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### Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action

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# Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action\*

Filippo Valguarnera

## Abstract

In the last few years European legislators have shown an increasing interest in group litigation, stimulated by the political pressure coming from consumer associations, the public at large and the European Union. The European devices, however, are very different, with a few interesting exceptions, from the internationally most famous group action model: the American class action. The European legal systems tend to restrict the power to sue to selected subjects, such as associations, they prefer the opt-in mechanisms to determine who will be bound by the judgement, and they restrict the application of the group action devices to only a few legal fields. The most common explanation for these differences refers to the pressures coming from powerful industrial lobbies worried by large classes of consumers represented by greedy lawyers, the very epitome of the so-called American "litigation culture."

The purpose of this article is to focus on the resistance against the class action offered by the European legal tradition itself. The article focuses in particular on two closely-related elements: the "hierarchical" distribution of power among the various actors of the legal systems and the tendency to regulate the market *ex ante*. These factors favour group litigation models that are deprived of the tremendous transformative power of the American class action.

The cautious European approach has a few advantages. For instance, it avoids the bitter ethical issues that quite often afflict the American class action bar. This comfort, however, comes at a price that is seldom discussed. The European legal culture prevents legislators from paying appropriate attention to important functions of civil litigation, such as deterrence. Moreover, the continental European inclinations present the seductive but false idea of a world where the law can be grasped by the common man and where democratically elected officials have full control over the rules governing the community. The contribution of the courts flies under the radar of public opinion and public debate. From a democratic perspective this is undesirable as the public should

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be informed about the most important policy choices and about who is in charge of making them. “Stronger” group action devices could bring to the spotlight of media attention the work of the courts and the role of civil litigation. Secondly, the improved access to justice would help many social issues which today are “hidden” to emerge, providing precious feedback to the legislator.

**KEYWORDS:** class action, opt out, opt in, coordinate ideal, hierarchical ideal, ex ante regulation, legal profession, *cy pres*, Italy, Germany, France, Sweden, Netherlands, Norway

## Introduction

When a European comparative law scholar lectures about the American procedural tradition, the point of departure is usually its “exceptionalism”. It has such exotic features as punitive damages, pretrial discovery, contingency fees and, last but not least, class actions. In recent years, however, the two sides of the Atlantic seem to have grown a little closer, as many European legal systems have started to develop devices for group actions.

The new trend has been stimulated by various factors. Firstly, there is a huge political pressure coming from consumer associations and the public at large. The words “class action” remind most people of John Grisham novels and Hollywood movies, where the “common citizen” manages to prevail over large corporations. Given its popularity, the “class action” has, not surprisingly, also become a widespread electoral promise. Secondly, the European Union, has, since an EU Commission paper of 1984<sup>1</sup>, taken an interest in the development of collective actions in the field of consumer law.<sup>2</sup> This has resulted in a number of directives requiring that persons or organizations having a legitimate interest in protecting consumers may bring a lawsuit before the courts or administrative tribunals, for instance in the case of unfair contractual terms<sup>3</sup> or of misleading advertising.<sup>4</sup> Among those, the most interesting is certainly the Directive 98/27 on injunctions for the protection of consumers’ interests, which allows so-called “qualified entities” in the Members States to apply for injunctive relief in the interest of the consumers.<sup>5</sup> Thirdly, the introduction of group actions has been endorsed by prominent European legal scholars, who, since the 1966 reform of Rule

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<sup>1</sup> Memorandum from the European Commission: Consumer Redress COM(84) 692, 12-12-1984.

<sup>2</sup> For the EU approach to aggregate litigation see C. Hodges, *Global Class Actions Project – Summary of European Union Developments*, [http://globalclassactions.stanford.edu/PDF/EU\\_Report\\_on%20Developments\\_EU\\_and\\_UK\\_Nov%2008.pdf](http://globalclassactions.stanford.edu/PDF/EU_Report_on%20Developments_EU_and_UK_Nov%2008.pdf) (2008).

<sup>3</sup> Directive 93/13/EEC, Article 7: “1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

<sup>4</sup> Directive 84/450/EEC, Article 4.1: “Member States shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public. Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising may:

- a) Take legal action against such advertising; and/or
- b) Bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. (...).”

<sup>5</sup> According to Directive 98/27/EC Article 3, a “qualified entity” is any body or organization which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring the enforcement of the provisions of Member States related to the protection of the collective interests of consumers.

23 of the US Federal Rules of Civil procedure, have discussed with interest the new creature they have seen grow and prosper in America.<sup>6</sup> Finally, contemporary society, more than ever before, needs solutions to deal in an efficient way with mass litigation. This is true not only as regards mass torts, as when a medical product damages thousands of consumers, and threatens seriously to overload the judicial machinery for years, but also increasingly in the field of securities, as clearly shown by the Deutsche Telecom case in Germany.<sup>7</sup>

There are reasons to suspect, however, that the narrowing between Europe and the United States is more apparent than real. As we shall see, the European group action devices are very different from the US class action.<sup>8</sup> So different in fact that they could be considered almost an *escape* from their American cousin. While the American class actions can be brought by any given class member, the European group action models usually restrict this power to selected subjects, such as associations. While the American class action uses an opt-out/mandatory mechanism to determine who will be bound by the judgement, the European models prefer the opposite opt-in solution. While the American class action can be used to litigate, in principle, all subject-matters, the Europeans have preferred piecemeal regulation, restricting the application of the group action devices to a few selected legal fields.

These European choices are determined by factors, some of which are obvious - but others less obvious. The most obvious factor of them all is the pressure from industrial lobbies, fearing that American-style class actions would bring a devastating rise in litigation expenses and that defendants would be left under a

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<sup>6</sup> Of considerable interest is, for instance, the contribution of the Italian legal scholar Mauro Cappelletti (Florence and Stanford), founding father of the so-called “access to justice” movement. Cappelletti – using a metaphor destined to become famous – described access to justice as a movement consisting of three consecutive “waves”. The first wave involved the reform of national legal aid systems, institutions aimed at facilitating access to legal services for the poor; the second wave sought to protect diffused and fragmented interests such as those of consumers and the environment; the third wave intended to explore the alternatives to ordinary civil litigation, like arbitration and mediation. In this context, class action was seen as an interesting tool to deal with the second wave, the protection of diffused and fragmented interests. See for instance M. Cappelletti, B. Garth, *Access to Justice and the Welfare State: An Introduction*, in M. Cappelletti (Ed.), *Access to Justice and the Welfare State*, Alphen aan den Rijn, Sijthoff, 1981, 11-20. The Swedish scholar Per Henrik Lindblom later picked up on this theme in a very influential book which started the class action debate in Scandinavia. See P.H. Lindblom, *Grupptalan – Det anglo-amerikanska class actioninstitutet ur svenskt perspektiv*, Stockholm, Norstedts Juridik, 1989, 3-19.

<sup>7</sup> The need for group action devices has also been underlined by the general decline in the last fifteen years of welfare programs in most European countries. Many social issues that once were solved by state intervention are now left to the judicial system. Moreover, many legal aid programs have been curtailed as well, exposing the weakness of individual “one shot litigants”. See E. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401-402 (2002).

<sup>8</sup> Significant exceptions are the Scandinavian countries. For a brief discussion see *infra* section 1.

sword of Damocles – with a real risk of damages hard to calculate beforehand, and leading to “blackmail” settlements. There is also a false, but widespread, notion that the class action is inevitably linked to other elements of the American civil procedure that many Europeans consider undesirable (such as punitive damages). Other elements include the fear of jeopardizing revered procedural rights such as the right to choose one’s legal counsel, the right to be heard before suffering the consequences of a judgment and notice of the proceedings.<sup>9</sup>

It is the not so obvious factors, or at least a few of them, which are the subject of this Article. I will argue that there are certain features, deeply ingrained in the continental European legal culture, that shape the legal systems and which are hostile to the American style class action. I will focus in particular on two closely-related elements: (i) the distribution of power among the various actors of the legal systems, and (ii) the way the legal systems handle market regulation.

As for the distribution of powers, I will partially draw from the analytical tools developed by Professor Mirjan Damaška in his seminal work “The Faces of Justice and State Authority”<sup>10</sup>, where he distinguishes between a “coordinate ideal of authority”, towards which the American legal system leans, and a “hierarchical ideal”, closer to the continental European tradition. The “coordinate ideal” consists in a “horizontal” distribution of state authority, in the sense that public functions are vested in a variety of lay officials not bound by relationships of hierarchy. According to the “hierarchical ideal”, on the contrary, the state officials are professionals organized in a vertical system of superiority and subordination.

When it comes to market regulation, I will base my analysis on the distinction between *ex ante* regulation, typical of civil law legal systems, where the policy choices are made *a priori* by the legislator or by public agencies, and *ex post* regulation, which belongs to the American tradition, and more widely to the common law experience, of regulating after the fact through enforcement.

I will leave for another occasion the more ambitious task of linking these elements to genuinely “cultural” features of the European and American traditions. For instance, I will not discuss whether the distribution of power in the United States is related to the high level of individualism characterizing that country, as opposed to a more socially oriented Europe. I will also limit this paper to the relationship between the United States and continental Europe, excluding England and Ireland, with a brief exception in section 3. A proper comparison between two members of the common law legal family requires, in my view, a wider array of analytical tools than the limits of this Article allow.

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<sup>9</sup> See R.B. Capalli, C. Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT’L & COMP. L.J. 217, 219 (1992).

<sup>10</sup> See M. Damaška, *The Faces of Justice and State Authority*, New Haven and London, Yale University Press, 1986.

Finally, it must be stressed that the purpose of this paper is not to provide a very detailed account of the continental group action devices, nor to describe the most advanced solution elaborated in Europe, but rather to show how European legal system are hampered by their legal tradition in dealing with group litigation. For this reason, the analysis will mainly be based on legal systems such as the French, the German and the Italian, which I consider representative of the majority of the continental legal systems, rather than on the spearheads of group litigation in Europe, such as the Scandinavian countries, the Netherlands and Portugal. A brief description of the group litigation devices elaborated in these countries will nonetheless be provided for a more complete picture of the European landscape.

### **1. Europe v. United States: a sketch of the main differences**

This section is mainly descriptive. The goal is to sketch the main differences between the American class action, as defined by Rule 23 of the Federal Rules of Civil Procedure, and some of the most typical European models.<sup>11</sup>

#### *The American federal class action in a nutshell*

According to Rule 23(a) of the Federal Rules of Civil Procedure<sup>12</sup> an individual may sue on behalf of a wider group of people if four prerequisites – commonly summarized as *numerosity*, *commonality*, *typicality* and *adequacy of representation* – are met.<sup>13</sup> Firstly, the members have to be so numerous “that joinder of all members is impracticable” (“numerosity”). In other words, severe logistical problems would result if each member of the class acted separately. However, it is not required that the class members be so numerous that joinder would be altogether impossible. In fact, this prerequisite has not proven difficult to meet and the

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<sup>11</sup> Updated reports on collective litigation in a large number of countries can be found at: <http://globalclassactions.stanford.edu/>

<sup>12</sup> There are both federal and state class actions. In this paper I will take into consideration only the federal ones, governed by Rule 23 of the Federal Rules of Civil Procedure. The reason is twofold. First, the state class actions, more often than not, resemble their federal counterpart. Second, the Class Action Fairness Act 2005 has “federalized” many class actions that previously would have been litigated in front of state courts.

<sup>13</sup> In other words, the court must “certify” the class action, deciding if all the Rule 23(a) prerequisites have been met. In theory the court at this stage must not consider the merits of the claim *per se*. The dividing line, however, is often very thin. For instance, a court which needs to determine the existence of a predominant common issue could go beyond the mere pleadings and consider at least some of the substantive issues involved. The issue is analyzed in G.P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004).

courts have in many cases certified classes with only a few dozens members.<sup>14</sup> Secondly, the questions of law or fact must be common to all the members of the class (“commonality”). It is not required for all the class members to be in an *identical* situation. The damages suffered by each member might for instance vary significantly, but the lawsuit might still be certified as a class action if a question related to the liability of the defendant is common to all of them.<sup>15</sup> It goes without saying that the resolution of the case, by verdict or settlement, pertains only to the common issue. Thirdly, the claims or defences of the representative party must be “typical of the claims or defences of the class” (“typicality”). This requirement appears to be intertwined with “commonality”. The individual claims that are going to be decided in court are those of the representative of the class, and the outcome will then be applied to all the other members.<sup>16</sup> Thus, the representative must share their same legal or factual position. Finally, the class representative must “fairly and adequately protect the interests of the class” (“adequacy of representation”). This implies not only that no conflict of interests between the representative and the other members of the class may exist, but also that the legal counsel chosen by the representative must be experienced and qualified. The rule is easily understood if one takes into account that the final judgment is going to bind all members of the class. Hence, the choice of the attorney has to provide certain reassurance to the class members not directly involved in the management of the proceeding.

In addition to meeting the Rule 23(a) requirements, the lawsuit must fall under one of four types of class action described under Rule 23(b), which can be grouped in two categories according to the remedy sought by the plaintiff.

In class actions belonging to the first category the plaintiff is not so much interested in compensation for monetary losses as in seeking injunctive relief to directly change the defendant’s behaviour.<sup>17</sup> The goal is often to obtain institutional reform or to change certain policies. According to Rule 23(b)(2) a class action can be certified when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”. A typical case, for instance, could involve claims over discrimination in college admissions. A striking feature of this kind of actions is often the uncertain borders

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<sup>14</sup> See N.M. Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, [http://www.law.stanford.edu/library/globalclassaction/PDF/USA\\_\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/USA__National_Report.pdf) (2007), 6-7.

<sup>15</sup> *Ibid.*, 7.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 9.

of the class, which for instance could involve all the beggars in New York afflicted by a certain policy.

“Institutional reform” class actions can sometimes be certified under Rule 23(b)(1)(A), according to which a class action can be brought when “separate actions by or against individual class members” would create a risk of “inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class”. The Rule seeks to protect a party (in most cases the defendant) from the danger of being subject to different and contradictory court orders. For example, this would be the case if several landowners separately sued a neighboring factory for excessive pollution. Each plaintiff could aim for a different goal (to close the plant altogether, to reduce pollution to different levels) and a losing defendant could thus be ordered by the courts to take different and incompatible actions.<sup>18</sup>

Both Rule 23(b)(2) and Rule 23 (b)(1)(A) class actions are so-called “mandatory” class actions. All subjects comprised in the class definition (in our previous examples, all the beggars in New York or all the landowners afflicted by a polluting factory) will be bound by the judgment with *no possibility to opt-out*. In other words, the members of the class cannot retreat from the proceedings for any kind of reasons. If the outcome is not to their liking they will not be able to sue again individually. Moreover, the absent class members are not entitled to receive any notice informing them about the proceeding.<sup>19</sup>

The other two types of class actions – under Rule 23(b)(1)(B) and Rule 23(b)(3) – can be used to seek monetary compensation.<sup>20</sup>

Rule 23(b)(1)(B) class actions are used, quite rarely, in circumstances where there is a risk of “adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests”. The most typical example involves an action against a defendant with limited resources, as in the case of several beneficiaries suing a fund.<sup>21</sup> The first beneficiary to sue would have a much greater chance of obtaining full compensation – by consuming a disproportionately large part of the money in the fund – than the second one. This is also a “mandatory” class action, as the members have no power to exclude themselves from the class.

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<sup>18</sup> *Ibid.*, 9-10.

<sup>19</sup> While notice is not required, the courts still have the possibility to order it. See Rule 23(c)(2)(A).

<sup>20</sup> See N.M. Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature*, *supra* note 14, 11-24.

<sup>21</sup> See for instance *Baker v. Wash. Mut. Fin. Group, LLC*, 193 Fed. Appx. 294 (5<sup>th</sup> Cir. 2006).

Finally, Rule 23(b)(3) states that a class action can be brought if “the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”. These two requirements are often referred to as *predominance* and *superiority*.<sup>22</sup> The first refers to the “cohesiveness” of the class. In practice, it means that individual issues have to be of relatively little importance. For instance, in the case of many subjects exposed to a toxic agent released by a chemical factory, questions related to individual exposure and to pre-existing conditions can be of key relevance, making the predominance requirement difficult to meet. The superiority requirement boils down essentially to a question about the manageability and efficiency of the class action. The court has to decide whether a class action in a specific case really would produce better results than letting each individual claim be adjudicated separately. When individual damages are likely to be very small (as in many consumer cases) the class action is in practice often the only useful device at the plaintiffs’ disposal. On the other hand, if the individual damages are very large (thus making separate suits feasible) and the plaintiffs’ claims present a wide range of individualized issues, it may be possible to argue that the superiority prerequisite has not been met. Despite these limits, the Rule 23(b)(3) class action is a very flexible tool that can be used in a wide range of different issues: consumer cases, mass tort claims involving personal and property damages, financial injury etc.

From a procedural standpoint Rule 23(b)(3) class actions are governed by rules that differ from what was described earlier in two crucial aspects.

Firstly, “for any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort” (Rule 23(c)(2)(B)). The requirement can be very expensive to fulfill. For instance, in *Eisen v. Carlisle & Jacquelin* (1974)<sup>23</sup>, the U.S. Supreme Court established that notice had to be directed to all 2,250,000 members of the class (which involved buyers and sellers of small quantities of securities, many of whom could quite easily be identified), with astronomical costs for the plaintiffs.

Secondly, the main reason for requiring notice of certification in Rule 23(b)(3) class actions is that in this type of litigation the class members have a

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<sup>22</sup> See M.H. Redish, C.W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 761 (2007). The court, according to Rule 23(b)(3) must take into account the following factors: “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

<sup>23</sup> 417 U.S. 156 (1974).

unique opportunity to opt-out from the proceeding. If they choose to do so they will not be bound by the effects of the judgment. Hence, they will not receive any form of compensation in case of victory by the class and they will retain the possibility of suing individually. It is crucial, especially from a comparative point of view, to understand how the opt-out mechanism works. If the member does not opt-out before a deadline determined by the court, she will be considered a member of the class. Silence is equivalent to assent. An alternative and opposite mechanism, employed in the United States before 1966 and adopted in various forms in many European jurisdictions (as we shall see), is the so-called *opt-in* mechanism, which instead requires an explicit manifestation of will by the class members. Their silence will be interpreted as a desire not to be bound by the effects of the proceeding. We will take a narrower look at the profound differences between these two solutions shortly. For the time being, it is enough to say that opt-out group actions tend to generate much larger classes than their opt-in siblings.

### *European models*

This section describes, very briefly, the main features of some of the most typical European models of group litigation. The reader should keep in mind that the situation on the European front is very fast-moving, as new reform proposals and electoral promises about “class actions” continue to appear.

#### Germany

The most time-honoured German collective litigation device dates back to the “Act against unfair competition for associations promoting commercial interests” of 1896, and is commonly known as *Verbandsklage* (“association complaint”).<sup>24</sup> It allows the aforementioned associations to seek injunctive relief against deceptive advertisements. In 1965, this right was extended to certain consumer associations.<sup>25</sup> In 1977, consumer associations also gained the right to promote collective actions in relation to unfair contract terms, as provided by the “Law regulating the use of standard contract terms” of 1977. The most recent trend has been a broadening of the *Verbandsklage*’s scope to a wider range of subject matters.<sup>26</sup> In 2002, the “Act on injunctive relief” (*Unterlassungsklagengesetz*), has for instance provided that consumer associations may act collectively against any violation of

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<sup>24</sup> The following account is largely based on D. Baetge, *Group Litigation & Other Forms of Collective Litigation. Germany*, [http://www.law.stanford.edu/library/globalclassaction/PDF/Germany\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Germany_National_Report.pdf) (2007).

<sup>25</sup> *Ibid.*, 4.

<sup>26</sup> *Ibid.*, 5.

provisions meant to protect consumer interests.<sup>27</sup> This form of collective action can, however, only lead to an injunction and never to monetary compensation.

In 2004, the German legislator established so-called “skimming-off” actions (*Gewinnabschöpfungsklagen*), used to enforce anti-trust laws by private action.<sup>28</sup> Trade associations can sue, for instance, companies alleged to have fixed prices, so depriving them of their illegal gains. The money is not, however, distributed to the members of the association but goes to the federal budget.

German law provides strict rules about the associations that are allowed to bring a lawsuit. Organizations founded to promote commercial interests must have legal capacity, a substantial number of members and sufficient resources in terms of both money and personnel.<sup>29</sup> Consumer associations must be registered with the Federal Office for Justice (*Bundesamt für Justiz*) or with the European Commission.

Another field that has been at the centre of an interesting development is the financial investments sector. In 2005, an “experimental law”, the “Capital markets model case act” (*Kapitalanleger-Musterverfahrensgesetz*, or *KapMuG*), which will automatically expire on November 1, 2010, was enacted. In order to speed up and rationalize proceedings when a number of investors – sometimes thousands<sup>30</sup> – sue the same business, one case is picked as a “model case” and its outcome is binding on the other plaintiffs whose cases are pending before the trial court (as long as they have joined the model proceeding). The choice of the model case is not made by the parties but by the District Court.

### France

In France the debate about group litigation has been particularly intense.<sup>31</sup> In a speech delivered on January 4, 2005, former President Jacques Chirac asked the government to “draft changes to current legislation so that consumer groups and

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<sup>27</sup> § 2.

<sup>28</sup> See § 10 of the Unfair Competition Act (*UWG*).

<sup>29</sup> See D. Baetge, *Group Litigation & Other Forms of Collective Litigation. Germany*, *supra* note 24, p. 16.

<sup>30</sup> In fact, *KapMuG* is the legislative reaction to the famous Deutsche Telekom case, when thousands of investors, between 2001 and 2003, sued the company accusing it of an overestimation of its value in two offering prospectuses. The sheer number of plaintiffs paralyzed the Frankfurt District Court for years. See A. Stadler, *A test case in Germany: 16 000 private investors vs. Deutsche Telekom*, 10 ERA-FORUM 37 (2009), presented in Florence at the conference “Collective Redress – Towards a System of Class Actions in Europe?” organized by the Academy of European Law Trier, 30–31 October, 2008.

<sup>31</sup> The following account is largely based on V. Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation. France*, [http://www.law.stanford.edu/library/globalclassaction/PDF/France\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/France_National_Report.pdf) (2007). See also L. Cadet, *Vers un système d’actions de groupe en Europe? L’état des lieux en France*, 10 ERA-FORUM 52 (2009), presented in 2008 at the ERA conference in Florence.

associations can bring class actions against the unfair practices going on in certain markets”.<sup>32</sup> This vow was later renewed by the current President Nicolas Sarkozy. However, despite good intentions, none of the drafts have so far been approved.

The French legal system has nonetheless other group action devices. In accordance to the Royer Act (1973), as codified in the Consumer Code in 1993, and amended in 1988 and 2001, “duly declared associations whose statutory object specifies the protection of consumer interests” may act in the collective interest of consumers, “if they are approved for this purpose”.<sup>33</sup> In case of a criminal offence, the consumer associations may “exercise the rights of a party to the prosecution in respect of events directly or indirectly harming the collective interests of consumers”. In accordance with Articles L. 421-2 and L. 421-7, an association, appearing before a criminal or civil judge, may seek a court order “to stop illicit actions or to remove illicit clauses from the contract or the standard contract offered to consumers”. It is important to notice that the associations in these cases can only join an already commenced civil or criminal case. However, Article L. 421-6 allows associations to initiate actions to seek a court order to remove abusive clauses from contracts or standard contracts intended for the consumers.

In a similar fashion, approved associations may exercise the rights of a party to the prosecution when a direct or indirect offence has been made against the collective interests of the users of the health care system, against the environment or against the collective interests of investors.<sup>34</sup>

While the actions considered above can only be employed to obtain injunctive relief, the French legal system also makes some provision for representative litigation aiming at compensation by way of damages. According to Article L. 422-1 of the Consumer Code, an approved nationwide association may sue on behalf of at least two consumers, as long as the prejudice they have suffered has a common origin and has been inflicted by the same person. A similar instrument exists also in the financial sector, where an approved association may sue on behalf of two or more investors.<sup>35</sup>

### Italy

The Italian legal system has developed a number of group litigation devices which operate in specifically defined areas of the law. Of these, the most interesting is the consumer collective action, which made its appearance in the 1990s and is presently governed by the Consumers’ Code of 2005.<sup>36</sup>

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<sup>32</sup> *Ibid.*, 5.

<sup>33</sup> Art. L. 421-1 of the Consumer Code.

<sup>34</sup> Article L. 1114-2 of the Public Health Code and L. 142-2 of the Environment Code.

<sup>35</sup> Article L. 452-2 of the Monetary and Financial Code.

<sup>36</sup> For an overview of the Italian developments see E. Silvestri, *The Globalization of Class Actions – Italian Report*,

Standing to sue in the consumer collective action was originally granted only to consumer associations which met certain requirements and were included in a special registry held by the Ministry for Economic Development. Moreover, the associations could bring a lawsuit only to apply for an injunction against a seller or a supplier found to be violating the rights of the consumers; for instance in relation to unfair contract terms (Article 140). A successful action thereby benefitted all the consumers and not only the members of the association.

However, after considerable pressures from consumer organizations, the Italian legislator modified the Consumers' Code in 2007, enabling collective actions also for monetary compensation (Article 140bis). Besides the associations recognized by the Ministry for Economic Development, standing was also granted to other associations capable of "adequately representing" the interests of consumers. The consumers, in order to be covered by the judgment, had to "adhere" to the action or, in other words, opt-in.

However, this reform never actually entered into force. After two years of continuous postponements and delays, Article 140bis of the Consumers' Code was itself amended in July 2009.<sup>37</sup> The major novelty in this latest reform is that *individuals*, and not only associations, may represent the group in actions for monetary compensation. The new collective action is called a "class action" (*azione di classe*) but it bears few similarities to its American counterpart, as it can still be used only in the field of consumer law and still requires that each member of the "class" adhere to the lawsuit by communicating her decision to that effect to the court. Moreover, this opportunity for individuals to become class representatives is counterbalanced by an important requirement: the legal standing of the class members has to be "identical", which appears a much stricter test than the US commonality requirement. The new device entered into force on January 1, 2010.

*Overview of the main differences (and of a few significative exceptions)*

The differences between the American federal class action and the most typical European models can now be summarized under three categories: 1) standing to sue; 2) mechanisms employed to select who will be bound by the effects of the judgment; and 3) the subject matters that can be litigated.

We have seen that:

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[http://www.law.stanford.edu/library/globalclassaction/PDF/Italian\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_National_Report.pdf) (2007), E. Silvestri, *The Italian 'Collective Action for Damages': An Update*,

[http://www.law.stanford.edu/library/globalclassaction/PDF/Italian\\_Collective\\_Action\\_for\\_Damages.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_Collective_Action_for_Damages.pdf) (2008) and A. Giussani, *Enter the Damage Class Action in European Law: Heading towards Justice on a Bus*, 28 CIV. JUST. Q. 132 (2009).

<sup>37</sup> Legge 23 luglio 2009 n. 99, Article 49.

1) While the American federal class action can be initiated by any member of the class (as long as certain requirements are met) most European models reserve the standing to sue to associations, and often only to associations that have preliminarily been approved by the government.

2) While the American class action is either mandatory or opt-out, the European models follow what we can loosely call the opt-in system, meaning that the judgment binds only those who have adopted an active stance. A “silent” and passive group member does not benefit from a victory and retains his or her right to sue autonomously.<sup>38</sup>

3) While the American class action can be used to litigate all kinds of subject matters, most European models allow group litigation only for certain specific areas of the law (consumer rights, environmental protection).

Two other differences between Europe and the United States are of great importance for the functioning of group litigation: the rules about costs and the role of the legal profession. However, these elements do not pertain to the models themselves, but rather to the overall procedural landscape, and will be discussed later.

To the above summary an important caveat should be lodged. While most European countries follow the aforementioned pattern, a small group of legal systems, the Scandinavian countries, Portugal and the Netherlands, have elaborated solutions which resemble the American class action. These, however, will mostly be left aside in the analysis that follows. This choice is justified by the main purpose of this paper, which is to illustrate how certain aspects of the continental legal tradition pose an obstacle for the transplant of an American-style class action in Europe. For such a study it is certainly more interesting to look at the traits which the vast majority of the European group action models have in common, rather than to analyze a few brilliant exceptions, in the same way as the average John Doe is more interesting than Olympic champion Usain Bolt for testing the normal physical performance of the human population. Obviously, this does not mean that these legal systems are irrelevant for our discussion. On the contrary, they clearly show that some traits of the Continental legal culture, which I will soon discuss, make a narrowing between Europe’s and the United States’ approaches to group litigation hard, but by no means impossible. It is therefore useful to provide at least a short description of the Scandinavian, Portuguese and Dutch group litigation devices.

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<sup>38</sup> Exceptions to this tendency are the actions brought by German or French associations on behalf of the collective interest of the consumers. If the court issues an order against a business to cease an illegal practice, all consumers benefit from it.

In the Scandinavian countries, a serious discussion about group litigations started in 1989, with a Nordic seminar on the topic.<sup>39</sup> The first country to take concrete steps in that direction was Sweden, whose government in 1991 appointed a Commission on Group Actions chaired by Professor Per Henrik Lindblom.<sup>40</sup> In 1995, the Commission presented an extensive report that proposed the introduction of a wide range of group litigation devices. Strong opposition to the proposal, mainly from business, managed to delay the reform for several years and a somewhat simplified version of the proposals was not approved by Parliament until 2002.

The 2002 Swedish Group Proceedings Act introduced three forms of group litigation: private actions, organization actions and public actions. All three can be used to obtain injunctive relief as well as to recover monetary damages.

From a European perspective, the most groundbreaking novelty was certainly the introduction of private actions, which, like the American class actions, can be brought by any affected individual in representation of the group, and are not restricted to specific areas of the law. However, a major difference between the American model and its Swedish counterpart is the mechanism adopted to determine who will be bound by the effects of the judgment. The Group Proceedings Act implements the so-called opt-in mechanism: only the subjects who have actively chosen to join the action are considered members of the group. The opt-in mechanism also represents a significant departure from the proposal submitted by the Lindblom Commission in 1995 – which endorsed the opt-out mechanism – and can be seen as a compromise between the political supporters of group actions and its many tenacious opponents.

Organization actions can be initiated by non-profit associations and are restricted to consumer and environmental law. An interesting difference from similar devices in Germany and France is that the associations do not need prior approval by the government. A new organization can legitimately bring an action as long as the court considers it a good representative of the litigated interest and as long as its financial affairs are in order.

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<sup>39</sup> Interest in the topic was triggered by Professor Per Henrik Lindblom's book *Grupptalan: det anglo-amerikanska class action institutet ur svenskt perspektiv*, *supra* note 6.

<sup>40</sup> For a description of the work carried out by the Lindblom Commission and of the Swedish group actions see R. Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381, 395-402 (2001) and P.H. Lindblom, *National Report: Group Litigation in Sweden*, [http://globalclassactions.stanford.edu/PDF/Sweden\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/PDF/Sweden_National_Report.pdf) (2007). For a more extensive account see P.H. Lindblom, *Grupptalan i Sverige: bakgrund och kommentarer till lagen om grupprättegång*, Stockholm, Norstedts Juridik, 2008, 91-108. See also P.H. Lindblom, *Group Litigation in Scandinavia*, 10 ERA FORUM 7 (2009), presented in 2008 at the ERA conference in Florence, forthcoming on *Zeitschrift für Zivilprozess International*.

Finally, the so-called public actions may be initiated by public authorities such as the Environmental Protection Agency and the Consumer Ombudsman.

Norway has a well established tradition in the field of organization actions: a case litigated in this form was discussed by the Norwegian Supreme Court as early as in 1914.<sup>41</sup> Associations may initiate a group action in all kinds of subject matters and before doing so they do not require any special approval from the government. A recent novelty, heavily inspired by the Swedish Group Proceedings Act of 2002, is the introduction of private actions in the new Code of Civil Procedure, which came into force on January 1, 2008. The most interesting departure from the Swedish model is the mechanism to determine who will be bound by the judgment. While the general rule, as in Sweden, relies on the opt-in mechanism, an exception has been introduced when the amounts are so small that it is unlikely that cases would ever be litigated individually.<sup>42</sup> In those cases the courts may choose to switch to opt-out, as the risk to individuals in terms of losing procedural rights seems negligible. The same rule has been introduced in Denmark, where a class action system along the Swedish lines has been implemented, but with an important difference: the representative in an opt-out litigation must necessarily be a public authority, as for instance the Consumer Ombudsman.<sup>43</sup>

This difference between the Nordic countries and the legal systems elsewhere in Europe may be explained as follows. The Scandinavian legal systems as a whole have a rather peculiar status in the European landscape. While a few authors consider them part of the civil law tradition, others prefer to group them in an autonomous legal family.<sup>44</sup> Although all taxonomical choices are open for discussion, it is a fact that the Nordic countries do not share an important part of the historical background of their European brethren, including codification and its

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<sup>41</sup> See *Norsk Retstidende* 1914, 419.

<sup>42</sup> Code of Civil Procedure (*Tvisteloven*) § 35-7.

<sup>43</sup> Administration of Justice Act § 254 e(8) and § 254 c.

<sup>44</sup> While René David consider the Scandinavian legal systems as a part of the wide Roman-Germanic legal family (see R. David, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, London, Stevens, 1985, 33-34), Konrad Zweigert and Hein Kötz (*An Introduction to Comparative Law*, Oxford, Clarendon Press, 1998, 276) as well as Pierre Arminjon, Boris Nolde and Martin Wolff (*Traité de droit comparé*, Paris, R. Pichon et Durand-Auzias, 1950, 47) consider them an autonomous legal family. The latter opinion is justified by several factors that isolate the Scandinavian legal tradition from the rest of the continent. The most relevant among those are: a) the absence of codifications in the French-German sense of the word; b) a very high historic continuity not determined, as in the common law, by the work of the courts but by a legislative tradition whose style and main features date back to the medieval age; c) the late appearance of doctrine as a relevant contributor to the legal system. These aspects are treated in A. Simoni, F. Valguarnera, *La tradizione giuridica dei Paesi nordici*, Torino, Giappichelli, 2008.

ideological premises. Moreover, Scandinavian legal science has traditionally displayed greater pragmatism and less attachment to dogmatic analysis than the rest of continental Europe. In the field of civil procedure this has resulted, in my view, in a better understanding of the functions of civil litigation.<sup>45</sup>

It is true to say that, generally speaking, the Scandinavian legal environment is much less hostile than the rest of Europe to procedural innovations, such as group actions, which improve certain functions of civil litigation, such as the communicative functions and deterrence (to be discussed later<sup>46</sup>), at the expense of the traditional individualistic (or “bipolar”, to use a term forged by Professor Abram Chayes<sup>47</sup>) structure of the proceeding. As a consequence, the achievements of the Nordic legal systems are not a very good indicator of the general trend of the European continent, nor can they help us in bringing to light the difficulties which most European countries face in their approach to group litigation.<sup>48</sup>

Portugal, in 1995, introduced the so-called “popular action” (*acção popular*), which protects a wide range of interests, such as the environment, public health, cultural heritage and consumers’ rights.<sup>49</sup> Standing to sue is granted to any

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<sup>45</sup> The work of Scandinavian scholars on the functions of civil litigation is indeed remarkable. The author who most developed this line of research was late Professor Per Olof Ekelöf, who discussed the conflict-solving and the behaviour-modifying functions. See for instance P.O. Ekelöf, R. Boman, *Rättegång I*, Stockholm, Norstedts Juridik, 1997, 7-22. Most recently, the functions of civil procedure, especially with reference to group actions, have been analyzed by Professor Per Henrik Lindblom. See P.H. Lindblom, *Grupptalan – Det anglo-amerikanska class actioninstitutet ur svenskt perspektiv*, *supra* note 6, 435-65, P.H. Lindblom, *Group Actions and the Role of the Courts – A European Perspective*, The Hague, Kluwer Law International, 1997 and P.H. Lindblom, *The Growing Role of the Courts and the New Functions of Judicial Process – Fact or Flummery?*, 51 SCAND. STUD. LAW. 281, 299-307 (2007).

Surprisingly, American scholars have not spent a comparable amount of time discussing the functions of civil litigation in explicit terms. One of the very few articles dealing with the issue is K. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975). The functions of civil litigation have, however, been dealt with at least indirectly in the works which analyze the role of the judge. See for instance A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). In the more specific class action setting the role of civil litigation has been analyzed more deeply, with particular reference to the division between the compensatory function and deterrence. See for instance M. Gilles, G.B. Friedman, *Exploding the Class Action Agency Costs Myth: the Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. 103 (2006).

<sup>46</sup> See *infra* section 2.

<sup>47</sup> See A. Chayes, *The Role of the Judge in Public Law Litigation*, *supra* note 45, 1282.

<sup>48</sup> This does not mean that the Scandinavian countries will be completely neglected. Some of the points that will be made in the following pages apply also to them. For example, it is of significance, as we will see, that the Danish legislator allows opt-out actions only when the group is represented by a public authority.

<sup>49</sup> Law 83/95 of August 31, 1995. A more detailed account about the Portuguese “popular action” can be found in H. Sousa Antunes, *Class Actions, Group Litigation & Other Forms of Collective Actions (Portuguese Report)*,

citizen enjoying civil and political rights, to associations or foundations whose purposes are within the aforementioned public interests and to local authorities in order to protect the interests of the residents of their districts. The action can be initiated to seek both damages and injunctive relief. The notice of the proceeding is advertized to the prospective class members through appropriate media, depending on the scope of the involved interests being regional or national. Interest holders who fail to opt-out of the popular action before the end of the production of evidence are considered members of the class.<sup>50</sup> The popular action is further facilitated by the application in Portugal of the so-called “American rule” about costs: a losing plaintiff will not be held responsible for the defendant’s expenses<sup>51</sup>.

Despite the incentives provided by the legislator, the popular action in Portugal has yet to experience a significant breakthrough in legal practice. However, according to a Portuguese country report submitted in 2008, the understanding of this device by legal practitioners has increased over time and its existence is not questioned anymore.<sup>52</sup> It is therefore not unrealistic to expect that the practical relevance of representative group litigation in Portugal will expand in the not too far away future.

Group litigation in the Netherlands is regulated by two sets of rules.<sup>53</sup> The first one was introduced in 1994 and is laid down in Article 3:305a-c of the Dutch Civil Code. It does not depart very much from the usual Continental pattern. Standing to sue belongs to associations which represent the interests involved, which can also be established ad hoc.<sup>54</sup> It must be observed that the outcome of the proceeding is binding for the defendant and for the association, but not for its

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[http://www.law.stanford.edu/library/globalclassaction/PDF/Portugal\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Portugal_National_Report.pdf) (2007) and in Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal*, [http://ec.europa.eu/consumers/redress\\_cons/pt-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf).

<sup>50</sup> Law 83/95 Article 15. See also H. Sousa Antunes, *Class Actions, Group Litigation & Other Forms of Collective Actions (Portuguese Report)*, *supra* note 49, 20.

<sup>51</sup> *Ibid.*, 14.

<sup>52</sup> See Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal*, *supra* note 49, 2.

<sup>53</sup> For more details about collective redress in the Netherlands see I.N. Tzankova, *Class Actions, Group Litigation and Other Forms of Collective Litigation – Dutch Report*, [http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands_National_Report.pdf) and Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country-report the Netherlands*, [http://ec.europa.eu/consumers/redress\\_cons/nl-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf).

<sup>54</sup> I.N. Tzankova, *Class Actions, Group Litigation and Other Forms of Collective Litigation – Dutch Report*, *supra* note 53, 7.

individual members who retain their right to sue.<sup>55</sup> Finally, the Dutch collective actions cannot be used to seek monetary relief.<sup>56</sup>

The second set of rules, concerning collective settlement, was conceived as a response to a very specific issue, namely the widespread damage caused by a drug called diethylstilbestrol (or, more simply, DES), designed to prevent miscarriages but allegedly responsible of causing health damage to female children. It has been calculated that about 440,000 persons in the Netherlands have, directly or indirectly, been affected by the damages caused by DES. A settlement between the pharmaceutical industry and the affected individuals was reached in 1999, creating a € 35 million fund. The defendants, however, requested the settlement to be final for all Dutch parties. Such a condition could not be realized according to the existing legislation, under which the parties had to expressly adhere (opt-in) to a settlement in order to be bound by it.<sup>57</sup>

In 2005 new rules entered into force. The collective settlement is regulated by Articles 7:907-910 of the Civil Code and Articles 1013-1018 of the Code of Civil Procedure. When the defendant and a representative organization are able to reach an out-of-court settlement, they can petition the Amsterdam Court of Appeal (which has exclusive jurisdiction on the matter) to approve it.<sup>58</sup> The parties must inform the court about the estimated number of class members, the amounts involved, the conditions that class members must meet in order to be eligible for compensation and the method to determine the amount of the compensation. In order to approve the settlement, the court must consider several factors such as the ability of the association to represent a wide number of class members, payment methods, and the reasonableness of the amounts.<sup>59</sup> The settlement must then be advertised in a newspaper, giving to the class members the opportunity to opt-out within a certain period of time.<sup>60</sup> The defendant has the right to opt-out as well, provided that this protection is expressly stipulated in the agreement. She may have an interest in doing so if too many class members decide to detach themselves from the settlement.

The reactions to the collective settlement have been mixed. The major criticism put forward by the plaintiffs' bar and by consumer organizations is that the pressure on the defendants to settle the case is very low. While the defendants

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<sup>55</sup> Ibid., 10.

<sup>56</sup> Ibid., 2.

<sup>57</sup> Ibid., 4.

<sup>58</sup> Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country-report the Netherlands*, supra note 53, 3.

<sup>59</sup> Ibid., 4.

<sup>60</sup> Ibid., 5.

may wish to reach an agreement in order to achieve finality vis-à-vis all or most of the plaintiffs, he is not subjected to the threat of an opt-out class action.<sup>61</sup>

## **2. The analytical framework**

Having described the main differences between the European group action models and the American class action, it is now time to discuss how each element fits into its legal environment. In order to do so, it is first necessary to provide a general description of the two legal traditions.

This Article will focus on two main aspects of the legal environment. The first is the organization of state authority in Europe and in the United States. The other will be the way market regulation is handled in the American and European traditions.

The first author to explore the organization of state authority in Europe and the US was Mirjan Damaška in his work “The Faces of Justice and State Authority”.<sup>62</sup> Damaška, undertaking the very complex task of seeking to compare and explain the civil law and common law procedural systems, proposed two different “ideals”: the hierarchical and the coordinate organization of authority.

The hierarchical ideal refers to an organization of authority where state officials are professionals, locked into a hierarchy of superiority and subordination and bound to make decisions according to technical standards. This structure corresponds roughly to classical bureaucracy.<sup>63</sup> A few consequences of this “ideal” are of particular interest for our analysis. Firstly, the hierarchical organization brings about a strong sense of order and a desire for uniformity. As a consequence, the application of state authority to a wide range of subjects is perceived as highly undesirable. Secondly, the professionalization favours a specialization and separation of functions, as each bureaucrat jealously defends her own turf against external influences and recognizes only the superior echelon of authority as competent to review her decisions.<sup>64</sup>

The coordinate ideal is, from a general point of view, diametrically opposed to the hierarchical one. Power is vested in lay officials who exercise authority for a limited period of time, and with the possibility of delegating action to persons without official functions.<sup>65</sup> Authority is not organized vertically but rather horizontally, being distributed among several officials belonging roughly to the same rank. Consistency and predictability are protected through voluntary co-

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<sup>61</sup> I.N. Tzankova, *Class Actions, Group Litigation and Other Forms of Collective Litigation – Dutch Report*, *supra* note 53, 4.

<sup>62</sup> See M. Damaška, *The Faces of Justice and State Authority*, *supra* note 10.

<sup>63</sup> *Ibid.*, 17.

<sup>64</sup> *Ibid.*, 19, 27.

<sup>65</sup> *Ibid.*, 24.

ordination and self adjustment (for instance elaborating common guidelines).<sup>66</sup> The decisions are not made according to technical standards, but rather by applying community standards deriving from ethical, religious and political norms. These values, as highlighted by Damaška<sup>67</sup>, are not always widely shared within society, as the officials can be guided by principles shared by the ruling elite and not necessarily also by the general population. From the point of view of our analysis the most interesting consequence of the coordinate ideal is its tendency towards overlapping or even merging functions, as a by-product of the lack of professionalism, and towards a wide distribution of power, due to the horizontal organization of authority.

Damaška discusses these two ideals focusing mainly on the organization of judicial authority. It should be kept in mind, however, that Damaška's models have a much wider analytical range. If a society is characterized by the "hierarchical ideal", all branches of authority will tend to follow the bureaucratic pattern, with professional officials organized in locked vertical hierarchies. Similarly, a political community permeated by the "coordinate ideal" experiences overlapping functions and a wide distribution of powers across the whole political spectrum. This means that the Damaškan model can be used not only with respect to the organization of the judicial system, but also to describe the relationship between different institutional actors.

It should also be stressed that the two ideals are not rigid alternatives, but rather two extremes in a continuum where many intermediate solutions are possible. In fact, in their purest forms the two "ideals" are not to be found in reality, but serve rather as conceptual models through which to assess reality. Historically, structures of power present a blend of characters from both ideals, often thereby giving rise to internal contradictions and tensions. As such, and in "diluted" form, Damaška argues that the Anglo-American legal experience can be said to lean towards the coordinate ideal, while the continental European countries are tilted toward a vertical and hierarchical organization of power.<sup>68</sup>

Observed through the Damaškan lens, many different aspects, of both the political organization in general and of the procedural law in particular, appear to be logically connected as parts of an overarching cultural fabric. We can for instance observe that the Continental tendency to sharply divide public and private law is the result of the hierarchical organization of power, where each section of bureaucracy tends to specialize in a certain field and jealously defend its prerogatives. From an even wider perspective, the neat division between the role of the legislator, the policymaker, and the role of the courts can be tracked down to

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<sup>66</sup> Ibid., 19, 27.

<sup>67</sup> Ibid., 27.

<sup>68</sup> Ibid., 29-46.

the inclination of hierarchical systems to divide sharply between the branches of government and to apply technical norms.<sup>69</sup>

A second aspect of the difference in legal environments which will be taken into account in this Article is the way market regulation is handled in the American and European traditions. European countries typically force businesses to go through suffocating and bureaucratic procedures in order to operate on the market. The entry into the American market is normally smoother and cheaper.<sup>70</sup> The United States legal system allows the average company to start up its activities in a relatively short time and does not require expensive procedures.<sup>71</sup> The picture changes, however, if the point of view shifts from, on the one hand, access to the market, to, on the other hand, litigation: on which companies in the United States spend more than in Europe. While the European countries prefer ex ante regulation, the American legal system compensates for its deregulated access to the market with stronger accountability after the fact, providing strong means of enforcement.<sup>72</sup>

It is easy to connect this feature to the civil law and common law traditions. In the civil law experience, the law is essentially made by the legislator,

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<sup>69</sup> One objection has to be addressed immediately. It is true that no-one could seriously deny the important role played by the French or German courts in many strategic areas of the law, as for instance tort law. It is equally undeniable, however, that the widespread perception of the role of the courts in civil law countries still is aligned with the French revolutionary ideal of the judge as a mere "bouche de la loi" (mouth of the written law). This perception, while often undermined in practice, is never openly defied by the judges themselves. This attitude is reflected in the judicial review mechanisms. Most Continental countries refuse to assign this task to the courts themselves and prefer to entrust a specific organ that can be judicial in nature (as the German or Italian constitutional courts) or political (as the French Conseil Constitutionnel). Others, for example Sweden or Norway, while entrusting the courts with the power to control the constitutionality of parliamentary Acts, provide severe formal or informal restraints, so that judicial review is in practice exercised very parsimoniously.

<sup>70</sup> According to a study the entry into the market requires 4 different procedures in the United States, 15 in France and 16 in Italy. See S. Djankov, R. La Porta, F. Lopez-De-Silanes, A. Schleifer, *The Regulation of Entry*, 117 Q. J. ECON. 1, 18-21 (2002).

<sup>71</sup> The analytical need to provide wide generalizations should not let us forget that the US legal system is not perfectly uniform. There are areas of the market which closely resemble the European ex ante regulation. This is the case when the products, in case of wrongdoings, could cause massive and widespread harm. The FDA (Food and Drug Administration), for instance, is a federal agency which focus on ex ante regulation. See S. Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 378.

<sup>72</sup> *Ibid.*, 377. Much has been written about the advantages and disadvantages of ex ante and ex post regulation. The first offers greater predictability, while the latter guarantees higher flexibility. See for instance D. Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 357 (1984), C.D. Kolstad et al., *Ex Post Liability for Harm Versus Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990) and E. Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63 (2008).

who foresees the relevant issues and provides adequate rules. The courts are then supposed simply to apply those rules to individual cases.<sup>73</sup> In the Anglo-American tradition the law is at its core the product of the courts, which elaborates the rules deciding actual cases. These tendencies are so deeply rooted in the two experiences that continental lawyers, and even the general public, conceive the law as a sum of general and abstract rules, while their Anglo-American peers, on the contrary, tend to imagine it as a series of judicial decisions. It is hardly surprising that the same attitude applies also to market regulation. In Europe the policymaker is supposed to provide detailed rules beforehand, forcing the companies to comply before they even start to actually run their activities. In the United States, instead, regulation merges with enforcement.

One might think that ex post regulation in the United States should have been weakened by the increased weight of the legislation during the last century, which has brought the common law into the “age of statutes”, to paraphrase a work by Professor Guido Calabresi.<sup>74</sup> In fact, nothing could be farther away from the truth. As illustrated by Professor Samuel Issacharoff, many laws in the United States which formally appear to provide ex ante regulation are aimed in fact at ensuring ex post accountability. For instance, New York’s milk control laws require that milk dealers put funds into a bond in order to ensure that future claims by producers are payable.<sup>75</sup>

The ex ante-ex post divide has profound consequences for both civil procedure itself and the tasks that it is called to accomplish. A legal system which tends to rely on ex post regulation must provide particularly strong means to ensure enforcement and to deter future wrongdoings. The consequence of not doing

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<sup>73</sup> The strict separation between the legislative power and the judiciary in the civil law tradition emerges with clarity if one recalls the original functioning of the “Tribunal de Cassation”, the forefather of the French Court of Cassation. The Tribunal’s task was to ensure that the courts did not deviate from the text of the laws, as even construction of statutes was considered a potential violation of the separation of powers. The courts were allowed to refer doubtful questions of interpretation to the Tribunal (“référé facultatif”). The Tribunal, not being considered part of the court system but rather an assistant of the legislature, could not decide the case on the merits but only quash the decision of the court because of a violation of the law. The court was not bound by the interpretation of the Tribunal de Cassation and was allowed to decide the case according to its original interpretation of the law. However, if the ruling was questioned again, the Tribunal had to refer the issue to the legislature itself for the final solution. This baroque system was soon abandoned for obvious practical reasons. See K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, *supra* note 44, 119-20. While the Tribunal de Cassation must certainly be considered a rather extreme example of distrust towards the lawmaking activity of the courts, it is nonetheless revealing of a mentality that is deeply rooted in the civil law tradition.

<sup>74</sup> See G. Calabresi, *A Common Law for the Age of Statutes*, Cambridge Mass., Harvard University Press, 1982.

<sup>75</sup> See S. Issacharoff, *Regulating After the Fact*, *supra* note 71, 384 and N.Y. Agric. & Mkts. Law § 258-b(3)-(6).

so would be a conversion from a *deregulated* market to an *unregulated* one, something that is alien to any economically advanced country.<sup>76</sup> Moreover, the political and ethical discourse that surrounds regulation will, to a certain degree, be moved forward in comparison to the Continental legal systems. Here, the so called “communicative functions” of the judicial process – as described and discussed below – are of particular importance.

The “communicative functions” emerge with clarity when the main reason to start litigation goes beyond the mere solution of a conflict between two parties.<sup>77</sup> This is true, for instance, when the damage is negligible from a purely economic perspective. The action can then be justified by something different, and psychologically deeper, than mere compensation. It is possible, and fairly common, that the plaintiff wants to express anger over a wrong she has suffered.<sup>78</sup> Pure and simple “vengeance” can play a role, but not necessarily. The plaintiff may want to take an active stance and defend her rights publicly, in front of the community, to stress her own personal dignity or to prevent the defendant from continuing an illegal practice. The reason behind the lawsuit can also be purely altruistic or political.<sup>79</sup> The courtroom can be used as an arena where the plaintiff participates in a wider political debate. This can be the case when the subject matter touches a wide number of individuals, or even the society as a whole, as when the lawsuit involves environmental issues. Sometimes the proceeding is a way to signal to a wide auditorium the existence of a certain social issue, as when the plaintiff has been discriminated on the basis of a personal condition (ethnicity, gender, sexual orientation, etc.) that she shares with many others.

While the communicative functions of the judicial process emerge in all legal traditions, they play a particularly important role in legal systems tilted towards *ex post* regulation. In a democratic and open society we take for granted that regulation should be publicly discussed. Issues that affect the life of many can

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<sup>76</sup> *Ibid.*, 380.

<sup>77</sup> The communicative functions of civil litigation, especially with reference to group actions, have been analyzed by Professor Per Henrik Lindblom. See P.H. Lindblom, *Grupptalan i Sverige, supra* note 40, 174 and P.H. Lindblom, *The Growing Role of the Courts and the New Functions of Judicial Process – Fact or Flummery?*, *supra* note 45, 302-307.

<sup>78</sup> These themes have been explored mostly in the field of criminal justice. See for instance M.S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096 (2008).

<sup>79</sup> This aspect has been analyzed in the American legal literature mostly through the lens of the so-called “public interest litigation”. See for instance L. Epstein, C.K. Rowland, *Debunking the Myth of Interest Group Invincibility in the Courts*, 85 AM. POL. SCI. REV. 205 (1991), J. Spriggs, P. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POLITICAL RESEARCH QUARTERLY 365 (1997) and C.R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, Chicago, Chicago University Press, 1998. In this paper the theme is further touched upon in section 3, discussing the so-called “private attorney general”.

(and for the sake of efficiency must of necessity) be decided by a selected group of persons. This does not imply, however, that the policy debate should be confined to the decision-makers. In the legislative sphere this idea needs hardly to be explained. The decisions are taken by a small group of elected officials, but the fact that the public is informed of the issues at hand is nonetheless seen as an element of crucial importance for the well-being of a democracy. Surely, one reason for this is the need for the voters to be in a position to make an informed choice in the voting booth. But this is not the only rationale. A wide debate can provide valuable input to the policymakers and, more generally, contributes to a sense of participation in public life by the members of the community.

The same argument can also be used when regulation takes place *ex post*. The fact that policies are decided through enforcement instead of the legislative process does not diminish the need for public debate. On the contrary, one could argue that the unelected nature of most judges makes the need for public discussion even more urgent. While courts generally are not democratically elected organs, they tend, to a certain degree, to follow mainstream social values in their decisions.<sup>80</sup> A lack of debate, on the other hand, would increase the risk of cultural isolation. Decisions might then be reached more according to standards common to a professional elite than to those of the public at large.

Of course, deterrence and communicative functions are important also in a continental European setting. Deterrence is a key element in order to allow the courts to effectively implement policy choices made by the legislator, while widespread participation in state functions, even if not perceived as strictly regulatory, should be well accepted and even encouraged. In practice, however, things are not so straightforward. The focus on *ex ante* regulation has led to the widespread perception that the application of the law in civil matters is something of a “private” business of relevance to the involved parties, and only indirectly to the community in general. This perception has resulted in an almost compulsive need in the European legal systems to protect individual procedural rights even at the expense of more general public considerations, such as the deterrence of future wrongs and the implementation of policies decided by the legislator.

As for the communicative functions, the political and ethical discourse, in a country that favours *ex ante* regulation, belongs to the legislative arena rather than to the court-house. Of course, *ex post* and *ex ante* regulations are not mutu-

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<sup>80</sup> It has been observed, for instance, that the United States Supreme Court’s rulings are generally aligned to public opinion. A good example of this tendency is provided by the refusal of a quite conservative court to overrule *Roe v. Wade* (410 U.S. 113 (1973)). See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See also M. Comiskey, *The Rehnquist Court and American Values*, 77 JUDICATURE 261 (1994) and W. Mishler, R.S. Sheehan, *The Supreme Court as a Counter-Majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SC. REV. 87 (1993).

ally exclusive, and they can very well work in tandem. However, the general attitude of an ex ante legal system and, more widely, of the political actors is to convey public participation to the parliamentary debate. Citizens in France or Italy wishing to change the law in a certain area would more likely choose to draw up a petition or start a public protest rather than file a lawsuit.

### **3. Analyzing the differences**

Having established a framework for the analysis, the time is now ripe to test it on the differences between the American class action and the European devices.

#### *The standing to sue*

The United States legal system allows any the members of the class, as far as certain general requirements are met, to bring an action on behalf of the whole group. This rule can be linked to the American inclination towards the coordinate ideal of authority, which tends to distribute power “horizontally” among a wide range of lay officials. The distinction between the private and the public sphere is tenuous and the roles of different subjects tend often to overlap. A typical example of this phenomenon in the judicial sphere is the so-called “private attorney general”.<sup>81</sup> As pointed out by Professor William Rubenstein, the term, at its core meaning, “is a placeholder for any person who mixes private and public features in the adjudicative arena”.<sup>82</sup> The concept is nowadays very popular but also extremely malleable. It can refer to the plaintiff (most times), to the defendant (less frequently), to the lawyer or to the client.<sup>83</sup> Its most dramatic consequence is a shift in the rules about costs, as the private attorney general is, according to many statutes, allowed to recover her fees in case of victory, as an exception to the ordinary American rule which obliges each party to pay for her own expenses.<sup>84</sup>

While it is possible for a private attorney general to sue individually, it is also clear that class action lawsuits highlight the public function of the plaintiff. The most classic example is a Rule 23(b)2 class action brought to defend the rights of a discriminated minority. The plaintiff, as a member of the minority, has

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<sup>81</sup> The term was used by the U.S. Supreme Court for the first time in a dissenting opinion by Justice Douglas in *FCC v. Nat'l Broad. C., Inc.*, 319 U.S. 239, 265 n. 1 (1943), quoting Judge Jerome Frank in *Assoc. of New York v. Ickes*, 134 F.2d 694 (2 Cir. 1943). For an interesting account about the development and the shifting fortunes of the private attorney general notion see J.A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW AND CONTEMP. PROBS. 179 (1998).

<sup>82</sup> See W.B. Rubenstein, *On What A “Private Attorney General” Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2131 (2004).

<sup>83</sup> *Ibid.*, 2130.

<sup>84</sup> See J.A. Rabkin, *The Secret Life of the Private Attorney General*, *supra* note 81, 195.

obviously a personal interest involved in the dispute, but she also defends a strong public interest in enforcing civil rights laws. Another example, from a completely different field, is provided by the Microsoft case. Because of Microsoft's antitrust violations pursued by the U.S. Justice Department, many class actions were filed on behalf of consumers who had bought Microsoft products. In California a settlement was reached for a total amount of \$1.1 billion, in form of vouchers to be redeemed by the class members in the following four years. The amount not redeemed by the class members, according to a *cy pres* settlement provision<sup>85</sup>, was to be distributed to Californian public schools.<sup>86</sup> This case is a perfect example of how private and public interests can find themselves intertwined in class actions. The lawsuit clearly improved the enforcement of antitrust laws and even managed to distribute a significant amount of money to public schools. By comparison, the primary private interest involved in the case, that of the class members, was ill-treated, as the vouchers obtained by each member were of a very modest value. The private interest best served by the lawsuit was that of the legal counsel, as the main attorney had requested \$97 million in fees and costs and \$197 million for thirty-four other law firms involved in the case.<sup>87</sup>

It is premature in this discussion to comment on the role of the legal profession, and nor will the private attorney general be considered in further detail. What is important to observe, though, is that the American legal culture happily takes advantage of the contributions of private actors to improve law enforcement.<sup>88</sup> From this point of view, to allow any class members to bring a lawsuit on behalf of the whole class makes perfect sense, as it broadens the field of possible representative plaintiffs. Law enforcement can therefore be assisted by an army of

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<sup>85</sup> The *cy pres* doctrine was invented by the English equity courts to solve cases where the original purpose of a charitable trust was illegal or had otherwise failed. The judge could then direct the money to a use "as near as possible" ("cy pres comme possible" in Norman French). In the field of class actions the *cy pres* doctrine is used to distribute the unclaimed portions of a fund, allowing the court to give the money to a third party. Courts have so far claimed great discretion in determining who is eligible to benefit from a *cy pres* ruling. See K.M. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, 35 JUDGES J. 19 (1996).

<sup>86</sup> See W.B. Rubenstein, *On What A "Private Attorney General" Is – And Why It Matters*, *supra* note 82, 2161.

<sup>87</sup> *Ibid.*, 2161.

<sup>88</sup> One of the most obvious examples of this American peculiarity is the so-called Independent Counsel, an attorney with a private practice who is appointed by Congress in order to investigate criminal misconduct by high executive officials, including the President of the United States. This institution was introduced by the Ethics in Government Act in the aftermath of the Watergate scandal. The most famous example of Independent Counsel in relatively recent times is Kenneth Starr, who investigated President Clinton for the Lewinsky scandal. See J.A. Rabkin, *The Secret Life of the Private Attorney General*, *supra* note 81, 180-181.

private citizens.<sup>89</sup> On the contrary, to vest the power to bring a class action only on associations, as is often the case in Europe, significantly restricts the field for potential “private attorney generals”.

The strengthening of enforcement through private attorney generals is crucial for a legal system, as the American, with ex post regulation tendencies if it wants to avoid the risks of converting altogether to an unregulated market. Such a legal system could of course, at least theoretically, rely solely on enforcement by state agencies. However, this alternative would require a considerable consumption of public resources.<sup>90</sup> A good example of how private actors in the United States provide an invaluable contribution to enforcement can be found in the field of securities. According to an interesting study by Professor Howell Jackson, in the years 2002-2004 public agencies such as the SEC, the Department of Justice, the NASD and the NYSE brought actions which resulted in sanctions for an average of \$5.3 billion per year. In the same period, the damages awarded to private plaintiffs averaged \$3.5 billion per year, totaling 39.8% of the total monetary sanctions. Notably, the vast majority of the “private sanctions” came through class action settlements.<sup>91</sup>

To broaden the number of individuals allowed to represent the class brings also the additional benefit of improving the communicative functions of civil litigation. On one hand, group litigation makes each claim weigh more. A lawsuit against discrimination in the working place brought by an individual plaintiff can be the object of mild interest by the news media and the political establishment. The same claim brought by thousands of class members makes a much deeper impact.<sup>92</sup> On the other hand, the American solution opens class ac-

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<sup>89</sup> On the class action as a device for private enforcement see also N. Trocker, *Class action negli USA – e in Europa?*, 1 *CONTRATTO ED IMPRESA* 178, 183 (2009).

<sup>90</sup> See S. Issacharoff, *Regulating After the Fact*, *supra* note 71, 381.

<sup>91</sup> See H.E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 *YALE J. ON REG.* 101, 280-281 (2005).

<sup>92</sup> The capacity of group actions to attract media attention has been well expressed by Steve Hedley with reference to mass personal injuries: “Each profession has its mysteries, and journalists are as insistent on the mystery of which stories have news value as any lawyer ever is about the mysteries of the law. Individual plaintiffs are usually too inconspicuous; yet how can a faceless group of plaintiffs have human interest? The large number of injuries that take place every year has a very low media profile, and articles on them tend to be rather remote accounts of reports on the matter. Yet, surprisingly group actions seem to overcome this hurdle; a paradox neatly summed up in the remark that ‘Drinking and driving is the equivalent of a King’s Cross [disaster] every fortnight’. The existence of the group of litigants makes it worthwhile for their lawyer to contact the press; the press manages to present the plaintiffs not as a group, but as individuals whose fate is worth narrating.” See S. Hedley, *Group personal injury and public opinion*, 14 *LEGAL STUD.* 70, 83 (1994). Of course, the press coverage of large group actions is not triggered solely by interesting personal stories, but also by the “discovery” of previously underestimated or ignored social problems.

tion lawsuits to subjects with different cultural backgrounds and aspiration, so contributing to a more interesting and rich debate about policy issues. By comparison, the individuals running consumer and environmental associations in Europe form a rather homogenous group. Of course, one could object that many, perhaps even most, class actions are attorney-driven, in the sense that the American entrepreneurial lawyers, which also form an homogeneous social group, often “create” the class and bring the lawsuit in order to collect large fees.<sup>93</sup> Still, the American solution creates an opportunity for members of minorities and under-represented social groups to gain power, and a “voice”, in the judicial arena.

Phenomena similar to the American private attorney general would be more or less unthinkable in Europe. States tilted towards the hierarchical ideal of state authority are characterized by a high degree of specialization and professionalism of the officials and by a strict separation between the private and the public spheres. These legal systems avoid as much as possible the allocation of public functions to private actors. In the field of group litigation, the preferred solution is often therefore to limit the number of subjects that are allowed to sue, vesting the power to commence the action only on associations<sup>94</sup>. This restriction alone would make it more difficult for individuals to bring a group action, but the obstacle would hardly be insurmountable. If a group of consumers wanted to sue a company, the only requirement would be for them to form an association for that specific purpose. The groups would certainly be considerably smaller in size than most American classes, but could still give rise to a mixture between private and public functions. Not surprisingly, some of the Continental legislators, as the French and the German, have therefore preferred to attribute the power to bring group actions only to associations that have been pre-emptively recognized by the government and that meet certain requirements. Technically, these associations continue, of course, to be private subjects, so it is possible to argue that, even with these limitations, there is a mixture of private and public functions. However, the associations are kept under the indirect control of the government and their num-

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<sup>93</sup> The American “entrepreneurial lawyer” will be more thoroughly analyzed in section 4.

<sup>94</sup> Of course, while I believe the distribution of powers to be the overarching explanation behind the European hostility to a broad field of potential representative plaintiffs, other rationales can also be found. Many of these have been described and analyzed in a recent article by Professors Samuel Issacharoff and Geoffrey Miller. To limit the lead plaintiff role to organizations can, at least as intended by many European legislators, guarantee loyal and competent representation. Secondly, the preference for consumer and environmental associations may ensure that the lead plaintiff has enough resources to pay the costs of the proceedings and, eventually, also the costs of the defendant should she (the plaintiff) lose the case (according to loser-pays rules common in most European countries). Thirdly, the preference for consumer and environmental associations can perhaps limit the emergence of the American-style entrepreneurial attorneys by putting the legal counsel under the control of a strong and experienced lead plaintiff. See S. Issacharoff, G.P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 192-197 (2008).

ber is limited. So, while there still is a certain distribution of public functions to private organizations, the associations cannot freely bring a collective lawsuit without the imprimatur of the state authority.<sup>95</sup>

The European solution is facilitated by the *ex ante* market regulation typical of civil law legal systems. While those systems would certainly not suffer any harm from strengthening enforcement and from improving the communicative functions of civil procedure, the perception of the judicial process as a mere application of legal rules that are already “there”, written in a book, leads them to underestimate the importance of enforcement efficiency and of the value of a wide public debate. The Continental tradition is focused on the creation of legal rules by the legislator, and tends to consider the second stage, the actual application of those rules, as something almost trivial. The law is not what the courts say it is, but what is written in the codes. This description may appear as a caricature, but, while reality is certainly much more nuanced, it is difficult to deny that it is a caricature which tells a few fundamental truths about its subject. So, although all Europeans would agree that enforcement is important, its efficiency is not perceived as something essential for the very existence and development of the legal system. For the same reason, the European legal systems find it hard to consider the judicial process as an arena where crucial social and political issues are debated. If the law, as most Europeans believe, is essentially a product of the legislator, there seems to be no reason to improve public participation in civil litigation. The necessary debate, according to this vision, will have already taken place in and around the Parliament.

### *Opt in or opt out?*

The second major dividing line between the American class action and the European group action devices is the mechanisms employed to determine who will be bound by the outcome of the lawsuit. As we have seen, the American class action is either mandatory or opt-out, while the rules adopted by the European countries

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<sup>95</sup> The differences between Europe and the United States have been described by Professor Michele Taruffo in more genuinely cultural terms as a distinction between two types of individualism. “Altruistic individualism” emerges when individuals litigate not only for their personal interests but also for the advantage of other similarly situated subjects (private attorney general). Its opposite is “egoistic individualism”, which pushes individuals to litigate only for a personal advantage, unwilling to spend time and resources for the sake of others. According to Professor Taruffo, this second type of individualism, and the correlated tendency of ascribing to “someone else” the task of dealing with super-individual problems, has led to the growing importance of supranational organizations (such as the European Union) that are also active in the field of collective litigation and to the emergence of associations pursuing super-individual goals. The latter, however, as far as litigation goes, need the approval of a public authority. See M. Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405, 417-20 (2001).

normally limit the binding effect of the judgment to those who have explicitly expressed their will to participate in the proceeding.<sup>96</sup>

The major practical difference between the two systems is the size of the groups/classes. The reason can be found in the natural tendency to inertia that characterizes most people when the interest at stake is very small.<sup>97</sup> Consider, again, the Microsoft class action. The damages recovered by each individual were in the range of a few dollars, paid in the form of vouchers. How many of the class members would have spent time reading the legal documents and communicating their intention to opt in for a voucher worth five or ten dollars? Not many. But even if the individual interests at stake were higher, a person could remain passive because of her inability to understand the content of legal documents or because she simply forgets to respect a certain deadline.

Those who favor opt-in (in a broad sense) adopt two basic arguments. The first is that opt-out class actions jeopardize individual procedural rights, such as the right to be heard before suffering the consequences of a judgment and the right to choose one's legal counsel. It is obviously true that the opt-out model theoretically does not deprive the class member of these rights. An individual can always retain her right to bring a lawsuit, or to not bring it at all, simply by opting out. But, for the same reasons that explain the larger size of opt-out classes, it is reasonable to believe that many individuals get involved in a class action, without fully understanding its implications, simply because of inertia. The second argument is that opt-out class actions tend to bring to court people that normally would not have been involved in litigation, thus unnecessarily overloading the courts and reducing the class actions' beneficial effects on procedural cost efficiency.

Those who favour opt-out counter these two arguments by saying that the major rationale behind group actions is precisely to open the courtrooms for people who usually, because of cultural or economic barriers, are unlikely to sue. The dividing line between opt-in and opt-out can thus be said to be mainly functional. While opt-in is preferred by those who see class action as a means to achieve cost efficiency, opt-out is the solution promoted by those who look at class action as a powerful tool to increase access to justice. While this distinction

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<sup>96</sup> For a survey of the solutions adopted in the EU member states, as well as a strong pleading for opt-out see R. Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409 (2009).

<sup>97</sup> The tendency of the average class member to stay passive has been empirically proved by a study conducted by Professors Theodore Eisenberg and Geoffrey Miller. According to their analysis of hundreds of American cases from 1993 to 2003 in which quantitative information could be ascertained, the mean opt-out rate for all types of class actions was 0.6%. In consumer cases the rate was as low as 0.2%. See T. Eisenberg, G. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546-49 (2004).

is perfectly valid and analytically useful, it should be discussed also in a wider context.

Let us consider the issue from the American perspective, starting with a brief look at the social and economic background against which the 1966 revision of the Federal Rules of Civil Procedure took place. Between the 1950s and the 1960s the most important social issue in the United States was the dismantling of racial segregation, not only in its most apparent forms, such as school segregation based on the “separate but equal” doctrine, but also more hidden and insidious forms of discrimination, as for instance various stratagems, including literary tests, used to deny blacks their right to vote. In the same period two other issues started to appear in front of the courts. The first was related to damages caused by dangerous or defective products, the second reflected increasing environmental concerns.

These issues were not primarily dealt with by the legislator but by the courts. It is of course true that many anti-segregationist policies were elaborated and promoted by the federal government. Professor Michael Klarman argues that World War II and subsequently the cold war forced the Roosevelt and Truman administrations to desegregate important areas of the public life, such as the army, with beneficial effects for the whole American society.<sup>98</sup> However, it is hardly deniable that many of the most relevant breakthroughs were made by the courts. Apart from the most famous case, *Brown v. Board of Education*<sup>99</sup>, other very important decisions could be cited, like for instance *Smith v. Allwright*<sup>100</sup>, which ruled that the political parties could not exclude blacks from the primaries. As for the consumer movement, Professor Stephen Yeazell convincingly argues that the American public, as a consequence of several well-publicized incidents, became skeptical about the effectiveness of both the market and the legislative process as regulatory mechanisms. Naturally, the consumers turned their attention to the courts. Similar things could be said about the environmental movement that was forged in these same years. The common perception was that the damage to the environment was not effectively being prevented by the legislator.<sup>101</sup> Again, the

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<sup>98</sup> See M.J. Klarman, *Brown v. Board of Education and the Civil Rights Movement*, New York, Oxford University Press, 2007, 27.

<sup>99</sup> 347 U.S. 483 (1954). It should be kept in mind that *Brown v. Board of Education* marked an important milestone in American legal history not only for the merits of the case, but also because it opened the doors to litigation as a tool for social change. The New Deal enthusiasts in the 1930s saw the executive branch as a much more likely tool for reform. Litigation had instead the goal of protecting social advancements achieved through the legislation from courts eager to declare them unconstitutional. See S.C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004).

<sup>100</sup> 321 U.S. 649 (1944).

<sup>101</sup> See S.C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, New Haven and London, Yale University Press, 1987, 238-249.

courts seemed the most appropriate alternative.<sup>102</sup> The reliance on the judiciary as a feasible alternative to the legislator was possible in a legal system leaning towards a coordinate organization of authority and ex post market regulation. The absence of a strict division of powers between the branches of government paved the way to the attribution of significant policymaking powers to the courts.<sup>103</sup>

However, the opportunity for the courts effectively to regulate fields such as civil rights, consumer law and environmental issues before the 1966 was limited. These three fields share a few common traits. The first is, of course, that each case tends to involve a wide number of individuals. The second is the relative weakness of one of the parties. The social weakness of discriminated ethnic minorities needs hardly to be mentioned. Consumers and environmentalists facing big industries have also a clear disadvantage. A consumer, usually, has limited resources and limited experience in court. Its commercial or industrial opponent often has its own legal team and relatively much greater resources. These factors made it difficult for the “common citizen” to litigate successfully.

The shift towards an opt-out/mandatory solution in 1966 helped to reach a better equality of arms between the parties involved in this kind of disputes. The new Rule 23 managed to empower groups that were socially weak and politically disorganized. Scattered individuals, using the vehicle offered by the class action began to form a critical mass capable of defending interests against powerful “repeat-player litigants”. Organizations devoted to the protection and improvement of civil liberties gained a useful device to bring their issues to court more regularly than before.<sup>104</sup> At the same time the new Rule 23 greatly empowered the

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<sup>102</sup> The US Supreme Court itself has recognized the role of litigation as an alternative to the legislative process. In 1963, only three years before the Rule 23 reform, the Court wrote: “Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts (...). Under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances.” *NAACP v. Button*, 371 US 415, 429-30 (1963).

<sup>103</sup> The role of the judiciary is clearly reflected in the ways judges are recruited in the United State, which are always, in a way or in another, political. The clearest example is certainly provided by the states, as for instance California, where judges are elected by the people. While this system leaves much to be desired when it comes to judicial independence, it is also clearly the result of a legal culture which recognizes the important role played by the personality of the judge, her cultural background and political inclinations. The same thing could be argued for judges that are selected by the executive branch, at state or federal level. If the judge was perceived merely as a dull bureaucrat, with only the rather mechanical task of applying the law to a given case, it would make very little sense for her appointment to be made by a political representative. The judicial policymaking is also underlined by the high visibility given to the judge as an individual. She is not simply an anonymous member of a larger entity, as in continental Europe, but is entitled to express a personal opinion dissenting from the majority. See B.A. Smith, *Selecting Judges in the 21st Century*, 30 *CAP. U. L. REV.* 437 (2002).

<sup>104</sup> Empirical research has shown a rapid increase in the involvement of interest groups in litigation since 1966. One of the first studies in the field was conducted by Nathan Hakman, examining

federal courts - as their decisions acquired a much wider range, and bound a much larger number of individuals. The policymaking role, already embedded in the American courts, acquired an even larger scope.<sup>105</sup>

Moreover, the new Rule 23 favoured both the deterrence and the communicative functions of civil litigation.<sup>106</sup> The larger size of opt-out classes exposes the defendants to a much higher economic risk than relatively small opt-in groups. At the same time, the larger groups attracted a higher media-awareness and could more easily be a means to start a wide debate about policy issues.

The link between the class action and the way the political community addresses social issues is also useful to explain the remarkable differences between the two most prominent members of the common law family: the United States and England.<sup>107</sup> As is widely known, the class action is originally an English product, introduced between the seventeenth and the eighteenth century in equity proceedings by the Lord Chancellor. Representative litigation in this age,

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group involvement in US Supreme Court cases from 1928-1966. He found that the presence of interest groups was very modest, and declared group involvement in litigation to be the exception rather than the rule. See N. Hakman, *Lobbying the Supreme Court*, 35 *FORDHAM L. REV.* 15 (1966). Research conducted in the following decades shows, however, a very different trend. For instance, an article by Professor Lee Epstein shows how the number of amicus curiae briefs to the US Supreme Court has radically increased since the end of the 1960s, reaching a peak during the Rehnquist Court era. Of all full opinion cases from 1986 to 1990, 84.4 percent contained at least one amicus curiae brief, compared to the 28.6 percent during the Warren Court era. See L. Epstein, *Interest Groups Litigation During the Rehnquist Court Era*, 9 *J.L. & POL.* 645 (1993).

<sup>105</sup> A distinction between mandatory and opt-out class actions is however necessary. A mandatory class action seeks injunctive relief. Its goal is to change the defendant's behavior, not to obtain monetary compensation. The personal motivations behind this kind of action are often idealistic or "political". The plaintiff is not primarily seeking personal gain; she is in court to defend a principle. She is therefore more interested in a court decision, which is public and can establish a binding precedent if it climbs the judicial hierarchy, rather than in a settlement. This could be true for opt-out class actions as well, as when a group of people seeks redress for their relatives' death caused by a defective product. The plaintiff could be driven more by the desire to obtain "justice" publicly, or to change the law, than by the mere monetary compensation. However, the large majority of opt-out cases end with a settlement. The courts then become an important arena in order to reach an agreement, but are deprived of the power to actually decide the case.

<sup>106</sup> In the words of Judith Resnik: "By the 1960s, lawyers, judges, academics and legislators began to conceive of civil justice as having characteristics readily associated with criminal justice and administrative systems: that it had the potential to serve as a venue for enforcement of public norms, and that, given other efforts to provide subsidies aimed at providing a small measure of redistribution towards the very poor, market intervention might also be appropriate within the civil justice system". See J. Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *U. PA. L. REV.* 2119, 2144-45 (2000).

<sup>107</sup> As stated in the Introduction, a comparison between England and the United States in the field of group litigation requires a different set of analytical tools – more genuinely "cultural" – than those used in this paper. What follows is therefore only a very brief sketch of the issue, which deserves to be widened in another occasion.

unlike modern American classes, involved cohesive social groups, remnants of the feudal age, consisting of individuals who worked and lived together.<sup>108</sup> Later on, at the beginning of the industrial era, the class action served as an early procedural substitute for the yet to be invented rules about economic associations.<sup>109</sup> The gap in the substantive law was finally filled in the nineteenth century and the class action disappeared from the English procedural landscape only to resurface in the United States.<sup>110</sup> Given its early contact with representative litigation, why did the English civil justice system not develop something similar to the American class action?

Despite their close legal kinship, the role of civil litigation is far from being the same in the two countries. To be sure, the English legal system showed from an early age many of the features belonging to the “coordinate” ideal of state authority, as it avoided the intense professionalism typical of the Continental milieu, delegating important functions to lay judges and juries. However, the “horizontal” organization of civil procedure has traditionally not mirrored a similar distribution of powers in society.

In England the political system accepted (and to a certain extent still accepts) inequalities among the members of society determined by birth, as proved by its monarchical form of government and by the hereditary nature of one of its Houses of Parliament (the House of Lords). At the same time, English political debate, at least until the end of the nineteenth century, was characterized by a very paternalistic attitude.<sup>111</sup> The cultural and economic elite had the duty to protect the less fortunate population even from its own choices and desires. An elitist inclination has traditionally characterized also the English legal profession. The barristers, among whose ranks the judges of the courts have traditionally been recruited, comprise a very small group of professionals grouped in four Inns of Court concentrated in the capital.<sup>112</sup> This feature is widely considered one of the

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<sup>108</sup> The most cited case is *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676). The case involved a parish of miners and their parson, who claimed customary rights on a tenth of the mined ore. The parson had sued the entire parish, which had named four representatives. According to Professor Stephen Yeazell, however, the group litigation has much deeper roots, emerging as early as in the twelfth century. See S.C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, *supra* note 101, 100 and 133-137.

<sup>109</sup> *Ibid.*, 166-197.

<sup>110</sup> The English legal system comprises two main forms of group litigation devices: a) a non-representative device that can be applied to any types of claim, the so called Group Litigation Order (GLO) and b) several representative devices that can be applied for well defined subject matters, such as collective actions for the enforcement of consumer interests. For details see among others C. Hodges, *Global Class Action Project – Country Reports: England and Wales*, [http://globalclassactions.stanford.edu/PDF/England\\_Legislation.pdf](http://globalclassactions.stanford.edu/PDF/England_Legislation.pdf).

<sup>111</sup> On the topic see D. Roberts, *Paternalism in Early Victorian England*, New Brunswick, N.J., Rutgers Univ. Press, 1979.

<sup>112</sup> See K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, *supra* note 44, 212-217.

most interesting of the English legal system, leading to both positive and negative consequences. On one hand it favours professional courtesy and mutual respect between the bench and the bar. On the other, it concentrates an amazing amount of policymaking power in the hands of a few individuals belonging to the same social circle, risking the isolation of policy choices from the values of the society at large. The small size of the English legal profession, coupled with its considerable power, also contributed to the extremely high costs of English justice, unparalleled in the Western world.

In the United States the humble origins of most of the population, the sheer size of the country and the lasting influence of republican ideals paved the way for a much more decentralized distribution of power. The American democracy from its very start was much fonder of the ideal of (at least formal) equality than its English ancestor and much more afraid of elitism. This does not imply that the founding fathers of the United States were perfectly at ease with direct democracy. One should for instance remember that the President of the United States is elected not by the people but by a council of electors.<sup>113</sup> Today this is widely considered an odd formality, but the original intention was to protect the selection of the President from the passions which agitated the common man. For the same reason, the senators of the United States were, until the 17<sup>th</sup> amendment to the federal Constitution, appointed by the state legislatures and not elected by the people. These aspects were, however, counterbalanced by a strong anti-federalist movement, best personified by Thomas Jefferson, which aimed at strengthening the power of the states and at narrowing the political choices to the voters. Moreover, the legal profession in the United States developed very different features than its English counterpart: the American lawyers were not concentrated in one city and they did belong to very different social groups. The presence of lawyers and bar associations all over the country contributed to a better access to justice, not only because of the geographical proximity to the population, but also because of the competition between the law firms, which protected the public from the chilling costs of English justice. On top of that, the American establishment was accustomed from the very beginning to discuss political issues in legal terms.<sup>114</sup> It had done so against the British crown with the Declaration of Independence, and the close link between politics and law was bound to continue

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<sup>113</sup> US Constitution, Article II, Section 1.

<sup>114</sup> This is, of course, the classical and frequently quoted thesis of Alexis de Tocqueville, according to whom "there is hardly a political question in the United States that does not sooner or later turn into a judicial one". See. A. De Tocqueville, *The Democracy in America: And Two Essays on America*, London, Penguin, 2002, 315. The statement, as observed by a few commentators (see for instance M.A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004)), is certainly exaggerated, as most political questions in the United States are solved outside the courthouse. It is nonetheless beyond doubt that the American courts deal with political issues to an extent unknown to the European legal systems.

in the years to come. All these factors (the proximity of the legal profession to the general population, the habit of discussing politics in terms of legal problems, and the egalitarian ideals) contributed to a bottom-up approach to civil litigation. The courts were considered as a means to fight political battles and, at least in certain periods, as a way to achieve social change. The American class action, as reformed in 1966, is consistent with this ideal, as it provides a device that can be used by even weak elements of the population openly to raise policy issues in the judicial arena.

The peculiarities of the American solution become even clearer if compared to the European environment. In legal systems leaning towards the hierarchical ideal of authority the dividing line between different echelons of bureaucracy and between public and private functions tends to be very sharp. The state organization tends to be based on a very clear division of powers, quiet different from a constitutional model based on “checks and balances”. While the legislator creates rules with universal validity, the courts should merely apply the law one case at the time.<sup>115</sup> From this perspective an opt-out/mandatory model is not desirable. A court whose decisions can bind thousands of persons is perceived as something different from a pure and simple “bouche de la loi”: it almost crosses the frontier to the legislative power. This is the key to understanding the recent Danish reforms that have introduced the possibility for the court to switch from opt-in to opt-out, but only if the class representative is a public authority, as for instance the Consumer Ombudsman.

The European preference for opt-in solutions is further encouraged by the inclination towards ex ante regulation. As enforcement is regarded as a private matter between the parties, and not as a vital link in the policymaking process, the legal system tends to consider the judicial process as “merely” a means to protect individual rights, of a substantial or procedural nature.<sup>116</sup> Hence, the state goes long ways to prevent an individual from losing a procedural right “by mistake”, even at the expense of such litigation’s deterrence and communicative functions.

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<sup>115</sup> There is no doubt that the continental European courts have greatly contributed to the evolution of their legal systems. However, there is no common acceptance of the policymaking role of the courts in the European environment. Stephen Yeazell, discussing the impact of the *Brown* case on the American legal culture, has written that “*Brown* and the civil rights movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change” (see S.C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, *supra* note 99, 1976). Such a statement could never be written by a European scholar about her own legal system. While case law plays a significant role in many legal fields, litigation is certainly not perceived as an “avenue for social change”. As a consequence, the European legal environment has nothing similar to the American “civil rights lawyer”, an individual that merges idealism and professional skill in order to promote a cause in the courtrooms.

<sup>116</sup> On the European preference for opt-in see also N. Trocker, *Class action negli USA – e in Europa?*, *supra* note 89, 218-220.

Such a line of thought hides a cultural bias: that losing a procedural right by mistake is worse than accidentally being left out of a proceeding. This mentality is the product of the very formalistic way procedural law has been (and in many quarters still is) conceived in continental Europe. The reasoning is simple. Having a right is better than not having a right. A class member left out of a class action still has the right to sue individually. If the same person gets “accidentally” involved in a class action her right to sue is lost forever. If the outcome of the proceeding is less than satisfactory, the damage will be irreversible. The opt-in mechanism protects class members against such risks.

A less formalistic and more realistic approach reveals a more nuanced truth. For an individual, being left out of a class action may likely be far more of a disadvantage than losing the right to sue individually. This is the case when the damage suffered by a consumer is so small that an individual lawsuit would be economically unjustifiable. Such a consumer might nevertheless be interested in participating in the group action in order to recover at least a symbolic amount of money and to “make her voice heard” against the company responsible for the damage (a good example of the communicative functions of civil litigation).

This reasoning is perhaps what induced the Norwegian legislator to regulate the question in an interesting way.<sup>117</sup> According to the recent Norwegian code of civil procedure (which entered into force on January 1 2008) the court, at its discretion, can decide to switch from opt-in to opt-out if the litigation concerns such a small amount (on an individual basis) that an individual lawsuit is unlikely. In this way the legal system is still presuming to know what is best for the individuals, but it is at least making its assumptions on a more sound rational ground.

Finally, it must be observed that the anti opt-out bias that affects most European countries can have an interesting practical effect on the certification of a multinational class action by an American court. A defendant can argue for a violation of the so-called superiority requirement prescribed by Rule 23(b)(3) when there is a risk that the American judgment will not be recognized by a foreign jurisdiction, allowing the plaintiffs to relitigate the case in their own countries.<sup>118</sup> There is little doubt that opt-out is from a European perspective the most disturbing feature of the American class action, and the only one that could prompt a European court not to recognize a judgment because of violation of public policy. The recognition of the binding effects of a judgment on a person who has not re-

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<sup>117</sup> The idea is not new and it has been advocated in England and South Africa (see R. Mulheron, *The Class Action in Common Law Legal Systems*, Oxford – Portland, Or., Hart Publishing, 2004, 33-34). However, as far as I know, it has been enacted for the first time in Norway.

<sup>118</sup> See S.J. Choi, L.J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 480 and H.L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 31-33 (2007-2008).

ceived individual notice of the proceeding or has not expressed her willingness to participate in the litigation could very well amount to a due process violation in many European jurisdictions.

This aspect has, for instance, been discussed in the district court case *In re Vivendi Universal*<sup>119</sup> where a French corporation had been sued by non-American investors for providing false financial data. This case was, in other words, a so called “foreign-cubed” (or f-cubed) securities class action: a class action brought by foreign plaintiffs trading outside the United States against a foreign defendant.<sup>120</sup> The Court, nonetheless, recognized the applicability of American securities laws, as the defendant had promoted its activity on Wall Street and had acquired American companies which were the main object of the misleading information. As for the superiority requirement, the Court established that “the closer the likelihood of non-recognition [of the judgment by a foreign court] is to being a ‘near certainty’, the more appropriate it is for the Court to deny certification of foreign claimants.”<sup>121</sup> On this basis the Court considered it fit to exclude German and Austrian plaintiffs, but not Dutch and French ones. The Court recognized that France does not admit opt-out group actions as a general rule but referred to the exceptional possibility of trade unions and associations of copyright holders applying to the courts on behalf of their members to show that opt-out proceedings are not to be considered contrary to French public policy.<sup>122</sup> By contrast, opt-out collective actions, according to the Court, would violate Article 103 of the German Federal Constitution, which protects the right of the citizen to be heard and to take part in legal proceedings.<sup>123</sup>

### *The subject-matter*

We have observed that while the American class action can be used to litigate, in principle, all subject-matters, the continental European representative group ac-

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<sup>119</sup> 242 F.R.D. 76, 81 (S.D.N.Y. 2007).

<sup>120</sup> See J. Choi, L.J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, *supra* note 118, 466.

<sup>121</sup> 242 F.R.D. 76, 95 (S.D.N.Y. 2007).

<sup>122</sup> The issue, however, has been addressed by the French Conseil Constitutionnel in a 1989 case concerning precisely the standing to sue of trade unions. According to the Conseil Constitutionnel an employee involved in a group action must be “afforded the opportunity to give his assent with full knowledge of the facts and that he remained free to conduct personally the defence of his interests”. Moreover, “the employee concerned must be informed by registered letter with a form of acknowledgement of receipt in order that he may, if he desires so, object to the trade union’s initiative”. See Dec. Cons. Const. N. 89-257 DC, July 25th 1989, spec., pt 24-25 and Civic Consulting, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report France*, [http://ec.europa.eu/consumers/redress\\_cons/fr-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf), 2.

<sup>123</sup> See 242 F.R.D. 76, 95-102.

tions are mostly regulated by laws covering specific legal fields, most commonly consumer litigation and environmental issues.

The choice of limiting the range of group actions to a few, albeit broad, legal fields is consistent with the hierarchical organization of authority, as the general tendency of such an organization is to draw the line between the role of the state bureaucracy and private interests as clearly as possible. In principle, all group actions have a tendency to depart from the strictly private dimension of litigation and acquire certain public connotations. This mixture of private and public, which has been discussed through this Article, is particularly apparent when the power to bring a group lawsuit is unrestricted and the members are selected by an opt-out/mandatory mechanism. It is, however, far from absent even in opt-in group actions where the power to sue is bestowed only on associations. In fact, as I have argued, the reason to assign the representation to associations recognized by the government is precisely the quasi-public nature of such litigation. Thus, the subject-matter limitation can be seen as another way for the state authority to restrict and control the distribution of public functions.

From a practical point of view, the piecemeal legislation that characterizes group litigation in most European countries is the product of two opposing forces: the general tendency to restrict group litigation as much as possible and the political pressure coming from certain social groups such as consumer associations and environmentalists. While the state is not willing to grant a general solution, it is forced to concede partial ones. This is made even clearer by a comparison with the United States where the pressure from racial minorities, consumers and environmentalists has instead resulted in a very wide legal device. This is, of course, consistent with the tendency to distribute public functions horizontally and with the high tolerance towards the overlap of state powers and of the public and private spheres.

The difference between the American and the European solutions can also be explained according to the *ex post-ex ante* market regulation dichotomy. From the American perspective, using class actions, with their substantial benefits in terms of deterrence and public debate, across (almost) the whole legal spectrum is perfectly natural. On the contrary, the European legal systems do not have an equal regard for these advantages as incentives to expand the use of group actions.

#### **4. The legal profession and its impact on group litigation**

We have so far taken into consideration the standing to sue, the opt-in/opt-out divide and the subject-matters that can be litigated as group actions. There is, however, a fourth difference between the American class action and the European models: the rules about costs. These rules affect the whole procedural landscape, but generate particular and significant effects in the field of group litigation. To

better understand the last statement we must take into consideration the role of the legal profession in the sphere of aggregate litigation.

According to tradition, both in Europe and in the United States, the attorney is simply the judicial *longa manus* of her client, while the client, at least theoretically, has full power to control the work of her agent. This model can be seen in the American class action, provided that the representative plaintiff has enough at stake to invest precious resources in bargaining the fee with the lawyer and in closely monitoring her judicial activity. In most class actions, however, the interests at stake are, on an individual scale, very small. Few class members would take the time to be actively involved in the proceedings when their particular interest is limited, perhaps, to just a few dollars. Often the individual with the most to win or to lose is the attorney herself. While the average class member is rewarded with an almost symbolic amount of money or with a discount voucher, the attorney may walk away with a few million dollars. There is a flip side though: an unsuccessful attorney loses all the precious resources invested in the case. This is possible because of the American practice, frequently applied also in individual litigation, of calculating the attorney fees as a percentage, often between 20 and 30 percent, of the damages awarded to her client<sup>124</sup>. If no damages are awarded to the class members, the attorney is not entitled to a fee. On top of that, most law firms relieve their clients from the burden of paying the other costs of the proceedings (such as the costs of investigation, depositions and experts) through a so called advanced payment system, according to which the attorney sustains all the costs of the litigation until the conclusion of the case and is then reimbursed from the recovered fund. If the plaintiff loses there is no fund from which the costs can be recovered and the client, at least in theory, remains liable for such expenses. In practice, however, most law firms have policy of not seeking payment.<sup>125</sup> The losses in case of defeat are, however, mitigated by the so-called “American rule”, according to which each party is liable for her own expenses, as opposed to the “English rule”, more common all over Europe, according to which the losing party is liable for the expenses of her opponent.

The combined effect of these rules is to detach the class action lawyers from the traditional client-attorney model. The attorney tends to become less of an

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<sup>124</sup> Other methods for calculating the lawyer’s fees in class actions have indeed been elaborated. The most notable is certainly the so called “lodestar” method. According to this system the court would calculate the amount of hours reasonably spent by the legal counsel on the case, multiply it by a reasonable hourly rate and then by a multiplier representing the risk undertaken by the attorney. For instance, a \$300,000 lodestar could be multiplied by a risk factor of 2 resulting in a fee of \$600,000. The major problem with this method was that it put in place incentives for the law firms to spend more time and man power than necessary on the cases. See D. Christopher Wells, *Report on Contingent Fees in Class Action Litigation*, in 25 REV. LITIG. 459, 467-69 (2006).

<sup>125</sup> See J.F. Vargo, *The American Rule on Attorney Fee Allocation: the Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1617-1618 (1993).

agent for her clients and more of an entrepreneur, or, using a less elegant term, a judicial bounty hunter.<sup>126</sup> The economic interest of the attorney is so much higher than that of any given class member that the purpose of her actions is often not to serve her clients but to maximize her own profit. This can pose interesting ethical issues when the interests of the class clashes with those of the attorney.<sup>127</sup> The percentage calculation of the fee reduces but does not eliminate this kind of issue. For instance, an attorney determined at maximizing her hourly profit could decide to accept an early settlement even if going to court or delaying the settlement in order to recover a larger amount would bring a greater benefit to her clients.<sup>128</sup> Clashes of interests between attorneys and clients can also be spotted when a settlement contain *cy pres* clauses or when, as is frequently the case, it obliges the defendant to compensate the class members with coupons, providing a discount on future purchases from the defendant. Although the benefits for the class members are very limited, the attorney still receives a cash fee calculated as a percentage on the value of the coupons. The federal legislator has tried to partially correct the problem with the Class Action Fairness Act 2005 providing that fees tied to the value of coupons must be calculated only on the coupons that have actually been redeemed.<sup>129</sup> In this way the fee mirrors the actual benefit enjoyed by the class members. Still, there is something slightly distasteful in seeing an attorney rewarded with a few million dollars, while the class members receive mere coupons. Such a situation presented itself when the United States District Court for the Northern District of Georgia approved a settlement according to which the

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<sup>126</sup> Contemporary research about the role of the class action lawyer is deeply influenced by the analysis of Professor John Coffee, who in a 1987 contribution observed that “the high agency costs” in class actions “permit opportunistic behavior by attorneys”. Attorneys, according to Professor Coffee behave therefore often like an independent entrepreneur. See J.C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-883 (1987). These ideas have been further developed by Jonathan Macey and Geoffrey Miller, according to whom the most salient feature of class action litigation is precisely the existence of entrepreneurial lawyers “not subject to monitoring by their putative clients”. See J.R. Macey, G.P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991).

<sup>127</sup> According to Robert Gasaway, a major contribution to the emergence of entrepreneurial lawyers comes from a deregulation of the legal profession on three fronts: 1) Supreme Court decisions holding that the First Amendment prohibits the States from banning the solicitation of new clients by lawyers (such as *NAACP v. Button*, 371 U.S. 415 (1963) and *In re Primus* 436 U.S. 412 (1978)); 2) the similar ruling holding that advertising by attorneys is protected by the First Amendment (*Bates v. State Bar of Ariz.*, 433 US 350 (1977)); 3) the failure to enforce ethical rules prohibiting exorbitant legal fees. See R.R. Gasaway, *The Problem of Tort Reform: Federalism and the Regulation of Lawyers*, 25 HARV. J.L. & POL’Y 953, 959-61 (1992).

<sup>128</sup> See D. Christopher Wells, *Report on Contingent Fees in Class Action Litigation*, *supra* note 124, 469-70.

<sup>129</sup> 28 U.S.C.A. § 1712 (West 2005).

defendants, a group of major airline carriers, were to provide discounts to the class members for future travels. The court granted the attorney \$14 million, a substantial reduction on the attorney's original request for \$24 million.<sup>130</sup> The disproportion between the attorney fees and the benefits for the class members is far from being the only ethical issue. A clear example of the darkest side of class action lawyering is provided by the federal indictment in 2006 of a famous class action firm, Milberg Weiss Bershad & Schulman. The firm was accused of paying plaintiffs to induce them to sue. It is a clear example of how the American rules about costs in a class action may subvert the normal client-attorney relationship, as the attorney becomes *de facto* an entrepreneur expecting a profit in return for her investments.

Despite the emergence of troublesome ethical issues, one can hardly deny that the entrepreneurial class action attorney serves an important function in the American legal system. As revealed in the previous pages, the United States relies heavily on "private attorney generals" for law enforcement, which enforcement plays a particularly important role in a legal system inclined towards ex post market regulation. The function of class actions is not only to compensate individuals for damages but also to sanction wrongdoers and deter future bad behavior. The class action has, thus, both a private and a public dimension, thanks to the coordinate organization of authority which allows the merger of public and private functions. These two dimensions could hardly coexist without entrepreneurial lawyering.<sup>131</sup> How many individuals would go through the hassle of bringing a class action against a company for a few dollars or a discount coupon? With the bait of large fees, the legal system attracts many law firms which invest considerable resources in class actions. As a matter of fact, these firms not only accept 'classes' for representation in court, they actually "create" the classes themselves, taking the initiative of tracking down and recruiting suitable plaintiffs. In this undertaking the American class action attorneys are facilitated by the opt-out/mandatory mechanism which can allow the creation of large classes with relatively small effort.<sup>132</sup>

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<sup>130</sup> See *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993).

<sup>131</sup> The importance of deterrence has been particularly stressed by Professor Myriam Gilles and Gary Friedman, who take issue with the widespread idea that class action reforms in the United States should be aimed at increasing the client's control over the lawyer's activities and improving the possibilities for the class members to obtain full compensation. They suggest that deterrence and not compensation is the true function of class action lawsuits and that the rules should be shaped accordingly. See M. Gilles, G.B. Friedman, *Exploding the Class Action Agency Costs Myth: the Social Utility of Entrepreneurial Lawyers*, *supra* note 45.

<sup>132</sup> Of course, when it comes to fees the larger is not always the better. While too small fees would damage law enforcement, too much incentive could encourage attorneys to pursue frivolous cases, while companies could find themselves "over-deterred" in their economic activity. See D. Christopher Wells, *Report on Contingent Fees in Class Action Litigation*, *supra* note 124, 465.

The European setting is radically different. Legal systems inclined towards the hierarchical ideal of state authority find it hard to delegate public functions to private actors. To use civil litigation as a means of sanctioning wrongdoings seems awkward to most European jurists. Punishment is the realm of criminal law, while civil law has the limited goal of compensating individuals for the damages they have suffered. Not surprisingly, in this cultural frame nothing similar to the American punitive damages has emerged. The role of the legal profession in group lawsuits reflects this general inclination. The function of group actions is to improve procedural efficiency and, possibly, access to justice, but not to deter future wrongdoings and to allow a public debate about policy issues. The American phenomenon of law firms that “create” classes for the sole purpose of collecting fees is genuinely unappetizing for most Europeans, and is linked to the “litigation culture” typical of the United States.<sup>133</sup> Hence, the European legislators do not find it necessary to provide rules about costs capable of attracting law firms to aggregate litigation.<sup>134</sup> On the contrary, the traditional rules about costs which dominate the European landscape are quite unattractive for class action lawyers. On the one hand, the absence of contingency fees makes class litigation much less appetizing for the attorneys. On the other, loser-pays rules inhibit litigation adding an additional risk: that the losing plaintiff will have to pay both her own costs and those of the defendant. The consequence is quite severe. Even if the European legal systems were to manage to develop advanced group action models, these will, in the absence of different rules about fees and costs, resemble beautiful cars without engines. Without proper economic incentives for the attorneys, group litigation will in practice be available only when the economic damage for the class

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<sup>133</sup> This notion has been expressed with great clarity by the Italian scholar Professor Claudio Consolo: “Within Italy’s institutional and social framework it is impossible to conceive of legal agents operating comparably to this American mode. The greatest obstacle is not the different principles under which our litigation expenses and attorney fees are allocated. Nor is it the particular fact that our legal system, like many others in Europe, outlaws the contingent fee, which calculates the attorney’s compensation as a percentage of his client’s entire recovery. Neither the one nor the other is the critical obstacle. Rather, it is mostly a question of the continuing centrality in our system of the injured person’s role as the personal holder and proponent of rights, not as a figurehead. The litigation process dedicates itself to giving effect to the injured party’s rights, with legal agents as mere technical assistants and certainly not as full representatives, or worse, as holders of direct litigation interests. The lawyers, then, are seen as an instrumentality dedicated to giving effect to the right of action or defence in a singular cause, and not as the protagonist of cases and processes.” See R.B. Capalli, C. Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, *supra* note 9, 289-90.

<sup>134</sup> Again, the Scandinavian countries are a major exception. In the case of Sweden, for example, the legislator has allowed an agreement between the attorney and the client about a method for fee calculation according to which the fee is calculated on an hourly base and then multiplied, for instance two or three times, in case of victory. See Group Proceeding Act 2002 § 39 and P.H. Lindblom, *Grupptalan i Sverige*, *supra* note 40, 145-151.

members on an individual base is large or when the lawsuit is brought by a consumer or environmental association. The risk is to leave uncovered the many cases in which companies may generate huge illicit profits by damaging large numbers of individuals, each in perhaps a quite small way.

At the end of the day, the role of the legal profession in group litigation mirrors the more general function assigned to civil procedure. The ex ante regulation tendency in Europe underpins the widespread idea that civil procedure has only the function of solving conflicts between private parties. The United States, on the contrary, because of the common law heritage and the policymaking role assigned to the courts, shows a better understanding of the public virtues of litigation.<sup>135</sup> This translates in a type of lawyer wearing three hats: as defender of the class members' interests, as private attorney general and as entrepreneur. This multiplicity of roles is not to be found in Europe, where the simplicity of the traditional attorney-client model enjoys better purchase. A few recent developments seem, however, to partially contradict this account. The Italian legislator, in 2006, has for instance removed the ban against contingency fees.<sup>136</sup> In the same year, the German Constitutional Court has ruled the same ban unconstitutional, as it restrict access to justice as well as the attorneys' economic liberty.<sup>137</sup> It is too soon, however, to determine whether, and if so how far, these novelties will be the departure point for a new continental trend.

## 5. Conclusions

The previous pages highlight the European approach to group litigation. On the one hand, the European legislators are facing huge political pressures from consumer associations and the public at large, which perceive the American style class action as the quintessential weapon against large corporations. On the other hand, the continental European legal tradition, inclined towards a hierarchical organization of authority and ex ante market regulation, rejects the U.S. class action's cultural underpinnings. The result is in most cases a group action device very different from its American counterpart, and certainly deprived of its transformative power. The European group action models are not designed to truly empower the "common man" against powerful corporations and other "repeat

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<sup>135</sup> One could observe that the difference between the United States and the European legal systems on this point is quite ironic and counter-intuitive. A nation that most Europeans consider more or less founded on individualism has a less individualistic focus in civil litigation than countries better known for socialistic and collectivistic approaches. For a similar observation see R.A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 30-31 (2009).

<sup>136</sup> D.L. 4/07/2006 n. 233 art. 2.

<sup>137</sup> BVerfG, 1 BvR 2576/04, 12/12/2006,

[http://www.bundesverfassungsgericht.de/entscheidungen/rs20061212\\_1bvr257604.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20061212_1bvr257604.html).

players”, but only to provide a certain rationalization of litigation and cost efficiency improvement in a few well-selected legal fields. If the American class action is a wild mustang which has changed the American legal environment in ways not fully foreseeable by the 1966 drafters, the European group actions are, at most, tame ponies well under the control of their riders.

Some may, of course, find the European way quite desirable. In 1999, an insightful article by Professor Linda Silberman warned the Europeans against the perils of trying to follow the United States on the class action road.<sup>138</sup> Vouchers are a sad reality and so are the bitter ethical issues that quite often afflict the American class action bar. It is beyond doubt that most class action settlements benefit infinitely more the attorney than the average class member and that Judge Richard Posner speaks for many when he describes some fees as “grotesque”.<sup>139</sup> Certainly, the European legal systems seem, at the moment, well shielded against these risks. Group actions exert some sort of positive effect without a radical change in the client-attorney relationship and without jeopardizing individual procedural rights. This comfort, however, comes at a price that the European legislators should be aware of.

The European inclination towards considering civil litigation as a purely private business, while regulation falls under the exclusive domain of the legislator (and of a few public agencies), is an oversimplification of reality rooted in the reorganization of legal sources that followed the French Revolution. Not only the Continental legal systems, but the Continental culture at large, have been seduced by the idea of clear and understandable rules enshrined in codes that the courts should merely apply. The reason behind the success of this ideal is its simplicity. It promises a world where the law can be grasped by the common man and where democratically elected officials have full control over the rules governing the community.

As often happens, however, these shiny promises are deceptive. Although no-one would dare to put an Italian or a French court in the same class as an American or an English one when it comes to policymaking, there is no doubt that case law in continental Europe has had an increasingly strong influence in many fields of crucial importance, such as tort law. This is well known to most attorneys, who devote a considerable share of their time searching for Supreme Court cases in support of their arguments. Yet, the contribution of the courts flies under the radar of public opinion and public debate. From a democratic perspective this is undesirable. While the courts in Europe are not influenced by electoral considerations, the public should still be informed about the most important policy

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<sup>138</sup> See L. Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT’L & COMP. L. 201 (1999).

<sup>139</sup> See D. Christopher Wells, *Report on Contingent Fees in Class Action Litigation*, *supra* note 124, 466.

choices and about who is in charge of making them. Group actions could here be helpful on two levels. Firstly, they could bring to the spotlight of media attention the work of the courts and the role of civil litigation. Secondly, the improved access to justice would help many social issues, which today are “hidden”, to emerge, providing precious feedback to the legislator. Such results, however, cannot be achieved through group action models open only to certain associations and based on opt-in mechanisms.

A second consequence of the European mentality is an underestimation of the importance of deterrence. This may seem absurd. After all, a legal system which puts the legislature, and not the courts, in charge of lawmaking should be preoccupied with the true impact on society of the policy choices made in Parliament. Nonetheless, in most European countries civil litigation is perceived as merely being a conflict-solving device. The implementation of the law is carried out one case at the time, on an individual level. But civil litigation has a much larger potential. The knowledge that a wrong is followed by the payment of damages deters not only the losing defendant from persisting in her illegal activity, but also the society at large. Conversely, to let a few subjects get away with huge profits because of the inadequacy of civil procedure is not only repulsive from a fairness point of view, but dangerous, as it allows a proliferation of illegal behaviours.<sup>140</sup> Again, group litigation can be a powerful device to ensure deterrence, but only as far as (at least) two requirements are met: 1) an opt-out mechanism, capable of generating large classes and, thus, of exposing the defendants to a relevant economic risk, and 2) economic incentives for the attorneys, encouraging them actively to pursue cases which cannot be brought on an individual base.

The overall impression is that certain aspects of the European legal culture prevent legislators from paying appropriate attention to important functions of civil litigation. A more moderate point of view is that Europe is trying to strike a difficult balance, as it wants (at least some of) the advantages of aggregate litigation without the disadvantages of the American style class actions, in terms of “legal blackmail”, high costs for business and, overall, excessive litigation. The result is, so far, not particularly encouraging, as the solutions developed in most European legal systems are very much too conservative to offer any real improvement.

The major exceptions in this respect are the Scandinavian countries, the Netherlands and Portugal. While these certainly offer a glimpse of hope for the future of collective redress in Europe, their relevance for a correct assessment of the situation must be taken with a grain of salt, especially as far as the first two legal systems are concerned. The Scandinavian countries have certainly displayed considerable interest in group actions as a way to improve all the functions of

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<sup>140</sup> See also R. Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, *supra* note 40, 385.

civil litigation, including deterrence and the communicative functions. However, for the reasons put forward in section 1, it is doubtful that the Nordic exception can be read as a changing trend for the rest of Europe. As for the Netherlands, there is no doubt that the opt-out collective settlement is of great interest for managing mass litigation. However, this device is weakened by not being backed up by an opt-out group action, which also explains why it is regarded more favorably by the defendants' bar than by consumer associations.

An interesting question is whether Europe really needs to approach group litigation as a trade-off between the advantages in terms of deterrence, access to justice and public participation and the perceived "horrors" of the American litigation culture. Besides the simple fact that the most intimidating aspects of the U.S. style entrepreneurial lawyering can be moderated by regulating the economic incentives for the attorneys (as has been done, for instance, in Sweden), there is also the very real possibility that the European public would not use class actions to the same extent and in the same way as in the United States even if they were available. After all, it is difficult to imagine that the mere strengthening of enforcement through aggregate litigation would subvert the very deep-rooted idea that reform and social change is better achieved through the legislative process and not through the courts. Realistically, even the boldest group litigation device in Europe would be used much less often than the American class action. If this is the case, the European legislators are, by being overcautious, throwing away the many interesting advantages offered by "true" group actions in exchange for no real benefit.