Stockholm University
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EARTH TO BRUSSELS:
Lessons Learned From Swedish, Norwegian, Danish, and Dutch Class Actions for the European Union Debate on Collective Redress

Thesis submitted in partial fulfillment of the
Master's in E.U. Law Program

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I. INTRODUCTION

A Green Paper issued by the European Commission in December 2005 opened a dialogue on methods of collective redress for increasing private enforcement of competition law. The subsequent White Paper in April 2008 recommended opt-in class actions but rejected opt-out class actions. On a separate track, proposals for collective redress in consumer protection are expected at the end of 2008, but the Commissioner in charge has already stated that class actions will not be considered – "not under [her] watch."[1] These early decisions in the ongoing debate may have a significant impact on E.U. citizens' access to justice, compensation, and private enforcement of law. Of course, such early decisions may still be reversed, but it is critical to understand whether the criticisms of opt-out class actions, or class actions in general, are warranted. This thesis explores the opt-out and opt-in procedural mechanisms from a non-political viewpoint.

Why have the Commissioners of Competition and Consumer Protection taken opt-out class actions, or all class actions, off the table of policy recommendations? Are class actions viable in Europe and, if so, should they be given serious consideration in the E.U. debate on collective redress? European national models indicate that class actions brought by private parties are consistent with European legal tradition and would be viable options for collective redress. Sweden and Denmark allow opt-in class actions and Norway allows both opt-in and opt-out class actions. The Netherlands permits opt-out class action settlements. This thesis will focus on one aspect of collective redress – private opt-in and private opt-out class actions – and it will not address other issues relevant to private enforcement such as the loser's pay rule, discovery, mandatory fee-shifting, and other matters. It will focus solely on the procedural mechanism.

The first section of this thesis, *infra* at 3 - 6, will provide background on the E.U. debate and critically examine some of the problems. It will then explain the following: what is meant

[1] Kuneva, Meglena, Commissioner for Consumer Protection, *Healthy markets need effective redress,* Conference on Collective Redress, November 10, 2007, Lisbon, Portugal, *available at* http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_10112007_en.pdf (last viewed on May 27, 2008) (hereinafter "Kuneva Speech"), 2 ("To those who have come all the way to Lisbon to hear the words 'class action', let me be clear from the start: there will not be any. Not in Europe. Not under my watch.").

by the term "collective redress"; the way the Commission is proposing E.U. legislation on separate tracks (or not at all) in various substantive fields; and why the Directorate-General for Competition recommended the opt-in mechanism but rejected the opt-out mechanism. The second section, *infra* at 28 - 56, will explain how private class actions are already part of the European fixture. It will discuss the Swedish, Norwegian, Danish, and Dutch national models for collective redress, including their procedural mechanisms (e.g., opt-in, opt-out, representative); legislative backgrounds; case descriptions; and assessments.

The third section, *infra* at 56 - 81, will impart lessons the E.U. might learn from these European national models. The lessons include: opt-out class actions are preferable and should be given renewed consideration; opt-in class actions are unlikely to lead to a significant increase in private enforcement; representative actions will not lead to any increase in private enforcement but they may lead to a mild increase in compensation through public enforcement; a single Treaty basis, such as Art. 65(c) E.C., should be used to legislate class actions in a single overall framework rather than one separate track at a time; and the flexibility of E.U. legal traditions to accept new methods of collective redress should be recognized. Concluding remarks will be given, *infra* at 81 - 83.

Due to space constraints, some materials have been placed in Annexes at the end. Annexes A – D contain detailed descriptions of class action lawsuits in the four European nations studied in this thesis. Annex E contains a description of prejudices and misconceptions about U.S. class actions that frequently arise in the E.U. debate over collective redress. These prejudices are almost never supported by evidence but, unfortunately, they seem to drive many important policy decisions, including the Commission's rejection of the opt-out device. Annex F explains why many of these misconceptions may be wrong and suggests that the Commission fund a study of U.S. class actions for more careful examination. Because U.S. class actions have become the primary reference point in E.U. and national debates over collective redress, they should be understood correctly so that E.U. policy decisions rest on clear precepts rather than foggy misconceptions.

A few words should be said about this thesis's focus and point-of-view. There are numerous features of a collective redress system that might affect the private enforcement of law

– e.g., damage remedies, the loser pays rule, caps on lawyer's fees, etc. – but this thesis does not address those issues, although many of them are discussed at length in European debates on collective redress. They are important, but they are outside the scope of a short study. This thesis takes a single feature of collective redress for review – the procedural mechanism. This is fair enough because a given procedural mechanism may be used in a wide variety of contexts. Procedural mechanisms are not married to any one system of features, e.g., a system with the loser pays rule or punitive damages. They may be plucked out of one system and put into another. Finally, the critical examination that appears in this thesis is motivated by the view that policy debates should be objective, open-minded, and clear in thought and that the best policy judgments will result from a dispassionate study. In this spirit, we now turn to the E.U. debate on "collective redress."

II. E.U. PROPOSALS FOR COLLECTIVE REDRESS

A. Background

The European Commission has recognized that "collective redress" may be the best method for increasing private enforcement of E.U. competition laws. The concept is broad and, consequently, so is the policy debate. "Collective redress" includes opt-out class actions, opt-in class actions, representative actions, public actions, and other procedural mechanisms. In the White Paper on competition law, released in April 2008, "collective redress" was described as "[procedural] mechanisms allowing aggregation of the individual claims of victims …"[2] The DG Competition's goal is to find a procedural mechanism that allows victims who have "suffered scattered and relatively low-value damage" to bring claims for monetary compensation over competition law infringements.[3] Most legal systems in the E.U. do not presently have methods for collective redress.[4] As a result, most E.U. citizens never seek compensation for competition law infringements because there are too many "costs, delays, uncertainties, risks,

[2] White Paper § 2.1.

[3] There are other forms of redress, e.g., solely to obtain injunctive relief but this thesis (as well as the White Paper) focuses on procedural mechanisms that enable private individuals to obtain monetary compensation. *See also* White Paper Staff Working Paper, 7 n.5 ("In this White Paper, the Commission is focusing on damages actions so as to render the victims' right to damages effective in Europe").

[4] Kuneva Speech, 9 (remarking that half or more of Member States do not have systems of collective redress).

and burdens involved." For those who do come forward, their efforts are defeated by "procedural inefficiencies" in the judiciary.[5]

The Tampere Council called for "greater convergence in civil law" and the approximation of Member States' legislation to "eliminate obstacles to the good functioning of civil proceedings."[6] The Tampere Council aimed for harmonization of the procedural rules of the Member States: "The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. … More convergence between the legal systems of Member States must be achieved." The Tampere Council requested the Community to propose "new procedural legislation in cross-border cases."[7] The emphasis on "cross-border cases" was likely inserted due to Article 65 E.C.'s application to "civil matters having cross-border implications."

Since the Tampere Council, there have been no E.U. proposals, and no debate, on whether collective redress should be available in a single overall framework. The White Paper on competition law contains no reference to the Tampere Council,[8] which is strange in light of the Commission's acknowledgment that private enforcement is hampered by "considerable hurdles … either of a legal or procedural nature."[9] Indeed, the E.U. has been slow to harmonize civil procedure rules:

> … the Commission in 1990 requested a group of experts, called "Commission European Judiciary Code", to draw up a study on the approximation of the laws and rules of the Member States concerning certain aspects of the procedure for civil litigation. The resulting report (the so-called "Storme Report") was published in 1994. It contained a series of proposals to approximate the various aspects of civil procedure which have, however, not been enacted.[10]

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[5] White Paper § 2.1 with reference to this and preceding sentence.

[6] Presidency Conclusions - Tampere European Council, 15 and 16 October, 1999, *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en9.htm (last viewed on May 28, 2008) (hereinafter "Tampere Conclusions"), IV(28), VII(38)-(39) with reference to this and subsequent sentence; *see generally* Communication from the Commission to the Council and the European Parliament, *Area of Freedom, Security, and Justice: Assessment of the Tampere programme and future orientations* (COM(2004) 401 final), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0401:FIN:EN:PDF (last viewed on May 28, 2008) (hereinafter "Tampere Communication"), 11.

[7] Tampere Conclusions, VII(38).

[8] The word "Tampere" is not mentioned a single time in the 671-page White Paper Impact Study. Nor is the word "Tampere" mentioned a single time in the 67-page White Paper Impact Report.

[9] White Paper Staff Working Paper, 8.

[10] Green Paper on Small Claims § 4.1.

The Commission has made limited progress in harmonizing very discrete portions of civil procedure, but those reforms have mostly related to family law matters.[11] Large-scale harmonization of Member States' civil procedure rules has not yet occurred. Class actions have not even been on the agenda for civil procedure harmonization. They have, however, appeared among the list of Policy Options to increase private enforcement of competition law. The Commission reported that the lack of "collective redress mechanisms," or class actions, has been one of the "main obstacles" to private enforcement of competition law.[12]

This thesis uses the term "class actions" with regard to procedural mechanisms that permit a large number of aggregated individuals to recover damages in lawsuits brought by private parties. A "class" is the same as a "group," i.e., a number of victims who share the same legal or factual claim. In Sweden, the phrase "group action" is sometimes used but the phrase "class action" is also used.[13] In Norway, the term "class action" is readily used in English translations by Norwegians. In the White Paper and Leuven Study, the Commission does not use the term "class actions" but prefers the term "collective action" or "group litigation" even though both of these terms are synonymous with "class action."[14] It would be preferable if everyone were to use the same term to facilitate understanding. The word "class action" may apply to any form of collective redress that is brought by private individuals or organizations to recover compensation.

In the U.S., the phrase "class action" applies to various procedural forms. Most class actions in the U.S. use the opt-out mechanism.[15] Some class actions in the U.S., however, use the opt-in mechanism.[16] Class actions in the U.S. against a "limited fund" do not provide a right

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[11] Peers, 370 - 371.

[12] White Paper Staff Working Paper, 7 – 8.

[13] The professor who is really the father of class actions in Sweden has called their mechanism a "true class action." Lindblom National Report, 6. Prof. Lindblom wrote the book that started the dialogue and then chaired a government commission on collective redress in Sweden.

[14] Leuven Study, 261; White Paper Impact Report, 29 – 30 (calling opt-out system a "class action" but opt-in system a "collective action"); *but see* White Paper Impact Study, 13; *id.* at 276 n. 443 ("The terms collective actions and class actions are synonyms. The latter expression is more common in the US than in Europe").

[15] Classes certified under Fed. R. Civ. P. 23(b)(3) for primarily monetary relief provide for the right to opt-out.

[16] The U.S. Fair Labor Standards Act of 1938, e.g., requires the use of opt-in rather than opt-out class actions. 29 U.S.C. §201 et seq.; Pace, Nicolas M., *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, prepared for the Oxford Conference on Global Class Actions, available at http://globalclassactions.stanford.edu/PDF/USA__National_Report.pdf (last viewed on May 23, 2008), 19 n. 21 and accompanying text; *see also* White Paper Impact Study, 280 (noting that in a U.S. opt-out class action, the class

to opt-out.[17] Class actions in the U.S. for injunctive relief (with the possibility of subsidiary monetary relief) also do not provide an opportunity to opt-out.[18] Yet, all of these models are still called "class actions." It does not matter if they feature the opt-out mechanism, the opt-in mechanism, or neither. What matters is that they aggregate claims. Therefore, this thesis uses the single term "class action" for all of these forms. It is an appropriate choice since the E.U. debate over "collective redress" frequently uses U.S. class actions as a benchmark, as noted *infra* at 108 - 112, and because the U.S. has the longest-running history with this form of collective redress.[19] The term "representative action" will be used with regard to actions brought by public bodies or consumer associations that have not suffered damage on their own.

B. Separate Tracks for Collective Redress

The European Commission is looking at the issue of "collective redress" on one track for competition law and on a separate track for consumer protection. It appears that there has been no movement at all in other substantive fields. This section will examine why this might be the case and then it will discuss recent movements along the separate tracks for competition, consumer protection, and other fields. The Commission has not proposed, or openly discussed, a single overall framework that would provide "collective redress" to enforce the different substantive laws at once. It has instead pursued separate tracks. Why? There may be several reasons: (1) institutional, (2) legal, and (3) historical. Although these reasons might provide some explanation of the Commission's separate-track approach, they do not require the Community to follow this path into the future, particularly since a single overall framework would be legally, institutionally, and legislatively viable, as discussed *infra* at 118. It is not only inefficient to re-invent the wheel, but it is also harmful for E.U. citizens to have to wait until "collective redress" finally arrives in a given field.

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members ultimately had to opt-in to collect damages). The Age Discrimination in Employment Act ("ADEA") also requires victims to opt-in to the class action. 29 U.S.C. §§ 621-634 (1982). Victims are not party to an ADEA lawsuit unless they opt in: "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

[17] Class actions against a "limited fund" are certified under Fed. R. Civ. P. 23(b)(1) with no opportunity to opt-out.

[18] These cases are certified under Fed. R. Civ. P. 23(b)(2) with no opportunity to opt-out.

[19] Class actions were introduced over forty years ago to increase private enforcement of the civil rights of African-Americans.

First, regarding institutional reasons, the E.U. is divided into separate Directorate-Generals ("DG"s) that handle different substantive fields. There is a DG for Competition and a separate DG for Health and Consumer Affairs. The DG for Freedom, Security, and Justice is charged with the harmonization of civil procedure rules.[20] Each DG may have its own reasons for pursuing separate tracks.[21] They might feel their obligations only extend to a particular area of substantive law, e.g., competition without any regard for another area of substantive law, e.g., consumer protection.

Second, E.U. law requires a sound factual and legal treaty basis for every legislative measure. The DG Competition has developed a voluminous record to support its recommendations for collective redress in private enforcement.[22] The DG Health and Consumer Affairs has not developed an extensive record to support collective redress for consumer protection, although common sense and the experience of Member States support the need for increased private enforcement. A Leuven study into collective redress for consumer protection, and other matters, was released in January 2007,[23] and a new report on collective redress in the Member States will be issued at the end of 2008.[24] The consumer protection track is, however, a bit behind the competition track. Legally, DG Competition seeks measures to enforce Articles 81 and 82 E.C. that are legislated via Article 83 E.C and the qualified majority voting procedure. The DG Health and Consumer Affairs may seek measures to enforce Article 153 E.C. that are legislated via Article 95 E.C and the co-decision procedure in Article 251 E.C.[25] These different Treaty bases may require the DGs to proceed apart.

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[20] Directorate-General for Justice, Freedom, and Security, *Creating a single Justice area in civil and commercial matters, available at* http://ec.europa.eu/dgs/justice_home/judicialcivil/wai/dg_judicialcivil_en.htm (last viewed on May 28, 2008) (hereinafter "D-G Justice Mission Statement").

[21] It should be noted that DG Competition has been the "lead service" in promoting collective redress in competition law but coordinates to some extent with DG Health and Consumer Affairs; DG Justice, Freedom, Security; DG Enterprise; DG Economic and Financial Affairs; and others. White Paper Impact Report, 5, 9.

[22] White Paper Impact Report.

[23] An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings: Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, prepared by the Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, Belgium, January 17, 2007, available at *http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf* (last viewed on May 25, 2008) (hereinafter "Leuven Study").

[24] Engelbrekt Interview.

[25] Decision No. 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013) (hereinafter "Decision

Third, prior to 2003, there was no model in the E.U. Member States for class actions that could be used to enforce all substantive laws. The first model arose when Sweden permitted the first opt-in class actions in Europe starting in 2003. Since then, several more European countries have adopted class actions. Today's landscape is different. Looking back on the past five years, the national models described in this thesis demonstrate how class actions might work in the E.U. as a whole. It seems natural for the Commission to give more careful consideration to these models. The history that the Commission looked upon in 2005, when it released the Green Paper that started the debate, is different from the history that the Community looks back upon today, as it reviews options for collective redress. Next, we will examine the separate tracks in greater detail.

1. Competition

On the competition law track, the Commission looked at collective redress as a means of increasing private enforcement of Articles 81 and 82 E.C.[26] The right of private individuals to compensation for infringements of competition law was recognized by the European Court of Justice in Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.[27] However, these legal rights have not been realized in practice, costing victims billions of euros per year.[28] The failure of private enforcement has been the result of "various legal and procedural hurdles."[29]

The dialogue in the E.U. on private enforcement of competition law began in earnest in December 2005 when the Commission issued the Green Paper: Damages actions for breach of the EC antitrust rules (COM(2005) 672 final, December 19, 2005) (hereinafter "Green Paper on Competition"). The Green Paper on Competition noted that the E.U. should consider all forms of "collective action" as a means of encouraging private enforcement:

> Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can

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on Consumer Policy"), Preamble ("Acting in accordance with the procedure laid down in Article 251 of the Treaty…").

[26] White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final, April 2008) (hereinafter "White Paper").

[27] White Paper § 1.1; White Paper Staff Working Paper, 14 - 15.

[28] White Paper § 1.1; *id.* at § 1.1 n. 2 and accompanying text.

[29] White Paper § 1.1 (citing Green Paper on Competition Law).

> serve to consolidate a large number of smaller claims into one action, thereby saving time and money.[30]

The Green Paper on Competition did not exclude opt-out class actions form the debate. In responding to the Green Paper, the European Parliament echoed "the view that, in the interests of justice and or reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organizations whose statutes have this as their object."[31] The European Parliament claimed that European solutions should be different from the "North American model" with "class actions" because "[n]o formula of this type exists in European legal practice."[32] This misperception may be one of the reasons why the Commission ultimately rejected the opt-out mechanism.[33]

The Commission released a White Paper in April 2008 "to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle."[34] The same considerations could justify collective redress for employment discrimination, environmental protection, or consumer protection, but the White Paper was restricted to competition law.

The White Paper recognized that some form of collective redress is necessary because victims will not otherwise sue for "scattered low-value damages."[35] Even if suits were filed, "national courts would have to handle a multitude of scattered low-value individual claims with

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[30] Green Paper on Competition § 2.5.

[31] European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules T6-0152/2007 ("EP Resolution"), ¶ 21.

[32] European Parliament Draft Report on the Green Paper on Damages Actions for breach of the EC antitrust rules (2006/2207(INI)), Source Reference PE380.685 (Oct. 24, 2006) (Rapporteur: Antolin Sanchez Presedo) (Draftsman: Bert Doorn, Committee on Legal Affairs) ("EP Draft Report"), at p. 10 (Explanatory Statement § 6 ("The North American model is based on a set of elements (judicial bodies consisting of non-professionals, 'class actions', strict requirements on the disclosure of documents, punitive damage payments of three times the damage occasioned, risk-free litigation owing to the lawyer's fees being pegged to the outcome and payment by each party of the costs o litigation, etc.) No formula of this type exists in European legal practice.")); *see also* European Parliament: tabled non-legislative report, Source Reference A6-0133/2007, Explanatory Statement § 6.

[33] Opt-out class actions are not listed among the proposals put forward by the Commission (White Paper, 4), but they are briefly mentioned in the White Paper and the shorter documents accompanying the White Paper. White Paper Staff Working Paper, 17 – 18 ("Affiliation of the group may be limited to victims that have expressly stated their intention to be included in the action or, on the contrary, to all those who have not expressly opted out of the action"). They are addressed in greater detail in the 671-page White Paper Impact Study and the 67-page White Paper Impact Report.

[34] White Paper § 1.2.

[35] White Paper Staff Working Paper, 15.

no possibility of collective redress [which] would lead to procedural inefficiency."[36] The White Paper does not suggest, however, that collective redress should be limited to low-value claims. Whatever collective redress mechanism is ultimately approved might be used for high-value claims as well as low-value claims.

The White Paper and its accompanying documents laid out five different Policy Options. Policy Option 5 was simply the status quo.[37] Policy Option 1 described a collective redress system that included the opt-out mechanism.[38] Policy Option 2 included the opt-in mechanism and representative actions.[39] As described below, the Commission ultimately recommended Policy Option 2. We now turn to a closer look at the Commission's thinking and critically examine its reasons for rejecting the opt-out mechanism.

a. Opt-Out Class Actions

The Commission's final recommendation was that the Community should reject Policy Option 1 with opt-out class actions, double damages, broad disclosure requirements, and mandatory fee shifting.[40] At the same time, the Commission recognized that the opt-out procedural mechanism has advantages over the opt-in procedural mechanism:

> An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim's harm.[41]

[36] White Paper Staff Working Paper, 16.

[37] White Paper Impact Report, 32 – 34.

[38] White Paper Impact Report, 29 – 30.

[39] White Paper Impact Report, 30 - 31.

[40] White Paper Impact Study, 561 – 566.

[41] White Paper Staff Working Paper, 20 – 21; *see also* White Paper Impact Report, 39 ("high incentives and opt-out class actions will lead to compensation of very much higher number of victims (including those who suffered scattered damages) … opt-out class actions simplify small-claims actions … opt-out class actions are more efficient than individual suits); White Paper Impact Study, 574 (opt-outs would increase awareness of anti-trust laws); *id.* at 146 n. 272 and accompanying text (attributing phrase "litigation culture" to speech given in 2007).

In short, the opt-out mechanism provides compensation to a greater number of victims; prevents infringers from keeping a larger share of illicit gain; provides greater deterrence; and makes the litigation less complex. Despite its obvious advantages, the opt-out mechanism was not recommended by the Commission in the White Paper as one of the procedural mechanisms that might be useful for private enforcement in the E.U.[42] The opt-out mechanism was packaged into Policy Option 1 with controversial features such as double damages, disclosure requirements, and mandatory fee-shifting. The overall package was presented as the one "most closely resembling the US system."[43] The reason for rejecting the opt-out mechanism may have more to do with European prejudice against the American legal system than with any rational assessment of this procedure, as noted *infra* at 108 - 112 (Annex E). The opt-out mechanism was mischaracterized by the Commission as being more prone to "abuse" than the opt-in mechanism.[44]

None of the other Policy Options included the opt-out mechanism. This was a strategic error. The main concerns over Policy Option 1 focused on the impact of one-way mandatory fee shifting and double damages in creating a "litigation culture."[45] The opt-out mechanism is not grafted to double damages, mandatory fee shifting, or any other features in Policy Option 1. It is simply a procedural mechanism. It could be plucked out of Policy Option 1 and inserted into any other system of collective redress. Nor is there any evidence that the opt-out mechanism would contribute to the development of a "litigation culture." The Commission did not provide any analysis from trained sociologists or anthropologists or other professionals on the impact of these legal mechanisms on European culture. Therefore, statements about Policy Option 1's contribution to a " litigation culture" should be viewed with great skepticism.

The White Paper gave no reasons why the opt-out mechanism should be rejected or why it was excluded from the more favorable Policy Options. The only explanation about the potential disadvantages of the opt-out mechanism appeared in the 671-page White Paper Impact Study. None of the reasons stated therein are objectively justified. We might sort the criticisms

[42] White Paper § 2.1.

[43] White Paper Impact Study, 561.

[44] White Paper Impact Study, 626 ("'… 'opt out' procedures could be seen to be more open to abuse …").

[45] White Paper Impact Study, 562, 563 (fee shifting and double damages would serve as over-deterrent and "free token for strategic lawsuits"), 566 ("A 'culture of litigation boom' would be very likely to emerge"), 569 (concerns over double damages and fee shifting), 574, 578; White Paper Impact Report, 52 ("litigation culture").

into four categories: (1) opt-outs are more expensive than opt-ins[46]; (2) opt-outs pose constitutional problems regarding the "day in court" that opt-ins do not pose[47]; (3) the person who files the lawsuit on behalf of class members, i.e., the class representative, might get over-compensated in an opt-out if other class members do not claim their damages[48]; and (4) opt-outs create principal/agent problems that do not exist in opt-ins.[49] These arguments are inaccurate and over-stated. To the extent some of these concerns, e.g., principal/agent conflict, do exist, they also arise in opt-in class actions and traditional litigation. Therefore, it is puzzling that the Commission recommended opt-ins over opt-outs when there are no comparative disadvantages to the opt-out mechanism. We now turn to the Commission's four arguments.

First, regarding costs, the Commission wrongly stated that opt-out class actions would be more expensive to litigate than opt-in class actions:

> *Opt-out class actions can lead to economies of scale,* but they are normally expensive to litigate, due to high court (and often lawyers') fees, principal-agent problems, costs linked to the certification of the class, high costs of distribution of damages, etc. These costs might in some cases outweigh the benefits of economies of scale, but this would be because at least some individual actions would not have been brought in the absence of a collective action mechanism.[50]

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[46] White Paper Impact Study, 570.

[47] White Paper Impact Study, 40; *id.* at 272 (noting that German constitution limits the possibility of a person being bound by a judgment in a proceeding in which he did not take part and did not have the opportunity to intervene); *id.* at 573 ("*Opt-out class actions an unknown tool in almost all European member states.* The opt-out solution for group litigation in Europe has been rejected by some commentators on constitutional grounds, as it may conflict with principles of due process or the right for a day in court (see Nordh 2005; Micklitz and Stadler 2004)"); *see also* Leuven Study, 268 ("Indeed, in Europe it is widely believed that Article 6 of the ECHR and the relevant constitutional principles guaranteeing access for each citizen to a judicial decision-maker form an obstacle to the introduction of US-type class actions based on an 'opt out' system").

[48] White Paper Impact Study, 568.

[49] White Paper Impact Study, 570; *see generally id.* at 47, 203; White Paper Impact Report, 38 ("in opt-out class actions, the very large group of victims included in the class may not always be able to control the lawyers acting for the class (principal/agent problem)"). One of the authors of the White Paper Impact Study, Roger Van den Bergh, took a strong belief that class actions lead to principal/agent conflicts in one of his published papers. Van den Bergh, Roger and Visscher, Louis, *The Preventive Function of Collective Actions for Damages in Consumer Law*, Erasmus Law Review, Vol. 1., Issue 2, Article 2, p. 5, *available at* http://www.erasmuslawreview.nl/files/02-the_preventive_function_of_collective_actions.pdf (last viewed on May 26, 2008) (hereinafter "Van den Bergh") ("… collective actions pose problems of their own. The leading plaintiff or the organization issuing the collective action could try to advance its own interests, rather than furthering overall consumer interests. Moreover, a large-scale lawsuit might harm the reputation of the defendant and thus create the possibility of 'frivolous suits'"). Dr. Van den Bergh's perception that principal/agent problems are unique to class actions – and not just a component of all litigation – comes through in the White Paper Impact Study.

[50] White Paper Impact Study, 570.

Neither the White Paper Impact Study, nor any of the associated documents, provided a shred of evidence from the U.S. or any other jurisdiction to support this view. There is no reason why opt-out class actions would involve higher court fees than opt-in class actions, but the former were rejected and the latter were recommended.

The White Paper Impact Study offered no support for its view that lawyer's fees would higher in opt-out class actions than in opt-in class actions. The White Paper Impact Study noted that principal-agent problems chiefly arise in contingency fee arrangements[51] but E.U. Member States do not permit lawyers to earn contingency fees.[52] It would not matter if the amount claimed were large (due to an opt-out class with many members) or small (due to an opt-in class with fewer members). Fees would be restricted to an hourly rate or, where permitted, a success fee. The Commission gave no explanation as to how opt-outs would lead to larger fees in Europe. The Commission also failed to explain how principal –agent problems would act to increase costs.

As for the cost of distributing damages, these expenses would be the same for opt-out and opt-in class actions. Notice would have to be sent to the public at the start and/or settlement of an opt-out or opt-in class action, incurring the same cost. Members of an opt-out class who respond to a settlement notice by submitting a claim form would, then, be just as easily identifiable as the person who joins an opt-in class action. In an opt-out class action, class members may be identified from the defendant's own records. It is hard to see how these unsubstantiated costs would give any advantage to opt-ins over opt-outs, since the cost of identifying class members is the same.

Second, the White Paper Impact Study reported that opt-outs would pose constitutional problems (not found in opt-ins) by depriving class members of their day in court.[53] As the experience of the U.S. demonstrates, *infra* at 116, these are not serious concerns. The Nordh and Micklitz articles cited in the White Paper Impact Study[54] were written *before* the first Dutch opt-

[51] White Paper Impact Study, 203.

[52] White Paper Impact Study, 201 ("… contingency fees… prohibited in most jurisdictions, and are rather heavily regulated in others …")

[53] White Paper Impact Report, 40 ("opt-out class actions … raise public policy or even constitutional concerns …"); *id.* at 288 (citing possible concerns with "day in court" arising in German constitution) (citing reluctance to adopt opt-outs in Sweden).

[54] White Paper Impact Study, 573 (noting concerns by Nordh and Micklitz that opt-outs pose constitutional problems).

out class action settlements, the start of Norway's law permitting private opt-out class actions, and the start of Demark's public opt-out class actions.

Third, the person bringing filing the opt-out class action lawsuit would not get over-compensated, as feared by the Commission.[55] Class representatives are only entitled to their ordinary damages. The rest of the money in an opt-out class action settlement fund must be distributed to remaining class members, given to a cy pres fund, or returned to the defendant.

Fourth, the White Paper Impact Study argued that opt-outs pose special principal –agent problems that do not exist in opt-in class actions.[56] This portion of the White Paper Impact Study was likely written by co-author Dr. Roger Van Den Bergh, because he published identical statements elsewhere in a Dutch law review article.[57] Dr. Van den Bergh's law review article (and the White Paper Impact Study) failed to offer any empirical evidence to support this view. In his article, Dr. Van Den Bergh's reasoning consists of a hypothetical situation without reference to published studies. The Commission made an awkward fit of Dr. Van Den Bergh's unsubstantiated belief into the White Paper Impact Study as a primary reason for rejecting the opt-out mechanism and recommending the opt-in mechanism. The Commission also cited several America law review articles regarding the principal/agent conflict in class actions,[58] but none of these articles claimed that the principal/agent problem is unique to opt-out class actions. To the contrary, the majority of articles reviewed by the Commission actually support the use of the opt-out mechanism as one of the successful features of U.S. class actions.[59]

Principal-agent problems do exist, but they are common to every form of legal representation. In traditional litigation, e.g., a lawyer might have an interest in billing as many hours as possible on a case to earn a higher fee while the client has an interest in paying for fewer hours. These problems are not unique to class actions. To the extent class actions pose

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[55] White Paper Impact Study, 568.

[56] White Paper Impact Study, 570; White Paper Impact Report, 38 ("the very large group of victims included in the class may not always be able to control the lawyers acting for the class (principal/agent problem) mis-alignment of their interests could lead to under-compensation").

[57] Van Den Bergh, 23 – 24. The only difference between Dr. Van Den Bergh's views and those in the White Paper Impact Study and White Paper Impact Report is that Dr. Van Den Bergh seems to acknowledge that principal-agent problems (which he overestimates in class actions) may arise in class actions of all forms – both opt-ins and opt-outs. Van Den Bergh, 29. It may be that the Commission simply made an awkward adaptation of his argument to support its own recommendation for opt-ins over opt-outs.

[58] White Paper Impact Study, 279 – 280.

[59] White Paper Impact Study, 286 – 287 (noting 6 articles in support of U.S. opt-out mechanism and only two articles in opposition).

unique principal-agent problems that do not exist in traditional litigation, these challenges are common to both opt-in class actions and opt-out class actions.[60] The principal-agent problem is therefore no reason for the Community to choose the opt-in mechanism over the opt-out mechanism, and it is further reason to question the Commission's recommendations. Having reviewed and debunked all of the reasons given by the Commission for choosing opt-ins over opt-outs, we are left with no justifiable reasons. It is a puzzle.

The only sensible explanation is that the Commission allowed its bias against U.S.-style class actions (which incorporate the opt-out mechanism in some, but not all, class actions) to influence its decision to package the opt-out mechanism into the most "radical" proposal, i.e., Policy Option 1. The opt-out mechanism was then rejected as part and parcel with the other features in Policy Option 1, such as mandatory fee shifting and double damages. Our examination, however, will demonstrate that the Commission had no objective reason to reject the opt-out mechanism. Indeed, on its own, the opt-out mechanism contains many advantages over the opt-in mechanism without any additional costs or burdens. However, instead of the opt-out mechanism, the Commission recommended Policy Option 2 with its two different procedural mechanisms: (1) opt-in class actions; and (2) representative actions.[61] We now turn to those two devices.

b. Opt-In Class Actions

In the White Paper, the Commission recommended opt-in class actions "in which victims expressly decide to combine their individual claims for harm they suffered into one single action."[62] The way it would work is, first, notice would be distributed to raise awareness of the lawsuit. It appears that such notice would be sent prior to the actual filing of a lawsuit. Other people with the same claim would then "decide whether they want to opt-in when a collective

[60] White Paper Impact Study, 279 – 280. In the U.S., courts are obliged to monitor class action settlements to ensure that the lawyer (and the class representative) have not traded away the rights of class members for their own advantage. Fed. R. Civ. P. 23(e). American courts sometimes overturn class action settlements approved by a lower court if the attorney's fees and/or class representative's fees seem too high in comparison to the results achieved for the class members. *Staton v. Boeing,* 327 F. 3d 938 (9th Cir. 2003).

[61] Commission Staff Working Document Executive Summary of the Impact Assessment White Paper on Damages actions for breach of the EC antitrust rules (SEC(2008) 406, April 2, 2008), 3 ("victims of an infringement of competition law may have recourse to collective redress mechanisms. Damages actions can be brought by representative entities or by opting in to a collective action.").

[62] White Paper § 2.1; White Paper Staff Working Paper, 18, 20 n.34 and accompanying text, 92; White Paper Impact Study, 270 ("In an opt-in system, only those who explicitly declared their agreement to become members of the group are bound").

action will be brought." This is an unusual procedure as most opt-ins, e.g., in Sweden, begin with the filing of an action in court followed by notice and opportunity to opt-in, as noted *infra* at 29 - 31. In the Commission's proposal, parties may choose to opt-in at any stage of the litigation. Only those people who opt-in will be bound a final judgment.[63]

In the Commission's proposal, once a case is eventually filed, the opt-in mechanism would ensure that more parties participate in the case than in traditional litigation, thereby providing "efficiencies" for the court over hearing each case individually.[64] The opt-in mechanism was bundled into the package that the Commission called Policy Option 2.[65] Individuals who opt-in to a class action would receive damages that "correspond to the harm suffered by those included in the action."[66] The White Paper said nothing about who would keep track of the identities and number of people who opt-in, or how, whether by register, court clerk, or other means. Very few details on the actual workings of the opt-in procedure were given in the White Paper and its accompaniments.

The White Paper Impact Study claimed "opt-in collective/representative actions make recovery of scattered damage more likely…" and that opt-ins would have a mild deterrent effect.[67] However, the availability of opt-in class actions would likely result in a negligible increase in private actions because the incentives to litigate are not great for lawyers or victims. The reason why the Commission thought recovery would be "more likely" in an opt-in class action, than in an opt-out class action, is because the victims would have to identify themselves early on to participate in the litigation.[68] However, opt-out class members must also come forward to identify themselves, albeit at a later stage, or they would otherwise not be able to collect their compensation. Next, we examine the "representative action" that was part of Policy Option 2 recommended by the Commission.

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[63] White Paper Impact Study, 270, 299 with reference to whole paragraph.

[64] White Paper Impact Statement, 42.

[65] White Paper Impact Report, 30.

[66] White Paper Staff Working Paper, 21.

[67] White Paper Impact Study, 41; *id.* at 581 – 582.

[68] White Paper Impact Study, 584 ("*Opt-in collective and representative actions* ensure that the damage is compensated to a group of identifiable victims").

c. Representative Actions

As part of Policy Option 2, the Commission proposed a "representative action" in which organizations approved by Member States would be authorized to prosecute cases for damages on behalf of victims.[69] At the commencement of the action, the organization would "use effective mechanisms for informing the victims they represent", in part, to prevent victims from bringing their own private opt-in actions over the same misconduct.[70] One of the main problems with the "representative action" is that it is already permitted in most Member States as a way to obtain injunctive or declaratory relief.[71] It is the status quo. The Commission's recommendation for "representative actions" would not result in a meaningful increase in private enforcement, as recognized in the underlying White Paper Impact Study.[72] The German experience with representative actions by consumer associations has not been encouraging.[73] It is puzzling that the Commission has recommended the "representative action" even though it has little chance of fulfilling the primary goal of the White Paper.

To fully understand the impact of the "representative action" model, we must comprehend what the Commission proposed. There are strict requirements (not immediately obvious) on what type of organization may bring a "representative action." We must start, therefore, with a precise meaning of the term. The Commission gave the following definition in one of the documents accompanying the White Paper:

> A representative action for damages is an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves party to the action, and aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity). One may think of a consumer association defending consumers'

[69] White Paper Staff Working Paper, 92.

[70] White Paper Staff Working Paper, 18, 22.

[71] White Paper Impact Study, 274 ("Representative actions by associations are possible in the absolute majority of Member States, although often limited to obtaining injunctions and not for claiming damages").

[72] White Paper Impact Study, 602 (acknowledging that "representative action" proposal would not lead to significant improvement over status quo), 607 ("… this set of policy measures may end up being less than proportionate to the goal, as the expected impact on deterrence and corrective justice would be too small to ensure achievement of the ultimate goal of this policy action – i.e., ensuring that victims of EC competition law infringements have access to truly effective mechanisms for obtaining full compensation for the harm they suffered"), 608 ("… absent more ambitious measures, we do not expect private antitrust litigation to develop quickly and become a true 'second pillar' of antitrust enforcement in Europe").

[73] Bakardjieva Engelbrekt, Antonina, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation,* Stockholm University, Stockholm, 2003 (hereinafter "Fair Trading"), 267 ("Private adjudication has not been an easy task for German consumer organisations").

> interests, or a trade association defending the interests of its members active in a given industry.[74]

The representative action must be brought by an organization that is not, itself, a member of the class it seeks to represent. Representative actions would be filed by consumer associations, state bodies, trade associations, or other organizations that are *either* (a) "officially designated" in advance *or* (b) "certified" on an ad hoc basis to bring actions on behalf of their members or other victims.[75] In other words, the Commission's proposal would empower two types of organizations to bring a "representative action": "officially designated" organizations and ad hoc "certified" organizations. It is important to understand the details of how these organizations would gain official designation or ad hoc certification. We must turn to the Commission's explanation of the mechanics.

The Commission defined what it meant by an "officially designated" organization: "entities representing legitimate and defined interests, officially designated in advance by their Member State to bring representative actions for damages on behalf of identified or, in rather restricted cases, identifiable victims (not necessarily their members)."[76] The Commission suggested that readers look to Article 3 of the Consumer Protection Injunctions Directive 98/27/EC for further elaboration.[77] Following the trail, we look to that directive for greater understanding of how an organization would become "officially designated" to bring a representative action in accord with the Commission's recommendation.

The Consumer Protection Injunctions Directive permits Member States to "designate" which courts or administrative authorities will hear claims brought by "qualified entities" seeking injunctive relief to protect consumers.[78] In the Consumer Protection Injunctions Directive, "qualified entities" are either (a) public bodies or (b) organizations entrusted with the duties normally performed by public bodies:

> For the purposes of this Directive, a "qualified entity" means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring

[74] White Paper Staff Working Paper, 18.

[75] White Paper § 2.1; White Paper Staff Working Paper, 18 - 19.

[76] White Paper Staff Working Paper, 19.

[77] White Paper Staff Working Paper, 31 n.19.

[78] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (hereinafter "Consumer Protection Injunctions Directive"), Art. 2, OJ L 166/51.

> that the provisions referred to in Article 1 are complied with, in particular:
>
> (a) one or more independent ***public bodies***, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or
>
> (b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the ***criteria laid down by their national law***.[79]

The "officially designated" entity, therefore, would be a creature of the state. It would be either a "public" body itself or an entity that is specifically sanctioned by "national law." In essence, cases brought under the Commission's proposal would be brought by a Member State. It is hard to imagine how actions by "officially designated" entities would increase *private* enforcement of competition law, since they would do little more than extend the arm of current public enforcement. The White Paper does not explain.

The second organization that the Commission's proposal would permit to bring a "representative action" would be one "certified" on an "ad hoc basis." The phrase "ad hoc" sounds more expansive than the actual proposal would allow. The Commission's proposal would not permit entrepreneurial lawyers to set up a legal entity one day and then use it to bring a lawsuit the next day, as allowed in Dutch opt-out class action settlements. Instead, "ad hoc" organizations under the Commission's proposal would be "limited to entities whose primary task is to protect the defined interests of their members, ***other than*** by pursuing damages claims (e.g. a trade association in a given industry) and which gives sufficient assurance that abusive litigation is avoided."[80] The White Paper does not explain why such a limitation would be necessary. Organizations that exist for other purposes, such as consumer associations, would be permitted to bring actions because "it is believed that actions through consumer associations are less likely to lead to abuses."[81] The White Paper does not define "abuses", explain why consumer associations are less likely to file lawsuits, or describe what kind of "assurance" they would have to provide.

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[79] Consumer Protection Injunctions Directive, Art. 3, OJ L 166/51 – 52 (emphases added).

[80] White Paper Staff Working Paper, 19 (emphasis added).

[81] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final) ("Staff Working Paper"), ¶ 32.

An "ad hoc" organization that might be "certified" to bring an action "would only be able to represent the interests of its members, whom would be identified or identifiable victims of the competition law infringement."[82] In the latter example, in which the organization would represent all "identifiable victims," sounds like an opt-in class action in which the organization would serve as the class representative even though it has not, itself, suffered damages. The former example, in which the organization would represent only "the interests of its members," sounds much more restrictive. The scope would be strictly limited to a narrow class of people who already belong to the "ad hoc" organization. No further parties could opt-in or benefit from a favorable judgment. It is hard to imagine how this would function as a practical matter. We should perhaps take a hypothetical example to demonstrate the practical difficulties with such a system. If we imagine that Business A sells professional-grade camera equipment, and it colluded with Business B to raise the price of zoom lenses in violation of Article 81 E.C., then which organization would be "certified" to bring an action against Business A and Business B?

A run-of-the-mill consumer association would not be a proper organization to bring a "representative action" under this hypothetical scenario because the vast majority of its members would not purchase professional-grade zoom lenses. There may (or may not) be an association of professional photographers, called Association A, whose membership closely matches the hypothetical infringement. It might qualify as an "ad hoc" organization that is "certified" to bring a "representative action." Association A would likely keep a register of all its dues-paying members, so they would be easily "identifiable." However, Association A is unlikely to have any expertise in legal matters, competition law, or the recovery of damages. Such litigation would be outside its scope. Association A may have a staff of four employees who spend the bulk of their time organizing an annual convention and preparing a quarterly newsletter. Even if the infringements by Business A and Business B are made known to Association A, it would not be interested in filing a lawsuit. There may be no other organization like Association A in the given Member State. Therefore, no case would be brought.

The list of organizations that would be "officially designated" or "certified" to bring a representative action would be short. For most, litigation would be outside their realm of competence. A study of German consumer associations revealed that "[f]ew had constant legal

[82] White Paper Staff Working Paper, 20.

expertise at their disposal."[83] In other Member States, associations are not likely to have the \ expertise to identify, file, and prosecute legal claims, particularly in a specialized field like E.U. competition law. The Commission would further thrust upon these associations the unwelcome responsibility of calculating damages assessed by victims and then distributing those damages: "Where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action (e.g. the harm suffered by the producers in a given industry)."[84] How is an association to know who, among its members, suffered damages and in what measure, much less manage the distribution?

In the White Paper, the Commission did not describe how (or with what money) the associations would perform these duties on their own. It may be that the Commission intended government-funded consumer associations, such as those supported by the German and Swedish governments,[85] to take the lead in filing representative actions. The practical likelihood, however, is that associations will not perform these duties or file representative actions because such activities lay outside the scope of their duties. Therefore, the "representative action" recommended by the Commission is not likely to result in an appreciable increase in private enforcement. Having reviewed the debate on collective redress in competition, we now turn to a separate track – consumer protection.

2. Consumer Protection

In November 2007, the Director-General for Health and Consumer Affairs, Robert Madelin rejected the opt-out mechanism as one of the "excesses" in the U.S. class action system,[86] mirroring the prejudices of DG Competition. Mr. Madelin did not explain his remark. Commissioner Kuneva in DG Health and Consumer Affairs stated in November 2007 that class actions would not happen "under [her] watch." These sharp lines in the sand were drawn very recently, but the debate over collective redress for consumer protection began much later than

[83] Fair Trading, 267.

[84] White Paper Staff Working Paper, 20.

[85] Fair Trading, 584 (reporting that German consumer associations receive funding from federal government, *Länder,* and the European Community); *id.* at 587 - 588 (reporting that Swedish government provides financial support to private consumer organizations).

[86] Madelin, Robert, *Collective Redress Remarks,* Conference on Collective Redress, November 9, 2007, Lisbon, Portugal, 15 (Finally, it is crystal clear that probably nobody in this room – and not only those who have read the books of John Grisham – wants to have the ***excesses*** of the US-style class actions, characterised by a mixture of punitive damages, contingency fees, pre-trial discovery and ***opt-out system***") (emphasis added).

the separate track for competition. We will first look at the historical backdrop before returning to the significance of these recent remarks. In December 2006, a decision was issued that called for a program to help consumers "organise themselves in order to safeguard their interests."[87] The decision sought "effective application of consumer protection rules, in particular through…redress."[88] However, the decision did not plainly call for "collective" redress but instead focused on alternative dispute resolution, actions by public or non-profit organizations, and improved communications, e.g., through publications.[89] The toothless measures in Annex I of the directive were intended to be the means through which the "objectives shall be achieved."[90] These soft measures provided the general context of consumer protection redress until very recently.

In January 2007, the DG Health and Consumer Affairs released a 415-page report that looked at "collective redress" in Member States but whose scope was "limited to redress obtained by consumers."[91] The analysis proceeded along a separate track established by DG Health and Consumer Affairs. The Leuven Study noted that some Member States have "group actions (which feature some but not all characteristics of US type class actions)" but that "no Community action has as yet been taken in this area."[92] Chapter 5 of the Leuven Study devoted 62 pages to "collective actions for damages." The Leuven Study reported there would be efficiencies in aggregating claims.[93] Danish and Norwegian class actions were not addressed, but scattered comments were made about the U.S., Australia, and Canada. The Leuven Study

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[87] Decision No. 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007-2013) (hereinafter "Decision on Consumer Policy"), Art. 2 § 1.

[88] Decision on Consumer Policy, Art. 2 § 2(b); *see also* Common Position (EC) No. 31/2006 of 14 November 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Decision of the European Parliament and of the Council establishing a programme of Community action in the field of consumer policy (2007-2013) (hereinafter "Common Position on Consumer Policy"), Art. 2(2)(b) (seeking "effective application of consumer protection rules, in particular through … redress").

[89] Decision on Consumer Policy, Annex I, §§ 10.1 – 10.3

[90] Decision on Consumer Policy, Art. 2 § 2.

[91] *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings: Final Report*, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, prepared by the Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, Belgium, January 17, 2007, *available at* http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf (last viewed on May 25, 2008) (hereinafter "Leuven Study"), 2.

[92] Leuven Study, 4.

[93] Leuven Study, 263 with reference to this and preceding sentence.

reported that Sweden was the only Member State that offered standing to any interested party to file a class action.[94] However, Norway and Denmark now offer the same rules on standing. In addition, the Netherlands allows someone to form an organization one day and sue the next, a generous approach to standing. The Leuven Study concluded that the choice of an opt-out mechanism over an opt-in mechanism could be "decisive" in "determin[ing] whether a collective action for damages for consumers is practical and effective" but fell short of making did any final recommendation.[95]

In March 2007, the Commission initiated two studies on collective redress in relation to consumers.[96] It is expected that the DG Consumer Protection will issue a Communication on Collective Redress by the end of 2008.[97] One of the studies will look at "national collective redress systems" and "assess whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available."[98] The Commission will "consider action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU anti-trust rules."[99] The Commission will then "consider" whether to make any proposals for collective redress in consumer protection.[100] In other words, it is possible that the Commission will not make any proposals for collective redress in consumer protection.[101] If it does, the proposals might proceed along the same legislative sequence that was followed by DG Competition. The consumer protection track would necessarily follow on the heels of the competition law track since the former track's Green Paper will not appear until the end of 2008 whereas the latter track's Green Paper appeared in 2005.

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[94] Leuven Study, 284.

[95] Leuven Study, 321.

[96] White Paper Staff Working Paper, 22.

[97] Interview with Jivka Staneva, European Commission DG Consumer Protection, Cabinet of Meglena Kuneva, Brussels, Belgium, April 16, 2008 (notes on file with author) ("Staneva Interview"); White Paper Staff Working Paper, 22; BEUC, 2 n.1.

[98] White Paper Staff Working Paper, 22.

[99] 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 promoting them* (COM(2007) 99 final, March 13, 2007), 11.

[100] White Paper Staff Working Paper, 22 ("Following this consultation [after the publication in December 2008 of a Communication], the Commission will consider whether, and if so, to which extent an initiative on consumer collective redress is necessary at EU level").

[101] Kuneva Speech, 2.

On May 31, 2007, the Council issued a resolution that called upon the Commission to "carefully consider collective redress mechanisms and come forward with the results of the ongoing relevant studies, in view of any possible proposal or action."[102] The Council further mandated legislation to "strengthen consumers in their rights."[103] The Council sought a "high level of consumer protection."[104] If taken seriously, this higher standard would require the Community to adopt opt-out class actions instead of representative actions or opt-in class actions. The experience of the European national models, *infra* at 56 - 64 (opt-outs), 64 - 68 (opt-ins), 68 - 70 (representative actions), indicates that representative actions and opt-in class actions would afford a lower level of protection to consumers.

It would be helpful for the Commission to examine the national models for class actions in Sweden, Denmark, Norway, and the Netherlands. The procedural mechanisms in these nations may be useful for the enforcement of consumer protection, particularly since private opt-in class actions have been used on behalf of consumers in at least several cases in Sweden.[105] Unfortunately, the Commissioner for Consumer Protection, Meglena Kuneva, stated in Lisbon in November 2007 that no such relief would be available in Europe: "To those who have come all the way to Lisbon to hear the words 'class action', let me be clear from the start: there will not be any. Not in Europe. Not under my watch."[106] In other words, she removed this procedural mechanism from the policy debate, refusing to consider private opt-in or private opt-out class actions. Her decision conflicts with the Council's mandate to "carefully consider collective redress mechanisms."[107] Commissioner Kuneva's views are far more drastic than those held by D.G. Competition. The White Paper recommended private opt-in class actions. It is hard to imagine why opt-in class actions would be useful for competition but not for consumer

[102] Council resolution of 31 May 2007 on the Consumer Policy Strategy of the EU (2007-2013) (hereinafter "Council Resolution on Consumer Policy"), § II(10).

[103] Council Resolution on Consumer Policy, § III(17).

[104] Council Resolution on Consumer Policy, Preamble; Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Decision of the European Parliament and of the Council establishing a programme of Community action in the field of consumer policy (2007-2013) ((COM(2006) 700 final), § 2 (same).

[105] *Infra* at 91 (Åberg case); 93 (Broberg case); 93 - 95 (Devitor case); 96 (Fortum case); *see generally* Lindblom National Report, 29 ("the Group Proceedings Act [in Sweden]…is not restricted to any particular areas of law").

[106] Kuneva Speech, 2. Maybe she needs a new watch?

[107] *Supra* n. 102 and accompanying text.

protection. It is also startling that Commissioner Kuneva excluded a viable policy choice before the Green Paper, impact assessment report, or any other study has even been completed.

Commissioner Kuneva's rejection of class actions may have been motivated by fears about the U.S. system, particularly since her colleague, the Director-General for Health and Consumer Affairs, Robert Madelin, also made unfavorable remarks about U.S. class actions and the perceived "excessive" litigation, *infra* at 109. Commissioner Kuneva said in her Lisbon speech that "[t]he introduction of unmeritorious claims should be discouraged."[108] This remark was likely a reference to the U.S. legal system. Because class actions are nothing more than procedural mechanisms for aggregating claims, they neither encourage nor discourage the filing of lawsuits. They simply aggregate class members. The incentive to file a lawsuit is more closely related to the question of lawyer's fees (regulated by the bar associations of each Member State) and the amount of compensation awarded to victims (regulated by substantive law on damages). Neither matter would be affected by a procedural mechanism. Therefore, it remains unclear why Commissioner Kuneva and Director-General Madelin have taken such a strong and early stance against class actions.

Prior to its recent examination of "collective redress," the DG for Health and Consumer Affairs preferred much softer measures. The DG previously issued a Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed Up Small Claims Litigation (COM(2002) 746 final, December 2002 (hereinafter "Green Paper on Small Claims"). The Green Paper on Small Claims sought to fulfill the goals of the Tampere Council and reported that "the European Union faces the challenge of ensuring that in a genuine European Area of Justice individuals and businesses are not prevented or discouraged from exercising their rights …"[109] The Green Paper on Small Claims was released in 2002. It reviewed "the different models that exist in the MS"[110] but, of course, no European class action models existed at that time. The Green Paper on Small Claims noted that "plaintiffs in purely internal cases are possibly left with a burdensome ordinary civil procedure system that does not meet their justified needs"[111] Today, the civil procedure system is still "burdensome".

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[108] Kuneva Speech, 11.

[109] Green Paper on Small Claims, 49.

[110] Green Paper on Small Claims, 2.

[111] Green Paper on Small Claims, 6.

As a result of the Green Paper on Small Claims, a regulation was enacted that will take effect in January 2009.[112] The regulation, however, does little to help other consumers who have suffered the same injury. It does not aggregate their claims. Each consumer must file a separate claim using the European Small Claims Procedure Claim Form established by the regulation.[113] If it is not worth the trouble, e.g., because a claim is worth 5 euros, then no claims will be filed under the new procedure, as shown by the Swedish experience.[114] If a claim is filed, then it will only resolve the matter for the individual who filed the claim. Other claims will remain unaddressed. The separate track for consumer protection is, therefore, not only behind the competition law track but it is also likely to veer into a different, toothless direction unless DG Health and Consumer Affairs and Commissioner Kuneva take time to explore their prejudices about the U.S. class action system, learn from the experience of European nations with class actions, and change the present course. Next, we will take a brief look at separate tracks where collective redress could be useful but has not yet been explored.

3. Other Areas

There are a great many fields in which class actions might be useful for the private enforcement of E.U. law, but for which no debate on collective redress has yet occurred. They include: (1) environmental protection, (2) employment discrimination, (3) nationality discrimination, (4) human rights, and other matters. It does not appear that the Commission has proposed collective redress in any of these fields or even begun debate along the separate tracks that each one would entail. Ample legal basis exists in the treaties to legislate class actions in each of these areas, as discussed *infra* at Annex G.

First, there has been no E.U. legislation on collective redress for the private enforcement of environmental protection laws.[115] There is no E.U. legislation on the direct effect of

[112] Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter "Regulation on Small Claims Procedure").

[113] Regulation on Small Claims Procedure, L199/10 – L199/16 (reprinting Claim Form to be filled out by claimant).

[114] Sweden has a small claims procedure, as well, but it is "very rarely used." Only 6 cases were filed in 2004 using this procedure. Leuven Study, 30 n.7. In fact, the European Small Claims Procedure "contributes little for the effective enforcement of consumer law in Sweden." Leuven Study, 229.

[115] Email correspondence from Jonas Ebbesson, Professor, Stockholm University Law Faculty, Stockholm, Sweden, to Robert Gaudet, May 23, 2008 (on file with author). There is some legislation that speaks of access to justice – such as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC –

environmental protection provisions in the Treaty or on collective redress. The right to sue in collective redress might be supported by the text of Articles 174, 175, and 251 E.C.

Second, there has been no E.U. debate on collective redress for the private enforcement of employment discrimination. However, legal bases exist in Articles 136, 137, 141, and 251 E.C. to support collective redress for the private enforcement of E.U. laws forbidding gender and racial discrimination in employment. The European Court of Justice confirmed in Case 43/75 *Defrenne v. Sabena* (No. 2) [1976] ECR 455 that individuals have a right to sue for "equal pay" under Article 141 E.C. (then known as Article 119 E.C.). In *Defrenne*, a female flight attendant, or "air hostess," sued on the basis that she was not paid as well as male flight attendants, or "cabin stewards," even though they performed the same duties, in violation of Article 119 E.C.[116] The ECJ upheld her right to bring a claim because the Treaty article had direct effect.[117] The ECJ upheld her right to bring a lawsuit for equal pay in both private and public work, even though Article 119 E.C. (now Article 141 E.C.) expressly obliges Member States to ensure equal pay.[118] Indeed, the ECJ has gone even further to say that the right to equal pay is primary in importance over the elimination of distortions in competition. However, in the past 32 years since the *Defrenne* decision, class action have not been possible for private enforcement of the "equal pay" treaty right. If they had been available, then Ms. Defrenne's female colleagues might have been compensated as class members in a suit brought by Ms. Defrenne. It is not likely that they were otherwise compensated.

Third, class actions would be useful for the private enforcement of E.U. laws against racism and xenophobia under Articles 29 and 34 TEU. It would require unanimity in the Council to pass such legislation, per Article 34(2) TEU, but class actions are "procedural" mechanisms so a majority vote in the Council might suffice under Article 34(4) TEU. The Council has not yet considered any proposals for collective redress for "combating racism and xenophobia" under Article 29 TEU.

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but it only provides for the right to appeal administrative decisions. The same applies to Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. It just sets up a procedure for NGOs to, among other things, request internal review.

[116] *Defrenne,* at ¶ 2.

[117] *Defrenne,* at ¶¶ 4 – 5, 40.

[118] *Defrenne,* at ¶ 22.

Fourth, if the Community someday accedes to international human rights instruments, and if they are given direct effect, then individuals could file class actions to enforce their legal mandates. In a sense, this has already been attempted. One of the first class actions in Sweden was brought on the legal basis of the UN Declaration of Human Rights and the European Convention on Human Rights on behalf of people who had been taken away from their biological families and placed into foster homes. It was dismissed. Similarly, there has been news that a similar class action may soon be filed in Norway on the legal basis of European Convention on Human Rights, *infra* at 99. The time may not be ripe for such class actions, but when and if these human rights treaties have direct effect, then class actions would speed their private enforcement.

III. EUROPEAN NATIONAL MODELS

The E.U. should carefully examine the experience acquired by European nations with class actions, particularly since the White Paper has sought "measures … embedded in, and build[ing] on, the European legal cultures and traditions of the 27 Member States."[119] The adoption of class actions in Sweden, Denmark, Norway, and the Netherlands may herald the future of the E.U. or it may represent a progressive experiment among the Nordic countries.[120] To fully understand their importance as potential models for the E.U., we must give a closer look to each one, including the following details: (1) the class action procedural mechanism (e.g., opt-out or opt-in or both); (2) the legislative background of the law permitting class actions; (3) descriptions of class action cases; and (4) an assessment. We will start with Sweden and then look at Norway, Denmark, and the Netherlands.

[119] White Paper Staff Working Paper, 10 – 11; *see generally* EP Draft Report, 10 (Explanatory Statement, § 6 ("This report proposes a clearly differential approach, in line with the experience acquired by the Community and the Member States")).

[120] The "legal unity of the Nordic countries" is well accepted, and it may be due to "the degree of continuity between the fundamental premises of their legal theory, consistency in the formation of their basic legal concepts, uniformity of their methodology of codification, the doctrine of precedent, and the choice of the sources of law." Bernitz, Ulf, *European Law in Sweden – Its Implementation and Role in Market and Consumer Law*, Faculty of Law, Stockholm University Series of Publications No. 70, Stockholm, 2002, 96.

A. Sweden Allowed Opt-In Class Actions in 2003

1. Procedural Mechanism

In Sweden, the Group Proceedings Act allowed, for the first time in January 2003, two types of actions: (1) private opt-in class actions; and (2) representative actions.[121] Each will be discussed in turn.

a. Opt-in Class Action

Sweden introduced private opt-in class actions to enforce any substantive law for compensatory damages. The professor who initiated the dialogue on class actions and then chaired a government commission that eventually recommended class actions has called the Swedish model a "true class action."[122] It has also been called the first class action in Europe.[123] The Swedish opt-in mechanism may be used to enforce any type of claim, e.g., consumer protection, labor law, or environmental laws.[124] Class actions may be filed in any one of the 53 district courts in Sweden. A private opt-in class action may be initiated by "a natural person who, or legal entity that, himself, or herself or itself has a claim that is subject to the action."[125] Once the lawsuit is initiated, members of the group must affirmatively opt-in via a communication to the Court, if they wish to be part of the action or they will otherwise be left out of it:

> Contrary to the situation in the United States, Canada and most other countries, membership in the group is always conditional on the member making an application to the court to join the action. It is an *opt-in*, not an opt-out system.[126]

This is a bit of a misconception. Some class actions in the U.S. are opt-ins, as described *supra* at 5 n.16, although most U.S. class actions for monetary relief are opt-outs. In Sweden, potential class members who fail to opt-in by the deadline may bring an additional lawsuit over

[121] Sweden Group Proceedings Act, § 1.

[122] Lindblom National Report, 6.

[123] *See e.g.,* Leuven Study, 273 ("Sweden is the only European country that to date has implemented a group action based on the American model").

[124] Leuven Study, 279.

[125] Sweden Group Proceedings Act, § 4.

[126] Lindblom National Report, 13 (extended quote), 10, 11 with reference to the whole paragraph.

the same misconduct in the future: "People who fit the description of the group but do not apply – do not opt-in – by the stipulated deadline are no longer considered group members and are not bound by any future decisions on the matter." Therefore, the Swedish opt-in mechanism might encourage additional lawsuits, lacking some of the efficiency offered by an opt-out mechanism that resolves a greater number of claims at once. The opt-in may be used when class members share "circumstances that are common or of a similar nature."[127] If some claims "differ[] substantially" from other claims, then a class action is not suitable.

Class actions may be filed in a district court in Sweden which goes by the name of *tinsgrätt* in Swedish.[128] There are 53 such courts. Notice defining the class and giving "the opportunity for the members to personally participate in the proceedings" is sent out to potential class members at the start of the class action.[129] Notice is again sent out at the settlement of the case. Class members may also receive notice to inform them of "other decisions, measures or overall situation." The court either pays for the cost of notice or, if it is more efficient, the court may order the plaintiff to issue the notice and get reimbursed from public funds:

> Section 49. The court shall, in addition to what is prescribed by other provisions, notify a member of the group affected of a judgment or a final decision and also of a settlement that is subject to a request for confirmation in accordance with Section 26. If it is necessary taking into consideration the importance the information may be deemed to have for the rights of the member, the court shall also notify a member of the group affected if
>
> 1. the plaintiff has been substituted with a new plaintiff,
>
> 2. the plaintiff has appointed a new attorney,
>
> 3. the plaintiff has waived the action,
>
> 4. that an issue has arisen concerning the approval of a risk agreement,
>
> 5. that a judgment or decision has been appealed against, and
>
> 6. other decisions, measures and overall situation.

[127] Sweden Group Proceedings Act, § 8 with reference to this and subsequent sentence.

[128] Sweden Group Proceedings Act, §§ 2, 3.

[129] Sweden Group Proceedings Act, § 13.

> Section 50. Notifications to members of the group in accordance with this Act shall be made in the manner considered appropriate by the court and observing the provisions contained in Chapter 33, Section 2, first paragraph of the Code of Judicial Procedure. The court may order a party to attend to a notification, provided this has significant advantages for the processing. The party is in such a case entitled to compensation from public funds for expenses. The provisions contained in the second paragraph also apply when notification is given by service.[130]

Consequently, plaintiffs are not responsible for the costs of notice in Sweden. The plaintiff who initiated the lawsuit is obliged to "protect the interests of the members of the group." Further, the plaintiff must give class members "an opportunity to express their views" and receive relevant information.[131] The court must monitor the performance of the class representative and replace the class representative if the plaintiff is "no longer considered to be appropriate to represent the members of the group."[132] This enables the court to control the leadership of the class action. Court approval of settlements is required.[133]

b. Representative Action

The Group Proceedings Act allows representative actions to be filed in district courts for two substantive areas – consumer law and environmental law. Once a case is brought, it seems that anyone may opt-in to become a class member. The only difference from the typical opt-in class action is that the lead plaintiff must be either a consumer association or an environmental protection association. Non-profit consumer associations are authorized to bring representative actions to enforce consumer protection laws.[134] The text of the law states:

> An organization action may be instituted by a not-for-profit association that, in accordance with its rules, protects consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utility that the business operator offers to consumers.[135]

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[130] Sweden Group Proceedings Act (*Lag* 2002:599 *om grupprättegång*) (attached to Lindblom Group Proceedings) (hereinafter "Sweden Group Proceedings) §§ 49 – 50.

[131] Sweden Group Proceedings Act, § 17.

[132] Sweden Group Proceedings Act, § 21.

[133] Sweden Group Proceedings Act, § 26.

[134] Lindblom National Report, 11 with reference to whole paragraph.

[135] Swedish Group Proceedings Act, § 5 (quoted and translated at Lindblom National Report, 41).

The consumer associations referred to in the law must be dedicated to consumer protection rather than other issues. Non-profit environmental organizations may also bring suits for damages or injunctions regarding environmental damage, but such environmental organizations must be dedicated to nature conservation and environmental protection to bring a representative action. All-purpose associations whose "rules" do not specifically aim at the protection of consumers or the environment may not bring such actions.

A consumer or environmental association may be legally formed one day and used to bring a representative action the next day:

> Organisational actions are restricted to two areas of law: consumer law and environmental law. In the field of consumer law, a group action may be instituted by an affiliation of consumers or wage-earners in disputes with a tradesperson relating to goods, services or other utilities offered by the tradesperson, in the course of business, to consumers primarily for private use.
>
> Within the field of environmental law, non-profit associations dedicated to nature conservation and environmental protection, as well as professional federations in the fishing, farming, reindeer, and forestry industries, are given the right to commence proceedings concerning injunctions and/or compensation for environmental impairment.
>
> The right to commence group actions will be open to all non-profit organisations having the objectives mentioned above. There are no restrictions concerning authorisation by the government, size, age etc. of the organisation. It is possible to set up a new organisation with just a small number of members one day and commence proceeding the next day, provided that the economy is in good order and that the court thinks that the organisations is a good representative of the group. The organisation may claim damages not only for the members of the organisation but also for all members of the group concerned.[136]

This model is less restrictive than the "representative action" recommended by the White Paper. The White Paper would not permit an association to be set up "one day" and then sue "the next day." To bring a "representative action" under the Commission's proposal, the "representative action" would have to be "officially designated" by the Member State or

[136] Lindblom Group Proceedings, 16 – 17.

otherwise be "certified," as noted *supra* at 17 - 21. No representative actions have been filed in Sweden.[137]

The Sweden Group Proceedings Act also permits public actions that are "instituted by an authority, taking into consideration the subject of dispute, is suitable to represent the members of the group. The Government decides which authorities are allowed to institute public group actions."[138] This portion of the Act refers to cases brought by the Consumer Ombudsman. They are not truly private enforcement, although private individuals might opt-in and receive damages. One public action has been brought by the Consumer Ombudsman, filed in the Umeå district court in northern Sweden.[139] In reality, the Swedish public action is much like the "representative action" recommended by the White Paper in the sense that a public or government-approved body would be authorized to lead a class action suit for damages. The same preconditions, e.g., claims that are "common or of a similar nature," that apply to private opt-in class actions also seem to apply to public actions.[140]

2. Legislative Background

Sweden's investigation into class actions began after the Consumer Ombudsman traveled to the U.S. and asked for Prof. Lindblom's opinion of them.[141] An extensive and long-term debate followed. The Swedish Commission on Group Actions was started in 1991 to look at private class actions as a way to increase private enforcement of consumer, environmental, and gender-based employment discrimination laws:

> In accordance with the Commission's terms of reference, the inquiry had emphasized consumer and environmental law and gender-based pay discrimination. The Commission discovered that in these areas, and most likely in many other areas of law, there

[137] Wasteson, Marianne, *Summarisk sammanställning av mål enligt lagen om grupprättegång,* unpublished manuscript (on file with author) (hereinafter "Wasteson List") (listing all class actions, representative actions, and public actions filed in Sweden as of April 2008).

[138] Sweden Group Proceedings Act, § 6.

[139] Wasteson List, 1; Lindblom National Report, 18.

[140] Sweden Group Proceedings Act, § 8(1).

[141] Lindblom Group Proceedings, 2 ("In 1974, the Swedish Consumer Ombudsman, coming home from the USA, wanted my opinion of the federal Rule 23 class actions I could not answer because I had never heard of class actions before. No one in Sweden had at that time. I felt ashamed and some years later I started to study the Anglo-American class action. In 1989 I published an oversized book (800 pp.) on the subject. A discussion among lawyers started almost immediately")

> were evident difficulties in obtaining access to justice for group claims.[142]

The Commission ultimately proposed "an extensive law combining private class actions, public actions, and organization actions for injunctions as well as damages." Opponents funded by the business community argued "the proposal was a threat to…traditional tort law" and that the proposed measures were not constitutional.

Because the private class action more closely matches Swedish legal traditions on standing than representative actions, it has been wondered why class actions engendered so much more opposition from the business community than representative actions:

> The question arises: Why are public and organization actions (at least for injunctions) easily accepted by corporate Sweden – but not class actions? After all, the class action is more in line with traditional liberal civil procedure; the class action plaintiff is a member of the concerned group and has a personal interest in the case. The plaintiff is an entrepreneur in a free market, while the public action can be seen as a socialist solution and the organization action as a corporatist model.[143]

It is likely that the business community knew that private class actions would have much greater force than an additional form of public representation. However, the goal of the drafters of Sweden's law was to deter corporate misconduct:

> [Due to the loser pays rule], it was presumed when the legislation was drafted that private group actions would be rare and confined mainly to cases involving large individual damages. Accordingly, the drafters presumed that the ten or so group actions they estimated would be initiated every year would be public and organization actions. Plaintiffs in such actions have no personal pecuniary interests and the drafters assumed the main aims would be to achieve better behavior modification on the general level (prevention) and legal development.[144]

Deterrence was the primary aim, and compensating victims was not as significant to the drafters of the Swedish law as it may be, now, to the drafters of the White Paper. Therefore, the different goals of the Commission to ensure compensation might be better met by an opt-out

[142] Lindblom National Report, 8, 9, 32 with reference to whole paragraph.

[143] Lindblom National Report, 9 n.7.

[144] Lindblom National Report, 18.

mechanism that creates a broader class size and helps victims more easily receive their compensation.

3. Case Descriptions

Descriptions of Swedish class actions are given in Annex A, *infra* at 91 - 98.

4. Assessment

At a recent gathering, it was asked how many Swedes in the audience had heard of the concept *grupptalan*, i.e., the Swedish word for "class action."[145] Fourteen out of 21 Swedes raised their hands to indicate they had heard of the phrase. This was roughly 67 percent of the Swedish audience. A similar question was posed to the Americans in the audience: "how many of you have heard of the concept 'class actions' in the U.S.?" Eighteen out of 21 Americans replied that they had heard of "class actions," including a small boy who raised his hand for both Swedes and Americans. This was roughly 86 percent of the American audience. These responses were interesting – not because of the near unanimous American recognition of "class actions" but because *grupptalan* are so well known to Swedes after only five short years and a handful of cases. If class actions were previously unknown, they now seem to be part of Swedish popular culture.[146]

Sweden's private opt-in mechanism has been a "practical success" but the father of Swedish class actions, Prof. Lindblom, believes it should be "supplemented with an opt-out alternative in actions involving minor claims, at least in public group actions."[147] The drafters of the Sweden Group Proceedings Act expected the filing of some 10 or more lawsuits per year, mostly as representative actions and public actions to deter misconduct. However, "these predictions did not pan out." There have been no "representative actions" except for a case brought by the Swedish Consumer Ombudsman (*infra* at 98) in the past five years. The nine or

[145] Gaudet, Robert, *Class actions in Europe,* Fulbright Award and Recognition Ceremony, May 15, 2008, Oscarsteatern, Stockholm, Sweden (notes on file with author) with reference to next few sentences.

[146] Lindblom Group Proceedings, 29 ("I started to say that when I began to study class actions, no one in Sweden had ever heard of it. Today every single citizen knows what "grupptalan" is. That is very important").

[147] Lindblom National Report, 18, 34, 36, 37 with reference to the whole paragraph.

so cases that were initiated were private opt-in class actions. The opt-in class action is the main driver of private enforcement:

> Not one organization action has been initiated so far, despite very liberal rules on standing in organization actions (even small and recently formed non-profit organizations with an acceptable purpose have standing in organization actions…)…Only one public group action has been brought, by the Consumer Ombudsman in *Kraftkommission*…The other eight cases were all private group actions. Thus, there have been more private actions and considerably fewer organization and public group actions than estimated.

The Swedish experience demonstrates that opt-in class actions have resulted in a mild increase in private enforcement while representative actions and public actions have had virtually no effect. Private class actions have exceeded expectations: "eight private group actions is a surprisingly high number…even greater than certain foreign experts forecast on the basis of weak financial incentives and substantial cost risks involved."

If it were not for the private opt-in class action mechanism, the *Åberg* case would probably not have been brought.[148] An individual case could have been brought under the procedures for small claims which do not permit an award of attorney's fees, thereby discouraging lawyers from taking on such small cases and discouraging plaintiffs from paying lawyers a large amount of fees only to recover a small sum. Without legal counsel, "it is unlikely that any of the passengers would have been willing to appear as the sole plaintiff and without legal representation" to prosecute an action in his or her own name. Similarly, "[i]t is unlikely an individual consumer would have even considered bringing a lawsuit against the companies", i.e., Fortum or Sydkraft regarding the power outage of January 2005 if it were not for the possibility of an opt-in class action. If the private opt-in class action had not been possible, there would have been no recourse for the policyholders of Skandia Liv who participated in the group action brought by *Grupptalan Mot Skandia*: "It is commonly believed that the insurance companies' inside agreement over the heads of policyholders would never have been tried in court or arbitration proceedings if a group action on the matter had not been possible."

[148] Lindblom National Report, 22, 23, 26 - 27 with reference to the whole paragraph.

It may be that the number of private opt-in class actions is under-reported in Sweden, particularly since some class actions have apparently settled before the complaints were filed.[149] Their number may multiply in the future as the Swedish bar gets used to the new procedural mechanism. Although one might think that Swedish lawyers would need time to become comfortable with private opt-in class actions, Prof. Lindblom has expressed the view that "[a]wareness that group actions can nowadays be prosecuted in the general courts is…universal among lawyers in Sweden." Despite their small number, private opt-in class actions have made a salutary impact on private enforcement, deterrence, policy debate, and moral sentiment:

> To a noteworthy extent, the Group Proceedings Act is already serving its two main purposes: access to justice and behavior modification. Avid media coverage of ongoing and planned trials is furthering that end. . . . Surprisingly, private group actions, sometimes litigated or backed up by ad hoc organizations, have so far dominated the case statistics. This may be in part due to that group actions may also be a means to fulfill the "new" functions of civil procedure: to provide a forum for legal policy debate, and an arena for ethical/moral discourse. Incentives to sue in court are not always solely financial. Some group members have said in the media (and told me) that the sense of being wronged and disregarded by big business and public institutions or perceived immorality among the "high and mighty" were what made them want to go to court once there were realistic options for taking legal action in group contexts.[150]

It is the "moral" advantage of the class action device that provides the most surprising, but perhaps most valuable, intangible benefits. It truly gives access to justice. Even if judged by a single case, the private opt-in class action would be a success in Sweden by increasing access to the courthouse and compensation for victims:

> Even with very few actions, the significance of the Act is and will be considerable. One single action, which helps thousands or maybe tens or hundreds of thousands of people to enforce their legal rights, is enough to justify the Act. The goal of increased access to justice and compensation is reached. And, after all, the main influence of group actions, to be sure, is prevention or behaviour modification. It will no longer be possible – or at least, it

[149] Lindblom National Report, 26-27, 34 ("It takes time before procedural reforms gain their full impact") with reference to the whole paragraph.

[150] Lindblom National Report, 35-36.

> will be more difficult – to make money by causing individually small losses to a great number of people.[151]

Sweden has managed a good start. The only question is, "could it be better," and some think that it should be – with an opt-out class action. Many of the provisions in Sweden's current opt-in system mirror similar requirements in U.S. class actions regarding the duties of class representatives, the court's duty to supervise the proceedings, the right to notice, the commonality of legal claims, and other matters.

B. Norway Allowed Opt-In and Opt-Out Class Actions in 2008

1. Procedural Mechanism

a. Opt-in and Opt-Out Class Actions

Norway allows opt-in and opt-out class actions by private individuals. They were introduced for the first time in the Act Relating to Mediation and Procedure in Civil Disputes, 17 June 2005 no. 90 ("Norwegian Dispute Act"), effective in January 2008.[152] The class actions provide a "set of special procedural rules" that may be used to enforce any substantive law.[153] It is "an action that is brought by or directed against a class on an identical or substantially similar factual and legal basis, and which is approved by the court as a class action."[154] When the case is filed, the plaintiff must indicate in the original "writ of summons," or complaint, whether the class action should be opt-in or opt-out.[155] The court then makes a determination as to whether the class action should be opt-in or opt-out.[156] The court may also decide that the lawsuit should not proceed as a class action, at all, but only as an individual action.[157] A class action "can only be brought if … class procedure is the most appropriate way of dealing with the claims."[158] In

[151] Lindlbom Group Proceedings, 29.

[152] Bernt-Hamre, Camilla, *Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts*, prepared for Oxford Conference on the Globalization of Class Actions, Dec. 12 – 14, 2007, *available at* http://globalclassactions.stanford.edu (last viewed on May 17, 2008) ("Bernt-Hamre"), p. 2 n.6 – n. 7 and accompanying text.

[153] Norwegian Dispute Act § 35-1(3).

[154] Bernt-Hamre, 11 (quoting Norwegian Dispute Act Ch. 35, § 35-1 (2)).

[155] Norwegian Dispute Act, Ch. 35, § 35-3(3).

[156] Bernt-Hamre, 13.

[157] Norwegian Dispute Act, Ch. 35, § 35-4(3); Bernt-Hamre, 9, 12.

[158] Norwegian Dispute Act, Ch. 35, § 35-2(1)(c).

other words, it must be better than the alternative of joinder. A class that contains 40 or more class members, e.g., might be better suited for a class action than for joinder.[159]

The most unique contribution of Norway – unknown thus far in Europe – is the introduction of an opt-out class action that may be initiated and prosecuted by a private individual who "acts on behalf of the class."[160] This procedure exists in the United States (for classes certified under Fed. R. Civ. P. 23) and in the Netherlands (but only for purposes of settlement), but it is otherwise new to Europe. It is up to the court's discretion to determine whether the case should be an opt-out class action when claims are too small to justify individual actions and it would be preferable to create one class. In such a case, all potential claimants will belong to the class without having to register:

> Section 35-7 Class actions that do not require registration of class members
>
> (1) The court can decide that persons who have claims within the scope of the class action shall be class members without registration on the class register, if the claims
>
> (a) on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, and
>
> (b) are not deemed to raise issues that need to be heard individually.
>
> (2) Persons who do not wish to participate in the class action may withdraw pursuant to section 35-8. The court shall maintain a register of withdrawals.[161]

When the court creates an opt-out class action, all potential claimants automatically become members of the class without having to sign into a "register" or notify the court. The court will presume that they are part of the class unless they state otherwise. Claimants who are automatically included in the opt-out class action may, of course, take affirmative steps to withdraw themselves (or "opt-out") from the class action litigation. They will not be forced to

[159] Nagelhus Interview. Assistant Judge Nagelhus arrived at this conclusion, in part, by reviewing the case law in the United States on how to determine whether there is sufficient "numerosity" to justify a class action (rather than joinder or an individual action) under U.S. law. He wrote an article in Norwegian on the topic.

[160] Norwegian Dispute Act, Ch. 35, § 35-1(7).

[161] Norwegian Dispute Act § 35-7.

be part of the class, particularly since resolution of the matter will be binding upon them and all other class members who have not exercised the right to withdraw themselves from the class.

In Norway, the private opt-in class action works in substantially the same manner as in Sweden and Denmark, allowing people to belong to "register" as members of the class if they wish to join the proceedings:

> Section 35-6 Class actions that require registration of class members
>
> (1) The class action shall only include those persons who are registered as class members, unless the action is brought pursuant to section 35-7 [opt out class action]. Persons who have claims that fall within the scope of the class action can register as class members.
>
> (2) An application for registration shall be submitted within the time limit. At any time before the main hearing, the court may in special cases approve delayed registration unless regard for the other parties strongly suggests otherwise.
>
> (3) On application from the person who has brought the class action or the class representative, the court can decide that registration shall be subject to the class members accepting liability for a specified maximum amount of costs pursuant to section 35-14. The court may also on application decide that all or part of the amount shall be paid to counsel for the class before registration.
>
> (4) The class register shall be maintained by the court…[162]

The final judgment or resolution of an opt-in class action will only be binding upon those people who affirmatively exercise their right to "register." It will not bind others. This mechanism will naturally lead to smaller classes since people will have to take the affirmative step of registering with the court. Some claimants may not hear about the case. Other claimants may hear about the case but not understand their legal rights. Yet others may decide it is not worth the effort to notify the court.

In either an opt-in or opt-out class action, the class members consist of "the legal persons who have claims or obligations falling within the scope of the class action."[163] A class action

[162] Norwegian Dispute Act, Ch. 35 § 35-6.

[163] Norwegian Dispute Act Ch. 35, § 35-1(4).

may be used for claims that have "the same or substantially similar factual and legal basis."[164] If the determination of damages requires a look at individual circumstances, then the court may use the class action for common issues facing class members and, later, look at damages on an individual basis without the use of a class action. Class actions are specially suited for cases where the question of the defendant's liability is common to all class members, or where "there are many claims for damages that are all caused by a single event or decision."[165]

After deciding the case may proceed as an opt-in or opt-out class action, the court must issue notice to potential class members.[166] The court may order the class representative to pay for the costs of notice, but it is not clear who would pay if the court decides that the class representative should not pay for costs. The Norwegian Dispute Act does not expressly say that the court or the public should pay for the expense of notice, as does the Sweden Group Proceedings Act. After sending out notice, the court must keep a "class register" of all the names of people who opt-in.[167] The court must also keep a "register of withdrawals" of the names of people who withdraw from an opt-out class action.[168]

b. Representative Action

A private opt-in or opt-out class action for damages may also be filed by "an organization, an association or a public body charged with promoting specific interests, provided that the action falls within its purpose and normal scope …."[169] This sounds much like the White Paper's recommendation for a "representative action." As in the White Paper proposal, there are restrictions on the type of organization that may bring a Norwegian "representative action." A person cannot set up an organization for the purpose of litigation on one day and then sue on the next day.

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[164] Bernt-Hamre, 9.

[165] Bernt-Hamre, 9, 10 with reference to last few sentences in paragraph.

[166] Norwegian Dispute Act Ch. 35, § 35-5 ("(1) Once a class action has been approved, the court shall by notice, announcement or other method ensure that the class action is made known to those who may join it or who are class members pursuant to section 35-7. (2) The notice or announcement shall clearly state what the class action and the class procedure implies, including the consequences of registering or deregistering as a class member, the potential liability for costs that may be incurred and the authority of the class representative to settle the action. The notice shall state the time limit for registering on the class register. (3) The court shall decide the contents of the notice, how notice shall be given etc., including whether the class representative shall take charge of issuing the notice or announcement and paying the expenses thereof").

[167] Norwegian Dispute Act Ch. 35, § 35-6(4).

[168] Norwegian Dispute Act Ch. 35, § 35-7(2).

[169] Norwegian Dispute Act, Ch. 35, § 35-3(1)(b).

Norwegian rules on the "capacity to sue and be sued" only permit organizations to bring a class action if the lawsuit fits with "the purpose of the organisation and the subject matter of the action."[170] To have capacity to sue, the organization must further have a "formalised membership arrangement" and a "permanent organisational structure."[171] Due to these limitations, only established organizations with a mission statement that corresponds to the subject matter of a particular lawsuit would be entitled to bring a class action. There are likely to be few such organizations with a keen interest in prosecuting lawsuits.

Even prior to the Norwegian Dispute Act, and for the past forty years, representative actions for injunctive relief and declaratory judgments – but not monetary damages – have been available in Norway.[172] These actions may not bind other parties, e.g., other class members, and they can only be brought by an organization that brings an action in its own name over a subject matter that is within the scope of the organization's stated purpose. Individuals may not bring organizational actions. Because this older mechanism does not allow for monetary damages, it is outside the scope of this thesis.

c. Organizational Opt-Out Class Action for Unfair Contracts

Even prior to the Norwegian Dispute Act, Norway has allowed organizations to bring actions for declaratory or injunctive relief over unfair standard contracts in what amounts to an opt-out class for injunctive relief or declaratory judgment. The action may seek a declaration that standard contractual terms are unfair. If a court rules that the contract terms are unfair, then the order is "binding and decisive for the rights and obligations of all who use the standard contract" even though all users of the contract may not affirmatively write to the court or otherwise opt-in to the action.[173] Because this procedural mechanism does not provide for monetary damages, it is also outside the scope of this thesis. It is also highly particularized and may only be used for disputes over unfair standard contracts.

[170] Norwegian Act of 17 June 2005 No. 90 relating to mediation and procedure in civil disputes (The Dispute Act) (hereinafter "Norwegian Dispute Act"), Chapter 2, § 2-1(2).

[171] Norwegian Dispute Act, Chapter 2, § 2-1(2).

[172] Bernt-Hamre, 3 and Bernt-Hamre Interview with reference to whole paragraph.

[173] Bernt-Hamre, 5 with referene to whole paragraph.

2. Legislative Background

The Ministry of Justice in Norway felt that class actions might represent "the development of more up-to-date procedural rules that meet the needs of modern day society."[174] Class actions were thought to provide advantages over the previous mechanism, joinder, that allowed people to join the same lawsuit. Joinder is less efficient for resolving a large number of claims because "through joinder of parties each party handles his or her case and makes his or her own decisions throughout the trial, whereas in a class action decisions are made collectively for the whole class." In joinder, each party has the same status as in individual litigation. The primary intention in creating class actions was to improve access to justice for people who would not otherwise be able to bring a claim:

> The Ministry states that mass production and mass delivery of goods and services can lead to many small claims from several consumers against the same business, and that experience has shown that such claims are very rarely resolved, although they may have a strong foundation. Individual lawsuits are too costly, and the rules about joinder of parties and the options of a joint hearing have not been utilized for such small claims in practice. The consequence of this situation is that legislation set to protect consumers is not enforced…The Ministry emphasises the need for access to court also for small consumer claims, both to protect the claim of the individual litigant and to ensure compliance with legislation. The Ministry states that the option of class actions will lower the threshold to the courts…It is one of the motivating factors for introducing class actions to Norway to enable litigants with claims that they would otherwise not be able to bring to court, to have access to court. Furthermore, the risk of a class action will be an incitement for businesses to comply with the law, and will provide consumers as a group with negotiation leverage…Another advantage of class actions is that compliance can be ensured through civil lawsuits, and thereby reduce the need to pursue perpetrators through administrative means or criminal prosecution…it is financially favourable, both from a party and a society point of view that many like claims are determined in one verdict.[175]

[174] Bernt-Hamre, 7; *see also id.* at 4-5, 12 with reference to whole paragraph.

[175] Bernt-Hamre, 7-8.

The Ministry predicted that the class action device would be used across-the-board for various types of substantive claims: "In addition to consumer claims, the Ministry predicts that there may be scope for class actions for lawsuits concerning discrimination."[176]

Opponents included associations representing banks, businesses, and even lawyers. They did not give any proof or empirical evidence to substantiate claims that class actions were necessary in the U.S. due to the lack of public enforcement.[177] The Ministry of Justice felt that class actions would not lead to the perceived difficulties in the U.S. because of unique features of the Norwegian system, such as the lack of punitive damages or civil jury trials.[178] Norwegians also rejected warnings that class actions would encourage baseless lawsuits: "The Association feared that class actions will lead to litigation about insignificant issues…and that litigation about insignificant issues and claims may reduce the public's respect for the courts. Finally the Association stated that there is a risk that attorneys will instigate class actions that would otherwise never have taken place in order to serve their own financial interests." Opponents further argued that class actions "may lead to legal blackmail, which means that even when there is a greater chance that the defendant will win than lose, he or she may choose to settle the case because the risk is too great." The "risk of being sued" was thought by opponents to pressure business to "accept terms and settlements that there is no foundation for…[as in] the USA, where such problems are said to have occurred."

Opponents also stated that class actions were inconsistent with "fundamental principles of civil procedure." The Ministry of Justice considered all these arguments and "concluded that they were either not likely to cause problems, or not weighty enough to outweigh the advantages of class actions." The Ministry noted that class actions "must fulfill the same requirements as claims in other lawsuits" regarding standing, causality, and legal cause of action.

3. Case Descriptions

Descriptions of Norwegian class actions are given in Annex B, *infra* at 99. No class action has been filed and fully prosecuted, but there are rumors that one was filed but then withdrawn and that two more may be filed in the near future.

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[176] Bernt-Hamre, 9.

[177] Bernt-Hamre Interview with reference to preceding two sentences.

[178] Bernt-Hamre, 6 – 7, 9, 10 with reference to the whole paragraph.

4. Assessment

In the past six months, there is no evidence that Norwegian defendants have been blackmailed into settling lawsuits without merit. Indeed, no cases have been filed and fully prosecuted or settled. It is noteworthy that Norway adopted the opt-out mechanism for small claims, bucking arguments that it would be unconstitutional or that it would lead to the settlement of frivolous lawsuits. To the contrary, it is expected that any lawsuit filed without substantial legal foundation, such as the possible lawsuit against Child Protective Services, discussed *infra* at 99, would simply be dismissed. There is no evidence that Norwegian businesses are so far being subjected to frivolous litigation as the result of class actions.

The private opt-in class action in Norway is similar to the private opt-in class action in Sweden, and it will likely result in a modest number of cases, as has been the case in Sweden over the past five years. The "representative action" brought by an organization with "funds of its own" and whose "purpose" fits with the subject matter of the litigation is not likely to result in hardly any litigation since most such organizations have other business and concerns.[179] Litigation is not the special competence of such organizations, nor is it a service that they would likely provide for their membership.

Private opt-out class actions are unlikely to occur, except for the settlement of many low-value claims, unless special funding is made available from an investor or the lawyer representing the private individual. The class members in an opt-out class action are not required to contribute money to pay for the costs of the litigation. Therefore, the class representative would have to pay for costs and expenses on his own. Since the opt-out mechanism is only available for low-value claims, the class representative is not likely to pay for a lawyer to recover a small amount of compensation unless he is confident of winning the case. The class representative in an opt-out class action is solely responsible "to the opposite party for the class's potential liability for costs."[180] In a Norwegian opt-in class action, by contrast, class members are required to contribute toward costs, removing the financial disincentive for a class representative to file a claim.[181] If a class action, either opt-in or opt-out, succeeds, then the class representative may recover "costs" and "disbursements" including lawyer's fees from the

[179] Norwegian Dispute Act, Chapter 2, § 2-1(2).

[180] Norwegian Dispute Act, Ch. 35, § 35-9(3).

[181] Bernt-Hamre Interview.

defendant.[182] The duties of the class representative, the duty of the court to determine whether and how to certify a class, the necessity for commonality, the threshold between joinder and class actions, and other concepts mirror similar requirements in U.S. class actions.

C. Denmark Allowed Opt-in Class Actions and Representative Actions in 2008

1. Procedural Mechanism

The new Danish law on class actions took effect on January 1, 2008.[183] The Administration of Justice Act, § 254a(1) allows for common claims submitted on behalf of a number of persons to be considered as class actions. There are two mechanisms: (1) private opt-in class action; and (2) representative actions.[184] For both, the court must determine that a "class action is deemed to be the best way of examining the claims." If a class action is not "the best manner of handling the claims" then a Danish court will not permit a case to be maintained as a class action. A class action must be "more appropriate than traditional rules on subjective cumulation." The Danish law provides for a better procedural examination of claims that are "uniform in terms of facts and law" (but not necessarily identical) so these claims can be handled more effectively.

The limited use of class actions as creatures of the court's discretion was intended as a brake "against wild and groundless actions." The Administration of Justice Act § 254h also requires class action settlements to be approved by the court. The Danes view this as court "supervision" over a class action.[185] The new Danish law only provides for procedural "access" to the courts, but it does not change substantive law: "provisions about the courts, evidence, discovery, expert witnesses, etc. etc. [sic] are exactly the same under the new class action provisions, as in other cases."[186] A class action is initiated by filing a "writ of summons" with the court that gives a description of the class, the name of a proposed class representative, and

[182] Norwegian Dispute Act, Ch. 35, § 35-13(1) – (2).

[183] Denmark Ministry of Justice, *New rules on class actions under Danish law*, June 26, 2007, issued by Procedural Law Division, reference no. 2006-740-0187, document no. HAA40315 (English translation) (on file with author) ("Danish Ministry Report"), 1, 6.

[184] Danish Consumer Ombudsman, 7; Danish Ministry Report, 8.

[185] Danish Consumer Ombudsman, 6; Danish Ministry Report, 7 – 8, 10.

[186] Werlauff, Erik, *Class actions in Denmark – from 2008*, article prepared for Oxford Conference on the Globalization of Class Actions, Dec. 12 – 14, 2007, *available at* http://globalclassactions.stanford.edu (last viewed on May 17, 2008) (hereinafter "Denmark National Report"), 2 with reference to whole paragraph.

information on how to identify and notify the class members. Notice may be sent individually, by advertising, or through public announcement.

A lawsuit may only proceed as a class action if the victims can be "identified and notified in an appropriate manner…as to provide a high degree of certainty that the persons affected are made aware of the case."[187] The class representative has a special duty to "safeguard" the interests of the other class members. The court can remove the class representative and appoint another if, e.g., the class representative has "conflicting interests" from the rest of the class. The court may make such a replacement *sua sponte* or upon the request of one of the parties or, presumably, from one of the class members. There is little chance, therefore, that a class representative would have the opportunity to over-compensate himself with undistributed money left over from a settlement fund, as the Commission feared would happen in a class action settlement. Now, we shall take a brief look at each one of the three mechanisms: (1) private opt-in; and (2) representative actions.

a. Opt-In Class Actions

Private individuals may bring opt-in class actions to which they must affirmatively indicate their wish to be in the class. Parties who wish to opt-in, after receiving notice, must "register" with the court. They may have to pay money to register, as a security. They may also have to pay additional legal costs up to the amount that they might be able to recover as compensation. The opt-in mechanism is supposed to provide greater access to justice:

> The Standing Committee on Procedural Law finds that rules on class actions will ensure that more people will have real access to the courts and that that form of action will thus facilitate the satisfaction of justified claims.[188]

The opt-in mechanism is thought to give the defendant "an overview of the members of the class from a certain time in the proceedings" which enables a defendant to "predict the consequences of a judgment." Having a firm idea of the members of the class, because they have each affirmatively opted in, is also thought to "facilitate the execution of the judgment." . Class actions may be brought when the class members have "uniform claims" based on the "same factual circumstances" as well as the "same legal basis."

[187] Danish Ministry Report, 7 - 9 with reference to whole paragraph.

[188] Danish Ministry Report, 4 - 6, 8, 9, 10 with reference to whole paragraph; *see also* Danish Consumer Ombudsman, 6.

b. Representative Action

An organization, a private institution, or an association devoted to that particular cause may file a representative action. For instance, the Danish Consumer Council may bring a representative action regarding consumer matters.[189] There is not a great deal of information in English about the Danish "representative action" and it is beyond the scope of this thesis to explore the Danish literature in greater depth.

The new Danish law allows for a representative action, brought by the Consumer Ombudsman, with an opt-out mechanism if the amount of each member's claim is no more than DKK 2,000 or 270 euros.[190] Class members who remain in an opt-out class action may be required to pay legal costs up to the amount that they stand to recover if the lawsuit is successful, but they do not have to pay an additional fee as security, unlike opt-in class members who are liable for both costs.[191] The most significant limiting factor is that only public authorities, such as the Danish Consumer Ombudsman, may bring opt-out class actions:

> As a main rule, a class action will comprise the class members who opt for the class action (the opt-in model). If a class action according to the opt-in model is not an appropriate way of examining the claims, the court may, however, decide that the class action is to comprise the class members who do not opt out of the class action if it is evident that the claims cannot be expected to be brought through individual actions due to their limited size (the opt-out model)…In opt-out class actions only public authorities may be appointed as class representatives.[192]

This is what makes it a "representative action." Danish law provides for an opt-out representative action brought by a public authority because it will "on average include more persons that class actions according to the opt-in model, and it could therefore be a more effective and a more economical procedure from an overall point of view." The Court may decide that the case should be an opt-out class action if the "claims … are so small that it is evident that they cannot generally be expected to be brought through individual actions, not

[189] Danish Ministry Report, 8.

[190] Øe, Henrik, *Collective redress in Danish law and perspectives at EU level,* presentation at Oxford/Stanford conference on globalization of class actions, December 2007, *available at* http://globalclassactions.stanford.edu/PDF/Danish_Conference_Presentation.pdf (last viewed on May 31, 2008) (hereinafter "Danish Ombudsman"), 8.

[191] Danish Ministry Report, 12.

[192] Werlauff, Erik, *Class actions in Denmark – from 2008*, article prepared for Oxford Conference on the Globalization of Class Actions, Dec. 12 – 14, 2007, *available at* http://globalclassactions.stanford.edu (last viewed on May 17, 2008) (hereinafter "Denmark National Report"), 2, 5, 7 with reference to whole paragraph.

because the persons concerned do not think they have justified claims, but merely because the inconvenience and financial risk of individual litigation are deemed to be disproportionate to the outcome of the individual action."

Because Danes felt that the "opt-out is foreign to Danish legal thinking…an opt-out therefore requires the presence of quite special circumstances and, as noted, only a public authority can serve as class representative in opt-out actions, e.g. the consumer ombudsman."[193] It may be that opt-outs are not against the Danish legal tradition, strictly speaking, but just different from the previous cultural feeling.

2. Legislative Background

The Danish law on class actions was intended to "facilitate access to the courts and thereby support the enforcement of justified claims, including claims that are abandoned today due to a lack of resources."[194] The drafters thought the new law "would emphasise more clearly the desire of society to safeguard the most effective and expedient procedural rules for examining a large number of uniform claims, particularly in cases where the individual claims are of a modest size." The principle of giving citizens "[a]ccess to the courts" was an impetus for the law and it was also a "procedural guarantee for the individual". Danish officials felt that claims of "limited size…cannot generally be expected to be brought through individual actions" and would not be brought at all, without the new class action law.

One of the drafters of the new law, Prof. Erik Werlauff, thought the new class action law could be used for a variety of cases on behalf of consumers, investors, and victims:

> Other examples of where Danish provisions of class actions would be relevant have been mentioned, e.g. a huge Danish case about roof materials that crumbled (the Eternit case, reported in *Ugeskrift for Retsvaesen* (UfR) 1989:1108 H); the tragic cases for the Danish haemophiliacs that had been treated with HIV infected blood on public hospitals (UfR 1996:1554 Ø); compensation claims for flight tickets (no printed case law); unlawful fees collected by banks (the Laan-&-Spar case, UfR 2003:1581 H); cases on unlawful price trusts (the Løgstør case; no printed case on the question of compensation); cases on uncomplete prospectus stock emission (the Hafnia case, cf. below). Other examples could be mentioned – and common for these are that the case will either be

[193] Denmark National Report, 4; *see also* Grønnegaard Interview, 2 with reference to whole paragraph.

[194] Danish Ministry Report, p. 2 – 3 with reference to whole paragraph.

> dropped if no provisions on class actions exist, or the case will be more expensive and/or conducted in a less "powerful" and efficient manner if the individual consumer etc. has to initiate and conduct his or her own case.[195]

It was hoped that this new procedural mechanism would be used to enforce a broad array of substantive laws on behalf of both consumers and businesses, e.g., where businesses have paid an improper tax to the government.

As in the current dialogue in the E.U., the Danish class action law was opposed by "some commercial and industrial lawyers [who] argued that the introduction of class actions would be a dangerous path towards an 'American' state of law."[196] They were afraid Danish lawyers would aggressively pursue clients and prosecute cases in order to win fees for themselves rather than to benefit clients.[197] Danish legislators unanimously adopted the bill, nevertheless. The new class action law is consistent with Danish legal practice and tradition.[198] Danish lawyers "are used to people making claims together in actions" and the previous rules on "substantial cumulation" similarly allowed Danish lawyers to argue common issues that applied to two or more clients. The new class action law is simply more efficient because a judgment on liability will apply to all class members in the same manner whereas clients in a "substantial cumulation" could have received different results.

3. Case Descriptions

Case descriptions are given in Annex C, *infra* at 100 - 101.

4. Assessment

There has been no rush to file class actions since Denmark allowed them in January 2008. It took five months to file the first private opt-in class action. There have been no representative actions. The law regarding public actions has been used on three occasions to persuade defendants to enter into settlement negotiations with the Consumer Ombudsman but no lawsuits were formally filed, as of December 2007. The Consumer Ombudsman's use of the law may

[195] Denmark National Report, 1-2 with reference to whole paragraph.

[196] Denmark National Report, 1 – 2 with reference to first few sentences of paragraph.

[197] Telephone interview with Casper Hauberg Grønnegaard, Ret & Raad, Copenhagen, Denmark (May 14, 2008) (notes on file with author) ("Grønnegaard Interview").

[198] Grønnegaard Interview, 1 – 2 with reference to last few sentences in paragraph.

lend some support to the White Paper's proposal for "representative actions", but the threat of a "representative action" may be useful even if the case is never filed in court.

One private opt-in class action has been filed on behalf of investors who were paid an unfair price for their shares. Another private opt-in class action may be filed on behalf of small businesses that were misled by unfair marketing practices. These are fairly sophisticated plaintiffs. There is no evidence that they have tried to "blackmail" or apply undue pressure on the defendants. The defendants have not settled the cases.

The class action law in Denmark is not likely to lead to a great number of private lawsuits, because there are no financial incentives. The class representatives in an opt-in class action may be greatly discouraged from opting in because they may be required to pay legal costs as a security and, then, additional legal costs up to the amount they stand to recover. It may not be worth it. There are, also, no incentives for Danish lawyers to bring class actions.[199] Danish lawyers cannot be awarded a percentage of the class's recovery in a successful class action. Instead, they must charge their ordinary billable rate. There is no opportunity for a Danish lawyer to charge a high success fee in the event of success in a class action.[200] The procedural mechanism, per se, does not affect the willingness of lawyers to bring class actions. It may be too early to assess the long-term impact. After the first three years of this new law, in 2010 – 2011, Denmark will assess the impact of the class action law, as required by the new law itself.[201]

D. Netherlands Allowed Opt-Out Class Action Settlements in 2005

1. Procedural Mechanism

a. Opt-Out Class Action Settlement

Since August 1, 2005, the Netherlands has allowed private opt-out class action settlements for monetary damages under the legal authority of the Dutch Civil Code Art. 7:907-

[199] Grønnegaard Interview, 1 with reference to whole paragraph.

[200] When asked whether they can charge a success fee (or conditional fee) in their cases, Danish lawyers have given different answers. Some have said, "yes, success fees of 100 percent or 200 percent or 300 percent are fine, with no upper limit." Others have said, "yes, but only if the success fee is limited to an 50 percent above the ordinary billing rate." Others have said, "no, success fees of any sort are not allowed."

[201] Danish Ministry Report, 2.

910 CC and the Dutch Code of Civil Procedure Art. 1013-1018 CCP.[202] This is the first time a European country has allowed private parties to use the opt-out mechanism for monetary damages. The new law only applies to settlements and does not permit the filing of a private opt-out class action complaint or the litigation of a class action suit: "If the parties agree to settle the dispute out of court, they can apply to the court to declare the settlement fair and binding even on non-parties to the agreement, on an opt-out basis." Class members may receive monetary damages under this opt-out class action settlement procedure.

Opt-out class action settlements must receive approval from the Amsterdam Court of Appeal.[203] The Court will examine a settlement to see if the amount of compensation is fair. The settlement agreement must describe the class, the estimated number of class members, the amount of compensation, eligibility for compensation, and method for obtaining payment. If the settlement is approved, then class members must be given at least three months to opt-out of the settlement or they are otherwise bound by it, even if they did not know about the settlement.[204] Class members are required under Dutch law to have up to one year after the court decision approving the settlement to file claims for compensation.[205]

b. Representative Action

The Netherlands also permits representative actions.[206] Because representative actions may not seek monetary compensation, they are outside the scope of this thesis and are not addressed at great length. Dutch law has provided for representative actions under a slightly older law, Dutch Civil Code, Art. 3:305a-c CC, that became effective on July 1, 1994. Organizations or consumer associations or public authorities may file "representative actions" for injunctive or declaratory relief but not for monetary damages. Because the primary aim of the pending E.U. proposals is to increase private enforcement and compensate consumers, this thesis focuses mainly upon class actions for monetary damages.

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[202] Tzankova, Ianika N.; Scheurleer, Daan F., Memorandum to Prof. Deborah Hensler and Dr. Christopher Hodges, Sept. 24, 2007, prepared for Oxford Conference on the Globalization of Class Actions, Dec. 12 – 14, 2007, *available at* http://globalclassactions.stanford.edu (last viewed on May 17, 2008) (hereinafter "Dutch National Report"), 3 with reference to whole paragraph.

[203] Dutch National Report, 7, 9 with reference to whole paragraph.

[204] Dutch National Report, 8-9.

[205] Shell FAQ Press Release.

[206] Dutch National Report, 2, 12 with reference to whole paragraph.

2. Legislative Background

The new opt-out class action mechanism was originally meant for mass disasters and mass exposures[207] but it has since been used for a wide variety of legal claims, including financial matters and securities fraud. The opt-out class action mechanism was sought by corporate industry as a way to obtain global peace from potential claims. At first, the law was passed because industry wished to obtain a final settlement of all claims brought by mothers who took Des and their children, so the industry "insisted on an (opt-out) settlement solution that could only be achieved through legislation" and thereby led to the new Dutch law on opt-out class action settlements. The entire "idea came in other words from the industry." Whereas the business community in Norway, Sweden, and Denmark directly opposed class action legislation, the Netherlands business community advocated for opt-out settlements as a method for obtaining global peace.

The Dutch law on opt-out class actions was "inspired by the US class settlements approach."[208] At the same time, the Dutch government was "wary of developments in the direction of 'the American litigious society' and collective actions of any kind are seen as a tool that promotes such a society." Despite these fears, the Netherlands passed the new law, adopting opt-out class actions.[209] There were other concerns that the "opt-out" mechanism might deprive class members of their "fundamental 'day in court' right" but those concerns were addressed through "[i]mprovements in the notification requirements" to ensure that the best possible attempts are made to reach class members and notify them of the litigation prior to settling their right to bring any future claims.

3. Case Descriptions

Case descriptions are given in Annex D, *infra* at 102 - 107.

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[207] Dutch National Report, 4 – 5, 6 ("Others, mainly the plaintiffs' bar, were less excited about the new possibilities, pointing out that the proposed collective action was probably only meaningful in connection with 'long-term' mass torts (and others call 'mass exposure cases': claims involving pharmaceutical products, asbestos, etc.) where the number of present and future victims and the impact of the disputed activity are unknown") with reference to whole paragraph.

[208] Dutch National Report, 5 - 7 with reference to whole paragraph.

[209] In the U.S., class actions seeking predominantly monetary damages may be certified as opt-out class actions under Fed. R. Civ. P. 23(b)(3). The U.S. federal rules also provide for class actions for injunctive and declaratory that are binding on all class members and which provide no right to opt-out. Fed. R. Civ. P. 23(b)(2). The federal rules require opt-in class actions – not opt-out – for some legal claims such as those brought under the Fair Labor Standards Act. The most well-known mechanism, however, is the opt-out class action for monetary damages. Until the past several years, it was unknown in Europe. Now, it has become law in the Netherlands and Norway.

4. Assessment

The Dutch opt-out system has worked well, in less than 3 years, to settle large cases with high dollar value. The Des case settled for 35 million euros (*infra* at 102), the Dexia case settled for 1 billion euros (*infra* at 102 - 103), and the Royal Dutch Shell case is settling for 352.6 million USD (*infra* at 103 - 107). This is a significant amount of compensation to return to victims. In addition, the opt-out system will not, here, incur any additional costs that are not also incurred in the opt-in system. The parties who settled the Royal Dutch Shell opt-out class action issued notice to inform potential class members of their legal rights.[210] Class members will then have to write in to the court, providing "information and supporting documentation" to demonstrate that they are truly class members.[211] In the Swedish opt-in system, after receiving notice, individuals must also write in to the court to be part of the opt-in class action. Norwegians must write in to join the court "register" in order to join an opt-in lawsuit. In the Dutch opt-out system, The Amsterdam Court of Appeals will have no trouble identifying the parties that deserve compensation. Therefore, the Dutch model disproves the Commission's fears that it would be difficult to identify and reimburse victims in an opt-out settlement.

Two significant cases have already been settled, and a third one is on its way. There has been no flood of litigation,[212] but these three cases have increased access to justice for thousands of people:

> The experiences with the new collective settlement device are however mainly positive if one evaluates them in terms of achieving fast and reasonable compensation for claimants and offering final resolution to defendants, however many things can be improved. The potential of devices like the Dutch Act on Collective Settlements in achieving pan-European solutions is

[210] Shell FAQ Press Release ("Once the Court (in Amsterdam) declares the agreement binding we will notify shareholders by placing adverts in newspapers, announcing [sic] on this website and it will also be on the other websites.").

[211] Shell FAQ Press Release.

[212] "There is still resistance to introducing no cure, no pay funding arrangements [i.e., contingency fee], as the public and thus the political perception is that this would encourage a US-style litigation culture. Interestingly enough, recent empirical research on the Dutch litigation culture shows that such a development is absent. The number of lawsuits is not increasing, although higher damages are being claimed, such as for pain and suffering." Dutch National Report, 19.

> noteworthy keeping the Shell settlement in mind and requires further exploration.[213]

The Royal Dutch Shell settlement is particularly striking because it includes class members from all over Europe and the world. Specifically, class members come from Italy, Sweden, Germany, Belgium, France, the Netherlands, and other countries, as noted *infra* at 103 - 107. The opt-out system has so far been more efficient than the alternatives:

> The impression is that dealing with mass claims by the judiciary not using the existing collective mechanism/settlement devices places much greater burden on the courts than "simply" using those devices…The last two collective settlements were handled relatively expeditiously.[214]

Although originally intended for the settlement of mass tort disasters, the opt-out class action procedure may be used across-the-board to settle disputes under various substantive laws:

> The Dutch Act on Collective Settlements was originally meant for the resolution of mass exposure claims and mass disaster personal injury claims like in the DES case. In the Dexia case it became clear that it could be also used with relation to financial products or services.[215]

The opt-out class mechanism is no longer restricted to mass exposure or mass disaster cases, as originally intended, but has morphed into a catch-all procedural mechanism that addresses "mass disputes" in general. It will likely be "used more often" as "mass disputes" of every variety "occur more and more often and become less extraordinary."[216] It is noteworthy that many provisions regarding notice, settlement, withdrawal, and other matters are almost identical to provisions in Fed. R. Civ. P. 23 governing U.S. class actions.

As the Amsterdam Court of Appeal, charged with reviewing proposed class action settlements,[217] has gotten more experience with opt-outs, "the judiciary seems nowadays more and more comfortable with her new, more active, role." The Dutch opt-out system has

[213] Dutch National Report, 22.

[214] Dutch National Report, 21-22.

[215] Dutch National Report, 15.

[216] Dutch National Report, 17 with reference to the whole paragraph.

[217] Dutch National Report, 7.

apparently avoided the adverse effects that some thought would follow the adoption of U.S.-style opt-outs: "It is not possible to put pressure on a defendant who is unwilling to settle as it is under the US class action regime through the commencement of a damages class action." There is no evidence that filing a U.S. class action lawsuit pressures a defendant to settle. The Dutch experience, however, indicates that pressure of some sort, perhaps from the media and political circles, did pressure the insurance and pharmaceutical industry to settle the Des case as quickly as possible. Indeed, the pressure was so great that it spurred passage of opt-out legislation "on short notice" and with "no time for lengthy public debate."[218] The period of assessment will continue, especially since the Dutch Ministry of Justice started evaluations in late 2007 and will likely issue an official report.

IV. LESSONS FOR THE E.U.

A. Best Procedural Mechanism (Descending Order)

1. Opt-Out Class Actions

The opt-out mechanism should be given renewed consideration, either in the Commission's next proposal or by the European Parliament or Member States at a later stage of the legislative process. The opt-out mechanism has many advantages over the opt-in mechanism. The Dutch model provides the most powerful example of how an opt-out system can result in enormous settlements of 35 million euros (*infra* at 102), 1 billion euros (*infra* at 102 - 103), and 352.6 million USD (*infra* at 103 - 107) that are distributed straight to the victims. The opt-out mechanism in the Netherlands is by far the most powerful mechanism in Europe with the most substantial settlements and the greatest recovery for victims. Adopting such a mechanism would fulfill the E.U.'s legal obligation to seek "as a base a high level of protection" in matters pertaining to competition law and consumer protection under Art. 95(1) E.C. Further, Norway's legislative background (*supra* at 43 - 44) indicates that opt-out class actions afford the best protection to consumers with small claims. Prof. Lindblom who initiated the Swedish national discussion on class actions[219] recently expressed the opinion that Sweden's private opt-

[218] Dutch National Report, 5 – 7 with reference to the whole paragraph.

[219] Lindblom, Per Hendrik, *The Swedish Group Proceedings Act – Introduction,* Paris, France, May 10, 2005 (unpublished manuscript on file with author) ("Lindblom Group Proceedings"), § 1.2 ("In 1974, the Swedish Consumer Ombudsman, coming home from the USA, wanted my opinion of the federal Rule 23 class actions I

in class actions mechanism should be "supplemented with an opt-out alternative in actions involving minor claims, at least in public group actions."[220]

Yet, the White Paper rejected opt-outs in favor of opt-ins, and Commissioner Kuneva has rejected class actions outright for consumer protection.[221] The national models discussed in this thesis, especially the Dutch one, indicate that such an omission may be a grave mistake. In light of the advantages of an opt-in, one would expect strong justifications to support the Commission's rejection. But they do not exist. As discussed *supra* at 10 - 15, the reasons given in the White Paper and its supporting documents for rejecting the opt-out device are extremely poor. Commissioner Kuneva did not bother to give any reasons. And Commission-funded studies misconstrue what is happening in nations with class action devices. For instance, the Leuven Study wrongly noted that the opt-out mechanism in the Netherlands is only good for a declaratory judgment.[222] That is not true. As the Shell settlement proves, *infra* at 103 - 107, the Dutch opt-out mechanism may be used for monetary compensation. In fact, it has been primarily used for monetary compensation in all three cases that were presented to the Amsterdam Court of Appeals. Norway permits opt-out class actions for monetary damages, as well, as discussed *supra* at 38 - 41. Portugal uses the opt-out mechanism, too, for monetary damages but that model is outside the scope of this thesis.[223]

The Commission gave numerous reasons why the opt-out mechanism should be rejected, but these reasons do not stand up to careful inspection. The White Paper Impact Study reported that opt-out class actions would be more expensive to litigate than opt-in class actions, as noted *supra* at 10 - 15 due to (1) higher court expenses and costs in distributing damages, (2) higher costs for class certification, (3) higher lawyer's fees, (4) principal/agent problems, and (5) over-compensation of the class representative.[224] Further, (6) the Commission wrote that opt-outs would pose constitutional problems that opt-ins would not, depriving class members of a "day in

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could not answer because I had never heard of class actions before. No one in Sweden had at that time. I felt ashamed and some years later I started to study the Anglo-American class action. In 1989 I published an oversized book (800 pp.) on the subject. A discussion among lawyers started almost immediately").

[220] Lindblom National Report, 36, 37.

[221] White Paper Staff Working Paper, ¶ 32; Kuneva Speech, 2.

[222] Leuven Study, 321.

[223] Leuven Study, 292 – 293.

[224] White Paper Impact Study, 570.

court"[225] and that (7) opt-outs would be "foreign" to Europe and likely to create a "litigation culture." These statements of comparison between opt-outs and opt-ins are not only erroneous, but they are contradicted by the experience of European nations as well as the U.S.[226] In the space below, we will see how the national models contradict the Commission's view that opt-outs entail disadvantages that are not shared by opt-ins.

First, the Commission wrote that opt-outs would result in higher court expenses than opt-ins. In actuality, the expenses are the same. In opt-ins, Norwegian courts must keep a "class register" of all persons who opt-in to the class action.[227] In opt-out cases, Norwegian courts must also keep a "register of withdrawals" with the names of people who opt-out.[228] Norwegian courts bear the expense of maintaining a register for both opt-ins and opt-outs. There is no difference in this regard. In the Netherlands, a claims administrator incurs the same kind of expenses in keeping track of people who opt-out. The cost of keeping the Dutch register, however, is paid at private expense. In the Netherlands, if class members remain in the class, then they must identify themselves in order to collect compensation unless they may be identified from the defendant's own records, as was done in the *Dexia* case, *infra* at 102. In the Shell case, class members will be required to submit claim forms with proof of purchase to a claims administrator, *infra* at 103 - 107, demonstrating that they have a right to compensation under the opt-out settlement.[229] The Amsterdam Court of Appeals will, therefore, know to whom damages must be distributed. An opt-out class member who does not come forward will not share in the recovery. The difference between the opt-out and opt-in mechanism is, therefore, minimal since class members must come forward in both scenarios to identify themselves. The White Paper does not recognize this point.

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[225] White Paper Impact Study, 288.

[226] Although his views on the U.S. litigation system should be viewed with skepticism, Dr. Van den Bergh (one of the authors of the White Paper Impact Study) has elsewhere published his view that the opt-out class action is not responsible for the perceived excesses or abuses in the U.S. litigation system. He wrote: "Class actions have been criticised also for other reasons, which are ***not inherent in this particular enforcement mechanism***, but characteristic of US law. Rather than the class action in itself, some traits of the American legal system seem to cause major problems; they include contingency fees, punitive damages, and jury bias." Van den Bergh, 7 (emphasis added). This nuanced view of Dr. Van den Bergh was lost in the drafting of the White Paper and its accompanying documents, all of which hold the opt-out mechanism, per se, responsible for the perceived ills in U.S. litigation.

[227] Norwegian Dispute Act Ch. 35, § 35-6(4).

[228] Norwegian Dispute Act Ch. 35, § 35-7(2).

[229] Shell FAQ Press Release ("provide information and supporting documentation"); *see also* Shell Settlement Agreement, 14 - 16.

In Sweden, the court must keep a register that holds the name of every person who opts-in to the class action. The law indicates that the court must receive affirmation from each person that opts-in and presumably the court must also keep a register of those names: "A member of the group who does not give notice to the court in writing, within the period determined by the court, that he or she wishes to be included in the group action shall be deemed to have withdrawn from the group."[230] Research into this thesis revealed that the Swedish courts often keep track of each individual who opts in. In the *Wihlborg* case, the Stockholm District Court gave each opt-in individual a special designation, such as *Anmälan om grupptalan fr Olle Nyberg*, on the court docket, as noted *infra* at 95 - 96. Inserting each one of these names takes time from court personnel. In an opt-out class action, no such register is kept and the time required from court personnel may be diminished. In sum, the Commission was mistaken to say that opt-outs would result in higher court costs. The opposite is likely to be true.

Second, certification of opt-outs is not more expensive than the cost of opt-ins. In Norway, class certification does not entail any additional cost, because it is simply a matter for adjudication under the court's discretion, as noted *supra* 41. When the time comes, a Norwegian court must decide whether to certify a class as an opt-in class or an opt-out class. It may choose either one. The court is required by statute to make this determination. Therefore, choosing an opt-out class over an opt-in class does not create additional expense for the court. It must make the decision, either way, on whether a class of any sort should be created. Similarly, in an opt-out class action settlement in the Netherlands, the Amsterdam Court of Appeals must decide whether to approve a proposed opt-out class action settlement. The same decision is required of a Swedish court[231] or Danish court[232] that is asked to approve an opt-in class action settlement.

Third, higher lawyer's fees do not result from the opt-outs rather than opt-ins. The normal rules on fees apply. They must be reasonable. Moreover, most jurisdictions prohibit fees that are awarded as a percentage of a recovery so most European lawyers are barred from collecting a percentage of any settlement amount. The Danish ethical rules bar lawyers from

[230] Sweden Group Proceedings Act, § 14.

[231] Sweden Group Proceedings Act, § 26 (**"**A settlement that the plaintiff concludes on behalf of a group is valid, provided the court confirms it by judgment").

[232] Denmark National Report, 7 ("*Any settlement entered into by the class representative* on claims covered by the class action becomes valid when the settlement is approved by the court under Section 254h of the Administration of Justice Act").

earning more than a reasonable fee.[233] Norwegian ethical rules bar lawyers from being paid a percentage of the amount recovered, regardless of whether the case is an opt-out class action or traditional litigation.[234] Norwegian lawyer's fees must be reasonably related to the assignment and work which has been done. Norwegian lawyers may not enter into a contingency fee agreement. The Norwegian law on class actions does not contain any special provisions that would entitle a Norwegian lawyer to deviate from the normal rules on fees. In Sweden, a class action lawyer may enter a "risk agreement," or *riskavtal,* with the class representative to receive a higher-than-usual fee but he is barred from taking a proportion "based solely on the value of the subject of dispute."[235] In any event, the Swedish "risk agreement' applies to opt-in cases, not opt-outs. The Commission did not explain how European lawyers would be able to take a percentage (in either opt-ins or opt-outs) when such a practice is forbidden across Europe. The point is that the Commission mistakenly believed in the White Paper that opt-outs led to higher lawyer's fees. The opt-out mechanism, itself, does not result in higher fees.

Fourth, there is no evidence of any principal-agent problems in those jurisdictions, i.e., Norway and the Netherlands with opt-out mechanisms. To the contrary, Dutch settlements must receive approval from the Amsterdam Court of Appeals. Otherwise, they are not binding. The Amsterdam Court of Appeals will ensure that class members' interests have been safeguarded. A poor settlement reached through the compromised efforts of a conflicted lawyer will not likely receive approval from the court. Similarly, in Norway, court approval is required for a class action settlement. The eyes of the court provide a check on any principal-agent problem, as do the ordinary ethical rules that require lawyers in each Member State to provide competent representation. In any event, there is no evidence from the experience of Sweden, Norway, Denmark, and the Netherlands that opt-outs pose special principal-agent problems that are not found in opt-ins. All of these nations treat lawyers and class representatives with the same watchful eye, regardless of whether the case is opt-out or opt-in.

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[233] Grønnegaard Interview.

[234] Bernt-Hamre Interview (consulting administrative decree posted on Norwegian lawyers association's website) with reference to this sentence and the subsequent two sentences.

[235] Sweden Group Proceedings Act, § 39 ("A risk agreement may only be approved if the agreement is reasonable having regard to the nature of the substantive matter. The agreement shall be concluded in writing. The agreement shall indicate the way in which it is intended that the fees will deviate from normal fees if the claims of the members of the group were to be granted or rejected completely. The agreement may not be approved if the fees are based solely on the value of the subject of dispute").

Fifth, the class representative in an opt-out class action will not be over-compensated, as the Commission feared would happen.[236] In Norway, the class representative is obliged to "act[] on behalf of the class."[237] He may not put his own interests first, e.g., by over-compensating himself relative to other class members. Norwegian law mandates: "The class representative shall safeguard the rights and obligations of the class in the class action."[238] If the class representative cannot properly "safeguard the interests of the class," then a Norwegian court may "revoke" the appointment and replace the class representative with a new person.[239] As discussed *infra* at 103 - 107, any unclaimed money in the Royal Dutch Shell settlement in the Netherlands would not go to the class representative but, instead, would be (a) given to class members through a supplemental distribution, (b) given to a charitable foundation, or (c) returned to the defendants. The excess money would not go into the class representative's pocket in an opt-out any more than it would in an opt-in.

Sixth, the opt-out mechanism is not contrary to constitutional rights by depriving class members of a "day in court." The same argument was made and rejected in the Netherlands and Norway where opt-outs are allowed. It was also rejected by BEUC, the European Consumers' Association, on the grounds that people are free to withdraw from the opt-out class action and bring their own individual claims.[240] Regarding the Netherlands, the Commission reported that the opt-out mechanism may only be used in settlements brought by consumer associations, thereby avoiding constitutional concerns raised by the opt-out mechanism.[241] That is false. Any party in the Netherlands may start a legal entity today and initiate an opt-out class action settlement tomorrow. There is no requirement that the Dutch entity be "officially designated" or "certified" as the Commission would require for representative actions recommended in the

[236] White Paper Impact Study, 568.

[237] Norwegian Dispute Act, Ch. 35, § 35-1(7).

[238] Norwegian Dispute Act, Ch. 35, § 35-9(1).

[239] Norwegian Dispute Act, Ch. 35, § 35-9(3).

[240] BEUC, 6 ("It is claimed that opt-out may sometimes be more difficult to combine with the freedom to take legal action. Yet, it does not necessarily limit the plaintiff's freedom since people are able to withdraw from the group. In any case, this freedom has to be balanced against the need to ensure that all those affected can achieve access to justice").

[241] White Paper Impact Study, 288, 295. The Dutch opt-out class action was described as a "representative action." White Paper Impact Study, 273. This is inaccurate. The organization that brings a Dutch opt-out class action settlement does not have to be "officially designated" or "certified," as would an organization bringing a "representative action" under the Commission's recommended proposal. Therefore, the Dutch model offers no support for the Commission's recommendation of a "representative action."

White Paper, discussed *supra* at 17 - 21. Further, the Dutch opt-out mechanism addresses German concerns (shared by the Dutch) that each person should have her "day in court" to prove individual damages.[242] The Royal Dutch Shell settlement provides just such an opportunity. Class members may opt-out from the settlement and pursue individual claims.[243] If they remain, they may object to the terms of the settlement by submitting a written "defense" to the court.[244] They may also file Claim Forms for compensation. An administrator will review Claim Forms and determine the amount of money that each should receive. If the class members disagree with the administrator's assessment, they may within 30 days "submit the dispute to either the District Court or the Dispute Committee for resolution."[245] Claimants may submit disputes without the assistance of legal counsel, if they so choose.[246] In sum, the opt-out mechanism in the Netherlands does provide the opportunity for a "day in court." In an opt-out class action, notice may be sent by letter, where possible, or publicized in the media and via websites, as in the Shell settlement.[247] If class members do not read a notice, the opt-out class action will proceed nonetheless.

In Sweden, it was argued that all class actions are contrary to the constitutional rights of Swedes, but such arguments were put to rest.[248] Prof. Lindblom of Sweden has written: "Even with an opt out-regime the members of the class are not deprived of their day in court. They get notice and may opt out. There are many special safeguards (superiority, counsel, adequacy of representation, notice, settlement check up etc.) in group proceedings taking care of their interests. And if the claims are individually not recoverable for the group members, the alternative to a class action is not an individual action but no access to justice at all."[249] In Denmark, opt-out class actions may be brought by the Consumer Ombudsman or a public

[242] White Paper Impact Study, 288.

[243] Shell Settlement Agreement, 30 ("A potential Participating Shareholder who desires not to be bound by the Binding Declaration and the Release must deliver to the Administrator a notice of his, her or its intention not to be bound …").

[244] Shell Settlement Agreement, 29. It is unclear why the settlement agreement refers to this concept as a "defense" since the right to submit objections is held by class members who stand in the shoes of the plaintiff – not to the defending companies, i.e. Shell, who normally have the right to present a "defense".

[245] Shell Settlement Agreement, 16.

[246] Shell Settlement Agreement, 16 – 17.

[247] Shell FAQ Press Release.

[248] Lindblom National Report, 33.

[249] Lindblom Group Proceedings, § 3.

authority, so clearly the mechanism is not considered unconstitutional or contrary to European legal tradition in Denmark.

In Norway, a committee determined that opt-outs would not conflict with the "disposition principle" (all parties have the right to control whether or not their claims shall be brought to court) because class members have full opportunity – i.e, up until final judgment – to opt-out of a class action.[250] They thereby control their right to be bound. Norway also dismissed concerns over constitutionality since many low-value claims would otherwise not be brought.[251] An Assistant Judge in Norway has further explained that opt-out class actions are analogous to legal notice practices that have existed for years.[252] For instance, if a Norwegian leaves Norway to live in another part of the E.U. for a long time but forgets to pay taxes on his Norwegian home, the state may send notice to the postal mailbox and ultimately sell the home to recover unpaid taxes. This may be done even if the homeowner has never read the notice or actually knew about the proceedings. In some cases, Norwegian police might post a writ or summons on the door of a home, and that will constitute legal notice in Norway, even if it is not actually read. Therefore, opt-outs were not such a radical change for Norway.

Seventh, the Commission took the view that the opt-out mechanism was foreign to Europe and likely to create a "litigation culture."[253] This is untrue. Opt-outs are now accepted in many parts of Europe. In the Royal Dutch Shell settlement, investors from all over Europe participated in the 352.6 million USD settlement. The settling plaintiffs included investors, both public and private, from Norway, Italy, Belgium, France, Germany, Sweden, the Netherlands, and other countries.[254] This is quite remarkable considering that the Dutch law on opt-out class action settlements has only been effective since 2005, i.e., for less than three years. If the opt-out mechanism was previously unknown in Europe, then the citizenry have adapted very quickly to this new mechanism. It may also be that the mechanism is not new at all, at least to some Europeans, and that it fits quite well with traditional methods of litigation. European

[250] Telephone Interview with Torbjørn Hagerup Nagelhus, Assistant Judge, Nedre Telemark Tingrett, Skien, Norway, May 22, 2008 (notes on file with author) (hereinafter "Nagelhus Interview").

[251] Bernt-Hamre Interview.

[252] Nagelhus Interview with reference to the rest of the paragraph.

[253] White Paper Impact Report, 52 (Policy Option 1 "could lead to development of a litigation culture").

[254] Shell April Press Release.

shareholders may have prior familiarity with securities opt-out class action lawsuits in the U.S., giving them some familiarity with the new opt-out mechanism in the Netherlands.

2. Opt-In Class Actions

Another lesson for the E.U. is that private opt-in class actions are not likely to lead to a substantial increase in private enforcement or compensation for victims.[255] However, they are likely to lead to more compensation, access to justice, and deterrence than the status quo. The Swedish experience demonstrates that opt-ins would make E.U. citizens feel more connected to their judicial systems, strengthened by a "moral" sense (*supra* at 37) that they can sue the "high and mighty" for violating their legal rights. This intangible benefit is the stuff of democracy, and it should not be lightly discounted, particularly since Europeans have recently wondered how to increase democratization within the Community. There have not been a great many opt-in cases filed in Sweden – only 8 in five years – so the E.U. could not expect a substantial increase in private enforcement. Opt-ins would be much better than representative actions, or the status quo, but they would not provide as much compensation or access as opt-outs.

Opt-in classes would be smaller than opt-out classes, and they would provide compensation to fewer victims. There may be "economic, psychological or social barriers" that discourage a class member from opting in.[256] The defendant "may escape the full consequences of its conduct" if all of the class members do not opt in. Experience in Europe has shown that the participation rate in opt-in cases has been less than 1 percent, whereas the participation rate in opt-out cases has been 97 percent to 100 percent.[257] Therefore, the Commission's expectations of an increase in private enforcement and "access to justice for low-value small claims"[258] would not materialize with an opt-in device. The Swedish experience does reflect opt-in participation rates that are much higher than the traditional 1 percent. In the *De Geer* case, 7,000 out of 20,000 potential class members opted in for a 35 percent opt-in rate, *infra* at

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[255] Shapiro, David, *David Shapiro: EU needs a class action of its own,* Legal Week, April 24, 2008, *available at* http://www.legalweek.com/Navigation/35/Articles/1118227/David+Shapiro+EU+needs+a+class+action+of+its+own.html (last viewed on May 28, 2008) (hereinafter "Shapiro") ("… every expert and honest practitioner in the field knows that the opt-in class is totally incapable of providing effective collective redress").

[256] Leuven Study, 289.

[257] BEUC, 6 ("Recent experience in Europe of the opt-out procedure in consumer claims showed that the rate of participation is very law (less than 1%). On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal).").

[258] White Paper Impact Study, 41 (expressing hope that opt-ins would "make recovery of scattered damage more likely"); *id.* at 42 (expecting increase in access to justice for small claims).

96. In the *Åberg* case, 500 out of 700 potential class members opted in, *infra* at 91, for a 71 percent participation rate. It may be that Swedish culture encourages class members to opt-in and that word-of-mouth spreads quickly. Or it may be that intense media interest over these first cases contributed to a much higher participation rate than we will see in subsequent years. At some point, the Swedish media is likely to get *grupptalan* fatigue and lose interest in reporting on these class actions.

The Swedish experience demonstrates that opt-ins are not likely to generate a large number of lawsuits or lead to the "blackmail" of corporate defendants. This is because the opt-in device is not convenient. Because opt-outs are much more convenient than opt-ins, Swedish investors with claims against Royal Dutch Shell participated in the opt-out class action settlement in the Netherlands, as discussed *infra* at 104, rather than file a similar lawsuit in Sweden. No such case was brought in Sweden. In general, relatively few opt-in class actions have been brought in Sweden. Eight cases in five years is not much. In some of the Swedish opt-in cases, the lawsuits were dismissed within months before notice was ever sent to potential class members. Few victims participated. For instance, the private opt-in class action filed by Mr. Broberg and two others against a Swedish newspaper did not result in any additional people opting into the action, and it was dismissed only two months later, as discussed *infra* at 93. There was no blackmail of the corporate defendant in *Broberg*. Mr. Broberg appealed the dismissal of his case, and he lost there too. Similarly, in the *Devitor* case, no additional parties opted into the case and it was dismissed five months later, as discussed *infra* at 93 - 95. The first class action ever filed in Sweden, *Åberg v. Elefterios Kefalas* (*infra* at 91), took four years to finally settle for only 70,000 euros, not a large sum. There is no evidence of any defendant paying large sums of money to settle a Swedish class action as the result of blackmail.

The Commission reported that a Swedish private opt-in class action against a life insurance company, Skandia, was a "representative action" rather than a private opt-in class action.[259] This was incorrect. The case was filed by an organization, Grupptalan Mot Skandia, formed expressly for the purpose of the litigation. This would have been impossible under the Commission's proposal for a "representative action" in which an organization would have to be "officially designated" or "certified" in advance, *supra* at 17 - 21. In Sweden, no such designation or certification is necessary for an organization to file suit. Parties may form a legal

[259] White Paper Impact Study, 271 n. 441 and accompanying text.

entity one day and then file a lawsuit on the next day. What happened in the Swedish Skandia case is even more striking. After the lawsuit had been filed by Grupptalan Mot Skandia, an individual with a legal claim against Skandia transferred his legal claim to Grupptalan Mot Skandia. As described *infra* at 92 - 93, the case then became a Swedish private opt-in class action rather than a Swedish representative action. The organization served the same purpose as any individual who might have held a legal claim, filed the lawsuit, and served the role as lead plaintiff. Hence, the example of Sweden is much more liberal than the model recommended by the Commission for two reasons – one, it allows organizations created for the sole purpose of litigation to file a class action and, two, it allows an organization to serve as the lead plaintiff (with a claim for damages of its own) in a private opt-in class action. Under the Commission's definition, an organization filing a representative action cannot hold a legal claim of its own and it cannot belong to the class: "[r]epresentative actions also depart from traditional litigation as the representative is acting only on behalf of a group, without being a member of that group."[260] Therefore, the Swedish model is actually a private opt-in class action, and it does not support the "representative action" recommended by the Commission.

Further, opt-ins might be more expensive than opt-outs at the commencement of litigation. In the opt-in model recommended by the Commission, plaintiffs would have to pay up-front costs for notice to inform potential class members of the lawsuit.[261] The cost of paying notice in an opt-out case might be lower, according to the Leuven Study, because opt-out notice would be sent later when "a settlement has been proposed or damages are being assessed" so the plaintiff would not have to bear as great an expense.[262] The Swedish model eliminates this discrepancy in costs by requiring the court to either issue the notice or ask the plaintiff to issue the notice and get reimbursed from public funds, as described *supra* at 30. The Swedish method fully relieves the plaintiff of the cost of notice.

In the White Paper, the Commission feared that opt-out class actions – but not opt-in class actions – would lead to the filing of "frivolous" litigation. Litigation without merit may be filed in any form, but it is subject to the same rules for dismissal as traditional litigation. The opt-in mechanism neither discourages nor encourages lawsuits without merit. In Sweden, the

[260] White Paper Impact Study, 273.

[261] Leuven Study, 287 – 288.

[262] Leuven Study, 288.

Lindberg opt-in class action was dismissed for lack of precision in damages because it did not clarify the amount of damages or to whom they should be paid, *infra* at 97 - 98. The complaint filed in the Stockholm District Court did not cite any Swedish law, statutory code, or legal cause of action. The only legal foundation for the lawsuit, cited in the complaint, was a reference to the U.N. Declaration of Human Rights and the European Convention on Fundamental Rights. The plaintiffs alleged that when they were children, they were wrongly taken from their parental homes and placed into foster care. No other legal cause of action was cited. The plaintiff requested 1 million kronor per person per year for each class member. The defendants included 7 government municipalities. This may or may not have been a "frivolous" lawsuit, because there was some basis in international law, but the lawsuit did not satisfy Swedish legal standards, and it was dismissed. Similarly, in Norway, there were reports that a similar private opt-in class action on behalf of children placed into foster homes might be filed against state entities. The expectation is that, if filed, it would soon be dismissed, *infra* at 99.

In sum, the lessons from Sweden and Norway are that private opt-in class actions are not especially immune from lawsuits without a strong legal basis. The court system will, however, deal with such lawsuits expeditiously by dismissing them when appropriate, as in the *Lindberg* and *Devitor* class actions, thereby discounting the notion that class actions lead to "blackmail" and unfair settlements. There is no evidence that Swedish or Norwegian municipalities have felt pressured by foster care class actions. Indeed, the Swedish experience with opt-in class actions shows that "legal blackmail" has not occurred.[263] Swedish corporate defendants have been clever at avoiding legal liability by successfully arguing that certain class actions did not meet the class action prerequisites set out in the Sweden Group Proceedings Act § 8, *infra* at 93 (*Broberg* case) and 93 - 95 (*Devitor* case). In the *Skandia* case, 15,000 individuals participated in the litigation but the corporate defendant, a life insurance company, was somehow able to convince them to withdraw the litigation and submit instead to arbitration, as discussed *infra* at 92 - 93. The matter is still not resolved.

[263] Leuven Study, 267 ("Experience from countries such as Sweden, Canada and Australia shows that the fears of legal blackmail and a resulting floodgate effect on the courts do not seem to have occurred").

3. Representative Action

The Swedish experience demonstrates that a "representative action" would have little or no impact. In Sweden, not a single representative action has been filed in the past five years.[264] Because Sweden has more liberal rules on what kind of organization may file a "representative action" (*supra* at 31 - 33) than the strict requirements in the Commission's proposal, even fewer cases would be filed under the Commission's White Paper proposal. Moreover, the Commission's proposal would force additional obligations upon an organization bringing a "representative action," e.g. requiring the organization to review claims and distribute damages, *supra* at 17 - 21, which are not required in Sweden. This would not be a good model for increasing private enforcement. However, it might be useful for increasing public enforcement, because the Danish Consumer Ombudsman has already used the threat of bringing opt-out representative actions to encourage defendants to settle in three different cases, *infra* at 100 - 101, all prior to the time when the law permitting opt-out representative actions actually took effect.

In Sweden, "[i]t is possible to set up a new organisation with just a small number of members one day and commence proceeding the next day, provided that the economy is in good order and that the court thinks that the organisations is a good representative of the group. The organisation may claim damages not only for the members of the organisation but also for all members of the group concerned."[265] This would not be possible under the Commission's proposal for a representative action. The Commission would limit representative actions to those brought by organizations that have been "officially designated" or previously "certified." The net result is that very few representative actions would be brought by private organization under the Commission's proposal. Even under the more liberal rules for standing in Sweden, there have been no representative actions filed in the past five years, *supra* 33 n.137 and accompanying text.

The Commission's "representative action" proposal would require an association to serve as a claims administrator on behalf of the victims whom it represents. Its own members might be easy to identify. However, reaching other victims would take some effort, as in any opt-in or opt-out class action, via notice and adequate communications. The association in a "representative action" would have to set up a claims procedure, notify membership at the

[264] *Supra* at 31; Lindblom National Report, 34 ("public and organization group actions have yet to 'take off'").

[265] Lindblom Group Proceedings § 2.3.

commencement and termination of a lawsuit, receive claims, appraise claims and proof, and distribute damages. The Commission's recommendation would require associations to internalize these costs or impose them upon the association's members. The Commission's proposal would disincentive associations from filing representative actions.

The activities of a claims administrator are way beyond the scope of an ordinary association. In fact, such activities constitute a separate industry in Canada and the U.S. where specialized companies[266] are paid to distribute notice, receive claims, and distribute payments to class members. In the Netherlands, in the Shell settlement, similar activities will be handled by a specialized claims administrator who will be paid for these duties under the terms of the opt-out settlement agreement. The Shell administrator will have to respond to telephone, email, and mail inquiries; maintain a website; receive claim forms, appraise claims, and defend its decisions in a court if challenged; distribute damages; and perform numerous other duties.[267]

One of the lessons that may be learned from legislation in the studied national models is that truly *private* enforcement should be made possible. The Dutch law allows purely private parties to settle an opt-out class action. The plaintiff may be a Special Purpose Vehicle set up expressly for the purpose of the litigation. Or it may be a private individual. Either one may be represented by private lawyers. The same applies to private opt-in class actions in Sweden, Denmark, and Norway. Norway further allows opt-out class actions to be filed by private individuals. However, the Commission's representative action model would be prosecuted by a public body or an entity that has been "officially designated" or "certified" in accordance with criteria set by national statute, as discussed *supra* at 17 - 21. This mechanism would do little to increase *private* enforcement because the cases would be filed by public or quasi-public entities, stealing the wind from the sails of private enforcement.

The Swedish and Dutch models are preferable because they allow claimants to set up a legal entity for the purpose of litigation without government approval or "certification." An

[266] The names of just a few of these companies include The Garden City Group, Inc. (www.gardencitygroup.com); Rust Consulting, Inc. (www.rustconsulting.com), Deloitte & Touche LLP (www.deloitte.com); *see also* Deloitte & Touche LLP –Canada, *Class action administrators streamline complex processes, available at* http://www.deloitte.com/dtt/article/0,1002,cid%253D79548,00.html (last viewed on May 24, 2008) (.pdf on file with author) ("According to Eric, an increasing number of defendants and corporate clients are recognizing that the claims process is outside their area of expertise. Rather than redirect valuable internal resources, many are engaging qualified class action administrators. The more complex the case, adds Eric, the greater the need").

[267] Shell Settlement Agreement, 14 – 29; *id.* at 45 - 46 (listing all Administrative Expenses).

organization may be set up for litigation one day and then be used to file (in Sweden) or settle (in the Netherlands) a class action the next day. In Sweden, pre-standing consumer associations have not brought any "representative actions" in the past five years. When organizations did bring a class action in Sweden, as in Grupptalan mot Skandia, the cases were brought by organizations formed especially for the purpose of litigation. The Netherlands permits Special Purpose Vehicles established for the purpose of litigation to settle opt-out class actions. In all of these cases, lawsuits have not been handled by pre-existing consumer associations but rather by organizations formed especially for the purpose of litigation. The Commission's White Paper would deny such an option.

To the extent the Commission wishes to increase *public* enforcement, then the "representative action" may be a useful model. Public entities, such as consumer ombudsmen, would be able to use a "representative action" to obtain compensation for victims. The Danish Consumer Ombudsman was able to use the threat of an opt-out public action to persuade defendants to enter into three different settlements, *infra* at 100. It has, therefore, been useful in the Danish experience for promoting public enforcement of competition laws to recover compensation for private individuals. It is not known, however, to what extent the Danish Consumer Ombudsman's settlements were successfully distributed to victims. The cost of reviewing claims and making disbursements, of course, would be borne in such a case by the public rather than internalized among the litigating parties.

B. Single Overall Framework Instead of Separate Tracks

Rather than have one track for collective redress in competition and separate tracks for consumer protection, gender discrimination, environmental protection, and other issues, it would be preferable for the Commission to propose a single overall framework for collective redress. The national models discussed in this thesis demonstrate that Danish, Norwegian, Dutch, and Swedish class actions may be used to enforce any substantive law, as noted *supra* at 100 (Denmark), 38 (Norway), 53 (Netherlands), and at 29 (Sweden).[268] They are not restricted to competition law or consumer protection. The Community should follow the same model.

[268] Annexes A – D show that class actions have been used for a wide variety of cases in various areas of law. *See also* Leuven Study, 279 ("In Sweden, all claims that can be brought in a civil procedure, and especially labour laws, environmental laws and consumer laws, including statutory violations of consumer protection laws, an be brought under the collective action").

A single overall framework for collective redress would provide greater uniformity in the procedural rules of Member States.[269] A single treaty basis would make it possible from a legal perspective. From an institutional perspective, the DG for Freedom, Security, and Justice could lead such an effort under Article 65 E.C. If, for whatever reason, the Commission continues to pursue a separate-track approach, then there would be ample authority under the treaties to legislate class actions in several different tracks, as shown *infra* at 118 in Annex G. We will now turn to Article 65 E.C. and alternative treaty bases that would support a single overall framework.

1. Article 65(c) E.C.

The third pillar of the E.C. Treaty provides a sound legal basis for class actions as a procedural mechanism for enforcing all areas of substantive law. The Council has a mandatory obligation to establish measures in the field of judicial cooperation in civil matters.[270] The DG for Justice, Freedom, and Security is charged with "the establishment of a genuine European area of justice in civil and commercial matters" and could take the lead in proposing a single overall framework for class actions.[271] This DG is tasked with "proposing minimum procedural standards." The legal Treaty basis for a single overall framework could be Article 65(c) E.C. which supports harmonization of national rules on civil procedure:

> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include…eliminating the obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.[272]

Building on this Article, the European Parliament's Committee on Legal Affairs has noted that civil procedure reforms could be based upon "Article 65, which enables the European Union to eliminate obstacles to the good functioning of proceedings in civil matters having

[269] Tzankova Interview.

[270] Article 61(c) E.C. ("In order to establish progressively an area of freedom, security and justice, the Council shall adopt … measures in the field of judicial cooperation in civil matters as provided for in Article 65").

[271] D-G Justice Mission Statement with reference to this and subsequent sentence.

[272] Art. 65(c) E.C.; *see also* Peers, 355 (Treaty of Amsterdam transferred civil cooperation from third pillar to first pillar, effective May 1, 1999).

cross-border implications."[273] Article 65(c) E.C. has so far been under-utilized,[274] but legislation on a single overall framework of collective redress would fit under this Article. The powers granted to the Community under Article 65(c) were added by the Treaty of Amsterdam and took effect fairly recently in May 1999.[275] The harmonization of civil procedures may be the next wave of legislation, particularly since broad fields of civil procedure have been largely unaddressed.[276]

The field of collective redress is in desperate need of harmonization. Only half the Member States provide collective redress, leaving residents of other Member States as the losers in an accident-of-birth "passport lottery."[277] It would be appropriate to legislate class actions for the whole E.U. because, as the national models demonstrate, such reform would otherwise happen gradually and with differing results. E.U. citizens will suffer from indirect discrimination, legal uncertainty, and differing standards if the procedural rules of one nation permit opt-out class action settlements, i.e., the Netherlands, while others do not. The Netherlands is likely to become a magnet for the settlement of opt-out class actions, consisting of class members spread across Europe, as in the Shell settlement, *infra* at 103 - 107, simply because Europeans have nowhere else to go. Due to these discrepancies, the White Paper noted that harmonization would be preferable:

> There is no indication … that any sizeable number of other Member States is likely to introduce, in the foreseeable future, legislative changes that ensure an effective legal framework for damages actions of victims of antitrust infringements. In addition, isolated initiatives can not ensure that a coherent level of effective minimum protection of the victims' entitlement to damages is achieved throughout Europe. Finally, the interaction of measures facilitating actions for damages with various aspects of public enforcement needs to be addressed, and individual action by

[273] Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the Green Paper: Damages actions for breach of the EC antitrust rules, February 27, 2007, ¶ C.

[274] Peers, 379 ("The lack of accompanying positive legal integration has caused concern among those who argue for greater similarity in national civil procedure laws …").

[275] Peers, 355.

[276] Peers, 362 ("… the EC has not yet addressed the question of adopting minimum standards on civil procedure more broadly, still less harmonization of civil procedure").

[277] Kuneva Speech, 9 ("Almost half of the Member States have at present systems of collective redress – the rest do not … This kind of 'passport lottery' seems to me to be a clear sign of inequity and inefficiency across the EU").

> Member States is not sufficiently capable of achieving this in any consistent manner.[278]

The same logic that motivated the White Paper to propose "collective redress" for competition law would support class actions for the enforcement of other substantive laws. Otherwise, left to their own devices, Member States will continue to legislate class actions along different lines, as shown by the examples of the Netherlands, Denmark, Sweden, and also Norway. The same logic of increasing access to justice applies equally to competition law violations and other infringements: "competition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the administration of justice."[279]

The Tampere European Council in October 1999 adopted the goal of establishing "special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims …"[280] Class actions would meet this goal. The Council, via the Justice and Home Affairs Council, is "formally charged with adopting the measures" in Title IV E.C, and COREPER sets the agenda for Justice and Home Affairs Council meetings.[281] These institutions should place class actions on the Council's agenda. There is no "deadline" for enforcing Art. 65(c) E.C. but measures may be enacted through the co-decision procedure.[282] The unanimous vote of the Council is not required – just a qualified majority – to harmonize the civil procedure rules of Member States.[283] The Commission has a monopoly on proposals in this region,[284] so it would be the Commission's initiative to propose class actions on the basis of Art. 65 E.C. A Member State – particularly, Sweden, Denmark, or the Netherlands – could also request that the Commission "submit a proposal to the Council" regarding the harmonization of civil procedure.[285]

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[278] White Paper Staff Working Paper, 9.

[279] White Paper Staff Working Paper, 16.

[280] Peers, 357.

[281] Craig, 245.

[282] Peers, 356; Art. 67(5) E.C.

[283] Art. 67(5) E.C.; Art. 251(2) E.C.; *see also* Peers, 356; Craig, 242.

[284] Peers, 356; Art. 251(2) E.C. ("The Commission shall submit a proposal to the European Parliament and the Council").

[285] Art. 67(2) E.C.; *see also* Craig, 242.

Even though DG Competition has started a separate track for collective redress in competition, it might clarify in its next proposal that collective redress– opt-in, opt-out, or whichever mechanism is chosen – should be applicable to the enforcement of any substantive law. Such a proposal would match the ambitions of the Tampere Council. Thus far, the Commission's efforts to fulfill the Tampere Council goals have reached into softer measures such as the enforcement and recognition of judgments,[286] legal aid in cross-border cases, alternative dispute resolution,[287] mediation,[288] service of documents, collection of evidence,[289] maintenance payments among divorced persons,[290] and family law issues.[291] Class actions have not arisen in the Commission's Article 65 E.C. proposals, perhaps because they are so new to Member States. A new regulation that takes effect in January 2009 will require Member States to make available specified claim forms and an expedited process for "the speeding up of small claims litigation"[292] for claims less than 2,000 euros, but this is a small measure compared to the comprehensive access to justice that a single overall framework would provide.

The Commission and Council might require the availability of an opt-in or opt-out device as a harmonizing measure for all Member States under Article 65(c) E.C. It appears that, so far, the Council has only been willing to adopt measures limited to cross-border disputes.[293] Therefore, to ensure passage, the Commission might require the availability of class actions for litigations that have a "community dimension," as in the EC Merger Regulation[294] or which

[286] Peers, 357 - 359.

[287] Communication from the Commission on "widening consumer access to alternative dispute resolution" (COM(2001) 161 final).

[288] Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2008) 131 final).

[289] Peers, 361.

[290] Peers, 364.

[291] Peers, 370 - 371.

[292] Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter "Small Claims Regulation"), Preamble ¶ 6 ("On 20 December 2002, the Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation. The Green Paper launched a consultation on measures concerning the simplification and the speeding up of small claims litigation").

[293] Peers, 365 – 366.

[294] Council Regulation (EC) No. 139 /2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter "EC Merger Regulation"), Art. 1, § 2 ("A concentration has a community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is

otherwise have links to more than one Member State. Accordingly, class actions might apply to cases in which "at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised."[295] Such a rule would be imminently workable. The U.S. Congress recently adopted such a rule for U.S. class actions, requiring all claims worth $5 million or more and involving a plaintiff in one state and a defendant in another state to be heard in federal – not state – court for all proceedings.[296] In other words, large cases with inter-state parties must be heard in federal court in the United States. A similar rule could apply in the Community, requiring Member States to permit class actions in "cross-border case[s]"[297] where the plaintiffs are in one Member State and the defendant is in another Member State. This would fit with Article 65(c) E.C.'s expressly written limitation to matters with "cross-border implications." However, others believe that Article 65(c) E.C. legislation may apply to purely domestic matters even when there is no cross-border element.[298] If that were true, then no such "community dimension" would be required.

2. Article 293 E.C.

As an alternative legal basis, under Article 293 E.C., Member States may "enter into negotiations with each other with a view to securing for the benefit of their nationals … the

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more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State"); *id.* at Art. 1, § 3.

[295] Small Claims Regulation, Art. 3(1).

[296] U.S. Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711 – 1715 (hereinafter "CAFA").

[297] Small Claims Regulation, Art. 3(1).

[298] Report of the European Parliament Committee on Legal Affairs and the Internal Market on the prospects for approximating civil procedural law in the European Union (COM(2002) 746 + COM(2002) 654 – C5-0201/2003 – 2003/2087(INI)) (A5-0041/2004 final) (hereinafter "EP Civil Procedure Report"), 12 ("Some further comments should be made about the European order for payment. The first question to answer is whether the procedure should be confined to cross-border cases or could also be applied to litigation between parties domiciled in the same country. Bearing in mind that not all Member States have a special procedure of this type in their procedural law and those procedures that do exist differ substantially, it would be desirable, in order to avoid unequal treatment of creditors in different categories (cross-border and national creditors), for parties to have the option of using the order in domestic litigation as well. The European order for payment should relate solely to a pecuniary obligation so as to ensure that the procedure will be sufficiently swift"); *see also* Opinion of Advocate General Leger delivered on 14 December 2004, Case C-281/02, *Owusu v. N.B. Jackson*, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002C0281:EN:HTML (last viewed on May 20, 2008) (hereinafter "AG Owusu Opinion"), ¶ 195 (expressing opinion that it is not necessary for legislative measures passed under Arts. 61(c) and 65 to be limited to factual situations that are "necessarily … linked with two or more Member States"); *id.* at ¶ 202 ("To make the applicability of the jurisdictional rule in Article 2 of that regulation [i.e., Regulation No. 44/2001] conditional upon the existence, in every dispute, of an actual and sufficient link with two or more Member states would be liable … to make the boundaries of the field of application of that article particularly uncertain and subject to chance. Such an interpretation … would be contrary to the objective of the regulation, which is to unify the conflict of jurisdiction rules and simplify the recognition and enforcement of judgments in order to eliminate obstacles to the functioning of the internal market which specially derive from differences between the national legislations in that area").

enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals." In the past, judicial cooperation in civil matters was often harmonized through Art. 293 E.C.[299] If Dutch citizens have the right to settle disputes in an opt-out class action settlement filed in the Court of Appeals of Amsterdam, then perhaps Belgian citizens should have the same procedural rights in Belgian court. If Swedish citizens can file an opt-in class action in a Swedish district court, then perhaps Germans should have the same right to file an opt-in class action in a German court. The disadvantage to seeking reform under Article 293 E.C. is that it would require unanimity among the Member States. Unanimous acceptance seems unlikely. Even though class actions are gathering wider and wider acceptance,[300] they are only allowed in a minority of Member States and, as shown in this thesis, they have engendered passionate opposition from the business industry, except for in the Netherlands where the pharmaceutical and insurance industries requested an opt-out settlement device, *supra* at 53.

3. Article 308

The European Parliament's Committee on Legal Affairs has noted that civil procedure reforms could be based upon Articles 83, 95, 153, or 308.[301] Article 83 E.C. would not be useful for a single overall framework because it only applies to implementations of Articles 81 and 82 E.C., as DG Competition is attempting to do now with its White Paper recommendations. Article 95 E.C. might provide an adequate legal basis for a single overall framework,[302] except that it does not apply to measures regarding employment or free movement of persons.[303] It might be used to create a single framework for collective redress on all other matters. Article 153 E.C. applies to consumer protection, as noted *infra,* but not other matters. Article 308 would be appropriate for a single overall framework, with no exceptions, if "the Treaty has not provided the necessary powers." This might be the case, e.g., if Article 65 E.C. is limited to

[299] EP Civil Procedure Report.

[300] Class actions are now permitted in Bulgaria, a fairly new Member State. Interview with Antonina Bakarjieva – Engelbrekt, Stockholm University Faculty of Law, in Stockholm, Sweden (May 21, 2008) (notes on file with author).

[301] Motion for a European Parliament Resolution on the Green Paper on Damages actions for breach of the EC antitrust rules, ¶ E.

[302] Art. 95(1) ("…the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall … adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market").

[303] Art. 95(2) ("Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons").

cross-border cases, then Article 308 might provide the legal justification for legislation requiring class actions in purely domestic matters to enforce any substantive law. Working hand-in-hand, then, Article 65(c) E.C. and Article 308 E.C. might provide the legal basis for legislating class actions in cross-border cases and purely domestic cases, respectively.

4. ECJ Decision

A final method by which class actions could become a part of civil procedure across the entire E.U., in one fell swoop, is through an Article 234 E.C. preliminary ruling from the European Court of Justice (hereinafter "ECJ"). It is possible for the ECJ to find that class actions should be required in every Member State.[304] It is unlikely, however, that the Court would have the opportunity to rule on such a matter because the issue would first have to be placed squarely before it.[305] This might happen if a court in Sweden or the Netherlands were to ask the ECJ for a preliminary ruling regarding the legality or appropriateness of the class action device. A precise question would have to be formulated in order to achieve the desired ruling. Swedish lawyers might be in the best position to request a preliminary ruling in the course of *grupptalan* proceedings in a Swedish district court or *tingsrätt*.[306]

A Dutch lawyer might ask the Amsterdam Court of Appeals to request an Article 234 E.C. preliminary ruling as to whether the opt-out mechanism satisfies due process rights, respects the right to a "day in court", and/or complies with other rights granted under the treaties. A member of the class in the Royal Dutch Shell settlement might include with the "defense" that he submits to the Amsterdam Court of Appeals[307] a request that the court seek an Article 234 E.C. preliminary ruling. A Dutch lawyer or objector could make such a request during the final hearing on November 20, 2008 or by submitting objections by the deadline (roughly, October 1,

[304] Interview with Justice Koen Lenaerts, Fulbright program luncheon provided by Luxembourg Ministry of Education, Luxembourg, March 13, 2008 (hereinafter "Lenaerts Interview"); *see* Peers, 374 ("Civil procedural rules affecting references to the Court from national courts under Article 234 EC are within the scope of Community law, and national rules affecting access to remedies for breach of EC law are governed by the 'equal remedies' and 'effective remedies' rules created by the Court of Justice"); *see* Peers, 374 ("Civil procedural rules affecting references to the Court from national courts under Article 234 EC are within the scope of Community law, and national rules affecting access to remedies for breach of EC law are governed by the 'equal remedies' and 'effective remedies' rules created by the Court of Justice").

[305] Lenaerts Interview.

[306] Danish lawyers could not raise such an issue because Denmark "is fully excluded from civil law legislation" in the E.U. by treaty agreement. Peers, 373 n.119 and accompanying text. Norway is outside the E.U. so could also not raise such an issue.

[307] Shell Settlement Agreement, 29, 31.

2008) for the filing of objections to the proposed settlement.[308] This would be appropriate since commentators, and now the Commission, have expressed the view that the opt-out mechanism might violate fundamental rights, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6.[309] It has been said that opt-out class actions violate Article 6 ("right to a fair trial") which reads as follows:

> In the determination of his ***civil rights*** and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[310]

Because Article 6 applies seems to apply to criminal trials, rather than civil litigation, it is hard to comprehend how it could pose an obstacle to opt-outs in civil proceedings. All aspects of Article 6 and, in particular, the remaining portions (Article 6(2), Article 6(3)(a) – (e)) speak only about the rights of a criminal defendant, lending one to believe that the brief reference to "civil rights" also pertains only to criminal proceedings. It is hard to imagine how publicity at trial would impair the rights of a plaintiff suing a corporate defendant in civil litigation. Nevertheless, opponents have argued that class actions would violate Article 6 on numerous occasions and, now, in the E.U. debate. Therefore, it might be appropriate for a Dutch lawyer to ask the Amsterdam Court of Appeals to request a preliminary ruling to adjudge whether the opt-out device is legal under Article 6 of the European Convention on Human Rights or other such instruments. It may be that the ECJ would refuse to hear such a case since the European Court of Human Rights in Strasbourg has jurisdiction to hear cases under the European Convention on Human Rights. However, an appropriately worded request might fit within the ECJ's jurisdiction The results could be astounding – class actions across the E.U. by order of the ECJ.

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[308] Shell Settlement Agreement, 50 ("must file any defenses … at least six (6) weeks prior to the hearing date").

[309] White Paper Impact Study, 288 n.458 and accompanying text; Email from Torbjørn Hagerup Nagelhus, Assistant Judge, Nedre Telemark Tingrett, Skien, Norway to Robert Gaudet, June 1, 2008 (on file with author) (noting that Article 6 was an issue in both the Swedish and Norwegian national debates over opt-outs).

[310] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950 (hereinafter "European Convention on Human Rights"), Art. 6(1) (emphasis added).

C. Flexibility of E.U. Legal Traditions

One of the lessons is that E.U. legal traditions are flexible enough to accept the class action device.[311] The national models of Sweden, Denmark, Norway,[312] and the Netherlands demonstrate that class actions may be readily adopted in countries that belong to different legal family backgrounds. Class actions have also gained acceptance in the European popular culture. An astounding 76 percent of Europeans who participated in a survey indicated that they would be more likely to seek redress for consumer protection if they would be able to do so in an aggregated manner with other consumers.[313] In the Netherlands, investors from all over Europe – i.e., Germany, Italy, Netherlands, Sweden, France, Belgium, Norway and other Member States – have participated in the opt-out settlement against Royal Dutch Shell.[314] The settlement has involved at least six Member States. At least two more Member States (Denmark and Bulgaria) allow class action litigation.[315] There are no legal obstacles to accepting class actions. In other words, the popular culture of at least 8 Member States has clearly accepted class actions. It may be that there is a disjunction between the popular desire of E.U. citizens for access to justice and the pro-industry political stance that has taken over Brussels.

For the E.U. as a whole, class actions provide a mechanism to exercise otherwise dormant rights. In Sweden, class members have spoken of class actions as a leveling force that entitle them to sue the "high and mighty" corporate defendants and hold them accountable for

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[311] *See generally* White Paper Staff Working Paper, 11 (class actions are now part of "European legal cultures and traditions of the 27 Member States"); *contra* Lindblom National Report, 32 (noting that opponents of Sweden's class action bill had argued "[t]here is potential harm to group members: they could, all unawares, be deprived of the option to take independent legal action; it is also constitutionally unacceptable that judgments in group actions will be binding on group members"); *id.* ("[t]raditional, individualist Swedish tort law may be undermined by demands for simplification of rules on causation and greater use of standardized calculations and radical damages awards to group members").

[312] "…Norwegian legal tradition is based on a fairly pragmatic view of the law. It is built upon the view that the law must develop in accordance with the changes in society. If a precedent is based on values and legal points of view that are no longer current, the Supreme Court will sometimes choose to diverge from it." Norwegian National Report, 2.

[313] Leuven Study, 263 ("[Euro Barometer survey in 2004 revealed] seventy-six percent of those questioned would be more likely to pursue redress for an injury if they could do so in conjunction with other consumers. The 2006 Euro Barometer confirmed these findings: seventy-four percent of those polled in twenty-five Member States now stated that they would be more willing to defend their rights in court if they could join with other consumers").

[314] Shell April Press Release.

[315] Interview with Antonina Bakarjieva – Engelbrekt, Stockholm University Faculty of Law, in Stockholm, Sweden (May 21, 2008) (notes on file with author) (hereinafter "Engelbrekt Interview") (noting that a fairly new Member State, Bulgaria, now allows class actions).

their wrongs.[316] Class actions in Sweden, Norway, Denmark, and the Netherlands fulfill the E.U. Treaty's promise of increasing access to justice. Prof. Lindblom has written that it is "inarguable" that access to justice has improved in Sweden: "A single successful group action can have considerable *reparative* impact and the mechanism inarguably improves access to justice in Swedish society. I have been told many times that the alternative to group action in several relevant cases would have been no action at all."[317] The Danish law similarly sought to increase "[a]ccess to the courts" for individual plaintiffs with small claims.[318] Nevertheless, some Europeans regularly assert that class actions do not fit with European laws. This is curious since class actions are just a procedural mechanism, and they do not change underlying substantive laws.

To the extent it is thought that class actions are foreign to the European legal tradition, critics must also accept that E.U. legal traditions have the capacity for reform and that Europe itself may be changing.[319] Ten years ago, there were no private class actions in Europe. Now, class actions exist in several European nations as a means for invigorating private law enforcement and access to monetary compensation. The Commission has been slow to accept these changes.[320]

For Sweden, at least, the new law on class actions has been viewed as "an initial breakthrough of a full-scale law on group actions in a civil law system."[321] It is a "breakthrough" in part because it allows Swedish citizens to seek damages in general courts. Because class actions are consistent with established legal traditions, the "breakthrough" may be more political than legal. It has been argued that Swedish class actions are more consistent with traditional legal principles than representative actions to the extent that private class actions are brought by individuals who actually suffered harm, or have legal standing, whereas

[316] Lindblom National Report, 36.

[317] Lindblom National Report, 35.

[318] Danish Ministry Report, 3.

[319] Lindblom Group Proceedings, 30 ("The times they are a changing and a national reform may function as a rolling stone. It may end up with a harmonized system of group actions in the EU").

[320] White Paper Impact Study, 268 (recognizing changes but nonetheless asserting, in rest of document, that the opt-out mechanism and other features of European class actions are somehow inconsistent with European culture) ("The European legal landscape has shifted in the last few years so that forms of group litigation [i.e., class actions] are"). If the European legal landscape has truly shifted, then why does the White Paper Impact Study recommend such conservative proposals, e.g., the representative action and the opt-in class action?

[321] Lindblom National Report, at 29, 29 n.27, 32-33 with reference to whole paragraph.

representative actions are brought by third parties who ordinarily would not have legal standing to bring a claim. In addition, class actions are "purely *procedural*" and they do not change the underlying substantive laws on a right of action, causation, or damages. The Danish law permitting opt-ins also leaves the underlying substantive laws untouched, preserving the traditional rules on causation, burden of proof, and compensation.[322] The flexibility of these nations, then, is in adopting a procedural mechanism that makes it easier to enforce otherwise-unchanged substantive laws.

V. CONCLUSION

The E.U. debate over collective redress would benefit from a closer examination of the national models discussed in this thesis. All of the countries examined in this thesis permit class actions to enforce a variety of laws, leading us to wonder why the Commission does not propose a single overall framework for collective redress to enforce different substantive laws. Moreover, rather than reject opt-outs, the Commission should give them renewed attention, as they have resulted in enormous compensation and access to justice in the Netherlands. The Swedish example demonstrates that opt-ins might contribute to a mild increase in private enforcement but they do not provide as much access or compensation. When they were able to do so, Swedish investors joined an opt-out settlement in the Netherlands to recover from Royal Dutch Shell rather than file an opt-in class action in Sweden.

Representative actions, as recommended by the Commission, hold little promise. They would mostly constitute public or quasi-public enforcement. Although Swedish law has allowed them over the past five years, representative actions have not been brought. The Danish Consumer Ombudsman used the threat of a representative action on a few occasions, before the law even took effect, but such efforts do little to increase private enforcement, although they may lead to greater compensation. It was not intended to be a part of this research, but frequent and inaccurate references to U.S. class actions were startling in both the E.U. debate and the national debates. Therefore, serious consideration should be given to understanding the U.S. model through research funded by the Commission.

[322] "The assessment of the Standing Committee on Procedural Law of whether to introduce rules on class actions thus builds on existing substantive rules and principles regarding individual calculation of compensation for the loss suffered and of excess consideration paid, and on the unchanged continuation of applicable rules and principles concerning the burden of proof and standard of evidence." Danish Ministry Report, p. 3.

The title of this thesis, *Earth to Brussels*, is intentionally provocative. It seems that fundamental facts about class actions in the Netherlands, Norway, Denmark, Sweden, and the U.S. are not being heard. Or they are not understood. The use of different terms such as "group action" and "class action" and "collective action" for concepts that have the same meaning adds to further confusion. It is not easy. However, we have an obligation to study the details and correct our misunderstandings. If the E.U. is going to reject opt-outs or (as Commissioner Kuneva threatens) all forms of class actions, then the E.U. should do so for the right reasons. The right reasons are, unfortunately, not presented in the White Paper and its accompanying documents. They present, instead, a bundle of misconceptions, emotional feelings, and stereotypes about the opt-out mechanism. These should be examined. Otherwise, the most powerful feature of the class action, i.e., the opt-out mechanism, as proved in the Netherlands, may be denied to European citizens.

Finally, it should be remembered that the vast majority of surveyed Europeans would be more likely to seek redress if they could do so in conjunction with other consumers. The same principle likely holds for the infringement of any other substantive law. These sentiments and the high participation rates in Swedish and Dutch class actions indicate that there has been a groundswell of support for European class actions over the past several years. The experience, thus far, of the Netherlands, Denmark, Sweden, and Norway has been positive. In the eyes of some Swedes, class actions even provide a moral leveling force. Such a tool should not be left out of the hands of European citizens without good reason, careful examination, and an objective survey of what is happening in Europe and across the Atlantic.

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ANNEX A - SWEDISH CASE DESCRIPTIONS

Roughly 9 group actions have been filed over the past 5 years, and an additional dozen cases (although un-filed) have been reported in the Swedish media.[323] Non-profits have appeared, and provided support, in the 8 private opt-in class actions that have been filed in Sweden.[324] Since the devil is in the details, we will next turn to the facts of 9 private opt-in class action cases, only 8 of which were actually filed in court. Some of the original research was done in the *Stockholms Tingsräatt Archivet*, i.e., the Stockholm District Court Archives, to identify the facts in a few of these cases but further research into the Göteborg and Nacka District Courts was outside the scope of this study.

A. Bo Åberg v. Elfeterios Kefales

This was the first class action filed in Sweden under the Sweden Group Proceedings Act. The plaintiffs were passengers on Air Olympic.[325] Several hundred were left stranded in airports around Europe and had to find their own way home. Plaintiff Åberg initiated the private opt-in class action on behalf of 700 passengers. The complaint, or *Stämningsansökan,* was filed in the Stockholm District Court on March 3, 2003 and given case number T 3515-03. The named defendant was Elefterios Kefalas, represented by lawyer Thomas Lindwall. Group members received individual notification from the Court. About 500 passengers opted in. Mr. Åberg was represented by Percy Bratt and Karl Harling of Bratt & Feinsilber in Stockholm. The plaintiff's counsel had a "risk agreement," or *Avtal*, in which they would be paid twice their normal hourly rate in the event of success and half their normal hourly rate in the event of failure. The risk agreement was filed with the court on March 3, 2003 – the same day as the initial complaint.[326] On March 29, 2007, the case was transferred from Stockholm District Court to Nacka District Court, or *Nackas tingsrätt*. Before trial, the parties settled for 810,000 kronor, or 70,000 euros, and the Court confirmed the settlement in July 2007, i.e., four years after the complaint was first brought.

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[323] Lindblom National Report, 21.

[324] Lindblom National Report, 18.

[325] Lindblom National Report, 21-22 (citing to Nacka District Court, Case No. T 1281, 2004), 21 n.11, 27 with reference to the whole paragraph; *Åberg v. Elefterios Kefalas*, Case No. T 3515-03, Stockholm District Court, Docket (*Dagbok*), May 9, 2008 (on file with author) (hereinafter "Åberg Docket").

[326] Åberg Docket, Docket No. 5 (Agreement).

B. Guy Falk and Lisbeth Frost v. NCC AB

This case was filed in the Göteborg District Court.[327] Plaintiffs sued over breach of contract regarding the construction of a marina. The defendant was a Swedish construction company. Fifty-three people opted into the private class action. The case proceedings were stayed until October 2007 for settlement negotiations. Due to difficulties in receiving an electronic copy of the docket from the Göteborg District Court's Archives, more detailed information is not available for the purpose of this thesis.

C. Grupptalan mot Skandia v. Försäkringsaktiebolaget Skandia

A non-profit organization called Grupptalan Mot Skandia was formed in October 2003 to prosecute this case as a representative action.[328] On January 5, 2004, the *Stämningsansökan*, or complaint, was filed in Stockholm District Court and assigned case number T 97-04.[329] The original complaint is dated January 5, 2003, as typed into the complaint by the plaintiff's lawyers, but the court's official stamp shows that it was actually received on January 5, 2004. The complaint stated that the class included people who were saving money with Skandia Liv as of January 7, 2002. The complaint said there were 14,000 potential class members who might have an interest in the lawsuit. The type of case, or *Saken,* was listed on the court's docket as *grupptalan i form av fastställelsetalan,* or a "class action for a declaratory judgment." The complaint said the plaintiffs would later say how much money they would request. The complaint alleged that the defendant had violated Swedish law *Forsäkringsrörelselagen,* Ch. 12, § 2; Ch. 16, § 3; and Ch. 16, § 6. This law regulates the insurance industry and forbids the giving out of money from profits.

As background, the suit was brought against Skandia Liv for selling its asset management business and transferring the proceeds to its parent company, Försäkringsaktiebolaget Skandia. About 15,000 people joined the organization, Grupptalan mot Skandia. They each paid about 15 euros in dues to the organization. In all, about 200,000 euros were collected. The money was used to finance the litigation. The plaintiffs were represented by Bratt & Feinsilber in

[327] Lindblom National Report, 22 n.14 (citing Göteborg District Court, Case No. T 7211, 2003) with reference to whole paragraph.

[328] Lindblom National Report, 22 n.3, 22-23, 27 with reference to whole paragraph.

[329] *Grupptalan v. Försäkringsaktiebolaget Skandia,* Stockholm District Court, Docket Sheet, May 5, 2008, *Målnummer* T-10992-04, *Målgrupp* 10, *Måltyp* 99 (on file with author) (hereinafter "Skandia Docket").

Stockholm. A member of the board of Grupptalan Mot Skandia transferred his legal claim to the organization, thereby giving the organization standing to bring a private opt-in class action instead of a representative action. The lawsuit was transferred from the Stockholm District Court to another court by a decision made on May 24, 2004. The plaintiff voluntarily withdrew the suit after Skandia Liv and Försäkringsaktiebolaget Skandia agreed to resolve the matter in arbitration. As of December 2007, the arbitration proceedings had not been resolved.

D. Linus Broberg v. Aftonbladet Nya Medier AB

Plaintiff Broberg filed the *Stämningsansökan,* or complaint, on July 8, 2004 for a private opt-in class action against a Swedish newspaper, Aftonbladet, in the Stockholm District Court, Case No. 10992, 2004.[330] The legal cause of action was breach of contract or agreement.[331] The plaintiffs sought compensatory damages for money paid to the newspaper, Aftonbladet, to participate in an online game. They were unable to play the game due to data transmission problems on the internet. Only three names in total appear in the court docket under the heading *Aktörer* (actors): Linus Frans Oscar Broberg represented by lawyer Per-Ulrik Andersson; Andreas Johansson represented by the same lawyer; and Carl Henrik Tommy Skeppland represented by the same lawyer. Because the court dockets generally list all of the people who opt-in, it appears that this case was brought by three individuals represented by the same lawyer but that no additional individuals opted-in to the action. Otherwise, the names of the people who opted-in would have appeared in the list of *Aktörer.* The case was dismissed under the Sweden Group Proceedings Act, § 8 and the Code of Judicial Procedure, Ch. 42 in a *Slutigt beslut,* or final decision, dated September 14, 2004, only two months after the complaint had been filed. An appeal, or *Överklagande från Per-Ulrik Andersson,* was filed on October 5, 2004and it was sent to the court of appeal (*Akten exp till hovrätten*) on the same date. On November 11, 2004, the appeal came back from the court of appeal, but it is beyond the scope of this thesis to determine the outcome. It was presumably not good for the plaintiff because the Stockholm District Court docket contains no further entries.

E. Devitor Aktiebolaget v. TeliaSonera Aktiebolaget

[330] Lindblom National Report, 23, 23 n.18 with reference to whole paragraph.

[331] *Broberg v. Aftonbladet Nya Medier AB,* Stockholm District Court, Docket Sheet, May 5, 2008, *Målnummer* T-10992-04, *Målgrupp* 10, *Måltyp* 99 (on file with author) (hereinafter "Broberg Docket"). (listing the *Saken* ("type of case") as *avtalsbrott/skadestånd* ("breach of an agreement/damages")) with reference to whole paragraph.

Plaintiff limited liability company, Devitor Aktiebolaget, filed a *stämningsansökan,* or complaint, to commence a private opt-in class action on March 3, 2006 against TeliaSonera in the Stockholm District Court, or *Stockholms Tingsrätt*, where it was assigned case number T 5254, 2006.[332] The plaintiff sought compensation for the amount of money that it had been overbilled by the defendant. The *Stämningsansökan*, or complaint, did not specify the amount of damages sought on behalf of the class but said that the defendant would have to pay back an unspecified amount. The complaint said the class was very big with thousands, or hundreds of thousands, of class members because many customers of the defendant have an agreement of the same type, but that it was impossible for plaintiff to know the identity of all the potential class members. The plaintiff asked in the complaint for 300,000 kronor for itself. The complaint did not refer to any specific law that had been broken. The complaint also asked the court to approve the risk agreement, or *riskavtal*, between the plaintiff and its lawyer. The plaintiff was represented by lawyer Anders Lindow of Advokatfirmen Lindow.[333] The plaintiff alleged that the defendant had over-billed from the agreed rate for night-time cellular phone minutes.

The defendant was represented by lawyers Claes Lundblad and Robin Oldenstam of Mannheimer Swartling. On March 28, 2006, lawyer Robin Oldenstam on behalf of the defendant submitted a document to the court in which it was claimed that the plaintiff, Devitor, had used the rebate system improperly. Oldenstam also claimed, on behalf of TeliaSonera, that Devitor would not be a good representative for the class action. The Court instructed the plaintiff to define the members of the group, but the plaintiff failed to do so. On August 4, 2006, the court issued a *Slutligt Besult,* or order closing the case, in which the lawsuit was dismissed because the plaintiff did not meet the requirements of the Sweden Group Proceedings Act, § 8, ¶ 4 which states: "a class action may only be considered if…the class, taking into consideration its size, ambit and otherwise is appropriately defined."[334] Under the Sweden Group Proceedings Act, § 9, the plaintiff is required to give certain details about the class in the initial complaint (*stämning* or "summons"):

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[332] Lindblom National Report, 24, 24 n. 21 with reference to whole paragraph; *Devitor Aktiebolaget v. TeliaSonera Sverige Aktiebolag,* Case No. T-5254-06, Stockholm District Court*,* Docket Sheet, May 5, 2008 (on file with author) (hereinafter "Devitor Docket") with reference to this whole paragraph and subsequent paragraph.

[333] Devitor Docket, 2.

[334] Devitor Docket, Docket No. 40 (Decision (*Slutigt Beslut*)).

> An application for a summons shall, in addition to the provisions of Chapter 42, Section 2 of the Code of Judicial Procedure, contain details concerning
>
> 1. the group to which the action relates,
>
> 2. the circumstances that are common or similar for the claims of the members of the group,
>
> 3. the circumstances known to the plaintiff that are important for the consideration of only some of the claims of the members of the group, and
>
> 4. other circumstances that are important for the issue of whether the claims should be processed as group proceedings.
>
> The plaintiff shall state in the application the names and addresses of all members of the group. Such details may be omitted if they are not necessary for processing the case. The plaintiff shall also provide details of circumstances that are otherwise important for notifications to the members of the group…

The case was dismissed, only 5 months after the case had been filed, because the plaintiff failed to meet these requirements in his complaint. On August 24, 2006, the plaintiff appealed the order dismissing the case. The court docket refers to an item dated September 27, 2006 titled *Inkom Protokoll mål nr Ö* 6868-06 *från Svea hovrätt*, in reference to the court of appeals, but it is beyond the scope of this thesis to recover this decision from the appeals court. It must have resolved the case because no further entries appear on the Stockholm District Court docket sheet.

F. Pär Wihlborg v. The Swedish State Through the Chancellor of Justice

On November 30, 2005, Plaintiff Pär Wihlborg filed a private opt-in class action in the Stockholm District Court, where it was assigned case number T 31953-05, seeking compensatory damages from the Swedish government on behalf of Swedish importers of E.U. alcohol, including wine, from other Member States.[335] Mr. Wihlborg was not the only plaintiff, or *kärande,* listed on the court's docket. There were actually 209 plaintiffs listed in the court docket as *Aktörer*, or actors, bringing the case against the single defendant, *Staten genom Justitiekanslern* or the State through the Chancellor of Justice. It appears that a total of 180 individuals then opted-in to the class action. The first one, Olle Nyberg, opted in on December

[335] Lindblom National Report, 24 – 25 with reference to whole paragraph; *Wihlborg v. Staten genom Justitiekanslern,* Case No. T 31953-05, Stockholm District Court, Docket Sheet, May 9, 2008 (hereinafter "Wihlborg Docket") with reference to the whole paragraph.

16, 2005 according to court docket no. 5 with the heading *Anmälan om grupptalan fr Olle Nyberg*. The last recorded one, Bo Nilsson, opted in on May 4, 2006 according to court docket no. 202 with the same heading *Anmälan om grupptalan fr Olle Nyberg*. Altogether, there were a total of 389 individuals with a personal stake in the class action. An organization called *Föreningen för privatimport inom EU* financed the litigation but does not serve as a plaintiff or group member. The roughly 400 members of *Föreningen för privatimport inom EU* are also members of the private opt-in class action. The case was brought due to the confiscation by the Swedish customs authority of imported alcohol, some of which was destroyed by age while in custody. On March 29, 2007, the case was transferred from the Stockholm District Court to the Nacka District Court where it received case number T 1286-07.[336] Marti Mörk made a filing with the court on behalf of the State. The Court stayed the proceedings to await a decision by the ECJ prohibiting bans on the importation of alcohol within the E.U.

G. Carl de Geer et al v. Luftfartsverket

On August 29, 2006, six plaintiffs filed a *stämning,* or complaint, against the *Luftfartsverket,* or Swedish Airports and Air Navigation Service, in Nacka District Court where it was assigned case number M 1931, 2007.[337] Residents of the Upplands Väsby neighborhood formed a non-profit organization called *Föreningen Väsbybor mot flygbuller* and, then, some of the members of the non-profit brought a private opt-in class action against the Swedish Airports and Air Navigation Service to recover damages on behalf of 20,000 people for noise caused by the nearby Arlanda Airport. Notice went out and 7,000 people opted into the class action. The plaintiffs were represented by lawyer Salmi Ismo, and the defendant was represented by lawyer Lewensjö Åke.

H. Fortum and Sydkraft

Around 2006, electricity consumers formed an organization and told the media that they were contemplating a lawsuit against electricity providers Fortum and Sydkraft over an

[336] *Wihlborg v. Staten genom Justitiekanslern,* Case No. T 126-07, Nacka District Court, Docket Sheet, May 14, 2008 (on file with author) (hereinafter "Wihlborg Nacka Docket") with reference to the whole paragraph.

[337] Lindblom National Report, 24 with reference to whole paragraph; *De Geer v. Luftfartsverket,* Case No. M 1931-07, Nacka District Court, Docket, May 14, 2008 (on file with author) (hereinafter "De Geer Docket") with reference to whole paragraph.

electricity failure in January 2005 during a snowstorm.[338] The potential plaintiffs believed that the loss of electricity was due to the potential defendants' negligent failure to maintain the power transmission grid. The possible plaintiffs wanted to recover damages caused by the power outage. A settlement ensued and apparently the case was never filed. Numerous customers received compensation in the settlement.

I. Peter Lindberg v. Botkyrka kommun, Huddinge kommun, Järfälla kommun, Nacka kommun, Solna stad, Stockholms stad, Södertälje kommun

Plaintiff Lindberg filed a private opt-in class action against seven Stockholm-area government municipalities, or *kommun* or *stad*, on behalf of people who had been removed from their own families, as children, and placed in foster homes against their will. The complaint was filed in the *Stockholms Tingsräatt* or the Stockholm District Court. It does not appear from the docket sheet that anyone opted-in to the class action. The complaint, or *Stämningsansökan*, alleged that they suffered from a stolen childhood. The 3-page complaint, or *Stämningsansökan*, was filed on April 24, 2006.[339] Lawyer Ruby Harrold-Claesson represented the plaintiff. On the first page of the *Stämningsansökan*, the plaintiff requested damages for a lost childhood in the amount of 1,000,000 krona per person per year as well as interest provided by the *Räntelagen* (interest law) ¶¶ 4, 6.[340] The plaintiff's legal claims rested upon the U.N. Declaration of Human Rights and the European Convention on Fundamental Rights dated November 4, 1950 in relation to the fundamental rights and freedoms including the protection of family life. The plaintiffs claimed their rights under these instruments were violated. The complaint did not state any legal cause of action base on Swedish national law. The complaint asked for legal aid paid from public funds to cover the legal expenses of the plaintiff, and it asked for Ruby Harold-Claesson to be appointed by the Court to speak on behalf of the entire class. In a *Protokoll* dated June 26, 2006, the Court dismissed the case under *Rättgångsbalken* (Code of Judicial Procedure) Chapter 42, § 2 because the complaint lacked precision on damages (how much the plaintiff was

[338] Lindblom National Report, 26 – 27 with reference to whole paragraph.

[339] *Lindberg v. Botkyrka kommun, Huddinge kommun, Järfälla kommun, Nacka kommun, Solna stad, Stockholms stad, Södertälje kommun,* Case No. T 9593-06, Stockholm District Court, Docket, May 9, 2008 (on file with author) (hereinafter "Lindberg Docket") with reference to whole paragraph.

[340] Lindberg Docket, *Aktbilaga* 1 (*Stämningsansökan*) (filed on Apr. 24, 2006).

requesting and for whom).[341] The dismissal was appealed around July 18, 2006 to the *Svea hovrätt* or court of appeals.[342]

J. Konsumentombudsmannen v. Kraftkommission

In December 2002, a Swedish provider of electricity, Kraftkommission, stopped providing electricity to some 6,000 consumers.[343] They were re-directed to another supplier but charged a higher price in violation of their agreement with Kraftkommission for a set price. The consumers sought compensation for the difference between the two prices. Sweden's National Board of Consumers' Claims awarded them compensation amounting to a total of 2 to 2.5 million euros if the customers would each present their electricity bills as proof. Kraftkommission failed to make payment. The Swedish Consumer Ombudsman then filed a public action in the Umeå District Court. The defendant filed a motion to dismiss on the grounds that the claims were too disparate, i.e., not sufficiently common. The court denied the motion, and Kraftkommission appealed. The defendant lost its appeal and then applied to the Supreme Court for an "extraordinary appeal" which was refused. This is the only public action that has been filed, thus far, in five years under the Sweden Group Proceedings Act.

[341] Lindberg Docket, *Aktbilaga* 134 (*Protokoll*) (filed on June 26, 2006).

[342] Lindberg Docket, Nr 51, *Akten exp Svea hovrätt* (entered July 18, 2006).

[343] Leuven Study, 289 – 290; Lindblom National Report, 18, 23 - 24.

ANNEX B – NORWEGIAN CASE DESCRIPTIONS

The Norwegian law permitting opt-in and opt-out class actions took effect in January 2008. There have been reports that one class action was filed but then withdrawn, and there are media reports that two class actions might be filed in the future. Brief news on each is presented below.

A. Child Protective Services

There have been media reports that a class action will be filed against the public agency, Child Protective Services, on behalf of children taken away from their parents.[344] The case has not yet been filed, but it is on the way. The legal basis for the case is not apparent from media reports. Parents who suffered difficulties with Child Protective Services formed an ad hoc organization. Their class action would be based upon the European Convention of Human Rights. If it is filed, however, it is predicted that the case would likely be dismissed because it either will not have a legal basis or it will not fulfill the requirement for "similarity" under the Norwegian law permitting class actions.

B. Financial Savings Products

There have been media reports in a newspaper about a class action that may be filed in the future regarding certain financial instruments for savings. The allegations are that the bank gave people bad advice to invest in these savings products. No case has yet been filed.[345]

C. Norwegian Government

There were allegations that the first Norwegian class action was filed in a court in Kongsberg but was later withdrawn by the plaintiffs after the judge called and convinced them to withdraw the class action and file an individual suit instead.[346] The Norwegian government was named as a defendant in the suit.

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[344] Telephone interview with Camilla Bernt-Hamre, Research Fellow, University of Bergen Law Faculty, Bergen, Norway, May 23, 2008 (notes on file with author) (hereinafter "Bernt-Hamre Interview") with reference to the whole paragraph.

[345] Bernt-Hamre Interview with reference to the whole paragraph.

[346] Nagelhus Interview with reference to whole paragraph.

ANNEX C - DANISH CASE DESCRIPTIONS

The Danish law permitting opt-in class actions took effect in January 2008. The law firms of Ret & Råd and Nielsen & Nørager in Denmark are reputed to have established web sites, or purchased domain names, regarding the preparation of future class action cases.[347] One class action has been filed and a second one is about to be filed, as discussed below.[348] No representative actions have been filed. It appears from remarks made by the Danish Consumer Ombudsman in December that three public actions were initiated, in 2007, but not filed in court, on the basis of the new opt-out law. They included cases regarding (1) collection of an unlawful fee; (2) contract formed through misleading marketing activities; and (3) unfair terms in a contract.[349] In one of them, the defendant is Viasat. It should be noted that the Danish Consumer Ombudsman used the threat of an opt-out public action to enter into these settlements prior to January 2008 when the new law took effect.

A. BankTrelleborg

The first class action filed in Denmark was brought by lawyer Eigel Lego Andersen of the Nielsen Nørager law firm against bankTrelleborg in May 2008.[350] It took roughly five months after the new class action law took effect for this first class action to be filed. The case was brought by private individuals who held a minority of shares in the bankTrelleborg. The bank was sold to another bank, Sydbank, and bankTrelleborg's minority shareholders were dissatisfied with the price for which their shares were sold. The minority shareholders alleged that they were forced by the fund that owns the bank to sell their shares. The bank was sold in February on a Friday and the minority shareholders were paid for their shares on the same day. On the following Monday, the value of shares was more than double the price they had been paid

[347] Denmark National Report, 7.

[348] Grønnegaard Interview, 1.

[349] Danish Consumer Ombudsman, 10.

[350] Grønnegaard Interview, 1; Domstol, "Danmarkspremiere på gruppesøgsmål" May 8, 2008, *available at* www.domstol.dk (last viewed on May 14, 2008) (""Danish Court's Statement"); *see also* Email correspondence from Jon Jon Fors-Skjaeveland to Robert Gaudet (May 15, 2008) (translating Danish Court's Statement) (on file with author) ("Jon's Translation"); all with reference to whole paragraph.

on Friday. The minority shareholders felt the bank had manipulated the value of their shares, so they brought a private opt-in class action for damages. The court approved the case as a class action.

B. Internet Directory

A second class action may be filed by the law firm of Ret & Raad on behalf of small business owners against the publishers of an internet directory.[351] The defendants sell listings in an internet phone book for 200 to 300 USD and later try to sell additional ads to the same small businesses. The defendants allegedly present themselves as government officials and infer that small business owners must purchase their listings to be included on their web directory. The defendants have official names like the "Danish Phone Book" which make small business owners think that the defendants are government officials. Not knowing that the listings are optional, rather than mandatory, small business feel compelled to purchase listings. The plaintiff small businesses will request their money back in a private opt-in class action.

[351] Grønnegaard Interview, 1 with reference to whole paragraph.

ANNEX D – DUTCH CASE DESCRIPTIONS

Only four cases have settled (or are in the process of settlement) under the opt-out class action settlement law, but they surely will not be the last, and they are described below. There have been roughly 32 representative actions for declaratory and injunctive relief[352] but they are outside the scope of this thesis on class actions for monetary damages.

A. DES

This case was not only the "first court approved opt out class settlement ever in the Netherlands and in Europe", approved on June 1, 2006, but it was also the reason why the new procedural mechanism was adopted in the Netherlands to ensure the widespread settlement of claims regarding harm suffered by the women who took Des and their children. The children claimed: "use of the drug DES by their mothers during pregnancy had caused them medical damage." Roughly 18,000 claimants submitted claims to a "DES register centre" that was set up for claimants. There may have been as many as 440,000 members of the class. The settlement provided a fund of 35 millions euros for all of the victims and it concluded the claims for "all Dutch victims," i.e., perhaps as many as 440,000 people. The pharmaceutical manufacturer of Des paid 17.5 million euros, and the insurance industry paid the other 17.5 million euros.[353]

B. Dexia

Around 90,000 people injured by Dexia donated some 45 euros each to a foundation used to start an organizational action (for declaratory and/or injunctive relief only) against Dexia. Investors settled an opt-out class action with Dexia regarding "securities leasing" by which Dexia enabled retail investors to buy listed stock with borrowed money but allegedly gave misleading or inadequate information about the financial product and its risks. The opt-out settlement was approved by the court on January 25, 2007. It created a settlement fund of 1 billion euros. About 24,700 investors opted out of the settlement, but the final settlement bound

[352] Dutch National Report, 13-14.

[353] Dutch National Report, 4, 15 with reference to the whole paragraph.

an estimated 300,000 or 400,000 individuals.[354] The class members did not receive a direct monetary payment in the settlement. Instead, Dexia forgave some part of the loans which they owed to Dexia.[355] The claimants were credited back a percentage of the money that they owed to Dexia. The claimants still owed money on the loans to Dexis, but they did not have to pay all of it back under the terms of the settlement. They had taken out loans to buy shares. The case originally started with numerous individual actions and a couple of representative actions that sought a declaration that the bank had acted wrongfully by giving misleading information about their products and the risks. The class members in the ultimate opt-out class action settlement did not have to file claim forms because the bank could automatically forgive part of the claimants' debt by resorting to its own records. The bank forgave roughly 66.6 percent of the debt that was owed to it by each claimant. There were some objectors to the settlement – more than in the Dexia settlement.

C. Royal Dutch Shell

An opt-out class action settlement against Royal Dutch Shell was filed with the court for approval on April 11, 2007.[356] The plaintiffs alleged that Shell wrongly re-categorized its oil and gas reserves, causing a drop in the share price after an announcement in the media.[357] The Amsterdam Court of Appeals will hold a hearing on November 20, 2008 to determine whether the settlement should be binding on an opt-out class, i.e., whether the settlement should be approved.[358] If the court approves the settlement, then class members will have an opportunity to "opt-out", i.e. withdraw their individual claims or to submit individual claims for

[354] Dutch National Report, 15, 19, 21 with reference to the whole paragraph; Tzankova, Ianika, *Collective redress in the Low countries: An update from the Netherlands,* April, 2008, *available* at http://globalclassactions.stanford.edu (forthcoming May, 2008) (manuscript on file with author) (hereinafter "Low Countries"), 3 (recording 300,000 claimants).

[355] Telephone Interview with Ianika Tzankova, lawyer, Nauta Dutilh, Amsterdam, The Netherlands, May 19, 2008 (notes on file with author) (hereinafter "Tzankova Interview") with reference to subsequent sentences in the paragraph.

[356] Dutch National Report, 3.

[357] Dutch National Report, 3, 15; *see also* Shell Media Relations, *Shell announces settlement of reserve-related claims with US investors,* June 3, 2008, *available at* http://www.shell.com/home/content/investor/reserves_settlement/release_06032008/us_reserves_settlement_06032008.html (last viewed on May 20, 2008) (hereinafter "Shell June Press Release"); *see also Shell Reserves Compensation Foundation v. Shell Petroleum N.V.,* (Amsterdam Court of Appeals) Productie 1, Settlement Agreement, available at http://www-static.shell.com/static/investor/downloads/reserves_settlement/productie_1.pdf (last viewed on May 27, 2008) (on file with author) (hereinafter "Shell Settlement Agreement"), 3 ("WHEREAS, beginning in January 2004, the Royal Dutch Petroleum Company and The 'Shell' Transport and Trading Company p.l.c. announced recategorizations of certain of their proved oil and gas reserves").

[358] Shell FAQ Press Release.

compensation if they choose to remain in the action.[359] The settlement would provide 352.6 million USD to non-U.S. stockholders who purchased Shell stock on any stock exchange outside the U.S. between April 8, 1999 and March 18, 2004.

There may be more than 500,000 class members.[360] The settlement was reached by the Stichting Shell Reserves Compensation Foundation that represents all shareholders covered by the agreement. The Foundation is governed by an independent board of directors including Prof. MJ.G.C. Raaijmakers, Porf. M.J. Kroeze, and G. Izeboud. The Foundation's "participants" include 133 institutional investors such as ABP, Stichting Pensioenfonds Zorg en Welzijn, DEKA, Norges, UBS and Morley as well as the confederation of European shareholders association and 18 organizations representing individual stock owners from Sweden, Belgium, France, Germany, Italy, the Netherlands, and other countries.[361]

To recover money from the settlement, if it is approved, class members would have to "provide information and supporting documentation relating to their purchases and sales of RD and STT shares in the relevant period (April 8, 1999 through March 18, 2004, inclusive)."[362] There are detailed procedures on how class members will have to submit claim forms, if the settlement is approved by the Amsterdam Court of Appeals:

> Each Participating Shareholder who wishes to receive a distribution from the Net Settlement Amount must complete and submit a Claim Form consistent with this Section II.C. … The Claim Form shall require each Participating Shareholder to do the following:
>
> a. provide the dates during the Relevant Period on which the RD/STT Securities were purchased, the amount and type of RD/STT Securities (i.e., RD or STT) purchased on each date, the purchase price of each such security, the stock market or exchange on which each such security was purchased, and the date on which any such security was sold and the price at which it was sold;

[359] Shell FAQ Press Release.

[360] Shell Settlement Agreement, 5.

[361] Shell Media Relations, *Announcement about the Shell securities class settlement of reserve-related claims with European and other non US investors*, April 11, 2009, *available at* http://www.shell.com/home/content/investor/reserves_settlement/release_11042008/court_appeal_date_reserves_11042008.html (last viewed on May 20, 2008) (hereinafter "Shell April Press Release") with reference to the preceding three sentences.

[362] Shell Media Relations, *Reserves settlement – Questions and Answers, available at* http://www.shell.com/home/content/investor/reserves_settlement/faq/faq_reserves_settlement_13042007.html (last viewed on May 20, 2008) (.pdf on file with author) (hereinafter "Shell FAQ Press Release") with reference to the whole paragraph.

> b. submit original (or legible copies) of broker confirmation slips, monthly brokerage statements or other proof confirming the particulars of the information provided under Section II.C.3.a above …
>
> f. agree to be subject to inquiry with respect to the validity and/or amount of the claim made;
>
> g. consent to the disposition by either the District Court or the Dispute Committee (where the Participating Shareholder will not have to be represented by counsel), with respect to the validity and/or amount of, or any other dispute regarding the claim for settlement relief …
>
> j. deliver a copy of the executed and completed Claim Form to the Administrator at the address shown in the Notice by no later than the Claim Date.[363]

Only after all of these steps have been completed, and proof furnished, may class members' claims for compensation be considered by an administrator. The lawyers representing the shareholders will be paid "separate and apart" from the settlement fund for investors.[364] Any money that is left over after distributions to the class members may be (a) distributed to "Participating Shareholders" through a "supplemental distribution" or (b) disbursed as a "charitable contribution" (known as a cy pres fund, or the "next best use" in U.S. litigation) or (c) if it is over 5 million USD and it cannot be distributed through "supplemental distribution" then it may be returned to the defendants:

> To the extent any monies remain in the Cash Settlement Account after all reasonable efforts to distribute the Net Settlement Amount pursuant to the Settlement Distribution Plan have been taken, the Shell Reserves Compensation Foundation shall in its sole discretion (taking into account, among other things, the amount of such monies) determine whether such monies should be (i) distributed to Participating Shareholders pursuant to a supplemental distribution, (ii) subject to Paragraph 2 of Article 910 of the 2005 Law, returned to the Settling Companies or (iii) disbursed as a charitable contribution to a qualifying entity or entities; *provided however*, that if the monies remaining in the Cash Settlement Account are in excess of five million US ($5,000,000) and the Shell Reserves Compensation Foundation determines that it is not feasible to effect a supplemental

[363] Shell Settlement Agreement, 14 – 16.

[364] Shell Settlement Agreement, 10.

> distribution, then, notwithstanding anything in this Section II.B.3, the remaining monies shall, subject to Paragraph 2 or Article 910 of the 2005 Law, be returned to the Settling Companies.[365]

The class representative, i.e., the Foundation, would have "sole discretion" to choose one of these three options. None of the three options would permit the Foundation to pay itself the remaining funds. Therefore, the unclaimed funds would not be given to the class representative, i.e., the lead plaintiff who forged the settlement, to over-compensate them, as the Commission feared would happen in an opt-out class action.[366]

This case might be a "ground-breaker" because of the enormous geographic scope of the class – the class includes all shareholders around the world with the exception of investors in the United States.[367] The settlement agreement includes all investors who purchased Shell stock on any exchange in the world except for the New York Stock Exchange.[368] If approved, the settlement could hearken to future global class action settlements in the Netherlands:

> This settlement can be seen as a pilot that explores the potential of the Dutch legislation on collective settlements to contribute to the achievement of a Pan European settlement in addition to a class settlement for United States claimants. Up to now those issues have been entirely resolved in the US.[369]

The mere prospect that a Dutch court might supervise a global class action settlement is striking. It is something that U.S. courts have not even dared to do, since American courts supervising class actions with non-American class members often exclude foreigners, particularly if their foreign laws do not allow for relief under a similar class action procedure or if American law prevents a U.S. court from finding jurisdiction over far-away class members with no link to the U.S. Under the new Dutch law, it is easy to imagine a scenario in which litigation would start in the U.S. and then settle on behalf of a global class in the Amsterdam Court of Appeals – something a U.S. court is not likely to do.

One curious aspect about the Dutch settlement is that it was conditional upon a finding by an American court that claims by non-Americans would be dismissed from the lawsuit pending

[365] Shell Settlement Agreement, 13 – 14.

[366] White Paper Impact Study, 568.

[367] Dutch National Report, 3.

[368] Shell Settlement Agreement, 55.

[369] Dutch National Report, 15.

in that court, i.e., the U.S. District Court in the District of New Jersey.[370] If the U.S. court had decided that it would retain jurisdiction over all non-U.S. as well as U.S. investors in their claims for violations of the securities fraud laws and regulations in the U.S., then the Dutch settlement agreement would have become "null and void." In essence, the Dutch settlement gave the American court first choice to decide whether it would hear the claims of non-U.S. investors.[371] It is not certain whether the Dutch settlement took this view for legal reasons, practical reasons, or out of simple courtesy or comity to the foreign court that first heard the claim when it was filed in New Jersey in January 2004. More importantly, the Dutch settlement was conditional upon the approval of a similar settlement for the same misconduct on behalf of American investors by the federal court in New Jersey. If the American court failed to approve the settlement, then an extra "Settlement Amount Addition" would not have to be paid under the terms of the Dutch settlement.

D. Vedior

An opt-out class action settlement with defendant Vedior was announced in May, 2008. It is shareholder's litigation. The petition to settle the case has not yet been filed with the Amsterdam Court of Appeals.[372]

[370] Shell Settlement Agreement, 2, 4, 7 – 8, 33 with reference to the whole paragraph.

[371] Shell Settlement Agreement, 33 ("… this Settlement Agreement will terminate automatically if, prior to the Binding Date, a United States Order certifies a class that includes Home Exchange Purchasers or otherwise exercises jurisdiction over the claims of Home Exchange Purchasers"). In other words, if the U.S. court decides to exercise jurisdiction over the European claimants, then the settlement agreement will terminate and further approval from the Amsterdam Court of Appeals will not be sought.

[372] Tzankova Interview with reference to whole paragraph.

ANNEX E – ANTI-US BENCHMARK

In the course of conducting research into this thesis, it became apparent from published articles, Commission-funded studies, official reports, speeches, and private interviews that the U.S. has become the unwitting benchmark, or "reference model," for almost all of the E.U. and European national discussions on collective redress.[373] Usually, the comparison is unfavorable.[374] These derogatory comments and misperceptions have profoundly shaped the debate and taken on a life of their own. They have affected significant policy decisions. For instance, in the White Paper, the Commission rejected the opt-out mechanism due to the misconception that the opt-out mechanism was somehow more costly and likely to lead to high lawyer's fees, as is perceived to occur in the U.S. Misperceptions may have led Commissioner Kuneva to reject class actions despite a clear mandate from the Council to review all forms of "collective redress", *supra* at 24 n.102, for consumer protection.

One of the co-authors of the White Paper wrote that the U.S. class action is the "best-known example of a private collective action for damages."[375] In Europe, it might also be the

[373] White Paper Impact Study, 9; *id.* at 561 ("we adopted [the U.S. system] as a reference model of a legal system where private antitrust litigation is more widespread"); *id.* at 277 (U.S. class action is "*the* example … of group litigation"); *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings: Final Report*, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, prepared by the Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, Belgium, January 17, 2007, *available at* http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf (last viewed on May 25, 2008) (hereinafter "Leuven Study"), 261 ("[European] collective actions will be discussed in this chapter and will be compared to US style class actions"); *id.* at 267 – 268; *id.* at 280.

[374] Leuven Study, 12, *id.* at 13 ("whereas US class actions are embedded in a judicial system that risks promoting extensive or costly litigation, the report indicates that the current or prospective European collective actions are embedded in the judicial systems of each Member State"); *id.* at 268 (reporting concerns that opt-out system, as in U.S., would violate due process rights under ECHR, Art. 6); White Paper Impact Study, 10 ("… we develop a range for the potential impact … by relying mostly on date from a jurisdiction with effective private enforcement, *i.e.* the U.S., although it is often observed that in the latter jurisdiction a 'litigation culture' has emerged in the past years"); Van den Bergh, 24 ("The American experience shows that class actions may be initiated to inflict reputational harm on companies") (not citing any evidence or studies); *id.* at 29 ("Experience gained with US class actions shows that attorneys may take decisions, such as early settlements, that are not in the interest of their clients and that attorneys may also initiate unmeritorious suits"); BEUC, The European Consumers' Assocation, *European Group Action Ten Golden Rules, available at* www.beuc.eu (last viewed on May 29, 2008) (hereinafter "BEUC") (on file with author), 2, 5 ("Collective redress mechanisms have been in place for a long time in the North American legal systems, under the denomination of 'class actions'…Unfortunately, the 'class action' system has, in some countries, suffered abuses and excesses that are constantly brought forward by those who oppose the introduction of a European system of Group Action. We do not support any system characterised by the excesses depicted in so much legal literature") (failing to cite any legal literature).

[375] Van den Bergh, 10. The author of this statement (who also co-wrote the White Paper Impact Study) has many misconceptions of how class actions work in the U.S. For instance, he wrote that, in class actions, "enormous compensations are largely due to the jury system and the possibility of granting statutory treble damages and punitive damages." Van den Bergh, 10. In actuality, class actions virtually never go to trial. Hence, juries do not have an opportunity to award damages. Only 1.8 percent of civil litigations, of any sort, filed in the U.S. federal courts ever make it to trial. The proportion of class actions that go to trial is even smaller. Further, plaintiffs in anti-

least understood. For starters, European commentators generally misunderstand the meaning of the phrase "class action."[376] They often think it is restricted to U.S. opt-out class actions. However, some U.S. class actions require the opt-in mechanism, *supra 5* at n.16, just as in Norway, Sweden, and Denmark. Other class actions in the U.S. provide no opportunity to opt-out or opt-in, as noted *supra* 6 n.17 and 6 n.18. Yet, all of these cases are "class actions." More significantly, misconceptions about the way U.S. class actions work, and the opt-out mechanism, have affected E.U. policy decisions at the highest levels. The European Commission's Director General for Health and Consumer Affairs, Robert Madelin, made derogatory references to U.S. class actions in a public speech about collective redress:

> Finally, it is crystal clear that probably nobody in this room – and not only those who have read the books of John Grisham – wants to have the excesses of the US-style class actions, characterised by a mixture of punitive damages, contingency fees, pre-trial discovery and opt-out system.[377]

Mr. Madelin did not give any evidence of the "excesses" or describe how the opt-out system would have caused such excesses. He likely pre-judged the opt-out mechanism because it is one feature – among many – in the U.S. class action system. His colleague, Commissioner Kuneva, said at the same conference that class actions would not occur "under [her] watch." These are not isolated incidents. Derogatory remarks also appear in policy documents like the White Paper which blame the opt-out mechanism, in particular, for the perceived ills:

> The development of collective redress mechanisms in Europe has increasingly attracted attention because of the importance of these mechanisms for access to justice, but also due to the excesses that have been reported from other jurisdictions … ***Excesses in U.S. class action litigation*** have often been mentioned, and the risk of importing these excesses into Europe has been raised. It is important to note, however, that the overall legal context in the US, which goes well beyond the mere class action mechanism, is very different from the one in Europe. US class actions in antitrust cases are characterised by a combination of features that is very specific

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trust lawsuits almost never earn the statutory treble damages or punitive damages (the two types of damages are synonymous and treble damages may be awarded, in law, as a punitive measure even though they are never awarded in practice) because those cases are either dismissed or they settle before trial.

[376] Leuven Study, 261; BEUC, 5; *but see* White Paper Impact Study, 13; *id.* at 276 n. 443 ("The terms collective actions and class actions are synonyms").

[377] Madelin, Robert, *Collective Redress Remarks,* Conference on Collective Redress, November 9, 2007, Lisbon, Portugal, 15.

> to the US, including jury trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees arrangements and ***an opt-out mechanism***.[378]

These statements are not based on careful analysis. The White Paper Impact Study raised the concern that the opt-out mechanism (as opposed to the opt-in mechanism) presents unique problems such as a principal/agent conflict, presumably between the lawyer and the class members.[379] One of the co-authors, Dr. Roger Van Den Bergh, repeated the same argument in a published paper that failed to cite any empirical study but merely relied upon a hypothetical example posed by Dr. Van Den Bergh.[380] Despite the lack of supporting evidence, the Commission has persisted in its belief that op-outs create a principal/agent problem: "Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem)."[381] The U.S. was surely included in the Commission's reference to "other jurisdictions"; the White Paper does not mention any other jurisdiction. More significantly, the White Paper does not explain why the principal/agent problem is unique to the opt-out mechanism but not to the opt-in mechanism.

Even before the White Paper was issued, the Green Paper on Competition evoked an outcry that collective redress would lead to adverse consequences of the sort that are perceived to occur in the United States:

> In reaction to the Green Paper, some respondents opposed any initiative which would facilitate collective redress. The objections focus principally on the potential costs of collective redress mechanisms for society, and on the risk of multiple recoveries from infringers. Those opposing any initiative in that field ***evoke the US system*** in their argumentation, mentioning the ***excesses*** this system has led to, and the resulting ***costs*** for business and society as a whole.[382]

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[378] White Paper Staff Working Paper, 17 n. 24 and accompanying text (emphases added).

[379] White Paper Impact Study, 570; *see generally id.* at 47, 203.

[380] Van Den Bergh, 23 – 24 ("In American class actions, the attorney thus becomes the leading actor of the case and might pursue his private interests to the detriment of the harmed consumer group as a whole").

[381] White Paper Staff Working Paper, 21.

[382] White Paper Staff Working Paper, 14 (emphases added).

Opponents to collective redress did not offer any empirical evidence to support their claims that the U.S. system promotes "excesses" or leads to costs to "society as a whole." There may be political reasons for this type of argumentation, but it may lead to poor policy choices, including rejection of the opt-out mechanism in the White Paper's Policy Option 1.[383]

It often seems that Europe's cultural identity – rather than policy choices over civil procedure – is at stake in the debate over collective redress.[384] Member States and, now, the E.U. have avoided the American model in talk while moving closer towards it in practice. Despite all of the anti-American talk, the E.U. and the Member States are adopting and considering opt-in and opt-out class actions.[385] The cy pres fund – considered in the White Paper and utilized in the Netherlands – is another feature of U.S. class actions that has gained traction in Europe.[386] These are now accepted practices, but policy debates still refer to American "excesses."[387] Specific details about these "excesses" are never given, and it appears there has been no careful scrutiny in Brussels of American class actions. By contrast, the Swedish debate over class actions began with an 800-page book examining class actions in the U.S., Canada, U.K. and Australia.[388] The book was inspired by the Swedish Consumer Ombudsman's curiosity

[383] White Paper Impact Study, 52 (rejecting Policy Option 1, the closest one to the U.S. class action model, because "this scenario could lead to development of a litigation culture whose benefits … appear questionable").

[384] White Paper Impact Study, 586 ("The underlying problem is to avoid that Europe moves toward a litigation culture instead of a more healthy 'competition culture'"). The White Paper Impact Study often sounds more like a political speech than an objective policy statement. For instance, phrases like "litigation culture" and "competition culture" make the U.S. system different when, in fact, the procedural mechanisms for class actions are often the same in Europe and the U.S. The Leuven Study uses "collective action" and "group action" to describe European practices and "class action" to describe U.S. practices even though the procedural mechanisms are the same. It appears that such language is used to differentiate Europe ("competition culture"; "collective action"; "group action") from the United States ("litigation culture"; "class action"). This practice suggests differences in policy and substance that may not exist in reality. The former set of phrases (i.e., European phrases) are generally described in normative, positive terms such as "more healthy" or "balanced" while the latter terms (i.e., American terms) are generally described in derogatory, inferior terms such as "blackmail" or "excessive." These terms are not innocent. They steer decision-makers away from policy choices associated with derogatory qualities.

[385] White Paper Staff Working Paper, 11.

[386] White Paper Staff Working Paper, 18; *see also supra* at 105 (cy pres fund is part of Shell settlement).

[387] *See, e.g.,* White Paper Impact Study, 585 (suggesting that lack of loser pays rule, as in U.S., leads to "discovery blackmail") ("the loser-pays rule … shields plaintiffs [sic] from discovery blackmail"); *id*. at 594 ("The risk of fishing expeditions and discovery blackmail, the likelihood of frivolous lawsuits aimed at early settlements, the risk of duplication of liability are all minimized [in an opt-in class action model] compared with scenario 1 [i.e., opt-out class action with double damages and mandatory fee-shifting]"). With these colorful phrases, it sounds like the U.S. Chamber of Commerce wrote portions of the White Paper Impact Study, since similar phrases are used by the Chamber in its lobbying and public opinion strategies in the United States.

[388] Lindblom Group Proceedings, § 1.2; Lindblom National Report, 8 with reference to this and subsequent sentence.

about class actions in the U.S. It was followed up with a 1,400 page book that eventually led to Sweden's adoption of opt-in class actions.[389]

The European Parliament has claimed that European solutions will be different from the "North American model" of "class actions" because "[n]o formula of this type exists in European legal practice."[390] This statement was, of course, inaccurate, because opt-out class action settlements then existed in the Netherlands, private opt-in class actions existed in Sweden, and private opt-in and opt-out class actions were already approved by the legislature in Norway. Nevertheless, aversions to an American benchmark might give greater clarity, in the minds of some, to European cultural identity. In the White Paper, the Commission promised its recommendations would "consist of balanced measures that are rooted in European legal culture and traditions."[391] The Commission warned that class actions would lead to "excesses and external costs" as well as "abusive settlements", and a system should be designed that "protects against unmeritorious actions."[392] The underlying sentiment is that class actions are unbalanced and inconsistent with European legal tradition, particularly since they seem tied to the U.S. The adoption of class actions by Netherlands, Norway, Denmark, and Sweden, however, proves that class actions are fully consistent with European tradition.

[389] Lindblom Group Proceedings, § 1.2

[390] European Parliament Draft Report on the Green Paper on Damages Actions for breach of the EC antitrust rules (2006/2207(INI)), Source Reference PE380.685 (Oct. 24, 2006) (Rapporteur: Antolin Sanchez Presedo) (Draftsman: Bert Doorn, Committee on Legal Affairs) ("EP Draft Report"), at p. 10 (Explanatory Statement § 6 ("The North American model is based on a set of elements (judicial bodies consisting of non-professionals, 'class actions', strict requirements on the disclosure of documents, punitive damage payments of three times the damage occasioned, risk-free litigation owing to the lawyer's fees being pegged to the outcome and payment by each party of the costs o litigation, etc.) No formula of this type exists in European legal practice.")); *see also* European Parliament: tabled non-legislative report, Source Reference A6-0133/2007, Explanatory Statement § 6.

[391] White Paper § 1.2.

[392] White Paper Staff Working Paper, 14; *see also* White Paper Staff Working Paper, 10 ("does not intend to incentivize victims to bring an action when their actions are not meritorious."); Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules (COM(2008) 165 final) (hereinafter "White Paper Staff Working Paper") (parties responding to Green Paper on Competition "called on the Commission to refrain from setting up a system leading to excessive and unmeritorious litigation"), 7; *see also id.* at 18 (proposals made by Commission "avoid abusive litigation").

ANNEX F – ASSESSMENT OF THE US BENCHMARK

Because misconceptions about U.S. class actions have influenced the E.U. debate, resulting in the White Paper's rejection of opt-outs, it is incumbent upon the Community to fund a realistic appraisal of U.S. class actions.[393] Misconceptions should be objectively confirmed or denied. Clear thinking about the operation and impact of U.S. class actions would enable the E.U. to determine which discrete features should be open to consideration. The Commission has funded studies of class actions in the Member States,[394] but it is perhaps more important to study the country with the longest-running history of class action litigation – the U.S. This idea is not new. In the 1970s, Germans gained inspiration from U.S. class actions in their policy debates over collective redress to enforce consumer protection laws.[395] Sweden was inspired by the U.S. model and, in turn, later motivated Denmark and Norway to adopt similar rules.

The White Paper raises at least four important issues that should be given greater thought in a Commission-funded study: (1) do U.S. class actions result in "excessive" litigation; (2) do U.S. class actions result in unfair pressure on defendants to settle cases[396]; (3) are contingency fees part of the U.S. class action system[397]; (4) are treble damages ever awarded in private U.S. antitrust cases; (5) do private U.S. antitrust cases ever go to trial; (6) do opt-outs present a principal/agent problem that is not different from any principal/agent problem that might occur in opt-ins or traditional litigation; (7) do U.S. rules prohibit lawyers from filing "frivolous" lawsuits and, if so, do those rules apply to class actions as well as traditional litigation; and (8) are U.S. opt-out class actions contrary to principles of due process. Although it would be important not to pre-determine the outcome of any such analysis, a quick glance at each issue reveals that U.S. practices are sound or, at least, not nearly as bad as the Commission would have us believe. We will now take a quick look at each issue.

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[393] The White Paper Impact Study provides a very limited review of articles discussing various features of U.S. antitrust class action. White Paper Impact Study, 139 – 146, 277 - 283. These sections are cursory. More importantly, this brief analysis of the U.S. model does not examine the opt-out mechanism.

[394] Leuven Report; Waelbroeck, Denis; Slater, Donald; Even-Shoshan, Gil, *Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report*, Brussels, August 31, 2004.

[395] Fair Trading, 259.

[396] Leuven Study, 267.

[397] The Commission presumed that contingency fees are part of U.S. antitrust class action litigation. White Paper Impact Study, 144 – 145. That is not true. A contingency fee agreement between a lawyer and a class representative would not be enforced by a U.S. court.

First, class actions are a very small number of cases filed in the U.S., generally by a small number of law firms specializing in class action litigation. It would be a simple matter to determine the raw number of cases filed in federal courts (in comparison to the number of non-class action lawsuits) by reference to data stored by the Federal Judicial Center.

Second, it is unlikely that class actions in the U.S. "blackmail" defendants to settle. What generally happens is that defendants have several chances to defeat a class action lawsuit, as in traditional litigation, through (a) a motion to dismiss on the pleadings under Fed. R. Civ. P. 12; (b) successful opposition to a plaintiff's motion for class certification (thereby requiring the case to either proceed as an individual lawsuit or be withdrawn); (c) a motion for summary judgment on the facts in record under Fed. R. Civ. P. 56; (d) a motion for a judgment as a matter of law after the plaintiff's presentation of evidence at trial but before the case is submitted to the jury under Fed. R. Civ. P. 50(a); (e) success at trial; or (f) a renewed motion for a judgment as a matter of law filed within 10 days of final judgment under Fed. R. Civ. P. 50(b). Each step provides an opportunity to defeat a case, and defendants regularly employ each method.[398]

Third, contingency fee agreements in U.S. class actions are not enforceable, nor are they subject to court approval.[399] In a U.S. class action, the court determines the amount of fees to award to the lawyers who prosecuted the lawsuit. If the settlement is for monetary damages, the court might determine whether to award a percentage of the settlement (ranging from 4 percent[400] to 25 percent) as attorney's fees, except in statutory fee cases. Alternatively, the court might award a lodestar fee which is calculated as the number of hours worked times the billable rate times a multiplier of perhaps 1.6 or another number to reward lawyers for the risk they took in bringing a case. If the former method is used, the judge determines the precise percentage (not the lawyers or the client) based on what is "reasonable."[401] In short, contingency fee agreements are not a part of U.S. class actions but judges may use their discretion to award a percentage, chosen by the judge, as a fee award.

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[398] White Paper Impact Study, 213 (acknowledging that, in the U.S., summary judgment motions and motions to dismiss provide "other means to avoid unmeritorious damages actions" but undervaluing the significance of these measures and failing to elaborate on similar methods in E.U. to dispose of unmeritorious actions)

[399] *Contra* Lindblom National Report, 9 (expressing view that contingency fees are part of U.S. class action system); Lindblom Group Proceedings, 4 (same).

[400] Rothstein, Barbara J. and Willging, Thomas E., *Managing Class Action Litigation: A Pocket Guide for Judges,* Federal Judicial Center, 2005, 22, 24-25 (noting that 4 percent may be awarded in "mega" cases settling for hundreds of millions of dollars) with reference to this and subsequent sentence.

[401] Fed. R. Civ. P. 23(h).

Fourth, trebled damages are almost never awarded in U.S. class action cases. The law does allow for them. To receive them, a party must win a final judgment. In practice, this never happens because, fifth, antitrust cases in the U.S. rarely go to trial. The probability of settlement in an antitrust case is 81 to 94 percent.[402] Settlements generally pay less than single nominal damages.[403] The difference between the U.S. and Europe in antirust damages is not so great as the misrepresentations would suggest, particularly since European nations generally award pre-judgment interest – which U.S. courts do not – to give plaintiffs more than single damages.[404] European victims therefore get somewhere between single and double damages in practice while American are only entitled under trebled damages to 1.25 to 1.66 times actual damages since they are not entitled to pre-judgment interest.

Sixth, a study would likely reveal that opt-out class actions do not present principal/agent problems any substantial different from those that arise in opt-ins or traditional litigation. In an opt-out class action, just as in an opt-in, the class representative must look after the best interests of the class members. In the U.S, the principal/agency problem is resolved by requiring the court to confirm that the lawyer, i.e., class counsel, is suitable to represent the class.[405] This is commonly known as the "adequacy of representation" prerequisite for class certification. The court has sole power to appoint a lawyer to serve as class counsel.[406] The court may give class members an opportunity to complain about the lawyer representing the class, thereby revealing any principal/agent concerns.[407] Further, class representatives are obliged under Fed. R. Civ. P. 23(a)(4) to look after the best interests of the class and monitor class counsel. If the class representative is not capable of doing so, the court may not certify a class. An American court must approve any final settlement, as in the Netherlands, Sweden, and Denmark, so the court will have an opportunity to ensure that the terms are favorable and that the lawyer has not sold

[402] Renda, Andrea, 24 (citing studies by Perloff & Rubinfield (1988) and Perloff et al. (1996)).

[403] Renda, 20.

[404] Renda, 38 with reference to this and subsequent sentence.

[405] Fed. R. Civ. P. 23(a)(4); Fed. R. Civ. P. 23(g)(1) ("In appointing class counsel, the court … may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class … may order potential class counsel to provide information on any subject pertinent to the appointment …"); Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class").

[406] Fed. R. Civ. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)").

[407] Fed. R. Civ. P. 23(d)(1)(B)(iii) ("In conducting an action under this rule, the court may issue orders that … require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class

out their rights in return for favorable treatment for himself, i.e., the classic principal/agent conflict.

Seventh, American law forbids lawyers from filing lawsuits without a good faith basis in fact and in law.[408] Lawyers in the U.S. may be sanctioned and fined for filing frivolous litigation.[409] The Commission provides no empirical support for its vague remarks on "frivolous" litigation in the U.S. so it is hard to measure the Commission's credibility on this score. Contrary to popular myth, U.S. lawyers are not prone to file lawsuits without merit. Plaintiff's lawyers working on a "no cure, no pay" basis receive nothing if a case is dismissed, creating a natural incentive to avoid unmeritorious cases.

Eighth, opt-out class actions are consistent with constitutional principles of due process and the right to a "day in court" because notice must be sent to opt-out class members, giving them the right to be informed, opt-out of the action, and make any objections to a settlement. The U.S. Supreme Court decided in 1985 that the opt-out mechanism was consistent with principles of due process.[410]

This thesis does not purport to resolve all of the misrepresentations about U.S. class actions in one attempt. It merely suggests that misconceptions which may have driven the Commission to exclude opt-out class actions from the list of White Paper recommendations – despite obvious advantages – warrants closer examination. If the assumptions made by the Commission are incorrect, then opt-outs should be given renewed consideration. Further, closer examination of the U.S. might suggest effective means of getting around the perceived problems, such as the principal/agent conflict, in a way that would be satisfactory. The national models discussed in this paper show that closer examination of the U.S. was very helpful in their own

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members of … the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action").

[408] The rule that applies to all litigation filed in a U.S. federal court, Fed. R. Civ. P. 11(b), reads: "By presenting to the Court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

[409] Fed. R. Civ. P. 11(c)(1), (3). The sanctions may include monetary fines and non-monetary directives. Fed. R. Civ. P. 11(c)(4), (5).

[410] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

respective dialogues over class actions. The Netherlands was heavily influenced by the U.S. model to adopt opt-outs, as noted *supra* at 53. Sweden's first inspiration to adopt class actions similarly came from the U.S., as noted *supra* at 33. The E.U. is almost certain to benefit from closer, objective examination.

ANNEX G –PURSUIT OF SEPARATE TRACKS

The national models discussed in this thesis demonstrate that class actions have been used for a wide variety of legal claims. In the Netherlands, opt-out class actions were used to settle a securities fraud case against Royal Dutch Shell. In Sweden, opt-in class actions were used to enforce insurance regulations against a life insurance company that sold its assets and transferred the wealth to a parent company. In Denmark, and Norway private opt-in class actions may be used in civil proceedings to enforce any substantive law. Therefore, even if E.U. legislation proceeds along separate tracks (thereby rejecting the single overall framework recommended *supra* at 70 - 79), then class actions should be made available to enforce Community legal rights for consumer protection, competition law, employment discrimination, securities fraud, human rights, and other matters. The E.U. and EC Treaties provide ample basis for legislative action along separate tracks.

Because "[v]ictims have a right to compensation … and it is fundamental that they can enforce it effectively",[411] the Community has a moral as well as a legal obligation to ensure that E.U. citizens have access to procedural mechanisms to enforce their legal rights. But, first, the leaders in Brussels must overcome their emotional reaction against class actions.[412] If the Community does not make class actions available, then the status quo will remain: "most of the harm caused by … infringements will continue to be left uncompensated, and victims and businesses that comply with the law will continue to have to absorb that loss."[413] This statement, although made in the context of competition, applies equally to other substantive areas. Companies that engage in training and compliance procedures to abide by E.U. laws will suffer a loss in relation to companies that infringe those laws. Even worse, the direct victims of, say, environmental pollution or gender discrimination will have little or no recourse to damages. The Community should avoid this default option. Next, we will review some of the separate tracks for which the Commission might propose collective redress for private enforcement.

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[411] White Paper Staff Working Paper, 10. This statement was made in the context of proposals regarding the private enforcement of competition law and with special reference to an ECJ case underscoring the right of competition law victims to sue for compensation. But the same logic applies to other E.U. laws with direct or indirect effect.

[412] Kuneva Speech, 2 ("To those who have come all the way to Lisbon to hear the words 'class action', let me be clear from the start: there will not be any. Not in Europe. Not under my watch").

[413] White Paper Staff Working Paper, 10.

For consumers, the experience of Norway shows that both opt-in and opt-out class actions would be useful for enforcing consumer protection. The drafters of the Norwegian Dispute Act thought class actions would be useful for consumers with small claims, as noted *supra* at 43. Under Article 153 E.C., the Community would find legal support for class actions by individuals for monetary damages, or restitution:

> In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to ***organise themselves*** in order to safeguard their interests.[414]

Class actions are precisely the type of mechanism that would permit consumers to "organise themselves in order to safeguard their interests." Indeed, the class action device is nothing more than an organizational or procedural tool. It should therefore be among the highest – not the lowest - of priorities for DG Health and Consumer Affairs. If necessary, the class action device could be limited to cross-border cases worth less than 2,000 euros, as in the Small Claims Regulation that will become effective in January 2009.[415] The DG Health and Consumer Affairs, the Council, and the European Parliament may refuse to consider such an option but, if they do, they are making a deliberate decision that will result in millions of consumers suffering damages without remedy. Any rejection of class actions should be based on clear reasoning rather than vague fears of the U.S. model or an incorrect belief that class actions would be contrary to European legal tradition.

For minorities, class actions might be used to protect Europeans from discrimination on the basis of Art. 13 E.C.: "…the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Minorities should also be able to enforce Article 12 E.C. forbidding "discrimination on grounds of nationality" through collective redress.

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[414] Art. 153 E.C. ¶ 1 (emphasis added).

[415] Small Claims Regulation, Art. 2(1) ("where the value of a claim does not exceed EUR 2 000"); *id.* at Art. 1 ("This Regulation established a European procedure … concerning small claims in cross-border cases") and Art. 3(1) ("cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised").

For workers, class actions might be used to protect Europeans from employment discrimination at work. The Treaty provides a legal basis for class actions to remedy gender discrimination suffered by women in the workplace:

> 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job. 3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ***ensure the application*** of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.[416]

Although Article 141 E.C. refers to the obligations of Member States (Art. 141(1)), the Treaty's force also applies to individuals. In *Defrenne*, the ECJ confirmed the right of a victim of gender discrimination at work, in this case a female flight attendant, to recover compensation under Community law.[417] If class actions were available at the time of the *Defrenne* case, Ms. Defrenne could have sued on behalf of all female flight attendants at Sabena Airlines. Because class actions were not available at the time, there was likely no recourse for the majority of female flight attendants. The adoption of class actions for employees who suffer gender discrimination at work would fulfill the Council's legal obligation to "ensure the application" of E.U. laws prohibiting gender-based discrimination.

Class actions could also be used to enforce the anti-discrimination laws of Member States: "the Community shall support and complement the activities of the Member States in…equality between men and women with regard to labour market opportunities and treatment at work..." Art. 137(1)(i) E.C. Further, the Council is empowered to adopt "minimum requirements for gradual implementation" that do not impose administrative, financial, or legal costs. Art. 137(2)(b) E.C. The enactment of a procedural mechanism would create just such a

[416] Art. 141 E.C (emphasis added).

[417] Case 43/75 *Defrenne v. Sabena* (No. 2) [1976] ECR 455.

"minimum requirement[]" without imposing additional costs. Despite the obvious advantages, class actions have not been considered for employment discrimination in the 32 years since the ECJ decided the *Defrenne* case. A truly free market requires freedom in employment just as much as freedom from competition infringements, if not more so. The principle of non-discrimination, more generally, on grounds of nationality could also be enforced through class actions since the Tampere Council resolved that the Community should "enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia."[418]

For the environment, class actions might be protected on a separate track under the legal authority of Articles 174 and 175 E.C. which provide for "a high level of protection." Class actions might be used to promote the goals of "preserving, protecting, and improving the quality of the environment" and "protecting human health."[419] Collective redress has not yet been considered for environmental protection. In Sweden, however, private individuals have already filed an opt-in class action regarding noise pollution created by a local airport, as noted *supra* at 96 (*De Geer* case). Such actions might be useful across the E.U.

For human rights, class actions could be used to collect compensation from a Member State that has infringed Community law.[420] The Tampere Council expressed the belief that the Community will accede to the European Convention on Human Rights.[421] Class actions would be an appropriate way to enforce human rights norms when victims suffer from a common violation. In fact, the lessons of Sweden and Norway indicate that class actions would be used for just such a purpose. There have been rumors that an opt-in class action may be filed in Norway on the basis of the European Convention on Human Rights, *supra* at 99, and one of the opt-in class actions already filed, and dismissed, in Sweden was brought on the basis of the same convention, *supra* at 97 - 98.

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[418] Tampere Conclusions, § A(III)(18).

[419] Art. 174(1) E.C.

[420] Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Federal Republic of Germany* and *R and Secretary of State for Transport ex parte: Factortame Ltd.* [1996] ECR I-01029; *see also* Betten, Lammy and Grief, Nicholas, *EU Law and Human Rights*, Addison Wesley Longman Ltd., New York, 1998.

[421] Communication from the Commission to the Council and the European Parliament, *Area of Freedom, Security, and Justice: Assessment of the Tampere programme and future orientations* (COM(2004) 401 final), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0401:FIN:EN:PDF (last viewed on May 28, 2008) (hereinafter, "Tampere Communication"), 8.