I. INTRODUCTION

Consumer confidence is a fundamental requirement in order for the European Union (EU) to successfully become a single market. To secure this confidence, the consumer must be protected from physical and financial harms arising from transnational purchases within the EU. This Note discusses European Community legislation that uses injunctive relief to bolster consumer protection and confidence.

II. CONSUMER PROTECTION IN EUROPE AND THE MASS DEFAULT SCENARIO

Article 129 of the Maastricht Treaty, the treaty creating the EU and outlining the goal of a single market, established a title to implement the mission of a “high level” of consumer protection. The elevation of the consumer protection priority to a possibly constitutional level emphasizes its...
There is broad awareness of the significance of consumer protection in the EU. A commission report stated that the “reactions [of Member States, Community institutions, consumer advocacy groups, firms, lawyers, judges were] unanimous . . . on the fact that the existence of effective means of redress for consumer disputes is an essential condition for the smooth functioning of the Single Market.” The European Economic and Social Committee expressed this sentiment more emphatically, stating that “the credibility of the European construction is at stake in the question of consumer protection.”

Consumer confidence and the ultimate success of the single market depends on consumer belief that the purchase of an item from another member state will be backed by the same level of protection as in their own country. While consumers may not be willing to initiate legal action to redress a grievance suffered in the course of a transnational transaction, they may be willing to subsequently avoid transnational transactions altogether.

The commission recognizes the significance of a possible chilling effect on transnational commerce and has endeavored “to ensure that all Member States provide for some form of representative action” to compensate for “the prohibitive costs to individuals of bringing a legal action.”

There are many situations in which “slight harms” could result in deterioration of consumer confidence in the single market. For example, suppose a financial organization in member state A imposes harsh severance penalties on consumers who wish to surrender their life insurance policies or repay their loans early. Suppose these penalties are in violation of European Community (EC) law regulating consumer credit practices or unfair contract

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3 See Stephen Weatherill, EC Consumer Law and Policy 25 (1997). “Article 129a offers the prospect for a consumer policy no longer subordinate to the dictates of internal market policy.” Id. This is because “it offers scope for regarding consumer policy as more than an indirect consequence of internal market policy.” Id. at 152.


5 Committee of the Regions Opinion on the Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, 1994 O.J. (C 217) 29, 30 [hereinafter Committee of the Regions Opinion] (noting that the Committee of the Regions called on the commission to treat consumer dispute settlement as a matter of priority and to make full use of the opportunities created by article 129(a)).


terms. Assume further that the degree to which the individual consumer is harmed is slight enough that the gamut of disincentives facing the individual in such a situation, such as the cost of litigation and the mountain of procedural barriers, are such that pursuing legal recourse will invariably be opted against. Finally, suppose that the aggregate injury and the "ill-gotten gains" for the violator amount to a great sum of money but the violator has far more resources to use in a legal dispute than the injured individual. Such a situation is referred to as a mass default.

There are three conditions under which mass defaults arise. First, there is an intentional or negligent failure to advise consumers of their risk of loss or actual loss due to the malfeasance of the defaulter; second, the risk of loss is unlikely to be detected by similarly situated consumers; third, the defaulter profits by not having to compensate consumers for the harm.

The mass default is not an isolated event. It is characteristic of economies directed toward mass production, distribution, and consumption. These large "[b]usinesses repeatedly subject consumers to mass breach of contract, unreasonable bank surcharges, the deprivation of guaranteed health and welfare benefits, violations of product warranties, and excessive finance

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9 Reasons why consumers may not pursue legally well-founded claims include the expense in light of the small chances of winning a small amount and the social and psychological factors discouraging the pursuit of the suit. See Henrik Lindblom, Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure, 45 AM. COMP. L. 805, 817 (1997); see also WEATHERILL, supra note 3, at 146 ("[C]onsumers frequently write off disappointing purchases," especially where dealing with a non-home member state's avenues of consumer redress. "[L]iterally the last thing a consumer wants to do is go through the expense and delay of pursuing formal proceedings in court.").

10 This has been referred to as the problem of balance. See Leon E. Trakman, David Meets Goliath: Consumers Unite Against Big Business, 25 SETON HALL L. REV. 617, 620 (1994) (noting that the violators "not only benefit from the breach, but the inability of consumers to launch a legal challenge fails to deter future breaches").

11 See id. at 617.

12 See id.

13 See Lindbolm, supra note 9, at 817; see also Economic and Social Committee Opinion on the Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, 1994 O.J. (C 295) 4 [hereinafter ESC Green Paper Opinion] (noting that "the increase in the number of legal relations in general, and consumer-related ones in particular, is . . . a natural consequence of the Single Market . . .").
charges. Recognizing their victim’s failure or reluctance to sue, mass defaulter rendered harmless by impunity.” Legal issues stemming from the complexities of the internationalization of trade open the door for judicial institutions to play an increasingly significant role. To secure the linchpin of consumer confidence, European legal institutions should be prepared to deal with claims against mass defaulter that might otherwise escape justice through gaps left by the disharmony of national laws and the practical limitations on consumers seeking redress for transnational transactions. Actions must be brought in order to maintain and build confidence, to prevent defaulter from unjustly benefitting at the expense of reputable businesses, and ultimately, to secure the integration of the single market.

III. THE ROLE OF THE EC IN CONSUMER PROTECTION

A. EC Responsibility

It is the place of the EC to protect the consumers in the single market. Not only can “consumers . . . be protected better at the European level than at the national level . . . ,” but consumers expect and support such action. Consumer protection policy must be formed at the European level for several reasons. First, no single member state has the authority to generate community-wide law, and so no single member state can address the problem of generating consumer confidence in the single market. Furthermore, EC

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14 Trakman, supra note 10, at 620; see Resolution 339/96 of February 1997 on the Commission Green Paper on Financial Services—Meeting Consumer’s Expectations, 1997 O.J. (C 85) 137. In this resolution, the European Parliament stated: “[T]here have been cases where vulnerable persons have been defrauded or misled by unscrupulous financial operators, demonstrating the need for strong consumer protection at the European level.” Id.
15 See Lindholm, supra note 9, at 818.
16 See id. at 817-18.
17 Huet, supra note 2, at 590. “[I]n this time of economic difficulties when member states are more concerned about business profits than improving the quality of life, EC legislation rather than legislation by specific member states is the better tool to protect consumer interests.” Id. at 584.
19 See Coughlin, supra note 2, at 151. “Recognizing the inadequacy of national laws to protect consumers within a common market, the Community determined that ‘the creation of a European Community with a common market necessitates a comprehensive and coherent policy at Community level in order to protect consumers.’” Id. at 151 (quoting George Argiros, Consumer Safety and the Single European Market: Some Observations and Proposals, LEGAL
institutions are the only bodies with the authority to carry out community-wide initiatives due to the primacy and direct applicability of community law.20 So, while it is within the member states that the consumers’ cases will be heard, it is the EC governing institutions that must compel member states to adopt effective consumer protection legislation.21

B. EC Consumer Protection Policy

The EC has not been remiss in addressing the need to protect consumers in the single market. The first program for a consumer protection and information policy, adopted by the Council of the European Communities in 1975, listed “proper redress . . . by means of swift, effective, and inexpensive procedures”22 as one of consumers’ five fundamental rights. While a body of EC law exists to secure the other four fundamental consumer rights,23 the EC has not achieved uniform protection of the right to redress.24 While the debate concerning substantive limitations of consumer protection measures in the EC

20 See Coughlin, supra note 2, at 151.
21 This responsibility is explained well in the Commission’s Proposal for an Injunction Directive, supra note 4, at 7 (“[B]earing in mind the intra-Community dimension of the infringements in question, as well as the ‘compartmentalization’ of a national means of redress, the coordination of national rules governing these means of redress is crucial for the effective and non-discriminatory application of the underlying Community law and, hence, the smooth functioning of the single market.”).
22 Preliminary Program of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C92) 1, 8.
23 The other four rights are as follows: “[t]he right to protection of health and safety, the right to protection of economic interests, the right to information and education, the right to representation. . . .” Id. For instance, “[t]here are now several Community texts which endow consumers with a set of concrete rights that can be relied on in all the Member States.” “These rights concern Product liability, consumer credit, doorstep selling, package holidays, overbooking in air transport . . . unfair [contract] terms, contracts negotiated at a distance, and timeshares. . . .” Id.
24 See generally Brady, supra note 2, at 155 (commenting that the goal in establishing the single market, removing barriers between countries, has failed due to insufficiency of consumer protection measures, and the lack of information and complexity of national law). But some argue that there is a changing tide in consumer protection. See Gabriele Silingardi, Tourist Contractual Protection by Directive of the European Community: No. 314 on Package Travel, 20 HAMLINE L. REV. 611, 619 (1997) (arguing that the community directive on package travel is an example, with its clarity and express rights of redress and to compensation, of its tendency to promote quality, which will “improv[e] the standards of the market [and] . . . weed out th[e] abusers”).
it is clear that there are serious procedural limitations on the effectiveness of consumer protection measures. The conditions discussed above, including the gaps in the legislation and the legal obstacles, seem to increase the potential for, if not invite, mass defaults. If the EC is not able to protect consumers from these individually small but collectively huge losses of money and confidence, then the linchpin of consumer confidence will not be secure.

The questions is, therefore, what is being done to secure the protection of EC citizens from mass defaults and to assure redress when defaults occur in order to protect consumer confidence in the single market. The mass default is a special situation because, unlike individual claimants who can generally find specific protection, there is a lack of protection from mass defaults. This lack of protection probably compromises consumer confidence to a significant degree.

The remainder of this Note focuses on recent EC legislation intended to grant consumers a means of redress for harm to their interests by way of an injunction. The Injunction Directive will be considered in light of the need for group consumer actions against those who are committing or have committed mass defaults. Proceeding by this method will more fully expose

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25 Some of the most cogent criticism has come from within community institutions themselves. The Draft Proposal for Activities in Favor of Consumers stated that community action in favor of consumers has been piecemeal, needs to be more intensive and effective, and "the high level of protection for consumers remains an objective requiring a special effort by the community." The Economic and Social Committee found it "difficult to understand why consumers do not enjoy at community level the same protection which they enjoy under national laws in some Member States." Opinion on Consumer Protection and Completion of the Internal Market, 1991 O.J. (C 339) 18. Furthermore, "[t]he problem of watered down initiatives plagued the Community and prevented the consumer from realizing maximum protection." Brady, supra note 2, at 160 n.35.

26 These include problems implementing directives and the vagueness of directives. See Brady, supra note 2, at 164, 165; see also Alasdair R. Young, Towards a More Vigorous European Consumer Policy?, 7 EUR. BUS. J. 34, 36 (1995) (discussing the ineffectiveness of consumer groups charged with initiating the legal proceedings).


28 These will be analogous to, but not substitutes for, class actions, for which the European Community does not provide.

29 The term "mass default" is borrowed from an article that used it to describe the condition in which a consumer has been harmed, but only to a small degree, such that the "cost of an individual suit and the likelihood of winning meager damages" deter the consumer from pursuing a breach. However, if aggregated with other consumers suffering the same injury, the combined harm would add up to be of a significant order. See Trakman, supra note 10, at 617.
the potentially progressive nature of the directive and of the latest efforts by the EC to protect consumers in the single market by ensuring their confidence.

Though the Injunction Directive adds some teeth to EC consumer protection law, those teeth are loose due to the directive’s main flaws. First, there is the fallacy that the Injunction Directive will be able to expedite the process of enjoining violations notwithstanding the fact that it is still limited by the constraints on the effectiveness of the directives it was designed to improve. Another problem with the directive is that it does not provide for a damage complement that is required to ensure justice, and thus confidence. Lastly, the action is available only to qualified consumer organizations, to the exclusion of individual citizens. Though the legislation itself may be limited, there are other community institutions, such as the European Court of Justice, that have assumed aggressive and critical roles in ensuring the efficacy of community legislation, which may bolster consumer protection.

IV. THE INJUNCTION DIRECTIVE

The Injunction Directive is intended to address the “urgent need for some degree of approximation of national provisions designed to enjoin the cessation of [violations of consumer protection regulations] irrespective of the country in which the unlawful practice has produced its effects....” This “urgent need” arises from the ability to avoid prosecution for victimizing consumers by simply relocating to another member state with lower standards and from the recognition that mechanisms available at the national and community levels to ensure compliance with consumer protection could be improved.

30 This problem has been addressed by an EC institution, the Economic and Social Committee (ESC), that indicated that the directive would be too limited, and “[c]onsideration should be given to the case for liability actions, which would be an effective complement to injunctions.” Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on Injunctions for the Protection of Consumers’ Interests,’ 1997 O.J. (C 30) 112, 113 [hereinafter ESC Opinion on Injunction Directive Proposal].

31 See Injunction Directive, supra note 27, art. 3.


33 Injunction Directive, supra note 27, preamble, para. 6.

34 See id. preamble, para. 4.

35 While most national legal systems allow actions for injunctions, “the effectiveness of such measures is jeopardized whenever the illegal practice concerned originates in a different country from that in which its effects are felt.” ESC Opinion on Injunction Directive Proposal, supra note 30, para. 1.3.
protection directives, were failing to terminate violations in good time.\textsuperscript{36} These failures were recognized as disrupting the "smooth functioning of the internal market"\textsuperscript{37} and likely diminishing "consumer confidence in the internal market."\textsuperscript{38}

There was a need for the Injunction Directive, particularly in regards to mass default situations. "Such collective action represents an important mechanism for securing law enforcement in light of the inability of an individual consumer relying on the private law effectively to dissuade widespread malpractice."\textsuperscript{39} It has been noted that collective action has tended to fall apart in the face of transnational disputes.\textsuperscript{40} The more proactive measures of the Injunction Directive may address this problem.

A. Advances Made by the Injunction Directive

1. Mutual Recognition. By applying the principle of mutual recognition, the Injunction Directive takes a major step toward overcoming a traditionally prohibitive barrier to consumer organizations seeking to stop mass defaults. At the time of the Proposal for an Injunction Directive, the existing directives covered by the Injunction Directive\textsuperscript{41} had two limits: 1) only qualified entities

\begin{footnotesize}
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\item \textsuperscript{36} See Injunction Directive, supra note 27, preamble, para. 2.
\item \textsuperscript{37} Id. preamble, para. 4.
\item \textsuperscript{38} Id. preamble, para. 5.
\item \textsuperscript{39} WEATHERILL, supra note 3, at 148.
\item \textsuperscript{40} See id.
\end{itemize}
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could bring the action and 2) "in certain Member States the very admissibility of the action [was] predicated on the infringement of a provision of national law." The first limitation still exists and is discussed later, but the second limitation was addressed by the application of mutual recognition to the qualified entities.

Mutual recognition is a principle that for this case means that a "qualified entity" in member state A may apply directly to the court in member state B or initiate proceedings through another qualified entity in member state B. Without mutual recognition, there may be no legal obligation for member state B to execute judgments won by groups in member state A (or even member state B’s groups representing the member state A complainant) without international conventions addressing it. But under the Injunction Directive, "[w]hen practices contrary to . . . [the covered directives] are detected . . . in a Member State apart from the one in which they originated, the Directive requires the relevant bodies in the second Member State to take direct or indirect action in the first one." This application of the principle of mutual recognition has been touted by member states' consumer ministries as a notable achievement and is perhaps the most progressive element of the Injunction Directive.

Nigel Griffiths, chair of the consumer agenda under the United Kingdom presidency, said the following of the Injunction Directive: "I warmly welcome
the new powers. Giving consumer bodies the power to seek injunctions will mean added protection for the consumer, especially in cross border cases where in the past action has been difficult.48

Furthermore, the Injunction Directive allows for orders requiring violators to pay into the public purse, or any beneficiary designated under national legislation, when the violator fails to comply within the time period specified by the courts or administrative authorities.49

2. The Injunction Directive Is a Stronger Mandate. The Injunction Directive is applicable to those actions arising under the consumer protection directives enumerated in the annex,50 some of which already had injunction provisions.51 Compared to the injunction-granting portions of those directives, the Injunction Directive is more specific and forceful. It is indicative of the more assertive stance the EC has taken by issuing it. For instance, article seven of the Unfair Contracts Directive states only that “Member States shall ensure that . . . adequate and effective means exist to prevent the continued [infraction],” without any qualifiers regarding promptness of response, degree of urgency, etc.52 The Injunction Directive directs that member states must be able to issue orders with “all due expediency” by way of “summary procedure,” and where appropriate, accompanied by “publication of the decision” and/or the “corrective statement with a view toward eliminating the continuing effects of the infringement. . . .”53

Article five augments the powers accompanying the Injunction Directive. It permits concerned parties to bring an action for injunction if the infringing party does not cease infringement within two weeks after being notified that it is in violation.54 It also grants member states the power to impose monetary damages for failure of violators to comply with its orders.55

In summary, there are several indications that the Injunction Directive is a significant leap beyond the prior directives concerning consumer

49 Though this is qualified by the limitation “insofar as the legal system of the Member State concerned so permits.” Injunction Directive, supra note 27, art. 2(1)(c). This article also states that an action under this directive will not prejudice actions under private international law. See id. art. 2(2).
50 See directives cited supra note 41.
51 Directives 1, 6, 7, and 9, supra note 41, contain specific provisions on injunctive actions. See Injunction Directive, supra note 27, annex.
52 Unfair Contracts Directive, supra note 8, art. 7, par. 1.
53 Injunction Directive, supra note 27, art. 2, par. 1(a)-(b).
54 See id. art. 5(1).
55 See id. art. 2(1)(c).
MASS DEFAULT SCENARIO

First is its breadth. The directive covers nine other directives and thus concentrates the weight of EC pressure on member states to establish uniform injunction proceedings. Second, the application of mutual recognition helps consumer organizations, at least technically, solve the non-recognition problem. Finally, there is the very limited time that infringers have before an injunction is to be issued. In tandem, these advantages may make the whole of the Injunction Directive greater than the sum of its parts. But internal limitations as well as the external limitations facing all EC directives undermine the Injunction Directive’s apparent strength.

B. THE LIMITS OF THE INJUNCTION DIRECTIVE

1. Internal Limits. Notwithstanding the progress the Injunction Directive offers for consumer protection, as discussed in the above section, there are many ways in which its efficacy is compromised. The purported goals of the Injunction Directive are to mitigate the lag time endemic in the current EC and member state enforcement mechanisms and to address the “urgent need” for approximation of national provisions regarding the issues listed in the annex.

a. The Limited Nature of Group Actions. First among these limits is the constraint on who may bring the actions. Due to the cost-benefit deterrent to individual suits, a class action would seem the most appropriate means to secure redress for the mass default. Assuming that the class action is possible, it will still be inappropriate when a mass default arises in different jurisdictions, where claimants seek “vastly disparate” damages, and where different remedies are sought, such as specific performance versus injunctive relief.

In Europe, where class actions are “almost non-existent,” a different approach is required to address mass defaults anyway. In 1992, an author...
wrote that a powerful impetus for considering the introduction of the class action to Europe was the "stark reality that nothing worth mention [was] being done in Europe to offer procedural civil justice in cases of mass victimization." In the case of European consumer protection, the public interest is entrusted to a public prosecutor who has the capacity to bring representative group actions. In other words, the avenue of redress for mass defaults in the European legal system is limited to collective actions brought by public representatives for groups of concerned consumers.

The group action, prosecuted by public ministers, is not a class action suit. It aggregates individual causes of action for individual recovery but operates in a parallel and distinct fashion. The group action has been criticized as being ineffectual, and confidence in the efforts of the European officials charged with bringing the actions is lacking.

Under the Injunction Directive, only "qualified entities" may bring the action. A "qualified entity" is:

any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or (b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law.

So, there is a limited group that may bring these actions. While in the United States mass defaults are prosecuted as aggregates of private rights by "private attorneys general" with the latitude to seek not only injunctions but

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63 See Lindblom, supra note 9, at 819-20. Lindblom notes that "group actions can serve as a bridge over the troubled water between traditional individualistic procedure and mass claims." Id. at 820.
64 See Cappalli & Consolo, supra note 62, at 239-40.
65 See id. at 240.
66 See id. at 218-19. This is not to say that the class action is a panacea. Legal professionals have criticized class actions on the grounds that the attorneys are often better compensated than the clients and that the settlement process is vulnerable to collusion. See Mark S. Davis & Thomas R. Grande, Class Actions Benefit Consumers, TRIAL, Apr. 1, 1997, at 24.
67 Injunction Directive, supra note 27, art. 3.
also damages, the "qualified entity" limitation is the rule consistent with the European "public action" approach to mass defaults and other situations.

The "qualified entities" (consumer organizations) at the national level vary greatly in number and power, from one in the Netherlands to twenty in France, and "on the whole [they] have relatively little clout." This is obvious when considering that, except in the United Kingdom and Germany, where consumer associations are government funded, the various national and local organizations are funded only by membership fees and by the voluntary work performed by their members. Nearly all of the member states have national-level bodies representing the consumer organizations, so-called Consumer Councils, but these tend to be "consultative bodies" that are just appendages of the respective ministry responsible for consumer affairs.

There are problems with dispersing the responsibilities of ministries charged with consumer protection. It is no help to the efficiency of integration and harmonization that no member state has a ministry or agency responsible specifically for consumer affairs. Also, the fact that there are several ministries jointly responsible for developing and enforcing consumer policy makes it more difficult for member states to harmonize their policies. Furthermore, as in the case of the Unfair Contracts Directive, member states often face vague instructions as to the degree, if any, that they are to vest power in these organizations. Some member states resolve the ambiguity against the consumer. For instance, in implementing the Misleading

68 See Cappalli & Consolo, supra note 62, at 239-40. The authors criticize the "public action" as being largely ineffectual. The authors define the threshold as to when an action becomes a "class action" as when a proceeding "enables private suits to be brought which might otherwise be economically infeasible . . . ," and because the Injunction Directive does not operate as such, it is not a grant of class actions. Id.
70 See id.
71 Id. at 9-10.
72 See id. For example, in Austria, the responsible authority is the Federal Ministry of the Feminine Condition and Consumer Protection, while the primary responsibility for developing consumer policy is spread between the Federal Ministry of Justice, the Federal Ministry of Economic Affairs, and the Federal Ministry of the Environment, Youth and the Family. See id.
73 See id. at 6.
74 See WEATHERILL, supra note 3, at 86.
Advertising Directive, the United Kingdom limited the consumer organization to filing a complaint with the corresponding administrative authority.\textsuperscript{75}

Although the consumer organizations have traditionally been weak in their role in the EC, they may soon be strengthened.\textsuperscript{76} A recent EC proposal for a decision of the European Parliament and Council stated "it is also necessary to strengthen the bodies and organizations that are active in the area of consumer protection so that they can be a more effective driving force for making consumers aware of the priorities set by the Community."\textsuperscript{77} The proposal also stated that it is necessary to achieve community-level representation of consumers by these bodies in order to provide "significant support" to them, to support organizations at the national or regional level by encouraging collaboration among them, and to provide the necessary financial support for them to carry out these tasks.\textsuperscript{78}

Articles two, five, and six of the Draft Proposal detail the Community's funding objectives for the consumer organizations. Article five defines consumer organizations as non-governmental, non-profit organizations that protect the "interests and health of consumers," have been required to represent interests of consumers at the community level, represent consumers of at least half of the member states, and are active at the national or regional level.\textsuperscript{79} The Draft Proposal also outlines (in article seven) the criteria for an organization being funded by the Community.\textsuperscript{80} The sincerity of efforts to

\textsuperscript{75} See id. at 110. The United Kingdom interpreted the Misleading Advertising Directive as "not allowing consumer organizations to initiate proceedings before Court." Monique Goyens, \textit{Where There's a Will, There's a Way!: A Practitioner's View, in EUROPEAN CONSUMER POLICY AFTER MAASTRICHT, supra note 45, at 93, 101. But if the directive only requires group actions and the groups are not allowed to get to court, how do the consumers get to court?\textsuperscript{76} See Goyens, supra note 75, at 98.

\textsuperscript{77} Draft Proposal for a Decision in Favor of Consumers, \textit{supra} note 1, at 8.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 11. The article five criteria were adopted in the \textit{Call for Projects to Promote and Protect Consumer Interests in 1999} (visited Apr. 25, 2000) <http://europa.eu.int/comm/dg24/library/tenders/call05_en.html> [hereinafter Call for Projects]. The Call for Projects is an invitation for proposals to be submitted for review to see if they qualify for funding by the Community. See id.

\textsuperscript{80} Draft Proposal for a Decision in Favor of Consumers, \textit{supra} note 1, at 12. The criteria include:

- a satisfactory level of cost effectiveness; an added value ensuring a high and uniform level of the representation of consumers' interests; a lasting multiplier effect at European Level; effective and balanced cooperation between the various parties for planning and carrying out activities and for financial participation; the development of lasting transnational cooperation, especially by the exchange of experience to raise the awareness of consumers
empower consumer organizations is evidenced by the detailed outline of procedures, evaluation, and monitoring in chapter three of the Draft Proposal.\(^8\) It is further evidenced by the measures for community policing of the organizations’ use of funds,\(^9\) the objectives in areas of educating consumers and producers of their respective rights and responsibilities regarding community law,\(^10\) and detailed outlay of funding of the organizations.\(^11\) The success of the consumer organizations in securing consumers’ rights under the Injunction Directive and in uprooting mass defaulters, will very much depend on their ability to offset the substantial resources of those mass defaulters. This requires more than a proposal; it requires legislation.

b. Deference to Member States. There are many areas in which the Injunction Directive defers to the member states on key issues of enforcement, which could potentially enable the member states to undermine enforcement.\(^12\) The preamble gives member states the choice of creating bodies to act as “qualified” entities that enforce the Injunction Directive in particular or of simply relegating the enforcement of the directive to existing bodies, whose job it is to protect the collective interests of consumers as national law dictates.\(^13\)

Consumers are disadvantaged in member states that opt to have their consumer organizations take control of consumer actions under the second option because:

[a] number of cases have shown that the authorities at the place of the damage are not obliged to take legal action as they are not the national bodies of the country of the individ-
ual affected. The interests of their own domestic consumers might well not be affected by the goods or services intended for foreign consumers. 87

As one author notes, "The problem of insufficient means granted to national supervisory authorities is a general problem which consumer policy has to face: sophisticated legislation is of no use if it is not enforced by stringent procedures." 88

Article four is a source of another significant weakness of the Injunction Directive. It allows member states to limit application of mutual recognition because the member state where the infringement took place can require the foreign claimant to engage in court proceedings via a qualified entity from that member state. 89 Even with mutual recognition, a defendant-friendly member state could become a haven for infringement prone parties that move to that state. That state would govern the administration of a case arising from an infringement in that state regardless of the origin of the plaintiff party. Furthermore, not all states sponsor consumer protection to the same degree. "[T]he organizations of the northern countries are more structured and there is a strong tradition of consumer awareness [as] compared to the Mediterranean countries." 90

Articles two and five contain more limits on the force of the directive by deferring to member states. Article two, paragraph one, subsection (c) limits the scope of the power to order losing defendants to pay into the public purse or to any beneficiary named in national legislation for failure to abide by the order of the injunction, to the degree that member state permits such punitive orders. 91 Article five allows the member states to create or keep rules that require the party seeking the injunction to first consult with the defendant. 92 This option, like others the member states are granted, allows for inconsistency

87 VIVIENNE KENDALL, EC CONSUMER LAW 158 (1994).
88 Goyens, supra note 75, at 100.
89 The ESC stated that the enforcement of a requirement for an intermediary would vitiate the principle of mutual recognition. See ESC Opinion on Injunction Directive Proposal, supra note 30, para. 3.3. This loophole could also lead to delay just by virtue of increased administrative work, which would undermine the purpose of the directive in the first place. See id.
90 KENDALL, supra note 87, at 19.
91 See Injunction Directive, supra note 27, art. 2(1)(c).
92 See id. art. 5(1). But if the cessation of the infringement is not achieved within two weeks from the date the request for consultation is received, then the plaintiff may bring the action for injunction. See id.
between the member states and thus undermines the standardization necessary for confidence in the single market.\textsuperscript{93}

c. No Damages Provision. One of the most glaring voids in the Injunction Directive is the lack of an action for damages.\textsuperscript{94} An action for damages arising from liability would be "an effective complement to injunctions."\textsuperscript{95} This seems obvious. Supposing a mass default situation that has continued for a significant period of time, over the course of which the defaulter has amassed a significant amount of income by way of the default, the defaulter may not be deterred by the possibility of a later injunction. The defaulter in this situation would be able to take the money and run. The problem is compounded by the presence of procedural barriers to the implementation of the Injunction Directive. The longer it takes for the member state governments to respond to this directive and enforce provisions promulgated pursuant to it, the longer the defaulter can get away with wrongfully injuring others that it will never have to actually compensate under EC law.\textsuperscript{96}

The commission stated that the Injunction Directive is designed to prevent damages, "as distinct from actions for damages which are designed to 'make good' the consequences . . .," and that "clearly an action for an injunction can play a preventative role only provided it is part of an effective and rapid procedure."\textsuperscript{97} However, given that community-level legislation is necessary to achieve the harmonization to secure consumer confidence in the single market and given the fact that legislation exists securing consumers' express rights to compensation,\textsuperscript{98} it is apparent that the EC has the capacity to secure this right. Why has it not done so? It may be that "[i]n principle, the conditions to be fulfilled before the remedy can be granted are those applicable under national law . . . ."\textsuperscript{99} This does not explain why the Injunction Directive does not include the added protection of a general damages provision.

\textsuperscript{93} See Brady, supra note 2, at 191 (addressing the problem of discrepancy where member states may choose whether both direct and indirect damages would be available to a consumer victim of a violation of Guarantee Proposal).

\textsuperscript{94} See ESC Opinion on Injunction Directive Proposal, supra note 30, para. 2.4.

\textsuperscript{95} Id.

\textsuperscript{96} National law, however, may make such recovery possible.

\textsuperscript{97} Proposal for Injunction Directive, supra note 4, at 10.

\textsuperscript{98} See, e.g., The Package Travel Directive, supra note 41, art. 5(2) (imposing liability for damages caused to the consumer by organizers and retailers of package vacations).

\textsuperscript{99} Sacha Prechal, EC Requirements for an Effective Remedy, in REMEDIES FOR BREACH OF EC LAW 3, 8 (Julian Lonbay & Andreia Biondi eds., 1997).
Though there have been directives for consumer protection that do expressly grant the right to seek remuneration, such as the Package Travel Directive and cancelled flight compensation regulation, other directives have been gutted of their compensation provisions. For instance, the Directive on Unfair Terms in Consumer Contracts was intended to provide the following remedies for victims: reimbursement costs, replacement costs, repair costs, or reduction of price if the buyer retains the goods. Yet, there is no such provision in the final version of the directive. This is probably because the passage of consumer legislation does not occur without countervailing political pressure. Each piece of consumer legislation has its corresponding industry adversary. And because the Injunction Directive covers a breadth

100 The Package Travel Directive provides that the seller shall be liable to package travel consumers for damages incurred by the consumer arising from a breach by the seller, subject to the terms the member state may set out as grounds for exoneration, or the exculpatory terms in the directive itself. See Silingardi, supra note 24, at 616-17.

101 Council Regulation 295/91 on Establishing Common Rules for Denied Boarding Compensation System, 1991 O.J. (L 36) 5. This regulation is very limited in scope but consumer friendly in that it guarantees compensation in cases where consumers have been denied boarding of a plane for which they had a ticket. New proposals for an amendment to the directive would increase the amount to which passengers are entitled in the case of overbooking, the value of which will be immediately redeemable at the check-in desk. See Commission Press Release IP/98/110, Airlines Must Provide Higher Compensation to Passengers Denied Boarding on Overbooked Flights under New European Commission Proposals, Jan. 30, 1998 (visited Apr. 10, 2000) <http://www.europa.eu.int/rapid/start/cgi/guesten.ksh> (search under IP reference number).


105 See Brady, supra note 2, at 196-98 (noting the considerable clout industry trade groups exerted in demonstrating great opposition to the Commission Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Guarantees, COM(95) 520 final at 1 [hereinafter Proposal on Guarantees]). These groups decry the supposed expensive and cumbersome obstacles the directive would throw into the single market in an attempt to kill it or at least water it down. See Emma Tucker, EU to Regulate Financial Services, FIN. TIMES, Oct. 15, 1998, at 2 (noting banks' criticism of proposals for a directive to regulate the sale of financial services by phone, post, and Internet in the EU, based on their position that the regulation would increase the barriers to cross-border business by imposing unfair costs on the to-be-regulated services versus face to face sales. See generally Couglin, supra note 2, at 147-48 (addressing the root of this confrontation, the "conflicting goals of consumer protection and free trade").
of activities across industries, it is logical that there must have been industry pressure correlative of this combination.

It is therefore logical to think that any measure granting broad rights to consumers to redress grievances stemming from mass defaults would be attacked by industry groups and face reluctant implementation and inefficacy due to the weakness of the agencies charged with executing it. The degree of resistance is probably directly related to the strength of the measure.\(^\text{106}\)

Finally, the annex includes only a very limited group of directives dealing with consumer protection and leaves out very important ones, such as those dealing with product safety and the directives on banking and insurance.\(^\text{107}\) The commission stated that it chose these directives because “of the impact of their infringement on consumer interests and on the smooth functioning of the Single Market.”\(^\text{108}\) This is vague and begs the question of what way these directives specially impact consumer interests in ways that the omitted consumer protection directives do not.\(^\text{109}\)

2. *External Limits.* Even if the Injunction Directive was a facially powerful consumer protection measure, the historical and real world limitations on the effectiveness of directives will compromise the Injunction Directive’s capacity to address the incidences it is generally geared toward resolving, and the mass default situation in particular.

a. *Subsidiarity.* In order to abate the threat of differing levels of consumer protection among the member states on the integration of a single market, the EC has sought to harmonize consumer protection legislation among the member states.\(^\text{110}\) The European government is limited in the breadth and depth of community-level legislation by the principle of “subsidiarity.” This principle, derived from article 3(b) of the EC Treaty,

\(^{106}\) See Brady, *supra* note 2, at 198 (making a similar hypothesis that “[j]udging by the hostile reaction to the Proposal [on Guarantees], the Directive must be accomplishing some good for the consumer”).

\(^{107}\) See ESC Opinion on Injunction Directive Proposal, *supra* note 30, para. 3.2. The ESC Opinion urged that there should be a right to bring the Injunction action for violation of any provision that is designed either directly or indirectly to protect consumers, if an injunction would be an effective redress for such violation. *Id.* This does not address why the product safety and banking directives were left out. The answer may have something to do with the strength of the respective lobbies. Brady argued that the industry groups have considerable clout in affecting community legislation and that this clout was a threat to the strength of consumer protection legislation. Brady, *supra* note 2, at 198.


\(^{109}\) The commission did state that other community acts may broaden the scope of the Injunction Directive to cover other substantive areas. See *id*.

limits the EC to action that is necessary to achieve the objectives of the treaty. The EC is supposedly limited to circumstances in which common action of the member states and the EC is a necessity.\(^{111}\) The principle has been understood to mean that a cross-border character of the action was contemplated.\(^{112}\) Though this is a vague guideline, it is known that one of the express objectives of the treaty is a "high level" of consumer protection.\(^{113}\)

But subsidiarity is not a neutral principle. By the actions of some member states, such as Germany and the United Kingdom, subsidiarity may be used as a shield against consumer protection policy. Germany has repeatedly invoked the principle to attempt to gouge consumer protection directives.\(^{114}\) But community institutions have also been criticized for hiding behind the shield of subsidiarity, shielding the EU from progress in consumer protection. One commentator writes, "There has been particular resistance to EC involvement in action to improve consumer access to justice and redress for disputes concerning cross-border purchases of defective goods and services."\(^{115}\) More acutely, "[s]ubsidiarity cloaks a failure to act with the respectability of a principled stand. Member States have interpreted it as a concise formula for inaction at any level rather than as a vehicle for establishing the appropriate level for effective action."\(^{116}\) At the core of the subsidiarity issue is the "allocation of competence" between member states and the Community. It will be necessary for member states to participate heavily in the development of community law and integration of the single market. Just as consumers need to have confidence that other member states will play by the same rules, they must be confident that their country has participated in the development of the rules, which it too must abide by.\(^{117}\)

\(b\). The Limited Nature of Directives. In addition to the limits that subsidiarity poses, directives are easily watered down as the member states

\(^{111}\) See PAOLO MENGozzi, EUROPEAN COMMUNITY LAW: FROM COMMON MARKET TO EUROPEAN UNION 297-98 (Patrick Del Duca trans., 1992).

\(^{112}\) See id.

\(^{113}\) EC TREATY, supra note 2, art. 129.

\(^{114}\) See WEATHERILL, supra note 3, at 32.


\(^{116}\) Id. But see Hans W. Micklitz & Stephen Weatherill, Consumer Policy in the European Community: Before and After Maastricht, in EUROPEAN CONSUMER POLICY AFTER MAASTRICHT, supra note 46, at 33 (arguing that this perception is improper and that subsidiarity is both a way to empower the member states and a way to compel them to adopt policy in fields where the Community has a common policy, such as in consumer protection).

\(^{117}\) See Micklitz & Weatherill, supra note 116, at 28.
implement them in their legislation. A directive is implemented under a minimum harmonization model, which means that member states must adopt a certain level of regulation prescribed by the directive but may go further (which implies a low baseline).\textsuperscript{118} This method in itself creates a problem insofar as some states simply "bolt on" measures implementing directives to already existing national legislation, which makes the rule confusing, its incorporation perfunctory, and thus dissipates its intended effect.\textsuperscript{119}

More specifically, according to article 189 of the EEC Treaty, directives apparently are only binding to the extent of the result to be achieved, not to the form or method of implementation.\textsuperscript{120} That is, "EC Directives have no horizontal direct effect . . .[;] they cannot directly impose obligations on private parties."\textsuperscript{121} Directives, then, cannot be used themselves as bases for legal action. Rather, directives operate to have a vertical effect on the rights of parties in member states by imposing obligations on the member states to develop a body of law that determines the rights of those parties.\textsuperscript{122} This characteristic is a strength to the extent "that it allows norms derived from Community law to be absorbed into established national structures. . . ."\textsuperscript{123} But it is a weakness to the extent that the "[c]ommunity law origins of the legal rule may be obscured, and their impact diluted, by its indirect route into the national legal order."\textsuperscript{124}

The external limits on the effectiveness of the Injunction Directive—subsidiarity and the limited nature of directives—harm mass default actions if they harm the Injunction Directive. Because the Injunction

\textsuperscript{118} See Weatherill, supra note 3, at 86.
\textsuperscript{119} See id. at 86-87.
\textsuperscript{120} See id. at 138.
\textsuperscript{121} Christiaan W. A. Timmermans, Application of Community Law by National Courts: (Limits to) Direct Effect and Supremacy, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 29, 30 (Rosa H. M. Jansen et al. eds., 1997). This principle was laid out in Case 152/84, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), 1986 E.C.R. 723 and in Case C-91/92, Paola Faccini Dori v. Recreb Srl, 1994 E.C.R. I-3325. In Faccini Dori, the European Court of Justice refused to extend the doctrine to provide horizontal effect of directives—to permit individuals or enterprises to sue each other based on a non-implemented directive.
\textsuperscript{122} See Timmermans, supra note 121, at 31. But, under European Court of Justice case law, "persons [may] invoke the provisions of a directive—as long as they are sufficiently precise and unconditional—before the national courts, in order to obtain redress from the State if the latter has failed to transpose the directive in question within the period laid down. . . ." Christos G. Yeraris, Community Law and the Greek Administrative Courts, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY, supra note 121, at 58.
\textsuperscript{123} Weatherill, supra note 3, at 138-39.
\textsuperscript{124} Id. at 139.
Directive spells out its provisions and the mandates with relatively more force and clarity than other consumer protection directives, the member states may not be able to avoid implementing the measures to the extent envisioned by their drafters, or these states may be challenged if they do. As the deadline for implementing the Injunction Directive is not for another year, several years will likely pass before the effects of these external limits are seen.

V. OTHER CHARACTERISTICS OF THE EC LEGAL SYSTEM

A. The European Court of Justice

The European Court of Justice (ECJ) is a constitutional court whose purpose is to "secure uniformity in the interpretation and application of community law and guide its development."125 Some say that it has become a victim of its own success; it is in many ways "the most successful international court in the world community," with its fundamental function in the community legal order well established.126 It has become a popular forum for litigation because (1) there is a large body of law for which it is the sole authoritative interpreter and (2) enforcement of its judgment is relatively effective.127 While it is not the forum used by a consumer organization to challenge a mass defaulter, its history in giving force to the mandate for the member states to implement directives indicates a possible predisposition toward interpreting the duties of the member states in this area in a very pro-consumer way.

Despite the procedural hurdles that obstruct actions in favor of consumers and the limits on the efficiency of application of the directives,128 there are factors in the EC legal system that may operate to help ensure the consumer initiatives success. The ECJ has been an activist court in assuring the protection of the rights of individuals in the single market. The ECJ has suffered attacks on its power because of its efforts to balance the development of "its principled and daring case-law on judicial protection within member states with regard to the Community rule of law" while being careful to delineate the scope of community powers strictly.129 For example, in case of repugnancy between national and community laws, under the Frankovich

125 British Institute of International and Comparative Law, The Role and Future of the European Court of Justice 1 (1996) [hereinafter ROLE AND FUTURE].
126 Id. at 23.
127 See id.
128 See supra Part IV.
129 Timmermans, supra note 121, at 36.
decision, community law must be looked to by national judges. This is the principle of primacy, which prohibits the subordinate legal orders of member states from passing legislation contrary to community legislation. The principle of direct effect of community legislation, which allows individuals or enterprises to claim rights established by the Community but not yet in member state law, further promotes the interest of individuals. Some argue that these developments indicate that the ECJ has acted to ensure that there will be “real teeth” in the enforcement of community rules.

There are several ways in which the ECJ has “given concrete shape” to the right of individuals to enforce their community-granted rights: 1) by allowing direct effect of those “Community Treaties which are unconditionally formulated and sufficiently precise: vertically, so that they can be relied upon before a national court against the member state concerned; later on, also horizontally, that is that they can be relied upon against other private parties”; 2) by giving vertical direct effect “to provisions of directives which are unconditional and sufficiently precise”; 3) by requiring interpretation of national law to be consistent with directive provisions where national law has not yet adopted the provision; and 4) by requiring member states to compensate individuals for damages suffered as a consequence of a failure to adopt the directive provisions in the prescribed time.

Whether the Injunction Directive will have direct effect will depend on whether it “(i) impose[s] duties of ‘non action,’ such as the duty to obey to a negative rule and (ii) appear[s] to be unconditional and sufficiently precise to exclude any discretion of the Member States.”

Another principle has arisen under EC case law that may afford consumer organizations the right to seek actual compensation. If the Injunction Directive is not implemented to the degree required under law and someone has suffered damages as a result thereof, community case law states that parties may seek compensation “commensurate with the loss or damage

130 See Walter Van Gerven, The ECJ's Recent Case-Law in the Field of Tort Liability: Towards European Ius Commune?, in EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY, supra note 121, at 91, 104-05.
131 See Goebel, supra note 32, at 160.
132 See id.
133 Van Gerven, supra note 130, at 96.
134 Id.
135 Id.
suffered, so as to ensure the effective protection for their rights."  

This is because "[o]ne of the most important cornerstones of the case-law of the ECJ is that private parties, either as natural persons or legal entities, should have the opportunity to ensure that rights derived from Community law can actually be upheld by judicial means." And "because of the necessity of uniform application of Community law throughout the Community, there should be sufficiently harmonized rules which allow individuals to enforce these rules by way of sanctions and legal remedies which are, if not the same, then at least equivalent in all Member States." Following this line of reasoning, the Marshall II decision, which "made clear that the loss and damage actually sustained as a result of [a] discriminatory dismissal [in violation of a directive prohibiting discrimination in the workplace] should be 'made good in full,' " removed the arbitrary damages ceiling in the member state in question. This opinion, along with Frankovich, indicates a willingness by the ECJ to issue decisions that implement directives that have real force. This is evidenced by the rulings that punishment for failing to adopt directives or for maintaining policies inconsistent with them should be of a certain severity regardless of the state's determination. "[O]ne of the most important developments in EC law recently has been the expansion of the ability of the individual right to sue in national courts on the basis of EC law and rely on a proper remedy in the form of compensation."  

But while the commission appears to be facing up to its responsibility as guardian of the treaty by permitting infringement proceedings against member states, in practice, there are major problems with relying on the commission to secure individual consumer interests. The procedures have been called slow, difficult, and politicized. Furthermore, the relegation of disputes brought by national parties assumes that there is efficacious access to justice in the member states for all prospective plaintiffs, that the national lawyers are properly trained in EC law and know enough to recognize existence of claims, 

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137 Van Gerven, supra note 130, at 103. But those suffering damages may only seek compensation where: 1) the rule of law that was infringed was intended to bestow rights on the individual; 2) the breach is sufficiently serious; or 3) there is a "direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties." Id. at 100.

138 Id. at 95.

139 Id. at 96.

140 Goebel, supra note 32, at 163.


142 See id. at 167.

143 See id.
and that the member states are all abiding by their article five obligations to apply EC law. Furthermore, infringement proceeding judgments by the ECJ pursuant to EC article 171(1) are declaratory only, and the court does not have power to enforce them. In the context of the mass default, it would be even truer that "[t]he daunting prospect of pursuing an action against the state to recover a relatively small sum would dissuade the vast majority of consumers." There have also been cumbersome delays in which member states may act illicitly for four to five years in the case of infringement proceedings. But again, these delays may be curtailed if the case law allows actions for damages for failure to implement and if there are consumer organizations empowered enough to bring such actions.

B. Out-of-Court Settlements

Though the Injunction Directive does not contain a general damages provision, there are damage provisions in some of the directives listed in its annex. However, the consumer's likelihood of using legislation enacting these directives as the basis for recovery is still unlikely in the mass default situation due to all the reasons that allow the mass default to slip by.

One way that the European Community attempts to make up for the lack of the class action is by its emphasis and use of out-of-court settlements of disputes. The commission has attempted to answer what it called an "urgent need for Community action in regard to the settlement of consumer disputes." Addressing the mass default problem in a way, the communication highlights that one of the paramount goals of the Community is to "facilitate the settlement of consumer disputes by resolving the problems arising from the disparity between the economic value at stake and the cost of its judicial settlement." This communication outlines two methods designed to achieve this goal: by a complaint form "designed to facilitate communication between consumers and professionals, and should an amicable solution

144 See id. at 170.
145 See ROLE AND FUTURE, supra note 125, at 18.
146 WEATHERILL, supra note 3, at 144.
147 See ROLE AND FUTURE, supra note 125, at 3.
149 Communication from the commission on "the out-of-court settlement of consumer disputes" and commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, COM(98)198 final at 2 [hereinafter Communication on Settlements].
150 Id. at 2.

The communication acknowledges several of the problems facing consumers seeking justice in the courts: 1) the high cost of legal consultation, representation, expert opinions, and court fees; 2) the requirement in many member states that the plaintiff pay defendant’s costs if plaintiff loses; and 3) the long delays arising from backlogs of cases in the member states. These are in addition to the psychological barriers arising from the formalism and complexity associated with court procedures. Furthermore, these barriers are exacerbated when the dispute is between member states. The result of the barriers has been that “many consumers do not even try to assert their rights and simply allow them to be infringed” upon in light of the limited value of the dispute. Three possible solutions include making judicial procedure and access more efficient, improving communication between sellers and consumers, and using out-of-court procedures.

The “solution” of an amicable resolution to disputes between businesses and consumers is premised on the assumption that businesses will seek to avoid problems with consumers in order to preserve good will and business relationships. However, this ignores the possibility of intentional defrauding by a business and the corresponding likelihood of that business sacrificing good will to the benefit of profit. Even if individual customer good will is material, there is nothing in this framework to prevent the business from simply paying off that particular consumer to keep him quiet and happy, while still floating above the reaches of mass justice for the remaining defrauded customers. The communication acknowledges that “fruitful communication is obstructed through lack of consumer information,” the language barrier when dealing with other countries, and the lack of sophistication of the consumer for filling out the forms properly.

It may nonetheless be the out-of-court settlement that provides the predominant mode of consumer redress in the mass default situation. A variety of out-of-court methods already exist in the member states, including mediation, arbitration, and other supplementary measures. The out-of-court

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151 See id.
152 See id. at 5.
153 See id.
154 See Communication on Settlements, supra note 149, at 5.
155 Id.
156 See id.
157 Id. at 7.
158 See Communication on Settlements, supra note 149, at 7.
settlements may be initiated by public authorities, individual political associations, or firms offering mediation services. The goal is to get out-of-court procedures that most closely resemble courtroom adjudication in their independence and impartiality while at the same time improving access to justice. The communication acknowledges the inherent flaws of out-of-court settlement, including the flexibility that allows for circumvention of strict application and difficulties in implementing decisions.

The communication posits safeguards, in addition to respect for principles such as transparency, independence, and effectiveness, that will make for more reliability and confidence. First, consumers should be able to use their state’s court system without compromising their claim. Second, bodies responsible for out-of-court settlement will have mutual confidence in their member counterparts. The ultimate goal is that by networking the various resolution bodies, consumers will be able to “refer cross-border disputes to the competent out-of-court body in the foreign country via the corresponding out-of-court body in their own country.”

VI. CONCLUSION

Ultimately, to truly secure consumer confidence in the single market, perhaps class actions should be permitted to deal with mass default situations, where the smallness of each plaintiff’s claim effectively immunizes the defendant from suit. In the United States, class actions severely impact court dockets because of the “tremendous processing demands they place on judges and staff.” But the judicial infrastructure necessary to handle class actions may not exist in all member states. A country like Italy, whose judges are not accustomed to taking the active role necessary to run a class action suit, is ill-equipped for such an option. Under the law of some member states

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159 See id. at 8.
160 See id.
161 See id. at 10
162 See id.
163 Id. The commission has created a database of organizations and resolution bodies pursuant to the goals of this recommendation.
164 See Cappalli & Consolo, supra note 62, at 240-41.
165 Id. at 256.
166 See id.
such as Italy and under EC law, class actions are not going to become mechanisms for consumer redress, and mass defaults may go unremedied.\textsuperscript{167}

Consumer confidence in the single market will likely have to be built incrementally, on the foundation of many modest measures, rather than by sweeping changes in the law. The member states themselves, in a response to a EU Survey\textsuperscript{168} regarding their consumer protection policy, made suggestions on what measures the EC should propose to support and supplement policy in favor of consumers. For instance, Austria suggested that “the Commission should ensure that market surveillance is improved in the Member States so as to achieve a comparable and high level of consumer protection throughout the Community.”\textsuperscript{169} Very recent developments in consumer policy indicate a tendency of the commission to strengthen consumer protection measures in the Community. For instance, the new Consumer Action Program for 1999-2001 defines the protection of the consumer’s economic interest as a top priority.\textsuperscript{170} The program calls for community “measures” to promote consumer protection rather than “actions” under the EC treaty.\textsuperscript{171}

The Injunction Directive is a modest measure, but its concreteness gives some weight to the rhetoric about consumer protection. Despite its internal and external limitations, it does at least advance consumer protection in a more sweeping manner than other measures by designating a whole group of offenses and speeding up the remedies for them. It remains to be seen what force, if any, the directive will have, as cases have not yet arisen under implementing member state legislation.

\textsuperscript{167} See id. This article describes what will happen to the “small investor who suffers modest damage due to the fraud or fault of company executives. . . . The damage being minute makes the lawsuit impossible given: the uncertain results of his judicial initiative, particularly in fields where precise legal guidelines are lacking; cost of legal assistance disproportionate to the size of the grievant’s claim; and the difficulties of collecting proof of defendants’ illegal conduct and the quantum of plaintiff’s damages. The rational litigant can do nothing but suffer the loss instead of increasing it by futile legal action, risking a strong spiritual anxiety, and suffering probable final disappointment both in the ‘if’ and the ‘what’ of the legal remedy sought.” Id. at 267.

\textsuperscript{168} See Comparative Consumer Policy, supra note 69, at 14.

\textsuperscript{169} Id. Whether this is intended to mean that the commission should monitor or direct member states to monitor was not elaborated upon. See id. Some light is shed on this in the Austrian Consumer Protection Report, where it is stated that all member states have special departments to monitor implementation of the laws. See id.


\textsuperscript{171} See id.