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Contribution by EJF to Panel "FEEDBACK AND AFFECTING BEHAVIOUR"
Dr. Lorenz KÖDDERITZSCH and Dr. Herbert WOOPEN

I am standing here quasi together with Lorenz KÖDDERITZSCH, the former long-term Chair of European Justice Forum, to speak on behalf of European Justice Forum. EJF was founded in 2005 by the late Malcolm CARLISLE, a close friend of Chris, and a number of other company lawyers. The current chair of EJF, Moya STEVENSON, and its current Executive Director, Ekkart KASKE, are also present. As EJF, we first need to underscore that the research by Chris here in Oxford, at the Centre for Socio-Legal Studies, has been an extremely rich source of inspiration. This Conference – just as the Liber Amicorum[1] – are as much about paying tribute to his achievements as they are places to spread his ideas further and into the future to make them come to fruition to the fullest imaginable extent.

Of the activities EJF and in particular I have undertaken over the last couple of years, three may provide some food for our discussion here on **Feedback and Affecting Behaviour.** The short summary is: Maximising Feedback and Impact on Behaviour is all about structures and data. In more detail:

Firstly, you will see a **graphical overview** of the suitability of instruments for the resolution of mass claims and for impact on behaviour.

Secondly: We have tried to define the ideal **infrastructure** for the holistic approach called for by Chris, and I will point to people in a position to get this going, and

Thirdly, I will show ways to **link redress systems up also cross-border**, and *fourthly* clarify **roles and responsibilities**.

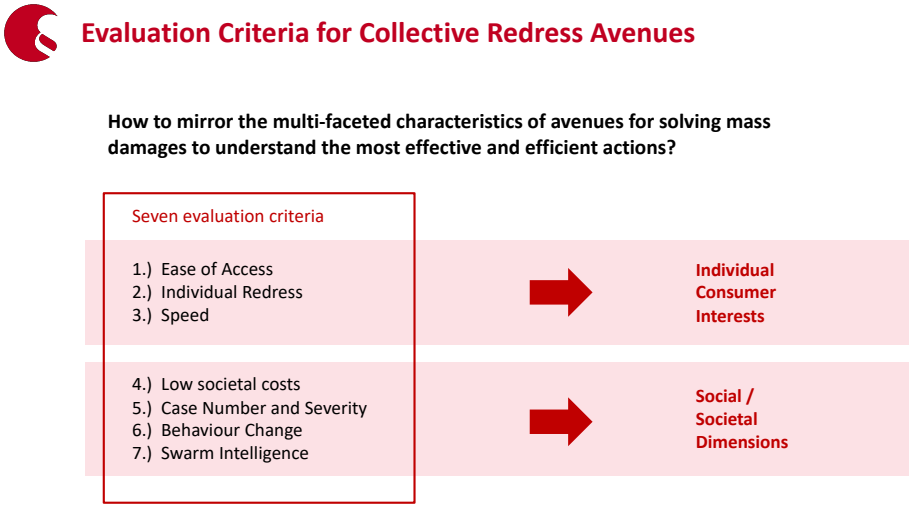
The need may be stressed at the outset to work *immediately* towards a **holistic integration** of non-court solutions into the transposition of the Representative Actions Directive before the national transposition projects have progressed too far. Such integration into the implementation of representative actions could ensure the desired creation of an interdependency and thus of **feedback loops** for future-proof interconnected solutions.

1. Description of various instruments

In a book yet to be published, Chris and I have attempted to give graphic expression to the multi-faceted characteristics of avenues to solving cases of mass damages and have chosen spider

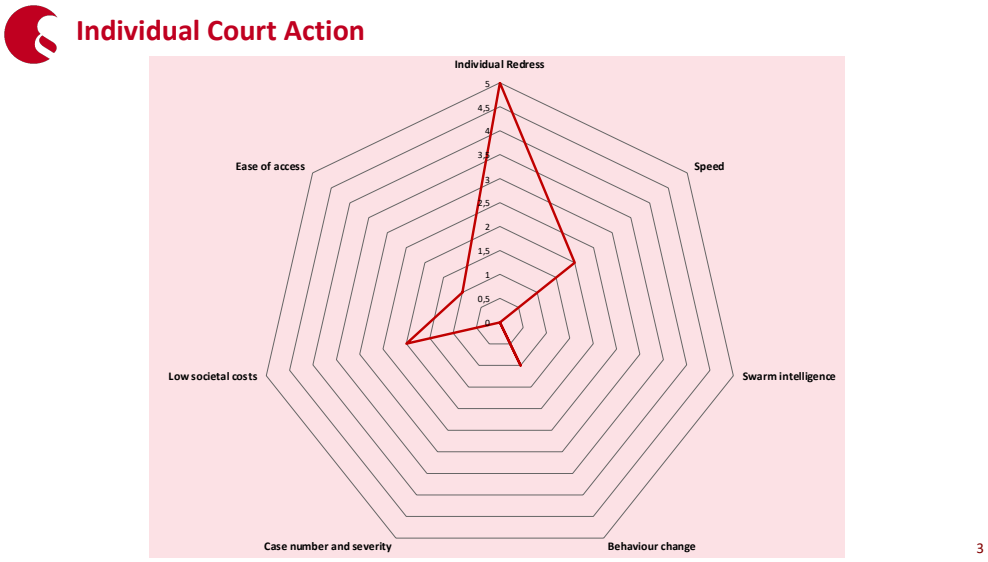
[1] Delivering Justice, A Holistic and Multidisciplinary Approach – Liber Amicorum in Honour of Christopher Hodges, Edited by Xandra Kramer, Stefaan Voet, Lorenz Ködderitzsch, Magdalena Tulibacka, Burkhard Hess, HART 2022.

diagrams to show the impact of these various pathways on both individual and on societal dimensions. We have consolidated more comprehensive descriptions of specific characteristics of redress systems to just 7 properties, in detail:



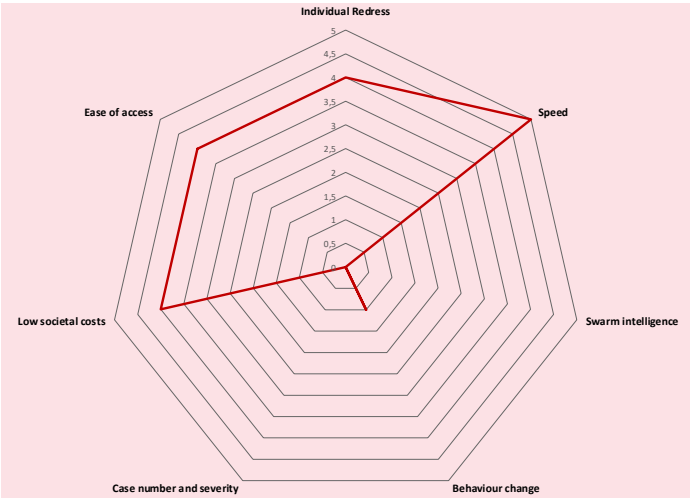
Each diagram has 7 corners which stand for these properties. I will quickly go through most of these diagrams. You see in the upper half of each of the following graphics the dimensions of interest to an *individual* consumer in search of compensation. These 3 dimensions are designated as *"Ease of access", "Individual Redress"* and *"Speed"*. The 4 social or societal dimensions of redress systems are captured in the four corners in the lower half of each diagram and are called *"Low societal costs", "Case number and severity", "Behaviour change"* and *"Swarm intelligence"*. So let's have a brief look at how we evaluate them:

a. The **individual court action** scores high on *"Individual Redress"*.



b. The standard **ADR procedure** does that, as well, but it also scores high on *"Ease of access"* and *"Speed"*.

Individual ADR Procedure



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c. While the classical **collective action** works well towards covering a *high quantity* of beneficiaries and *particularly severe cases*, it appears quite weak on other individual or societal dimensions.

Collective Action

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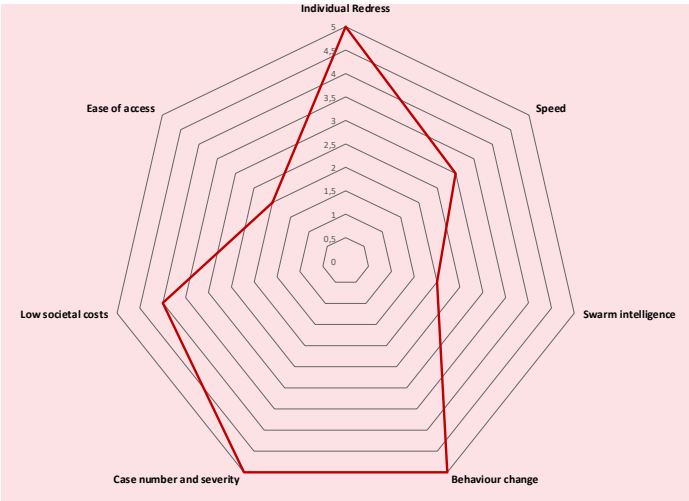
d. **Regulatory redress**, in turn, excels in its broad impact regarding *"Case number and severity"* and also in respect of *"Behaviour change"* while scoring high also on *"Individual Redress"*; it seems, however rather seldom that this avenue is offered.

Regulatory Redress



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e. Thus, the redress system with the fullest effects on the objectives to be achieved is the **ombuds model**, just as Chris pointed out in his opening statement. But how can a sufficient flow of cases towards ombuds entities be assured?

Ombuds Entity with Feedback Loop

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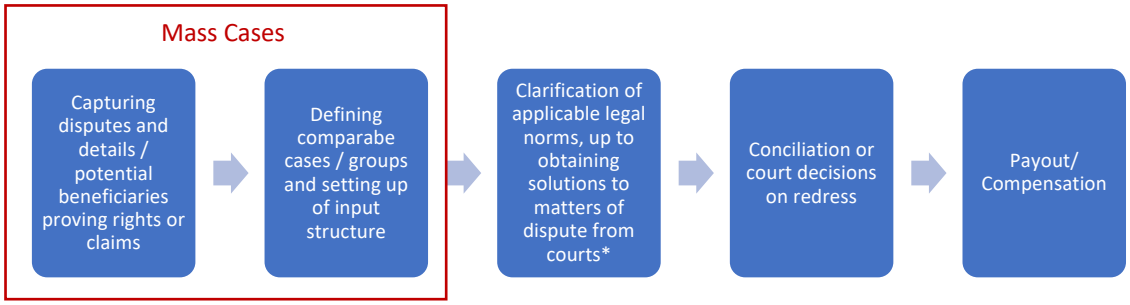
2. Developing the ideal holistic domestic infrastructure

We think that the future of effective feedback and impact on behaviour of companies does very much depend on structures in our redress systems as well as on availability of data. When we consider the perspective of a consumer and try to develop what modern marketing calls a "customer journey", we might call our topic a *"dispute resolution journey"*. A consumer would like to look at a holistic model with all pathways integrated. A consumer would expect a single point of entry as we see it realised in Belgium (and as has been laid out by previous speakers), only, that what is so far existing in reality is, even in Belgium, limited to the out-of-court resolution system.

a. In a contribution EJF made to the European Commission's consultation on "Resolving consumer disputes out-of-court", we provided the following plot of the "dispute resolution journey" which intends only to show that whichever avenue you take, be it a court, an out-of-court body or the intervention of a regulator as public authority, **the structure of the task to be accomplished is always the same**: Capture disputes and details as well as potential beneficiaries, define comparable cases in view of a solution, clarify applicable rules and either negotiate or impose a solution:

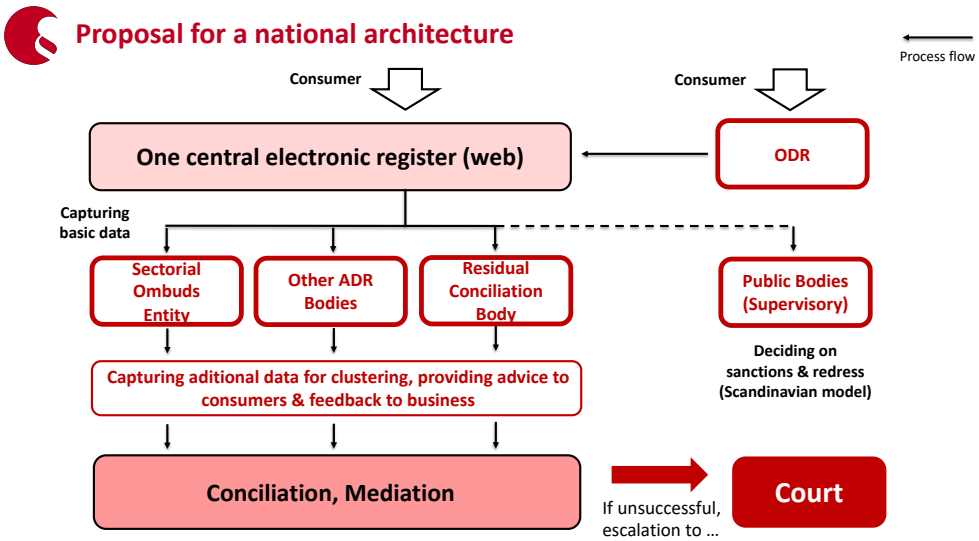


* preliminary rulings by national courts or even ECJ – Art. 267 TFEU

b. That leads to the consideration that the commonalities of these various procedures would benefit highly from having **effective IT support**. Such support for resolution tools could be essentially the **same for all three pathways**. "Mathematically" speaking, such a tool could be pulled "before the bracket", as a tool common to and required by all three. The importance of IT support has already been stressed by previous speakers: a high quantity of cases requires digitisation. We have therefore tried to connect the German Residual Conciliation Body – present here with its Director Felix Braun – with a Legal Tech company which already has successfully developed solutions for comparable tasks in the insurance industry in Germany; we know of course that "Resolver" has similar software in use in the UK and has

successfully marketed it in India and in Canada. The EU even has a special legislative competence by which it could create such a tool using its own budget – Art. 81 paragraph 2 letter g (!) TFEU[2].

c. Against this background, our proposal for a national **IT architecture increasing both feedback and impact on behaviour** would look as shown in our next chart: The single central electronic register is fed by consumers themselves, by consumer associations, by European Consumer Centres, by the public entities created by the Consumer Protection Cooperation Regulation for cross-border cases or by sectorial, other and residual ADR entities as sources. The system furthermore implies a **hierarchy of solutions**: first an ombuds service should have the opportunity to solve the conflict, but if this proves unsuccessful, regulatory redress should be attempted where available – both having access to the data captured in the uniform IT support. Only if a solution cannot be found by using these two methods, a court action should become authorizable at all – which pretty much mirrors the approach taken in the Canadian province of **Ontario** where a court can only authorise a collective action of any kind if it is *superior* to any other method available to achieve redress[3]:



[2] „1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

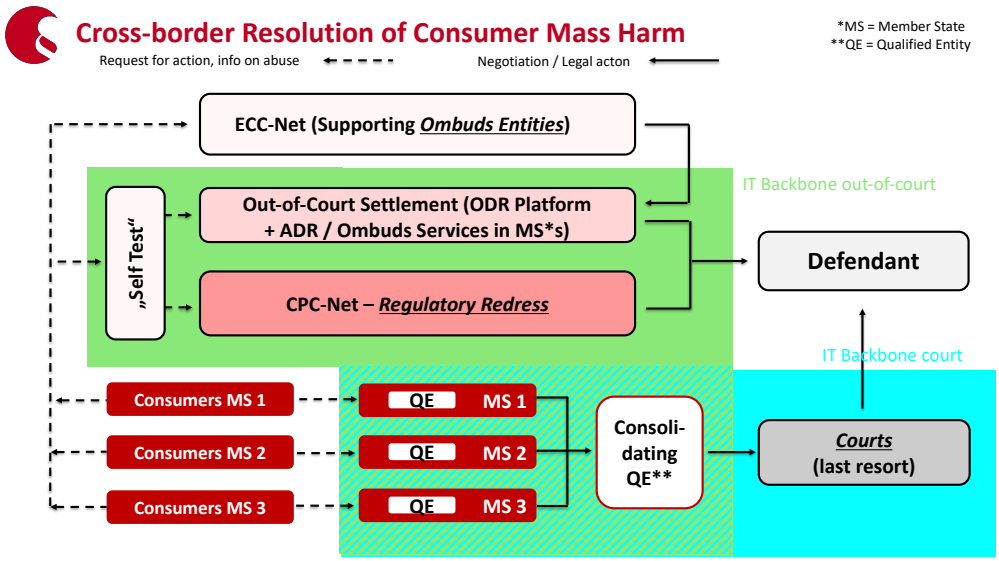
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: ..... (g) the development of alternative methods of dispute settlement;".

[3] "... is a preferable procedure for the resolution of common issues only if ... it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding ..." – see https://www.canlii.org/en/on/laws/stat/so-1992-c-6/latest/so-1992-c-6.html.

d. The close connection of all three ways of seeking redress via a single IT infrastructure should also help to ***first:*** **identify relevant questions of law** which cannot be decided clearly enough by ADR bodies or entities for regulatory redress and ***second:*** to **refer such points of law for decision by a court** and reference the result back (!) to all entities involved, just as Chris Hodges has proposed.

3. Linking systems up cross-border

Domestic IT infrastructures of the described kind would also very much help to ensure the exchange with **courts and administrative entities in other Member States**, a task which the EU has not duly addressed so far but the difficulties of which have been experienced and solved in Canada with ideas much more advanced than all we have seen in the EU to that effect – but it would lead too far to go into more detail here for now. You can read about it in my contribution to the Liber Amicorum for Chris[4]. A chart showing the cross-border link-ups might look as follows:



[4] Herbert Woopen, Let's Redress European Redress the Hodges Way! Redressons redress en Europe à l'Hodgienne! – A Look at How Canada Resolves the Conflicting Collective Claims Cross-Border Conundrum and How May the Canadian Solution Help Us in the EU?, in (fn. 1 above): Delivering Justice, A Holistic and Multidisciplinary Approach – Liber Amicorum in Honour of Christopher Hodges, Edited by Xandra Kramer, Stefaan Voet, Lorenz Ködderitzsch, Magdalena Tulibacka, Burkhard Hess, HART 2022, p. 119-138.

4. Defining roles and responsibilities

Finally the question arises – both for domestic and for cross-border cases – who the body could or should be **to bring an action if required and which criteria need to be fulfilled to bring it at all**. There has been some hesitation by ADR bodies in some Member States who felt that such court activity would harm their reputation of being **neutral players between two struggling parties**. This view must have been at the origin of the model implemented in Belgium, i.e. that the Consumer ombudsman common to all such bodies in Belgium may raise his hand and introduce an action in court ***but*** then only lead negotiations in a first phase of the collective court procedure. For contentious progress before the judge, he needs to devolve the lead of the procedure to a "partial" consumer association which is supposed to bring the court procedure to the end of a court judgment. This set-up has proved to *not* operate properly. By comparison, the "**Scandinavian model**" of an Ombuds entity which can either impose regulatory redress on the parties or at least bring and lead a collective court action until the end has proven to work:

It should help to drastically increase **impact on behaviour** to define the different roles involved in such a way as to dissipate the concerns some European ADR bodies have with taking more engaged action. While dispute resolution is primarily a task benefiting from neutrality, it is nevertheless true that the field of application we discuss here remains **substantive consumer protection law**, so a subject matter which has a clear protective direction and therefore **is *partial in itself* – it favours the consumer**. Furthermore, **private or administrative bodies are per definition *not* the ultimate decision makers**. These are, in a structure of division of public powers in the wake of *Montesquieu,* the **courts** with respect to interpretation of the law. If you look for example to **Switzerland**, you can find there even the rule in *Art. 197 Swiss Code of Civil Procedure* which requires that **before any court may be seized with litigation, a conciliation attempt needs to be made in front of an *administrative* body**, i.e. in front of a public power distinct and different from the judiciary and nevertheless acting within the framework of the applicable law.

So, a perspective which thinks an administrative or private body's reputation would suffer from taking in case of need the side of consumers if all attempts to mediate and reconcile have failed, is to some extent understandable but certainly not required. It should help to widen the view of the responsibilities of a non-court body to rely on the use-test of that model in the Scandinavian countries who have shown that the double role of the Nordic Ombuds entities has led to **very little collective litigation in courts** in the past. It thus must be seen as an extremely successful approach in avoiding unnecessary escalation and an adversarial deterioration of the societal climate. This practical proof of the pudding should be taken as **encouragement to pursue this direction also in other countries**, namely in Belgium where the split model of the past has proved to fail.