

TABLE OF CONTENTS

INTRODUCTION

| | |
|---|----|
| Fabrizio CAFAGGI and Hans-W. MICKLITZ | 1 |
| 1. The frame | 1 |
| 2. The questions | 7 |
| 3. Public/private enforcement in a multi-level structure – The US, Canada and Europe compared | 11 |
| 4. The transatlantic scenario – the regulatory role of aggregate litigation in North America and its institutional pre-conditions | 21 |
| 5. Adjudication and transborder litigation in North America and the EU | 29 |
| 6. Purpose and content of this book | 38 |

PART I. COMPARATIVE INSTITUTIONAL ANALYSIS

THE INSTITUTIONAL DIMENSION OF CONSUMER PROTECTION

| | |
|---|----|
| Samuel ISSACHAROFF and Ian SAMUEL | 47 |
| Introduction | 47 |
| 1. The Typology | 50 |
| 2. Institutions and Private Enforcement | 56 |

PUBLIC AND PRIVATE ENFORCEMENT IN CONSUMER PROTECTION: GENERAL COMPARISON EU-USA

| | |
|--|----|
| Jules STUYCK | 63 |
| Introduction | 63 |
| 1. The EU Constitutional Framework for Enforcement of Consumer Rights | 65 |
| 1.1. EU Competence and Its Limits | 65 |
| 1.2. The Autonomy of the Member States in the Field of Remedies and Its Limits | 70 |
| 1.3. The Lack of Horizontal Direct Effect of EU (Consumer) Directives .. | 74 |
| 1.4. Conclusion | 76 |

| | |
|--|----|
| 2. Individual and Collective Redress for Consumers in the Member States: | |
| The Public-Private Enforcement Divide and Mix | 76 |
| 2.1. Consumer Law as Part of Private or Public Law | 76 |
| 2.2. Public or Private Enforcement or Public and Private Enforcement? .. | 77 |
| A. General Discussion | 77 |
| B. The Injunctions Directive..... | 78 |
| C. The Administrative Cooperation Regulation | 79 |
| D. Conclusion..... | 79 |
| 2.3. Collective Actions for Damages: Comparison with US Class Actions | 80 |
| 3. Claims for Damages in the Case of Infringement of the EC Antitrust Rules | 82 |
| 4. A Case for Community Legislation? The Difficulties of Multinational Litigation of Collective Action | 86 |
| General Conclusion | 89 |

**PUBLIC AND PRIVATE ENFORCEMENT OF CONSUMER LAW IN
CENTRAL AND EASTERN EUROPE: INSTITUTIONAL CHOICE IN
THE SHADOW OF EU ENLARGEMENT**

Antonina BAKARDIEVA ENGELBREKT

| | |
|--|-----|
| 1. Introduction | 91 |
| 2. Analytical Approach | 93 |
| 3. The Evolution of Consumer Protection Law and Policy in CEE Countries . | 96 |
| 3.1. The Constitutional Setting | 96 |
| 3.2. Consumer Protection by Conditionality..... | 96 |
| 4. Institutional Choice and Design | 101 |
| 4.1. Administrative Enforcement | 101 |
| A. Institutional Design..... | 102 |
| B. <i>Ex Post v. Ex Ante</i> | 103 |
| C. Individual v. Collective Interests..... | 104 |
| D. Injunctions v. Penalties | 106 |
| E. Why Public Enforcement? | 109 |
| F. What Advantages Are There with Public Enforcement? The Costs and Benefits of Participation | 111 |
| 4.2. Judicial Collective Enforcement | 114 |
| A. Injunctions v. Damages..... | 114 |
| B. Institutional Actors: Consumer Organisations and Lawyers .. | 119 |
| C. The Problem of Confused Incentives: Converting Private Vice into Public Virtue?..... | 123 |
| D. The Judiciary as a Decision-Making Process..... | 124 |

| | |
|---|-----|
| 4.3. Novel Forms of Consumer Participation and Representation..... | 126 |
| A. Abstract Control of Legality..... | 126 |
| B. State Liability | 127 |
| C. Cooperative v. Bifurcated Strategies | 128 |
| D. Individual Consumers as Avengers of Collective Interests..... | 129 |
| E. European Judicial Governance: Another Forum for Consumer Voice?..... | 130 |
| 5. The Role of Enlargement Revisited | 130 |
| 6. Conclusion..... | 133 |

PART II. PUBLIC AND PRIVATE ENFORCEMENT IN CONSUMER PROTECTION

AN INSTITUTIONAL PERSPECTIVE ON THE REGULATION OF PRODUCTS IN THE UNITED STATES

| | |
|---------------------------|-----|
| Catherine M. SHARKEY..... | 139 |
|---------------------------|-----|

| | |
|--|-----|
| Introduction..... | 139 |
| 1. Theoretical Considerations..... | 141 |
| 1.1. Common Law Liability versus Safety Regulation | 142 |
| 1.2. State versus Federal Regulation | 142 |
| 2. Institutional Considerations..... | 143 |
| Conclusion | 149 |

DEVELOPING APPROACHES TO PUBLIC AND PRIVATE ENFORCEMENT IN ENGLAND AND WALES

| | |
|-------------------------|-----|
| Christopher HODGES..... | 151 |
|-------------------------|-----|

| | |
|--|-----|
| 1. Private Law Claims..... | 152 |
| 2. Compensation Schemes..... | 155 |
| 3. Powers of Public Authorities and Consumer Bodies | 157 |
| 3.1. Compensation Orders in Criminal Proceedings..... | 157 |
| 3.2. Specific Powers on Restitution | 158 |
| 3.3. Enforcement of EU Consumer Protection Law | 158 |
| 3.4. Competition Law Mechanisms..... | 161 |
| 4. Developing Linkages Between Consumer, Competition and Economic Policy | 163 |
| 5. A Revolutionary Policy Linking Enforcement and Redress Policies | 164 |
| 6. An Unfinished Story: Scope for a Unified Approach? | 167 |

**TAKING THE COLLECTIVE INTEREST OF CONSUMERS SERIOUSLY:
A VIEW FROM POLAND**

| | |
|--|-----|
| Marek SAFJAN, Łukasz GORYWODA and Agnieszka JAŃCZUK | 171 |
| 1. Introduction | 171 |
| 2. Collective Interest of Consumers and Its Functions | 175 |
| 2.1. Collective Interest of Consumers as a Procedural Instrument | 176 |
| 2.2. Possible Approaches to Building a Definition of the Collective Interest of Consumers | 179 |
| 2.3. An Attempt to Build a Definition | 179 |
| A. Compensation and Deterrence Perspective | 179 |
| B. The Role of Individual Interest | 181 |
| C. Towards a Positive Definition | 186 |
| D. A Proposal for the Definition | 187 |
| 3. Public Interest and Consumer Protection in Poland | 188 |
| 3.1. The Period of Socialism | 188 |
| 3.2. After the Transformation | 193 |
| 3.3. The Current State of Play | 196 |
| 4. Conclusions | 199 |
| References | 200 |
| Abbreviations | 206 |

**EFFICIENCY OF THE PROTECTION OF COLLECTIVE INTERESTS:
JUDICIAL AND ADMINISTRATIVE ENFORCEMENT IN THE CZECH
REPUBLIC**

| | |
|---|-----|
| Luboš TICHÝ and Jan BALARIN | 207 |
| 1. Introduction | 207 |
| 1.1. Topic and Purpose | 207 |
| 1.2. Methodology. Definitions and Notions | 208 |
| 2. Procedural Protection of Collective Interests | 210 |
| 2.1. Developments of Collective Litigation | 210 |
| A. Beginning | 210 |
| B. Civil Procedural Law | 211 |
| 2.2. Administrative Protection | 211 |
| 2.3. Adhesion Procedure Within Administrative and Criminal Procedure | 212 |
| 2.4. Differences Within the Procedural Modes of Protection | 212 |
| 2.5. Institutional Background | 213 |
| A. Consumer Organisations | 213 |
| B. Public Bodies | 214 |

| | |
|---|-----|
| 2.6. Efficiency of Protection | 215 |
| 2.7. Protection <i>Ex Post, Ex Ante</i> | 216 |
| 3. Analysis of the Regulation of Judicial Enforcement..... | 216 |
| 3.1. Community Action | 216 |
| 3.2. Class Action..... | 217 |
| 3.3. Negative Consequences of Class Action | 218 |
| 4. Practical Experience..... | 219 |
| 4.1. Actions of Consumer Organisations | 219 |
| 4.2. Motions to Administrative Bodies..... | 220 |
| 4.3. Conclusion | 221 |
| 5. Overcoming the Individual Protection Pattern, Critique of Positive Law and the Collective Action <i>De Lege Lata</i> | 221 |
| 5.1. Importance of the Civil Procedure Code Provisions | 221 |
| 5.2. Collective Actions and Public Interest | 222 |
| 5.3. Abstract Control, Public Interest and Consumer Rights | 225 |
| 5.4. Duties of Public Bodies and Their Relation to the Parties | 226 |
| 5.5. Principle of Party Presentation and Officiality Principle..... | 226 |
| 5.6. Human Rights Aspects: Is It an Academic or a Political Debate or Both?..... | 227 |
| A. Opt-In, Opt-Out | 227 |
| B. Informing the Aggrieved Consumers..... | 227 |
| C. <i>Res Judicata</i> | 228 |
| D. Participation in Proceedings | 228 |
| 5.7. Solution <i>De Lege Lata</i> | 228 |
| 6. Administrative Enforcement | 229 |
| 6.1. Status of Consumer Organisations at the Regulatory Authorities .. | 229 |
| 6.2. Indirect and Direct Enforcement, Abstract and Concrete Control .. | 230 |
| 6.3. Regulatory Authorities and Further Perspectives..... | 230 |
| 7. Unlimited Protection of Collective Interests – A Model for Europe? Conclusion..... | 231 |
| 7.1. State of Judicial Enforcement | 231 |
| 7.2. Neglect of Public Interest and Importance of Private Initiative | 232 |
| 7.3. Collective Action Solution <i>De Lege Lata</i> | 232 |
| 7.4. Administrative Protection – A Guarantee? | 232 |
| 7.5. Post-Communist Revival of Public Interest..... | 233 |

PUBLIC AND PRIVATE ENFORCEMENT IN CONSUMER PROTECTION – A DUTCH PERSPECTIVE

| | |
|---|-----|
| Ewoud HONDIUS | 235 |
| Summary | 235 |
| 1. Introduction | 235 |
| 2. Consumer Complaints and Access to Justice..... | 237 |
| 3. Complaints Boards | 239 |
| 4. Small Claims Procedures..... | 242 |
| 5. Collective Action | 245 |
| 6. Mass Damage Transactions | 247 |
| 6.1. The DES Case..... | 247 |
| 6.2. The Dexia Case | 251 |
| 6.3. Shell Hydrocarbon Reserves | 252 |
| 6.4. Doctrinal Comments | 252 |
| 7. Public Enforcement | 254 |
| 8. Conclusions | 255 |
| Selected Bibliography..... | 255 |

PART III. COMPARING REMEDIES IN PRIVATE ENFORCEMENT

COMPENSATION AND DETERRENCE IN CONSUMER CLASS ACTIONS IN THE UNITED STATES AND EUROPE

| | |
|---|-----|
| Geoffrey P. MILLER | 263 |
| 1. The Goals of Compensation and Deterrence in Consumer Law..... | 264 |
| 2. Compensation and Deterrence Under US Law | 267 |
| 2.1. Substantive Remedies..... | 267 |
| A. Federal Law | 267 |
| B. State Law | 268 |
| 2.2. Small Claims Cases..... | 270 |
| 2.3. Limitations on the Class Action Remedy | 274 |
| 3. Compensation and Deterrence in European Class Action Law | 279 |
| Conclusion | 281 |

THE REFORM OF DIRECTIVE 98/27/EC

| | |
|---|-----|
| Cristina PONCIBÒ..... | 283 |
| 1. Setting the Scene..... | 283 |
| 1.1. The Collective Interests of the Consumers..... | 286 |

| | |
|---|-----|
| 1.2. The “Collective Damage”..... | 288 |
| 1.3. The Limits of the Injunctions Directive | 289 |
| 1.4. A Lack of Courage: The Issue of Standing | 290 |
| 2. The Reform of the Injunctions Directive: Enlarging Associational Standing? | 292 |
| 2.1. Developments in EC Competition Law..... | 293 |
| 2.2. National Experimentation: Article 140- <i>bis</i> of the Consumer Code .. | 294 |
| 2.3. Consumer Associations and Lawyers | 296 |
| 3. An Impact Assessment of the Reform..... | 299 |
| 3.1. Empowering the Consumer-Citizen | 299 |
| 3.2. The Evolution of the Consumer Movement | 301 |
| 4. Conclusions | 302 |
| GROUP ACTIONS AS A REMEDY TO ENFORCE CONSUMER INTERESTS | |
| Astrid STADLER | 305 |
| 1. Introduction | 305 |
| 2. Mass Litigation and Small Damage Cases | 307 |
| 3. Collective Redress for Damages: How to Cope with Mass Litigation | 308 |
| 3.1. Mass Claim Situations in Europe..... | 308 |
| 3.2. US-Style Class Actions as a Role Model for Europe? | 310 |
| 3.3. Test Case Proceedings | 312 |
| 4. Group Actions..... | 315 |
| 4.1. Justification of Group Actions | 315 |
| A. Procedural Economy and Justice..... | 315 |
| B. Access to Court and Market Regulatory Function of Group Actions..... | 316 |
| 4.2. Constitutional Rights of Group Members: Opt-In or Opt-Out?.... | 317 |
| 4.3. Selection of the Appropriate Group Plaintiff | 318 |
| A. Group Plaintiff Assigned by the Group Members | 319 |
| B. “First Come, First Serve” Principle or Appointment of the Group Plaintiff by the Court | 320 |
| 4.4. Objective and Basic Procedural Structure of Group Actions | 322 |
| 4.5. Case Management and Participation of Group Members | 323 |
| 5. Group Actions and Small Damage Cases..... | 325 |
| 6. Conclusion..... | 327 |

COLLECTIVE CONSUMER REDRESS REFORM – WILL IT BE A PAPER TIGER?

| | |
|--|-----|
| Geraint HOWELLS | 329 |
| 1. Introduction | 329 |
| 2. Class Action, Group Actions and Representative Procedures. | 330 |
| 3. Current Law. | 331 |
| 4. Reform | 334 |
| 5. Key Features of the New Regime | 337 |
| 5.1. Scope..... | 337 |
| 5.2. Opt-In or Opt-Out | 338 |
| 5.3. Who Can Bring an Action?..... | 339 |
| 5.4. Incentives..... | 341 |
| 6. Conclusion..... | 343 |

NEGOTIATION AND ADJUDICATION. CLASS ACTIONS AND ARBITRATION CLAUSES IN CONSUMER CONTRACTS

| | |
|---|-----|
| Norbert REICH | 345 |
| 1. A New Interest in the Class-Action Device in Member Countries and the EU..... | 345 |
| 2. US Experiences | 347 |
| 3. Canadian Experiences..... | 350 |
| 4. Applicable EU and Member State Law | 351 |
| 4.1. Claro Revisited: Ordre Public also Against an “Arbitration Defence Clause”?..... | 351 |
| 4.2. The Importance of Brussels Regulation 44/2001 for Consumer Arbitration..... | 354 |
| 4.3. Collective Actions Based in Tort | 355 |
| 5. Conclusion..... | 357 |

PART IV. TRANSBORDER LITIGATION AND INTERNATIONAL PRIVATE LAW

TRANSBORDER LITIGATION AND PRIVATE INTERNATIONAL LAW: THE VIEW FROM CANADA

| | |
|--|-----|
| Geneviève SAUMIER..... | 361 |
| 1. Introduction to the Private International Law Challenges to the Transborder Consumer Class Action | 362 |
| 2. Jurisdictional Issues for Transborder Consumer Class Actions..... | 364 |

| | |
|---|-----|
| 3. Multiple Competent Courts, <i>Forum Non Conveniens</i> and Consolidation: the Canadian Experience..... | 370 |
| 4. Choice of Law, Diverse Legal Traditions and Transborder Class Actions. . | 374 |
| 5. Conclusion..... | 376 |

CROSS-BORDER COLLECTIVE DAMAGE ACTIONS IN THE EU

| | |
|--|-----|
| Peter ROTT | 379 |
| 1. Introduction | 379 |
| 2. Jurisdiction | 381 |
| 2.1. Scope of Application of the Regulation..... | 381 |
| 2.2. Available Courts | 383 |
| A. The Member State Where the Defendant is Domiciled | 383 |
| B. The Special Jurisdiction for Consumer Contracts | 383 |
| C. Special Jurisdictions in Contract and Tort Law Cases..... | 384 |
| D. An Additional Jurisdiction by Way of Joining?..... | 384 |
| 3. Procedural and Substantive Limitations of the Various Collective Actions | 385 |
| 3.1. Legal Standing..... | 386 |
| A. Collective Actions Brought by Representatives..... | 386 |
| B. Collective Actions Brought by Consumers Themselves..... | 387 |
| 3.2. Substantive Legitimacy to Bring the Claim (<i>Aktivlegitimation</i>) | 387 |
| 3.3. A Limited “Collective Interest of Consumers” and Other Disincentives | 388 |
| 3.4. Limitations as to the Type of Claims that are Eligible for Collective Actions | 389 |
| 3.5. Discretion as to the Joining or Admittance of Individual Claims .. | 390 |
| 4. Private International Law | 390 |
| 4.1. Contract Law Cases | 390 |
| A. Consumer Contracts..... | 391 |
| B. Other Contracts | 392 |
| C. Representative Actions | 392 |
| 4.2. Tort Law Cases | 392 |
| 4.3. Conclusion | 393 |
| 5. Summing Up – The Situation in the EC | 393 |
| 6. Looking Beyond the EC Borders | 394 |
| 6.1. Service of the Claim | 395 |
| 6.2. Recognition and Enforcement of Class Action Judgments | 396 |
| A. Punitive Damages and Treble Damages..... | 396 |
| B. Legislative Activities | 397 |
| 7. Outlook | 397 |

PART V. CONCLUSION**ADMINISTRATIVE AND JUDICIAL ENFORCEMENT IN CONSUMER PROTECTION: THE WAY FORWARD**

| | |
|---|-----|
| Fabrizio CAFAGGI and Hans-W. MICKLITZ | 401 |
| 1. The Relationship Between Administrative and Judicial Enforcement in Consumer Protection: The Way Ahead | 401 |
| 2. Administrative and/or Judicial Co-Operation in Europe | 408 |
| 2.1. Actions for Injunction | 408 |
| A. Shift from Judicial Collective Enforcement to Administrative Co-Operation? | 408 |
| B. The European Minimum Standard – Action of Injunctions | 409 |
| 2.2. European Group Actions and American Class Actions | 411 |
| 2.3. Three Models of Group Actions in 27 Member States | 414 |
| A. The Search for the Perfect European Model | 414 |
| B. The Key Role of Consumer Associations | 416 |
| C. Collective Consumer Actions in New Democracies | 419 |
| 2.4. Regulating Entry and Exit. Comparing <i>Ex Ante</i> and <i>Ex Post</i> Intervention | 420 |
| A. Consumer Organisations | 422 |
| B. Self or <i>Ad Hoc</i> Organisations | 424 |
| C. Administrative Agencies | 425 |
| D. Lead Plaintiffs and Lawyers in Tandem | 426 |
| 3. Reframing the European Debate in the Light of the US and Canadian Experiences | 427 |
| 3.1. The Constitutional Balance Between Collective and Individual Redress in Light of the Debate Between Public and Private Enforcement | 427 |
| 3.2. Administrative and Judicial Enforcement | 430 |
| 3.3. Injunctions and Pecuniary Remedies | 431 |
| 3.4. The ‘Indirect’ Effects of National Legislation Concerning Group Actions on Substantive Consumer Law | 434 |
| 3.5. The Players | 434 |
| 3.6. The Role for European Governance to Foster Effective Aggregate Litigation in Consumer Law | 438 |
| 4. Concluding Remarks | 442 |
| INDEX | 447 |