

NON-CLASS GROUP LITIGATION UNDER EU AND GERMAN LAW

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In his contribution, Professor Walter described the basic obstacles to American-style class litigation in continental European civil law systems.¹ This Article will discuss what European Union and German law does—or might do—to surmount these obstacles.² First, I will sketch the two basic models of collective interest representation in European procedure (“European procedure” meaning civil procedure in different European legal systems and the impact of European law on national procedure systems, *infra* Section I). Second, it is useful to note the most important substantive law fields in which group litigation schemes in European countries are utilized (Section II). Then, I will consider different types of group litigation (Section III) and certain procedural conclusions that can be drawn from the foregoing comparative survey (Section IV). Finally, I will give the prospects for some of the central problems of European group litigation and for its future development.

I. GROUP LITIGATION IN EUROPEAN PROCEDURES

The European Directive on Injunctions for the Protection of Consumers’ Interests presents a very topical background for the European interest in group litigation and in comparative experiences

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Revised version of a paper presented at the Duke/Geneva Conference on “Debates over Group Litigation in Comparative Perspective,” July 2000 in Geneva, Switzerland. I dedicate this Article to the memory of Herbert Bernstein of the Duke University School of Law faculty, to whom I owe a great deal of my understanding of justice and comparative law insights.

1. See Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT’L. L. 369 (2001).

2. See generally Harald Koch, *Class and Public Interest Actions in German Law*, 4 CIV. JUST. Q. 66, 66-79 (1986)(explaining class actions under German law); Harald Koch, *Group and Representative Actions in West German Civil Procedure*, in GERMAN NATIONAL REPORTS IN CIVIL LAW MATTERS FOR THE XIIIITH CONGRESS OF COMPARATIVE LAW IN MONTRÉAL 27-40 (Erik Jayme ed., 1990).

with it.³ The implementation of this Directive into national law was due by the end of 2000. The Directive's official title is a misnomer; it is not so much the injunction remedy that characterizes the Directive, but rather its procedural enforcement—by assigning rights of action to “qualified entities,” which are either organizations (e.g., consumer associations) or independent public bodies (e.g., administrative agencies)—that give it effect. Hence, even though the group litigation topic does not appear in the Directive's title, the associations' suit is the most important option the member states have in implementing the Directive into their national law.

In Germany, the Directive was incorporated in June 2000 into the Standard Contract Terms Act and the Unfair Competition Act,⁴ which now provide a right of action for consumer associations (*Verbandsklage*) that are registered in a list drawn up by the Federal Administrative Office and communicated to the EC Commission. The German legislature has not yet enacted a comprehensive and consistent law on collective remedies in a general procedural context, despite the recommendations of a number of renowned procedural experts.⁵ Rather, the *Bundestag* was content with a number of partial and unsystematic supplements and corrections to several consumer law statutes.⁶ However, the present Secretary of Justice, on the occasion of the Civil Code's (*BGB*) centenary, proposed a complete revision of the Law of Obligations, which is the part of the *BGB* that is under heavy European pressure. In this context, the introduction of a more general chapter on collective remedies—either associated with

3. See EUR. PARL. AND COUNCIL DIRECTIVE 98/27, 1998 O.J. (L 166) 51 [hereinafter Directive 98/27/EC].

4. See Gesetz über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro [Statute on Distant-Sales Contracts and Other Consumer Law Questions as well as on Adaption of Regulations to the Euro] v. 26.06.2000, Bundesgesetzblatt [hereinafter BGBl.] I p. 897 [hereinafter Statute v. 26.6.2000] (incorporating in addition the implementation legislation to the EC Distant Selling Directive 97/7/EC, 1997 O. J. (L 144) 19).

5. See, e.g., Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy*, 14 J. CONSUMER POL'Y 257, 279 (1992); Peter Gottwald, *Class Action auf Leistung von Schadenersatz nach amerikanischem Vorbild im deutschen Zivilprozess?* 91 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 1-38 (1978); EIKE VON HIPPEL, VERBRAUCHERSCHUTZ (3rd ed. 1987); Harald Koch, *Die Verbandsklage in Europa*, 113 ZZP 413, 441 (2000).

6. See Statute v. 26.6.2000 *supra* note 4, (supplementing the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [Standard Contract Terms Act] [hereinafter AGBG] secs. 13, 22 and the Gesetz gegen den unlauteren Wettbewerb [Unfair Competition Act] [hereinafter UWG] sec. 13).

consumer provisions of the *BGB* contract law or as a special procedural statute—is being seriously considered.⁷

The European Injunction Directive alternatively provides for one of two different models of collective interest representation practiced in member states. The first is the vindication of non-individual, diffuse, or public interests that can be distinguished from the accumulated interests and rights of individuals. This is characterized by Consideration no. 2 of the Directive:

“Whereas current mechanisms . . . for ensuring compliance with [consumer protection] Directives do not always allow infringements harmful to the collective interests of consumers to be terminated in good time; whereas collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement; whereas this is without prejudice to individual actions brought by individuals who have been harmed by an infringement; . . . Parliament and Council have adopted this Directive.”⁸

This is the model most civil law associations’ suits are following, and it is concerned primarily with certain substantive interests that are entrusted to and can be pursued by these associations, such as consumer protection, competition, or fair contract practices.⁹

The other model of collective interest representation is group litigation in the literal sense. In other words, the representation of a specifically defined group of adversely affected people that either by full assignment (contractual or statutory) or partial assignment (for procedural purposes only) transfers the right of action to the representative, a public trustee, or an association.¹⁰

Both of these forms of group representation in Europe differ from American and Canadian class actions in two important ways. First, there is no method of self-appointment of an individual cham-

7. Cf. the federal government’s proposal for a “Statute modernizing the law of obligations” (*Schuldrechtsmodernisierungsgesetz*) Aug. 4, 2000, Art. 3 (pp. 109 *et seq.*).

8. Council Directive 98/24/EC, Consideration no. 2, 1998 O.J. (L 131) 11.

9. Cf. GROUP ACTIONS AND CONSUMER PROTECTION - L’ ACTION COLLECTIVE ET LA DEFENSE DES CONSOMMATEURS (Thierry Bourgoignie ed., 1992); DIE BÜNDELUNG GLEICHGERICHTETER INTERESSEN IM PROZESS, (Jürgen Basedow, et. al. eds., 1999); Bryant Garth, *Group Actions in Civil Procedure*, in ACADÉMIE INTERNATIONALE DE DROIT COMPARÉ, XIII CONGRES INT. DE DROIT COMPARÉ, RAPPORTS GÉNÉRAUX 205 (Montreal 1990); Catherine Kessedjian, *L’Action en Justice des Associations de Consommateurs*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 281-300 (1997); Koch, *supra* note 5, at 413-442.

10. In Europe, it seems that only England—and to a certain extent the Netherlands—have accepted this model. See Ellger, *Die Bündelung gleichgerichteter Interessen im englischen Zivilprozeß*, in Basedow, et. al., *supra* note 9 at 109 *et seq.*; Koch, *supra* note 5, at 425.

pion (plaintiff) and no concept of an individual private Attorney General, whose initiative is fostered by fee incentives or by an alluring contingency fee arrangement. To be sure, this may be well-deserved because of the risk assumed and the attorney's hard work; however, in the European tradition—although this may be slightly over-simplified—we entrust the public interest to public institutions rather than to private law enforcers. By doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation. Under such a system, the interests of individual victims of unlawful behavior tend to be neglected in larger and more autonomous organizations. This is also true for large and anonymous class actions, but is more of a problem with the *Verbandsklage* (associations' suit) where special rules must secure the influence of those represented (information, *res judicata* and opt-out, fair distribution of proceeds, etc.).

There is a second crucial difference between the class action and the European style collective actions, and that is the latter's emphasis on injunctive relief rather than on damages (although in some countries, damages, especially symbolic and non-material, can also be sought by an association).¹¹

II. SUBSTANTIVE LAW FIELDS OF APPLICATION

This Section provides a short survey of the most important substantive law fields in which group litigation in Europe occurs. In Germany, the *Verbandsklage* is granted a unique and exceptional position in the doctrine of procedure, as it does not purport to enforce solely individual, subjective rights, which would be the usual designation of a civil procedure's function. This exceptional status is reflected in the lack of a general concept or rule of association action in civil procedure. Rather, an association's right of action is only provided in some special substantive law contexts, such as certain statutes concerning business self-regulation, consumer protection, labor law, industrial property, and environmental protection.¹²

11. For example, in France, Greece and Spain. See Hans-Jürgen Puttfarken & Nicole Franke, *Die action civile der Verbände in Frankreich*; Anastasia Papatoma-Baetge, *Die Verbandsklage im Griechischen Recht*; Eva-Maria Kieninger, *Die Verbandsklage in Spanien*, in Basedow et al., *supra* note 9; Koch, *supra* note 5, at 425-426.

12. See Koch, *Group and Representative Actions in West German Civil Procedure*, *supra* note 2, at 28.

Coming back to the European Injunction Directive, it confines itself from the outset to consumer protection, and in an annexed schedule, it lists nine special Directives and indicates those violations of specific consumer interests that are subjected to injunctive action made available to independent public institutions or consumer associations. This schedule can be divided into three groups:

- Protection from misleading and perilous advertising
- Certain sales practices such as door-to-door sales or distance selling
- Unfair contract practices in general and in special fields such as consumer credit, tourism, and time-sharing contracts.¹³

This seems to be a narrow scope of application for collective remedies, and the recent implementation experience in Germany is not very promising with respect to the introduction of a more general and progressive concept of group litigation. But on the other hand, the momentum the Directive can give to new developments should not be underestimated. At the very least, it is recognition of a function of civil procedure in Europe that to a great extent was previously denied—its capacity for collective and public interest protection.¹⁴ Also, in Article 6 of the Directive, the Commission is obligated to give a report to Parliament and Counsel after three years, not only on the experiences, but also on possible extensions of the substantive scope of application.¹⁵

III. DIFFERENT TYPES OF GROUP LITIGATION

This Section describes the different types of European group actions, characterized by the kind of relief sought and the interests represented.

A. Injunctive Relief

As already indicated by the European Directive's title, the associations' suit generated by the Directive is limited to injunctive relief. This was true before the Directive came into force in some of the countries where the associations' actions had been practiced, such as Germany, Austria, Switzerland, Italy, Spain, and the Benelux coun-

13. See Directive 98/27/EC, *supra* note 3.

14. See Reinhard Greger, *Verbandsklage und Prozessdogmatik - Neue Entwicklungen in einer schwierigen Beziehung*, 113 ZJP 339 (2000) (for critiques of this "collectivist" development).

15. See Directive 98/27/EC, *supra* note 3.

tries. In these countries, the associations' right of action for an injunction is established.¹⁶ In some countries, however, this right of action exists only in the consumer law area; thus, consumer associations have standing. However, in other countries, the right of action is also assigned to other organizations, such as business federations, unions, environmental associations, and chambers of commerce.¹⁷ This type of collective action is used for the control and enforcement of competition and business standards, industrial property rules, environmental law, etc. It therefore follows that this remedy is in fact a public interest tool; it pursues the public interest using effective law enforcement, since the traditional (European) instruments of control and law enforcement by administration are insufficient.¹⁸

B. Damages Relief

Damages in the traditional civil law perception exist primarily to compensate the individual victim, whereas the public interest primarily stands for regulation and control and thus focuses on the violator and effective sanctions. Because these are two very different objectives, associations' suits for damages seem incompatible with traditional concepts of civil liability. In France and Greece, where associations' suits are frequently used for damages relief (see *supra* note 8), the notion of damages differs greatly from the idea of an individual burden to be compensated. The notion of "*dommage collectif*" does not mean the simple accumulation of numerous individual claims, but rather a nominal, or a non-material, lump-sum that cannot be exactly calculated and proved; it is used merely for its symbolic meaning ("1 franc symbolique"), as it is usually awarded in the context of criminal proceedings against the violator.¹⁹ Recently, however, the awards in "*actions civiles*" brought by associations have become increasingly larger and sometimes take the character of deterrent or punitive damages ("*peine privée*").²⁰

In Greece, damages are not necessarily afforded to the association as they are not conceived as calculable compensation of specific

16. See *supra* note 6 (for detailed references). See Koch, *supra* note 2 (for Germany).

17. See *id.*

18. See HARALD KOCH, PROZESSFÜHRUNG IM ÖFFENTLICHEN INTERESSE 71 *et seq.* (1983); Anne Morin, *L'action de'intérêt collectif exercée par les organisations de consommateurs avant et après la loi du 5 janvier 1988*, in Bourgoignie, *supra* note 9, at 57, 76 *et seq.* (as to the comparative evaluation of criminal/administrative and private law enforcement).

19. Puttfarken & Franke, *supra* note 11, at 174; Morin, *supra* note 18, at 65.

20. See Puttfarken & Franke, *supra* note 11, at 176 (for detailed references to French cases).

losses. Rather, the association sues for non-monetary, intangible losses that are usually awarded in a lump-sum and must be used only for charitable purposes. The preventive, sometimes punitive, character of this type of action is obvious.²¹

C. Associations' Right of Action

Associations suing for a specific group whose members can be identified represent a completely different constituency. Here, it is not the public interest or the substantive or political advantage of a diffuse fraction of society (such as consumers or environmentalists) that is vindicated by the association; instead, it is the procedural representation of a certain group of claimants whose rights are collected for purposes of procedural economy. This can be dealt with by traditional procedural instruments of representation, such as mandate or assignment, and therefore does not require special legislation. Under these principles, associations could sue for damages even if it is their members' claims (assigned to them) that they are asserting. In mass tort situations, there is a possibility that an ad-hoc interest group may represent the members in negotiations and in legal proceedings. In Germany, this grouping of numerous claims under the control of an attorney (or by the court's initiative) is possible and often used.²² What runs into considerable opposition, however, is the formal and professional representation of such accumulated claims by an association. An old statute banning non-lawyers from counseling and dealing with legal matters is still zealously used by the organized bar in order to prevent unethical solicitation of business.²³ Under European rules of freedom of establishment and services, it is doubtful that such restrictions on offering legal services are still maintainable; the European Court of Justice seems to be moving in a more and more liberal direction.²⁴

21. See Paphoma-Baetge, *supra* note 11, at 201

22. See, e.g., Bundesgerichtshof (German Federal Supreme Court) [hereinafter BGH] Oct. 27, 1983, *Neue Juristische Wochenschrift* [hereinafter NJW], (1984), 2220; Rainer Wunderlich, *Zivilprozessuale Möglichkeiten für ein gemeinschaftliches Vorgehen geschädigter Kapitalanleger*, 46 DER BETRIEB 2269 (1993); Koch, *supra* note 2, 4 CIV. J. Q. 66, 74 *et seq.* (1986).

23. RECHTSBERATUNGSGESETZ [Statute on Legal Counselling] v. 13.12.1935, *Reichsgesetzblatt* [RGBl. I p. 1478]. For numerous examples *cf.* GÜNTER RENNEN & GABRIELE CALIEBE, *RECHTSBERATUNGSGESETZ* (3rd ed. 2001), art. 1 § 1.

24. See Case C-3/95, *Reisebüro Broede v. Sandker*, E.C.R. 6188 (1996) (such tendencies can be gathered from this case).

D. Public Rights of Action

Since law enforcement in the civil law tradition is the administration's function, it may not come as a surprise that in some countries, it is primarily public institutions that are granted a right of action in civil procedure. The European Injunction Directive provides for a right of action for "independent public bodies" as an alternative to the associations' suit (art. 3, lit. a), reflecting English and Scandinavian experiences with procedural initiatives that can be taken by independent agencies or the Ombudsman. In Scandinavia, the Consumer Ombudsman is granted a mandate to control illegal and unfair practices by negotiation, recommendation, or injunction, and sometimes even through the issuance of criminal fines towards illegal businesses.²⁵ The Ombudsman cannot, however, sue for damages. Although the Ombudsman tradition is generally considered successful in Scandinavia, the lack of damages relief may explain why the introduction of a group action-style class action ("*grupptalan*") is being seriously considered in Sweden (the Lindblom proposal) and in Norway (Norwegian Civil Procedure Commission).²⁶

In England, the Director General of Fair Trading has an independent right of action in consumer matters. It is restricted, however, to injunctions (sec. 37 of the Fair Trading Act of 1973) and is seldom used. This may be due to staff limitations, as well as sufficient extrajudicial control activities of the Office of Fair Trading.²⁷

Irrespective of the differing national rules, in general there remains serious objection to collective interest representation by the government; even if an Ombudsman or an agency is formally independent and free from government supervision, it will always have to rely on government funding and therefore its political autonomy might be limited.

25. See Roberth 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 (2001).

26. See also Per-Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805 - 831 (1997) (for a perspective on Sweden).

27. See Office of Fair Trading (Britain), 1992 ANNUAL REPORT; Ellger, *supra* note 10, at 125.

IV. PROCEDURAL CONCLUSIONS

The foregoing comparative survey of some European tools for collective litigation now allows me to draw some procedural conclusions.

A. Damages

First, what are the special problems that Europeans have with non-injunctive remedies? The confinement of the European Directive to injunctive relief may be due to a realistic assessment of the acceptance of harmonization proposals in the EU. To be sure, it does not prevent member states from taking more far-reaching steps in the process of national implementation of the Directive.²⁸ However, associations' suits for true damages (class-action style) are running into stiff opposition—at least in Germany.²⁹ Proposals are criticized as advocating deeply socialist reforms; such critiques obviously confuse the collective—hence efficient—use of procedural tools with socialism!

There are other obstacles that civilians have to overcome if they are serious about compensating for deficits in effective law enforcement in cases of widespread petty injuries and damages. The most important problem is the traditional understanding of damages as a means of purely compensating the victim (i.e., restoring the victim to his or her former position). What is necessary is a change of perspective towards the regulative and preventive functions of civil liability. Economists and comparativists have already taught us much about this change,³⁰ and there are some indications in that direction in the case law of several European high courts.³¹

Second, there is the rather narrow notion of special damages that can only be awarded under European laws, in particular in Germany. Except for pain and suffering and violation of privacy, there is no

28. See Directive 98/27/EC, *supra* note 3, art. 7.

29. See Greger, *supra* note 14, at 411; Klaus Oepen [*Bericht über die Diskussion*] report on the discussion of Koch's proposals: 113 ZJP 443 *et seq.* (2000).

30. See, e.g., J. P. Brown, *Towards an Economic Theory of Liability*, 2 J. LEG. ST. 323 (1973); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 163 *et seq.* (4th ed. 1992); UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997); see also Schäfer, *Anreizwirkung bei der Class Action und der Verbandsklage*, in Basedow et al., *supra* note 9, at 67 (from a German perspective); Gerhard Wagner, *Haftung und Versicherung als Instrumente der Techniksteuerung*, 50 VERSICHERUNGSRECHT 1441 (1999); Harald Koch, *Präventions—und Steuerungswirkung des Schuld—und Wettbewerbsrechts* 19 JURISTENZEITUNG 922, 930 (1999).

31. See, e.g., Cassell and Co. Ltd. v. Broome, H.L. 1027 at 1078 *et seq.* (A. C. 1972) (per Lord Hailsham, at 1119 per Lord Wilberforce); BGH 15.11.1994—Caroline of Monaco—NJW, (1995), 861.

possibility under German law for non-material damages that cannot be exactly calculated.³² However, it is possible to estimate material damages if the effort of ascertaining the exact amount would be unreasonable,³³ and this could also be used to estimate collective damages in situations of widespread losses.

Finally, the distribution of a damage award among victims of a violation is a management-like procedure to which civilian courts are purportedly ill-accustomed. What skeptics of any new judicial task forget is that there is already a field of activity and experience where courts must often manage the distribution of a fund among numerous claimants: bankruptcy. Thus, there are dispositions for a more extensive development of collective remedies already *de lege lata*.

B. Judicial Certification

Judicial certification and control of representation are additional procedural tools necessary to prevent the misuse of collective proceedings. The EU Directive and its implementing legislation in Germany provides for a certification procedure for an association that wishes to engage in litigation in the consumer field.³⁴ Such an association can only be admitted and registered if it has at least seventy-five individual members or is a parent organization of other consumer associations. The business community in Germany is particularly suspicious of the misuse of the associations' right of action, and since the judiciary is afraid of being overwhelmed by too many proceedings brought by self-appointed champions of the public interest, it has provided for a general misuse clause in the Unfair Competition Statute.³⁵ Thus, the courts have the discretion to admit only serious associations.

C. Prior Consultation Proceeding

In order to save the courts from premature group demands, the EU Directive suggests a prior consultation proceeding.³⁶ An association that intends to ask for an injunction may start the procedure after

32. See BASIL MARKESINIS, GERMAN LAW OF OBLIGATIONS, VOL. 2: LAW OF TORT (3rd ed. 1997); GERT BRUEGGEMEIER, PRINZIPIEN DES HAFTUNGSRECHTS 182 *et seq.* (1999).

33. See, e.g., ZIVILPROZESSORDNUNG [German Civil Procedure Code] v.12.9.1950, § 287 [BGBl I p. 533] (which gives the court discretionary power to ascertain the origin and amount of damages).

34. See Directive 98/27/EC *supra* note 3, art. 4; AGBG sec. 22(a).

35. See UWG § 13 (5).

36. See Directive 98/27/EC *supra* note 3, art. 5.

trying to stop the alleged infringement via consultation with the defendant. Germany has not picked up this suggestion because it has other means of preventing plaintiffs from suing. These are mainly cost disadvantages; if the defendant in an early stage of the proceeding recognizes the claim of a plaintiff who failed to demand that the defendant comply with his obligation, then the costs of the lawsuit will be charged to the plaintiff, even though he or she won the case.³⁷

D. The Costs of Group Litigation and the Role of Attorneys

This brings us to my final point: the costs of group litigation and the role of attorneys. The crucial role that the costs of litigation play for the significance (or insignificance) of nearly every procedural rule and arrangement cannot be overemphasized. It is not necessary in this context to comment on the importance of attorneys' fees and their allotment in damages class actions; however, the "American rule" and contingency fee arrangements are unknown in Europe and thus must be considered if we want to learn from each other. Instead, I want to sketch very briefly the financing rules in associations' suits in some European jurisdictions.

Collective and public interest litigation needs some kind of discharge of the plaintiff's risk, as the individual plaintiff obviously does not litigate for his own economic advantage. The respective cost rules for most European countries can be arranged in two categories. The first is public funding of the associations and their lawyers and/or no fees for public interest litigation.³⁸ The second is financing "via the market" or abiding by the European rule of costs (the loser pays principle).

However, following this market rule, even in public interest litigation by associations, there could be a major obstacle to the efficient use of procedural remedies. In particular, if courts' expenses and attorneys' fees are calculated by a percentage of the amount in controversy (which is the rule in Germany), the risk involved in losing a case of great public importance and then having to pay all the costs (including the opposing attorneys' fees) would severely reduce these semi-public and necessary control activities. Therefore, in light of the

37. See ZPO § 93.

38. See UWG, § 23 b; MARKENGESETZ [Trademark Act] v. 25.10.1994 § 142 [BGBl I p. 3083]; AKTIENGESETZ [Stock Corporation Act] v. 6.9.1965 § 247 (2) [BGBl. I p. 1089] (in Germany, consumer associations engaging in litigation are largely publicly funded; other means of subsidizing public interest litigation include the court's power to reduce the amount-in-controversy (which is conclusive for the fees)).

law enforcement functions served by the associations' suits, they should at least be co-financed by public subsidies. Of course, the associations' proceeds from delivering chargeable services, publications, and tests, as well as from membership dues, could be used as financing resources as well.³⁹

V. PROSPECTS

A general appraisal of the prospects of group litigation in Europe must take into consideration both the European and the member states' level of legislation. The future of group litigation will be dictated by two factors: the demand for more effective enforcement in certain substantive areas and the demands of the procedural economy. Among the most important substantive fields of law covered in the EU Treaties are environmental and consumer protection. In these fields, the need for legal action is considered to be very high, and since standard behavior and mass phenomena are very common in both fields, violations of legal rules may lead to widespread injury and therefore the respective remedies must be adequate. The policy programs of the EC Commission in consumer and environmental law expressly provide for reforms of procedural instruments to more effectively realize their substantive policy goals.⁴⁰

The second factor of determination is the demands of procedural economy, and it is this combination of substantive policy and procedural needs that will force European legislators to invigorate collective and public interest functions of civil procedure to a much greater extent than recognized before. Whether it opts for a class action model, an association's suit or another form of public representation depends largely on procedural traditions in the respective countries and the political power of organized interests, including the bar and the judiciary. It seems that in most continental European countries, an association's suit is more easily compatible with traditional principles of legitimate representation, public responsibility, and procedural economy. The step to a new procedural dimension, however, is the extension of all forms of collective proceedings to a *damages* remedy. The history of the American Federal Rule of Civil Procedure 23(b)(3) strikingly demonstrates that group litigation becomes a real

39. Cf. Koch, *supra*, note 5, at 431(my proposals as to that effect).

40. See Greenbook on Consumer Access to Law and Conciliation of Consumer Disputes in the Internal Market, COM(93)576 final, at 60, 92; Consumer Policy Action Plan, COM(98)696 final, at 21, 22. See also Greenbook on Civil Liability for Dangerous Products, COM(99)396 final, at 31, 32.

political and social force for change as soon as it asks for damages and thus leads to adequate compensation, as well as to perceptible sanctions for wrongdoing. It is this remedy that makes the class action, as well as the associations' suit, a powerful tool for effective law enforcement.