NEW MODES OF REDRESS FOR CONSUMERS AND COMPETITION LAW

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Abstract: *This paper begins by examining the development of discussions at EU level on collective redress, so as to show how policy ideas have developed in relation to the two principal areas that are currently under discussion, competition damages and consumer ADR.*

Summary: 1. The Problem. 2. The Different Models of Public and Private Enforcement. 3. Competition Damages – a Confused European Time Warp. 4. New Empirical Evidence of Competition Problems and Patterns of Litigation. 5. Consumer Redress and ADR. 6. The Current Landscape of CDR Bodies. 7. Conclusions.

1. THE PROBLEM

The underlying issue that arises is how to provide remedies that work for individual claims that each typically have small monetary value. Systems of civil procedure in most Member States have all struggled to provide pathways to justice that are capable of providing remedies for small consumer claims. Even small claim procedures or the introduction of mediation into civil procedure have not solved this problem for low value claims in most countries. It is premature to evaluate European initiatives on cross-border

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small claims[1] and encouraging mediation,[2] but they are not likely to have made a significant difference. It is true that the civil procedure system in some Member States involved low court costs (such as France) and low and predictable general costs, especially where claims are covered by insurance (such as those similar to the German system),[3] but even these struggle to be sufficiently attractive for many consumer claims.

There is a second underlying issue that arises out of the first. Whilst it may be disproportionate to be concerned about an inability to provide justice for an individual claim of low value, where that claim is one of a large number of similar claims, there is a wider issue. The trader who is able to keep illegal profits from a mass of small individual infringements can amass large illegal gains. The aggregate effect of that trader's behaviour distorts competition in the market. Hence, the concern here is more to do with regulation of the market than with individual corrective justice.

So the problem has two facets, one at micro level and one at macro level. Viewed another way, the first is about corrective justice on an individual scale, where the normal procedures for private enforcement are typically disproportionate and ineffective, and the second is about market regulation. Member States have differing approaches to whether controls on market regulation involve public or private enforcement mechanisms, and no European consensus has focussed on the optimal model.

2. THE DIFFERENT MODELS OF PUBLIC AND PRIVATE ENFORCEMENT

For some years, debate about mass redress for multiple individual small losses focused on the idea that economies of scale could be made in aggregating individual claims within civil procedure. The most familiar technique for this was the class action, which has been widely used in the United States for many decades. The theory was that aggregation of small individual claims would introduce 'judicial economy' that would make a class action economically viable, since a single action should involve lower costs than multiple individual actions. In this analysis, however, three problems were overlooked. Firstly, a class action would still involve inherently large cost, and the comparison

1 Regulation (EC) 861/2007 establishing a European small claims procedure.

2 Directive 2009/52/EC on certain aspects of mediation in civil and commercial matters.

3 See Hodges, Vogenauer & Tulibacka, 2010.

with multiple individual claims *that would not have been brought* would be a false comparison in concluding that an aggregate procedure would prove to be itself economically proportionate. Secondly, the lesson that many court procedures remain lengthy was forgotten. By introducing a larger procedure, which would be inherently more complex, the duration (and cost) would only increase.

The third problem was more fundamental. Class actions play a fundamentally different role in the American legal system from the role that they could play in a European system. In the United States, the basic architecture of the legal system relies heavily on private enforcement for both private rights *and public norms*. The policy is that every individual is able–and is incentivised–to seek out and pursue infringements by others. There is a strong culture of individual freedom and assertion of individual rights, which has produced a system of 'adversarial legalism',[4] in which there is strong distrust of distant concentrations of power, such as large corporations and Federal regulatory agencies. The design of a system of private enforcement logically includes the ability for individuals to investigate whether infringements have occurred, and to institute legal action to rectify damage done. It would also impose dissuasive sanctions on both individual infringers and others, on a theory of individual and general deterrence.

Since individuals might only have incurred small losses, they would not be incentivised to take such public-spirited action. Therefore, in incentives are put in place to encourage public enforcement by 'private attorneys general'. The list of incentives and techniques of imposing public sanctions is well-known, and includes ensuring that the claimant has no cost and no cost risk (intermediaries are paid by results, and there is no 'loser pays' rule); a one-way cost-shifting rule for many infringements of market law by corporations;[5] high damages (triple damages for antitrust breaches); high fees for intermediaries;[6] wide discovery and depositions; punitive damages; jury trials; aggregation of individual claims (class actions and multi-district litigation procedure); no pre-emption by tort law of regulatory rules; alignment of substantive law (such as no requirement to prove individual reliance on misrepresentations

4 Kagan, 2001.

5 Farhang, 2010.

6 Lee III & Willging, 2010; Eisenberg & Miller, 2010.

by issuers of corporate prospectuses in order to found a (collective) damages claim).

In the context of the United States' legal system, these rules are intended to impose high costs on infringers and for such costs to be paid to successful claimants and their lawyers. The funding of litigation is largely privatised: legal aid or similar support is highly limited. Corporate defendants can be expected to complain that the costs of the system are too high and that the scale of the costs involved produces undesirable practices, such as 'blackmail settlements' where it is cheaper to pay in a negotiated settlement than to fight, irrespective of merits. These phenomena are both inherent and intended in the American system of private enforcement. But in the context of a European legal system, such phenomena appear alien and abusive.[7]

The important point is that European legal systems rely on a different balance between public and private enforcement, and on different theories of enforcement other than just deterrence. Many public authorities (other than in competition enforcement) adopt enforcement policies that rely on risk-based, prioritised responses to infringements in which a series of escalating measures can be deployed.[8]

Debate at European level on collective issues has gone through significant changes in rhetoric and terminology. It began as a debate about 'class actions', changed around 2005 into 'collective actions' and by 2009 had changed into 'collective redress'.[9] This change is significant. It reflected that the debate was about the *policy outcome* (redress), rather than about the technique (private enforcement through litigation, or any specific civil procedure technique, such as a collective *action*). It was pointed out that other, more European, techniques of public or private enforcement could achieve redress, and that such techniques could, if properly designed, achieve redress more quickly, cheaply and effectively than mass litigation.

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7 'U.S. style class action is not envisaged. EU legal systems are very different from the U.S. legal system which is the result of a "toxic cocktail" – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures). [...] This combination of elements – "toxic cocktail" – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge's discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.' European Commission DG SANCO, MEMO/08/741, p. 4.

8 Ayres & Braithwaite, 1992.

9 See Hodges, 2006; Hodges, 2008; Hodges, 2009; Cafaggi & Micklitz, 2009.

The European Commission has undertaken a 2008 consultation on benchmarks,[10] a Green Paper on consumer collective redress,[11] accompanied by a Questions and Answers document[12] and two studies: a Problem Study,[13] which evaluated the problems faced by consumers in obtaining redress, and the economic consequences; and an Evaluation Study,[14] which evaluated the effectiveness and efficiency of existing collective redress mechanisms in the EU.

The European debate has been stalled since 2008,[15] resting on the assertion that Europe will not adopt an American-style class action procedure, that abuse will not be allowed, and that a European-style collective action will be proposed without the features that give rise to abuse in America. It is argued that techniques such as control of cases by judges would prevent the economic incentives from producing abuse, through control of the merits of cases (certification), settlement, and fees. Business is fully opposed to those arguments. The European Commission has said it will publish a statement of general principles on collective redress having been through a consultation exercise in 2008.

These assertions are completely unconvincing. Firstly, every aggregated procedure inherently involves adopting features that affect the all-important economic incentives for litigants and especially lawyers and investors in litigation (such as the mere fact of aggregation). Secondly, EU legislation cannot prevent developments at national level that affect those economic incentives. Some Member States have contingency fees[16] or are proposing

10 See <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Benchmarks>.

11 Green Paper on Consumer Collective Redress, COM(2008) 794, 27.11.2008, at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

12 MEMO/08/741, 27.11.08.

13 Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, by Civic Consulting and Oxford Economics, 2008, at <http://ec.europa.eu/consumers/redress_cons/finalreportevaluation studypart1-final2008-11-26.pdf>.

14 Study on the Evaluation of the effectiveness and efficiency of Collective Redress mechanisms in the European Union, by GHK, Civic Consulting and Van Dijk Management Consultants, at <http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf>.

15 This was pending the European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0021&language=EN.

16 See Hodges, Vogenauer & Tulibacka, 2010.

to introduce them.[17] Third party investors in litigation, a phenomenon not known until recently, are spreading very quickly.[18] Loser pay rules are being changed.[19] Thirdly, one cannot calibrate the civil procedure system: it is not possible to design a system that will have 'just enough' private enforcement without abuse, since there are multiple economic incentives involved, and these change from jurisdiction to jurisdiction and are themselves constantly changing. We would end up with either the continuation of the current situation of little private enforcement of small claims and relying on public enforcement and other methods of dealing with market behaviour, or of a major switch to private mass enforcement of private rights that would have a behavioural role that would duplicate public enforcement. This would lead to forum shopping, and duplication, inconsistency and inefficiency in setting standards of behaviour.

If courts are confronted with mass litigation, they usually need a procedural rule to enable them to process aggregated claims, since civil procedure is designed to process individual claims.[20] Empirically, very few European courts have been confronted with mass litigation, and a major reason for this is that aspects of market behaviour by traders are designed to be dealt with through regulation and not through litigation. Seventeen Member States have so far introduced some form of collective action procedure, largely within the past decade, but in almost all of these there have been very few cases.[21] The few cases that have occurred have usually taken several years, at great cost. The case that gave rise to the German 2005 KapMug procedure took ten years to conclude in 2012 that there had been no initial mis-statement by the company (whereas a class action in USA had been settled for a large sum because that was the cheapest way out). See also severalk cases in Sweden

17 *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. The Government Response* (Ministry of Justice, 2011).

18 Hodges, Peysner & Nurse, 2012. Veljanovski, 2011.

19 See the proposed introduction of one-way cost shifting for personal injury cases in England and Wales: *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. The Government Response* (Ministry of Justice, 2011).

20 Experience in England and Wales has been that a specific collective procedure has not been used, since courts apply general case management principles in all litigation, and litigants are subject to requirements and incentives to seek to settle cases.

21 See national reports of the Stanford-Oxford Global Network on Class Actions at globalclassactions.stanford.edu.

and Italy. Cases can, of course, settle, and the Netherlands in particular has incentivised this. Consistent with a national culture of settlement in the Netherlands, the Dutch 2005 Class Action Law (WCAM), has no 'front end' of certification of a class and only a 'back end' in which a settlement that has been agreed by parties can be taken to court for it to be approved and made binding on those who have not opted out.[22]

But the fact that there may be mass litigation in some cases does not answer the question of whether that is the only, or preferred, technique for delivering mass redress. Other techniques exist, involving combination of public regulation, self-regulation, negotiation and alternative dispute resolution (ADR).

Public enforcement authorities that have sufficiently wide powers have been shown to be able to deliver redress (i.e. restitution of losses) as part of their enforcement activities. Importantly, such powers can deliver collective redress very swiftly and cheaply–far more so than through private litigation unless it can be settled quickly. The Danish Consumer Ombudsman (principal enforcer of consumer law in Denmark) has had collective redress powers since 2008 to seek a collective court order against a trader to pay restitution,[23] which he has so far not had to use, since reputable companies negotiate repayment plans with him so as to avoid heavier sanctions and damage to their market reputations. Some companies come to him to confess infringements, whilst others are identified through effective systems of market surveillance, in which access to aggregated complaint data (including that collected through the consumer ADR system) plays an important part. The financial services authority in the UK was given a redesigned collective

22 Weber & van Boom, 2011. This procedure has proved popular, and there have been eight large settlements in seven years, although it may have been too enthusiastically embraced, since the latest case, by investors in the Swiss company Converium, involved only 3% of shareholders based in the Netherlands, and gives rise to issues of enforceability by shareholders in other countries' courts who may allege they were not bound.

23 See Hodges, 2008.

redress power in 2010,[24] since when it has concluded a series of agreements with companies that they will institute repayment plans with customers.[25]

These examples of agreed, speedy and low-cost restitution demonstrate that techniques of public regulation and ADR can be highly effective in addressing both repayment of mass small losses and ongoing regulatory scrutiny of traders' behaviour. The American private enforcement technique can deliver the first goal (at great cost) but is not so flexible at the second. This paper will now examine the two separate areas in which debate on collective redress has so far been focused: competition damages and consumer redress.

3. COMPETITION DAMAGES – A CONFUSED EUROPEAN TIME WARP

Competition law appears to be the only area in which the enforcement policy adopted by European public authorities is based solely on deterrence. As noted above, all other public enforcers (consumer protection, health and safety in the workplace, sectors such as pharmaceuticals, telecommunications and services, and protection of the environment) all adopt other policies, in which deterrence may play a part but other approaches are more dominant. European policy on competition enforcement is heavily influenced by American-inspired law and economics theory on deterrence.[26] However, the European policy-makers have failed to understand that the architecture of the United States and European legal systems differs, and that techniques cannot simply be transferred.

In the United States, as explained above, 95 to 98 per cent of antitrust enforcement is through private litigation, rather than by public authorities.[27] Private enforcement there will inherently produce *both* restitution (damages) and removal off illicit gains–plus, under the deterrence policy, imposition of punitive sanctions through triple damages. The position can be illustrated in Figure 1.

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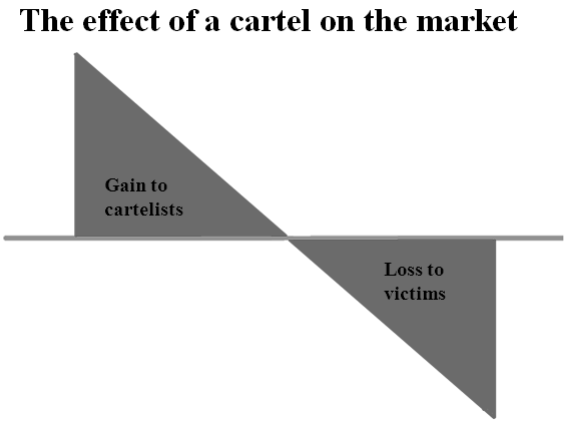
24 See 404 of the Financial Services and Markets Act 2000. The enforcement policy, based on 'restorative justice' principles (rather than a deterrence theory) prioritises disgorgement (restitution), discipline (penalties for offenders) and deterrence, in that order. See http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/036.shtml; FSA consultation paper [CP09/19] on enforcement of financial penalties at http://www.fsa.gov.uk/pubs/cp/cp09_19.pdf.

25 Personal communications between the author and the Danish Consumer Ombudsman.

26 See Posner, 1976; Polinsky & Shavell, 2000.

27 Sourcebook of Criminal Justice Statistics Online, available at http://www.albany.edu/sourcebook/pdf/t5412009.pdf.

FIGURE 1: **The distorting effect of a cartel on a balanced market**



In contrast, the European approach to competition infringements has hitherto been focused almost entirely on imposition of fines by public authorities. The adoption of American-style deterrence theory has led to such fines being deliberately high.[28] Only recently has the problem been discussed that those harmed by infringements have not received restitution, unless they have been able to bring damages claims under national law.[29] However, the policy pursued by the European Commission has been to maintain its regime of public enforcement (and its reliance on a policy that enforcement should be based solely on deterrence theory) and seeking to enable the ability of victims to claim private damages for their losses by separate private procedures (added on).[30] Thus, the left side of the graph in Table 1 remains public enforcement with deterrent fines, and on the right

28 In 2009 the European Commission adopted six cartel decisions, imposing a total of EUR 1.62 billion in fines on 43 undertakings: *Report on Competition Policy 2009* COM(2010)282, 3.6.2010.

29 Case C-453/99 *Courage and Crehan* [2001] ECR I-6297. Waelbroeck, Slater & Even-Shoshan, 2004. More recent data, notably from Germany, indicates that the level of claims and/or settlements is considerably higher than was thought: see Peyer, 2010.

30 European Commission (EC), White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008. Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404 ('Staff Working Paper'). Commission Staff Working Document accompanying the White Paper on damages actions for breach of the EC antitrust rules: Impact assessment, SEC(2008) 405 ('Impact Assessment Report').

side is added privatised enforcement. Further, fines imposed have had no relation to the level of distortion in the market (the angle of the line on the graph) since they have been based primarily on a percentage of turnover of the infringer[31] (on the theory that the impact of deterrence is a function of the size of the business).

Commissioner Kroes' 'add-on' proposal in 2008 met with strong political opposition and failed.[32] It appears that Commissioner Almunia is intending to repeat the same approach. He adheres to deterrence theory, that it should be achieved through maintaining a high level of fines that were appropriate when deterrence was achieved only though public enforcement without private enforcement, and that collective actions should be added on– miraculously without producing abuse,[33] but without explaining how.[34]

There will be various results if current thinking is pursued. Firstly, private enforcement will occur in some cases and not others. Secondly, victims are still faced with having to bring mass claims, especially overcoming the economic barriers that face any mass litigation. In order to address those barriers, the levers would be to introduce collective procedures, and to increase the economic incentives for funders through no cost-shifting rules, incentivising funding by lawyers and third parties (which is happening anyway), and similar techniques. The problems of controlling against 'abuse', discussed above, arise afresh. Thirdly, a confrontational culture will be entrenched in which business objects that it is given no credit for adopting best practice to control internally against infringements[35] and consumers with small claims do not receive redress.[36] Fourthly, the authorities, whose primary goal should be to see that a balanced competitive market is maintained (that the graph

31 Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02, paras 19 and 21.

32 Tait, 2009. See Letter from the Presidents of the Association of German Chambers of Industry and Commerce (DIHK), the Association of German Banks (BdB) and the German Insurance Association (GDV) to President Barroso, 8 May 2009.

33 Statement by Commissioner Almunia at the European Parliament, IMCO Committee, Public Hearing on Collective Redress in Antitrust, held on 22 September 2011.

34 Wils, 2003; Kortmann & Swaak, 2009. The latter is a strong attack on DG COMP's proposals, arguing that they will lead to 'overcompensation' and messing up national rules, especially in relation to "passing on" of loss and limitation periods. They do not see empirical evidence on which to found a proposal.

35 Hofstetter & Ludescher, 2011.

36 See speech by P Houghton of *Which?* at the European Competition Summit, 2011.

returns to a straight line), will have failed to have produced that result and will be unable to determine the extent of deviation from that result: they will not know when restitution was paid and by how much, and they will not know to what extent the illicit gains have been removed, or the real effect that sanctions have had on the infringer or on anyone else in the market.

There is no realisation by policy-makers, firstly, that if restitution were made it would inherently rectify the unbalanced market, secondly, that restitution can (and should) achieved *before* imposition of sanctions, and that the public authorities could achieve those goals if they had appropriate powers (as noted above). The log-jam in the problem is the Commission's enforcement policy.[37] No real progress can be achieved in relation to competition damages and enforcement without a fundamental review. Fortunately, the position on consumer redress has made substantial progress and is set to deliver real benefits for consumers, traders and the health of the market: we now turn to that but first note some important empirical research data.

4. NEW EMPIRICAL EVIDENCE OF COMPETITION PROBLEMS AND PATTERNS OF LITIGATION

A research study on private enforcement of competition law in the EU from 1999 has revealed highly relevant data and findings about the types of problems that are arising and being litigated.[38] The findings included:

- far more private enforcement cases have been brought than were thought to have existed in all large Member States;
- private enforcement of competition law is mostly used by businesses in commercial contract (B2B) disputes, often as one of a number of arguments that are primarily about contract law rather than competition law, and sometimes raising competition arguments as defences; accordingly, the question arises whether competition law could be better integrated within other commercial or consumer trading law and systems, so as to be more effective;

37 Hodges, 2011.

38 AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-, led by Professor B Rodger of Strathclyde University, see www.clcpecreu.co.uk; results were reported at a conference held in London on 15 September 2012.

– speed of response to competition infringements is of paramount importance, so injunction remedies are far more important than delayed damages actions;
– there have been almost no small value mass consumer claims based on competition law in any Member State. The reasons are multiple, including the inherent complexity of competition law and of establishing issues such as dominance or that a cartel exists, problems of proving quantum of damage, high cost of both litigation and distribution of funds, grossly disproportionate and unattractive cost-benefit rations for funders of litigation. It was questioned whether litigation could ever be an effective answer to such problems in the European context.

5. CONSUMER REDRESS AND ADR

We turn now from competition law issues to the different world of enforcement of general consumer protection law. Dispute resolution has traditionally been analysed on the basis that the courts are the ultimate paradigm, and that 'alternative' techniques can occur within the shadow of the courts, such as private arbitration and mediation or conciliation. Yet, as noted above, courts are often too slow and costly to handle small claims that are typical of consumers' disputes with businesses. Courts are also not user-friendly for today's citizens. Consumers do not want to waste time in lodging formal documents in court, to have to cope with unfamiliar court processes, to attend hearings, to pay lawyers, to risk having to pay opponents' costs, to await results, to have to seek enforcement, and to see companies repeating the same mistakes. Even including mediation processes into court procedures does not solve all these problems. Consumers cannot be compelled, before or at the time of purchase, to agree to dispute resolution through arbitration.[39] So how can small individual disputes be resolved whilst general market behaviour be controlled? The answer does not lie in courts or 'private enforcement' but in the separate world of Consumer ADR (CDR), which has developed into its own unique world, with its own architecture.

39 See European Convention on Human Rights, art 6; and Case C-168/05 Mostazo Claro [2006] ECR I-10421 and Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579.

In the past decade, ADR has been included within court procedures.[40] But a separate structure of CDR has been constructed, unnoticed by many people. The components of this structure have developed in different ways, at different speeds in different Member States, so there is little overall cohesion. But the main elements are identifiable, and general principles can be applied.[41] A European Code of Conduct for Mediators was published in 2004, which requires mediators to have competence, independence and impartiality. It states that a mediator must keep confidential all information arising out of or in connection with a mediation, including the fact that the mediation is taking place or has taken place, unless compelled by law or public policy to disclose it. Any information disclosed in confidence by one of the parties must not be disclosed without permission to the other parties, unless compelled by law.[42]

A cross-border network has existed since 2001 to transmit complaints between official bodies in Member States, which are then directed at the local trader or a relevant CDR body. There is a standard consumer claim form.[43] It began as the Extra-Judicial Network (EEJ-Net)[44] and was subsequently renamed the European Consumer Centres Network (ECC-Net).[45] Over time, many of the ECC offices have found themselves performing conciliation services, and 'leaning' on traders to settle disputes, using their official status and close links with regulatory authorities. The ECCs have handled around 50,000 or more complaints annually, involving products and services, often relating to contract terms. The main sector concerned by far

40 In addition to the mediation Directive noted above, see also Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>.

41 Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:109:0056:0061:EN:PDF.

42 European Code of Conduct for Mediators, at <http://europa.eu.int/comm.justice_home/ejn/adr_ec_code_conduct_en.pdf>.

43 http://www.eejnet.org/filing_complaint.

44 Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ C 155/1, 6.6.2000.

45 http://europa.eu/legislation_summaries/other/l32043_en.htm.

has been air transport, and a large number of complaints also concerned online transactions (55%).[46]

Sectoral cross-border CDR networks are emerging. FIN-NET (Financial Services Complaints Network)[47] was established in 2001 to link 50 CADR schemes for disputes in financial services. In 2009, FIN-NET reported 1,523 cross-border cases, of which 884 were in the banking sector, 244 in the insurance sector, 410 in the investment services sector, and 4 that could not be attributed to one sector. In 2011, a network of energy sector ombudsmen was formed.

A number of sectoral EU Directives either encourage or require traders to belong to an ADR scheme. This is encouraged for e-commerce,[48] postal services,[49] financial instruments,[50] and services,[51] and included in the draft Common European Sales Law.[52] It is required for telecoms,[53] energy,[54] consumer credit[55] and payment services.[56]

A 2005 study by Leuven found that since many ADR schemes and methods are used, and every Member State has put in place an unique mix, it was not clear how a single 'ideal' ADR system could be proposed, but full national coverage would be desirable.[57] A 2009 study suggested that there were 750 consumer-to-business ADR systems across the EU.[58] In 2011 a Commission consultation on ADR stated that ADR had not achieved its full

46 See http://ec.europa.eu/consumers/ecc/key_facts_figues_en.htm.

47 See http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm (accessed July 2008).

48 Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

49 Directive No 2008/6/EC.

50 Directive No 2004/39/EC.

51 Directive 2006/123/EC, art 27.

52 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635, 11.10.2011, Annex, art 13.1(g).

53 Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37.

54 Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

55 Directive No 2008/48/EC.

56 Directive No 2007/64 /EC.

57 Stuyck and others, 2007.

58 Civic Consulting, *Study on the use of Alternative Dispute Resolution in the European Union*, 16 October 2009 http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

potential, and that in 2009 only 6.6% of the cross border complaints received by the ECC-Net had been transferred to an ADR scheme.[59]

In November 2011, the European Commission published proposals[60] for a Directive on Consumer ADR[61] and a Regulation to establish a web-based ODR (online dispute resolution) platform[62] to which consumers across the EU could direct a complaint, which would refer the complaint to the correct national body. These proposals seek that application to national as well as cross-border disputes, and full national coverage of all types of disputes. However, not all Member States currently have full coverage, there is some reluctance by governments to find funds to provide full coverage, or to impose the cost of a privatised scheme on business. In some Member States, sectors argue that they currently handle disputes satisfactorily through in-house customer relations functions, and do not need to pay for anything else.

6. THE CURRENT LANDSCAPE OF CDR BODIES

There are differences in the national architectures of CDR systems, in the number of sectors that are covered by individual schemes, and in whether coverage is comprehensive.[63]

In Nordic states, the priority rests with information and advice to consumers, from local government Advice Bureaux, with specialist State-sponsored bureaux for important sectors such as financial services, insurance and telecoms. These bureaux are linked with the Consumer Agency, which provides national coordination and extensive web-based advice. If post-purchase issues arise, the bureaux can assist in advising on how to seek solutions, but disputes can be taken either to a sectoral CDR Board or to the national CDR Board (the ARN). The procedure in these Boards is based

59 Consultation paper on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union (European Commission, January 2011), available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf.

60 See Communication by the European Commission on "Alternative Dispute Resolution for consumer disputes in the Single Market", COM(2011) 791/2.

61 Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM (2011) 793/2.

62 Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 793/3.

63 Models in ten Member States have been examined in Hodges, Benöhr & Creutzfeldt-Banda, 2012.

on an arbitration model, where there is a neutral chair sitting with two other members, one from a list of consumer representatives and another from a business list.

The arbitration model is also found in Spain, with a network of consumer arbitration Boards funded by regional authorities, and free to consumers and traders. Some sectoral ombudsmen have recently emerged.

Portugal also has a mediation-arbitration model, with judges or others sitting as single arbitrators, with a small number of sectoral schemes (financial services, insurance, motor vehicles). Adherence is high for some schemes, but the model is based on metropolitan centres, and there are problems of national coverage and funding.

In most Central and Eastern European (CEE) states, consumers may complain about traders to a CADR function that is located within the national consumer authority (a legacy of Soviet architecture). Examples are the Trade Inspection in Poland and the State Consumer Enforcement Authority in Lithuania.

In the Netherlands, sectoral Boards (geschillencommissie) have been created over 40 years on a single model, administered by a single foundation, whose costs are paid by the state (20 per cent) and by trade associations (80 per cent). Every Board therefore operates on the same, transparent model, involving panels of three-person arbitration. For financial services, there is a three tier structure, with complaints going first to an ombudsman, then a geschillencommissie, then an appeal board. There is very wide coverage, but no residual body, for example for disputes with traders who are not members of trade associations and have not voluntarily joined the geschillencommissie system.

In the United Kingdom, there are some statutory ombudsmen (financial services, pensions, lawyers), some private sector ombudsmen (telecommunications, energy, housing) and some private sectoral dispute resolution schemes, usually operating to resolve disputes under codes of business practice (travel, motor vehicles). There is wide coverage, but no residual facility.

In Germany, some complaints may be made to regulators (telecoms and energy to the Bundesnetzagentur or financial service to the Bundesbank, but these have low usage), there are various bank and insurance ombudsmen, and ombudsmen are being established in a growing number of other sectors (transport).

France has complaint mechanisms for financial services, energy and telecoms, and a number of in-house *médiateurs*.

Belgium has some sectoral ombudsmen and has created in 2011 a state-sponsored web platform that can direct consumers to the correct sectoral CDR scheme. The government is now working with business sectors to create a sufficient number of sectoral schemes. It might construct a single integrated system.

7. COMPARATIVE OBSERVATIONS ON CDR BODIES

Various observations can be drawn about the structure and performance of current CDR schemes.[64]

Firstly, those states that provide effective and easily accessible information and advice to consumers (and traders) seem to have lower levels of problems. In every country, the first priority in responding to problems is to direct consumers to contact traders. Traders should be given an adequate time to solve the problem, but not an indefinite time. After that stage, consumers should have the opportunity to contact a CDR scheme. In the Nordic and CEE states, there is a single, national CDR scheme that can accept any type of dispute, and so provides a residual function with full coverage. In the Netherlands and United Kingdom, the model is that many sectors have CDR schemes, but without a residual function. It may be that large traders have strong customer relations functions, which both seek to attract all customer feedback and to resolve any problems quickly. In contrast, smaller traders who have less resource and reputation may benefit from having a CDR scheme to assist in capturing issues that they should focus on.

The techniques that are used by CDR schemes are familiar: a stage of mediation/conciliation and/or a stage of reaching a decision to resolve a dispute (adjudication, whether binding or not). Indeed, the best CDR systems operate by sequencing those techniques, and resolve the majority of issues at the earlier stages. At the final stage, the number of disputes that need a decision to be taken by an independent third party is often far lower than the number of initial contacts, and the number of contacts that became formal cases.

The models within which CDR providers operate have developed over time. The model thirty years ago, involving a panel of three 'arbitrators', was

64 See Hodges, Benöhr & Creutzfeldt-Banda, 2012.

influenced by models of courts plus a desire to have balances representation, as in arbitration. More recently created ombudsmen systems have case handlers at initial stages, and escalate unresolved cases to single more senior staff and ultimately to a single ombudsman (large organisations may contain multiple staff qualifying as an ombudsman). The three-person panel may have the advantage of symbolic representation, individual expertise of panel members, and a guard against bias. But the one-person model is quicker and usually cheaper. Different models may be appropriate in different situations.

Ombudsmen or CDR functions have frequently been created as integral parts of new regulatory regimes for sectors, such as in financial services, telecoms, and energy. The CDR function may be intended to be a means of processing an increase in simple disputes that arise as a result of new regulatory obligations. But an equally important function may be to capture the nature and incidence of the main types of issues that arise in the sector. This aggregated data can be fed back to traders, regulators, consumers, trade associations, the market, and the media. Hence, CADR bodies and regulators increasingly move away from traditional confidentiality of the details of disputes, and publish data. This transparency provides the ability for aggregated small complaints to have behavioural effect, as referred to at the start of this paper. The system therefore operates as 'CDR as regulation' as well as solving small individual disputes. It can be supplemented by giving regulators strong powers to influence or order mass redress, subject to court supervision.

The other reason for making data transparent is to enhance the democratic accountability and level of trust in the third party CDR scheme and its decision-makers. Any non-court assistance in dispute resolution involves private citizens who are not state-appointed judges. There needs to be confidence that mediators or others who make decisions about legal rights can be trusted. Their jurisdiction should be proportionate to their independence and expertise. Hence CDR schemes must operate to adequate levels of quality and performance. The 2001 Recommendation sets out the basic criteria, but needs to be reviewed and modernised. CDR schemes should also publish data on their performance against key indications, such as duration, cost, throughput, and outcomes.

Many CDR schemes make decisions on the basis of law, but many apply higher standards contained in business codes of practice. Some CDR schemes make decisions on the basis of the law, but some on the basis also of fairness

or equity. Business can sometimes object that there is confusion over whether more than one set of standards are being applied, although this effect can also occur with courts.

CDR schemes are good at applying clear law to simple facts. They are not always so appropriate for clarifying what the law is. That is a core function of courts. There therefore has to be a new relationship between courts and CDR. The function of one could be described as declaration, the other as application. Some CDR schemes have begun to refer points of law to courts, or to regulators. Courts should refer simple cases back to CDR schemes, for proportionate resolution, just as many CDR schemes refer cases between themselves to that which has the relevant sectoral expertise.

There is no suggestion that access to courts should be denied. The ECJ case has shown that even mandatory out-of-court procedures for the settlement of disputes between consumers and providers can be legal provided the *right* to bring an action before the courts for the settlement of disputes is maintained.[65] This is largely a question of sequencing, rather than access. English courts require litigants to take appropriate steps to settle cases, both before and during the court process, and may impose costs sanctions for unacceptable behaviour.[66]

Some CDR schemes (especially those based on post-sale agreement to arbitration) impose a cost on consumers, but the clear majority are free to consumers. It is striking that business sectors can completely change their attitude to CADR, and where they operate in stable and competitive markets they can insist on the value of CADR, whether to reduce the cost of claims being diverted unnecessarily to courts by lawyers, or because of the value of the 'regulatory feedback' effect noted above.

Some CDR schemes are binding on the consumer, where they have to agree to this process after a dispute has arisen, but most schemes are not binding on consumers until they agree to the outcome of the mediation or suggested decision. The decisions of some CDR schemes are imposed as binding on traders by law (UK statutory financial services scheme) or by prior voluntary agreement that members will adhere to decisions (the Netherlands, some in

65 Case C-317/08, C-317/08, C-319/08 and C-320/08, *Rosalba Alassini v Telecom Italia SpA, Filomena Californio v Wind SpA, Lucia Giorgia Iacono v Telecom Italia SpA* and *Multiservice Srl v Telecom Italia SpA*, March 18, 2010.

66 English Civil Procedure Rules, r 44.5(3).

UK and Germany). Where 'decisions' are not binding (Nordics), other 'name and shame' techniques can be used, and compliance with recommendations is usually fairly high.

8. CONCLUSIONS

We are seeing new solutions emerging for old problems, since the old problems have not been solved by previous solutions. Some people may find the new solutions too revolutionary, but the new approaches have already spread widely, and are continuing to spread. The 21st century is taking a holistic approach to issues such as regulation and redress, and public and private enforcement, which were previously thought to exist in separate compartments that had little relation to each other. Now, the barriers between the compartments are breaking down, and we see public regulators delivering private redress, and new forms of dispute resolution delivering regulation. The real questions that need to be asked are: what solutions work? How much do different solutions cost? How long do they take? Which options deliver best outcomes?

In answering these questions, we are seeing some 'thinking outside the box', which is imaginative and offers considerable promise. Collective actions might be largely consigned to history, but collective redress has a healthy future if regulatory and CDR mechanisms are embraced. The intelligent design of regulatory and CDR systems can offer solutions to the conundrums posed at the start of this paper on how to deliver access to justice for small claims, and how to affect the behaviour of traders. These are European solutions that differ from the American model of private enforcement. They are more attuned to European principles of solidarity, culture and proportionality.

The future may see considerable consolidation in CDR schemes. They can operate well as methods of dispute resolution for small claims. They appear to have captured many small consumer claims that would otherwise not be brought in courts, because they are user-friendly, quick and cheap. Many have overcome the proportionality barrier that affects courts. CDR schemes also have considerable potential to operate as part of efficient and effective regulatory systems, feeding back aggregated data on markets and traders, and supporting the achievement of high standards. They are likely to be particularly useful in supporting compliance with regulation by SMEs. However, almost every Member State will need to review its existing structure of CDR bodies and how they operate, if this technique is to realise its full potential in delivering effective outcomes.

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