those instruments that warranty an effective social cooperation between individuals. If this task is accomplished by means of an instrument of the civil procedure that allows consumers to be the “judge of the market”, it is to expect that other public supervision instruments lose importance.

13 CJEC Judgment of 6th June 2013, Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*. ECLI:EU:C:2013:366.

14 *So Herrero Suárez*, CDT 2016 150, (155).

15 About the negative incidence of the primacy of the public enforcement over the private one as per the renounce to access to evidence in favour of the leniency programs see *Suderow, J*; El acceso a las pruebas en expedientes de la Comisión Europea y los límites establecidos por su programa de clemencia, in: *Velasco et al.* (Dir): La aplicación privada del Derecho de la competencia, p. 535 ff.; *Rubiano, P*; Programas de clemencia y reparación del daño antitrust, in: *Velasco, et al* (Eds.); La aplicación privada del Derecho de la competencia, cit. p. 789 et ss.; *Diez Estella/ Pérez Fernández*, La Directiva de acciones de daños derivadas de ilícitos anticompetitivos con especial referencia a los programas de clemencia: ¿la última gran revolución en el Derecho de defensa de la competencia?, *RAUE*, 2014, 41-68.; *Perez Fernández*, La problemática relación entre los programas de clemencia y las acciones privadas de resarcimiento de los daños derivados de ilícitos antitrust”, *Indret*, 1, 2013, p. 1ff; *Komminos*; EC Private Antitrust Enforcement. Decentralised application of EC Competition Law by National Courts., p. 20 ff.

When it comes to consumers' protection, even in the legal analysis, it cannot be skipped the fact that the current antitrust policy and its associated regulation is based on specific economic theories to ascertain damages after anticompetitive decisions are conducted. Namely, the current legal assessment of damages is based in the neoclassical conception of the economy based on models of equilibrium, where it exists such thing as a legal price and an anticompetitive price. Based on these theories, the antitrust policy is linked in the substantive Law as a necessary instrument for a better defense of consumers. Nevertheless, this stake of the market and of the economy has been challenged by dynamic theories that question the suitability of the legal *state of the art* in this matter.¹⁶ A direct protection of consumers, rather than focusing on indirect instruments such as the antitrust policy will increase the protection of consumers without prejudicing which economic school is right. Thus, consumers' protection policy shall be focused on direct protection instruments such as the collective redress instruments by breach of individual rights, rather than the idea of improving the private enforcement by breach of public goods.

Nevertheless, as by the current *state of art*, the competition policy is considered in the positive Law as an indirect consumers' protection policy, current provisions in this field will be treated in detail. In this sense, as mentioned above, recent European legal developments regarding consumers' protection have putted the focus on the presumption that a breach of the antitrust regulations causes a damage to consumers but not in the collective redress tools that could help consumers to recover these and other actual damages. The result is a legal configuration of the private enforcement plagued of legal presumptions. Not only will be presumed that the existence of a trust causes *per se* a damage, (objective aspect) it will also be presumed that the compensation to victims can be established comparing prices of two hypothetical scenarios (with and without the cartel). Also, the EU Law recognized that in administrative and civil procedures the joint of liability (subjective aspect) will be established not in grounds of culpability but by means of the developed conception of single economic unity, as it increases the possibilities to injured parties to obtain a reparation or facilitate public authorities to collect a fine. Thereby the principle of effectiveness overcomes the principle of individualized responsibility. This work will be divided in 6 parts of analysis and a very briefly dispositive conclusion about the suitability of the antitrust policy and the European harmonization as instruments that shall improve consumers' protection in the market. After the Introduction, the second part will be dedicated to common thoughts about the legal configuration of the consumer, wich shall be valid both for Germany and Spain, as members of the European Union. The second part will be dedicated to the current consumers' protection in Germany and the configuration of the collective instruments available in this country. The four part will do the same analysis taking into consideration the Spanish legal system, and the fifth part will be dedicated to the consideration of the figure of consumer across the history of the European Union until the very last developments related to collective redress and antitrust policy. A final part will make a brief comparison of the Spanish and German systems and present the conclusions for possible future legal developments.

¹⁶ Besides economical theories, for a field study about the negative impact on consumers interests of the antitrust policy see *Kinsella/ Melin*, Who's afraid of the Internet? Time to put consumers interests at the heart of competition law.

Part II Common aspects

1. Relevant aspects to consumer's figure

1.1 Primary definition and role of consumers

The consumer is a representation of a social and legal subject.¹⁷

As social agent, this figure was established primarily in the free market economy of the 19th century and the first half of the 20th century. This representation has preserved previous anthropological components until today, including traces inherited from the construction of social subjects introduced by the Enlightenment.

Currently, **the economic and social role of consumers** in a market based society has been incorporated to the consumers policy in EEUU and Europe.¹⁸ It **turns around the idea of its legal protection and of its life's quality.**¹⁹ As the consumer's figure acquires significance role in the developing of the *constitutional social and well fare State*, legitimate rights of consumers, have been categorized as **3rd. generation of fundamental rights.**²⁰ From the abstract concept or role of consumers in the society, the Law specifies which subjective rights are attributable to each consumer;²¹ *prima facie*- a consumer is any citizen purchasing or using products or services obtained in the market.²² In some legal venues and under some circumstances also a legal person can be considered as such, but the consumer is essentially a citizen, a human being, or in other words, a human being is a consumer.²³

1.2 Consumers' interests

1.2.1 General

As almost any aspect of life affects the human being in its economical function, many regulated (and not regulated) aspects of life affect the field of consumption generically considered.²⁴ Thus, **Acquiring a comprehensive protection of consumers by means of the Law is not a simple task,**²⁵ as consumers may have interests in heterogeneity aspects of the economy such an adequate **antitrust** and **unfair**

17 As per the Resolution No. 543 (1973) of the Council of Europe, known as the European Consumer Protection Charter and the Resolution of the Council of the EC concerning a "Preliminary Program of the European Economic Community for a policy of consumer protection and information, the consumer is well a social as an economic agent.

18 Kennedy Speech at the US Congress: '*Consumers by definition, include us all, they are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard.*' 15 March 1962 U.S. Congress.

19 Lasarte Álvarez, Manual sobre protección de consumidores y usuarios, p. 59 ff.

20 The consumer "*fulfils a noteworthy role for the market economy to function, which derives from the very structure of the Social State*". Porfirio Carpio, La discriminación de consumidores y empresarios como acto de competencia desleal, p. 67 ff.

21 Lasarte Álvarez, Manual sobre protección de consumidores y usuarios p. 59 ff.

22 The Spanish constitutional protection of consumers considers consumers in a broad sense as "the individual in the market. Porfirio Carpio, La discriminación de consumidores y empresarios como acto de competencia desleal, p.69 ff.

23 It will be explained in further chapters a more accurate definition of consumer considering the European, German and Spanish example.

24 *The consumer is not only a buyer or user of goods and services for personal, family or group use. He is also a person that may be directly or indirectly affected by different aspects of social life.* Council Resolution (EC) No. 92/1. No. 3.

25 Lasarte Álvarez, Manual sobre protección de consumidores y usuarios, p. 6.

competition frame, a **sustainable developing economical system**, as well as in other general policies which affect its purchase capacity such the **fiscal and monetary policy**.²⁶ Giving shape to the specific rights of consumers, the European Commission recognized as the most important topics of a modern consumer's policy the protection of **health, safety and economic well-being, promoting their rights to information and education and safeguarding interests and encouraging self-help associations**.²⁷ In these mentioned and other protected fields, **legitimate interests of consumers** and users are those **recognized or protected by material Law**. An indirect protection of consumers covers aspects such the regulation of the inner market, fight against monopolies, prices policies, etc.; and the direct protection is related to those faculties directly attributed by the legal system such benefices, assistance, direct rights, etc...²⁸ Legitimate rights or interests in favour of consumers can operate so good within the public as well as in private Law. Private interests related to the free will of consumers in their market relationships will be followed by measures of public Law to strength their position before their counter parties in the market and before the court.

1.2.2 Limits to consumer's protection

The consumers and user's policy in Spain and Germany shall be integrated in other general principles of Law such the *freedom of enterprise* or the *private autonomy*.²⁹ In virtue of these two principles, in absence of an imperative rule, the contract between parties is Law. However, modern consumers' policies tend to overpass such limitation.³⁰ The role of consumers as principal actors of the national and global economy makes its protection a fundamental public policy which transcends the private Law between individuals. There is a public necessity of an adequate balance of market's parties beyond principles such the freedom of will. In this sense, the resort to collective redress mechanisms involves a change in the traditional view of the liberal civil procedure structures; **the social State should participate to warranty private rights, and this necessary role blurs the traditional differences between the private and the public interests**, which mix together.³¹ A possible way to make compatible the defence of the public and private interests, the freedom and responsibility of consumers in their market relationships would be a higher degree of education of consumers, in a frame of good governance of corporations and free competition. Terms such "average consumer" have been traditionally used to calibrate the responsibility of consumers in their market relationships.³²

26 The State traditional counts with two big instruments to regulate the economy: the monetary and fiscal policy. These policies do affect in a substantial way the so-called legitimate economic interests of consumers. These policies are in part delegated to the EU.

27 European Commission. Putting the consumers first. <http://europa.eu/pol/cons/flipbook/en/files/consumers.pdf>. (Retrieved last time, 01.03.2017).

28 Lasarte Álvarez, Manual sobre protección de consumidores y usuarios, p. 59

29 Lasarte Álvarez, Manual sobre protección de consumidores y usuarios p. 6 ff.

30 Auto AP Sección 11, 16 Juni 2005. «*La defensa de intereses colectivos trasciende de la tradicional concepción del proceso civil como medio de resolución del conflicto de intereses particulares y privados, proyectándose en el derecho procesal y sustantivo como instrumento adecuado de tutela y satisfacción de intereses que afectan a una pluralidad de individuos de difícil determinación, tanto en el plano de los demandantes como, en su caso, de demandados, y que, por tanto, precisa de un regulación especial como tales acciones colectivas, en aras a evitar la repetición innecesaria de litigios, aportando seguridad jurídica en el conjunto de relaciones de esa índole, que afectan a los sujetos intervinientes.*» FJ 2 (JUR 2005/173178).

31 STC (18/1984, FJ3º), ECLI:ES:TC:1984:18.

32 Art. 4.1 Ley 3/1991, de 10 de enero, de Competencia Desleal, BOE, No. 10, of 11th January 1991.

1.2.3 Holders of consumers' interests

A key aspect of consumer's collective redress is the specification of the standing's holder. Damage events in consumption situations may affect rights whose holders are more or less ascertainable. It is also relevant who will represent these interests in a specific procedure. **In the Spanish Procedural Civil Act (LEC)³³ the possibility of ascertaining affected consumers will be the central point to establish the legal standing** of the collective redress mechanisms when individual rights might be affected by the judgement.

1.2.3.1 Determinable consumers

Situations which affect determinable consumers normally arise from contractual relationships. As example, it can be named deficiencies in contracted services (i.e. a holiday's package) or damages caused from a product acquired in the market (i.e. an electric tool which causes any damage to specific users). The defence of these rights present less enforcement problems, as their holder are known or ascertainable. Affected consumers could act directly or by means of any kind of representative instrument.

1.2.3.2 Hard to be determinable consumers

There are other situations which affects interests or rights whose holders cannot be easily ascertained. It happens specially in extra-contractual relationships (cases such the misleading advertisement in the mass media, or those manufacturing activities which results in a lasting damage for the environment, or in general those damages caused by unfair competition behaviours). Even the decisions of big actors in the global market or wrong State policies in regulated markets affect the individuals in its economic role as consumers. As in these situations the holders of the subjective right or *Anspruch* are usually unascertainable, the enforcement of these non-determinable rights could be done by institutions which watch for general or collective interests, both public bodies or private institutions. The task of the consumes associations in this field has been introduced as an enforcement measure to facilitate the access to justice of consumers and users. This way these associations accomplish a social role and watch for the *ordre public*.

1.3 Consumers and Law

1.3.1 Direct and indirect protection measures

Under *consumers Law* is to be understood all regulations oriented to the protection of legitimate rights or interests of this collective, as well as the general regulation of its figure in the society.³⁴ There are other areas regulated by Law, not specific oriented to consumers, that affect those legitimate interests as well. Due to the heterogeneity of the different situations in which consumers need protection, *consumers Law* have found in the last decades an important developing, being nourished from other fields of Law, both from

³³ Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE No. 7 of 8th January 2000.

³⁴ In Germany under *Verbraucherrecht* will be understood the general interests of consumers in their market relationships. *Hopt/Baetge*, Rechtsvergleichung und Reform des deutschen Rechtsverbandsklage und Gruppenklage, in: *Basedow* (Ed.), *Die Bündelung gleichgerichteter Interessen im Prozeß. Verbandsklage und Gruppenklage*, p. 15 ff.

the private and public.³⁵ In the other hand, legal protection developed in favour of consumers have also developed other areas regulated by Law. Two kind of policies may be undertaken to strength the protection of consumers: those which provides a direct protection, or those that regulate areas where consumers deploy its interests, which constitute the so-called indirect protection. Traditionally, as an indirect protection measure, the free competition has been considered as a key policy in connection to the protection of consumers.³⁶ Such policy shall provide an indirect protection of consumers, regulating negative aspects for consumers interests such the monopolies, oligopolies, etc.³⁷...

Nevertheless, the indirect effect of the free competition regarding the actual welfare of consumers could be reviewed.³⁸ In the current global market, products and services move almost freely world-wide without a unified global competition authority, fact that may decrease the indirect effect of the competition policies in connection with the defence of the interests of consumers. Some authors even deny that public antitrust policies result in a higher protection of consumers at all. On the authority of some economics schools, regulations on antitrust or fair competition are based on a wrong static conception of the market and it does not exist such thing as the “proper price”. As per this view, any State regulation on free/unfair competition would result in further damages for consumers, as such regulations pursue successfully entrepreneurs which provide consumers better products and services.³⁹ Per a dynamic conception of the market, a high grade of access to the market with less public regulation and the application of the general civil Law principles to the relationships between corporations and consumers could be more efficient to strength consumer’s protection rather than any antitrust regulations or enforcement authorities. Discussion about the conception of the market, as a dynamic or static reality exceed the purpose of this work,⁴⁰ but nevertheless, in this work will be supported the idea that direct measures of consumer’s protection acquire a most relevant role than the indirect measures. Thus, improvements in the access to justice by means of collective redress instruments appears as suitable option in order to balance the position of the consumer against the companies, if not in a global market, at least before the local Court.⁴¹ A deterrence effect brought by these kind of claims, may conduct to a proper behaviour of the companies as well as to a better allocation of resources, both economical

35 See *Lasarte Álvarez*, Manual sobre protección de consumidores y usuarios, p. 6.

36 As indirect measure, the antitrust *policy* is not the only policy to be considered when it comes to consumer’s protection. Even in markets where the competition is quite high, like the United States, the consumer’s policy resorts to different areas of the Law Understood in a broad sense, both Antitrust as well as Unfair Competition policy. In this regard see *Lasarte Álvarez*, Manual sobre protección de consumidores y usuarios p. 7 ff.

37 For some authors, even, the necessity of developing sectorial and specific norms in defense of consumers (For instance the arts. 85 and ss. of the treaty of Rom of 1957 and the Ley española de Defensa de la Competencia de 1989) is a result of the failure of the rules that try to regulate the market, see in this regard *Lasarte Álvarez*, Manual sobre protección de consumidores y usuarios, p. 7.

38 Exhaustiver see *Diez Estella*, GJUEC 2003, 32-52.

39 Critics to Antitrust policy: selling over the prices of the market is an indication for abuse of dominant position but selling under market prices is an indication of unfair competition and selling at the same prices that competitors is a sign of a cartel. See the parable of Tom Smith and the bread machine. Available on: <http://mises.org/library/tom-smith-and-his-incredible-bread-machine>. Retrieved last time 01.03. 2017. The Spanish Professor D. Huerta de Soto, as recognized member of this school of thought explains it further: <https://www.youtube.com/watch?v=ozLyYwRcHUG>, retrieved last time 01.10 2019, deeper grounds in *Huerta de Soto*, Sozialismus, Wirtschaftsrechnung und unternehmerische Funktion.

40 To different economic/legal approaches to free competition see *Hönn*, Examen Repetitorium Wettbewerbs-Kartellrecht, p. 14 ff.

41 White Book of the European Commission on damages actions for breach of the EC antitrust rules. COM (2008) 165, 2.4.2008.

as judicial.⁴² According to the current mathematical conception of the prices, the collective redress system is particularly crucial in the field of competition Law, as anticompetitive practices can often result in relatively small amounts of damage to individuals and significant amount of damage to the society at large.⁴³

1.3.2 Legal policy: consumers interest and collective redress instruments

In the European Union, the protection of consumers has been acquiring a structural character recognized in the Treaties and in the secondary Law, as it is a fundamental part of the European policies. Spain counts with a specific *General Law for the Defence of Consumers and Users*,⁴⁴ but as it happens in Germany, the consumer's protection is sustained in different areas of Law such the administrative, mercantile, criminal, etc... In the civil field, collective redress- as an instrument which could improve the access to justice of consumers and enforce the material law- appears as a suitable instrument to deal with situations which affect a plurality of rights. A central question of the collective redress thoughts is which rights could by actually been brought into the court by means of these legal instruments. In the field of consumption, the remaining central question of discussion among the academia is focused on the legal nature of the interests at stake; namely, if it allows the reparation of individual damages by means of collective redress instruments.⁴⁵ It has been found substantive differences between Germany and Spain in these mentioned aspects, differences that are expected to be reduced in a near future thanks to the actual impulse given by the European Union to the collective redress mechanism within their member countries.

1.3.2.1. Spanish approach

Focused on the substantive rights granted to consumers in each country, **in Spain** exists a particularity. In this country, it **exists a general Constitutional Protection of the legitimate economic rights and interests of consumers and users** as a guiding principle of the economic policy. The central axis of the material protection of consumers is gathered in the Art. 51 of the Spanish Constitution. Next to this direct reference to consumers in the Constitution, the fundamental right to an effective protection of judges and courts (Art. 24 CE) plays an important role in the configuration of the consumer's protection in Spain.⁴⁶

1.3.2.1.1 Constitutional protection of consumers in the Art. 51 CE

Based on this constitutional protection, some Spanish authors have linked consumers' rights and their protection with a type of **diffuse interests**, related to the **"3rd. generation of fundamental rights** whose axiological basis is **based on social solidarity.**"⁴⁷ The classification "3rd. generation fundamental rights" includes legitimate

42 Although the European Commission is prudent regarding the deterrence effect that theses instrument shall provide. As general rule, punitive damages are to be avoided. See chapter IV of this work.

43 *Pietrini*, L'action collective en droit des pratiques anticoncurrentielles, p. 116 ff; *Bernhard*, Kartellrechtlicher Individualschutz durch Sammelklagen, p.63 ff.

44 Ley General para la defensa de consumidores y usuarios LGDCU (now TR-LGDCU), BOE No. 287, 30th November 2007.

45 *Wagner*, Kollektiver Rechtsschutz: Regelungsbedarf bei Massen- und Streuschäden, p.41 ff.

46 Art. 24, Spanish Constitution. BOE No.. 311, 29th December 1978, pp. 29313- 29424.

47 *Porfirio Carpio*, La discriminación de consumidores y empresarios como acto de competencia desleal, p. 68 ff; see also *Font Galán*, Desafío ético del mercado competitivo: la humanización de las relaciones de consumo, in: *Roberto Franganillo, A; y Lopez Martín*, (Eds.), Empresa, economía y Sociedad, p.145 ff.

interests of social groups in situations of inferiority or subordination, such as consumers faced with certain practices and in certain circumstances, as recognized, among others in the Spanish Unfair Competition Act (LDC).⁴⁸ The new 3rd. generation rights include some that may also be considered fundamental in the light of socio-historical changes. The following are worthy of note: the right to preservation of the environment and diversity; rights as regards genetic applications and bioethics; and in general, the right to protection of health, privacy and human development as regards the social use of new kinds of technology.⁴⁹

It should be remembered, however, that the Constitutional Protection of consumers in Spain is not a fundamental right that can be directly acted upon. It is part of the general principles of Law. As such - and in keeping with the Spanish Civil Code⁵⁰- **it is applied in the absence of law or custom and with no detriment to its informative nature as regards legal regulations.** Specifically, the principle of consumer protection falls within the constitutional chapter devoted to the economic model. Therefore, consumer's protection in Spain, as a general principle, defines the characteristics the economic model should have and is part of the so-called *economic constitution*.⁵¹ In this frame, Spanish authors have identified fundamental rights of consumers such the safety, the health and their legitimate economic interests by one side, and by the other, those instrumental rights, which are necessary to ensure its observance such information, education and participation in the society through own associations. ⁵²

1.3.2.1.2 Fundamental right to an effective judicial protection

Beyond the constitutional recognition of consumers interests, the Spanish version of the fundamental right to be heard before the court (Art. 24 CE), which is based in the principle of effectiveness, plays an important role in connection with the collective redress.⁵³ As per this article, anyone has the right to an effective protection of its rights or interests, individual or collectives, so that no defenceless may happen.⁵⁴ Keeping minor damages off the court because the civil procedure does not offer a suitable procedure would breach this Constitutional order. It is remarkable, that different to the German case where the limitations to damages recovery by means of collective redress instruments arise mostly based in the right to be heard before the Court, the absence of a suitable collective redress instrument in Spain will be considered against the constitutional principle to obtain an effective protection of Judges and Courts. In this frame, consumer's collective actions for reparation of damages has been recognized and regulated by the Law maker as a necessary instrument to ensure an adequate protection of the interests of consumers and as result of the right to obtain an effective protection of court and judges.

48 This recognizes the principle of consumer protection viewed as the weak side of typical market relationships. *Ley 3/1991*, de 10 de Enero, de *Competencia Desleal*. Preámbulo. Published in BOE No. 10, 11 January 1991, pp. 959 - 962.

49 *Porfirio Carpio*, La discriminación de consumidores y empresarios como acto de competencia desleal, p. 69 ff.

50 Rule No.1.4 Spanish Código Civil, BOE No. 206, 25/07/1889.

51 Under economic constitution will understood in Spain the sum of the constitutional rules informing about the economic model in Spain.

52 *Lasarte Álvarez*, Manual de Consumidores y usuarios, noción de consumidor, p. 65 ff.

53 Article 24 1. Spanish Constitution: *Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case, may he go undefended.* Own translation.

54 Artículo 7.3 Ley Órganica del Poder Judicial, LOPJ, BOE, 2nd July 1985.

1.3.2.2 European approach

The European Union recognized in its first consumers program the right to be compensated for the damages suffered by consumers in its „fundamental rights “.55 Despite of this early recognition, the EU has developed up to the date mainly a negative defence of the interests of consumers. European measures in consumer protection include, as part of their enforcement provisions, an obligation on member States to provide in their implementing legislation for collective action to be taken by consumer representative bodies to defend the collective rights of consumers in specified circumstances. The available remedies would typically be limited to orders related to the defendant's conduct, such as injunctive relief, rather than monetary claims.⁵⁶Based on the consumers program of 2007-2013, the scope of consumers standing will be extended.⁵⁷ Consumer Strategy 2007-2013 headlined the overhauling of the legislation of cross-border shopping rights and the creation of strong systems for redress and enforcement, including consideration of collective redress mechanisms on damages.⁵⁸ The recent approval of the Directive on Damages by breach of national or EC competition rules, as well as the Recommendation for introduction of collective redress instruments are the last European developments, that shall increase the private enforcement of consumers protection.

1.3.2.3 German approach

This country *is very sceptic* about legal instruments with effects for parties which did not take part in the process. ⁵⁹ The German Law takes very seriously, its fundamental right (Art. 103 GG) which demands, that anyone who is going to be affected by a judicial decision has the right to be heard by the Court. However, the *associative actions*⁶⁰ in Germany are not a newness. The institution of the *Verbandsklage* exists since 1896. Nevertheless, the extension of this collective redress mechanism in favour of consumers came much later, and when it appeared, it has fulfilled basically a *negative protection*, as they were mainly oriented to avoid further damages in the future, rather than the restitution of damages to the victims. The reason for such limitation has been explained in the liberal character of the German civil Law. The introduction and extension in Germany of collective mechanisms which seek the compensation of damages are, for an important part of the German academia, against the principles of the German tort Law.⁶¹ As per this view, the aim of some collective redress mechanism does not correspond to the aim of the individual claims; thus, defence of *supra individual interests* (collective or general) wouldn't be a finality of the private Law. According to the principles of German's civil Law, the defence of *supra individual* rights shall be done rather by public institutions.⁶²

Nevertheless, in the case of Germany, there is not a public institution in consumer's field compared to others like the *Kartellamt* in competition Law. Unless it is considered that

55 OJ C 92, 25.4.1975, p. 1–1.

56 Background Report: *OECD*, Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19-20 April 2005, Washington, DC (OECD, Paris, 2005), p. 31.

57 See *Sauerland*, Die Harmonisierung des kollektiven Verbraucherrechtsschutzes in der EU, Ziff. 5.3.

58 COM (2007) 99, 13 March 2007.

59 *Stadler & Micklitz*, Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, p. 1231 ff.

60 Literal translation for *Verbandsklage*.

61 *Germany*, Stellungnahme zum Grünbuch, der Kommission zu Schadenersatzklagen wegen Verletzung des EU Wettbewerbsrecht, BDI, April 2006; see also *Vogel*, Kollektiver Rechtsschutz in Kartellrecht, p. 221 ff.

62 Further on this matter see *Säcker*, Die Einordnung der Verbandsklage in das System des Privatrechts.

a public surveillance of the free competition is enough to watch for consumer's specific rights, the task of enforcing the material rules in favour of consumers will be developed mostly by private institutions such consumers' associations and brave individual affected consumers which overpass all barriers to enforce its rights (if they count with the necessary incentives to claim).⁶³As Säcker points out, for some authors, the introduction of collective redress mechanism might bring a compensating instrument to the market. As per their view, private enforcement shall help the State, which could be too sensible to economic interests of great corporations, to reach a balance in the market in favour of consumers.⁶⁴ The primary difference of opinion concerning the benefits that could flow from introducing new mechanisms of collective redress for the enforcement of EU Law is between citizens/consumers and business: consumers are generally in favour of introducing new mechanisms, while businesses are generally against.

The introduction and developing of collective redress mechanism to fight against abuses of big corporations will not be specially supported by any national industrial lobby, neither the German one.⁶⁵ It is to remain that the German *Verbandsklage* was born as a collective defence instrument for competitors in the market. The actual collective redress instruments in Germany with their limitation regarding damages are enough developed for the German Industry which has developed a lobby pressure to avoid its extension in German Law. ⁶⁶ Academics are generally in favour. Lawyers are divided on this issue, although those who are sceptical or opposed outnumber those in favour.⁶⁷ **These mentioned limitations regarding damages reparation by means of collective redress instruments was expected to change with the latest European proposals in this field. Nevertheless, as the EU has choose a soft instrument, namely a Recommendation for the introduction of collective redress instead of a Directive, the timid European approach to this matter will not compel Germany to introduce any further collective redress instrument for the reparation of damages.**

2. Categories of consumers' interests

2.1 Distinction

A legal definition for the various categories of consumer interests in Spain and Germany is necessary to be precise and accurate when defining and comparing the different legal regimes. A clear-cut definition also allows us to identify the beneficiaries of the different categories of interests, as well as the suitability of the various legal remedies available in Spain and Germany within the framework of the EU Law to seek effective judicial protection. The legal nature of the consumers interests have been widely discussed in both countries: a first distinction could be made between consumer interests that in their very legal nature can be considered "*of public interest*" (i.e. affecting the general values of the society); "*collective*" or "*common*" (i.e. shared by a group), and "*pure individual interests*" that may have some collective relevance (i.e. that may be brought to

⁶³ That is not the case in the most EU countries, which does count with such institutions, in connection tho this point see *Rechtliche Verfahren der Verbraucherzentrale, Verbraucherschutz: Recht harmlos?* Verbraucherzentrale Bundesverband.

⁶⁴ See further in Säcker, *Die Einordnung der Verbandsklage*, Introduction.

⁶⁵ According to Keuchel, the extension of such mechanisms has been obstructed by the German industrial lobby. See *Keuchel*, *Kartellsündern droht Prozesswelle*.

⁶⁶ *Germany / Becher*, BDI bei der Anhörung vor dem Wirtschaftsausschuss, Protokoll 15/ 67, p. 1103 ff.

⁶⁷ Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions. "Towards a European Horizontal Framework for Collective Redress", /* COM/2013/0401 final */, point 2. Main outcomes of public consultation.

court together in the same procedure).⁶⁸ In the field of consumers protection all these all have been named *supra individual* interests.

2.2 Supra individual interests

2.2.1 Definition

In the frame of consumers Law, the term *supra individual* will be generally understood under a subjective point of view. Thus, a supra individual interest is this whose holder is not a single individual. It is supra individual because belongs to a plurality of individuals, not because this interest has an over ranking nature. **If two subjects count with a similar interest, the definition supra individual is already matched.**

2.2.2 Interests of consumers and its relationship to the general interest

The Academia has broadly discussed the relationship between the public interest and the interest of consumers. **For German authors** such Manfred Wolf, **consumers' interests are different than the general interests of the society**, as it is shown in the role of consumers' associations, which do not care about the general interest; they would rather care for the protection of consumers.⁶⁹ **Thus, the consumers interest will be equal to group interests rather than public interests** (*Gruppeninteresse* not *Allgemeine Interessen*). In this sense, interests of consumers can be confronted to interests of the competitors in the market, and both interests build the general interests.⁷⁰ Only when interests of every part of the market (of consumers and of corporations) are considered, it should be correct speaking of general interests.⁷¹ As per their nature between the public and private interest, the *Gruppeninteressen* have been also defined as "*Zwischenrechts*" (Intermediate Rights), a category between the public and the private interest: when it comes to enforce these rights, they cannot be sustained in a lawsuit by turning to the traditional instruments provided by the public or private Law.⁷² As the German literature recognizes, it is hard to provide a more accurate definition, as the *quality* of these interests will be very oft mixed up with the procedural definitions regarding the enforcement of these rights.⁷³

Accepting the differences between the interests of consumers and the general interests of the society, it is however defensible considering that a market based society will take advantage if protects the largest group of the market: the consumers.⁷⁴ **In the case of Spain, the relationship between the protection of the consumers interests and the general principles of the economy- which is a public value- is stated in the**

68 In Germany, it will be distinguished between the *individuellen, kollektive and allgemeine Interessen*. Wunderle, Verbraucherschutz im Europäischen Lauterkeitsrecht: p. 44 ff.

69 Wolf, Die Klagebefugnis der Verbände- Ausnahme oder allgemeines Prinzip? p. 13 ff.

70 Thiere, Die Wahrung überindividueller Interessen im Zivilprozess, p. 102 ff.

71 *Ibidem*, p. 23.

72 Cappelletti / Garth; The protection of diffuse, fragmented and collective Interest in Civil litigation, in: Walter J. Habscheid (Ed.); Effektiver Rechtsschutz und Verfassungsmäßige Ordnung, die Generalberichte zum VII. Internationalen Kongreß für Prozeßrecht Würzburg 1983, p. 117 ff.

73 Von Moltke, Kollektiver Rechtsschutz der Verbraucherinteressen, p. 21 ff.

74 Kennedy in its famous speech to the US Congress in 1962: "*Consumers by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision*". 15 March 1962 U.S. Congress.

Spanish Constitution⁷⁵, which gathers the defence of the consumers interests as part of the *Guiding Principles of the economic and social Policy*.⁷⁶ Although in Germany, does not exists such Constitutional recognition of consumers' figure, in that country an adequate protection of the figure of consumer is substantial for the good working of his social market economy as well, which is also recognized in the German literature⁷⁷and Law.⁷⁸ The connection with other general interests of the society, is shown also in the fact, that consumers policy are very connected to other general policies, such the competition Law, the developing of the Social Welfare State, etc...⁷⁹The link between the general interest and consumers interest shall embrace any consumption situation: the general interests of consumers considered as a group, as well as single interests of specific groups of consumers. It exists a general interest in the preservation of the confidence and rights of every single consumer who acquires a product or service in the market or in the possibility to enforce substantive rights in a suitable civil procedure. Thus, the safeguard and protection of consumers' interests, even when they are intrinsically pure individual interests, may affect the general interests of the society in a balanced market.

2.2.3 Collective consumers' interests

Given the connection between the well going of consumers and the general interests of the society, it can be specific situations which may affect rights of a specific collective of consumers. These are called "collective interests" of consumers, which are a category of supra individual interests (*Gruppeninteresse*). As a group, normally would:

1. Not include all the generality: in case of including all the generality it would be more accurate speaking of public interest. However, a collective can embrace the whole society (i.e. damages to the natural environment).

2. Not have general (public) access to the group of interest's holders: in order to be part of the group some characteristic must be common among the group members. (For instance, a harm derived from a harmful product. The group will be conformed with those consumers who suffered the damage). It exists a general (public) interest in avoiding harming cases, and it exists also a right to be repaired that only assists to the group of injured consumers.

3. The capacity of the interest's holders are determinable: the group will be conformed with the summation of individual determinate rights.

Spanish Law categorizes cases in which the members are not determinable as diffuse rights. This definition is foreseen in the Spanish Law for situations in which a group is holder of indivisible rights, - cannot be appropriated by a single person-, but also

75 BOE N° 311-1 of 29th December 1978, pp. 29313-29424

76 *Article 51*: 1. The public authorities shall guarantee the defence of the consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures. 2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them in those questions which could affect them under the terms which the law shall establish. 3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic commerce and the system of licensing commercial products. That way Spain becomes the first occidental country gathering this constitutional consumer protection according to J. W. *Gerlach*, ZVglRWiss 85 (1986), 247 (252).

77 *Hefermehl*, GRUR 1969, 653 (655); based on the former § 13 I a UWG, which allows access to the lawsuit to the generality.

78 As stated in the § 1 UWG.

79 In its broad sense, referring also to Unfair competition as well as antitrust regulations.

for a multitude of individual rights whose holder are undetermined. **As in both situations, these diffuse rights are closer to the public interest, the Spanish Civil Procedure Act (LEC) only grants standing to defend these interests before court to qualified institutions;** namely representative associations of consumers and users which looks for the general interests of this collective.⁸⁰ The legal categorization of diffuse interests is discussed; it is an expression used mostly in the Latino- American procedural law dogmatic. It is reflected in the positive Law, and in some countries, as Brazil it has been meticulous described.⁸¹ In Germany, it will be *spoken of Kollektive Interessen*, as the interest of a group are different than the general (*Allgemeine*) interests; the members of the group (*Gruppeninteresse*) should be count with distinctive characteristics which excludes the generality.⁸² In a damage situation, the *Gruppeninteresse* in a narrow sense, would be those individuals considered in their role as consumers who have been damaged. In a broad sense, will be the rest of consumers which are also threaten by this unlawful act, but they do not have suffered the damage yet (equal to the collective interests of consumers).

From the legal nature of the interests at stake, collective interests can be the interests of individuals who claim together, or interests of a collective, different to the addition of individual interests. These categories are qualitatively distinguished, and for a good understanding of the different category of interests it should be separated the legal nature of the interests in play and the corresponding procedural figures for their enforcement.⁸³ In this sense, Koch distinguishes the “*Verbraucherinteresse*” from the “*Individuellen Verbraucherinteresse*”; for this author, individual enforcement of a subjective right should be considered as “*Verbraucherschutz*” (consumers’ protection) while the collective enforcement of consumers’ interests serves the objective “*Verbraucherrecht*” (consumers’ Law).⁸⁴

2.2.3.1 Accumulation of individual interests

Collective interests of consumers are personified general interests when can be attributed to a determinate person. Other general interests will be those that can not be associated to determinable individuals, such the environment rights, etc...⁸⁵

A specific subjective right to obtain a restitution for damages counts with the necessary subjective element to be enforced (*Anspruch*). **In these situations, binding interests in a single law suit make sense due to efficiency criteria.** The *ratio* is the enforcement of individual interests by improving their access to justice. Situations of accumulation of individual rights are often related to cases of massive damages. In such cases, the individual interest to be repaired does not reach the quantity to do a lawsuit worthy, thus, a sum of individual interest organized in a group would be more efficient for their right’s enforcement, the access to justice and the procedural economy. **Binding**

80 Also the Public Prosecution Ministry is entitled to lodge a claim in defence of diffuse interests. Art. 11.4, Ley de Enjuiciamiento Civil (LEC), BOE No. 7 of 08th January 2000.

81 See *Mafra Leal*, Die Kollektivklage zur Durchsetzung diffuse Interessen, p.44 ff.

82 Further in *Von Moltke*, Kollektiver Rechtsschutz der Verbraucherinteressen, p. 22 ff.

83 So *Wunderle*, Verbraucherschutz im Europäischen Lauterkeitsrecht: Theoretische Grundlagen, p. 44.

84 Fn. 100, in *Von Moltke*, Kollektiver Rechtsschutz der Verbraucherinteressen, p. 22.

85 For *Moltke* this distinction seems to be kind of blurry: the interests of consumers would only be a part of the general interests, and to avoid confusion we should avoid speaking of general interests that can be or can not be individualized, see *Hopt / Baetge*, Rechtsvergleichung und Reform des deutschen rechts-Verbandsklage und Gruppenklage in: Basedow (Ed.), Bündelung gleichgerichteter Interessen im Prozess, p. 11 ff.

multiplicity of pretensions bring other procedural advantages (the same facts and legal questions might be solved at once), **as a psychological fortification of the claiming party.**⁸⁶ As disadvantage of this instruments will considered the lack of attention to the individual case. Nevertheless, not binding these pretensions in a single lawsuit, can drive to a multitude of different decisions in different procedures, as a huge cost of procedural resources which prejudice the whole Justice´s system.⁸⁷

In cases of massive damages, all interests, pure individuals, general of consumers and users and the general interest of the society to enforce the Law shall be taking into consideration. All the society, both upon directly affected consumers, as potential victims have an interest to prevent the damage to happen again. It may lead to granting legal standing to institutions that care for general interests. For some authors, however, the cases of a plurality consumers who are affected in their own sphere by a single unlawful act, the resort to collective redress instruments are just a procedural solution and not a reflection of a general or collective interests; it means, it is a procedural response to deal with a plurality of individual rights rather of a case of a substantive right based on general interests.⁸⁸ The legal nature of this situation has been very academical discussed, and leads to questions such who would count with legal standing to defend a plurality of individual connected rights, how the individual reparations can be calculated, if the litigant needs any kind of authorization of the holders of the interest which are going to be sustained, etc... ; as the interest to deal with are between public and private, legal standing might be granted to qualified organizations (acting in general interests of the collectives that they represent). The individual interest could be warranted by procedural solutions such *opting out; opting in* mechanisms which shall allow every single affected consumer to start its own action if he wants to. That way the general interests of consumers – and of the society through granting protection to this collective- as well as the right to obtain an effective protection of court and judges of every single consumer will be warranted.

2.2.3.2 Indivisible collective rights

In other situations, such misleading advertisement, the unlawful act is forwarded to the consumers in general, so, it is difficult to determinate which consumers have been affected. In German Law, when it comes to enforce collective interests, it will not be taking into consideration immediate individual rights.⁸⁹ As an exception, an individual right can be taken into the court represented by an association (*Musterklage*) which is holder of collective rights. The collective interests of consumers will be strength due to the publicity of the judicial decision and possible use of the sentence in later lawsuits. Nevertheless, in these claims, it is still the individual subjective right and individual circumstances the object of jurisdictional control. The Spanish Law refers to this situation as diffuse rights, although

86 *Rechberger*, Neue Herausforderungen an das Prozessrecht: Die Bewältigung von Kumul- und Großschäden, in FS Beys, p. 1322.

87 *Stadler*, Bündelung von Interessen im Zivilprozess- Überlegungen zur Einführung von Verbands- und Gruppenklagen im deutschen Recht, p. 2 ff.

88 In connection with this matter Schaumburg reminds that in its origin the Roman Law did not distinguish between the substantive right and the procedure right. The *Actio* was the axe of the legal system. *Schaumburg*, Die Verbandsklage, p. 41. There are some discordant voices in the German literature regarding the legal nature of the *Verbandsklage*, where this is just figure of process representation, *Habscheid*, GRUR 1952, 221 (222).

89 *Von Moltke*, Kollektiver Rechtsschutz der Verbraucherinteressen: Analyse effektiver Rechtsdurchsetzung im deutsch-englischen Rechtsvergleich, p.20 ff.

the edge of this concept is discussed by the academia as well, as the term diffuse rights has been used also for massive damages with hard to be ascertainable consumers.⁹⁰

At a European Level, **The Directive 98/27/EC** of the European Parliament and of the Council of 19 May 1998 on injunction for the protection of consumers' interests,⁹¹ in its Explanatory Memorandum Number 2 **defined collective interests as those which do not include the accumulation of interests of individuals who have been harmed by an infringement.** Thus, for this Directive, collective rights are supra individual indivisible rights; the individual consumer has not an immediate relationship with this interest, can not dispose of the same as it belongs to a collective. This definition has been literally reproduced in the updating of the "Injunction's Directive" for the protection of consumers' interests of 2009/22/EC⁹² of the European Parliament and of the Council of 23 April 2009, in its Explanatory Memorandum Number 3. This negative definition, according to the interpretation hold by the Commission, seeks to avoid any possible confusion with the North American *class actions*, in which a "collective" protection of a pecuniary sum of individual interests is possible.⁹³ In its Article 3, "Entities qualified to bring an action" the Directive grants a general legal standing to any body (with legal personality) which *has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied,*⁹⁴ but leaves out **groups of affected** which are not being properly constituted according to the Law of a member State, meaning the groups of affected consumers without legal personality, for instance affected groups constituted "*ad hoc*."⁹⁵ This is a logical consequence of considering the collective interests not as a sum of individual interests, as the groups constituted *ad hoc* are a sum of individual consumers affected by a harmful product or service. A positive definition of the term collective interests, or more precisely, the scope of collective interests falling under the protection of the Injunctions Directive 2009/22/EC, is included in the Annex I.⁹⁶ This list has been extended several times from

90 It can be determined if we took in consideration all the consumers who acquired a specific product following misleading advertisement. See Spanish part of this study.

91 OJ L 166 of 11.06.1998.

92 OJ L 110 of 01.05.2009.

93 According to *Gutiérrez de Cabiedes e Hidalgo de Caviedes*, La nueva Ley de Enjuiciamiento Civil y los daños con multiples afectados, p. 142 ff.; Reflexiones sobre el alcance de las disposiciones de la Directiva 98/27/CE del Parlamento Europeo y del Consejo, Representación España, U.E., Bruselas 2000.

94 The Spanish Civil Procedure Act (LEC), recognizes a general legal standing to groups of affected in order do defend collective interests (Art.6.1.5 in connection with Art. 11.2). This does not include injunctions actions; exception made in some sectorial Acts, such the Spanish Act on information society services and e-commerce (Ley 34/2002 de servicios de la sociedad de la información y comercio electrónico) in its article 31.b.

95 *González Cano*, La tutela Colectiva de Consumidores y Usuarios, p 49 ff.

96 List of directives referred to in article 1.1: 1. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31). 2. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) [2]. 3. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23). 4. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59). 5. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). 6. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19). 7. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12). 8. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce), (OJ L 178, 17.7.2000, p. 1). 9. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311,

the original injunctions Directive 98/27EC and covers a broad spectrum of fields in which consumers' collective interest could be affected. The Commission's report concerning the application of the Directive 2009/22/EC⁹⁷ gathers as possible changes in the legal framework the extension of the scope of application of the Directive to all consumer protection rules, as for instance *laws on the protection of privacy and personal data which are increasingly regarded as "consumer laws"*.⁹⁸ This possible extension set out the question of the scope of the term collective interests, as this field seems to protect basically individual interests.

It should be remained, that the action for injunctions in defense of collective interests do not prejudice to individual actions brought by individuals who have been harmed by an infringement, which is a logical consequence as the Directive does not allow itself adversely affected consumers to obtain compensation for the damage suffered. In connection with this matter, the Commission also recognizes that *most stakeholders take the view that consumers should benefit directly from a judgement following a successful case, rather than being obliged to introduce new proceedings to enforce their rights*.⁹⁹ If the Commission finally addresses this, then there is the possibility that the current definition of collective interests that do not include the accumulation of interests of individuals who have been harmed by an infringement could be amended in a certain way. In order to deal with these mentioned situations, in many countries a new legal terminology and procedure instruments have been proposed and introduced progressively in their legal systems. We will attend to the German and Spanish case and compare their legal solutions in this field. The role of the EU Law since the approval of the Injunctions Directive,¹⁰⁰ that speaks of *collective interest*, has become more and more relevant, putting the cap the approval of the **Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union**.¹⁰¹

3. Collective redress instruments

3.1 Introduction

In societies of massive consumption, a single market act can lead to massive cases of damages. As it is general accepted, the traditional structures of the civil procedure Law are unsuitable to deal with collective indivisible rights or a multitude of individual connected

28.11.2001, p. 67).¹⁰ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (OJ L 271, 9.10.2002, p. 16).¹¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22).¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).¹³ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of time share, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10).[1] The Directives referred to in points 5, 6, 9 and 11 contain specific provisions concerning injunctions.[2] The said Directive was repealed and replaced, with effect from 12 May 2010, by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (OJ L 133, 22.5.2008, p. 66).

⁹⁷ Report from the commission to the European parliament and the council Concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest /* COM/2012/0635 final.

⁹⁸ 5.1.b.1 COM/2012/0635 final.

⁹⁹ 5.1. b.2. COM/2012/0635 final.

¹⁰⁰ OJ L 166, 11.6.1998.

¹⁰¹ OJ L 349, 5.12.2014, p. 1–19.

rights. Due to the unsuitability of the standard civil rules to face to these new situations, substantive rights in favor of consumers and the abstract control of the norms are not fully observed. Collective redress instruments appear as a suitable option in consumers and competition Law to improve consumers defence.¹⁰² **Collective actions** are being lately strength in Europe as tools for improve access to justice. Three categories of instruments are identified: *group actions*, which feature some but not all of US type class actions, *representative actions* and *test cases*.¹⁰³ Within these three categories, considerable heterogeneity exists. As disadvantage of the collective redress will be considered the risk of abusive litigation. Litigation can be considered abusive when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them.¹⁰⁴ The main concerns voiced against the introduction of collective judicial redress mechanisms at European level were that it would attract abusive litigation or otherwise have a negative impact on the economic activities of EU businesses.¹⁰⁵ Therefore the Commission was expressly not proposing to introduce class actions or contingency fees, within other precaution measures.¹⁰⁶ Academic opinion ranges across a wide spectrum, from supporting European harmonization¹⁰⁷ to questioning whether empirical evidence supports any need for dramatic change, and to concern over the inevitable adoption of American litigation culture.¹⁰⁸

102 EU Consumers protection policy; EU White Book for private enforcement; *Micklitz/Stadler Verbandsklage*, p. 10.

103 It cites as examples of the test case approach the German Musterverfahren and KapMuG procedures and the Austrian Musterprozessen but concludes that potential delay and the lack of automatic binding authority make a test case less 'able to discharge the courts' as much as a group action. *Hodges*, Global Class Actions Project Summary of European Union Developments, Centre for Socio-Legal Studies, University of Oxford, p. 9 ff.

104 *There is the risk that the mere allegation of infringements could have a negative influence on the perception of the defendant by its existing or potential clients. Law-abiding defendants may be prone to settle the case only to prevent or minimise possible damages. Furthermore, the costs of legal representation in a complex case may constitute substantial expenditure, in particular for smaller economic operators. 'Class actions' in the US legal system are the best known ample of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation. Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well founded. Such features are for instance contingency fees of attorneys or the discovery of documents procedure that allows "fishing expeditions". A further important feature of the US legal system is the possibility to seek punitive damages, which increases the economic interests at stake in class actions. This is enhanced by the fact that US class actions are legally 'opt-out' procedures in most cases: the representative of the class can sue on behalf of the whole class of claimants possibly affected without them specifically requesting to participate. In recent years, U.S. Supreme Court decisions have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation.* Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee of the Regions. "Towards a European Horizontal Framework for Collective Redress" /* COM/2013/0401 final */

105 The experience of the North-American model will be considered in order to prevent same mistakes in the European version of collective redress. As per the former competition Commissioner Kroes, the US model as having excessive and undesirable consequences, as to produce "a competition culture and not a litigation culture". Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. "Towards a European Horizontal Framework for Collective Redress" Opinion expressed by most stakeholders, businesses.

106 Speech by Commissioner N. Kroes at the Harvard Club, 22 September 2005. The Green Paper avoids references to class actions and contingency fees. A barrage of objections from business interests met the Green Paper on Collective Consumers Redress, arguing that excessive and costly litigation would inevitably result and would harm, rather than enhance, the European economy.

107 Exhaustiver see *Micklitz / Stadler*, EBLR 2006, 1473-1503.

108 *Wils*, WCLR 2003 473, (489).

3.2 Aim of collective redress

As per some studies of the Commission¹⁰⁹ in this field, the incorporation of collective redress instruments might provide:¹¹⁰

A better access to justice of affected consumers

A better observance of the Rule of Law

A higher deterrence effect of the companies in the market

By improving the private enforcement and the access to justice of consumers' rights, the possibilities of affected consumers of obtaining reparation in cases of minor damages would be higher. It shall derive in a better behavior of the companies in the market as well and in a better observance of the legal system. Beyond the defense of subjective rights provided by the civil law, it also provides the realization of the objective material right, the legal peace.¹¹¹ The whole legal system will take advantage of its observance. For German authors, such Micklitz and Stadler, these have two main functions:

1. They shall improve the collective defense of consumers where they now do not have any legal instrument by allowing damage reparations for the injured part. Thereby collective remedies will improve consumers' protection policy by covering some blanks of the current available defense.¹¹²
2. These helps improving the *Regulierungsfunktion*. Individuals and associations assume the defense of the public interest, thereby the enforcement of the law will be privatized in benefit of the society.¹¹³ The legal system fulfil its social aim when the judicial decisions determine the conduct to follow in accordance to the material substantive law.¹¹⁴

3.2.1 Access to justice

A legal system which grants subjective rights but do not count with an effective enforcement procedure is inefficient, as **even the best law is void if cannot be enforced**.¹¹⁵ A high degree of access to justice by the general population is necessary to ensure the observance of the material and formal Rule of Law.¹¹⁶ A civil procedure which not allow to enforce substantive rights granted by the legal system, lacks efficiency and would jeopardize the whole legal system. In this sense, the access to justice of affected holders of rights depend very much on the cost of opportunity of starting a process. The affected party normally will make a rational analysis of the advantages and inconveniences of starting a judicial action. In consumers' field, the individual consumer rarely sues against (big) companies, as the possible benefits do not overcome the troubles. Next to the costs

109 See chapter IV of this work.

110 See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory OJ L 201, 26.7.2013, p. 60–65 (collective redress mechanisms in the Member States concerning violations of rights granted under Union Law)- Whereas 9.

111 *Rosenberg / et al.*, *Zivilprozessrecht*, 17 Aufl; §1 Rn.8

112 *Stadler & Micklitz*, *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft*, p. 2.

113 *Ibidem*.

114 *Hass*, *Die Gruppenklage*, p.50.

115 *Lakkis*, *Der kollektive Rechtsschutz der Verbraucher in der Europäischen Union dargestellt an der Verbandsklage der Verbraucherverbände nach dem AGBG, dem UWG und dem griechischen Verbraucherschutzgesetz*.

116 *Cassone*, *Eur JL & Econ* 2011, 205 (215).

of the procedure it has been brought other aspect as the ignorance of Law, inequity of arms consumers- corporations, etc...

In cases of massive damages, the collective redress appears as a suitable option to improve the access to justice. The Commission find out in survey in 2006 which found that 74 per cent of Europeans would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing.¹¹⁷ Collective redress mechanisms can strong the position of the weakest parts in the procedure (consumers) and increase the access to justice of affected rights.

It will be discussed in Germany if this country shall follow the comparative Law and extend such remedies that would allow enforcement of supra individual,¹¹⁸ abstract damages or levy of illegal earnings through conducts against consumers' protection. The incorporation of modern collective redress mechanisms in this country could improve the allocation of judicial resources, needed in a law suit, as the *Verbands- Gruppen or Musterklage* fulfils this task in a more economical way. As for the German Academia, the experience of other European countries, shows that each model has its advantages and disadvantages, but one can give a full response to every discussed situation.¹¹⁹

3.2.2 Enforcement of consumers Law

3.2.2.1 Public enforcement

Next to the civil procedure, enforcement of consumers Law can be done by institutions, both public or private. As per the firsts studies following the Green Paper on collective consumers redress, the Commission found out that only 15 of the 27 EU member countries counted with associations of public institutions with active legitimization in order to defend collective rights.¹²⁰ An acceptable compensation for victims in cases of minor damages is not yet happened in the inner market; the activity of associations or public Law institutions in this field has been considered very poor, and the lack of harmonization in this field may suppose a barrier for the realization of the common market.¹²¹ With regard to EU policy fields where public enforcement plays a major role — such as competition, environment, data protection or financial services — most stakeholders to Commission's work on collective redress see the need for specific rules to regulate the interplay between private and public enforcement, and protect the effectiveness of the latter.¹²² **Public enforcement, itself, is not sufficient in order to provide a comprehensive enforcement of consumers Law; it does not help the**

117 Eurobarometer Special Report 252 'Consumer Protection in the Internal Market', European Commission, 2006, QB28.5, available at europa.eu.int/rapid/cgi/rapcgi.ksh. (Retrieved last time 01.03.2017). The Report notes that since Greeks are those who most regard resolving a consumer dispute in court as easy (51%), it is not surprising that 86 % of them would be willing to assert their claims in a joint action. At the other end of the scale, 53% of Hungarians would not be more motivated to take joint court action.

118 *Stadler & Micklitz*, Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, p.6 ff.

119 *Staudenmayer*, Überlegungen der Europäischen Kommission zur kollektiven Rechtsdurchsetzung, in: *Casper/et al;* (Hrsg.), Auf dem Weg zu einer europäischen Sammelklage? p. 87 ff.

120 *Sauerland*, Die Harmonisierung des kollektiven Verbraucherschutzes in der EU, p.44 ff.

121 *Ibidem*, p.43.

122 In the competition field, many stakeholders emphasise the need to protect the effectiveness of leniency programmes applied by the Commission and national competition authorities when enforcing EU rules against cartels. Other issues frequently mentioned in this context include the binding effect of infringement decisions by national competition authorities with regard to follow-on collective damages actions and setting specific limitation periods for bringing such follow-on actions. Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress".

victims to be fully reimbursed and can cover only a partial part of all violations of the market¹²³, as it has the following limitations:

- Institutions normally conduct a public surveillance of the material law, but does not seek to compensate individual injured parties.
- Due to the necessity of optimizing the public resources, public institutions will prosecute the most important violations of the law, leaving aside other infractions.

Collective damages actions in regulated policy areas typically follow on from infringement decisions adopted by public authorities and rely on the finding of an infringement, which is often binding on the civil court before which a collective damages action is brought. For example, in *Antitrust Law*, the Regulation (EC) No 1/2003 provides that when national courts rule on issues concerning EU antitrust rules which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. In such cases, follow-on actions essentially concern the questions of whether damage has been caused by the infringement and, if so, to whom and in what amount. Nevertheless, for the European Commission, the effectiveness of public enforcement shall not be put into jeopardy because of collective damages actions or actions that are brought before courts while an investigation by a public authority is still ongoing. This may typically require rules regulating access by claimants to documents obtained or produced by the public authority during the investigation, or specific rules on limitation periods allowing potential claimants to wait with a collective action until the public authority takes its decision as regards infringement.¹²⁴ Beyond the purpose of protecting public enforcement, rules of this kind also facilitate effective and efficient redress through collective damages actions. Namely, the claimants in a follow-on action can to a significant extent rely on the results of public enforcement and, thus, avoid the (re-)litigation of certain issues. Due account should be taken of the specificities of collective damages actions in policy areas where public enforcement plays a major role, to achieve the twofold goal of protecting the effectiveness of public enforcement and facilitating effective private collective redress, particularly in the form of follow-on collective actions.¹²⁵

123 Damages claims for breaches of Articles 101 or 102 of the Treaty constitute an important area of private enforcement of EU competition law. It follows from the direct effect of the prohibitions laid down in Articles 101 and 102 of the Treaty that any individual can claim compensation for the harm suffered, where there is a causal relationship between that harm and an infringement of the EU competition rules⁵. Injured parties must be able to seek compensation not only for the actual loss suffered (*damnum emergens*) but also for the gain of which they have been deprived (loss of profit or *lucrum cessans*) plus interests. Compensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. Awarding compensation is outside the field of competence of the Commission and the NCAs and within the domain of national courts and of civil law and procedure. Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union /* COM/2013/0404 final - 2013/0185 (COD) */Whereas 11.

124 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", /* COM/2013/0401 final *//, point 3.7.

125 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", /* COM/2013/0401 final *//, point 3.7.

3.2.2.2 Private enforcement

3.2.2.2.1 Connected individual rights

Own enforcement of own subjective rights or interests does not present further theoretical questions, as it **is the essence of the European continental civil Law**. A single citizen -consumer- which suffers a damage is legitimate to sue, directly or by means of a representative party. However, in consumption's field, the postulates of the civil Law find practical barriers that may drive to a so called rational lack of interest to claim of the entitled person.¹²⁶

Some aspects have been identified:

1. The consumer is not always aware of his rights.
2. He could be not aware that he has suffered any damage in his rights or interests.
3. And the most important factor is the inequality between consumers and companies, and the complexity and cost of the civil procedure which can results in a so called rational lack of interest to claim.

This inequality has many other faces. The complexity and costs of the civil procedure that consumers would have to face against companies in connection with the potential earnings are not proportional.¹²⁷ These obstacles could be particularly hard to overpass in certain fields of consumption, such international border cases ¹²⁸ or consumption in very regulated and technical fields (financial law, competition Law, etc...)¹²⁹. In cases of minor damages is also to be considered that a lawyer, due to the minimal earning will renounce to the action. A lack of incentives shall drive to a lack of specialization in this field,¹³⁰ which increases the inequity of arms that consumers must face, which is also a key procedural factor. All these mentioned aspects would drive to a rational lack of interest by the affected consumer. In contrast to the rational lack of interest of the consumer, there is to be expected a big interest of companies to make a substantial investment to avoid one negative decision which can be the basis for further claims against them.¹³¹ A possible solution to equilibrate the positions of affected consumers against companies is to sum up all the individual pretensions in a single law suit. As per demands of procedural efficiency, if there are enough connective or common factors between a certain plurality of individuals, the best-case scenario will be those in which all these individuals can defend their interest in the same process. Which model may provide a better representation of these interests in a specific case may be discussed.

¹²⁶ Sauerland, Die Harmonisierung des kollektiven Verbraucherschutzes in der EU, p. 43 ff; Also, see Hirte, VersR 2000, 148-155.

¹²⁷ Schäfer, Anreizwirkung bei der *class action* und der Verbandsklage, in: Basedow, et al (Eds.); Die Bündelung gleichgerichteter Interessen im Prozess, beitrage zum ausländischen und internationales Privatrecht, p. 67 ff.

¹²⁸ See Special Eurobarometer 292, Civil Justice in the EU" from April 2008 in the point 1.2.

¹²⁹ This is according to the Commission very disfunctional for the private enforcement in antitrust field. See Kaufmann, Rechtsschutz im deutschen und europäischen Kartellrecht, Konzeption einer effektiven Schadenersatzklage, p. 17.

¹³⁰ Krämer, Law and diffuse interest in the European legal order- Recht und diffusen Interessen in der Europäischen Rechtsordnung, Liber aicorum, p. 861 (867).

¹³¹ Kötz & Homburger, Klagen Privater im öffentlichen Interesse, in: Homburger, / Kötz (Eds.), Generalreferat auf der Tagung für Rechtsvergleichung in Hamburg 1973, p. 69 ff.

When the collective redress mechanism seeks individual compensations, it seeks these rights *accumulative* or *additive* to be prosecuted.¹³² There are issues related to these cases both in the tort as well as in the procedure Law, in a frame where the mobility of good and persons is global.¹³³ For a determinate damage result, the injured parties share, in principle, the same legal questions to sustain their damage pretensions / claims. Collective redress appeared in comparative law¹³⁴ and EU law¹³⁵ as a suitable tool.

3.2.2.2 Indivisible rights

The defence of indivisible rights presents more theoretical barriers regarding the legitimization to defend these rights. Examples of a pure public Law situation which affects consumers would be the defence of the environment, *the pure air*, an adequate economic policy (such the monetary and fiscal policy), *the protection of the free competition*,¹³⁶ and any other policy which may affect the economic interests of consumers. **These are indivisible rights** in the sense that belong to all consumers at the same time. Thus, it appears reasonable that associations as well as public institutions which seek for the general interests of consumers and users are granted with legal standing in order to defend these interests before the court. Nevertheless, indivisible right may often be individualized. It is a task of the national consumers' policy to delimit what fall within consumers' indivisible interests. In this regard, it is interesting to study such doctrines which have as subject the attribution of indivisible rights to specific holders; i.e. giving a part of the good to each consumer which share the good (collective private property rights on common goods such the water, natural resources, etc...)¹³⁷.

3.2.2.3 Consequences of a lack of enforcement

If the Law is not enforced, not only affects aspects related to justice, such the compensation of the victim, the general rule of Law is jeopardized. An affected consumer who cannot bring its damages action to the court drive to a deficit in the observance of the whole legal system,¹³⁸ which loses efficiency. Specific consequences are that the companies will consider as profitable some activities that injured rights granted by the substantive Law. The "unlawful money" remains by the infringer. This Situation does not benefit the optimal allocation of resources either. Both economical or procedural and therefore is not a desirable situation.¹³⁹

3.2.3 Compensation and deterrence

A total reparation of the damages appears as a necessary goal of any civil procedure. Any reparation granted to the victim which does not cover at least the earning

132 Vogel, Kollektiver Rechtsschutz im Kartellrecht, p. 14.

133 See Rechberger, Neue Herausforderungen an das Prozessrecht: die Bewältigung von Kumul- und Großschaden, in: Festschrift für Kostas E. Beys, 2003, Nakamura/Fasching/Gaul/Georgiades (Hrsg), Zweiter Band, 2003, p. 1309 ff.

134 Further see Koch, ZZP 2000, 413-441.

135 Already seen the proposal of the reparation of damages of 1975. Further in Franke, N. (Franke, 2002) Franke, Die Verbandsklage der Verbraucherverbände nach dem französischen Code de la consommation in Vergleich zum deutschen Recht, 2002, p. 20.

136 Jolowicz, Introduction on Civil Procedure, p.1,10.

137 In this sense see the Spanish example of the Tribunal de las Aguas de Valencia, where users of a common good defines the rights of use of a common good as the water.

138 See Hass, Die Gruppenklage, Wege zur prozessualen Bewältigung von Massenschäden.

139 For an exhaustive analysis see Hylton, The economics of class actions.

obtained through the unlawful act, will still be worthwhile for the causer.¹⁴⁰ Thus, in order to maximize the deterrence effect of the private enforcement, the total reparation of the victims is a capital matter.¹⁴¹ In this regard, different legal systems present different alternatives. Potential responses are the incorporation of punitive damages, or merely instruments that guarantee effective recoveries.

3.2.3.1 Perfect compensation

As per the Commission's White Book on Action for Damages, the entitlement to full compensation includes not only to the actual loss due to an anti-competitive price increase, but also to the loss of profit because of any reduction in sales and encompasses a right to interest.¹⁴² It means that the party suffering the damage shall be compensated, so that its wealth remains so, as before suffering the damage act. This view has been confirmed on the new Directive on actions for damages on competition Law.¹⁴³ The liability is the starting point of the reparation. Any suffered damaged shall be charged, imputed to the causer. As per the European continental tradition, the material compensation law is considered as a balance function. This is oriented to the reparation of the damaged suffered, it will be questioned the deterrence effect of the compensation.¹⁴⁴

3.2.3.2 Optimal deterrence

Next to the compensation principle **there exists also a preventive function in the reparation of damages**; it shall positively influence the causer. An optimal deterrence effect is reached when discourage any person or company of misbehaving, due to the negative effects that can follow. **In this sense, a punitive damage system would reach a higher deterrence effect.** There are not many European countries following the American example of punitive damages, which incorporate to the compensation principle also a punitive one.¹⁴⁵ In cases of minor damages, as the *ratio legis is the enforcement of consumers law rather than the full compensation of victims, in USA the punitive damages are usually part of the class actions.*¹⁴⁶ German authors considered, however, that the prevention is not an aim of the civil Law and considered that this vision of using the civil law in order to reach a preventive function is an ideological matter.¹⁴⁷ As per this view, the full restitution principle of the German civil Law shall not include a deterrence aim.¹⁴⁸ This function shall rather be conducted by public institutions, as they have a higher capacity of research for possible infractions, and imposing higher fines. It also has been pointed that the interest of the lawyer or private litigants are not equal to public interest, and from the point of view of the costs, it is more efficient the public enforcement than the private one. Nevertheless, the deterrence function of the civil Law is generally recognized in the

140 Further on economical aspects of the deterrence see i.e. *Becker*, JOPE 1968, 169-217; *Schwartz*, GLJ 1980, 1075-1102 and *Ulen*, EJLE 2011, 185-203.

141 Judgment of 13th July 2006, Joined cases C-295/04 to C-298/04, *Manfredi*, , ECLI:EU:C:2006:461, points 95 and 97.

142 White Paper on Damages actions for breach of the EC antitrust rules Brussels, 2.4.2008 COM (2008) 165 final.

143 See Chapter IV of this work.

144 So, *Sauerland*, Die Harmonisierung des kollektiven Verbraucherrechtsschutzes in der EU, p. 44, and *Kelliher*, and scopes, in: *Koziol, / Schulze*; Tort Law of the European Community, p. 1 ff.

145 More about punitive damages and its compatibility with the European „ordre public“ principles; see *Hölzel*, Kartellrechtlicher Individualrechtsschutz im Umbruch (Ed.), Neue Impulse durch Grünbuch und Zementkartell.

146 *Buchner*, Kollektiver Rechtsschutz, p. 56.

147 See further in *Koch*, JZ 1999, 922-930

148 See further in *Diemer*, ECLR 2006, 309-316; *Ritter*, WuW 2008, 762 (773).

academia¹⁴⁹ as well as in the positive¹⁵⁰ and case law,¹⁵¹ which equilibrate the optimal deterrence function and the rights of the victims of being compensated as a main function of the civil Law.¹⁵² Despite of this recognition, the deterrence effect shall be limited to the *Ausgleichsprinzip*, meaning that the injured party shall not obtain a better position by means of the recovery as it had before suffering the damage. At European level, following the case law of the CJCE, the European Commission, recognized in competition field that a high level of private enforcement or deterrence reduce the infringement of the law.¹⁵³ Thus, the enforcement of the provisions has a double dimension.¹⁵⁴

- Compensation of the victim (private interest)
- Deterrence of future unlawful behaviors (public interest)

The CJEC have both functions supported.¹⁵⁵ The reparation of damages is a key factor, as it counts with *overall deterrent effect*.¹⁵⁶ The *Courage and Creehan decision* means the explicit recognition of the deterrence function with shall, per the CJEC, follow the damages reparations. ¹⁵⁷

3.2.4 Spread damages

The concept of massive damages is not a legal concept neither in Spain nor Germany. It does not exist a proper definition of massive damages in the positive Law, but is to be found in the academia.¹⁵⁸ In Germany, the concept of *Massenschaden* (massive damages) has been used instinctively with other terms such *Massendelikt*, *Streuschaden*, *Grossschaden* and in different areas of Law, such traffic Law, finance Law, etc...¹⁵⁹ In England, it will be used the term *multi party situations* to deal with situations where a plurality of individuals has been affected in their personal legal sphere, *sharing a sufficient common ground*.¹⁶⁰ In Spain it will be used the term “*daños masivos*”.

Characteristic of massive damages (*Massenschaden*), are a multitude of individuals which suffer a legal damage, therefore, a multitude of persons are entitled to reparations.¹⁶¹ Examples of massive injured parties can be given both in contractual (general contracts clauses) or extra-contractual relationships (mass transport accidents, radioactive release, etc...). The academia uses the term massive damages normally to speak of high damages.¹⁶² Quantitatively considered, massive damages are not related to the importance of the damage. This concept shall include so good those massive relevant

149 Zypries, ZRP 2004, 177 (178).

150 Government position by the reform of the GWB, BT Drucks 15/3640 p. 35 ff.

151 Besides the well-known decisions *Courage and Manfredi*, also in the field of discrimination CJEU.

152 Vogel, Kollektiver Rechtsschutz in Kartellrecht, p. 91 ff.

153 Exhaustiver see *Wind*, ECLR 2005, 659-668.

154 See White Paper on Collective redress for breach of EC antitrust regulations, COM (2008) 165, 2.4.2008

155 Judgment of 20th September 2001, Case C-453/99, *Courage Creehan*, ECLI:EU:C:2001:465, Fundamentation 26 compensation principle and in fundamentation 27 prevention principle.

156 Further on deterrence see *Korninos*, CompLRev 2006, 5 (14).

157 Judgment of 20th September 2001, Case C-453/99, *Courage Creehan*, ECLI:EU:C:2001:465, p. 26, 27.

158 See Vogel, Kollektiver Rechtsschutz im Kartellrecht, p. 13 ff.

159 See Lange, Das begrenzte Gruppenverfahren: Konzeption eines Verfahrens zur Bewältigung.

160 Lever & Larouche, Tort Law, p. 263; Balen & McCool, Multi-Party Actions, p. 4 ff.

161 See Hass, Die Gruppenklage, Wege zur prozessualen Bewältigung von Massenschaden.

162 Stadler & Micklitz, Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, p. 9.

damages, as well as those massive minor damages. In both cases is questioned the enforcement of the subjective rights (reparation) as well as the enforcement of the material Law, the legal order (the Rule of Law). As these are cases of an affection of individual interests, the key factor shall be, how deep these individual legal positions have been affected by a specific damage. **The procedural remedies shall reflect the intensity of the suffered damages, as it is not the same a case of an irrelevant or minor damage than a big damage of the individual legal sphere of a plurality of consumers.**

Two different scenarios might be considered despite the enforcement of massive damages:

a. **An unlawful behavior causes a damage so negligible, that the affected individual has a subjective indifferent lack of interest in obtaining a reparation.** The harm does not affect him very much, so that the holder of the legitimate interest decides not to act to recover its previous situation. The effectiveness of the procedural remedies at hand are not so important.

b. **Different are the cases in which the individual is willing to do something to get satisfaction by the damaged suffered in its personal legal sphere, but the obstacles that he is expecting to find in the civil procedure demotivate him to lodge any claim.** In this last case, although the individual has suffered a damage big enough to act, it exists an objective rational interest in appealing to the civil procedure instruments, as the benefits expected to obtain does not overcome the inconvenient of lodging the same. Here will be spoken of efficient costs, cost of opportunity, etc... In this case, procedural principle of parity of arms will be easily reached by means of collective redress mechanisms.¹⁶³

3.2.4.1 Minor damages

The previous mentioned barriers to the access to court of consumers arise specially in the case of massive minor damages, where in principle it lacks incentives to claim.¹⁶⁴ Minor massive damages are those in which through a single act, or some serial similar acts causes a damage to a lot of consumers, but this damage is limited to small quantities. The rights of the affected consumers, individually considered, are so minor that it does not exists by its side any incentive to enforce its rights before the court.¹⁶⁵

In Germany, will be used the term *Streuschaden* (spread damages) for the cases in which a single unlawful or negligence act will drive to a multitude of damages, but the damage of the single consumer will remain low (*Bagatellschaden*). In these cases, due to the principles and procedural issues of the civil procedure, private enforcement is either not suitable neither worthy, since the costs of the procedure exceed the possible earnings of the same. Nevertheless, the sum of all these individual marginal damages will result in a considerable amount, which in absence of an effective enforcement instrument will be

¹⁶³ In conformity with the study of the EU, where approximately 70 % of citizens would start civil actions to enforce their rights when they can act together with other aggrieved parties. (Spezial Eurobarometer 60.0 „Die Bürger der Europäischen Union und der Zugang zur Justiz“. (Spezial EB 60.0, p. 38).

¹⁶⁴ As typical given example is the fraud by lack of product in packet items, which cause the consumer a negligible damage, but returns in huge benefits for the infringer: example occurred in France in the 70's, in which a wine dealer filled the bottles with 1'486 instead of the 1'5 liters by 200 million bottles. It provided him with an extra win of 13 Milli; Franke, Die Verbandsklage der Verbraucherverbände nach dem französischen *Code de la consommation* in Vergleich zum deutschen Recht, 2002.

¹⁶⁵ See Eichholtz, Die US amerikanischen *Class Action* und die deutschen Funktionsäquivalente, p. 7 ff.

remain as a not repairable damage in the hands of the causer.¹⁶⁶ In Germany, reparation in case of minor damages is based on the § 280 BGB for obligations, or unlawful winning or criminal reparation of damages (§ 823, 826). As popular example, it has been named the so called O2 case, in which the company calculated the prices in the transition to the Euro currency by rounding off prices to the cost of their clients.¹⁶⁷

Some authors considered that due to this minor damage, it will be sufficient with the public enforcements expressed in faints to damage's causer to warranty the Rule of Law. So, according to this view, any collective redress instrument related to cases of minor damages – if any- should be oriented to the realization of the Rule of Law rather than obtaining reparations for the individual affected victims. The affected interest here is the public interest, rather than the private one. The public interest will be jeopardized when the Law suffers lack of enforcement. A lack of procedural remedies to deal with these kinds of damages and an insufficient activity of public institutions to care about these interests,¹⁶⁸ decrease the efficiency of the Rule of Law.¹⁶⁹ Companies can obtain an important earning by causing minor damages to the consumers, being aware that they will not claim against them and the public institutions can not prosecute all infringements. Therefore, **negligence or intentional acts can be very profitable for companies.** In cases of minor damages, allowing the enforcement of supra individual interests in favor of an association has primarily a preventive function, more than the compensation of individual damages.¹⁷⁰ As per the decision of the constitutional court, the German law maker is free to choose the way to retrieve unlawful earnings.¹⁷¹

3.2.4.2 Relevant damages

There are also cases in which a plurality of individuals has suffered a damage, and it is (individually considered) big enough, that the holder of the legitimated damaged interest (or right) has enough incentives to sue. In Germany, they will be used the terms *Groß- and Massenschaden* for these cases of *mass torts*,¹⁷² also for the cases a plurality of damages, which have the same casual origin.¹⁷³ In these cases, the individual has suffered a damage that incentive him to enforce their compensation rights. It exists an objective incentive.¹⁷⁴ Classic examples for these cases are accidents in massive transportation means such plane, train, ships, and in the modern times also terrorist

166 Stadler & Micklitz, Das Verbandsklagerecht in der Information und Dienstleistungsgesellschaft, p. 1314 ff.

167 Judgment of 14th of September 2004, Case C-19/03, *Verbraucher-Zentrale Hamburg eV vs O2 (Germany) GmbH & Co*, ECLI:EU:C:2004:524. Further examples in *Thiere*, Die Wahrung überindividueller Interessen im Prozess, p. 340, More specific see chapter II of this work.

168 Further on this subject see *Micklitz*, Verbandsklagerecht, p. 11 in: Micklitz, Hans- W./ Stadler, Astrid (Eds.), Das Verbandsklagerecht in der Information und Dienstleistungsgesellschaft.

169 It will be spoken of "intermediate category" as affects the public and private interest. See *Jolowicz* 1983 222 (235).

170 BverfG considered the § 73d StGB in its decision of 14 January 2004 (2 BvR 564/95) as compatible with the German constitution.

171 *Stadler & Micklitz*, Die Verbandsklage, Das Verbandsklagerecht in der Information und Dienstleistungsgesellschaft, in: Micklitz, /Stadler, (Eds.), Das Verbandsklagerecht in der Information und Dienstleistungsgesellschaft. p. 18 ff.

172 *Meller-Hannich*, Kollektiver Rechtsschutz, in: Meller- Hannich, pp 13-15.

173 *Stadler*, Bündelung von Verbraucherinteressen im Zivilprozess, in: *Brönneke*, Kollektiver Rechtsschutz im Zivilprozess; Gruppenklagen, Verbandsmusterklagen, Verbandsklagebefugnis und Kosten des kollektiven Rechtsschutzes, pp.1-51.

174 Expectation of costs of the procedure and possible earnings.

attacks,¹⁷⁵ cases of massive intoxications arising from a liability from the producer, such as cigarette, medicines, etc...¹⁷⁶ Many authors also include in these cases those arising from capital markets; In the USA, such procedures are known as security class actions. In Germany, there was also an example in this field, the case Telekom with more than 13.000 injured claimants.¹⁷⁷ The connection of individual interest lays out certain legal and organizing issues. ¹⁷⁸ The German *Deutschen Juristentag* 1998 recommended developing such mechanisms that allow the connection of interests in a single claim.¹⁷⁹

3.2.5. Economy of the procedure

This is one of the most relevant advantages of the collective redress, as binding multitude of claims in a single lawsuit will save a lot of resources, both economical and judicial,¹⁸⁰ as for instance the procedures followed in Germany by means of the KapMuG have already shown; which facilitates access to justice in cases of ca. 17.000 claimants.¹⁸¹ Nevertheless, these advantages will depend very much on the specific configuration of the collective instrument. The collective redress, if proper, can save costs for the individual claimant, if improper can lead to multitude of contradictory decisions and to put in risk fundamental rights as for instance the right to be heard before the court. If this implies also a saving of resources for the whole judicial system could be discussed.¹⁸² The comparison is done under the premise that a collective redress will save judicial costs because it will avoid that each affected individual starts its own judicial procedure. This premise seems unrealistic in the cases of minor damages, as not each affected consumer will find the necessary incentives to claim.¹⁸³ But once again, this will depend very much on the specific configuration, as a proper developed collective redress instruments shall have as goal to overpass the rational apathy to claim in cases of minor damages. If in these cases, where the affected consumer was not planning to sue due to the small amount of the damage, the question of the procedure economy lost weight in favor of the question of the effective access to justice.

The specific aspects where the collective redress may increase the savings of resources are related to aspects such the common treatment of evidences and other judicial aspects of the procedure. The more these questions can be solved together, higher will be the savings of resources. In this respect, some collective redress instruments could be more efficient than others; namely, a *Verbandsklage* shall be cheaper than a *Gruppenklage* where all affected parties shall be notified.¹⁸⁴ However, it could not be proper to compare different configurations of the collective redress between them, as they can pursue different tasks. The efficiency of the collective instrument shall be measured by comparing the real costs that individual claim would face for the equivalent enforcement. The beneficiaries of saving costs by solving common questions in

175 For example, the class action sustained in Israel against Germany for the NS crimes, further in *Harald*, Internationales kollektiver Rechtsschutz.

176 *Sauerland*, Die Harmonisierung des kollektiven Verbraucherrechtsschutzes in der EU, p. 34 ff.

177 19.08.2005, BGBl. IK, 2437; *Sauerland*, Die Harmonisierung des kollektiven Verbraucherrechtsschutzes in der EU, p. 34.

178 Further see *Stürner*, JZ 1978, 499-507.

179 Verhandlungen des DJT, Bd. II/1 S. I, 88 sub IV 6, in *Stadler & Micklitz*, Das Verbandsklagerecht in der Information und Dienstleistungsgesellschaft. p. 14.

180 *Möllers / Weichert*, NJW 2005, 2737 (2738).

181 *Tamm*, Das Kapitalanleger-Musterverfahrensgesetz: Hintergrund, Ausgestaltung und Reformüberlegungen, p.525 ff.

182 So, *Buchner*, Kollektive Rechtsschutz, p. 47.

183 Further on the subject see *Dam* J. Legal Stud; 1975, 47-73.

184 So *Buchner*, Kollektiver Rechtsschutz, p. 47.

a single lawsuit are not only consumers, but also defendants; both will benefit of the legal clarification of common questions in a single procedure.¹⁸⁵ Furthermore, in cases of losing the trial, the costs of the procedure will be cheaper both for claimants and defendant.¹⁸⁶ In absence of contingency fee, the losing claimants can divide the costs between the multitude of participants in the procedure. The losing defendant may reduce its costs as well by facing the costs of a single procedure rather than a multitude of individual claims. In Germany, for such procedures, it would apply the § 34 Abs. 1 S. 1 GKG that implies an important potential reduction of costs for the losing defendant.¹⁸⁷

Another aspect of the efficiency of the collective procedure is the incentive for settlement, as it shows the experience in another countries such USA,¹⁸⁸ Austria and Sweden.¹⁸⁹ **Companies will be interested in avoiding a precedents than can be used against them in further procedures¹⁹⁰ and to obtain certainty of the actual costs that would have to face, which will be more clear in a settlement than in the uncertainty of multitude of disperse claims.**¹⁹¹ The efficiency of settlement is reflected in cases such the leaflet of Telekom Ag in its third wall flotation. In US, affected shareholders could obtain a compensation by means of settlement in 2005, while in Germany, the OLG Frankfurt by applying the KapMuG, needed until 2012 to found its decision.¹⁹² **Nevertheless, also the American experience shows how some baseless claims have been lodged just to obtain a settlement as the defendant will try to avoid the costs of the preliminary proceedings, the so-called *blackmail settlement*.** This is of course an undesirable situation, but it is to presume that the European principles on tort Law, where the losing party must face the costs of the procedure – different to the American case where each party must cover its own expenses- will avoid abusive behaviors of the settlement.¹⁹³

185 *Augenhofer*, Private enforcement: Anforderungen an die österreichische und deutsche Rechtsordnung, p.39,50.

186 So, *Buchner*, Kollektiver Rechtsschutz, p. 46 ff.

187 Further to this in *Buchner*, Kollektiver Rechtsschutz, p. 46 ff.

188 Further in *Bohn / Choi*, U Pa. L. Rev. 1996, 903 (970).

189 So, *Buchner*, Kollektiver Rechtsschutz, p. 48. Specifics to each country see Pirker-Hörmann / Kolba, Kollektiver Rechtsdurchsetzung, p.199 ff; *Lindblom / Nordback*, Kollektiver Rechtsdurchsetzung, p.191,196.

190 *Buchner*, Kollektiver Rechtsschutz, p. 48.

191 *Ibidem*.

192 *Buchner*, Kollektiver Rechtsschutz, p. 51.

193 About the abusive experience of the US class actions and the precautions to me taken see *Bremer*, NZG 2010, p.1296 ff.

Part III Collective redress in Germany

1. Specifics to German Law

1.1 Legal nature and relevant principles of German civil Law

1.1.1 Development

The figure of the *Verbandsklage* exists in German Law since 1896.¹⁹⁴ Despite of the early recognition of such supra individual instrument in its civil procedure, **German Civil Law, both in its origin and nowadays, is generally considered a quite liberal legal system**, based on the defense of individual rights.¹⁹⁵ The civil procedure was incorporated in Germany as a tool to enforce subjective rights, to protect private interests.¹⁹⁶ According to this liberal approach, any person shall be allowed to fight for its subjective rights on a process, *when he wants*, as a projection of the private autonomy.¹⁹⁷ Thus, **the German civil procedure will turn around the idea of two differentiated and determinable parties, with a specific legal relationship between them**. It is reflected in fundamental procedural matters, such the right to initiate proceedings, to withdraw a claim, to delimit the scope of the procedure, etc...¹⁹⁸ Since the first third of the XXth. Century, however, a more social approach has been progressively incorporated into German civil Law, supported by comparative Law¹⁹⁹ and by a more social oriented academia. **According to a more social approach, civil Law is an element of the social wealth with a supra individual dimension** which should be recognized in the civil procedure.²⁰⁰ From a pure social perspective, the civil procedure serves the entire legal system, being the private legal relationships of individuals just a part of the whole.²⁰¹ As per this view, the preservation and warranty of the legal order benefits the public interest in the first place,²⁰² the preservation of individual interests being an indirect effect of observance of the whole legal system.

1.1.2 Nowadays

The Bundesrepublik adopted a liberal conception of the civil Law in a *Soziale Marktwirtschaft* frame.²⁰³ The current German fundamental Law established as basic

194 UWG, Reichgesetz v. 27.5.1896, RGBI, p.145.

195 Using a broad definition of supra individual.

196 Since its enactment the Civil Procedure Code has been amended several times, the latest comprehensive reform was undertaken in 2001 coming into force on January 1,2002. For a description of the reforms, see *Stadler*, HICLR 2003, 55-76.

197 *Hellwig*, Lehrbuch des Deutschen Zivilprozeßrechts, Bd.I, § 1 I (p.2).

198 See further analysis in *Rosenberg, Gottwald/ Schwab, Zivilprozessrecht*, 17 Aufl.

199 The Austrian Civil procedure served primarily supra individual interests.

200 *Klein*, Zeit- und Geistesströmungen im Prozesse, p. 25 ff; *Klein / Engel*, Der Zivilprozess Österreichs, p. 191.

201 A social conception of the aim of the civil process was incorporated to the German civil's law *Novelle* of 1933, see *Thiere*, Die Wahrung Überindividueller Interessen im Zivilprozess, p. 7.

202 *Schönke*, Das Rechtsschutzbedürfnis, p. 11; and *Habscheid*, ZZP 1954, 187 (191). Against this vision many authors such *Pohle* zur Lehre vom Rechtsschutzbedürfnis, in: Festschrift für Friedrich Lent zum 75. Geburtstag, p. 195 f.

203 For the jurist H. Heller, the submission of the economy to the laws in a State of Law implies submitting the means to the ends of life, *Heller*, Die Souveranität, p.299. The double link between the

principle the conservation of the individual interest, **placing the individual at the central axis of the legal system**.²⁰⁴ According to that principle, **the current German civil procedure serves in the first line subjective interests**.²⁰⁵ The civil procedure and the civil judges serve the enforcement of subjective interests or rights granted to individuals by the legislator, according to the principles of the social State and other Constitutional principles. Third parties, as a matter of principle, are not invited to the process and are not affected by the binding effects of court decisions.²⁰⁶ **This has an adjoining effect in two aspects of the procedure: *Prozesszweck* (aim of the process) and *Prozessmaxime* (trial dictums)**. These aspects of the procedure will reflect the individualist *Zeitgeist* of the age in which the civil Law was born.

It is considered that in a different level, the civil procedure serves the public interest in the preservation of the legal order,²⁰⁷ the warranty of the legal system unity, the legal certainty, the legal education, etc...,²⁰⁸ as enforcing the material private Law serves the public interest as well.²⁰⁹ Thus, **an effective civil procedure reflects the public interest of solving private conflicts through a peaceful mechanism**.²¹⁰ Regarding the nature of the interests protected by civil Law, the most liberal positions in the German academia traditionally questioned the existence of collective rights as a recognized category of legal rights. In line with this stake, the civil procedure is merely a mirror of the substantive Law; since the Law only recognizes individual subjective rights, there is no place for collective pretensions in the civil procedure. Conforming to this view, collective redress instruments would be just a procedural solution to defend a plurality of individual connected rights.²¹¹ This school of thought has now been overpassed in the positive Law; since collective rights, are recognized within German Law. The main aspect of the so called "*Kollektivgüter*" is that they are open to everyone, and nobody shall be excluded of its use.²¹² Nevertheless, **the existence of individual concern (in the sense of §§ 227 ff; 823 ff; 1004 BGB) remains as condition for *locus standi* before German courts**. The admission of any claim is still based on individual rights.²¹³ Other interests such the general interest, the abstract enforcement of the legal order, or the fairness of market competition belong to the second line of the civil procedure, behind the enforcement of

constitutional freedom of enterprise and the social purpose of the economy enables the models of Germany and Spain to be defined as "social market economy". It was in Germany where the term "*Soziale Marktwirtschaft*" was coined, which is attributed to Alfred Müller-Armack when WWII ended. This model went from economic-political theory into practice in Germany through Ludwig Erhard. Its intention is to harmonize economic development and a freely competitive market with stability and social peace. The concept became popular after 1949. In that year, it was included in the CDU's electoral programme for the first elections to the Bundestag. The SPD adopted this economic model for the first time in the Godesberg electoral programme of 1959.

204 Art. 1.1 GG [BGBI](#), 1949, p. 1.

205 The civil process is understood as a two parties process, which in its procedure reflects the main ideas of the private autonomy", Säcker, Die Einordnung der Verbandsklage, Vorwort V, (own translation).

206 After the introduction of the Verbands- Unterlassungsklage in the UWG 1965 and later in the AGBG 1976 it came some efforts to separate the German Law from the 2 parties' model, so *Stadler*, Bündelung von Interessen im Zivilprozess. p.1; also, Säcker, Die Einordnung der Verbandsklage, p.13 ff.

207 Against many, *Stein*, Das private Wissen des Richters; *Martin*, Zivilprozessordnung, and *Hass*, Die Gruppenklage pp.15, 50 ff.

208 Despite of its liberal character, it is general accepted that even a civil procedure based on pure subjective rights acquires social relevance, see *Thiere*, Die Wahrung Überindividueller Interessen im Zivilprozess. p.8. *Under private legal protection shall understood the application of civil law instruments for the enforcement of norms and standards*. *Vogel*, Kollektiver Rechtsschutz im Kartellrecht, p.2.

209 Further in *Wach*, Handbuch des Deutschen Civilprozessrechts.

210 *Rimmelspacher*, Zur Prüfung von Amts wegen im Zivilprozeß, p.19.

211 *Grunsky*, Grundlagen des Verfahrensrechts, p.5.

212 *Aaken*, KritV 2003, 44 (46).

213 Further see *Lindacher*, ZZP 1990, 397-412.

subjective rights.²¹⁴ Within this legal framework, the introduction of collective redress instruments in Germany is considered by most German scholars as an element, if not contrary to the individual conception of the economic and social order, at least as a foreign instrument that challenges the traditional structures of the national private Law tradition.²¹⁵ Thus, in the middle of the discussion about the introduction of collective redress instruments remains the question about the aim of the private Law. Previous discussions on the aim of the private law discussed if collective redress tools are an element for the defense of subjective rights,²¹⁶ or rather if they serve the overall legal system. With the privatization of public Law, the discussions include the role of the claimant, as it seems to evolve into a kind of public worker who helps to enforce the overall legal system while he cares about its personal sphere.²¹⁷ A good example of the privatization of the public task is to be found in the 8. *Novelle GWB*, which is based on the “proportional” inclusion of associations in the enforcement of the Law.²¹⁸

1.2 Standing in German Law

1.2.1 Party on a procedure

German civil Law follows a formal criterion; **party is who is designated as such by the claimant.**²¹⁹ “*Die Parteistellung ist von der Beteiligung an dem Streit stehenden Rechtsverhältnis unabhängig.*”²²⁰ The capacity to be party- subject of an ascertainable legal relationship in a process-²²¹ will be *ex officio* proved by the court (if the requirements for the procedure and for the procedural practice exist).²²² Although the party must not be namely identified first, according to § 253 II No. 1 ZPO, the identification of the party must be done at the claim, so that its identity can be ascertained without doubt.²²³

1.2.2 Interests and rights

Authors like Jhering firstly established a relationship between rights and interests.²²⁴ As per this author, **interests are the basis for the legal rules, the subjective right would not serve its content, but its aim as satisfaction of a subjective interest.**²²⁵ The German school of thought *Interessenjurisprudenz*²²⁶ considered the legal system, in its

214 Othmar: Zivilprozessrecht, §1, §1 III 2.

215 Further Basedow, Kollektiver Rechtsschutz und individuelle Rechte, in: AcP 182 (1982), pp.329-371.

216 Bucher, Gegen Jherings "Kampf um's Recht": was die Privatrechtler aus unsinniger These lernen können, Gauch's Welt: Recht, Vertragsrecht Und Baurecht: Festschrift Für Peter Gauch Zum 65. Geburtstag, p.45 ff.

217 Einhaus, Kollektiver Rechtsschutz im Englischen und Deutschen Zivilprozessrecht, p. 31 ff.

218 Bundesregierung, Begründung Entwurf 8 GWB-Nov; BT Drucks 17/9852,1

219 See further in Jauernig, Zivilprozessrecht.

220 So Einhaus, Kollektiver Rechtsschutz im englischen und deutschen Ziv.Proz. Rec, p. 315.

221 Rosenberg/ Schwab/ Gottwald § 40 Rn. 2; Zöller/ Vollkommer, § 50 Rn. 3

222 Hess, ZZP 2004 267-304; Fn. 5 in Einhaus, Kollekt. Rechtsschutz p. 315.

223 Raeschke-Kessler, NJW 1981, 663 (663).

224 The concept of a right is constituted by two aspects, a substantive aspect, which is concerned with practical purpose, namely the use, advantage or gain guaranteed by the rights, and a formal aspect, which is a means of achieving that purpose, namely legal protection or the cause of action”, Jhering, Geist der römischen Rechts, p.339 ff.

225 Enneccerus, Allgemeiner Teil des Bürgerlichen Rechts, Erster und zweiter Halbband. 15. Aufl. Tübingen 1959/60. p. 428.

226 Jhering, Geist des römischen Rechts p. 339; Hass, Die Gruppenklage, Wege zur prozessualen Bewältigung von Massenschäden, p. 15.

totality, as the protection of interests. The Law would be the result of the recognition of different interests in the field of material, national, religious or ethic aspects of a society.²²⁷

Conforming to this interpretation, the Law would have a double function:

1. Recognition of interests and
2. Resolution of possible conflicts between these interests

It should be distinguished between subjective interests and subjective rights: for Ihering, **rights are interests protected (by Law)**.²²⁸ Discussions on this author and Windscheid doctrine has lead to numerous so-called combination theories.²²⁹ This statement has been reviewed by the German doctrine, as it is considered that Ihering mixed up the content of the subjective right with the aim of the interest. As example, it will be mentioned that there can always be a 3rd party with interest in the object or realization of the legal transaction without being entitled with any subjective right (i.e. § 328 BGB). As it often happens in the fiduciary business, the holder of the interest is not always the holder of the subjective right. Rather, **the subjective right, serves not its content, but its aim is the satisfaction of the interest**. So far subjective rights are enforced, within the civil procedure Law, will be also subjective interests preserved.²³⁰

1.2.3 *Anspruch* and subjective right

In the German Civil Code, the article §194 Abs.1 BGB defines **Anspruch as the right to demand that another person does or refrains from an act (claim)**.²³¹ This article is to be extended to consumer associations.²³² The father of the concept of *Anspruch* in Germany was Windscheid, who adopts the concept of the Roman Law into the modern interpretation.²³³ In Roman Law, the *Actio* was the central axis of the legal system. There was no distinction between substantive/ material and procedural Law.²³⁴ After this author, *subjective right* and *Anspruch* are equal concepts.²³⁵ He transformed the roman "*actio*" in a substantial Law instrument, free of procedural elements. Thus, the judicial defense is a consequence of the right itself, with primacy over its judicial defense.²³⁶ The German Academia has subsequently precisely fixed this term:

227 Own translation, Heck, AcP 1914, 1 (1ff).

228 Ihering, Geist des römischen Rechts, p. 339.

229 See references in Alexy, A theory of Constitutional Rights, p. 115; *Enneccerus*, Allgemeiner Teil des Bürgerlichen Rechts, I, p. 428 f.: "a subjective right is conceptually a legal power, granted to the individual by the legal system, with the purpose of providing a means to the satisfaction of human interests, so Jellinek, System der subjektiven öffentlichen Rechte, p. 44 ff: "thus a subjective right is a human power of the will recognized and protected by the legal system and directed towards some good or interest. On the dispute between these positions, see in place of many, Kelsen, Hauptprobleme der Staatslehre, 572 ff; Bachof, Reflexwirkungen und subjektive Rechte im öffentlichen Recht, p. 291ff; Raiser, JZ 1961, 465; Kasper, Das subjektive Recht- Begriffsbildung und Bedeutungsmehrheit, 1967, 49 ff; Aicher, Das Eigentum als subjektives Rechts zugleich ein Beitrag zur Theorie des subjektiven Rechts, p. 24ff.

230 Extracted from *Enneccerus*, Allgemeiner Teil des Bürgerlichen Rechts, p. 445.

231 Section 194 Subject-matter of limitation (1) The right to demand that another person does or refrains from an act (claim) is subject to limitation. The translation includes the amendment(s) to the Act by Article 1 of the Act of 27.7.2011 (Federal Law Gazette I, p. 1600).

232 See Brandner, E., Hensen, H.-D., & Ulmer, P. *AGB-Gesetz: Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*.

233 Windscheid, Die Actio der römischen Zivilrechts.

234 Schaumburg, Die Verbandsklage im Verbraucherschutz und Wettbewerbsrecht, p. 41.

235 Schaumburg, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, p. 42.

236 Other authors will consider that the procedural defense is the main aspect, i.e. Bernhard, Einführung in die Rechtswissenschaften; Esser, Einführung in die Grundbegriffe des Rechtes und Staates.

The *Anspruch* is a material Law construction with associated procedural aspects associated to the subjective right.²³⁷ Not all persons entitled with subjective rights may demand the compliance of their rights to any person. The outside projection of the right needs a defined third person. In the case of mandatory rights, (*Forderungen*), only the obligated party can be compelled. In the rights not resulting from an obligation, it must be established as result of a pre-existing right. The material pretensions (for instance those derived from §§ 985, 1004 BGB) results from the §§ 903 and ss., serving therefore the application or enforcement of the primarily subjective right. In the §194 BGB it is established that the pretensions are subject to a statute of limitations, so that these rights are associated to the pretension, but after the time expires, the rights cannot be judicially exercised anymore. **There is a relationship between a substantive right, which is the basis for the *Anspruch*, and the possibility of getting a substantive right enforced in a legal procedure:**²³⁸ *when the subjective right cannot be properly enforced in a legal procedure, it has as a consequence the partial or total renounce to the content of the subjective right,*²³⁹ as the *Anspruch* is based on the subjective right; *it is the exercise of this subjective right to the outside.*²⁴⁰ According to the German doctrine, the concept of *Anspruch* only makes sense in the legal procedure, and is defined as the right to demand in a judicial procedure a performance from the counterpart.²⁴¹ In order for the substantial right to be effectively protected, there must be the adequate procedural instruments to be enforced. It needs not only the possibility of filing the claim, but also the *Anspruch* will define the course of the proceedings.

1.2.4 Representation of subjective rights

There are situations in which a holder of a subjective right may voluntarily delegate its defense to a third party. This third party may very well be an association (such the association GEMMA in Germany or SGAE in Spain for the defense of intellectual property rights). This relationship is privately established by empowerment,²⁴² and not by any social or public aim. Thus, associations will not play the role of being the social tutor of the individual.²⁴³

A distinction must be drawn between *Verbandsklage* in which the individual interests are connected, and those supra individual *Verbandsklage* in which collective rights are at stake. As per the definition of the Directive 98/27 EC collective rights will be other category than the merely accumulation of individual rights. Collective rights have thus substantive autonomy. Their defense will be collective because there is not only an

237 For Larenz, the concept of BGB its to be subsumed within the material law, but has a procedural cut, and for Georgiades it is also material law that allow the claimant to bring the defendant to the court, Schaumburg, p. 41.

238 If by subjective right one understands legal positions and relations in the sense identified, then we can distinguish between (a) justifications for subjective rights (b) subjective rights as legal positions and relations and (c) the legal enforcement of subjective rights. Failure to distinguish these three matters is a major cause of the unending controversy about the concept of subjective rights, and above all the dispute between various versions of the interest and will theories of rights, Alexy, A Theory of Constitutional Rights p. 115.

239 Own translation of Hirte, Berufshaftung, p. 465; Bahnsen, Verbraucherschutz im Zivilprozessrecht. Untersuchung unter besonderer Berücksichtigung der DDR- Novelle der Zivilprozessordnung vom 29. Juni 1990, p. 63.

240 Schaumburg, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, p. 41.

241 So Esser, Einführung in die Grundbegriffe des Rechtes und Staates. p. 311. For more doctrinal debate about this question see Schaumburg, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, p. 41.

242 Säcker, Die Einordnung der Verbandsklage. Rn. 116, (p. 75).

243 So the legislative proposition of Stadler & Micklitz, (Eds.), Die Verbandsklage, pp. 1185-1281.

affection of an *inter partes* relationship, but there are other public interests to be watched;²⁴⁴ not only individual rights are at stake, but also the interest of consumers as a whole is in play. It will justify a previous legal empowerment as granting legal standing to consumers' associations reflects. By developing such instruments, the focus is not in the private enforcement of public values through private associations,²⁴⁵ but the effective enforcement of rights that otherwise will probably remain damaged.

1.2.5 Associations of consumers as holder of group interests

Standing of **associations in the civil procedure** is generally accepted. As any other subject with legal capacity, associations count with a first ordinary legitimization to defend their own, *egoistical* interests.²⁴⁶

The question regarding the legal standing of the associations in connection with the collective redress run through the classical civil – private- standing and is related to the public interest. With the introduction of an industrial associative claim in 1896 in the German UWG, it was expected to increase the level of competition, and therefore the indirect protection of entrepreneurs.²⁴⁷ This protection was considered already by the Law maker as in interest of the generality.²⁴⁸ Currently, the Idea of a self-protection of competitors in the market in order to watch for the fair competition is in the practice abandoned,²⁴⁹ and German Law grants standing to industrial associations in order to defend their members interests.²⁵⁰ In order to prevent abuses and miss uses of this kind of industrial standing between competitors, the German law maker has historically included some limitations in the exercise of this action. So, the introduction of the UWG Novelle in 1994 limited the legal standing to those associations with a high number of members and for similar sectors of the market. Since then, associations can only lodge claims in the same circumstances as their members do to prevent a kind of “popular claim”.²⁵¹ Regarding consumers' associative claims, these were introduced for the first time in Germany in 1965 in the UWG. The reason for the introduction of such claim is to be found in the unavailability of the industrial associations to protect the interests of consumers. **This is a recognition by the German law maker that the observance of the free competition is not enough to protect consumers' interests.** Nevertheless, it was not expected that through this claims the Consumers associations act as “*Tribun der Konsumenteninteressen*”,²⁵² which is strange, as this is actually the aim of consumers' associations. After more than 40 years of substantial limitations in this associative claim regarding consumers' associations, (misleading advertisement was the requisite) finally was included in the § 2 UKlaG without further limitations, being able the consumers' associations to claim for injunctions in those aspects that affect consumers interests substantially. Transnational activity was supported by the EU activity, which published a

244 Säcker, Die Einordnung der Verbandsklage, Rn.117 (p. 75).

245 As unjustified *Pfarr & Kocher*, Kollektivverfahren in Arbeitsrecht, 1998 p. 124; against it *Wolf*, JZ 1974, 41 (43).

246 Säcker, Die Einordnung der Verbandsklage, Rn. 80 (p. 47).

247 RGZ 120, p.47, 49; 128, p.330,342 f. Further see *Koch*, ZZZP 2000, 413-441.

248 Die Denkschrift zum I. Regierungsentwurf vom 7.1.1895, printed by *Pfarr & Kocher*, Kollektivverfahren im Arbeitsrecht, Arbeitnehmerschutz und Gleichberechtigung durch Verfahren 1998, p. 101, in: *Säcker*, Die Einordnung der Verbandsklage, Fn.27.

249 Säcker, Die Einordnung der Verbandsklage, Rn. 81 (p. 48).

250 *Pfarr & Kocher*, Kollektivverfahren im Arbeitsrecht. Arbeitnehmerschutz und Gleichberechtigung durch Verfahren; *Hensen*, Zur Effizienz der Verbandsklage nach §13 AGBG, in FS Ulmer, 2003, pp.1135,1136.

251 BGH GRUR 1995, P.604, 605; BGH GRUR 1997, P.933, 934: OLG Düsseldorf GRUR 2003, p.131.

252 So Säcker, Die Einordnung der Verbandsklage, Fn.37.

list of qualified institutions entitle to act in trans-border activities.²⁵³ The requisite of substantial affection to consumers' interests include now minor damages in the sense of the & 3 UWG.²⁵⁴

Wolf wonders which requisites an association should have to be granted with such faculties. The most important issue for this author is the fact that the members of the association are the real beneficiary of the interests at stake, not being necessary that these beneficiaries form the totality of the association; it would be enough that the association is opened, it means, that not only seeks to look after individual interests, being also opened to accept new members.²⁵⁵ The coherence of the interests defended by the associations connected with the rights granted by the legal system, justifies that legally recognized group interests are defended as if they were an own right of the associations, entitle to defend these rights. As per Wolf, the UWG does not only aims to protect individual or public interests, but rather to strength interests of the totality of competitors and consumers. The groups will be protected independently of the individual group members.²⁵⁶ As the UWG grants this legal capacity to the associations; the coincidence between the natural interests/efforts of the association by one side and those interests protected by the Law justify the recognition of the group interests as interest of the associations, so far, the association has the protection of these interests as own duty recognized.²⁵⁷ Different to industrial associations, and other EU countries, **in Germany, entitled consumers associations does not need to count with a high number of members in order to be granted with standing to suit.**²⁵⁸ As requisites to claim, consumers associations must have as aim the protection of consumers interests, (in general) not only of their associative members.²⁵⁹ Germany adopted that way the Directive 2005/29 EC which order protection of consumers interest by private or public institutions against unfair commercial practices. Thereby, private institutions develop a public function. Other limitations to prevent abuses check if the claiming consumers' association really acts as such. Thus, consumers' association must be at least one year before being entitled to lodge any *Verbandsklage*. It will be watched if in this year of existence, the consumers' association really acted as such.²⁶⁰ This requisite will avoid spontaneous reactions to unlawful activities for some affected consumers' associations and will avoid the creation of affected associations ad hoc in order to claim for a specific damage.²⁶¹

The most popular collective instruments lodged by associations are based on the §§ 1, 8 UKlaG. These have a significant predominance over other instruments. These will be considered by the affected parties as an efficient instrument to solve disputes. Possible improvements are connected to aspects such costs, collective enforcement, evidence last.²⁶² Regarding the activities of the associations, since these instruments are available, only between January 2000 and December 2005 the VzBv ²⁶³ and the consumers Zentralen lodged about 5.900 Injunctions claims based on unfair commercial

253 § 13, Abs. 2 No. 3UWG, BGH GRUR 2004, p.435, 436.

254 Köhler, H., in: Köhler & Bornkam (Eds.), Wettbewerbsrecht: Gesetz gegen den unlauteren Wettbewerb, § 3 UWG, Rn. 108.

255 Hefermehl, Klagebefugnis p. 21.

256 Own translation, Hefermehl, Klagebefugnis. p. 19.

257 Also, the State is holder of these interests; further in Wolf, Klagebefugnis, p. 20.

258 See Hopt, / Baetge, Rechtsvergleichung und reform des deutschen Rechts- Verbandsklage und Gruppenklage, In: Basedow / et al (Eds.), Die Bündelung gleichgerichteter Interessen in Prozess, 1999, pp.11-63

259 BGH GRUR 1973, p. 78, 79.

260 Stadler & Micklitz, Verbandsklage, p.1185 ff.

261 Pfarr & Kocher, Kollektivverfahren im Arbeitsrecht, 1998, p. 127.

262 Exhaustiver see Meller-Hannich, *Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente.*

263 Verbraucher Zentrale, Bundesverband.

practices.²⁶⁴ 5 % were based on transnational cases. The half of them were resolved extra judicially. Those which follow the judicial process finished the mostly in success for the claimant.²⁶⁵

As per the approval of the **Gesetz über außergerichtliche Rechtsdienstleistungen (RDG)** at 1. July 2008, consumers' associations in Germany count with two possibilities to recover damages of consumers. Affected consumers may cede their rights to the association which would try to enforce these rights as own rights, or they can empower the association to claim for their rights.²⁶⁶ With the previous regulation of the RberG (Art. 1 § 3 No. 8, RBerG) the extra judicial enforcement of consumers and the judicial connection of individual rights of consumers was possible when it is done in interest of consumers (*Erforderlichkeit im Sinne des Verbraucherinteresses*).²⁶⁷ The RDG however explicitly allow in its § 8 Abs. 1 No. 4 both judicial and extrajudicial provision of legal services by consumers' associations. The requisite of being in interest of consumers disappeared.²⁶⁸ In line with the Art. 79 ZPO, Sec. 2,2 No. 3 ZPO, consumers' associations might represent interests of damaged consumers when the assignor is recognized as consumer, and the claim fall between the social object of the consumers' association. Such claims are to be lodged before the local court (*Amtsgericht*),²⁶⁹ and are already been used by its standings holders.²⁷⁰ If the possibility offered by the RDG is a proper instrument to deal with massive damages will be discussed. Nevertheless, limitations to the role of consumers' associations as claimants for damages persist in Germany. So, the GWB does not include this possibility for consumers' associations, although such introduction was discussed in the last two amendments (7. & 8. *Novelle*). There persists in Germany doubts of such standing extension. It is to be founded in the literature 3 major concerns related to 1) The legitimation of the associations; 2) the distribution of the damages; 3) double sanction, private and public.

Regarding the legitimation for damages recovery by breach of antitrust rules, it shall be avoided the risk of multiple claims against the defendant, as normally antitrust cases are quite spread out. It would be an unjustified last for a company when it must defend itself in different jurisdictions/ procedures at the same time because a single anticompetitive act. Multiple prosecutions shall not be discarded for good; as one single act, can affect different markets causing a multitude of damages. So, for instance, a company which commits and unlawful act and then put in different markets its products or services shall count with the possibility to be sue for all damages in all these markets. Moreover, the standing to consumers associations in order to claim for damages shall avoid several procedures in the same market, both from a single or different consumers associations, which can lead to important costs for the defendant even before the unlawful act has been established by the court.²⁷¹ In this sense, a concern extracted from the US experience is the so called phenomenon of *run to the courthouse*, which means that the

264 Müller; Tagung zum Verbandsklagerecht – Verbraucherschutz: Recht harmlos? 8. Mai 2006 - Einführung.

265 Results from 2005-2009 available on <http://www.bmelv.de/SharedDocs/Downloads/Service/AnWis/Heft523.pdf?blob=publicationFile>.

266 Buchner, Kollektiver Rechtsschutz, p. 76.

267 *Ibidem*; see BGHZ 170, 18, 29.

268 *Ibidem*.

269 Behrendt / Enzberg, RIW 2014, 253 (254).

270 BGHZ 170,18 zu OLG Düsseldorf NJW-RR 2006, 127 ff; OLG Düsseldorf WM 2004, 319 ff; OLG Köln VuR 2010,198 zu LG Köln, Urteil v. 2.4.2008; Az. 26 O 522/06; LG Frankfurt/M ZIP 2006, 463 ff; LG Bonn ZIP 2005, 1006 ff.

271 Scholl, Kollektiver Rechtsschutz, p. 220.

first consumer association which lodge the claim will be run the claim.²⁷² This should not be a major problem which shall prevent or extend the standing for damages recovery to consumers associations. A watching consumers' association, which act fast and determined shall not be an inconvenient; by the other side, a certain degree of competition between consumers' associations could be positive. There is not argument to deny the extension of positive effects of the competition between associations. Those which managed their resources in a better way than the others will be in a better position to defend consumers' interests. Especially when these associations are partially financed by public means, the efficiency in the administration of its resources is very desirable. As key factor about the standing of the associations remains its seriousness. In order to avoid baseless or abusive claims it is mandatory a previous examination of the seriousness of any claim lodged by consumers' associations. In this regard two aspects can be named. First the existence of a material right and legitimation to claim for it, and secondly that the association counts with the necessary means to support its claims and to face costs in case of losing the case.²⁷³ In Germany such risk of abusive claims is partially prevent by the §§ 91 ff. ZPO, provision which lead to a full payment of the costs of the procedure in case of lodging an abusive claim. In Germany, court costs are proportional to the amount of the claim, so there are important costs that the claimant shall face before starting a real procedure.²⁷⁴

Another aspect of concern is the distribution of recoveries within injured parties when an association claim for damages. As it will be shown following, German Law counts with some principles regarding the distribution of damages that affects a possible extension of the damages standing to consumers' association. The general principle of German *Schadensrecht* is the individual compensation (§§ 249 ff; BGB). Critics to this standing extension are based in the following: the recovery of damages is considered an enforcement of subjective rights and the enforcement of subjective rights by means of third parties is generally alien to German Law.²⁷⁵ Answer to this critic points out that the subjective enforcement can always remain on the willing of the individual consumer,²⁷⁶ specially in such instruments as opt-in class actions. Nevertheless, if Germany will to count with an effective instrument that override the rational disinterest in cases of spread minor damages, shall increase the flexibility of such principle; an opt-out class action seems a proper instrument to overcome the apathy to claim in such cases. The willing to enforce subjective rights in an opt-out class action law suit could be fathom when a proper publicity of the claim is done and the consumer does not exercise its right to separate from the action. ²⁷⁷ It has been proposed to fix a specific amount of the so called *Bagatellschaden* that would allow to increase the flexibility of the standing requirements in the GWB of consumers associations.²⁷⁸ This proposal could override the rational disinterest of the consumer to claim in cases of minor damages and at the same time the right to be heard before the court would be affected only when minor damages are at stake. In my opinion the attempt to set up an objective amount for the rational disinterest is arbitrary, as the valuation of the costs and benefits of enforcing an own right is purely subjective. A proper publicity mechanism of the claim which can inform to all potential claimants of the basics of the law suit starting by the association and a simplified

272 About this phenomenon see *Stadler*, *Bündelung von Interessen im Zivilprozess*, p.19.

273 *Scholl*, *Kollektiver Rechtsschutz*, p. 222.

274 *Scholl*, *Kollektiver Rechtsschutz*, p.223.

275 *Halfmeier*, *Popularklagen im Privatrecht*, p.383.

276 *Stadler*, *Kollektiver Rechtsschutz*, pp.1, 26.

277 So *Jüntgen*, *Die prozessuale Durchsetzung privater Ansprüche im Kartellrecht*, p. 181. As example of this solution see the so-called Google Book Settlements, on this see *Rauer*, *K&R* 2010, 9 (13) and more recent *Rauer*, *K&R* 2011, 196 (198).

278 Proposal of Stadler in *Stadler*, *Kollektiver Rechtsschutz*, pp.1-26.

mechanism to exercise the opt-out option could be more practicable. When the association is enforcing rights of its own members, there are not further problematics on legitimization, especially if the association has as aim the enforcing of consumers' rights; as it is covered by the § 398 BGB. Different is when the association is generally granted with standing to defend general interests of consumers, as it happens for instance in France²⁷⁹ and in Spain (those enough representative associations). Such general habilitation to consumers' associations which can sustain a damage class action in Germany is not granted yet; although regulations such the UGW justify the standing of consumers' associations to lodge injunctions actions on the general interest of a balanced market and the 8. *Novelle* of the GWB extend injunctions claim in favor of consumers' associations as well. A general self-empowerment in favor of the association based on the idea that damages to consumers are equal to damages to the consumers' association seems more problematic from the Constitutional view than a partial empowerment of the association to enforce alien rights, well as cession of rights or as a representative party.²⁸⁰

Concerning the distribution of recoveries, there can be different solutions to import into German Law. As per the German reparation principles, the recoveries shall be awarded only to injured parties. Thus, the association cannot be the final beneficiary of the recoveries. Nevertheless, if the association carries all the risks of the claim and does not count with any incentive the rational disinterest to suit will be transmitted from the individual consumers to the consumers' association. Removing all incentives of the claimant while he must bear with the costs of the same does not seem a realistic solution to increase any private enforcement. Such is however the solution offered by the GWB e institution of *Gewinnabschöpfungsklage* (§34 a), where the association shall act in general interest and will forward the recoveries to the Federal Budget.²⁸¹ Only the task of monitoring the market to find out infractions is a high resource demanding activity, not speaking of all costs related to start the action; or the very quantification of the harm from any *Kartell*.²⁸² The recoveries can be granted in the first place to the association and afterwards distributed into its members. Questionable is when the association is enforcing rights of consumers which are no members. In both situations, the expenses to be included in the list of the association of beneficiaries for recovery can exceed the benefits. The evaluation of costs and benefits is in any case a personal decision that can show the willing to enforce a subjective right. As per the American experience, the opt-out class action is not always suitable to transfer the recoveries to the injured parties in full, but at least is oriented to this goal, so that probably there is not any other better instrument to achieve a recovery of minor damages.²⁸³ **As regards the double sanction of anticompetitive practices both by public sanctions and private damage actions it exists the concern of falling in over-enforcement.**²⁸⁴ The relationship between private and public enforcement can be evaluated taking into consideration previous thoughts about the relationship between the public and private interests of consumers. The so-called public interest can always be individualized, so, to establish that the market or the consumers as such have been damaged, it is necessary to identify which specific individual rights have been affected. Only the infringement of individual rights, even if they are hard to be determined, shall justify any enforcement. If there are not individual rights

279 See on this subject *Franke*, Die Verbandsklagen der Verbraucherverbände.

280 *Scholl*, Kollektiver Rechtsschutz, p. 226.

281 *Scholl*, Kollektiver Rechtsschutz, p. 226.

282 The simple task of quantifying the damage demands a lot of resources which consumers' associations may not be able to face. To quantification of damages see *Schwalbe / Maier-Rigaud*, Quantification of antitrust damages. In *Ashton / Henry* (Eds.), *Competition damages action in the EU: Law and practice*.

283 *Scholl*, Kollektiver Rechtsschutz, p. 226.

284 *Scholl*, Kollektiver Rechtsschutz, p. 226.

affected there is no justification to act in favor of the *order public*. At the same time, if any affection to the *ordre public* is based on the infringement of individual rights, there is preferable an efficient, speedy and cheap procedural solution to enforce subjective rights rather than any kind of public enforcement. **The *ordre public* is an abstract concept, but the affection to individual rights is something tangible.** Furthermore, **it can be discussed if maintaining public institutions to watch for the free competition with taxes that pays every citizen and corporations reverts in the public benefit better than allowing affected parties to enforce its rights by means of a suitable procedure.** In this regard, the very task of the competition authorities has been challenged by economical schools which consider that almost all antitrust regulations are constructed on the wrong mathematic concept of the economy and competition.²⁸⁵

1.3 German reparation principles

German tort Law separates the civil from the criminal Law; thus, punitive damages will not be granted as the liability in this country plays a role of compensation rather than a public (deterrence) aim. This principle is known as “**Ausgleichsprinzip**”. This separation between the civil liability and the criminal sanction, is proper of the so-called Continental Law systems, and it is a capital difference with the systems based on Common Law.²⁸⁶ When different collective redress systems are compared, the principles of liability of each system plays a very important rule. Many critics have been forwarded against the inclusion of a model based on the US opt out class action, as it is considered abusive and unfair in many aspects. In the Staff Working Paper accompanying the White Paper;²⁸⁷ the Commission mentions that excesses in US class actions have often been mentioned, and that the risk of importing these excesses in Europe was raised. Nevertheless, there are other positions that consider that to make it attractive for designated bodies to bring follow-on actions in all competition redress cases, the system must be changed so that opt-out systems can be used. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.²⁸⁸

Beyond the class action system itself, in US it is applied in a frame where punitive damages- between other singular aspects of the American tort law such the principle that each party pays its own costs- are allowed; thus, the principles of liability play a substantial role regarding the effectiveness and suitability of the collective redress instruments. Compensations as the treble damages granted in USA are alien to the European continental tradition, and in Germany and Spain the losing party should bear all the costs

²⁸⁵ Such stake is hold by the so called *Austrian School of Economics*, which defends that such thing as the “proper/legal price” or the price of monopoly does not exist and therefore any antitrust regulation is meaningless; i.e. *Rothbard*, *Monopolio y competencia*; further in *Huerta de Soto*, *The theory of dynamic efficiency*. Following this school there are only two prices: the real price, which comes from the free market, and the other price which is given in a system where the State regulates the economy, whether by antitrust regulations, or by privileges such patents, benefits, etc...

²⁸⁶ Some authors of the German academia took position against this „compensation“, (Genugtuungsfunktion) principle of the BGH. Könidgen, which considered that this principle of the reparation of the victim has in background not other but an aggression and aggressive rage of the society, with is discouraged in other norms which does not include this reparation of patrimony. *Könidgen, Haftpflichtfunktionen und Immaterialschaden am Beispiel von Schmerzensgeld bei Gefährdungshaftung*, p. 95. For comparison between continental and common law systems see *Rhee*, *EECL* 2012 140, (146).

²⁸⁷ SEC (2008) 404.

²⁸⁸ *Mulheron*, Fn. 47 In BIS Department for business Innovation and skills Private Actions in Competition Law: a consultation on options for reform, April 2012 p.28.

of the procedure, which is a precaution against abusive claims. As per the American experience, the fact that each party covers its own costs can turn in an extortion instrument which next to the treble damages will compel the defendant to face high costs even in cases of abusive claims.²⁸⁹In this connection, **contrary to the American or common Law model, compensations will be limited in Germany in many senses:**²⁹⁰

1.3.1 Natural restitution

This principle is gathered in the § 249 BGB. Under this article, the causer has the duty of restoring immaterial damages to the situation as it was before the damage. As per the § 250 BGB, after a reasonable period to accomplish the natural restitution, the obligation can be monetary claimed.

1.3.2 Monetary compensation

1.3.2.1. Intangible damages

As per the article § 253 BGB, referred to intangible damages, if this natural restitution is not possible, the damage shall be repaired with money, but only if it is legally supported, it means, when a specific rule allows this monetary reparation. Thereby the § 253.1 BGB, let out reparation of non-pecuniary damages unless it is recognized by any legal provision.²⁹¹ The article § 823 BGB, connected with the former § 847 BGB served to general legal provision of non-material damages regarding the necessity of reparation based on a legal rule. Until the reform of the BGB, the article § 823 was the only available article. The BGB will be amended in 2002; maintaining the criteria of speciality of the § 253 BGB, (the *Schadenanspruch* must be based on a Law) but recognizing generally compensation for non-material damages²⁹² by adding more “torts”.²⁹³ It make no longer necessary resort to the § 847 BGB. The new redaction leaves apart the term *personality rights* and specifically *names body, health, freedom and sexual free choice*. This satisfaction is for some authors equivalent to the so called *Schmerzensgeld*.²⁹⁴ *Such stake is for part of the German Academia proper of the personality rights, and closer to criminal*

289 Regarding incentives depending on such principles see *Cenini et al*; EJLE 2011, 229-240.

290 Specific to punitive damages under German Law see *Amiz-Said*, Die Zustellung einer Punitive damages Sammelklage (...); also, see *Cassone*, The simple economics of class action: private provision of club and public goods.

291 *Willingmann*, Amerikanisierung des Schadenersatzrechts? Überlegungen zur aktuellen Reform des Schmerzensgeldanspruchs “in: Koch / Willingmann (Eds.), Modernes Schadensmanagement bei Großschaden, p. 25.

292 Gesetz zur Modernisierung des Schuldrechts, Vom 26. November 2001, Bundesgesetzblatt Teil I 2001No. 61 vom 29.11.2001.

293 §§ 825 y 839a BGB, further on this subject see *Lamarca i Marquès / González*, Entra en vigor la segunda ley alemana de modificación del derecho de daños.

294 However, the edges of this matter remain unclear, in this respect see *Willingman / Koch*, Amerikanisierung des schadenersatzrechts? Überlegungen zur aktuellen Reform des Schmerzensgeldanspruchs, in: Koch, Harald/ Armin Willingmann, Modernes Schadensmanagement bei Großschaden, p. 26 ff.

law. For Willingmann,²⁹⁵ introducing such a modern reparation system would only add bad elements such the earning search, self-interest and greediness, driving to abuse claims.²⁹⁶

In the field of the non-patrimonial damages, it will be observed in German Law the so-called “*Genugtuungsfunktion*” rather than a compensation based on the *Differenzhypothese*. In these cases the calculation of the damages will take into account the intensity and length of the damage, but will also be oriented to the extent of the guiltiness of the causer.²⁹⁷ Different than in the cases of *Schmerzensgeldanspruch*, the *Anspruch* to damages against personality rights is based on “*der Gesichtspunkt der Genugtuung des Opfers im Vordergrund*”.²⁹⁸ The German case law has delimited this matter.²⁹⁹ The borders of the reparation have been fixed by the BGH’s case law.³⁰⁰ According to the interpretation of the BGH on a § 847 based claim, reparations shall cover those damages, and suffered „*erlittene Schmerzen*“ and loss of loss of pleasures of life or “*Lebensfreude*“, and at the same time holding the thoughts of satisfying.³⁰¹ In Germany, the court has a relative broad capacity, but has to respect criteria established by the case law.³⁰² If the court separates from the criteria from previous decisions in any direction, it must be enough motivated. The over courts fulfil this task in Germany, creating some tables to calculate damages.³⁰³ Thus, the discretionary room of the former § 847 BGB, and the current § 287 BGB is limited by the case law.

1.3.2.2 Material damages

German material reparations principles are based on the *Kompensationsprinzip*.³⁰⁴ In conformity with this principle, damages will only be granted, when the claimant suffers a repairable damage. **Towards to calculate the damage, German Law applies the so called *Differenzhypothese*** based on the § 249 abs. 1 BGB.³⁰⁵ The amount of the damage is calculated comparing the initial patrimony with the result of the damage.³⁰⁶

295 Willingmann, Amerikanisierung des Schadenersatzrechts? Überlegungen zur aktuellen Reform des Schmerzensgeldanspruchs, in: Koch, Harald/ Armin Willingmann (Eds.), Modernes Schadensmanagement bei Großschaden, p. 30.

296 Willingmann, Amerikanisierung des Schadenersatzrechts Überlegungen zur aktuellen Reform des Schmerzensgeldanspruchs in: Koch/ Willingmann (Eds.); Modernes Schadensmanagement bei Großschaden, p. 26.

297 BGHZ 18, p.149ff; 157 f; OLG Köln VRS 98 (2000), p.414. See in connection, Keßler, Schadenersatz und Verbandsklage, p. 58.

298 BGHZ 128, p.1ff, see also, Keßler, Schadenersatz und Verbandsklage p. 59.

299 BGHZ 26, 349.

300 BGH; BGHZ 7, 23= JZ 1953, 40m, recognizing any real damages compensation. The patrimonial situation of the debtor/ claimant shall not be modified when calculated the compensation amount. Same view RG, RGZ 63, 104; 76, 174; JW 1933, 830.

301 Today's majority doctrine, based on the BGHZ 128, 117, 119 = NJW 1995, 781.

302 Willingmann, Amerikanisierung des Schadenersatzrechts? Überlegungen zur aktuellen Reform des Schmerzensgeldanspruchs in: Koch, Harald/ Armin Willingmann, Modernes Schadensmanagement bei Großschaden, p. 28; BGH VersR 1970, 281, 282.

303 BGH VersR 1970, 281, 282.

304 Germany, Stellungnahme zum Grundbuch der Kommission zu Schadenersatzklagen wegen verletzung des EU Wettbewerbsrechts.

305 Keßler, Privater enforcement -Zur deliktsrechtlichen Aktualisierung des deutschen und europäischen Kartellrechts im Lichte des Verbraucherschutzes, WRP 2006,1061-1070., also Wagner, Schadenersatz bei Kartelldelikten, German Working Papers in Law and Economics Volume 2007, paper 18, p. 13. Available at: <https://core.ac.uk/download/pdf/6541030.pdf>, retrieved last time 10.10.2019.

306 BHGZ 51, 30, 344; 72, 328, 330; 79, 223, 225f; 145, 256, 261 f; NJW 2001, 673, 674; referred to antitrust law BGH decision of 19.06.2007, KRB 12/07. Der schadensrechtliche Ausgleichsanspruch ergibt seiner Höhe nach aus der Differenz zwischen dem Vermögensstand des Geschädigten ohne das

In line with this double function of reparation supported by the BGH, the search for equity allows to bring in to this calculation other aspects related to the singular case. Therefore, the court shall analyze different aspects, such the duration of the damage, impact, grade of culpability and the patrimony of the parties,³⁰⁷ the high and the measure of the damages in the life impairment, namely the duration and intensity of the *Schmerzen*.³⁰⁸ Further compensations based on punitive principles are not observed within the German reparation system of the § 249 BGB. It is different to the Common-Law tradition, which considered that it is axiomatic that if anyone breaks the law, they should pay all the damages (full compensation) and suffer such penalty as society deems appropriate in the circumstances.³⁰⁹

1.3.3 Competition Law

The above-mentioned principles apply so good in general civil Law as well as in competition Law, being in the later more problematic to calculate the effective damage.³¹⁰

In theory, all individuals or businesses that can show they have been affected by a breach of competition Law may bring an action before a court. In this field, a single breach could potentially harm many persons, including consumers and small businesses, who would have similar claims (although often for different values). If each claim were pursued individually, the same, potentially complex, issues would have to be litigated in each case. It might be difficult, given the value of the individual claim, to finance a competition case. Finally, should an individual claimant get as far as filing an action in a court, it will be at risk of costs liability if it should lose – and these costs may far outweigh the individual value of the case. This direct exposure can be a clear disincentive to smaller claimants, or those with smaller claims, from bringing an action.³¹¹ These issues acquire special relevance apropos the realization of the common market, where each single country count with their own procedural rules and liability principles. In this regard, with the approval of the new Directive on damages for breach of EU or national competition regulations, two major measures will be ordered to the European member countries:³¹²

1. *To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices.*³¹³

schädigende Ereignis (hypotesischer Zustand) und dem tatsächlich gegebenen Vermögensstand als Folge der schädigenden Einwirkung (realer Zustand). Munch/KommBGB/ Oetker § 249, (Rn. 19).

307 *Willingman & Koch* Amerikanisierung des Schadenersatzrechts? Überlegungen zur aktuellste Reform des Schmerzensgeldanspruchs” In: Koch, Harald/ Armin Willingman; Modernes Schadensmanagement bei Großschaden, p. 28.

308 This is recognized in the case law tradition; RG, Urt.v.15.11.1882; RGZ 8, 117 ff.

309 Further see *Hodges*, European Competition Enforcement Policy: Integrating Restitution and Behaviour Control.

310 More about this problematic see *Keßler*, Schadenersatz und Verbandsklage, p. 47.

311 *Great Britain*, Department for business Innovations & Skills Private Actions in competition Law: a consultation on options for reform, BIS, p. 23 ff.

312 Regarding the Directive proposal: *Cette proposition de directive cherche a concilier deux objectifs faciliter les recours en allégeant la charge probatoire qui pese sur les demandeurs, tout en préservant l'efficacité des mécanismes volontaires de reglement des actions publiques que sont les procédures de transactions et de clémence*. Procédures Chroniques. Concurrences, Revue des droits de la concurrence, Concurrences CLR 2013, 139-154.

313 Directive Wheras (46): *Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is*

2. the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State *to determine its own rules on quantifying harm, and for the Member States* and for the national courts to determine what requirements the *claimant* must meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favorable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness).³¹⁴ In this matter, in Germany it applies the so called and majority accepted principle of *Totalreparation*. By one side the debtor is obliged to pay the whole amount of the damage suffered to the creditor, but this amount is limited to the *Dyferenzhypothese*.³¹⁵ At the same time, the injured party is subject to the “*Bereichungsverbot*” so, by means of the compensation, it is not foreseen that the debtor or claimant, turned in a better position as he was before entering the damage.³¹⁶ Otherwise, the *Ausgleichsfunktion* gathered within the German reparation principles will not be matched.³¹⁷

The *Ausgleichsfunktion*, is an element of the German “*ordre Publique*”.³¹⁸ This principle applies in the relationship between individuals offering a compensation function. However, it lacks a preventive function. In the German tradition, the criminal measures are alien to civil Law and shall be undertaken exclusively by the State.³¹⁹ Consistent to the German reparation principles, it is not to acceptable that a court grants based on the interest of the generality in a deterrence effect- any compensation which exceed the *Ausgleichsprinzip*.³²⁰

In antitrust field applies other principle which is used by the defendant or debtor as *Einwand* (valid objection). It is called the “passing on defense”.³²¹ The suitability of this instrument has been already discussed, specially in connection with the American

appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

314 Directive Whereas (46): Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused by the competition law infringement. *Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. To ensure coherence and predictability, the Commission should provide general guidance at Union level.* Directive of the Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. European Parliament 2014-2019 Plenary Sitting 10.09.2014 Corrigendum to the position of the European Parliament adopted at first reading on 17 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, P7_TA-PROV (2014)0451 (COM(2013)0404 – C7-0170/2013 –.

315 *Keßler*, Schadenersatz und Verbandsklagerechte, p. 48.

316 BGHZ 118, S.312ff;338; BHG NJW 2001, S. 673, 674; BGH NJW 2004, P. 2528 f; BGH NJW 2005, pp. 241, 242.

317 MüKoBGB/Oetker 6 Aufl; BGB § 249, Rn 1-505.

318 CJEC Judgment of 20th September 2001, Case C-453/99- *Courage/Crehan*, ECLI:EU:C:2001:465.

319 *Keßler*, Schadenersatz und Verbandsklage, p. 57.

320 BGHZ 118,312 ff; 343.

321 As this work turns around consumers and not corporate protection, it will be not analysed deeply the elements of the passing on defense here

competition practice,³²² and it is a valid defense before German and Spanish courts.³²³ In a short description, a *passing on defense* is based on the transmission of the “unlawful” prices payed by the victim to their final clients. As long as these unfair prices are paid by others and not by the intermediary purchaser, it has not suffered any damage. Any compensation in favor of the intermediary purchaser that does not include this defense could turn against the *Bereichungsverbot*. This figure is compatible with the requirements of the Directive 2013/0185 on damages for breach of antitrust provisions.³²⁴

1.3.3.1 EC Related principles

The **principle of effectiveness and equivalence** is born in the CJEC’s case law as a structural element of the inner market. These principles have been progressively affecting the procedural rules of the EU member countries.³²⁵ The CJEC case law will determine how far the principles of the common market are oriented to safeguard citizen’s rights.³²⁶ That the citizen in the market is a consumer will be recognized in the early stages of the common market; the EU will recognized very early the relation between citizens’ rights and its role in the market (as consumers) within the competition policy:³²⁷ **In order to reach a competitive market is necessary to compensate damages to the markets participants.**³²⁸

As per the Commission, in accordance with the principle of effectiveness, the national legal system shall provide an effectively and measured legal protection in order to fulfil the rights granted by the EU to individuals.³²⁹ In the frame of competition Law, member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition Law.³³⁰ This statement reflects the recognition of the private enforcement by means of suitable national procedures in order to safeguard community rights. This is a legal basis for the development of suitable means of private enforcement. In accordance with the Commission, the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less

322 *Emmerich*; in: Immenga/Mestmäcker (Eds.), *GWB*, § 33 Rn. 55.

323 Against the first Instance Judgment, the BGH Urteil vom 28. Juni 2011 (Az.KZR 75/10), in frame of a damages action by cartel activities, stated that indirect purchasers are entitled to claim, and secondly that the passing on defense applies. (Der BGH stützte den Schadensersatzanspruch aufgrund des Zeitraums des Kartells nach damaliger Rechtslage auf § 823 Abs. 2 BGB i.V.m. Art. 81 bzw. Art. 82 EG a.F. Heute käme § 33 Abs. 3 GWB i.V.m. Art. 101 bzw. Art. 102 AEUV zur Anwendung. Gleiches gilt bei Verletzungen von §§ 1 GWB bzw. §§ 19, 20 GWB.) Sentencia del Tribunal Supremo No. 651/2013, de 7 de noviembre.

324 *El Considerando (29) y artículo 12 de la Propuesta reconocen explícitamente la posibilidad de que, en principio, la empresa infractora pueda invocar la defensa “passing-on” frente a una reclamación de daños y perjuicios por el comprador directo.*

325 *Heininger* (13.12.2001 Rs. C- 481/99, NJW 2002, 81) and *Leitner* (12.3.2002 Rs. C- 168/00, Slg. 2002, I- 2631 explain the signification of the legal protection / Rechtsschutzes).

326 See further in *Keßler*, Schadensersatz und Verbandsklagerechte im Deuteschen und Europäischen Kartellrecht.

327 CJEC Judgment of 18th September 1992, Case T-24/90; *Automec*, p.50, ECLI:EU:T:1992:97.

328 CJEC Judgment of 20th September 2001, Case C-453/99- *Courage/Crehan*, ECLI:EU:C:2001:465, p. 29 ff; CJEC Judgment of 13th July 2006, case C- 295/04-298/04 -*Vincenzo Manfredi/LloydAdriatico Assicurazioni*, p. 62; further in *Komninos*, CMLR 2002 447, (456) and *Logemann*, Der kartellrechtliche Schadensersatz, p. 98 ff.

329 Rott, *EuZW* 2003, 5 (9).

330 Art.4, Directive of the Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

favorable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.³³¹ In order to preserve those rights granted to citizens by the competition policy or by the EC in general, all national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that national procedural rules should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favorably than those applicable to similar domestic actions.³³² As per the CJEC, the application of the above-mentioned principles and the enforcement of subjective rights shall increase the competition in the market. Thus, the more suitability to obtain an individual reparation, the more enforcement of public values will be reached. More specific, the CJEC has defined what effectiveness takes in competition field. In the *Courage* case, as per the formulation of the CJEC, “anyone” has the right to obtain a compensation for any damage suffered by breach of European competition rules.³³³ In *Manfredi*³³⁴ consumers claimed compensation for the damage they suffered because of a price fixing cartel that had been condemned by the Italian competition authority. The Court confirms that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC. *Courage* however gave little guidance as to the nature of the loss in case of competition infringements and the problem of causation.³³⁵ According to the Manfredi decision, **reparation includes loss of winning and interests and the recognition of the decisions of national competition authorities or judges before national courts.** The recognition of the judgments or decision of foreign competition authorities before national courts, have been already incorporated to German Law (§ 33 Abs. 3 P. 4 GWB).³³⁶

331 Ibidem. Further aspects of the cooperation between EU and National authorities are regulated in the Regulation 1/2003, see Lorentz, Moritz, An introduction to EU competition Law, p. 45 ff.

332 Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions insofar as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive. Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Whereas (11). As example, in England, currently it is rare for consumers and SMEs to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour. Between 2005 and 2008, there were only 41 competition cases of any kind which came before the courts and where judgments were delivered. Out-of-court settlements can be a major source of resolution in some areas of law, but a survey of legal practitioners estimated that there were only 43 out-of-court settlements between 2000 and 2005 relating to anticompetitive practices. See “Rodger ECLR 2008, 96-116.

333 CJEC Judgment of 20th September 2001; C-453/99, *Courage Ltd*, ECLI:EU:C:2001:46, p. 30.

334 CJEC Judgment of 13th July 2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi e.a. v. Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461.

335 *Stuyck*, In Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question, p. 495 available on <http://www.kluwerlawonline.com/document.php?id=EULR2009022> visited last time on January 21st 2017.

336 § 33 Abs. 4 GWB wurde in das Gesetz eingefügt mit dem Siebten Gesetz zur Änderung des GWB v. 7.7.2005, BGBl. I 1954. § 33 Abs. 3 P. 4 GWB 4: *Wird wegen eines Verstoßes gegen eine Vorschrift dieses Gesetzes oder gegen Artikel 101 oder 102 des Vertrages über die Arbeitsweise der Europäischen Union Schadensersatz gefordert, ist das Gericht an die Feststellung des Verstoßes gebunden, wie sie in einer bestandskräftigen Entscheidung der Kartellbehörde, der Europäischen Kommission oder der Wettbewerbsbehörde oder des als solche handelnden Gerichts in einem anderen Mitgliedstaat der Europäischen Union getroffen wurde. Das Gleiche gilt für entsprechende Feststellungen in rechtskräftigen Gerichtsentscheidungen, die infolge der Anfechtung von Entscheidungen nach Satz 1 ergangen sind. Entsprechend Artikel 16 Absatz 1 Satz 4 der Verordnung (EG) No. 1/2003 gilt diese Verpflichtung unbeschadet der Rechte und Pflichten nach Artikel 267 des Vertrages über die Arbeitsweise der Europäischen Union.* See in connection Köhler, Kartellverbot und Schadensersatz, GRUR 2004, 99-103.

As per the actual regulations connected with the associative claims in Germany, it will be put into question if aspects such as the cost of the procedure, the limited binding effects of the decision as well as the sanctions, would pass the European effectiveness test.³³⁷ Cases of reparations based on massive damages, besides some remarkable exceptions, have not found practical relevance at the German civil courts.³³⁸ The blanks of the German civil procedure law regarding collective redress has been fulfilled with other alternatives of public Law.³³⁹ However, these blanks have driven to forum shopping in other legal venues.³⁴⁰ German academia has been in the latest years reviewing if the extension of consumers' protection by means of a collective procedure in order to balance social inequity of consumers may find space within the German civil Law principles.³⁴¹

As per the new **Directive on damages for breach of EU antitrust regulations**,³⁴² there are included **several regulations that shall guarantee that anyone who suffered a damage** due to a breach of the art. 101 or 102 of the TEC, or single national rules on competition, has the right to a comprehensive and full compensation of the damage suffered.³⁴³ The new Directive does not require from European members to develop any kind of collective instrument in order to reach the goals of the Directive.³⁴⁴ Thus, to extend collective redress to antitrust field will be a prerogative of those member countries which already count with these instruments, or are in the path to develop them.³⁴⁵ The new

337 Against it: "Ein Bedarf für ein europäisches Rechtsinstrument zur Ausgestaltung des kollektiven Rechtsschutzes besteht nach bisherigen Erkenntnissen nicht. Ein zusätzlicher Wert neu einzuführender Sammelklagen zur Durchsetzung von EU-Recht ist nicht ersichtlich. Die Kommission hat nicht dargetan, dass es Defizite bei der Durchsetzung materiellen europäischen Rechts innerhalb des europäischen Rechtsraums gibt, die für das Funktionieren des Binnenmarktes ein Hindernis darstellen." Rott, *EuZW* 2003, 5 (7).

338 As BGHZ 52, 194.

339 Solutions came from the Insurance practice, single regulations for special cases, settlements reached before the threaten of a criminal procedure as it happens in the Contergan Case. See Micklitz/Stadler, *Stadler & Micklitz*, *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft*, p. 15.

340 As it happens in the case of forced labor of Holocaust victims of the third Reich. See Micklitz/Stadler *Stadler & Micklitz*, *Verbandsklage Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft: Forschungsvorhaben im Auftrag des BMVEL*, p. 16; In *Re Holocaust Victims Asserts Litig*; 103 F. Supp. 2Nd 139 (EDNY 2000).

341 *Säcker*, *Die Einordnung der Verbandsklage*. Vorwort V.

342 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19.

343 Art. 2 Directive. More in *Burgstaller*, *Die Gruppenfreistellungsverordnungen*, p. 114.

344 This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.

345 In the French case, *Class actions do not exist as such. However, it is possible to join similar claims by means of a simple joinder procedure. Over and above this orthodox approach, there are two separate collective redress mechanisms in France; collective interest actions (action d'intérêt collectif) and joint representative actions (action en représentation conjointe). In recent years, there have also been attempts to introduce a more ambitious collective redress action into French law, and a reform proposal to introduce an opt-in mechanism is currently going through the parliamentary procedure (see below). Under the current approach, collective interest actions (action d'intérêt collectif) and joint representative actions (action en représentation conjointe) are available in certain sectors only: consumer law; security/financial services; environmental law. Collective interest actions allow for accredited consumer associations to bring claims where there has been an infringement of the so-called "collective consumer interest." (Article L. 421-1(1) and following of the Consumer Code, C. cons). This procedure is however in practice rarely used. Joint representative actions can also be brought by accredited associations, and unlike consumer-related matters this action is taken in the individual interest of consumers in cases where several individuals have suffered harm, which was caused by the same professional person or body, and which has a common origin (Article L. 422-1 and following of the Consumer Code, C. cons). British Institute of International and Comparative Law. Focus on collective redress. France. Available on <http://www.collectiveredress.org/collective-redress/reports/france/overview> visited last time on November 22th.*

Directive is the first European Rule which regulate actions for damages in antitrust law. Which shall harmonize this field. Specially the presumption of damage of the art. 17.2 of the Directive will need to modify the German praxis. Nevertheless, this article does not release the claimant to demonstrate at least the range of the damage.³⁴⁶ The Directive, reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition Law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not preempt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interests, irrespective of whether those categories are established separately or in combination in national Law.³⁴⁷

Payment of interests is an essential component of compensation to obtain full reimbursement make of damages, sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.³⁴⁸ Nevertheless, *without prejudice to compensation for loss of opportunity, full compensation under the new Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.*³⁴⁹

1.3.4 Joint of liability

1.3.4.1 General principles in German Law

The ruling articles in German Law are gathered in the BGB, namely in the §§ 421 ff. According to them, the creditor is free to choose which co-debtor to sue. Therefore, even in the case that only one co-debtor is financial capable to face the debt, the claimant will be satisfied. The provisions content in the BGB do not specify under which circumstances a multitude of debtors can fall into this situation where the claimant can sue against one of them and not against all co-debtors, neither under which circumstances the creditor is able to claim for the whole debt from any of a multitude of co-debtors instead of obtaining a partial restitution from each one.³⁵⁰ This lack of accuracy in the law, has lead, according to

³⁴⁶ *Makatsch & Mir*, EuZW 2015, 7 (8) also *Calisti*, NZKart 2014, 466 (469).

³⁴⁷ Directive of European Parliament 2014-2019 Plenary Sitting 10.09.2014 CORRIGENDUM to the position of the European Parliament adopted at first reading on 17 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union P7_TA-PROV(2014)0451 (COM (2013)0404 – C7-0170/2013 – 2013/0185(COD)) Whereas (12).

³⁴⁸ Directive European Parliament 2014-2019 Plenary Sitting 10.09.2014 CORRIGENDUM to the position of the European Parliament adopted at first reading on 17 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union P7_TA-PROV(2014)0451 (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)) Whereas (12)

³⁴⁹ Whereas (13), Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19.

³⁵⁰ *Rust*, NZKart 2015, 501 (502).

some authors, the questions regarding the joint of liability to be one of the most fundamental legal questions of the XX Th. Century.³⁵¹

German case law has drawn the limits and regulation of the joint liability, based in 3 possible cases:³⁵²

- 1.- Joint liability is foreseen in a contract
- 2.- Joint liability arises as a result of a common protection aim of a specific legal good
- 3.- Join liability as a result of insurances of legal obligations

In antitrust field, the relevant case is the second one mentioned above. Breach of antitrust regulations drive to joint liability, as typical example of the common protection aim of a legal good, as it is ruled in the §§ 830, 840 BGB, and reflected in the § 33 GWB. Possible inner recoveries within the members of the cartel are ruled in the § 254 BGB taking into consideration such aspects as the culpability and causality of the damage.³⁵³ The joint liability principles deploy its effects mostly in two different areas, the administrative sanctions procedure and the civil considerations by damages recovery. It is also to be considered the EU practice and the German historical developin in this matter: Joint of liability for group of companies is recognized at the European antitrust field, mainly as result of the broad definition of corporation content in the some decisions of the CJEC, as for instance the decision fallen in the Akzo matter, under the term of single economic unity.³⁵⁴ According to the stake hold in this decision, a multitude of corporations can constitute a single corporation under the European point of view, if they acquired the consideration of economic unity. Such consideration takes place when a subsidiary, despite of having its own legal personality, keep financial and organic links to the mother company. The developed case law of the European courts has built a *de facto iuris tantum* presumption that the mother company has influence in its subsidiary,³⁵⁵ which establish almost automatic a liability of the group of companies.³⁵⁶ Thereby, legal persons that does not have been causer of a cartel, can respond for it, as the breach of competition rules of any member of the corporate group will be attributed to the so called single economic unity.³⁵⁷ This is now common practice both for the Commission as well as for the European Courts, which differs from older practice.³⁵⁸

With such stake, the European legal institutions look a better possibility to enforce its economic sanctions. Nevertheless, such stake has been hard criticized,³⁵⁹ as such extension of the liability is for many authors a breach of the individual responsibility that shall govern any sanction prerogative of the State, and could be a breach of the *ordre public* principles.³⁶⁰ In general, the joint liability is not recognized in the German administrative sanction uses, based in individual culpability principle of *nulla poena sine lege*, and is contrary to the § 30 OWiG. According to this article, in connection with the §

351 See further in Meyer, in Historisch-Kritischer Kommentar zum BGB, 2013, Bd. 1 Rn. 209.

352 Rust, NZKart 2015, 501 (502).

353 Rust, NZKart 2015, 501 (502).

354 CJEC Judgment of 10th September 2009, Case C- 97 /08, *Akzo Nobel*, EU:C:2009:536, p. 55, 59.

355 CJEC Judgment of 29th September 2011, Case C- 520/09, *Stora*, ECLI:EU:C:2011:619, p. 28, 29-
CJEC Judgment of 25th October 1983, Case Lm. 107/82, - *AEG- Telefunken*, ECLI:EU:C:1983:293, p.50.

356 "All in all, the rebuttal of the economic entity presumption is in fact something like the Yeti of Eu antritrust law: much has been written about it; nobody has seen it in real life" Thomas, JECLP, p. 11-20.

357 CJEC Judgment of 10th April 2014, Case C-231/11 - *Comission / Siemens*, ECLI:EU:C:2014:256, p. 45.

358 CJEC Judgment of 14th July 1972, Case Lm.48/69, *ICI LT. vs Commission*, ECLI:EU:C:1972:70, p. 126/130,132/135. 136/141

359 Rust, NZKart 2015, 501 (503).

360 Schnelle, WuW 2015, 332 (338).

130 OWiG, there is no legal support in this country to apply the joint liability to the mother company when its subsidiary has committed any breach of any competition rule.³⁶¹ A single economic unity shall be only consider according to the § 81 section 4, 2,2 GWB, but not in the frame of sanction relevant articles of the §§30 section 1, 2a; 130 section 1 OWiG.³⁶²

Also in the German civil practice in antitrust matters there is not a direct extension of liability of the subsidiary to the mother company, stake lately confirmed by the LG Berlin as follows:³⁶³

*“For the German national case law is a joint liability of group of companies alien, as the liability in Germany is oriented according to the Trennungsprinzips, after which the legal person is liable only with its own capital and not with their partners capital”.*³⁶⁴ Such stake of the German case law finds it legal support in the § 13 section 2 GmbH with same consideration, namely that a specific legal personality is liable with its own capital and not with the capital of any of their partners. Next to the above mentioned *Trennungsprinzip*, Germany, different than the EU Institutions, respects the so called *Verschuldungsprinzip*, after which the liability must be established according to the culpability in the first line of a natural person (that can be attributed to the legal one according to the § 31 BGB and in the second to a corporate culpability of the organization).³⁶⁵ The search of the *effet utile* does not justify the extension of the liability. The argumentation that victims of cartels cannot recover the damages if a subsidiary get bankrupt, is a general risk which is present in any action for damages in any other area of the Law practice.³⁶⁶

1.3.4.2 Rules concerning inner recovery

In cases of administrative sanctions, the European commission has denied its role to establish the rules concerning inner recoveries between the sanctioned members of a cartel. As result of the so-called Hydrogen peroxide decision of the German BGH,³⁶⁷ the European Commission will established some principles that apply in the outer relationship before the Commission that affects the distribution of the joint liability and are based mainly in changes in the structure of the group of companies that has taken place during the infraction time frame of by the edict issue.³⁶⁸ The BGH will take into consideration the § 426 section 1 BGB, so in absence of a previous agreement between the parties, the inner recovery between the parties shall be clarified according to the § 254 BGB, namely taking into consideration the nature of the specific case.³⁶⁹

Rules applying in civil Law differs of the rules governing administrative sanctions procedures. German antitrust principles contained in the § 33 GWB, 830 and 840 BGB, foresee joint liability of the members of the cartel when it comes to reparation of damages.³⁷⁰ Thus, market participant who has suffered a damage can, by means of the § 421 BGB, choose against which co-debtor he drives its action, without probing any specific causal relationship, as long as it is proved that the co-debtor is part of the cartel and of the

361 So, *Rust*, NZKart 2015, 501 (503).

362 *Hülsen & Kasten*, NZKart 2015, 296 (297).

363 LG Berlin decision of 6.8.2013, 16 O 193/11 Kart, *Fahrtreppen*, Open Jur 2015, 2006, p. 84 ff.

364 Own translation.

365 *Hülsen & Kasten*, NZKart 2015, 296 (297).

366 LG Berlin decision of 6.8.2013, 16 O 193/11 Kart, Open Jur 2015, 2006, p. 86 f.

367 BGH NZKart 2015, p. 101. *Fahrtreppen*

368 CJEC Judgment of 24th January 2014, Case C- 50/12- *Kendrion*, ECLI:EU:C:2013:771.

369 So, *Rust*, NZKart 2015, 501 (503); BGH WuW/ E DE- R 2996 Rn. 129 ff.

370 BGH, Decision of 28.6.2011, p. 80- ORWI.

unlawful activity.³⁷¹ As result of the so-called Hydrogen peroxide decision, the CJEC has confirmed that from a cartel injured parties have the right to bind the claim before any legal venue where at least one defendant its domiciled. This legal venue will remain even when the defendant which opened that venue is settled. So is confirmed the legal venue foreseen in the Art. 8.1 of the **Regulation (EU) No 1215/2012 (former Art. Sect. 6.1 Rg. 44/2001)**.³⁷²

In connection with the joint of liability of associations of companies, any member of a group of companies may face a damages action, when they have been part of a cartel. Because of the so called *Trennungsprinzip*, requisite is having conducted a role in the cartel enough to be imputed following civil standards.³⁷³ Previous mentioned rules of economic unity which are been used in administrative sanction procedures have been not apply in Germany civil Law. If this traditional consideration could change by the implementation of the Directive 2014/104 is discussed by the German authors.³⁷⁴ As per the inner recovery between the members of the cartel, German literature has discussed the proper legal basis for this matter. It is generally accepted that the § 426 BGB has limitations and may not be the proper article governing this subject.³⁷⁵ The majority find more suitable the § 254 BGB, stake which has been confirmed by the Calcium Carbide decision, being the individual responsibility and causality a key factor for the inner return.³⁷⁶ This decision, was applicable also to those beneficiaries of a leniency program, which can take its special circumstances, as for instance the already payed fine, into consideration. Such privilege does not apply for the outer relationships of the beneficiary of such program and is limited to the inner recoveries.³⁷⁷ The Directive 2014/14 will extend the privileges to the outer relationships too, as it will be explained further later, limiting the responsibility of the State witness only for its direct purchasers and subsidiary to the indirect ones. Settlements acquired importance in the antitrust practice, specially in the relationships between distributor and finally consumer, but it also modifies the inner recovery relationships of the members of a cartel.

One of the capital aims of the Directive on damages is improving the private enforcement of the competition Law. Although some authors consider that this aim has been somehow forgotten in the legislative procedure in favor of the public enforcement, it cannot be denied that the Directive contents some rules regarding the joint liability that shall help to increase the private enforcement. The joint liability gathered in the Directive (Art. 11 section 1) is in German competition Law field not a newness. Nevertheless, the Directive foresees a multitude of rules governing this matter which shall gain harmonization in the practice of the member States. Such rules are a challenge in some aspects for the current German principles and shall modified them by transposition of the Directive. In connection with the European single economic unity concept, it is discussed if this conception shall be adopted into German Law due to the implementation of the Directive 2014/ 14 into national Law. Most voices in the German literature are traditionally against it,³⁷⁸ as it would incorporate, specially in the administrative sanction procedures, a

371 *Rust*, NZKart 2015, 501 (505) and exhaustiver in *Krüger*, WuW 2012, 6-13.

372 *Rust*, NZKart 2015, 501 (505).

373 *Rust*, NZKart 2015, 501 (507).

374 Against it *Suchsland/ Rossman* WuW 2015, 973-981, as well as *Hülßen & Kasten*, NZKart 2015, 296-307. Other considerations see *Kersting*, WuW 2014, 564- 575.

375 So *Rust*, NZKart 2015, 501 (507).

376 BGH, NZKart 2015, p. 101.

377 *Rust*, NZKart 2015, 501 (507) and *Krüger*, WuW 2012, 6 (13).

378 In favour *Inderst/ Thomas*, *Schadenersatz bei Kartellverstoßen*, 2015, pp. 75-82, *Mäger* NZKart, 2015, 329 (330).

completely alien conception of the culpability and its associated liability.³⁷⁹ Furthermore, it has been pointed out by members of the European Commission, that from the legal political point of view, the extension of the liability based merely in the influence of the mother company in its subsidiaries is problematic, as thereby will be punished companies that compliance with the antitrust rules.³⁸⁰ Stakes in favor of the incorporation of the European single economic unit concept into the civil German Law, arise both in grounds based in primary and secondary EU Law. From the primary EU Law it shall be considered the **principle of effectiveness** and its developed case law, which speaks of “**anyone**” who has suffered a damage has the right to full reimbursement. This developed case law finds its reflex in the EU secondary Law, even in the very same Directive, (Art. 1 section 1 of the Directive 2014/ 14): *This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law **by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.** It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.*³⁸¹

Argument for the incorporation into German Law thus, are based on practical arguments for the effective recovery of the injured party, namely to avoid that the claimant is not reimbursed due to a possible bankruptcy of the subsidiary company. Nevertheless, these exposed arguments shall not breach the principles of liability. The assignment of liability shall not depend on the possibilities of the injured party to recover its damages. Rather, the liability shall be established on grounds of culpability. Any other stake that assigns payments, not based on direct responsibility of the potential causer but in the possibilities of the affected party to recover damages shall be avoided. Otherwise, it can also be alleged that the State is subsidiarily responsible for the damages, as it will also warranty an effective recovery of the injured party. If the responsibility of the mother company in connection with its subsidiaries is established in culpa *in vigilando*, the same argument can be used for the extension of the liability to the State. It will be discussed if there exist an obligation of the German Law maker to incorporate such principles. Nevertheless, the arguments that the Commission as well as the European courts use for the extension of liability, belong to the *acquis communautaire*, and as long as this stake is maintained by the mentioned institutions, the member States shall comply. Proponents of the assimilation of the European economical unit concept, do consider that the economic unity concept can be adopted into German Law as the § 33 Section 3, 2 GWB is enough open to accept such transposition without further amendments.³⁸² However, we find in the German legal practice several manifestations that reject to incorporate such principles. In my opinion, there has been pointed out arguments that the “anyone” and the case law based on the *effet utile* of the CJEC as per *Manfredi*, *Courage*, *Pfeiderer* and *Donau Chemie* is not sufficient in order to extend the liability under German Law. And these arguments are correct. However, the extension into German Law can be based in the case law of the CJEC that specific recognizes the common liability of mothers and subsidiary corporations such the *Akzo Nobel*³⁸³ or *Stora*.³⁸⁴ Nevertheless, so far, the BGH remains in

379 So *Bosch*, ZWeR 2012, 368 (375); *Voet van Vormizele*, WuW 2010, 1008 (1016), *Hülsen & Kasten*, NZKart 2015, 296 (298).

380 So *Hülsen & Kasten*, NZKart 2015, 296 (298), with reference to *Braun/ Kellerbauer*, NZKart 2015, 175 (179); *Kellerbauer/ Weber*, EuZW 2014, 688 (691).

381 *Kersting*, WuW 2014, 564-575.

382 *Hülsen & Kasten* in reference to *Kersting* WuW 2014, 564-575 (with lege ferenda proposal for the § 81 GWB).

383 CJEC Judgment of 10th September 2009, Case C- 97 /08 *Akzo Nobel*, ECLI:EU:C:2009:536, p. 55, 59.

its stake and defend the German limits of liability, specially in the sanction administrative proceedings. So, in the consideration of the German Supreme Court, the Union principles shall be interpreted considering the German legal principles and such extension of liability based in the *effet utile* and an analogical interpretation of the national law beyond the meaning of the words, to extend the liability is *contra legem* and will jeopardize the prohibition of analogy of the Art. 103 Section 2 GG, Art. 49 sec. 1 Fundamental Rights Charter and art. 7 ECHR.³⁸⁵

As per the Art. 1.Sec. 1 and Art. 8 of the Directive, it remains in hands of the national members to incorporate an effective frame to warranty the principles of effectiveness and equivalency. The Directive does not include any definition of Corporation as single economic unity, so by means of the Directive it does not appear necessary to amend the German stake in regards of the *Verschuldungs-* and *Trennungsprinzip*, as it cannot be defended- due to the absence of a specific definition of the economic unity, that the Directive pretends a total harmonization in this regard. Specially, when the Directive includes in its Art. 2 a serial of definitions and let out the concept of corporation as single economic unity. This stake is also supported by the fact that in the developing procedure of the Directive, there is no record that the idea of the economical single unity has been taking into consideration.³⁸⁶ Next to the legal already exposed grounds against the incorporation of the European single unity concept, voices among the German literature also denies the utility of such incorporation based on economic grounds.³⁸⁷ In connection with the inner recovery, as per means of the Art. 11 section 5 of the Directive, it shall be taken into consideration for the inner recovery such aspects as *their relative responsibility for the harm caused by the infringement of competition Law*. To establish such mentioned relative responsibility, the revenue for being member of the cartel acquires special relevance, as it shall be taken into consideration to establish the umbrella price effect. Cases of discrepancy between the revenue and the cartel quote shall be treated upon the specific case.³⁸⁸

1.3.4.3 Privilege of whistleblowers

The Directive contents a significant privilege for those companies which have participated in a leniency program. By means of these privileges, gathered in the Art. 11 Section 4-6 of the Directive, those beneficiaries of a leniency program which have paid the full fine will acquire some benefits. The status of State witness can be challenged by the claimant as well as by the co-debtors.³⁸⁹ The most significant privilege in the outer relationships regarding its liability is that State witness will be only liable before their direct and indirect purchasers and not before other customers which acquire services or products from other members of the cartel. This shows the primacy of the public enforcement before the private one to the eyes of the Commission, as it is an advantage for the State witness in detriment of the claimant. Only when the claimant cannot recover the full damages from other members of the cartel, the State witness will respond subsidiarily. Keeping the private enforcement in mind, considerations about the statute of

384 CJEC Judgment of 29th of October 2011, Case C- 520/09- *Stora*, ECLI:EU:C:2011:619, p. 28, 29.

385 *Hülsen & Kasten*, NZKart 2015, 296 (299); BGHZ decision of 16.12.2014KRB 47/13, NZKart 2015, p. 272, p. 17 ff.- Silostellgebühren.

386 So *Hülsen & Kasten*, NZKart 2015, 296 (301).

387 Specific to this matter see *Hülsen & Kasten*, NZKart 2015, 296 (302). This will not be treated further in this work, as it exceeds the object of the same which is the consumer protection in connection with the collective redress.

388 *Rust*, NZKart 2015, 501 (509).

389 So *Rust*, NZKart 2015, 501 (509) and *Schweitzer*, NZKart 2014, 335 (344).

limitations in these cases shall be regarded in the national Law by the transposition of the Directive, as due to this privilege, the claimant could face many years of trials until he recovers its full damages. It is remarkable, that despite the origin of the Directive was the improve of the private enforcement, the claimant must bear such burden, as result of the preference of keeping the leniency programs. Regarding inner recoveries, the State witness is also limited, in compliance with the Art. 11 Section 5 of the Directive, to those damages suffered by their direct or indirect purchasers, that as a matter of fact, shall be equal to its revenue quote. Nevertheless, the State witness take advantage in 2 essential aspects by the inner recovery: first, it will be discussed if the limitations of recoveries to the amounts of the revenue of its direct and indirect purchasers release him in the inner recovery of claims of other participants due to the so-called umbrella price effect.³⁹⁰ Secondly, this limitation release the State witness in the inner relationship, of the subsidiary responsibility. This advantage could not be such one in the practice, as it could drive to insolvency of other members of the cartel These 2 aspects can present major problems in the practice, as they imply multiple calculations.

1.3.4.4 Privileges of SMEs

Not only the State witness count with privileges. The Directive also included the SMEs as holders of special protection. According to the Art. 11 Section 2 of the Directive, such companies as defined in Commission Recommendation 2003/361/EC are liable only to its own direct and indirect purchasers where: its market share in the relevant market was below 5 % at any time during the infringement of competition Law, and application of the normal rules of joint and several liabilities would irretrievably jeopardize its economic viability and cause its assets to lose all their value. Such privileges wont applies either if the SME is responsible for the cartel infringement, or if it is a persistent offender.

Remarkable is that different to the State Witness, apparently, SMEs do not respond subsidiary if other members of the cartel become insolvent, or at such provision is not to be found in the Directive. Furthermore, the regulation of the SMEs in the Directive regime does not content rules about the inner recovery, as it does with the State witness.

1.3.4.5 Settlements

One of the recognized aims of the Directive is to improve extra judicial settlements. In order to reach that aim, the Directive recognizes some privileges to those members of the cartels that settle, in detriment of other members.³⁹¹

These privileges also deploy their effects in the outer and inner relationships. As per the outer relationships, *following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. Where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer. The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.*³⁹²

390 So *Rust*, NZKart 2015, 501 (509); against such stake *Stauber/ Schaper*, NZKart 2014, 346 (347).

391 Whereas 48, 51, 52.

392 Art. 11 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19.

1.3.4.6 Implementation of the Directive into German Law

Most of the above-mentioned privileges shall be implemented in German Law. Specially the privileges concerning SMEs and State witnesses.³⁹³ The Art. 19 I 3 of the Directive, concerning settlements and contractual agreements between the settle parties to avoid further recovery from the settled defendant shall also be included in the implementation of the Directive into German Law.³⁹⁴

1.4 Procedural aspects of the collective redress

Instruments of collective redress are, in its easiest form, not alien to German Law. An accumulation of a plurality of claims against the same plaintiff in Germany can also take the form of joinder of parties (*aktive Streitgenossenschaft*) or consolidation of actions (*Klageverbindung*).

1.4.1 Joinder of parties: *Streitgenossenschaft* (§§ 59 ff. ZPO)

This kind of procedure is foreseen in the §§ 59 ff ZPO, both for a plurality of claimants, as well as for a plurality of plaintiffs. **It maintains the principle of two party process, but with a multitude of participants in the claimant's (*aktive Streitgenossenschaft*) or defendant's side (*passive Streitgenossenschaft*), so there is not conflict with the two parties principle of the German civil procedure law.**³⁹⁵ By means of this instrument a multitude of legal relationships will be treated in a single evidences, hearing and decision procedure.³⁹⁶ Thus, this instrument allows theoretical to deal with cases of massive damages,³⁹⁷ as all separated processes acquire a common legal frame.³⁹⁸ In this common frame will be take the evidence acceptance. The result of the claim may drive to different decisions, due to individual questions related to liability, amount of damages, etc...

The *Streitgenossenschaft* has been considered as the German way to deal with cases of massive damages, a type of „*Sammelklage*“, not comparable at all to the American class action. As per the *Streitgenossenschaft*, affected parties does not act as a group but as individual claimants or defendants in a single procedure. These are individual judicial procedures, connected to the same legal questions, which are driven by the same lawyer or consumers' association. Some aspects can be treated together, but in the so called *Einfache Streitgenossenschaft* (§§ 59, 60 ZPO) the defense of each party and procedural aspects such application, modification, extension and all relates aspects to the scope of the process are independent of each other. The Court may accept this instrument as per party request or can set it up *ex officio* if the requirements of the § 147 ZPO are fulfilled.³⁹⁹

393 §§ 830, 840 BGB do not included such privileges.

394 So *Makatsch & Mir*, EuZW 2015, 7, (11).

395 *Rosenberg/ Schwab/Gottwald*, § 40 Rn.31.

396 *Lüke*, Die Beteiligung Dritter im Zivilprozessrecht, p. 12

397 *Säcker*, Die Einordnung der Verbandsklage, p. 72.

398 Exhaustiver see *Braun*, NJWZ 1998, 2318-2322.

399 See *Jauernig*, Zivilprozessrecht.

By the so called *notwendigen Streitgenossenschaft* (§ 62 Abs. 1 Alt. 1 ZPO) common aspects will be treated for all the members of the *Streitgenossenschaft*.⁴⁰⁰ It will be considered that a *Streitgenossenschaft* is procedural necessary when its binding force is extended to other procedures.⁴⁰¹ As per some German authors, this figure could help to improve the enforcement in cases of minor damages, as by means of the § 60 ZPO consumers which have suffered a common damage may lodge a claim together against the same company, which shall reinforce the psychological aspects of the claimants and at the same time reduce the costs of the procedure.⁴⁰² Nevertheless, from the of consumers associations in Germany, these claims present a lot of barriers, and claims with multitude of affected individuals drive to a considerable lack of efficient council. The experience has also shown that it is usual a separation of the procedure between the parties, which drives to high costs.⁴⁰³ That all results in a lack of interest of the associations and affected consumers in connection with this procedural solution. In connection with the costs, all the costs and risks of a real *Sammelklage* are to be calculated in the *Streitgenossenschaft*.⁴⁰⁴

The German government considers current regulation regarding collective redress instruments in Germany as sufficient. According to the government, the current §§ 59 & 60 ZPO through the instrument of the *Streitgenossenschaft* allows the binding of consumers' interests in a single procedure. The government support this stake in the following points:

- Due to the decreasing costs of the afore mentioned procedure for legal representation and in some cases gathering collective evidence.
- The *praxis* shows that the claimants know each other so they can coordinate its strategy.
- Affected consumers that does not want to participate in the procedure can be represented by consumers' associations according to § 79 Absatz 2 Nummer or individuals according to the § 79 Absatz 1 Satz 2.

For German authors however, this instrument is not able to face all the procedural challenges that arise in the private enforcement of minor damages.⁴⁰⁵

1.4.2 Consolidation of actions (*Prozessverbindung*)

§ 147 ZPO allows unifying different cases which are in the same level of jurisdiction, and they are depending among them for a common hearing and judgment. Aim of this figure is to promote procedure economy by a common hearing, evidence analysis and judgment procedure. If the claims are connected, they will be solved together. The pretensions brought to the procedure must have a **commonality**, whether in material legal connection (in the sense of § 33 ZPO) or subjectively connected.⁴⁰⁶ A merely time, local, factual or evidence connection is not enough to open this kind of claim.⁴⁰⁷ This kind of claim is considered unable to deal with multitude of connected rights of consumers, as the

400 *Ball & Musielak*, Zivilprozessordnung, § 62, Rn.9.

401 *Ibidem*.

402 *Zöller*, Zivilprozessordnung, § 62 ZPO Rn.11 ff; *Wanner*, Das KapMuG als allgemeine Regelung für Massenverfahren.

403 *ZvBv*, Gruppenklage - Ein Prozess, aber viele Gewinner Stellungnahme de Verbraucherzentrale Bundesverbands für die Einführung einer Gruppenklage. Available on http://www.vzbv.de/cps/rde/xbcr/vzbv/Gruppenklagen-Stellungnahme-vzbv-2013_08_21.pdf visited last time on 8th Februar 2016.

404 *Ibidem*, p. 4.

405 *Buchner*, Kollektiver Rechtsschutz, p.75; *Einhaus*, Kollektiver Rechtsschutz, p.371 ff.

406 *MünchKomm ZPO / Patzina*, § 33 Rn.2.

407 *Ibidem*; *Stein/ Jonas/Roth*, § 33 Rn. 26; *Zöller/Vollkommer*, § 33 Rn. 15.

aggrieved parties count not with the initiative to drive the procedure, it rather depends very much of the willing of the Court.⁴⁰⁸

1.4.3 Different local jurisdiction and connection of procedures

Different courts are a handicap for the connection of claims. In situations of massive damages, the damage will be probably spread in a geographical extended area. The German law foresee in its § 32 ZPO the damage place, and the general principle of legal venue of the place of the defendant. As per the § 147 ZPO can be connected for common questions the procedures in the same court before the same chamber.⁴⁰⁹

1.4.4 Suspension of procedures

Is regulated in the German § 148 ZPO. For most the German academia, there's not of application for the cases of massive damages.⁴¹⁰ Only for a minority of authors, the cases regulated in the § 148 could be analogue extended to cases of massive damages. Thereby it shall be avoided the repetition of evidence acceptance and the risks of divergence decisions.⁴¹¹

1.4.5 Contingency fee

German Law originally prohibited any kind of success fee (*Erfolgshonorar*), i.e. an arrangement that made the fee part of it dependent on the outcome of the case and so banned both contingency and conditional fees.⁴¹² As per decision of the German Constitutional Court, any law barring contingency fees in all cases is unconstitutional.⁴¹³ It held that, under certain narrow circumstances, there was a constitutional right to be able to bring a civil action by means of a contingency fee contract with a lawyer.⁴¹⁴ Thus the law was amended to allow for contingency and conditional fees in cases where the plaintiff would otherwise not be able to enforce his rights because of his financial situation.⁴¹⁵ The German government answer to this matter in an inquiry about its matter and collective redress: in some cases, the contingency fee is allowed; when in other cases the affected party will not be able to start the action. (§ 4a *Rechtsanwaltsvergütungsgesetzes*). Also, the court can leave aside under some circumstances the requirement of the trial deposit in order to start the action (§ 14 Nummer 3 of the *Gerichtskostengesetzes*). The financing of the procedure is also possible through the appeal to the institution of the *Prozesskostenfinanzierern* or the *Prozesskostenhilfe*.⁴¹⁶ For the German Government there is no need to extend the contingency fee in Germany, as the current instruments already covers cases or economic rational disinterests.

408 *MünchKomm ZPO- Wagner*, § 147 Rn.7.

409 In order to bewahr the guaranty to the legal court, *Leipold*, Der Anspruch aus Gewinnzusage (§ 661 BGB) in dogmatischer Betrachtung, In: Festschrift für H-J, Musielak, 2004, p. 317 ff.

410 *Stadler & Micklitz*, Die Verbandsklage, p. 13.

411 *Stadler & Micklitz*, Die Verbandsklage, p. 13.

412 Bundesrechtverwaltungsordnung, 1 August 1959, BGBl.I at 565, § 49b. See *Van de Walle*, Private Antitrust Litigation in the European Union and Japan: a Comparative perspective, p. 67ff.

413 BVerfG, 12.12.2006, BvR 2576/04, BVerfGE 117, 163.

414 BVerfG, 12.12.2006, BvR 2576/04.

415 Rechtsanwaltsvergütungsgesetz vom 5. Mai 2004 (BGBl. I S. 718, 788), Amended by Art. 10 G v. 8.7.2014 I 890.

416 Niemand muss allein wegen der Kosten auf eine Prozessführung verzichten, die hinreichende Aussicht auf Erfolg bietet.

As per the American experience, it is a matter of concern within the literature that a contingency fee class action may drive to collision of rights between damaged parties and its lawyers.⁴¹⁷ Lawyer could be more interested in reaching a settlement due to costs/benefits calculations of the procedure than in obtaining a full reimbursement for the victims. In this sense, as it already occurred in USA with the approval of the Class Action Fairness Act and by means of the 28 U.S.C. § 1713, the Court may invalidate the agreement if the benefits of the damaged parties do not exceed significantly their financial losses.⁴¹⁸

1.4.6. Costs of the procedure

As general principle in German law, the party who lost the trial must face the costs (§ 91-101 ZPO).⁴¹⁹ This is a general precaution to avoid less founded or imprudent claims. This provision on costs has not punitive character, and depend on the amount of the claim, the higher is the claim, the higher will be the costs of the procedure that the losing party must face. In competition law is to be expected that the amounts at stake are high, so this rule has a deterrence effect against the potential claimants. Thus, the 7GWB Novelle introduced some limits to the potential claimants according to their economic capacity (§89a ABs.1 S.1 GWB). This limitation in the costs seeks to improve the willing to start the action for potential claimants by overriding the economic deterrence effect.⁴²⁰ There are however also exceptions to this rule on collective procedures. There are specific rules allow for splitting (Sec. 24 KapMuG) or reimbursement of costs (Sec 10 (4) UWG).⁴²¹

2. Consumers' collective redress

2.1 Consumers' Law

As per the reform of the consumers Law in Germany,⁴²² the definition of consumers will be extended. The characteristic of consumer is a prerequisite for the application of consumers' Law. According to the § 13 BGB a consumer means every natural person who enters a legal transaction for a purpose that is outside his trade, business or profession. Thereby the § 13 BGB accomplish a double function: it transposes the European consideration of consumer by establishing a definition which includes the minimum functional requirements for the realization of the European single market⁴²³ and at the same time serves as reference point for the application of the national consumers law.⁴²⁴ In the so called dual use, which serves the personal as the professional use of the buyer, it will weight which aspect is prevailing.⁴²⁵ The other part shall be aware that is closing a

417 *Coffee*, Colum. Law Rev. 95, 1343 (1350).

418 *Buchner*, Kollektive Rechtsschutz, p. 55.

419 *Rosenberg/ Gottwald*, / *Schwab*, Zivilprozessrecht, § 84 Rn.64.

420 *Otting & Bechtold*, § 89 Rn.1,2.

421 British Institute for International and Comparative Law, Focus on collective redress; Germany. Available at: <https://www.collectiveredress.org/collective-redress/reports/germany/overview>. Retrieved last time, 20 th February 2017.

422 Das Artikelgesetz "Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung" vom 20. September 2013 (BGBl. I S. 3642) ist am 13. Juni 2014 in Kraft getreten

423 *MünchKomm BGB-Micklitz*, § 13 Rn.4 ff.

424 *MünchKomm BGB- Micklitz*, § 13 Rn.1.

425 BGH24.02.2011- 5 StR 514/09; "ist für die Abgrenzung nicht der innere Wille des Handelnden entscheidend, sondern es gilt ein objektivierter Maßstab. Ob eine Tätigkeit als selbstständige zu qualifizieren

business, that there is not a consumers but a business selling.⁴²⁶ In connection with employees, their purchases in order to exercise its job remains as consumers contracts. If the founder of a new business can be considered consumer is also a matter of interest, as it can lead to many advantages. By industrial or free-lance activities will in general not consider a consumer.⁴²⁷ It will be objectively considered, so legal transactions in order to open the company, rental of business locals, etc. will not be fall within consumers law.⁴²⁸ Nevertheless, those activities oriented to decide if the business shall finally be open will fall under the protection of consumers law.⁴²⁹ If the German approach to consumers protection is more restrictive than the European one will be discussed by the literature, in opposition to the Spanish case where will be discussed if the Spanish model is more favorable to consumes than the European one. ⁴³⁰

2.2 Legal necessity for collective redress

In the last years, German's Law maker has increase the private enforcement in different areas of Law by means of the introduction of collective redress forms instruments.⁴³¹ In the year 2004 was introduced the *Gewinabschöpfungsanspruch* in favor of consumers' associations in the UWG and in the next year the *Musterklage* of the KapMug.⁴³² In its basic form, the civil Law in Germany is configured in a 2-party's system: claimant and defendant. **As main aim, the Civil procedure is oriented to recognize and enforce subjective rights.** Germany has a civil procedure which is more oriented to the two-party system than those systems which are more influenced by the Roman Law, where the participation of third parties are more extended.⁴³³ In the form of a *Verbandsklage*, there are also a single defendant and a single claimant. In other forms of collective redress, it can be a multitude of claimants and defendants. This configuration does not seek for the individual protection but the supra- collective interests. ⁴³⁴ Thus, the general rules of the 2-party configured system of the ZPO is not direct applicable. This applies for all collective instruments present within the German law (Muster-, Gruppen- und Sammelklagen (despite of the § 5 UKlaG) for the *Verbandsklagen*).

The most relevant aspects of the ZPO which may be affected by the collective redress instruments affects principles such the:⁴³⁵

Dispositionsmaxime

Addition principle (*Beibringungsgrundsatzes*)

ist, bestimmt sich nach dem durch Auslegung zu ermittelnden Inhalt des Rechtsgeschäfts, in die erforderlichenfalls die Begleitumstände einzubeziehen sind." For sociological aspects of the definition of consumers in Germany see *Buchner*, Kollektiver Rechtsschutz für Verbraucher in Europa, p. 24 ff.

426 Not necessary that the other party knows that is closing a business with a consumer. BGH 30.09.2009 – VIII ZR 7/09

427 BGH 24.02.2005 - III ZB (36/04).

428 BGH 15.11.2007 - III ZR (295/06).

429 BGH 15.11.2007 - III ZR (295/06).

430 Exhaustiver see *Heiderhorf*, Grundstrukturen des nationalen und europäischen verbrauchervertragsrechts.

431 *Stadler*, Grenzüberschreitender Grenzüberschreitender kollektiver Rechtsschutz in Europa, p.21

432 *Buchner*, Kollektiver Rechtsschutz, p. 72.

433 Exhaustiver *Koch*, KritV 1989, 323- 327.

434 *Meller-Hannich*, Kollektiver Rechtsschutz im Zivilprozess, p. 1.

435 *Meller-Hannich / Höland*, *Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente: [Abschlussbericht gem. § 5 sowie Anhang B "Gliederung der Berichte" des Vertrags vom 16.11.2009]*. Bonn: Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (BMELV.)

The existence of a subjective right for the competence to drive the procedure
(*Prozessführungsbefugnis*)
Precedent effects (for the *Musterverfahren*)
Configuration or multitude and parallel procedures

As a general consideration, the *Verbandsklage* are not only related to obligated parties, but also to parties that does not have any obligation relationship. Thus, for some German authors they are not categorized as *Forderungen* and shall be rather classified as dependent pretensions (*unselbständige Ansprüche*).⁴³⁶ For some authors, however, the definition of consumers gathered in the German Law is too broad: thus, it is related rather to a function than to a clearly defined social group⁴³⁷, which prevent of a separation of own interest from the interests of the collectivity of consumers.⁴³⁸ The *Verbandsklage* does not defend individual interests. It is an instrumental tool for the defense of supra individual interests. This nature of the protection is so broad, that does not proper line up with the classic model of the individual private civil Law. It present problems of compatibility with the § 194 Abs. 1 BGB, what can cause some legal blanks, for instance in aspects such the statute of limitation. **For German scholars, it seems that the Law maker has introduced a new category of pretensions, a material Law based pretension for the defence of supra individual rights, that can be considered as *sui generis*.**⁴³⁹ These claims will in any case be considered as based on material pretensions, as in the sense of the § 194 Abs. 1 BGB, validating so its civil consideration.

Two aspects are mostly sought with the introduction of collective claims: to release the burden of the enforcement of individual pretensions, and the observance of supra individual interest in the civil procedure.⁴⁴⁰ These two categories are not always easy to differentiate, since the simplification of the procedure to enforce individual rights also improves the general interest in the observance of the legal order.⁴⁴¹ The first category is in any case closer to the problematic of individual reparation of damages, while the second category is rather related to collective -general- rights.⁴⁴²

2.2.1 Individual and collective pretensions

Säcker reminds that **is unclear which interest are enforced by means of a *Verbandsklage* in its different configurations.** When these instruments affect individual rights, the author questions the introduction of such instruments to overpass the rational disinterest of the affected individual to suit. According to the German Professor, **the State shall not promote claims when the individual does not want to claim as result of a rational decision.**⁴⁴³ Nevertheless, the rational analysis on the injured consumer to start an action will depend very much on the suitability of the legal remedies

436 *Schaumburg*, Die *Verbandsklage*, p. 43.

437 *Schaumburg*, Die *Verbandsklage*, p.44 ff.

438 The definition of consumer and entrepreneur is to be found in the German Civil Code (as per the §2 abs. 2 UWG; §§ 13, 14 BGB). Consumer is any natural person which closes a legal act, not for its industrial or professional activity. Entrepreneur is any natural or legal person, which closes a legal business in the frame of its industrial or professional activity, *Reinel*, Die *Verbandsklage* nach dem AGBG, p. 114.

439 *Schaumburg*, Die *Verbandsklage*, p. 46.

440 *Einhaus*, Kollektiver Rechtsschutz, p. 5.

441 *Einhaus*, Kollektiver Rechtsschutz, p. 51.

442 About the different treatments of supra individual standing sin Germany see (Schlake,2009), Überindividueller Rechtsschutz, p.128ff, and in connection with private enforcement of public interests see *Alexander*, Schadenersatz und Abschöpfung in Lauterkeits- und Karterllrecht, p.42 ff.

443 *Säcker*, Die Einordnung der *Verbandsklage* Rn. 63 also Basedow, Die Bündelung gleichgerichteter Interessen Im Prozessrecht, pp.1-24.

available to him. Thus, arguments based on the efficiency and enforcement of the legal order have been confronted to promote collective redress instruments and thereby making good the rational disinterest.⁴⁴⁴ To keep the individual/ liberal conception of the civil procedure, **the decision of whether to initiate or not civil action must be provided within a procedural framework where suitable instruments are available.** Only then can we speak about a “legitimate” and not a “compulsory” disinterest to suit.

In order to reach full enforcement of consumers’ Law and promote consumers’ access to justice, it could be necessary to undertake measures in those aspects, which nowadays discourage consumers from claiming their rights before the courts. **If the affected consumer can be part of a group, he can get over the initial rational disinterest.** The EU Commission was influenced by a 2006 survey which found that 74 per cent of Europeans would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing.⁴⁴⁵ Thus, **the introduction of collective remedies will be supported based on the limitations of the civil procedure instruments to enforce private consumers’ rights. There is currently no doubt that the *Verbandsklage* of the German civil Law serves the public interest.**⁴⁴⁶ The lack of proper instruments in this field would justify the introduction of such collective remedies.⁴⁴⁷ If the entitlement to sue is granted to consumers associations and they count with a legitimate adequacy of representation, the collective enforcement remains in the field of the private Law; where private rights shall be private enforced (associations can be considered private institutions developing a public aim) and at the same time respects the two parties procedure. In this connection Säcker reminds the Constitutional principles in which the private Law is based: **only when there is an affection to subjective private rights**, or an individual concern in the sense of Art 230 TEC⁴⁴⁸ **there is a constitutional *Anspruch* for court protection** in favor of the affected individual.⁴⁴⁹ Thus, the ***locus standi* of consumer associations is completely strange within the current system of private Law**, requiring special justification for its introduction, since it modifies the pillars of private enforcement, which protects the individual freedom of will (reflected in protection against baseless claims by third

444 Säcker, Die Einordnung der Verbandsklage, Rn. 2.

445 Eurobarometer Special Report 252 ‘Consumer Protection in the Internal Market’, European Commission, 2006, QB28.5, available at europa.eu.int/rapid/cgi/rapcgi.ks. (Retrieved last time 01.01.2017). The Report notes that since Greeks are those who most regard resolving a consumer dispute in court as easy (51%), it is not surprising that 86 % of them would be willing to assert their claims in a joint action. At the other end of the scale, 53% of Hungarians would not be more motivated to take joint court action.

446 BGH NJW 1995, 1488, 1489; Dieter, BGB; Die Verbandsklage zum Schutz allgemeiner und breitgestreuer Interessen, in: Gilles, (Ed.), Effektivität des Rechtsschutzes und verfassungsmäßige Ordnung, Die Deutschen Landesberichte zum VII Internationalen Kongress für Prozessrecht in Würzburg 1983, p. 57.

447 In the British case, a Research by the Office of Fair Trading (OFT) shows that businesses view the present approach to private actions as one of the least effective aspect of the UK competition regime. As it currently stands, challenging anti-competitive behaviour is costly and complex, well beyond the resources of many businesses, particularly SMEs. Even though the total damage caused by the behaviour may be very large, the sums involved for each individual business or consumer harmed are often small, making the expense of going to court impractical. This means that even if the perpetrators of a price-fixing scandal are caught, consumers and businesses still lose out – something that is fundamentally unjust. BIS Department for Business Innovation and Skills “Private actions in competition Law: a Consultation on options for reform. April 2012. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf. Retrieved last time 01.03. 2017.

448 Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

449 Säcker, Die Einordnung der Verbandsklage, Rn. 3.

parties).⁴⁵⁰ⁿ According to this author, before introducing collective redress instruments, some elements shall be taken into account:

- The introduction of collective redress needs justification
- The necessary agreement on the capacity of associations as entitled to sue
- The subsumption of collective redress instruments in the structure of the judicial protection
- The tolerability of the claim to the parties in the proceedings under the constitutional principles of proportionality

In turn, Stadler⁴⁵¹ refers to three examples in which **the reality of the current economic frame affects individual rights, which can be hardly protected with the traditional structures of the civil Law**, specially the two (well ascertainable) party's procedure:

1. Mass production

Cases of injuries of patients from mass production of medicines and healthcare products are particularly suitable for collective redress actions. In these cases, the number of potential affected individuals is huge and they all face the same legal questions as claimants. Solving these issues before different courts would be a waste of resources, and can lead to contradictory judgments.

2. Minor damages (*Bagatellschaden*).

According to Stadler, in Germany either the *Unterlassungsklagen*, (which only causes effects in the future) neither the public enforcement based on criminal prosecution will warranty the necessary deterrence effect. This can only be reached by means of civil procedures. The extension of UWG`S *Gewinnabschöpfungsklage* to other fields protected by consumers' dispositions were suggested, and in some aspects, succeed.

3. Securities and other financial products.

All sorts of financial products are often sold to consumers by banks or other financial institutions. Bad commercial practices by these entities may cause huge loses to consumers. As seen in the last financial crisis, malpractice in connection with the savings of individuals can also lead to economic crisis that affect the general interest.

2.2.2 Public or private enforcement

This problematic is especially relevant in cases of massive minor damages or *Bagatellschaden*. The premise is that due to a rational disinterest, the individual affected consumers does not take its right to the court. Thereby the legal system lacks an efficient abstract control of the law and its enforcement, losing any preventive or punitive function. It leads to an economic advantage in benefit of the causer.

The German current regulations to face cases of minor damages are regulated in § 79 Abs. 2 Satz 2 No. 3 ZPO, in connection with the § 8 Abs. 3 UWG, as well as the confiscatory earnings claim of the § 10 UWG (and §§ 33, 34, 34a GWB). How efficient

450 Säcker, Die Einordnung der Verbandsklage, Rn. 3.

451 Stadler, Bündelung von Interessen im Zivilprozess, p. 1.

these instruments are depending on its actual ability to overpass the rational disinterest of the affected party.⁴⁵² Many studies, private and public, alert of the economic consequences of not surpassing the rational disinterest to claim. These include for consumers:

- a) *Consumers are subject to uncompensated loss;*
- b) *Economic behavior of consumers can be distorted.*⁴⁵³

Obstacles to obtaining satisfactory redress may also lead to adverse immediate economic consequences for businesses. These may include:

- a) *Distortion of incentives for businesses to avoid infringements of Consumer Law;*
- b) *Harming business strategies using contractual warranties; and*
- c) *Efficiency gains of collective redress mechanisms for businesses are not fully exploited.*

*In case of a multitude of individual claims (for example, related to a high-value mass claim/mass issue), obstacles to collective redress may cause additional costs to the affected business, as individual litigation is likely to lead to incoherence and uncertainty of legal consequences of business decisions and practices.*⁴⁵⁴ Thus, a lack of enforcement of consumer regulations affects negatively both the consumers as well as those competitors who observe the law. The absence of an effective recovery system against these damages results in a kind of established unfair competition frame, or at least in an incentive to behave unfairly.⁴⁵⁵ Some of these issues might be mitigated by the public surveillance task, but the efficiency of public enforcement in this area is often put into question. Within the German academia, there is to find an argument for the introduction of such collective private remedies based on the limitations of the public power. As per this view, the modern State would no longer be capable to play the role of losing conflicts between big powers such the industrial or financial, and weakest players of the society. The so called *neosozialistische Theorie des Privatrechts*, demands the support of the equity mission of the State through the activities of private associations.⁴⁵⁶ The German Government, as well as German authors, consider that this critic to the public enforcement is not to be sustained, as the public enforcement does really provide adequate protection, as the fines

452 *Meller-Hannich*, Effektivität kollektiver Rechtsschutzinstrumente. p. 12 ff.

453 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 Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC) Framework Contract Lot 2 – DG SANCO Date: 26 August 2008: Erleidet eine Vielzahl von Verbrauchern jeweils nur einen geringen Einzelschaden („Streuschäden“), ist der einzelne Geschädigte an einer Individualklage nicht interessiert, weil sie ihm mehr Aufwand als Nutzen bringt (sog. rationales Desinteresse). Dadurch unterbleibt eine wirkungsvolle Prävention und Sanktion von Rechtsverstößen, obwohl diese gegebenenfalls mit einem hohen wirtschaftlichen Vorteil des Schädigers einhergehen. *Meller-Hannich*, Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente für Verbraucher im nationalen Recht und rechtliche Bewertung ausgewählter Ansätze zu ihrer Fortentwicklung Az.: 514-06.01-2809HS011, p. 12.

454 Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Civic Consulting and Oxford Economics, 2008, http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf, p. 5. Retrieved last time 20 February 2017.

455 Ensuring that those affected by anti-competitive behaviour can obtain redress adds to the deterrent effect of the enforcement regime. A requirement to compensate reduces the possibility of unjust enrichment from overcharging or exclusion and increases the risk from engaging in anti-competitive behaviour. BIS Department for business Innovation and Skills Private actions in competition Law: a consultation on options for reform April 2012, p. 12.

456 *Säcker*, Die Einordnung der Verbandsklage, Rn. 3. The author reminds that the reality shows the opposite, and the public institutions does conduct an efficient surveillance activity. However, letting the defense of consumers interests in hands of public bodies can also be considered as a voluntaristic conception, as it will depend very much of external factors (such the power of the national corporations, the independence of the government, etc...

imposed to corporations due to malpractices are quite high.⁴⁵⁷ At the political stage, it might be discussed whether private enforcement of consumer law is more related to socialist theories. As example, in the US the class action system is well developed and the US is far from being considered a socialist country. Even the fact that the public values are enforced by private associations rather than by the “Father State” could be considered a more liberal position. Also in England, with a liberal tradition as well, it is considered that the public surveillance alone, is not enough to reach a high degree of competition in the market.⁴⁵⁸

In any case, the European discussions on the matter seem to be more focused on essential aspects of any democratic system such a proper access to justice and an adequacy of representation rather than ideological matters.⁴⁵⁹ Beyond the discussions about the efficiency of the public enforcement, this path left aside the individual reparation of consumers. The individual protection provided by some public agencies (like the *Kartellamt*) will attenuate the necessity of individual protection by means of collective redress instruments in some aspects. However, **it is to be remained that these agencies normally will impose fines rather than provide individual reparation to injured parties**, and thereby its function is always limited, no matter how sensible is the State to industrial interests or how efficient these agencies are.⁴⁶⁰ Enforcement of consumer Law could never be complete if it is based on the idea that individuals who suffer minor damages do not deserve to be compensated. This is a kind of blank check to corporations that will be encouraged to establish minor damages relationships with their clients, with the only threat of the public surveillance.

In Spain, the case law considers that a legal system that does not allow bringing minor damages (reparation) by binding interests in the same civil procedure could jeopardize the right to obtain a properly and effective judicial protection (Art. 24 CE).⁴⁶¹ As per the Spanish case Law consideration, the actual concentration of providers and the mass production needs efficient means to deal with mass damages.⁴⁶² The collective redress could give response to these cases in which individual rights are affected but are not taken into the court due to procedural barriers. The collective redress can be a means to fulfil the liberal conception of the civil right, the safeguard of individual rights. If the right is indivisible, it applies other public considerations that can also justify the introduction of

457 *Germany*, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Nicole Maisch, Jerzy Montag, Harald Ebner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 17/8850 – *Säcker*, Die Einordnung der Verbandsklage, Rn 3.

458 However, it leaves several cases where it would be an inefficient use of public resource to bring the full force of an investigation to bear. Furthermore, even cases where the OFT does find a breach of competition law, although a fine is imposed, there is no specific provision to make redress to those who have suffered the damage. *Great Britain*, Department for Business Innovation & Skill Private actions in competition Law: a consultation on options for reform April 2012. BIS, p. 11.

459 *Carballo Piñeiro*, Derecho de competencia, intereses colectivos y su proyección procesal: observaciones a propósito del art. 6 del reglamento “Roma II” considers that the admission of collective redress shall be not depend on substantive law, which is mostly oriented to individual standing. It shall rather depend on the adequacy of representation; see also in connection *Meller-Hannich*, Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente, p. 54 ff.

460 *Great Britain*, Department for business Innovation and Skills Private actions in competition Law: a consultation on options for reform April 2012, BIS, p. 4 “*While the public competition authorities are at the heart of the regime, they have finite resources and cannot do everything. A greater role for private actions would complement public enforcement, enhancing the benefits of the competition regime to our economy. What is needed from Government is to create the legal framework that will empower individual consumers and businesses to represent their own interests.*”

461 Which is the Spanish version of the right to be heard before the court. Constitución Española. See Chapter III of this work.

462 Recognized by *Stadler*, Bündelung von Interessen im Zivilprozess, p. 1.

such collective mechanisms. Ironically, the two-party's procedure straitjacket can jeopardize the enforcement of individual rights.

The civil procedure has as its teleological function the reparation of individual damages, and this aim must be conformed according to the circumstances. Thus, if collective claims are lodged by associations and not by a sum of individuals in a class action, a rough and ready apportionment of damages may be the only practicable course. In some instances, damages may be more appropriately paid to collective organizations representing the interests of the victims than to individuals directly.⁴⁶³ *Other cases may call for still more innovative remedies. For instance, in the New York Yellow Cab case,⁴⁶⁴ when overcharging was proven in a class action, the company was ordered to reduce its prices until the damages suffered generally had been returned to the public.⁴⁶⁵*

2.3. Precautions

In the background of the introduction of collective redress instruments is the idea of a better access to justice. Nevertheless, for the German literature, a matter of concern regarding the introduction of collective remedies affects baseless claims and thereby the equality of arms in the procedure. The German industry as well, expressed its concerns regarding introduction of such instruments, which can lead to unjustified and abusive claims.⁴⁶⁶ Such unjustified claims may turn into an extortion instrument against companies.⁴⁶⁷ Another capital concern in the literature affects the *ordre public*. In a collective action, the defendant will have obstacles to identify the affected parties, and therefore will not be able to raise possible objections against them, which partially breaks the right to be heard before the court of the defendant.⁴⁶⁸ It is a matter of concern that the introduction of collective redress implies a burden for the other party, and therefore it needs special justification to maintain the principle of equality of arms. According to these limitations, the German GWB and EnWG, although have extended the Individual protection to any affected market participant, will not include *Verbandsklage* in favor of consumers in the first place. The GWB include it in the 8. *Novelle*.⁴⁶⁹ **The introduction of collective redress in these fields where individual claims are possible and exists a public surveillance of state bodies, is for some authors against the principle of free enterprise** as it is recognized in the Art. 12 and 14 of the German GG.⁴⁷⁰ Private enforcement, together with public enforcement through the activity of public bodies could lead to a "*Kontrollhypertrophie*".⁴⁷¹ For many German authors, the extension of collective representative actions following the American example shall be denied due to the different aims of both legal systems. For an important part of the German academia, the extension of American standards to the German law might imply a violation of constitutional rights

463 *Thus in the Agent Orange case brought in the US courts by Vietnam veterans who claimed to have suffered injury as a result of a chemical defoliant used in the jungle war, a substantial proportion of the damages was paid to veterans' associations rather than to individuals; Schuck, Agent Orange on Trial; Howells, Group or class actions in the United Kingdom, p. 40.*

464 *Daar v Yellow Cab Co 63 Cal Rptr 724 (Cal 1976). Reference in: see previous Ftn.*

465 *Howells, Group or class actions in the United Kingdom, p. 40*

466 *More on precautions against baseless claims in Nieden, Zustellungsverweigerung rechtmisbrauchlichen Klagen in Deutschlands nach art. 13 Haager Zustellungsübereinkommen. p. 239 ff.*

467 *Germany, Sammelklagen – Ein einheitlicher Referenzrahmen Zehn Forderungen der Wirtschaft Ein einheitlicher Referenzrahmen Deutscher Industrie- und Handelskammertag*

468 *Röhm / Schütze, RIW 2007, 241 (244)*

469 *Säcker, Die Einordnung Rn. 8, p. 4.*

470 *Säcker, Die Einordnung der Verbandsklage, Rn.12.*

471 *Säcker, Die Einordnung der Verbandsklage, p. 78.*

such the *Justizgewährungsanspruch*,⁴⁷² the right to be heard by the court, Art. 103 Abs. 1 GG,⁴⁷³ the right to a predetermined legal judge Art. 103 Abs. 2 S. 1 GG⁴⁷⁴ and the *Dispositionsmaxime*.⁴⁷⁵ Hess considers that an *opt out* instrument is incompatible with the principle that the parties delimit the scope of the process, as it will drive to a multitude of legal relationships with unknown claimants.⁴⁷⁶

2.4 Academia

The legal nature of the *Verbandsklage* has been quite discussed by the German academia. Säcker reminds that there is not clear which kind of interest are to be enforced by these kinds of actions in their different variations.⁴⁷⁷ As it happens in Spain, part of the German academia has categorized these actions as a *sui generis* case of a representative legal standing, which is granted to an association, not on an own subjective right (*Anspruch*) basis. It would be granted to defend foreign rights or interests of a third party.⁴⁷⁸ The *Verband* does count with legal standing to defend alien rights or interests, without suffering an own damage. So, it has been proposed that in these actions, the *Verband* is acting for alien rights of individuals who are somehow connected to the association.⁴⁷⁹ For Burckhardt, the *Verband* is not acting based in any interest that can be related to the association, being these claims more like a limited *popular action*.⁴⁸⁰ For other authors, the *Verbandsklage* would be a case of representation, not of consumers, but of the State.⁴⁸¹ Lakkis considered that the associations are merely legitimated by law to defend the fair competition in the market. So, the *Verbandsklage* would be just a legal tool to reach that aim. No doubt, it exists a public interest in the activity of the associations, but the link between the association and the individual interest which the associations actually represents shall not be denied either. So far, the consumers' association represent general consumers' interests, the association is linked to individual consumers' rights as well. For Capeletti, the interests sustained in a *Verbandsklage* are those whose litigation and access to court is *prima facie* not decided.⁴⁸² *The diffuse interessen sind - de lege data- not subjective ones*, thus, the procedural enforcement of these rights is not opened.⁴⁸³ The material right will be enforced when the objective right turns in a subjective one by opening the judicial redress mechanism. The *Verbandsklage* would be more an

472 See Meller-Hannich, *Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente*, p.44, for further references, see Leufgen, *Kollektiver Rechtsschutz zugunsten geschädigter Kapitalanleger*, p. 145 ff.

473 Meller-Hannich, *Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente*, p.44; further reference in Eichholtz, *Die US-amerikanische Class Action und ihre deutschen Funktionsäquivalente*, p. 230.

474 Meller-Hannich, *Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente*, p.44, further references in Eichholtz, *Die US-amerikanische Securities Fraud Class Action gegen europäische Unternehmen*, p. 119.

475 See Hass, *Die Gruppenklage*.

476 So, Hess, WuW 2010, 493 (498).

477 *Individual interest (interest's of the association members, enforcing of supra individual collective interests in the sense of group's interest and therefore the general enforcing of diffuse, public, not personalized or a combination of all of them*. Own translation of Säcker, *Die Einordnung der Verbandsklage in das system des Privatrechts*, p. 33.

478 MünchKomm ZPO- Lindacher, § 50, Rn 73.

479 Habscheid, GRUR 1952, 221-224.

480 Burckhardt, *Auf dem Weg zu einer class action in Deutschland*, p. 28, so also, Thiere, *Die Wahrung überindividuelle Interessen im Zivilprozess*, pp. 279- 290.

481 Marotzke, ZJP 98 (1985), 160-199.

482 Cappelletti, *RabelsZ* 1976, 669-680.

483 Hass, *Gruppenklage*, p. 15.

instrument for the enforcement of the objective right as provide a process guiding for the enforcement of public interests,⁴⁸⁴ without own material interest and right.⁴⁸⁵

From the functional point of view, the *Verbandsklage* offers a legal solution to those cases in which the material own right cannot be enforced or articulated, to preserve the right to access to court. The ratio of this instrument is the preservation of the legal order, in the capability of enforcing the objective right. In the German unfair competition legislation, shows how the *Verband* can act, serving both a general economic function (to preserve the good working of the market), as well as under a legal aspect, serving the enforcement of the objective law and rights. **According to the most part of the German doctrine⁴⁸⁶, and case law⁴⁸⁷ the association enforces an own interest when lodging these kinds of actions. They count with an own material right (*Anspruch*), which is based in the general interest.** This view is gathered in the German legislation, such the § 13 Abs. 2 AGBG, the § 3 Abs. 1 UklG as well as the UWG *Novelle* (§ 8 Abs. 2 UWG).

2.5 Case Law

The German civil case law⁴⁸⁸ and its supporting doctrine in the civil procedure, as well as the connected literature in competition field⁴⁸⁹ considered the *Verbandsklage* as an instrument derived from material substantive law. For the German Supreme Court⁴⁹⁰ (BGH) the *Verbandsklage* is material law in the sense of the § 194. Abs. 1 BGB. The content of the former § 13 Abs. 4 AGBG, and the §13 UWG, include a statute of limitation to exercise the right, which is recognized as a case of material law.⁴⁹¹ The associations are not considered as the holder of the material right to be protected, (the holders are the consumers), but they are entitled, they have the right (*Anspruch*) for a judicial defense of these rights. Later interpretations will consider it as a case of double legitimization, both procedural and material.⁴⁹²

2.6 Consumer dispute resolutions

Better known in Germany as the *Verbraucherstreitbeteiligungsgesetz* (VSBG),⁴⁹³ this law has entered in force on the 0.04.2016. This Law incorporates into German Law the principles of the associated Directive about alternative dispute resolutions (ADR).⁴⁹⁴

The European Commission is not unconcerned about the possibilities that the alternative dispute resolutions offer to advance in the implementation of the collective redress.⁴⁹⁵ Nevertheless, in the ADR Directive, the collective redress is marginally

484 Koch, Prozessführung in öffentlichen Interesse, Rechtsvergleichende Entwicklungsbedingungen und alternativen objektiver Rechtsdurchsetzung, p. 278.

485 See Hass, Die Gruppenklage, p. 16.

486 Otting / Bechtold, Kartellgesetz: Gesetz gegen Wettbewerbsbeschränkungen Kommentar § 13 Rn. 4

487 BGH GRUR 2001, p. 846 (847); BGH GRUR 1996, p. 804 (805); BGH NJW- RR 1990, p. 886 (887)

488 RGZ 120, p.47, 49 s; BGH, ZIP 1996, p. 3276, 3277; NJW 1995, p. 1488 s; NJW- RR 1990. p.886, 887= BB 1990, p. 950.

489 Köhler, in: Köhler/Bornkamm (Eds.), UWG, § 10, Rn.5.

490 BGH, ZIP 1990, p. 511, 512.

491 Schaumburg, *Verbandsklage*, p. 36 ff.

492 BGHZ 133, p. 316, 319; BHG, NJW 1996, p. 3276, 32777; also, OLG Köln, VuR 1995, p. 289 ff.

493 "Verbraucherstreitbeilegungsgesetz vom 19. Februar 2016 (BGBl. I S. 254, 1039)".

494 Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. OJEU L165/63.

495 Meller—Hannich/ Höland, GPR 2011, 168 (172,176).

treated.⁴⁹⁶ The German VSBG is aware of its limited effect as its application field is limited, according to § 4 Sec. 1 VSBG to consumers' contracts in the sense of the § 310 Sec. 3 BGB. Furthermore, this Law finds a big limitation for the collective defence of interests, as does not foresee any proper instrument for collective requests. Thereby, the ADR copy the general principles of German civil Law of individual interests' protection rather than collective ones. Such regulation does not seem proper to deal neither with minor damages neither with massive damages. In order to succeed, an alternative dispute resolution system must count as reflex for its effectiveness with a legal ordinary procedure, which makes attractive to potential defendants to resort to its extra judicial instrument. As long, as there is not a proper collective redress system incorporated to ordinary civil Law, does not seem to have much sense to develop alternative dispute resolutions mechanisms. Therefore, no further analysis will be dedicated in this work to this regulation.

3. Collective instruments in Germany

3.1 Main types

In Germany, there are basically 3 kind of collective redress instruments: *Verbandsklage*, *Gruppenklage* and *Musterklage*.⁴⁹⁷ By the *Bündelungsmöglichkeiten* gathered on the ZPO, every affected party will take part in the process.⁴⁹⁸ By means of a *Verbandsklage*, a legal recognized organization is responsible for the enforcement of supra individual alien interests, are limited to certain specific areas by statute and are an anomaly in the German civil procedure, as there is not a general legal provision which allow this kind of suits.⁴⁹⁹ These are present in consumer and environmental protection, labor law and industrial property.⁵⁰⁰ A *Verbandsklage* based on collective consumers interests affect consumers as a whole. Directly will be considered the collective interest, the individual consumer will only be benefit in an indirect way, as no subjective individual interest will be considered (might improve its position through a collective interest based claim as he is part of the consumers collective). These kinds of actions provide merely a so called negative defense. It is not oriented to provide a reparation to the victims, rather to prevent similar unlawful acts in the future.⁵⁰¹

As opposite, by means of a *Gruppenklage*, **specific individual rights will be sustained, not of third parties but of affected ones.**⁵⁰² Affected consumers sue together against the same damaging act of a company.⁵⁰³ There are criteria of efficiency justifying binding individual interests in the same process. The background for this claim is the individual reparation. There are basically two option for the configuration of the *Gruppenklage* which depends on the binding effects of the decision; the so-called opt-in or opt-out model. Regarding the representation of individual claimants, it could be done by a private litigant (as in the American class actions), by a representative elected by the group,⁵⁰⁴ or by an *Interessenverband*.⁵⁰⁵

496 So, *Frank/Henke/Singbartl*, VuR 2016, 333 (335).

497 Publications such "Die *Verbandsklage* in der Information and Dienstleistungsgesellschaft" von Micklitz /Stadler include all the collective redress instruments available in German civil law.

498 *Scholl*, Kollektiver Rechtsschutz im Kartellrecht, p.115.

499 *Karlsgodt*, World Class Actions: A Guide to Group and Representative Actions around the world. Paul G. Karlsgodt, p. 395.

500 *Koch*, Non- class group litigation under EU and German Law, pp. 281-296.

501 *Stadler*, JZ 2009, 121, (126).

502 *Alexander*, Gemeinschaftrechtliche Perspektiven der kollektiven Rechtdurchsetzung, pp. 683,688.

503 *Tamm*, EuZW 2009, 439 (440).

504 *Stadler*, Bündelung von Verbraucherinteressen im Zivilprozess, In: Brönneke, Tobias (Ed.), Kollektiver Rechtsschutz im Zivilprozess, p.1.

In between the *Verbandsklage* and the *Gruppenklage* exists in Germany an original instrument, the *Musterprozessführung*. **By means of this instrument, individual determinable interest might be enforced, serving it as signal effect for the whole legal practice.**⁵⁰⁶ Massive relevant damages-based claims demand normally a high cost procedure to manage a lot of several evidences and legal questions which are similar as well. This lasts so good the claimant as well as the Court both in the quantitative and qualitative aspects. These handicaps could be mitigated by means of a *Musterverfahren*. By means of this kind of action, multitude of small quantity-based claims could be sustained.⁵⁰⁷ The *Musterklage* seeks to serve as precedent case, translatable to similar cases. Such claim is regulated in Germany in the VwGO (§93), not in the ZPO.⁵⁰⁸ In the German KapMug is also included under specific requirements.⁵⁰⁹ The binding effects of injunctions claims based in the §§ 10, 11 UKlaG, *Musterverfahren* of the KapMuG and those similar, next to the concentration of procedures before the same court § 6 UKlaG, §§ 32a, 32b ZPO, § 14 UWG (§§ 87-89 GWB) shall mitigate the quantitative and qualitative last and costs of this cases. Their efficiency shall be measure in its suitability to disburden claimants and court in cases of massive big damages.⁵¹⁰

3.2 *Verbandsklage* repertory

As per the previous considerations exposed in connection with the legal nature of the German Law, the so called *Verbandsklage* is the central collective redress figure in this country. It serves primarily the enforcement of the legal order in the field of competition, unfair contract term conditions and consumers protection by means of a so called *negative protection of consumers*.⁵¹¹

3.2.1 UWG

The Unfair Competition Act of 1896 (UWG),⁵¹² described as strong individualist and liberal, entitled industrial associations to claim based on unfair advertisement. Legal standing was granted to competitors, as well as associations for promotion of industrial interest, but not to consumers' associations.⁵¹³ Primarily, the UWG referred to several activities between competitors which could be considered unfair and can be punished. Blanks were fulfilled with the resort to the general civil law, (§ 826 BGB and § 823 BGB).⁵¹⁴

505 Stadler, *Musterverbandsklage nach künftigem deutschen Recht*, in *Festschrift für Schumann*, p. 465; Burkhardt, *Auf dem Weg zu einer class action in Deutschland?* p. 21.

506 Burkhardt, *Auf dem Weg zu einer class action in Deutschland?* p. 22.

507 Scholl, *Kollektiver Rechtsschutz* p.119

508 Scholl, *Kollektiver Rechtsschutz*, p.120.

509 Stadler, *Grenzüberschreitender kollektiver Rechtsschutz in Europa*, 121, 122.

510 Meller-Hannich, *Effektivität kollektiver Rechtsschutzinstrumente*, p. 12 ff.

511 Stadler & Micklitz, *Die Verbandsklage*, p. 19.

512 Reichsgesetz v. 27.5.1896, RGBI, p.145.

513 Art. 13. UWG 1896 „...*Verbänden zur Forderung gewerblicher Interessen*“. Previously, in this field, and the german case law tended to consider that setting up some standards of fairness could jeopardize the just recognized freedom of enterprise *Reconocida en el territorio del II Reich con su nacimiento en 1871*. Volker Emerich, *Unlauterer Wettbewerb*, C. H Beck 6. Auflage München 2002. P. 9. It was negative, as which did not help to prevent the formation of cartels RGZ 38, 155 del 4.2.1897. For the german judges of the II Reich, the term unfair competition was proper of the French Law and alien to the German one. RGZ 3, 67(69); 18, 93 (99ff); 20,71 (75f); This trend was modulated by important decisions such the case *Apollinaris*. Here was recognized that violations against the protection offered by law such the trade marks Law could assume a case of unfairness and be opposite to the general interest.

514 However, the German judges opt for the *scholastic reasoning* and use the *argumentum a contrario*: those behaviours not expressly forbidden are allowed, so that not even the § Art. 1382 BGB could be used. See Emerich, *Unlauterer Wettbewerb*, p. 13 ff.

In 1909, the UWG incorporated a general “good faith” clause against those unfair behaviors which causes a damage, independently of its previous recognition in a separate legal text. Thereby, a substantive basis was granted in a sectorial regulation, solving the lack of application by the German judges of the general regulation for damages of the § 823 BGB.⁵¹⁵ By establishing the model of a general clause based on “*Sittenwidrig*” § 1 UWG,⁵¹⁶ Germany adopted the model that several European countries will follow.⁵¹⁷ Despite of some initials reservations of the German judges, by the 20 ´s the “good faith” clause will be generally applied, becoming the § 1UWG the *Jew of the crone in this field of law, supported by the little general clause of the § 3 UWG*.⁵¹⁸

The *Verbandsklage* were limited to unfair activities derived from advertisement contrary to the moral or good custom *sittenwidrige Werbung*.⁵¹⁹ Only competitors where protected, so good individually considered as well as organized in associations of industrial interest. The interest to be protected were those based on the freedom of enterprise. The first step into the „legalization” of consumers’ interests⁵²⁰, was reached with the introduction of the § 13 UWG in 1965. Thereby is explicit recognized the social dimension of the UWG.⁵²¹ A 3 stage protection structure were configured: observation of the rule of law and public interest, defense of competitors’ interest and defense of consumers’ interests. These represent the modern standards of a competition law.⁵²² It still had important restrictions, as was limited to those behaviors against activities prohibited in the § 1 UWG, which lead to an essential damage to consumers’ interests,⁵²³by means of an injunction claim.

In 2004, the UWG⁵²⁴ suffered a big reform, looking for the modernization and liberalization of the field of Law. ⁵²⁵ The concept of the former §1 UWG, “*Sittenwidrigkeit*”⁵²⁶ were substituted by „*unlautere Wettbewerbshandlungen*.” As procedural newness, the reform incorporated into German Law the figure of the *Gewinnabschöpfungsanspruch* (confiscation of profits) of the § 10 UWG. By means of this figure, who intentionally obtains a winning as a result of the violation of the general clause of the § 3 UWG, could be sued and possible monetary recovery will be given to the German federal budget. With the approval of the Directive on unfair commercial practices,⁵²⁷ the EC seek the harmonization of relationships between consumers and corporations in the European room, as a subsidiary instrument to the unfair competition

515 Tzakas, ZEuP 2009, 443 (444).

516 Former § 1 UWG, and former § 3UWG.

517 Spain, Art. 5 LPC, art. 6b LGP; Austria §1 UWG, Denmark §MFL, Sweden, Sec. 4 Para. 1 MFL, Finland, Chap 2 1 para. 1 §KSL y §SopMenl. Portugal, Antigo Art. 260 CPI, Greece Art. 1 Ley de Competencia Desleal, Luxemburg, Art. 16 Loi du 27 Novembre 1986 régleme...la concurrente déloyale, Swiss, Art. 2 UWG

518 Emmerich, Unlauterer Wettbewerb: ein Studienbuch, § 1 Rn.15.

519 Schaumburg, Die Verbandsklage im Verbraucherschutz – und Wettbewerbsrecht. p. 24 ff.

520 BGB1.I 1965, p. 625; see Keßler, WRP 1990, 73 - 85

521 Gloy, W., Loschelder, M., Erdmann, W., Ahrens, H.-J., Melullis, K.-J., & Ungern-Sternberg, J ; *Handbuch des Wettbewerbsrechts*, §21 Rn.45.

522 Schaumburg, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, p.24.

523 “*Wesentliche Belange der Verbraucher Berührt*”.

524 Gesetz gegen den unlauteren Wettbewerb (UWG) vom 03. Juli 2002, BGB1, p. 1414.

525 Specific to the matter see Haesen, Der Schutz gegen den unlauteren Wettbewerb in Deutschland und England, p. 15 ff.

526 Contrary to moral or good uses.

527 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. DO L 149/22 de 11.06.2005.

rules.⁵²⁸ This Directive incorporates a list of activities which can be considered unfair, a black list. The adoption of such list was object of important discussions in Germany.⁵²⁹ The UWG maintained its structure. The transposition of the Directive affected the § 3 UWG „*Schwarze Liste*“ and § 5 UWG.

3.2.1.1 Legal nature

As per the § 1 UWG the Law is oriented to protect the general interests of the parties of the market (consumers and competitors) as well as the general interest of the society in a fair competition frame. The injunctions claim of the UWG is based, according to most the German academia, in an own legal standing to enforce material Law.⁵³⁰ As per the legal standing granted in the UWG and in the UKlaG the associations are holders of the legal standing. It is not a case of representative action, the association does not act in name of their members, or in name of a cumulative individual interests, it is entitled by the collective interest in having a fair competition.⁵³¹ The big reform of 2004 closed previous discussions about the previous redaction of the UWG.⁵³² **It will be legally clarified that these kind of claims will be considered as a material right in favor of associations, they count with material legitimization.**⁵³³ The action for recovery of unlawful earnings (confiscation of profits) will be considered as well as an action derived of material Law, as per the formulation of the § 10 Abs. 1 UWG (“*kann [...] in Anspruch genommen werden*”).⁵³⁴ It will be discussed if this claim can be subsumed within the current legal frame and if the existence of an own material basis to claim in favor of associations is compatible with the principles of the German civil Law.⁵³⁵ Namely will be questioned if these pretensions are equal to the classic individual legitimization of the § 194 Abs. 1 BGB or if these pretensions are of different nature. For some authors, the statement of the law maker lacks justification. **The fact that the entitle associations must be included in a list of qualified institutions seems to be incompatible with a consideration of entitlement based on a material Law.**⁵³⁶

3.2.1.2 Available instruments

The law gathers 4 kind of actions. The injunctions, removal (§ 8 UWG), and restitution of unlawful earnings (confiscatory earnings) can and must be lodged by the qualified entities. The damage claim which cannot be collectively lodged (§ 9 UWG).⁵³⁷ **The main difference with the Spanish equivalent regulation is regarded to the entitlement. In Spain, any affected individual or entitle association can lodge any kind of action, even for damages.**⁵³⁸

528 *Schaumburg*, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, p. 32.

529 *Schaumburg*, Die Verbandsklage im Verbraucherschutz und Wettbewerbsrecht, p. 32, *Köhler*, GRUR 2005, 793 (797).

530 See *Teplitzky / et al*; *UWG Grosskommentar*, Kommentar zum UWG, § 1 Rn. 247.

531 Thereby is by the law maker the discussion about the nature of the legal standing closed.

532 *Greger*, NJW 2000, 2457 (2462).

533 BT- Drucks. 15/1487, p. 22.

534 *Schaumburg*, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrech, p.39 ff.

535 Further in *Säcker*, Die Einordnung der Verbandsklage.

536 *Schaumburg*, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrech, p. 40.

537 *Teplitzky /et al*; *UWG*; *Grosskommentar*, Einleitung, Rn. 147.

538 See Spanish Part of this work for more details.

3.2.1.2.1 Injunction and removal claim

As central axis of legal sanctions in unfair competition appears the injunctions claim. These have been mostly used extra judicially, as a persuasion measure.⁵³⁹ The injunctions claim seek to suppress a determinate infraction act, is oriented to prevent coming unlawful activities, to avoid its repetition in the future, while the removal claim (*Beseitigungsklage*) is oriented to suppress a long-term infraction, an already occurred damage. The damage or risk situation must be current., at least shall be present by the time of the last oral hearing. If the origin of the damage disappeared, disappears the *Anspruch* as well.⁵⁴⁰ The expression must be false to be potentially removed.⁵⁴¹

Legal standing against the non-compliance are foreseen in favor of competitors, legal personality associations to promote industrial or self-employee interests, qualified entities (§ 8. (3) 1-4 UWG), as well as industrial and commerce chambers (§ 4 UKlaG). The current rules of the UWG regarding legal standing are very like the provisions of the former § 13 UKlaG.⁵⁴² Qualified institutions of consumers will find standing in the same conditions than in the UKlaG. The UWG expressly linked two laws. (§8.(3).3 UKlaG) and § 8 Abs. 5 UWG will be directly linked to the § 13 UKlaG. The recognition of consumers' protection is stated in the § 1 UWG. A requisite is the registration before the *Bundesamt der Justiz* as per the § 8 (3) 3. is to fulfil the requisites of the § 4 UKlaG. The association must count with legal capacity, cannot operate industrially, and must care about general consumers' interest permanently, not momentarily. The list will be published one / year.⁵⁴³ For consumers, the most relevant unfair activities are associated to misleading advertisement, normally regarded to aggressive forms of publicity, which has a higher impact in the private area of the consumer (such private marketing, spam, etc.).⁵⁴⁴ Relevant actors are the Zentrale zur Bekämpfung des unlauteres Wettbewerbs in Bad Homburg, as well as the Verbraucherzentrale Bundesverband. The percentage of enforcement is based 2/3 in Economical associations and 1/3 consumers' associations.⁵⁴⁵ Despite of the legal regulation, the injunctions entitlement has been mostly exercised extra judicially.⁵⁴⁶ The § 12 UWG includes the procedural rules. As per the 12.1 UWG it is foreseen a written call to order *Abmahnung* before lodging the claim, which has been used as a highly efficient and cheap procedure. In the § 13 UWG will be considered the *Landgericht* as competent court. The § 14 UWG regulates the local jurisdiction (the place where the defendant its industrial or *selbständige* domicile have). In the rest of cases will be the committing place § 14 Abs. 2 UWG (the judge of the place where the action happened).

As per the requisites contained in the UWG, the injunctions claim can be exercised against any general unfair trade practice according to the 3 § UWG or against §7 UWG as well as against the examples of the § 4UWG. The catalog included in the law shows how

539 See *Falckenstein*, WRP 1978, 502-505.

540 Retractions as special form of the *Beseitigungsanspruch* Is oriented to remove present negative effects. In the praxis, it is related to *Rufgeschäfts* or *Kreditschädigende Ausserungen*. Characteristic is the material character of the manifestation. The revocation of expressions, which only are a opinion is protected by the Art. 5.1 GG. The differentiation of one or another will be based on the content of the expresion, and how it will be understood in the traffic circle.

541 *Fezer/ et al; Lauterkeitsrecht, Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG) Bd. 2 §§ 5 - 22., 3 Aufl; §8 Rn. 29.*

542 Exhaustiver *Stadler*, WRP 2003, 559 (562).

543 *Köhler/ Bornkamm*, UWG Kommentar, Aufl. 25, § 8 Rn.3.52.

544 *Stadler & Micklitz*, Die Verbandsklage, p. 20.

545 *Ibidem*.

546 ¾ of these entitlements for injunctions were enforce extrajudicially, furher in *Falckenstein*, WRP 1978, 502 (505).

the law maker seeks to configure the UWG transparently. With the general clause of the § 3 UWG the law maker takes distance from the concept of „*guten Sitten*“ which dominated the previous UWG.⁵⁴⁷ In order to consider a determinate act as unfair, it must be a relevant harmful act. *Bagatellchaden* (minor damages) are to let out of the unfair competition law,⁵⁴⁸ nevertheless, when it affects a plurality of consumers, this requisite is given.⁵⁴⁹ The harmful act is objective to be considered: *Verschuldensunabhängig*.⁵⁵⁰ Requisite for the injunctions claim of this paragraph is a succeed violation of the § 3 UWG. The specific harmful act must be objective unlawful and current to the time of the decision, as it has effects over the future. If the act disappears, the claim will be rejected. Next to an objective harmful behavior, the risk of future damages must exist.⁵⁵¹ This was a previous unwritten requisite which now is gathered in the § 1.1 UWG. Requisite for the action is that a serious and possible risk of repetition exists, in the same or a similar way. It shall exist by the time of the last contact between parties.⁵⁵² In competition field it exists a general presumption of repetition, which can be hardly removed.⁵⁵³ An important aspect of such claims is the binding effects of the decision. A wide decision will allow the claiming association to extend the case to others similar being a narrow interpretation a barrier for that. In the practice, the courts will make a narrow scope of their decisions.⁵⁵⁴ The injunctions claim of the UWG, conducts effects only in the future, and must be fulfilled with other legal instruments to compensate the damages that already emerged. It appears also problematic to set up the monetary value of the lawsuit.⁵⁵⁵

With these instruments, the association enforce a limited material right.⁵⁵⁶ Having into account, that the injunctions claim only act for the future, the economic advantages derived from a harmful act, remain by the causers side.⁵⁵⁷ Thus, the law maker has the complementary action called *Gewinnabschöpfung*. By means of this kind of claim, the unlawful win or earning will not remain in hands of the causer. Question is if this claim, in its given configuration is useful in the real practice.⁵⁵⁸ Next to consumers' associations, other active bodies have been "*Zentrale zur Bekämpfung des unlauteren Wettbewerbs* en Bad Homburg, as well as the *Verbraucherzentrale Bundesverband* (hasta el 2001 *Verbraucherschutzverein e. V. Berlin*).⁵⁵⁹

3.2.1.2.2 Gewinnabschöpfungsklage

Until the year 2004 the UWG did not allow these kind of actions; thereby any unlawful earning act remains unsanctioned and attractive, encouraging misbehaviors by companies.⁵⁶⁰ It reflected a gap in the German legal protection against massive (minor) damages affecting consumers which was solved with higher legal rationality. This is a

547 Good faith.

548 *Berlit*, Wettbeberbsrecht, 8 Aufl; E8; §§1,2,3, Rn. 16.

549 *Berlit*, Wettbewerbsrecht, 8 Aufl; §§ 1,2,3, Rn. 17.

550 Damage (*Verletzungs Unterlassungsanspruch* § 3 Abs.1 S.1)

551 BGH GRUR 1992, 318, 319- Jubiläumsverkauf; BGH GRUR 1983, 127, 128- Vertragsstrafversprechen.

552 BGH GRUR 1994, 516, 517- Information about emergency services

553 BGH GRUR 2003, 899, 900- Olympiasiegerin; BGH GRUR 1997, 379 (Wegfal der Wiederholungsgefahr).

554 *Stadler & Micklitz*, Die Verbandsklage, p. 21.

555 *Ibidem*.

556 So Teplitzky/ et al., UWG Grosskommentar, § 1 Rn. 4

557 *Stadler & Micklitz*, Das Verbandsklagerecht in der Informations und Dienstleistungsgesellschaft, p. 21.

558 Criticism to the actual regulation of this claim in *Stadler & Micklitz*, WRP 2003, 559 (561).

559 *Stadler & Micklitz*, Die Verbandsklage, p. 20.

560 *Micklitz & Stadler*, Die Verbandsklage. p. 26.

unique instrument which has no antecedent either at the European neither at the German field,⁵⁶¹ and for the first time, the § 10 UWG allow an association for economic recovery.⁵⁶² in the European The reform of the UWG extended standing in favor of associations in order to lodge a recovery claim into German Law.⁵⁶³ The configuration of such mechanism captured the Parliamentary discussions about the amendment of the UWG, as it was a newness for the German law maker.⁵⁶⁴ The reason for the introduction of such claim was based on the “*rationelle Desinteresse*” of the affected consumers in order to suit. Thus, the lack of enforcement jeopardizes the directive function of the tort law.⁵⁶⁵ This German specificity, which is not to be found in the comparative Law,⁵⁶⁶ is the middle point between the traditional *German Verbandsklage* limited to injunctions, and a damage action, which have been over and over discard in Germany as some aspects such calculation and distribution of damages, dealing with multitude of claims and probably abuses appears as insuperable for the Germany consideration.⁵⁶⁷In the configuration of this claim, will be decided that the money obtained in the recovery will go to the federal budget, although the holders of the pretension are the associations.⁵⁶⁸ In fact, the removal of unlawful earnings were already gathered in the GWB (&34 GWB). In the GWB was a prerogative of the public institution *Kartellamt*, to increase the level of competition in the market. It is not a case of *Prozessstandschaft*. It is hard to classify these sort of claims within tort law, as the compensations will not be recovered by the affected parties, not even by the claimant. For authors like Schaub, it is not classifiable and is a kind of *sui generis Anspruch*.⁵⁶⁹

These kinds of claim pursue covering the enforcement deficit in the cases of minor damages. Therefore, a company responsible of the unlawful act is obtaining a non-lawful benefit, and keeping it, as nobody will sue against her.⁵⁷⁰ Companies which act unlawfully and obtain a benefit may be sued by qualified institutions, as well as by the chambers. To avoid abuses, the recovered amounts will be integrated in to the Federal Budget. It has not a punitive character, it is an instrument to neutralize injustice earnings.⁵⁷¹This instrument is not a damage recovery action, rather more is though for a multitude of consumers which suffer a (minor) damage due to an *Wettbewerb* infringement.⁵⁷² The unlawful earning must be connected to a loss of the consumer. It shall discount all the quantities already paid or granted to third parties. (§ 10 UWG abs. 2). The individual interest has prevalence. Only after the enforcement of individual rights to recover damages, will apply this claim. Paid damages of the action damages will be considered, but no the costs of the procedure (lawyers fee, court costs, etc...). As the associations are supported partially by public means, it would justify that the amounts recovered by the activity of the associations returns to the German Federal Budget. The association could recover the money invested to enforce their pretensions.⁵⁷³

561 Sack, Beitrage - Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle, pp. 549,550.

562 Exhaustiver see Stadler & Micklitz, WRP 2003, 559 (560).

563 Stadler & Micklitz, WRP 2003, 559 (560); Wimmer-Leonhardt, GRUR 2004, 12 (16).

564 See Alexander, JZ 2006, 890 (891).

565 Reasoning to law RegEntwurf of UWF, BT Drucks, 15/1487, p. 23. See Micklitz / Stadler, Unrechtsgewinnabschöpfung 2003, p. 34; Stadler & Micklitz, WRP 2003, 559-562.

566 Köhler in: Köhler/Bornkamm, UWG, § 10 UWG, RdNo. 3.

567 Säcker, Die Einordnung der Verbandsklage, Rn 29.

568 Micklitz & Stadler, Die Verbandsklage, p. 29 also Wimmer- Leonhardt, GRUR 2004, 12 (16).

569 Schaub, GRUR 2005, 918 (922).

570 Köhler, GRUR 2003, 265, (266).

571 Köhler, GRUR 2003, 265 (266).

572 BT Drucks 15/1487, p. 23.

573 BT Drucks 15/1487, p. 23

Any damage suffered by the side of consumer will sustain the claim, even those cases in which its situation is somehow negatively affected. In case of dispute about the damage suffered, the § 287 ZPO, will apply.⁵⁷⁴ Individual actions for recovery lodged by individual have preference over these claims. What is *Gewinn* (winning) is not specified by the law. It happens when a patrimony loss takes place in the side of consumer.⁵⁷⁵ As per the reform of the UWG, associations, qualified institutions as well as the chambers are entitled to claim companies in order to recover obtained earnings at cost of a multitude of consumers. Associations and institutions in the sense of the § 8 Abs. 3 No. 2-4 are entitled to lodge unlawful recovery action in favor of the German Federal Budget for those practices contrary to the § 3 UWG.

In order to lodge this claim, following requisites are mandatory:

- 1.- It must be an unlawful misconduct
- 2.- The competition act must drive to a loss of the damaged parties (systematic behavior)
- 3.- The arisen damages must be at the cost of the consumers

As per the formulation of the law „ *zu lasten einer Vielzahl von abnehmern*“⁵⁷⁶ the unlawful earning and the consumers' loss shall be connected.

Even though this claim is thought to face massive damages, individual reparations of consumers or competitors have preference. This is made clear in the second paragraph; the federal budget will reimburse the debtor.⁵⁷⁷

The introduction of this instrument is mostly considered as a civil instrument. Nevertheless, for some German authors, due to its legal consequences it might be considered so good civil as well as criminal rule. So, in the bill of law, the § 10 UWG it has been spoken of its sanction character.⁵⁷⁸ Such privatization of the penal entitlement could be incompatible with the principle *non bis in idem* of the Art. 103 Abs. 3 GG, as this sanction is already foreseen in the §§ 73 ff StGB (Gewinnverfall).⁵⁷⁹ Therefore, for some German authors this regulation would be considered contrary to the German constitution.⁵⁸⁰ Some authors consider that due to the privatization of the criminal law,⁵⁸¹ this rule would be the basis for the enforcement of American class action (which recognize punitive damages), against German corporations.⁵⁸² The BGH already failed in 1992 that a claim based on public interests will not justify damages, if these are not given

574 Section 287 ZPO Investigation and determination of damages; amount of the claim: (1) Should the issue of whether damages have occurred, and the amount of the damage or of the equivalent in money to be reimbursed, be in dispute among the parties, the court shall rule on this issue at its discretion and conviction, based on its evaluation of all circumstances. The court may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be involved to prepare a report. The court may examine the party tendering evidence on the damage or the equivalent in money thereof; the stipulations of section 452 (1), first sentence, subsections (2) to (4) shall apply *mutatis mutandis*. (2) In the event of pecuniary disputes, the stipulations of subsection (1), sentences 1 and 2, shall apply *mutatis mutandis* also to other cases, insofar as the amount of a claim is in dispute among the parties and to the extent the full and complete clarification of all circumstances authoritative in this regard entails difficulties that are disproportionate to the significance of the disputed portion of the claim.

575 The motivation of the UWG refers to the § 278 ZPO (Motivation to § 10 Abs. 1 UWG).

576 „To expenses of a lot of consumers“.

577 More about this in Micklitz & Stadler, *Verbandsklage*, p. 31.

578 Referentenentwurf vom 23.01.2003 zur UWG Novelle, p. 47. See *Oppermann/Müller*, GRUR 2005, 280 (282); *Sack*, BB 2003, 1073, (1080); *Wimmer-Leonhardt*, GRUR 2004, 12 (16).

579 *Sack*, WRP 2003, 549 (553).

580 See *Wimmer-Leonhardt*, GRUR 2004, 12 (14), *Sack*, WRP 2003, 549 (552).

581 *Engels & Salomon*, WRP, 2004, 32 (43).

582 BGHZ 118, p. 312, 338 ff.

to injured parties.⁵⁸³ Very few associations will enter into the risk of claiming, as the risks overpass the benefits. It has been proposed a monetary fund to support these associative claims.⁵⁸⁴

Another critic is based on the lack of preventive effect. If the claim is oriented only to recover such earnings arising from an unlawful act (no punitive damages) this claim has a clear lack of prevention effect. As the company, in the worst-case scenario will give back unlawful earnings.⁵⁸⁵ Incentives for misbehavior of the corporations in their relationship with consumers remains. This claim is though for cases of minor damages, but not always a lack of rational interest of claiming correspond to a minor damage. The damage can be relevant, but the consumer could still have some reserves before suit against big companies. Therefore, it depends on the activity of the association, but in any case, the affected consumer will not receive a reparation directly. **Probably the most conservative characteristic of this kind of claims, to prevent abuses, is that the recovery will go to the Federal Budget.** Some voices considered that it is a fair solution, as the acting of the association will be in part supported by the public budget.⁵⁸⁶ In order to avoid a total lack of incentives from the associations side, these are entitled to recover the expenses in the process from the federal budget, unless these costs are recovered by the opposite part. One substantial point is that the recovery action implies a loss of risks for the association. The association is assuming a big risk when claims, burning resources needed to support further claims. **The associations have to borrow all the costs of the procedure in case of losing the trial, thus, in the practice just a few associations will be in position to take these risks.**⁵⁸⁷

3.2.2. AGBG

The AGB- Gesetz from 1976 included an association claim in favor of consumers' associations in the §§ 13 ff. This claim was limited to the contractual relationships, and only have effects related to the contract.

It was not a general granting of standing. Other parties were not allowed to appeal to the decision fallen in a precious association claim, but the decision fall have *res iudicata* effects. The provisions of the AGBG were imported to the UKlaG (§ 1). As per the § 11 UKlaG, the two parts procedure, will be extended to any affected part of the challenged AGBG per the § 11 UKlaG any third part, even if was not part of the process, can appeal to the material Law of the decision fallen in these claims.⁵⁸⁸ Associations granted with legal standing were the same than in the unfair competition law. This law reflected the transposition of many European Directives in the field of consumers' protection.⁵⁸⁹ Requisite for these claims is that the collective interest of consumers has been affected. The consumers' association count with not only with a procedural standing, they count with own material legitimation. There are not based in the subjective rights of

583 BGHZ 118, p. 312, 328.

584 Stadler & Micklitz, Das Verbandsklagerecht in der Informations und Dienstleistungsgesellschaft, p. 32 ff.

585 See Micklitz & Stadler, Unrechtsgewinnabschöpfung- Möglichkeiten und Perspektiven eines Kollektiven Schadenersatzanspruchs im UWG, p. 51; also, Stadler, WRP 2003, 559- 562.

586 BT Drucks, Proposition Motivation, 15/1487, p. 25, so Micklitz/Stadler, Die Verbandsklage, p. 29 ff.

587 Stadler & Micklitz, WRP 2003, 559 (561), they propose the creation of a claiming fond in order to mitigate the risks associated to the trial.

588 Vogel, Kollektive Rechtsschutz in Kartellrecht, p. 147.

589 The most relevant one is the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55.

consumers, but *in the control of the material objective law*.⁵⁹⁰ The ratio of the German AGB- Gesetz of 1976 was to improve to optimal standards the defence of consumers' interests.⁵⁹¹ The German law maker choose a posterior control of that clauses. In the § 13 UWG are granted with legal standing those who take part in the market relationships, Wirtschaftverbände, consumers and *Kammern*. In 1987, the UWG was light amended. The legal standing was extended to *Industrie – y Handelskammern*, as well as to the *Handwerkskammern* § 13 Abs. 2 UWG. This extension was incorporated also to the AGBG, § 13. Abs.2 No. 3.⁵⁹² Previously was incorporated a paragraph into the law to prevent baseless claims (§ 13 Abs.5). The big reform of the UWG of 1994 follow this inclination of avoiding baseless claims, and increase the requisites in order to sue, following the view of the German case law.⁵⁹³ Further requirements were demanded from the associations, such a minimum number of members, or requiring a substantial affection of the market in order to accept this claims, which seems to be a measure proper of the antitrust policy,⁵⁹⁴ rather than of unfair competition.⁵⁹⁵ The amendment to the UWG were not extended to the AGB- Gesetz, fact that derives in a minor thoroughness in the field of general contract conditions. The lack of harmonization was not solved by means of the case law. As per the decision of the BGH of 8th October 1997⁵⁹⁶ considered that there was not a legal blank that needed to be fulfil by judicial application of analogy. There was not a necessity of extend the limitation of one law to the other.

3.2.3 UKIaG

As per the Directive on Unfair terms in Consumers contracts,⁵⁹⁷ member States are required to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts with consumers by sellers or suppliers. Such means shall include provisions whereby “persons or organizations, having a legitimate interest under national law in protecting consumers” may take actions according to national law before the courts or administrative tribunals for a decision on whether contractual terms drawn up for general use are unfair, so that appropriate and effective means to prevent the continued use of such terms can be applied.⁵⁹⁸ As at 2000, the above provision had been implemented in different ways by Member States. In some states only consumer associations were entitled to seek injunctions, whereas in others the initiative could be taken by a regulator responsible for upholding the public interest, such as the Office of Fair Trading (OFT) in the UK, or the Director of Consumer Affairs in Ireland, the consumer ombudsman in Nordic states, and the *Verbraucherschutzvereine* in Germany, and the relevant Ministry in Spain and in Portugal.⁵⁹⁹ In its 2002 Green Paper, the Commission

590 *Meller-Hannich*, Verbraucherschutz im Schuldvertragsrecht: Private Freiheit und staatliche Ordnung, p. 285.

591 In order to reach that, it was proposed to include a preventive previous control of general contract conditions by the central State. This idea was let aside, as it implies a huge administrative effort, and such previous control stumble against the principles of free enterprise and market economy.

592 Estas modificaciones no fueron relevantes, ya que los nuevos legitimados no han sido muy activos. De hecho en el ámbito de AGBG nunca han interpuesto una sola demanda. Ver *Ulmer/ Brandner/Hensen-Hensen*, AGBG § 13 Rn. 42.

593 BGH, GRUR 1958, 544.

594 “...geeignet ist, den Wettbewerb auf diesem Markt wesentlich zu beeinträchtigen”.

595 Schaumburg, *Die Verbandsklage im Verbraucherschutz und Wettbewerbsrecht* p. 27.

596 BGH, NJW 1998, p. 454 ff.

597 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ L 95, 21/04/1993, p. 29–34.

598 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts OJ L 95, 21.4.1993, p. 29–34 art 7.1.

599 Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, COM (2000) 248, 27.4.2000. France and Belgium have created

noted that the UK system, in which the OFT was involved, was notably effective in reaching compliance, in both qualitative and quantitative terms, including through direct negotiation that might avoid the necessity for court action and costs.⁶⁰⁰

The reform of the liability law in Germany in the year 2001 resulted in the derogation of the AGB- Gesetz and the approval of the UKlaG.⁶⁰¹

The approval of the Directive 98/27 CE,⁶⁰² known in Germany as *Unterlassungsklagerichtlinie*, aimed to improve the access to justice of consumers in the whole EU.⁶⁰³ The ratio was to reach a free circulation of injunctions claims within the EU.⁶⁰⁴ The material law basis was the so-called *Consumers Directives*. The transposition of the Directive into the German law was done in the 2000 by the Art. 3 de la “Gesetz[es] über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro.”⁶⁰⁵ As per the transposition into German Law of the Directive about author rights,⁶⁰⁶ (*Urheberrechtsrichtlinie*) in the year 2003, the Art. 3 de la “Gesetz[es] zur Regelung des Urheberrechts in der Information und Dienstleistungsgesellschaft,”⁶⁰⁷ incorporates the §§ 2^a y 3^a UKlaG. It was established that a violation against the § 95 b Abs. 1 UrhG could be a material basis to support an injunction claim, which can be lodged by those associations included in the § 3^a UKlaG. Unlawful activities related to general contract conditions which can be challenged by means of an injunction or removing claim were incorporated to the §§ 307-309 BGB, and §1 UKlaG, which also regulates in its § 2 the injunctions claim against those activities against consumers’ interests. The § 3 is dedicated to the legal standing.

§§1- 4 treats possible pretensions, the legal standing, and the registration procedure before *the Bundesverwaltungsamt*: §§ 5-12 procedural aspects, and the § 15 expressly lets out the labor field, to avoid unions to use these claims to negotiate salaries.

As per the reform of the § 13 Abs. 2 AGBG, the *Verbandsklage* pretensions of the associations will be consider based on an own entitlement according to most the German academia, based in an own material legal standing of the association. The § 3 Abs. 1 UKlaG maintain that the pretension of the associations belong to them. The association is not only allowed to represent (alien) pretensions before the court, as counts with own entitlement.⁶⁰⁸ With this law, the associations can enforce a limited material right granted to them. It is not a kind of procedural representation. It is not a case of enforcement of alien

collegiate bodies whose main mission is to recommend the elimination of unfair terms, and the courts are reported to refer to the recommendations of these bodies in their Judgments. Data showed a difference in approach, with Germany, Austria, France and the UK predominantly adopting preventative actions, which were rarer in Belgium and Spain, and unknown in Ireland and Luxembourg, where the approach was on individual actions.

600 The Report said that the OFT had moved from a situation of no prior regulatory control in the field of unfair terms to examining over 800 cases annually.

601 Gesetz über Unterlassungsklagen bei Verbraucherverrechts- und anderen Verstößen vom 26. November 2001, BGB1. I, p.3173.

602 Official Journal of the European Communities No. L 166/51.

603 Commission Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market. COM (93) 576

604 COM (93) 575 fin. p. 87 ff.

605 BT- Drucks 14/2658, p. 8f.

606 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, DO L 167 de 22.6.2001, p. 10/1.

607 Gesetz del 10 Septiembre 2003, BGB1, S. 1774, in force since 1st september 2004.

608 As per the clear formulation of the law in the § 3 Abs. 1 UKlaG “Die in den §§1 und 2 bezeichneten Ansprüche auf Unterlassung und Widerruf stehen zu.” Fn. In Micklitz/Stadler, Die Verbandsklage, p. 21

rights in own name (*Prozessstandschaft*).⁶⁰⁹ The passing on of this *Gesetz* means an advance into the modernization of the liability law in Germany.⁶¹⁰ This law is the torso of the procedural rules gathered in the AGBG,⁶¹¹ in the UKlaG will be for the first time separated the material and procedural rules. For German scholars, despite the newness, the law maker missed the opportunity to incorporate new forms of collective redress instruments.⁶¹² Legal standing in the UKlaG is granted to qualified institutions (Institutions of the § 4 UKLAG or of the Art. 4 of the Directive 98/27/ EC whose aim is the protection of consumers' interests),⁶¹³ industrial's associations (§3(1) 2 UKlaG) as well as the Trade and Industrial chamber (§ 3(1).3 UKlaG). As per the regulation of the § 3 Abs. 1. 2 and § 3a. 2 UKlaG cessions are regulated. Entitle associations can transfer the legal standing to other associations which are already entitle. It seems that the intention of the law maker is to avoid the commercialization of these pretensions., prohibiting as general rule the transfer, and considering the articles that allows that as exceptions.⁶¹⁴

The §§ 1- 4 are dedicated to the pretensions (*Ansprüche* §§ 1,2 UKlaG), the holders of the entitlement (§ 3UKlaG) as well as the registration process before the *Bundesverwaltungsamt* (§4UKlaG). The §§ 5-12 UKlaG gather the procedural rules.

The labor legislation is expressly excluded of the application of the law (§15 UKlaG), to avoid using these claims as a labor wages negotiation instrument.⁶¹⁵

- *Unterlassungsklage* § 1 UKlaG

The § 1UKlaG transposes unmodified the injunctions claim of the former § 13 Abs. 1 AGBG. The former *Unterlassungsklage* of the AGBG finds its correspondent figure in the § 1 UKlaG. Legitimated are qualified associations, (which defend general interests of consumers)⁶¹⁶, as well as the associations of industrial interest, and the *Kammern*. They can lodge an injunction claims against (§ 3 Abs.1 Satz 1 UKlaG) and in case of recommendation of use, a retraction (*Widerruf*). This is foreseen against unlawful general contract conditions, by means of an abstract control based on the dispositions of the §§ 307- 309 BGB.

- *Unterlassungsklage* § 2 UKlaG

This article is divided in the §2 and § 2a. The article § 2 UKlaG transposes the injunctions Directive 98/ 27 EC; it is foreseen against contraventions of consumers' protection rules; a breach of consumer interests' dispositions which were previously incorporated to the former § 22 AGBG. By means of this article, any violation⁶¹⁷ against material protection rules in favor of consumers can sustain the injunctions claim by the institutions with legal standing according to the § 3 Abs. 1 UKlaG. Requires an objective violation of the rules protecting consumers, therefore, it does not matter if the violation is

609 BGH, NJW-RR 1990, 887; NJW 1996, 3276, 3277; Rosenberg/Schwab/Gottwald, § 47 Rn. 10,11; 25, 28 ff.

610 Schmidt, NJW, 2002, 25 (28).

611 Micklitz & Stadler, Die Verbandsklage, p. 21, 22.

612 MünchKomm ZPO/ Micklitz, UKlaG Rn. 2,3.

613 Schmidt, NJW 2002, 25, (26). Fn. 86 p. 22 Micklitz & Stadler, Die Verbandsklage, p. 22.

614 The transfers gathered in the law acquire so a character similar to *litisconsorcio*, as the assignee party count with own entitlement and assigned entitlement. Schaumburg, 1. Aufl. 2006, p. 38.

615 MünchKommZPO/ Micklitz; UKlaG Rn. 14.

616 Schmidt, NJW 2002, 25 (26).

617 Schmidt, NJW 2002, 25, (26).

done by a CEO or just an employee of a corporation (b § 2 Abs. 1 UklaG). Sue will be in any case the owner manager. The § 2a UklaG extend the field of application of the injunctions claim to those violations in intellectual property law, namely against the § 95b Abs. 1 of the German *Urheberrechtsgesetzes* (intellectual property law).

Positive critics are to be found between German authors. Micklitz and Stadler consider that the private enforcement through the activity of associations means an ideal addition to the civil instruments.⁶¹⁸ Säcker even consider that without the associative consumers' injunctions claim it will not be reached a comprehensive consumers protection.⁶¹⁹ Meller-Hannich also consider that these instruments may exceed the lack of incentives by side of the consumer to suit.⁶²⁰ Most claims are lodged by consumers' associations, a limited number lodged by associations for promotion of economic interests, and without relevance the chambers.⁶²¹ As per the limited resources of the consumers' associations its activity is not enough to clean the market of general unlawful clauses. Remains opened in the German academia some discussions related to the principle of the two parties process, such the legal binding effect of the decision, which remains between the parties in the process, as well as the *lis pendens* (pending at law). The § 11 UklaG allows the extension of the decision to another contractual partner affected in the same way. Third contractual parties of a company may use the positive decision in its individual claims, not being the case for negative decisions.⁶²² In the real practice, other companies will apply clauses which already have been declared unlawful in other process sustained against other companies. So, it came the thought if the law need an amendment in order to extend the legal binding effects to other parties which were not present in the procedure.⁶²³ Against this position is the Constitutional right to be heard by the court.⁶²⁴

Main criticisms against these claims are based in the fact that these claims are oriented to the future, but only in relationship to a given act. It has not preventive effect, even it has a contrary effect. If damages are not allowed, the companies will find a good ally in these claims. They can misbehave in the market, being sure, that the party who suffered the damage will only be entitle to stop the unlawful behavior if the *Verband* acts. In any case, no reparations will be granted. Therefore, it lacks deterrence effect, the causer of the unlawful act will not suffer any monetary losses who can keep the earnings derived by the violation of consumers' protection rules. Some authors point that as per the absence of an information claim, the consumer can be unaware that their rights have been damaged. These limitations will be revealed in the case law. The decision of the Court OLG Köln of 31 March 2004, recognized the limitations of the law to protect against abuses in the general contract conditions (AGBG).⁶²⁵

618 *Micklitz/Stadler*, *Verbandsklagerecht*, p. 1185 ff.

619 *Säcker*, *Die Einordnung der Verbandsklage*, p. 76.

620 *Meller-Hannich*, *Effektivität kollektiver Rechtsschutzinstrumente*, p. 268-270.

621 See table in *MünchKomm/Micklitz*, *BGB*, Vor §13 *AGBG* Rn. 36.

622 *Micklitz / Stadler*, *Die Verbandsklage*, p. 23.

623 *Micklitz & Stadler*, *Die Verbandsklage*, p. 23.

624 *Anspruch auf rechtliches Gehör*. German Constitution Art. 103 GG.

625 See OLG Köln, Az. 13 U 192/ 03 announced on the 31 March 2004. In detail, *Micklitz & Stadler*, *Die Verbandsklage*, p. 24, 25. Solutions in *Krüger*, *WM* 2000, 2021-2030.

3.2.4 GWB

3.2.4.1 The 7. *Novelle*

The guiding principle of the 7th reform of the German anti cartel main regulation was to improve the private enforcement.⁶²⁶ In Germany, the 7th Amendment to the German Competition Act, which has been in force since 1 July 2005, replaced the requirement that only persons within the protective scope of the law were entitled to claim damages (Schutznormtheorie) ⁶²⁷ by the “affected parties test” (§33 of the Gesetz gegen Wettbewerbsbeschränkungen– GWB).⁶²⁸ Such amendment have improved the private enforcement in this country in this specific area of law.⁶²⁹ Lately, the Supreme Federal Court of justice has recently decided in the ORWI case that indirect purchasers are entitled to claim damages.⁶³⁰

The removal action was included in the article § 33.1 GWB of the former GWB, configured as an analogue regulation to the § 1004 BGB.⁶³¹ Despite of the efforts to improve the private enforcement, the 7. *Novelle* maintained important restrictions regarding the legal standing to lodge a removal action. As regards the individual claimant, he will count with legal standing if it matches the criteria of affection (*Betroffenheit*).⁶³² Affected market party are members of the market counter-party as well as indirect purchasers.⁶³³ Nevertheless, in connection with the associative claimant, the reform still let outside consumers’ organizations. Despite of the extension of legal standing to consumers’ associations in the law proposal, they were left outside in the final draft.⁶³⁴ According to the law, only associations for the promotion of industrial interests were legitimized, as long as they act in the same market where the breach happened.⁶³⁵ The extension of the Standing of consumers’ associations in order to lodge damages actions was erased in the last minute from the amendment’s proposal.⁶³⁶

626 According to the German Government, the main aim of the reform was the “Kompensation befürchteter Durchsetzungsdefizite im Zusammenhag mit dem Übergang von einem Anmeldesystem mit Erlaubnisvorbehalt hin zur einföhrung einer Legalausnahme, außerdem eine gesteigerte Abschreckungswirkung”. Bundesregierung Entwurf 7. GWB Novelle; Bt Drucks 15/3640, 1 und 35. n ; *Bien*, Das deutsche Kartellrecht nach der 8. GWB-Novelle, p. 329.

627 Further in *Büyüksagis* SRBL 2015, 18 (20) Available at SSRN: <http://ssrn.com/abstract=2577898>.

628 *Komninos*, Private Enforcement in the EU with Emphasis on Damages Actions, in: *Damien Geradin/loannis Lianos* (Eds.), Research Handbook on European Competition Law, p.249.

629 *Dietrich, M. & Hartmann-Rüppel*, Overview of recent private antitrust litigation activity in Germany, p. 194 ff.

630 BGH, 28.6.2011, KZR 75/10, reversing Oberlandesgericht [Appellate Court] Karlsruhe, 11.6.2010, 6-U 118/05 (Kart.). For an analysis, see Florian Wagner-von Papp/Jörg Fedtke, Germany, in: *Ken Oliphant/Barbara C. Steininger* (Eds.), European Tort Law Yearbook 2011, Berlin/Boston 2012, p. 242; *Lübbig/Roman A. Mallmann*, WRP 2012, 166 (167).

631 *Bien*, Deutsche Kartellrecht, in connection to LG Frankfurt, Urt. v. 330 OLG Stuttgart, Urt. v. 14.10.1998- 2 /06 283/98, NJW 1999, 586, 587.

632 *Bien*, Deutsche Kartellrecht, p. 330.

633 BGH, Urt. v. 28.06.2011-KZR 75/10- ORWI, BGHZ 190,145,154, RdNo.29.

634 Beschlussempfehlung des Vermittlungsausschusses, BT- Drucks. 15/5735, 2 (Streichung der Geplanten No. 2 n § 33 Abs 2 WB);

635 *Bien*, Deutsche Kartellrecht, p. 330.

636 *Otting / Bechtold*, GWB Kommentar. §33 Rn.16.

3.2.4.1.1 Confiscation of earnings: *Gewinnabschöpfung*

The discussion about the extension to antitrust law the associative claims of the UklG and UWG succeed with the 8. UWG Novelle. This was of course, a political rather than a legal question. As per the § 2 Abs. 2 UklG, the provisions of the law could be extended to antitrust law.⁶³⁷ Before this extension took place. As per the former § 10 UWG will be introduced a *Gewinnabschöpfung* claim in the 7 Novelle GWB (§ 34a GWB for economic associations in the sense of the Art. 33 Abs. 2 GWB.) Thereby prosecution of antitrust breach rules by the civil law were based on the former § 33 GWB. The damage actions were reserved only for competitors: “who... causes a damage is obliged to repaired the competitor...”

This legal resource was also granted to the *Kartellamt* by means of §34 GWB as administrative measure. Those economic associations could act subsidiary according to the former 34a GWB. With this instrument is seek to give a response to such cases in which the damaged parties can lodge a claim, and therefore the unlawful earning remains by side of the causer. With the extension of civil law sanctions to those competition infringements, the German overpayment pretends to create „ *an effective civil law sanction system with a testable deterrence effect*“.⁶³⁸ Similar procedures were based on the §29 OwiG or § 73 Abs. 3, 73 a StGB.⁶³⁹ As per its formulation, it is unclear if law wants to afford cases of massive damages.⁶⁴⁰ Requisite for this action is a breach of any competition regulation or disposition of the competition authorities, and thereby an earning arises to the costs of a plurality of victims. Thus, the main objective of this claim is not the individual restitution, its aim is avoiding that unlawful earnings remains by the causer. It is subsidiary to the public enforcement and to the private enforcement through private claims (§34 Abs. 2 GWB), which already have been sustained. As the recovery amounts do not go to the association, the association is for some authors not the holder of the *Anspruch*, only a process actor, a party granted with legal standing.⁶⁴¹ According to the provision of the § 34a Abs. 4 GWB it exists a costs recovery action against the *Bundes Kartellsamts*.

For authors such K. Schmidt, the introduction of the former § 13 UWG (precedent for the actual § 8 Abs. 3 UWG), based in the number of lodged claims, is a high developed institution which contributes to the succeed of the sanction system.⁶⁴² In the practice, the provisions of the GWB related to recovery of unlawful earnings has not relevance.⁶⁴³

In order to lodge this claim, following requisites mut be present:

- 1 *Actus reus* (unlawful activity).
2. Violation of the competition at costs of a plurality of consumers.
Primarily oriented to avoid that an entrepreneur takes advantage of unfair advertisement.

Negligence or *dolo* gegen one antitrust regulation. It is not enough a breach of an antitrust rule. It also must cause a damage. There is no specific regulation of causality in

637 Vogel, *Kollektiver Rechtsschutz im Kartellrecht* p. 143.

638 Micklitz & Stadler, *Verbandsklage* p. 33.

639 Micklitz & Stadler, *Verbandsklage* p. 33.

640 The law proposal spoke of „ Masse und – Streuschäden “, Fn. in Micklitz & Stadler die *Verbandsklage*, p. 33.

641 See *Oppermann / Müller*, *Wie Verbraucherfreundlich muss das neue UWG sein?*

642 In procedural issues in the private enforcement of EC Competition rules: considerations related to german civil procedures, Schmidt, K. in *Ehlermann / Atanasiu*, ECLA 2003, 253-265.

643 *Stadler*, *Collective action as an efficient means for enforcement of European competition Law* pp.195-213.

GWB, thus the general rules of the BGB apply (BGB § 249ff). The injunctions claim in antitrust and unfair competition are regulated in § 8 Abs. 3 No. 2-4 UWG (§ 3 Abs. 2 No. 2-4 UWG) as well as the §33 GWB. The legal standing for the injunctions claim will be extended to qualified institutions (consumers' associations). With this extension, the law maker takes the stance that the competition law is specially oriented to consumers. Entitlement falls on those listed in the § 33 abs. 2. Within them exist the possibility for the associations to lodge the claim: These claims can be lodged by associations which fulfill the requirements of the article § 33 abs. 2 GWB. Although the association is not affected, it counts with standing to lodge these claims.⁶⁴⁴ They act in public and not own interest, as there exists a general interest in a free competition economy. However, the association can only claim in the field of its interest. Either consumers' associations, neither individual consumers were entitled to lodge damage actions. Not even for own damages of the association, only when the association act as concurrent party (competitor § 2 Abs. 1 No. 3 UWG).

The 7. Novelle included the § 33. Abs 3 GWB as legal basis for claims based on violations of national or European rules. As an exception for the dogmatic of reparations included the § 33 Abs 3 also the reparation of loss of winning.⁶⁴⁵ **Consumers associations were not granted with legal standing, as the sanctions of the GWB were closure for them until the 8. Novelle.** These kinds of claims had no relevance in the practice. In the first place because as per the formulation of the law, the potential infractors are members of the associations granted with legal standing,⁶⁴⁶ and because there are no incentives to claim as these are very risky and complicated claims.⁶⁴⁷ Granting legal standing to consumers' associations in order to lodge injunctions claims in antitrust field is in Germany not succeed despite the multiple voices in this sense in the legal procedure following the 7. Novelle.⁶⁴⁸

3.2.4.2 The 8. Novelle GWB

By means of this reform, the jurisdiction is granted to the General Civil Courts of the Landgerichte, which shall count with a specific know-how in this matter.⁶⁴⁹ Many voices in the German academia supported the extension of the actions gathered in the UWG to the GWB. Keeping the idea of private enforcement included on the 7. Novelle, the latest reform extended the legal standing to qualified institutions. One key aspect of the reform is the confidence on consumers' associations to enforce antitrust law.⁶⁵⁰ This shall however not be understood as a capacity of associations to recover damages for consumers. However, for some authors the *Beseitigungsanspruch*, which in some cases allows recovery of damages is quite similar to an opt-out class action.⁶⁵¹

644 BGH, NJW-RR 1986, 915.

645 Alexander, JuS 2007, 109 (111).

646 Rolf, Privater Rechtsschutz im deutschen Kartellrecht, p. 81.

647 Vogel, Kollektiver Rechtsschutz im Kartellrecht p. 143.

648 See Basedow, Effective private enforcement of EC Antitrust Law, Diskussionbeitrag (Panel Two-procedural issues), in Ehlermann/Attanasio (Ed.); ECLA 2001-Oxford u.a. 2003, 157-184.

649 See in connection the § 95 Abs.2 No. 1 GVG which specifically removes the jurisdiction from the Kammer für Handelssachen.

650 Ziel des Gesetzes.

651 Bien, Der Anspruch der Verbraucherverbände und Verbände der Marktgegenseite auf Unterlassung, Beseitigung und Vorteilsbächöpfung, in: Bien F. (Ed.), Das deutsche Kartellrecht nach der 8.GWB -Novelle, p. 337.

3.2.4.2.1 Injunction and removal claim

The requirement to „qualified institutions“ arises from the § 4 UklG, which established the criteria in order to be qualified. Next to formal requirements, **it will apply a presumption „*iuris tantum*“ that consumers’ organizations which are promoted by public means fulfil this requirement.** According to the European requirements, other EU organizations are equally legitimated if they fulfil the European requirements to be consider qualified.⁶⁵²

The German government expressly stated that no class action in favor of consumers would be introduced with the 8th Reform.⁶⁵³ Aim of the government was to introduce a reasonable level of private enforcement by consumers associations.⁶⁵⁴ It is wide accepted among German authors that a *Beseitigungsanspruch* may be forwarded also to pecuniary restitution.⁶⁵⁵ According to the *Kartellssenats* of the German Supreme Court the removal action includes a right to a proportional restitution,⁶⁵⁶ thereby the removal and damage actions come closer and share some aspects.⁶⁵⁷ Nevertheless, there are still some big differences between these claims which affect aspects such the culpability and others but mainly the “timing” of the cartel activity. It is to be remained that the removal action only applies for this activity which may cause a harm in the future and not for such behaviors which cause a damage in the past.⁶⁵⁸ So, among other differences, the removal action will be limited to recover such damages arisen from the difference between the amount paid and the actually correct market price (*damnum emergens*), while proper of a damage action is also the recovery lost earnings (*lucrum cessantis*) as well as other damages.⁶⁵⁹

3.2.4.2.2 Gewinnabschöpfung

This is also an available instrument for consumers’ associations due to the reform of the 8. *GWB Novelle*. it is regulated in the § 34a.1 *GWB*. Since damages are claim for the Federal Budget, consumers’ associations fulfill the public surveillance with private means by means of an injunction and an unlawful earnings claim. The appeal of such instrument is quite limited as the claiming association hold all the risks and no single reparation granted will remain for the association. Associations concur with the German *Kartellamt*, which is also legitimated to lodge such claim. There are differences in the time barred. According to the § 34 (Abs.5 S.1 *GWB*) pretensions of the *Kartellamt* will expire after 5 years, being the time for associations limited to 3 years (§ 195 *BGB*), since the

652 Directive 98/27 EC of the European Parliament and council of 19 May 1998, Injunctions Claims in Favour of Consumers Interests, OJL L 166 of 11.6.1998.

653 Bundesregierung, Begründung Entwurf 8 *GWB* Nov; BT Drucks 17/9852,1.

654 *Bien*, Das Deutsche Kartellrecht, p. 326.

655 *Otting / Bechtold*, Kartellgesetz: Gesetz gegen Wettbewerbsbeschränkungen Kommentar, § 33 RdNo. 13.

656 BGH, Urt. v. 6.10.1992- KZR 10/91, NJW 1993, 396- *Stromeinspeisung*; Urt. v. 4.4.1995 – KZR 5/94, WuW/E BHG 2999 f.- *Einspeisevergütung*. Further in Bechtold, *GWB*, 6 Auflage, § 33 RdNo. 13

657 “Der Anspruch auf Beseitigungs (...) zumindest ein Stück weit sieselbe wiederherstellende Wirkung wie der Schadenersatzanspruch führt.” BGH, Urt. v. 1.12.1995- V ZR 9/94, NJW 1996, 845,846; Der Anspruch der Verbraucherverbände und Verbände der Marktgegenseite auf Unterlassung, Beseitigung und Vorteilsbachöpfung, *Bien*, (Eds.) Das deutsche Kartellrecht nach der 8.*GWB* -Novelle, p. 339.

658 For some authors there is no reason in order to avoid the extension of removal damages to past activities such *Bien*, 2013), Das deutsche Kartellrecht, p. 338, against it *W-H Roth*, in: FK Kart, 49 Lfg; November 2001, § 33 RdNo. 100, also *Emmerich*, in: *Inmenga/Mestmäcker*, *GWB*, § 33 Rdn.100.

659 *Roth*, Sammelklagen im Bereich des Kartellrechts. In: Casper / Janssen / Pohlmann, / Schulze (Eds.), *Auf dem Weg zu einer europäischen Sammelklage?* RdNo. 181.

damage was known by the claimant (§ 199 Abs.1 BGB).⁶⁶⁰ A damage class actions is not foreseen in the GWB. With this amendment, the German law maker reaches uniformity with the UWG. The nature of the GWB's injunctions and *Gewinnabschöpfung* claim do not differ to the already exposed characteristics of the UWG. The *Kartellamt* count with the possibility to order refund to unfair amounts to affected consumers.

3.2.4.3 Calculation of damages

The § 33 Abs. 3 does not define what shall be understood as damage. This provision just refers to the economic harm that the cartel may cause in relationship with the transmission of prices. So is defined in the § 33 Abs 3 S. 2: „ *Wer einen Verstoß nach Absatz 1 vorsätzlich oder fahrlässig begeht, ist zum Ersatz des daraus entstehenden Schadens verpflichtet. Wird eine Ware oder Dienstleistung zu einem übersteuerten Preis bezogen, so ist der Schaden nicht deshalb ausgeschlossen, weil die Ware oder Dienstleistung weiterveräußert wurde.* “

The content and scope of a claimant right based on damages is regulated according the §§ 249 ff BGB. The calculation is based on the so called *Differenzhypothese*.⁶⁶¹ It means a comparison of the actual patrimony of the affected party with the patrimony that could have occurred if the antitrust violation never took place. It is worth to watch that agreements between distributor and purchaser in general contract conditions of 15 % affection in the price due to trust activities are considered as valid in Germany.⁶⁶² Next to the *Dyferenzhypothese*, in German Law apply also the so-called principle of *Bereicherungsverbot*. According to this principle, the affected party shall not be in a better position than he would be if the unlawful never happened, confirmed later in the repeatedly ORWI – decision. Therefore, the aim of the damages reparation, is the actual reparation of the suffered damaged. No less no more. These principles shall serve to the deterrence effect of antitrust activities gaining a prevention effect based in the actual compensation. ⁶⁶³

3 problems can be considered when it comes to damages calculation⁶⁶⁴:

- 1- Which data can be used to compare the harm?
2. Which time shall be used for the comparison, and in which scope an advantage calculation succeeds?
3. The distribution of evidences exhibition and means of proof, specially in connection with a possible advantage.

The answers to these questions shall be facilitated with the incorporation of the Directive 2014/104/CE and shall be treated in this work in the corresponding chapter. Nevertheless, by means of the reform of the GWB (7. and 8. *Novelle*) the German legal system has improved the frame for a better private application both of the EC as well as of the national competition rules. Since the reforms operates in German Law, not only the number of private claims has been increased but also the claiming amounts, selected examples are:⁶⁶⁵

Deutsche Bahn vs Lufthansa and others before the LG Köln (2014) based on inflated freight prices. Claim of 1,2 plus 500 million € interests. CDC vs Cement Cartel before the

660 *Bien*, Das deutsche Kartellrecht, p. 344; *Bechthold*, GWB, § 34a RdNo.16.

661 In connection with the calculation of damages see *Inderst/ Schwalbe*, WuW 2012, 212.

662 LG Mannheim decision of 4.5.2012, WuW / E De-R 3584,3588 ff.- Feuerwehrfahrzeuge.

663 BGH decision of 28.6.2011, BGHZ 190, 145, 164.

664 *MunchKomm/ Luebbig*, GWB, 2 Aufl; Rn. 69.

665 *Janssen*, CB 2015, 35 (35).

LG Düsseldorf (2005). Claim of 176 million € plus interests. Deutsche Bahn vs Thyssen-Krupp based on inflated rails; settlement reached in the amount of 150 million €. Voestalpines settles in amount of 50 million €, (2015).

Due to the high amounts in such procedures, for the claimant does it makes sense to lodge its claim against the legal person rather than against the directive board. Nevertheless, this possibility is granted in German Law,⁶⁶⁶ following the general imputation of liability based on the non-observance of a generic obligation of conduct: to behave with the care and the diligence of a good businessman.⁶⁶⁷ A necessary relation must be between the unlawful act and the occurred damaged. ⁶⁶⁸. It is also important to note, that the legal practice shows that the claims are lodged almost always by direct purchasers.⁶⁶⁹ This is one of the aspects that shall change by the incorporation of the Directive on damages into German Law. Nevertheless, due to the commitment of the German Law maker to not introduce an effective collective redress system, it is to be feared that the damages actions remain as a possibility only for privileged claimants, such the Deutsche Bahn or other big companies., it means, direct purchasers.

3.2.4.4 The 9. GWB-Novelle.

3.2.4.4.1 Transposition of the Directive 2014/104/EC

As per the closing of this work, the 9. GWB -*Novelle* has not entered yet in force, it will be taken into consideration the proposals and considerations of the German literature for the transposition, as well as the last Government proposal for the 9. GWB- *Novelle*. Proposals from German authors go from considering the inclusion of the material rules of the Directive by amending the § 33 GWB and the inclusion of the procedural rules in the § 89a GWB, to even developing whole new legal bodies such a *KartSchadG*.⁶⁷⁰

Many of the rules content in the Directive are already incorporated into German Law. These are for instance the binding effects of the National Competition Authorities or Courts (§33 GWB Sec. 4), the objection of the passing on defence, (§ 33Sec.3 GWB) as well as the judicial competence for the assessment of the damage (§ 287 BGB).⁶⁷¹ Nevertheless, there are many other aspects of the directive that would need amendments or complementary developing in the current German Law. One aspect is the presumption of the Directive content in its Art. 17 II, that the mere existence of a cartel causes a damage. In Germany, there is a *prima facie* evidence gather in the case law, that a quote in a cartel drives to a higher price.⁶⁷² Some Germans authors, have proposed the incorporation of a specific quantification of the harm due to cartel activities. So, *Kersting* support the incorporation of a 10 % estimation rule into German Law. This quantification shall be justified as a result of empiric studies regarding the harm associated to a cartel.

666 OLG Düsseldorf, 13.11.2013 – VI-U (Kart) 11/13 –Dornbracht, das einen Geschäftsführer gesamtschuldnerisch mit dem Unternehmen zu Schadens-ersatz wegen eines Verstoßes gegen Art. 101 AEUV und § 1 GWB verurteilt hat.

667 About this and the release of liability in accordance with the so called Business Judgment Rule see *Hopt*, Kommentar zu § 93, Sec. 4, No. 66 ff, in: *Hopt/Wiedemann*, Großkommentar zum Aktiengesetz.

668 BGH decision of 26.09.2005, NJW 2005, (3721 /2722).

669 *Janssen*, CB 2015, 35 (39).

670 *Kersting/Preuß*, Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) - Ein Gesetzgebungsvorschlag aus der Wissenschaft (Implementation of the Directive on Actions for Cartel Damages (2014/104/EU) into German Law - An Academic Proposal), p. 12 ff.

671 *Bischke/Brack*, NZG 2016, 99 (102).

672 KG NJOZ 2010, 536.

Furthermore, in connection with the passing-on defence, instead of undertaking complicated calculations, according to this author, it shall be considered such estimation, as a kind of “flat rate” antitrust damage, transmitted along the distribution chain. This stake is of course not to be taken into consideration. The presumption that a cartel causes a damage is already a sufficient breach of the principle of causality in sanction procedures, which also contradicts modern economic theories that the cartels are not harmful at all. Incorporating a flat harm rate, is definitively going too far in the sanction prerogatives of the State and shall at any cost be avoided, as it is a breach of the culpability principle.⁶⁷³

Another aspect of the Directive that would need complementary development is connected to the passing-on defence. Both direct and indirect purchasers are entitled under German law to claim for recoveries too.⁶⁷⁴ This shall be related to the passing-on defence, as one of the principles of the Directive is to avoid overcompensations. This defence is already recognized in German Law, and some criteria has been established in the ORWI decision of the BGB.⁶⁷⁵ By its side, the Directive regulates the regime of disclosure between members of the cartel and its direct and indirect purchasers. Thus, as a general rule, the defendant has to bear the burden of proof that the prices have been transmitted. Nevertheless, the defendant can demand the exhibition of evidences of the claimant or third parties to support its passing-on defence. This need to be incorporated into German Law.⁶⁷⁶ Some authors consider that the enshrinement of the passing-on defence increases the risk for the direct purchasers making any claim less attractive from the economic point of view. Thus, it is to be feared that, due to the higher risks and complexity, less number of claims will be lodged. So, the stake to renounce to the introduction of the passing-on defence into German Law, or at least to limit this to the criteria established in the ORWI decision has been defended.⁶⁷⁷ In any case, the German literature is aware that the Directive demands substantial modifications in the German configuration of the *Streitverkündung*.⁶⁷⁸ Although the indirect purchaser has to prove that the prices have been transmitted to him, the Art. 14 II of the Directive incorporates a presumption that it happened if some requirements are fulfilled. This presumption is alien to German Law and need to be incorporated. Due to the low amounts that they would be entitled to claim due to the passing-on defence, 2 proposals have been taking into consideration for the incorporation of the Directive into German Law. One would be the introduction of a register of claims and the second the introduction of a *Verbraucherverbändemusterfeststellungsklage*.⁶⁷⁹

Special significance regards harmonization have the rules of the Directive about disclosure of documents, and view of administrative records, both in connection with **confidential information**. 2 points of view are to be considered here. One is the disclosure of documents to prove a breach of an antitrust rule and the causality of the damage associated to the same, and the other, the disclosure in favor of the defendant, for instance to demonstrate the existence of the so-called umbrella price effect. In this regard,

673 Schmidt, NZKart 2016, 126 (127). Economic theories that challenge the idea of cartels as harmful agreements will be briefly presented in the dispositive part of this work.

674 BGH, 28.6.2011, KZR 75/10, BGHZ 190, 145 (151 ff., Rn. 23 ff.); see in this regard also Lettl, WRP 2015, 537 (538, 541, 544, Rn. 4, 16, 34).

675 BGH WuW/E DE-R 3431,3443- ORWI.

676 Bischke/ Brack, NZG 2016, 99 (100).

677 So Haucap, in Schmidt; NZKart 2016, 126 (127) regarding a previous work: Haucap/ Stühmeier, WuW 2008, 413-424.

678 In this matter see the systematic work of Hoffman, Jochen; Kartellrechtlicher Streitverkündung bei Schadensabwälzung- Ein Vorschlag zur Umsetzung von Art. 15 der KartellschadenersatzRL, NZKart 2016, 9-19.

679 Pipoh, NZKart 2016, 226 (226).

the most significant aspect of the Directive that differs from the current existing German practice is the express prohibition of disclosure of documents of State witness in the frame of a leniency program. The incorporation of this prohibition into German Law will suppose for the first time that rules about leniency programs are incorporated into positive - substantive- German Law.⁶⁸⁰ Also, it will need adjustment into German Law the disclosure regulation regarding whole categories of documents, which includes those that may be confidential. The member States shall, according to the Directive, create the necessary safeguards to avoid “fishing expeditions”, and to ponder interests when confidential information is at stake (Art. 15 Sec. 3 b/c).

It will be discussed if the disclosure of evidence shall be considered as an object of substantive material entitlement that could be treated in a previous proceeding or if it shall be treated in the proper procedure. Voices for the consideration of a treatment of this matter in a preliminary proceeding have been raised among German authors.⁶⁸¹ The possibility to disclosure confidential information shows how relevant is the access to evidence in this kind of procedures, both for the claimant as well as for the defendant. In any case, as the Directive foresees, the national practice, which shall be applied by the national Judge, will play a fundamental role to ponder interests. In this sense, German practice recognizes some instruments when disclosure of information containing confidential information is granted. Such is for instance to distinguishes confidential and not confidential information in the specific document, and cover the protected information in black.⁶⁸² Further judicial measures to preserve confidentiality can be found in the introduction of the so called “Enforcement Directive” into German Law,⁶⁸³ where specific measures are avoided in favor of a valuation of the judge according to the specific circumstances of the case. Nevertheless, there is not foreseen a secret procedure in general German civil procedure Law,⁶⁸⁴ so if the incorporation of the Directive does not include a specific regulation about this matter, German judges will not have any connection point in the general civil regulation to resort to. Different than the case of the Enforcement Directive, that in its Art. 6 Sec. 1 just foresees that the *competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information*, the damages Directive orders member States to *ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information*. If this higher requirement means that the German Legislator shall introduce specific elements of protection as they are content in the Whereas of the Directive will be discussed.⁶⁸⁵ Finally, the Directive gives full relevance to the protection of professional secrets according to national or European regulations. In Germany, such professional secrets are protected unless another Law foresees exceptions. If as per the wording of the Directive “*national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence*” such exceptions are prohibited is discussed. Such general prohibition is an absolutely category that shall have been well justified in the Whereas of the Directive if it pretended to be a general prohibition.⁶⁸⁶ So, exceptions to this general

680 *Bischke/ Brack*, NZG 2016, 99 (100).

681 *Preuß*, Nicola in *Pipoh*, NZKart 2016, 226 (227).

682 BGH, 21.2.2012, I ZR 140/99, GRUR 2002, 709 (712).

683 *Kerstin/ Preuß*, p. 125 in connection to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.4.2004, incorporated into German Law by § 87c Abs. 4 HGB und § 259 HGB.

684 See in connection *Prütting*, in: Gehrlein/Prütting (Eds.), ZPO, 5 aufl; § 142 ZPO Rn. 18 f. For a perspective about considered proposals as well as about the judicial praxis see *Wrede, M*; *Das Geheimverfahren im Zivilprozess*, p. 149 ff.

685 *Kersting & Preuß*, Umsetzung der Kartellschadensersatzrichtlinie, p. 127 ff.

686 *Kersting & Preuß*, Umsetzung der Kartellschadensersatzrichtlinie, p. 127 ff.

rule can exist under national Law as long as not national or communitarian principles are affected.

In connection to disclosure of evidence from the National Competition Authorities, the Directive includes a specific regime in its Art. 6. So, this refers to the general regulation of the Art. 5 but at the same time includes specific considerations when the disclosure of evidences contained in an administrative file is at stake. In this regard, 2 aspects shall be considered. First, the presumption that the information provided by a national competition authority in the same country shall be considered as full probatory evidence, and the second the impossibility to access to such documents which are in possession of the national authority in the frame of a leniency program, as it is regulated in the Art. 6. Sec. 6 of the Directive. Once again, the Directive shows how the instruments that shall improve the private enforcement are limited by the defence of the leniency programs. Procedural measures to access to administrative documents are already included in German Law under the consideration that the administrative body is not part of the procedure but a third party,⁶⁸⁷ as it is regulated in the § 432 ZPO. Further will be discussed in the Germany literature if the consideration of the Administrative body as a 3rd party according to the § 142 ZPO modify the general systematic of German Law that differentiates between disclosure of third parties and disclosure of administrative bodies, and if both regimes can be treated by single application of the § 432.⁶⁸⁸ Nevertheless, such distinction shall not drive to a situation of the applicant party in connection to administrative files worse than general 3rd party disclosure, according to the light of the Directive, so a specific introduction of the requisites of the Directive by means of a specific regulation into German Law has been proposed.⁶⁸⁹

Another relevant aspect is the regulation of the **joint of liability**. According to the current German regulation, members of a cartel face joint liability before the claimant (§§ 830, 841 BGB) and compensation between them (§421 BGB). Such regulation matches the criteria of the Art. 11 I of the Directive. Nevertheless, the Directive includes also some privileges for the beneficiaries of a leniency program as well as for SMEs. The appropriateness of such privileges is analyzed in the European part of this work, and will not be treated here. Despite that some authors consider that the privileges of the SMEs contained in the Directive are a mistake,⁶⁹⁰ such privileges shall be incorporated into German Law (until a nullity action is lodged following the European law requisites in order to challenge the legality of such privileges).⁶⁹¹ Other privileges contained in the Directive, specially the benefit of being released of inner return in favor of the State witness, as well as some privileges in the outer relationship against cost of the claimant need to be incorporated into German Law.⁶⁹² Regarding the statute of limitation, the GWB need to be amended in order to extend the limitation period. So, the 3 years included in the §§195, 199 I BGB period shall be extended to 5 by means of the Art. 10, Sec. 3 of the Directive. As the Directive just requires a minimum standard, the so called German *ultimo-verjährung* principle is compatible with the Directive, as well as the suspension of the limitation period during the administrative anti cartel procedure of the Commission or any other national competition authority as it is regulated in the § 33 Sec. 5 are not contrary to the Directive and can be maintained without further amendment.⁶⁹³ The most relevant change in this

687 So *Calisti/Haasbeek/Kubik*, NZKart 2014, 466 (467).

688 In this connection see *Preuß*, in: *Prütting/Gehrlein*, ZPO, 5 Aufl; § 432 ZPO, p. 8.

689 *Kersting/ Preuß*, Umsetzung der Kartellschadenersatzrichtlinie, p. 132.

690 So *Pipoh*, NZKart 2016, 226 (227).

691 The whole issue will be treated in the European Frame, part IV of this work.

692 So *Bischke/ Brack*, NZG 2016, 99 (100).

693 So *Pohlman*, WRP 2015, 546 (547).

matter in German Law shall be the starting point for the prescription, that according to the Directive shall not start until the breach of the competition rule has ceased. This question has been object of discussion between German authors in those cases that that a member of the cartel get off the same.⁶⁹⁴ It will be discussed if the incorporation of the **European concept of single economic unity** shall be incorporated to the GWB or any other German Law. This aspect has been treated previously intensively in the joint liability part of this work. Specific to this point in connection with the Directive is the Art. 1 Sec. 1, as it says following: *This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.*

It shall not be understood from this paragraph that the European legislator speaks of joint liability of a group of companies. Furthermore, a literal interpretation of this article drives to the conclusion that only when a group of companies have (all) taking part in a breach of the competition rules with the result of a damage, then these companies shall be liable. That would be the case of a cartel, where a group of different companies undertake a prohibited behavior. Furthermore, if the intention of the European Law maker was to introduce the European single unity concept, the Art. 2 of the Directive was the proper place to introduce this principle, as it is the part of the Directive that is dedicated to definition and clarification of concepts for a total harmonization. Nevertheless, there is no reference to such principle neither in the Art. 2 of the Directive, either in the Whereas of the same. For all these exposed reasons, as well as for those explained in the chapter dedicated to the joint liability of this work, there seems not to be a necessity to incorporate into the German GWB or any other Law of such concept that will be contrary to the current regulation of the § 31 BGB. Nevertheless, for some German authors that have defend specific proposals for the incorporation of the Directive into German Law, the European concept of economic unity shall be adopted.⁶⁹⁵ In this regard, the whereas 11 of the Directive that refers to the principle of effectiveness according to the case law of the CJEC could be a stronger basis from the side of the Directive than the Art. 1 of the same. By means of that principle, national rules shall not make impracticable a damages recovery of affected parties. Although, this principle is widely accepted, it is not enough basis to extend liability beyond the German principle of *Verschulden* (culpability). As per the proposal of the Government, it is foreseen the introduction of the joint of liability of concerns, independent of is direct responsibility in administrative sanction procedures. As per the government proposal, the reorganization of companies in concerns pursues in some cases to avoid the infractions of antitrust rules, so for a better local certainty, it shall be amended the German regime of liability in such administrative sanction procedures.⁶⁹⁶ It is different than the current joint of liability regulated in the German §§ 830,840 BGB, where the liability is extended to all members of the cartel under the conditions of the §421 BGB. ⁶⁹⁷ This regime of liability and the inner recovery is already regulated in German law, and the incorporation of the Directive just demands to amend some provisions regarding the privileges included in the Directive for SMEs and Whistleblowers. Nevertheless, that extension of liability to the members of the *Konzern* will not be applied in civil Law. The proposal of the Government remains as follows in a new §81 Sec. 3a of the GWB:⁶⁹⁸

„(3a) Hat jemand als Leitungsperson im Sinne des § 30 Absatz 1 Nummer 1

694 *Pipoh*, NZKart 2016, 226 (227).

695 *Kerting/Preuß*, Umsetzung der Kartellschadensersatzrichtlinie p. 38 f.

696 Gesetzentwurf der Bundesregierung Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 97 ff.

697 Specific to this matter see *Seegers*, GCLR 2014, 140 -149.

698 § 81 Abs. 3a RefE-GWB.

bis 5 des Gesetzes über Ordnungswidrigkeiten eine Ordnungswidrigkeit nach den Absätzen 1 bis 3 begangen, durch die Pflichten, welche das Unternehmen treffen, verletzt worden sind oder das Unternehmen bereichert worden ist oder werden sollte, so kann auch gegen weitere juristische Personen oder Personenvereinigungen, die das Unternehmen zum Zeitpunkt der Begehung der Ordnungswidrigkeit gebildet haben und die auf die juristische Person oder Personenvereinigung, deren Leitungsperson die Ordnungswidrigkeit begangen hat, unmittelbar oder mittelbar einen bestimmenden Einfluss ausgeübt haben, eine Geldbuße festgesetzt werden.

Requisite for the extension of liability is that at the time of the infraction, mother company and their subsidiaries were configured in a single economic unity, according to the consideration of economic unity hold by the European communities, which match 100 % all cases of concern of corporations.⁶⁹⁹ According to the stake of the German Government, the incorporation of the single economic unity concept into German administrative Law is the only way to enforce the current sanctions foreseen in the substantive Law. **Such stake is another brick in the building of presumptions that configures the antitrust policy.** It shall be reminded that it already exists a presumption in the assumption that a cartel causes a damage; **by means of the extension of liability to the whole concern of companies, the presumptions find anchoring both in the objective and subjective aspects of the sanction procedure.** Furthermore, the extension of liability is not a *iuris tantum* presumption that can be fight in the Court with possibilities of success, as the practice shows that the willing for collection of sanctions beats the principle of innocence at the European case law, now, with the reform of the GWB, extended to German Law too. It exists a risk that the antitrust policy is creating a legal tangle, that pursuing to preserve general goods based on neoclassical economic theories (such the control of prices or agreement between corporations by the State) is affecting individual rights in basic principles such the principle of innocence and the freedom of enterprise. It is remarkable to find few concerns in the legal literature about this threat to individual rights, which is being currently addressed with more intensity in the economic literature.⁷⁰⁰

Another question that has arose in the frame of the incorporation of the Directive 2014/104/CE is the basis of the same, namely the question if the private enforcement helps in the first place for a higher level of antitrust compliance. So, questions are connected to the decisive role of the public enforcement by means of the leniency programs as the proper tool to fight against violations of EC or National competition rules. In this sense, any improve in the private enforcement that weakens the public one, jeopardizing the incentives for whistleblowers, could undermined the whole competition level. Thus, according to this stake, any proposal for incorporation shall keep the focus in the leniency programs rather than in the incentives for the private enforcement.⁷⁰¹ In this regard, the same Directive seems to give preference to the leniency programs, as it grants privileges to State witness (*whistleblowers*) in the frame of the joint liability both for the outer relationships before direct and indirect purchasers, as well as against other members of the cartels when it comes to inner recovery.

699 Cotta & Reich, Referententwurf zur 9. GWB- Novelle, refering not to the Government Proposal but to the Cabinet one.

700 For relevant field studies about the economical theories which serves as basis for the antitrust legal presumptions and how the antitrust policy affects negatively consumer's interest see Anderson / et al., The microsoft corporation in collission with antitrust law, JSPES; 2001, pp. 287-302; Kinsella/ Melin, Who is afraid of the Internet? Time to put consumer interests at the heart of competition.

701 So Ost in Schmidt, NZKart 2016, 126 (128).

Finally, some authors have alerted about the lack of incentives to bring an antitrust damage actions into German courts, something that shall be taken into consideration by the incorporation of the Directive into German Law. Some aspects have been pointed out for this lack of incentives. These go from the lack of efficient collective redress systems, uncertainties,⁷⁰² until the slowness of the German courts dealing with these cases due to a lack of material and human resources of the competence judicial bodies (*Rother*).⁷⁰³

It is worthy to mention, that it is the first time that a European Directive regulates procedural rules of the member States. As result of that, there is a major concern in the Spanish and German literature, that the specific requirements of the Directive, specific for damages actions for breach of the competition rules extend their effects to the general civil Law. Specific proposals for the introduction of the Directive into German Law are already published.⁷⁰⁴ The proposal for amending the articles § 33 a-h and 89 a-e include civil and civil procedural rules, that could be more proper of the general BGB or ZPO field.⁷⁰⁵ The introduction of the necessary amendments in order to incorporate the Directive 2014/104/EC in German law in the GWB and not in the BGB or ZPO could respond to a voluntarist proposal of avoiding the extension of the more claim-friendly proposal of the actions for damages based on competition law into the general civil claims. As per *Rother*, the existing reserves of the *Bundesministerium de Justiz und der Verbraucherschutz* against the introduction of alien regulations into German Law by means of a Directive, have not prevent against a proper incorporation into German Law of the basics of the Directive 2014/104/ CE. So, according to this author, the initial reserves of incorporating alien institutions such the pre-trial discovery of US Law or a disclosure following the common-Law tradition has not happened. Nevertheless, the §§ 242 of the BGB already supports the material law and the §§ 142 ZPO its procedural realization.⁷⁰⁶ Rules concerning disclosure of evidence are included in the future § 33 g and § 89 b GWB-RegE, not as incorporation of a strange legal figures, but furthermore as object of legal clarification and legal certainty, in a proportional way.⁷⁰⁷

The regulation of discovery in the §33 g. No. 6-GWB-RegE seems to be proportional as is based on a ponderation of interests, which shall be done by the Court. In this regard, it is also included the confidential information. Maybe in another way as it is regulated in the whereas 18 of the Directive, where is stated that the protection of the confidentiality shall not avoid an effective reparation. The German law maker let this appreciation in hands of the court under the ponderation of interests as it is redacted in the § 33 g Sec. 3 No. 6-GWB-RegE as follows:

Die Herausgabe von Beweismitteln nach den Absätzen 1 und 2 ist ausgeschlossen, soweit sie unter Berücksichtigung der berechtigten Interessen der Beteiligten unverhältnismäßig ist. Bei der Abwägung sind insbesondere zu berücksichtigen: (6) der Schutz von Betriebs- und Geschäftsgeheimnissen und sonstiger vertraulicher Informationen und welche Vorkehrungen zu deren Schutz bestehen.

The disclosure regime contained in the § 33 g is followed by the § 89 b No. 6 and 7 GWB-RegE which refers to the currently § 142 ZPO, but includes also some warranties itself for the protection of confidential information:

(6) Auf Antrag kann das Gericht nach Anhörung der Betroffenen durch Beschluss die Offenlegung von Beweismitteln oder die Erteilung von Auskünften anordnen,

702 Further in *Schmidt*, NZKart 2016, 126 (128).

703 The stake of *Rother* will be deeper analysed further on in this chapter.

704 *Kersting / Preuß*, Umsetzung der Kartellschadensersatzrichtlinie, p. 81.

705 *Rother*, NZKart 2017, 1 (2)

706 *Rother*, NZKart 2017, 1 (1).

707 *Ibidem*.

- deren Geheimhaltung aus wichtigen Gründen verlangt wird oder deren Offenlegung beziehungsweise Erteilung nach § 33g Absatz 6 verweigert wird, soweit
1. es diese für die Durchsetzung eines Anspruchs nach § 33a Absatz 1 oder die Verteidigung gegen diesen Anspruch als sachdienlich erachtet und
 2. nach Abwägung aller Umstände des Einzelfalls das Interesse des Anspruchstellers an der Offenlegung das Interesse des Betroffenen an der Geheimhaltung überwiegt.

Der Beschluss ist zu begründen. Gegen den Beschluss findet sofortige Beschwerde statt.

- (7) Das Gericht trifft die erforderlichen Maßnahmen, um den im Einzelfall gebotenen Schutz von Betriebs- und Geschäftsgeheimnissen und anderen vertraulichen Informationen zu gewährleisten.

Regarding the § 89 b No. 7, GWB-RegE, the Directive 2014/104/CE contains some suggestions about how to keep *confidential* information save and make it compatible with the access to evidence, such *those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form (Whereas18)*. The German Law maker trust the criteria of the Court in this matter. *Rother* sees a missed opportunity in the incorporation of the Directive into German Law for a better specialization of this matter in the German courts. Namely, due to the complexity of these kind of actions, special judicial organs shall be ordered to deal with such claims. If the 8. *GWB- Novelle* already was aware of this problematic and changed the § 95 Sec. 2 No. 1 establishing the competence to judge these matters to the *Zivilkammer of the Landgerichte*, for the mentioned German author, these do not count with the necessary resources, both material as humans to deal properly with antitrust cases and the 9. *GWB-Novelle* shall had incorporated specific auxiliary tools and resources in favor of these judicial bodies.⁷⁰⁸ It has been proposed too, that in such follow-on claims, due to the indisputable character of the administrative resolutions, where the court will be only dealing with questions about causality of the damage and assessment of the damage, the middle instance shall be skipped. By giving competence in these cases, to the *Kartellsenate* of the *Oberlandsgerichte*, which dispose of the necessary means to deal with these matters, a desirable celerity would be reached.⁷⁰⁹

Finally, the position of the German *Bundesrat* regarding the Government proposal calls for the prompt introduction of a *Musterklage* in this matter.⁷¹⁰ This shall be celebrated. It is strange for this drafter that the Directive 2014/104/CE, in connection with one of its original bricks, the White Paper which clearly betted for the introduction of collective redress systems, finally has left them apart. As stated further on in this work, the German institution of the *Musterklage*, original in its specie, is for me one of the most suitable judicial instruments for the defence of a multitude individual rights. Nevertheless, according to *Roth*, the suggestion of the German *Bundesrat* shall be not considered as an instrument of the collective redress in favor of affected individuals, as per the position of the *Bundesrat*, consumers associations, shall be granted with legitimization in order to deal with a multitude of connected individual rights. Different than other member countries which have used the requirement of the introduction of the Directive in its national legal systems to develop class actions following the example of UK, such Hungary and Holland, Germany keeps its precautions in this regard. Therefore, for the above-mentioned author, the effective enforcement of cartel rights will be remaining in hands of international group

708 *Rother*, NZKart 2017, 1 (1).

709 *Ibidem*.

710 *Rother*, NZKart, 2017,1 (2).

of companies and big companies. This is of course, a non-desirable situation in connection with the *ratio legis* of the Directive, which, according to the “anyone” principle of reparation, shall facilitate the recovery of indirect purchasers, it means consumers affected by violations of the antitrust rules.⁷¹¹ The Government proposal, different than the draft bill, includes some transitional measures in order to avoid committed mistakes in previous amendments of this Law, as it happens for instance in the 7. GWB- Novelle.⁷¹² Relevant for the judicial practice are the § 186 Sec 3,4 GWB RegE. As per the previous experience of the 7. GWB- Novelle that did not include any transitional regulation, the time frame of application of the previous reform has been long discussed in the German judicial praxis. Even in recent decisions such the ORWI, the BGB has not been able, -according to Scherzinger- to avoid such problems.⁷¹³ As per this decision, damage claims as are regulated in the § 33 GWB will be only apply after the 7. Novelle has been fully entered into force.⁷¹⁴ Nevertheless this clarification, there are still controversy about substantial aspects as the interest rate in connection with the § 33 Sec. 3 GWB,⁷¹⁵ as well as with the statute of limitation in connection with the § 33 Sec. 5 GWB.⁷¹⁶

The Directive 2014/104/CE itself contained some prevision in this regard. According to the Art. 22 Sec. 1, *Member States shall ensure that the national measures adopted (...) to comply with **substantive provisions** of this Directive do not apply retroactively.* As by means of the Art. 22 Sec. 1 a specific time line for procedural matters is drawn in order to allow damages actions in light of the provisions of the directive as follows: *Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.*

As per the clarity of the Directive regarding the prohibition of retroactive effect of material rules, and its compatibility with the German practice (*intertemporal Law*); it seems than no specially incorporation in German Law is necessary.⁷¹⁷ Different is with the provisions of the Art. 22 Sec. 2 of the Directive. Thus, it is quite important the categorization of the nature of a rule as material or procedural. The German Government had categorized such rules included in its reform proposal from §§ 33 c Sec. 2 to Sec. 5, 33 g as well as 89 e GWB-RegE as of procedural rules.⁷¹⁸ In this regard, the GWB-RegE does include some provisions to deal with the possible retroactive effect of procedural rules. This is regulated in the § 186 Sec. 4 GWB-RegE. As by means of this article, the § 33 c Sec. 2 to 5 GWB-RegE (rules in favor of the indirect purchaser that the umbrella price effect has been transferred, § 33 g GWB- RegE (Right to disclosure), as well as the §§89 b to 89 e GWB-RegE are only applicable to these procedures lodged after 26th December (final date for the incorporation of the Directive into the national law of the member States).⁷¹⁹ Although, the Directive would have allowed a prior date, namely the 26 December 2014, the German Government has decide itself for a later date, which has been well received.⁷²⁰ An important aspect when it is spoken about time frame of

711 Rother, NZKart 2017, 1 (2).

712 Scherzinger, NZKart 2016, 513 (513).

713 Scherzinger, NZKart 2016, 513 (513) referring to BGH Decision of 28.6.2011, KZR 75/10, Juris, P. 13- ORWI.

714 This was in any cause questioned again in the OLG Nürnberg, decision of 19.7.2016, 3 U 116/16, Juris, p. 68.

715 OLG Karlsruhe decision of 27.8.2014, 6 U 115/11 (Kart), Juris, p. 175.

716 LG Düsseldorf, decision of 18.2.2015, VI-U (Kart) 3/14, Juris, p. 36ff- Damages by Cement Cartel.

717 Scherzinger, NZKart 2016, 513 (515).

718 Further analysis about the adequacy of this categorization in Scherzinger, NZKart 2016, 513 (515).

719 So, Scherzinger, NZKart, 2016, 513 (515).

720 *Ibidem*.

application is of course the statute of limitation. The § 33 h GWB- RegE incorporates in German Law the provision in this regard of the Art. 22 Sec. 2 of the Directive. According to the § 186 Sec. 3 GWB – RegE such damages that persist at the time that the Law is coming in force will be regulated according to the new regime. It does not apply, to the suspension, expiry suspension and restart of the suspension of the statute of limitation, that will be regulated according to the previous regime (§186. Sec. 3 GWB- RegE). A specific aspect of the statute of limitation, namely the interruption due to an anti-cartel proceeding and its required extension to at least 1 year (as a matter of fact the 1 year time frame will be incorporated into German Law, by means of the § 33 h Sec 6 GWB RegE,) the new regime, will not, according to the §186 Sec. 3 GWB-RegE, apply to those damages that last to the coming in force of the new regime, therefore, the old one will be of application.

3.3 Gruppenklage repertory

These kinds of claims are alien to the German Civil Procedure Act (ZPO). The absence of such a claim is explained in the contradictory nature of the German civil Law.⁷²¹ Consumers, in case of small loses can transfer its claims to a consumers' associations by means of the *Enziehungsklage* after the §79 Abs. 2 No. 3 ZPO.⁷²² Nevertheless, after the case *Zementkartellfall*⁷²³ the German doctrine will discuss an application of law which creates a solution which drives to a kind quasi *Sammelklage*.⁷²⁴ In this case, a Belgian corporation (CDC),⁷²⁵ gathered in a civil law association multitude of individual demands in its own name.⁷²⁶ Such cession of own interests to a third party (based on the § 398 BGB) could be in principle be allowed by the German Courts.⁷²⁷ Thereby the German case Law facilitates the recovery of spread damages by means of cession of rights to a third party, similar to an opt-in class action.⁷²⁸ CDC managed the interests of 36 damaged parties, in its own name;⁷²⁹ the company acquired by means of a legal cession the rights of its costumers before starting any legal action. In this particular case, the action was finally rejected,⁷³⁰ as the Court consider that CDC represented alien rights before been stablished as a provider of legal services, which was contrary to the German ***Rechtsberatungsgesetz***, and was not in position to face the costs of the procedure in case of losing it, which is a prevention against baseless claims.⁷³¹ This decision, confirms the CDC model is in principle confirmed if matches the requirements of the Art. 79 ZPO but also shows that German courts will maintain high standards in connection with these requirements.⁷³² This case stimulated the doctrinal discussion in Germany about the suitability of a *Sammelklage* by means of a GbR in order to deal with spread damages,⁷³³ as it opens new possibilities to the collective redress. In this regard, always will be necessary the adhesion of injured parties to the society, which will depend

721 Scholl, Kollektiver Rechtsschutz, p. 136.

722 Buchner, Kollektiver Rechtsschutz, p. 78 ff.

723 LG Düsseldorf, Urt. vom 17.12.2013, Az. 37 O 200/9, BeckRS 2013, 22380. Confirmed by OLG Düsseldorf 18.2.2015 (az. VI U 3/14).

724 *Ibidem*.

725 Cartel Damage Claims Holding S. E.

726 CDC represented a sum of 36 injured parties.

727 OLG Düsseldorf BB 2007,847; confirmed by BGH BeschI.v.07.04.2009, KZR 42/08; in connection see Koch, NJW, 2006, 1469 (1471); general to standing of civil Law associations see Schmidt, Gesellschaftsrecht.

728 Scholl, Kollektiver Rechtsschutz, p.141.

729 Koch, NJW 2006, 1469 (1470).

730 Judgment of 18th February 2015 (Az. VI U 3/14), confirming previous instance.

731 RGZ 81, 175, 176; BGHZ 96, 151; OLG München, Urt. v. 14. Dezember 2012 - 5 U 2472/09

732 Mann, NJW 2010, 2391, (2394).

733 Gesellschaft Bürgerliches Recht: Association of Civil Law.

on the rational analysis of the victims. Damaged consumers may get organized around a Society of civil Law, according to the § 705 BGB, and assign its claims to the society according the §§ 398 BGB in order to claims for its rights.⁷³⁴ This cession of rights need to observe some requirements in order to be valid, so any cession to a created Inkasso or provider of legal services, unless it is done according to the requirements of the § 3 RDG will be void according to the § 134 BGB.⁷³⁵ If there is a case of enforcement of own rights or representation of alien rights will depend on the nature of the contract between the original holders of the rights and the claimant association. According to the German federal supreme court, BGH, when the price of the cession's contract will depend on the actual recovery (sort of contingency fee contract), it will be a case of providing legal services in name of a third party. ⁷³⁶ In the other hand, if the recoveries go in full to the association, then it is a case of proper cession of rights and the association act in its own name.⁷³⁷ So, if affected consumers want to create an *ad hoc* association to claim for its rights, it shall be avoided that they all under the requirements of the § 3 RDG. In order to get this, it is necessary a specific configuration of the association's contract;⁷³⁸ namely, **the act of transfer of right must be irrevocable, and it shall be avoided that transfers in any form the risk of the result to the assignors.**⁷³⁹ If the associations contract does not include these provisions, the GbR will be acting in alien rights in the sense of the § 2 Abs. 1 RDG, and will need a title in order to act when its acting is an autonomous business.⁷⁴⁰

By observing the above-mentioned requirements, this instrument could be a proper instrument in order to connect (in origin) individual pretensions in a single representation and law suit. Of course, for minor damages, the rational disinterest will be a handicap. In this sense, this instrument allows for the distribution of costs between the members of the association, and at the same time the courts will be unburdened by a common gathering of evidence. The suitability will depend on the expectations of the injured parties, which at the same time will depend very much on the amount of the losses and the probabilities for recovery.⁷⁴¹ The cession of rights to the association is similar to the voluntary participation in an opt-in class action. As per the model of CDC, the injured parties lost their rights in favor of the company, which acts in its own name and interest. It means that any successfully recovery of damages will not be addressed to the victims, but to the society. As CDC establishes a contingency fee relationship with their clients, it in its own interest to claim for the highest possible amount.⁷⁴² As per these judicial construction Germany counts with an instrument that is similar to the contingency fee opt-in class action without having any legal provision in this sense within its legal system. Therefore, although being the class action alien to the German Law, this country counts with a judicial created instrument that bring closer this country to the European standards on collective redress.

In Europe, representative collective actions are often discussed in terms of two basic models: 'opt-in' and 'opt-out'. In England, the Civil Justice Council has noted,⁷⁴³ that

734 *Buchner*, Kollektiver Rechtsschutz, p. 80.

735 So BGH WM 2012, 2322, 2325, deeper in *Buchner*, Kollektiver Rechtsschutz, p. 81 ff.

736 BGH WM 2012, 2322, 2323 f.

737 According to Loritz and Wagner the categorization of this business shall be independent of the cession's contract, as the members of the association bear with the risks as well.

738 Exhaustiver see *Mann*, ZIP 2011, 2393-2396.

739 *Buchner*, Kollektiver Rechtsschutz, p.86.

740 *Ibidem*.

741 *Scholl*, Kollektiver Rechtsschutz, p. 145.

742 *Scholl*, Kollektiver rechtsschutz, p.145.

743 http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf. Retrieved last tim 01 September 2019.

the distinction between ‘opt-in’ and ‘opt-out’ is not necessarily clear cut, as in order to receive any compensation a party has to step forward at some point.⁷⁴⁴ In considering options for a reform of the English regulation on the matter, it appeared a third model, known as ‘**pre-damages opt-in**’, which lies approximately halfway between opt-in and opt-out, containing elements of both.⁷⁴⁵ The European version of the consumers’ class actions, in the most cases grant legal standing to qualified associations rather than to individual consumers/ plaintiffs and the acceptance of the opt in model prevails. In the field of *Wettbewerbsrecht*, the White Book of the EU Commission take position for granting legal standing to associations to recover unlawful earnings and in exceptional cases also for restitution of determinable affected consumers.⁷⁴⁶ Institutional class actions driven by associations, this does not act in own interest, but in public interest or in interest of affected parties. As the association has not suffered any damage, it acts as a „self-named consumers agent“⁷⁴⁷ thus, it arises some questions about its legitimation or legal standing.⁷⁴⁸ **Associative damage actions has been categorized as an intermediary action between the common law class action and the continental *Verbandsklage*.**⁷⁴⁹ As per the Commission’s White Book, the calculation of the damage shall be limited to the basis of the unlawful earning calculated, especially when the affected parties can not exactly be identified (*where the claimant represents a group of victims who cannot all be precisely identified*).⁷⁵⁰

3.3.1 Constitutional and civil barriers

Gruppenklage connect individual damages of a group which may be ascertainable or not. This requires an *adequacy of representation*. It can be done by one or more members of the group, by a private representing party, alien to the group such any association of interests.⁷⁵¹ It can be also proposed an appointment of the representing party by the court, in the same way that a bankruptcy administrator is named, as per the §§ 26, 206 UMwG.⁷⁵²

Next to the standing, the key discussion on collective claims is the configuration of an opt in or an opt out model. It affects the binding force of the judgment. Possible barriers

744 A paper by Professor Rachael Mulheron sets out ten potential collective action models along the opt-in / opt-out spectrum, ranging between the pure opt-in and the pure opt-out, see *Mulheron*, ‘Opting in, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Action Law Makers’.

745 **Pure opt-in:** Individual parties should actively elect to join the action as members of the represented group. An individual who does not opt-in would not benefit from the outcome of the collective action, except that it might constitute a precedent were they to bring a separate claim. **Pre-damages opt-in:** Individual parties must actively elect to join the action as members of the represented group but can do so at any point up until the damages are quantified – even after liability has determined. However, any individuals who do not opt-out are bound by the outcome of the case as to whether they can bring subsequent claims for damages. **Pure opt-out:** All parties who fall within the definition of the represented group are bound by the outcome of the case whether unless they actively opt-out of the action. Damages are determined based on an estimation of the total size of the group with claimants coming forward after the quantification of damages to claim their share. Private actions in competition law: a consultation on options for reform BIS, Department for business Innovation & Skills Private actions in competition Law: a consultation on options for reform. April 2012, p. 31.

746 EU Commission, Whitebook working paper, more in *Weidenbach*, BB 2008, 1020-1025.

747 *Vogel*, Kollektiver Rechtsschutz im Kartellrecht. p. 222.

748 See *Schmidt*, Aufgaben und Leistungsgrenze der Gesetzgebung im Kartelldeliktsrecht; Eine rechtspolitische Studie zu den ausserstrafrechtlichen Sanktionen in GWB.

749 *Ibidem*

750 EU Commission White Book Working Paper, COM(2008) 165, 2.4.2008 p. 194.

751 *Hass*, Die Gruppenklage, Wege zur prozessualen Beseitigung von Massenschaden, p. 337.

752 *Stadler & Micklitz*, Verbandsklage, p. 6.

to the constitutional principles refer fundamentally to the right to be heard in court. For the most part of the German academia, only an *opt in* configured class action would fit in the German constitutional system. Although many German authors has treated this question with interest, they are mostly very critical with the introduction of a class action opt-out system following the American example.⁷⁵³ In the most of the cases, there are dogmatic barriers as the introduction of such collective redress mechanism is against the individualistic conception of the German civil and civil procedure law.⁷⁵⁴ For an important part of the German Academia the introduction and extension in Germany of private legal mechanisms which not seek the compensation of the damaged party are against the principles of the German tort law.⁷⁵⁵ This function, according to the principles of German civil law, shall be done by public institutions. One of the aspects most frightened by the critic authors is referred to the risk of create a similar litigation culture to the American one and the associated abuses.⁷⁵⁶ This is rejected by the BzBV as the European model is mostly introduced following the opt in system, avoid the contingency fees and the punitive damages are not allowed. Nevertheless, excessive precautions have been pointed as practical inconveniences. For the lawyers, there would in principle a lack of incentives in this area, as the contingency fee is generally prohibited in Germany. The structures of the German civil law will be also presented as an inconvenient for the distribution of damages obtained in such a process.⁷⁵⁷ There have been pointed other arguments against the introduction of such mechanism as for instance, that damages obtained in the claims for the victims will be recovered by the companies increasing the prices of their products in the market.⁷⁵⁸ This argument is of course, applicable to any monetary sanction which a company faces, both from public or private origin, and this possibility will decrease in a frame of a higher competition.

Such procedures need to be very carefully with the constitutional principles and the extension of the judgment to those parties that did not took part on the process.⁷⁵⁹ Aspects such the adequacy of representation, and notification to the involved parties are object of concern the German academia.⁷⁶⁰ A proper design of the adequacy of representation and in general an adequate configuration of the procedure procedure may match any constitutional's requirement, even in an opt out model.⁷⁶¹ The interests of affected consumers will be better defended with such a mechanism that in the absence of the same, as for the cases of minor damages the usual outcome is the non-claiming decision. The compatibility of collective redress mechanisms with any fundamental right can be succeed for instance adding some elements such the „opt in“ or „opt out“ mechanism. Hempel,⁷⁶² Micklitz and Stadler are for this solution. With this solution, the holder of the legitimate interest delegate it voluntarily to the representing party. A necessary requisite

753 The German Deutsche Juristischen Tagen DJT took position against the introduction of such a claim in Germany; *Stadler*, *Empfehlen sich gesetzgeberische Maßnahmen zur Bewältigung von Massenschaden?* Verhandlungen des 62 DJT Band I, Gutachten A P. 64 ff.

754 *Germany*, Stellungnahme zum Grundbuch, BDI.

755 BDI, Stellungnahme zum Grünbuch, der Kommission zu Schadenersatzklagen wegen Verletzung des EU Wettbewerbsrecht, April 2006 pg. 2; *Vogel*, *Kollektiver Rechtsschutz in Kartellrecht*, p. 221.

756 BDI Stellungnahme zur Grundbuch; *Spindler / Ulmer*, *Die amerikanische Institution der Class Action als Mittel des Konsumentenschutzes – Kuriosum oder Vorbild?* Festschrift für Eugen Ulmer, 1973 pp. 369-380.

757 *Schmidt*, *Aufgaben und Leistungsgrenzen der Gesetzgebung im Kartelldeliktsrecht. Eine rechtspolitische Studie zu den außerstrafrechtlichen Sanktionen im GWB*, p. 34 ff.

758 *Spindler / Ulmer*, *Die amerikanische Institution der Class Action als Mittel des Konsumentenschutzes – Kuriosum oder Vorbild?* Mitarbeiterfestschrift für Eugen Ulmer, 1973 pp. 369- 374.

759 *Dispositionsmaxime und Anspruch auf Rechtliches Gehör*.

760 See *Vogel*, *Kollektiver rechtsschutz mi Kartellrecht* p. 33.

761 *Gottwald*, *ZZP* 1978, 1 (7).

762 *Vogel*, *Kollektiver Rechtsschutz im kartellrecht*, p. 314,

will be the statement of representation.⁷⁶³ Only single authors will be considered compatible with the German constitutional law a class action based on an *opt out* system.⁷⁶⁴ Even the BzbV, which considers the Gruppenklage as the unique suitable system to recover minor damages under German Law recognize the opt in model as the proper one.⁷⁶⁵

3.3.2 RBerG (Rechtsberatungsgesetz)

The Art. 5 Abs. 2 SchuModG⁷⁶⁶ introduced a *Verbandsmusterklage*⁷⁶⁷ – in order to strength consumers’ protection. Until the introduction of this article, common interests could be sustained in a single procedure, but it cannot be done in an alien interest, as the prohibition of the 1§ 1 Abs. 1 Satz 1 RberG was clear: prohibition of “*geschäftsmässige Besorgung fremder Rechtsangelegenheiten*”.⁷⁶⁸ According to the § 134 BGB violation of this observations will conduct to nullity of acting.⁷⁶⁹ The 1§ 3 No. 8 RberG establishes an exception to this general principle, **allowing consumers associations, to defend alien rights or interest both judicially and extra judicially**. Thereby the 1 §3 No. 8 RBerG⁷⁷⁰ explicitly recognized legal standing of consumers’ associations *und Zentralen- in order to represent holders of a substantive law*. Until the passing of this article, this law, explicit prohibited binding creditor’s pretensions in a single procedure.

As necessary requisite, the pretension shall be necessary for the defense of consumers’ interests, in the frame of the field of activity of the consumer association, and the association must be supported by public sources. This rule modified the German civil procedure law as well: ZPO § 79 Abs. 2 S. 2 No. 3, later also § 8 No. 4 RDG. This regulation content a multiplicity of forms in which an association can bring into the court pretensions for the defence of consumers. What is common for all these possible claim’s form is that the association is acting in name of individual consumers’ interest, and they can dispose about its interests. It is the supra individual collective element the most relevant aspect of these claims.⁷⁷¹ It is not a comparable to the U.S. Class Action which allows enforcing rights or interest of not determinable injured parties.⁷⁷² These are cases of enforcement of individual rights by associations. They will be *additive -summative gebündelt und kumulativ- gleichartig ausgeübt*.⁷⁷³ Different than the injunctions claim, the association claim for damages recovery is, although many proposals for their introduction,⁷⁷⁴ even for the last reform of the UWG)⁷⁷⁵ extraneous in the positive German

763 Vogel, Kollektiver Rechtsschutz im Kartellrecht, p.17.

764 Koch, DJCIL 2001, 355-367 who justified this redress instrument from the point of view of the tort & liability law; also Gottwald, ZJP 1978, 1 (7).

765 See http://www.vzbv.de/cps/rde/xbcr/vzbv/Gruppenklagen-Stellungnahme-vzbv-2013_08_21.pdf
Retrieved last time 20 January 2017.

766 Zum 01 Januar 2002.

767 Literally translated as associative model claim.

768 Representation of alien interests.

769 BGH, WM 2007, p. 67.

770 Rechtsberatungsgesetz (RBerG) vom 13 Dezember 1935, RGB1.I S. 1478.

771 Schilken, Der Zweck der Zivilprozess und der kollektiven Rechtsschutz, in: Meller- Hanninch, Kollektiver Rechtsschutz im Zivilprozess, p. 21, 36.

772 Zöller / Geimer Zivilprozessordnung Kommentar, § 50, Rn 60.

773 Säcker, Zur kollektiven Durchsetzung von Interessen in der deutschen Rechtsordnung- in: BMELV, Tagungsband kollektive Rechtsdurchsetzung- chancen und Risiken. Internationales symposium, Bamberg 20. bis 21 Februar 2006, pp. 225- 230.

774 Further Mertens, ZHR 1975, 438- 475; Koch, ZJP 2000, 413-441.

775 Oppermann / Müller, GRUR 2005, 280-289.

Law. 776 Consumers are not entitled for this reparations claim nor in the UWG neither in the general clause of the § 823 Abs. 2 BGB.⁷⁷⁷ Some authors considered this kind of claim as the possibility of a *Musterklage* (example claim) in which the association let aside individual claims or let themselves be empowered for the process.⁷⁷⁸ Other authors saw the possibility of a *Sammelklage*, which would imply that the represented consumers are determined and that the *res iudicata* will only be extended to those determinable consumers.⁷⁷⁹

For Burckhardt, it was the introduction of a type of *Sammelklage* in German Law, in the form of a claim which allows the enforcement of connected interest or rights by an association. As this kind of claim does not deal with supra individual interests- in the sense of collective interest -but deal with the determinable rights of third parties, it is not a traditional claim of the association enforcing collective interests, furthermore it is a case of *Verbandsklage in interest of third injured consumers*.⁷⁸⁰

With the reform of the Art. 1 § 3 No. 8 RberG was introduced the possibility of a *Verbandmusterklage* (Associative example claim) in favor of consumers' associations. As per the recovery action of the § 79.2 No. 3 ZPO, since the year 2002, German consumers' associations are allowed, in their acting fields to file a recovery action in name of a single or multitude of consumers. Some consumers associations have made use of this possibility.⁷⁸¹ This regulation, in its primary intention shall give a proper response to the so called minor damages (*Bagatell* or *Streuschadens*), but such stake was not clearly adopted in the final law proposition.⁷⁸² Thus the final result of the law seem to be inappropriate to deal with these kind of damages.⁷⁸³ This procedural instrument is foreseen in order to recover minor damages, that due to this minimum amount would otherwise remain by the causer. However, this instrument is in the *praxis* unappropriated to reach this aim, as in the procedure, each affected consumer case is going to be treated separately (the amount to claim, the submission of evidences, etc...).

Consumers associations have made use of this instrument preferentially as an example case (*Musterklage*). As the claim is based on an onerous pretension, the consumers' association VzBv considers that these claims are likely to promote unfounded

776 Schilken, Der Zweck der zivilprozess und der kollektiven Rechtshutz, in Meller- Hanninch, Kollektiver Rechtshutz im Zivilprozess, pp. 21-32.

777 Emmerich, Unlauterer Wettbebersrecht, § 23, Rn.5 -11; according to Vogel, the dogmatic proposal for the introduction of such claims in Germany go back to Steindorff, ZHR 1974 504 (512).

778 Wimmer-Leonhardt, UWG reform und Gewinnabschöpfungsanspruch oder „Die Wiederkehr der Drachen“, IZRIJurPC Web-Dok. 219/2003, Abs. 14.

779 Von Moltke, Kollektiver Rechtshutz der Verbraucherinteressen, p. 183.

780 Own translation of Burkhardt, Auf dem Weg zu einer Cass action in Deutschland. p. 23.

781 Ibidem, p. 6.; Der Anteil sog. Bagatellverfahren lag 2009 bei 19% und damit seit 2004 nahezu unverändert auf dem gleichen Niveau, übrigens mit beachtlichen regionalen Unterschieden, so waren es 2009 in Bayern 16%, in Berlin hingegen 25% Anteilswert. Hinzu kommen in 2009 insgesamt 6.738.787 Mahnverfahren mit einem mutmaßlich hohen Anteil an geringen Streitwerten. Die durchschnittliche Verfahrensdauer vor deutschen Amtsgerichten betrug 2009 in Zivilsachen (ohne Mahnverfahren und Familiensachen sowie FGG-Verfahren) 4,6 Monate. In 42% der im Jahr 2009 in Deutschland erledigten 1,25 Millionen Zivilpro- zesse vor dem Amtsgericht waren beide Parteien durch einen Anwalt vertreten, in weiteren 46% mindestens eine Partei, meist der Kläger. Die unmittelbare Vertretung der eigenen Interessen vor Gericht ist die Ausnahme: 2009 waren nur 12% der Parteien ohne anwaltliche Vertretung in einem amtsgerichtlichen Zivilverfahren. Statistisches Bundesamt, Brings, Justiz auf einen Blick, 2011, p. 43; Jünemann, Ubi ius ibi remedium: Ein richtiges Postulat auch für den Ersatz von Kleinst- und Massenschäden?

782 BT Drucks 14/ 7052, p. 210

783 Stadler & Micklitz, Die Verbandsklage p. 25.

claims.⁷⁸⁴ Antitrust or unfair activities will be included as far as the consumers' interests are affected. In this sense, the §1 UWG already establish the relationship free/fair competition and interests of consumers.⁷⁸⁵ **It was incorporated the sentence „when it is necessary requirement for the interest of consumers“.**⁷⁸⁶ In the practice the field of application is based in the § 661a BGB. It was avoided by the law maker to draft these claims to allow consumers associations to act as an insurance institution, and therefore the missing *Gruppenklage* (class action) is still not part of the German positive Law.⁷⁸⁷ During the time in force of this law, a declarative claim was excluded as per the unmodified formulation of the § 265 BGB.⁷⁸⁸ The *Verband Musterklage* follows the general characteristics of the *Musterklage*, exception made, that the claim is not lodged by an individual, but by an association. Thus, these sorts of claims count with the problem, that only can extend their effects, previous agreement between parties. It can be think about the utility of this kind of claims for the consumer, as it is hard to imagine that any company will agree to a decision which is not favorable for him. **The objective of this claim would be the establishing of one decision which can be used to support later claims. The decision fallen in these cases will support later individual claims. This is a kind of representative action, through by the affected consumers will be represented in court by an association.**

3.3.2 Erforderlichkeit im Interesse des Verbraucherschutzes

This is an undetermined concept. The OLG Düsseldorf⁷⁸⁹ made a narrow interpretation, letting outside of the RberG the wide interpretation of the UWG or UKlaG.⁷⁹⁰ Thus, the acting of an association based on the RberG shall be considered an exception. This interpretation was corrected by the German Supreme Court.⁷⁹¹ According to the BGH

784 See http://www.vzbv.de/cps/rde/xbcr/vzbv/Gruppenklagen-Stellungnahme-vzbv-2013_08_21.pdf
Visited last time on May the 8th 2014

785 Stadler & Micklitz, Die Verbandsklage, p. 25.

786 Erforderlichkeit im Interesse des Verbraucherschutzes

787 Stadler, in: Fs Schumann, 2001, p. 465 ff.

788 Stadler & Micklitz, Die Verbandsklage, p. 26.

789 Die hohen Anforderungen des Berufungsgerichts (vgl. bereits OLG Düsseldorf [WM 2004, 319](#) ff. zu einer Musterklage) werden teilweise auch in der Literatur vertreten. Danach soll der Anwendungsbereich zulässiger gerichtlicher Forderungseinziehung durch Verbraucherorganisationen praktisch auf wenige Ausnahmefälle wie z. B. den der Gewinnzusagen gemäß § [661a](#) BGB beschränkt (Chemnitz/Johnigk, Rechtsberatungsgesetz 11. Aufl. Art. 1 § 3 Rdn. 471. 1) und insbesondere in der vorliegenden Konstellation nicht eröffnet sein (Schebesta WuB VIII D. Art. 1 § 3 RberG 2. 06). Auch das Landgericht Frankfurt ([ZIP 2006, 463](#) ff.) hat die Erforderlichkeit der Verbandsklage in Fällen des Kreditkartenmissbrauchs mit der Begründung verneint, die Anwendbarkeit des Anscheinsbeweises sei jeweils individuell zu prüfen, so dass keine generelle Klärung einer für eine Vielzahl von Verbrauchern relevanten Rechtsfrage erzielt werden könne. BGH WM 2007, 67 Rn. 16. Against it also: The legitimation of the association shall be understood in the frame of the UWG, or UKlaG. Nach einer weiteren - auch von der Revision vertretenen - Auffassung ist Art. 1 § 3 No. 8 RberG nicht nur als Freistellung von der Erlaubnispflicht nach dem Rechtsberatungsgesetz zu verstehen, sondern als Begründung einer eigenen Klagebefugnis der Verbraucherverbände, die im Kontext mit der Klagebefugnis nach dem Unterlassungsklagegesetz (§ [3](#) Abs. 1 No. 1 UKlaG) oder dem Gesetz gegen den unlauteren Wettbewerb (§ 13 Abs. 2 No. 3 UWG a. F. bzw. § 8 Abs. 2 No. 3 UWG n. F.) zu sehen sei. Entsprechend den dortigen Maßstäben müsse es daher ausreichen, wenn neben dem mit der Klage verfolgten Individualinteresse auch ein kollektives Moment vorliege, Verbraucherinteressen nicht nur am Rande berührt seien (vgl. Micklitz, in: MünchKommZPO, 2. Aufl. Aktualisierungsband UKlaG Rdn. 28 ff.; ders. [VuR 2005, 34](#), 36 f. sowie Micklitz/ Beuchler NJW 2004, 1502 (1503) oder ein verbraucherrechtlicher Sachzusammenhang bestehe (Kleine-Cosack, Rechtsberatungsgesetz Art. 1 § 3 Rdn. 56; vgl. auch Erbs/Kohlhaas, Strafrechtliche Nebengesetze Stand 158. ErgLfg. R 55 § 3 Rdn. 22).

790 See *Vogel*, Kollektiver Rechtsschutz im Kartellrecht, p. 167.

791 BGH WM 2007, 67 "Das Berufungsgericht hat jedoch - wie die Revision im Ergebnis mit Erfolg beanstandet - die Voraussetzungen der Ausnahmenvorschrift des Art. 1 § 3 No. 8 RberG zu Unrecht verneint. Nach dieser Vorschrift ist die gerichtliche Einziehung fremder und zu Einziehungszwecken abgetretener

it shall be allowed these claims for the cases also in which the general interest of consumers is also affected, and the acting of the association will defend these interest in a more efficiency way. ⁷⁹²This happen for instance in the cases in which due to the minor damages of consumers, or when the costs/ risks/ will probably conduct to a non-claiming result.⁷⁹³ If the application scope of the RberG was unclear,⁷⁹⁴ with the reform of the RDG possible limitations are aside, so these *Verbandsklage* can also be used in antitrust law. For authors like Stadler, the scope of these claims shall be released from unnecessary limitations.⁷⁹⁵The experience with this instruments hows in a field study that from 121 associations taking part on the study, merely 4 had already used this instrument. As expected- this regulation is forwarded to these specific associations, they were all consumers associations. They were active in different fields.⁷⁹⁶Half of the associations taking part on the survey (2 of 4) consider these actions as actually practicable, the other 2 consider this instrument as partially practicable. In connection with further developments, the half of the associations taking part asked affirmatively, but do not specified how.⁷⁹⁷

3.3.3 Reform by the RDG

Verbraucherforderungen durch Verbraucherzentralen und andere Verbraucherverbände, die mit öffentlichen Mitteln gefördert werden, im Rahmen ihres Aufgabenbereichs zulässig, wenn dies im Interesse des Verbraucherschutzes erforderlich ist. Dem Berufungsgericht ist zwar im Ansatz darin zuzustimmen, dass eine solche Erforderlichkeit nicht schon bei jedem verbraucherrechtlichen Sachzusammenhang oder bei bloßer Berührung von Verbraucherinteressen zu bejahen ist, sondern einer darüber hinausgehenden Rechtfertigung für die Einschaltung des Verbraucherverbandes bedarf. Das Berufungsgericht hat aber an diese Rechtfertigung zu hohe Anforderungen gestellt." Rn.1

792 Die Erwägung des Klägers, es sei Prozess-ökonomisch, Ansprüche mehrerer Karteninhaber gegen dasselbe Kreditinstitut miteinander zu verbinden, weil dann die erforderliche Beweisaufnahme zur Sicherheit des Verschlüsselungssystems einer bestimmten Bank nur einmal durchgeführt zu werden bräuchte, ist für die Anwendung des Art. 1 § 3 No. 8 RBERG irrelevant, weil eine prozessökonomische Zielsetzung den aufgezeigten rechtlichen Anforderungen keinesfalls genügt. OLG Düsseldorf · Urteil v. 28. Oktober 2005 · Az. I-16 U 160/04; BGH WM 2007, 67.

793 Schließlich behandelt eine dritte Rechtsmeinung das Merkmal der Erforderlichkeit zwar als zusätzlich einschränzendes Zulässigkeitskriterium, stellt daran aber geringere Anforderungen als das Berufungsgericht. Die Einschaltung eines Verbraucherverbands soll danach erforderlich sein, wenn die Verbandsklage nicht nur zur Durchsetzung von Verbraucherinteressen geeignet, sondern außerdem auch effektiver als eine Individualklage der geschädigten Verbraucher ist, z. B. weil der Verband über aussagekräftigere und repräsentativere Informationen zu der Streitfrage verfügt oder das Beweispotential bei gebündelter Rechtswahrnehmung gründlicher ausgeschöpft werden kann (vgl. LG Bonn [WM 2005, 1772](#), 1773 ff.; zustimmend Beuchler WuB VIII D. Art. 1 § 3 RBERG 1. 06; Derleder [EWiR 2005, 579](#) f.; jurisPK-BGB/Knerr, BGB 2. Aufl. Internet-Aktualisierung § 398 Rdn. 63; Palandt/Heinrichs, BGB 65. Aufl. § 134 Rdn. 21). BGH WM 2007, 67.

794 BT Drucks, 16/3655, p. 88 ff.

795 Stadler, Rechtspolitischer Ausblick zum kollektiven Rechtsschutz, in: Meller- Hanninch; Kollektiver Rechtsschutz im Zivilprozess, p. 93-96.

796 „Breitenwirkung nach erfolgreichen AGB-Verfahren mit deutlichem Vermögensbezug (Lebensversicherungen); Vorerfahrung (Abtretung nach RBERG) mit "Premiere"/viele Forderungen à 80 Euro". nach Feststellung der Unzulässigkeit von Preiserhöhungsklauseln (Gasmarkt) durch ein Gericht oder aufgrund einer Unterlassungserklärung erfolgte keine Rückzahlung zu Unrecht eingezogener erhöhter Preisbestandteile“ „überhöhte Stromentgelte, Fluggastrechte, unwirksame AGB von Fluggesellschaften“ „vorangegangenes positives AGB-Verfahren“.

797 Ob dieses Verfahren unter dem Gesichtspunkt der Praktikabilität weiterentwickelt werde solle, wird von vier Verbänden verneint und von ebenfalls vier Verbänden bejaht. 113 beantwortet diese Frage nicht. In welcher Form eine Weiterentwicklung stattfinden sollte, weiß ein Verband nicht zu beantworten. Die drei anderen nennen folgende Möglichkeiten „Bündelung evtl. mit §§ 1, 2 UKlaG und § 8 UWG; Opt-in-Rückzahlungsklagen; vgl. bitte Stellungnahme des Verbraucherzentrale Bundesverbandes e.V.“ „siehe Stellungnahme“ (vzbv) „So etwas wie Rückrufverpflichtung (wie bei kaputtem Auto); Anbieter sollte verpflichtet werden, ihre (Ex)Kunden über Ansprüche zu informiere oder automatisch zahlen“

The *Bundesministerium der Justiz* published on the 13th April 2005 a proposal for a new *Rechtsdienstleistungsgesetz* (RDG).⁷⁹⁸ This normative refers to out of court advising. It was proposed an amended of the ZPO (§ 79 Abs. 2 No. 3 ZPO) in order to regulate the *Verbandmuster und Sammelklage* of the Art. 1 § 3 No. 8 RBerG. As per the proposal, consumable to defend judicially an addition of individual consumers' interests.⁷⁹⁹ In the German Law there is practically of non-relevance.⁸⁰⁰ A general provision for a Gruppenklage were gathered in the former Art. 1 § 3 No. 8 RberG and for certain aspects of German Commutation Law (*Umwandlungsgesetz*).⁸⁰¹ The Art.1 §3 No. 8 RberG (Neu: § 8 No. 4 RDG, § 79 Abs.2 S.2 No.4 ZPO) was in force till 01.07.2008, derogated by the RDG.⁸⁰²

3.4. Muster Claim KapMuG

An intermediary position between the collective and individual redress will be provided by the so-called example claims (*Musterprozesse*). These actions serve the procedural economy as well. Different than the *Verbands-* or *Gruppenklage* this instrument is not properly a collective instrument.⁸⁰³ By means of this instrument there is not either a third party who represent alien rights or receive by cession alien rights to be enforced. The main function of this claim is to solve legal questions that can be connected to several cases. It is a proper instrument to deal with spread damages when these have as common origin a single act. These actions will be usually driven by a single claimant seeking an example decision which can be used in later procedures.⁸⁰⁴ This kind of claim does not exist under Spanish law, is a German specialty, that did not found reflection in the ZPO⁸⁰⁵ until the approval of the *Kapital Musterverfahrensgesetz*. For the German academia, this **is not a kind of class action, just an original way to connect individual interest in a single procedure**.⁸⁰⁶ The KapMug is in force in Germany since 01.11.2005. The aim of this regulation is to improve the protection of shareholders by facilitating their access to justice by means of a cheaper and speedy process.⁸⁰⁷ As this instrument was also alien to German Law, the Law Maker put in its first version a temporally deadline for the validity to the law, which will need evaluation of its effectiveness before being extended.⁸⁰⁸ In contrast to a U.S. class action, model proceedings under the KapMuG⁸⁰⁹ are designed as mere interlocutory proceedings and not as separate action.⁸¹⁰ With this instrument, the German law maker introduces for the first time a specific instrument to deal with cases of massive damages,⁸¹¹ limited to misleading capital-market information. The German law maker considers that misleading information in this field drive to massive damages.⁸¹² According to the law's motivation, it not only cares for a better individual protection, but

798 Available in www.bmj.de; also Dahns, NJW 2005, 237 (237).

799 Schaumburg, *Die Verbandsklage im Verbraucherschutz und Wettbewerbsrecht*. 28

800 Stadler & Micklitz, *Verbandsklage*, p. 7.

801 Cancellation of representing party.

802 *Rechtsdienstleistungsgesetz* vom 17.12.2007: BGBl. I 2007, p. 2840.

803 Scholl, *Kollektive Klagen*, p. 146.

804 Ertmann/ Keul, *Zum Vorlageverfahren nach dem KapMuG*, WM 2007, p.482 ff.

805 Alexander, *JuS* 2009, 590 (592).

806 Exhaustiver *Schneider*, BB 2005, 2249-2258.

807 RegE. Begr. BT_Drucks. 15/5091, p.13,36 ff.

808 Background study from *Halfmeier*, *Kollektiver Rechtsschutz im Kapitalmarktrecht: Evaluation des Kapitalanleger-Musterverfahrensgesetzes*.

809 BGBl. I 2005, 2437

810 Exhaustiver see *Bälz & Felix*, *Collective Litigation German Style - The Act on Model Proceedings in Capital Market Disputes*, in *Conflict of Laws in a Globalized World*, pp. 126-132; *Gottwald*; *ZZP*, 1978, 1 (7), *Stürmer*, *CIV.JUST.Q.* 2007, 253 (264).

811 *Einhaus*, *Kollektiver Rechtsschutz*, p. 399.

812 BT Drucks 15/5091, p. 16; *Braun / Rotter*, *BKR* 2004, 296-301.

also the legal- political order in this field,⁸¹³ and in the last place unload the judicial system. With this Act, the German lawmaker reacted promptly to the massive damages of the case Telekom and passed a bill governing test cases concerning the protection of investors (KapMuG).

The German *Musterverfahren* of the KapMuG⁸¹⁴ was considered as a possible option for a collective redress in the impact study of the White Book.⁸¹⁵ According to the Commission, a group claim with an opt in option could be a proper instrument in order to submit in the same process all the affected interests and to avoid the risk of different decisions in different procedures. In this, thought an individual interest will be enforced by the holder of the rights or an association, in last instance are the determinate interest of a group which are in the basis for the process. This regulation has its origin in the case Telekom, which is the biggest case of massive damages brought to the Court in Germany, and brought the judicial system to its frontiers.⁸¹⁶ The German legislator did not react until, in the Frankfurt Telekom case, he noticed how quickly one single lawsuit can paralyze the courts.⁸¹⁷ The development of this figure has its origin in the § 93a of the Code of Administrative Procedure,⁸¹⁸ provision based itself on massive procedures followed in Germany before the administrative court.⁸¹⁹ The decision fallen in such process could be used as example for further process. It needs however, an example agreement (*Mustervereinbarung*) between the injured parties and the defendant. From January 2002, this possibility of example claim was extended to the field of consumers' protection by the modernization of the *Schuldensrecht*⁸²⁰ (liability law).⁸²¹ **Main characteristic of these kind of claim is, that the decision fallen only affects to those who were part of the process or at least have a participation right.**

The scope of the German *Musterklage*, according to its § 1 Abs. 1 S. 1 is limited to damages recovery due to false, confusing or omission of substantial capital information as

813 BT- Drucks 15/ 5091; *Reuschle*, Das Kapitalanleger- Musterverfahrensgesetz, NZG 2004, p. 590 ff.

814 Kapitalanleger-Musterverfahrensgesetz vom 19. Oktober 2012 (BGBl. I S. 2182), das zuletzt durch Artikel 3 des Gesetzes vom 4. Juli 2013 (BGBl. I S. 1981) geändert worden ist.

815 EU Commission, Impact Study, p. 482 ff.

816 Details in *Hess*, ZIP 2005, 1713-1720; Bälz / Felix, Collective Litigation German Style - The Act on Model Proceedings in Capital Market Disputes, in Conflict of Laws in a Globalized World pp. 126-132 (Eckart Gottschalk et al., eds., forthcoming 2007); *Stürmer*, Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany, 26 CIV.JUST.Q. 250, 253 (2007); see also *Milne*, Judge Slams D Telekom Methods, FIN.TIMES, Nov. 24, 2004, at 18; *Jahn*, ZIP 2008, 1314 (1315).

817 *Micklitz / Stadler*, EBLR 2006, 1473 (1475).

818 Article used for the first time before the Federal Supreme Court in two separated cases, both involved the expansion of regional airports (Berlin-Schönefeld and Leipzig/Halle respectively). Cf. *Paetow*, Erstinstanzliche Großverfahren vor dem BVerfG, 26 NVWZ 36,38-40 (2007). Fn. Referring to *Baetge*, ZfP, 112, 329-351 referenz in Fn.253.

819 The (Verwaltungsgericht) had selected some 30 test cases, out of a total of more than 5700 and had suspended the other procedures while conducting the test cases, supported by the Federal Constitutional Court. Code of Administrative Procedure (Verwaltungsgerichtsordnung or VwGO) of Jan. 1, 1960 in the version promulgated on Mar. 19, 1991, BGBl. I, p. 686, as amended. For a brief description of the test case procedure envisaged by VwGO § 93a and its possible transfer into the Code of Civil Procedure, see further in Hopt / Baetge, Rechtsvergleichung und Reform des deutschen Rechts - Verbandsklage und Gruppenklage, in Die Bündelung Gleichgerichteter Interessen im Prozess 57-9 (Jürgen Basedow et al., eds., 1999). See Class Actions, Group Litigation & Other Forms of Collective Litigation - Germany - Dietmar Baetge, available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Germany_National_Report.pdf Position supported by the BVerfG, Mar. 27, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 39. For a description of the genesis of VwGO § 93a see Richard Rudisile, in Kommentar Zur R Verwaltungsgerichtsordnung § 93a mn. 1-2 *Schoch*/ et al.

820 Gesetz zur Modernisierung des Schuldrechts vom 26.11.2001, Bundesgesetzblatt Teil I 2001No. 61 vom 29.11.2001, 3138-3218.

821 *Stadler & Micklitz*, Die Verbandsklage, p. 7.

well as the lack of fulfilment of contracts related to acquisition of shares. As to reforms, Germany has recently revised the Capital Market Model Claims Act (*Kapitalanleger - Musterverfahrensgesetz* (KapMuG)) to make test case proceedings more efficient. As per this reform, been effective from 1 November 2012, the scope of the act has been extended to cases where capital market-related information is used in the sale and distribution of financial products. *Also, plaintiffs can now join the model case to stop the limitation period of their claims and await the outcome of the test case proceedings before deciding to pursue an individual claim.* Another important feature introduced with the reform a *court-approved settlement agreed upon by model claimant and defendant with binding effect on all plaintiffs unless they opt out.*⁸²² This in an instrument imported from Dutch Law.⁸²³ The previous configuration needed of the consent of all parties involved in the procedure, which has been shown impracticable due to the large number of plaintiffs involved. With the current regulation, the Court is able to order the settlement if some circumstances are present; namely if the test plaintiff and the defendant agree on a general settlement that covers the key aspects of the claim such the total damages to be paid, the distribution of damages among plaintiffs and the distribution of costs of the proceedings.⁸²⁴ The settlement need to be confirmed with at least 70 % of the plaintiffs, who can exercise its right to opt-out of the agreement. Lower acceptance among plaintiffs will reject the proposed settlement.

In Germany, this kind of action is not foreseen in the general civil procedure. This is a legal instrument though to be an example for further similar procedures. **The decision fallen in this process can be used in similar later ones.** The binding effects are related to factual not material legal aspects. However, the parties can freely agree to extend the decision of a *Musterprozessverfahren* to later aspects of their contractual relationship.⁸²⁵ The scope is foreseen in the field of *Kartellrecht*. The article § 779 BGB provides a definition of settlement in German Law: a contract with which the parties to legal relationship eliminate the dispute or the uncertainty about this relationship by reciprocal easing (settlement). Further affected parties by a *Kartell* activity must obtain an understanding with the causer of the damage to apply the decision fallen in a test case to its own particular case. The court shall decide about this settlement.⁸²⁶ This would be compatible with the principles of free contract and dispositions maxim.⁸²⁷ This law was time limited and served as example of a group claim for the connection of individual rights. The rightness of the law will be studied before it is extended.⁸²⁸ Thus, if these claims are considered appropriated for dealing with a plurality of single connected rights, it can be extended to other areas of Law. In the cases of minor damages there is a lack of incentives to claim, both for the affected person, as well as for the representing lawyer, that will calculate its fees according to the amounts disputed in trial.⁸²⁹ In the other hand, if there are a lot of affected individuals affected by an identical or similar factual situation, and all of them submit a claim, it implies a lot of costs for the judicial system, and there

822 So British Institute for International and Comparative Law: focus on collective redress, Germany. Available at: <https://www.collectiveredress.org/collective-redress/reports/germany/overview>.

823 So, *Michael Weigel, A& Porter, K.* Collective redress in Germany, available at <https://www.expertguides.com/articles/collective-redress-in-germany/collec14>.

824 *Ibidem*.

825 Study center for consumer law, final report. The Katholike Universiteit Leuven, Belgium, University of Leuven Tz. 370, an analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings- Final report.

826 *Rosenberg / et al.*, Zivilprozessrecht, § 47 Rn. 20.

827 *Schilken*, Der Zweck der Zivilprozess und der kollektiven Rechtshutz, in: Meller- Hanninch (Ed.); Kollektiver Rechtshutz im Zivilprozess, pp. 21- 52.

828 Bundeswirtschaftministerium und Bundeskartellamt, Stellungnahme zum Grundbuch, p. 8

829 Further in *Reuschle*, NZG 2004, 590-594.

exists always the risk of having divergent decisions taken by different courts. These are the two negative situations that this law is seeking to avoid. If there is single example question taking into consideration in different procedures, the decision fallen in one shall have effects for the other procedures.⁸³⁰ This aim will be obtained through the *Musterentscheid* (example decision). Which such decision the judicial system will be automatically discharged and the risk of having different judicial decisions for the same factual situation will be also avoid. According to the law-making material, also the enforcement of the material right will be though this kind of claims also strength.⁸³¹

Only the local *Landgericht* where the plaintiff has it domicile is competent to know of the case.⁸³² For some authors it shall be an especial national court competent for these cases, obtaining so the necessary expertise and know-how for these kinds of claims.⁸³³

3.4.1 Procedural aspects

Every single shareholder must its own claim before the competent *Landgericht* lodging. The claim shall fulfil the requisites of the § 253 ZPO. The claimant shall also cover the procedure costs expectations, for a claim of 10.000 €, these are at least of 1.708,18 €. ⁸³⁴ Any claimant has the possibility of asking for the application of the example claim based on the material fields of application. Without the petition of the claimant, the court cannot seek for this procedure. In the petition shall be included how far the current process shall be extended to other parallel procedures. If the petition is accepted, the court stop the process and register it in the electronic German federal data base (§ 2 KapMuG). A deadline of 4 months will be given to wait for further petitions connected to the same legal question. If at least 9 are accepted, then the registration will be disclosure. The court which accepted the solicitude in the first place will be the one continuing the procedure. The decision to go on with the process will be binding for the OLG (§4 Abs.1 S. 2 KapMuG). Any procedure in which the legal questions of the example claim are subject to this procedure, even if there was not any solicitude for such a claim, it means, these procedures will be stopped according to the § 7 Abs. 1 KapMuG. Thus, once the example claim is lodged and accepted, an individual process is no longer accepted. One of the claimants will be, according to § 8 Abs. 2 KapMuG named by the court as the *Musterklager* (example claimant). The court will take into consideration the amount claimed, as well as a proper unification of the represented interests.⁸³⁵ The claimant, will be limited in its dispositions rights, as per the importance of the interest that represents.⁸³⁶ The rest of the claimants can be put on the same level, to the figure of the § 67 ZPO (*Streithelfers*). They are allowed to submit any evidence or defence or attack means, so far, they are not contrary to the procedure strategy of the main claimant. Hereby is secured the fundamental right to be hear by the court. The judge has an active role in order to accelerate the process in interest of the process parties.⁸³⁷ The court decision can be appeal before the German Supreme Court BGH. Also, a settlement is possible, according to the § 14 Abs. 3 KapMuG, only possible previous agreement of the process parties. The individual process will be continue applying the muster decision. The individuals shall probe in its procedures the causality and the amount of the damages will be divided between the individual procedures. The main claimant has not to bear with further costs.

830 Further in Zypries, ZRP 2004, 177 (178).

831 BT- Drucks 15 /5695, p. 22.

832 § 32b ZPO corresponding to § 1 Abs. 1 P. 1 KapMuG.

833 So Sessler, WM 2004 2344, (2348).

834 For these calculations see Braun / Rotter, BKR 2004, 296-301.

835 *Ibidem*.

836 Vogel, Kollektiver Rechtsschutz, p. 189, against it see Burkhard, WM 2004, 2329-2334.

837 Exhaustiver see Vollkommer, NJW 2007, 3094 - 3098.

So, the costs will be divided, which is a favorable thing for those who suffered minor damages.

3.4.2 Following individual claims

According to §§ 5, 7 there cannot be sustained similar individual procedures while the example claim is being sustained. This possibility only exists once the decision of the example claim has fallen, as it has not *erga omnes* effects. In connection with the prescription, for authors such Schneider the actual regulation of this law allows the homeland injured person to choose between to the binding effects, of the example decision, or renounce to its pretension.⁸³⁸ This is an example of a possibility to deal with a lot of connected individual claims, as it is cheap and saves procedural resources.

For part of the German doctrine this was, so far, the only available mean in order to deal with massive relevant damages.⁸³⁹ The involved parties arrange to avoid multiple claim and reduce it to a lost or just one, using the decision fallen in the conducted process to be extended extra-judicially to the rest of cases. There are some issues related to this possibility such the prescription, (§205 BGB). If finally further claims are brought into a process, the previous agreement cannot be used for a legal binding extension or interpretation of the other courts.⁸⁴⁰ The agreement can be brought into the court allowing the decision to be sustained in the same.⁸⁴¹ The main disadvantage of these claim is that there is not a process in order to find out all injured parties and form a comprehensive union of claimants, and also the fact that this agreements are not worthy for the defendant, as the cost of the procedure and actual barriers of the civil procedure play in its benefit in cases of plurality of individual claims.

3.4.3 Consumers defence

The *Musterverfahren* may be a proper instrument to deal with massive damages. However, its effectiveness in consumers protection is very limited due to the narrow field of application of the law.⁸⁴² If this law was introduced to overpass the apathies to claim connected in cases of minor damages,⁸⁴³ the experience with this law has shown that in cases of securities, the damages are not usually *bagatell*,⁸⁴⁴ so there exists enough incentives for the individual enforcement, and will be doubted if this instrument, due to its complexity, provide a better defence than the individual ordinary claim when massive damages are spread.⁸⁴⁵ The case par excellence of application of this law, the Deutsche Telekom lasts 6 years until the order of remission of the LG Frankfurt.⁸⁴⁶ In connection with its capability to unburden the judicial system, as per the configuration of the law, the

838 Further see *Schneider*, BB 2005, 2249-2258, also *Hess*, WM 2004, 2329-2334; *Vogel*, Kollektive Kartellrecht, p. 191.

839 *Jacoby*, Der Musterprozessvertrag, p. 1.

840 Majority of the German doctrine, as well as BHG, NJW 1958, 1968, see further *Stadler & Micklitz*, Der Verbandsklage, p. 15.

841 *Stadler*, Empfehlen sich gesetzgeberische Maßnahmen zur rechtlichen Bewältigung der Haftung für Massenschaden? Gutachten A zum 62. Deutschen Juristentag, Bremen 1998, in: ständige Deputation des Deutschen Juristentages (Hrsg). Verhandlungen des zweiundsechzigsten Deutschen Juristentages Bremen 1998, Band I Gutachten, A1- A 104, 1998.

842 *Buchner*, Kollektiver Rechtsschutz, p. 95.

843 *Zimmer / Höft*, ZGR 2009, 662 (717).

844 *Wagner*, in Verhandlungen des 66.DJT, Band I, S.A 1,121.

845 *Buchner*, Kollektiver Rechtsschutz, p. 95; *Halfmeier/ Rott/Fees*, Kollektiver Rechtsschutz im Die Kapitalmarktrecht, p.54,81; *Meller-Hannich / Holand*, ZBB 2011, 180 (190).

846 *Buchner*, Kollektive Rechtsschutz, p.96.

KapMuG has a limited effect. According to Micklitz, the only effect is that complex procedures will be treated at the court of Appeal.⁸⁴⁷

4. Collective redress *de lege ferenda*

Discussed will be if the ZPO in its current configuration may regulate collective redress. Some German authors will consider that the collective remedies shall be regulated within the frame of the ZPO. In order to evaluate the compatibility of the collective redress with the ZPO the German academia, the discussion shall focus in the aim and principles of the civil procedure.⁸⁴⁸ If the ZPO is compatible with the nature of the collective redress will depend very much on the configuration of the collective redress instrument. For Huff⁸⁴⁹ an extension of the American model is not desirable (Class action and punitive damages),⁸⁵⁰ and several aspects of such collective instruments would not fit in the generality of the ZPO.⁸⁵¹

4.1 Proposals from the German academia

Micklitz and Stadler make some approaches *de lege ferenda* to this area of Law.⁸⁵² According to these authors, a pluralistic vision is a requisite. The actual collective redress mechanisms existing in Germany shall be unified in a single legal body. The injunctions claim (*Unterlassungsklage*) shall remain as an instrument to offer negative protection. The *Musterprozesse* (Example procedure) are considered as an additional instrument, as it has a considerable advantage that in one single procedure in an over court can be extend their precedent to further cases. *Gruppenklage* (class actions) shall only be recognized in these cases of a substantial rational lack of interest to claim, where connecting individual pretensions seems appropriate in terms of procedural economy.⁸⁵³ They will propose a separate law, a „*Verbandsklagesgesetz*“. A separate body has the advantage of non-limiting these claims to the civil Law. These could also be extended to labor, or environmental Law.

As per Stadler the configuration of such remedies depends very much on the aim of the collective redress. In connection with the limitation of individual rights in a collective procedure, one key aspect is related to the opt- in/-out option. As per the opt-in system, alien subjective rights can only be represented in a procedure if their holders expressly agree. Any injured consumer shall weigh the risks and benefits of the collective redress in comparison with the individual procedure before opt-in. So, in order to deal with massive minor damages characterized by the passivity of the claimant an opt in system could not mobilize all affected consumers, as they need expressly join the claim. Thus, an *opt out* instrument shall be more appropriated; although it counts with other problems.⁸⁵⁴ Due to the complexity of an opt out system, the German author recognizes the *Verbandsklage* as the easiest way to deal with massive minor damages. Nevertheless, this instrument

847 Micklitz, Collective private enforcement of consumers Law, p. 16.

848 So Schilken, Kollektiver Rechtsschutz im Zivilprozess, in: Meller-Hannich, 2008, p. 21ff.

849 Huff, ZZP 2007, 491 (496), against it Greger, ZZP 2000, 399 (405).

850 Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (BMELV).

851 Rosenberg/ et al., 16.A., § 47, Rdn. 14ff.; Alexander, JuS 2009, 590 (591).

852 Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation Wien Micklitz / Stadler.

853 Stadler & Micklitz, Die Verbandsklage, p. 36 ff.

854 Stadler, Bündelung von Verbraucherinteressen im Zivilprozeß, in: Brönneke, Tobias; Kollektiver Rechtsschutz im Zivilprozeßrecht, pp. 1-51; Hass, Die Gruppenklage, pp. 320, 326 ff.

renounces to the compensation function of the civil Law, as the distribution of these minor damages between the injured is not possible.⁸⁵⁵ In the other hand, for these cases in which a lot of injured wants to claim, a *Gruppenklage* following the American example⁸⁵⁶ could be the best option in order to avoid the judicial system and for an effective law enforcement. The individual consumer joining a collective action shall be aware that some disadvantages regarding the material and procedural protection.⁸⁵⁷ How these limitations compatible are with the connection of individual rights is a matter of the suitability of the claim. As the process of Certification of the American class action is related to the acceptance of the claim and demands some discretionary room for the judge.⁸⁵⁸ **The expressly agreement is limited in the opt out option. So, this option requires of higher standards of publicity of the claim and of the possibility of getting out of the *res iudicata* effect.** The USA and the EU share the Principle that no one is entitled to affect individual rights of other person in a process without a previous judicial statement, so that the affected party may act in the procedure and affect the judgment. ⁸⁵⁹ The individual rights may be represented by the claimant, as recognizes the ECHR⁸⁶⁰, which justifies limitations in the individual rights, especially when there are no other suitable alternative. ⁸⁶¹ In the opt out system, the express agreement to be represented

855 Micklitz / Stadler, Unrechtsgewinnabschöpfung – Möglichkeiten und Perspektiven eines kollektiven Schadensersatzanspruchs im UWG, 2003; Stadler & Micklitz, Verbandsklagerecht, p. 1309 ff.

856 Meaning a claim in which a subjective right of an injured can be represented in a procedure not being the holder part of the procedure.

857 *“Die Bewältigung bzw. Bündelung von „Massenansprüchen“ in einem handhabbaren Verfahren muss aber ebenfalls zu Kompromissen bereit sein und Abstriche gegenüber einem Rechtsschutz durch Individualverfahren in Kauf nehmen. Dies gilt prozessual, aber auch materiellrechtlich. Insbesondere Gruppenklagen, die auf Schadensersatz gerichtet sind, müssen auch bei der Schadensberechnung, bei Kausalitätsfragen etc. in gewisser Weise Pauschalierungen erlauben. Bekanntermaßen waren sie ursprünglich auch vom Anwendungsbereich der amerikanischen class action ausgenommen, gerade weil sich in Schadenser-satzprozessen regelmäßig auch viele Fragen stellen, die nur individuell beantwortet werden können und sätzlich bereit wäre, ihren Anspruch einzuklagen und damit eine Überlastung einzelner Gerichte droht – wie der Salzburger Fall eindrücklich belegt.“* Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation Micklitz &/ Stadler, p. 103.

858 Advisory Committee Notes on Rule 23 Federal Rule of Civ. Procedure, 1966 amendments subdiv. (b) (3) Anerkannt, dass die Anwendung der class action-Regelungen auf Massenschäden erst seit den „In Re Agent Orange“-Haftungsklagen in den 1980er Jahren; hierzu see *Univ. of Virginia, The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 *Virginia Environm. L.J.* 2004, 249 (257). In Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation Wien Micklitz / Stadler, p. 102.

859 Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation Micklitz / Stadler, p. 103. Article 6.1 Right to a fair trial ECHR.

860 *Lithgow and others vs the UK* (Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81) 8th July 1986.

861 *“Der EGMR hält in der Entscheidung Lithgow v. Vereinigtes Königreich, EuGRZ 1988, 361, 365 eine Zwangsvertretung letztlich zwar für zulässig, begründet dies aber nur sehr kurz u.a. mit dem Hinweis, dass der Beschwerdeführer schließlich von dem durch das Gesetz geschaffenen Kollektivsystem Nutzen gezogen habe. Wie konkret dieser Nutzen für die Zwangsmitglieder aussehen muss, wäre insbesondere bei einem „Opt-out“-Modell oder einer Zwangsgemeinschaft ohne Ausstiegsmöglichkeit für Bagatell- und Streuschäden genauer zu hinterfragen. Da regelmäßig angesichts eines riesigen Verwaltungsaufwandes und anstehender Beweisschwierigkeiten eine Auskehrung des eingeklagten Betrages an die Geschädigten nicht möglich sein wird, bliebe für die Zwangsmitglieder einer solchen Gruppenklage nur der höchst mittelbare Effekt, dass das prozessuale Instrument mittelfristig abschreckende Wirkung entfalten kann und damit dem Gesamtwohl aller Verbraucher dient. Ob dies ausreicht, das rechtliche Gehör des Einzelnen deutlich einzuschränken oder ihm die Durchsetzung seines individuellen Anspruchs gesetzlich zu versagen, erscheint zumindest fraglich“;* Stadler & Micklitz, Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation unter Mitarbeit von Holger Beuchler & Alexander Mom Fassung vom 12. August 2005 p. 104 ff.

(characteristic of the opt in) is substitute by a deadline first to exercise the right to get separated of the group claim. The author recommends following the opt-in solution. Even if it is configured a constitutional compatible opt out system, the weight of interest of the member of the group will – in absence of a highly motivated contingency fee lawyer- the court will be overloaded.⁸⁶² In the process itself, the opt-in solution can content solutions in order to weight the interest in an effective procedure and the individual rights of the member of the group, so they do not lose entirely its right to be heard before the Court. In connection with the possibility of using an electronic register to inform the members of the group of the cases facts and its developing, it demands a huge effort by the lawyer that could justify the introduction of a contingency fee. ⁸⁶³ Stadler bets rather for modern communication means to communicate with the group members, as it happens in Austria.⁸⁶⁴ In connection with the Information and participation of the group's members, as per the aim of the collective redress, which is the representation of a multitude of injured consumers in a single law suit, the information to each member of the class is an essential aspect. In an opt- in system, a lack of information is not so problematic, as the no informed consumer will always kept its right to start its own action if he wants to. On contrary, a lack of information to the affected consumer results in the expiration of its right. A negative effect of a lack of proper communication in an opt in system could result in a less efficiency of the group in order to negotiate a settlement. Stadler recommends using an electronic claim register, the usual print medias, and using own means of claimant lawyers. The American model of opt out requires a higher degree of effort. ⁸⁶⁵ The period of time shall be adapted to the opt in or out process. In opt in systems proper individual cases could be started before the deadline to opt expires.⁸⁶⁶ Stadler, to avoid abusive claims, propose to establish a part of the cost of the procedure for the claimants; a sort of caution. The opt in solution shall be configured as an irrevocable mean. The European system, contrary to the American- considers that claimant shall support the risk of the claim as well. It is to avoid that single members left the group before a settlement which they consider insufficient. The second opt out possibility introduced in the USA⁸⁶⁷ before the settlement is very controversial.⁸⁶⁸ If the single members are allowed to leave the group, the interest of the defendant to reach a settlement will decrease.⁸⁶⁹ Studying the examples offered by the north American class action, the most recognized fear factor between the academia is the

862 *Stadler & Micklitz*, Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation unter Mitarbeit von Holger Beuchler & Alexander Mom, p. 104.

863 *Schäfer*, Anreizwirkungen bei der Class Action und der Verbandsklage, in: *Basedow/et al.*, (Eds.); Die Bündelung gleichgerichteter Interessen im Prozeß, p. 67 ff.; *Hirte*, VersR 2000, pp. 148-155.

864 *Stadler & Micklitz*, Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation unter Mitarbeit von Holger Beuchler & Alexander Mom, p. 105: Für das deutsche Recht wurde im Zusammenhang mit dem Gesetzentwurf zur Kapitalanleger-Musterverfahren vorgeschlagen, ein elektronisches Klageregister einzuführen.² KapMuG; krit. zum elektronischen Klageregister wegen einer gewissen „Prangerwirkung“, *Sessler*, WM 2004, 2344-2347. Einzelheiten zum neuen Gesetz see *Stadler*, Das neue Gesetz über Musterfeststellungsverfahren im deutschen Kapitalanlegerschutz in Festschrift Rechberger 2005.

865 See Rule 23 (c) (B): “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”

866 *Stadler & Micklitz*, Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika. Gutachten im Auftrag des Vereins für Konsumenteninformation Wien, p. 105 ff.

867 Rule 23 (e) (3) Federal Rules of Civil Procedure.

868 Further see *Univ. of Virginia*, The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform, 22 *Virginia Environm. L.J.* 2004, 249, (276). (Note originated as a paper of Jason Betts, further references to be found in the publication).

869 *Stadler & Micklitz*, Gruppenklagen in den Mitgliedstaaten, p. 108.

possible missuses of this instrument.⁸⁷⁰ It was a fear recognized in the Commission studies as well. However, it is also recognized that the abuses of the American class action depend very much on the American tort and procedural law system, which differs from the European. **It is recognized that the abuses of the American model, could not take place in Germany due to this capital differences in the procedural procedure and tort law.**⁸⁷¹ Thus the proposals to introduce any sort of class action shall respect the precautions of the European model, specially in fundamental aspects such the prohibition of punitive damages. It has also been considered that the *Sammelklage* could avoid the advantages given by the civil procedure to the defendant in favor of a possible agreement with all claimants in a single procedure.⁸⁷²

4.2 Proposals from the BÜNDNIS 90/DIE GRÜNEN in collective redress

As per this political fraction of the German Parliament, two main problems are to be overpassed: first to mitigate the limited access to justice even in minor spread individual damages and secondly, its consequent lack of law enforcement.

In order to reach such aim, the proposal shall target three aspects:

1. The already introduced instruments of the *Kapitalanleger-Musterverfahrensgesetz (KapMuG)* for the connection of individual rights shall be introduced in the general civil procedure.

2. The barriers included in the KapMuG regarding the collective redress shall be eliminated to reach a highest standard of law enforcement.

3. It shall be created a suitable frame to reach solutions to cases of massive damages.

In order to reach that it will be proposed the introduction of a group settlement instrument for these cases in the 623 ZPO.⁸⁷³ The settlement shall be accepted by the court and will be void if the 30 % or more of the members exercise its right to get out of the agreement. (§§ 623-25 ZPO). Regarding the costs associated to such legislation, the green fraction claims that when the violation of the law do not longer is worthy due to a

870 See further concerns in Hess, JZ 2000, 372 (374); Hopt / Baetge, Rechtsvergleichung und reform des deutschen rechts- Verbandsklage und Gruppenklae- In: Basedow/et al; (Eds), p.48ff; further in Hirte, VersR 2000, 148-155 in: FS Leser 1998, 335ff, 339; Mertens, Kollektivrechtlicher Schadensersatz als Mittel des Verbraucherschutzes, ZHR 1975, (470).

871 Stadler, Bündelung vom Interessen, p. 23.

872 *Ibidem*.

873 § 623 ZPO Vergleich (1) Der Gruppenkläger und der Beklagte können einen gerichtlichen Vergleich dadurch schließen, dass sie dem Gericht einen schriftlichen Vergleichsvorschlag unterbreiten oder einen schriftlichen Vergleichsvorschlag des Gerichts durch Schriftsatz gegenüber dem Gericht annehmen. Den Teilnehmern ist über das gemäß § 620 Absatz 2 eingerichtete Informationssystem Gelegenheit zur Stellungnahme zu geben. Der Vergleich bedarf der Genehmigung durch das Gericht und wird nur wirksam, wenn weniger als 30 Prozent der Teilnehmer ihren Austritt aus dem Vergleich gemäß § 625 Absatz 2 erklären.

(2) Der Vergleich soll auch die folgenden Regelungen enthalten:
1. die Verteilung einer gegebenenfalls vereinbarten Leistung auf die Mitglieder der Gruppe,
2. den von den Gruppenmitgliedern zu erbringenden Nachweis der Leistungsberechtigung,
3. die Fälligkeit der Leistungen sowie
4. die Verteilung der Kosten des Gruppenverfahrens. Sollte dieser Vergleich nicht zustande kommen, ergeht ein Urteil im Gruppenverfahren, dass alle Teilnehmer des Verfahrens bindet §§ 627, 628 ZPO-E

highest private enforcement, the corporations will improve its better uses. The proposal, as the American Rule 23a, includes 4 prerequisites related to *numerosity*, commonality, typicality and adequacy of representation. The main difference with the American or the Spanish model is that the group must be ascertainable, determined, and in each member, must be legally advised. Other difference is that in order to admit the claim at least 10 members of the class shall participate. In connection with the local jurisdiction, they propose the general jurisdiction (domicile of the defendant) and to create supra regional courts in order to deal with these specific cases (§ 608.3 ZPO). Remarkable is that the proposal includes an electronic system of notification in the § 620 Abs. 2 ZPO-E which shall improve the efficiency of the communication. They think in a way to reach as much as possible number of similar claimants and even other already started procedures.⁸⁷⁴ An alternative would be the communication to injured consumers through consumers' associations. Any member of the group or a qualified institution may lodge the claim and act in the procedure as group claimant (§ 611). Any affected individual may join the group, as long as he is legally represented and express its will to participate. The new member shall specify its pretensions (§ 616). Joining the group is allowed until the first oral negotiation in the first instance. As the same time, if one member wants to abandon the group, shall count with the same deadline. If the group lost its 10 members the court can *ex officio* state the dissolution of the collective claim and apply the § 91a ZPO to the costs. The judge can any time revoke the empowerment of the collective claimant if is not representing in a proper way the group's interests. The withdrawal of the claim will require the support of the group members according to the general clause of the § 269. 2 ZPO. Applies the general principle of the losing party pays the trial. The costs will be split between the group claimant and their members proportionally according to their pretensions. The members will support some costs until a certain limit. The rest will be faced by the group claimant. However, this rule means that the costs can remain in multitude of occasions over or very close to the damages, which, as the green party recognizes can be an obstacle to overpass the rational disinterest too claim regarding minor spread damages cases.⁸⁷⁵

4.3 Proposal from consumers' associations

The Verbraucherzentrale Bundesverband (VzBv) applauds the latest activity of the European Union in consumers' collective redress. The VzBv promote the implementation of the transpositions and recommend the law maker to consider several aspects:

1. Introduction of the collective redress in the general civil procedure, as it happened in Spain in the year 2000 with the approval of the LEC. It shall include damage reparations and standing shall be granted according to the VzBv to the Bund and the Ländern.

2. In Competition field, the VzBv recommended the improvement of the European Directive to reach a higher level of protection of consumers. The VzBv recommend the

⁸⁷⁴ Engel, Einführung von Gruppenverfahren? Published on 4. Juli 2014 by Martin Engel. <http://www.verbraucherstreitbeilegung.de/einfuehrung-von-gruppenverfahren/> "Das wiederum wirft die Frage auf, welche Vor- und Nachteile das vorgeschlagene Gruppenverfahren gegenüber der bereits de lege lata verfügbaren Einziehungsklage nach § 79 Abs. 2 S. 2 No. 3 ZPO hat."

⁸⁷⁵ Einführung von Gruppenverfahren? Published on 4. Juli 2014 by Martin Engel. <http://www.verbraucherstreitbeilegung.de/einfuehrung-von-gruppenverfahren/> "Das Kostenrisiko kann allerdings auch bei minimalen Klagebeträgen wegen des Mindestsatzes anwaltlicher und gerichtlicher Gebühren nicht unter € 73,19 fallen. Wie die vorliegende Fraktion selbst sieht, wird das vorgeschlagene Gruppenverfahren das rationale Desinteresse der Verbraucher gerade bei kleinen Forderungen in Höhe ein- oder zweistelliger Beträge kaum beseitigen."

German Government to push for the introduction of a clear regulation to compensate damages. In this respect, the VzBv agree with the European Commission regarding the rejection of the American model in connection with the finance of the claim. According to the *Verbraucherzentrale*, key aspects to avoid miss founded claims is to limit the contingency fee, and the reimburse of the procedure costs to the claiming association. This institution recommends an independent model where the financing means are as far as possible related to the procedure. In this sense, it has been proposed that part of the money fairs due to breach of competition rules are granted to associations. The VzBv reminds the discussions in the frame of the amendment of the 8. *GWB Novelle* where *tangible proposals in this sense were made.* ⁸⁷⁶

3. The VzBv recommend that part of the recovery amounts is invested in consumers' associations, so they can act independently. At the same time, they consider also some precaution measures to avoid abuses, such the prohibition of punitive damages, or a contingency fee by side of the lawyer or avoiding or avoid claims without knowledge of the affected consumers (opt-out).

4. Recommendation for an opt-in *Gruppenklage*

According to the opinion of German consumers' associations, a proper access to justice for the cases or reparation of damages in case of massive damages is only to be reached by means of a new Group claim. The improvement of the access to justice must however avoid miss founded claims (American behaviors).⁸⁷⁷ The main aim of the group claims is to repair consumers for the damaged suffered.

4.4 Position to the last European developments in competition Law

The **Procedure 2013/0185/COD**⁸⁷⁸ for approval of the Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was very celebrated by consumers' associations. Specially in antitrust cases, such associations considered that it shall improve the protection of consumers, as it included a presumption rule which will simplify the burden of proof of consumers. Instead a complicated calculation win unclear proof material, it will be considered a percentage of the Cartel incoming, (Art. 13,16).

Associations are critical with the fact that the consumers' associations do not play any role in antitrust field according to the limitations to damage actions in the *GWB*. According to the activity of the *Bundeskartellsmant*, the fines imposed due to *Kartel* agreements is of hundreds of millions of euros.⁸⁷⁹ As per the associations, the experience show that the fines, usually remains lower than the unlawful profits of *Kartel* activities,

⁸⁷⁶ Der VZbV erinnert insoweit an die Änderungsvorschläge des Bundesrates im Rahmen der 8. *GWB*-Novelle. Der Bundesrat hatte sich dafür ausgesprochen, 20 Prozent der Kartellbußen und die abgeschöpften Vorteile (nach Abzug der Prozesskosten des jeweils klagenden Verbandes) in ein vom Bund neu einzurichtendes und von ihm zu verwaltendes Sondervermögen zu geben, das die Zweckbindung hat, die Verbraucherarbeit finanziell zu unterstützen (BR-Drs. 176/12, No. 15 und No. 19). Entspricht BT-Drs. 17/9852, p. 45 ff.

⁸⁷⁷ Communication of the Commission COM (2013) 401 Ziff. 2.2.

⁸⁷⁸ COM (2013) 404: Proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

⁸⁷⁹ Tätigkeitsbericht des Bundeskartellamtes für 2011/12, BT-Drs. 17/13675, p. 30 ff.

which is a sign of the potential of damage claims.⁸⁸⁰ Thus, the deterrence factor has not been well explored yet. The German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) includes a damages actions, but consumers are practically out of exercise this action. For most consumers, it is not possible to calculate the damage and to prove the *Kartel* activity before the court. This situation breaches the case law of the CJEC since the Courage and Creehan decision. Thus, it is necessary that Germany undertake the necessary steps to facilitate recovery of damages due to breach of national or European competition rules. In this sense, the proposal for Directive includes a serial of measures to facilitate the probatory activity of the consumer. The proposal for Directive facilitate this probatory activity (Art. 13 No. 2 lit. a bis c) and the court will count with the prerogative to evaluate the compensation (Art. 16). In competition Law, collective redress instruments can be of application for such cases of fixing prices,⁸⁸¹ or abuse of dominant position. Also, some expressions of the unfair competition, arising from the modern communication means such the direct marketing, or a misleading advertisement of indications for products or services.

4.4.1 German's government stake in connection with European proposals

The German government considers the current collective redress instruments in Germany as enough. According to the government, the current §§ 59 & 60 ZPO through the instrument of the *Streitgenossenschaft* allows the binding of consumers interests in a single procedure. The government support this stake in the following points:

- Due to the decreasing costs of the above-mentioned procedure for legal representation and in some cases gathering collective evidence.
- The *praxis* shows that the claimants know each other so they can coordinate its strategy.
- Affected consumers that does not want to participate in the procedure can be represented by consumers' associations according to § 79 Absatz 2 Nummer or individuals according to the § 79 Absatz 1 Satz 2.

4.4.2 German's industry stake

The German industry expressed its concerns about the introduction of such instruments.⁸⁸² These concerns were published by the DIK in a document containing 10 points that any developing in collective redress shall observe. It can be resume as follow:

1. Only legitimate damages shall be object of collective redress. Punitive damages are rejected. Sanctions shall only be imposed by public institutions in a due process. Double sanctions shall be avoided.
2. Damages shall only be split between real affected consumers. This is a precaution to avoid that third parties (such lawyers and associations) defend their own interest before consumers' interests.

880 Ausgehend vom Durchschnittswert von 20 Prozent Kartellaufschlag lag der Verbraucherschaden beim „Badezimmerkartell“ beispielsweise nach bei geschätzten 7 Milliarden Euro, wogegen die Geldbuße nur 622 Millionen Euro betrug. Das Beispiel zeigt, dass der wirtschaftliche Anreiz für kartellrechtswidriges Verhalten trotz Bußgeld sehr hoch ist. Ähnliche Diskrepanzen bestehen in anderen Kartellfällen (Kaffee: Schaden 860 Mio. Euro, Geldbuße nur 160 Mio. Euro; Mehl: Schaden 1,2 Mrd. Euro, Geldbuße 82 Mio. Euro)VbVz Gruppenklage, p. 8

881 *Sauerland*, and *Scholl*, name the example of a belgian company which was recognized with legal standing in order to claim which as Inkassozesionar represented the interest of 36 damaged parties.

882 *Deutsche Industrie und Handelskammer*, Sammelklagen – Ein einheitlicher Referenzrahmen © DIHK – Deutscher Industrie- und Handelskammertag e. V. November 2008

3. Procedural cost shall be proportional and low to last the claimant and the defendant of excessive costs.

4. The procedure shall not be an instrument to push for settlements in miss founded cases.

5. the injured shall be aware of its participation in such remedy. The opt in solution is for the DIK the only way consumers and corporations can exercise its self-determination right. As concern, the IDK mentioned that big cases, with a lot of affected consumers will be an incentive for lawyers and associations. Incentives shall be left aside.

6. equality of arms: Its shall be avoided any disadvantage by the side of the defendant. The risks of the claim shall be split proportionally, in order to avoid that a merely claim filing results in an over last for the defendant. The DIK is concerned that small and mediums corporations could not be able to afford such procedures.

7. Data protection, personal and corporative shall be not violated by those procedures. Different rights shall be weigh.

8. Forum shopping shall be avoided through a uniform European regulation. Procedural costs shall be also similar between European courts.

9. Only transnational cases shall be regulated by the EU. For pure national cases, the IDK considers that the EU lacks competence.

10. the analysis of risks shall be prior to the introduction of such remedies. Collective remedies shall only be introduced when the risk is turned off.

Part IV Collective protection of consumers in Spain

1. Specifics to Spanish Law

1.1 Consumer

1.1.1 General Law for the defense of Consumers and Users (LGDCU)

The concept of consumer is not uniform under Spanish Law, as the definition provided by the central State and their Autonomous Communities (CCAA) differs.⁸⁸³ There are also differences between the definition of the general consumers' regulation: General Law for the Protection of Consumers and Users (LGDCU) and other sectorial regulations. As per the definition of the former (LGDCU)´ 1984,⁸⁸⁴ **the most relevant characteristic of the consumer's definition was its consideration as *final user***.⁸⁸⁵ **The former law, in force until 2007, was amended in order to get adapted to new EU standards on consumers protection and to obtain uniformity under Spanish Law.**⁸⁸⁶ The passing on of the "Revised Text of the General Law for the Protection of Consumers and Users" (RDLGPCU) ⁸⁸⁷of 2007 is, as general accepted, an important step to reach uniformity under Spanish Law. As per this law, consumer and users was defined as follows:

*"For the purposes of this law... **consumers and users are natural or legal persons acting in a sphere that falls outside (any) entrepreneurial or professional activity.**"*

Such definition, that included natural and legal persons in the same sentence was amended by a later regulation, which pursues to adapt into Spanish Law the Directive 2011/ 83 EU of consumers' rights. The Ley 3/2014,⁸⁸⁸ provides a more accurate definition, remaining the same as follows:

„For the purposes of this law, consumers and users are natural persons when they act not pursuing their commercial, economic, or professional activity, (...), legal persons and entities without legal personality are consumers too when they act without profit making intention besides an entrepreneurial or commercial activity“. This amendment, pursues clarification of the definition of consumers in a frame where coexisted several different definitions both in the European and Spanish Law. Despite of this harmonization, the Spanish definition of consumers still includes, under some circumstances, legal persons as consumers.

883 Spain is a decentralized country. Some Autonomous Regions are considered the most autonomous regions in Europe. It will use the term Estado Autonomico instead of Federal State.

884 BOE, No. 176, 24th July 1984.

885 Sociological aspects were related to this figure: the Spanish consumer was "critic and informed" Fischer, Verbraucherschutz im spanischen Vertragsrecht, p. 70.

886 As it will show the Spanish law-maker will keep intentionally some differences in connection with the European definition.

887 BOE No. 287 of 30th November 2007.

888 Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el R.D. Legislativo 1/2007, de 16 de noviembre BOE No. 76 of 28th March 2014, pp. 26967 - 27004.

According to the Spanish Academia, the definition provided by the article 3, should be related to the definition contained in the Explanatory Memorandum of the RDLGDC:⁸⁸⁹

*“Consumers and users, as defined by Law, are individuals or legal persons acting in a sphere that falls outside entrepreneurial or professional activity. This is to say, they participate in consumer relations for **private purposes**, contracting goods and services as **final recipients without direct or indirect involvement in the processes of production, marketing or provision to third parties.**”*

Explanatory Memorandums has not direct legal force in Spain, but are considered as guidance for interpretation.⁸⁹⁰ By keeping elements of the previous definition of consumers the connected case law can be linked to the actual regulation. Based on both connected definitions and the related case law, the Spanish doctrine recognizes at least 5 characteristics of consumer’s figure under Spanish Law:

1. It can be a natural or legal person:

A legal person constituted according to private Law can be considered as a consumer, if develops an extra professional activity and do not undertake activities of production or putting into the market of any service or product.⁸⁹¹ Thus, **any legal person that usually operates in the market is not a consumer.**

The social object of the legal persons can not include any professional or entrepreneurial activity. In this sense, it is relevant which form acquires a legal person: a limited liability company or a public company will not be in any case considered as consumer, even if these are constituted as nonprofit companies.⁸⁹² Example of a consumer legal person which under Spanish law are trade unions in the frame of a legal relationship in which contracts advertisement services,⁸⁹³ or the Red Cross.⁸⁹⁴ According to the Spanish doctrine, the new definition of consumer provided by the RTGLDCU will change the consideration of legal persons as consumers in 2 aspects:⁸⁹⁵

- It must act beside any entrepreneurial or professional field, as a main criterion.⁸⁹⁶
- It is no longer necessary being a non-profit legal person.⁸⁹⁷

Other entities without legal personality that usually act in the traffic as consumers, such a community of owners of horizontal property, or a community of heirs.⁸⁹⁸

889 Explanatory Memorandum No. 3.3.

890 See *Parra Lucán*, Responsabilidad civil por bienes y servicios defectuosos, p. 421-556.

891 Own translation of *Busto Lago, Peña López, / Álvarez Lata*, Reclamaciones de consumo. Derecho de consumo desde la perspectiva del consumidor, p. 63.

892 *Martínez Espín*; Aproximación al concepto de consumidor. p. 2. Available in <http://www.eedc.posgrado.uclm.es/TitulosPropios/UserFiles111%5CRecursos%5CP%3%BA%20al%20concepto%20consumidor.pdf>.

893 SAP Teruel, Sección Unica, 31 October 2002 (AC 2002,1508), in: Reclamaciones de Consumo. La posición del consumidor en el ordenamiento jurídico español, p.63.

894 SAP Guipúzcoa 12 junio 2000, *Cruz Roja*, (AC2000/1463).

895 *Camara Lafuente*, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos, p. 100.

896 See further in *Cámara Lapuente*, «Comentarios al artículo 4 TR-LGDCU», en Id., *Comentarios a las normas de protección de los consumidores y usuarios*.

897 *Because the definition of consumer is only one for natural and legal persons and does not include any reference to the profit or non-profit finality, and having a non profit character is not a constitutive requirement of a legal person, see Cámara Lapuente, «Comentarios al artículo 4 TR-LGDCU», cit. En el contexto de la definición de empresario del art. 1.- 1:105(2) DCFR, also sustaining the same view (DCFR-Full edition, cit., I, pp. 92, 93 y 101- 102).*

2. Consumer is not only who contracts the product or service:

Consumer is so good the person who acquires the product or service as well as the consumer in a material sense.⁸⁹⁹

3. One of the parties must be a professional or entrepreneur developing its activity

As a general rule, it does not fall under consumer Law the provision of a service or the sale of a product, when it happens between individuals. The sale of the own car from an individual to a third person is not a consumption case.⁹⁰⁰

4. The entrepreneur or professional who offers the product can be of public or private nature

It is irrelevant that the party offering the product or service is public or private. The public provision of services falls also under Consumers Law.⁹⁰¹

5. There are no longer sociological aspects in the definition of consumer of the RTLGDUCU

There are not references in the RTLGDUCU to the terms “average” or “vulnerable” consumer, as it is considered in the case law of the CJEC⁹⁰² or 5.2.b. of the Directive 2005/29. Such terms are however maintained in the Spanish Fair Competition Act LCD.⁹⁰³

1.1.2. Connection to the European definition

The EU and their member countries do not share a definition of consumers; some countries such France did not have a definition as such during long time.⁹⁰⁴ The European

898 For further analysis on this case law see *Cámara Lapuente*, «Comentario al artículo 62 TR-LGDUCU», en Id. (dir.) *Comentarios a las normas*.

899 For instance, a minor who consumes the product that his parents contracted. SSAP Asturias, Sección 5a, of 21 January 2004 (AC 2004, 14); A Coruña, Sección 3a, 13 April 2004.

900 *Busto Lago/ et al*; *Reclamaciones de Consumo*, p.63.

901 STS 1997, (RJ 1997, 5471).

902 CJEC Judgment of 16th July 1998, C-210/96, Case *Gut Springenheide y Turkey c. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*; ECLI:EU:C:1998:369, CJEC Judgment of 4th April, Case C-465/98, *Verein gegen Unwesen in Handel und Gewerbe Köln eV c. Adolf Darbo*, ECLI:EU:C:2000:184; CJEC Judgment of 13th January 2000, Case C-220/98, *Estée Lauder c. Lancaster*; ECLI:EU:C:2000:8; CJEC Judgment of 8th April 2003, Case C-44/01, *Pippig Augenoptik GmbH & Co. KG c. Hartlauer Handelsgesellschaft GmbH y Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer*; ECLI:EU:C:2003:205; CJEC Judgment of 7th July 2005, Case T-385/03, *Miles Handelsgesellschaft International GmbH c. OAMI and Biker Miles Motorrad Handels- und Vertriebsgesellschaft GmbH*, ECLI:EU:T:2005:276.

903 *Cámara Lapuente*, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos, p.5.

904 *Schulte-Nölke*, *EC Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States*, pp. 456-457 (free access on http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf), *Y DCFR-Full edition*, cit., I, p. 95. However, this country, next to Austria is one of the few EU countries that have a “Consumers Code” (*Code de la Consommation*). The french consumers code introduced the definition of consumer by means of the *Loi n° 2014-344*, of 17th March 2014, (also known as *loi Hamon*). In fact, the incorporation to the french Law copies the definition of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance. OJ L304, 22.11.2011, p. 64–88.

definition of consumer *must be interpreted independently* to the national Law of the member countries.⁹⁰⁵ The Spanish definition maintains some particularities:

1.1.2.1 Legal persons

The RTGLPCU transposes the definition contained in some Directives,⁹⁰⁶ but intentionally leaves out others,⁹⁰⁷ keeping some differences with the European definition of consumers and the Spanish one: *The concepts of consumer and user are brought into line with European Union terminology, whilst respecting the particular features of the Spanish judicial regime in relation to 'legal persons'.*⁹⁰⁸ The inclusion of legal persons in the RDLGDCU, which is expressly denied by the CJEU in connection with some Directives,⁹⁰⁹ is according to the Spanish academia, the most important difference with the European definition. It will be discussed if the Spanish concept of consumer is broader than the European one.⁹¹⁰ Although the Spanish definition includes legal persons, it leaves out “any” entrepreneurial or professional activity. In connection with the European regulations, the main difference is the substitution of the pronoun “it’s” in the Directives by the indefinite article “any” when referring to the entrepreneurial or professional activity.⁹¹¹ Such distinction was raised by the introduction of the new definition of consumers by means of the Ley 3/ 2014, which specifies that legal persons shall act pursuing nonprofit activities and besides an (any) entrepreneurial or commercial activity. If the inclusion in Spanish Law of legal persons under the definition of consumers is compatible with the European law has been already proved. Namely, the question of if a legal person can be considered under the definition of consumer according to the Directive 93/13/ EEC (modified by the Directive 2011/83/EU) was raised to the CJEC, which did not use the case to respond to the matter in an exhaustive manner.⁹¹² In the decision *Cape*, the CJEC, regarding two questions for preliminary ruling based on the consideration of legal persons as consumers, the Court remains by the short definition of the Directive considering only consumers to natural persons, as it was established in the Art. 2 of the Directive.⁹¹³ Nevertheless, the Court did not take position about a claim submitted by the Spanish Government and supported by the French one. For them, if the European definition excluded the legal persons, it does not impede national law to extend the

905 CJEC Judgment of 20th January 2005, Case C-27/02, *Petra Engler c. Janus Versand GmbH*, ECLI:EU:C:2005:33.

906 Directive 85/577 art. 2; Directive 93/13 art. 2.b, Directive 97/art. 2.2, Directive 99/44 art. 1.2.a and with some different wording Directive 85/577, Directive 93/13, Directive 97/7, Directive 99/44.

907 Directive 98/6 Art. 2.e; Directive 2002/65 Art. 2.d; Directive 2008/48 Art. 1.2.a; Directive 2000/31 Art. 2.e Directive 2005/29 Art. 2.a; Directive 2008/122 Art. 2.f.

908 Statement of purposes No. 3.II

909 Denied in connection with the interpretation of the article 2.b of the Directive 93/13 EEC C541/1999, C-542/1999, *Cape Snc contro Idealservice Srl*, ECLI:EU:C:2001:625.

910 SAP A *Coruña* 25.3.2008; según el dictamen del Consejo Económico y Social de 21.2.2007 al anteproyecto del TR-LGDCU, la nueva definición «rebajaría el alcance de lo definido al acotarlo de manera difusa»; aunque este tipo de declaraciones genéricas sobre el carácter más estricto del nuevo concepto sólo resulta abonado en relación con la admisión de las personas físicas y jurídicas en la LGDCU y no en las Directivas, no respecto al binomio destinatario final/reintroducción en procesos productivos. Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer Law Compendium*, cit., p. 458; Acquis Group, *Principles...*, cit., I, p. 27. cit. In: Cámara Lapuente, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos, p.92.

911 Cámara Lapuente, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos, p.9.

912 So, *Pazos Castro*, El control de contenido de las condiciones generales de contratación, p. 199 ff, in connection to the decision of the CJEC Judgment of 22nd November 2001, Case C-541/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI*, ECLI:EU:C:2001:625.

913 Point 16 of the a.m. decision.

definition of consumers to them.⁹¹⁴ The CJEC keep silence about this matter.⁹¹⁵ The Spanish government keep in any case the possibility to consider legal persons as consumers; quality which is maintained and extended by an explicit mention to entities without legal personality. This legal regime means for instance that the protection is extended to such entities as the community of neighbors when they close a contract for the installation / reparation of elevators.⁹¹⁶ Nevertheless, such entities shall act without profit intention; thereby community of goods are excluded of the consideration of consumers.⁹¹⁷ In the French case, the incorporation of a definition of consumer into the material Law does not exclude the consideration of legal persons as consumers. The French Law does not only speak of consumer, it is also used the term „no professional“, which allows some legal persons to be covered by the consumers' protection *loi*. Both terms were used indistinctively in France, as the French law n°78-23 of 1978 gathered both concepts as a single unity (Art. 35). Later both terms were still being used, but not anymore as total synonyms, as per the redaction introduced in the L. 132-1 *Code. Cons.*, by means of the French law N°. 95-96 of 1995 uses the distinction consumers „or“ no professionals. According to the decision of the French Court of Cassation of 15 March 2005, the Directive of abusive clauses were refereeing exclusively to consumers, while the French legislator has used the term „no professional“ that implies a different category of legal subjects. Nevertheless, the extension to consumers protection under French law is not excluded.⁹¹⁸ Looking for clarification too, the French law maker has amended the French consumers code by means of the *Ordonnance n° 2016-301, de 14 de marzo de 2016*,⁹¹⁹ to distinguish between consumer and no professional as two different entities, being no professional any legal person which act following purposes that do are not included in its professional, commercial, industrial, artisanal, agrarian or liberal activity. Furthermore, the Art. L. 212-1 of the Code cons. refers to the contracts celebrated between corporations and consumers, and following in its Art. L. 212-2, it mentions that the regime of consumers is extended to those contracts between corporations and *no professionals*.⁹²⁰ Thereby, if there does not exist an identity of significance, by the moment both definitions; *consumers and no professionals*, count with the same protection when they close contracts with corporations.

1.1.2.2 Final recipients

Another aspect of the Spanish consumer's definition is the meaning of the concept included in the Explanatory Memorandum of the Law: "final recipients".⁹²¹ This requisite was central in the definition contained in the former consumers' law. Now has been displaced to the Explanatory Memorandum. As interpretation criteria, shall be measured with other elements of the current definition. This concept was confusing in the practice, as the edges of **final recipient** was not enough clarified by the Spanish case law. As per

914 Point 14.

915 *Carballo Fidalgo*, regrets the poor argumentation of the court in this matter, (La protección del consumidor, pp.23,24).

916 *Marín López*, El "nuevo" concepto de consumidor, p. 15; Bercovitz, Artículo 3, *Comentarios TRLGDCU Aranzadi*, p. 64; STS de 11 de marzo de 2014 (RJ 2014, 2114).

917 *Ibidem*.

918 *Pazos Castro*, El control de contenido de las condiciones generales de contratación, p. 203 ff.

919 NOR: EINC1602822R.

920 *Pazos Castro*, El control de contenido en las condiciones generales de contratación, p. 204.

921 This requirement is also to be found in other European countries such Luxembourg, Greece and Hungary Schulte-Nölke/Twigg-Flesner/Ebers, *EC Consumer Law Compendium*, cit., pp. 457-458; Acquis Group, *Principles...*, cit., I, pp. 26-27; *DCFR-Full edition*, cit., I, p. 96; Cámara Lapuente, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos., p.92

some court's decisions, an entrepreneur who acquired a product and becomes **final recipient** has been not qualified as a consumer even though the acquired product had not direct relation with its commercial activity.⁹²² On the contrary, among others, a decision of the *Audiencia Provincial de Madrid* considered that a translator who acquired a personal computer to develop translations works is a consumer. The key element for the *Audiencia* in this specific case was that the translator was the *final recipient* of the computer, and does not introduce it afterwards on the market.⁹²³ A similar decision fall in a case before the *Audiencia Provincial de Burgos* in which a private medical center signed a contract of purchasing and maintenance of elevators. The *Audiencia* failed that it was a consumption situation.⁹²⁴

For most of the Spanish academia, to loss the consideration of consumer, it is enough when the acquired product or service help in any way the entrepreneur to develop its activity or can be integrated in any form in its production process. Thus, the use of the product cannot be related to the "market" in any way to appreciate the quality of consumer. ⁹²⁵

The RTGLDCU clarifies this discussion adopting the more restrictive view: **"...without direct or indirect involvement in the processes of production, marketing or provision to third parties"**.⁹²⁶

1.1.2.3 Mixture acts

Mixture acts are related to an incidental or indirect use of a product or service by an entrepreneur or professional. At European level the decision Gruber,⁹²⁷ explains the article 13 and 15 of the Brussels Convention. In the Spanish case law, we find contradictory decisions in this area too.⁹²⁸ There are not a consolidated case law in Spain yet about this matter. Until the law maker defines this question, the article 3 of the RTGLPCU should be interpreted to the light of the European case law; being important decisions the mentioned case Gruber and the case Benincasa.⁹²⁹

922 SSTS 18th June 1999, Rec.No. 337/1994, ECLI:ES:TS:1999:4319; 29th December 2003, Rec.No: 847/1998, ECLI:ES:TS:2003:8521; 15th December 2005., Rec.No:1556/1999, ECLI:ES:TS:2005:7510.

923 It does not matter if helped or not its professional activity. This decision explained that only if the acquisition was made for a later sale the category of consumer could be lost. SAP Madrid, Sec. 10a of 26 April 2004 (AC 2004, 1201).

924 In order to loss the quality of consumer, it is not sufficient that the acquired product/service is integrated in the production chain. The distinguishing factor is that it should be integrated in a relevant manner SAP Burgos, 15 February 2001 (AC 1875).

925 *Bercovitz /Rodríguez-Cano*, Comentarios a la Ley General para la Defensa de Consumidores y Usuarios, Fn. 29-31; *Gómez Calero*, Los Derechos de los Consumidores y Usuarios, p. 44.

926 The current wording of the law, matches reasons exposed in other decisions such the *SAP Tarragona 15 July 2004*, which considered that any product or service acquired that helps in any way the professional or entrepreneur to develop his activity will be sufficient in order to loss the consideration of consumer.

927 CJEC Judgment of 20th January 2005, Case C-464/01, *Johan Gruber c. Bay Wa AG*, ECLI:EU:C:2005:32.

928 SAP Alicante of 18 December 2008 rule out the possibility that a car used by an entrepreneur for private and commercial use can be considered a consumer purchase.

929 CJEC Judgment of 3th July 1997, Case C-269/95, *Francesco Benincasa y Dentalkit s.r.l.*, Rec I-3767, ECLI:EU:C:1997:337.

1.2 Corporation

As counter-party of the consumer in a contractual relation, the Spanish Law defines company in a wide sense.⁹³⁰ According to Spanish Law, company would be any part which offer consumers contracts for goods and services (free-lance, state company or public supplies companies).⁹³¹ As per the Ley 3/2014, the Spanish Consumers Law updated the definition of the consumer's market counterparty by incorporating the definition of entrepreneur. So, it will be *any individual or incorporated entity, whether public or private, acting directly or through another person in their name or following their instructions, for a purpose related to their commercial or business activity, trade or profession, is an entrepreneur* (Art. 4 Ley 3/2014). The Law also defines who is producer, making thereby a distinction between entrepreneur and producer: (...) *for the purposes of this law, producers are considered to be goods manufacturers, service providers, intermediaries thereof, or importers of goods or services into the territory of the European Union, as are persons presenting themselves as such by providing their name, trademark or other identifying feature along with the goods or services, whether on the container, wrapping or any other protective or presentational component.*

1.3 Role of consumers' associations

Before the LGDCU came in force, there were already a multiplicity of consumers' associations in Spain, not too representative, as they lack a considerable number of members.⁹³² The General Consumer's Law, (LGDCU) of 1984 aimed to strength the position of the consumers' associations by including them in the law-making process on consumers' field,⁹³³ and entitled to bring 3 different kind of actions in name and behalf of:⁹³⁴

Association's members' interests (voluntary trail representation)
General consumers interest (ordinary class action)
Association interest (own rights)

As per the vagueness of the term „general consumers' interests“ and due to a lack of procedural support, a Spanish sort of class action was not developed in the first place.⁹³⁵ Further amendments to the general consumers' law and specially the passing on of the Civil Procedure Act (LEC) of the year 2000, design a comprehensive procedural regulation of a collective redress mechanism which entitle the associations to sue in general interest of consumers and users. According to the Art. 23 RDLGDCU, **associations of consumers are non-profit organizations**, constituted according to the specific requirements of the association's regulation,⁹³⁶ which has as aim the defense of legitimate interests and rights of consumers and users, including its training and education in general or specific aspects of consumption. Consumers associations are also those constituted entities according to the cooperatives regulations if in their aim is included the trainee and education of their associated members, if they support this task with an

930 Former Art. 1. Abs. 3 former LGDCU.

931 *López Sánchez*, JCP 1985, 389 (396).

932 More details in *Gerlach*, ZvglRWiss 1986, 247-323.

933 Art. 22 former LDGCU, now art. 24.1, 2 LEC.

934 *Stadler & Micklitz*, Die Verbandsklage, p.666.

935 *Marín Lopez* in: *R. Bercovitz- Cano/ J. Salas Hernandez* (Eds.); *Comentarios a la Ley General para la defensa de los consumidores y usuarios*, Primera edición 1992.

936 Or the specific regulation of the Autonomous Community.

economic found. Associations can be integrated in confederations, if they share the same aim, and are constituted according to the law (Art. 23 RDLGDCU). They shall act with fully independence regarding other market parties and public power. Grants and subsidies shall not break its independence (Art. 23 RDLGCU). The law specifies some measures to guarantee this independence (Art. 27 RDLGCU).⁹³⁷

1.4 Supra individual interests of consumers

The Spanish literature recognizes a certain degree of confusion when it comes to distinguish the various situations in which consumer interests may be affected.⁹³⁸ This confusion makes that some authors refer to this matter as “confusing interests”.⁹³⁹ In Spain the terms **general interests of consumers and users** and **supra individual interests** have been used indistinctly.⁹⁴⁰

Supra individual interests overcome the private and individual sphere of interests and have a projection to the exterior. Supra individual interests are given when *all members of a group share the same de facto situation, which entitles them individually to aspire to certain substantive rights, but they are also common interests as they belong to a number of individuals.*⁹⁴¹ In this sense, Bujosa Vadell, similar to the German academia, refers also to consumers interests with a supra individual relevance as “*group’s interests*” and added a procedural element in the definition: **supra individual are a variety of interests which have in common a certain complexity in order to obtain an effective judicial protection through individuals legitimization and need flexible mechanism in order to access to justice.**⁹⁴² Depending on the possibility of gathering around or identifying these interests, these would be *collective* or *diffuses interests*.⁹⁴³

Regarding the legal nature of the interests at stake, they can be:

1. **Individual interests**, which can be taken into the court by the individual or together with other individuals to strength their position. In this case, **every individual consumer is still holder of its right**, even if he joins other individuals to exercise a *collective defense* of its interest.

2. Interests that belong to a group and to the individual because he is part of the group. There are **indivisible rights**. The individual does not have a direct relationship with the good or right. **The holder of the interest is the group.**

In this classification, **the most important factor** to distinguish these rights is **whether the members of the group are affected in their exclusively subjective**

937 Their associated can not be legal persons with profit purposes and can not receive grants or donations of entrepreneurs of group of entrepreneurs which offer products and services to consumers.

938 Situation recognized by many authors, such Bujosa Vadell, “El acceso a la justicia de los consumidores y usuarios”, p. 1711 ff.

939 See further in *Montero Aroca, La legitimación en el proceso civil (Intento de aclarar un concepto que resulta mas confuso cuanto más se escribe de él)*, p.69 ff.

940 See further in *Lucchi López-Tapia, La Tutela jurisdiccional civil de los intereses de consumidores y usuarios*, also *Cabañas García, Los procesos civiles sobre consumidores y usuarios y de control de las cláusulas generales de los contratos*, p. 174 ff.

941 Own Translation, *Vidal Fernandez, Comentarios a la Ley de Enjuiciamiento Civil*, p. 82

942 See further in *Bujosa Vadell, El acceso a la justicia de consumidores y usuarios*, p. 1711 ff.

943 *Ibidem*, p. 1743.

rights,⁹⁴⁴ or if the quality of the affected consumers is more *diffuse* because the interest to be defended cannot be appropriated exclusively by any member of the group.⁹⁴⁵ For Gutierrez de Cabiedes, the supra individual interests can be collective or diffuse, or connected individual interests with public relevance:

1.4.1 Collective and diffuse interests

Supra individual interests represent the legitimate interests of a category of individuals that are in the same or in a similar legal position. This is different to a mere accumulation of individual rights, as it would have *substantive autonomy*. The interest belongs, at the same time, individually to all members of that category, and to all of them as a whole, for being members of the same group or affected community.⁹⁴⁶

If there is any violation in the exercise of the rights of a community, the community, as a whole (or any individual member of the same community) should be able to exercise its legitimate right to seek access to court and defend its interests. **If the court were to issue a favorable decision in a process started by an individual member of the group, the whole community would be able to benefit from such decision. If the court were to issue a negative decision, the whole group would not be affected by this decision.** *Supra individual interests* may be subdivided into two different groups, *collective* and *diffuse interests*, depending on whether the group is determinate (or can be easily determined) or not. **In the German literature diffuse interests will be mostly understood as those that cannot be warranted as subjective rights and therefore cannot be enforced by individuals.**⁹⁴⁷

1.4.2 Connected individual rights

As per Gutierrez de Cabiedes, the **supra individual interest is different than the addition of individual interests.** Substantive rights owned by individuals would be connected depending on their own personal *de facto* situations. A positive decision fallen in a process initiated by an individual cannot be extended to other individuals. Every litigant will have to show before the court their personal circumstances, both factual and legal to benefit from a favorable decision. However, this factual situation can also achieve a plural dimension through the involvement of multiple individuals who are under the same circumstances.⁹⁴⁸ Despite of the different shades, the Spanish academia focus the distinction of the legal nature of the interests in play as the fundamental element to establish different kind of procedures. **The key aspect is if the interests are individual and can directly be appropriated by a single consumer, or if these interests belong to the consumers as a group and the access to the court need to be organized around the group.** Nevertheless, this logical distinction based on the legal nature of the different interest is not clearly established in the Spanish Civil Procedure Act (LEC).

944 *Ibidem*, p. 1712; (Denominated individual homogeneous rights in the Brazilian Code for the defense of consumers Ley n° 8078, of 11 September 1990 which have a common origin).

945 *Ibidem*. p. 1736 ff.

946 The author mentions some examples. Diffuse interest: putting on the market of a damaging product, broadcasting of misleading advertisement, a trade mark imitation, etc...; Collective Interests: lack of hygiene of a school, discrimination against a certain group of consumers, etc...

947 So, *Von Aaken*, KritV 2003, 44 (48); *Buchner*, Kollektiver Rechtsschutz, p.30.

948 Examples of individual connected interest proposed by the author: users of a product that does not have the advertised qualities, scholars injured due to negligence of the center, etc...

The Spanish Procedure Act (LEC)⁹⁴⁹ will not attend to the interest in play, and will establish different procedures depending on if the affected interests belong to a group of consumers which is easily determinable or not. Thus, the LEC offers a procedural solution to deal with supra individual rights, but not attend to the legal nature of affected interests. The capacity to determine the holders of affected interests will be the central element of the collective redress in Spain according to the LEC.

1.4.3. Supra individual rights in the Civil Procedure Act (LEC)

The possibility to determinate affected consumers is the criteria under Spanish Law to deal with the so called massive damages.⁹⁵⁰ The reason for this differentiation under Spanish law has been explained as consequence of the massive intoxication occurred in the 80's in Spain due to denatured rape oil, in which thousands of persons were injured.⁹⁵¹ As the Spanish Procedural Civil Law does not establishes as differentiation criteria the value of the claim, in case of massive damages, the LEC will not consider the amount of the damage. The article 11 of the Spanish Civil Procedure Act (LEC), which deals with the "Legal Standing for the Defense of Consumer and User Interests"⁹⁵² refers to the following types of interests: *General interests of Consumers and Users (Art. 11.1 LEC); Collective interests (Art.11.2 LEC); Diffuse Interests (Art. 11.3 LEC).*

1.4.3.1 General interests of consumers and users

The Article 11.1 LEC speaks of *general interest of consumers and users*. It reproduces literally the content of article 20.1 of the former General Law for the Defense of Consumers and Users of 1984 (LGDCU),⁹⁵³ which was a substantive Law. Neither of both regulations provided a definition of what shall be understood under "general consumers' interests". The article 20.1 of the former LGDCU merely said that the associations of consumers and users are legitimated to defend *their own interests, as the interest of their associated member as well as the general consumers' rights and interests.*⁹⁵⁴

For Cabañas García, the general interests of consumers and users gathered in the article 11.1 LEC should be understood as supra individual interests, (affecting the general interests of the society) threatened in every possible kind of consumer relationship, such *failures in the distribution of medicines, or electricity supply, which have as recipients dozens, hundreds or thousands of consumers.*⁹⁵⁵ These interests, if affected, could be indemnified as per the examples of the articles 11.2 and 11.3 of the LEC (collective or diffuse rights). Different, with similar result, is the interpretation of Cabiedes Hidalgo, who criticizes the LEC still using the term "general interests of consumers" of the former Art. 20.1 LGDCU adding confusion to the notion of collective and diffuse interests gathered in the sub paragraph 11.2 and 11.3 LEC. For this author, "general interests" belong to the

949 BOE No.7 of 8th January 2000, pp. 575-728.

950 Example of massive damages as diffuse interest JPI Barcelona (No.. 21) 17th October 2003 (Fundamento de Derecho segundo).

951 *Fröhlingdorf / Lincke*, RW 2001, 357 (361).

952 Which have its origin in the Ley General Para la Defensa de los Intereses de los Consumidores y Usuarios, (General Law for the defense of Consumers and Users), former Art. 20 LGDCU 26/1984, developed by Real Decreto 825/1990. Today Article 24 of the Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Intereses de los Consumidores y Usuarios (Royal Legislative Decree 1/2007). (BOE 287 of 30th November of 2007).

953 BOE No. 176 of 24th July 1984.

954 See *Banacloche Palao et al.*, § 28 p. 131.

955 *Ibidem*.

citizen individually just for being a citizen, while “supra individual interests” (collective or diffuse) belong to a group, more or less determinable, affected by an unlawful act and are object of economic reparation.⁹⁵⁶ This confusion could have its origin in the fact, that the sub paragraph 11.1 of the LEC is merely a transposition of a substantive Law (article 20.1 of the former GLDCU) into the procedural Law.⁹⁵⁷ The connected case law, considered the Article. 20. 1 of the former LGDCU just as a programmatic principle needed of further regulation. **The Spanish case law, made a narrow interpretation of this concept leaving aside pecuniary compensation of determinable subjects, unless they were affiliated to the association.**⁹⁵⁸ This interpretation sustained by the Spanish case law appears as contradictory. If the law granted legal standing to these associations to defend the general interests of consumers and users, it is not understandable that these privilege is limited to their associated members.⁹⁵⁹ This limitation is not longer to be sustained, as the LEC includes a developed damage action system, (11.2,3 LEC) under the scope of the terms “collective” and “diffuse” interests.

1.4.3.2 Collective and diffuse interests

Collective interests of consumers are those, whose owners are determinate or easily to be determinable.⁹⁶⁰ *Diffuse interests*, according to the law, are those corresponding to a not determinate or easily determinable group.⁹⁶¹ For part of the Spanish Academia this distinction based on the possibility of determinate the affected consumers are accurate, and does help to understand the legal nature of the interests in play: *if the affected individuals are determinable, it means that the claimant bringing the action into the court is acting in name of interests that can be individualized. Therefore, they are collective and not diffuse interests. On the other hand, if it is not possible to determine the owners of such interests, the term “diffuse” is appropriated.*⁹⁶² The current classification of interests brought by the Spanish procedural Law sheds light on the previous doctrinal discussions in Spain regarding the terms *collectives* and *diffuse*, making this field of Law more understandable. It should be said, that until this point, part of the Spanish academia had used both terms indistinctly.

956 *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La nueva ley de enjuiciamiento civil y los daños con múltiples afectados., p. 160, Fn.19.

957 Also, *Ara*, Las Partes en el proceso civil, p. 87. See also Cabañas García, Los procesos civiles sobre consumidores y usuarios. This author however considers that the subparagraphs 11.2 and 11.3 are superfluous, and that it should be enough the article 11.1 speaking of general interests of consumers and users. This last consideration can not be shared. As it was mentioned, a merely mention of the general interest of consumers and users make difficult to configure damages actions. It should be more specific.

958 See Cabañas García, Los procesos civiles sobre consumidores y usuarios y de control de las clausulas generales de los contratos, p. 181.

959 This case law will change with the decision of the Spanish Supreme Court of 1997 regarding the case of massive intoxications due to the putting on the market of denature rape oil. STS de 16 de Septiembre de 1997, No.. 895/1997.

960 SJPi No. 21 Barcelona, 17th October 2003: «*Los intereses colectivos existen cuando se da una vinculación jurídica entre los miembros del grupo y un tercero; por ejemplo, los afectados por la falta de higiene en determinado centro de trabajo. Los intereses difusos se dan cuando existe un interés supraindividual sin que entre los individuos interesados exista vínculo jurídico alguno, ni entre ellos y un tercero, sino que el nexo de unión que les agrupó obedece a circunstancias fácticas y contingentes; por ejemplo: los afectados de un producto defectuoso.*»

961 As example of diffuse interests can be given the injunctions claim. In this action is not seek the redistributive justice, but the repetition of an unlawful acting.

962 Further on the term diffuse see *Sánchez Aristi*, La protección jurídica de los consumidores, p. 64. Same opinion *Gutiérrez de Cabiedes e Hidalgo de Caviedes*, La Tutela Jurisdiccional de los intereses supraindividuales: colectivos y difusos, pp.99-110.

Despite of the advance in the clarification of this terms, **the law has an important lack of accuracy**, since it does not distinguishes the most important categories of interests, namely: *“those supra individual legitimate interests (interes legítimo supraindividual) corresponding to the collective and diffuse; and those, which in fact are individual rights, but can be plural and connected,*⁹⁶³ *a subjective right to be repaired due to a personal injury).*⁹⁶⁴ Aspects, such the **size or harmonization of the group**, which could be relevant in the procedure **will not play any role in the LEC**. This lack of accuracy of the LEC in this matter, has been subject of many critics. **Spanish authors reveal that in the practice, this distinction based merely in the possibility of determining the group may prove unsuitable in certain cases:** a group may be perfectly determinable but at the same time constitute an *enormous, inorganic and geographically disperse group*. Thus, the procedural remedies available should not be the same in this situation (enormous and disperse groups) as it would be for a small and concentrated determinable group of individuals.⁹⁶⁵ According to Bujosa Vadell, the law maker made a mistake by considering a collective determinable group as a small one too, which leads to procedural inconveniences. In connection with the legitimation to defend determinable rights, the law establishes that in the case of *collective interests*, the legal standing in order to access to court is granted to those *Consumers Associations, or Legal Entities* whose aim is the defense or protection of the (consumer) interests, as well as *groups of affected consumers*.⁹⁶⁶ In the case of *diffuse interests*, only those associations of consumers which are regarded as *“representative”* will be granted with the necessary legal standing in order to gain access to Court.⁹⁶⁷

1.4.4 Supra individual interests outside consumers´ field

It shall be noticed that supra individual interests in Spain are also recognized in other fields beyond consumer´s protection, such as labor Law and Contentious-Administrative proceedings.⁹⁶⁸ Also the category *collective and diffuse interests* not only refers to consumers.⁹⁶⁹ As the Spanish law maker recognizes, the rules content in the LEC apply also to those actions or process based on relationships included in the Ley de Condiciones Generales de Contratación (General Contract Conditions Act)⁹⁷⁰, or those actions promoted by *Entidades de Gestión* according to the Industrial Property Act.⁹⁷¹ Despite of that, the Spanish Civil Procedure Act only recognizes the collective and diffuse interests of consumers, when they are other situations which already happened in Spain

963 See *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La nueva Ley de Enjuiciamiento Civil y los daños con múltiples afectados, p. 139

964 *Derecho subjetivo patrimonial a la reparación de un perjuicio personal*. Distinction made in the most elaborated legal systems in defense of consumers such in the United States (Rule 23; Rule 23(b) (3) class actions for damages vs. other actions such injunctive and declaratory class actions; and Brazil, specially in the Law Num. 8078 of 11 September 1990, Title III, Chapter II. Referenz in *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La nueva Ley de Enjuiciamiento Civil y los daños con múltiples afectados, p. 140.

965 Critics to the determinability differentiation criteria, *Bujosa Vadell*, La protección jurídica de los consumidores y usuarios en la nueva Ley de Enjuiciamiento Civil, RJC 2001 (No..4); pp.29, 42; *Bujosa Vadell*, El acceso a la justicia de los Consumidores y Usuarios, p. 1755.

966 A group of affected consumers does not need to have legal personality.

967 The definition of representativeness is not contained in the law. It will be analysed it below in the following chapters. The Public Prosecutor (Ministerio Fiscal) is also entitled to bring actions for the defense of collective and diffuse interests of consumers and users under article 11.4 LEC.

968 *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La nueva ley de enjuiciamiento civil y los daños con multiples afectados, p. 141.

969 See *Grande Seara*, AFDO 2002, 289 (290).

970 Final Provision No. 6.

971 Final Provision No. 2.

such a breach of water reservoir or contaminating spills which also need of an effective collective redress mechanism in order to fulfil the right of access to court of the victims.⁹⁷²

2. Constitutional and Civil aspects of collective redress

2.1 Legal standing in Spain

The Spanish Civil procedure separates the capacity to be part in a procedure, which is similar to the civil capacity, and the capacity *ad causam*, which is based on the defense of interests or rights in a given judicial process.⁹⁷³ The legitimation to start a procedure is quite broad under Spanish civil Law.⁹⁷⁴ **Active legitimation in Spain is based**, according to the Spanish Constitution, **both in subjective rights and legitimate interests (*intereses legítimos*)**. To the claimant will be presumed a legitimate interest only by lodging the claim; such interest will be proved during the process. Only in the evident cases of the absence of a legitimate interest the claim will be rejected.⁹⁷⁵

The articles 10 and 11 of the Spanish Civil Procedure Act (LEC) rule the *legitimitio ad causam* to be part in a process. As a general rule, **any person** (legal or natural) **in possession of its civil rights**,⁹⁷⁶ **can be part in a process in order to defend an own right or interest**, -not general rights or interests and not general rights or interests in general-. This is a consequence of the right to obtain an effective protection of judges and courts, fundamental right recognized in the article 24 of the Spanish Constitution which speaks both of *subjective rights*, as well of *legitimate interests*. Including **both, rights and interests** under the coverage of this fundamental right, makes that not only a holder of a right, but also the holder of a legitimate interest (for instance in the decision fallen in the process) can access to the court.⁹⁷⁷ **For the Spanish Supreme Court** the distinction of rights and legitimate interest stated in the article 24 of the Spanish Constitution should not be considered as the expression of two different or opposed concepts, the one stronger than the second. ***This distinction should be appreciated as the purpose of increasing the judicial protection of the citizen, so he also receives a protection of courts and judges in these situations in which due to its imprecise nature can be in the edge of the substantive faculties.***⁹⁷⁸ More precisely, the concept of legitimate interest should be

972 See Bujosa Vadell, El acceso a la Justicia de los consumidores y Usuarios, p.1752 ff.

973 SAP Alicante, Sec. 9a, 23.11.2010, JUR 2011/63950. *Se denomina capacidad para ser parte y capacidad procesal, a lo que tradicionalmente se conocía como legitimitio ad procesum, es decir, la capacidad que es necesario ostentar para ser sujeto de una relación procesal y poder realizar actos procesales válidos y con eficacia jurídica (Arts. 6 a 9 de la Ley de Enjuiciamiento Civil), cuya apreciación imposibilita el análisis de la cuestión de fondo debatida, pudiendo ser apreciada ya de oficio (art. 9 Ley de Enjuiciamiento Civil) en el momento de admisión a trámite de la demanda, de la contestación o de la reconvencción, en el acto de audiencia previa si se trata de un juicio ordinario (art. 418 de la LEC) o en el momento del juicio en el verbal (art. 443 nº 2 y 3 LEC , o como cuestión incidental por hechos acaecidos tras la audiencia previa (art. 391 nº 1 y ss de la Ley de Enjuiciamiento Civil), o al dictar sentencia en la instancia e incluso en vía del recurso, ya a instancia de parte, si es el actor lo hará saber en el acto de audiencia previa (art. 418 nº 1 LEC) o en el de juicio si es un juicio verbal (art. 443 nº 3 LEC), y si es el demandado al contestar a la demanda de forma escrita en el juicio ordinario (art. 405 LEC) o en el acto de juicio si es el juicio verbal (art. 443 nº 2 LEC), bien entendido que en cualquier otro momento posterior del proceso podrán plantear si procede una cuestión incidental o denunciar la situación para provocar la actuación de oficio del Tribunal. Juzgado de Primera Instancia A Coruna. Auto 18 september 2012*

974 In criminal Law there are some limitations to the Popular Action (Acción popular), since the decision of the Spanish Supreme Court in the so called „Botín case“, Rec. Casación: No.: 1912/2017 ECLI: ES:TS:2018:2198.

975 Garnica Martín, La Ley, 2001, 1451 (1456).

976 Art. 7.1 LEC.

977 The Spanish Constitutional Court order judges and courts to make a broad interpretation of the rules granting legal standing. (SSTC 24/1987 of 25 February and 93/1990 of 23 May).

978 STS 25th April 1989, (Sala 3, Sección 1), ECLI: ES:TS:1989:2645.

understood as *the expectation of obtaining an economic or personal advantage and also as an interest in avoiding possible damages, that in the field on consumer law could be for instance those arisen by a misleading advertising, or cease the production of a harmful product.*⁹⁷⁹

2.1.1 Art. 10.1 LEC: Own standing

As per the Article 10 LEC legitimate party to the proceedings shall be those who appear and act in court as parties to the *judicial relationship or the matter in dispute*. The process will show if that right or interest actually exists.

2.1.2 Art. 10.2 LEC Standing by substitution

In other exceptional cases, the law recognizes legal standing to a party who is not holder of the right or interest which is going to be claimed on the process. It is an exception ruled in the article 10.2 LEC: *“the cases in which, by law, standing is attributed to a person other than the party are excepted.”*⁹⁸⁰ These situations are distinguished by the presence of at least two parties by the side of the claimed right or interest: one who is acting in the process in its own interest, and another who is the owner of the right or legitimate interest. An example would be creditor who is bringing in a process the rights or the debtor to satisfy the debt.

2.1.3 Indirect or extraordinary legitimation (Art. 11 LEC) ⁹⁸¹

As per recent decision of the Spanish Supreme Court “Tribunal Supremo”,⁹⁸² it is to understand that the Art. 11 LEC is a legal exception based on the article 10.2 LEC.

This is the third kind of legal standing recognized in the Spanish Civil Procedure Act. It is ruled in the article 11 of the LEC, dedicated to the ***Standing for the defense of the rights and interests of consumers and users***, which grants this capacity to different entities, such consumers associations, to defend different kind of interests. **In this kind of representation, the claimant (association or any other entity granted with legal standing) is acting in name of a plurality of consumers but not in its own interest.**⁹⁸³

979 More about that in Los procesos civiles sobre consumidores y usuarios y de control de las cláusulas generales de los contratos. Juan Carlos Cabañas García, p. 75- 77.

980 STS 634/2010, of 14th October, RC 1643/2006, *se trata de situaciones en las que “se habilita a determinados sujetos para formular una pretensión de manera que el órgano judicial decida sobre el fondo de una cuestión que haga posible la actuación del derecho objetivo que originariamente no corresponde a quien promueve el proceso. Estas excepciones, en cuyo origen subyacen causas de muy distinta índole, exigen la cobertura expresa de una norma de atribución de la facultad de promover el proceso”*.

981 It has been found some differences in the denomination hold by the Spanish doctrine. For some authors, such Oliva Santos and Teresa Armenta Deu, as well as Cabañas García it is a case of *indirect representation*. Further in *Cabañas García*, Los procesos civiles sobre consumidores y usuarios, p. 175 ff; *Andrés Oliva Santos, Armenta Deu*, El proceso de declaración, in: *Lecciones de Derecho Procesal Civil*. p.89. For the denomination, *extraordinary legitimation Montero Aroca*, Derecho jurisdiccional II Fn. 78-79. for the denomination *action in general interest Moreno Catena*, V. *Derecho Procesal Civil. Parte General*, cit. Fn. 99-100. For *Lucchi Lopez Tapia*, this figure is in between legal standing by substitution and the voluntary representation, *Lucchi López-Tapia*, La legitimación activa en los procesos para la tutela jurisdiccional civil de los intereses de consumidores y usuarios, p.55.

982 STS Nº: 241/2013, Will be see in detail at the end of this chapter.

983 I take this position, although the consumers associations (or other entities) by acting in name of collective or diffuse interests are satisfying their social object. It is the main difference with the institution of *procedure substitution* (sustitución procesal), in which the acting part acts in its own interest defending a

It could be said, that so far, the consumers' association aims the defense of consumers' interests, is acting in own interest when lodges a collective action. Nevertheless, for most the Spanish doctrine, when an association of consumers (or any other entity with necessary legal standing) promotes a process in name of collective or diffuse interests of consumers, it should be considered a case of *indirect representation (legitimación indirecta representativa)*.⁹⁸⁴ The legal basis for the indirect representation lies in the Spanish Constitution,⁹⁸⁵ which gathers the defense of consumers economic and general interests in its article 51,⁹⁸⁶ within the section called *Guiding Principles of the economic and social Policy*. This constitutional mandate obliges, -next to the Fundamental Right to obtain an effective protection of judges and courts-, the Legislative Power to create the necessary legal frame to obtain a judiciary defense of the **legitimate interests**⁹⁸⁷ of consumers, so that in no case may there be a lack of defense.⁹⁸⁸ Spanish Law recognizes consumers as the weakest part both in the market relationships and before the court. Spanish courts are not ready to deal with cases of minor damages, as the costs of time and money which follows lodging an action results in a rational lack of interest to suit.⁹⁸⁹ Despite of the minor damage suffered by the individual consumer, the society has to bear with huge costs due to this unlawful activities.⁹⁹⁰ Thus, consumers protection will be limited if only relies in the individual legal protection.⁹⁹¹ In this sense, the CGPJ (Spanish Judges authority) published in 1987 the so called „White Book on Justice“ which recommended the introduction of collective redress mechanism in the Spanish civil procedure. This instrument shall have *Erga Omnes* binding effect, and the enforcement of the decision could be applied by any injured party, even when did not take part in the process.⁹⁹² The Supreme Court decision in the case of the massive intoxication in Spain due to the commercialization of denatured rap oil,⁹⁹³ stated that, despite the constitutional provision, there was a lack of a specific procedure rule in Spain to defend properly the general interests of consumers and users before the court. For the Supreme Court, a wide interpretation of the Art. 20 of the former LDGCU which entitle associations to claim in order „to protect general interest of consumers and users“ could be used to cover this legal

foreign right. As it will be show, different is the case in which the associatio act in name of their associated members. In theses case I do consider that the association act in their own name as well.

984 Other authors use the designation: *extraordinary standing*, or *standing based in general interest*, further in *Cabañas García*, Los procesos civiles sobre consumidores y usuarios y de control de las clausulas generales sobre los contratos, p. 175 ff.

985 BOE No. 311 of 29th December 1978.

986 *Article 51*: 1. The public authorities shall guarantee the defense of the consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures. 2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them in those questions which could affect them under the terms which the law shall establish. 3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic commerce and the system of licensing commercial products.

987 The scope of the term legitimate interest has been explained previously in this chapter.

988 Art. 24: All persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case, may there be a lack of defense.

989 *Barona Vilar*, ZJP Int 2001, 91.

990 *Oliva Santos/ Díez Picazo*, Derecho procesal civil, El proceso de declaración, 2a Edición, § 52, p, 601 ff.

991 Fundamento Jurídico 61. *Uno de los supuestos en los que la legitimación ordinaria se revela insuficiente es precisamente en el campo de la tutela de los consumidores, ya que la asimetría de las posiciones extraprocesales de profesionales y empresarios, por un lado, y consumidores, por otro, se proyecta en el proceso y desincentiva al consumidor la asunción de la defensa judicial de los propios intereses, con los costes de toda índole que conlleva un litigio, de forma correlativa, potencian comportamientos irregulares de algunos empresarios y profesionales, al amparo de su impunidad estadística.* STS No. 241/2013 of 09th May 2013, 485/2012, ECLI: ES:TS:2013:1916.

992 Further *Bujosa Vadell*, La protección de los consumidores y usuarios en la nueva Ley de enjuiciamiento Civil, RJC 2001 969-998.

993 Known as *Colza Case*.

blank, but it still remains a necessity of a more specific, sufficient and proper civil procedure rule to protect these rights.⁹⁹⁴ **The introduction of procedural rules on collective redress came first with the approval of the Spanish Civil Procedure Act (LEC) of the year 2000.**⁹⁹⁵

2.2 Collective redress as Constitutional development

2.2.1 General Law for the defense of consumers and users (LGDCU)

The consumers' protection gathered on the Spanish Constitution as directive principle of the economic and social policy is a programmatic principle which needs further developing.⁹⁹⁶ The general law for the defense of consumers and users (LGDCU) of 1984⁹⁹⁷ was the first development in the field of substantive Law following the constitutional prevision. The configuration of the law results from the constitutional provision as well as the necessity to adapt the Spanish Law to European standards.⁹⁹⁸ This law defined the relationships between consumers and suppliers of goods and services, and for the first time under the Spanish Law, recognizes the possibility for consumers and users associations⁹⁹⁹ of promoting the necessary legal actions in order to defend "*their own interests, as the interest of their associated member as well as the general consumers' rights and interests*".¹⁰⁰⁰ This was a substantial advance for the Spanish Procedural Law via a substantive law regulation, *following the EU tradition*.¹⁰⁰¹ Due to its character between public and private, the law has been categorized as an „interdisciplinary law.“¹⁰⁰² The edges of the LCU were proved in the previous mentioned case of massive intoxication of 1981.¹⁰⁰³ The consumers and users association OCU (Organización de Consumidores y Usuarios) lodged both joined criminal and civil action, in representation of all injured parties, including not members of the association. The pretensions of the OCU failed in the previous stand,¹⁰⁰⁴ but the Supreme Court considered that the OCU was entitled to claim for civil damages in representation of all injured parties, included those which were not taking part in the judicial process. The favorable decision of the Spanish Supreme Court was based on the following legal grounds:

994 STS of 26th September 1997, No. 895/1997, Rec. No: 2569/1996, ECLI: ES:TS:1997:5661.

995 *Ibidem*.

996 It is not a simple Programmatic principle, but a legal principle with legal binding effects (not a subjective right). The law maker is not allowed to approve any law that is against any constitutional principle, also the judges and courts, are obliged to interpret the law according to these principles, as well as the public administration; further See *Gerlach*, *ZvglRWiss* 1986, 247-323.

997 Ley 26/1984, de 19 de Julio General para la Defensa de Consumidores y Usuarios. BOE, No.. 176 de 24/07/1984. (General Act for the protection of consumers and users).

998 As the Spanish Constitution does not specify if the consumers' protection is a competence of the central State or of the CCAA, some of them have approved consumers' protection regulations in the frame of their Autonomic Statues Comunidades Autónomas (Autonomic Communities). Andreas Mom, Micklitz & Stadler *Estatutos de Autonomia* is the legal body which gathers the competences of the Autonomic Regions

999 Also granted to cooperatives of consumers (Art. 16).

1000 As well as the rights of their associated members and of course of the association. Art. 20.1

1001 *Vid.* Ayuntamiento de Córdoba. Servicio Municipal de Consumo. OMIC Defensa de los Intereses Colectivos de los Consumidores, p.1 3. Available in http://www.consumo.ayuncordoba.es/secundarias/smc/EstudiosInformes/OMIC_DEFENSA_DE_INTERESE_S_COLECTIVOS_DE_LOS_CONSUMIDORES.pdf, retrieved last time 20.01.2017.

1002 About the dogmatic classification of this law see *Fischer*, *Verbraucherschutz im spanischen Vertragsrecht im Lichte der europäischen Rechtsangleichung*, p. 40- 43; *Mom*, *Landbericht Spanien*, p. 664.

1003 Killed 600 people and several damaged more than 25.000.

1004 SAN 24th May 1996, Sala de lo Penal (34/1996), ECLI: ES:AN:1996:14.

- Art. 51, Spanish Constitution (CE) which speaks of legitimate economic interests of consumers.
- Art. 24.1 Spanish Constitution (CE) which gathers the fundamental right “to an effective judicial protection of judges and courts”.
- Art. 20. 1 of the LGDCU that entitles consumers associations to watch for general interests of consumers and users.

As procedural requisite, the OCU proved the causality of the damages, as well as a direct interest (legitimate) in the judgement.¹⁰⁰⁵

2.2.2 Judiciary Power Organic Act (LOPJ)

Closer to procedural Law, the first regulation developing the constitutional consumers’ protection principle and the standing granted to consumers and users associations in the LGDCU is to be found in the article 7.3 of the Organic Law for Judiciary (Ley Orgánica del Poder Judicial or LOPJ).

The Organic Law of Judiciary¹⁰⁰⁶ of 1985, states in its article 7.3 that the Spanish courts *will protect legitimate interests, both individuals and collectives, so that in no case may there be a lack of defense. For the defense of collective interests, legal standing will be granted to associations, corporations or affected groups which are legally authorized for their defense.*¹⁰⁰⁷ This article is an important legal basis for the defense of consumers and users’ general interests before the court. It speaks of *collective interests* which should be represented by the associations of consumers or corporations. Through this regulation, defense of collective interests acquires structural character under Spanish Law.

The newness towards the previous LGDCU, lies in the granting of legal standing to groups of affected (groups without legal personality); a breach in the Spanish civil tradition which only recognized legal standing to individuals and legal persons. Nevertheless, the scope of this article is unclear, as it does not specify which kind of *legal authorization* do the groups should have to be allowed to access to court. Namely, it does not specify if they shall count with a general legal provision foreseen in any law, or can they count with legal standing based on being holders of a legitimate interest. It was object of discussion for the Spanish Doctrine.¹⁰⁰⁸ Until the decision of the Spanish Supreme Court in the *Colza* case,¹⁰⁰⁹ the Spanish case law was resistant to allow reparation for damages based on the general interests of consumers. This possibility gathered in the LGDCU was considered by the judges as a programmatic provision which required further legal regulation. In the decision fallen in this case, the Supreme Court stated finally, that the consumers’ associations can represent the interest of every affected, even if they did not take part in the process, and the groups of affected will be also granted with legal standing and capacity to access to court, as their members are holders of a legitimate interest to obtain monetary reparations. Despite of the step forward, this article contained in the Organic Law for Judiciary was clearly not sufficient as did not offer a whole legal regulation of how collective or diffuse interest should be brought effectively in a real process. After the

¹⁰⁰⁵ As stated in the 7.3 ode la LOPJ.

¹⁰⁰⁶ Ley Orgánica del Poder Judicial, BOE, No. 157 of 2nd July 1985.

¹⁰⁰⁷ Own translation.

¹⁰⁰⁸ For Maria Jesus Ariza, the group, as entity without legal personality *is granted with fictitious personification different of the members which form the group, but it should be delimited which interests they can represent and the way in which they act in a process. (Legal standing and capacity). Colmenarejo / González, Protección de los Consumidores e Inversores, Arbitraje y Proceso*, p. 91.

¹⁰⁰⁹ STS 16th September 1997, No. 895/1997 ECLI:ES:TS: 1998:6879A.

Organic Law for Judiciary, the collective standing was developed in further sectorial regulations.¹⁰¹⁰

2.2.3 Other collective redress developments

These would be, in chronological order, the specific regulations which included any sort of collective redress instruments:

- **Law 34/1988 of 11 November of Advertisement**,¹⁰¹¹ which in its article 25.1 granted legal standing, between others, to “the consumers and users organizations” to lodge actions in this field of Law.
- **Law 3/1991 of 10 January of Unfair Competition**,¹⁰¹² which in its article 19.2.b) granted legal standing to “*those associations which according to their own statutes have as aim the protection of consumers*” if the unfair considered act affect the interest of consumers.
- **Law 7/1998 of 13 April of General Contract Conditions**,¹⁰¹³ in its article 16.3 grants legal standing to lodge injunctions, rectification, and declarative actions to *the associations of consumers and users which have in its statutes the defence of them*.

2.3.4 Ley de Enjuiciamiento Civil (LEC)

It won't be possible until the year 2000, to find under Spanish Law a general regulation for the defense of collective and diffuse rights of consumers, *which allows in a similar way to the North American class actions to lodge damage actions*.¹⁰¹⁴ **With this regulation**, the Spanish Civil Procedure Act (LEC), definitively overcomes the liberal individualism of the further Civil Procedure Act of 1891. In words of Montero Aroca, **we attend to a socialization of the legal standing propelled by the new socio-economic frame**.¹⁰¹⁵ As per the most authorized Spanish doctrine, this new regulation provided by the LEC is still quite incomplete and imprecise in some aspects concerning collective redress.¹⁰¹⁶

3. Types of collective instruments in Spain

Two big groups of collective redress instruments can be categorized:

- a. - *Acciones típicas* (regulated in sectorial regulations).
- b. - *Acciones atípicas* (regulated in the General Civil Procedure Act LEC).

Such distinction is merely formal, depending on the legal body where they are regulated. For purposes of systematic however, such distinction helps to sort the different collective redress instruments within Spanish Law. **The *acciones típicas*, as they are gathered in specific sectorial regulations, will be *lex specialis* against the *lex generalis* of the *acciones atípicas*, gathered in the general Civil Procedure Act (LEC)**. Nevertheless, for many authors, the multiplicity of rules in this matter drives to

1010 See Marín López, Las acciones colectivas y el papel de las asociaciones de consumidores y usuarios como “policía privada”, p. 302.

1011 BOE No. 274 of 15th November 1988.

1012 BOE No. 10 of 11th January 1991.

1013 BOE No. 89 of 14th April 1998.

1014 Further on this comparison see Marín López, Las acciones colectivas y el papel de las asociaciones de consumidores y usuarios como “policía privada”, p.304.

1015 Montero Aroca, El Derecho Procesal en el siglo XX, pp. 66-70.

1016 See Acciones Atípicas.

some problems regarding the interpretation of the Law, and in some cases also contradictory regulations.¹⁰¹⁷ Normally, (besides the exceptions that will be showed later) the *acciones típicas* will provide a negative defence of consumers, and therefore, they present similarities to the collective redress instruments that exist in German Law. The *acciones atípicas* are gathered exclusively in the LEC and are oriented to damages recovery. Under this classification, it shall be distinguished also between the institutional class action, lodged by consumers' associations entitled *ex ante* and such class action foreseen for a group of *ad hoc* affected consumers.

4. Catalogue of typical Actions

Collective redress instruments are present in different fields of Law. Those which fall within the EU harmonization umbrella will logically present more similarities to the German regulation. These are regulated in the fields of Competition Law, Trade Marks and General Contract clauses and are known as *acciones típicas*.

1. Unfair Competition Act (Ley de Competencia desleal) LCD
2. General Advertisement Act (Ley General de Publicidad) LGP
3. General Contract Conditions Act (Ley sobre Condiciones Generales de Contratación) LCGC
4. Free Competition Act (Ley de defensa de la Competencia) LDC
5. Revised Text for the General Defence of Consumers and Users (Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios) RTLGDUCU

4.1 Unfair Competition Act (*Ley de Competencia desleal* (LCD))

4.1.1 Development

In comparison with Germany and other European countries, the first specific law in defense of fair competition in Spain came quite late, as was not approved until 1992. Single regulations in this field came earlier. The criminal code of 1829¹⁰¹⁸ and the Spanish law for protection of industrial property of 1902 gathered the term “unlawful” instead of “unfair” competition.¹⁰¹⁹ Nevertheless, these provisions were oriented to the protection of competitors rather than consumers and applied mostly in the criminal field.¹⁰²⁰ Possible civil claims found support on the art. 1902 of the Spanish Civil Code under the wording: *the person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused*. During Franco's dictatorship, the Spanish economy became corporatist and protectionist oriented.¹⁰²¹ In this time, the first regulation oriented to consumers was approved in 1964 in the Advertisement's Statute.¹⁰²² In its article 10 there was a clause against “unlawful”

1017 *Mom*, Landbericht Spanien, in: Micklitz & Stadler (Eds.), Die Verbandsklage p. 663 ff.

1018 See *Kroemer*, Der unlautere Wettbewerb nach spanischem Recht- Eine Entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht; *Mom*, Landbericht Spanien, in: *Micklitz & Stadler* (Eds.), Die Verbandsklage, p. 671 ff.

1019 Art. 172 Ley de Protección Propiedad Industrial, contained a general prohibition of taking advantage from another's reputation in the market, and a list of 7 prohibited conducts.

1020 *Kroemer*, Der unlautere Wettbewerb nach spanischem Recht- Eine Entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht p. 59.

1021 Further *Juan Ignacio Font Galán*, RDM 1977, 519-560.

1022 Ley 61/1964 de 11 de Junio por la que se aprueba el Estatuto de la Publicidad, Gazeta No. 143, 15/06/1964.

advertisement. The amended of the Art. 7.8 of the Spanish Civil Code introduced a new definition of unlawful competitive activity. It will not only include the subjective aspect (*dolo o culpa*), also those conducts that may objectively cause a harm.¹⁰²³

By the incorporation of Spain to the EU, several laws were amended to adapt the Spanish Law to the *Aquis Communautaire*.¹⁰²⁴ First the general consumers act (LGDCU) of 1984 included a right in favor of consumers' association in cases of misleading advertisement to start a removal administrative procedure. The first judicial civil standing in favor of consumers' associations came by the approval of the General Advertisement Law of 1988 (Art. 25). Finally, the *Ley 3/1991, de 10 de Enero, de Competencia Desleal*¹⁰²⁵ strength the consumers' protection in Spain by adding a general clause of good faith, as a catalogue of unfair conducts (former Art. 18 LCD), and introducing the active legitimation in favor of professional and consumers' organizations (former Art. 19 LCD). The Spanish law maker introduced procedural instruments for an effective and proportional enforcement of the substantive law.¹⁰²⁶ The Spanish Unfair Competition Act (LCD) has been amended several times to be adapted to the European requirements.¹⁰²⁷ The last amendment was done in 2009 by the *Ley 29/2009* which modified the legal regime in the field of advertisement and unfair competition. It came into force on the first of January 2010, and adapted the Spanish law to the Directives 2005/29 and Directive 2006/114 EC.

4.1.2 Legal nature

The LCD came into force on the 31 January 1991. It is categorized as a legal body of private law and *lex generalis* in unfair competition field.¹⁰²⁸ **The law considered itself as a radical change in this area of law, as is oriented not only to regulate conflicts between competitors but also the collective interests of consumers.**¹⁰²⁹ It responds to a social necessity of protecting interests of all parties in the market and of the State in the achievement of a healthy competition system.¹⁰³⁰ The consumers' protection is recognized as a fundamental aspect of the good working of the Market.¹⁰³¹ With the approval of this law, Spain regulates the unfair competition systematically and in an organized manner, building a reliable and safety legal frame.¹⁰³² As per the lack of experience of the Spanish law maker in this field, the comparative law was very important for the development of the LCD. As the motivation of the law recognized, the German UWG was an example.¹⁰³³ The requisite of good faith included in the original article 5 LCD was imported from the Swiss

1023 *Pérez Mosteiro*, La reforma de la Ley de competencia desleal efectos de la armonización comunitaria, p. 37.

1024 Trade Marks Law (Ley 32/1988, de 10 de Noviembre, BOE No.. 272 de 12/11/1988, including the articles 87-89 in field of unfair competition, which were valid until the Unfair competition act came into force; General Advertisement Law Ley 34/1988 de 11 de Noviembre, General de Publicidad, BOE No.. 274 de 15 /11/1988; Ley 16/1989; Ley 16/1989 de 17 de Julio de Defensa de la Competencia, BOE No.. 170 de 18/07/1989.

1025 BOE 11 January 1991; in force from 01 February 1991 until 29th March 2000.

1026 *Mom*, Landbericht Spanien, in: *Micklitz & Stadler*, (Eds.), Die Verbandsklage p. 672.

1027 First amendment: BOE de 11 de Enero de 1991. In force from 01 February 1991 until 29 March. 2000; II Amendment in force from 8th January 2001 until 21st December 2003. III amendment in force from 21st December 2003 until 01 January of 2010.

1028 Interpretation of *Leible*, WRP 1992, 1 (1).

1029 III point of the law's motivation.

1030 II point of the law's motivation.

1031 *Pérez Mosteiro*, La reforma de la Ley de Competencia Desleal, p. 31.

1032 *Ibidem*, p. 30.

1033 *Mom*, Landbericht Spanien, in: *Micklitz & Stadler* (Eds.), Die Verbandsklage p. 674.

unfair competition act.¹⁰³⁴ Also from the Swiss example was adopted in the art. 19.1 LCD (now Art. 33.1 LCD) the individual consumers active legal standing (Art. 10 Swiss Unfair Competition act), as well as the declarative claim foreseen in the former art. 18.1 LCD.¹⁰³⁵

In the field of unfair competition, the relationships between corporations and consumers will be considered unfair when two elements are present:¹⁰³⁶

- That the acting of the entrepreneur is contrary to the necessary professional diligence.
- That such behavior is susceptible to distort, in a significant way, the economic behavior of consumers.

4.1.3 Types of actions

The sort of claims foreseen in the LCD are content in its Chapter IV.¹⁰³⁷ These claims are considered as typical actions, as they belong to a special legislation. With the introduction of such actions, the Spanish law maker aims to reach a proportional enforcement of the substantive law in this field of law, by improving the sanctions against unlawful activities.¹⁰³⁸

The catalogue of possible claims was listed originally in the former article 18 LCD LCD, now Art. 32LCD. There are listed 6 different kind of claims. Consumers associations are entitled to lodge the first 4 of them as well as a damage actions based on the Art. 11.2 LEC:

- 1.^a Unfair declarative action
- 2.^a Injunctions claim
- 3.^a *Removal action*
- 4.^a *Action to correct misleading information*
- 5.^a Recovery actions
- 6.^a Unlawful enrichment action

* Damages action

4.1.3.1 Declarative action

The Art 32. 1 LCD foresees a declarative action to determinate the unfairness of a given activity. As per the Art. 18 No.1 of the former LCD, the declarative action had a substantial limitation, since it was limited to those activities which were currently having their negative effects by the time of filling the claim. This limitation was quite criticized by the Spanish academia. ¹⁰³⁹ German authors such Wirth considered that this limitation was justified, as the declarative decision is not a requisite in order to lodge the other actions gathered in the law.¹⁰⁴⁰ Nevertheless, the declarative action has been finally amended and

1034 In detail *Leible*, WRP 1992, 1-11.

1035 In detail *Leible*, ZfRV 1992, 257-280.

1036 Preamble II of the Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios. BOE No.. 315 Thursday 31st December 2009 Sec. I. pp, 112039 - 112060.

1037 Capítulo IV included by the paragraph 11 of the first article of the Ley 29/2009, of 30 December, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios («B.O.E.» 31 diciembre). In force since 1st January 2010.

1038 LCD Former Preamble Apron III.

1039 See *Otero*, GRUR Int. 1992, 183 (184).

1040 *Wirth*, Das neue Recht des unlauteren Wettbewerbs in Spanien, Eine darstellung des Gesetzes 3/1991 about fair competition and comparative law, p.170; Stadler & Micklitz, Die Verbandsklage p. 678.

this limitation has been removed. Remains open the question of the necessity of such an action, as the statement of unfairness can be done by the judge following the general rules for evidence in any of the other actions included in the law.

4.1.3.2 Injunction claim

This is a case law creation action in Spain.¹⁰⁴¹ As per the former wording of the article, it was unclear if the injunction claims also included a prohibition to repeat the unfair act in the future, or to prevent it.¹⁰⁴² The reform makes the injunctions and prohibition action much clearer. The protection also is extended to acts which were not initiated yet and to future repetitions.

4.1.3.3 Removal action

For some voices in the literature, the removal action and the action to correct misleading advertisement enter into contradiction, as both actions follow the same aim, which is to remove adverse specific effects of a given unfair activity.¹⁰⁴³ Under the removal action is included the action to correct misleading advertisement.¹⁰⁴⁴ This action can be lodged alone, but it is usual to follow an injunction claim. With this action can be removed physical elements which are causing the harm such promotional or advertisements objects. Specific measures shall be taken by the court.

4.1.3.4 Corrective action

Aim of this action is to correct any misleading information. The court shall determine the necessary means to enforce the decision, such the election of the mass media to publish, the timing of the publication, etc....¹⁰⁴⁵

4.1.4 Procedural aspects

As per the Art. 33.1 LCD, consumers' associations are entitled to lodge a damage action based on the Art. 11.2 LEC (on collective determinable rights of consumers and users) as well. The damage actions were not introduced in the original LCD. It's absence was justified in the fact that the Spanish law does not foresee a recovery action for not determinable damages, and these damages are hard to be determinable.¹⁰⁴⁶ The introduction of the link to the Spanish LEC 11. 2 solves this problem, as they foresee a collective redress mechanism only for determinable of easy to be determinable injured consumers.

As per the Art. 33.3 LCD other bodies can lodge the first 4 claims. It includes the National Consumers Institute (INC) and its equivalent in the Autonomous Communities, as well as qualified European consumers' associations and the Spanish public prosecution

1041 The Spanish highest ordinary court, Tribunal Supremo recognized for the first time this action at the 2nd February 1974, see *Carlos Sastres*, *Manual Consumidores y Usuarios*, also *Kroemer*, *Der unlautere Wettbewerb nach spanischem Recht- Eine Entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht* p. 59.

1042 *Otero*, *GRUR Int.* 1992, 183 (184).

1043 *Ibidem*.

1044 *Mom*, *Landbericht Spanien*, in: *Micklitz & Stadler* (Eds.), *Die Verbandsklage*, p.678 ff.

1045 More in *Vicent Chuliá*, *GRUR Int.* 1994, 14-32.

1046 *Bercovitz Rodríguez-Cano*, *Comentarios a la LGDCU*, p. 571.

Ministry (Ministerio Fiscal). The professional associations, representative of economic interests can also lodge the first 4 claims against unfair activities when they affect their members' interests. Any natural person can lodge any of the first 5 claims, so far, its economic interest is threatened or affected by the negligence conduct. It is different than the German case, that does not allow individual claims. Specially, against misleading advertisement will be entitled to lodge any of the first 5 claims any person who is directly affected or has a subjective or legitimate interest. The action against unlawful enrichment can be lodged only for the holder of the injured legal position.

4.1.4.1 Statute of limitation

As per the art. 35 LCD there are two terms for the statute of limitation: - 1 year since the holder of the action has knowledge of the infraction and know who is responsible for that. - 3 years since the unlawful activity finishes

The actions in defense of general interest of consumers and users will follow the statute of limitation of the Art. 56 of the Revised Text of the Law for the General defense of consumers and users (RTLGDUCU) and other complementary rules.

4.1.4.2 Preliminary proceedings

By means of the Art. 36.1 LCD, any entitled party to lodge an action foreseen in the law, can ask the court to take all necessary measures to assurance the facts that will be relevant for the procedure (*diligencias de comprobación de hechos*). Such measures are regulated in the Spanish Patent Law¹⁰⁴⁷, and can be extended do the whole company activity (Art.36.2 LCD).

4.1.4.3 Jurisdiction

It is not regulated in the LCD, but in the general civil procedure act (LEC). As per the Art. 52.1 No. 12 LEC, the local jurisdiction is where the defendant has its establishment. In absence of the same, will be the defendant's living place. In absence of establishment or living place of the defendant in Spain the local jurisdiction will be the place where the unfair activity was conducted. The claimant can choose between the place where the negligence act was done or where the unfair activity succeeds. The kind of procedure will be the ordinary proceeding, (juicier ordinaries), which is regulated in the articles 399-436 of the Spanish Civil Procedure act.

4.2 Antitrust Act: Ley de defensa de la competencia (LCD)

Damage actions by breaching of the antitrust regulations are regulated in Spain in the Unfair Competition Act (Ley de Competencia Desleal), as these are considered unfair competitive behaviors that may drive to a reimbursable damage. Besides this reference in the Spanish Antitrust Act (LDC) which leads to the damage regime regulated in the Unfair Competition Act, there is not further regulation of actions for damages in the LDC.

Nevertheless, since the approval of the Ley de Defensa de la Competencia (LDC) in 2007, several amendments have considerable improve the exercise of the private enforcement, that was almost unknown in this country.¹⁰⁴⁸ The updated regulation solved

1047 Articles 129 to 132 of the Ley 11/1986, de 20 de marzo, de Patentes, BOE 73 of 26th March 1986.

1048 *Herrero Suárez*, CDT 2016, 151 (153).

some of the problems identified with the previous regime of defence of the free competition. One important clarification is related to the unification in the application of the local legal venue. Previous to 2007 there existed differences in the legal venue, so the Mercantile Judges and Courts were responsible for the application of the former Art. 81 and 82 of the Treaty, meanwhile the Civil Courts were responsible for the application of the national rules on competition (artículos 1 y 6 de la LDC 1989), situation which has been resolved with the new law by granting jurisdiction to the Mercantile Judges and Courts to deal both with national or community Law. With the amendment of the law, it was also erased one of the most important barriers for the private enforcement, namely the necessity to count with a previous administrative resolution in order to lodge a claim based on the infraction of a national law. It was a requirement of the Regulation 1/2003. Such requisite didn't apply for those claims based in infringement of the European rules, as per the direct effect of the Art. 101 and 102 of the Treaty, former (artículo 13 LDC 1989). Nevertheless, the LCD does not content specific procedural rules for the exercise of actions based on infringements of the competition rules. It applies the general regime content in the Civil Procedure Act (LEC) for contractual and specially for extra-contractual relationships. The Proposal for Incorporation of the Directive on Damages¹⁰⁴⁹ revert this situation as it includes a specific Title in the Law about damages recovery which tries to gather all substantive aspects of these kind of claims, and linking to the LEC for pure procedural aspects such the access to evidence.

A closer exam to the judicial practice in the last years shows kind of improvement. It has substantially been increased the number of private claims,¹⁰⁵⁰ but this situation remains not satisfactory for part of the Spanish doctrine.¹⁰⁵¹ The success rate is quite different depending on if the claims are based on a previous administrative resolution (66,7%) or if they are stand-alone claims.¹⁰⁵² From the successful actions, few of them have actually granted with damages, being the most usual judgment the declaration of unlawful activity and the nullity of anti-competitive general contract clauses.

4.2.1 Incorporation into Spanish Law of the Directive on damages

The incorporation into German Law has been treated in the chapter dedicated to the 9.GWB- Novelle. In Spain, the Ministry of Justice created in February 2015 a special codification general commission (Comisión General de Codificación) with the task of preparing a proposal for the incorporation of the Directive into Spanish Law. This commission submitted in the last days of 2015 a specific proposal for incorporation. Such Proposal ¹⁰⁵³ foresaw an amendment of the Antitrust Act (Ley de defensa de la competencia) as well as of the Civil Procedure Act (Ley de Enjuiciamiento Civil). Nevertheless, the electoral calendar in Spain and the long time in 2016 with interim Government (which is not allow to submit Law proposals) has delayed the approval of the transposition Law. The Ministry of Justice opened a deadline to submit observations to the proposal if incorporation that ended at 11th January 2017. As the Spanish Government did not comply with the transposition date, the content of the Directive is of direct application

1049 Propuesta de Ley de la sección especial para la trasposición de la Directive 2014/104/UE del Parlamento Europeo y del Consejo, de 26 de Noviembre de 2014, relative a determinadas normas por las que se rigen las acciones por daños en virtud del Derecho de la competencia nacional o de los Estados miembros y de la Unión europea.

1050 Marcos Fernández, ICE, 2014, 91 (96 ff) & GCLR 2013, 167 (167 ff.); Diéz Estella / Estrada Meray, RCD 2014, 189; Yanes, RCD 2011, 133.

1051 Herrero Suárez, CDT 2016, 151 (154).

1052 Marcos Fernández, GCLR 2013, 167 (171).

until its final transposition into Spanish Law.

The current proposal of incorporation introduces a new title in the LDC under the denomination of “about the compensation of damages caused by restrictive practices.”¹⁰⁵⁴ This title contents all relevant aspects of such regulation with exception of the access to evidence which is regulated in the LEC. The Spanish proposal does not go far away of the content of the Directive, not even in those aspects where the Directive allowed more free space to the member countries for self-regulation. Aligned with the Directive, the Spanish legislator has not considered any aspect of the collective redress for further development. The proposal for incorporation of the Directive does raise a big amendment of the general access to the evidence regime included in the Spanish Procedural Act (LEC). It has been used the opportunity of the incorporation to establish a modified regime applicable both for the civil and mercantile jurisdictions. The proposal shall incorporate a new Section within the chapter dedicated to the access to evidence, divided in 3 subsections. As per the first section, it includes general dispositions, included the requirements to demand from the Court disclosure of evidences, a list with examples of possible measures and its execution. Further subsections content such specialties of the access to evidence related to the protection of IP rights and in such cases of damages by breach of EC or national competition rules. The last subsection transpose the Directive and the general prohibition of disclosure in the frame of a leniency program.¹⁰⁵⁵ So, the reform of the LEC shall content a general disclosure regime and a specific regime for the disclosure in actions for damages based on breach of EC or national competition rules. The proposal for incorporation of the Directive intends to erase 2 current procedural institutions, namely the preliminary diligences of the Arts. 256-263 LEC and the exhibition of documents in possession of the counterparty or a third party (Art. 329-333 LEC).¹⁰⁵⁶ Both institution will be substituted by a new one called „**access to sources of evidence**“, defined them as any element prone to be as basis for later probatory practice in the later procedure. Critics to this new regime included the fact that the preliminary diligences were not just an institution to obtain evidences, but rather a preliminary judicial act that shall help to obtain information that the claimant would need to prepare the claim or even to judge if a later claim would be suitable. The information which could be provided in such preliminary diligence includes aspects related standing, legal representation, and all necessary aspects that could help to prepare the potential later claim, so, there is not limited to access to evidence.¹⁰⁵⁷

The suppression of the institution of the preliminary diligence has been criticized, as this instrument was suitable to obtain relevant information which could be used to decide if starting the procedure is worthy or not, it was not a procedural step limited to obtain evidences.¹⁰⁵⁸ The *Additional Disposition* No. 3 of the proposal for incorporation includes the list of definitions included in the Art. 2 of the Directive.

One of the most conflictive matters in this Directive is the relationship between the public and the private enforcement, which embodies itself in the access to evidence. As per the nature of this kind of claims, in order to probe the claimants support- or the defendant arguments- there is necessary an intensive factual analysis of objective behavior of the counter party as well as an important economic study of the circumstances

1054 The proposal modifies also the Art. 64 LDC regarding the assessment of the fine by introducing a mitigating cause based in previous compensations.

1055 *Herrero Suárez*, CDT 2016, 151 (157).

1056 Derogative Disposition of the Proposal, *Herrero Suárez*, CDT 2016, 151 (160).

1057 Specific to this matter see *Herrero Suárez*, CDT 2016 151 (160).

1058 *Herrero Suárez*, CDT 2016, 151 (162,163).

of the case. and economic aspects. the experience in such cases show that in many cases the evidence that will support a claim are in the hands of the counterparty or in hands of a 3rd party, and the defendant has not access to them in order to prove its claims. The Directive contents some rules in order to facilitate the access to evidence, which under judicial supervision shall find an equilibrium between the right of the claimant to access to probatory elements and the risk of incurring in all associated risks to an excessive disclosure system (such the American experience shows).¹⁰⁵⁹ In this sense, capital aspects such who is entitled to ask for those evidences, when and how it shall be granted by the Judge and which elements shall be ponder for the disclosure have not be forgotten by the Directive. Sanctions for not compliance, destruction of evidences or in general for failure by fulfilling judge orders are included in the Directive as well (Art. 8). As in the most of the cases the most of these claims are based on previous administrative decisions, the questions about the access to evidence are related mostly to such documents content in sanction administrative procedures in the frame of a leniency program, where specific documents have been voluntarily provided to the competition authority (corporate statement). This controversial matter, which links the public and private enforcement is resolved by the Directive with a general absolute prohibition to access to such statements done by corporations in the frame of such leniency programs, and with an analogue temporal protection which covers any document or statement done by a natural or legal person during the term of the procedure. Such protection seeks to avoid that the access to evidence could jeopardize the results of an ongoing procedure. Such documents that are result of an administrative procedure, but not in the frame of a leniency program, according to the Directive will be, as a general rule, ready for disclosure, if the applicant party submits a motivated application and there is not reasonable expectation that a third party can disclosure such documents. In this case, the Judge shall ponder interests at stake. Also in the Spanish literature, the absolute prohibition of disclosure of documents in a leniency program frame has been criticized, as it seems that the European Commission rather than improve the private enforcement is willing to protect its transaction and leniency programs, even when the CJEC has taken position against this total prohibition.¹⁰⁶⁰

The access to evidence in the Spanish Procedural Act is for the Spanish literature quite proportional and suitable.¹⁰⁶¹ The access to evidence is based on principles of simplicity, assurance of access to evidence by anticipation granted as protectionary measures (Art. 293 ff. LEC), and the general obligation of public authorities to cooperate with the judicial body. The obligation of disclosure from the counterparty or 3rd parties is also generally included in the LEC. It shall be granted by the judge, who shall ponder its suitability. The request shall perfectly identify which document is requested for disclosure, or its detailed description (Art. 328). Sanctions for no compliance are also included in the law. The Directive regulates two measures that are broader to the current regulation of the matter in the Spanish LEC; namely the access to a hole category of documents and the documental exhibition prior to the beginning of the procedure as it is regulated in the Art. 7.3 of the Directive.¹⁰⁶² The Spanish Civil Procedure Act does not regulate however the total prohibition of access to evidence in the frame of a leniency program. Thus, this matter would need to be incorporated into Spanish Law. Nevertheless, if such prohibition is compatible with the case law of the CJEC is still doubtful, and it shall be expected a scrutiny of the European judicial bodies eventually. So, it is reasonable to doubt if the incorporation to the LEC of such general prohibition does make sense.

1059 *Herrero Suárez*, CDT, 2016, 151 (157).

1060 *See Sopeña/Martín*: RCD, 16, 2016, 1-40.

1061 *Herrero Suárez*, CDT 2016, 151 (159).

1062 *Herrero Suárez*, CDT 2016, 151 (159).

Another substantial aspect is the consideration of the administrative decisions of the NCA's in the judicial procedures. At European level, there are differences between the force of such decisions. As per the decision in the case *Masterfood*, the Regulation 1/2003 gathers the direct effect on national competition authorities and courts of the decisions of the Commission related to the existence of an antitrust infraction. In countries such Germany and Austria, national courts are also binded to the decisions of national competition authorities. This is not the case of Spain, which is still subject only to the decisions of the Commission and not of other European competition authorities. The coexistence and scope of decisions of different judicial orders is not a pacific matter in the doctrine. It is general accepted in Spain that the confirmation of the Audiencia Nacional of administrative resolutions do have binding force in other judicial procedures.¹⁰⁶³ In this case, the Audiencia Nacional is also a judicial body, so what deploys its effects over other judicial orders is not the administrative resolutions per se, but the judicial confirmation of the same by means of a judiciary organ. Such stake was confirmed by the Spanish Supreme Court in the notorious *sugar case*.¹⁰⁶⁴ Nevertheless, the Supreme Court does not establish a total identity or binding effect of the administrative resolutions. The judge or court can develop a new factual analysis if do not share the sense of the administrative resolution, as long as he motivates his decision. This stake is much more aligned with the right to an effective judicial protection of judges and courts, and the defence of the individual against the coercive decision of the administrative organs of the State. As stated before, the antitrust prosecution is already based on numerous presumptions which shall facilitate a decision of culpability. Although the justice provided by the State does not solve the problem of being judge and party, judicial institutions offer more guaranties than the administrative bodies. Giving unlimited binding effect to the administrative decisions could jeopardize the effective defense of individuals against the coercive power of the State by blurring the differences between the different jurisdictions.

In Spain, imported from the American jurisdiction, it was introduced in 2007 the figure of the *amicus curiae*, which allows competition authorities, European, national or local to participate in the procedure so good as demand of h judge or as own initiative, not having the consideration of party on the procedure.¹⁰⁶⁵ Any statement provided by these competition authorities will not have per se a de iure binding effect, but the auctoritas of such institutions play a substantial role in the judge or court decision.

The Directive breaches such precautions, as demands that decisions of national authorities shall have binding effect before national courts. It is not justification to extend such effect to those decisions. If the decisions of the Commission could find – weak-justification in the fact that its binding effects shall help to provide uniformity among the member States, this extension to national authorities do not count with such justification. This mandatory request of the Directive is a breach to the judicial independence, is another brick in the wall of presumptions that configure the antitrust Law. It seems that the European Legislator understand under private enforcement vulneration of the right to an effective judicial protection and the right to be heard before the judge of private people. Nevertheless, the proposal for incorporation into Spanish Law of the binding effects of national decisions includes so good the mandatory binding effects of the national authorities and its extension to the decision of national competition authorities of other member countries, following the German example. The Spanish doctrine agree that in order to deploy its binding effects, the decision of the national competition authority needs

1063 *Sancho Gargallo*, Indret, 2009, 1 (14).

1064 See specific to this matter STS 7th November 2013, Sala de lo Civil, No. 651/2013, *Azúcar*, ECLI:ES:TS:2013:5819.

1065 *Herrero Suárez*, CDT 2016, 151 (166).

to be final, it means, that if an administrative decision in this matter has not been, or could not have been potential revised by a judicial body, it does not deploy any binding effect. This precaution shall increase the warranties against an excessive sanction faculty of the administrative organs, nevertheless, the requisites to consider an administrative resolutions as final depend very much on procedural rules of the member countries, and these can take into consideration formal circumstances that do not enter to evaluate the material aspects of the decision (an administrative decision might become final because one part does not file appeal in time and form, but this decision can deploy effects to a third party that was not part in such procedure). The requirement of being final means that if a damage action is lodged before the administrative procedure becomes final, the plaintiff will be required to prove its claims. This extension of the binding effects of the administrative resolutions is generally celebrated by the Spanish literature, as it shall provide legal certainty and uniformity within the common market.¹⁰⁶⁶

Finally, the incorporation of the Directive into Spanish Law shall deal with the question of the several and joint liability of the members of the cartel or which took part in the anti-competitive conduct. The Directive includes exceptions in favor of SMEs and corporations which took part in leniency programs. The SMEs, - if fulfill some requirements- will only be liable against its direct purchasers, both direct or indirect. In the case of beneficiaries of such leniency programs will be also seen limited its liability against its direct or indirect purchasers, and subsidiarity against 3rd parties (Art. 11 of the Directive).

Regarding the inner relationship between the members of the cartel, as a general rule, the causer has the right to recover from the other members such amount that exceeds its responsibility. Beneficiaries of leniency programs will also be privileged in this inner relationship; they will only be liable against its own acquirers both direct or indirect, it means that if they have reimbursed them, whistleblowers will be safe against inner repetition of other members of the cartel (unless all co-perpetrators were insolvent). This matter need to be incorporated fully *ex novo* into Spanish Law.¹⁰⁶⁷ The general rule of joint liability in Spain is based on the institution of the common responsibility (*mancomunidad*, Art. 1137 CC derived of a contractual relationship), but the proposal incorporates the joint and several responsibilities (*responsabilidad solidaria*). It means the incorporation into Spanish Law of an unknown figure, alien to the positive legislation and judicial development. Nevertheless, the Spanish case law has established that in th cases of numerous co-debtors, when its partial responsibility cannot be ascertained the joint liability applies (figure known in Spain as „*solidaridad impropia*“ that shall be stated by a judicial resolution when the 2 above mentioned requirements are present). As per the Directive, the joint liability occurs since the very moment that a numerous of parts take part in the anticompetitive conduct, (*ex lege*) and the Spanish jurisprudential development requires of judicial statement which extends this liability to all defendants which were sued by the plaintiff. It means that the liability cannot be extended to those parts which have been not be sued by the plaintiff and they would be exempt of the possible later inner recovery.¹⁰⁶⁸

The proposal also includes the responsibility of the mother companies in aggrupation of corporations *ex lege* which until the date was only foreseen in the administrative sanction procedures. All these newnesses are incorporated in the Art. 73 of the Proposal, which almost copy the exact wording of the Directive.¹⁰⁶⁹

1066 About this question so good in the Spanish as well as in the German jurisdiction see *Calvo Caravaca & Suderow*, CDT 2015, 114 (144)

1067 *Herrero Suárez*, CDT 2016, 151 (166).

1068 *Brokelmann*, RgDe 2015, 1 (12).

1069 *Herrero Suárez*, CDT 2016, 151 (177).

4.3 General Advertisement Act

Spain have very early a pure advertisement act called Estatuto de la Publicidad.¹⁰⁷⁰ This law regulated several aspects of the publicity. It was not only a tool to regulate the relationships between competitors, it recognized the consumers' protection as well.¹⁰⁷¹ As per the motivation of the General Advertisement Act (LGP) of 1984, the Estatuto was obsolete, and not enough flexible. It was derogated, substituted in 1984 by the (LGP) to prepare the incorporation of Spain to the EU. In its origin, the LGP offered principally an administrative protection or control of advertisement activities. Neither was included any collective redress mechanism, either any association of consumers has active legal standing.

As per the approval of the Ley 39/ 2002 of 28th October 2002, several European regulations were incorporated into Spanish Law. *The provisions of the Directive 98/27 EC were incorporated, in order to grant standing to qualified entities from the European countries.*¹⁰⁷² *As transposition of the articles 4 and followings of the Directive 84/450 EEC, the law incorporated a summary procedure in order to cease any unlawful advertisement. It was introduced legal standing to associations in order to file an injunctions and correction claim in order to strength consumer's protection as well. The Spanish law was not limited to misleading advertisement, but included any kind of unfair advertisement.*¹⁰⁷³ *Before the reform of the LCD, the protection against unfair competition was in Spain double dimensioned. **This law has lost now any practical relevance.** Nowadays in Spain the possible unfair activities arising from advertisement is also regulated in the unfair competition act. The general advertisement act remains as a legal body which content some definitions (what is advertisement, advertisement contracts, etc...*

The current regulation of the law is divided in 4 Titles. Titles I and II establish general dispositions and the definition of the unlawful advertisement, as well as the different administrative acts regarding such products and services which may potentially harm consumers. Title III regulates specific aspects of private contracts in this field. Finally the Title IV speak of the procedural instruments, sanction procedures, voluntary self-control of advertisement, etc...

4.3 Protection against unfair terms in consumer contracts

The first regulation in this field in Spain came with the approval of the LGDCU (general consumers and consumers' law of 1984). Until this regulation came into force, the main control instrument was the task of judges and courts in connection with the

¹⁰⁷⁰ EGP, Estatuto General de la Publicidad 1964. J. Guillén Caramés: "La intervención de las autoridades administrativas de competencia en la aplicación judicial privada del Derecho de la competencia" in: *L.A.Velasco/ et al*; La aplicación privada del Derecho de la Competencia, Lex Nova, Valladolid, 2011, p. 250 ff.

¹⁰⁷¹ *Kroemer*, Der unlautere Wettbewerb nach spanischen Recht Eine Entwicklungsgesichtliche, pp.127, 131.

¹⁰⁷² See Exposición de Motivos (Whereas) of the law.

¹⁰⁷³ *Marin Lopez*, Derecho de representación, consulta y participación y régimen jurídico de las asociaciones de consumidores y usuarios, in: *Bercovitz/ Salas*, Comentarios a la LGDCU, p.574 ff.

interpretation of the Art. 1281 of the Spanish Civil Code¹⁰⁷⁴, as well as from the Spanish general principles of Law.¹⁰⁷⁵

The Art. 10 of the General Consumers Protection Act of 1984 introduces into the Spanish positive Law an individual control system against unlawful or abusing general clauses (also against a clause's catalogue). It lacked, however of a clear mechanism to allow general clause control granted in favor of consumers' associations. It was a controversial matter if the art. 20.1 LGDCU (entitlement of associations to protect general interests of consumers and users) was a sufficient legal basis to sustain an associative claim. For the most part of the Spanish academia, there was not a necessity of a further regulation to allow such collective control of the general clauses.¹⁰⁷⁶ Due to the less of clarity and relevance of the former art. 10 LGDCU, as well as the necessity for a better adaptation of the European rules, the Spanish law maker finally decided to create a separate legal body in this field. In 1998 finally came into force the Spanish General Contract Conditions Act.¹⁰⁷⁷ **This law is not limited to consumers' protection, but it is a general law on contract conditions, does not only covers abusing clauses in consumers' field.**¹⁰⁷⁸ As the previous regulations gathered in the LGDCU were not derogated, there were 2 legal bodies in this field. The law has been several times more amended, introducing new articles. The European Directive in this field was adopted by introducing new articles in the LCGC by means of the Ley 39/2002 of 28th October 2002.

The approval of the Spanish Civil Procedure Act, which included this matter in this scope drive to the abrogation of several articles.

4.3.1 General Contract Conditions Act LCGC

Following the German example, Spanish Law was not limited to the protection standards and abstract control of the European Directive 93/13 CE¹⁰⁷⁹. **The Spanish regulation allows collective enforcement of determinable individual rights through collective redress mechanisms.**¹⁰⁸⁰ As per this collective redress entitlement of the LCGC, the consumers associations were able for the first time to lodge a collective claim in this field of law. Due to the coexistence of this law with the consumers general protection act, the new collective redress instrument was extended to this last law as well. According to the law, general contract conditions are those predisposed clauses whose incorporation to the contract is imposed by one of the contracting parties, independently of its material authorship, of its external appearance, its extension and whatever other circumstance, as long as they have been drafted in order to be incorporated to a multiplicity of contracts. The second paragraph of the article 1 specifies, that even in the cases of clauses that have been individually negotiated, this law shall apply to the contracts, if the same can be considered as an adhesion contract. The law will be applied to any contract which contents general conditions clauses which are closed between a

1074 Rules on contract's interpretation see *Mom* in: *Micklitz & Stadler*, Die Verbandsklage, p. 689.

1075 *Fröhlingsdorf*, Das spanische Wettbewerbsrecht, in: *B. Löber/ W. Peuster* (Public.), Aktuelles spanisches Handels- und Wirtschaftsrecht, 1991, p. 497 ff.

1076 See *Marín López* in: *Bercovitz/ Salas*, (Eds.), Comentarios a la LGDCU, p. 557.

1077 Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (LCGC), BOE 89 of 14th April 1998.

1078 Point 4 of the Exposición de Motivos.

1079 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Official Journal L 095, 21/04/1993 pp. 0029 -0034.

1080 *Kohtes*, Das Recht der vorformulierten Vertragsbedingungen in Spanien, Diss. Münster 2003, Frankfurt/Main 2004; ref. in *Mom*, Landbericht Spanien in: *Stadler & Micklitz*, (Eds.), Die Verbandsklage p. 693.

professional and any other natural or legal person. Professional is any natural or legal person acting in the frame of its professional activity, both public and private.

4.3.1.2 Repertory of actions

These are regulated in the chapter IV of the LCGC.

The general contract conditions act gathers 3 different kind of actions: injunction, retraction and declarative. Damage action is also recognized.

4.3.1.2.1 Declarative action

This action seeks to declare one clause, as a general contract condition clause. In case of a favorable decision to the claimant, the judicial secretary will order the inscription of the clauses in the General Contracting Clauses Registration according to the Art. 22 LCGC. The introduction of a Register of general clauses was a newness in the Spanish contractual field. The regime of inscription is regulated in the article 11 of the LCGC., following the art. 7 of the Directive 93/13 EEC, this shall contribute to facilitate the control of such general clauses and thereby strength the legal protection. The registration is voluntary, (in some sectors mandatory). Resolved court decisions are to be written, according to the requisites of the law.¹⁰⁸¹

4.3.1.2.2 Injunction claim

The law expressly states the entitlement of the law to the associations of consumers to lodge injunctions claims in this field is in favor of the general interest, through an abstract control. It is also have been designated such an altruistic claim.¹⁰⁸² The aim of such entitlement is to release the market from abusive clauses. As per means of the art. 17.1 of the LCGC, any professional using or recommending this (void) clauses can be sued in an injunction claim. This claim seeks to condemn the defendant to cease using those clauses declared void, and not to using them again. The decision of the court, if necessary, shall clarify, which parts of the contract remains valid. There is a double protection 1st, to eliminate the void clause from the market (current contracts), and 2nd to cease its use again (to forbidden this clause in new contracts). **As a particularity of the Spanish law, this action also can be lodge next to a recovery action for the amounts paid under the abusive clause, as well as a damage action derived from the damages that may have arisen.** This possibility was introduced as Final Disposition No. 6 of the Spanish Civil Procedure Act of 2000.

4.3.1.2.3 Retraction action

This sort of action is aimed against recommendations of use of void clauses, well in the past, as in the future, and forbids its repetition. The way in which the defendant has to get retracted is not specified in the law. The court's decision shall specify this matter. The claim can be sustained against any professional which recommend the use of this void clauses, or express its intention to use them, as long as theses clauses have been already used.(17.2) The declarative action can be sustained against any professional which use

1081 *Fischer*, RIW 1998, 689 (690).

1082 *Mom*, Landbericht Spanien in: *Stadler & Micklitz*, (Eds.), *Die Verbandsklage* p. 694.

these general conditions.(17.3) All the above mentioned claims can be sustained also against professional corporations, or several professionals. (Art. 17.4 LCGC).

4.3.1.2.4 Damages

With the approval of the Spanish civil Procedure act of 2000 it was introduced a new paragraph in the article 12.2 of the LCGC (General contract Conditions Act). **As result of this new regulation, damages actions can be lodged based on unlawful general contract conditions.** This paragraph, with clearer redaction of a previous formulation, finishes previous academics discussions about the possibility of connecting a damage action together with the action to remove general unlawful contract conditions.¹⁰⁸³ The regulations contained in the LEC will be extended to the field of general contract conditions. The LEC introduced a 4th additional clause in the LCGC.¹⁰⁸⁴ Thereby, the provisions contained in the LEC for the procedures in defense of general interest of consumers and users will be of application to those procedures derived from the LCGC, even when no consumers are affected.¹⁰⁸⁵ **Damages can arise for instance in those cases in which the unlawful general contract condition drives to the nullity of the contract, and the customer (consumer) suffers damages arising from this situation.**¹⁰⁸⁶ As the law does not foresee a nullity action, the recovery and damages actions depend on the injunctions claim, being accessory to this one.¹⁰⁸⁷

The standing to file this claim is granted to:

1. Associations or corporations of entrepreneurs, professionals, farm workers, whose aim is the defense of their members.
2. Chambers of commerce, Industry and sailing,
3. Users and consumers associations, which fulfill the requirements of the LGDCU
4. National Consumption Institute and their equivalent entities in the Autonomic Regions
5. Professional Bar association (Colegios profesionales)
6. Public prosecution ministry
7. Qualified entities of the European Union for the protection of collective and diffuse interests of consumers and users entitled by its inclusion in the official community gazette. The judge will accept the legal standing of the above-mentioned associations, but shall make also an examination on the aim and affected interests to sustain the action.

The binding effects of the judgement are regulated in the article 221 of the LEC. This article allows the extension of the judge decision in a single case to other parties which don not take part in the process. The article 221.1No. 2 allows the judge to extend a decision fallen in a collective injunction claim to an individual claim between the user and other party.¹⁰⁸⁸ The art. 21 of the LCGC lets the judge, when the decision is final to decide also about the publication of its decision's content to expenses of the condemned. The inscription of the decision in the general clauses register is mandatory in any succeeded claim, as per the article 22 LCGC.

1083 Expressly about that see *Kohtes*, Das Recht der vorformulierten Vertragsbedingungen in Spanien.

1084 No.ero 2 del artículo 12 drafted by No. 1 de la Disposición Final 6.^a de la Ley 1/2000, 7 enero, de Enjuiciamiento Civil («B.O.E.» 8 enero). *In force since 8th January 2001*.

1085 Specifically, the applicable articles will be the: art. 15, 78.4; 256.1.No. 6, 221 and 519 LEC). See n detail in Diez- Picazo Gimenez, in: De la Oliva/ Diez Picazo, § 52 S. 610

1086 *Mom*; Landbericht Spanien, in: *Micklitz & Stadler*, (Eds.), Die Verbandsklage, p. 718.

1087 *Kohtes*, Das Recht der vorformulierten Vertragsbedingungen in Spanien, p. 262 ff.

1088 Further in *García de Enterría & Velázquez*, La Ley 1998 D- 257, 1675.

4.3.2 General contractual conditions in the General Consumers Protection Act

The General Law for the Defense of Consumers and Users also regulates this matter. As per the nature of this law, the associative claims foreseen in this law can only be lodged by those consumers associations which seek for the public interest. Also the public prosecution ministry, as qualified foreign associations from the EU member countries. As the collective redress instruments are regulated in specific regulations, the LGDCU appears as subsidiary in those regulated fields, and as the legal basis to collective claims in antitrust field.¹⁰⁸⁹ It needs to be differentiated the possibility for consumers' associations to act in the administrative procedure (the Council of Consumers and Users will be heard before granting authorizations according the exceptions content in the art. 1. 3 of the LDC) and to claim. The reparation of damages will follow the general procedure content in the Spanish Civil Procedure Act. (LEC)The Injunction claim is regulated in the Art. 53 of the RTLGDUCU. Aim of the injunction claim Art. 53 is oriented to obtain a judicial decision which obliges the defendant to cease this activity and to forbidden its future repetition, if the activity was at the time of lodging the claim already concluded if there exists any risk of repetition. The injunctions claim can be sustained against those conducts which are contrary to the provision of this law in field of abusive contractual clauses, its recommendation of use, contracts celebrated outside the commercial establishment, distance selling, warranties in the selling of products and combined travels.

The legitimation is granted to:

- National consumer institute and their equivalent institutions in the autonomic regions
- Associations of consumers and users that fulfils the requirements of this law
- Public prosecution Ministry
- Those qualified associations of the European union member countries

Judges and courts will accept the legal standing of these institutions as prove of the capacity to sue and to take part in the process, but will also examine if the claims aim and the affected interest are enough related. Any of the above mentioned legitimated parties can take part in other process initiated by third parties, to defend the interest that they represent. In case of those activities developed by entrepreneurs which infringe the general interest of consumers and users, the injunctions claims will be regulated by the Art. 11, 2 and 3 LEC. In these cases, also the public prosecution ministry and the national consumers Institute (and again their equivalent in the Autonomous Regions). For those injunction actions in other European Union, only the associations included in the European official list will be entitled. (art. 54). As per the article 56 the injunctions claim will not expire as general rule. There are some limitations for those general clauses published in the register.¹⁰⁹⁰

4.3.3 Questions related to Jurisdiction

It is regulated in the new Civil Procedure Act, art. 52.1. No. 14 LEC. The competent judge is this of the establishment of the defendant (or in absence of the same of its place of residence). In absence of known establishment or residence place in Spain, will be open the forum of the adhesion to the contract.

¹⁰⁸⁹ Following the position of *Marín Lopez* in; *Bercovitz/ Salas* (Eds.), *Comentarios a la LGDCU*, p. 586.

¹⁰⁹⁰ See art. 19 of the General Contract Conditions Act (LGCC).

As in the case of collective redress, it will be considered as the place where the general conditions apply.¹⁰⁹¹ The competent judges are the *Juzgados de Primera Instancia* (first instance judges), as long as there is not a regulation which grants jurisdiction to other courts. In this sense, the Article 86 Ter 2. d. of the LOPJ,¹⁰⁹² grants jurisdiction to the *Juzgados de lo mercantil*, among others, to those actions related to general contract conditions. In a case of general contract conditions, a collective action can be lodged before the *Juzgado de lo Mercantil*, but there is a huge problematic in order to accumulate actions such nullity of contract. The Supreme Court considers that there are some subjects that if are not resolved in the same process, it exists the risk of a serious division of the matter and contradictory decisions, driving to a breach in the legal certainty, which shall be avoided. So, accumulation of procedures shall be allowed to prevent a breach of the unity of the process,¹⁰⁹³ avoid a lack of defence,¹⁰⁹⁴ split the cause,¹⁰⁹⁵ or to avoid contradictory decisions.¹⁰⁹⁶ Normally, it can be appealed to rules of connection in order to accumulate actions, but this is not happening in these cases in Spain, where no general connexion rule is being applied and the courts are rejecting to accumulate the collective claims based on the LCGC with actions for nullity of contract.¹⁰⁹⁷

4.4 Trademark Act: *Ley de Marcas*

The former *Ley de Marcas* of 10th November 1988¹⁰⁹⁸ did not recognized any explicit legitimation for a collective redress in favor of consumers associations, but, as per the wide formulation of the law's wording, the most part of Spanish academia recognized legitimation to associations, in defense of general interest of consumers.¹⁰⁹⁹ The new Trade Mark Act in Spain was approved in 2002. As per the *Exposición de Motivos* of the Law, the reform faced 3 aspects not fully regulated in the previous regulation:¹¹⁰⁰

1091 Thus, a company can be sued before any judge where the general clause have been applied.

1092 Artículo 86 ter introduced by *apartado 7 del artículo segundo de la L.O. 8/2003, de 9 de julio, para la Reforma Concursal, por la que se modifica la L.O. 6/1985, de 1 de julio, del Poder Judicial* («B.O.E.» 10 julio). *Letra g) del artículo 86 ter introduced by artículo primero de la Ley 20/2003, 23 diciembre, de modificación de la Ley Orgánica del Poder Judicial y del Código Penal* («B.O.E.» 26 diciembre). *Vigencia: 11 julio 2003.*

1093 STS 14th October 1993, Rec. No. 361/91, ECLI:ES:TS:1993:6845.

1094 STS 24th July 1996, Rec. N. 3760/1992, ECLI:ES:TS:1996:4619.

1095 STS 24th July 1996, Rec. No. 3760/1992, ECLI:ES:TS:1996:4619.

1096 STS 16th October 1990, No. 7330/1990, ECLI:ES:TS:7330.

1097 AP Barcelona (Auto nº 82/2012, de 20 de Abril), la AP Las Palmas, (sec. 5^a, de 18 demayo de 2009 y Sección 4^a, rollo No..167/2005, 23 de diciembre de 2005, rollo No.. 516/2005, 20 de enero de 2006, rollo 494/2005 y 20 de octubre de 2006, rollo 395/2006), la AP Álava (Auto de 21 de Noviembre de 2005), la AP Madrid (Sección 10^a, Auto de fecha 22 de mayo de 2012 y de 29 de Febrero de 2012) and other courts such Juzgado de lo Mercantil nº 1 de Burgos (Auto de 22 de marzo de 2011), specific stated theat the covil courts have generic, subsidiary and exclusive competence for those connected matters no directly attributed to the juzgados de lo mercantil.

1098 *Ley de Marcas*, BOE No. 272 of 12th November 1988.

1099 *Mom*, Landbericht Spanien, in: *Micklitz/Stadler*, *Die Verbandsklage*, p. 706 ff.

1100 *Exposición de Motivos I*

1. Incorporates the decision of the Spanish Constitutional Court in connection with the distribution of competences between the central State and the Autonomic Communities in the field of protection of intellectual creations.

2. Adaptation of the Spanish law to the European and international regulations several amendments in the material and procedural procedure in the regulation of this field were undertaken.

3. Incorporation of certain rules of material and procedural law as per the experience of the previous Law, to obtain face the requisites of the new information society.

4.4.1 Types of actions

4.4.1.1 Nullity and Expiration

The collective redress of the Spanish Trade Marks Law is considered as a *lex specialis* collective claim.¹¹⁰¹ These collective claims are oriented to the so called absolute nullity or expiration. Thus, this legal remedy can only be lodge to declare one mark as void or to remove it from the registration. In order to accept the sue, the claiming association has to prove that they are affected in their subjective rights or legitimated interests. The active legitimation is granted by means of the article 59.1 of the LM to the Spanish patent and mark office, and to any individual or association who represents the interest of consumers, producers, traders which are affected or count with a legitimate interest to sue.

5. Atypical Actions: *acciones de grupo* ¹¹⁰² in the Spanish Civil Procedure Act

5.1 Configuration in the Civil Procedure Act (LEC)

The new Civil Procedure Act of year 2000 (LEC), incorporated for the first time in Spain a comprehensive regulation of the collective redress in defense of consumers and users. The LEC allows collective enforcement of individual rights, as long as they are consumers' interests.¹¹⁰³

1101 *Mom*, Landbericht Spanien in: *Stadler & Micklitz*, Die Verbandsklage p.707.

1102 Not comparable to the US model. The Spanish proposal will have important specificness in connection with the adequacy of representation, publicity of the process, and other relevant issues (opt out model with *res judicata* effect).

1103 *Mom*, Landbericht Spanien in: *Stadler & Micklitz*, (Eds.), Die Verbandsklage p. 718.

The main articles of application of the LEC are:

- Art. 6.1 No. 7 capacity to be party,
- Art. 7.7 capacity to act in a procedure,
- Art. 11 legal standing,
- Art. 15 publicity and participation of third parties,
- Art. 78.4 connection of actions,
- Art. 221,222.3 binding effects,
- Art. 256.1 No. 6 preliminary preparation measures,
- Art. 519 decision's enforcement.

With this act, the Spanish law maker pretends to reach a comprehensive regulation of the collective redress in consumers' field, improving the constitutional provision of defense of consumers and users.¹¹⁰⁴ Not special procedure will be introduced, just some norms to regulate the collective redress within the two Spanish types of civil procedures: *juicio verbal y juicio ordinario*.¹¹⁰⁵ The collective redress of the LEC has been criticized in some aspects as very inaccurate, and presents several procedural barriers for consumers associations in order to success in a claim. In words of one of the most active consumers associations in Spain, *the LEC introduces prerogatives to consumers associations and then fill it up of barriers for its accomplishment*.¹¹⁰⁶

Regarding the binding effects of the procedure, it is hard to classify the Spanish model. It is not an opt in system, as the collective redress play a *vis atractiva* to the individual claimant (but the group of claimants must be conformed with the majority of affected members, or the claimant is a qualified organization). **The judgement extends its binding effects for injured parties which did not assist to the process, although there is not an opt out possibility.** In order to compensate this capital matters which affect the fundamental right to be heard before the Court, the Spanish Legislator introduce some measures in connection with the publicity of the claim and even a previous view in order to build up the group of affected consumers. The law allows *acciones de grupo* both for entities without legal personality (groups of affected consumers), as well as for consumers' associations.

5.2 Group of affected consumers (Group *ad hoc*)

Besides associations and other entities with legal personality, **the LEC recognizes standing for the defense of collective interests of consumers to groups without legal personality.** The brief regulation contained in the Art. 7.3 of the LOPJ regarding the legal standing of groups of affected without legal personality found further development in the article 6.1.VII LEC,¹¹⁰⁷ which grants this capacity only to **groups of affected**

1104 Art. 54 Spanish Constitution.

1105 Explanatory Memorandum of the Law Exposicion de motivos Point VII, 5th paragraph.

1106 ADICAE, La defensa colectiva de los consumidores en la justicia Espanola. Condiciones para el ejercicio de la acción colectiva y propuestas de mejora de la normativa procesal Departamento de proyectos de ADICAE Madrid, Diciembre 2012.

1107 *This article has been celebrated by the Spanish doctrine, as finally includes in the Civil Procedure Act the capacity of entities without legal personality to be part in a process, Desdentado Daroca, La personification del empresario laboral: Problemas, sustantivos y procesales, p.239.*

consumers as follows:

“...groups of consumers or users affected by a damaging event when the parties which compose this are determined or easily determined. In order to lodge a claim in court, the group must necessarily be constituted by the majority of those affected”.

The group must be conformed with most **affected consumers** which have suffered a damage from the same origin, and their members shall be **determined or easy to be determinable**.¹¹⁰⁸ The law maker does not give further indications about the requisite of majority. If a qualified or simple majority is necessary is object of discussion in the Spanish academia.¹¹⁰⁹ This lack of precision regarding the adequacy of representation has been pointed as an inconvenient to deal with big groups.¹¹¹⁰

5.2.1 Legal Nature

The capacity of the group is relative, as is not granted to any group, but only to groups of consumers affected by a harmful act; and it is conditional, as the group must be formed by most affected consumers.¹¹¹¹

The Group's is a plurality of individuals forming a being without legal personality established around to an interest shared and common. The interest shared and common is based on two circumstances, arising both from a contractual or non-contractual relationship:¹¹¹²

1. The members of the group suffered a damage in their personal or economic sphere.
2. The damage is imputable to the same producer, provider entrepreneur or public organization which provides the product or service.

The legal nature of the groups is based on an addition of individual interests arising from a similar origin. The legitimate interests which are object of judicial protection are the interest of the members, individually considered and not the group's interest. The affected consumers form a group to obtain in a more efficiently way a protection of their individual interests, resorting to the representation mechanism. However, according to this article, the groups of affected consumers and users can only access to court to defend collective interests, it means **neither individual either diffuse rights**.¹¹¹³

This article has been hard criticized by the Spanish doctrine.¹¹¹⁴ By not granting standing to the individual affected consumer, *the LEC obliges him to look for the excuse of the group*. He will be able to be part as injured natural person, (based on the general article 10.1 LEC), but not as injured consumer. It has been pointed out in the literature, instead of promoting the participation of the consumer in the civil proceeding raise a

1108 Art. 6.1.No. 7

1109 For a simple majority *Garnica Martín*, RPJ 62 (2001), pp. 67- 207.

1110 So *Kohtes*, *Das Recht der vorformulierten Vertragsbedingungen in Spanien: die Umsetzung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen*, p. 267.

1111 *Banacloche Palao/ et al.*, *Comentarios a la Ley de Enjuiciamiento Civil*, p. 83.

1112 See *Cabañas García*, *Los Procesos civiles sobre consumidores y usuarios*; *Las partes*, p. 193.

1113 The other limitation of the legal standing, in the aspect of diffuse rights seems to be thought to take distance from other collective redress mechanisms such the North American class actions. For *Gonzalez Cano* “*this prohibition imposed to these groups, next to other guaranteed related to the composition of the group, evidently seeks to avoid that the conduct of the groups of affected degenerates in abuses and frauds.*” *González Cano*, *La tutela colectiva de consumidores y usuarios en el proceso civil*.

1114 *Gutiérrez de Cabiedes e Hidalgo de Caviedes*, *La nueva ley de enjuiciamiento civil y los daños con multiples afectados*, p. 173.

serious blockage, that in the practice (excepting the cases of very harmful cases) will keep the consumer away of lodging a claim.¹¹¹⁵

5.2.2 Requisites for this action

Due to the binding effects of the sentence by means of the article 222.3 LEC¹¹¹⁶, the Law foresees a serial of measures in order to compensate the absence of an *opt out* system. These are some specific requirements such the majority of affected consumers in order to form the group, and the necessity of a representative party in order to act before the court. There are another requisites in connection with the publicity of the claim, which are common to the collective redress in defense of general interests of consumers and users. These last requirements will be seen later in the chapter dedicated to procedural aspects.

5.2.2.1 Majority

The article 6.1.VII LEC obliges the groups of affected, in order to lodge a claim, to be constituted by the majority. The Law does not specify further details for the achievement of this requisite, something that set out a lot of unresolved questions. The first unresolved questions is if the law speaks of a simple or a qualified majority and if the defendant would be able to challenge the capacity of the group if this quantity has not been reached.¹¹¹⁷

In order to evaluate if the majority of affected consumers are present, 2 possibilities can be considered:

1. The individual consumer expressly states his will of being part of the group.

The process could be initiated when the majority of members express this will.

2. The will of the well notified consumer of being part of the group will tacitly considered unless he expressly states the opposite.¹¹¹⁸ Part of the Spanish academia considers that a written statement is mandatory, based on the wording of the article 15.2 LEC¹¹¹⁹: *“When the proceedings involve determined or easily determined damaged parties, the claimant or claimants **must have previously notified those concerned of their intention to lodge a claim**”*. Nevertheless, it should take into account, that even if the group is determinable it can be *enormous, inorganic and geographically disperse*,¹¹²⁰ making the achievement of this requisite very complicated and expensive. In this respect, the law foresees a *preliminary proceeding* in order to help the claimant to achieve this requisite of majority.

¹¹¹⁵ See Lorca Navarrete, A.M.; *Lorca Navarrete*, Comentarios a la Nueva Ley de Enjuiciamiento Civil, p. 127. This opinion can be shared in part. In any case, despite the lack of accuracy of the law, it is an improvement respect to the previous situation.

¹¹¹⁶ Art. 222 LEC. Material Res Judicata: **3**. Res judicata shall affect the parties to the proceedings in which it is ruled, as well as their heirs and successors and any non-litigants holding rights upon which the parties' capacity to act is grounded in accordance with the provisions set forth in Article 11 herein.

¹¹¹⁷ See *González Granda*, La Nueva Ley de Enjuiciamiento Civil, p. 31.

¹¹¹⁸ *Bujosa Vadell*, El acceso a la justicia de consumidores y usuarios. p. 1736.

¹¹¹⁹ See *Andrés de la Oliva Santos*, El Proceso de declaración, cit. 117.

¹¹²⁰ See footnote No.8

5.2.2.1.1 Special preliminary procedure

By means of the article 256.6 LEC, **the court can take appropriate measures in order to identify the determinable consumers, including a compulsory request to the defendant.**¹¹²¹ It is a total newness under Spanish Law, that the LEC support the claimant, helping him to constitute the group.

This measure shall also protect individual interests, so that the individual affected consumer can join the group or take part in the process. It contains also a third purpose, which is to avoid that the defendant hides relevant information in order to determinate the affected consumers, what would allow him later to challenge the majority requirement. In this sense, the previous article is completed with the Art. 216 LEC¹¹²², for the case that the requested person denies to cooperate. It rules a compulsory registration, the court shall order that the necessary intervention measures be adopted, including entry and search. **For some voices in the Spanish academia, these measures are not compatible with the principle that the parties delimit the scope of the process.**¹¹²³ It has been also doubted of the compatibility with the constitutional rights, as per this article, the order of entry and search can be adopted by a court order (*Providencia*) that does not need to be fully reasoned.¹¹²⁴

5.2.2.2 Lost of majority

The law do not say anything about this particular case either, but it is clear that the intention of the law maker is to avoid the legal standing of groups of affected consumers to defend diffuse interests, (consumer that do not appear in the process, both determinate or not). The requisite of majority should be maintained during the whole process, as a procedural requisite of public order.¹¹²⁵ In this point the Spanish academia agrees. The majority should be maintained during the whole trial If the majority is lost, the procedure should finish, due to an irreparable loss of a formal requisite.¹¹²⁶

As per the article 9 of LEC, this is a procedural requisite which can be appreciated *ex officio* already by lodging the claim and during the whole process.¹¹²⁷ The loss of capacity can be also alleged by the defendant based on article 418 LEC. In this case a

1121 *Article 256.1.(vi) Types of preliminary proceedings and how to apply for them: " By an application by whomever intends to initiate legal action for the defence of the collective interests of consumers and users with a view to specifying the members of the group of aggrieved parties when, not having been determined, it can easily be determined. To this end, the court shall take the appropriate measures to verify the members of the group, in accordance with the circumstances of the case and the details provided by the applicant, including a request to the defendant to cooperate in the said determination"*

1122 Art. 261. LEC (E) ...the court shall order that the necessary intervention measures be adopted, including entry and search, with a view to finding the documents or particulars required, notwithstanding the criminal liability that may be incurred for contempt of court...

1123 *Samanes Ara*, Las partes en el proceso civil and *Grande Seara*, AFDO 2002, 289 (293).

1124 *Lorca Navarrete*, Comentarios a la Nueva Ley de Enjuiciamiento Civil, p. 1700.

1125 *Bujosa Vadell*, El acceso a la justicia de consumidores y usuarios. p. 1737. Also, *Cabañas García*, Los procesos civiles sobre consumidores y usuarios, p.199.

1126 *Busto Lago*, Formas de resolución conflictos de consumo. Available in <http://www.eedc.posgrado.uclm.es/TitulosPropios/UserFiles111%5CRecursos%5CP%C3%BAblico%5CFor mas%20de%20resoluci%C3%B3n%20conflictos%20de%20consumo%20%28JM%20BUSTO%20LAGO%209.pdf>. Retrieved last time 20 January 2017.

1127 Article 9 LEC. *Ex officio appreciation of the lack of capacity: The lack of capacity to be a party and the lack of the legal capacity to sue or plead may be ex officio appreciated by the court at any time during the proceedings.*

hearing should be granted in order to verify if the requisite of majority is repairable.¹¹²⁸ It will be discussed by the Spanish doctrine if this hearing should be granted even if the loss of majority has been appreciated *ex officio*, based on the 2nd sub paragraph of the same article.¹¹²⁹

5.2.3 Group as defendant

It should also be clarified if the group of affected consumers can be a passive party of the process. As the law does not clarify this question, it should be resolved by means of interpretation. There are some arguments in order to deny this capacity. The wording of the article 6.VII, dealing with group of affected consumers says “In order to lodge a claim...”, not to be sued. In any case, if the requisite of majority, if is necessary to sue, will be also necessary to be sued. As a matter of fact, the group of affected consumer is not going to be formed in order to be sued, so this circumstance would allow at the most a counter claim. Also the Explanatory Memorandum (VII) of the law clearly states that the aim of the law in this field is to protect the interest of consumers and users. In spite of these arguments, the Spanish doctrine considers that normally the groups of affected only will act as active party, but no rule would avoid that they can be sued as well or being counter claimed.¹¹³⁰

5.2.4 Representation

The group of affected consumers results from an accumulation of individual interests. The group does not count with legal personality and need a representative in order to act before the court and conduct all necessary procedural actions.¹¹³¹ Representing party will be this one that act in name of the group before third party, as a result of tacit activities or agreement of the group.¹¹³² In Spanish Law, the general representation of legal persons before the Court, does not set out any problem in general. According to the law, these persons will appear in court represented by *those who legally represent them* (Art. 7.4 LEC). This general article on representation of the LEC has to be connected with the Article 264.2 of the LEC, which establishes that with the claim it should be submitted *the documents evidencing the representation which the litigant claims to hold*. More problematic is the representation of the affected consumers without legal

1128 Article 418 LEC. *Defects of capacity or representation. Effects of not rectifying or correcting such defects. Declaring default. Where the defendant has alleged in the defence of claim defects of capacity or representation which are rectifiable or susceptible to correction or the claimant should do the same at the hearing, such defects may be rectified or corrected at the hearing and, should it not be possible at that moment, a time limit not exceeding ten days to do so shall be granted. In the meantime, the hearing shall be adjourned.*

1129 2. *Where the defect or fault is neither rectifiable nor may be corrected, or should they fail to be corrected within the time limit granted, the hearing shall be construed to have come to an end and a decision bringing the proceedings to an end shall be issued...*In connection with this matter, see *Cabañas García*, Los procesos civiles sobre consumidores y usuarios, p.198.

1130 *González Granda*, La Nueva Ley de enjuiciamiento civil. Tomo I. (Coordiadores Valentín Cortés Domínguez y Víctor Moreno Catena), p. 31; *Grande Seara*, AFDO 2002, 289 (291); *Ara*, Las partes en el proceso civil, p. 20; *Cortés Domínguez*, Las Partes procesales, p. 79.

1131 Article 7.7 *Appearance in court and representation. Regarding the entities with no personality referred to number 7 of paragraph 1 (affected groups) and in paragraph 2 of the preceding article, the persons who, in fact or due to agreements made by the entity act on its behalf with regard to third parties, shall appear in court.*

1132 Authors like *Bujosa Vadell* again criticizes the lack of view of the Spanish law maker, as this regulation is made thinking in small size affected groups, in which a representing person can easily represent the small group, *Bujosa Vadell*, RJC 2001 (4) pp. 29, 37.

personality. **As per the legal nature of the group of affected consumers and the interests at stake, for some authors, the representing party shall be a member of the group.**¹¹³³ Any relationship of representation is based on the confidence. It can be questioned, if in a case that affects a plurality of rights, it is enough a confidence relationship, or if on the contrary sharing interests is mandatory. The law does not specify this matter,¹¹³⁴ and does not demand specific requisites of the representative person. If in the American class action the requisite of adequacy of representation is well regulated and the judge count with enough powers in order to control the adequacy of representation, in the Spanish model, the law keeps silence in capital questions such settlement, renounce, etc, and does not expressly recognized capacity to the judge to fulfil this blanks.¹¹³⁵

The representing can be a natural or legal person as well. Based on the article 3 of the Revised Text of the General Act for the Protection of Consumers and Users,¹¹³⁶ which says that legal persons can be consumers as well, a legal person could be part of the group of affected consumers and also be its representative.¹¹³⁷

5.2.4.1 Statement of representation

In order to appreciate the adequacy of representation, a formal written agreement of representation will provide more guarantees, especially if the representative party is not a member of the group of affected consumers. From the procedural point of view, submitting a statement of representation which gathers the will of all affected consumers will let out the possibilities of the defendant of challenging this adequacy of representation of the claimant.¹¹³⁸ Nevertheless, in cases of a huge and disperse group it can be a very expensive and complicated requisite, in some circumstances even unachievable. Regarding this matter, the Spanish Academia is quite divided. Some authors consider that the article 264.2 LEC should also apply for the representation of groups of affected consumers, and therefore, submitting a document stating this representation is mandatory. For Samanes Ara, despite of the difficulty to obtain such a written authorization, a merely statement of representation by side of the representative without further authorizations results in adverse consequences: will be doubted that the absence of this statement would be compatible with the principle that the parties delimit the scope of the process, and the defendant would be put in an unsecured situation as does not know who is really the claimant (faculty that the defendant has according to the article 399.1 of the LEC). And finally because it presents some problems in connections with who should be responsible

1133 So *Garnica Martín*, RPJ 2001, 207 (270); supporting this requisite Pablo Grande Seara, in *Grande Seara*, AFDO 2002, 289 (293); and *Alenza García et al.* Comentarios a las normas de protección de consumidores, p. 140. Against this requisite *Cabañas García*, Los procesos civiles sobre consumidores y usuarios y de control de las cláusulas generales de los contratos, p.198.

1134 *Mom*, Landbericht Spanien, in: *Micklitz/Stadler*, Die Verbandsklage., p.666 ff.

1135 It does not mean that the judge is unable to control the adequacy of representation. Bujosa Vadell supports an indirect control by the judge in case of settlement. See *Garnica Martín*, RPJ 2001, 207 (270, 281).

1136 Revised Text of the General Law for the Protection of Consumers and Users. Former article 1.2.

1137 See *Cabañas García*, Los procesos civiles sobre consumidores y usuarios y de control de las cláusulas generales de los contratos, p. 197.

1138 Article 416 LEC: *Examination of and decision on procedural issues, exclusion of issues concerning jurisdiction and competence. 1.* Once an agreement between the parties has been discarded, the court shall issue a decision on any circumstances which may impede the proceedings from being validly conducted and ended through a judgment on their grounds and on the following:(A) The litigants' lack of capacity or representation of several kinds. See also *Cortés Domínguez*, Los procesos especiales y los ordinarios con especialidades, in: La Nueva Ley de Enjuiciamiento Civil V., p.145.

for the costs of the trial.¹¹³⁹ Against this position is that the general rule of the art. 264.2 should be considered *lex generalis* before the *lex specialis* of the article 7.7 of the LEC, which refers to representation as “...**in fact** or due to agreements made by the entity...”.

5.2.4.2 In fact representation

Since the agreement for representation can be “*in fact*”, it could be situations in which a written agreement is no longer necessary. Thus, when this factual representation has been established, a document showing this representation next to the claim is superfluous. This in fact representation happens when the representative party have being acting before third parties before lodging the claim. If the defendant had previous relations with that person who have been representing the collective interest out of court this “in fact” representation has been already established. The defendant will not be able to challenge this capacity of representation as he would be acting against his own acts, even when the representative does not count with any document stating its representative power. Nevertheless, we are speaking of groups of affected consumers without legal personality, which normally will be constituted short before lodging the claim. Thus, as some authors points at,¹¹⁴⁰the most probably scenario is that in which the representative did not have the opportunity of acting in behalf of the group with regard to third parties.

The representative could also have been acting, not before third parties, but within the members of the group. Once this inner relationship has been established, remains unclear if the representative would only need an act on behalf of the group to fulfil the requisite of acting on its behalf to third parties, such for instance choosing the necessary legal representation to lodge the claim (*Abogado* and *Procurador*).¹¹⁴¹ This article needs to be interpreted in a flexible manner due to the complexity of counting with a written statement granting representation of the group members.¹¹⁴² Regarding the preliminary proceeding in order to form the group (article 256.1 LEC) the role of the representative party is unachievable. The law here seems to walk in circles, as the petition for the preliminary proceeding foreseen in the article 256.1 should be applied by the representative person, but this cannot be established until the majority of the group has been formed. Different would be the cases of “in fact representation”.

5.2.4.3 Lack of representation

The lack of representation can be appreciated by the judge *ex officio* in any time of the proceeding according to the article 9 LEC. Nevertheless, in agreement with the law, if a lack of representation is observed, this will not lead to the inadmissibility of the claim, something reserved for the cases foreseen in the articles 403 and 439 LEC, which do not include this specific case. For some authors however, it should be understand that the judge should, in the **initial examination** of the claim, order the absolute bar of the same if he appreciates irremediable lack of this adequacy of representation, or ordering not file the claim until this adequacy has been achieved.¹¹⁴³ Later, on the preliminary hearing before

1139 See *Ara*, Las partes en el proceso civil, p. 41. Against it: Bujosa Vadell, these are unnecessary concerns as it should be considered that the group is always the claimant, and because the principle that the parties delimitie the scope of the process should be mitigated in these kind of process; *Bujosa Vadell*, El acceso a la justicia de consumidores y usuarios, p. 1739.

1140 *González Cano*, La tutela colectiva de consumidores y usuarios, p. 141., also *Ara*, Las partes en el proceso Civil, p. 39.

1141 Against it *González Cano*, La tutela colectiva de consumidores y usuarios, p. 141.

1142 Position shared also by *Grande Seara*, AFDO 2002, 289 (293).

1143 *Ara*, Las partes en el proceso civil, p. 42 ff.

the trial, the judge must resolve about the litigants *lack of capacity or representation* (art. 416.1.a LEC), but only when this has been alleged by the defendant; which fits very well with the principle that the parties delimit the scope of the process. If the judge appreciates a lack of representation, it can be supplemented¹¹⁴⁴ in 10 days. In any case, as pointed before, this possibility will be denied to the defendant who already treated with the representing person of the group.

5.2.5 Individual consumer in actions promoted by groups of affected consumers

The LEC does not gather the possibility for the affected consumer of *opting out* of the process initiated by the groups of affected consumers but includes an opt in mechanism. If the group achieve the requisite of majority, a single consumer who does not want to join the group will be able to take part in the process initiated but won't be able to defend its rights in a later process. The group is the procedural part in the process but is composed by an addition of individual interest. As per the legal nature of the interests at stake, the individual consumer should have the possibility of reserve its right to act in his own process if he wants to. But this is something that is not foreseen in the Spanish Civil Procedure Act. The individual consumer has the possibility of being the first one starting the process based on the article 10.1 LEC (as any citizen), but if a group of affected consumers or any other entity such a consumers and users association already lodged a claim in order to defend collective rights, he will be able to “... *act in the proceedings at any time, but may only conduct the procedural acts which have not been precluded.*” (Art. 15.2 LEC). If the individual consumer and the group conduct the claim separately, Cabañas García considers the following possible scenarios:

a. As the group has to be formed by the majority of affected in order to gain access to court, it makes impossible to constitute another group achieving this majority. At most, the main group could be subdivided in other smaller groups in order to act under the same legal representation.

b. **Once the claim lodged by the group is admitted, it applies the *lis pendens*** based on the article 410 of the LEC.¹¹⁴⁵ Any other claim will be depend on the already opened process. The individual consumer could try to be admitted in the group, or joining the action separately, based on the article 15.2 LEC being able to *conduct only the procedural acts which have not been precluded.*

c. If an individual consumer is the first one lodging the claim, **the affected group can be part in the process and will be considered as the *vis atractiva* of the process, becoming the main claimant.** The articles of the law regarding the joinder of proceedings will apply (76-78 LEC).

¹¹⁴⁴ Article 418 LEC. *Defects of capacity of capacity or representation. Effects of not rectifying or correcting such defects. Declaring default. 1. Where the defendant has alleged in the defense of claim defects of capacity or representation which are rectifiable or susceptible to correction or the claimant should do the same at the hearing, such defects may be rectified or corrected at the hearing and, should it not be possible at that moment, a time limit not exceeding ten days to do so shall be granted. In the meantime, the hearing shall be adjourned.*

¹¹⁴⁵ Article 410. *Commencement of lis pendens: Lis pendens along with all its procedural effects shall come about from the moment the claim is brought, should it then be given leave to proceed.*

5.3 Actions In defense of rights and interests of consumers and users

This is the translation of the article 11 LEC provided by the Spanish Justice Ministry of the Spanish regulation on this matter:

Article 11. Standing for the defense of the rights and interests of consumers and users.

1. Notwithstanding the individual standing of those damaged, the legally constituted associations of consumers and users shall be legitimized to defend the rights and interests of their members and of the association in court, as well as the general interests of consumers and users.¹¹⁴⁶

2. When those damaged by an event are a group of consumers or users whose components are perfectly determined or may be easily determined, the standing to apply for the protection of these collective interests corresponds to the associations of consumers and users, to the entities legally constituted whose purpose is the defense or protection of these, and the groups affected.

3. When those damaged by an event are an undetermined number of consumers or users or a number difficult to determine, the standing to lodge a claim in court in defense of these diffuse interests shall correspond exclusively to the associations of consumers and users which, in accordance with the law, are representative.

4. Furthermore, the Public Prosecution Service and the authorized entities referred to in Article 6.1.8. shall be legitimized to exercise the cessation of the defense of the collective interests and the diffuse interests of the consumers and users.¹¹⁴⁷

5.3.1 Legal standing of consumers' associations

According to the Art. 11 of the LEC, the associations of consumers and users (and other equivalent entities in some cases) are granted with legal standing in order to defend following legitimate interests:

Of the association itself (11.1)

Of the associated members (11.1)

Collective and diffuses interests (11.2 and 11.3)

5.3.1.1 Of the association itself

This case does not present any difficulty. As a constituted legal person, the association its holder of rights. The acting of the association in defense of its own rights or legitimate interests, (even if the aim of the association is the defense of consumer and users), cannot be consider a case of defense of consumers and users. The standing is based on the general article 10.1 of the LEC.

¹¹⁴⁶ Same wording that the article 20.1 of the General Act for the Defense of Consumers and Users of 1984, exception made of the standing granted to the individual consumer.

¹¹⁴⁷ Paragraph added by Act 39/2002, of 28 October («OFFICIAL STATE GAZETTE» No. 259, of 29 October), on the transposition of several Community directives regarding the protection of the interests of consumers and users to Spanish legislation.

5.3.1.2 Of its associated members

*In good legal analysis, this is not a case of collective interests;*¹¹⁴⁸ however, it seems that the LEC do not has clear this point, according to its internal logic, which includes this case in the article 11.2 LEC dedicated to the collective interests. Here are considered private rights of associated members (individually consider or together, but always individual rights) which will be defended by the association (being this one of the purposes of the association). Thus, the associated member/s delegate/s in the association the defense of their legitimate interest/s. In that way, the associated/s do not bear the risk and costs of the process, which are bear by the association. It is to be expected, that many consumers will join an association consumer on the trust that if he any damage arises due to a product or service, the association will act on his behalf. When it comes to designate the legal nature of this relationship between the association and their members, the Spanish doctrine is quite divided. Grande Seara reminds, that there are basically 3 stances in the Spanish Academia:

1. Followed by the case law and the most part of the Spanish doctrine, namely: this is a case legal standing by substitution, as it is ruled in the article 10.2 of the LEC.¹¹⁴⁹

2. For De la Oliva that is not a case of “acting *in own name and interest but on behalf of a foreign right*” which is the condition for the substitution. This is more a case of “acting *in name and interest of their associated and on behalf of a right of them*”. Thus, this is a case of representative standing (*legitimación representativa*).¹¹⁵⁰

3. Finally, Gutierrez de Cabiedes considers that this is a mere case of representation, as the association acts in own interest and in defense of it’s associated. The registration of the consumer in the association is an act of voluntary empowerment in favor of the association.

It can be sustained, that the association is acting so good in name of its associated members as well as in its own interest. The aim of the association is defending members interests, and in that way, the association will be able to gain more members. So, both interest (of associated and consumers) can not be separated. As a matter of fact, the association act in the process without express empowerment of representation. According to the case law provided by the Spanish Supreme Court¹¹⁵¹, it will be presumed, that the association always count with the authorization of their members to act before the court, because this is one of the reasons to be of the association (representing the interest of their members). Thus, no written authorization of their members will be necessary for the association in order to lodge the claim. As a logical consequence, the absence of this written authorization will not entitle the defendant in order to challenge the capacity of the association.

As a general presumption, it is hard to imagine that the association enters in a conflict of interests, as the interest of the association lies in acting in name of its members. Both

1148 See *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter, Gutiérrez de Cabiedes e Hidalgo de Caviedes*, La nueva ley de enjuiciamiento civil y los daños con múltiples afectados. p. 157.

1149 *Bujosa Vadell*, La protección jurisdiccional de los intereses de grupo, p. 326, 328. Also, Juan Carlos Cabañas García. Los procesos civiles sobre consumidores y usuarios y de ocntrol de las clausulas generales de contratación pg. 181.

1150 *De la Oliva*, Derecho procesal civil. El proceso de declaración (con Díez-Picazo Gimenez), pp. 132,133. Also *Garnica Martín*, Comentarios a la Nueva Ley de Enjuiciamiento Civil, p. 168.

1151 STS 29th October 1999 (RJ 8165 and 8167), 18th October 2001 (RJ8644), 15th October 2002 (RJ 57 of 2003).

interests need to be connected. The association will not be able to represent in a good manner the interest of their members if he is not taking an active role during the process. He will need to cooperate, and will be called into the process under the modality of interrogatory of party (not of witness) due to his interest in the outcome of the process, as foreseen in the article 301.2 LEC.¹¹⁵² Nevertheless, if a member consider that any conflict arises, or just he feel that the association is not representing his rights in a proper manner, he can always get separated from the action of the association (as it is not a mandatory representation) and by means of the article 10.1 of the LEC, (previous notification to the court) continue the process alone.¹¹⁵³

5.4 Ascertainable consumers (Collective interests) Art. 11.2 LEC

The precedent to this article was the article 7.3.of the LOPJ, that allowed damages actions under some conditions, as well as the already mentioned decision of the Spanish Supreme Court regarding the massive intoxication due to denatured rape oil in Spain.¹¹⁵⁴

The law only allows associations to act in defense of alien rights based on a social representation.¹¹⁵⁵ The prove that the association fulfils all the requirements to be claimant will be sustained will be checked by the procedural moment of accepting or not the claim.¹¹⁵⁶ For the most part of the Spanish doctrine, the second sub paragraph (dedicated to collective interests), as well as the third one of the Article 11, (dedicated to diffuse interests) rule the defense of *individual plural rights* of consumers or users, it means those consumers who already suffered a damage, both personal or economic from a product or service.¹¹⁵⁷Hence, this would be a case of representation that would need the authorization of every affected consumer.¹¹⁵⁸

It will be discussed if these articles also speak of supra individual interests (which can affect the general interest). For Samanes Ara under collective and diffuse interests in the article 11.2 and 11.3 of the LEC, it should be understood both supra individual or generic interests of consumers and users as well as a plurality of individual rights, due to the connection of this article with the articles 221 and 519 of the LEC that allow reparation of individual damages.¹¹⁵⁹ Both articles (Art. 11.2 and 11.3 LEC) are considering the protection of individual rights with a *homogeneous content*, which allows association of consumers and users not only to lodge actions in benefit of the group, such injunctions claims, but also in defense of individual (accumulated) interests who suffer a damaged due to the general clause considered void.¹¹⁶⁰ For Bujosa Vadell, the wording of the article 11.2 and 11.3 should be interpreted in a wide manner as well. Thus, it should be allowed not only individual claims which have a common origin (the same product or the same

1152 Position sustained by *Cabañas García*, Los procesos sobre consumidores y usuarios y de control de las clausulas generales de los contratos, p.181.

1153 *Ibidem*.

1154 STS of 26th September 1997, Rec, No. 2569/1996, ECLI:ES:TS:1997:5661. For an exhaustiver analisis see *Cabañas García*, Los procesos sobre consumidores y usuarios y de control de las clausulas generales de los contratos, p.182.

1155 Position of *De la Oliva Santos*, in *De la Oliva/ Diez Picazo* § 28 p. 131.

1156 *De la Oliva Santos*, in: *De la Oliva/ Diez Picazo*, (Eds.), § 28 p. 132.

1157 *Gutiérrez de Cabiedes e Hidalgo de Caviedes*, La nueva ley de enjuiciamiento civil y los daños con multiples afectados, p. 163.

1158 See in connection with that *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La nueva ley de enjuiciamiento civil y los daños con multiples victimas, in: Derecho del Consumo acceso a la justicia, responsabilidad y garantía. Estudios de Derecho judicial.

1159 See *Ara*, Las Partes en el proceso civil, p. 88.

1160 JPI Madrid 25th October 2002, see also *Bujosa Vadell*, El acceso a la Justicia de Consumidores y Usuarios, p. 1755.

service) but also claims which have a different origin (several products or services) but are *qualitatively identical*.¹¹⁶¹ Possible doubts about the legal nature of this sub paragraphs could be solved by means of the articles 221 and 519 of the LEC, which allows lodging a declaratory as well as a damages claim, to repair individual damages, setting aside any previous limitations imposed under Spanish Law to the associations of consumers in this respect. The claimant must specify its pleas, according to the principle that the parties delimit the scope of the process; namely his pecuniary demands, the content of the request of doing or not doing in connection with the defendant, etc...

5.4.1 Standing

According to the article 11.2 LEC collective rights are determinable interests affected by a harmful fact, *whose components (holders) are perfectly determined or may be easily determined*. If the group of affected consumers is already determined or easy to be determinable, the active legitimation in order to defend collective interests will be granted to those consumers associations whose aim is the defense of consumers interests. They can act in representation of members and no members of the association.¹¹⁶² The legal standing of the association is based, directly in the article 11.2 LEC. For some voices in the Spanish Academia, the legal standing to defend interests that are not from their associated (based on the general interests) is also based on the article 11.1 LEC which entitles the association of consumers *for the general defense of consumers and users* (supra individual interests).

According to the article 11.2 there are other entities entitled to act in a process in defense of collective interests, namely *the entities legally constituted whose purpose is the defense or protection of these, and the groups affected*. It is not clear of what kind of entities is speaking the article 11.2. In principle, this aim is proper of consumers associations, but the law maker is making a distinction. As hermeneutic answer, part of the doctrine consider that the law maker was referring to those entities which do not have as social purpose exclusively the defense of consumers and users. Being so broad the wording of this article, these entities could be any association which includes in its social object the defense of consumers, or even the protection of its members if they suffered a damaged acting as consumers, such¹¹⁶³ *neighborhood associations, an association of parents of children in a school* ¹¹⁶⁴, *entrepreneur associations, associations of professionals, professional chambers, the National Consumer Institute and the equivalent entities of the Autonomous Communities (comunidades autonomas,* ¹¹⁶⁵ *the public prosecution service*¹¹⁶⁶, etc... If the paragraph is referring to consumer's cooperatives, then this paragraph is superfluous, as these entities were equated to the consumers and

1161 *Ibidem*.

1162 Against it *Garnica Martín*, RJP 2001, 207 (277) and in "Las acciones de grupo en la LEC 1/2000" La Ley, Vol. 6, 2001, p. 1455 ff. The author consider that it the association should show its standing *a limine*, demonstrating that is acting on behalf of any of its members, , at least one affected party shall be member of the association. This view is not translated into the Law, as the associations are expressly granted with legitimation to act in name of alien rights.

1163 See further in *Jiménez Fortea*, Tutela de los consumidores y usuarios en a nueva ley de enjuiciamiento civil, p. 86.

1164 *Ara*, Las partes en el proceso civil, p. 88, 89.; Also, *Gutierrez de Cabiedes Hidalgo de Caviedes*, La nueva ley de enjuiciamiento civil y los daños con multiples afectados, p.169.

1165 *Grande Seara*, AFDO 2002, 289 (296).

1166 See further in *González Granda*, La nueva ley de enjuiciamiento civil I; Legitimación de las partes, p.52.

users associations by means of the article 20.2 of the former General Act for the Defence of Consumers and Users.¹¹⁶⁷

5.5 Diffuses interests Art. 11.3 LEC

With the introduction of the article 11.3 LEC the Spanish Law makes a certain approach to the North American class actions, as the action can affect to individuals who are unknown during the whole process, but are included in the class. If the North American class action can be filed by any single affected (if achieves some requisites), the Spanish Civil Procedure Act count with the preventive measure of granting legal standing only to the representative association of consumers and users, following the continental example. Here the Spanish model follow the continental tradition opting for an associative claim instead of a group claim,¹¹⁶⁸ but the group claim is already recognized in the Art. 6.3 LEC.

5.5.2 Standing

The article 11.3 LEC gathers legal standing for the defense of diffuse interests to those Associations of Consumers and Users which are **representative**. According to the law, diffuse interests are those of a group of consumers who suffered a damage from a product or service and are hardly determinable. As in the previous case of collective interests, it is also not clear which kind of legal standing is gathered in this article, if a case of standing for the defense of supra individual interests (called general interest in the article 20.1 of the former General Law for the Defense of Consumers and Users GLDCU and Art. 11.1 LEC) or if this standing is granted for the defense of a plurality on individuals rights which are not determinate. If it is the first case, for some authors this article seems to be superfluous, as the standing for the general interest of consumers and users is already stated in the article 11.1 (which reproduces the article 20.1 of the former GLDCU). If this were the case, this article could be too restrictive, as only grants legal standing to associations of consumers and users which are representative. In Spain, in some sectorial laws, legal standing is already granted to individuals in order to defend supra individual diffuse rights of consumers and users, such in the article 25 of the General Advertisement Law, which allow individuals to lodge injunctions claims.¹¹⁶⁹ Also the Spanish Constitutional Court has allowed standing to an individual to defend the interest of a community.¹¹⁷⁰ The difference with other sectorial rules is clear, as the article 11.3 LEC in connection with the article 221 of the LEC allows a damages action.¹¹⁷¹ It places this article closer to the defense of a plurality of individuals consumers, this is to say, it is a case of representation. As any legal representation, it needs authorization of the represent

1167 Today Art. 23.1 and 24.1 of the Revised Text of the General Law for the Protection of Consumers and Users (RTGLPCU). Despite of this equiparation, the case law before the aproval of the LEC denied the cooperatives of consumers and users to act in defence of the general interest of consumers and users. STS, 3a of 11 December 1991 (RJ 1991, 9369), which consider according to Law the article 18 of the Royal Decree 825/1990 of 20 December which denied this capacity to the cooperatives of consumers and users, *López Santos*, La defensa de los intereses generales de los consumidores y el art. 18 del Real Decreto 825/1990, de 22 de junio sobre derecho de representación, consulta y participación de los consumidores y usuarios a través de sus asociacione, in: *Estudios sobre Consumo*, 1991, No.. 22, p. 31.

1168 *Mom*, Landbericht Spanien, in: *Micklitz/ Stadler*; (Eds.) Die Verbandsklage, p. 724.

1169 *Gutiérrez de Cabiedes e Hidalgo de Caviedes / Vachmayer Winter*, La Nueva Ley de enjuiciamiento civil y los daños con múltiples víctimas., p. 212 ff.

1170 STC 214/1991 of 11 November, which grants standing to Msr. Friedman to defend the right to the honor of a community, namely the Jewish community. ECLI:ES:1991:214.

1171 As precedent, the mentioned article 7.3 of the LOPJ and the very discussed article.12.2 of the General Contract Conditions Act.

party, which is impossible to obtain as the affected consumers are not determinable. It could justify that only representative associations are granted with standing. The quality of being representative is however related to the protection of individual rights, not general interests of consumers and users.

As seen the, LEC does not attend to the nature of the interest in game. Due to the specifications content in the article 221, the LEC clarify in a certain sense the lack of accuracy of the article 11, which only distinguishes if the affected consumers are determinable or hardly to be determinable. Samanes Ara proposes that the article 11 in its subparagraphs .2 and .3 gathers both supra individual interests, as a plurality of individual rights, due to the different actions that the article 221 of the LEC contents.

5.5.3 The requisite of representativeness

The LEC does not clarify under which criteria an association of consumers and users can be considered representative. The Revised text of the General Law for the Protection of Consumers and Users (RLDCU) specifies in its article 24.2¹¹⁷² under which criteria should an association of consumers and users being considered representative. According to the RLDCU, it depends on fulfilling an administrative requisite, namely being member of the Consejo de Consumidores y Usuarios. The requisites to be part of this Council are content in the **Royal Decree 894/2005, of 22nd July**.¹¹⁷³

For important voices among the Spanish doctrine this requisite is not necessary in any case attending to the kind of interests at stake. If the association is acting in name of supra individual interests, then the association is defending a *shared legal position*. Standing is granted to defend the legitimate interests of a group or category of individuals. According to the article 24 of the Spanish Constitution¹¹⁷⁴, *it cannot be established any filter to these associations to defend their rights, different than have been affected in its social object or purpose*.¹¹⁷⁵ On the contrary, if the association is acting in name of a plurality of homogeneous individual rights, then this is a case of representation and the requisite for the valid representation is the authorization of every single represented person (impossible as are not determined consumers). Gutierrez de Cabiedes warned that this criterion of being representative should be in any case appreciated by a judicial organ and not by an administrative one. According to the author, the requisites should be established by a general law, which should require that the association not only has the defense of collective interest within its social object, but also must have developed its social object in a real way, as the *Bundesgerichtshof* demanded in Germany in

1172 Article 24. Legitimization of consumer and user associations. *Only consumer and user associations established under the provisions of this title, and of the regional legislation applicable to them, are authorized to act in the name and representation of the general interests of consumers and users. Associations or cooperatives that do not meet the requirements described in this title or in applicable regional legislation shall only be able to represent the interests of their members or of the association, but not the general, collective and diffuse interests of consumers. For the purposes of the provisions set forth in Article 11.3 of the Law of Civil Procedure, the representative consumer and user associations that form part of the Council of Consumers and Users shall be considered lawful, except where the geographical scope of the dispute basically affects an Autonomous Community, in which case they will be subject to its specific legislation*

1173 BOE No. 204 of 26th August 2005.

1174 Art. 24: *All persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case, may there be a lack of defense.*

1175 Own Translation of *Gutiérrez de Cabiedes e Hidalgo de Caviedes*, La Nueva Ley de enjuiciamiento civil y los daños con múltiples afectados, p.165.

interpretation of the § 13 of the UWG, incorporated in the *Novelle* of 1. August 1994.¹¹⁷⁶ This requirement is fulfilled so far administrative resolutions may be appealed before the Administrative Court, and its suspension does not affect its legal capacity. The content of this requisite has been clarified by the Spanish Academia¹¹⁷⁷ and case law. Until the concept of “representative” was clearly stated in the Art. 24. 2 RTLGDUCU, the Spanish courts made an extensive interpretation of this requisite, as any limitation to a fundamental right such access to court must be regulated by a law rank regulation.¹¹⁷⁸ **It should be remained, that the defense of diffuse interest is, in any case, a matter of extraordinary legitimization.** The legal standing is not based on the article 10.1 of the LEC which rules the ordinary legitimization.

This is an extraordinary legitimization (indirect representation) and its granted by law and the article 11.3 LEC can established limitations to this capacity. Establishing some requisites for the defense of rights of third parties does not infringe the Article 24 of the Spanish Constitution. *The defense of rights or interest of third parties is not part of the association right and cannot be part of the right to obtain the effective protection of the judges and courts in the exercise of their rights and legitimate interests.*¹¹⁷⁹ Different would be establishing requisites for the defense of own rights or legitimate interest, which in the case of **the associations of consumers and users would be the defense of their members of its own interests.**

5.6 Possibilities of the individual consumer

The law does not clarify if the individual legal standing recognized on the Art. 11.1 LEC is granted in order to claim rights or interests which belongs only to the individual consumer or also granted for interest that have both dimensions, individual and collectives.¹¹⁸⁰ According to the majority of the Spanish Academia, the individual standing of the first subsection of the article (11.1 LEC) is granted in order to claim an individual substantive right. The individual consumer could choose to access to the court next to other individual consumers through a joint action, (*demanda conjunta*) but in any case, the court will decide over individual claims, even if they shape together a plurality of them. Thus, the individual is acting here in his own name and not in name of a collectivity of any kind. It is an ordinary standing, the party does not have to demonstrate that is holding a legitimate interest in order to file the claim, it is enough to appear and claim this right or interest, as it is defined in the article 10.1 of the LEC. This kind of standing only allows bringing the action into the court. In cases in which an association of consumers or other entity granted with the necessary standing already lodged an action in name of a plurality on interests (collective), the individual consumer will also have the faculty (or obligation due to the binding effects of the sentence) of incorporating himself to the process based on the article 13.1 of the LEC.¹¹⁸¹

1176 *Ibidem.*

1177 See *García Tuñón*, Comentarios a la Nueva Ley de Enjuiciamiento Civil, (Dir. Lorca Navarrete), p. 169.

1178 JPI N° 17 Madrid, Ordinary Procedure 1018/02.

1179 SAP León, Sección 1a, 2nd of March 2012. Rec. 411/2011, ECLI:ES:APLE:2016:252.

1180 See *Gutierrez de Cabiedes e Hidalgo de Caviedes*, La nueva ley de enjuiciamiento civil y los daños con multiples afectados. Pg. 153. This question can be answered in the following pages, in connection of the legal standing granted to the groups of consumers affected.

1181 Art.13.1 LEC While proceedings are pending, whoever accredits a direct and legitimate interest in the outcome of the case may be considered to be admitted as a claimant or defendant in the case. *In particular, any consumer or user may intervene in proceedings lodged by legally recognized entities in defence of the interests of these.* Article 15 specifies the rules for the publicity of the action

An opt-out possibility is not foreseen in the Spanish Civil Procedure Act, and the collective claims will act a *vis atractiva* in connection with individual claims. Thus, individuals only have the possibility of „*intervencion procesal*“ to influence the procedure. Possible conflict of interests will be solved denying the capacity of the association to defend the interest of the any consumer with who does not reach an agreement. As happened in the case of associated members who consider that it was such a conflict, the consumer who wants to deny this representation of the association needs to inform the court before be able to act by its own, and will also need to specify his pleas.

5.6.1 Collective interests

In case of determinable or easy to be determinate consumers an opt in mechanism is introduced. Any affected party can join the process in any moment (Art. 13.3 LEC). However, they will only take part in those handling which are not yet concluded as it is foreseen in the article 15.2 (which is *lex specialis* in connection with the art. 13). The academia has taken different stake in connection with the suitability of this norm. For some authors, due to the expected plurality of participants in such cases of massive damages, this provision of the law does make sense.¹¹⁸² This participation is -on the paper- voluntary, but due to the binding effects of the decision and the *res iudicata* effect, the affected party could felt obliged to act in the already started process.

5.6.2 Diffuse interests

In this case, the participant has to join the process in the break (maximal 2 months). After that, its participation is no longer allowed Art. 15. 3 LEC. Even when they do not took part in the process, they can appeal to the fallen decision in the execution stage.¹¹⁸³ What they do not have is the option of start they own procedure.

5.7 Possibilities of the Spanish Public Prosecution Ministry

As per the regulation of the Articles 6.1.6 ° y 8 ° y 11.3LEC, lacks the public prosecution ministry of standing to lodge any other collective action different than the injunctions claim. It will be possible for the Public prosecution ministry,¹¹⁸⁴ accumulate to the injunctions claim, also a damages actions as accessory.¹¹⁸⁵

5.8 Procedural aspects of collective redress in the LEC

5.8.1 Objective competence

As per the Art.86 ter, 2 LOPJ, introduced by Ley Orgánica 8/2003,¹¹⁸⁶ collective redress in cases of unfair competition, intellectual and industrial property, advertisement,

1182 In favour: *Diez Picazo Gimenez*, in: De la Oliva/ Diez Picazo, (Eds.), § 52, p. 605. Against this *Garnica Martin*, La Ley 2001, 1451 (1452).

1183 *Monton Garcia*, La Ley 2000, 1451 (2032).

1184 According to the artículo 12 de la Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación.

1185 Auto Juzgado n° 11 de A Coruna of 18th September 2012, No.Rec. 659/2012, ECLI:ES:JPI:2013:92.

1186 BOE No. 164 of 10th July 2003.

as well as those matters within the regulation of commercial societies and cooperatives, as well as the foreseen cases in general contract conditions are assigned to the Juzgados de lo Mercantil.¹¹⁸⁷ As per the wording of the Art. 86 ter, 2, de la LOPJ, the case law and Spanish academia tend to interpret that the subjects attributed to these courts are *numerus clausus*, it is to say, these mercantile court can only know about the subjects directly assigned and no other cases. This set up some questions related to joinder of proceedings.

5.8.2 Classification

The associative claims will be sustained before the first instance judge (Juzgado de Primera Instancia). The kind of procedure will be the so called “juicio ordinario”, which is the ordinary general procedure. As per the reform of the LOPJ the juzgados de lo mercantil also have jurisdiction for the cases attributed to them. For the injunctions claim on consumers interests, according to the number 16 of the Article 52.1 LEC ¹¹⁸⁸the local jurisdiction will be the place where the defendant has its establishment, and in absence of the same the place of its residence. If the defendant does not count with any of them in Spain, the local jurisdiction will be the one of the domiciles of the claimant. (Art. 52.1 No. 16 LEC). According to the transposition of the Injunctions Directive 98/ 27/ EG, which claims for a quick procedure, the kind of procedure will be the “juicio verbal”, which is the fastest one under Spanish law. (Art. 250.1 No. 16 LEC). It is an oral procedure with a brief written claim, in which the evidence material will be orally presented in the same procedure. The court has 10 days to submit a decision. Value of the claim¹¹⁸⁹, binding effects, ¹¹⁹⁰ as well as the enforcement of the decision ¹¹⁹¹ will not have further particularities and will follow the general provisions of the LEC. According to the general principles of Spanish law, those decision fallen in the first instance judge, can be appealed before the Audiencia Provincial, which is a collegiate organ.¹¹⁹² In cases of violation of material rules applied to the case, there exists also, under certain circumstances the possibility of appeal to the Supreme Court in Revision Claim. Also for *casational* purposes.¹¹⁹³

5.8.3 Joinder of proceedings

Collective redress implies the possibility of an joinder of different kind of actions in the same proceeding (art. 71 LEC). This happens for instance in proceedings related to general contractual conditions where an accessory recovery or damage actions is sustained. Next to an injunctions claim it is possible to lodge a reparation or damages action as well.¹¹⁹⁴ Regarding the subjective joinder of actions, art. 72 LEC states that actions may be joined and simultaneously brought against several or single subjects, as long as such actions have some sort of link or grounds on the basis of a title or the causes

1187 Different to Civil Courts, Juzgados de lo Mercantil are oriented to commercial affaires.

1188 *Introducido por el artículo 1.4.º de la Ley 39/2002, de 28 de octubre, de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios*, BOE 259 of 29th October 2002, pp. 37922-37933.

1189 Art. 251, 252 LEC.

1190 Art. 222. 3 LEC.

1191 Art. 709-710 LEC.

1192 Art. 455.2 No. 2 LEC.

1193 In case of two contradictory decisions of the Audiencias Provinciales, or if the appealed decision is contrary to the case law of the Supreme Court, a casational claim can be lodge.

1194 SAP Islas Baleares, No. 395/2006 (Sec. 3), of 21st September 2006; Rec. Ap. No: 438/2006, ECLI:ES:APIB:2006:1810, SAP Pontevedra No. 392/2006 (Sección 6), of 30th June, Rec.Ap. No. 5215/2006, ECLI:ES:APPO:2006:1779.

of plea. It shall be considered that the title or grounds are identical or connected where the actions are grounded in the same facts. As per the literal tone of the article, joinder of action is possible when there is a connexion related to the title or the pleas. According to the last paragraph, it will be presumed that the connexion is given when the actions are grounded in the same facts but does not impede to appreciate this connexion if the facts are different. The criteria of the Spanish courts tend to unify simple connexions in a single procedure, once the objective accumulation is proved. This is so in order to avoid the breach of the procedure, avoid the short cut of the defense, avoid the division of the cause,¹¹⁹⁵ or to avoid contradictory decisions.¹¹⁹⁶ In the Spanish Civil Procedure Act is foreseen the accumulation of actions. Thus, many different procedures with the same legal petition can be sustained before the first court in which the pretension was lodged. As results of the law, only one procedure will be conducted with a single decision.¹¹⁹⁷ It is not foreseen in the law a plurality of procedures initiated before different courts or judges when it comes to enforce the declarative decision.¹¹⁹⁸ Thus, we have to analogue apply the prescriptions of the Law for the ordinary cases of accumulation of actions.¹¹⁹⁹ In cases of collective process in defence of consumers and users is the article 78.4 LEC will apply. This article allows the accumulation of actions ex officio.¹²⁰⁰ The judge or court which first know in the case, will sustained further procedures.¹²⁰¹ As per the Audiencia Provincial de Valencia,¹²⁰² the apparently contradiction between the artículos 73.2 (joinder of actions in the same claim) and 78.4 de la LEC, (accumulating different kind of procedures, such juicio verbal- proper of injunctions claim and juicio ordinario- proper of general contract conditions-), in case of accumulation of procedures, the main aspect is to avoid a lack of defense of the parties, so, the juicio ordinario will unify a plurality of procedures in order to provide more guarantees.¹²⁰³

5.8.4 Nullity of contract and subjective accumulation of claims

In order to accumulate pretensions the key factor in the connexion, being sufficient the “*conexión impropia*”, a doctrinal development recognized by the case law,¹²⁰⁴ which is based on related cases where the pleas are not identical but

1195 STS of 24th July 1996, Rec. No: 3760/ 1992, ECLI:ES:TS:1996:4619.

1196 STS of 14th October 1993 Rec. No: 361/91: ECLI:ES:TS:1993:6845.

1197 Acumulación de acciones. Art. 74 -78 LEC.

1198 *Mom*, Landsbericht Spanien, Micklitz/Stadler; (Eds.), Die Verbandsklage, p. 731.

1199 *Garnica Martín*, Las partes en la nueva Ley de enjuiciamiento civil: novedades mas significativas, RPJ 62 (2001), 207 ff.

1200 *Diez-Picazo Gimenez*, in: *De la Oliva/ Diez Picazo* § 52 p. 605.

1201 Art. 79 LEC.

1202 SAP Valencia Sección 9^a, of 23th June 2008, Nº de Recurso: 35/2008, ECLI: ES: APV:2008:2657.

1203 *“La evidente contradicción que para el ejercicio de las acciones relativas ala protección de los derechos e intereses colectivos o difusos de los consumidores y usuarios resulta del tenor de los puede ser salvada al considerar que, siguiendo los principios de economía procesal y de evitación de resoluciones contradictorias que fundamentan toda acumulación, -sea ésta de acciones sea de procedimientos-, a los efectos de resolver la cuestión a que nos venimos refiriendo lo fundamental será, finalmente, que la tramitación que se siga no suponga para las partes pérdida de derechos procesales (artículo 77), siendo por tanto el Procedimiento Ordinario a nuestro entender el correcto para procederá esa acumulación al no disminuir se derechos a ninguna de las partes. Esta tesis, favorable a la acumulación objetiva, encontraría también apoyo en la circunstancia de que el artículo 12 de la Ley7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación, parece contemplar tal situación, pues en el apartado segundo de dicho precepto se establece que “a la acción de cesación podrá acumularse, como accesoria, la de devolución de cantidades que se hubiesen cobrado en virtud de las condiciones a que afecte la sentencia y la de indemnización de daños y perjuicios que hubiere causado la aplicación de dichas condiciones”.*

1204 See *Gascón Inchausti*, La acumulación de acciones y de procesos en el proceso civil, La Ley, 2000; See *Diez Picazo, Gimenez I.*, en AAVV., Comentarios a la Ley de Enjuiciamiento Civil, pp. 206, 746, y en AAVV., Derecho procesal civil. El proceso de declaración, p. 168; *Armenta Deu T.*, en AAVV., Ley de Enjuiciamiento Civil: respuestas a 100 cuestiones polémicas, 2002, p. 685 ff.

homogeneous when different actions are grounded in the same sort of facts, even if the historical facts which sustain the action are different.¹²⁰⁵ As per the Art. 72 LEC the title is the same when is based on the same facts. According to the doctrine of the Supreme Court, its application must be done in such flexible manner, not in a literally way.¹²⁰⁶ The article 72 (joinder of actions) differs of the Art. 12 LEC dedicated to the *litis consorcio* in the fact, that the article 12 demands identity in the facts, while art. 72 speaks of a connection.

If the objective accumulation is related to the economy of the process, the subjective accumulation of actions pretends to avoid contradictory decisions based in the same *causa pretendi*. If not identical, the *causa pretendi* must be connected, is sufficient that they are similar and drive to identical legal questions.¹²⁰⁷ Being the facts linked, the possibilities for a subjective accumulation of actions increase. So can be conducted an injunctions claim against several professional which use or recommend the same general unlawful clauses. In this sense, the argumentation of the Audiencia Provincial de Cádiz¹²⁰⁸ reminded that is peaceful doctrine of the supreme Court the flexible criteria in order to accumulate actions, being sufficient the „conectividad jurídica“ that justify the unitary treatment and a single resolution.¹²⁰⁹

5.8.5 Publicity of the claim

The Spanish approach to notice is an interesting contrast to notice under Fed. R. Civ. P.23. Under the Spanish Act, all potential claimants must be notified “by appropriate means” before the claim is filed. Once the claim is filed, notice is published in the newspaper. As per the Art.15.1, the LEC it is established the obligation of calling to the process to all ascertainable consumers harmed by the product or service which causes the process. As per the literally tenor of the article, this call must be done after the claim has been lodged and accepted. As per the confusing redaction of the article, it is not clear who is responsible for the calling. The art. 15. 1 establishes that the judicial secretary is responsible for the calling once the claim is accepted. But the article 15.2 LEC establishes that the calling shall be done by the claimant. There are judicial decisions in both sides.¹²¹⁰

5.8.5.1 Collective interests

As per the redaction of the article 15. 2 when proceedings involve determined or easily determined damaged parties, the claimant or claimants must have previously notified those concerned of their intention to lodge a claim. This article does not specify the way in which the calling shall be done. The burden of proof of the accomplishment of this requisite falls to the consumers association.

1205 Sentencia de la Audiencia Provincial de Vizcaya de fecha 26 de marzo de 2007 y Sentencia de la Audiencia Provincial de Madrid, de fecha 20 de febrero de 2004

1206 STS Nº 620/1999 9th July, Rec.Nr: 3461/1994: “*Que el criterio flexible que ha de presidir el tratamiento de la acumulación subjetiva de acciones que regula la LEC, entiende que procede la misma a pesar de que el supuesto concreto no se halle comprendido en la norma, si tampoco le alcanzan las prohibiciones del mismo cuerpo legal, y existe entre las acciones cierta “conexidad” jurídica que justifique el tratamiento unitario y la resolución conjunta.*”

1207 *García Vila*, Tutela de los Consumidores y Usuarios en la Nueva Ley de Enjuiciamiento Civil, p. 265.

1208 AP Cádiz, 10th September 2002. Rec. Num. 334/2003. ECLI: ES: APCA:2003:1632.

1209 As per the SSTS of 8th November 1995, 7th february 1997 and 17 december 1997.

1210 AP Girona, Sección 2^a, Auto 18th January 2006, FD III: “La dificultad para enclavar el llamamiento de afectados por los fraudes, mencionando, incluso, que en función del No.ero de afectados podremos estar, cuando sean muchos, ante intereses difusos, concluye en este sentido que es al Juzgado a quien compete esta función, tal como menciona el Fundamento de Derecho Cuarto de la resolución citada”.

As per decision of Audiencia Provincial de Sevilla¹²¹¹, in a contractual case related to a private language school, the Court establish, that as the students signed a contract with a financial corporation in order to pay the courses, the personal information of the students was registered. As per the Audiencia, the personal information could be required by the claimant to the financial entity. Thus, the claimant has the legal duty of proof that the calling has been performed. In this specific case wonder how the association can obtain such information when this information is constitutionally protected.

The law does not clarify either which would be the consequence if there is a lack of publicity, thus it must be considered that the review of the achievement of this formal requirement is done by the court. The consequences for not fulfill appears defined in the Sentencia de la Audiencia Provincial de Valencia,¹²¹² in a pretension sustained by ADICAE in connection with languages schools. The Court did not accept the claim based on a lack of call to affected consumers, which was a requirement to be accomplished by the association as previous requirement following the indications of the art. 15.2 LEC. This requisite shows again, that the law maker was thinking in a small group when considered collective interests. The publicity of the process, will be easy if the affected consumers are members of the association, but if is a determinate and disperse group this requisite can be hard and expensive to fulfil. Although, the law does not specify the content of this communication, but according to the spirit of the law, it shall be clarified the intention to lodge a claim which affects collective interests, as well as identifying the defendant, are the man aspects of the claim. The aim of this article is to warranty that the affected parties can participate in the process.¹²¹³

5.8.5.2 Diffuse interests

By its side, the Art. 15.3 LEC establishes that once the claim has been accepted, the calling will suspend the procedure for a maximal deadline of 2 months in order to affected consumer to join the procedure. After these 2 months will no longer accepted in the declarative process but can take part in the Judgments enforcement according to the requisites of the LEC. As per the nature of this case, it is not possible to communicate the injured parties the intention of lodging a claim in defense of their interests. The LEC however demands the publication of the admission of the claim in mass media, in order at least to reach the most possible number of affected individuals.¹²¹⁴ This publication seeks to inform all possible affected individuals so they can take also part in the process (*opt in*).

The conditions and circumstances of the publication such the duration and the type of media, shall be determinate by the judge.¹²¹⁵ In the cases of undetermined or hard to be determinate group, the publication will stop the process for a maximal period of two months. The process will then continue with all the member of the group which react to the publication. (Art. 15. 3.2 LEC).

5.8.5.3 Exception to publicity

As exception to the requirement of calling affected consumers is gathered in the LEC as result of the transposition into Spanish Law of some European regulations in

1211 SAP Sevilla, Sección 5ª, 22nd January 2004, N° Rec: 5231/2003, ECLI: ES: APSE:2004:255.

1212 SAP Valencia, Sección 9ª, of 23th June 2008, N° de Recurso: 35/2008, ECLI: ES: APV:2008:2657.

1213 SAP Sevilla, Sección 5ª, 22nd January 2004, N° Rec: 5231/2003, ECLI: ES:APSE:2004:255.

1214 Art. 15.1 LEC.

1215 *Diez-Picazo Gimenez*, in: *De la Oliva/ Diez Picazo*, (Eds.), § 52 p. 604.

consumers field, the Ley 39/2002,¹²¹⁶ added a new point to the Art.15 (Art.15.4 LEC) that regulates an exception to the general regulation. For cases of injunctions claims promoted by consumers associations will be published in order to accelerate the process.¹²¹⁷ The procedure will be the oral process (*juicio verbal*).

5.8.5.4 Call to affected consumers and right to privacy

Recent, the Spanish Constitutional Court (**STC 96/2012**)¹²¹⁸, as results of a pretension of the claimant ADICAE in order to obtain personal information of the clients of a financial entity in order to determinate them according to the Art. 15.2 LEC, support the argumentation of the Bank concludes that the financial entity is guarantor of the personal information provided by their clients, and as long as this information can be obtained with other means, this way must be avoided. In this decision the Court did not proved if there were an alternative available way in order to obtain such information. The Court argumentation is based on the art. 256.1.6 de la Ley de Enjuiciamiento Civil in the following words, under the coverage of the art.256.1.6 LEC (RCL 2000, 34, 962 y RCL2001, 1892) and without previous consent of the affected holders cannot be obtained personal information which are not indispensable for the exercise of the collective action. As general observation, in cases of contractual massive damages the first font of information is the provider of products or services.

5.8.6 Binding effects

Taken into account the relevant consequences in connection of the scope of the decision, the Spanish law maker was not clear enough.¹²¹⁹ The scope of the decision and the material *res iudicata* effects are regulated in the article 222 of the LEC:¹²²⁰In the Judgments on marital status, matrimony, kinship, paternity, maternity or incapacity and the recovery of capacity, *res iudicata* shall take effect from the moment such Judgments are duly registered or entered in the Civil Registry.

Point 3 of the article 222 LEC extends the decision to those parties' holders of rights in accordance with the provisions set in the article 11 of the LEC (standing for the defense of the rights of consumers and users). According to the article 222.2 The material *res iudicata* shall include both the claim's and the counter claim's pleas, so that any beneficiary consumers can appeal to the declarative decision in the enforcement stage. The Art. 222 LEC allows extension of the scope of the sentence without further limitations to those parties (holders of rights) that were not present in the procedure.¹²²¹ The extension of the beneficiary decision is also to extend to their legal heirs or successors, as well as those parties which were not present in the procedure according to the standing

1216 Ley 39/2002 28 de Octubre, de transposición al ordenamiento jurídico español de diversas directrices comunitarias en materia de protección de los intereses de los consumidores y usuarios

1217 Exposición de Motivos.

1218 ECLI:ES:TC:2012:96, FJ 6°.

1219 *Mom*, 2005 Landbericht Spanien, in: Micklitz & Stadler; Die Verbandsklage, p. 731.

1220 *Res iudicata* effect shall affect the parties to the proceedings in which it is ruled, as well as their heirs and successors and any non-litigants holding rights upon which the parties' capacity to act is grounded in accordance with the provisions set forth in Article 11 herein.

1221 *Gárnica Martín*, La Ley 2001, 1451 (1457). Sanz Viola differentiated two different cases: the decision fallen in a succeed or failed claim. For this author only in the first case could the decision have *erga omnes* effect. Fn. 391 in (Andreas Mom, 2005), Landbericht Spanien, in: Micklitz/Stadler, Die Verbandsklage, p. 731.

granted in the article 11 of the LEC (consumers).¹²²² **As there is not opt out rule in Spain, it appears problematic the relationship between the collective and individual enforcement of the material consumers Law.** This has as consequence the sacrifice of the right to be heard before the court, which is a fundamental right.¹²²³ In these cases, as per the binding effects of the decision, the individual consumer which did not take part in the process can appear in the enforcement procedure, what mitigates the possible problems of the right to be heard before the court.¹²²⁴

5.8.7 Content of judgement

The article 221 LEC rules the Judgments issued in proceedings brought by consumer or users associations. However, the Law does not regulate the end of the process in the group claims based on the article 6 of the LEC. The reasons for this omission has been explained in different ways. For authors like Garnica Martín it is just a mistake of the law maker that forget to introduce this regulation due to the plurality of amendments that follow to the law draft.¹²²⁵ Nevertheless, the following article, the art 222.3 support the extension of the provisions of the article 221 to the group claims. This regulation expressly extends the binding effects to all the in the article 11 LEC named parties, included groups of affected consumers.¹²²⁶ The LEC counts with a specific article in order to regulate the scope of the judgment in claims promoted by consumers' associations (Art. 221 LEC).

In case of a monetary pretension, the judgement will individually specify those consumers and users who will benefit from the condemn. In cases of non-determinate consumers, as the individual setting is not possible, the judgement will establish under which criteria the payment can be done in the enforcements phase. As per the article 221.2 LEC, if a specific behavior is considered unlawful, the judgement shall establish the procedural binding effects of the decision to other parties which were not present in the process. As per the article 221.3 LEC, if determinate consumers took part in the process, the judgement shall expressly respond to their demands. As per the art. 221.2 LEC, in case of positive Judgments in cases of collective and diffuse consumers and users, the Court can order to publish the judgement to expenses of the condemned. The determination of the subjective scope of the judicial decision is a necessary part of the decision, even when the characteristics of the individual affected consumers is hard to be determinate.¹²²⁷

5.8.7.1 Collective interests

The judicial decision fallen in the process shall expressly clarify if and how the pretensions of the claimant are accepted, and its scope for parties which were not present in the procedure.¹²²⁸ The decision applies for and against all the considered parties object of the procedure. The binding effects of the decision will be, based on the article 221.1 of the LEC extended to other consumers which did not take part in the procedure. Those procedures requesting monetary benefits shall determine individually the beneficiaries of the same. Art. 221.1No. 1. Thereby, the beneficiaries of the judicial decision which were

1222 *Mom*, Landbericht Spanien, in: Die Verbandsklage, p. 732.

1223 *Ibidem*, p. 732.

1224 See *Garnica Martín*, La Ley 2001, 1451 (1457 ff).

1225 *Garnica Martín*, La Ley 2001, 1451 (1461), also Prof. *Gascon Inchausti* in a speech n Madrid at 7th June 2004, Fn. In: *Micklitz & Stadler*, (Eds.), Die Verbandsklage, p. 727.

1226 *Bellido Penades*, *Tribunales de Justicia* 2002, (12) pp. 1-15.

1227 *Garnica Martín*, La Ley 2001, 1451 (1462).

1228 Art. 13.3 LEC.

not present in the main process can take part in the judgment compulsory enforcement procedure. Such extension of the legal effects is not problematic from the right to be heard by the court (*tutela judicial efectiva*).¹²²⁹

5.8.7.2 Diffuse interests

The article 221.1.No. 3 LEC determines that the judicial decision fallen in process in which the parties are determine. A *sensu contrario*, for those not determined parties, the individual clarification of pretensions is not possible. For the cases in which a monetary benefit is seek, the decision shall clarify who will be the beneficiary of the decision to allow them to take part in the compulsory enforcement procedure.

According to the article 221.1.No.2 LEC, should a specific activity or type of behavior be judged illicit or not in keeping with the law as the grounds for the sanction or as the main or single verdict, the judgment shall determine whether such verdict shall have procedural effects beyond those who had been a party to the corresponding proceedings. A special enforcement procedure is foreseen in the article 519 of the LEC. This article allows the extension of benefits to those parties that did not take part in the process.¹²³⁰

5.8.8 Calculation and distribution of damages

Distributing damages under the Spanish Act also differs significantly from the approach typically taken under Fed. R. Civ. P. 23. The judgement in the case will indicate everyone entitled to receive damages when the individuals in the action have been identified or can be readily identified to receive damages (“collective damages”). For individuals who cannot be readily identified, the judgement must describe the characteristics of the beneficiaries and set out the criteria to identify them (“general damages”). Individuals who are not plaintiffs have five years to seek enforcement of the judgment.¹²³¹ In the frame of group claims, there are not articles in the LEC dedicated to the calculation of the damages, which for some authors is a capital mistake.¹²³²

As per the art. 219 of the LEC Judgments subject to settlement, in the event of a trial claiming the payment of a specific amount of money or of proceeds, rents, utilities or products of any nature whatsoever, the claim shall not be limited to request a merely declaratory judgement confirming the right to receive the former but shall also request the order to pay them, indicating their exact amount, and may not request its determination during the execution of the judgement, or clearly establishing the bases on which the settlement shall be carried out, in such a way that the latter shall consist of a mere arithmetic operation.

5.8.8.1 Collective interests

The decision shall clarify the scope and the amount to be paid to the parties which

¹²²⁹ *Mom*, Landbericht Spanien, in: *Micklitz & Stadler*, (Eds.), *Die Verbandsklage*, p. 728.

¹²³⁰ Article 519. Enforcement action for consumers and users grounded on a conviction without individual determination of beneficiaries. Where the convictions referred to in the first rule of Article 221 do not state the individual consumers or users benefiting thereof, the court holding jurisdiction for enforcement shall at the request of one or several interested parties issue a court order in which it shall decide whether it recognizes the applicants as beneficiaries of the conviction in accordance with the data, characteristics and requirements set forth in the judgment. With the certification of this court order, the parties thus recognised may seek enforcement. The Public Prosecution Service may seek enforcement of the judgment to the benefit of the consumers and users affected.

¹²³¹ *Harbour & Shelley*, *Amer. Prac. Lit.*, 2007, 23 (25).

¹²³² *Garnica Martín*, *La Ley* 2001, 1451 (1464), *Bellido Penadés*, *Tribunales de Justicia* 2002 (12), pp.1,16.

took part in the process as well to those who were absent. As the group is easy to be determined, the decision can be the summation of all individual compensations. The calculation procedure is not foreseen in the law.

5.8.8.2 Diffuse interests

In this case, the global amount to be paid cannot be calculated summing up all the individual compensations. For some authors, however the decision still has to include the global amount to be paid.¹²³³ The declarative decision shall just clarify who are the beneficiaries of the decision and the mechanisms to calculate the damage, so according to the article 219, in such a way that the latter in the enforcement procedure shall consist of a mere arithmetic operation.

As per the regulation of the Law, there is not foreseen the distribution of the amounts. As the law does not content any article specifying the refund to the claiming association of the spent costs of the procedure, it, but speak of reparation of affected consumers, the group claim is oriented to this reparation of the affected consumers rather than compensate the claiming association.¹²³⁴ The group claim is incorporated to the LEC trying to be an effective collective redress instrument in order to strength the interest of consumers and users, not for the well-being of the consumers associations. Thus, the compulsory enforcement stage succeeds by the participation of the consumers itself. It is also possible that this stage is also conducted by an association as representing party.¹²³⁵

5.8.9 Enforcement of Judgments on diffuse interests

The final decision is an executable title in favor of the winning party.¹²³⁶ By means of the title, the succeeding party has a deadline of 5 years to judicially enforce the decision. As per the article 519 LEC,¹²³⁷ in monetary condemnns on diffuse interests (no determinate consumers), the judgement enforcement court, previous hearing to the condemn party, will decide by means of a Court order¹²³⁸ if any interested applicant may benefit from the declarative judgement. Also the public prosecution Ministry can request the enforcement of the declarative decision in favor of the interests of consumers and users.¹²³⁹

The Spanish Civil Procedure Act (LEC), allows five years to execute the declarative decision.¹²⁴⁰ The connection of the article 221.1.No. 1 LEC with the Art. 519 LEC serves to allow those parties which were not present in the main procedure to take profit of the favorable sentence. The article 221.1 LEC orders the establishment of the individual beneficiaries, and when it is not possible, the declarative decision shall establish the parameters that will be use in the enforcement stage to determinate who can be appeal to the declarative decision. The compulsory enforcement is an individual procedure. As per the nature of this procedure, some problem can arise, such the distribution of the indemnification and possible remaining amounts. If the debtor of the enforcement is not

1233 *Mom*, Landbericht Spanien, in: *Micklitz & Stadler*, (Eds.), *Die Verbandsklage*, p. 729.

1234 *Mom*, Landbericht Spanien, in: *Micklitz & Stadler*,(Eds.), *Die Verbandsklage*, p.730.

1235 *Kohtes*, p. 277.

1236 Article 517.2 No. 1 LEC.

1237 *Artículo 519 draft by the disposición final tercera of the Ley 16/2011, de 24 de junio, de contratos de crédito al consumo («B.O.E.» 25 junio). In force since 25 september 2011.*

1238 Auto judicial.

1239 New redaction of the article 519 drafted by “*la disposición final tercera de la Ley 16/2011, de 24 de junio, de contratos de crédito al consumo*”. B.O.E. 151 of 25 th June 2011.

1240 Art. 518 LEC new draft: *Artículo 518 redactado por el apartado dieciséis de la disposición final tercera de la Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles*. BOE 162 of 7th July 2012, pp.49224-49242.

acting, or if the deadline to enforce the declarative decision passed, then the amounts remains by the losing party.¹²⁴¹

The second paragraph of the article 221 states that: *Where individually determining such users or consumers may not be possible, the judgement shall set forth the necessary details, characteristics and requirements to be in a position to require payment or, as appropriate, apply for enforcement or be a party to it should the association that had brought the claim do so.* As per the formulation of the law, it seems that in cases of non-determinate consumers (diffuse rights) the possibility to ask for the enforcement of the decision fallen within the associations choice.

The connection with the individual enforcement is not determinate by the law.¹²⁴² The connection with the article 510 serves to clarify this connection. The article 519 allows the enforcement of decisions in which the individual of the beneficiary party. For these injured consumers, the article 519 allows a “determination procedure”, in which the applicants (previous hearing to the defendant) will demonstrate that is beneficiary of the declarative decision.¹²⁴³ The decision fallen in this “determination procedure” will be valid as an enforcement title.¹²⁴⁴

5.8.10 Costs of the procedure

Under Spanish Law, the party losing the case, as a general principle, have to bear with the costs of the procedure. The judge or court can regulate this general principle.¹²⁴⁵ In the law making process was discussed to introduce a rule in order to the claimant to bear all the costs of the procedure, but it was finally not introduced, and the group claims follow the general principles of the Spanish law: each party has to bear with their costs on the procedure.¹²⁴⁶ As own costs will considered the cost of the notification to affected consumes as well as the publication of the admission of the claim in mass media.¹²⁴⁷ However, the winning party can in some circumstances have reimbursed its costs.

5.8.11 Court fees

As per the Ley 10/ 2012¹²⁴⁸ is introduced in Spain a new regulation about judicial taxes. With the former regulation, only corporations were obliged to pay taxes to sue. With the new regulation, this payment is extended to any natural person, exception made of those beneficiaries of legal aid. This tax is introduced to avoid baseless claims, in a very saturated judicial system as the Spanish one is. This law has received multitude of critics and is being currently reviewed by the Spanish Constitutional Court.¹²⁴⁹ The tax for consumers’ protection claims is of 150 € as corresponds to verbal Judgments, and a rate

1241 *Mom*, Landbericht Spanien, in: Micklitz & Stadler (Eds.), Die Verbandsklage, p. 730.

1242 *Mom*, Landbericht Spanien, in: Micklitz & Stadler; (Eds.), Die Verbandsklage, p. 730.

1243 According to Kohtes, as the damage casualty relation does not have to be proof, it simplifies the individual enforcement procedure very much.

1244 Further *Barona Vilar*, ZZPInt, 2001, 91-108.

1245 The costs of the procedure are regulated in the art. 523 and 842 LEC.

1246 Art. 241 LEC.

1247 *Bujosa Vadell*, RJC 2001 (4), pp. 29-46; *Kohtes*, Das Recht der vorformulierten Vertragsbedingungen in Spanien p. 270.

1248 Ley 10/2012, de 20 de noviembre, por la que se regulan determinadas tasas en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses BOE No.. 280 de 21 de Noviembre de 2012

1249 Audiencia Nacional reises Cuestion de Constitucionalidad, STC 92/2017, ECLI:ES:TC:2017:92.

of the value of the claim.¹²⁵⁰ In consumers' protection field where the collective redress looks for a better access to justice, this tax may discourage consumers associations from initiating a legal suit. Claiming associations already must bear with costs, such the written request of notification to affected consumers or the publication of admission of the claim.

5.8.12 *Cuota litis* in Spain

As per Resolution of the Tribunal de Defensa de la Competencia (TDC)¹²⁵¹ a fine of 180.000 € was imposed to the Consejo General de la abogacia as per a breach of the Art. 1 of the Spanish free competition act (*Ley de defensa de la Competencia* LCD).

The fine was based on the content of the Deontological Code for Lawyers, that prohibited the establishment of a pure *cuota litis* between client and attorney. As per the resolution of the Tribunal de Defensa de la Competencia¹²⁵², it results in barriers for new attorneys to access to the market. The decision was appealed Audiencia Nacional¹²⁵³ in 2.005, and the case finally reached the Tribunal Supremo. As per the motivation of the Spanish high court, any rule, as a prohibition of a pure *cuota litis* agreement between lawyer and client is against the principles of the free competition.¹²⁵⁴

5.8.13 Preliminary proceedings (Art. 256 LEC)

The idea of preparation of the procedure by the claimant party is in the background, The claimant party has to bear the burden of preparing the necessary frame for the trial. In this respect, a decision of SAP Zaragoza, ¹²⁵⁵ establishes that the preliminary proceedings are a civil instrument which allow to the interested party (claimant) to obtain certain information related to the object of the claim or related to the standing art. 256.6 LEC (Art. 256.7 LEC) and circumstances of the defendant or related to fundamental facts in order to succeed in the claim. Even the article contents limited cases of application, its interpretation must be done in a flexible manner. ¹²⁵⁶ The preliminary proceedings serve the later procedure obtaining capital information related to the possible process. It serves the realization of the fundamental right to obtain an effective protection of judges and courts. As per Auto of the la *Audiencia Provincial de Cádiz*, sec. 2^a, 15-3-2007¹²⁵⁷, which classified the preliminary proceeding attending to its aim, so the preliminary proceeding must be connected to those aspects that the later trial will treat. Local jurisdiction is treated in the art. 257 LEC. As general criteria, will be the domicile of the requested party, which reflects the provisions of the art. 50 and ss. LEC, (general jurisdiction of natural persons). If the required party has not its domicile in Spanish territory, will be the domicile of the required party abroad. The procedure is regulated in the article 258 and ss LEC. If the court considers that a legitimate interest grounds the preliminary proceeding, will issue it. A surety will be established a (which must be paid in 3 days or the application will be

1250 0'5 % up to 1.000.000 €, and then 0'25 %. Maximal 10.000 €.

1251 Which is an administrative court.

1252 Despite of the name, the Tribunal de Defensa de la Competencia was an administrative organ. Now become the Comisión Nacional de Competencia.

1253 SAN of 27th June 2005, ECLI:ES:AN:2005:6902.

1254 STS Sala 3a of 04th November 2008, Rec. Cas. No.: 5837/2005, FD 3.

1255 SAP Zaragoza, Sección 2^a, of 16th September 2002, Rec. 482/2004, ECLI:ES: APZ:2005:1776.

1256 AP Madrid, Sec. 11^a, A 1-6-2010, Rec. No. 850/2009, ECLI:ES:APM:2010:8015A.

1257 “Además de ser típicas, en cuanto a su regulación, y por tanto, cerradas en lo que respecta al listado de las mismas. Junto a la finalidad, o precisamente, en razón de la misma, como hemos visto se exige también ex lege que se realice unareferencia circunstanciada al asunto objetodel juicio que se quiera preparar de modoque el órgano judicial pueda conocer el objeto del futuro proceso que se pueda o se vaya a preparar.”

automatically rejected. The application must be resolved within a deadline of 5 days as *Auto*. If the application is accepted no appeal is possible. If not, the decision can be appeal. The court decision (*Auto*) will specify in which way the preliminary proceedings shall be undertake. In the frame of proceeding affecting intellectual or industrial property, as per the Art. 259. 3 and 4 LEC, interrogation can be done behind closed doors.

The initial admission of the preliminary proceeding act does not impede the required party to oppose to the diligence. The deadline is of five days, since the requirement and the requested party can oppose any legitimate reason. The law does not specify how this opposition must be done. As there is not specific regulation, it seems that the opposing requested party must sue a claim, or at least submit a writing with the structure of the claim. The court will finally resolve in an ordinary contradictory view. The law does not specify about the cost of the procedure, but in any case, costs of the preliminary proceeding will be paid for the party that without justification oppose to its realization, so it can be presume that the applicant party will pay the unjustified applications.

As per the Proposal for incorporation of the Directive 104/2014 UE, the institution of the Preliminary Diligence shall be removed from the LEC.¹²⁵⁸

5.8.14 Protection of personal information

The right to intimacy is a fundamental right. This belongs to those rights that affect the private sphere, which are the most protected rights. It is to be treated preferentially and supported a direct access to Constitutional Court protection (*recurso de amparo*).¹²⁵⁹

The essence of this right responds to the protection of the private before third parties, unless any single individual freely decides to share this aspect. In Spain it is regulated in the **Ley Orgánica 1/1982**.¹²⁶⁰ This law defines the edges of this fundamental right. As special regulation, this law does not consider as legitimate, violations of this rights supported by Law. The legislation in this field reach the top in Spain with the approbation of the **Ley Orgánica 5/1992**,¹²⁶¹ which was in force until the passing on of the **Ley Orgánica 15/1999, of personal data protection (LOPD)**.¹²⁶² In constitutional case law, the **STC, 292/2000**,¹²⁶³ is an important decision. It is related to the art. 18.4 CE, which establishes the limitation of the „informatics“ in order to warrant the intimacy rights.¹²⁶⁴ So, for the Court, the informatics freedom includes safeguard that the personal data of citizen won't be used for different purposes that justify its obtaining.¹²⁶⁵ So, the citizen has the power to control its personal data against public power and any other third party (not only sensible data, but any information that falls in the private sphere).

¹²⁵⁸ See the chapter dedicated to the LCD.

¹²⁵⁹ Personal claim at the Constitutional Court to defend fundamental rights.

¹²⁶⁰ Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen. BOE of 14th May 1982.

¹²⁶¹ Ley de 29 de octubre, de regulación del tratamiento automatizado de los datos de carácter personal (LORTAD), BOE No. 262 de 31 de octubre de 1992.

¹²⁶² Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal (LOPD). BOE No. 298 of 14th December 1999.

¹²⁶³ STC, 292/2000, of 30th November 2000, ECLI: ES:TC:2000:292.

¹²⁶⁴ FJ 6, reiterado luego en las SSTC 143/1994, FJ 7, 11/1998, FJ 4, 94/1998, FJ 6, 202/1999, FJ 2).

¹²⁶⁵ “La llamada “libertad informática” es así derecho a controlar el uso de los mismos datos insertos en un programa informático (“habeas data”) y comprende, entre otros aspectos, la oposición del ciudadano a que determinados datos personales sean utilizados para fines distintos de aquel legítimo que justificó su obtención” (SSTC11/1998, FJ 5, 94/1998, FJ 4”).

Regarding the limits of this right, the Court establishes that it can be limited in its content or in its exercise. It can be limited in virtue of other goods, or constitutional interest, as long as the cutback is necessary, proportional in order to warranty the legitimate interest and respects the essential content of the right.¹²⁶⁶ The **Tribunal Constitucional** treated this question related to bank secrecy. STC 110/1984, decision which settles the content of this right, which will be treated in later constitutional decisions. In connection with the action promoted by ADICAE in defense of economic interest of those investors affected by the toxic products sold by Lehman Brothers which were commercialized by some banks in Spain, the claimant party request preliminary proceedings in order to clarify some aspects that shall be treated in a later procedure. In this case, the **Juzgado de Primera Instancia No. 71 de Madrid**,¹²⁶⁷ considered that there were not legitimate interest in the request of the claimant to obtain identification data of the clients of affected by the commercialization of financial products sold by Lehman Brothers Holding Inc., as these data were protected by the **Ley de Protección de Datos Personales** (Arts. 1,2). The aim of the applicant is to dispose of a confidential information in order to prepare a trial for these possible future clients, which will try to capture that way. (non legitimate interest). The claimant appeals the decision based on the art.15.2 LEC which obliges to call to all determinate affected parties in consumers trials. It is to remain the obligation of court and procedures of respect the art. 7.3 LOPJ of protecting the legitimate interests, so good the individual as well as the collective, so that no defenselessness may occur. This argument, next to the tendency of the Spanish court to protect the weakest part in contractual relationships were the arguments of the Audiencia Provincial de Madrid,¹²⁶⁸ in order to give preference to the cession rather that the consent. Another decision is SAP **Audiencia Provincial de Madrid, sec.20ª, de 8 de Julio de 2010**, considers that the stipulation of the art I art. 256.1.6º LEC that the court will take all necessary measures in order to find out the members of the group, cannot be considered unless the acceptance of the members of the group has been done.¹²⁶⁹

¹²⁶⁶ STC 57/1994, 28th February, ECLI:ES:TC:1994:57, FJ 6; STC 18/1999, 22th February, ECLI:ES:TC:1999:18, FJ 2: *“Los derechos fundamentales pueden ceder, desde luego, ante bienes, e incluso intereses constitucionalmente relevantes, siempre que el recorte que experimentensea necesario para lograr el fin legítimo previsto, proporcionado para alcanzarlo y, en todo caso, sea respetuoso con el contenido esencial del derecho fundamental restringido”*.

¹²⁶⁷ See ful Judgment. STS of 7th July 2015, Rec. No. 3198/2015- ECLI:ES:TS:2015:3198.

¹²⁶⁸ AP Madrid, Sec. 19, of 13th May 2009, ECLI:ES:APM:2009:18669.

¹²⁶⁹ AP Madrid AUTO of 8th July 2010, Num. Rec. 263/2010. ECLI:ES: APM:2010:10463 A.

Part V European Frame

1. European Consumers protection

1.1 Development

As per the Treaty of Rome, **the Community acquired competence in order to promote the harmonization of national regulations that might affect the good working of the common market.**¹²⁷⁰ This objective entered into conflict with national measures on consumers protection, as any regulation in this field which is valid only in one member country might create distortion in the common market. The CJEC could very early check if national regulations on consumers protection were compatible with the common market.¹²⁷¹ After the decision *Cassis de Dijon*, national measures on consumers protection justify limitation of goods within the common market. Harmonization in consumers policy is the logical consequence. First action program related to consumers protection was presented by the Commission in 1975.¹²⁷² It gathered 5 fundamental consumers rights, one of them to be reimbursed for suffered damages. Since this first development, many other programmatic documents will precede legislative advances in this area.

As per the Treaties, with the **Single European Act (SEA)**¹²⁷³ consumers rights obtain a place within consumers policies, as the Commission shall propose measures in order to defend consumers with a high protection standard.¹²⁷⁴

The **Treaty of Maastricht** consolidated a *high consumers protection* standard, being this policy recognized as one of the instruments of the Community (Art. 3 s) to reach its objectives. The article 129-A introduced a competence article to the Commission oriented to reach a high standard of consumers protection based on measures for the realization of the common market (Art 129 A 1.1a) and supporting national measures (Art. 129A lit b). This recognition partially developed the subsidiarity principle, as the community could only address specific actions in order to support the policies of the member countries.¹²⁷⁵ **Based on the minimal protection principle, consumers protection was configured in the first place as a supporting policy for the consummation of the inner market.** It means that the community established minimum standards, and the member countries will be able to develop other protection measures.¹²⁷⁶ As example of secondary law arising from this vision was the Directive for Prices 98/6/EC.¹²⁷⁷

1270 Art.3 Treaty of Rome.

1271 Dassonville decision (1974), was checked a Belgian regulation that demands a Certification of origin to imported whiskies, requirement that was not compulsory in France. The decision *Cassis de Dijon* (1979), analysed a German regulation prohibiting putting into the market spirituous drinks if they did not have a certain level of alcohol.

1272 The right to protection of health and safety, the right to protection of economic interests, the right of redress, the right to information and education, the right of representation (the right to be heard). **Preliminary programme of the European Economic Community for a consumer protection and information policy**, OJ C 092, 25/04/1975 P. 0002 – 0016.

1273 OJ L 169 of 29th June 1987.

1274 (Art. 100-A).

1275 *Reich / Micklitz*, Europaisches Verbraucherrecht, p.1155.

1276 This minimal protection principle was not changed in further revisions of the European treaties. In Amsterdam was the Art. 153. 5 EC and since Lissabon Art. 169. 4 TFEC.

1277 OJ L 80, 18/03/1998, p. 27–31.

The **Amsterdam Treaty** (in force at 1. Mai 1999)¹²⁷⁸ rather than extending new competences for the Community,¹²⁷⁹ clarifies its distribution with the member countries.¹²⁸⁰ The European consumers protection loses its character of supporting the policy of member states. **The article 153 (now Art. 169 TFEU) extended the consumers policy; in its task catalogue recognized aims such the „ promotion of consumers interests, as well as warranting a high level of consumers protection, advancing the consumers protection as an own European policy”.** The art. 153. 2 stated that the consumers interest will be taken into account when developing other community policies.¹²⁸¹

With the approval of the **Niza Treaty, the Community will advance in the recognition and promotion of consumers interests. So called “soft laws”, as per instance the five years consumers strategies will be developed.**¹²⁸² With the Green Paper on European Union Consumer Protection¹²⁸³ the Community proved the current standards in consumers protection within the member countries and at European level. The research studies existing Directives and presented discussion topics in order to advance in this field. One of the proposals was substituting the minor harmonization by a full harmonization.¹²⁸⁴ The traditional areas of consumers European protection in the European contracts as well as the liability law, also in competition law will be extended, gaining more and more importance.¹²⁸⁵

1.2. Freedom of consumers associations

The right to build up associations is gathered in the member states legislation as well as in the ECHR and the European Fundamental Rights Charter. The European Community grants a similar protection to the associative right of the Germany Art. 9 GG.¹²⁸⁶ **The Treaty of Amsterdam and the European case law recognized the legal position of consumers in associations,¹²⁸⁷ being entitle to act before courts of any member state and not to be discriminated by its nationality.**¹²⁸⁸ The right to create associations includes the right to protect their interests. With the article 153 TEC, the Community recognized so good individual protection of consumers, as well as of consumers associations as well. This recognition put consumers associations in a place equal to enterprises regarding the establishment right, entitled them to act in any other EU member country, being prohibited a discriminative treatment based on its nationality.¹²⁸⁹ This recognition of consumers associations was thought in order to increase

1278 Amsterdam Treaty OJ C 340 of 10.11.1997. The Art. 129a TEU which attributed competences to the Community changed to Art. 153 TEC (Now Art. 169 TFEU).

1279 So *Gröner / Köhler*, Verbraucherschutz in der Marktwirtschaft, Ökonomische und rechtliche Aspekte des Konsumentencredits.

1280 See *Grabitz & Hilf*, *Das Recht der Europäischen Union*.

1281 *Rösler*, 30 Jahre Verbraucherpolitik in Europa, rechtsvergleichende programmatische und Institutionelle Faktoren, *ZfrV* 2005, 134, 135.

1282 First consumers Strategie 2202- 2006, KOM (2002) 208 ABL 2002 c 137/2 vom 08-06.2002.

1283 Brussels, 2.10.2001 COM (2001) 531 final.

1284 See, *Micklitz / Reich*, *VuR* 2007, 121 (125).

1285 *Beater*, Verbraucherschutz und Schutzzweckdenken im Wettbewerbsrecht.

1286 *MünchKomm/ Micklitz*, § 13 ABG Rn. 7.

1287 CJEC Judgment of 15th December 1995, Case C- 415/ 93, *ASBL vs Jean-Marc Bosman*, ECLI:EU:C:1995:463.

1288 Art. 12 TEC (now Art. 18 TFEU); see *Stuyck*, *CMLRev.* (37) 2000, 367; *Reich*, *VuR* 1999, p. 3, *MünchKomm Micklitz*, § 13 ABG Rn. 7 *Micklitz*, in *Reich/ Micklitz*, *Europäisches Verbraucherrecht*, p. 1152 ff.

1289 For details see *Reich*, *VuR* 1999, 3-10.

the private enforcement, increasing therefore as well the subjective rights protection and the effectiveness of the European rules.¹²⁹⁰

1.3 Collective redress

Ideas about collective redress as an instrument to enforce rights granted by the EU were developed later than the consumers protection. First European proposals date from the Commission in 1984.¹²⁹¹ Another resolution came from the European Parliament, which promoted the introduction of collective redress mechanisms, in order to facilitate the access to justice of consumers.¹²⁹² An important step in the collective protection of consumers was reached with the approval of the so called Injunctions Directive 98/27 EC.¹²⁹³ This was the first European regulation obliging the member countries to develop redress instruments that may allow consumers associations of other member countries to act before a national court.

Starting by the recognition of a proper access to justice to consumers,¹²⁹⁴ collective redress has become a priority in the last years of the European agenda,¹²⁹⁵ as the *EU justice policy aims to develop a genuine area of freedom, security and justice that serves citizens and businesses, which should be able to obtain effective redress, in particular in cross-border cases and in cases where the rights conferred on them by European Union law have been infringed.*¹²⁹⁶ The EU thoughts of collective redress have been growing parallel to the consumers protection and the implementation of collective redress mechanism in the member countries.¹²⁹⁷ The legal basis of the EU in order to affect the national civil procedure is based in the art. 81 TFEU (former Art. 65.

1290 COM (2005) 672, as well as Commission's Staff Working Paper (SEC 2005); *Sauerland*, Die Harmonisierung des kollektiven Verbrauchersrechts in der EU, p. 28; so also *Michailidou*, Prozessuale Fragen des Kollektivrechtsschutzes im europäischen Justizraum, p. 295.

1291 Memorandum from the Commission: Consumer Redress COM (84) 692, 12.12.1984. The paper noted the common legal tradition of the then Member States, irrespective of whether they came from civil law or common law traditions, that no individual is entitled to institute legal proceedings unless he establishes a direct personal interest, see *Hodges*, Global Class Actions Project Summary of European Union Developments Dr Christopher Hodges* Centre for Socio-Legal Studies, University of Oxford. Available at: http://globalclassactions.stanford.edu/sites/default/files/documents/EU_Report.pdf Visited last time on 20 January 2017.

1292 OJL 1987 C 99/ 203 of 13th April 1987. In connection with that *Reich*, Bürgerrechte in der EU, Subjektive Rechte von Unionsbürgern und Drittstaatsangehörigen unter besonderer Berücksichtigung der Rechtslage nach der Rechtsprechung des EuGH und den Vertrag von Amsterdam.

1293 OJL 1998 L 166/51 of 11 Juni 1998.

1294 See Grünbuch über den „Zugang der Verbraucher zum recht und Beilegung von Rechtsstreitigkeiten der Verbraucher im Binnenmarkt“ vom 16. 11 .1993 KOM (93) 576.

1295 From development until 2010 see *Hess*, WuW 2010, 493 (499).

1296 See the Commission's Communication "Action Plan Implementing the Stockholm Programme" COM (2010) 171 20.4.2010. See Stockholm Programme — An open and secure Europe serving and protecting citizens, adopted by the European Council on 9.12.2009, OJ C 115, 4.5.2010, p.1.

1297 Collective redress is one of the mechanisms that has been analysed since several years by the EU institutions on the basis of experience made in several Member States as to its capacity to contribute to the development of the European area of justice to ensure a high level of consumer protection and to improve the enforcement of the EU law in general, including the EU's competition rules, while serving economic growth and facilitating access to justice. The Commission has continued and deepened this analysis between 2010 and 2012 to provide answers to three basic questions: (1) what is the problem that is not yet satisfactorily addressed by existing instruments, (2) could a particular legal mechanism, such as a possible European collective redress mechanism, solve this problem? (3) how could such a mechanism be reconciled with the requirement of Article 67(1) TFEU, according to which the Union, while establishing a European area of freedom, justice and security, is asked to respect the different legal systems and traditions of the Member States, in particular in areas (such as procedural law) which are well established at national level while being rather new at EU level.

TEC Judicial Cooperation in Civil matters), being a condition for the European standing the existence of transnational activities. In this sense, **the European law maker** have already developed regulations to deal with transnational or border trespassing activities such Brussels I¹²⁹⁸ and Brussels II,¹²⁹⁹ but traditionally **has been very cautious when it comes to affect national civil procedures**.¹³⁰⁰ Nevertheless, developing collective redress instruments may require procedural law solutions on the basis of EU law. Examples are a lot of European regulations facilitating effective redress. The most relevant regulations¹³⁰¹ are the European Small Claims Procedure¹³⁰²; the European Order for Payment Procedure,¹³⁰³ the Mediation Directive,¹³⁰⁴ applicable in all cross-border civil disputes.¹³⁰⁵

In the field of consumer policy¹³⁰⁶ the Directive on consumer Alternative Dispute Resolution¹³⁰⁷ together with Regulation on consumer Online Dispute Resolution¹³⁰⁸ go further by requiring Member States to ensure that contractual disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an alternative dispute resolution entity.

1298 Council Regulation (EC) 44/01 of the 22nd December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

1299 Council Regulation EC 2201/2003 of the 27th November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

1300 This stake has been surpassed, as we can find other regulation that do affect the international civil procedure such the so called „enforcement Directive“ 2004/48/ EG. Its main regulation is dedicated to the procedures in the IP rights field, touching important aspects of the same such the submission of evidences, information rights, and other related aspects, Hess, WuW 2010, 493 (499).

1301 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the regions. "Towards a European Horizontal Framework for Collective Redress“.

1302 Which facilitates consumer claims resulting from cross-border sales Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007.

1303 Which contributes to fast cross-border debt recovery, making it easier for businesses to manage their claims Regulation (EC) No. 1896/2006 creating a European Order for payment procedure, OJ L 399, 30.12.2006.

1304 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008.

1305 Which promotes Alternative Dispute Resolution that saves costs and efforts and reduces the time needed for cross-border litigation.

1306 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)99final, {SEC(2007)321}, {SEC(2007)322}, {SEC(2007)323}, 13.03.2007 and Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "A European Consumer Agenda - Boosting confidence and growth", COM(2012)225final, {SWD(2012) 132 final}, 22.05.2012

1307 P7_TA(2013)0066 Alternative consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.749 European Parliament legislative resolution of 12 March 2013 on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2011)0793 – C7-0454/2011– 2011/0373(COD)).

1308 P7_TA(2013)0065 Online consumer dispute resolution, Committee on the Internal Market and Consumer Protection PE487.752 European Parliament legislative resolution of 12 March 2013 on the proposal for a regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) (COM(2011)0794 – C7-0453/2011–2011/0374(COD)) (Ordinary legislative procedure: first reading).

1.3.1 Necessity of collective redress

Law enforcement guaranties the exercise of the rights granted by the EU legal system.¹³⁰⁹ Within consumers policy, collective redress has acquired an important role,¹³¹⁰ as in the practice, it is unusual that an individual consumer initiates a civil process in order to enforce its subjective rights.¹³¹¹ Being the weakest part in relationship with companies,¹³¹² potential claims of consumers against big companies very oft are “nonstarter” claims.¹³¹³ Many times the consumers are even not aware that their rights have been affected, and they count with a lack of information about the possibilities of enforcing their rights.¹³¹⁴ Due to the passivity of consumers, companies are encouraged to drive unlawful activities, which harm the whole society.¹³¹⁵ Thanks to collective redress the rational lack of interest to sue can be mitigated, as the process economy, legal education and enforcement of Law shall be improved.¹³¹⁶ **Collective redress allows similar legal claims to be bundled into a single court action.** Procedural economy and/or efficiency of enforcement facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.¹³¹⁷ **Thus, consumers protection may be strengthened.**¹³¹⁸ Depending on the type of claim, collective redress can take the form of *injunctive* relief, where cessation of the unlawful practice is sought, or *compensatory* relief, aimed at obtaining compensation for damage suffered. Any form of class action is based in the full representation. Even a single litigant¹³¹⁹ sue in this kind of actions for the completely affected group, for their rights and interests.¹³²⁰ In these actions are all the members of the group subject to the *res iudicata*, even when they are not part of the process.¹³²¹ Collective claims based on consumers associations relies in an abstract entitlement and legal standing of the association, which can act before the court without an own interest in the legal questions which are going to be sustained.¹³²² The standing of the association is granted in public benefit.¹³²³ Thereby public and private interests are linked. An individual affection of rights will overcome in a supra individual affection, improving the access to justice for collective as consumers, which strengths individual position, becoming an effective counter power against companies.

1309 Lakkis, Der kollektve Rechtsschutz der Verbraucher in der Europäischen Union, (Fn.1).

1310 See Reich, Subjektive Rechte von Unions bürgern und Drittstaatsangehörigen unter besonderer Berücksichtigung der Rechtslage nach der Rechtsprechung des EuGH und den Vertrag von Amsterdam

1311 This happens because normally the damage is minor, and the barriers associated to the civil process are huge P. Lakkis, Der kollektve Rechtsschutz der Verbraucher in der Europäischen Union, 12 nWN 1997

1312 Whish. ECLR 1994, 60 (67).

1313 Holmes / Davis, A practical guide to national competition rules across Europe, p. 12.

1314 Oughton & Lowry, Textbook on consumer Law, p. 3.

1315 Micklitz / Reich, Europäisches Verbraucherrecht p. 1149.

1316 Baetge, ZZP 1999, 329–351.

1317 Communication from the Commission tpo the european Parliament, the Council, the European Economic and Social Comitee and tthe Comitee of the regions. "Towards a European Horizontal Framework for Collective Redress". Point 1.2 What is collective redress?

1318 Reich / Micklitz, Europäisches Verbraucherrecht p. 1151; in connection with the public interest in the enforcement of law by means of collective redress see Nagy, Comparative Collective Redress From A Law And Economics Perspective: Without Risk There Is No Reward!, p. 418 ff.

1319 Eichholtz, Die class action und ihre deutschen funktionsäquivalen.

1320 Koch, ZZP 2000, 413-441.

1321 Silver, Class actions- representative proceedings, in: Bouckaert De Geest; Encyclopedia of law and Economics Volume V, p.194.

1322 Reich / Micklitz, Europäisches Verbrauchersrecht, p. 1149.

1323 MünchKomm/ Micklitz, § 13 AGBG RdNo. 5.

1.3.2 Legal basis for collective redress instruments

The legal basis for create rules in consumers field arises form a combination of the article 153. 3 and Art. 95 TEC there are two kinds of measures: those oriented to the realization of the inner market and those which are not. The capacity of the inner market plays an important role in the field of community consumers protection. As per the art. 95. 3 TEC the Commission seeks a high consumer protection standard. The fulfilling of the inner market is based on the Art. 3 lit c) Art. 95 TEC as exclusive competence of the community. The collective redress proposals let them be justified based in the subsidiarity principle. **According to the principle of the effectiveness of community rules, it is labor of the member states to create the necessary procedural measures to enforce the community rules.** The introduction of collective redress mechanism is necessary in order to reach a similar level of enforcement in all member states.¹³²⁴

Only a proper interaction of the substantive and procedural measures can warranty the proper enforcement of the Community Law. The criteria here are the effectiveness as in the enforcement of supra individual interests.¹³²⁵ Private enforcement of subjective rights has been seen as the logic consequence of the modernization of EU competition law.¹³²⁶ As per the Regulation 1/2003 the Commission bet for the private enforcement, as a supporting element to the public activity, in order to reach a higher level of competition. As per the case law of the CJEC, the private enforcement shall not find barriers in the national regulations. National regulations that impede obtain reparation for damages are against the principle of effectiveness.

The injunctions claim is the central collective redress mechanism in Europe, but damages claims are not recognized in all European countries. Germany is a good example of a country – with the exceptions and particular instruments which recognizes- which mostly bet for the collective negative protection while other countries such Spain, France, Greece recognized actions for damages.¹³²⁷ The first consumers program already considered the pretension to proportional reparation of damages, by means of quick, effective and costs saving procedure, as one of the fundamental rights.¹³²⁸ However, until the latest initiatives, the community traditionally has support only negative protection by means of an injunctions claim. Therefore, the reparation of damages has not been part of the community minimum standards.

1.4 Specific developments

In the year 2009 the Commission published a specific study on the matter, the Green Book on Consumers Collective Redress.¹³²⁹ This study of the EU differs from the White book on collective redress by breach of EC antitrust rules insofar the free competition is a specific field. However, the study recognized, *that infringements of consumer rights that affect a very large number of individuals may create distortions in*

1324 Before the introduction of the article 153 TEC, it was the position of association not enough clear. With this article, there is a justification for the activity of the associations before national courts.

1325 *Baetge*, ZP 1999, 329-351.

1326 The European Consumers Organisation, BEUC, Damages actions for breach of EC anti- trust rules- BEUC position on the commissions Green Paper, April 2006.

1327 *Micklitz & Stadler*, Die Verbandsklage, p. 48.

1328 First consumers program, 3, 32.

1329 Brussels, 27.11.2008 COM (2008) 794 final GREEN PAPER On Consumer Collective Redress (presented by the Commission).

markets.¹³³⁰ The Green Paper focused on the resolution of mass claim cases and aims at providing effective means of collective redress for citizens across the EU, it is to say, creating mechanisms by which a large group of consumers affected by a single trader's practice can effectively obtain redress wherever the trader is located within the EU. Before the Study was published, some instruments specifically designed at European level for consumer redress were already undertaken. It can be counted two Commission Recommendations ¹³³¹ to facilitate alternative dispute resolution through simple and inexpensive procedures, setting out principles for the good functioning of out of court settlements. By its side, the so called injunctions Directive ¹³³² provided a procedure enabling consumer associations and public authorities to stop infringements abroad. Public enforcement was strengthened through the Regulation on Consumer Protection Cooperation which allows named national authorities to request another Member State authority to act on an infringement.¹³³³ Neither the Injunction Directive nor the Consumer Protection Cooperation Regulation provide for consumer compensation, which is a gap for a comprehensive defence of consumers.

1.4.1 Green Book on consumers collective redress

After specific studies on the matter, for the Commission, the overall performance of the existing consumer redress and enforcement tools designed at EU level indicated that public cross-border enforcement were not satisfactory. ¹³³⁴ According to a studying following the Green Book, only thirteen Member States counted with judicial collective redress mechanisms. According to the Commission, the existing mechanisms were very different across countries and have diverse results. The Commission found that every national configuration of the collective redress provides more guarantees for the consumer than the existing individual procedures and alternative dispute resolution schemes,¹³³⁵ but at the time of the Study, the Commission realized that only 4 citizens of every 10 millions took part in a collective redress in Europe, which shows the poor "prestige" of these instruments in Europe. The Commission considered that the main obstacles for this poor standing of the collective litigation in Europe is related to the financial risk for the representative party which wishes to lodge the claim, as well as the complexity and diversity of national injunctive proceedings.¹³³⁶ In this regard, the Commission Consumer

¹³³⁰ Introduction 7.

¹³³¹ 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.

¹³³² Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51.

¹³³³ 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, OJ L 364, 9.12.2004, p.1

¹³³⁴ As per the conclusions of the Green paper, the private enforcement was high underdeveloped in the member countries, which contrast to the US experience, where the 90 % of the judicial procedures in competiion follow the path of the privvate enforcement. In connection see *Lande*, Benefits of private enforcement.

¹³³⁵ Evaluation Study, p.93.

¹³³⁶ More specific, the elements which hinder the effectiveness and efficiency of a collective redress mechanism include *insufficient funding, lack of expertise and resources of consumer organisations, the fact that the risk of paying high litigation fees often falls on consumer organisations, the complexity of collective redress mechanisms, very strict prerequisites regarding admissibility and standing (which deter from access to the mechanisms), the length of proceedings and the ability of defendants to delay proceedings, lack of media coverage, the inability to distribute the proceeds of the actions effectively, the dependence of alternative dispute resolution mechanisms on the trader's willingness to cooperate and the use of one*

Policy Strategy¹³³⁷ which precedes the Green Book, fixed the objective of promoting the retail internal market by making consumers and retailers as confident shopping cross border as in their home countries by 2013. According to the Commission, the *elements which contribute to the effectiveness and efficiency of a collective redress mechanism include political and financial support from governments, high media coverage,¹³³⁸ no or low litigation fees for consumers, no or reduced litigation fees for representatives, flexible solutions regarding lawyers' fees and by passing the formalities of normal civil procedures.*¹³³⁹

The option 4 of the Green Book,¹³⁴⁰ proposes a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States. Such a procedure would ensure that every consumer throughout the EU would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases. The issues to be decided include: with regard to representative actions, the financing of entities representing consumers is a key aspect. The costs of the procedure is one of the aspects that consumers associations has to bear in mind before starting any representative action. It is to be reminded that consumers associations normally are considered as a nonprofit organizations and count with limited funds that come from public foundation or from their members fees. Therefore, starting any kind of action by an association involves a cost of opportunity that must be well weight by the claiming association. A possible solution is to find ways to reduce these costs. This can be done by reducing the court fees that associations may have to face or capping legal fees. But this solution will translate the costs, that exists, to the whole society, as someone has to pay the bill of the actually costs. The Commission considers as a possible solution allocating a share of the compensation to the organization to cover its costs. This solution could be practicable, as the associations need some kind of incentive to bring the action to the court, otherwise will bear with all risks without any compensation, which may translate the rations disinterest to sue from the individual consumer to the association. The Commission also considered that third parties, both from the public or the private sector could grant a loan to cover possibly needed pre-financing of court proceedings. In this sense, it is desirable a private foundation rather than a public one, as the private foundation shall make a better estimation of the relationship between costs and benefits than a public entity which is sustained by taxes.

One of the historical concerns in connection with the collective redress is related to the creation of an undesirable litigation industry based on unmeritorious claims, as this would benefit lawyers rather than consumers and create high costs for defendants. In this sense, the Commission wonders which aspects could facilitate meritorious claims and at the same time to discourage the abusive ones. The Commission points at the role of the national judge, which shall be entitled to prove the nature of the claim. As specific measures to undertake, the Commission *considers limiting the standing to a representative entity which would need certification in order to act, such qualified consumers associations or the Ombudsman or applying principles such the loser-pays-principle.* The Commission also consider that the public authorities could play an important role by financing only those associations or entities that are proven to be meritorious. In

collective redress mechanism for all claims, without tailoring the mechanism to the value, needs and specificities of each particular claim. Point 14 Green Book.

1337 COM (2007) 99 final.

1338 Which can act as an incentive for traders to settle and can also help in finding financing companies; in general, it can have a deterrent effect on wrongdoers.

1339 Point 13 Green Book.

1340 Point 48 of the Introduction.

my opinion, this is not desirable to make consumers associations so depending of the public sector. Rather more than depending on the discretionary will of any public authorities, consumers association shall count with a legal developed frame where they find enough incentives to claim bases in an efficient and cheap legal frame. Abusive claims shall be prevent if the national judge is able to charge the cost of the procedure to the losing party or the party that has acted reckless. Another measure to fight against an abusive litigation culture may grant standing only to qualified institutions.

1.4.1.1 Opt-in vs Opt-out

An important discussion of collective redress procedures is related to the specific configuration of the collective redress, namely if it shall have the form of an **opt-in** or an **opt-out procedure**. Concerns on the configuration of the collective redress in Europe arises mostly from the American experience, which for many authors constitutes a system which allows abuses and certain *excrescences*.¹³⁴¹ The above mentioned variants reflects the two basic approaches to the way in which the represented group is composed: by means of an 'opt-in' claim, the class will be conformed only by those individuals or legal persons who actively opt in to become part of the represented group. In the other hand, an "opt-out" system will configure the class with all individuals who belong to the defined group and have been harmed by the same or similar infringement unless they actively choose to opt out of the group. In the 'opt-in' model, the judgement is binding on those who opted in, while all other individuals potentially harmed by the same or similar infringement remain free to pursue their damages claims individually. On the contrary, in the 'opt-out' model, the judgement is binding on all individuals that belong to the "class" except for those who explicitly opted out. The 'opt-in' model is used by most member states that provide for collective redress.¹³⁴² The 'opt-out' model is used in Portugal, Bulgaria and the Netherlands (in collective settlements) as well as in Denmark in clearly defined consumer cases brought as representative actions.¹³⁴³ One of the most concerning aspects of this solution is the issue of information, as a lack of information of the procedure could lead to situations where consumers would be bound by a judgement without their knowledge or without having been able to contest the management of the case. In addition, in opt-out scenarios consumer organizations may face a burden when they have to identify the victims and distribute the compensation.

1.4.1.4.1 Opt-in

As per this model, individual parties have to actively elect to join the action as members of the represented group. An individual who does not opt-in would not benefit from the outcome of the collective action in the first place. However, the decision fallen in this procedure might constitute a precedent which may be used in a later separate claim by the individual consumer. When it is a damage claim, Individual parties have to actively elect to join the action as members of the represented group, but this decision can be taken at any point up until the damages are quantified – even after liability has determined. The Commission is aware, that opt-in systems involve most complicated and cost cost-

¹³⁴¹ *Micklitz*, Collective enforcement of consumer law, in: Boom, W. H., & Loos, M. Collective enforcement of consumer law: Securing compliance in Europe through private group action and public authority intervention, p. 20

¹³⁴² *Great Britain*, BIS Department for business Innovations & Skills Private Actions in competition Law: a consultation on options for reform, April 2012, p. 30.

¹³⁴³ The 'opt-out' system has two advantages that explain why some Member States have introduced it: first, it facilitates access to justice in cases where individual damage is so small that some of the potential claimants would not opt in to the proceedings. The second is that 'opt-out' proceedings give more certainty to the defendant, since the Judgment would not bind only those who opted out.

intensive tasks for claiming consumer organizations, as they will need to do preparatory and expensive works such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff.¹³⁴⁴ This variant, as requests some actively behavior by the affected consumer, may not override the rational disinterest to sue in cases of minor damages, and therefore the class may face difficulties in obtaining a sufficiently high number of consumers opting-in in the case of very low value damage, where consumers are less likely to act. However, the mentioned inconvenient are not so important for the Commission as to avoid promoting excessive or unmeritorious claims, as in the US, where the opt-out model is the standard.¹³⁴⁵ The 'opt-in' system is compatible with the civil law principles that are based in the private enforcement of subjective rights, as it respects the right of a person to decide whether to participate or not in the action; the opt-in system guarantees that the judgement will not bind other potentially qualified claimants who did not join the class. Furthermore, by means of the opt-in configuration, the value of the collective dispute is more easily determined, as it would consist on the sum of all individual claims and therefor, the court is in a better position to assess both the merits of the case and the admissibility of the collective action. Regarding the distribution of recoveries, in an opt-in procedure the court may **distribute the compensation** and allow consumers to join a mass action after the judgement in a test case has been delivered and giving the judgement effect for all victims. Each consumer would, however, have to follow a specific judicial procedure in order to benefit from the judgement.¹³⁴⁶

Despite of the above mentioned precautions in connection with the collective redress, which is show in the preference of the Commission for the opt-in way, there are some doubts remain nevertheless regarding the appropriateness of the opt-in principle instead of the opt-out.¹³⁴⁷In the U.S., where an opt-out regime allows a representative claimant to bring a case on behalf of all members of a class affected, less than two in a thousand class members exercise the right to exclude themselves from the case.¹³⁴⁸ Some surveys show that European consumers would be more incline to take part in an opt-out system rather than an opt-in.¹³⁴⁹

1.4.1.4.2 Opt-out

By means of this configuration of the collective redress, all parties who fall within the definition of the class are bound by the outcome of the case whether unless they actively opt-out of the action. Damages are determined on the basis of an estimation of the

1344 Green Book, Whereas (55).

1345 U.S. Federal Rules of Civil Procedure 20 (a) (1) and 23. Further on subject abusive claims see S. Greve. Harm-less Lawsuits? What's Wrong with Consumer Class Actions. In 2005, in order to ensure more adequate procedural safeguards in class actions, Congress passed the Class Action Fairness Act, which requires that, at the federal level, the class consist of at least one hundred plaintiffs to be certified, greater restrictions on the use of, and fees collected from, coupon settlements, and easier removal of state class actions to federal court. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711-15 (2005); In connection see *Schwartz*, Pepp. L.Rev. 2011, p.571.

1346 Green paper, whereas (57).

1347 *Issacharoff / Miller*, Vand. L.Rev. 2009, 179 (202).

1348 *Eisenberg*, Vand. L.Rev. 2004, 1529 (1534).

1349 The European Consumers' Association, European Group Action – Ten Golden Rules, available at<www.grouppaction4consumers.eu/docs/European%20Group%20Action_Ten%20Golden%20Rules.pdf> For other empirical studies, see also Werlauff, Erik. Class Action and Class Settlement in a European Perspective, EBLR 2013, p.173 ff; *Mulheron*, Reform of Collective Redress in England and in Wales, A Research Paper for Submission to the Civil Justice Council of England and Wales, p.147 ff. See also Gaudet, ECLR 2009, 107-117.

total size of the group with claimants coming forward after the quantification of damages to claim their share. Opt-out solutions are often viewed negatively in Europe due to the perceived risk of encouraging the excessive litigation experienced in some non-European jurisdictions¹³⁵⁰ and its incompatibility with the right to be heard under the human rights convention.¹³⁵¹ Even the U.S. Chamber of Commerce had indeed warned its European counterparts of the risks associated with excessive litigation.¹³⁵² As per the Commission, any collective redress system based on an opt-out instrument should be designed to avoid such risks. A significant number of stakeholders to the Commission study, in particular businesses, strongly opposed the 'opt-out' model, arguing that it is more prone to abuse and that it may be unconstitutional in some Member States, or at least incompatible with their legal traditions. On the other hand, some consumer organizations argue that 'opt-in' systems may fail to deliver effective access to justice for all consumers who have been harmed.¹³⁵³ In their view, the availability of 'opt-out' is therefore desirable, at least as an option in appropriate cases and subject to approval by the court. The most pointed advantage of the opt-out configuration is its capability to enforce the law and its capability to correct negative markets. As this action do not need of further behavior or initiative of the affected consumer, it's a good instrument for the private enforcement of consumers law.

1.4.2 Communication "Towards a European Horizontal Framework for Collective Redress"

The European Parliament's resolution 'Towards a Coherent European Approach to Collective Redress' of 2 February 2012¹³⁵⁴ takes *well note* of the widely divergent opinions of stakeholders expressed on the issue of collective redress. *As per the views and arguments put forward during the public consultation,¹³⁵⁵ and, makes it possible to identify the main issues that must be addressed in a coherent manner in a European horizontal framework on collective redress. In particular, it is common ground that any European approach should:¹³⁵⁶*

- Be capable of effectively resolving a large number of individual claims for compensation of damage, thereby promoting procedural economy
- Be capable of delivering legally certain and fair outcomes within a reasonable time frame, while respecting the rights of all parties involved
- Provide for robust safeguards against abusive litigation;
- Avoid any economic incentives to bring speculative claims

1350 Point 56, Green Book.

1351 *Micklitz*, Collective enforcement of consumer law, in: Boom, W. H., & Loos, M. Collective enforcement of consumer law: Securing compliance in Europe through private group action and public authority intervention, p. 20.

1352 *Nölke*, JCMS 2007, 487 (500 ff).

1353 The UK consumer organisation which refers to its experience in the Replica Football Shirts case, where an 'opt-in' collective action (follow-on damages action in the competition field) ultimately secured compensation for only a tiny percentage of those harmed in the terms of the decision of the competent authority.

1354 European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

1355 Notably of the position of the European Parliament, together with the expertise gathered by the Commission in the course of previous activities in the area of consumer protection and competition

1356 Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. "Towards a European Horizontal Framework for Collective Redress".

1.4.2.1 Information of the claim

The Commission recognizes that effective information and awareness for consumers that an action is prepared is a vital condition, but it has to weigh two opposite interests. By one side, the information of the claim must ensure, that those who have been harmed by the same or similar alleged infringement learn of the possibility to join a representative action or a group action and, thus, their right to access to justice is preserved. On the other hand, the way this information is spread, may not affect legitimate interests of corporations, as any advertising (i.e. on TV or via flyers) informing of the expected action may have a negative impact on the reputation of the defendant. Therefore, the configuration of collective redress shall weight both interests at stake.

*According to the Commission, there is a consensus among stakeholders on the importance of rules stipulating that a representative entity has an obligation to effectively inform potential members of the represented group. Many stakeholders suggest that the court should play an active role in checking that this obligation is fulfilled. For any type of collective action, any rules regarding the provision of information to potential claimants should balance concerns regarding freedom of expression and the right to access information with the protection of the reputation of the defendant. The timing and conditions in which the information is provided will play an important role in ensuring that this balance is kept.*¹³⁵⁷

1.4.2.2 Lex causae

One mentioned aspect of the collective redress is its capacity to enforce regulations that otherwise would not be applied.¹³⁵⁸ Nevertheless, this possibility to enforce material law shall not prejudice the classification of the collective redress as a procedural instrument. Therefore, it shall be applied the principle that *lex fori regit processum*. Classified as a procedural instrument, the question about the *lex causae* shall not present any specialty, as in any other field, it shall be applied the ordinary rules of International private law. Nevertheless, as the possible cases can affect several countries in the common market, the class of claimants can be “international”, and regulations from different countries could be applied. In the USA, the tendency is to apply the *lex fori*.¹³⁵⁹ If the Court considers that more than one law is applicable, normally the collective claim will be rejected.¹³⁶⁰

In cross-border cases the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction¹³⁶¹ would be applicable to any action including an action brought to court by a public authority, if it is exercising private rights (e.g. an ombudsman suing for consumers). Representative actions would have to be brought to the trader's court or the court of the place of performance of the contract (Art. 5 (1)). In mass cases where

¹³⁵⁷ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions. "Towards a European Horizontal Framework for Collective Redress". Point 3.5. p. 12.

¹³⁵⁸ *Carballo Piñeiro*, Derecho de la competencia intereses colectivos y su proyeccion procesal, p. 482.

¹³⁵⁹ In this regard, the North American Supreme Court stated that the *lex fori* will be applied as long as they exists enough connection with the *fori*. *Phillips Petroleum Co. / Shutts Vd* .472 U.S. 797 (1985).

¹³⁶⁰ See in the Matter of Rhone-Poulenc Rover, Inc., 51 F. 3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re General Motors Corporation Pick-Up Truck Fuel Tank Products liability litigation, 53 F. 3d 768 (3d Cir.), cert. denied, 116 S. Ct.88 (1995); *Castano/ The American Tobacco Co.* N° 95-30725, N° 951996 WL 273523 (5th Cir., May 23, 1996).

¹³⁶¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of Judgments in civil and commercial matters, OJ L12, 16.1.2001, p.1.

consumers come from different Member States, the court would have to apply to contractual obligations the different national laws of the various consumers (Art. 6 Rome I Regulation).¹³⁶² This would cause practical problems in cases with consumers from many different Member States. A solution would be to introduce an amendment to the rules imposing the law of the trader in collective redress cases. Other options are the application of the law of the market most affected or of the Member State where the representative entity is established. In similar situations in the area of product liability (Art. 5 Rome II Regulation)¹³⁶³ a choice of law agreement after the damaging event occurred (Art. 14 (1a) Rome II Regulation) would help.¹³⁶⁴

2. Proposals for collective redress

On 11 June 2013, the European Commission published a serial of documents related to collective redress. The current proposal follows up on earlier policy initiatives in competition field, in particular a 2005 Green Paper and a 2008 White Paper. It included a Recommendation to the member countries of some aspects of the collective redress related to the injunctions or damage reparations, as well as an associated communication,¹³⁶⁵ and a proposal for a Directive on damages actions for breaches of EU Competition law.¹³⁶⁶ The Recommendation complements the proposal for a Directive on antitrust damages which will help the victims of violations of antitrust rules to obtain compensation through the legal actions available in Member States.¹³⁶⁷ Finally the collective redress was not included in the proposal for a Directive in antitrust damages. While the Recommendation calls on Member States to put in place collective redress mechanisms, the Directive leaves it to Member States whether or not to introduce collective redress actions in the context of private enforcement of competition law,¹³⁶⁸ but enters into the national procedure rules in order to harmonize damages claims across Europe.

1362 Green Paper, (60). 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), OJ L177, 4.7.2008, p.6

1363 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p.40.

1364 Point 60.

1365 COM (2013) 401 final.

1366 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM (2013) 404, 11.6.2013.

1367 See (IP/13/525, MEMO/13/531).

1368 Las acciones colectivas en Europa: ¿Un paso adelante? Las líneas generales propuestas en la Recomendación de la Comisión Europea sobre los principios comunes aplicables a los mecanismos de *recurso colectivo* de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (2013/ 396/ UE) Marta Otero Crespo. Available in http://revistas.usc.es/boletincede/Editorial_noviembre2013_MartaOteroCrespo_Acciones_Colectivas.pdf. Retrieved last time on 20 January 2017.

2.1 Commission Recommendation on collective redress mechanisms concerning violations of rights granted under Union Law

2.1.1 Characteristics

The Recommendation is a so called soft law.¹³⁶⁹ The promotion of the collective redress in Europe fall within the private enforcement of rights and is primarily oriented to consumers protection, protection of personal information, competition law, etc. ¹³⁷⁰ Based on the Art. 81 TFEU, this Recommendation shall reflect the waging of interests between consumers and corporations. The firsts shall improve their access to justice and the seconds shall be prevent from abusive claims that may drive to financial or reputation damages.¹³⁷¹ The fields content in the Recommendation shall not be understood as *numerus clausus*, as the Recommendation recognizes that these can be extended to any other field in which rights granted by the EU are threatened, ¹³⁷² where this Recommendation refers to the violation of rights granted under Union Law, it covers all the situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and legal persons.¹³⁷³

The Recommendation ¹³⁷⁴ is focused on the developing of collective redress instruments by the EU member countries on a harmonized basis.¹³⁷⁵ It is to say, to enforce at national level rights granted under European Law. This shall be based on general common principles among the member countries and configured to prevent possible abuses. Different than previous European developments in collective redress, which seek for negative protection, the recommended instruments do not seek that the unlawful act is not happening again, they are rather oriented to compensate the victim. Thereby, the collective redress proceedings appear as a tool to improve access to justice for citizens and companies in disputes concerning European law. It is a supplement to public enforcement in some areas such as competition law, which has provided an indirect protection of consumers.

2.1.2 Precautions

This Recommendation puts forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting

¹³⁶⁹ Whose principles shall be developed in a 2 years time deadline. Deadline until 26th July 2015. Another 2 years are expected in order to evaluate the application of its principles. So the temporal frame for this Recommendation in order to produce legal effects shall be of 4 years. Recomendación de la Comisión Europea sobre los principios comunes aplicables a los mecanismos de *recurso colectivo* de cesación o deindemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (2013/ 396/ UE) Marta Otero Crespo.

¹³⁷⁰ The proposal for a Directive lets in hands of member states the introduction or not of collective redress instruments in competition field. *“for the Commission, the horizontal Recommendation and the sectors specific Directive are a ‘package’ that, seen as a whole, reflects a balanced approach deliberately chosen by the Commission. While the adoption procedures differ for both measures under the Treaties, significant changes to this balanced approach would require the Commission to reconsider its proposal”*. Point 10 of the Communication.

¹³⁷¹ Buchner, Kollektive Rechtsschutz, p. 161.

¹³⁷² Point 6, 7.

¹³⁷³ Whereas (6) of the Recommendation.

¹³⁷⁴ C (2013) 3539: Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹³⁷⁵ Point 12.

the different legal traditions of the Member States. These principles should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards.¹³⁷⁶ These measures are related to preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in the Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.¹³⁷⁷

In connection with conditional attorney's fees (*cuota litis*), as general criteria the Recommendation beg for its prohibition, accepting it as an exception when the national law maker warranties a fully restitution to the affected parties. Those Member States that exceptionally allow for contingency fees, as is the Spanish case, should provide for appropriate national regulation of those fees in collective redress cases. The Recommendation also contents some precautions related to the availability of funding for collective redress litigation, which should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest.¹³⁷⁸ *A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met.¹³⁷⁹*

2.1.3 Proposed instruments

The Recommendation includes two different kind of claims, the injunctions and the damage claims. These actions must be exercised by qualified institutions for the defence of a same nature right or interest or groups *ad hoc*. *The requisite is the existence of a massive damage what happens when 2 or more natural persons suffered a damage derived from the same unlawful act. Different to the American requisite of numerosity, the Recommendation does not establish a minimum of affected parties in order to appreciate the massive damage. The Recommendation pretends to establish common elements to the collective redress for a better harmonization between the member countries. These elements are related to procedural issues, such standing, claim accepting, lawyers' fees costs of the procedure, etc... and more specific questions related to trans-border cases.*

2.1.4 Standing

As per this Recommendation, it shall be introduced a European variant of class action in Europe, with a lot of precautions in order to avoid the bad consequences of the

¹³⁷⁶ Point 13, C(2013) 3539: Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹³⁷⁷ Point 15, C(2013) 3539: Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹³⁷⁸ Point 19, C(2013) 3539: Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

¹³⁷⁹ Point 20, 21, C(2013) 3539: Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

American experience. One of the capital precautions fall in the adequacy of representation. Instead of qualified lawyers (American model), the standing is granted to qualified institutions. Subsequently, the member parties of the group must not be individually identified, is sufficient that the claim is limited to a general description of the group, or the injured parties are described according to the injuring act. This is a requisite of commonality in frame of the American Rule 23 FRCP.¹³⁸⁰

In order to compensate the non-individual identification of the group members, Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 4 or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.¹³⁸¹ Qualified institutions are to be found already in other European regulations such the so called injunctions Directive.¹³⁸² These included consumers organizations, authorized to lodge claims before any member state national court. For some authors this European stake is not sufficient in order to avoid abusing claims, as there are not minimum standards in order to appear in the qualified institutions list.¹³⁸³ In the praxis, the qualified institutions will need the support of qualified lawyers.

As these institutions have to face the cost of the procedure is to expect fee agreements with these law firms. As the Recommendation exclude the contingency fee as a general rule it is to be expected a high competition between the member countries.¹³⁸⁴ The member states must designate which institutions are granted with standing according to 3 requirements: ¹³⁸⁵ They are nonprofit organizations; they count with a direct relationship between the aim of the entity and the affected rights or interests; the association must count with the necessary means in order to offer a proper defence. If the Association fails to fulfil the requirements, then loss the standing. In order to avoid miss funded claims, will be stressed the necessity of verify in an early stage of the procedure if the claimant party is qualified. This task control fall over national courts.¹³⁸⁶ It is unclear if these requirements shall also apply to Ad hoc entities.¹³⁸⁷

In cases where different entities claim to represent mass tort victims or consumers, national courts should develop adequate selection criteria. However, used to individual claims, judges and courts will find themselves in an awkward situation.¹³⁸⁸ However, since the case management of mass disputes differs from the case management of ordinary claims, it may happen. It has been proposed training programs for judges who will be dealing with collective redress actions.¹³⁸⁹

1380 Besides, the claim can be lodged based in common questions of law Art. 6 & 7.

1381 Recommendation, 2013/396/EU, OJ L 201, 26.7.2013, p. 60–65, point 6.

1382 Former EC Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests *OJ L 166, 11/06/1998, p. 51–55* now Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *OJ L 110, 01/05/2009, p. 30–36*.

1383 So *Hess*, *Kartellrechtliche Kollektivklagen in der Europäischen Union*, p. 158, also *Roth*, in: *Casper*, *Auf dem Weg zu einer europäischen Sammelklage?* 2009, pp. 109-130.

1384 *Hess*, *Kartellrechtlicher Kollektivklagen in der europäischen Union*, p.158 ff.

1385 Article 4.

1386 Article 5.

1387 For an analysis of the Recommendation, see Astrid Stadler, *The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues*, NIPR 2013, p.483ff.

1388 *Büyüksagis*, SRBL 2015, 18 (27). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1389 *Tzankova*, *Managing the Mass: From Case Managing Mass Disputes to Designing Claim Resolution Facilities*, working paper presented at the UNIDROIT/ELI Conference in October 2013 in Vienna, Austria.

2.1.5 Costs of procedure

It is a key element, as the costs of the procedure are one of the grounds for the lack of interest in individual claims. The Recommendation allows financial support by a third party, (*third party funding*), which is object of control measures as well in order to avoid abuses. As per the art- 14-16 the claimant party shall inform the court about the origin of the financial means which will sustain the claim. As financing by a third party is possible, the Recommendation includes some precautions to avoid conflict of interests as well. It is also necessary that the part bringing the action count with the necessary means in order to take the action to the end and to face the costs of a negative decision. Finally, as another possible precaution measure, the Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law.¹³⁹⁰

2.1.6 Opt-in vs. Opt-out

As specific principles related to collective redress, the European Commission take position for the opt-in configuration, which is common accepted as more compatible with the European tradition.¹³⁹¹ The point 3.54 of the Parliament Communication "Towards a European Horizontal Framework for Collective Redress" gathers the inconvenience of the opt out model, as they would be more prone to abuses or unconstitutional violations. Against this critics have been pointed the efficiency of this instruments in the countries where it has been implemented.¹³⁹² **The Commission recommends that in order to be part of the class and to be affected by the binding effects of the decision it shall be necessary that the affected party expressly states its will of being part of the class,** as the opt-in variant is defined. Exceptionally, the Recommendation accept opt-out instruments, for the cases when there are already foreseen by law or court decision, grounded on an effective administration of justice.

The Recommendation, is very prudent with the respect to the right to be heard before the court, as according to its text, an individual member of the class, shall be free to leave the procedure at any time, before the final decision or the settlement is reached. The procedural treatment in this case shall not differ to what applies to withdrawal in individual actions, namely, shall preserve its right to pursue its claim in a later procedure. Such condition shall not prejudice of the necessary measures of the member countries in order to warranty a good administration of justice. This Recommendation of the Commission does not specify the binding effects of the decision fallen in a collective redress procedure. The Spanish model is a clash against the principles of the

¹³⁹⁰ Las acciones colectivas en Europa: ¿Un paso adelante? Las líneas generales propuestas en la Recomendación de la Comisión Europea sobre los principios comunes aplicables a los mecanismos de *recurso colectivo* de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (2013/ 396/ UE) Marta Otero Crespo. Available in http://revistas.usc.es/boletincede/Editorial_noviembre2013_MartaOteroCrespo_Acciones_Colectivas.pdf Visited last time on 1st April 2014.

¹³⁹¹ This instrument will be more compatible to the right to be heard by the court, as the binding effects of the decision does not extend further to other parties that were not present in the process, *Otero Crespo*, p. 8. Although some doctrinal discussions, about the impossibility to classify the Spanish collective redress of the LEC, the Spanish system gathers an opt in system with *res iudicata* effect. *Requejo Isidro / Crespo Otero*, "Collective redress in Spain: recognition and enforcement of class action Judgments and class settlements", in: *Fairgrieve & Lein* (Eds.), *Extraterritoriality and collective redress*, Oxford University Press, 2012, pp. 309 y ss., esp. pp. 313 y ss.; *Gascón Inchausti*, *Tutela judicial de los consumidores y transacciones colectivas*, pp. 25 -27.

¹³⁹² *Requejo Isidro & Crespo Otero*, *Collective Redress*, p. 6.

Recommendation. As seen in the Spanish part of this work, Spain has developed a model that ensures that the affected interests are taken into the court, but does not guarantee the participation of affected consumers in the procedure, which, could be defined as the right of the interest to be heard by the court, rather than the right to be heard by the court of the holders of the right. In connection with the German Law, one characteristic of the German civil procedure is the so called „ *Prozessrechtsverhältnis*“, in which both parties claimant and defendant interact through the court. The parties will delimit the scope of the process, (according to the §§ 265ff, 325 ff ZPO), object of the process and its legal effect. This principle warrants also the right to be heard by the court. An opt out figure is hard to be considerable compatible with these exposed principles. Based on the principle of two parties procedure, exists for each connected claim this right or principle. Even in the submission of the claim will be a plurality unlimited of *Prozess rights* with undetermined parties established. Other questions such the retrieve of the representative claimant will affect the scope of the process. The retrieval can success by means of the article 269 ZPO, and in the cases of a collective opt out claim it is an alien possibility. A retrieval with permission of the court is *de lege ferenda* possible.¹³⁹³ The protection of the defendant before a new claim remains still, based on the § 269 II ZPO.

2.1.7 Information issues

Following the considerations of the Green Paper, the Recommendation, wants (recommends) member States to ensure that it is possible for the plaintiff to spread information to the generality about a claimed violation of rights granted under Union law and their intention to seek injunction or to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, *ad hoc* certified entity, a public authority or for the group of claimants should be ensured as regards the information on the on-going compensatory actions.¹³⁹⁴ The requisite of publicity is a capital question in the collective redress, specially in those models which choose an opt - out configuration. In Spain it play a major role as the Spanish civil procedure Act (LEC) build its class action system depending on the capability to ascertain the affected consumers.

*The information duties must be done taking into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court and without prejudice to the Union rules on insider dealing and market manipulation.*¹³⁹⁵ This brief regulation let opened some issues in connection to the right to be heard before the court. The Recommendation includes only the German principle to „notice requirement“, without further clarifications. Remains the question of determinable injured parties shall be individual noticed. As per the nature of the information, it has of course be objective and content the necessary information in order to allow the individual consumer to decide if want to join the class, or eventually opt-out of the same, thus the possibility to obtain a recovery shall be mentioned. A public register is promoted as well, but it will serve more consumers associations rather than individuals.¹³⁹⁶

¹³⁹³ Hess, Kartellrechtlicher Kollektivklagen, p. 160.

¹³⁹⁴ Point 10 of the Recommendation Commission Recommendation of 11June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law *OJ L 201, 26.7.2013, p. 60–65.*

¹³⁹⁵ Point 11 of the Recommendation Commission Recommendation of 11June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L 201, 26.7.2013, p. 60–65.*

¹³⁹⁶ Points 35-38.

2.1.8. Alternative disputes resolution (ADR´s)

The Recommendation also take under consideration collective alternative disputes resolution instruments at a transnational basis. As per the Recommendation, the member countries shall improve measures in order to improve settlements according to the requisites of the Directive 2008/52/CE.¹³⁹⁷ Starting ADR´s, will interrupt the time limitation, and a judicial control ex post shall be implemented in order to check that the rights of the involved parties are protected.

2.1.9 Reparation of damages

According to the European tradition, no punitive damages are recommended. In this sense, the attached Communication of 11 de June of 2013 clearly states that the punitive and deterrence effect must be conducted by public bodies.¹³⁹⁸

2.1.10 Cross-border cases

*As per the Recommendation, the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.¹³⁹⁹ Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.¹⁴⁰⁰ As per the border trespassing nature of the collective redress instruments, these shall be compatible or understood in the frame of the **Council Regulation (EC) No 44/2001¹⁴⁰¹ (RBI)**, as it is the main regulation in the coordination of civil procedures within the EU. Characteristic of the regulation is that also is based in the two parties procedure. Therefore, it needed further developments in order to make an opt out claim compatible.¹⁴⁰²*

2.1.11 Jurisdiction

As per its nature, the Forums of the RBI, may be hard to be applicable in collective redress situations.¹⁴⁰³ The **Regulation (EC) No 44/2001** gathers as international legitimation the traditional legal venue, the domicile of the defendant,¹⁴⁰⁴ measure contrary to the claimant interest. In consumers law, it makes bigger the inequality between consumers and companies. Thus, a new territorial legitimation shall be considered. The

¹³⁹⁷ 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. O.J. EC No L (Legislation), Edition 136, Year 2008, p.3 - 8

¹³⁹⁸ See point 3.1. de la Communication.

¹³⁹⁹ Article 17.

¹⁴⁰⁰ Article 18.

¹⁴⁰¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *Official Journal L 012, 16/01/2001 P. 0001 - 0023*

¹⁴⁰² Hess, *Kartellrechtlicher Kollektivklagen*, p. 160.

¹⁴⁰³ According to the CJEC case law CJEC 19 february 2002, as. C-256/00, Besix / Wabag Plafog; Carballo Derecho de la competencia intereses colectivos y su proyeccion procesal; Observaciones a proposito del Art. 6 del Reglamento "ROMA II" p. 486 ff.

¹⁴⁰⁴, (Art. 2 und 60 EuGVO) Stadler, *Grenzüberschreitender kollektiver Rechtsschutz in Europa*, *Stadler JZ* 2009, 121 (124).

Regulation does gather a specific section dedicated to contractual consumers relationships. According to the article 16 Reg. 44/2001 a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.¹⁴⁰⁵ In matters relating to tort, delict or quasi-delict cases, it will be considered the Art. 5.3 Reg. 44/2001EC, that considered the damage place as legal venue. Nevertheless, the CJEC has made a narrow interpretation of this article. As per the *Shevill* decision¹⁴⁰⁶ the Court only allows this jurisdiction in order to recover damages with occur in this country. Exceptions made in the case of violation of personal right arising in internet.¹⁴⁰⁷ Another exception to the general rule in which may apply in consumers affairs is based on the art. 6.1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable Judgments resulting from separate proceedings; According to this provision, the legal venue can be of the joinder action group. Requisite is that the at least one defendant is claimed in its general legal venue (art. 2, 59 Rgl. 44/2001). It is also necessary a connection between the considered claims. It allows the forum shopping. ¹⁴⁰⁸ If the liability of the companies is established by contract, it opens a new jurisdiction, namely the contract jurisdiction. (Art. 5. 1 Rgl 44/2001).¹⁴⁰⁹

2.1.12 Procedures coordination

There are considerable risks related to the *lis pendens* and competition between courts. As per the Art. 27 Rgl. 44/2001, where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.¹⁴¹⁰ Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.¹⁴¹¹ For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable Judgments resulting from separate proceedings.¹⁴¹²

The cases must be identical in order to apply the *lis pendens* of the art. 27 Rgl.44/2001. As per the article Art. 28 Rgl. 44/2001, later courts parallel procedures to be stopped until the first court find its decision. This is in any case decision of the court. *Redress* can only take place in exclusive legal venues, it must succeed in the place of the defendant, what is prejudicial for the claimant.¹⁴¹³ Thus, the *lis pendens* rules of the Regulation, in its articles 27- 30 Rgl. 44/2001 are inappropriate for opt out class

1405 This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

1406 CJEC Judgment of 07th March 1995, Case C-68/93, *Shevill /Presse alliance*, ECLI:EU:C:1995:61

1407 *Hess*, JZ 2012, 189 (190).

1408 Example is the CDC m LG Dortmund am 16.03.2009 being claimant a German company and defendants companies from Finland, Holland Germany, Spain, Belgian and France.

1409 In consumers field, also the Art. 15 f. Of the EuGVVO.

1410 Art. 27.1.

1411 Art. 27.2.

1412 Art. 27.3.

1413 *Roth*, *Sammelklagen im Bereich des Kartellrechts*, in: *M. Casper, A. Janssen, P. Pohlmann, & R. Schulze* (Eds.), *Auf dem Weg zu einer europäischen Sammelklage?* pp.109-134.

actions.¹⁴¹⁴ Parallel procedures are possible and allows transfer of claims in broad sense (multi district litigation of 28 usc § 1407) and associations of claims (consolidation).¹⁴¹⁵ The *lis pendens* of the EU tradition based on the priority cannot deal proper with opt out claims. The proposal for directive would makes necessary amendments in the Regulation 44/2001.

2.2. Proposal for a **Directive on antitrust damages**¹⁴¹⁶

2.2.1. Characteristics

The current legal frame in Europe assumes that infringements to European competition rules cause a harm to competition conditions in the market. That implies, that for the competition authorities and other enforcement agencies there do exist a proper price in the market for products and services and the agreement between corporations may alter the proper price that the consumer would have to pay. Thereby the defence of the free competition is linked to consumers protection. Such stake considers, besides the disturbance to the general structure of the Market, that these infringements causes specific damages to market participants which have a right to be compensated. This damages to the market are prosecuted mostly by the Competition Authorities rather than by individual consumers. As per information of the European Commission, only a 25 % of victims of such damages go to Court. Beyond traditional inconveniences associated to enforcement of consumers rights before the national court, at European level, there is a lack of harmonization in key aspects such the disclosure of evidence, standing costs of the procedure, etc... which increases barriers to transnational enforcement of consumers rights.¹⁴¹⁷ In competition field there are specific decisions of the CJEU,¹⁴¹⁸ based on the principle of effectiveness of the European regulations which consider that the absence of an effective reparation principle will jeopardize the rights granted to the Union to particulars. Therefore, the Commission decided to approach this issue through the Proposal for a **Proposal for a Directive** of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,¹⁴¹⁹ escort by a **Communication from the Commission on quantifying harm** in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union¹⁴²⁰ and a **Practical Guide on Quantifying Harm** in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.¹⁴²¹

The Proposal seeks to ensure the effective enforcement of the EU competition rules by optimizing the interaction between the public and private enforcement of competition

1414 The American model does not foresee cases of *lis pendens*.

1415 See *Eichholtz*, Die US amerikanische class action p.68 f.

1416 Following will be extracted selected original texts from the Proposal and will be briefly commented, as the analyse come in the next chapter.

1417 Besides these specific substantive obstacles to effective compensation, there is wide diversity as regards the national legal rules governing antitrust damages actions and that the diversity has actually grown over recent years. This diversity may cause legal uncertainty for all parties involved in actions for antitrust damages, which in turn leads to ineffective private enforcement of the competition rules, especially in cross-border cases. Explanatory Memorandum 1.2 p.5.

1418 CJEC Judgment of 20th September 2001, Case C-453/99- *Courage/Crehan*, ECLI:EU:C:2001:465, CJEC Judgment of 14 June 2011, Joined cases C-295/04 to C-298/04 Manfredi, ECLI:EU:C:2006:461. CJEC Judgment of 6th November 2012, Case C-360/09 *Pfleiderer*, CJEC Judgment of 6th November, Case C-199/11 *Otis and Others*, 6 June 2013, C-536/11 *Donau Chemie*, ECLI:EU:C:2013:366.

1419 COM (2013) 404, 11.6.2013.

1420 C (2013) 3440, 11.6.2013.

1421 SWD (2013) 205, 11.6.2013.

*law; and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.*¹⁴²² It is expected an efficient and uniform exercise of the right to be repaired by the victims of damages derived from competition infringements. At the same time, this exercise shall not interfere in the task of national or European competition authorities, specially in these aspects related to leniency programs, as it is gathered by the CJEC.¹⁴²³

2.2.2 Legal basis

As the wide case law of the CJEC in this matter recognizes, the private enforcement is necessary for the full effectiveness of the EU competition rules and in particular, the practical effect of the prohibitions they contain, would be put at risk if affected citizens do not have an easy and direct access to justice. It considered that damages actions strengthen the working of the EU competition rules and can thus make a significant contribution to maintaining effective competition in the EU.¹⁴²⁴ As per the Explanatory Memorandum of the Proposal, it is based on both Articles 103 and 114 of the Treaty, because it pursues two equally important goals which are inextricably linked, namely (a) *to give effect to the principles set out in Articles 101 and 102 of the Treaty and (b) to ensure a more level playing field for undertakings operating in the internal market, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market.*¹⁴²⁵ In seeking to improve the conditions under which injured parties can claim damages and to optimize the interaction between the public and private enforcement of Articles 101 and 102 TFEU, the proposal clearly gives effect to these provisions, but the harmonization on the common market (direction to a collective redress market) is also considered. It is sought to mitigate those marked differences described in a 2004 comparative study and in the 2008 White Paper and its accompanying Impact Assessment. For the Commission these differences have increased due to diverging legislative and judicial developments in only a limited number of Member States. As per the Explanatory Memorandum of the Proposal, *it is in line with the subsidiarity principle since its objectives cannot be sufficiently achieved by the Member States, and there is a clear need for, and value in, EU action. A legally binding act at EU level will be better capable of ensuring that full effect is given to Articles 101 and 102 of the Treaty through common standards allowing for effective damages actions across the EU, and that a more level playing field is established in the internal market.*¹⁴²⁶

2.2.3 Proposed measures

The Proposal establish a serial of substantive and procedural regulations as a common bases for all European member countries in order to reach harmonization in this field. It also contains regulations in order to make compatible decision of European or

¹⁴²² Explanatory Memorandum 1.2 of the Directive.

¹⁴²³ See CJEC Judgment of 14th Juny 2011, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389.

¹⁴²⁴ See CJEC Judgment of 20th September 2001, Case C-453/99, *Courage and Crehan*, [ECLI:EU:C:2001:465; Judgment of 13th July 2006, Joined Cases C-295/04 to C-298/04, *Manfredi*, ECLI:EU:C:2006:461; judgment of 14th Juni 2011, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389; and CJEC Judgment of 6th November 2012, Case C-199/11, *European Community v. Otis NV and others*, ECLI:EU:C:2012:684.

¹⁴²⁵ Proposal. 3.1.

¹⁴²⁶ Explanatory Memorandum Point 3.2

national competition authorities with the private enforcement. The proposed Directive contains provisions regulating following issued:¹⁴²⁷

- Parties will have **easier access to evidence** necessary in actions for damages. In particular, if a party needs specific documents that are in the hands of other parties or third parties to prove a claim or a defence, it may obtain a court order for the disclosure of those documents. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.
- **Decisions of national competition authorities**, like the Commission's decisions, will constitute **full proof before civil courts** that the infringement occurred.
- **Clear limitation period rules are established**, so that parties have sufficient time to bring an action. In particular, from the moment a victim has the possibility to discover that he or she suffered harm from an infringement, that victim should have a period of at least five years to bring a claim. This period is suspended if a competition authority starts proceedings, so that victims can decide to wait until the public proceedings are over before they bring a claim.
- Victims should obtain **full compensation for the actual loss suffered but also for lost profits**.
- The proposal clarifies the **legal consequences of the 'passing on'**. Direct customers of an infringer sometime offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered from the price increase. However, since it is difficult for indirect customers to prove that they suffered this pass-on, the proposed Directive facilitates their claims by establishing a rebuttable presumption that they suffered a part of the price increase, to be estimated by the judge.
- The proposal establishes a **rebuttable presumption that cartels cause harm**. This will facilitate compensation, given that victims often have difficulty in proving the harm they have suffered. The presumption is based on the finding that more than 90% of cartels cause a price increase (as found by an external study). In the very rare cases where a cartel does not cause price increases, infringer can still prove that their cartel did not cause harm.
- **Any participant in an infringement should be responsible towards the victims for the whole harm caused by the infringement**, with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, this should not apply to infringers who cooperated with an investigation and obtained immunity from fines before a competition authority; these companies should compensate only their own purchasers.

2.2.4 Compensation

As per the Explanatory Memorandum of the Proposal, the second main objective is to ensure that victims of infringements of EU competition rules can effectively obtain compensation for the harm they have suffered. While the right to full compensation is guaranteed by the Treaty itself and is part of the *acquis communautaire*, the practical exercise of this right is often rendered difficult or almost impossible because of the applicable rules and procedures. Despite some recent signs of improvement in a few Member States, for the Commission, to date most victims of infringements of the EC competition rules in practice do not obtain compensation for the harm suffered. So, the proposal aims to ensure that throughout Europe, victims of infringements of the EU competition rules have access to effective mechanisms for obtaining full compensation for the harm they suffered. This will lead to a more level playing field for undertakings in the internal market. Article 2 recalls the *acquis communautaire* on the EU right to full compensation. The proposed Directive thus embraces a compensatory approach: its aim is to allow those who have suffered harm caused by an infringement of the competition rules to obtain compensation for that harm from the undertaking(s) that infringed the law. In order to calculate the loss, it will apply the European case law in the matter, by not excluding any type of damage (material or immaterial) that arises from by an

¹⁴²⁷ http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html, retrieved last time on 01.10.2019.

*infringement of the competition rules. Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.*¹⁴²⁸

In connection with the Principles of effectiveness and equivalence, the Article 3 provides that any national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 of the Treaty shall not be less favorable to the injured parties than those governing similar domestic actions.

2.2.5 Disclosure of evidence

As per the Explanatory Memorandum of the Proposal, the regulated disclosure of evidences within the member countries shall ensure a minimum level of effective access to the evidence needed by claimants and/or defendants to prove their antitrust damages claim and/or a related defence. *The barriers for potential claimants in order to access to evidence was recognized in the Green Paper as one of the main obstacles to a more effective system of antitrust damages actions the disclosure of evidences. Much of the relevant evidence a claimant will need to prove his case is in the possession of the defendant or of third persons and is often not sufficiently known or accessible to the claimants, the so called 'information asymmetry'. The opportunity to ask the judge to order disclosure of information is therefore available to both parties to the proceedings.*¹⁴²⁹

*At the same time, the proposed Directive contents some precaution measures in order to make compatible the disclosure with other legal goods (such protect any business secrets or otherwise confidential information disclosed during the proceedings). It also avoids overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses, following the different legal orders of the Member States. As per the proposal, national Courts must also be able to impose sanctions which are sufficiently deterrent to prevent destruction of relevant evidence or refusal to comply with a disclosure order. These are foreseen in the 8 of the proposal.*¹⁴³⁰ The Spanish civil procedure act contents already a specific instrument (preliminary proceeding Art. 256 LEC) in order to obtain from the defendant necessary information. It includes also sanctions for the case the that compelled defendant does not provide the required information.¹⁴³¹ Decisions of National competition Authority, with some exceptions, can as general rule be used in actions for damages.

2.2.6 Effect of national decisions, limitation periods, joint and several liability

As per the article 9 of the Proposal, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. Regarding periods of limitation, as per the article 10, the minimum deadline is of five years. *Member States shall ensure that the limitation period shall not begin to run before an injured party knows, or can reasonably be expected to have knowledge of:*

- (i) the behaviour constituting the infringement;*
- (ii) the qualification of such behavior as an infringement of Union or national competition law;*

¹⁴²⁸ Explanatory Memorandum of the proposal. Selected text.

¹⁴²⁹ Expl. Memo. Pt. 4.2 (Articles 5 – 8). As example will be used the Directive 2004/48/EC on the enforcement of intellectual property rights. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004, p. 45

¹⁴³⁰ Expl. Memo. Pt. 4.2 (Articles 5 – 8). As example will be used the Directive 2004/48/EC on the enforcement of intellectual property rights

¹⁴³¹ See Chapter III of this work.

- (iii) the fact that the infringement caused harm to him; and
- (iv) the identity of the infringer who caused such harm

if a competition authority takes action for the purpose of the investigation to which the action for damages relates, member States shall ensure that the limitation period is suspended. The suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated. (Art. 10.5) The article 11 rule cases of joint and several liability. As per the exposure of motivation, where several undertakings infringe the competition rules jointly — typically in the case of a cartel — it is appropriate that they be jointly and severally liable for the entire harm caused by the infringement. While the proposed Directive builds on this general rule, it introduces certain modifications with regard to the liability regime of immunity recipients. The objective of these modifications is to safeguard the attractiveness of the leniency programmes of the Commission and of the NCAs, which are key instruments in detecting cartels and thus of crucial importance for the effective public enforcement of the competition rules. These measures of protection of immunity recipients cannot, however, interfere with the victims' EU right to full compensation. The proposed limitation on the immunity recipient's liability cannot therefore be absolute: the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers. To guarantee the effect utile of this exception, Member States have to make sure that injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the co-cartelists.¹⁴³²

2.2.7 Quantification of the harm

One of the key aspects of the actions for damages bringing by associations is the quantification of harm. It is regulated in the article 16 of the proposal for a Directive. As the exposure of motivation recognizes, the task of proving and quantifying any antitrust harm is generally very fact-intensive and costly, as it usually requires the application of complex economic models which may overflow the capacity of the claimant, specially in a frame of individual claims. To assist victims of a cartel in quantifying the harm caused by the competition law infringement, this proposed Directive provides for a refutable presumption with regard to the existence of *iuris tantum* harm resulting from a cartel,¹⁴³³ which shall stimulate a higher number of claims. The defendant could rebut this presumption and use the evidence at its disposal to prove that the cartel did not cause harm. *The burden of proof is thereby placed on the party which shall have in its possession the necessary evidence to meet this burden of proof*¹⁴³⁴. This presumption of higher prices by the merely existence of the cartel and the capacity of the same to alter the prices is discussed by modern economic theories and in my opinion the possibility to state such thing may exceed the capability of the parties as well as of the court.

Nevertheless, antitrust harm shall be quantified on the basis of national rules and procedures, which according to the principles of equivalence and of effectiveness shall not avoid an effective enforcement of the rights granted in the treaties by making the recovery of damages practically impossible or excessively difficult. In order to facilitate the quantification of the harm, the Commission is also providing non-binding guidance on this topic in its Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.¹⁴³⁵

1432 4.3.3. Joint and several liability. As example will be used the Directive 2004/48/EC on the enforcement of intellectual property rights.

1433 'Quantifying antitrust damages — Towards non-binding guidance for courts', accessible at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf, p.91.

1434 Explanatory Memorandum of the Directive 4.5.

1435 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C (2013) 3440.

2.2.8 Passing on defence

The infringer may appeal to the so called passing on defence under some circumstances, as it is already recognized by the CJEC. The burden of proof that the prices have been translated through the distribution chain will be for the entrepreneur which invokes it.¹⁴³⁶

2.3. Approval of the Directive on antitrust damages¹⁴³⁷

As per the approval of the Directive, 3 major aspects shall be improved: codifying the actual *community acquis* on competition Law by updating the positive law to the decisions of the CJEC, to make compatible the public and private enforcement and of course to facilitate the damages actions, especially those from the so called indirect purchasers. As per the specific content of the Directive, specially due to the privileges granted to those corporations which are beneficiaries of a leniency program, it could very well be understood that the final draft of the same has given priority to the public enforcement.¹⁴³⁸

Prior to the current approval of the Directive, in 2009, the EU Commission drafted a proposal for a directive on actions for damages, which aimed at setting out “the rules necessary to ensure that anyone who has suffered a harm caused by an infringement of Article [101] or [102] TFEU can effectively enforce the right to full compensation”.¹⁴³⁹ Such initiative was finally abandoned. The initial proposal from the Commission included collective redress mechanisms. When agreement on these could not be reached the Commission abandoned trying to include such mechanisms and instead issued a series of common, non-binding principles for collective redress mechanisms to be applied to all breaches of EU law.¹⁴⁴⁰ Nevertheless, as per the task of the European Parliament, the Directive will include some regulations which are not specific of competition Law and are rather oriented to consumers protection, such the harmonization of national regulations in procedural Law.¹⁴⁴¹ The Directive on antitrust damages actions was finally adopted by the Council on 10 November 2014. The Directive was formally signed during the Parliament's plenary session at the end of November 2014. Once the Directive is signed into law and published in the Official Journal, Member States will have 2 years to implement it in their national legal systems.¹⁴⁴² Finally, the adopted Directive is based on a proposal submitted by the Commission in June 2013 to the Parliament and the Council.¹⁴⁴³ After both co-legislators discussed the proposal and suggested amendments, informal meetings between the three institutions (so-called trilogies) were launched in February 2014 to achieve a political compromise. Representatives of the European Parliament and of

1436 See *Bernhard*, Kartellrechtlicher Individualschutz durch Sammelklagen, p. 116 ff; further regarding distribution of damages in *Ashton / Henry*, Competition damages actions in the EU and *Van den Bergh*, MJECL 2013,12-34.

1437 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L 349, 5.12.2014, p. 1–19.

1438 *Makatsch & Mir*, EuZW 2015, 7 (13).

1439 See *Büyüksagis*, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>; On this draft see *Alfaro / Reher*, TEAR 2010, 43-46.

1440 Common principles for injunctive and compensatory collective redress mechanisms, C (2013) 3539/3.

1441 Res. EP of 26.03.2009 (2008/2154(INI)); see also *Brokelmann*, La Directiva de danos y su transposición en España.

1442 EU Commission Web Page (Competition Action for damages).

1443 See [IP/13/525](#) and [MEMO/13/531](#).

Member States' governments agreed on a final compromise text at the end of March and the Parliament approved the text in April 2014.¹⁴⁴⁴ The collective redress system is generally considered as particularly crucial in the field of competition Law, as anticompetitive practices can often result in relatively small amounts of damage to individuals and significant amount of damage to the society at large.¹⁴⁴⁵ The EU choose however not to regulate the collective redress and the defence of the free competition in the same legal body. As seen, the Commission approved a Directive on antitrust damages¹⁴⁴⁶ and limited the collective redress to a merely Recommendation. It raises the question on how justify is the resort of the Directive to the competence norm of the Art. 114 Sec. 3 TFEU of a higher protection of consumers.¹⁴⁴⁷

2.3.1 Legal necessity and background

As per the Study conducted by the Law Firm Ashursts on behalf of the European Commission in 2004, regarding the current stand of the harmonization in this area, “The picture that emerges from the present study on damages actions for breach of competition in the enlarged EU is one of astonishing diversity and total underdevelopment.¹⁴⁴⁸ Being a Law Firm, the obstacles that Ashursts identify for a proper harmonization within the EU market, are not shared in full by the Commission. So, according to Ashurst’s Study, obstacles to private enforcement are limits on standing to sue, limits on collective redress, an excessively high burden of proof, inadequate discovery rules, and uncertainty regarding calculation of damages, as well as an absence of **contingency fees** and absence of **punitive damages**.¹⁴⁴⁹ These two last aspects are not desirable for the Commission as they consider that it could lead to an undesirable litigation culture in Europe. The Commission pretends to encourage meritorious claims by facilitating and stimulating indirect purchaser actions rather than motivating too much law firms in order to claim.¹⁴⁵⁰ Such broad standard is in conformity with the case-law of the CJEU,¹⁴⁵¹ which recognized that a third party victim of an anti-competitive practice may claim damages for any injury or loss. Thereby the Directive gathers the case law of the European Courts, and pursues to harmonize this right to be compensated between the member countries. Some authors were against to the harmonization in this matter, and bet for not binding recommendations of the European Union, as they consider that such harmonization will affect too sensitive regulations of the national Law, by means of this Directive, the EU regulates for the first

1444 See [IP/14/455](#) and [MEMO/14/310](#).

1445 *Pietrini*, L’action collective en droit des pratiques anticoncurrentielles, N. 116 ff; *Bernhard*, *Kartellrechtlicher* Individualschutz durch Sammelklagen, p. 63 ff.

1446 Directive leaves it to Member States whether or not to introduce collective redress actions in the context of private enforcement of competition Law.

1447 See in connection the whereas 13 of the Directive.

1448 *Waelbroeck*, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Brussels 2004, available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf. Retrieved last time 20 January 2017.

1449 See Büyüksagis, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>; *Kelemen*, Eurolegalism – The Transformation of Law and Regulation in the European Union, p.171; *Riley / Peysner*, ELR 2006, 748 (749).

1450 In Article 12(1), the Directive prescribes that anyone who has suffered a harm caused by an infringement of Union or national competition law can enforce the right to compensation: “[...], Member States shall ensure that [...] compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer [...]”.

1451 Recently see CJEC Judgment of 5th June 2014, C-557/12 *Kone AG and Others* ÖBB-Infrastruktur AG, ECLI:EU:C:2014:1317 p.22 and 32. See also CJEC Judgment of 20th September 2001, C-453/99, *Courage & Crehan*] ECLI:EU:C:2001:465, p. 26; CJEC Judgment of 13 July 2006, C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461, p. 61.

time procedural rules of the member states.¹⁴⁵² In this sense, the Directive found its basement not only in the Art. 103 of the Treaty (TFEU) but also in the Art. 114 which permits the Council and the Parliament to legislate in order to unify national rules. Thereby the Directive seeks to create a unified *level playing field* between the member countries,¹⁴⁵³ which includes not only violations to European competition rules, but also of national regulations if cumulative affects the 101 and 102 of the TFEU.¹⁴⁵⁴

As per the Whereas (4)¹⁴⁵⁵ *The right in Union law to compensation for harm resulting from **infringements of Union and national competition law** requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, and **Member States should ensure effective legal protection in the fields covered by Union law.** According to the in this chapter exposed reasons, the EU has acknowledged the right for victims of antitrust infringements to be compensated for the harm suffered. Moreover, national rules are widely diverging across Europe and, as a result, the chances of victims to obtain compensation greatly depend on which Member State they happen to live in. According to the Commission,¹⁴⁵⁶ the final draft of the Directive ensures that: *The Directive will help affected citizens and companies claim damages if they are victims of infringements of EU antitrust rules by providing easier access to evidence to prove the damage suffered and more time to make their claims. A more effective enforcement of the EU antitrust rules overall: it will fine-tune the interplay between private damages claims and public enforcement and preserve the attractiveness of tools used by European and national competition authorities, in particular leniency and settlement programs.**

2.3.1.1 Standing

As by means of the whereas 3, the Directive search the total effectiveness of the Art. 101 and 102 of the TFEU. Thereby, standing is granted to “anyone” who has suffered a damage as a result of a breach of the competition rules. As per the definitions of the Art. 2 sect. 1 and 3, it will be extended the application field of the Directive both to EC as well as to national competition Law, as long as according to the Art. 3 Sec. 1 or the Rg. 1/2003,¹⁴⁵⁷ as long as it regarding the *ratio legis* and scope are parallel applicable.¹⁴⁵⁸ As stated in the whereas 10, the Directive searches a harmonization in the legal practice of damages, both in the national and EC competition law: *in the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more*

1452 Brokelmann, RgDe 2015, 1 (7); against the harmonization see *Águila-Real*, *Contra la armonización positiva*.

1453 Deeper Brokelmann, RgDe 2015, 1-24.

1454 As long as the anticompetitive practice may affect the intra community trade in the sense of the Regulation 1/2003.

1455 European Parliament 2014-2019 Plenary Sitting 10.09.2014 CORRIGENDUM to the position of the European Parliament adopted at first reading on 17 April 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on certain rules governing actions for damages under national Law for infringements of the competition Law provisions of the Member States and of the European Union P7_TA-PROV(2014)0451 (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)).

1456 European Commission - Press release Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions Brussels, 10 November 2014. Available at http://europa.eu/rapid/press-release_IP-14-1580_en.htm. Retrieved last time 20th January 2017.

1457 Regulation 1/2003 of 16.12.2002, OJ L 1, 4.1.2003, p. 1–25.

1458 Keßler, VuR 2015, 84 (91).

level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law (...) as applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. Nevertheless, when only national competition rules are at stake, the Directive can be left apart. But, as the Directive enters – for the first time- into civil procedure regulation of the member States, this principle is not realistic, as it does not make sense that the member States count with 2 different civil procedures depending on which regulation, whether national or communitarian has been affected. This consideration is already adopted in German Law. By means of the § 2 Sec. 2 GWB, the German Law maker try to avoid divergences between the European and national law.¹⁴⁵⁹ Accepting that both direct and indirect purchasers have the right to bring a claim for any loss (including consequential damages), the Directive maintains the appreciation of the European case law in the matter.¹⁴⁶⁰ Regarding legitimization, the Directive gathers also the perspective of the CJEU in connection with the so called “*Umbrella prices*”, as established in the recent decision *Kones*, allowing that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel, who benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel.¹⁴⁶¹ Thus, any victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if he did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.¹⁴⁶² It is interesting to include in this point one reflexion about the scope of the standing to “anyone who has suffered a damage”.¹⁴⁶³ According to Haucaup, a literally interpretation of this term could drive *ad absurdum* to many different legitimizations of individuals that do not has a relationship with the cartel, not even being purchasers of the products commercialized by them. For instance, to those applicants that are looking for a job in corporations which compete with those which are part of the cartel. Due to the loss of a market share, these companies would not be able to hire so much people as they have would be in the absence of the cartel. Thereby they would have suffered a damage and they could be included under the ECJC developed principle that

1459 Keßler, VuR, 2015, 83 (84).

1460 Büyüksagis, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1461 See CJEC Judgment of 5th June 2014, C-557/12, *Kone AG and Others v ÖBB-Infrastruktur AG*, EU:C:2014:1317, further in: Bergström / et al (Eds.), *Harmonising EU competition litigation: The new directive and beyond*, p. 108; See also Büyüksagis, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1462 Büyüksagis, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1463 Before the well known Manfredi and Courage jurisprudence, German Courts where very restrictive in order to extend the right to obtain compensation, being direct purchasers endowed respect indirect purchasers. Those restrictions were raised with the “anyone” principle of the above mentioned decisions. For the former appreciation of the German courts see BGH Decision of 25.1.1983, BGHZ 86, 324, 330, WuW/ E BGH 1985, 1988- Familienzeitschrift. Nevertheless, the German courts took a long time to appreciate that the “anyone” principle does actually “anyone”. In this connection see LG Mannheim decision of 11.07.2003, GRUR 2004, 182- Vitaminpreise; LG Mainz decision of 15.01.2004, NJW-RR 2004, 478 (480)- Vitaminpreise; OLG Karlsruhe Urt. v. 28.01.2004, NJW 2004, 2243- Vitaminpreise. Specific to this point see Luebbig, Thomas, Muenchner Kommentar GWB europaisches und deutsches wettbewerbsrecht. Kartellrechtmissbrauchs- und Fusionskontrolle Band 2 GWB §§ 1-96,130,131. 2. Auflage 2015, Rn. 53 ff.

member states shall grant legitimization for damages recovery to anyone who has suffered a damage.¹⁴⁶⁴

3.2.2.2 Scope

Next to the wide legitimization, the Directive shall facilitate starting damage actions thanks to a presumption that “cartel infringements result in harm, in particular via an effect on prices”,¹⁴⁶⁵ as in most cases, the cartel results in higher price levels than those which would have otherwise prevailed or in reduced quality or consumer choice.¹⁴⁶⁶ This presumption affects the relation of causality between the harm and the breach of the antitrust regulations, and shall facilitate claims, as per the information asymmetry, some of the difficulties associated with quantifying harm in competition law cases” would make it almost impossible for the claimant to access to justice but for the presumption.¹⁴⁶⁷ As per this vision, harm does not result only in a rise in prices, but also in preventing prices from falling, which would otherwise have occurred but for the cartel.¹⁴⁶⁸ This consideration will for sure increase the incentives to sue, but with such appreciation, the Commission perhaps takes for granted some negative consequences of cartels which are yet discussed by the economical doctrine. Even more, the standardization of presumptions is also likely to lead to significantly divergent practices since different Member States courts have different historical approaches to the role and importance of presumptions. In order to harmonize this matter, in June 2013, the European Commission has published a Communication on quantifying harm in antitrust damages actions as well as a practical guide as assistance for national courts and parties to damages actions.¹⁴⁶⁹ Due to the high amounts of claims, it is to be expected that these actions will be drive against companies and not particulars. In any case, as already recognized in German Law, individuals can be sued as well.¹⁴⁷⁰

1464 See exposition of Prof. Dr. Justus Haucap, under the economical perspective of the incorporation into German Law of the Directive 2014/104/CE. Tagungsbericht vom Forum Kartellrecht 2016 in Münster: Die Umsetzung der Kartellschadenersatzrichtlinie- Ausblick auf die 9. GWB Novelle, *Schmidt*, S. NZKart 2016, 126 (127).

1465 Article 17 (2) of the Directive.

1466 As the French Supreme Court recently remarked in *Ajinomoto Eurolysine* victims of anti-competitive practices systematically pass on overcharges to their Second, “the information asymmetry, some of the difficulties associated with quantifying harm in competition law cases” would make it almost impossible for the claimant to access to justice but for the presumption. fn. 34, *Büyüksagis*, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>. Also, in response to the preliminary question of the Austrian Supreme Court, stated that the effectiveness of the private enforcement “would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. CJEU Judgment of 5th June 2014, Case C-557/12, *Kone AG and Others*, ECLI:EU:2014:1317.

1467 *Büyüksagis*, SRBL 2015, 18 (22). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1468 *Fuchs*, Anspruchsberechtigter, Schadensabwälzung und Schadensbemessung bei Kartellverstößen, in: Oliver Remien (Ed.) *Schadenersatz im europäischen Privat- und Wirtschaftsrecht*, p.61ff. (the author argues that the price-setting of undertakings, which are not members of the cartel, is made independently).

1469 Strasbourg, 11.6.2013 SWD (2013) 205 Communication From the Commission on COMMISSION on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union {C (2013) 3440.

1470 OLG Düsseldorf, 13.11.2013– VI-U (Kart) 11/13.

2.3.2 Main improvements

Main improvements introduced by the Directive include measures to ensure the observance of the principles of effectiveness and equivalency:

All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 **TFEU**, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they **should** not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the **TFEU** or less favorably than those applicable to similar domestic actions. **Where Member States provide other conditions for compensation under national law, such as immutability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.**¹⁴⁷¹

More specific, these principles will be matched when:

- *National courts can order companies to disclose evidence when victims claim compensation. The courts will ensure that such disclosure orders are proportionate and that confidential information is duly protected. This is subject to important restrictions in the frame of leniency or bonus programs.*
- *A final decision of a national competition authority finding an infringement will automatically constitute proof of that infringement before courts of the same Member State in which the infringement occurred. This follow the path started with the Regulation 1/2003.*
- *Victims will have at least one year to claim damages once an infringement decision by a competition authority has become final.*
- *If an infringement has caused price increases and these have been "passed on" along the distribution chain, those who suffered the harm in the end will be entitled to claim compensation.*
- *Consensual settlements between victims and infringing companies will be made easier by clarifying their interplay with court actions. This will allow a faster and less costly resolution of disputes.*

The Commission will proactively assist Member States in their implementation efforts. Furthermore, as required by the Directive and to assist national courts and parties to antitrust damages actions, the Commission will draft guidelines on the passing-on of overcharges. The Commission will review the Directive and submit a report to the Parliament and the Council in six years from the entry into force. The Commission's 2013 [Recommendation on collective redress](#) also invited Member States to introduce by July 2015 collective actions, including actions for damages, in line with the principles set out in the Recommendation. The availability of collective damages actions is particularly important for consumers harmed by antitrust violations. As the Directive applies to any damage actions in the antitrust field, it applies also to collective actions in those Member States where they are available.

1471 Whereas (11).

2.4 Harmonization by the Directive on antitrust damages

2.4.1 General perspective

The new regime in the EU by means of the Directive on Damages and the Recommendation on collective redress responds to the needs of promoting effective protection of the rights to damages and to decentralize the private enforcement by way of implementing local collective actions.¹⁴⁷²

The Directive shall make compatible the public and the private enforcement, warranting the efficiency of the public enforcement, but at the same creating the basic structure which ensures that victims of cartels can be compensated for the suffered damages.¹⁴⁷³ In order to reach such objectives, the Directive included several different rules: disclosure of evidences and access to administrative files (Art. 5-8); binding effects of the national competition authorities and judicial bodies both in national as well as in border crossing cases, (Art. 9), Statute of limitation (Art. 10); regime about joint liability as well as privileges for the so called whistleblowers (State witness) and SMEs (Art. 11); criteria for the configuration of the so called passing-on defence (Art.12-16), a general legal criteria for the calculation of the damage (Art. 17), and finally the effects of settlements. Such regulations affect mostly the material law, being the harmonization from the point of view of the procedural law limited.¹⁴⁷⁴

Damages actions before courts and public enforcement are complementary tools. The Directive seeks to fine-tune the interplay between them and to ensure that while victims are fully compensated, the key role of competition authorities in investigating and sanctioning infringements is preserved. In particular, cooperation between companies and competition authorities under "leniency" programs plays a key role in detecting infringements.¹⁴⁷⁵ The Directive therefore contains safeguards to ensure that facilitating damages actions does not reduce companies' incentives to cooperate with competition authorities. Two goals are seek by the Directive by means of harmonization. One to create a common European frame where full reimbursement of damages arisen by breach of EC on national competition rules is possible, (Art.1(1) as well as the coordination of the enforcement of antitrust law between the public authorities and private claimants (Art. 1(2)).¹⁴⁷⁶ The first goal to full reimbursement is clearly recognized by the Directive. However, in connection with the discovery of documents for victims of cartels in frame of leniency and bonus procedures the possibilities for the claimant are quite limited.¹⁴⁷⁷

Actions for damages might be sustained so good on infractions of national regulations as well as on infractions to European competition regulations, or both at the same time. These actions shall be lodged in Spain before the Mercantile Jurisdiction as per the Art. artículo 86 ter. 2.f) del Poder Judicial (LOPJ).¹⁴⁷⁸ Actions on competition Law shall be considered as extra contractual, which are regulated in the Art. 1902.¹⁴⁷⁹ **The current Statute of limitation for these kind of actions in Spain is one year, (as any**

1472 Büyüksagis, SRBL 2015, 18 (21). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1473 Whereas 12 Directive 2014/14/CE (from now on "The Directive).

1474 So *Wurmnest*, NZ Kart 2017, 2 (7).

1475 See [MEMO/14/310](#).

1476 Europäische Kommission, Richtlinienvorschlag COM (2013) 404 final, whereas 6 und 7.

1477 *Calisti*, NZKart 2014, 466 (467), so also *Makatsch / Mir*, EuZW 2015, 7 (8).

1478 Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (LOPJ), BOE No. 157, of 02th July 1985.

1479 Las acciones de daños por infracción del Derecho de la Competencia han sido catalogadas como responsabilidad extracontractual por el Tribunal Supremo (STS 546/2012, Sala de lo Civil, RJ ECLI: ES:TS:2012:5462, FJ 12).

other extra contractual based claim), and the deadline starts counting from the very moment in which the affected party knew about the infraction. **Being the liability objective**, the Spanish Supreme Court demands in those cases of cartel stated by any competition authority, a relation of causality between the conduct and the damage.¹⁴⁸⁰

As per the experience in Spanish courts the application of the collective actions for damages in competition law have been very limited. In Spanish two major aspects shall explain the lack of success of these instruments. One would be the short statute of limitation, but specially the lack of proper means of disclosure of evidence shall have been keeping potential claimants out of the court. The incorporation to Spanish law of the Directive,¹⁴⁸¹ and the adoption of such regulations regarding disclosure and the extension of the statute of limitation that shall facilitate such actions. Notwithstanding the improvements of the Directive in Spanish Law, at European stage, the Directive might suffer a lack of harmonization in relevant aspects such the determination of the relationship of causality or the determination of damages and neither establish compulsory orders about collective actions.

2.4.2 Quantification of the harm

Based on the judicial defense of the principles of effectiveness and equivalency expressed on the decisions *Courage* and *Manfredi*, the Directive incorporates the damage as well as the loss of profit as part of the reimbursement of damages in line with the full compensation principle. As per the whereas 12 of the Directive, *the payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.* So, the Directive ensures a uniformed recognition from interests and established a common basis for its calculation but at the same time refer to the member countries to regulate this matter. Questionable is the formula chosen by the Directive and the incorporation of this requirement in the prelude of the norm and not in its dispositive part which raised questions about its enforceability.¹⁴⁸² This lack of forcefulness has been criticized, as the interests are a capital matter in these kind of matters that can result in substantial differences in the recoveries granted by the judgement. In this particular matter can be discussed how far shall go the Directive in its aim of harmonization, and if there is justification for different regulations of the member countries. Difference in this particular matter can result in a competition between the member countries to make its jurisdiction more attractive.

In Spain, as general rule, the vesting of interests are granted since the moment of the reclamation, both by judicial or extrajudicial means (Art. 1100 Código Civil). The Spanish Proposal for incorporation of the Directive does not enter into this matter and just ignores the Art. 12 of the Directive. Interests are granted by the moment in which them

1480 The Supreme Court demands from the expert advice is a reasonable and technically sustained hypothesis over verifiable data that shows the causality relationship.

1481 Which expires at the 27th December 2016.

1482 *Herrero Suárez*, CDT 2016, 151 (172).

shall be calculated are not regulated in the Proposal. Thereby, the previous general rule still applies.¹⁴⁸³

One of the improvements for the German literature is the presumption that a cartel does cause a damage, as it is gathered in the article 17 II of the Directive.¹⁴⁸⁴ The previous German case law just recognized only a *prima facie* evident, that a quote in cartels drive to higher prices.¹⁴⁸⁵ Nevertheless, the presumption is limited to the existence of the damages, not to the actual calculation of the same,¹⁴⁸⁶ so the claimant still has to present calculation grounds and calculation basis, the Directive does not incorporated further calculation presumptions, as it is recognized for instance in Hungary, where exists such presumption that a cartel drives to a higher X price. Such presumption was discussed in the proposal for the impact assessment of the Commission for this Directive.¹⁴⁸⁷ It is to celebrate that the presumption does not go further, an excess of presumptions with the goal to facilitate private enforcement could jeopardize the right to a proper process and defence rights of the defendant. It is broadly recognized the complexity of establish the amount of the damage. In Germany, in order to calculate the damages, the German courts will resort to the § 287 ZPO, which allow the court to determinate under its free consideration (*freier Überzeugung*), using the so called *Differenzhypothese*, extracted from the §§ 288, 289, 249, 252 BGB.

In order to be entitled to reparation of damages, the plaintiff shall probe that the anticompetitive behavior of the defendant has caused him a patrimonial damage, and it shall be established the basis for a reasonable calculation of such damage. This matter shows how difficult is to make compatible the regulation of the competition with the reality. It can be establish that an anti-competitive behavior has taken place, but to ascertain that it has caused a real damage and its calculation is a game of presumptions. It is reasonable to discuss how far presumptions can affect individual rights, specially in the frame of administrative sanction procedures.¹⁴⁸⁸ This calculation is known as the distinctive factor or but-for-analysis. This doctrine recognizes the impossibility to know with accuracy the circumstances of an hypothetical situation, so there is necessary to resort to further hypothetical scenarios to stablish a frame of reference. This requires resort to the economic theory. So, **it doesn't seem reasonable to exercise any legal analysis in competition Law without a previous valuation of the suitability of the different economic theories in this matter.** Damages on hypothetical scenarios can only be calculated if there exist an absolute certainty that there are not variables that can modify the prices when 2 different markets (one without the anti-competitive conduct and the other with the anticompetitive behavior) are compared.¹⁴⁸⁹ **It cannot be obviated the fact**

1483 *Herrero Suárez*, CDT 2016, 151 (172).

1484 *Makatsch & Mir*, EuZW 2015, 7 (8).

1485 OLG Karlsruhe, NZKart 2014, 366 p. 54 f- Löschfahrzeuge; BGH, NJW 2007, 3792, p. 18- SD-Papier. KG Berlin, decision of 01.10.2009, Az. 2U 10/03 Kart, WuW/ E DE- R 2773, 2777 f.

1486 Whereas 47 of the Directive; see in connection *Schweitzer*, NZKart 2014, 335 (337).

1487 *Makatsch/ Mir*, EuZW, 2015, 26, 7 (8); SWD (2013) 203 Final, p. 89.

1488 See in this matter *H. Hovenkamp*, Federal Antitrust Policy (...), p. 722: "... the law of damages has the much more difficult task of quantifying injury; the difference between saying that a certain practice is harmful and quantifying the amount of harm can be significant".

1489 Further on the current techniques of calculation see: *Jiménez La Torre*, La Ley 2008, 55-70.; *Ortiz Baquero*, La aplicación privada del Derecho de la competencia; Los efectos civiles derivados de la infracción de las normas de libre competencia, La Ley, p. 263 ff.; *Gómez Asensio*, El estudio de la Comisión Europea de diciembre de 2009 para la cuantificación de los daños antitrust, in: *L.A.Velasco et. al* (Eds): La aplicación privada del Derecho de la Competencia, cit, pp. 229 ff.; *Tudor*, La cuantificación de daños y perjuicios en la aplicación privada del Derecho europeo de la Competencia, in: *L.A.Velasco et. al* (Eds.): La aplicación

that there exist economic theories that deny that the existence of a cartel does cause a harm. These economic theories has been referenced previously in this work. Thereby remains the question of how far a judge is subject to the presumptions content in the antitrust material law, and if exists the possibility to recognize a judge that the whole antitrust presumptions do not match the reality and do not serve as a basis to establish sanctions in an administrative procedure or to grant damages in a civil claim. Is favor of this thesis speaks the fact that there are not current legal dispositions that recognizes any calculation method as the correct one. There are instruments that can be used as guide to calculate the assessment of damages,¹⁴⁹⁰ but none of them has obtained legal primacy over others.¹⁴⁹¹

In Spain, the Proposal for incorporation of the Directive recognizes also the *iuris tantum* presumption that a cartel causes a damage, recognizing the right of the defendant to raise such presumption. This matter was not resolved in Spain as the *re ipsa loquitur* character of this presumption in antitrust cases found different treatment in the case law. So, there were decisions that recognized the existence of a cartel but denied that this causes any patrimonial hurt.¹⁴⁹² The Spanish Supreme Court aligned itself with the position that a cartel *per se* causes a damage. In the notorious sugar case, the high Court consider that the mere existence of the cartel results in a overprice, therefore, there exist a direct damage for both direct or indirect purchasers (if the over price was transmitted) of the cartelists.¹⁴⁹⁴

Further dispositions of the Directive in order to obtain the reparation amount, such the total reparation, the loss of profit, and the assessment of the damage of the Court, and the participation of the national competition authority (*Kartellamt*) are already included in German Law. So, the § 33 III GWB gathers the interest rate from the existence of the damage, invoking the §§ 288, 289 BGB. The reparation of the loss of profit that recognizes the Directive, as reflex of previous well known European case law (Manfredi and Courage) is also already recognized in German Law.¹⁴⁹⁵ A judicial estimation of the damage is also recognized in Germany in the § 287 ZPO in cases of lack of instruments for a proper calculation. This has been recognized in the judicial practice.¹⁴⁹⁶ Authors as *Makatsch/ Mir* miss in the Directive the introduction of a trail effect factor for a higher damage calculation, as it is already recognized in the German judicial practice.¹⁴⁹⁷ In this sense, the Art. 3 Sec. 3 of the Directive contents specifications in order to avoid an over compensation, *whether by means of punitive, multiple or other types of damages*. Thereby the Directive is

privada del Derecho de la Competencia, cit., pp. 567 et ss.; references in *Herrero Suárez*, CDT 2016, 151 (175).

1490 Quantifying antitrust damages Towards non-binding guidance for courts, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/>. Retrieved last time 01.010.2019.

1491 *Herrero Suárez*, CDT 2016, 151 (175).

1492 *Herrero Suárez*, CDT 2016, 151 (176).

1493 SAP, Madrid, 3th October 2011, No.370/2011.

1494 STS 7th November 2013 (STS Sala de lo Civil, Sección 1a, sentencia núm. 651/2013), ECLI:ES:TS:2013:5819. Further on this matter see *Sopeña/G. Martín*, La transposición de la Directiva europea para la reclamación de daños por infracciones de la competencia en España ..., cit.; *Marcos Fernández*, Damages'claims in the Spanish sugar cartel", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514239.

1495 BGHZ 190, 145 = EuZW 2012, 103 Ls. = NJW 2012, 928 Point 29 - ORWI.

1496 *Makatsch/ Mir*, EuZW 2015, 7 (8) refers to KG, NJOZ 2010, 536 - WuW/ E DE- R 2773, 2779 – Berliner Transportbeton.

1497 OLG Karlsruhe, NZ Kart 2014, 366 p. 54f.- Löschfahrzeuge, for calculation Cf. BGHZ 190, 145 = NJW 2012, 928 P. 84 – ORWI; *Makatsch/ Mir*, EuZW 2015, 7 (8 ff).

compatible with the German compensation principles based in the prohibition of unlawful enrichment.¹⁴⁹⁸

In this particular matter, the European executive branch has been gradually modified its position. A shy possibility to include punitive damages was incorporated to the Green Book for the cases of horizontal agreements. Following the American example it was proposed a flat multiplier in connection with the suffered damages, which could be conditional or fallen under the discretionary power of the judge. Also was incorporated the possibility of a kind of punitive damages based not in the actual damage suffered by the victim, but based on the actual earning of the infractor.¹⁴⁹⁹ These proposals were not accepted by the continental countries that were afraid of incorporate alien institutions to its legal systems.¹⁵⁰⁰ As per the passive legitimation, it will be discussed the extension of the European principles of economic unity and its transmission to national civil Law, specially the responsibility of the mother company when its subsidiary breach any competition rule. Thereby a group of companies will not be able to appeal to insolvency of the subsidiary in order to avoid civil actions against them. German authors consider this an opportunity to establish the same standard in German Law for the actual divergences between administrative and civil responsibility.¹⁵⁰¹

2.4.3 Discovery and Preliminary diligences

One of the most complicated matters and key aspects regarding damages reparation in antitrust field is to probe the damages causality. Based in the secret agreements of cartel companies, the claimant face normally many burdens in order to demonstrate the existence of the cartel and any other secret agreement that has driven to a potential damage. This asymmetry of information is one of the barriers that shall be erased in order to promote a more efficient private enforcement.¹⁵⁰² Therefore, an easiest and simplified system of discovery shall be granted in favor of the claimant. The White Book on actions for damages alerted about the fact that the barriers to access to evidence keep injured parties away from the court, so for companies it is still profitable to enter into a cartel agreement. According to the White Book that drives to several millions of damages that remain in the hands of miss conducting enterprises.¹⁵⁰³ It is in any case astonishing that companies do manage to hide such mysterious agreements but at the same time the European Commission is able to estimate such huge in range of billions damage to the society. This reality shall be mitigated with the instruments granted in the Directive. So, in its Art. 5 I, the Directive presents the general rules for the disclosure of evidence. According to this, national courts could dispose the disclosure of evidences of the claimant, defendant and third parties. In order to promote the private enforcement and to facilitate the probing task of the claimant, the Directive recognized that national courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures the possibility of disclosure whole relevant categories of evidence upon request of a party. *It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by*

1498 Keßler, VuR 2015, 83,92. (83).

1499 Green Book, Sec. 2.3.

1500 Herrero Suárez, CDT 2106, 151 (173).

1501 Makatsch & Mir, EuZW 2015, 7 (8).

1502 Whereas 14, 45.

1503 White Book on actions for damages point 1.1 and section 2.2 of the Impact Assessment Report (IAR).

*reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.*¹⁵⁰⁴

Confidentiality shall be protected, (Art. 5 IV) and affected parties shall be heard before disclosure is granted (Art. 5 VII). Affected parties are allowed to submit non confidential versions of their requested documents in a time frame established by the court (according to national law prescriptions), and under justification of the confidential nature of the documents. The Court will confirm this confidential treatment if the requested party demonstrates that such disclosure would inflict him a serious damage. In this regard see the decision of the CJEC in the case T-353/94 *Postbank N.V. v Commission*.¹⁵⁰⁵ Even if the consideration of confidentiality is granted, the Directive foresees that these documents shall be disclosure to the parties. In this regard, the proportionality of the Court, and a ponderation of interests by the court are mandatory. In this regard, the Directive itself contains some measures in order to make compatible the right of the parties to access to evidence material and the safeguard of the confidentiality as *the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form*.¹⁵⁰⁶

Member countries are able to regulate more flexible disclosure of evidences, as long as not contradict the safeguards of the Directive, specially what is referred to the limitations of the State witness. Finally, by means of the Art. 8 of the Directive, the member States shall develop a sanction system for the case that the requested party does not comply with the discovery demand of the Court (non complying scenarios are listed in the Art. 8 Sec. 1 of the Directive). These sanctions shall *ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive*, making not worthy not comply with the disclosure request. In order to reach that, sanctions shall also have a procedural effect such *presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility to order the payment of costs*. As per the reference “Preliminary diligences” in Spain it is to be understood any previous activity which shall help to prepare the trial. As per the decision of 5th February of 1999, AP de Jaén (AC 1999/4392) these diligences have specific aim which is to obtain the necessary information about relevant aspects related to the object of the trial.¹⁵⁰⁷ As per the Spanish author Montero Aroca¹⁵⁰⁸, the aim of the preliminary diligences are double: to erase any doubt about the passive legitimation and in some cases also about the active legitimation and to prepare the future trial by clarifying unknown elements related to the object of the procedure. Notwithstanding the absence of a proper discovery instrument among the Spanish civil Law, it does exist a specific preliminary diligence for collective redress in the LEC. The Art. 256.6 LEC allows the judge to undertake all necessary measures to provide

1504 Whereas 16.

1505 CJEC Judgment of 18 September 1996, Case T-353/94, *Postbank NV v Commission of the European Communities*. ECLI:EU:T:1996:119.

1506 Whereas 18.

1507 “*Las diligencias preliminares tienen una finalidad esencial y específica, que es la de obtener la necesaria y adecuada información sobre determinadas cuestiones al objeto del correcto planteamiento de un proceso ulterior*”. *En este sentido Sentencia 16 de julio de 1999, AP de Teruel, (AC 1999/1231)*; “*la finalidad esencial de las diligencias preliminares es la de conceder a cualquier persona legitimada para ello, la facultad de interpretar la tutela de los órganos judiciales para precisar y aclarar datos, elementos y cuestiones para ser usados en un eventual y posterior proceso judicial*”. Translation upon request

1508 Montero Aroca, *Derecho Jurisdiccional*, p. 153.

necessary documentation in order to find out possible affected consumers in collective actions. Thus, this article is limited to the configuration of the active legitimacy and is not related to disclosure of evidences. The discovery of this information may result in inconveniences under the current Spanish Law. In other countries such U.K. the access to evidence is much better regulated and this encourage a higher number of actions in competition field.¹⁵⁰⁹ In Spain, currently, only already known evidences may be used in the Court.¹⁵¹⁰ The Directive obliges to modify this situation by simplifying the access to evidence. As per the Directive, it is recognized the institution of the discovery. Namely, by means of the Directive, Spanish judges will be able to order defendants or public authorities, even third parties to discover evidences when a serial of requirements are fulfilled. The plaintiff shall motivate the request and the expected evidence material shall be necessary to sustain its claim(art.5). As basic requirement it applies the proportionality, which shall avoid „fishing expeditions” or excessive inquiring. For the discovery, plaintiffs will not have to specify the specific evidences they want to disclosure, it will be sufficient if they refer to them generic. Moreover, evidences obtained through the access to an administrative procedure can be used in a trial for those parts that had access to the administrative procedure.¹⁵¹¹ The file for disclosure can be done in any moment. Disclosure of a whole category of evidences will need to amend German Law, as such disclosure is not foreseen.¹⁵¹² There are however substantial limitations to disclosure when it might affect leniency programs. If this is compatible with the European primary law will be discussed.¹⁵¹³ Disclosure of documents is already foreseen in German law. However, the Directive will turn into right what currently in German Law lies in the discretionary decision of the Court.¹⁵¹⁴

2.4.3.1 Discovery on leniency programs

A concern related to the private enforcement is that it could jeopardize the public one. If potential claimants can access to the existing evidence in cases of clemency programs, companies in a cartel will not be so willing to cooperate with the public

1509 As a common law tradition, in the UK the defendant has to discover all necessary documents, both at the public authorities and to private claimants. Rule PART 31 – Disclosure and Inspection of Documents of the Civil Procedure Rules 1998.

1510 La normativa procesal actualmente aplicable a los procedimientos de reclamación de daños y perjuicios en Derecho de la Competencia (art. 328 Ley Enjuiciamiento Civil), tan sólo permite solicitar la exhibición de documentos concretos cuya existencia se conozca, sin que se pueda solicitar la exhibición de categorías de documentos o grupos de documentos desconocidos.

1511 In connection with evidences which are part of an Administrative procedure started by a competition authority, it is established that national judges and courts may order the discovery as it is regulated in the Regulation (EC) 1049/ No. 1049/2001 and according to the general european law regulations about the protection of inner documents of competition authorities and correspondence between different competition authorities, taking into account the necessity to preserve the efficiency of public watch and the application of the Community Law. (art. 6), in the following terms: This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities. As per the Directive, When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following: (a) whether the request has been formulated specifically with regard to the nature, subject-matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority, (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and (c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition Law.

1512 *Calisti*, NZKart 2014, 466 (468).

1513 *Pustlauk*, EWeRK 2015, 10 (12,13).

1514 § 142 Abs. 1 ZPO, §§ 421, 425 ZPO i. V. m. § 242BGB. See von Dietze/ Janssen, Kartellrecht in der anwaltlichen Praxis, 5. Aufl. 2015, Rn. 668; Heinichen, NZ-Kart 2014, 83 (84).

authorities. As per the CJEC in the case C-360/09 *Pfleiderer AG vs. Bundeskartellamt*,¹⁵¹⁵ national courts shall balance the relationship between the public enforcement by means of clemency programs and the private enforcement. By the CJEC decision, national courts have a wide margin to balance interests, but they shall respect the principle of effectiveness of the EC Law; if a public authority is obliged to facilitate all documents in their hands to private claimants is not specified by the Court. As result of the reference for preliminary ruling raised by the Bonn Amtsgericht, *has decided in the decor paper case that Pfleiderer AG will not be granted access to the leniency applications of the cartel participants. This decision has far reaching consequences for the future practice of the Bundeskartellamt in the prosecution of hard-core cartels. With its decision the court affirmed the Bundeskartellamt's view that leniency applications are subject to particularly strict confidentiality.*¹⁵¹⁶ As a result of such concern between the public and private enforcement, the Directive includes 4 articles of a total of 19 to regulate the discovery in leniency programs.¹⁵¹⁷

In Spain, the *Reglamento de Defensa de la Competencia*,¹⁵¹⁸ allow access to such documents necessary to answer to the specification of facts but deny accessing to those copies of any statement of the applicant of clemency, being confidential even the leniency statement. This regulation was introduced in the Civil Procedure Act 1519 by means of the *Disposición Adicional Segunda de la Ley Defensa de la Competencia* which introduced a new article 15 bis in the Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, (LEC) as follows: Article 15 bis (...) *The contribution of the information shall not include the data or documents obtained within the scope of the circumstances of application of the exemption or reduction of the amount of the fines stipulated in Articles 65 and 66 on the Free Competition Act.* It is to be understood, that the article 15 bis LEC is referred to any document in hand of the public authority. This shows the leniency programs for the Spanish legislator. As per some authors, clemency programs shall preponderate over civil actions. Otherwise the task of the public program would fail and these could even affect possible follow-on actions.¹⁵²⁰

In order to promote leniency programs, these documents shown in this procedures will not be entitle to discovery. The Directive gathers the concerns about the efficiency of the leniency programs if the private enforcement allows disclosure of evidences in the frame of this programs. As per the Whereas (26) the Directive states that **to ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence.** This consideration has its reflection in the article 6.6 of the Directive 6 which order *Member States to ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any categories of evidence arising from leniency programs.* Thereby the Directive harmonizes this question, which was not enough specified by the CJEC.

The tepid support of the CJEC in the decision *Pfleiderer AG vs. Bundeskartellamt*,

¹⁵¹⁵ Reference for a preliminary ruling: Amtsgericht Bonn – Germany. Further comments on this decision *Fornasier / Sanner*, pp. 1067-1080) and *Moya, RCDI*, 10, 229–237 (231 ff. Decision confirmed by decision of the CJEC on 6th Juni 2013, C-536/11, *Bundeswettbewerbsbehörde vs Donau Chemie AG and others*, ECLI:EU:C:2013:366.

¹⁵¹⁶ Decision of Local Court of Bonn strengthens leniency programme AGBonn, Beschluss vom 18.01.2012– 51Gs 53/09. www.bundeskartellsmants.de.

¹⁵¹⁷ Exhaustiver see *Brokelmann*, RgDe 2015 1-24.

¹⁵¹⁸ Art. 51 Real Decreto 261/2008, de 22 de febrero, (BOE No. 50, of 27th February 2008).

¹⁵¹⁹ BOE No. 7, of 8th January 2000.

¹⁵²⁰ *Byrne / Valente*, CLI 2011, 3 (4).

favour of disclosure evidence even in the frame of leniency programs¹⁵²¹ is not followed by the Directive. It appears as controversial the absolute prohibition of the Directive to disclose such documents in hands of public authorities as result of leniency statements. The CJEC supported the balance of interests in hands of the national judge, in *Pfeiderer* and in *Donau Chemie*,¹⁵²² so **such categorical prohibition of the Directive seems to be incompatible with the established European primary law and might infringe the principle of effectiveness of reparations which is seek by the Directive.**¹⁵²³ So, by the application of the Directive it can be taking into consideration a voidness claim based on the Art. 263 TFEU. It is also contrary to the German case law which also let the balance of interest in hands of the judge (OLG Hamm/BverfG).¹⁵²⁴ As per the current regulation in Germany, claimants shall drive its action against the member of the cartel before the competent local court, and then, based on the **§142 ZPO** apply for *order to produce records or documents* or the **§421 ZPO**; production by the opponent; offer to provide evidence. As long as the above mentioned voidness claim is not lodged, the member countries shall comply with the transposition of the Directive.¹⁵²⁵

For some German authors, the limitations of the disclosure, in order to warranty the public enforcement is not justified. Especially unjustified seems to be the total prohibition of disclosure of State witness statements and settlement implementations. Thereby, the private enforcement of competition Law will be treated in such cases that the claimant depends on such documents to probe its damage. So, the aim of the Directive for a coordination between the public and private enforcement clearly falls in the side of the public enforcement.¹⁵²⁶

Such precautions reflect a preference of the Commission for the public enforcement and its leniency programs rather than for private actions. This is still a substantial difference in this matter between the European continental uses and the tradition of the common Law. In USA reduction of fines are only possible if the private compensation has already happened. In order to maintain the incentive of such programs, as per the *Antitrust Criminal Penalty Enhancement and Reform Act* de 2004 the North- American legislator reduces the punitive damages granted to claimants if they participate in leniency programs.¹⁵²⁷ This is not a possibility in the most European countries that do not allow for punitive damages. However, from the American example it could be imported the distribution of liability, as the Directive does. As per the example of United States those corporations that collaborate in leniency programs do not have to answer to all victims of the cartel as the general rule says. Thereby United States connect

¹⁵²¹ Point (32): In the light of the foregoing, the answer to the question referred is that the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union Law.

¹⁵²² CJEC Judgment of 6th June 2013, Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, ECLI:EU:C:2013:366.

¹⁵²³ *Makatsch / Mir*, EuZW 2015, 7 (9).

¹⁵²⁴ OLG Hamm, Beschluss vom 26.11.2013, Az. III-1VAs 116–120/13, III-1VAs 116/13, III-1VAs 117/13, III-1VAs 118/13, III-1VAs 119/13, III-1VAs 120/13, III-1VAs 122/13, 1VAs 116– 120/13, 1VAs 116/13, 1VAs 117/13, 1VAs 118/13, 1VAs 119/13, 1VAs 120/13, 1VAs 122/13, NZKart 2014, 107 sowie BverfG vom 16.3.2014, Az. 1BvR 3541/13, 1 BvR 3543/13, 1BvR3600/13, NJW 2014, S.1581

¹⁵²⁵ Obligation of transposition based on the § 288 III TFEU, Art. 4 III TEU.

¹⁵²⁶ So *Makatsch/ Mir*, EuZW 2015, 7 (9).

¹⁵²⁷ *Green / Mccall*, CLI, 3, (3-5).

the public and private enforcement.¹⁵²⁸

It is noteworthy that in Spain, in the period between 1999 and 2014, 323 cases have been lodged before the Spanish courts, and only 18 of them were based on a previous administrative resolutions.¹⁵²⁹ So, it is a clear signal, that the private enforcement could be more relevant for an effective application of competition Law and thereby reaching a higher competition standard, than the public enforcement. These numbers are special significant taking into consideration that the Spanish judicial system is not known by its efficiency and celerity. It makes wonders how accurate the appreciation of the European Commission and the limitations is included in the Directive to the private enforcement in order to avoid jeopardizing the public one. Nevertheless, an adult private enforcement, where victims are responsible to be aware of its own damages and acting accordingly with a proper and suitable resort to the Court would jeopardize the very existence of the European Commissioner for competition matters.

2.4.4 Distribution and joint of liability

As per the Art. 11 of the Directive, members of the cartel are subject of joint liability. The claimant can satisfy its credit before any member of the cartel for the whole amount of the damage. This principle is already gathered in German Law by means of the §§ 830, 840 BGB, and it has been lately confirmed by the ORWI decision.¹⁵³⁰ After the outer liability has been faced, the members of the cartel do have a recovery right against other members in order to recover payed amounts that exceed its responsibility in the cartel (Art. 11 Sec. 5 of the Directive).

Regarding the distribution of liability, as per the Spanish Supreme Court in cases of extra-contractual responsibility the principle of solidarity applies. Thereby any affected consumer may drive its action to any member of the *cartel*. This principle, already recognized in Spanish Law, is another expected and harmonized improvement in the position of the claimant by the Directive. The claimant can sue and be compensated by the totality of the damages by any single member of the cartel. The defendant may recover from other members of the cartel such amounts that exceed its responsibility, in later inner recovery procedures.¹⁵³¹ The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.¹⁵³² This principle of solidarity of the Directive may however present some issues in its transposition to Spanish Law. If the solidarity in contractual relationships is given *ex lege by the Directive*, the solidarity in extra contractual relationships is limited under Spanish law only to members parties which have been declared so by means of in a judicial decision, the so called *Solitarian improper*. Thus, as per the current legal frame in Spain, the solidarity between the members of the cartel will be limited only to those members which have been condemned as part of the cartel by a judicial decision. It would limited the recoveries of member of the cartel, (as the Art. 11.5 foresees) only to other members which have been appointed in the judgement. In this

1528 Further in *Pérez Fernández*, La problemática relación entre los programas de clemencia y las acciones privadas de resarcimiento de los daños derivados de ilícitos antitrust. InDret 1/2013.

1529 *Marcos Fernández*, ICE 2014, 91 (95 ff).

1530 BGH decision of 28.06.2011, Az. KZR 75/10, BGHZ 190, 145, pp. 80, 483-486.

1531 It may drive to some problems to the defendant, as a member of the cartel could have disappeared or being in a bankruptcy process.

1532 Whereas 37.

aspect, Spain, does not count with a regulation such the § 830 BGB, which will probably be required in order to transpose the requirements of the Directive.¹⁵³³

2.4.5 Privileges by SMEs, State witnesses and settlement parties

According to the Art. 11 II of the Directive, SMEs will obtain some privileges, as they shall be liable only to its direct and indirect purchasers if its market share in the relevant market was below 5% at any time during the infringement and the application of normal rules of joint and several liability would irretrievably jeopardize its economic viability.¹⁵³⁴ This exception shall, however, not apply if the SME led the infringement, coerced other undertakings to participate in the infringement or has previously been found to have infringed competition law.¹⁵³⁵

In order to protect such companies which are taking part in a clemency program is provided an exception. These companies will be only responsible of damages against its direct and indirect purchasers.¹⁵³⁶ Nevertheless, if the affected consumers do not obtain reparation from its direct sellers, can drive its action to any other member of the cartel, even if he is beneficiary of a clemency program. Benefits of being a State witness are not limited to the outer relationships. Also in the inner recovery actions, the State witness will be seen limited its responsibility to the revenue which corresponds to its direct and indirect purchasers (Art. 11. Sec. 5). Thereby the Commission bets for the private enforcement without renouncing to the benefits of the clemency programs.

The Art. 19 of the Directive rules the benefits of settlements. The benefits of the settlement are oriented mostly to the inner relationships between the members of the cartel. As per the section 1, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. The above mentioned privileges of SMEs and State witness result in more burdens for the private claimant, and they mean an obstacle for the private enforcement of competition Law.¹⁵³⁷ Germany, Poland und Slovenia did not agree to these privileges in the Council.¹⁵³⁸ German authors have also criticized such stake of the European Commission.¹⁵³⁹ One of the legal justifications for the Directive is to improve the level of compliance of the competition Law by means of the private enforcement. Specially the privileges granted to these companies in the outer relationships, results in more burdens for the private claimant. The obligation that the claimant party cannot recover from other members of the cartel the damage which has suffered, is an unacceptable privilege of the infractor at cost of the victim, and can discourage of lodging the action.¹⁵⁴⁰ In connection with this matter it has been proposed that by the transposition in German Law, the State witness shall bear the burden of the proof that the claimant cannot recover its damage from other members of the cartel.¹⁵⁴¹

Privileges granted to State witness shall be limited to the inner relationships between the members of the cartel. It is notorious that these privileges do not fulfill the

1533 See *Brokelmann*, RgDe 2015, 1 (3).

1534 See *Lettl*, WuW 2015, 692 –701.

1535 In connection with the definition of SME Recommendation 2003/361/ EC of the Commission.

1536 See *Schweitzer*, NZKart 2014, 335 (344).

1537 *Brömmelmeyer & et al*; La Semaine Juridique 2015, 557 (563).

1538 Council Document No. 14680/14 ADD 1 of 3.11.2014.

1539 See *Makatsch & Mir*, EuZW 2015, 7 (11) and *Kersting*, WuW 2014, 564 (568).

1540 *Krüger*, NZKart 2013, 483 (486).

1541 *Makatsch & Mir*, EuZW 2015, 7 (12); so also *Kersting*, WuW 2014, 564 (568).

requirements of the European case law that hits upon the principle that „anyone“ has the right to obtain full compensation for suffered damages. Thus, these privileges put in risk the principle of effectiveness enshrined by the European courts.¹⁵⁴² Questionable is the fact that the claimant will not be aware at the time of lodging the claim if the defendant is entitled to such privileges, which means another burden for the plaintiff.¹⁵⁴³ To extend privileges beyond the inner recovery to the outer relationships is another breach of the principles of the Directive of making compatible the public and private enforcement. In the case of the privileges of SMEs it is hard to find proper legal justification. It is not task of the European Commission to decide which companies shall survive or not in the market. If we sustain the position of the Commission, that cartels *per se* constitute a barrier in order to access to the market, avoiding SMEs to get bankrupt as a result of a private damages claim, means that the European Commission is impeding new companies with a white service record to access to the market, promoting “bad companies” to stay in the market instead of “good ones”. Such privilege is a breach of the principle of equality.

2.4.6 Passing on defence

The regulation of this matter by the Directive shows its preference for the claims of indirect over the direct purchasers.¹⁵⁴⁴ Thereby the Directive takes distance of the American model which being aware of the difficulties involved in federal claims driven by indirect purchasers denies its legitimization.¹⁵⁴⁵

As per the passing-on defence, the defendant invokes as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition Law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.¹⁵⁴⁶ Thereby unjust enrichment of purchasers, who passed on the overcharge as well as multiple compensation for the illegal overcharge by the defendant shall be avoided. This principle is not clearly stated in the Art. 12 of the Directive, but rather is to be found in the formulation of the Art. 15 with the prohibition of multiple of claims against the causers. Nevertheless, the direct purchasers may have suffered a loss of profit due to the prices overcharge, and according to the Directive, the passing on defence is not excluded in this cases.¹⁵⁴⁷ This is a handicap for potential claims between direct purchasers and takes distance from previous judicial decisions both at the European and German level.¹⁵⁴⁸ In Germany, the Berlin Court of Appeals provided two important parallel decisions on damages claims of cartel customers.¹⁵⁴⁹ According to the Court, both direct customers as well as indirect customers may claim damages against members of a cartel. Cartel members may not invoke the so-called passing-on defence in relation to their direct customers, even if the direct customers might have passed on a price increase to the indirect customers. Rather, direct customers and indirect customers are so called joint creditors (*Gesamtgläubiger*) in terms of § 428

1542 Böni, EWS 2014, 324, (326).

1543 Kersting & Preuß, Umsetzung der Richtlinie, p. 77.

1544 So Brokelmann, RgDe 2015, 1 (3).

1545 The Direct purchaser rule denies standing to indirect purchasers since: US Supreme Court 9 June 1977 Illinois Brick Co. v. Illinois (431 U.S. 720 (1977)).

1546 Article 13 of the Directive.

1547 Brokelmann, RgDe 2015, 1 (5).

1548 Brokelmann, RgDe, 2015 1 (3).

1549 Kammergericht [District Court] Berlin. Transportbeton II, WuW 2010, p.189 ff. See also Lübbig/Mallmann, supranote 20 at 167.

BGB. 1550 Both actions, from the direct and indirect purchaser may be joint in a single lawsuit as well.¹⁵⁵¹

In a higher level, the BGH, by means of the so called ORWI decision,¹⁵⁵² confirmed the passing-on defence. Nevertheless, the Directive improve in this regard the position of the members of the cartel in comparison to the previous German practice. ¹⁵⁵³ First the member of the cartel do not has to bear the whole last of evidence, as the Court can calculate the umbrella price effect by its own, and secondly, the defendant can demand exhibition of evidences from the claimant.¹⁵⁵⁴ According to the German High Court, the defendant shall also prove that the transmission of higher prices to the next level of the distribution chain has not driven to a less demand that compensate the revenues due to a higher price.¹⁵⁵⁵ One of the aspects that could prevent direct purchasers of claiming is the possibility to be required by the claimant to show information in the disclosure that he would rather keep for itself.¹⁵⁵⁶

It has been pointed out, however, that the passing on defence strength the position of the direct purchaser and weak the position of the indirect one. One aspect is the difficulties which shall face indirect purchasers, to proof the extent of passing-on of the overcharge along the distribution chain.¹⁵⁵⁷ The private enforcement by indirect purchasers will find yet multiple obstacles, and the absence of a collective redress instrument in the Directive will not help to increase the incentives for the indirect purchasers to go to Court. The calculation of the distribution of unlawful prices across the chain of distribution is for sure a very complicated issue which will require of intense factual analyze. For the court may be not easy in the first place to find out who the actual indirect or direct purchasers are,¹⁵⁵⁸ and to establish how much of the cartel overcharge is actually absorbed by each distribution level.¹⁵⁵⁹ It would be specially complicated when transnational cases are at stake. In connection with this point is to be reminded that decisions of national competition authorities from different countries can be used as guidelines by other member countries courts, but they are not compulsory.¹⁵⁶⁰ The Directive, in its Art. 14.1 lies the bear of the proof that the prices have been transmitted across the purchasers claim by the claimant (indirect purchaser); however, in order to promote the claims of indirect purchasers, the Art. 14.2 establishes 3 *iris tantrum presumption* that the over costs have been translated in the purchasers chain, so general that actually the proof that the over costs have ben not transmitted will de facto fall by the defendant.¹⁵⁶¹ To avoid multiple liability or to an

1550 Further see Büyüksagis, SRBL 2015, 18 (30).

1551 Case KZR 75/10, WuW 2012, p.57 ff; BB 2012, p.75 ff.

1552 BGHZ 190, 145 = NJW 2012, 928 – ORWI.

1553 So *Makatsch & Mir*, EuZW 2015, 7 (12).

1554 *Makatsch & Mir*, EuZW 2015, 7 (12).

1555 BGHZ 190, 145 = NJW 2012, 928, P. 69 – ORWI.

1556 So *Makatsch & Mir*, EuZW 2015, 7 (12).

1557 *Büyüksagis*, SRBL 2015, 18 (23). Available at SSRN: <http://ssrn.com/abstract=2577898>, Ashton, D & Henry, D; Competition Damages Actions in the EU – Law and Practice, Cheltenham 2013, p.69 ff.

1558 *Büyüksagis*, SRBL 2015, 18 (24). Available at SSRN: <http://ssrn.com/abstract=2577898>.

1559 *Maier-Rigaud*, JCLE 2014, 341, (347); *Becker, Bessot / Smijter*, CPN 2008, 4 (5).

1560 Article 9 Effect of national decisions¹. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.² Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties. 3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

1561 *Brokelmann*, RgDe 2015 1 (17).

absence of liability of the infringer the Art. 15 of the Directive includes some provisions in favor of the national courts, which shall weigh:

- (a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;
- (b) judgments resulting from actions for damages as referred to in point (a);
- (c) relevant information in the public domain resulting from the public enforcement of competition Law.

In connection with the quantification of the damage, the EU already counts with multiple guidelines.¹⁵⁶² The Directive lets in hands of the national court, in accordance with national procedures, the quantification of the harm, and the Article 17.2 includes another presumption *iuris tantum* that the cartel *per se* causes a harm. As per this presumption, the burden of proof of the harmlessness will fall again in the defendant. This interpretation of the reality, that cartels creates *per se* a damage is included in the Directive as an instrument to incentive claims from indirect purchasers. It could of course be an incentive for abusive claims. Finally, as per the Art. 17.3, and according to the Regulation 1/2003 the National Competition Authorities can be invited as *amicus curiae ex officio* or as request of party in order to assist for the quantification of the damage.¹⁵⁶³

2.4.7 Statute of limitation

In this matter it exists a substantial difference between member countries. In countries such Italy, the statute of limitation for actions based on extra-contractual relationships is established in 5 years, since the very moment that the action may be filed (art. 2395 Codice Civile). In UK there exist different statues. As general rule, action brought before the High Court are statuted in 6 years since the damage occurred. This deadline can be extended if the defendant intentionally hides relevant data. In case of follow-on actions before the CAT, the claim shall be lodged within 2 years after the relevant date (the decision's date plus the appeal terms).¹⁵⁶⁴ By means of the Art. 10. Sec. 3 of the Directive, the statute of limitation will be set in 5 years; as it is a minimum requirement for harmonization member countries are able to extend this period. One of the obstacles named in Spain for the efficiency of collective redress instruments by breach of competition regulations was the short time of the statute of limitation. As per the current situation, actions based on breach of competition regulations were included in the article 1968.2 of the Spanish Civil Code, as any extra contractual relationship, namely one year since the affected party knew about about the damaging act. As per the Directive, the new statute of limitation will be of 5 years. The Directive also includes some references in order to clarify when the statute of limitation shall start running. This improve the clarification of

¹⁵⁶² Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, (2013/C 167/07); and the Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Art. 101, 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union {C(2013)3440}.

¹⁵⁶³ *Brokelmann*, RgDe 2015 1 (5).

¹⁵⁶⁴ *Herrero Suárez*, 2016, 151 (170). Specific to british case see *Whish/ Bailey*, Competition Law, Oxford University Press, Nueva York, 2012, p. 315.

this matter in competition field. The regulation of the Directive demands an amendment of the current German regulation in this matter too. Germany will also need to modify its statute of limitation, which currently is established in 3 years; furthermore, the actual regulation that makes the period of limitation independent of the knowledge of the potential claimant (§ 199 Sec. 3 BGB) shall be raised in Germany, as by means of the Art. 10, the Directive enshrined the principle that the Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, and can reasonably be expected to know 3 different circumstances, namely: that the behavior and the fact that it constitutes an infringement of competition law; the fact that the infringement of competition law caused harm to it and the identity of the infringer.¹⁵⁶⁵ Further will be discussed, at which point the potential claimant shall gain knowledge of these factors. Such clarification by the Directive would have gained legal certainty. Some authors discuss if this must know principle is reached by the mere publication of the non-appealable ruling, or first when they have access to the administrative file. A simplification of the Directive requisites could drive to a lack of preparation in the private claim which can even drive to a waiver of the claimant.¹⁵⁶⁶ According to the Art. 10. Sec. 4, *the limitation period shall be suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.*

In order to promote settlements, before the risk that negotiations between the parties last in the time and overpass the statute of limitation, the Directive demands that the prescription limitation periods need to be suspended for the duration of the consensual dispute resolution process.¹⁵⁶⁷ Settlement's promotion shall qualified the national court to suspend its procedure also, if extra judicial negotiations are undertook between the trial parties.¹⁵⁶⁸ Such suspension is foreseen in German Law, namely in the § 33 Sec. 5 No. 2 GWB, but the Directive grants one year (at least) after such procedure is over. It drives to a better position of the claimant.¹⁵⁶⁹

The Spanish proposal for incorporation of the Directive almost copy literally the 5 years term; so the Spanish law maker does not make use of the possibility included in the Directive to extend this term. Substantial aspects such the beginning of the count as well as the circumstances that the claim shall be aware in order to start the calculation reflect the wording of the Directive. Circumstances that will interrupt the statute of limitation, such the intervention of an administrative authority, as well as the existence of an alternative dispute resolution procedure (with effects only for the parties in the extrajudicial procedure) are reflected in the Spanish proposal following the Directive specific approach.¹⁵⁷⁰

2.4.8 Effect of national resolutions

As by means of the Art. 9, the Directive regulates the effect of the decisions of national competition authorities and competent judicial bodies. As per the section 1 of the

1565 *Bürger/ Aran*, NZKart 2014, 423 (424).

1566 *So*, *Makatasch/ Abele*, WuW 2014, 164 (169).

1567 Whereas 49 Directive

1568 Whereas 50 Directive.

1569 *Keßler*, VuR 2015, 83 (91).

1570 *Herrero Suárez*, 2016, 151 (170).

article, the decisions of national competition authorities / competent judicial bodies are indisputable, for the national court. Different is the case of foreign resolutions, which will have just a *prima facie* value according to national procedural rules (Art. 9.2). It can be a challenge to the right to an effective judicial protection considering the decisions of competition national authorities as indisputable. The fact that the access to files in the frame of a leniency program are prohibited for the parties, shall in my opinion not justify the consideration of indisputable character of the decisions of a national competition authority. Nevertheless, this is not a newness in the *aquis communautaire*, as per the decisions of the CJEC *Delimitis* and *Masterfoods*¹⁵⁷¹ the resolutions of the European Commission deploy binding force for the national courts. In regard to the decisions of the European Commission, the uniformity in the application of the European Law is granted, as the national courts can only challenge this resolution by means of a prejudicial question before the CJEC. Nevertheless, the direct recognition of a competition national authority *per se* seems to be incompatible with the principles of separation of powers and judiciary independence of the member countries.¹⁵⁷² In the Spanish case, for instance, such indisputable effect of the decisions of the Spanish national competition authority (now Commission Nacional del Mercado y la Competencia) was denied by the government of the Judges, the so called Consejo General del Poder Judicial as a breach of the separation of the above mentioned principles of separation of powers and judicial independence.

German authors consider that due to the asymmetry of information and the hidden agreements of a cartel it is justified the total presumption of the certainty of administrative decisions contained in the Art. 9 of the Directive.¹⁵⁷³ Nevertheless, the presumption of the Directive remains softer than the presumptions already included in the 7. Novelle GWB §33 Sec. 4, which grants such presumption not only to the German *Kartellamt* but to any competition authority of any other member country. The argument is that in the most cases, the affected parties have knowledge of a breach of the competition rules due to an administrative resolution. In my opinion this stake has no legal justification. In the first place because if the affected party is not aware of a damage, it probably means that this damage have never occurred. The protection of the common goods and the *ordre public* needs in my opinion an actual damage that can be individualized. Such damage shall be of enough entity so that the affected individual is aware of having suffered such damage. Otherwise, the risk that partial and wrong stakes of the *ordre public* exceed and overcome the actual individual rights is too high. Secondly, an administrative procedure does not contain all the warranties of a judicial one. It can be argued, however, that the parties investigated in an administrative process can always raise administrative appeal, so if an administrative resolution becomes final, the defendant has renounced to appeal, or it has been confirmed by a judicial body. This argument can be taken into consideration, and therefore the decisions of the national competition authorities can be consider as probed facts- in my opinion- as long as it is understood that one of the both mentioned requisites (confirmation by a judicial body or renounce to appeal by the defendant) are actually happened.

1571 CJEC Judgment of 28th February, Case C-234/891991, *StergiosDelimitis c. HenningerBräu AG*; ECLI:EU:C:1991:91; CJEC Judgment of 14th December, Case C-344/9, *Masterfoods Ltd c. HB Ice Cream Ltd*, ECLI:EU:C:2000:689.

1572 *Brokelman*, RGDE 2015, 1(5).

1573 *So Keßler*, VuR 2015, 83 (85).

2.5 The Directive and the forum shopping

One of the reasons which would support the harmonization of the private enforcement of antitrust rules is the inequality between the member countries to foster such kind of claims. Although in the beginning, the action for damages within the European room were considered as *rare orchids*,¹⁵⁷⁴ the majority of such claims were lodged in UK, Germany and the Netherlands.¹⁵⁷⁵ One of the aims of the Directive is to reach minimum standards, and thereby promote the private enforcement within the member countries by means of the legal certainty and harmonization between member countries. But it would be ironic, that a legal body which tries to increase the competition in the internal market, reaches such level of harmonization that impede in fact the competition between the different legal systems for the compliance of the EU Substantive competition rules.¹⁵⁷⁶

One of the key aspects that the Directive has left out is the collective redress. As it was recognized in the studies of the Commission previous to the final approval of the Directive, such instruments do have a substantial role in the private enforcement. As the Directive has not included any collective redress rule and has discard the harmonization in this regard, there is a substantial free room for the different member countries judicial systems to compete with each other by the introduction of suitable collective redress instruments. Next to the absence of collective redress instruments, it has been pointed out too, that the original high purposes and expectations about the improving of the private enforcement, have been partially succumbed to the public enforcement tools, as it shows some rules such the total prohibition to access to administrative files in the frame of a leniency program. Thus, the Directive seems to rely more in the public enforce rather than the private one in order to reach higher standards of competition in the community market.¹⁵⁷⁷

As the most of the rules contained in the Directive demand a minimum harmonization, with exceptions for a complete harmonization (such the prohibition of over compensation according to Art. 3 Sec.3 or the total prohibition to access to administrative files in the frame of a leniency program as by means of the Art. 6 Sec. 6), there exist room for the competition between the member states in order to configure the most attractive litigation forum. Such minimum harmonization is granted for instance in aspects such the statute of limitation, or the interruption of the same, where the Directive sets some high standards for a better private enforcement, but at the same time allows the member States to include more generous rules in this regard. Regarding the attractiveness of the German forum in this respect, the 9. *GWB-Novelle*'s Government proposals has adopted the 5 years rule of the Directive, losing thereby attractiveness against other legal venues such the UK that count with a 6 years period of limitation.¹⁵⁷⁸ For Spain, such statute of limitation, will be an important change, as any extra contractual relationship falls after one year time. Aspects as the interests claim will be supported by the Directive establishing the recognition of the whole compensation, and counting the date of the damage in order to

1574 So *Wurmnest*, NZKart 2017, 2, (9) in connection to Ashurts, Study on the conditions for claims for infringements oC EC Competition rules. Report on comparative Law situation of Waelbroeck/Slater/Even-Shoshan available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>. Retrieved last time 20th January 2017.

1575 See in this regard *Herrero Suárez*, CDT 2016, 150 (151); OCDE: *Relationship between public and private antitrust enforcement. Note by the Secretariat*. 11.06.2015, disponible en <http://www.oecd.org/ofcialdocuments>.

1576 See further in *Basedow* BJM 2016, 217 (219).

1577 So *Bien*, NZKart 2013, 481 (482).

1578 §33 h Sec 1GWB-RegE, further in *Wurmnest*, NZKart 2017, 2 (9).

calculate the same,¹⁵⁷⁹ but with the limit of the over compensation, will remain in the competence of the member States to establish the amount of the interest rate, which can play a substantial role in the competition between the different legal venues among the state members. Due to the prominent minimum harmonization character of the Directive, the competition between member states will be exciting. Probably one of the most relevant aspects will be the disclosure, as the literature has always stressed that the access to evidence is one of the most significant aspects that have prevent a higher level of private enforcement in competition law. In this regard, the English forum, specially the London one appears in the literature as quite liberal and attractive.¹⁵⁸⁰

With the limits and according to the legal configuration of the InPLaw rules that apply in this field, the forum shopping is a legitimate strategy in favor of the claimant, which shall be taken into account by the member states. For the point of view of the consumer protection, is desirable a high degree of competition not only in the market between companies but also in the judicial practice between countries. Governments of European member countries shall also take into consideration the importance of this factor, as it can have important economic advantages to count with a proper and attractive legal venues, as for instance the law firms established in attractive forums will be promoted in detriment of others that are established in less attractive forums.

1579 Whereas 12 of the Directive.

1580 So *Wurmnest*, NZKart 2017, 2 (10).

Part VI SUMMARY

1. Main differences between Germany and Spain

There are still substantial differences in the configuration of the consumer's legal figure and available collective redress instruments to its disposition in each country. **These differences refer mainly to the possibility to obtain reparation for damages in collective procedures.**

Spain introduced in the year 2000, in its general Civil Procedure Act (LEC), the possibility for consumers' associations and groups of affected consumers *ad hoc* to resort to **a sort of class action fully regulated**. This was a constitutional requirement of the right to be heard before the court, fundamental right that in Spain is known as the "Right to obtain an effective judicial protection of individual rights".¹⁵⁸¹ Such inclusion of collective redress in the general German Civil Procedure Act (ZCP), or any other sectorial regulation has not happened yet, as Germany keeps resistance to the introduction of those instruments which may affect the reparation of parties which did not take direct part in the procedure, which is a noble defence of the subjective rights. Curiously, if in Spain the introduction of collective redress develops the constitutional right to be heard before the court, the reluctance in Germany for the introduction of such instruments is also based on the same principle. As per the Spanish stake, not bringing spread damages to the court because there do not exist a suitable procedural instrument is a breach of the effective judicial protection of rights. Meanwhile, the German stake is based on the idea that a procedure that grants or may grant reparation to parties that are not involved in the procedure is also a violation of the right to be heard before the Court. Nevertheless, **Germany counts with a wide menu of instruments proper to deal with no pecuniary affection to supraindividual rights and a with an instrument -unique in its specie- that does allow to damage recovery of a multitude of affected parties: the German *Musterklage*. This instrument, which up to the date has been used mainly in connection with securities**, could offer a reasonable response to cases of massive consumers' damages.

Current differences between both countries shall have been mitigated through the harmonization efforts of the European Community in this field, but the European law maker has renounced to harmonize the collective redress in the common market by means of a compulsory instrument. Thus, Spain and Germany are entitled to follow their own path in this matter. EC's latest legislative task on consumers protection and antitrust policy task were undertaken with the approval of the **Directive on antitrust Damages** actions which was signed into Law on 26 November 2014, and the **Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress** mechanisms in the member States concerning violations of rights granted under Union Law. The Directive shall provide a harmonized response to consumer's damages within the European space by breach of the EC's or national competition regulations, whereas the Recommendation, a softer instrument just provide some guidelines for the collective redress actions for the member countries, if they want to pursue with such instrument.¹⁵⁸²

1581 Art. 24 Constitución Española, BOE 311 of 29th December 1978.

1582 See Chapter IV of this work.

Following will be compared those aspects which result in a different configuration of the collective redress in both countries, such standing, possibilities of the individual consumer once the collective procedure is started, and the treatment of specific situations such the reimbursement of damages – both minor or relevant damages, as well as procedural aspects, and other barriers that the collective redress might find to get an effective protection of consumers.

1.1 Different categorization of interests

Regarding the so-called *negative protection of consumers* -such as the injunction claims- there are not substantial differences between both countries as this is a well harmonized field within the EU. Nevertheless, there are differences in the consideration of the term *collective interest* and its judicial response, as **the term collective consumers' interests is according to the European and German consideration different than the accumulation of individual interests and therefore a defence of supraindividual rights do not allow for damages recovery.** According to this consideration, collective interest would be a category of an indivisible interest, thus, not a single consumer can dispose of such interest and would not be entitled for recovery when collective interests are affected.

Since the approval of the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, updated by means of the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, the so-called collective consumers interests shall be defended by consumers associations, as these associations represent such indivisible rights in a proper way. To obtain such consideration, a consumer's association must fulfil a serie of requirements. Such requirements may be established by the member countries legislation. Normally these requirements will try to avoid that the consumers associations act in the market as a profit organization that could use the representation of alien rights for its own enrichment; these associations shall care of indivisible collective goods rather in order to be entitled for the defence of such interests at Court.

In Spain, according to the Law's text and related case law, collective interests are understood in some circumstances as multitude of individual interests which can conform a procedural unity. Such consideration, **different to the European and German one, allows for damages recovery next to any injunction action.** The key criteria for the enforcement is the possibility to ascertain the individual right which shall be repaired. As a matter of fact, the determination of the holder of the subjective right plays a major role in the Spanish collective procedure, being one of the capital aspects that conform the collective redress in the Civil Procedure Act. If the collective interest can be individually ascertained, it can obtain reparation for damages in a collective procedure. When the right might not be ascertainable, Spanish Law establishes a different category of interests, namely "diffuse interests" and according to the article 11.3 LEC "*when those damaged by an event are an undetermined number of consumers or users or a number difficult to determine, the standing to lodge a claim in Court in defence of these diffuse interests shall correspond exclusively to the associations of consumers and users which, in accordance with the law, are representative*".¹⁵⁸³ In this sense, to be entitled to defence diffuse interests, it is not sufficeient to be a consumers association that watch for collective interests, it is also required to be enough representative.

1583 Article 11.3 LEC, BOE No. 7 of 8th January 2000.

Nevertheless, **the term *diffuse interest* is quite complicated to define, and is still a matter of concern for the Spanish academia. It has, two different treatments under Spanish Law: cases which merit injunction and cases with merit reparation of damages.** For instance, in those cases of misleading advertisement, where the affected consumers are not ascertainable, it could be considered a case of diffuse interests, but will not be treated under the article 11.3 of the LEC (diffuse interests) but by the article 11.2 LEC (collective or general interests). The article 11.3 LEC applies rather when the unascertained interests can be repaired. Thereby the Spanish legislator puts himself in a hard position. How can those rights be repaired when the holders are not ascertainable?

The possibility to ascertain the affected consumers must be considered at the time of lodging the claim. The impossibility of identifying each affected consumer at that time shall not prevent of lodging the claim based on those diffuse interests. The judgement shall establish sufficient criteria for reparation and identification of affected consumers which may be used in a later procedure before the enforcement court. A problematic pointed out in the literature is connected to the *res iudicata* effect of the judgement and its relationship with the right to be heard before the court for those parties that did not take part in the procedure or suffered the *vis atractiva effect* of the collective action over the individual one. This is a concern of the German literature also, and probably one of the most significant barriers for the implementation of collective redress instruments in this country.

1.2 Standing

1.2.1 Germany

Germany has a specific regulation for the negative defense of consumers and other market actors: the *UkLaG*. This Law, in general contract conditions, consumer's law, and intellectual property establishes the standing to defend collective consumers' interests. This regulation does not cover every injunction claim which consumers' associations might invoke under German Law. The UWG as well as the GWB include both injunction claims as well. Regarding the standing, both regulations refers to the § 4 *UkLaG*, which sets some requisites.

The German law maker, to grant standing to consumers' associations demands two main requisites. One related to **the activity of the association, which must care for consumers interests¹⁵⁸⁴ on a permanent basis** (at least one year in the related field) and **without industrial interest and offer**. The other is related to the number of components/members; if the association has not acted in the specific field, shall count with at least (75) members. In any case, **the association must be able to care in a proper way with the interests at stake, which shall be measure considering its previous activity.**

1584 The *UkLaG* does not specify if these interests are general or collective.

1.2.2 Spain

The Spanish Law maker, regarding the *general defense of consumer's interests*, **lets this task to consumers' associations** which may match the requirements of the Art. 23 RDLGDCU. As such will be considered, **non-profit organizations**, constituted according to the specific requirements of the association's regulation,¹⁵⁸⁵ **which has as aim the defense of legitimate interests and rights of consumers and users, including its training and education in general or specific aspects of consumption.** Consumers associations in Spain are also those constituted entities according to the cooperatives regulations if in their aim is included the training and education of their associated members, and they support this task with an economic fund. Associations can be integrated in confederations, as long as they share the same aim, and are constituted according to the Law. They shall act with fully independence regarding other market parties and public power. Grants and subsidies shall not break its independence.¹⁵⁸⁶ Thus, Spanish consumers' associations do not need to be acting one year in the related field of consumption or counting with many members in order to sue for the negative defense of consumers and users, or for recovery as long as the affected interests are ascertainable. **Both permanent consumers' associations and groups ad hoc of affected consumers count with standing to sue.**

In the case of diffuse interests, namely when the art. 11.3 LEC applies, and repairable diffuse interests are at stake, only those representative consumers' associations will be legitimized. These are such consumers associations that according to the Art. 24.2 RDLGDCU form part of the **Consejo de Consumidores y usuarios**. The requisites to be part of this Council are content in the Royal Decree **894/2005**.¹⁵⁸⁷ Being member of the Consumers Council is a presumption *luris tantum* that such association is enough representative. But the inclusion or not in the Council shall not prejudice if an association is representative or not. The judge will check if the claiming association is enough representative in the field of dispute, both material and territorially.

1.3 Problematic opt-in/ opt-out: right to be heard before the court

Probably the biggest concern with the introduction of a class action system is its affection to the fundamental right to be heard before the court. **The Commission clearly supports the opt-in system.**¹⁵⁸⁸ This option requires the express adhesion of the individual to the group in order to be affected by the binding effects of the judgement. **The Commission do not discard the opt-out system for good though.** In cases of minor damages, it is to be expected that the affected party will renounce both to start an initial claim as well as to enroll his right into an opt-in claim frame.¹⁵⁸⁹ The experience in case of minor damages, have shown, that without a proper opt-out instrument, damaged parties would not have received any compensation.¹⁵⁹⁰ Thus, the door to the opt-out system

¹⁵⁸⁵ Or the specific regulation of the Autonomous Community.

¹⁵⁸⁶ The law specifies some measures in order to guarantee this independence (Art. 27 RDLGDCU). Their associated can not be legal persons with profit purposes, and can not receive grants or donations of entrepreneurs of group of entrepreneurs which offer products and services to consumers.

¹⁵⁸⁷ BOE No. 204 of 26th August of 2005. Modified by Real Decreto 487/2009, of 3th April. Further analysis see Spanish Part of this work.

¹⁵⁸⁸ For a recent analysis from different perspectives, see *Van Boom*, Mass Torts in Europe, Cases and Reflections.

¹⁵⁸⁹ *Poelzig*, Normdurchsetzung durch Privatrecht, p. 385 ff.

¹⁵⁹⁰ Cases such "Agent orange"; "Asbestos litigation", "Dalkon Shields", or "Silicone breast implants". More in Bak, Jacek, *Ökonomische Analyse des Rechts*, p. 240. Further explanation and references see also *Hensler, D; Peterson, M.* BLR 1993, 960.

remains open for those cases as long as it is justified by reasons of procedural economy and it is sustained by law. The configuration of this system, where the affected member of the class need to express its will to defend by its own its subjective right, remains open and subject to configuration by member countries. As stated in other parts of this work¹⁵⁹¹, European scholars tend to consider the opt-in version more compatible with the European civil procedure principles. Nevertheless, some European countries such Portugal, or UK bet for the opt- out system.¹⁵⁹²

1.3.1 Spain

Spain did not choose one of two most popular variants for class action, whether an opt-in, or an opt-out system. The Spanish legislator choose a third variant, which shall warranty a uniform application of the Law and a higher procedural efficiency by avoiding duplicities but presents some questions about its constitutionality. **As per the Spanish Civil Procedure Act (LEC), any lodged class action will affect to all members of the class, as there is not recognized possibility to opt-out.** The binding effects of the judgement will affect to the members of the class *ex lege*. Nevertheless, any affected consumer may exercise an adhesive opt-in right in order to warranty its participation in a procedure that will affect him. Its participation as single claimant next to a collective procedure may suffer of all related issues related to the *vis attractiva* effect.

The absence of a proper opt-out instrument raises some questions about the constitutionality of the Spanish class action system, namely with the fundamental right to be heard before the court. In Spain the right to be heard by the Court is understood as an *effective judicial protection of judges and courts*. As per the Spanish Constitutional Court, the Spanish legislator count with a wide margin in order to configure this right, only limited by the necessary respect to the essential content of the fundamental right to an effective judicial protection and the principle of proportionality.¹⁵⁹³ As per the Art. 7. 3 LOPJ, **the Spanish Judges and Courts will protect legitimate interests, both individual as collective, so that no defenseless may happen.** This programmatic article is the reflection in the ordinary Law of the Constitutional order to protect *legitimate economic interest of consumers and users*. Not bringing minor damages because there is not a suitable procedure in order to do that, or not granting standing to consumers associations or group of affected consumers *ad hoc* for the defense of the collective consumers interests will be considered in Spain a breach of this fundamental right.

The current Spanish class action, regulated in the general **Civil Procedure Act (LEC)**, is the response to the above mentioned principle. In application of such right, the current regulation of the collective redress in the Civil Procedure Act respects in the first place the essential right to the effective protection from the judges and the courts in the exercise of legitimate rights of consumers and users, and in no case may there be a lack of defense, as the law does not allow for the self-exclusion of the procedure. Thus, **the absence of an opt-out instrument does not ensure that any affected consumer is**

¹⁵⁹¹ See German and European Part of this work

¹⁵⁹² See on this subject *Requejo Isidro/ Otero Crespo*, Collective redress in Spain: recognition and enforcement of class action judgments and class settlements, in: Fairgrieve/ Lein, (Eds.), Extraterritoriality and collective redress, p. 309 ff. *Gascón Inchausti*, Tutela judicial de los consumidores y transacciones colectivas, pp. 25 -27. Opt-out classs action introduced in UK by means of the Consumers Right Act 2015. Brief explanation and highlights of the british configuration available at <http://www.allenoverly.com/publications/en-gb/Pages/UK-Class-Action-Regime.aspx>.

¹⁵⁹³ STC of 18th December 2000, Rec. No. 311/2000,ECLI:ES:TS:2000:9358.

heard by the Court, but it does ensure that they obtain an effective judicial protection about their rights or interests. Even if the affected consumers are out of the procedure, they obtain a judicial response to its pretension, which is acquired by an -adequate- representative party. This solution would be compatible with the Spanish constitutional doctrine on the matter.¹⁵⁹⁴ At the same time, the limitation to affected members who were out of the process match the proportionality principle as it is:

1. Adequate and necessary in order to reach the aim of the legislator which is to configure an efficiency procedure to deal with massive damages by saving procedural resources in a single procedure and to watch for individual interest and rights that otherwise would not access to the court.

2. And allow consumers associations to watch for the general interests of this collective. Besides, there is a proportional sacrifice of the individual limitations with the results of the procedure. The individual claimant will entitle any time to intervene into the procedure by means of the *litisconsorcio activo*, counting with autonomy in defence of the pretensions that he may drive.¹⁵⁹⁵

It shall be distinguished the ordinary class action, promoted by groups *ad hoc* of affected consumers of the so called institutional class action promoted by representative consumers' associations. The class action in Spain may be lodged by the majority of affected consumers or it could be representative and lodged by consumers' associations. Different rules will apply for each variant, being the regulation for the representative associations to be extended to such legal blanks in the regulation of the class action of affected consumers.

1.3.1.1 Class action of affected consumers

As stated before, the Spanish class action of affected consumers is hard to classify in the system opt-in/-out. The Spanish law maker "forgets" to introduce in the LEC a specific regulation of the binding effects of the judgement for the cases promoted by groups of affected consumers *ad hoc*. Nevertheless, the regulation on actions promoted by associations will analogue apply.

Any Individual consumer will be affected by the claim, as the judgement deploys it *res iudicata* effect. As the group of affected consumers constituted *ad hoc* must be conformed by the majority of affected consumers in order to be able to lodge the claim, the majority of individual rights will be protected, which may be a sign of an *opt-in* system. Nevertheless, the individual consumer cannot act separately. **Once the claim lodged by the group is admitted, it applies the *lis pendens*** based on the article 410 of the LEC.¹⁵⁹⁶ Any other claim will be depended on the already opened process. The individual consumer could try to be admitted in the group, or joining the action separately, based on the article 15.2 LEC being able to *conduct only the procedural acts which have not been precluded*.

If an individual consumer is the first one lodging the claim, **the affected group can be part in the process and will be considered as the *vis atractiva* of the process,**

¹⁵⁹⁴ The compatibility of such instrument has been already being proved by Spanish scholars. This solution is compatible with the Spanish Constitution, so, *Prof. Javier Mieres, L; Acerca de la constitucionalidad de la nueva regulación de las accionescolectivas promovidas por asociaciones de consumidores y usuarios.*

¹⁵⁹⁵ Specific to the matter see *Javier Mieres, L; Acerca de la constitucionalidad de la nueva regulación de las acciones colectivas promovidas por asociaciones de consumidores y usuarios.*

becoming the main claimant. The Law regarding the joint of proceedings will apply (76-78 LEC).¹⁵⁹⁷ These limitations are proper of an opt-out system and are for some Spanish scholars, contrary to the right to be heard before the court. In this regard, the LEC includes a series of measures that attempt to mitigate the adverse effect of this system.¹⁵⁹⁸ Nevertheless, it can be sustained, that, as long as the regulation on actions promoted by associations apply, there are enough warranties for the individual consumer, as:

Since the group must be conformed by the majority, the affected consumers will need to cooperate; the affected consumer may drive its own representation during the process, and there is no need to specify the beneficiaries of the sentence (Art. 221.1.1 LEC): **Judgments issued in proceedings brought by consumer or users associations.** *1. Notwithstanding the provisions set forth the preceding articles, any Judgments issued as a result of claims brought by consumer or users associations having the legal capacity referred to in Article 11 herein shall be subject to the following rules: a) Should a monetary sanction have been sought for doing or failing to do a specific or generic thing, the judgement upholding the claim shall individually determine the consumers and users who shall be deemed as benefiting from the judgement in keeping with the laws protecting them. **Where individually determining such users or consumers may not be possible, the judgement shall set forth the necessary details, characteristics and requirements to be in a position to require payment or, as appropriate, apply for enforcement or be a party to it should the association that had brought the claim do so.***

1.3.1.2 Institutional class action

This variant is promoted by consumer's associations. It shall be distinguished the cases of ascertainable and not ascertainable affected consumers.¹⁵⁹⁹ There are specific regulations on publicity, admission of and to the claim, etc... for each above-mentioned variant. As shown in the Spanish part of this work, many authors have identified some deficiencies in the current LEC in connection with a proper defense of the right to be heard before the court. In my opinion, the LEC needs some improvements, but in its actual configuration contains enough warranties to obtain an effective judicial protection of rights.¹⁶⁰⁰ It should not be forgotten that these instruments are created to improve the access to justice in situations where consumers have been suffering defenseless. From the consumer's perspective, **any class action system, even if is configured as an opt-out model, is better than not suitable action at all**, especially in the cases of minor damages, when individual claims are not worthy. The possibility to delay the determination of the entitled consumer for reparation to a later stage, as the LEC permits, extend the constitutional guarantees of the affected individual consumers.¹⁶⁰¹ In this sense, the German's *Musterklage* present some coincidences with the Spanish solution. It can be used as a cognizance/ declarative/guidance judgement whose content may be used by the affected consumer in a later procedure.

1596 Art. 410 LEC. Commencement of *lis pendens*: *Lis pendens* along with all its procedural effects shall come about from the moment the claim is brought, should it then be given leave to proceed.

1597 Further develop and references in the Spanish Part of this work.

1598 See publicity of the Claim, Scope of the Judgment, etc... at the Spanish Part of this work.

1599 See Spanish Part of this work.

1600 The main problem of the Spanish collective redress is the general inefficiency of the whole Spanish judicial system which is too slow and too loaded of procedural requirements.

1601 This later determination of the affected consumer is not a two stages procedure declarative and executive. See Spanish part of this work for further analysis.

1.3.2 Germany

German's civil Law recognizes some liability instruments in consumers' Law. Within these instruments, the *Gewinnabschöpfungsklage* remains as the most preventive one,¹⁶⁰² it is as a matter of fact, an instrument that shall increase the enforcement of the substantive Law but is not an instrument which pursues recovery of individual damages. Beyond the negative protection of consumers, there are some special procedures in the German civil Law such the *Musterklage* (test case), and the general provision of the § 79.2 No. 3 ZPO which seek for reparation of damages in favor of consumers. The traditional *Streitgenossenschaft* of the § 59 ZPO ff – although not suitable for claimants over 100 participants¹⁶⁰³- shall also be named as a possible collective redress instrument.

Within the repertory of German instruments available to deal with spread damages, special mention shall be made for the *Musterklage*. The German *Musterklage* has been already shown its utility in the real practice. The current regulation of the *KapMug* is well configured and has proven its suitability already dealing with cases of massive damages in its field of application, such instrument *enables a more effective treatment of investor's claims involving identical issues of law or fact through model case proceedings on particular questions (such as whether a statement in a prospectus was wrong). The findings of these test case proceedings have binding effect on the other claims, but the individual cases are kept separate.*¹⁶⁰⁴

Unfortunately, this instrument is limited to a very specific field of application, namely the securities. This is not an instrument that can be compared to the American securities class action, but could in fact be a proper instrument to deal with massive damages in any field of law as it treats identical legal questions by means of a single procedure, and allows to treat specific individual circumstances at the same time. Declarative aspects of the issue will be treated as a common aspect and individual compensations will be treated separately. It is an instrument proper of German Law and represents a commitment between the individual protection of subjective rights and the possibility to deal with spread damages by means of a single kind of procedure. Some voices however, as **the Verbraucher Zentralen (VbVb)**, insists that the current existing instruments are not suitable to deal properly with minor damages and **Germany shall finally adopt a general opt-in institutional class action in its civil procedure** to strength consumers' rights in this country.¹⁶⁰⁵ As per the characteristics of the German civil procedure, - according to the *VbVb*- the introduction of such instrument shall not drive *per se* to abusive claims. The principles of compensating the winner party of the costs of the procedure, the prohibition of punitive damages and the limitations to the contingency fee, in an opt-in system frame shall prevent of abusive claims meanwhile consumers interests acquire a better protection. The *VbVb*, supporting the Commission's view suggests that other preventive measure is

¹⁶⁰² This could be a proper instrument for the public authorities, but it is not a suitable figure for private claimants- associations- which will not enter in such risks if they cannot obtain reparation for individual damages. It has been criticized as bureaucratic, and too complex in order to obtain just a recovery function. The protection against unlawful profits could be included in a general class action system that also allows damages recovery.

¹⁶⁰³ According to the consumers associations which have make use of this instrument, it is very hard to provide a comprehensive defense of each consumer when the claimants exceed 100 people

¹⁶⁰⁴ British Institute for International and Comparative Law: focus on collective redress; Germany. Available at: <https://www.collectiveredress.org/collective-redress/reports/germany/overview>. Retrieved last time 20 th February 2017.

¹⁶⁰⁵ References at the German Part of this work. Other authors consider that the *Musterklageverfahren* would be enough to improve the access to justice that the Commission demands. i.e. *Fiedler, Lilly*. Class action zur durchsetzung des europäischen Kartellrecht, p. 108 ff.

to avoid private financing of the claim. Such financing shall rely on imposed fines. This stake is not fully exempt of risks, as the associations shall, as much as possible, act independently from the public authorities, that already count with their instruments to prosecute with public means infractions to the *ordre public*. Otherwise it will be a negative movement towards the private improvement of the access to justice of consumers, which will still ultimately depend on public means. Consumers associations already count with public support. The role of other private actors such lawyers in the protection of consumers shall not be denied and could play an important role in the enforcement of consumers' rights. The negative example of the USA, where the active role of law firms in an opt-out frame has driven to an over litigation culture shall be put in perspective in Europe due to our liability systems. As per the Spanish experience, where contingency fees are legally allowed – but not used in the practice-, a litigation culture is yet far to be established¹⁶⁰⁶. It already exists enough barriers to access to justice for consumers in the European market, so a certain degree of incentives to bring cases to the court, shall not be feared and would help to improve the judicial protection of consumers without necessarily drive to abusive claims.

2. A better protection of private rights of consumers

It has been shown in this work different responses from the current civil Law to deal with supra individual interests. The civil Law response before these situations shall be mainly independent of the public supervision or any kind of institutional representation if the liberal principles of the European Civil Law are to be maintained. Thus, instruments to enforce rights shall be kept in the hands of their holders. Therefore, proper procedural instruments, able to overpass the so called rational apathy of consumers to sue making more attractive the litigation are very positive under many points of view; i.e.; consumers acquire responsibility in the market; - shall watch their own interests without relying on associations or any public institution. The renounce of the EU to harmonize in the first place the collective redress in the common market shall not be seen a negative situation. Furthermore, **the lack of harmonization could drive to a competition between the member states to develop the more proper collective redress instrument**. In this sense, it is to be celebrated that the Commission by focusing on the supremacy of the public enforcement and safeguard of its leniency programs has “forgotten” the collective redress for a while.

Some precaution measures must be taken in order to keep the equality of arms in the procedure and avoid baseless claims, but the individual claimant shall be able to start by its own an action that eventually become a class action, both in cases of determinable or hard to be determinable interests. In order to allow that, some aspects which facilitates the claim, such the contingency fee, measures regarding costs of the procedure, a clear distribution of damages, better mechanisms to access to evidence such the primacy of the private claims over the leniency programs, etc... shall be improved in favor of the potential individual claimant. As long as the European reparation principles are guaranteed (no punitive damages, and the principle of the losing party pays the trial) collective redress in favour of consumers could be configured in many ways to improve its access to justice.

¹⁶⁰⁶ In the Spanish popular culture, when you desire bad luck to somebody, you hope he enters in a lawsuit and he wins.

2.1 Institutional class actions vs group of affected consumers

Discussions on the collective redress focus on who shall defend subjective rights when these are not enforced by its owner. Agreeing with Säcker, the State shall not promote lawsuits when the individual does not want to claim, so is the nature of the subjective right. Nevertheless, this statement is true when the State don't create or avoid barriers for the existence of a suitable instruments for a better access to justice in favour of consumers, individually considered, if they want to claim. This stake shall have been clearer in the Directive on antitrust damages actions, which unfortunately keeps some barriers to the individual claimant as a precaution to maintain the public enforcement by means of the leniency programs. By granting standing to consumers' associations to deal with cases of massive damages, the subjective right is affected by an intermediary part, which may act or not. The motivations of the consumers' associations are defined by statute, and they shall care for consumers' interests. But in the current society, consumers are affected in many situations which may scape the watching capacity, resources or interests of consumers' associations. Increasing the public founding of consumers' associations in order to increase its ability to watch the market, makes them more depending of the public power.¹⁶⁰⁷ **The enforcement of the subjective right should be independent of the relationship's dynamics of consumers' associations with the origin of its founding when private enforcement is supported by the State.** The subjective right requires subjective protection, intermediary parties such consumers' associations, or competition authorities shall not be part of the protection of consumers' private interests, unless an explicit cession of rights is granted. Such cession could also be implicit when an individual decides to join a consumers association which is oriented to damages recovery. In this sense, this implicit relationship is clearer when the group of affected consumers are constituted after the damage happened in an *ad hoc* association of affected consumers. Affected parties are the holders of the subjective rights, and the efforts of the public authority and the civil procedure shall focus in the creation of a private instruments for damages recovery in favor of those affected parties. **The public supervision, or the activity of consumers' associations founded by public means do not fulfil the aim of the civil procedure, which is the private defence of subjective rights.**

Individual rights can be put together in the same procedural unity if the individual claim is not high enough to make it worthy. Such is the group of affected consumers or group *ad hoc*. This requires private organization and cooperation in order to build up the group. This organizative tasks could be developed by the affected consumers by their own, or by law firms or consumers' associations. As long as the standing remains in the affected parties, other private institutions can help in the configuration of the group and preparation of the claim, and if they count with the necessary cession of rights, also to lead the procedure. Following this path, citizens acquire responsibility of its economic roles as consumers. In any contract, each party shall count with the relevant information of the object of the contract to make it valid. Such principles shall apply also in consumers' protection. If a consumer's contract is signed and the necessary elements of the contract are present, the consumer shall be considered aware of its rights and shall be able to defend them as a rational decision in a suitable procedure.

¹⁶⁰⁷ See *Rott*, Kollektiveklagen von Verbraucherorganisationen in Recht, in: Casper (Ed.); Auf dem Weg zur einer europäischen Sammelklage, p. 268.

2.2 Opting-in or opting- out

If the individual consumer shall not depend on private associations or the public authorities to watch for their own rights, it should not be affected by the binding effects of a judgment fallen in a process lodged by a private claimant either. In this sense two possibilities may be suitable: an opt-in class action or a *Musterklage* with declarative effects that may be enforced by the affected consumer in a later stage. If the affected consumers are ascertained and not too many, they can be all notified, and they could choose if they join the group or not. Even an opt-out class action may be suitable. In the cases of affected consumers which are hard to be ascertained, the affected consumer shall not depend on the possibility to find each affected consumer to sue. The binding effects of the judgment can be declarative (i.e. those who are affected by the product “x”) and the individual consumer may choose if enforces the judgment in a later procedure showing a small evidence disclosure (i.e. I prove that I buy that product, or I match the requirements of the declarative judgement). Another possibility is to limit the time frame of an opt-out class action system. This variant could be based on the following schema: any affected claimant is entitled lodge such claim, some standards of publicity can be established, and the judgement remains as provisional during a certain period of time. In this time, the individual affected consumer can exercise its right to defend its own interest in its own procedure. Once this period is expired, the judgement fallen in an opt-out procedure can become final also for these parties that did not take part in the procedure. This possibility seems to be proportional. If an affected consumer has not be aware that a procedure is fallen in a case that affects him after a while, it is reasonable to presume that its own interest to enforce its right is not too high. Therefore, there is justification for a judgement based on an opt-out system. Any judgement is better than not judgement at all, and a whole class of affected consumer do not have to suffer the inconveniences of an opt-in system that shall prevent other individual rights to be enforce when its owner does not want to. At the same time, establishing a reasonable time frame is compatible with the legal certainty and the interest of the defendant of not being sued many times after this period expires.

3. De Lege Ferenda

3.1 Spain

As suggestion to the Spanish Law maker I would consider proceedings to modify the wording of the LEC in its article referred to groups of affected consumers allowing each single consumer to start the action if the affected consumers are not determined or are hard to be determined. The judgement shall have binding effects for those parties that does not take part in the process as well, as any opt out system. The judgment shall establish the minimum criteria in order to obtain reparation in a later procedure where personal circumstances can be considered. Further precautions regarding publicity of the process shall be taken to reach the most affected consumers. In the case of determined or easy to be determined consumers, there is no justification to build up the group with most affected consumers. Affected consumers may be well determined, by these can be a large and disperse group. Having as example a case which affect 10.000 people, where 4999 may want to sue, but as they do not conform the majority of affected consumers, they cannot lodge the class action. Only individual claims would be available for them. **It would be a much better solution to create an *opt-in* class action in the cases of determined or easy to be determined consumers.** The opt-out solution shall remain for such cases in which consumers are hard to be determined and it could be implemented the previous mentioned time frame to turn final a judgement fallen in this procedure.

3.2 Germany

This country counts with a suitable collective instrument, the *Musterklage* of the KapMuG. This instrument offers an efficient procedural path for the enforcement of the subjective interest **in the stakeholders' sector**. It requires a certain responsibility by the holder of the right which can decide if enforce its subjective right or not in a suitable procedure. By means of this instrument, the affected consumer does not depend very much on the activity of private associations or the public authorities to enforce its subjective right. Unfortunately, this instrument has not been extended yet to the general civil Law and has been limited to misleading capital-market information. A well designed *Musterklage* can be a proper instrument to deal with cases of massive damages and at the same time preserve the aim of the civil Law, which is the subjective enforcement of the subjective right. In my opinion this instrument, as long as it could be initiated by any affected consumer and the judgment establishes enough criteria for a later enforcement by any affected individual is a reasonable solution.

As inconvenient, it has been pointed out that by this kind of action, law firms will not find many incentives to follow multitude of individual claims with small quantities. They would rather prefer less procedures with more claimants and higher damages.¹⁶⁰⁸ In my opinion, law firms are a fundamental part of the improvement of the access to justice of consumer and users. As long as consumers' protection is not worthy for them, consumers' protection will rely on the activity of private associations or public authorities. In this sense, the stages of the procedure shall be designed to facilitate law firms to sum up individual pretensions in a single procedure. As per its current regulation in the KapMug, it has been pointed out that this instrument may be not suitable to deal with minor damages. If the *Musterklage* of the KapMuG shall be extended to other areas of law, it needs amendments to allow minor damages to be bring into the court. This can be reached by erasing payments in advance in form of deposits to the claimants. Nevertheless, this instrument may coexist with a general class action for groups of affected consumers regulated in the ZPO which facilitates recovery for minor damages. As per the Spanish experience, the contingency fee is not such an evil instrument and could be introduced as an impulse for the private defense of subjective rights. At the same time, the incorporation of a contingency fee instrument can lead to a higher competition between law firms and thereby make attractive this kind of claims.

The differentiation between determinate or hard to be determined consumers could also apply in Germany to choose between an opt-in or an opt-out model.

3.3 General configuration of the collective redress

According to the results of this work, Germany shall introduce a collective redress instrument in its General Civil Procedure Act (ZZP) and Spain shall incorporate some improvements to its current regulation in the LEC:

1. Considering the German legal tradition and its noble defense of the subjective rights, the most suitable instrument seems to be the *Musterklage*. This instrument, available at the sectorial law, shall be extended to provide a proper civil defense of any damage occurred in any field where the individuals exercise its freedom of choice. A declarative judgement that recognizes the existence of an objective damage can be later enforced in an executive court where special circumstances can be taken into

1608 See German part of this work.

consideration.

2. Spain shall amend its configuration of its class action to increase the possibilities of the individual claimant to exercise its rights also in cases of massive damages, where currently he suffers the negative *vis attractiva* effect in favour of consumers' associations or groups of affected consumers created *ad hoc*. It is also necessary to incorporate an opt-out mechanism so that the individual claimant can exercise the defense of its subjective right without depending on the activity of consumers' associations. In this sense, the incorporation of a temporal window of time to exercise the action seems to be reasonable due to the present regulation of the publicity of the claim contained in the LEC. After this time expires, the affected consumer will fall under the *res iudicata* effect of a judgment fallen in a procedure followed by enough representative consumers' associations.

3. Contingency fees shall be allowed and extended. Currently, the exercise of collective redress instruments depends very much on the role of consumers' associations. This is not a desirable situation as these associations do not always count with the necessary financial means to exercise the required actions and at the same time depend very much on the financial support of the State or the legal possibilities that State may grant to them. Europe shall bet for a more active role of the law firms in the defence of subjective rights. They offer a service in the market and the profit motive represents the best incentive to bring to the court rights that can be jeopardized. By keeping principles as the prohibition of unlawful enrichment or avoiding treble damages, baseless claims shall be kept away from the court.

4. The link between consumers' protection and antitrust policy shall be revised. There are currently some presumptions in the positive material Law that consider that the non-observance of competition rules causes a damage to consumers. This approach may be wrong. Consumers protection shall rely in direct protection instruments such as the proper collective redress instruments for the defence of its personal legal sphere. In this sense the State shall give more importance to the defence of the subjective rights instead of using the private law as an instrument to improve the enforcement of public goods.

Dispositive part: personal consideration about consumer's protection, antitrust policy and the European harmonization task

Consumer's protection policy is based in the idea that the consumer suffers a weak position in the market regarding its relationship with corporations. One expression of this inequality is the so-called **asymmetry of information**,¹⁶⁰⁹ - corporations know what they are selling, but the consumer does not exactly what is buying-. Another expression of this inequality is the available means to the market counterparties in case of dispute, so, normally, it is to be presumed, that corporations will count with much more means to its disposition than consumers in a potential legal fight. Thereby, a proper and comprehensive consumer's protection policy shall mitigate the inequality between consumers and corporations in the above-mentioned aspects.

Regarding the asymmetry of information, public measures can be undertaken to support a factual market frame where corporations provide the necessary information to mitigate the mentioned asymmetry. A legal example in this respect the so-called **Unfair Commercial Practices Directive**, a response offered by the positive law to increase the good manners of corporations in their relationship with consumers.¹⁶¹⁰

Nevertheless, beyond specific legislative measures, it is reasonable to presume that a higher degree of competition in the market could also *per se* mitigate this asymmetry. In a highly competitive market, specially where there are not barriers to access, consumers will be the best market players to judge if a practice is fair or not by expelling out of the market those competitors that do not match their standards. Under normal circumstances a consumer will not acquire twice a product that has been acquired following deceitful information. Therefore, it is in the best interest of a company to provide information which matches the reality of the product or services that introduces in the market, specially if the company has invested considerable amounts in the promotion of its product; as **no consumer will acquire twice any product or service if there is not correspondence between expectations and reality if a multitude of offerents are available**. This role of consumer as judge of the market need to be underpinned by a proper civil procedural system that allows to recover potential damages in a proper, efficient and cheap way for those cases in which the harm has already happened. Thus, **a highly competitive market and efficient civil procedural instruments for damages recovery would be the best instruments to mitigate the weak position of consumers in the market**.

Consumer's protection policy shall be therefore relying in 2 major points: increasing the competition of the market and creating a suitable claiming system in favor of consumers. As per the first point, in the positive Law of the European Union and its member States, the antitrust policy gathers the neoclassical general balance models of proper „competitive prices “. Such economical stake defends the idea that there exists a competitive price and this can be affected by unlawful activities of corporations such abuse of a dominant position in the market or agreements between corporations. Such stake is far away to be removed from the positive Law, as it shows the recent approval of the so-called *competition damages Directive*. Nevertheless, such economical view contradicts modern economic theories based in the dynamic nature of the market that challenge the

¹⁶⁰⁹ Concept developed by the Nobel price on economics Akerlof, in its work: The market for lemons: qualitative uncertainty and the market mechanism. *Uncertainty in Economics*.

¹⁶¹⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, OJ L 149, 11.6.2005, p. 22–39.

idea that corporations can control the prices of goods and services in the market.¹⁶¹¹ If the “competitive price” does not exist, the competition authorities cannot evaluate if a cartel has influenced prices in the first place and more less exercise the so called *Differenzhypothese* to calculate any reparation in a civil claim.¹⁶¹²

It is not aim of this work to enter economical discussions; however, current antitrust and consumer’s protection policy are based on specific economic considerations and it has implications in the legal configuration of the antitrust policy. Remaining in the legal analysis, a closer look to the current antitrust policy and its application both from the administrative or civil Law point of view, it will show that the whole system relies on legal presumptions. Namely, **there are legal presumptions that a cartel *per se* causes a damage, and there are legal presumptions to stablish the quantification of the harm, and lately also the EU pretends to extend the idea of the economical single unity to extend the liability to different legal persons.** The most problematic legal presumption in order to assest reparations of damages is based in the idea that the prices can be compared in two different scenarios: a scenario of a market without cartel agreements and a scenario where cartel agreements are given in a specific market, which in German is known as “*Differenzhypothese*”. The comparison between these two mentioned scenarios are the basis for the quantification of the harm in positive antitrust Law and are the basis for possible consumer’s reparations too. It is however, as a matter of fact not realistic to take into consideration an ideal market frame to stablish a “proper price”. First because there are unquantifiable elements that affect the prices of a good or service in the market, and second because this calculation needs to consider a specific market of reference, which requires to segment the whole market when alternative products may be available to consumers. **These presumptions convert the claims based on antitrust breaches in long and expensive procedures where damages can only be determined resorting to some presumptions. It can drive individual rights to be harmed as reparations are based on presumptions and not in facts.**

Under these circumstances, it could be reasonable to limit consumer’s protection to those aspects that are quantifiable. The competition policy, if it shall affect consumers, shall be not based on the idea of illegal agreements between corporations which affect negatively the prices, as this consideration remains as an instrument proper of the planned economy. Another substantial criticism to the link between the antitrust policy and consumers’ protection is based in the fact that there is not obligation of any natural or legal persons to offer any product in the market, so, the introduction of any service or product in the market, even by reaching agreements with other companies, will always improve the previous situation in favor of consumers. It could be legally disproportionate to sanction a company that offers products or services in the market based on the idea that due to its lower prices result in a barrier for the acces to competitors: first because lower prices are good for consumers, second because if the company follows a dumping strategy, in the very moment that it increases the prices, immediately it exists the incentive for competitors to enter in this market, and finally because as long as the State do rise barriers to the free access to the market to any potential competitor by means of limited

¹⁶¹¹ See as one of the most relevant current authors that challenge this idea, *Huerta, de Soto*, The theory of dynamic efficiency; further references in *Hazlitt, Economics!:* Über Wirtschaft und Misswirtschaft. Another substantial criticism against the public control of the prices of the corporations is the Nobel awarded doctrine of Hayek about the **impossibility of the planned economic calculation**. As per this theory, the prices in the market shall be not considered as a mathematical function based on the equilibrium price, but the prices are fixed by spontaneous mechanisms (**Catalactic** = *the order brought about by the mutual adjustment of many individual economies in a market*), *Hayek*, Law, legislation and liberty: A new statement of the liberal principles of justice and political economy, p. 108 ff.

¹⁶¹² Specific to this theory see *Hayek, The road to serfdom*; and *Preise und Produktion*.

licenses, taxes, technical or any other kind of requirements, any sanction of the State to any company for rising barriers to access to the market of other companies seem to violate the most simple legal logic.

Rather than building up a complicated and complex procedural frame to improve private enforcement of competition Law pretending to increase the protection of consumers, it could make more sense under the consumers point of view to develop an effective, cheap and fast collective redress system that allow consumer to recover actual damages. In this frame, the decision whether the interest of consumers have been damaged or not, shall remain in the subjective appreciation of the consumer itself. **The study of the configuration of the collective redress in Europe is a good opportunity to evaluate if the civil Law's principles can provide response to interpersonal relationships in a global society, keeping its liberal grounds of individual responsibility.** No doubt, it exists a tension in our modern societies between the public and the private enforcement of individual rights connected with the principles of the *ordre public*. As shown in this work, there are many doctrinal discussions about the nature of the supra individual rights; discussions about the very existence of indivisible rights goes beyond the legal realm and set up a lot of doctrinal disputes which affect any regulation on this matter. It is generally accepted that the State shall watch for the *ordre public* or the general interest. However, collective interests of specific sectors of the population may be organized in associations which care for interests of such collective interests. When collective interests can be identified in individual pretensions, and they voluntarily get organized together for a stronger defense of its rights, it is a desirable situation created by individual choices. In the other hand, if previous existing associations are *ex ante* entitled by the State to defend rights that can be individually identified, these associations have at their disposal subjective rights without direct legitimization. In this case, the defence of the *ordre public* harms the individual rights. This risk is present in the so-called opt-out claims lodged by consumers' associations.

In order to keep the subjective right in hands of its holder, the standing of associations shall be limited to those rights that affect the collective as a whole and are indivisible. Such would be the so called negative protection of consumers, where the affected parties are hard to be identified, and pecuniary reparations are not possible. The extension of the so-called *European Injunctions Directive* to material aspects where collective rights coexist with individual rights could convert consumer's associations in a kind of guild associations that dispose of individual subjective rights.¹⁶¹³ **Individuals shall count with proper instruments in his hands to protect their subjective rights without need of associative or public protection.** Otherwise the nature of the civil Law is not respected. Thus, recommendations of the European commission to develop a sort of class action by granting standing to representative associations to enforce individual subjective rights shall be avoided, as long as it does not count with a system where the affected consumer may voluntarily cede its rights to associations. It is more in line with the principle of the protection of subjective interests of consumers granting standing to groups of affected consumers or introducing such claims as the German *Musterklage*. The opt-out possibility shall be limited to those cases in which affected consumers are hard to be determinate, specially when it affects to reparation of damages, or being configured in such a way that the *res iudicata* effect of the judgement only apply when the individual consumer had a reasonable opportunity to get notice of the claim and decide whether to participate in the same or not.

¹⁶¹³ See the extension of the application field of the Directive of Injunctions 98/ 27 EEC and further developing at the General Part of this work.

Literature

- Aaken, A. (2003). *Massenklaagen im öffentlichen Recht aus institutionenökonomischer Sicht eine Art der direkten Volksrechte*. KritV 86 (1), 44–75.
- Ackermann, B., Gehrlein, M., & Prütting, H. (2015). *ZPO: Kommentar*, 5. Aufl; Köln: Luchterhand.
- ADICAE. (2012). *La defensa colectiva de los consumidores en la justicia Española. Condiciones para el ejercicio de la acción colectiva y propuestas de mejora de la normativa procesal*. Madrid: ADICAE.
- Aicher, J. (1975). *Das Eigentum als subjektives Recht: zugleich ein Beitrag zur Theorie des subjektiven Rechts*. Berlin: Duncker & Humblot.
- Akerlof, G. A. (1970). *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*. Q J Econ 84 (3), 488-500.
- Alexander, C. (2006). *Marktsteuerung durch Abschöpfungsansprüche*. JZ 61 (18), 890-895.
- Alexander, C. (2007). *Studium - Die zivilrechtlichen Ansprüche im Kartellrecht nach der 7. GWB-Novelle -- Ein Überblick*. JuS 47 (2), 109-114.
- Alexander, C. (2009) *Kollektiver Rechtsschutz im Zivilrecht und Zivilprozessrecht*. JuS, 49 (7), 590-594.
- Alexander, C. (2009). *Gemeinschaftsrechtliche Perspektiven der kollektiven Rechtsdurchsetzung*. WRP 55 (6), 683-690.
- Alexander, C. (2010). *Schadenersatz und Abschöpfung im Lauterkeits- und Kartellrecht: Privatrechtliche Sanktionsinstrumente zum Schutz individueller und überindividueller Interessen im Wettbewerb*. Tübingen: Mohr Siebeck.
- Alexy, R. (2002). *A theory of constitutional rights*. Oxford, New York: Oxford University Press.
- Alfaro Águila-Real, J. (2009). *Contra la armonización positiva: la Propuesta de la Comisión para reforzar el private enforcement del Derecho de la Competencia*. InDret, 3, 1-35. Available at: http://www.indret.com/pdf/667_es.pdf. Retrieved last time: 01 September 2019.
- Alfaro, J., & Reher, T. (2009). *Towards the Directive on Private Enforcement of EC Competition Law– Is the Time Ripe?* The Eur. Antitrust Rev 11, 43-46.
- Anderson, W. L., Block, W., DiLorenzo, T. J., Mercer, I., Snyman, L., & Wesley, C. (2001). *The Microsoft Corporation in Collision with Antitrust Law*. J SOC POLIT ECON ST 26, 287-302.
- Armenta Deu, M. T. (2002). *Lecciones de derecho procesal civil: proceso de declaración, proceso de ejecución y procesos especiales*, 1ª Ed; Madrid: Marcial Pons.
- Ashton, D., & Henry, D. (2013). *Competition damages actions in the EU: law and practice*.

Northampton: Edward Elgard.

- Augenhofer, S. (2009). *Private enforcement: Anforderungen an die österreichische und deutsche Rechtsordnung*, in: Augenhofer, S. (Ed.); *Die Europäisierung des Kartell- und Lauterkeitsrechts* (pp.39-61). Tübingen: Mohr Siebeck.
- Bachof, O. (1955). *Reflexwirkungen und subjektive Rechte im öffentlichen Recht*, in: Bachof, O. (Ed.) *Gedächtnisschrift Für Walter Jeliinek* (pp. 287- 303). München: Isar Verlag
- Baetge, D. (1999). *Das Recht der Verbandsklage auf neuen Wegen*. ZZP 112, 329–351.
- Bahnsen, F. (1997). *Verbraucherschutz im Zivilprozeß: Untersuchung unter besonderer Berücksichtigung der DDR-Novelle der Zivilprozeßordnung vom 29. Juni 1990*. Neuried: Ars Una.
- Bailey, D. (2010). *Presumptions in EU competition law*. European Competition Law Review 31 (9), 20-27.
- Bak, J., & Behrens, P. (2003). *Aktienrecht zwischen Markt und Staat: Eine ökonomische Kritik des Prinzips der Satzungsstrenge*. Wiesbaden: Deutscher Universitäts-Verlag.
- Ball, W., & Musielak, H.-J. (2014). *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz; Kommentar*, 11 Aufl; München: Vahlen.
- Bälz, M., & Felix, B. (2007). *Collective Litigation German Style - The Act on Model Proceedings in Capital Market Disputes*, in: Von, M. A. T., & Gottschalk, (Eds.); *Conflict of laws in a globalized world* (pp. 126–132). Cambridge; New York; Melbourne: Cambridge University Press.
- Banacloche Palao, J., Vegas Torres, J., Díez-Picazo Giménez, I., & Oliva Santos, A. de la. (2001). *Comentarios a la Ley de Enjuiciamiento Civil: 1ª Ed*; Madrid: Civitas.
- Barona Vilar, S. (2002). *Der verfahrensrechtliche Schutz von Verbrauchern durch das neue spanische Zivilprozessrecht*. ZZPInt 6, 91–108.
- Basedow, J. (1982). *Kollektiver Rechtsschutz und individuelle Rechte: Die Auswirkungen des Verbandsprozesses auf die Inzidentkontrolle von AGB*. ACP, 182 (4), 335 – 371.
- Basedow, J. (1999). *Die Bündelung gleichgerichteter Interessen im Prozess: Verbandsklage und Gruppenklage*. Tübingen: Mohr Siebeck.
- Basedow, J. (2003). *Private enforcement of article 81 EC: A German view: Effective Private Enforcement of EC Antitrust Law*, ECLA 137, 140–145.
- Basedow, J. (2016). *Die kartellrechtliche Schadenersatzhaftung und der Wettbewerb der Justizstandorte*. BJM, 217-239.
- Beater, A. (2000). *Verbraucherschutz und Schutzzweckdenken im Wettbewerbsrecht*. Tübingen: Mohr Siebeck.
- Becker, G. (1974). *Crime and punishment: an economic approach*, in: Becker, G. S., Landes, W. M., & National Bureau of Economic Research; *Essays in the economics of*

- crime and punishment* (pp. 169–217). New York: National Bureau of Economic Research, Columbia University Press.
- Becker, R., Bessot, N., & Smijter, E. De. (2008). *White paper on damages actions for breach of the EC antitrust rules*. C.P.N (2), 4-11.
- Behrendt, P., & Enzberg, D. F. (2014). *Auf dem Weg zur Class Action in Europa?: Die Empfehlung der Europäischen Kommission zum kollektiven Rechtsschutz in Europa*. RIW 5, 253-259.
- Bellido Penadés, R. (2002). *La tutela de los intereses de los consumidores en la nueva Ley de Enjuiciamiento Civil. Tribunales de justicia: Revista española de derecho procesal*. Madrid: Wolters Kluwer.
- Bercovitz, A., Bercovitz, R.-C. R., Salas, H. J., & Spain. (1992). *Comentarios a la ley general para la defensa de los consumidores y usuarios*. Madrid: Editorial Civitas.
- Bergström, M., Iacovides, M. C., Strand, M., & European Parliament. (2015). *Harmonising EU competition litigation: The new directive and beyond*. Oxford; Portland: Hart Publishing.
- Berlit, W. (2014). *Wettbewerbsrecht*, 8 Aufl; München: CH Beck.
- Bernhard, J. (2010). *Kartellrechtlicher Individualschutz durch Sammelklagen: europäische Kollektivklagen zwischen Effizienz und Effektivität*. Tübingen: Mohr Siebeck.
- Bernhard, R. (1966). *Einführung in die Rechtswissenschaft*. Berlin: DeGruyter.
- Bien, F. (2013). *Das deutsche Kartellrecht nach der 8. GWB-Novelle*. Baden-Baden: Nomos Verlagsgesellschaft.
- Bien, F. (2013). *Wozu brauchen wir die Richtlinie über private Kartellschadenersatzklagen noch?* NZKart 12, 481-482.
- Bischke, A-H & Brack, S. (2016). *Neue Entwicklungen im Kartellrecht, Was bringt die 9. GWB – Novelle?* NZG 3, 99-102.
- Bohn, J., & Choi, S. (1996). *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*. U Pa. L. Rev. 144, (3), 903-982.
- Böni, F. (2014). *Europäische Richtlinie zur privaten Kartellrechtsdurchsetzung: Maß aller Dinge für Privatgeschädigte?* EWS 25 (6), 324-331;
- Böni, Franz (2014). *Europäische Richtlinie zur privaten Kartellrechtsdurchsetzung - Maß aller Dinge für Privatgeschädigte*. EWS (6), 324-330.
- Bosch, Wolfgang. (2012). *Haftung für kartellrechtswidriges Handeln der Tochtergesellschaft- Neue Rechtslage nach dem Urteil in der Rechtssache Elf Aquitaine/Kommission*. ZWeR 10 (3), 368- 379.
- Brandner, E., Hensen, H.-D., & Ulmer, P. (2001). *AGB-Gesetz: Kommentar zum Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, 5 Aufl; Köln: Schmidt.

- Braun, D. & Kellerbauer, M. (2015). *Das Konzept der gesamtschuldnerischen Verantwortlichkeit von Konzerngesellschaften bei Zuwiderhandlungen gegen das EU-Wettbewerbsrecht- Teil 1*. NZKart (4), 175-181.
- Braun, F., & Rotter, K. (2004). *Der Diskussionsentwurf zum KapMuG - Verbesserter Anlegerschutz*. BKR (8), 296–301.
- Braun, J. (1998). *Haftung für Massenschäden*. NJW (32), 2318-2324.
- Bremer, J. (2010). *Europäische Pläne zur Einführung kollektiver Rechtsschutzinstrumente*. NZG (33), 1296.
- Brings, S. (2011). *Justiz auf einen Blick*, Ausg. 2011. Wiesbaden: Statistisches Bundesamt.
- Brokelmann, H. (2015). *La Directiva de daños y su transposición en Espana*. RGDE 37 1-24. Available at: <http://www.mlab-abogados.com/wp-content/uploads/2015/11/Helmut-Brokelmann-Directiva-de-Danos-RGDE-2015.pdf>. Retrieved last time: 01 September 2019.
- Brömmelmeyer, C; Jeuland, E. & Serafimova, M. Directive enforcement: L'Union européenne dépasse-t-elle les bornes? *La Semaine Juridique, Edition Générale*- 23 Mars, (12), 563, 561.
- Bucher, E. (2004). *Gegen Jherings 'Kampf um's Recht': was die Privatrechtler aus unsinniger These lernen können*, in: Pierce Tercier (Ed.), *Gauchs Welt: Recht, Vertragsrecht und Baurecht: Festschrift Für Peter Gauch* (pp. 45–60). Zurich: Schulthess
- Buchner, J. (2015). *Kollektiver Rechtsschutz für Verbraucher in Europa: die grenzüberschreitende Durchsetzung des europäischen Verbraucherrechts bei Bagatellschäden*. Göttingen: VetR Unipress.
- Bujosa Vadell, L. M. (2001). *La protección de los consumidores y usuarios de la nueva Ley de Enjuiciamiento Civil*. RJC 100 (4), 969-998.
- Bujosa Vadell, L. M. (2007). *El acceso a la justicia de los consumidores y usuarios. Derechos de los consumidores y usuarios*. Valencia: Tirant lo Blanch.
- Bujosa Vadell, L.M (1995). *La protección jurisdiccional de los intereses de grupo*. Barcelona: Bosch
- Bürger, Ch; & Aran, B. (2014). *Verjährung des § 33 Abs. 3 GWB bei follow-on Schadenersatzklagen de lege lata und de lege ferenda*. NZKart (11), 423-427.
- Burgstaller, P. (2014). *EU-Kartellrecht Die Gruppenfreistellungsverordnungen*. Wien: Verlag Österreich.
- Burkhardt, M. (2005). *Auf dem Weg zu einer class action in Deutschland?: Eine Untersuchung des Art. 1 3 No. 8 RBerG im System zwischen Verbandsklage und Gruppenklage*. Baden-Baden: Nomos.

- Busto, L. J. M., Álvarez, L. N., & Peña, L. F. (2010). *Reclamaciones de consumo: Derecho de consumo desde la perspectiva del consumidor*, 3ª Ed; Cizur Menor, Navarra: Thomson Reuters-Aranzadi.
- Büyüksagis, E. (2015). *Standing and Passing-on in the New EU Directive on Antitrust Damages Actions*. *Swiss Review of Business Law* 87 (1), 18-30. Available at: https://www.academia.edu/10326218/Standing_and_Passing-on_in_the_New_EU_Directive_on_Antitrust_Damages_Actions_Schweizerische_Zeitschrift_für_Wirtschaftsrecht_SZW_1_2015_pp._18-30. Retrieved last time: 01 September 2019.
- Byrne, B.& Valente, M. (2011). *Leniency and Disclosure*. *Comp.L.I.* 10 (01), 3-4.
- C. Gómez Asensio. (2011). *El estudio de la Comisión Europea de diciembre de 2009 para la cuantificación de los daños antitrust*, in: L. A. Velasco et. Alt; (Eds.); *La aplicación privada del Derecho de la Competencia* (pp. 229-242). Valladolid: Lex Nova.
- Cabañas García, J. C. (2005). *Los procesos civiles sobre consumidores y usuarios y de control de las cláusulas generales de los contratos*. Madrid: Tecnos.
- Calisti, D., Haasbeek, L., & Kubik, F. (2014). *The Directive on antitrust damages actions: Towards a stronger competition culture in Europe, founded on the combined power of public and private enforcement of the EU competition rules*. *NZKart* 2 (12), 466-473.
- Calvo Caravaca, A.L.& Suderow, J. (2015). *El efecto vinculante de las resoluciones de las autoridades nacionales de competencia en la aplicación privada del Derecho antitrust*. *CDT* 7 (2), 144-157.
- Cámara Lapuente, S. (2010). *Comentarios a las normas de protección de los consumidores y usuarios*. Madrid: Colex.
- Cámara Lapuente, S. (2011). *El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos*. *Cuadernos de derecho transnacional* 3 (1), 84-117.
- Cámara, L. S., & Alenza, G. J. F. (2011). *Comentarios a las normas de protección de los consumidores: Texto refundido (RDL 1-2007) y otras leyes y reglamentos vigentes en España y en la Unión Europea*. Madrid: Colex.
- Cappelletti, M. (1976). *Access to justice: comparative general report*. Tubingen: J.C.B. Mohr.
- Cappelletti, M., & Garth, B. (1983). *The protection of diffuse, fragmented and collective interests in civil litigation: Finding an appropriate compromise: a comparative study of individualistic models and group rights in civil procedure*, in: Habscheid, W (Ed.) *Effectiveness of Judicial Protection and Constitutional Order; The General Reports for the VIIth International Congress on Procedural Law* (pp. 155-159). Würzburg.
- Carballo Fidalgo, M. (2013). *La protección del consumidor frente a las cláusulas no negociadas individualmente*: Barcelona: Ed. Bosch.

- Carballo Piñeiro, L. (2007). *Derecho de competencia, intereses colectivos y su proyección procesal: observaciones a propósito del art. 6 del reglamento 'Roma II'*. AEDIPr (7), 465–495.
- Cassone, A. (2011). *The simple economics of class action: private provision of club and public goods*. Eur JL & Econ 32 (2), 205 – 224.
- Cenini, M., Luppi, B., & Parisi, F. (2011). *Incentive effects of class actions and punitive damages under alternative procedural regimes*. Eur JL & Econ 32 (2), 229–240.
- Coffee, J. C. (1995). *Class Wars: The Dilemma of the Mass Tort Class Action*. Colum. Law Rev. 95 (6), 1343-1465.
- Colmenarejo, M. J. A., & González, C. G. (2009). *Protección de los consumidores e inversores, arbitraje y proceso*, 1ª Ed; Madrid: Ed. Reus.
- Cortés Domínguez, V. (2000). *La Nueva Ley de Enjuiciamiento Civil. Tomo V: Los procesos especiales y los ordinarios con especialidades*. Madrid: Tecnos.
- Cortés Domínguez, V. (2011). *Las partes procesales, Derecho procesal civil: parte general*, 5ª ed; Valencia: Tirant lo Blanch.
- Cotta, G.P. & Reich, D.O. (2016). *Referententwurf zur 9. GWB- Novelle*. Available at: <http://www.beiten-burkhardt.com/de/component/attachments/download/4751>. Retrieved last time 01 September 2019.
- Dahns, Chr. (2005). *Der Entwurf für ein neues Rechtsdienstleistungsgesetz*. NJW (5), 237.
- Dam, K. W. (1975). *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*. J. Legal Stud. 4 (1), 47-73.
- Day, M., Balen, P., & McCool, G. (1995). *Multi-party actions: a practitioners' guide to pursuing group claims*. London: Legal Action Group.
- Deutsche Industrie und Handelskammer. (2008). *Ein einheitlicher Referenzrahmen*. Berlin: DIHK.
- Diemer, C. (2006). *The Green Paper on damages actions for breach of the EC antitrust rules*. ECLR 27 (6), 309–316.
- Dietrich, M; & Hartmann-Rüppel, M. (2014). Report Germany in: Synnott, A. (Ed.), *The Public Competition Enforcement Review*, (pp. 178-194), 6th Ed; London: Law Business Research, available at: <http://www.baykanidea.com/wp-content/uploads/2014/05/The-Public-Competition-Enforcement-Review-6th-Edition.pdf>. Retrieved last time 01 September 2019.
- Diez Estella, F. (2003). *Los objetivos del derecho antitrust*. GJUC 224, 32–52.
- Diéz Estella, F. & Estrada Meray, C. (2014). *Las acciones de daños derivadas de ilícitos anticompetitivos en España: análisis de la jurisprudencia reciente*. RCD, 15, 189-200.
- Eichholtz, S. (2002). *Die US-amerikanische Class Action und ihre deutschen*

Funktionsäquivalente. Tübingen: Mohr Siebeck.

- Einhaus, S. (2008). *Kollektiver Rechtsschutz im englischen und deutschen Zivilprozessrecht*. Berlin: Duncker & Humblot.
- Eisenberg, T. (2004). *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*. *Vand L Rev* 57 (5), 1529-1566. Available at: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1362&context=facpub>. Retrieved last time 01 September 2019.
- Eisenberg, T. & Engel, Ch. (2014). *Assuring Civil Damages Adequately Deter: A Public Good Experiment*. *J. Empirical Legal Stud*; (11), 301–349.
- Emmerich, V; (2014) § 33 GWB in: Immenga, U; & Mestmäcker (Eds.), *Wettbewerbsrecht Kommentar zum deutschen Kartellrecht*. Band 2 GWB/ Teil 1, 5 Aufl; (pp.1054-1119).
- Emmerich, V. (2016). *Unlauterer Wettbewerb: ein Studienbuch*, 10. Aufl; München: Beck.
- Engels, S., & Salomon, T. H. (2004). *Vom Lauterkeitsrecht zum Verbraucherschutz: UWG-Reform 2003*. *WRP* 50 (1), 32–44.
- Enneccerus, L. (1959). *Allgemeiner Teil des Bürgerlichen Rechts: ein Lehrbuch*. Tübingen: Mohr.
- Erttmann, D., & Keul, T. (2007). *Zum Vorlageverfahren nach dem KapMuG- zugleich eine Bestandsaufnahme zur Effektivität des Kapitalanlagermussterverfahrens*. *WM*, 2007, 482-485.
- Esser, J. (1949). *Einführung in die Grundbegriffe des Rechtes und Staates: eine Einführung in die Rechtswissenschaft und in die Rechtsphilosophie*. Wien: Springer.
- F. Jiménez La Torre. (2008). *Aspectos económicos de la cuantificación del daño*. *La Ley*, N°5, Nueva Época, 59-70.
- Fairgrieve, D., & Lein, E. (2012). *Extraterritoriality and collective redress*. Oxford: Oxford University Press.
- Falckenstein, R. von. (1978). *Verbraucherverbandsklage, Schädigungen der Konsumenten und UWG-Novelle*. *WRP*, 502-513.
- Fezer, K.-H., Becker-Eberhard, E., Braunmühl, P., Büscher, W., Fezer, K.-H., Götting, H.-P., Hausmann, R., ... Wiebe, A. (2016). *Lauterkeitsrecht, Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG) Bd. 2 §§ 5 – 22*, 3 Aufl; München: Beck.
- Fischer, A.-K. (2000). *Verbraucherschutz im spanischen Vertragsrecht im Lichte der europäischen Rechtsangleichung: eine Studie mit rechtsvergleichenden Bezügen zum deutschen Recht*. Frankfurt am Main; New York: P. Lang.
- Fischer, A.-K. (January 1998). *Das neue Gesetz über Allgemeine Geschäftsbedingungen in Spanien und die Umsetzung der EU-Richtlinie für missbräuchliche Klauseln in Verbraucherverträgen*. *RIW* 44 (9), 689-695.
- Font Galán, J. I. (1977). *Competencia desleal y prácticas prohibidas en el marco de la Ley*

de prácticas restrictivas de la competencia. RDM (146), 519–560.

- Font Galán, J. I. (2001). *Desafío ético del mercado competitivo: la humanización de las relaciones de consumo*, in: M. J. Rodero, F. A., López, M. M. C., & Loring (Eds.), *Empresa, economía y sociedad: libro homenaje al profesor Jaime Loring Miró*. Córdoba: Etea.
- Fornasier, M., & Sanner, J. A. (2011). *Die Entthronung des Kronzeugen?: Akteneinsicht im Spannungsfeld zwischen behördlicher und privater Kartellrechtsdurchsetzung nach Pfeleiderer*. WuW 61 (11), 1067-1080.
- Frank, T./Henke, S. & Singbartl, J. (2016). *¿Das Verbraucherstritbeilegungsgesetz-Auswirkungen auf den kollektiven Rechtsschutz?* VuR (9), 333-339.
- Franke, N. (2002). *Die Verbandsklagen der Verbraucherverbände nach dem französischen Code de la consommation im Vergleich zum deutschen Recht*. Frankfurt am Main; New York: P. Lang.
- Fröhlingsdorf, J. (1991). *Das spanische Wettbewerbsrecht*, in: W. Löber, B., Peuster & A. Reichmann (Eds.), *Spanisches Handelsgesetzbuch, Código de comercio* (pp. 497–512). Frankfurt: Wirtschaft, Edition für Internationale.
- Fröhlingsdorf, J., & Lincke, K. (2001). *Das neue spanische Zivilprozess Gesetz (LEC)*. RIW (5), 357-364.
- Fuchs, A. (2012). *Anspruchsberechtigte, Schadensabwälzung und Schadensbemessung bei Kartellverstößen*, in: O. Remien (Ed.), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht: Würzburger Tagung vom 11. und 12. Juni 2010* (p. 55 ff.). Tübingen: Deutsche Nationalbibliothek.
- García de Enterría, E., & Velázquez, J. (1998). *La pretendida vinculación de los jueces a las sentencias del Tribunal Supremo en materia de cláusulas abusivas: Sobre la inconstitucionalidad del artículo 20.4 de la ley de condiciones generales de la contratación*. La Ley (5), 1671–1676.
- García Vila, M. (2003). *El objeto del proceso en materia de consumidores y usuarios: pretensiones ejercitables y acumulación de acciones*, in: S. B. Vilar (Ed.), *Tutela de los consumidores y usuarios en la Ley de Enjuiciamiento Civil* (pp. 271–313). Valencia: Tirant lo Blanch.
- Gargallo, Sancho, I. (2009). *Ejercicio privado de las acciones basadas en el Derecho comunitario y nacional de la competencia*. InDret Núm.1, 1-35.
- Garnica Martín, J. F. (2001). *Las acciones de grupo en la LEC 1/2000*. La Ley (6), 1451–1465.
- Garnica Martín, J. F. (2001). *Las partes en la nueva Ley de Enjuiciamiento Civil: novedades más significativas*. RPJ (62), 207–284.
- Gascón Inchausti, F. (2000). *La acumulación de acciones y de procesos en el proceso civil*. Madrid: La Ley.

- Gascón Inchausti, F. (2010). *Tutela judicial de los consumidores y transacciones colectivas*. Cizur Menor: Civitas.
- Gaudet, R. (2009). *Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience*. ECLR 30 (3), 107-117.
- Geradin, D. (2015). *Collective Redress for antitrust damages in the European Union: is that reality now?* Geo Mason L. Rev 22 (5), 1079-1101.
- Gerlach, J. (1986). *Die moderne Entwicklung der Privatrechtsordnung in Spanien*. ZVglRWiss 85 (03), 247–323.
- Germany, & Becher, K. (2004). *Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*. Berlin.
- Germany. (2006). *Stellungnahme zum Grünbuch, der Kommission zu Schadenersatzklagen wegen Verletzung des EU Wettbewerbsrecht*. Berlin.
- Germany. (2012). *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Nicole Maisch, Jerzy Montag, Harald Ebner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN*. Berlin: Deutscher Bundestag.
- Gerven, W., Lever, J., & Larouche, P. (2000). *Common law of Europe casebooks: tort law*. Oxford; Portland Or.: Hart Pub.
- Gloy, W., Loschelder, M., Erdmann, W., Ahrens, H.-J., Melullis, K.-J., & Ungern-Sternberg, J. (2010). *Handbuch des Wettbewerbsrechts*, (Handbuch des Wettbewerbsrechts), 4 Aufl; München: Beck.
- Gómez Calero, J. (1994). *Los derechos de los consumidores y usuarios*. Madrid: Dykinson.
- González Cano, M. (2002). *La tutela colectiva de consumidores y usuarios en el proceso civil*. Valencia: Tirant lo Blanch.
- González Granda, P. (2000). *La Nueva Ley de Enjuiciamiento Civil. Tomo I: Sujetos y actuaciones del proceso. Las costas procesales*. Madrid: Tecnos.
- Gottwald, P. (1978). *Class Action auf Leistung auf Schadenersatz nach amerikanischen Vorbild im Deutschen Zivilprozess*. ZZP 91, 1–39.
- Grabitz, E., & Hilf, M. (2005). *Das Recht der Europäischen Union*, 2. Aufl; München: Verlag C.H. Beck.
- Grande Seara, P. (2002). *Una aproximación a la tutela de los derechos e intereses de los consumidores y usuarios en la nueva LEC*. AFDO (1), 289–308.
- Great Britain. (2012). *Private actions in competition law: a consultation on options for reform*. London: Department for Business Innovation & Skills.
- Green, J., & McCall, I. (2009). *Leniency and Civil Claims*. Competition Law Inside, 3–5.
- Greger, R. (2000). *Neue Regeln für die Verbandsklage im Verbraucherschutz- und*

Wettbewerbsrecht. NJW (34), 2457-2463.

Greger, R. (2000). *Verbandsklage und Prozessrechtsdogmatik: neue Entwicklungen in einer schwierigen Beziehung*. ZfP 1134 (4), 399–412.

Gröner, H., & Köhler, H. (1987). *Verbraucherschutzrecht in der Marktwirtschaft: ökonomische und rechtliche Aspekte des Konsumentenkredits*. Tübingen: Mohr Siebeck.

Grunsky, W. (1974). *Grundlagen des Verfahrensrechts*. Bielefeld: Gieseking.

Gutiérrez de Cabiedes e Hidalgo de Caviedes, P. (1999). *La tutela jurisdiccional de los intereses supraindividuales: colectivos y difusos*. Elcano (Navarra): Aranzadi.

Gutiérrez de Cabiedes e Hidalgo de Caviedes, P. (2002). *La Nueva Ley de Enjuiciamiento Civil y los daños con múltiples afectados*, in: Ministerio de Sanidad y Consumo (Ed.) *Derecho Del Consumo: Acceso a La Justicia, Responsabilidad y Garantía* (pp. 133–202)., Madrid: CGPJ.

Gutiérrez de Cabiedes e Hidalgo de Caviedes, P., & Vachmayer Winter, L. (2001). *La nueva ley de enjuiciamiento civil y los daños con múltiples víctimas*, in: Estudios de derecho judicial, CGPJ (Ed.) Madrid: Consejo General del Poder Judicial.

Habscheid, W. J. (1952). *Das Prozeßführungsrecht der Verbände zur Förderung gewerblicher Interessen (§ 13 UWG)*. GRUR, 221-224.

Habscheid, W.J. (1954). *Der Anspruch auf Rechtspflege*, ZfP No.3-4, 188-193.

Haesen, V. (2014). *Der Schutz gegen den unlauteren Wettbewerb in Deutschland und England vor dem Hintergrund fortschreitender europäischer Harmonisierung*. München: Diss.

Halfmeier, A. (2006). *Popularklagen Im Privatrecht: zugleich ein Beitrag zur Theorie der Verbandsklage*. Tübingen: Mohr Siebeck.

Halfmeier, A., Feess, E., & Rott, P. (2010). *Kollektiver Rechtsschutz im Kapitalmarktrecht: Evaluation des Kapitalanleger-Musterverfahrensgesetzes*. Frankfurt am Main: Frankfurt-School-Verl.

Harald, K. (2008). Internationaler Kollektiver Rechtsschutz, in: C. Meller-Hannich (Ed.), *Kollektiver Rechtsschutz im Zivilprozess. Hallesches Symposium zum Zivilverfahrensrecht* (pp. 53–72). Baden-Baden: Nomos.

Hass, D. (1996). *Die Gruppenklage: Wege zur prozessualen Bewältigung von Massenschäden*. München: V.V. Florentz.

Haucap, J. & Stühmeier, T. (2008). *Wie hoch sind die durch Kartelle verursachte Schäden: Antworten auf Sicht der Wirtschaftstheorie*. WuW 58 (4), 413-424.

Hayek, F. A. (1931). *Preise und Produktion*. Wien: J. Springer.

Hayek, F. A. (1944). *The road to serfdom*. Chicago, IL: University of Chicago Press.

- Hayek, F. A. (1976). *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy*. London: Routledge & Kegan Paul.
- Hazlitt, H. (2009). *Economics!: Über Wirtschaft und Misswirtschaft*. München: Olzog.
- Heck, P. (1914). *Gesetzesauslegung und Interessenjurisprudenz*. Tübingen: Mohr Siebeck.
- Hefermehl, W. (1969). *Die Klagebefugnisse der Verbände zur Wahrnehmung der Interessen der Verbraucher*. GRUR (12), 653-65.
- Heinichen, Chr. (2014). *Akteneinsicht durch Zivilgerichte in Kartellschadensersatzverfahren*. NZKart (3) 83- 92.
- Heller, H. (1927). Die Souveranität: Ein Beitrag zur Theorie des Staat- und Völkerrechts, in: Herrer, Gesammelte Schriften (Ed. Christoph Müller), Vol. 2, 31. Tübingen: J.C.B.
- Hellwig, K. (1903). *Lehrbuch des Deutschen Zivilprozessrechts*. Leipzig: A. Deichert.
- Hensen, H.-D. (2003). *Zur Effizienz der Verbandsklage nach § 13 AGB-Gesetz*, in: M. Habersack, P. Hommelhoff, U. Hüffer, & K. Schmidt (Eds.), *Festschrift für Peter Ulmer zum 70. Geburtstag am 2. Januar 2003* (pp. 1135–1151). Berlin: De Gruyter Recht.
- Hensler, D; Peterson, M. (1993). Understanding Mass Personal Injury Litigation: A socio-legal analysis. BLR 59 (3), 960-1063.
- Herrero Suárez, C. (2016). *La transposición de la Directiva de daños antitrust*. CDT 8 (1), 150-183.
- Hess, B. (2000). *Die Anerkennung eines Class Action Settlement in Deutschland*. JZ 55 (8), 372 – 382.
- Hess, B. (2004). *Der Regierungsentwurf für ein Kapitalanlegermusterverfahrensgesetz - eine kritische Bestandsaufnahme Navigationspfeil*. WM, 2329–2334.
- Hess, B. (2004). *Grundfragen und Entwicklungen der Parteifähigkeit*. ZJP 117 (3), 267-304.
- Hess, B. (2005). *Musterverfahren im Kapitalmarktrecht*. ZIP 26 (39), 1713-1720.
- Hess, B. (2010). *Kartellrechtlicher Kollektiveklagen in der europäischen Union*. WuW 5, 493–502.
- Hess, B. (2012). *Der Schutz der Privatsphäre im Europäischen Zivilverfahrensrecht*. JZ 67 (4) 189-193.
- Hirte, H. (1996). *Berufshaftung: ein Beitrag zur Entwicklung eines einheitlichen Haftungsmodells für Dienstleistungen*. München: Beck.
- Hirte, H. (2000). *Sammelklagen: Fluch oder Segen? ein Blick in die amerikanische Diskussion*. VersR 51 (4), 148–155.
- Hodges, C. (2008). *Global Class Actions Project Summary of European Developments*.

Available at: <http://globalclassactions.stanford.edu/content/global-class-actions-project-summary-european-developments>. Retrieved last time 01 September 2019.

- Hodges, C. (2011). *European competition enforcement policy: integrating restitution and behaviour control*. WCLER 31(3), 383–396.
- Hoffman, J. (2016). *Kartellrechtlicher Streitverkündung bei Schadensabwälzung- Ein Vorschlag zur Umsetzung von Art. 15 der KartellschadenersatzRL*. NZKart (1), 9-19.
- Hoffmann, D. M. (2009). *Die US-amerikanische Securities Fraud Class Action gegen europäische Unternehmen: Eine Untersuchung der Wechselwirkung von materiellem Kapitalmarkthaftungsrecht in SEC Rule 10b-5 und kollektivem Rechtsschutz durch die Securities Fraud Class Action sowie deren Bedeutung für ausländische Investoren*. Hamburg: Kovač.
- Holmes, M., & Davis, L. (2004). *A practical guide to national competition rules across Europe*. The Hague: Kluwer Law International.
- Hölzel, N. (2007). *Kartellrechtlicher Individualrechtsschutz im Umbruch: neue Impulse durch Grünbuch und Zementkartell*. Halle (Saale): Inst. für Wirtschaftsrecht.
- Hönn, G. (2009). *Examens-Repetitorium Wettbewerbs- und Kartellrecht*, 2. Aufl.; Heidelberg: Müller.
- Hopt, K; (2008). Kommentar zu § 93 in: Hopt, K & Wiedemann, H. (Eds.) Aktiengesetz, Großkommentar, §§ 77- 94 Dritter Band (pp. 82-230), 4. Aufl.; Berlin: De Gruyter.
- Hopt, K., & Baetge, D. (1999). *Rechtsvergleichung und Reform des deutschen Rechts: Verbandsklage und Gruppenklage*, in: Baetge (Ed.) [et Al.], Die Bündelung gleichgerichteter Interessen im Prozeß: Verbandsklage und Gruppenklage (pp. 11–64). Tübingen: Mohr Siebeck.
- Hovenkamp, H. (2015). *Federal antitrust policy: The law of competition and its practice*, 5. Aufl.; Minnesota: West Academic Publishing
- Howells, G., & (et al). (2008). *Group or class actions in the United Kingdom*, in: Tagung zum Verbandsklagerecht -Verbraucherschutz: ¿Recht harmlos? - Verbandsklage auf dem Prüfstand Die Verbandsklage der Verbraucherverbände – ein unverzichtbares Instrument des rechtlichen Verbraucherschutzes. (pp. 34-43). Berlin: Verbraucherzentrale Bundesverband.
- Huerta de Soto, J. (2013). *Sozialismus, Wirtschaftsrechnung und unternehmerische Funktion*. Stuttgart: Lucius & Lucius.
- Huerta, de Soto, J. (2009). *The theory of dynamic efficiency*. London: Routledge.
- Huff, M. W. (2007). *Das deutsche Rechtssystem braucht keinen amerikanischen Weg um sich den neuen gesellschaftlichen Herausforderungen zu stellen*. ZZP 120 (4), 491–504.
- Hülsen, P. & Kasten, B. (2015). *Passivlegitimation von Konzernen mi Kartell-Schadenersatzprozess? - Gedanken zur Umsetzung der Richtlinie 2014/104/EU*. NZKart (07), 296-307.

- Hylton, K. N. (2016). *The Economics of Class Actions and Class Action Waivers*. Supreme Court Economic Review, 23, 1, (pp. 305-339). Chicago: University of Chicago Press Journals.
- Inderst, R. & Stefan, T. (2015). *Schadenersatz bei Kartellverstoßen*. Düsseldorf: Handelsblatt Fachmedien.
- Inderst, R., & Schwalbe, U. (2012). *Das kontrafaktische Szenario bei der Berechnung von Kartellschäden*. WUW 62 (2), 122-132.
- Issacharoff, Samuel and Miller, Geoffrey P. (2008) Will Aggregate Litigation Come to Europe? *Vanderbilt Law Review*, Vol. 62, Paper No. 08-46. New York: NYU Law and Economics Research Available at <https://ssrn.com/abstract=1296843> or <http://dx.doi.org/10.2139/ssrn.1296843>. Retrieved last time 01 September 2019.
- J Harbour, L., & Shelley, M. (2007). *The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World*. *Prac Litigator* 18 (4), 23-26. Available at: http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/PLIT0707-HARBOUR-SHELLEY_thumb.pdf. Retrieved last time 01 September 2019.
- Jacobs, M. (1998). *Presumptions, damn presumptions and economic theory: the role of empirical evidence in Hospital merger analysis*. *Ind. L Review* 31,125-142.
- Jacoby, F. (2000). *Der Musterprozessvertrag: die gewillkürte Bindung an gerichtliche Entscheidungen*. Tübingen: Mohr Siebeck.
- Jahn, J. (2008). *Der Telekom-Prozess: Stresstest für das Kapitalanleger-Musterverfahrensgesetz*. *ZIP* 2 (29), 1314-1317.
- Janssen, Helmuth. (2015). *Schadenersatz wegen Verletzung des Kartellrechts – Auswirkungen der neuen EU-Richtlinie*. *CB* 35 (1–2), 35-40.
- Jauernig, O. (2003). *Zivilprozessrecht: ein Studienbuch*, 28 Aufl; München: C.H. Beck.
- Jellinek, G. (1905). *System der subjektiven öffentlichen Rechte*. Tübingen: J.C.B. Mohr.
- Jhering, R. (1878). *Geist des römischen rechts, auf den verschiedenen stufen seiner entwicklung*. Leipzig: Breitkopf und Härtel.
- Jiménez Fortea, F. J. (2003). *La capacidad en los procesos para la tutela de los derechos e intereses de los consumidores.*, in: S. B. Vilar (Ed.), *Tutela de los consumidores y usuarios en la Ley de Enjuiciamiento Civil* (pp. 77–114). Valencia: Tirant lo Blanch.
- Jolowicz, J. (1983). *Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law*. *The Cambridge Law Journal* 42 (2), 222-256.
- Jolowicz, J. (2000). *On civil procedure*. Cambridge, New York: Cambridge University Press.
- Jünemann, U. (2013). *Ubi ius ibi remedium : ein richtiges Postulat auch für den Ersatz von Kleinst- und Massenschäden?* In: C. Brömmelmeyer (Ed.); *Die EU-Sammelklage: Status und Perspektiven* (pp. 9-16). Baden-Baden: Nomos.

- Juntgen, D. A. (2008). *Die prozessuale Durchsetzung privater Ansprüche im Kartellrecht*. München: Heymanns.
- Karlsgodt, P. (2012). *World class actions: a guide to group and representative actions around the globe*. Oxford, New York: Oxford University Press.
- Kasper, F. (1967). *Das subjektive Recht-Begriffsbildung und Bedeutungsmehrheit*. Karlsruhe: C.F. Müller.
- Kaufmann, C. (2007). *Rechtsschutz im deutschen und europäischen Kartellrecht: Konzeption einer effektiven Schadensersatzklage*. Saarbrücken: VDM Muller.
- Kelemen, R. (2011). *Eurolegalism the transformation of law and regulation in the European Union*. Cambridge, Massacusetts: Harvard University Press.
- Kellerbauer, M. & Weber, O. (2014). *Joint and several liability for fines imposed under EU competition law: recent developments*. *EuZW* 18, 688- 693.
- Kelliher, D. N. (2008). *Tort Law of the European Community: Aims and Scope*, in: Helmut Koziol et al. (Eds.), *Tort law of the European Community* (pp. 1–22). Wien: Springer.
- Kelsen, H. (1925). *Allgemeine Staatslehre*. Berlin: J. Springer.
- Kersting Ch. & Preuß, N. (2015). *Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) - Ein Gesetzgebungsvorschlag aus der Wissenschaft (Implementation of the Directive on Actions for Cartel Damages (2014/104/EU) into German Law - An Academic Proposal)*. Baden-Baden: Nomos Verlagsgesellschaft.
- Kersting, Christian. (2014). *Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht*. *WuW* 64 (06), 564- 575.
- Keßler, J. (1990) *Wettbewerbstheoretische Aspekte des Irreführungsverbots - Eine ökonomische und dogmengeschichtliche Analyse*. *WRP*, 73 - 85.
- Keßler, J. (2009). *Schadensersatz und Verbandsklagerechte im Deutschen und Europäischen Kartellrecht*. Berlin: HTW.
- Keßler, J. (2015). *Die Europäische Richtlinie über Schadenersatz im Wettbewerbsrecht, Cui bono?* *VuR* (3), 83-92.
- Keßler, J. (2015). *Private Enforcement durch Beseitigungsklagen im deutschen und europäischen Kartellrecht*. *WRP* (08), 929–934.
- Keuchel, J. (2005). *Kartellsündern droht Prozesswelle*. Düsseldorf: Handelsblatt.
- Kinsella, S. & Melin, H. (2009). *Who is afraid of the Internet? Time to put consumer interests at the heart of competition*. *GCP*, pp. 2-15. Available at: http://www.sidley.com/~media/files/publications/2009/03/whos-afraid-of-the-internet-time-to-put-consumer_/files/view-article/fileattachment/kinsellamelin—gcp-article-march-09.pdf. Retrieved last time 01 September 2019.
- Klein, F. (1901). *Zeit- und Geistesströmungen im Prozesse: Vortrag, gehalten in der Gehe-Stiftung zu Dresden am 9. November 1901*. Dresden: Zahn & Jaensch.

- Klein, F., & Engel, F. (1927). *Der Zivilprozess Oesterreichs*. Mannheim: J. Bensheimer.
- Koch, H. (1983). *Prozessführung im öffentlichen Interesse: rechtsvergleichende Entwicklungsbedingungen und Alternativen objektiver Rechtsdurchsetzung*. Frankfurt am Main: A. Metzner
- Koch, H. (1989). *Alternativen zum Zweiparteiensystem im Zivilprozeß: Parteiübergreifende Interessen und objektive Prozeßführungsrechte*. KritV 4 (72), 323-340.
- Koch, H. (1999). *Die Prävention und Steuerungswirkung des Schuld- und Wettbewerbsrecht, Vertrags- -delikts und wettbewerbsrechtliche Instrumente zur Kontrolle wirtschaftlicher Tätigkeit*. JZ, 922–930.
- Koch, H. (2000). *Die Verbandsklage in Europa- Rechtsvergleichende und kollisionsrechtliche Grundlagen*. ZZP 113 (4), 413–442.
- Koch, H. (2001). *Non-class group litigation under EU and German Law*. Duke J. Comp. & Int'l L; 11 (2), 355–367.
- Koch, H. (2006). *Sammelklagen durch eine BGB-Gesellschaft*. NJW 59 (21), 1469–1472.
- Köhler, H. (2003). *UWG-Reform und Verbraucherschutz*. GRUR 105 (4), 265–272.
- Köhler, H. (2004). *Kartellverbot und Schadenersatz*. GRUR 106 (2), 99–103.
- Köhler, H. (2005). *Zur Umsetzung der Richtlinie über unlauteren Geschäftspraktiken*. GRUR (10) 793-802.
- Köhler, H., & Bornkamm, J. (2014). *UWG Kommentar*, Aufl.32; München: C.H. Beck.
- Kohtes, S. (2004). *Das Recht der vorformulierten Vertragsbedingungen in Spanien: die Umsetzung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen*. Dissertation, Frankfurt am Main: Lange.
- Komninos, A. (2013). *Private Enforcement in the EU with Emphasis on Damages Actions*, in HECL (pp. 228–272). Massachusetts: Edward Elgard Publ.
- Komninos, A. P. (2006). *Public and Private Antitrust Enforcement in Europe: Complement? Overlap?* ComplLRev. V, 3 (1), 5–26.
- Köndgen, J. (1976). *Haftpflichtfunktionen und Immaterialschaden am Beispiel von Schmerzensgeld bei Gefährdungshaftung*. Berlin: Duncker & Humblot.
- Kötz, H. & Homburger, A. (1975). *Klagen Privater im öffentlichen Interesse: Länderbericht zum Recht der Vereinigten Staaten von Amerika zusammen mit einem das deutsche Recht einbeziehenden Generalreferat und einem Bericht über die Diskussion* in: Kötz, Homburger (Eds.), *Gesellschaft für Rechtsvergleichung. Fachgruppe für Zivilrechtsvergleichung* (pp. 69–102). Frankfurt am Main: Metzner
- Krämer, L. (1997). *Law and diffuse interests in the European legal order: liber amicorum Norbert Reich = Recht und diffuse Interessen in der Europäischen Rechtsordnung*. Baden-Baden: Nomos.

- Kroemer. (1984). *Der unlautere Wettbewerb nach spanischem Recht: eine entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht*. Münster: Universität, Diss.
- Krüger, C. (2012). *Der Gesamtschuldnerausgleich im System der privaten Kartellrechtsdurchsetzung*. WuW 62 (1), 6 – 13.
- Krüger, C. (2013). *Die haftungsrechtliche Privilegierung des Kronzeugen im Außen- und Innenverhältnis gemäß dem Richtlinienvorschlag der Kommission*. NZKart (12), 483 – 488.
- Krüger, T. (2000). *Zulässigkeit von „Bankgebühren“ bei irregulären Geschäftsvorfällen*. WM (41), 2021-2030.
- Lakkis, P. (1997). *Der kollektive Rechtsschutz der Verbraucher in der Europäischen Union: Dargestellt an der Verbandsklage der Verbraucherverbände nach dem AGBG, dem UWG und dem griechischen Verbraucherschutzgesetz*. Bielefeld: Giesecking.
- Lamarca i Marquès, A., & González, S. R. (2002). *Entra en vigor la segunda ley alemana de modificación del derecho de daños*. Indret No.3, 96-102.
- Lande, R. (2010). *Benefits of Private Enforcement: Empirical Background* in: Foer, A. Albert; Cuneo, W. Jonathan (eds), *The International Handbook on Private Enforcement of Competition Law* (pp. 3–11). Cheltenham: Edward Elgar Publishing.
- Lange, S. (2011). *Das begrenzte Gruppenverfahren: Konzeption eines Verfahrens zur Bewältigung von Großschäden auf der Basis des Kapitalanleger-Musterverfahrensgesetzes*. Tübingen: Mohr Siebeck.
- Lasarte Álvarez, C. (2010). *Manual sobre protección de consumidores y usuarios*. Madrid: Dykinson.
- Leible, S. (1992). *Bedeutung und Bestimmung der Verkehrsauffassung im spanischen Recht des unlauteren Wettbewerbs*. WRP 38 (1), 1–11.
- Leible, S. (1992). *Das neue spanische Gesetz gegen den unlauteren Wettbewerb*. ZfRV, 33 (4), 257-280.
- Leipold, D. (2004). *Der Anspruch aus Gewinnzusage (§ 661 BGB)*, in: C. Heinrich & H.-J. Musielak (Eds.), *Sonderdruck aus: Festschrift für Hans-Joachim Musielak zum 70. Geburtstag* (pp. 317–336). München: Beck.
- Lettl, T. (2015). *Kartellschadensersatz nach der Richtlinie 2014/104/EU und deutsches Kartellrecht*. WRP 61 (5), 537 - 545.
- Lettl, T. (2015). *Privilegierung von kleinen und mittleren Unternehmen beim gesamtschuldnerischen Kartellschadensersatz (Art. 11 Abs. 2 Richtlinie 2014 104 EU)*. WuW 65 (7-8), 692–701.
- Leufgen, A. (2007). *Kollektiver Rechtsschutz zugunsten geschädigter Kapitalanleger*. Baden-Baden: Nomos.

- Lindacher, W. (1990). *Zur 'Sonderprozessrechtsnatur' der lauterkeitsrechtlichen Verbands- und Konkurrentenklage sowie der Verbandsklage nach dem AGB-Gesetz*. ZZP 103 (4), 397–412.
- Lindblom, H.P; & Nordback, K. (2006). *The Swedish Group Proceedings Act*, in: Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (Ed.), *Kollektiver Rechtsdurchsetzung- Chancen und Risiken* (pp.191-198). Available at: www.bmsk.gv.at/cms/site/attachments/0/8/3/CH0036/CMS11417176847_89/eu-studie_teil_i.pdf. Retrieved last time 01 September 2019.
- Logemann, H. P. (2009). *Der kartellrechtliche Schadensersatz: Die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) No. 1/2003 und der 7. GWB-Novelle*. Berlin: Duncker & Humblot.
- López Santos, O. (1991). *La defensa de los intereses generales de los consumidores y el artículo 18 del Real Decreto 825/1990, de 22 de junio, sobre el derecho de representación, consulta y participación de los consumidores y usuarios a través de sus asociaciones*. Estudios sobre consumo (22), 37–50.
- Lorca Navarrete, A. (2000). *Comentarios a la nueva Ley de enjuiciamiento civil*. Valladolid: Lex Nova.
- Lucchi López-Tapia, Y. de. (2004). *La legitimación activa en los procesos para la tutela jurisdiccional civil de los intereses de consumidores y usuarios*, in: E. Serra Font (Ed.), *Homenaje a don Eduardo Font Serra. Tomo II* (pp. 605–632). Madrid: Centro de Estudios Jurídicos de la Administración de Justicia.
- Lüke, W. (1993). *Die Beteiligung Dritter im Zivilprozeß*. Tübingen: Mohr Siebeck.
- Mafrá Leal, M. F. (2010). *Die Kollektivklage zur Durchsetzung diffuse Interessen*. Frankfurt am Main: Peter Lang.
- Mäger, T. (2015) *Eltern haften für Ihre Kinder?! NZKart* (8), 329-331.
- Maier-Rigaud, F. (2014). *Towards a European directive on damages actions*. JCLE 10 (2), 341–360.
- Makatsch, T / Abele, V. (2014). *Das Ende kollektiver Kartellschadensersatzklagen in Deutschland? Anmerkung zu LG Düsseldorf (17.12.2013), 37 O 200/09 (Kart) U. Zementkartell II*, WuW (2) 164-171.
- Makatsch, T., & Sascha Mir, A. (2015). *Die neue EU-Richtlinie zu Kartellschadensersatzklagen: Angst vor der eigenen 'Courage'?* EuZW 26 (1), 7–13.
- Mann, M. E. (2010). *Rechtsverfolgungsgesellschaften und Rechtsdienstleistungsgesetz*. NJW 63 (33), 2391-2396.
- Marcos Fernández, F. (2014). *La aplicación privada del Derecho de defensa de la competencia por los tribunales españoles*. ICE: Revista de economía N° 876, 91-104.
- Marcos, Fernández, F. (2013): *Competition Law Private Litigation in the Spanish Courts (1999-2012)*, GCLR 4, 167-208.

- Marín López, J. (1992). *Derecho de representación, consulta y participación y régimen jurídico de las asociaciones de consumidores y usuarios*, in: Bercovitz, A., Bercovitz, R.-C. R., Salas, H. J., & Spain (Eds.); *Comentarios a la ley general para la defensa de los consumidores y usuarios* (pp. 317-568). Madrid: Editorial Civitas.
- Marín López, J. (2002). *Las Acciones colectivas y el papel de las asociaciones de consumidores y usuarios como 'policía privada'*, in: CGPJ (Ed.), *Derecho Del Consumo: Acceso a La Justicia, Responsabilidad y Garantía* (pp. 301–318). Madrid: Dickynson.
- Marotzke, W. (1985). *Rechtsnatur und Streitgegenstand der Unterlassungsklage aus § 13 UWG*. ZJP 98, 160-199.
- Meller- Hannich, C. (2011). *Das Kapitalanleger-Musterverfahrensgesetz (KapMuG) – Eine Zwischenbilanz*, ZBB 23 (3), 180-191
- Meller-Hannich, C. (2005). *Verbraucherschutz im Schuldvertragsrecht: private Freiheit und staatliche Ordnung*. Tübingen: Mohr Siebeck.
- Meller-Hannich, C. (2008). *Kollektiver Rechtsschutz im Zivilprozess*. Baden-Baden: Nomos.
- Meller-Hannich, C. (2011). *Gutachten Evaluierung der Effektivität kollektiver Rechtsschutzinstrumente*: Bonn: Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (BMELV).
- Meller-Hannich, C., & Höland, A. (2011). *Die Europäische Sammelklage*. GPR (4), 168-176.
- Mertens, H.-J. (1975). *Kollektivrechtlicher Schadensersatz als Mittel des Verbraucherschutzes*. ZHR, 139, 438–475.
- Michailidou, C. (2007). *Prozessuale Fragen des Kollektivrechtsschutzes im europäischen Justizraum*. Baden-Baden: Nomos.
- Micklitz, H.-W. (2007). *Collective private enforcement of consumer law: the key questions*, in: Boom, W. H., & Loos, M. *Collective enforcement of consumer law: Securing compliance in Europe through private group action and public authority intervention*, (pp.13-35). Groningen: Europa Law Pub.
- Micklitz, H.-W., & Reich, N. (2007). *Europäisches Verbraucherrecht – quo vadis? Überlegungen zum Grünbuch der Kommission zur Überprüfung des gemeinschaftlichen Besitzstandes im Verbraucherschutz*. VuR 22 (4), 121-130.
- Micklitz, H.-W., & Stadler, A. (2003). *Unrechtsgewinnabschöpfung: Möglichkeiten und Perspektiven eines kollektiven Schadenersatzanspruches im UWG*. Baden-Baden: Nomos.
- Micklitz, H.-W., & Stadler, A. (2006). *The Development of Collective Legal Actions in Europe; Especially in German Civil Procedure*. EBLR 17 (5), 1473–1503.
- Möllers, T. M. J., & Weichert, T. (2005). *Das Kapitalanleger-Musterverfahrensgesetz*. NJW,

58, 2737-2741.

- Mom, A. (2005). *Landbericht Spanien*, in: Micklitz & Stadler (Eds.); Die Verbandsklage in der Information und Dienstleistungsgesellschaft (pp. 497-654). Forschungsvorhaben im auftrag des BMVEL. Münster-Hiltrup: Landwirtschaftsverl.
- Montero Aroca, J. (1995). *La legitimación en el proceso civil: (intento de aclarar un concepto que resulta más confuso cuanto más se escribe sobre él)*. Madrid: Cívitas.
- Montero Aroca, J. (2000). *El derecho procesal en el siglo xx*, 1ª Ed; Valencia: Tirant lo Blanch.
- Montero Aroca, J. (2014). *Derecho jurisdiccional*. Valencia: Tirant lo Blanch.
- Montón García, M. L. (2003). *Los consumidores y usuarios ante la nueva Ley de Enjuiciamiento Civil*, in: R. S. Arísti; & J. J. M. (Eds.), La protección jurídica de los consumidores (pp. 57–72). Madrid: Dykinson.
- Moya, V. M. (2012). *Eficacia y acceso a la información de los programas de clemencia. Reflexiones al hilo del caso Pfeiderer (C-360/09)*. RCDI, No.10, 229–237.
- Mulheron, R. (2008). *Reform of Collective Redress in England and in Wales*. London: Civil Justice Council.
- Mulheron, R. (2011). *Opting in, Opting Out, and Closing the Class: some Dilemmas for England's Class Action Law Makers*. Can. Bus. LJ 50, 376– 408.
- Münchener Kommentar zur Bürgerlichen Gesetzbuch: Band 1: Allgemeiner Teil: §§ 1-240, ProstG, AGG, 6. Auflage, München 2012; Band 2: Schuldrecht Allgemeiner Teil: §§ 241-432, 6. Auflage, München 2012; Band 10: Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche, (Art.1-24), 6 Auflage, München 2015, (Zit: Münch-Komm BGB- Author).
- Münchener Kommentar zur Europäisches und Wettbewerbsrecht: Kartellrecht Missbrauch- und Fusionskontrolle, Band 2 GWB §§ 1-96, 130, 131. 2. Auflage. 2016 (Zit. MünchKomm GWB- Author).
- Münchener Kommentar zur Zivilprozessordnung: Band 1: §§ 1-354, 4 Auflage, München 2013; Band 3 §§ 1025- 1109, EGZPO, GVG, EGGVG, UklaG, Internationales und Europäisches Zivilprozessrecht, 4. Auflage, München 2013 (zit.: MünchKomm ZPO- Author).
- Nagy, C. (2013). *Comparative Collective Redress From A Law And Economics Perspective: Without Risk There Is No Reward!* Colum. J. Eur. L; 19 (3), 469 – 498.
- Nieden, W. (2011). *Zustellungsverweigerung rechtsmissbräuchlicher Klagen in Deutschland nach Artikel 13 des Haager Zustellungsübereinkommens Zugleich ein Beitrag zum deutsch-amerikanischen Justizkonflikt*. Frankfurt am Main: Lang.
- Nölke, A. W. A. (2007). *Enhanced roles of private actors in EU business regulation and the erosion of Rhenish capitalism: the case of antitrust enforcement*. JCMS 45 (2), 487– 513.

- OECD. (2005). *Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace Background Report*. Paris: OECD.
- Oliva Santos, A. (2000). *Derecho procesal civil: el proceso de declaración conforme a la Ley 1 2000, de 7 de enero, de enjuiciamiento civil*. Madrid: Ed. Ramón Areces.
- Oliva Santos, A. (2004). *Derecho procesal civil: El proceso de declaración*. Madrid: Ed. Ramón Areces.
- Oppermann, B., & Müller, S. (2005). *Wie verbraucherfreundlich muss das neue UWG sein?* GRUR 107 (4), 280–289.
- Ortiz, B. I. S. (2011). *La aplicación privada del derecho de la competencia: Los efectos civiles derivados de la infracción de las normas de libre competencia*, 1ª Ed; Madrid: La Ley.
- Otero, L. J. M. (1992). *Das neue spanische Gesetz gegen unlauteren Wettbewerb*. GRURInt. 94 (3), 183–192.
- Otting, O., & Bechtold, R. (2010). *Kartellgesetz: Gesetz gegen Wettbewerbsbeschränkungen Kommentar*, 6 Aufl; München: Beck.
- Oughton, D., & Lowry, J. (2000). *Textbook on consumer law*, 2 Ed; London: Blackstone.
- Parra Lucán, M. A. (2008). *Responsabilidad civil por bienes y servicios defectuosos*, in: L. F. R. Campos (Ed.), *Tratado de responsabilidad civil* (pp. 421–556). Cizur-Menor: Thomson-Aranzadi.
- Pazos Castro, Ricardo (2016). *El control de contenido en las condiciones generales de contratación*. Tesis doctoral: Univ. Santiago Compostela.
- Pérez Fernández, P. (2013). *La problemática relación entre los programas de clemencia y las acciones privadas de resarcimiento de los daños derivados de ilícitos antitrust*. Indret (1), 1-23.
- Pérez Mosteiro, A. (2011). *La reforma de la Ley de competencia desleal efectos de la armonización comunitaria*. Madrid: Difusión Jurídica.
- Pfarr, H., & Kocher, E. (1998). *Kollektivverfahren im Arbeitsrecht: Arbeitnehmerschutz und Gleichberechtigung durch Verfahren*. Baden-Baden: Nomos.
- Pietrini, S. (2012). *L'action collective en droit des pratiques anticoncurrentielles: perspectives nationale, européenne et internationale*. Bruxelles: Bruylant.
- Pipoh, K. (2016). *Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) in das deutsche Recht*. NZKart (5), 226- 227.
- Pirker-Hörmann, B; & Kolba, P. (2006). *Von der Verbandsklage zur Sammelklage*, in: Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (Ed.), *Kollektiver rechtsdurchsetzung- Chancen und Risiken* (pp.199-211). Bamberg: BMELV. Available at: www.bmsk.gv.at/cms/site/attachments/0/8/3/CH0036/CMS11417176847 89/eu-

studie_teil_i.pdf. Retrieved last time 01 September 2019.

- Poelzig, D. (2012). *Normdurchsetzung durch Privatrecht*. Tübingen: Mohr Siebeck.
- Pohle, R. (1957). Zur Lehre vom Rechtsschutzbedürfnis, in: Rosenberg, L. (Ed.), *Festschrift Für Friedrich Lent Zum 75. Geburtstag* (pp. 195-235). München: Beck.
- Pohlman, P. (2015). *Verjährung nach der Richtlinie 2014/104 zum Kartellschadenersatz*. WRP (5), 546- 554.
- Porfirio Carpio, L. (2002). *La discriminación de consumidores como acto de competencia desleal*. Madrid: M. Pons.
- Pustlauk, M. (2015). *Couragiert gegen Kartelle?: Die EU-Richtlinie zu Schadensersatz bei Kartellverstößen*. EWeRK (1), 10-13.
- Raeschke-Kessler, H. (1981). *Einstweilige Verfügung gegen Unbekannt - ein Mittel gegen Hausbesetzer?* NJW 34 (13), 663–665.
- Raiser, L. (1961). *Der Stand der Lehre vom subjektiven Recht im deutschen Zivilrecht*. ZBJV (97), 121-152.
- Rauer, N. (2010). *Das Google Book Settlement 2.0*. K&R 9 (1), 9-15.
- Rauer, N. (2011). *Auch das Google Book Settlement 2.0 fällt durch*. K&R (5), 289-291.
- Rechberger, W. (2003). *Neue Herausforderungen an das Prozessrecht: die Bewältigung von Kumul- und Großschaden*, in: H. Nakamura, H. W. Fasching, & H. F. Gaul (Eds.), *Festschrift für Kostas E. Beys*, 2 Bnd (pp. 1309-1332.). Athen: Sakkoulas Verlag.
- Reich, N. (1999). *Bürgerrechte in der Europäischen Union: subjektive Rechte von Unionsbürgern und Drittstaatsangehörigen unter besonderer Berücksichtigung der Rechtslage nach der Rechtsprechung des EuGH und*. Baden-Baden: Nomos.
- Reich, N. (1999). *Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam*. VuR 14 (1), 3–10.
- Reich, N., & Micklitz, H.-W. (2003). *Europäisches Verbraucherrecht* 4 Aufl; Baden-Baden: Nomos.
- Reimann, G. (1964). *Zur Klagebefugnis der Verbraucherverbände im Wettbewerbsrecht*. BB, 860-861.
- Reinel, P. (1979). *Die Verbandsklage nach dem AGBG: Voraussetzungen, Entscheidungswirkungen und dogmatische Einordnung*. Köln, Berlin, Bonn, München: Heymann.
- Requejo Isidro, M., & Crespo Otero, M. (2012). *Collective Redress in Spain: Recognition and Enforcement of Class Action Judgments and Class Settlements*, in: Fairgrieve, D; Lein, E. (Eds.); *Extraterritoriality and Collective Redress*, (pp.309-331). Oxford: Oxford Univ. Press.
- Reuschle, F. (2004). *Das Kapitalanleger- Musterverfahrensgesetz*. NZG (13), 590-594.

- Rhee, C. H. & Verkerk, R. (2012). *Civil Procedure*, in: Elgar Encyclopedia of Comparative Law, 2 Ed; (pp.140-156). Maastricht: EE.
- Riley, A., & Peysner, J. (2006). *Damages in EC antitrust actions: Who pays the piper?* ELR, 31 (5), 748–761.
- Rimmelpacher, B. (1966). *Zur Prüfung von Amts wegen im Zivilprozess*. Göttingen: Schwartz.
- Ritter, J.-S. (2008). *Private Durchsetzung des Kartellrechts*. WuW (07-08), 762 – 774.
- Rodger, B. J. (2008). *Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005*. ECLR 29 (2), 96-116.
- Röhm, H.-R., & Schütze, R. A. (2007). *Die Bilanzierung von Class Action-Risiken*. RIW, 4 (1), 241-245.
- Rolf, H. (2002). *Privater Rechtsschutz im Kartellrecht. Eine rechtsvergleichende Analyse*. Baden-Baden: Nomos.
- Rosenberg, L; Schwab, K.H; Gottwald, P. (2010). *Zivilprozessrecht* 17 Aufl; München: Beck
- Rosenberg, L., Schwab, K. H. & Gottwald, P., & (2011). *Zivilprozessrecht*, 17 Aufl; JZ 66 (17) 843-844.
- Rösler, H. (2005). *30 Jahre Verbraucherpolitik in Europa: Rechtsvergleichende, programmatische und institutionelle Faktoren*. ZfRV, 46 (4), 134–147.
- Roth, W.-H. (2009). *Sammelklagen im Bereich des Kartellrechts*, in: M. Casper, A. Janssen, P. Pohlmann, & R. Schulze (Eds.); *Auf dem Weg zu einer europäischen Sammelklage?* (pp.109-135). München: Sellier.
- Rothbard, M. (2001). *Monopolio y competencia*. Buenos Aires: ESEADE.
- Rother, Christopher. (2017). *Kartelschadenersatz nach der 9. GWB- Novelle*. NZKart (01), 1-2.
- Rott, P. (2003). *Effektiver Rechtsschutz vor missbräuchlichen AGB – Zum Cofidis-Urteil des EuGH*. EuZW 2003, 5-9.
- Rott, P. (2009). *Kollektive Klagen von Verbraucherorganisationen in Deutschland*, in: M. Casper, A. Janssen, P. Pohlmann, & R. Schulze (Eds.); *Auf dem Weg zur einer europäischen Sammelklage* (pp. 259-276). München: Sellier.
- Rust, Ulrich. (2015). *Kartellverstoß und Gesamtschuld- Bestandaufnahme und Ausblick*. NZKart (05), 501-512.
- Sack, R. (2003). *Beiträge - Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle*. WRP 49 (5), 546- 558.
- Sack, R. (2003). *Regierungsentwurf einer UWG -Novelle- ausgewählte Probleme*. BB

- Säcker, F.-J. (2006). *Die Einordnung der Verbandsklage in das System des Privatrechts*. München: Beck.
- Säcker, F.-J. (2006). *Zur kollektiven Durchsetzung von Interessen in der deutschen Rechtsordnung. Rechtspolitische Würdigung der Verbandsklage und ihre Einordnung in das Privatrecht*, in: BMVEL (Ed.), *Kollektive Rechtsdurchsetzung – Chancen und Risiken. Internationales Symposium Bamberg* (pp. 225-230). Bamberg.
- Samanes, A. C. (2000). *Las Partes en el proceso civil*. Madrid: La Ley.
- Sánchez Aristi, R. (2003). *La protección jurídica de los consumidores*. Madrid: Dykinson.
- Sauerland, M. (2012). *Die Harmonisierung des kollektiven Verbraucherrechtsschutzes in der EU*. Frankfurt am Main: Peter Lang.
- Schäfer, H.-B. (1999). *Anreizwirkungen bei der Class Action und der Verbandsklage*, in: Basedow, J. (Ed.); *Die Bündelung gleichgerichteter Interessen im Prozeß: Verbandsklage und Gruppenklage Die Bündelung gleichgerichteter Interessen im Prozeß* (pp. 67–100). Tübingen: Mohr *Effektivität kollektiver Rechtsschutzinstrumente*: Siebeck.
- Schaper, H & Stauber, P. (2014). Die Kartellschadensersatzrichtlinie—Handlungsbedarf für den deutschen Gesetzgeber? *NZKart* (9), 346-353.
- Schaub, R. (2005). *Schadensersatz und Gewinnabschöpfung im Lauterkeits- und Immaterialgüterrecht*. *GRUR* 11, 918 – 924.
- Schaumburg, E. (2006). *Die Verbandsklage im Verbraucherschutz und Wettbewerbsrecht: Ansprüche auf Unterlassung, Widerruf, Beseitigung und Gewinnabschöpfung*. Baden-Baden: Nomos.
- Scherzinger, Johannes. (2016): *Hat der Gesetzgeber aus den Fehlern bei der 7. GWB-Novelle gelernt? - Zu den Übergangsvorschriften im Regierungsentwurf für eine 9. GWB-Novelle*. *NZKart* (11), 513-518.
- Schilken, E. (2008). *Der Zweck der Zivilprozess und der kollektiven Rechtsschutz*, in: Meller-Hannich (Ed.), *Kollektiver Rechtsschutz im Zivilprozess*, 1 Aufl; (pp.21-52). Baden-Baden: Nomos.
- Schlake, S. (2009). *Phänomenologie und Systematik überindividueller Klagebefugnisse im Verwaltungs- und Gemeinschaftsrecht, insbesondere am Beispiel des Umweltrechts*. Tübingen: Mohr Siebeck.
- Schmidt, E. (2002). *Verbraucherschützende Verbandsklagen*. *NJW* (55), 25-30.
- Schmidt, K. (1978). *Aufgaben und Leistungsgrenzen der Gesetzgebung im Kartelldeliktsrecht: Eine rechtspolitische Studie zu den außerstrafrechtlichen Sanktionen im GWB*: Baden-Baden: Nomos.
- Schmidt, K. (2002). *Gesellschaftsrecht*, 4 Aufl; Köln; München: Heymann.
- Schmidt, K. (2003). *Effective private enforcement of* in: Ehlermann, C.-D., & Atanasiu, I.

- (Eds.) *EC antitrust law*. ECLA, 2001, 253-265. Oxford: Hart.
- Schmidt, S. (2016). Tagungsbericht vom Forum Kartellrecht 2016 in Münster: Die Umsetzung der Kartellschadenersatzrichtlinie- Ausblick auf die 9. GWB-Novelle. *NZKart* (3), 97-144.
- Schmidt, Stefan (2016). *Tagungsbericht vom Forum Kartellrecht 2016 in Münster: Die Umsetzung der Kartellschadenersatzrichtlinie- Ausblick auf die 9. GWB-Novelle*. *NZKart* (3), 126-128.
- Schneider, B. (2005). *Auf dem Weg zu Securities Class Actions in Deutschland? Auswirkungen des KapMuG auf die Praxis kapitalmarktrechtlicher Streitigkeiten*. *BB*, 60 (42), 2249–2258.
- Schnelle, U. (2015). *Abhandlung Die Aufteilung von Bußgeldern im Konzern*. *WUW* (4) 332 – 347.
- Scholl, C.-C. (2011). *Kollektiver Rechtsschutz im Kartellrecht*. Frankfurt am Main: Peter Lang.
- Schönke, A. (1950). *Das Rechtsschutzbedürfnis: Studien zu einem zivilprozessualen Grundbegriff*. Detmold: Nauck.
- Schuck, P. (1987). *Agent Orange on trial: mass toxic disasters in the courts*. Cambridge Mass.: Belknap Press of Harvard University Press.
- Schulte-Nölke, H. (2009). *EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States*. *ERCL* 5 (1), 65 – 67.
- Schwalbe, U., & Maier-Rigaud, F. (2014). Quantification of antitrust damages, in: D. Ashton & D. Henry (Eds.), *Competition damages action in the EU: Law and practice* 1. Ed; (pp.122-132). Cheltenham: Edward Elgar.
- Schwartz, V. & Appel, Chr. (2011). *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*. *Pepp. L. Rev.*, 38 (2), 551 – 578.
- Schwartz, W. (1980). *An overview of the economics of antitrust enforcement*. Toronto: Law and Economics Programme, Faculty of Law University of Toronto.
- Schweitzer, H. (2014). *Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen*. *NZKart* (9), 335-345.
- Seegers, M. (2014). Interaction of the rules on joint and several liability and settlements under the EU Directive on damage actions. *GCLR* 7 (3), 140-149.
- Sessler, A. (2004). *Das Kapitalanleger – Musterverfahrensgesetz- eine Stellungnahme aus anwaltlicher Sicht*. *WM* (58) 2344–2348.
- Silver, C. (2000). *Class Actions - representative proceedings*, in: B. Bouckaert and G. De Geest (Eds.), *Encyclopedia of Law and Economics, Volume V. The Economics of Crime and Litigation* (pp. 194-215). Cheltenham: Edward Elgar 2000.

- Sopeña, V. & Martín, G (2016). La transposición de la Directiva europea para la reclamación de daños por infracciones de la competencia en España: mucho ruido, pocas nueces y una oportunidad perdida. *Revista de Derecho de la Competencia y la Distribución, RCD*, (17), 4-58.
- Spindler, H., & Ulmer, E. (1973). *Die amerikanische Institution der Class Action als Mittel des Konsumentenschutzes – Kuriosum oder Vorbild?*, in: *Gewerblicher Rechtsschutz, Urheberrecht, Wirtschaftsrecht: Mitarbeiterfestschrift zum 70. Geburtstag von Eugen Ulmer, mit Beiträgen aus dem deutschen, ausländischen und internationalen Recht*, (pp. 369-380) Köln: Heymanns.
- Stadler, A. (1998). *Empfehlen sich gesetzgeberische Maßnahmen zur rechtlichen Bewältigung der Haftung bei Massenschäden?* Referat. in: C. von Bar (Ed.); *Verhandlungen des 62. Deutschen Juristentags*, 2 Band (pp. 135-163). München; Beck.
- Stadler, A. (2001). *Bündelung von Verbraucherinteressen im Zivilprozeß*, in: Brönneke, T. (Ed.), *Kollektiver Rechtsschutz im Zivilprozeßrecht* (pp. 1–51). Baden-Baden: Nomos.
- Stadler, A. (2002). *Musterverbandsklagen nach künftigem deutschem Recht*, in: Gottwald, (Ed.), *Festschrift Schumann* (pp. 465–490). Tübingen: Mohr Siebeck.
- Stadler, A. (2003). *The multiple role of judges and attorneys in modern civil litigation*. *HICLR* 27 (1), 55–76.
- Stadler, A. (2004). *Bündelung von Interessen im Zivilprozess: Überlegungen zur Einführung von Verbands- und Gruppenklagen im deutschen Recht*. Heidelberg: Müller.
- Stadler, A. (2005). *Das neue Gesetz über Musterfeststellungsverfahren im deutschen Kapitalanlegerschutz*, in: Bittner, Klicka, Kodek, & Oberhammer (Eds.), *Festschr. Rechberger* (pp. 663–678). Wien: Springer.
- Stadler, A. (2007). *Collective Action as an Efficient Means for the Enforcement of European Competition Law*, in: Basedow, J. (Ed.), *Private enforcement of EC competition law* (pp. 195–213). Alphen aan den Rijn: Kluwer.
- Stadler, A. (2008). *Der kollektive Rechtsschutz – ein rechtspolitischer Ausblick*, in: Meller-Hannich, C. (Ed.), *Kollektiver Rechtsschutz im Zivilprozess, Hallesches Symposium zum Zivilverfahrensrecht* (pp. 93–125). Baden-Baden: Nomos.
- Stadler, A. (2009). *Grenzüberschreitender kollektiver Rechtsschutz in Europa*. *JZ* 64 (3), 121–133.
- Stadler, A. & Micklitz H. (2003). *Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung*. *WRP* 49 (5), 559-562.
- Stadler, A., & Micklitz, H.-W. (2005). *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft: Forschungsvorhaben im Auftrag des BMVEL*. (E. und L. [Bundesministerium für Verbraucherschutz, Ed.]). Münster-Hiltrup: Landwirtschaftsverl.

- Stadler, A., & Micklitz, H.-W. (2005). *Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft und den Vereinigten Staaten von Amerika*, in: G. und K. Bundesministerium für Soziale Sicherheit (Ed.), *Massenverfahren – Reformbedarf für die ZPO?* (pp.111-310). Wien: Osterreich.
- Staudenmayer, D. (2009). *Überlegungen der Europäischen Kommission zur kollektiven Rechtsdurchsetzung*, in: Casper, M. (Ed.), *Auf dem Weg zu einer europäischen Sammelklage?* (pp. 87-97). München: Sellier.
- Stein, F. (1893). *Das private Wissen des Richters Untersuchungen zum Beweisrecht beider Prozesse*. Leipzig: C.L. Hirschfeld.
- Steindorff, E. (1974). *Gesetzgeberische Möglichkeiten zu verbesserter Durchsetzung des Gesetzes gegen Wettbewerbsbeschränkungen*. ZHR 138 (5/6), 504–532.
- Stürner, M. (2007). *Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany*. CIV.JUST Q., 26, 250-267.
- Stürner, R. (1978). *Rechtsprobleme der verbandsmäßig organisierten Massenklage*. JZ, 33 (15/16), 499-507.
- Stuyck, J. (2000). *European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?* C.M.L.Rev; 37 (2), 367–400.
- Stuyck, J. (2009). *Class actions in Europe?: to opt-in or to opt-out, that is the question*. EBLR 20 (4), 483–505.
- Suchsland, U. & Rossman, N. (2015). *Verpflichtet die Kartellschadensersatzrichtlinie zur Übernahme des europäischen Unternehmensbegriffs in das deutsche Recht?* WuW (10), 973-981.
- Tamm, M. (2009). *Die Bestrebungen der EU-Kommission im Hinblick auf den Ausbau des kollektiven Rechtsschutzes für Verbraucher*. EuZW (13), 439-443.
- Tamm, M. (2010). *Das Kapitalanleger-Musterverfahrensgesetz: Hintergrund, Ausgestaltung und Reformüberlegungen*. ZHR 174 (6), 525-555.
- Teplitzky, O., Peifer, K.-N., Leistner, M., Jacobs, R., & Germany. (2013). *UWG: Gesetz gegen den unlauteren Wettbewerb: Grosskommentar, Band 1-3, 2 Aufl*; Berlin: De Gruyter.
- The European Consumers Organisation. (2008). *Damages Actions for breach of EC anti-trust rules BEUC position on the Commission`s Green Paper*. Brussels: EU
- Thiere, K. (1980). *Die Wahrung überindividueller Interessen im Zivilprozess*. Bielefeld: Giesecking.
- Tudor, E. (2011). *La cuantificación de daños y perjuicios en la aplicación privada del Derecho europeo de la Competencia*, en: L.A.Velasco et. Alt (Eds.); *La aplicación privada del Derecho de la Competencia 1* (pp. 567-577). Valladolid: Lex Nova.
- Tzakas, D.-P. (2009). *The Enforcement of Competition Law in Europe*. ZEuP 17 (2), 443–

- Tzankova, I. (2013). *Managing the Mass: From Case Managing Mass Disputes to Designing Claim Resolution Facilities*. Viena: UNIDROIT
- Ulen, T. (2011). *An introduction to the law and economics of class action litigation*. *EJLE*, 32 (2), 185 – 203.
- University of Virginia (2004). *The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 *Virginia Environm. L.J.* 22 (3), 249-289.
- Van den Bergh, R. (2013). *Private enforcement of European competition law and the persisting collective action problem*. *MJECL* 20, (1) 12–34.
- Vande Walle, S. (2013). *Private antitrust litigation in the European Union and Japan: a comparative perspective*. Maklu: Antwerpen.
- Vicent Chuliá, F. (1994). *Das spanische Gesetz gegen unlauteren Wettbewerb im Meinungsstreit: eine andere Meinung über das spanische Gesetz gegen unlauteren Wettbewerb*. *GRURInt.*, (1),14 – 32.
- Voet van Vormizele, P. (2010). *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*,. *WuW* 60 (10), 1008-1019.
- Vogel, M. (2010). *Kollektiver Rechtsschutz im Kartellrecht*. Köln: Heymann.
- Vollkommer, G. (2007). *Neue Wege zum Recht bei kapitalmarktrechtlichen Streitigkeiten*: *NJW* 60 (43), 3094–3098.
- Von Moltke, L. (2003). *Kollektiver Rechtsschutz der Verbraucherinteressen: Analyse effektiver Rechtsdurchsetzung im deutsch-englischen Rechtsvergleich*. München: Beck.
- Wach, A. (1885). *Handbuch des deutschen Civilprozessrechts*. Leipzig: Duncker & Humblot.
- Waelbroeck, D. (2004). *Study on the conditions of claims for damages in case of infringement of EC competition rules*. Brussels: Ashurst.
- Wagner, G. (2006). *Neue Perspektiven im Schadensersatzrecht: Kommerzialisierung, Strafschadensersatz, Kollektivschaden*. München: Beck.
- Wagner, G. (2007). Schadensersatz bei Kartelldelikten, in: T. Eger & H. B. Schäfer (Eds.), *Ökonomische Analyse der europäischen Zivilrechtsentwicklung Beiträge zum X. Travemünder Symposium zur ökonomischen Analyse des Rechts* (pp. 605 – 664). Tübingen.
- Wagner, G. (2009). *Kollektiver Rechtsschutz: Regelungsbedarf bei Massen- und Streuschäden*, in: Casper (Ed.), *Auf Dem Weg Zu Einer Europäischen Sammelklage?*, (pp. 41-86). München: Sellier
- Wanner, V. (2010). *Das KapMuG als allgemeine Regelung für Massenverfahren*. Baden-

Baden: Nomos.

Weidenbach, G. & Saller, M. (2008). *Das Weissbuch der Europäischen Kommission zu kartellrechtlichen Schadensersatzklagen*. BB 63 (20), 1020 –1025.

Weigel, A; & Porter, K. Collective Redress in Germany. <https://www.expertguides.com/articles/collective-redress-in-germany/collec14>. Retrieved last time 01 September 2019.

Whish, R. (1994). *The Enforcement of EC Competition Law in the Domestic Courts of Member States*. EBLR 5 (1), 3–9.

Whish, R., & Bailey, D. (2012). *Competition law*. Oxford: Oxford University Press.

Willingman, A. & Koch, H. (2002). *Modernes Schadensmanagement bei Großschaden*. Baden-Baden: Nomos.

Wils, W. P. J. (2003). *Should private antitrust enforcement be encouraged in Europe?* WCLR 26 (3), 473–488.

Wimmer-Leonhardt, S. (2003). UWG-Reform und Gewinnabschöpfungsanspruch oder "Die Wiederkehr der Drachen" JurPC Web-Dok. 219/2003, Abs. 1 – 35. Available at: <https://www.jurpc.de/jurpc/show?id=20030219>. Retrieved last time 01. September 2019.

Wimmer-Leonhardt, S. (2004). *UWG-Reform und Gewinnabschöpfungsanspruch oder ‚Die Wiederkehr der Drachen‘*. GRUR 106 (1), 12– 20.

Wind, E. (2005). *Remedies and sanctions in Article 82 of the EC Treaty*. ECLR 26 (12), 659–668.

Windscheid, B. (1984). *Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts*. Aalen: Scientia.

Wirth, A. (1996). *Das neue Recht des unlauteren Wettbewerbs in Spanien: eine Darstellung des Gesetzes 3 1991 über unlauteren Wettbewerb mit rechtsvergleichenden Bezügen*. Frankfurt [Main]: Ed. für Internat. Wirtschaft.

Wolf, M. (1971). *Die Klagebefugnis der Verbände: Ausnahme oder allgemeines Prinzip?* Tübingen: Mohr Siebeck.

Wolf, M. (1974). *Vorschläge für eine gesetzliche Regelung der Allgemeinen Geschäftsbedingungen*. JZ 29 (2), 41–46.

Wrede, M. (2014). *Das Geheimverfahren im Zivilprozess*. Baden-Baden: Nomos.

Wunderle, T. (2010). *Verbraucherschutz im europäischen Lauterkeitsrecht theoretische Grundlagen, gegenwärtiger Stand sowie Perspektiven der Rechtsentwicklung*. Tübingen: Mohr Siebeck.

Wurmnest, Wolfgang (2017). *Forum Shopping bei Kartellschadenersatzklagen und die Kartellschadenersatzrichtlinie*, NZKart (1), 2- 11.

- Yanes, P. (2011). *Aplicación privada antitrust, restricciones verticales y contratos de aprovisionamiento de combustible: ¿pronunciamientos de fin de ciclo?*. RCD, Núm. 9, 133-150.
- Zimmer, D., & Höft, Jan, (2009). "Private Enforcement" im öffentlichen Interesse?. ZGR 38, (5), 662-720.
- Zöller, R., & Geimer, R. (2004). *Zivilprozessordnung: mit Gerichtsverfassungsgesetz und den Einführungsgesetzen, mit internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen Kommentar*, 25 Aufl; Köln: O. Schmidt.
- Zöller, R., & Geimer, R. (2014). *Zivilprozessordnung: Mit FamFG (§§ 1-185, 200-270, 433-484) und Gerichtsverfassungsgesetz, den Einführungsgesetzen, mit Internationalem Zivilprozessrecht, EU-Verordnungen, Kostenamerungen: Kommentar*, 30 Aufl; Köln: Schmidt. (Cit: Zöller - Vollkommer)
- Zypries, B. (2004). *Ein neuer Weg zur Bewältigung von Massenprozessen*. ZRP 37 (6), 177-179.

Abbreviations and translations

AcP	Archiv für civilistische Praxis
AEDIPr	Anuario Español de Derecho Internacional Privado
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
BB	Betriebs Berater
BGB	Bürgerliches Gesetz Buch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BJM	Basler Juristische Mitteilungen
BKR	Zeitschrift für Bank- und Kapitalmarktrecht
BOE	Boletín Oficial del Estado (Official State Gazete)
BverfG	Bundesverfassungs Gericht (German Constitutional Court)
Can Bus LJ	Canadian Business Law Journal
CB	Compliance Berater
CDC	Cartel Damage Claims Holding S.E.
CDT	Cuadernos de derecho transnacional
CE	Constitución Española (Spanish Constitution)
CJEC	Court of Justice of the European Community
Colum. J. Eur. L	Columbia Journal of European Law
Colum. Law Rev	Columbia Law Review
Comp.L.I	Competition Law Insight
CompLRev	Competition Law Review
DDR	Deutsche Demokratische Republik (German Democratic Republic)
Duke L.J.	Duke Journal of comparative & International Law
EBLR	European Business Law Review
EC	European Community
EC C.P.N	European Commission Competition Policy Newsletter
ECLA	European Competition Law Annual
ECLR	European Competition Law Review
Ed/Eds	Editor/ Editors
EGP	Estatuto General de la Publicidad (Spanish Advertisement Statute Act)
ERCL	European Review of Contract Law
et al	And others
EU	European Union
Eur JL & Econ	European Journal in Law and Economics
EuzW	Europäische Zeitschrift für Wirtschaftsrecht
EWeRK	Energie- und Wettbewerbsrecht in der kommunalen Wirtschaft
Fn	Footnote
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
GEO.MASON L.REV.	George Mason Law Review
GG	Grundgesetz (German Constitution)
GPR	Zeitschrift für das Privatrecht der Europäischen Union
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht International
GWB	Gesetz Wettbewerbsbeschränkung (German Antitrust Act)
HECL	Handbook on European Competition Law
ICE	Información comercial española

InDret	Revista para el Análisis del Derecho
J SOC POLIT ECON ST	Journal of Social Politican and Economic Studies
J. Empirical Legal Stud	Journal of Empirical Legal Studies,
J. Legal Stud	Journal on Legal Studies
JS	Juristische Schulung
JZ	Juristische Zeitung
K&R	Kommunikation und Recht
KapMuG	Kapital Muster Gesetz (German Shareholders Example Act)
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
LCD	Ley de Competencia Desleal (Spanish Unfair Competition Act)
LEC	Ley de Enjuiciamiento Civil (Spanish Civil Procedure Act)
LG	Landesgericht (German County Court)
LGDCU	Ley General Defensa de Consumidores y Usuarios (Spanish General Consumers protection Act)
LOPJ	Ley Órgánica del Poder Judicial (Organic Judiciary Power Act)
MJ	Maastricht Journal of European and Comparative Law
NJW	Neue Juristische Wochenschrift
NZG	Neue Zeitschrift für Gesellschaftrecht
NZKart	Neue Zeitschrift für Kartellrecht
OCDE	Organizacion Cooperación y Desarrollo Económico (OECD Organisation für Economic Co-Operation and Development)
OJ L	Official European Journal
OLG	Oberlandsgericht (German Federal Court)
Pepp. L. Rev.	Pepperdine Law Review
Q J Econ	Quarterly Journal on Economics
RBerG	Rechtsberatungs Gesetz (German Legal Advice Act)
RCD	Revista de Derecho de la Competencia y la Distribución
RDLGCU	Real Decreto Ley General Consumidores y Usuarios
RDM	Revista de Derecho Mercantil
RIW	Recht der Internationalen Wirtschaft
RJC	Revista Jurídica de Catalunya
RPJ	Revista del Poder Judicial
RW	Zeitschrift für Rechtswissenschaftliche Forschung
SAP	Sentencia Audiencia Provincial (Federal Court Decision)
SGAE	Sociedad General de Autores de España (Intellectual rights authors association of Spain)
SME	Small and medium enterprise
SAP	Sentencia Audiencia Provincial
SAN	Sentencia Audiencia Nacional
STC	Sentencia Tribunal Constitucional (Constitutional Court Judgment)
CJEC	Court of Justice of the European Community/ Union
STJPI	Judgment Juzgado de Primera Instancia
STS	Judgement of the Spanish Supreme Court
TR-LGDCU	Texto Refundido Ley General Defesa de Consumidores y usuarios ()
UKlaG	Unterlassungsklage Gesetz (German Injunction Act)
Univ. Pa. L. Rev	University of Pennsylvania Law Review
Urt.v.	Decision from
UWG	Unlauteres Wettbewerbsgesetz (German Unfair Competition Act)

Vand L. Rev.	Vanderbilt Law Review
VersR	Versicherungsrecht
VuR	Verbraucher und Recht
VwGO	Verwaltungsgesetzordnung
VwGO	Verwaltungsgerichtsordnung (German Administrative Procedure Order)
VzBv	Verbraucherzentrale Bundesverband
WCLER	World Competition Law & Economic Review
WM	Zeitschrift für Wirtschafts- und Bankrecht
WuW	Wirtschaft und Wettbewerbsrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZFdG	Zeitschrift für digitale Geisteswissenschaften
ZfRV	Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZvglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess
ZZPInt	Zeitschrift für Zivilprozess International