FROM BUDAPEST TO BERLIN: HOW IMPLEMENTING CLASS ACTION LAWSUITS IN THE EUROPEAN UNION WOULD INCREASE COMPETITION AND STRENGTHEN CONSUMER CONFIDENCE

CHRISTOPHER SMITHKA*

INTRODUCTION

While class action lawsuits were first introduced in the United States in the mid-1960s, there is still no legal provision for European consumers to join together in a class action lawsuit.[1] According to Meglena Kuneva, the European Union's Consumer Affairs Commissioner, the internal market of the European Union (EU) remains fragmented with twenty-seven national mini-markets, depriving consumers of lower prices and better choices, and depriving the European economy of an additional source of growth.[2] Recently, the European Union has considered implementing a new consumer strategy to increase consumer protection and make the European Union's single market work more effectively.[3] The most striking proposal in the strategy is a system of collective redress, which would allow consumers across the European Union to join together in lawsuits against manufacturers and retailers of faulty goods and services.[4]

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* J.D., University of Wisconsin Law School, 2009; B.A., Hanover College, 2005. The author would like to thank his family for their many years of support.

1 Id.

2 Press Release, Consumer Affairs, Eur. Comm'n Directorate Gen. for Health and Consumers, Kuneva Launches New Consumer Strategy and Backs Plans for Collective Redress (Mar. 13, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/320&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter Kunevra Press Release].

3 Parker, *supra* note 3. Commissioner Kuneva has said, "I want a citizen in Birmingham to feel as comfortable shopping for a digital camera from a website in Berlin or Budapest as they would in their high street." George Parker et al., *Business Warns EU Against Class Action Suits*, FIN. TIMES, Mar. 14, 2007, *available at* http://search.ft.com/ftArticle?queryText=%22George+Parker%22+%22class+action%22&y=0&aje=true&x=0&id=070314000760.

4 Parker, *supra* note 3.

However, many European business leaders are opposed to the idea of a collective redress system, fearing that Europe might adopt the litigation culture prevalent in the United States (U.S.).[5] Although similar to the American class action model,[6] the collective redress system would avoid the excesses of the American model, such as high punitive damages and huge attorney fees,[7] because of the differences in the European legal system. For instance, juries are not used in civil actions, making absurdly generous awards less likely and American-style contingency fess are rare.[8]

This Comment argues that the European Union should implement a system of collective redress to strengthen consumer confidence and increase competition throughout the region, thereby bringing European consumers increased benefits in terms of price, choice, quality, and safety of products. This increased consumer protection is especially important given the recent growth of e-commerce and the fact that European consumers are increasingly buying more from other European countries.[9]

Part I of this Comment explores the history and background of class action lawsuits in the United States and discusses the advantages and criticisms of such lawsuits. It also discusses recent legislative action to prevent the abuse of class action lawsuits. Part II discusses the political institutions and judicial branch of the European Union, as well as the proposed Consumer Strategy 2007-2013.

Part III argues that the European Union should implement a system of collective redress to increase consumer protection and competition throughout the region. Further, it argues that the less-desirable aspects of class action lawsuits (i.e., outrageous punitive damages and high attorney fees) would not be imported to the European Union because the European legal system differs from the American version. It also explores several European Union countries that have already adopted some form of class action lawsuits. Finally, although based on the American version, the European Union class action model would have its own unique characteristics. In all, this Comment argues that the European Union should implement class action lawsuits to bring consumers in-

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5 Parker et al., *supra* note 6.

6 Parker, *supra* note 3

7 *If You Can't Beat Them, Join Them*, THE ECONOMIST, Feb. 17, 2007, at 68.

8 *Id.*

9 Parker, *supra* note 3.

creased benefits in terms of price, choice, quality, diversity, affordability, and safety of products.

I. CLASS ACTION LAWSUITS IN THE UNITED STATES

Class action lawsuits were first introduced in the United States during the 1960s to allow individuals with similar claims to bring a lawsuit against a common defendant.[10] The reasoning behind class action lawsuits is to allow individuals to get compensated for their injuries when it would otherwise be too costly or burdensome for them to pursue action on their own.[11] This part of the Comment will detail class action requirements under the Federal Rule of Civil Procedure 23 and examine their advantages and criticisms.

A. CLASS ACTION REQUIREMENTS

Under the U.S. Federal Rules of Civil Procedure, a class action can only be brought if four requirements are met.[12] The first requirement is *numerosity*. A class action is permissible only when the class is so numerous that joinder of all members is impracticable.[13] Joinder of parties is a rule that allows multiple plaintiffs to join in an action if each of their claims arises from the same transaction or occurrence *and* if there is a common question of law or fact relating to all plaintiffs' claims.[14] Joinder of parties promotes judicial efficiency because it allows multiple plaintiffs to join together against a common defendant to litigate issues in a combined action and avoids the possibility of inconsistent judgments.[15] However, a judge will deny a joinder if the plaintiffs are so numerous that the dispute would not be solved expeditiously.[16] Although there is no magic number as to how many plaintiffs it takes to make joinder im-

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[10] James Copland, *Class Actions*, POINTOFLAW.COM, MANHATTAN INST. FOR POL'Y RES., May 21, 2004, http://www.pointoflaw.com/classactions/overview.php.

[11] Parker, *supra* note 3.

[12] FED. R. CIV. P. 23(a).

[13] FED. R. CIV. P. 23(a)(1).

[14] FED. R. CIV. P. 20(a)(1).

[15] STEPHEN C. YEAZELL, CIVIL PROCEDURE 744, 793 (6th ed. 2004).

[16] FED. R. CIV. P. 20(b).

practicable, courts generally deny joinder (and thus allow class action certification) to groups consisting of more than fifty plaintiffs.[17]

The second requirement is *commonality*. A class action can only be brought if there are questions of law or fact common to the entire class of plaintiffs.[18] For cases involving a question of illegal policy or negligent failure to warn (i.e., mass torts and standard form contracts), commonality is easily shown because the common question is if the defendant did in fact act through an illegal policy or negligent behavior.[19]

The third requirement is *typicality*. The claims or defenses of the representative parties must be typical of the claims or defenses of the class.[20] The fact that different members suffered different damages is not sufficient to defeat class action certification; the judge can create subclasses.[21]

The final requirement is *adequacy of representation*. The representative parties must fairly and adequately protect the interests of the class.[22] For instance, the representative parties must have a stake in the litigation and cannot have any conflicts with other members of the class.[23] In addition, counsel must be experienced with class action litigation and must not have any conflicts with any class members.[24]

B. ADVANTAGES OF CLASS ACTIONS

Class action lawsuits offer several advantages because they aggregate a large number of individualized claims into one representational lawsuit. First, class action lawsuits increase the efficiency of the legal process and lower the costs of litigation because they avoid the repetition of witnesses, exhibits, and issues that would result from multiple lawsuits.[25]

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[17] YEAZELL, *supra* note 18, at 792.

[18] FED. R. CIV. P. 23(a)(2).

[19] YEAZELL, *supra* note 18, at 797.

[20] FED. R. CIV. P. 23(a)(3).

[21] FED. R. CIV. P. 23(c)(5).

[22] FED. R. CIV. P. 23(a)(4).

[23] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). In *Amchem*, the Court denied class action certification in an asbestos case because there was a conflict of interest between class members. *Id*. at 594. People with current symptoms had interest in immediate payout, while future claimants didn't know what their medical costs would be. *Id*. at 626.

[24] FED. R. CIV. P. 23(g).

[25] Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

Second, class actions overcome "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[26] In other words, class actions ensure that individuals who are harmed—even if the harm is only minimal—have a fair chance to be compensated for their injuries. Under a cost-benefit analysis, a plaintiff with a small claim might not pursue legal action because of the high cost. Joining a class action would allow them to bring their claim at a lower cost.[27]

Finally, the possibility of a class action lawsuit deters corporate wrongdoers.[28] In general, the risk of liability incentivizes behavior. By aggregating individual claims, class actions magnify that liability.[29] Therefore, by increasing a corporation's potential liability for wrongful conduct, class actions positively influence their behavior and promote social change for the better.[30] In addition, class actions have spread to various industries. Class actions started with securities but have since spread to mass consumer suits involving tobacco companies, pharmaceutical firms, medical malpractice, and employment issues.[31]

C. CRITICISMS OF CLASS ACTIONS

However, despite these advantages, there are also several criticisms of class action lawsuits. First, some believe that class action lawsuits are unfair to businesses because in some instances class actions can be composed entirely of individuals whose harms are purely hypothetical, such as when cases proceed under laws against fraud, misrepresentation, and unfair business dealing.[32] Plaintiffs, therefore, are not required to show that they actually relied, to their detriment, on the defendant's alleged misrepresentation.[33]

Second, juries often award astronomical economic and punitive damages against corporate defendants in class action lawsuits.[34] Recent

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[26] Amchem, 521 U.S. at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

[27] Copland, *supra* note 13.

[28] *Id.*

[29] *Id.*

[30] *Id.* In 2003, Philip Morris was found guilty for insinuating that its 'light' cigarettes were 'safer.' *Id.*

[31] ECONOMIST, *supra* note 10, at 66.

[32] MICHAEL S. GREVE, HARM-LESS LAWSUITS? WHAT'S WRONG WITH CONSUMER CLASS ACTIONS 1-2 (2005), *available at* http://www.aei.org/docLib/20050404_book814text.pdf.

[33] *Id.* at 1.

[34] ECONOMIST, *supra* note 10, at 66.

examples include a $145 billion verdict awarded by a Florida jury against five tobacco companies on behalf of all American smokers in 2000,[35] and an Illinois judge awarded a national class of plaintiffs $1.2 billion in a lawsuit against State Farm Insurance in 1999.[36]

Another common criticism of class action lawsuits is that class members often receive little or no benefit from class actions. For example, class actions can benefit the plaintiffs' lawyers at the expense of the plaintiffs.[37] Under the contingency fee system used in the United States, plaintiffs' lawyers normally agree to forgo their fees if the case fails but are entitled to around a third of the award if they win.[38] The large awards and settlements associated with class action lawsuits create award disparities between the few plaintiffs' attorneys and the large number of plaintiffs.[39] In one recent case in Alabama, against the Bank of Boston, the lawyers were awarded $8.5 million in fees while each plaintiff received only $8.76.[40]

Class actions sometimes bind all class members to low settlements that give them only a minimal benefit, such as a small check or a coupon for future services or products with the defendant company.[41] These "coupon settlements" are a strategic way for the defendant to forestall liability by precluding a large number of people from litigating their claims separately and recovering reasonable compensation for their damages.[42] For example, under the terms of a settlement of a 1999 class action lawsuit that accused Microsoft of overcharging customers for its software, consumers and companies could receive vouchers worth $16 for each copy of Microsoft Windows they purchased.[43] Further, it is estimated that only 620,000 of the 14 million people and businesses who were eligible for the voucher coupon actually filed a claim to receive

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[35] *Id.* Copland, *supra* note 13.

[36] Copland, *supra* note 13.

[37] ECONOMIST, *supra* note 10, at 66.

[38] *Id*.

[39] *Id.* In one recent example, the plaintiffs' lawyers received $8.6 million while each plaintiff only got $8.76. *Id*.

[40] *Id.*

[41] *See* Jeff Feeley & Mort Lucoff, *Sharper Image's Settlement Over Purifiers Rejected*, BLOOMBERG, Oct. 11, 2007, http://www.bloomberg.com/apps/news?pid=20601087&sid=aXe4YtvHmKMY.

[42] See generally id.

[43] Laurie J. Flynn, *Few Takers for Payments from Microsoft Settlement*, N.Y. TIMES, Jan. 5, 2005, at C4, *available at* http://www.nytimes.com/2005/01/05/technology/05soft.html.

theirs.[44] The plaintiffs' attorneys, on the other hand, were not paid in coupons.

Despite these criticisms, however, recent empirical studies show that the class action system is not spinning out of control.[45] Theodore Eisenberg and Geoffrey Miller[46] examined a huge sample of class action lawsuits, ranging from civil rights violations to securities fraud, from 1993 to 2002 and found no evidence that either recoveries for plaintiffs or fees for their attorneys as a percentage of the recovery increased.[47]

D. CLASS ACTION FAIRNESS ACT OF 2005

The United States Congress passed the Class Action Fairness Act of 2005 in order to prevent the abuse of class action lawsuits.[48] The Act requires that a class action consist of at least one hundred plaintiffs to be certified.[49] The Act also changes the rules for federal diversity jurisdiction and removal, enabling most large class action cases to be filed in, or removed to, federal court.[50] This, in turn, reduces "forum shopping" in friendly state courts that plaintiffs had traditionally taken part in.[51]

The Act also requires greater federal scrutiny procedures for the review of class action settlements and restricts the use of coupon settlements.[52] This, in turn, limits the large award disparity that sometimes existed between attorneys and the class of plaintiffs, such as in *Kamilewicz*

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[44] *Id.*

[45] Jonathan D. Glater, *Study Disputes View of Costly Surge in Class-Action Suits*, N.Y. TIMES, Jan. 14, 2004, at C1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E02EED71330F937A25752C0A9629C8B63.

[46] Eisenberg and Miller are law professors at Cornell University and New York University, respectively; therefore, the study was not financed or influenced by corporations or trial lawyers.

[47] Glater, *supra* note 48. The average settlement over the period from 1993 to 2002 was $100 million. *Id.*

[48] WILLIAM B. RUBENSTEIN, UCLA PROGRAM ON CLASS ACTIONS, UNDERSTANDING THE CLASS ACTION FAIRNESS ACT OF 2005 (2005), at 3-5, *available at* http://www.classactionprofessor.com/cafa-analysis.pdf. S*ee generally* Class Action Fairness Act of 2005, 28 U.S.C. § 1711-1715 (2005).

[49] RUBENSTEIN, *supra* note 51, at 3-5.

[50] *Id.* at 1.

[51] *See* Shruti Date Singh, *Illinois Supreme Court Bounces Case from Madison County*, CRAIN'S CHICAGO BUS., Nov. 17, 2005, *available at* http://www.chicagobusiness.com/cgi-bin/printStory.pl?news_id=18544. Madison County, IL, the site of the $1.2 billion award against State Farm, has a reputation for awarding large judgments against plaintiffs. *Id.*

[52] RUBENSTEIN, *supra* note 51, at 1, 10, 13.

v. Bank of Boston, where each plaintiff received a settlement of $8.76.[53] The Act has had a positive impact on class action litigation. Recently, a judge rejected a $22 million settlement of lawsuits regarding Sharper Image Corporation's air purifiers because plaintiffs would have received coupons worth nineteen dollars to buy Sharper Image products.[54]

Class action lawsuits were first introduced to allow individuals with similar claims to bring a lawsuit against a common defendant. Although they offer many advantages, such as increasing judicial efficiency, allowing plaintiffs the chance to pursue small claims, and deterring corporate wrong-doing, many critics believe that they allow juries to award extraordinary economic and punitive damages and that class members often receive little or no benefit. However, the Class Action Fairness Act of 2005 serves to limit such abuses.

II. CURRENT SITUATION IN EUROPE

Currently, there is no legal basis for consumers across the twenty-seven countries of the European Union to aggregate their claims against a company.[55] Although European business leaders are hesitant, the implementation of class action lawsuits would increase European consumers' rights by providing them with an effective redress mechanism for faulty goods and services.[56] This increased consumer protection is especially important considering the European Union's Consumer Strategy 2007-2013 objectives to empower EU consumers, enhance their welfare, and effectively protect them.[57]

A. POLITICAL INSTITUTIONS OF THE EUROPEAN UNION

The origins of the European Union date back to 1957, when six European Union countries formed the European Economic Community

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[53] Kamilewicz v. Bank of Boston, 92 F.3d 506, 508 (7th Cir. 1996).

[54] Feeley, s*upra* note 43.

[55] Parker, *supra* note 3.

[56] *See id*.

[57] EU Consumer Policy Strategy, supra note 1.

by the Treaty of Rome.[58] In 1993, the Maastricht Treaty established the legal framework for the current European Union.[59] Today the European Union is a political and economic community composed of twenty-seven member states located throughout Europe.[60]

There are three political institutions of the European Union: the European Parliament (Parliament), the Council of the European Union (Council), and the European Commission (Commission).[61] The Parliament is a directly elected parliamentary body that represents one half of the legislative branch of the European Union.[62] The Council forms the other half of the legislative branch and is composed of twenty-seven national ministers (one per member state); however, the exact membership depends on the topic being discussed.[63] The Commission is the executive branch and is responsible for proposing legislation, implementing policies, representing the European Union on the international state, and the general day-to-day running of the European Union.[64] The Commission operates in the method of a cabinet government, with twenty-seven Commissioners (one per member state).[65] However, Commissioners are bound to represent the interests of the European Union as a whole rather than their home state.[66]

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[58] Historical Overview of the EU Single Market, http://ec.europa.eu/internal_market/top_layer/index_2_en.htm (last visited Oct. 21, 2008). Those countries were France, Germany, Belgium, Italy, Luxembourg, and the Netherlands. *Id.*

[59] Summary of *The Treat of Maastricht on European Union*, http://europa.eu/scadplus/treaties/maastricht_en.htm (last visited Oct. 25, 2008).

[60] List of Member States of the EU, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Oct. 27, 2008). The current member-states are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *Id.*

[61] Overview of the Institutions of the European Union, http://europa.eu/institutions/inst/index_en.htm (last visited Oct. 21, 2008). The Parliament represents European citizens, the Council represents European governments, and the Commission represents the European interest. *Id.*

[62] Overview of the European Parliament, http://europa.eu/institutions/inst/parliament/index_en.htm (last visited Oct. 21, 2008). Currently, Parliament is composed of 785 Members of the European Parliament (MEPs). *Id.*

[63] Overview of the Council of the European Union, http://europa.eu/institutions/inst/council/index_en.htm (last visited Oct. 21, 2008). For example, when discussing agricultural policy, the 27 national agriculture ministers form the Council. *Id.*

[64] Overview of the European Commission, http://europa.eu/institutions/inst/comm/index_en.htm (last visited Oct. 21, 2008).

[65] *Id.*

[66] *Id.*

In all but a few cases, the Commission has the sole right to initiate legislation.[67] The Parliament, Council, or another party places a request for legislation to the Commission.[68] The Commission then drafts the legislation and presents it to the Parliament and Council.[69] Once it is approved and signed by both the Parliament and Council it becomes law.[70] The Commission's duty is then to ensure that the law is implemented. If a member state fails to pass the required national legislation, the Commission may initiate legal action against the member state in the European Court of Justice.[71]

The Commission is also in charge of overseeing the European Union's Single Market strategy.[72] Ever since its creation as the European Economic Community in 1957, the goal of the European Union has been to create a "common market" that transcends the borders of member states.[73] Throughout the 1980s and 1990s the European Union did this by eliminating quotas and tariffs, replacing national regulations with a common European rule, and allowing member states to give each others' laws and technical standards the same validity as their own (known as the "mutual recognition" principle).[74]

The European Union continues to create a single market through a system of laws that apply to all member states, guaranteeing the freedom of movement of people, goods, capital, and service.[75] Directives that are implemented at the national level by member states also guide the strategy.[76] The goal of the single market is to bring down barriers and simplify existing rules to enable everyone in the European Union—individuals, consumers, and businesses—to make the most of the "opportunities offered to them by having direct access to twenty-seven countries and 480 million people."[77]

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[67] *Id*. *See also* Overview of the Decision-Making in the European Union, http://europa.eu/institutions/decision-making/index_en.htm (last visited Oct. 21, 2008).

[68] Overview of the European Commission, *supra* note 67.

[69] *Id.*

[70] Decision-Making in the European Union*, supra* note 70.

[71] Overview of the European Commission, *supra* note 67.

[72] Historical Overview of the EU Single Market, *supra* note 61.

[73] *See generally id.*

[74] *Id.*

[75] Overview of the General Policy Framework of the EU Single Market, http://ec.europa.eu/internal_market/top_layer/index_1_en.htm (last visited Oct. 23, 2008).

[76] *Id.*

[77] *Id.*

B. JUDICIAL BRANCH OF THE EUROPEAN UNION

The judicial branch of the EU consists of the European Court of Justice, the highest court in the EU, and the Court of First Instance, the lower court.[78] Both are based in Luxembourg City and together they interpret and apply the treaties and the law of the EU.[79] The national courts within EU member states also play a key role in the EU as enforcers of EU law.[80] National courts can apply EU law in domestic cases and can obtain a preliminary ruling from the Court of Justice if they require clarification on the interpretation or validity of any EU legislation related to the case.[81] However, the right to declare EU legislation invalid is reserved solely to the EU courts.[82]

The Court of Justice was established in 1952 and is composed of one judge per member state; as a result, all national legal systems are represented.[83] It serves two purposes: "to ensure that EU legislation is interpreted and applied in the same way in all EU countries, so that national courts do not give different rulings on the same issue, and to make sure that EU member states and institutions do what the law requires."[84] The Court of Justice's scope is quite broad in that it has the "power to settle legal disputes between EU member states, EU institutions, businesses, and individuals."[85]

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[78] Overview of the Court of Justice and Court of First Instance of the European Communities, http://www.ena.lu/mce.swf?doc=5971&lang=2 (last visited Oct. 27, 2008).

[79] *Id. See also* Overview of the Seat of the Court of Justice and the Court of First Instance of the European Communities, http://www.ena.lu/mce.swf?doc=5980&lang=2 (last visited Oct. 27, 2008).

[80] *See* Overview of the Institutions of the Union, http://europa.eu/scadplus/constitution/institutions_en.htm (last visited Oct. 27, 2008). *See also* Overview of the Union's Founding Principles: Classification and Exercise of Competences, http://europa.eu/scadplus/constitution/competences_en.htm (last visited Oct. 27, 2008) and Overview of the Union's Founding Principles: The Legal Acts, http://europa.eu/scadplus/constitution/legislation_en.htm (last visited Oct. 27, 2008).

[81] Overview of the Court of Justice, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Oct. 27, 2008).

[82] *See* Overview of the Institutions of the Union, *supra* note 83.

[83] Overview of the Court of Justice, *supra* note 84. Currently, there are twenty-seven judges on the Court of Justice. *Id*. However, cases are usually heard by a 'Grand Chamber,' which is composed of only 13 judges. *Id*.

[84] *Id.*

[85] *Id.* For example, it can order a member country to follow an EU directive and determine when the European Commission has acted outside its power. *Id.*

The Court of First Instance was created in 1989 to help the Court of Justice deal with the large number of cases brought before it.[86] The Court of First Instance is also composed of one judge from each EU member state.[87] However, instead of using a Grand Chamber of the thirteen judges, three quarters of the cases brought before the Court of First Instance are decided by a chamber of only three judges.[88]

Like the Court of Justice, the Court of First Instance has the task of ensuring that EU law is correctly interpreted and applied by EU member states.[89] It has jurisdiction to hear and determine at first instance certain actions:

> [D]irect actions brought by natural or legal persons against acts of EU institutions (i.e., the Commission, Council, and Parliament), actions brought by the member states against the Commission, actions brought by the member states against the Council related to acts adopted in the field of state aid, actions seeking compensation for damage caused by EU institutions or their staff, actions based on contracts made by the EU institutions which expressly give jurisdiction to the Court of First Instance, and actions relating to EU trademarks.[90]

As such, the Court of First Instance handles cases that deal with a wide variety of subject areas, such as agriculture, commercial policy, social policy, institutional law, and transport.[91]

In addition, in view of the increasing number of cases brought before the Court of First Instance, the Treaty of Nice allows for the creation of special judicial panels to examine at first instance certain categories of actions in specific areas.[92] Special judicial panels have been

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[86] *Id.* The Treaty of Lisbon, passed on December 13, 2007, will rename the Court of First Instance to 'General Court' beginning in 2009 if it is successfully ratified by all European Union member states. *See* Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm (last visited Nov. 10, 2008).

[87] Overview of the Court of First Instance, http://curia.europa.eu/en/instit/presentationfr/index_tpi.htm (last visited Oct. 27, 2008).

[88] *Id.*

[89] Overview of the Court of Justice and Court of First Instance of the European Communities, *supra* note 81.

[90] Overview of the Court of First Instance, *supra* note 90.

[91] *See id.*

[92] Summary of the Treaty of Nice, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/23&format=HTML&aged=0&language=EN&guiLanguage=en (last visited Jan. 9, 2008). The Treaty of Nice entered into force on February 1, 2003. *Id.*

created to hear cases dealing with intellectual property and competition law.[93]

The Court of First Instance has its own rules of procedure.[94] In general, the court proceedings have a written phase and an oral phase.[95] At the beginning of each case, a judge-rapporteur is appointed to serve as the lead judge during the proceedings.[96] Although the procedure before the Court of First Instance is free of court fees, lawyer fees are not paid for.[97] However, an individual who is not able to meet these costs may still apply for legal aid.[98]

In the written phase, an application is drawn up by the lawyer and sent to the opposing party so that they may file a reply registry.[99] The main points of the application are then published in a public notice.[100] At this point, any person who can prove an interest in the outcome of the case may intervene during the written phase.[101] The judge-rapporteur then writes a report that sums up the facts of the case and the legal arguments.[102] The report is sent to all parties before the hearing.[103]

During the oral hearing the parties present their case briefly to the court and the judges are given an opportunity to ask questions.[104] After the hearing the judges deliberate on the basis of a draft judgment prepared by the judge-rapporteur.[105] Once decided, the judgment is delivered at a public hearing.[106] Decisions from the Court of First Instance (as well as the special judicial panels) may be appealed to the Court of Justice within two months of the ruling.[107]

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93 *See id. See also* Overview of the Court of First Instance, *supra* note 90.

94 Overview of the Court of First Instance, *supra* note 90.

95 *Id.*

96 *See* European Union Basics (FAQ), Part 6/8, http://www.faqs.org/faqs/european-union/basics/part6 (last visited Oct. 26, 2008).

97 Overview of the Court of First Instance, *supra* note 90.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 European Union Basics, *supra* note 99.

103 *Id.*

104 Overview of the Court of First Instance, *supra* note 90.

105 European Union Basics, *supra* note 99.

106 Overview of the Court of First Instance, *supra* note 90.

107 *Id.*

C. CONSUMER STRATEGY 2007-2013

The European Union is currently considering a new consumer strategy, called the Consumer Strategy 2007-2013.[108] Consumer spending currently represents 58 percent of EU gross domestic product (GDP).[109] However, statistics show that businesses and consumers are still not using the potential offered by the internal market of the EU, particularly the new possibilities created by the rise of e-commerce.[110] Therefore, the aim of the strategy is to "boost confidence in the Single Market so that consumers can shop freely across borders—traveling or online—to get the best price, the best quality and for the product best suited to their needs."[111] To accomplish this goal, the strategy includes more than twenty legislative and non-legislative initiatives to boost the retail side of the single market by 2013, including a comprehensive overhaul of cross border shopping rights and a pledge to open the market for better cross border deals for credit.[112]

A key part of the Consumer Strategy 2007-2013 is to implement a system of collective redress, similar to the U.S. class action model, which would allow consumers across the European Union to join together in lawsuits against manufacturers and retailers of faulty goods and services.[113] As of 2009, there is no legal basis for consumers across the twenty-seven countries of the European Union to aggregate their claims against a company.[114] According to the European Commission, this makes the European market fragmented with twenty-seven national minimarkets.[115] Members of the European Parliament have said that "the current system clearly punishes cross-border customers, leaving them at the mercy of a ping-pong game between the different national authorities . . . some form of collective action is necessary."[116]

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[108] Kuneva, *supra* note 5.

[109] Id.

[110] Id.

[111] *Id.* The objects are to empower EU consumers, to enhance EU consumers' welfare in terms of price, choice, quality, diversity, affordability, and safety, and to protect consumers effectively from the serious risks and threats that cannot be left to individuals. *Id.*

[112] Id.

[113] Parker, *supra* note 3.

[114] *Id.*

[115] *New Strategy to Boost Cross-Border Shopping,* EURACTIV, Mar. 13, 2007, http://www.euractiv.com/en/health/new-strategy-boost-cross-border-shopping/article-162438.

[116] *MEPs Back Idea of US-Style Legal Suits for Consumers,* EURACTIV, Sept. 13, 2007, http://www.euractiv.com/en/food/meps-back-idea-us-style-legal-suits-consumers/article-166584 [hereinafter *MEPs Back Idea*].

However, many business leaders in Europe are alarmed by the EU Consumer Affairs Commissioner's plans to adopt class action lawsuits.[117] Ernest-Antoine Seilliere, the president of the employee's organization Business Europe, said he strongly supports improving consumers' access to justice in cross-border transactions, but he said that "we are strongly against a U.S.-type class action because of the drawbacks of the system."[118] Business leaders are opposed to the idea of American-style class action lawsuits because of the high punitive damages and the possibility that a small number of attorneys would win big fees at the expense of the individuals involved in the suit.[119]

III. CLASS ACTION LAWSUITS IN THE EUROPEAN UNION

There are many reasons as to why the European Union should implement class action lawsuits. The implementation of class actions lawsuits would bring many benefits to European Union consumers. In addition, the worst aspects of the American-style class action lawsuits would not be imported to the European Union because of the fundamental differences in Europe's legal system. Finally, implementing a class action system in the European Union would not be difficult because several member states already permit them and there is already an institutional framework in place to handle such cases.

A. BENEFITS OF CLASS ACTION LAWSUITS IN THE EUROPEAN UNION

The implementation of class actions would bring many benefits to the consumers of the European Union. From an administrative standpoint, importing a single class action system would simplify rules and procedures throughout the European Union.[120] As discussed below, several European countries already have some sort of class action lawsuit in place. Implementing a uniform system across the European Union would decrease the costs incurred in bringing a class action lawsuit, benefiting both professionals and consumers.[121]

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[117] Parker et al., *supra* note 6.
[118] *Id*.
[119] *Id*.
[120] Parker, *supra* note 3.
[121] *Id.*

Class action lawsuits would increase consumer protection by allowing wronged consumers from across the European Union to join forces against a producer or retailer.[122] European consumers would have greater confidence when shopping across borders, which is especially important given the prevalence of e-commerce in today's world economy.[123] Ms. Kuneva, the EU Consumer Affairs Commissioner, said, "I want a citizen in Birmingham to feel as comfortable shopping for a digital camera from a website in Berlin or Budapest as they would in their high street."[124]

Furthermore, the implementation of class action lawsuits would help unify the diversified markets of the European Union. The internal market could be the largest retail market in the world.[125] However, it remains fragmented into twenty-seven national mini-markets, depriving consumers of lower prices and better choice.[126] Allowing consumers from across the European Union to join together in a class action lawsuit would help unify these diversified markets, thus increasing competition throughout Europe and bringing consumers increased benefits in terms of price, choice, quality, and diversity of products.

Finally, producers and retailers across Europe would be more socially responsible due to the fear of a class action lawsuit.[127] This is because allowing consumers from across the European Union to aggregate their claims would increase the potential liability a producer or retailer would face for producing a faulty good.[128] Thus, they would be more careful about the safety and quality of the goods they produce. For the above reasons, implementing class actions lawsuits would increase the efficiency and competitiveness of the European Union market.[129]

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[122] *Id.*.

[123] *Id.* Only six percent of European consumers made a cross-border e-commerce purchase in 2006. *Id.*

[124] Parker et al., *supra* note 6.

[125] Kuneva Press Release, *supra* note 5.

[126] *Id.*

[127] Parker, *supra* note 3.

[128] *Id.*

[129] *Id.* Commissioner Kuneva has said, "The internal market has the potential to be the largest retail market in the world but, today, it remains largely fragmented along national lines, forming twenty-seven mini-markets instead." *Id.*

B. FEARS NOT REALIZED

Although many European business leaders are hesitant to adopt class action lawsuits, the worst aspects of American-style class action lawsuits would not be imported to the European Union because of the differences in Europe's legal system.[130] Specifically, punitive damages and attorneys' fees are treated differently in Europe than they are in America.

First, excessive punitive damages that are sometimes awarded by juries in America (such as the $145 billion awarded by a Florida jury against five tobacco companies in 2002)[131] would be unlikely in Europe. This is because juries are not used in civil actions in Europe.[132] Instead, a single judge or a panel of judges, consisting of anywhere from three to fifteen judges, decides the case and they are less likely than a jury to award an excessive punitive damage.[133]

The second difference between the two systems is related to attorneys' fees. American-style contingency fees are rare in Europe; attorneys in class action lawsuits would not earn huge fees at the expense of the plaintiffs.[134] Only Spain has contingency fees that award lawyers a percentage of damages.[135] Additionally, the American tradition of making each party pay its own legal fees is not present in Europe.[136] Instead, the European Union countries operate on a loser-pay principle, making the losing party pay for each side's legal costs.[137] This increases the cost of losing a case and thus cuts down on the number of frivolous class action lawsuits brought.[138]

As member of the European Parliament has underlined, the EU's aim would not be to mimic the American class action model, whose "ag-

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[130] ECONOMIST, *supra* note 10, at 66, 68.

[131] *Id.* at 66.

[132] *Id.* at 68. Further, European businesses are more likely to be prosecuted, and punished, in criminal courts. *Id.*

[133] European Union Basics, *supra* note 99.

[134] ECONOMIST, *supra* note 10, at 68. For example, some countries permit 'no win, no fee' arrangements in which the plaintiffs' lawyers get nothing if they lose but a large bonus—up to double their normal hourly rate—if they win. *Id.*

[135] Caroline Byrne & Cary O'Reillly, *Sarkozy, U.S. Lawyers Shift Class-Actions to Europe*, BLOOMBERG, July 24, 2007, http://www.bloomberg.com/apps/news?pid=20601109&sid=aEM8mt1Xq3oo.

[136] *See* YEAZELL, *supra* note 18, at 291, 300.

[137] Byrne & O'Reilly, *supra* note 138.

[138] ECONOMIST, *supra* note 10, at 68. In contrast, under the American system, each side pays its own legal costs. *Id.*

gressive touting of consumers by unscrupulous lawyers and awards of punitive damages against economic operators in no way reflects the legal culture in European countries."[139]

C. LIMITATIONS OF EXISTING EUROPEAN MODELS

The push for class action lawsuits in the European Union is coming primarily from activist shareholders and legislators.[140] Several European countries have already recognized the need for a system of consumer redress and have adopted their own versions of class action lawsuits.[141] For example, Germany allows for a test case procedure.[142] On November 1, 2005, Germany enacted the Capital Markets Model Case Act, which allows sample claims arising from securities transactions to be brought in court.[143] The act was passed in response to an event in 2003 in which 16,000 shareholders of Bonn-based Deutsche Telekom swamped a Frankfurt court with 2,500 suits, all alleging a similar claim: that the company had made false statements when issuing shares.[144]

Under the Capital Markets Model Case Act, a representative plaintiff pursues their claim against the defendant in a model case and the ruling is then binding on the rest of the class.[145] The effects of the law will be monitored until November 1, 2010—at which point the German legislature will decide whether to have it extended or broadened to other mass civil case proceedings.[146]

Austria also allows for a variation of the class action lawsuit. Although the Austrian Code of Civil Procedure does not provide for a special proceeding for complex class action litigation, a "class action Austrian-style" does exist.[147] Under this version, Austrian consumer or-

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[139] *MEPs Back Idea, supra* note 119.

[140] Byrne & O'Reilly, *supra* note 138. French President Nicolas Sarkozy has called for the introduction of "class action a la Francaise." *Id*.

[141] Parker et al., *supra* note 6.

[142] *Id*.

[143] GERMAN FED. MINISTRY OF JUST., THE GERMAN "CAPITAL MARKETS MODEL CASE ACT" 1 (2006), http://www.bmj.bund.de/files/-/1056/EnglishInfoKapMuG.pdf [hereinafter GERMAN MODEL CASE ACT].

[144] Byrne & O'Reilly, *supra* note 138.

[145] GERMAN MODEL CASE ACT, *supra* note 146.

[146] *Id.*

[147] Alexander Klauser, *Group Litigation in Austria*, Summary of Speech to be Delivered at a Expert Conference "Effective Legal Redress–The Consumer Protection Instruments of Action for Injunction and Group Damages Action" (Feb. 24, 2006), *available at*

ganizations bring claims on behalf of hundreds or thousands of wronged consumers against the same defendant.[148] The Austrian Supreme Court has confirmed the admissibility of these lawsuits under the condition that all claims are based on the same grounds.[149] Further, the Austrian Parliament has requested the Austrian Federal Minister for Justice to propose Austrian class action legislation (*Gruppenklage*) that would provide a cost-effective and appropriate way to deal with mass claims.[150] The draft statute was due to enter into force on January 1, 2008 but is still being discussed.[151]

Countries such as Germany and Austria, in implementing their own versions of class action lawsuits, have recognized the importance of having a system of consumer redress. Although beneficial to the consumers within those countries, there are limitations to these models. For example, an Austrian consumer cannot bring a suit against a German producer and vice versa. Therefore, the European Union needs to implement class action lawsuits in order to protect consumers throughout the region.

D. A MODEL FOR THE EUROPEAN UNION

Importing class action lawsuits to the European Union would not be difficult. Although class action lawsuits exist in only a few member countries, the European Union already has the institutional framework in place to handle such lawsuits. Borrowing heavily from the American model, the European class action model would also have its own unique characteristics.

To begin with, legal institutions where class action lawsuits could be handled are already set up in the European Union. Class action lawsuits could be brought in the Court of First Instance, the "lower court" of the judicial branch of the European Union. This makes sense for several reasons. First, since the Court of First Instance has its own Rules of Procedure, implementing class actions lawsuits would not be

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http://www.eu2006.bmsg.gv.at/cms/eu2006/attachments/4/2/7/CH0604/CMS1133429025309/klauser.pdf.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] BERNHARD KOFLER-SENONER, PRIVATE ANTITRUST LITIGATION, AUSTRIA (2008), http://www.chsh.at/fileadmin/chsh.at/publikationen/BKS_GettingTDT_AustrianChapter_2008.pdf.

difficult.[152] In addition, the Treaty of Nice allows for the creation of special judicial panels to hear certain cases, such as those dealing with intellectual property and competition law.[153] Therefore, special judicial panels could be created that would exclusively hear class action lawsuits. Third, an appeal process is already in place: decisions of the Court of First Instance could be appealed to the Court of Justice. Finally, the problem of forum shopping that sometimes occurs in American class action lawsuits would not exist in the European Union model because the Court of First Instance is based in Luxembourg City. As such, plaintiffs in the European Union would not be able to "shop around" for favorable venues.

European Union class action lawsuits should include the same four requirements that are required of the American version (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.[154] Traditionally, American courts had denied class action certification to groups consisting of less than fifty plaintiffs.[155] However, the Class Action Fairness Act of 2005 requires that a class action consist of at least 100 plaintiffs.[156] Therefore, in order to prevent class action abuse, the class action model adapted in the European Union should have a higher standard and require at least 100 plaintiffs. The European Union class action model should also require commonality, meaning that the class action can only be brought if there are questions of law or fact common to the entire class of plaintiffs, and typicality, meaning that the claims of the representative parties must be typical of the clams or defense of the entire class.[157] Finally, the class action model should require adequacy of representation, meaning that the representative parties must fairly and adequately protect the interests of the entire class.[158]

The European Union class action model would also have its own unique characteristics. Diversity should be a requirement in order to cut down on the number of cases brought before the Court of First Instance. Diversity means that the parties in the lawsuit must come from at least two different European Union countries. For example, a suit involving an Italian manufacturer and Italian and German consumers would be al-

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[152] Overview of the Court of First Instance, *supra* note 90.
[153] Summary of the Treaty of Nice, *supra* note 95.
[154] FED. R. CIV. P. 23(a).
[155] YEAZELL, *supra* note 18, at 792.
[156] RUBENSTEIN, *supra* note 51, at 5.
[157] FED. R. CIV. P. 23(a)(2); FED. R. CIV. P. 23(a)(3).
[158] FED. R. CIV. P. 23(a)(4).

lowed whereas a suit involving only a French manufacturer and French consumers would not. Awards should also be limited. Although class action lawsuits would be decided by panels of judges, as opposed to juries, limits should be put into place since excessive punitive damages are one of the biggest concerns that European business leaders have of class action lawsuits.[159]

CONCLUSION

Currently, there is no legal basis for wronged consumers across the Europe Union to join together in a class action lawsuit. Importing class action lawsuits would give European consumers greater confidence when shopping across borders and make European producers and retailers more accountable for their goods and services. As such, class action lawsuits would help the European Union transform from a group of twenty-seven fragmented markets into a single market, thus increasing efficiency and competitiveness across the region and benefiting all European Union consumers.

Many European business leaders are hesitant to adopt such a policy because of the high punitive damages and large attorneys' fees associated with class action lawsuits. However, their fears would not be realized because of fundamental differences in Europe's legal system. Further, although based on the American version, the class action model adopted in the European Union would have its own unique characteristics. Finally, the European Union already has the institutional framework in place to handle such lawsuits. For these reasons, the European Union should import class action lawsuits.

[159] Parker et al., *supra* note 6.