

**Collective Action in Comparative and Empirical Perspective:
Towards a Socio-Legal Theory**



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Abstract

This DPhil thesis enhances existing understandings of collective action through a comparative and empirical study. Empirical analysis of economic, political, juridical, and social dimensions of the Brazilian experience reveals that some central understandings in existing literature are not borne out in this empirical context. In particular, the assertion that low monetary incentives for individuals hinder growth in use of collective action is strongly challenged.

The Brazilian experience is contextualised through comparative analysis of three legal traditions of collective action: class actions; collective redress; and civil public actions. The Brazilian system presents a setting with potential for regulatory enforcement of consumer protection law, but rare episodes of consumer compensation or the imposition of punitive damages on corporations. With low monetary incentives, the growth of collective actions is explained by non-monetary incentives and investment in social capital through development of institutional trust and legal institutions.

Collective actors develop their organisational infrastructure and perform their roles as representatives through institutional dynamics of concentration, competition, cooperation, and deference. The coexistence of multiple institutional actors in the regulatory space reduces agenda control, increases

opportunities for consumer participation, and increases oversight of regulatory capture.

The categories of diffuse, collective, and homogeneous individual rights explain the role of law in establishing procedural pathways and special features. This study is broadened through analysis of the legal environment and the potential regulatory impact of collective actions on the social relationships between businesses and consumers. I also evaluate limitations and possibilities regarding access to justice, judicial economy, compensation, and deterrence.

This thesis indicates the possibility of developing a socio-legal theory of collective action, which would enhance our understanding of the complex dynamics at play by going beyond analysis of the consumer experience as merely an economic transaction or a legal object, analysing them instead as a complex social relationship.

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Abbreviations

3G	Third-Generation Wireless Technology
AC	Civil Appeal
ADHS	Association for Defence of the Health of Smokers
ADR	Alternative Dispute Resolution
AGETRANSP	State Transportation Agency
AGO	Attorney General's Office
AGOCPD	Attorney General's Office Consumer Protection Department
AGORJ	Attorney General's Office of Rio de Janeiro
AGOSC	Attorney General's Office Superior Council
ANACONT	National Association for Consumer and Worker Assistance
ANATEL	National Agency for National Telecommunications
ANEEL	National Agency for Electrical Energy
B2C	Business to Consumer
BCB	Brazilian Central Bank
CADE	Brazilian Administrative Council for Economic Defence
CAFA	Class Action Fairness Act
CAT	Competition Appeal Tribunal
CBA	Complaints Book Act
CC	Civil Code
CDC	Code for Defence of Consumers
CPC	Code for Civil Procedure
CEO	Chief Executive Officer

CODECON	Committee for Defence of Consumers
CPAA	Civic-Public Action Act
CRFB	Constitution of the Federative Republic of Brazil
ECJ	European Court of Justice (currently known as CJEU, Court of Justice of the European Union)
EU	European Union
EUI	European University Institute
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FDI	Foreign Direct Investment
FGV	Fundação Getúlio Vargas
FIESP	Federation of Industries of the State of São Paulo
FRCP	Federal Rules of Civil Procedure
GLO	Group Litigation Order
IDEC	Brazilian Institute for Defence of Consumers
IJFF	International Junior Faculty Forum
KapMuG	Capital Markets Test-Case Action Act
LA	Latin America
MCCPIA	Model Code of Collective Procedure for Iberian America
NAPP	National Association of Public Prosecutors
NFDR	National Fund for Diffuse Rights
NGO	Non-Governmental Organisation
NUDECON	Office of Public Defenders' Consumer Defence Core
OA	Ombudsman Act
ODR	Online Dispute Resolution

OFT	Office of Fair Trading
OPD	Office of Public Defenders
OPDRJ	Office of Public Defenders of Rio de Janeiro
PAA	Popular Action Act
POF	Percentage of the Fund
PROCON	Bureau for Protection of Consumers
PROTEST	PROTESTE (Association for Defence of Consumers)
RBoS	Royal Bank of Scotland (acronym used by a rights group)
RBS	Royal Bank of Scotland
RJ	Rio de Janeiro
SARJ	State Assembly of Rio de Janeiro
SENARC	Chilean National Service for Consumer Protection
SFPDA	Standing For Public Defenders Act
SFS	Sports Fan Statute
SP	São Paulo
STF	Supreme Federal Tribunal (Brazilian Supreme Court)
STJ	Superior Tribunal of Justice
TJRJ	Tribunal of Justice of Rio de Janeiro
UK	United Kingdom
UN	United Nations
US	United States
USSC	United States Supreme Court

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PART I - INTRODUCTION

Chapter 1

Complex law enforcement: Between powerlessness and empowerment

‘Here lies the valiant cavalier,
Who never had a sense of fear:
So high his matchless courage rose,
He reckon’d Death among his vanquish’d foes.

‘Wrongs to redress, his sword he drew,
And many a caitiff giant slew;
His days of life tho’ madness stain’d,
In death his sober senses regain’d’.¹

‘Unhappy is the land that needs a hero’.²

1.1 Introduction

The death of Don Quixote inspired the poetic epitaph of this tragic hero. Among his qualities, however, we find a mixed combination of positive and negative traits. Don Quixote's bravery seems excessive, because lack of fear would inevitably lead our tragic hero to fight invincible enemies. Likewise, his obsession to redress wrongs and to challenge imaginary giants seems animated by madness and not sober calculation of the prospects of victory. And yet my

¹ Miguel de Cervantes, *Don Quixote* (OUP 2008) 943.

² Bertolt Brecht, *Life of Galileo* (Penguin 2008) 115.

empirical research of collective action in Brazil took me to the adventures of Don Quixote de la Mancha and Sancho Panza.

In their recollections of collective action for consumer protection, two senior prosecutors evoked this image to refer to the challenges facing law enforcers.³ This classic romance provides a vivid metaphor. After all, this tragic hero is often defeated and his victories are ephemeral. His chivalrous quests and language may resemble the extraordinarily complex missions of collective action and the artificial rhetoric of vindicating diffuse, collective, and homogeneous individual interests.⁴ His weak wooden lance, tired horse, and powerful adversaries establish a thoughtful parallel with ineffective juridical instruments, scarce organisational resources, and strong corporate defendants.⁵

Don Quixote is also a point of analytical inflection, because the academic literature often portrays the plaintiff of collective action as a hero. In the US there is the image of a private attorney general, capable of vindicating collective rights, protecting consumers, and redressing corporate wrongdoings.⁶ In contrast to this image, one prosecutor referred to the former head of the Attorney General's Office for Consumer Protection Department (AGOCPD) as a Don Quixote.⁷ Another explained that he left the AGOCPD 'because he did not

³ Interviews A' (SP 18.09.14) and T (RJ 10.09.14).

⁴ On the artificiality of these categories, see Angel R. Oquendo, Upping the ante: collective litigation in Latin America, *Columbia Journal of Transnational Law*, vol 47 (2009) 275.

⁵ On the limited resources, infrastructure and organisational strength of Brazilian collective actors in comparison with powerful corporate defendants, see Manuel Gómez, 'Smoke signals from the south: the unanticipated effects of an 'unsuccessful' litigation on Brazil's anti-tobacco war', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economic, and politics shape collective litigation* (Edward Elgar 2016) 67.

⁶ See, for instance, David Freeman Engstrom, Harnessing the private attorney general: evidence for qui tam litigation, *Columbia Law Review*, vol 112 (2012) 1244.

⁷ Interview T (RJ 10.09.14).

want to be a Don Quixote for the rest of his life'.⁸ These references to quixotic conduct reveal the feeling of powerlessness, explained by the limitations of collective action.

On the other hand, interviewees referred not only to Don Quixote, but also Bertolt Brecht's 'life of Galileo' – notably quoting the passage in which Galileo states that 'unhappy is the land that needs a hero'.⁹ These words contain also a strong message and explain the existential attitude of two public prosecutors who expressed their frustration with the expectation that they would exercise the role of heroes and vindicate collective rights.¹⁰ In the context of collective action, prosecutors seem to hope that consumers will develop a sense of autonomy, being able also to vindicate their rights without the necessity for law enforcer's active intervention.

There is a parallel between Galileo's pupil and the individual consumer, because dissemination of knowledge may be a source of freedom and empowerment.¹¹ Public prosecutors seem to suggest that happy is the land that does not need a hero, because individuals are empowered to balance and

⁸ Interview A' (SP 18.09.14).

⁹ See Brecht (n. 2) 115. This literary reference is also valuable, because Galileo refused to become a martyr, arguably acting in his own self-interest and to develop a sense of autonomy among his pupils. The eminent professor published his scientific discoveries supporting the Copernican heliocentric model of the solar system in accessible language for the common people, but refused to face torture and violent death to overcome the orthodox doctrine of the Roman catholic church. Nonetheless, Galileo shared a book with his scientific discoveries to a pupil who could disseminate this knowledge abroad.

¹⁰ Interview O (RJ 26.08.14) and A' (SP 18.09.14).

¹¹ On the power of information, but with a cautious warning that empowerment is not a panacea for all consumer issues, see Stephen Weatherill, 'Empowerment is not the only fruit', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement, and competition law* (Hart 2016) 211.

regulate their business to consumer (B2C) relationships themselves:¹² 'ideally the consumer should take care of his own problems himself, either as a result of awareness campaigns by civil society or of refusal to purchase from certain corporations';¹³ 'the system should stimulate consumer emancipation, by permitting that the consumer himself be empowered in a manner that guarantees his rights'.¹⁴ Their reference to the tragedy of necessary heroism reveals an aspiration for consumer empowerment, explained by the possibilities of collective action.¹⁵

Law enforcers find themselves in a complex existential situation: between powerlessness and empowerment. On one hand, they consider their practical limitations to fight on behalf of the weaker party against powerful corporations and vindicate consumer rights through collective action. This sense of powerlessness originates from the dismantling of the welfare state and the contemporary limitations to the use of state power to reduce market distortions.¹⁶ On the other hand, they consider a normative ideal that opens possibilities for empowered consumers to protect themselves and balance their

¹² On the importance of consumers exercising regulatory control of corporations through purchasing decisions, see Hugh Collins, 'Conformity of goods, the network society, and the ethical consumer', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement, and competition law* (Hart 2016) 313; on the importance of consumers exercising regulatory power by voicing their complaints to public authorities, see Christopher Hodges, 'The consumer as a regulator', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement, and competition law* (Hart 2016) 255-6.

¹³ Interview A' (SP 18.09.14).

¹⁴ Interview O (RJ 26.08.14).

¹⁵ On empowerment of group members through dynamic interactions and dispute transformation within collective actions, see Bryant Garth, Power and the legal artifice: the federal class action, *Law & society review*, vol. 26 (1992) 267-9.

¹⁶ Hans-W. Micklitz, 'The consumer: marketised, fragmentised, constitutionalised', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement, and competition law* (Hart 2016) 21-2.

B2C relationships. This sense of empowerment comes from the sociological fragmentation of the person and the development of new paradigms to overcome the consumer's vulnerability with the citizen's responsibility, confidence, and power.¹⁷ However, vulnerability and weakness are complex multi-dimensional issues, requiring not only consumer empowerment, but also consumer protection.¹⁸ In this sense, collective actions may be politically empowering, by increasing the stakes of a dispute, mobilising the power of big litigation, and providing opportunity for vulnerable parties to reframe the socio-legal meaning of their disputes.¹⁹

Consider, for instance, the struggle of prosecutors against advertising to children and children's obesity, which were deemed to be lost causes.²⁰ Nonetheless, these cases generated a lively public debate in the media, leading to their argument resonating widely and spreading their message throughout the population.²¹ This quixotic initiative generated several invitations for talk shows, interviews, lectures, and even a UN conference.²² Physicians provided the necessary information for the development of this case and the social mobilisation influenced a congressman to propose a federal bill regulating children's advertisement.²³ Society was empowering itself. When I interviewed

¹⁷ Micklitz (n. 16) 32-3.

¹⁸ Weatherill (n. 11) 220-1.

¹⁹ Garth (n. 15) 267-9.

²⁰ Interview Z (SP 16.09.14).

²¹ Interview Z (SP 16.09.14).

²² Interview Z (SP 16.09.14) and A' (SP 18.09.14).

²³ Interview A' (SP 18.09.14).

these prosecutors, they did not comment on the judicial process at all, but rather explained the transformative wave generated by dissemination of information.²⁴ Almost eighteen months after the interviews, the Superior Tribunal of Justice (STJ) judged their collective action and convicted the corporation for abusive advertisement against children in a historical landmark decision.²⁵ The lost cause turned out to be a unanimous verdict at the superior court.

This story of success should be contrasted with complete failures, cases of creative enforcement, and procedural limbo. Consider the problem of consumer over-indebtedness and social exclusion caused sometimes by excessive interest rates charged by financial institutions.²⁶ After years of joint-collaboration and informal partnership with an expert accountant for production of evidence, prosecutors filed collective suits against 10 major Brazilian banks, failing completely to receive any media attention and to obtain any positive verdict.²⁷ Reflect on the challenges for concrete application of the concept of misleading advertisement.²⁸ In an investigation over the correct use of the label 'whole wheat bread' by the bakery industry, major corporations refused to disclose the percentage of grain and natural flour in their formulas. Because Brazilian law

²⁴ Manuel Gómez observed a similar transformative wave in Brazil generated by a lost cause against the tobacco industry. See Gómez (n. 5) 66-7.

²⁵ *Attorney General's Office of São Paulo v. Pandurata Alimentos* (REsp n. 1.558.086-SP, rapporteur Humberto Martins, 2nd Chamber, STJ, 10.03.2016).

See: <http://www.migalhas.com.br/Quentes/17,MI235576,101048-Julgamento+historico+STJ+proibe+publicidade+dirigida+as+criancas> (checked on 15.01.17).

²⁶ On the development of contract governance to prevent unlawful practices of consumer credit and systemic risks caused by massive insolvency, see Hans-W. Micklitz, 'Consumer over-indebtedness and consumer insolvency - from micro to macro', in Hans-W. Micklitz and Irina Domurath (eds), *Consumer debt and social exclusion in Europe* (Ashgate 2015) 233-5.

²⁷ Interview Z (SP 16.09.14) and A' (SP 18.09.14).

²⁸ On the concept of misleading advertisement, see Norbert Reich and others, *European consumer law* (2nd edn, Intersentia 2014) 96-104.

contained no longer a clear parameter for 'whole wheat bread', the AGO chose not to sue for misleading advertisement.²⁹ Instead, based on the right to information, the AGO filed and won a collective action to oblige the corporations to disclose in their packages clear information of the percentage of natural flour.³⁰ Consider the delays in processing collective actions caused by procedural traffic jams. A consumer association uses scarce resources to conduct a collective action to compensate consumers for a compulsory tax on fuel imposed by the government in the 1980s,³¹ but with little hope to find any consumer that may demonstrate the injury and the amount of harm after such a long time of procedural limbo.³²

Conducting empirical and comparative research is relevant and necessary to understand these complex phenomena of collective action for consumer protection. This introductory chapter provides an overview of the problem, exploring the character of collective action and the interdisciplinary perspectives adopted. Additionally, the general plan of this thesis is presented.

1.2 Collective action and its interdisciplinary perspectives

This is a thesis about collective action - a polysemous concept with varying meanings in the different disciplines of law, economics, and political

²⁹ Interview L (RJ 14.08.14).

³⁰ *AGO v. Wickbold and Bimbo* (0337522-63.2012.8.19.0001, 1st Commercial Court of Rio de Janeiro). On the right to information as a cornerstone of EU consumer law, see Norbert Reich and others (n. 28) 21-5.

³¹ Interview R (RJ 02.09.14).

³² On the state of limbo, see Susan Silbey, Case processing: consumer protection in an Attorney General's Office, *Law & Society Review*, vol. 15 (1981) 866.

science.³³ This research investigates collective action as collective action.³⁴ Far from being a tautology, it develops the insight that juridical collective action is linked to limitations and possibilities of political and economic collective action. This thesis investigates interrelationships between the juridical, economical, political, and sociological dimensions of collective action, by examining how juridical instruments of collective action address challenges posed by high transaction costs, negative value incentives, asymmetries of information and power, and the coordinated protection of collective interests. Likewise, law is embedded in society,³⁵ being deeply influenced by economic enablers, institutional organisation, and social dynamics. This thesis examines how collective action works and its possibilities and limitations by investigating the dynamic interaction between these interdisciplinary dimensions.

The main research question is the following one: how do economic incentives, political participation, and social interactions of key actors shape the actual implementation of collective action mechanisms? This thesis articulates different economic, political, and socio-legal elements, but it also investigates these aspects through the following sub-questions: how do litigation funding, judicial economy, and a regime of sanctions and rewards influence collective action? How do the organisational structure and institutional dynamics influence

³³ Polysemy is a concept from linguistics, relative to the coexistence of multiple meanings for a single word or term.

³⁴ Stephen Yeazell framed this inquiry as an investigation of 'collective litigation as collective action'. See Stephen Yeazell, *Collective litigation as collective action*, University of Illinois Law Review (1989) 43.

³⁵ This idea of social sciences embedded in society may be attributed to the critique of enlightenment made by Giambattista Vico or to the critique of liberal economics made by Karl Polanyi. See, generally, Giambattista Vico, *The new science* (Cornell 1984) xx-xxi & 64-7; Karl Polanyi, *The great transformation: the political and economic origins of our time* (2nd edition, Beacon 2001) xiii, xxiii-xxvii & Ch 6.

collective actors? What is the role of law in shaping procedural pathways, normative architectures, and social mobilisation for consumer empowerment? Finally, this research is oriented towards a socio-legal theory of collective action and addresses the question: why are the professed objectives of collective action not entirely achieved?

First, collective action is the juridical term used to refer generically to mechanisms of aggregation or representation of numerous individual claims and systems of protection of diffuse, collective, and homogeneous individual interests.³⁶ Therefore, it is a generic expression that includes particular categories, such as class actions,³⁷ representative actions,³⁸ civil public action³⁹, and collective redress⁴⁰. This research is centred on the Brazilian experience of collective action and the Latin American (LA) regime of civil public action and empirical evidence was collected in Rio de Janeiro and São Paulo. Collected evidence supports the empirical statements made in this thesis.⁴¹ However, the United State (US) class actions system and the European Union (EU) model of

³⁶ Chris Hodges, *The reform of class and representative actions in European legal systems: a new framework for collective redress in Europe* (Hart 2008) 3.

³⁷ Rachael Mulheron, *The class action in common law legal systems: a comparative perspective* (Hart 2004) 3.

³⁸ Paul G. Karlsgodt (ed), *World class actions: a guide to group and representative actions around the globe* (OUP 2012), xxxix; Hans-W. Micklitz, Do consumers and businesses need a new architecture of consumer law? A thought provoking impulse, *Yearbook of European Law*, vol 32 (2013) 335.

³⁹ Ada Pellegrini Grinover, 'Brazil', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The globalization of class actions*, vol 622 (The annals of the American Academy of Political and Social Science 2009) 64-65.

⁴⁰ George Baker and Benoît Pierre Freyens, 'The economics of the European commission's recommendation on collective redress', in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 6.

⁴¹ See chapter 3 for the methodology adopted in this thesis.

collective redress also provide valuable lessons for our interdisciplinary understanding of collective action. Therefore, comparative elements are also incorporated into this analysis.

Additionally, the economic, political, and sociological meanings are relevant for the interdisciplinary understanding of juridical collective action. In his classical study, Mancur Olson concluded that "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*".⁴² This is an idea that might be contested, but juridical instruments of collective action may be studied as special devices to produce joint-action on the behalf of the common interest.⁴³

Olson referred to problems for mutual cooperation and difficulties for coordinating multiple interactions of social groups in a meaningful way.⁴⁴ Cooperation requires special institutional arrangements that induce joint action by providing incentives for the pursuit of common social interests.⁴⁵ Such incentives are not only economic rewards, but also include potential reputational factors and career gains generated by the strength of the organisation developed by political entrepreneurs.⁴⁶

⁴² Mancur Olson, *The logic of collective action: public goods and the theory of groups* (Harvard 1965) 2.

⁴³ Marc Galanter, Why the "haves" come out ahead: speculations on the limits of legal change, *Law and society review*, vol 9 (1974) 50-53.

⁴⁴ Olson (n. 42) 34-35.

⁴⁵ Olson (n. 42) 34-35.

⁴⁶ Russel Hardin, *Collective Action* (John Hopkins 1982) 34-37.

Particularly relevant for the collectivisation of rights are the concepts of interest and empowerment. Also a polysemous concept, interest may have the political dimension of an advantage or imply the economic dimension of a benefit for an individual or a group. Legally protected interests relating to someone's duty are normally classified as rights⁴⁷ and may be considered collective, if they protect group's interests.⁴⁸ Empowerment denotes the process of distributing authoritative powers,⁴⁹ which is important to evaluate the influence of capital, institutions, rights, and ideas over the B2C relationships.⁵⁰ In summary, economics and politics provide important elements for the comprehension of how juridical collective action may fail or succeed.

1.3 The interdisciplinary perspective.

1.3.1 The economic analysis of collective action

The analyses of collective action require interdisciplinary studies to explain socio-legal patterns, factors, and mechanisms - especially emerging from complex interactions. Examining the economics of collective action, low funding was appointed as a serious problem for the effectiveness of consumer protection

⁴⁷ Wesley Newcomb Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, *The Yale Law Journal*, vol. 23 (1913) 23-4 & 30-2.

⁴⁸ Miodrag Jovanovic, *Collective rights: a theory* (CUP 2012) 78-84.

⁴⁹ On this distribution of power (or *Machtverhältnisse*) through law, see Eugen Ehrlich, *Fundamental principles of sociology of law* (Harvard 1936) 198.

⁵⁰ Weatherill (n. 11) 203-11.

by the collective actors.⁵¹ Plaintiffs are not rewarded with legal fees by their contribution for the common benefit of consumers.⁵² Courts normally refuse to convict defendants to pay a percentage of the fund for plaintiffs as a compensation for their successful effort in advocating consumer interests.⁵³ As a consequence, plaintiffs are normally underfunded and must be selective in choosing their collective claims.⁵⁴ Moreover, plaintiffs normally operate individually against a team of corporate lawyers, because of their organisational structure and limited funding.⁵⁵

Another serious problem revealed by empirical research was the lack of economic consequences for the corporate defendants, which was revealed by documentation, participation, and interviews. Consumers are rarely compensated individually through the civil public action. Even when the outcome of a collective action is positive and they could be compensated, individual consumers rarely intervene in the collective action to receive their monetary damages. In contrast to the free litigation without the mandatory presence of a lawyer in small claims courts, the current architecture of collective action creates economic obstacles for consumers, by requiring payment of court usage fees and a lawyer. Economic analysis explains this phenomenon based on rational apathy and negative value claims, in which the transaction costs for

⁵¹ Interviews R (RJ 02.09.14), T (RJ 10.09.14) and Z (SP 16.09.14).

⁵² Interviews T (RJ 10.09.14) and Z (SP 16.09.14).

⁵³ Interviews T (RJ 10.09.14) and Z (SP 16.09.14).

⁵⁴ Interview R (RJ 02.09.14).

⁵⁵ Interview Z (SP 16.09.14).

recovering the monetary damages may be superior to the value of the damage itself.⁵⁶

Additionally, Brazilian judges rarely impose exemplary damages on corporations for their collective wrongdoings. Even if the Code for Defence of consumers (CDC) authorises the conviction of defendants to compensate collective moral damages caused to a mass of consumers, judges often reject the possibility of imposing punitive damages on corporations in collective actions. Consequently, corporations do not experience economic sanctions as a result of their wrongdoing. Without a “big stick”, compliance becomes elusive.⁵⁷ In practice, the civil public action fails to achieve the professed objectives of efficient compensation and optimal deterrence of corporate behaviour.

Interestingly, law enforcers have developed alternative strategies to compensate for the lack of formal economic sanctions and rewards. The dissemination of information through the media is an important alternative to the lack of individual compensation, because informed consumers become empowered and may seek redress through alternative dispute resolution (ADR), small claims courts, and ombudsmen. Importantly, corporations may also experience this potential negative publicity and the trial in courts of public

⁵⁶ Deborah Hensler and others, *Class action dilemmas: pursuing public goals for private gain* (RAND 2000) 68-9; Deborah Hensler, Goldilocks and the class action, *Harvard Law Review*, vol 126 (2012) 56; John Coffee, Class wars: the dilemma of the mass tort class action, *Columbia law review*, vol 95 (1995) 1362; John Coffee, Class action accountability: reconciling exit, voice, and loyalty in representative litigation, *Columbia law review*, vol 100 (2000) 422; Samuel Issacharoff, Preclusion, due process, and the right to opt out class actions, *Notre Dame law review*, vol 77 (2002) 1061-2.

⁵⁷ Hodges (n. 36) 212-3. Even if he opposes punitive damages and class actions, Hodges admits the need for a “big stick”. In a recent book launch at CSLS, he conceded the need for strong punitive measures against corporations and admitted that he failed to discuss in his book the necessity of a “red button” for extreme wrongdoings committed by corporations. See Christopher Hodges, *Law and corporate behaviour: integrating theories of regulation, enforcement, compliance, and ethics* (Hart 2015) 41-3.

opinion as an informal sanction in the place of exemplary damages. This symbolic interaction of law enforcers and corporations through media redistributes social capital in a way that may generate pressure for collective settlement. Money is replaced by reputation, substituting monetary for non-monetary incentives - prestige as a positive incentive for law enforcers and depreciation as a negative incentive for corporations. This emergence of social capital as an alternative to monetary capital has stimulated political entrepreneurship and institutional competition of collective actors, as explained in the following section.

1.3.2 The politics of collective action

The economics of litigation are also connected with the politics of collective action. Consumers are holders of diffuse, collective, and homogeneous individual rights, but their participation in collective actions is limited. In most collective suits, the contribution of consumers is restricted to the initial complaint made to a potential plaintiff.⁵⁸ Generally, collective actors have very little contact during the collective procedure with consumers they represent.⁵⁹ The legal regime of Brazilian collective action does not guarantee procedural rights of notice and participation during the collective procedure. Collective

⁵⁸ CPAA, Article 6.

⁵⁹ Interviews L (RJ 14.08.14) and M (RJ 21.08.14).

actors do not have any procedural obligation to provide information regularly to individual consumers. Likewise, there is no right to exit or to be heard.⁶⁰

Interestingly, there is a regime of institutional competition between public prosecutors, public defenders, state assembly attorneys, and consumer associations, which reduces their capacity to exercise veto power against consumer demands.⁶¹ Initially, the Attorney General's Office (AGO) exercised a *de facto* monopoly as a plaintiff for collective actions⁶² and could exercise political control as a veto player and agenda setter. The rise of competitors altered the socio-legal space and transformed the governance of consumer relationships, with the increasing importance of new authoritative actors and the widespread use of network connections to establish constituencies of consumers.⁶³ With limited control over agenda setting, popular participation influences initiatives of collective actors to file collective suits. This transformation brings a necessary new focus on decision-making processes and the mobilisation of different forms of authority with changing relationship dynamics and patterns of governance.⁶⁴ It also leads us to analyses of institutional dynamics of concentration, competition, cooperation, coalition, and deference.

⁶⁰ Judith Resnik, Dennis E. Curtis, and Deborah R. Hensler, Individuals within the aggregate: relationships, representation, and fees. *NYU law review*, vol 71 (1996) 376-81; Coffee, Class action accountability (n. 56) 406-28.

⁶¹ Frank Vibert refers to the competition between providers as an introduction of economic thinking into the heart of public administration by the new public management. See Frank Vibert, *The rise of the unelected: democracy and the new separation of powers* (CUP 2007) 36.

⁶² Grinover (n. 39) 64.

⁶³ Vibert (n. 61) 18.

⁶⁴ Vibert (n. 61) 19.

The politics of collective action also comprises agency problems of individuals who do not wish to cooperate with the group, who do not share the same interests with the group, or who are personally representing the group without the organisational structure to pursue this mission. In his seminal work, Olson pointed to the problem of the 'free rider': the individual who does not contribute to the common pool of resources but still hopes to benefit from the positive outcomes generated by other people's contributions.⁶⁵ Additionally, the 'kidnapped rider' is an individual member of the group who does not feel represented by the collective actor, considers the direction of the collective action to be detrimental to her own personal interests, and still cannot properly exit or voice her concerns in a collective suit litigated on her behalf.⁶⁶ Furthermore, the 'lone rider' is an individual representative of a group agent, who is personally responsible for the collective suit without actually benefiting from the support of a working team or exercising authority through shared agency within a complex organisational structure.⁶⁷ The institutional organisation of collective actors may minimise these problems.

1.4 Limits and possibilities of collective actions

1.4.1 Professed objectives and limitations of collective actions

⁶⁵ Olson (n. 42) 76.

⁶⁶ Yeazell (n. 34) 44.

⁶⁷ Christian List & Phillip Pettit, *Group agency: the possibility, design, and status of corporate agents* (OUP 2011) 60-64; Michael Bratman, *Shared agency: a planning theory of acting together* (OUP 2014) 25-39; Margaret Gilbert, *Joint commitment: how we make the social world* (OUP 2014) 81-93.

What are the professed objectives of collective actions?⁶⁸ Collective actions guarantee access to justice and judicial economy to consumers.⁶⁹ These juridical mechanisms are expected to reduce judicial costs, contribute to uniformity of judgments, prevent contradictory decisions, increase legal certainty, and provide speedy and effective trials.⁷⁰ Particularly regarding the effectiveness of judgments, collective action indicates that damage to the group should be entirely compensated.⁷¹ Moreover, group members are supposed to receive the necessary information and a communication about the existence of the collective procedure.⁷²

Additionally, collective actions are grounded on the objective of balancing an asymmetry of powers between unequal parties⁷³ - especially the asymmetric relationship between the individual plaintiff and the corporate defendant in consumer relations. Importantly, the aggregation of individual interests may be examined through a focus on the organism or on its multiple parts. On one hand, the law recognises the existence of an entity,⁷⁴ a corporate agent, or another kind

⁶⁸ In Europe, the two key policy objectives are improving access to justice for compensation and deterring unlawful behaviour. See Rebecca Money-Kyrle and Christopher Hodges, 'European Collective Action: Towards Coherence?', *Maastricht Journal of European and Comparative Law*, vol 19 (2012) 478.

⁶⁹ Fredie Didier Jr and Hermes Zaneti Jr, *Processo coletivo* (7th edn, Podium 2012) 34.

⁷⁰ Didier Jr and Zaneti Jr (n. 69) 34.

⁷¹ Didier Jr and Zaneti Jr (n. 69) 124.

⁷² Didier Jr and Zaneti Jr (n. 69) 116.

⁷³ Hely Lopes Meirelles, Arnaldo Wald e Gilmar Ferreira Mendes, *Mandado de segurança e ações constitucionais* (36th edn, Malheiros 2014) 308.

⁷⁴ David Shapiro, Class actions: the class as party and client, *Notre Dame Law Review*, vol. 73 (1997) 913.

of intermediate body as a collective actor for consumer rights protection.⁷⁵ On the other hand, collective actions retain their character as an instrument for collectivisation of interests,⁷⁶ vindication of collective wrongdoing,⁷⁷ and popular participation.⁷⁸

Does collective action achieve these professed objectives? The answer to this question will be developed throughout this thesis, but I may already anticipate a picture of a glass half full and half empty.⁷⁹ Therefore, the objectives are not entirely achieved, but systemic limitations do not prevent the emergence of relevant case studies of ethical, logical, and efficient collective action for consumer protection. Interviewees shared both their successful cases and professional frustrations. On one hand, collective action has the potential to facilitate the access of a multitude of consumers to the judiciary and to reduce procedural costs as promised.⁸⁰ On the other hand, the empirical observation of the Brazilian collective actions demonstrates the limited access of individual consumers to justice and the low impact on the protection of consumer rights.

In practice, consumers do not participate actively in collective procedures and are rarely benefitted directly by their sentences. Because of a poorly calibrated regime of incentives and disincentives, individuals are induced either

⁷⁵ Meirelles, Wald and Mendes (n. 73) 308.

⁷⁶ Stephen Yeazell, From group litigation to class action part II: interest, class, and representation, *UCLA Law Review*, vol 27 (1980) 1067.

⁷⁷ Hensler and others (n. 56) 483-5.

⁷⁸ Meirelles, Wald and Mendes (n. 73) 308.

⁷⁹ Perhaps this is also a fair expression to evaluate the U.S. class actions. See Deborah Hensler, A glass half full, a glass half empty: the use of Alternative Dispute Resolution in mass personal injury litigation, *Texas Law Review*, vol 73 (1995) 1587.

⁸⁰ Grinover (n. 39) 64-65.

to remain in the state of inertia typical of social apathy⁸¹ or to seek redress individually through an ombudsman or a small claims court.⁸² Therefore, just like an empty bus travelling without passengers, the collective vehicle is normally empty of individual claimants.⁸³ Because individual cases are not aggregated within a single collective action, but rather disseminated across various small claims courts in multiple counties and jurisdictions, judgments are not uniform and decisions may be contradictory.⁸⁴

Plaintiffs do not always interact with the networks of consumers they represent, even if they may nowadays explore new social media and the transformation of social organisation.⁸⁵ Consumers do not always receive notice of the collective litigation and are then unable to interact with the collective actors in a meaningful way for protection of their rights.⁸⁶ Obviously some cases involve negative value claims, in which the transaction costs for rights protection may be superior to the intrinsic value of the violated right.⁸⁷ However, consumer interests are not always limited to the small compensation that an individual may receive. Plaintiffs are also interested in regulatory enforcement and

⁸¹ Coffee, Class wars (n. 56) 1362; Coffee, Class action accountability (n. 56) 422.

⁸² Hodges (n. 36) 95-102.

⁸³ See chapter 4.

⁸⁴ Flávio Luiz Yarshell and Viviane Siqueira Rodrigues, 'Collective suits and homogeneous individual rights: a critical view about efficacy' (2014) Working Paper presented at the Law and Public Affairs Discussion Group on June 9th 2014 on file with the author, 21-26.

⁸⁵ Deborah Hensler, Of groups, class actions, and social change: reflections on *from medieval group litigation to the modern class action*, UCLA law review discourse, vol 61 (2013) 134.

⁸⁶ Resnik, Curtis, and Hensler (n. 60) 376-81.

⁸⁷ Hensler and others (n. 56) 68-9; Hensler (n. 56) 56.

changing corporate behaviour to prevent further future wrongdoings.⁸⁸ Collective actions may eliminate the asymmetry of power between the 'haves' and the 'have-nots' and eventually empower consumers.⁸⁹

1.4.2 The transformative possibilities for collective action

The possibility of transforming the socio-legal landscape through collective litigation was once considered by a sociological study to be merely a hollow hope.⁹⁰ However, collective actors have the capacity to mobilise their constituencies and generate social change.⁹¹ This thesis will present a number of case studies that reveal the transformative potential of collective action and also the possibility of failure to achieve its professed objectives. Legal interests seem to function like the dual structure of light: sometimes like particles and sometimes like a wave.⁹²

On one hand, disaggregated individual rights seem to be structured like particles. Processed individually through small claims courts or ombudsmen, these individual rights are isolated, dispersed, and fragmented. The disaggregation of these consumer interests may reduce their impact, because

⁸⁸ Hensler and others (n. 56) 69-71.

⁸⁹ Galanter (n. 43) 50-53.

⁹⁰ Gerald Rosenberg, *The hollow hope: can courts bring about social change?* (2nd edn Chicago 2008) 420-9. At a presentation in 2015 at the University of Oxford, Gerald Rosenberg conceded that courts decisively influenced the change of perspectives and the popular approval of same-sex marriage. According to him, he will have to make concessions that courts may bring social change in a future edition of his book, examining these cases in the United States.

⁹¹ Hensler and others (n. 56) 49-51; Bruce Ackerman, *We the people: the civil rights revolution*, vol 3 (Harvard 2014) Ch 10.

⁹² Werner Heisenberg, *Physics and philosophy: the revolution in modern science* (Penguin 1990) 18.

individual consumers are normally incapable of coordinating their efforts and collaborating to seek redress. However, exceptionally the large transaction costs of multiple similar claims against a private corporation may cause severe burdens and encourage the company to seek a global class settlement.⁹³ Additionally, social mobilisation of constituencies of consumers may generate political pressure and cause excessive risks of reputational loss and depreciation of corporate image. Otherwise, legal protection of disaggregated interests can be sparse, heterogeneous, and uncertain.⁹⁴

On the other hand, juridical collective action can aggregate a collection of multiple individual interests, putting them in motion collectively as a wave. Consumer interests may be allocated together in a way that increases the economic dimensions of litigation and the political pressure on a private corporation. These aggregated interests may be interconnected through multiple linkages of social networks, chains of interpersonal communication, and may generate cascade effects throughout society.⁹⁵ Collective actors could mobilise resources and resonate their messages through the media in a way that may cause the diffusion of normative ideas and generate social change.⁹⁶ In this case,

⁹³ This was the case in the Netherlands with DES. See Hodges (n. 36) 70-73.

⁹⁴ A good example comes from the German case of *Deutsche Telekom* (XI ZB 12/12, BundesGerichtshof, 21.10.2014), which led to the enactment of *KapMuG*. See Hodges (n. 36) 76-80.

⁹⁵ David Easley and Jon Kleinberg, *Networks, crowds, and markets: reasoning about a highly connected world* (CUP 2010) Ch 16 & 17.

⁹⁶ David Snow, Sarah Soule, and Hanspeter Kriesi, Mapping the terrain, in David Snow, Sarah Soule, and Hanspeter Kriesi (eds), *The Blackwell companion to social movements* (Blackwell 2007) 9-11.

legal protection of aggregated interests is normally concentrated, homogeneous, and towards a certain direction – just like a wave.⁹⁷

Collective action for consumer protection could operate like a wave, but it often does not. Empirical observation reveals that professed objectives are not always achieved. Why not? The normative horizons of consumers could be transformed by collective action, but judicial decisions often have limited impact on corporate behaviour and do not shape the living law of consumer experience in B2C relationships. The transformative agenda of collective actors is also not fully implemented, because of institutional limitations. Access to justice, judicial economy, full compensation, and deterrence depend on practical knowledge and the complex articulation of incentives, participation, and the architecture of collective actions.

In contemporary Brazil, low monetary incentives encourage the adjudication of disputes in the court of public opinion. Additionally, participation in collective actions is limited and consumers seek individual pathways rather than collective vehicles. These economic and political aspects reduce pressure on corporations. This combination of low incentives and participation prevents the emergence of effects from the aggregation of multiple individual interests and judicial settlements are not predominant as in other jurisdictions. It is only in extraordinary cases that law enforcers are able to overcome the limitations imposed by their ineffective instruments and scarce resources in their disputes against corporate defendants. In these exceptional cases, quixotic law enforcers

⁹⁷ Marc Galanter, Case congregations and their careers, *Law and society review*, vol 24 (1990) 371.

mobilise the media, raising awareness within public opinion and attempting to empower consumers to protect themselves.

The explanation for the law enforcer's dilemma is that collective actors are normally powerless, except when they manage to mobilise their networks and empower consumers. Then they navigate from the death of Don Quixote to the life of Galileo, because they sometimes manage to escape from the powerlessness of low incentives and limited participation to the empowerment of constituencies and of consumers themselves.

1.5 The Plan of the Thesis

This thesis will develop in the following way. Part II provides an original comparative argument, defending the thesis that there are currently three different legal families of collective action: class actions; collective redress; and civil public actions. Therefore, chapter 2 justifies the relevance of this comparative argument based on the production of knowledge, improvement of conceptual analysis, and establishment of benchmarks for verification of legal failures, such as low inclusion of consumers under an 'opt-in' regime and low enforcement resulting from a poorly calibrated regime of incentives for collective action. This chapter examines also interdisciplinary aspects of the three different models and explain their legal architectures, setting the stage for the empirical perspective.

Part III provides the empirical argument, explaining the influence of economic incentives, political participation, and social interactions of key actors on the actual implementation of collective action mechanisms. Chapter 3 consists

of an exposition of the empirical data collected for this thesis. I provide a preliminary analysis of 405 class actions filed against private companies by the Attorney General's Office's Consumer Protection Department in Rio de Janeiro between 1991 and 2010. The empirical evidence shows that the sanctions imposed by judges have not been sufficient to prevent new breaches, leading us to the discussion of economic incentives.

Therefore, chapter 4 examines how litigation funding, judicial economy, and a regime of sanctions and rewards influence collective action. I discuss the importance of allocating resources for funding collective action, producing expert evidence, providing notice, and mobilising a constituency of consumers during the collective procedure. I also highlight the relevance of compensation mechanisms for individual consumers and how transaction costs and asymmetries of information may limit the efficiency of collective actions.

Moreover, I argue that collective action may fail to prevent wrongdoings due to a lack of effective and exemplary economic sanctions. Brazilian courts do not impose exemplary economic sanctions and do not oblige companies to reimburse effectively the illegal fees that they abusively charged. In this setting, illegality becomes lucrative and companies may have economic incentives to break the law. Gradually, collective actions involve disputes over social capital, motivated by the prestige of law enforcers and depreciation of reputation of corporations. Interestingly, growth of social capital also increases the political capacity of collective actors.

Therefore, chapter 5 focuses specifically on the power of collective actors, examining particularly how organisational structure and institutional dynamics

influence collective actors. By analysing the practice of public prosecutors, public defenders, state assembly attorneys, and consumer associations, I show how each collective actor developed a particular infrastructure for mobilisation of constituencies of consumers. In their institutional dynamics, these collective actors are competing with each other, cooperating for common goals, and exercising mutual deference. Likewise, legal enforcers exchange information with companies and regulators. These relationships are strategic and influenced by a perception of conflicts of interests and risks of regulatory capture. I also discuss issues relating to the democratic credentials, shared agency, and political representation of these collective actors. Finally, this chapter examines also how the collective actors perform regulatory functions and mobilise resources within the regulatory space. This discussion of the regulatory space inevitably leads us to an analysis of the legal architecture.

Chapter 6 focuses on the role of law in shaping procedural pathways, normative architectures, and social mobilisation for consumer empowerment. I examine how the normative architecture of civil public action influences the socio-legal environment, focusing on the possible legal pathways for consumer protection, the different categories of diffuse, collective, and homogeneous individual interests, and how collective action may mobilise large groups of consumers. This research reveals that the normative architecture may induce consumers to choose the individual vehicle instead of the collective venue for consumer protection. Nonetheless, even if individuals will not opt for the collective pathway, the collective action may still be important for protection of their collective interests. Collective action may mobilise large groups of consumers in relative deprivation by legal entrepreneurs that frame

controversies as collective wrongdoing. However, voice, exit, and participation during the collective procedure should also be considered. This chapter also discusses the role of networks, group mobilisation, and interaction between collective actors and consumers. These aspects highlight the complexity of the legal environment.

Chapter 7 examines the complex legal environment, discussing the potential impact of collective action. The professed objectives of access to justice, judicial economy, full compensation, and deterrence are not simply achieved as an outcome of a judicial procedure. For an individual to exercise rights in the B2C relationship and enjoy the status of an equal in relation to corporations, more than just a judicial sentence is necessary. Consumer norms only emerge as part of the living law when their influence shapes juridical relationships within society and produces normative meaning for the interactions between companies and consumers. This outcome varies according to the complex logic of juridical collective action and how different choices of normative architecture impact behaviour on the socio-legal environment. For instance, establishment of economic rewards and contingency fees calibrate the impact of U.S. Class Actions, creating strong incentives for legal entrepreneurs to pursue potentially lucrative claims. On the other hand, systems with low economic rewards develop other mechanisms for protection of consumer interests. I theorise about the complexity of collective actions and how the emergence of norms is related to extraordinary effects generated by the aggregation of interests, the resonance of wrongdoings in the media, and cascades of empowered consumers within social networks.

Finally, Part IV brings the conclusion. Chapter 8 highlights the elements identified towards a socio-legal theory of collective action, and addresses the question of why the professed objectives of collective action are not entirely achieved. Contemporary literature on collective action concludes that the lack of monetary incentives inevitably causes the death of collective actions. However, the Brazilian experience shows a combination of lack of monetary incentives and growth of collective actions. The explanation comes from non-monetary incentives that constitute social capital for the public organisations entrusted to protect consumer rights. Additionally, my research emphasises the role of organisational structure and institutional competition - another original contribution to the literature on collective actions. Moreover, these complex interactions within the regulatory space lead to the emergence of different legal pathways and to the radiating effects of the public opinion - with parties bargaining under the shadow of the media.

In my conclusion, I summarise the findings of my empirical and comparative research, highlighting different features of collective action and how they influence each other. Additionally, I assess the possibilities and limitations of collective action. Moreover, context matters and explains why certain legal mechanisms function within legal systems operated through institutions embedded in specific legal cultures. Lastly, the explanation for why collective action fails to achieve the professed objectives may be that reconciling access to justice, judicial economy, full compensation, and deterrence depends on practical and local knowledge of collective action and its complexity.

PART II - THE COMPARATIVE PERSPECTIVE

Chapter 2

Comparing collective action: class actions, collective redress, and civic-public action

2.1 Introduction

When Air France flight 447 crashed into the Atlantic Ocean between Rio de Janeiro and Paris on 1 June 2009, a regulatory competition between class actions, civic public action, and collective redress started. US class counsel flew to Brazil and signed contracts with families of passengers, based on contingency fees and promising the high economic rewards of a class action suit in New York.⁹⁸ Brazilian authorities persuaded Air France to set up a claims settlement facility and a compensation fund for Brazilian families with resources from the insurance company.⁹⁹ France refused to join such an initiative, leading French families to file individual lawsuits in French courts - in the absence of an efficient mechanism for aggregation of mass torts claims by then.¹⁰⁰ More than just different legal cultures, this case reveals three different legal traditions for collective actions: class actions; collective redress; and civil public action. This

⁹⁸ Interviews M (RJ 21.08.14), Q (RJ 01.09.14), and X (RJ 12.09.14).

⁹⁹ Interviews M (RJ 21.08.14), Q (RJ 01.09.14), and X (RJ 12.09.14).

¹⁰⁰ Interviews M (RJ 21.08.14), Q (RJ 01.09.14), and X (RJ 12.09.14).

chapter advances the original argument that these are three different legal families of collective action, explaining different features of their legal architecture.

2.2 The Comparative Perspective

The comparative method is important for the production of analytical knowledge about a given object of study.¹⁰¹ In this sense, the comparative study of law may provide insight on important juridical elements, demands of life, and social function of a given legal institution.¹⁰² Particularly in the case of juridical collective actions, comparative studies may clarify their theoretical conceptualisation, the role of plaintiffs as collective actors, and the social functions of access to justice, judicial economy, deterrence, and compensation.¹⁰³ The comparative perspective increases the understanding of law across different legal cultures, the development of critical standards for legislative improvement, and knowledge of how legal phenomena in their various forms are shaped by social facts.¹⁰⁴

¹⁰¹ Konrad Zweigert and Hein Kötz, *An introduction to comparative law* (3rd edn, OUP 1998) 21.

¹⁰² Zweigert and Kötz (n. 101) 33-4.

¹⁰³ Importantly, the functional method of comparative law should be used with the refinement brought to this discipline from the critiques of sociological functionalism, leading to the so-called 'thin functionalism' that accommodates cultural diversity, practices without function, and escapes from the abstractions of grand theories. See Ralf Michaels, The functional method of comparative law, in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 352-5.

¹⁰⁴ Zweigert and Kötz (n. 101) 21.

The comparison may lead to development of a special system with a particular syntax and a vocabulary for the formation of concepts.¹⁰⁵ For instance, instead of referring to the object of study by the particular species of class actions, collective redress, or civil public actions, one may use the generic expression 'collective action' instead.¹⁰⁶ Instead of referring to parties that have legal capacity to protect consumer collective rights by the myriad of terms adopted across the globe, such as, for instance, plaintiffs, consumer representatives, ombudsman, and public entities, the term 'collective actor' captures nicely the idea of some individual or corporate agent acting on behalf of the collectivity.

Comparative law has also a close relationship with sociology of law, by adopting particular socio-legal methods and observing the empirical reality of law in action.¹⁰⁷ Researchers are expected to observe the interpretative practices of institutions and persons involved in the application and interpretation of the law, not limiting their observation to courts and judges.¹⁰⁸ Particularly in the case of collective action for consumer protection, there is a constellation of institutional actors, the broadcasting effect of the media, the force of social networks, the mobilisation of social movements, and the empowerment of consumers. These combined elements produce different processes and

¹⁰⁵ Zweigert and Kötz (n. 101) 44.

¹⁰⁶ Antonio Gidi also considers the expression 'collective action' to be conceptually more adequate than 'collective litigation' or 'class action'. See Antonio Gidi, *Class Actions in Brazil - a model for civil law countries*, *American Journal of Comparative Law*, vol 51 (2003) 335-6.

¹⁰⁷ Zweigert and Kötz (n. 101) 10-1.

¹⁰⁸ Stefan Vogenauer, *Sources of law and legal method in comparative law*, in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 889.

institutional dynamics, which have an explanatory power for the understanding of interdisciplinary aspects of collective action.¹⁰⁹

Lessons from different models of collective action are important for the analysis of problems and possible solutions for failures of the law.¹¹⁰ For instance, given the professed objectives of collective action, the 'opt-in' regime suggested by the European model clearly fails in performing the aggregative function by not collecting sufficient individual interests within the collective procedure, as sub-section 2.3.2 shows. Moreover, comparative study also reveals that economic incentives are insufficient for enabling collective redress in European jurisdictions, as discussed in sub-section 2.3.3. Likewise, the dysfunctional regime of low monetary incentives in the Brazilian civil public action is revealed in chapter 4.

The comparative observation of different collective actors, economic enablers, normative architectures, and legal environment may facilitate the observation of patterns and correlations, leading to the production of comparative knowledge by the formulation of ideal types.¹¹¹ The comparative perspective may also supply solutions for the shortcomings of a particular system, contributing with insights from legal institutions that function elsewhere and may eventually be adopted.¹¹²

¹⁰⁹ Gerhard Dannemann, Comparative law: study of similarities or differences, in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 390-1.

¹¹⁰ Zweigert and Kötz (n. 101) 34.

¹¹¹ Nils Jansen, Comparative law and comparative knowledge, in Mathias Reimann and Reinhard Zimmerman (editors), *The Oxford Handbook of Comparative Law* (OUP 2006), 315-8.

¹¹² Zweigert and Kötz (n. 101) 15-7.

Comparative law may also support the development of taxonomy and classifications, finding historical traditions in a given legal field, such as the well-known distinction between the common law and the civil law.¹¹³ One of the important tasks of the comparative perspective is the recognition of different styles of legal families, and groupings of certain models for taxonomic and academic reasons.¹¹⁴ In the case of collective action, there are currently three legal families or models: (i) the class actions, with collective litigation predominantly led and funded directly or indirectly by a class counsel pursuing regulatory enforcement and individual compensation motivated by potential private gains; (ii) the collective redress, a model of dispute resolution that restricts collective litigation as a last resort, by limiting standing for collective actors, monetary incentives, and participation and by prioritising state-based regulation and ADR; and (iii) the civil public action, with collective litigation predominantly led by state public authorities pursuing regulatory enforcement and individual compensation motivated by institutional reputation and social capital.

The model of class actions was developed through procedural reforms in the US and diffused to Canada, Israel, and Australia. The model of collective redress was developed by European bureaucrats and influenced legislative reforms in the UK, France, Belgium, and Lithuania. The model of civil public action was developed by Brazilian academics and adopted in Brazil, leading to

¹¹³ See generally John Henry Merryman and Rogelio Pérez-Perdomo, *The civil law tradition: an introduction to the legal systems of Europe and Latin America* (3rd edn, Stanford 2007) 1-5.

¹¹⁴ Zweigert and Kötz (n. 101) 63-4.

the elaboration of a Model Code for Collective Procedure in Iberian America. It influenced legislation in Brazil, Chile, Colombia, and Portugal.

2.3 The US Class Actions

The US class actions system is a paradigmatic scheme of collective action.¹¹⁵ Originating in medieval English laws,¹¹⁶ emerging with the enactment of the Federal Rules of Civil Procedure (FRCP) and growing after the 1966 legislative revision of Rule 23,¹¹⁷ the class action is a contemporary device for regulatory enforcement and social transformation through collective action.¹¹⁸ However, a decline in collective litigation resulted from a series of decisions from the United States Supreme Court (USSC) that restricted punitive damages awards¹¹⁹ and class certification,¹²⁰ but validated class action waivers in B2C contracts.¹²¹ Consequently, some contemporary commentators even proclaimed

¹¹⁵ Deborah Hensler, The globalization of class actions: an overview, in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (Annals of the American Academy of Political and Social Science 2009) 8.

¹¹⁶ Stephen Yeazell, Group litigation and social context: toward a history of the class action, *Columbia Law Review*, vol 77 (1977) 866-896; Stephen Yeazell, *From medieval group litigation to the modern class action* (Yale 1987) 26-31.

¹¹⁷ Hensler (n. 115) 8.

¹¹⁸ Stephen Yeazell, *Brown*, the civil rights movement, and the silent litigation revolution, *Vanderbilt Law Review*, vol 57 (2004) 2000-4.

¹¹⁹ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

¹²⁰ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fireboard Corp*, 527 U.S. 815 (1999); *Wal-Mart Stores, Inc. v. Dukes*, U.S. 131 S. Ct. 2541 (2011).

¹²¹ *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

the death of class actions.¹²² However, the recent Volkswagen global settlement shows that the class action survives, even if with limitations.¹²³ The next section examines the architecture of class actions.

2.3.1 The architecture of class actions

In terms of legal architecture, a class action suit requires numerosity of members, commonality of questions, typicality of claims, and adequacy of representation.¹²⁴ The legal architecture establishes types of class actions: (i) 'Rule 23(b)(1) class actions', preventing situations that could have an unfair impact on other plaintiffs and the defendant;¹²⁵ (ii) 'Rule 23(b)(2) class actions', providing uniform treatment for cases of injunctive or declaratory relief;¹²⁶ (iii) 'Rule 23(b)(3) class actions', extending preclusive effects (*res judicata*) for multiple individual cases of monetary relief, which are aggregated for reasons of deterrence and judicial economy.¹²⁷ In addition to the general pre-requisites for class certification, the law also establishes particular conditions for these types of collective action.¹²⁸

¹²² Brian Fitzpatrick, The end of class actions?, *Arizona Law Review*, vol 57 (2015) 173-4, 176-9 & 193-9; Linda Mullenix, Ending class actions as we know them: rethinking the American class action, *Emory Law Journal*, vol. 64 (2014) 404-5.

¹²³ On the survival of class actions for global settlements, see Georgene Vairo, Is the class action really dead? Is that good or bad for class members?, *Emory Law Journal*, vol 64 (2014) 528-9.

¹²⁴ FRCP, Rule 23(a).

¹²⁵ Richard Nagareda and others, *The law of class actions and other aggregate litigation* (2nd edn, Foundation Press 2013) 92.

¹²⁶ Nagareda and others (n. 125) 92.

¹²⁷ Nagareda and others (n. 125) 92.

The court certifies an action as a class action early in the judgment, defining the class, their respective claims, issues, defences, and appointing the class counsel.¹²⁹ Once the certification order is delivered, class members of a collective action type 'Rule 23(b)(3) ought to be individually notified of the nature and definition of the collective litigation through a clear notice,¹³⁰ allowing them to exercise their right of requesting exclusion of the class action judgment.¹³¹ Otherwise, the final decision binds them, whether or not favourable to the class.¹³² The class certification decision is very important for both plaintiff and defendant and court orders may generate appellate review.¹³³ Furthermore, a certification order may be altered or amended before final judgment.¹³⁴

The legal architecture establishes that courts describe whom they find to be class members¹³⁵ and groups of class members may be divided into particular subclasses.¹³⁶ Courts have also the following judicial powers: to prevent repetition or complication of evidence or argument;¹³⁷ to notify class members

¹²⁸ FRCP, Rule 23(b). There should be risk of inconsistency of judgments for Rule 23(b)(1)(a); Risk of disposition, impairment, and impediment of protection of individual rights for Rule 23(b)(1)(b); refusal from the opposing party that justifies the application of general relief to the class as a whole for Rule 23(b)(2); the predominance of the common matters and the superiority of the class action over any other available matters of fairly and efficiently adjudicating the controversy for Rule 23(b)(3).

¹²⁹ FRCP, Rule 23(c)(1).

¹³⁰ FRCP, Rule 23(c)(2)(b).

¹³¹ FRCP, Rule 23(c)(3)(b).

¹³² FRCP, Rule 23(c)(3)(b).

¹³³ FRCP, Rule 23(f).

¹³⁴ FRCP, Rule 23(c)(1)(c).

¹³⁵ FRCP, Rule 23(c)(3).

¹³⁶ FRCP, Rule 23(c)(5).

¹³⁷ FRCP, Rule 23(d)(1)(a).

when necessary;¹³⁸ to impose conditions on representative parties or intervenors;¹³⁹ to correct representation of absent parties;¹⁴⁰ and to deal with procedural matters.¹⁴¹ Courts have the duty to overview and to approve settlement, voluntary dismissal, or compromises, including notifying class members,¹⁴² scheduling a special judicial hearing,¹⁴³ and analysing any statement of the parties¹⁴⁴ to evaluate if the proposal is fair, reasonable, and adequate.¹⁴⁵ In terms of judicial oversight and guarantees to the right to exit and voice, the court may provide a new opportunity for class members to opt out¹⁴⁶ and any class member may become an objector to the proposal.¹⁴⁷

The court must also appoint the class counsel, examining previous work,¹⁴⁸ experience,¹⁴⁹ legal knowledge,¹⁵⁰ resources,¹⁵¹ and any other matter

¹³⁸ FRCP, Rule 23(d)(1)(b).

¹³⁹ FRCP, Rule 23(d)(1)(c).

¹⁴⁰ FRCP, Rule 23(d)(1)(d).

¹⁴¹ FRCP, Rule 23(d)(1)(e).

¹⁴² FRCP, Rule 23(e)(1).

¹⁴³ FRCP, Rule 23(e)(2).

¹⁴⁴ FRCP, Rule 23(e)(3).

¹⁴⁵ FRCP, Rule 23(e)(2).

¹⁴⁶ FRCP, Rule 23(e)(4).

¹⁴⁷ FRCP, Rule 23(e)(5).

¹⁴⁸ FRCP, Rule 23(g)(1)(A)(i).

¹⁴⁹ FRCP, Rule 23(g)(1)(A)(ii).

¹⁵⁰ FRCP, Rule 23(g)(1)(A)(iii).

¹⁵¹ FRCP, Rule 23(g)(1)(A)(iv).

matter to the adequacy of representation.¹⁵² The court must appoint the best candidate to class counsel,¹⁵³ who has a duty to represent class interests fairly and adequately.¹⁵⁴ Exceptionally, in the case of a putative class, the court may designate interim counsel until the class certification decision.¹⁵⁵ Lastly, the court defines the payment of attorney's fees and recovery of nontaxable costs.¹⁵⁶ The class counsel presents the claim for an award by motion, publicised to all parties and class members¹⁵⁷ - who may object.¹⁵⁸ For this particular decision, the court may hold a hearing¹⁵⁹ and also refer these issues to a special master or magistrate judge.¹⁶⁰

In general terms, these are the norms that establish the architecture of class actions, allocating powers, defining rights and duties, and influencing legal implementation and final outcomes.¹⁶¹ Several precedents and statutes also constitute the legal architecture of class actions, especially the Class Action Fairness Act (CAFA) - with federal jurisdiction for inter-state class actions and restriction for coupon settlements.¹⁶² This metaphor of legal architecture is

¹⁵² FRCP, Rule 23(g)(1)(B).

¹⁵³ FRCP, Rule 23(g)(2).

¹⁵⁴ FRCP, Rule 23(g)(4).

¹⁵⁵ FRCP, Rule 23(g)(3).

¹⁵⁶ FRCP, Rule 23(h).

¹⁵⁷ FRCP, Rule 23(h)(1).

¹⁵⁸ FRCP, Rule 23(h)(2).

¹⁵⁹ FRCP, Rule 23(h)(3).

¹⁶⁰ FRCP, Rule 23(h)(4).

¹⁶¹ Denis Galligan, *Law in modern society* (OUP 2007) 299.

¹⁶² The CAFA discouraged coupon settlements by relating the attorney's fee award to the value of coupons effectively redeemed - § 1712(a); established protection against monetary loss by class

useful, because the combination of norms, remedies, outcomes, and party roles establishes normative regimes with particular patterns formed by each part and their relationships.¹⁶³ The next section explores the socio-legal aspects emerging from the legal architecture of class actions.

2.3.2 Incentives for class actions

Collective litigation is influenced by the particular conditions for its economic viability. These aspects are defined by institutional and contextual factors related to the legal architecture, such as third-party funding in Australia, Percentage of the Fund (POF) or the lodestar formula in the US, and special public funds in Canada, for instance.¹⁶⁴ Class actions are calibrated by a regime of economic incentives and disincentives, which is established by a complex bundle of rules relating to fees, funding, rewards, and sanctions.¹⁶⁵ Emphasising these monetary aspects, commentators refer to the class action as a transactional

members, restricting the possibility of negative net benefits only for cases with substantial nonmonetary benefits - § 1713; protected class members against variation of payment based on geographic location of their residences - § 1714; established the jurisdiction of federal courts for interstate class actions with the respective removal of these class actions - § 1453. This controversial act was based on rhetoric of 'abuses of the class action device' that supposedly harmed class members, commerce, and the public respect for the US justice system. On the controversy and the dispute to enact CAFA, see Scott Nelson, 'CAFA in the Congress: the eight year struggle', in Gregory Cook (ed), *The Class Action Fairness Act: Law and Strategy* (ABA 2013) 23-70.

¹⁶³ Galligan (n. 161) 307.

¹⁶⁴ Camille Cameron, Jasminka Kalajdzic, and Alon Klement, 'Economic enablers', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 137. The Percentage of Fund consists of a regime in which courts calculate the attorney fees based on the estimated or on the actual volume of compensatory damages for consumers. When judges signal that attorney's fees will be based on actual compensation, lawyers have incentives to design settlements that facilitate the effective payment of compensatory damages for consumers instead of accepting payments with coupons or high standards of evidence. Lodestar formula combines worked hours of lawyers with multipliers normally based on performance.

¹⁶⁵ Hensler and others (n. 56) 72.

mode of conflict solving.¹⁶⁶ Class counsel are normally self-funded lawyers,¹⁶⁷ working under the perspective of payment of lucrative fees based on the lodestar method, the POF, or any other equivalent criterion for their awards.¹⁶⁸

Conscious of the economic consequences of collective litigation, attorneys may behave according to potential economic rewards and losses resulting from a class action suit.¹⁶⁹ The opportunity cost of a class counsel motivates her conduct, influenced by the expected marginal return on the lawyer's investment of time and money.¹⁷⁰ For instance, fees-oriented lawyers may favour cases with dispensable costly and lengthy pre-trial discovery procedures.¹⁷¹ Likewise, loss of a case results in covering expenses without recovering any fees.¹⁷² Thus, the practice of a lawyer in this area may be influenced by the pursuit of monetary gains, with strategies varying according to prospects of profiting from the class action suit.¹⁷³

This economic calculation may be problematic, if the attorney's private interests are not aligned with class members' interests.¹⁷⁴ However, some

¹⁶⁶ David Rubenstein, A transactional model of adjudication, *Georgetown Law Journal*, Vol 89 (2001) 419-27.

¹⁶⁷ Morris Ratner, Class counsel as litigation funders, *Georgetown Journal of Legal Ethics*, vol 28 (2015) 272-7.

¹⁶⁸ Hensler and others (n. 56) 71-2.

¹⁶⁹ Hensler and others (n. 56) 71-9.

¹⁷⁰ Cameron, Kalajdzic, and Klement (n. 164) 144.

¹⁷¹ Bryant Garth, Ilene Nagel, S. Jay Plager, The Institution of the Private Attorney General: Perspectives from an empirical study of class action litigation, *Southern California Law Review*, vol 61 (1987) 377.

¹⁷² Hensler and others (n. 56) 71-72.

¹⁷³ Hensler and others (n. 56) 78-79.

¹⁷⁴ Cameron, Kalajdzic, and Klement (n. 164) 145.

concrete examples reveal that class attorneys may pursue collective litigation differently from the predictions of the economic model.¹⁷⁵ Moreover, the legal architecture may calibrate and realign the economic incentives for collective action. For instance, lawyers may focus more energy on obtaining a monetary award, if they believe their fees depend largely on such award.¹⁷⁶ The temptation to collude is perceived as one of the fragilities of the U.S. class action system, but the legal architecture may reduce incentives for detrimental settlements to the class in the attorney's own interest.¹⁷⁷ Due to this potential orientation towards profit, class counsels are sometimes described as 'bounty hunters'.¹⁷⁸

Importantly, class attorneys pursue collective goals motivated by their individual interests, but are not expected to abandon the class interests for the bounty.¹⁷⁹ The monetary reward to the class attorney is formed as a result of the economies of scale generated by the aggregation of multiple individual claims.¹⁸⁰ The aggregation of multiple small value claims increases the total value of the litigation, reducing transaction costs and establishing economic pressure for defendants to consider a global settlement - being essential for the economic viability in the legal market of these small value claims.¹⁸¹ Once a case is certified as a collective action suit, defendants may have stronger economic incentives to

¹⁷⁵ Cameron, Kalajdzic, and Klement (n. 164) 146.

¹⁷⁶ Garth, Nagel, and Plager (n. 171) 381.

¹⁷⁷ Hensler and others (n. 56) 79-85.

¹⁷⁸ Hensler and others (n. 56) 402; Garth, Nagel, and Plager (n. 171) 354; Cameron, Kalajdzic, and Klement (n. 164) 144.

¹⁷⁹ Hensler and others (n. 56) 122-3; Cameron, Kalajdzic, and Klement (n. 164) 144.

¹⁸⁰ Cameron, Kalajdzic, and Klement (n. 164) 144.

¹⁸¹ Cameron, Kalajdzic, and Klement (n. 164) 144.

settle.¹⁸² On the other hand, without these aggregation effects, potential rewards are less attractive for class action plaintiffs.¹⁸³

The possibility of imposing punitive damages is another important factor for calculation of monetary rewards resulting from US Class Actions.¹⁸⁴ Private companies are normally risk averse and may prefer to trade uncertainty of extreme loss for the certainty of a reasonable economic loss, if faced with probability of suffering exemplary economic sanctions - the so-called 'bet the company' risk.¹⁸⁵ In this setting, companies may choose to settle cases, preventing convictions to pay punitive damages imposed by juries.¹⁸⁶ The rationale of this model implies compliance through deterrence, based on threat of potential economic losses.¹⁸⁷ However, after the series of limitations and caps on punitive damages imposed by the USSC, class action attorneys should no longer expect unlimited rewards.¹⁸⁸

¹⁸² Deborah Hensler refers to the terrorising effect of the class certification decision and describes a case in which the effects of certification and decertification are particularly salient regarding blood clotting products for hemophiliacs. Hensler and others (n. 56) 475 & 300-8. See *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

¹⁸³ Craig Jones, *Theory of class actions* (Irwin 2003) 41.

¹⁸⁴ Francesco Parisi and Marta Silvia Cenini, 'Punitive damages and class actions', in Jürgen Backhaus, Alberto Cassone, Giovanni Ramello (eds), *The law and economics of class actions in Europe: lessons from America* (Edward Elgar 2012) 136-9

¹⁸⁵ Hensler and others (n. 56) 485.

¹⁸⁶ Jones (n. 183), 56-8.

¹⁸⁷ See, for instance, A. Mitchell Polinsky and Steven Shavell, Punitive damages: an economic analysis, *Harvard Law Review*, vol 111 (1998) 869. However, observing empirical data, Cass Sunstein suggested that jury decisions are somewhat erratic and provide arbitrary results. See Cass Sunstein and others, *Punitive damages: how juries decide* (Chicago 2002) 26; Cass Sunstein, Daniel Kahneman, and David Schkade, 'Assessing Punitive Damages (with notes on cognition and valuation in law)', in Cass Sunstein (ed), *Behavioral law and economics* (CUP 2000) 233-40.

¹⁸⁸ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

Critics claim that the US class actions system is expensive, driven by economic considerations, and fosters a culture of litigation.¹⁸⁹ For instance, Hodges points to the possibility of frivolous litigation and 'blackmail settlements' to conclude that collective actions should be a last resort.¹⁹⁰ However, his critique is based on a logical fallacy. According to him, "the most important issue is whether claims that are brought, and particularly settled, have sufficient merit, and on that there is little reliable evidence but much assertion".¹⁹¹ First, little evidence that claims have sufficient merit does not authorise a conclusion necessarily based on the premise that there is sufficient evidence that claims have little merit. Second, the merits of a collective action are not a question answerable through empirical evidence, but rather a matter of perspective¹⁹² and normative judgment.¹⁹³ Hodges suggests that a normative judgment may be derived exclusively by factual observation of empirical evidence, committing the naturalistic fallacy by conflating normativity and facticity.¹⁹⁴ As Hensler explains:

Whether the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible

¹⁸⁹ Christopher Hodges, The European approach to justice and redress, *Supreme Court Law Review*, vol 53 (2011) 305. Hodges reproduces a statement from the EU Commission in 2009: "U.S. style class action is not envisaged. EU legal systems are very different from U.S. legal system which is the result of a 'toxic cocktail' – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures). This combination of elements – 'toxic cocktail' – should not be introduced in Europe".

¹⁹⁰ Christopher Hodges, 'US class actions: promises and reality', in Hans-W. Micklitz and Andrea Wechsler (eds), *The transformation of enforcement: European economic law in a global perspective* (Hart 2016) 225.

¹⁹¹ Hodges (n. 190) 224.

¹⁹² Hensler and others (n. 56) 416-7.

¹⁹³ Hensler and others (n. 56) 466-8.

¹⁹⁴ On the naturalistic fallacy and the idea that justice does not derive from nature, but from artifice based on judgment and understanding, see David Hume, *A treatise of human nature* (2nd edn OUP 1978) 455-76 & 488-9

for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters for judgment.¹⁹⁵

Obviously, class actions may be normatively evaluated and have the capacity to do good and ill.¹⁹⁶ However, judicial oversight may provide stricter regulation of class actions, reducing and eliminating abusive litigation.¹⁹⁷ Moreover, in contrast to this rhetoric of 'litigation explosion' and 'culture of compensation' used for lobbying and curtailment of civil justice systems, most actions are settled and trials are rare.¹⁹⁸ This combination of positive and negative aspects is also observed in the performance of the leading and supporting actors of class actions, as discussed in the next section.

2.3.3 Leading and supporting collective actors: counsel and plaintiff

Socio-legal studies reveal many nuances of class actions. One important dimension is related to the performance of leading and supporting roles in class actions dynamics. In theory, the plaintiff is the leader of litigation and the lawyer is responsive to the demands of her client.¹⁹⁹ However, in class actions, attorneys initiate and control the litigation, instead of class members.²⁰⁰ Class

¹⁹⁵ Deborah Hensler, Revisiting the monster: new myths and realities of class action and other large scale litigation, *Duke Journal of Comparative & International Law*, vol 11 (2001) 205.

¹⁹⁶ Hensler and others (n. 56) 472.

¹⁹⁷ Hensler and others (n. 56) 485 & 497-8; Jones (n. 183) 58.

¹⁹⁸ Hazel Genn, *Judging civil justice* (CUP 2010), 29-32.

¹⁹⁹ John Coffee Jr, The regulation of entrepreneurial litigation: balancing fairness and efficiency in the large class action, *The University of Chicago Law Review*, vol 54 (1987) 877.

²⁰⁰ Cameron, Kalajdzic, and Klement (n. 164) 156.

representatives have little incentive to fund, lead, or control the collective litigation - therefore having only a minor supporting role in class actions.²⁰¹ One possible role for class members is monitoring the performance of counsels, but individual incentives are necessary and may lead to conflicts of interest among class members.²⁰² Importantly, the legal architecture created the necessary conditions for the emergence of the class counsel as the protagonist of class actions.

Private attorneys are not the sole leading actors. Public attorneys are also relevant and their performance is particularly important in some politically sensitive cases, such as the global settlements resulting from tobacco litigation.²⁰³ Likewise, public attorneys may also pursue regulatory enforcement in courts, demanding monetary compensation and exemplary economic sanctions.²⁰⁴ However, these public actors are normally under-resourced, understaffed, and dependent on political circumstances.²⁰⁵ Consumer associations and other centres for public interest litigation may eventually also experience limitations resulting from low funding or their internal policy agendas.²⁰⁶ Even

²⁰¹ On the social value of compensating named plaintiffs for good performance, see Theodore Eisenberg and Geoffrey Miller, Incentive awards to class actions plaintiffs: an empirical study, *UCLA Law Review*, vol 53 (2006) 1305-6; Cameron, Kalajdzic, and Klement (n. 164) 156.

²⁰² On the importance of monitoring class counsel and eliminating conflict of interests with named plaintiffs through incentive awards, see Richard Nagareda, Restitution, rent extraction, and class representatives: implications of incentives awards, *UCLA law review*, vol 53 (2006) 1488-1491; Cameron, Kalajdzic, and Klement (n. 164) 156.

²⁰³ Hensler (n. 195) 208-9.

²⁰⁴ John Coffee Jr, *Entrepreneurial litigation: its rise, fall, and future* (Harvard 2015), 174-6.

²⁰⁵ Coffee (n. 204) 177-80; Ianika Tzankova and Deborah Hensler, 'Collective settlement in the Netherlands: some empirical observations', in Christopher Hodges and Astrid Stadler (eds), *Resolving mass disputes: ADR and settlement of mass claims* (Edward Elgar 2013) 104.

critics of profit-oriented private attorneys, recognise their essential role in providing deterrence and consumer compensation through class actions.²⁰⁷

In this context, class attorneys are accorded different labels, such as 'private attorney general', 'bounty hunter', and 'legal entrepreneur'.²⁰⁸ Judge Jerome Frank coined the expression “private attorney general” to refer to plaintiffs that defend public goods through private suits.²⁰⁹ This concept generated widespread debate in the North American academia about the role of private lawyers in advancing the public interest.²¹⁰ At one extreme, class action attorneys are perceived as “social advocates”, whose main interest is to promote social justice through collective litigation and to pursue innovative litigation on behalf of disenfranchised individuals – for instance, minorities, consumers, and employers.²¹¹ At the other extreme, class action attorneys are identified as “legal mercenaries”, whose main interest is profit maximisation through apparently simple cases that would lead to settlement with high economic rewards.²¹²

In practice, class counsels do not correspond to neither the romantic nor the apocalyptic image. Empirical research has revealed that the majority of

²⁰⁶ Byron Stier and Ianika Tzankova, 'The culture of collective litigation: a comparative analysis', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 32.

²⁰⁷ Coffee (204) 219-20.

²⁰⁸ Cameron, Kalajdzic, and Klement (n. 164) 144.

²⁰⁹ *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

²¹⁰ John C Coffee Jr, Rescuing the private attorney general: why the model of the lawyer as a bounty hunter is not working, *Maryland Law Review*, vol 42 (1983) 215; Garth, Nagel, and Plager (n. 171) 353; William B. Rubenstein, On what a private attorney general is – and why it matters, *Vanderbilt Law Review*, vol 57 (2004) 2129; Pamela Karlan, Disarming the private attorney general, *University of Illinois Law Review* (2003) 183.

²¹¹ Garth, Nagel, and Plager (n. 171) 356.

²¹² Garth, Nagel, and Plager (n. 171) 356.

Californian class action suits were brought as a consequence of an investigation made by the public sector – a regulatory agency or the AGO.²¹³ As a party representative, the private lawyers were acting on behalf of the class to obtain injunctive relief and recover damages for a collective wrongdoing identified by someone else - the so-called 'piggyback' class action.²¹⁴ Additionally, one third of the class action suits were initiated by lawyers affiliated with the Legal Services Corporation, hired by the U.S. government to provide free lawyering for the poor.²¹⁵ This empirical evidence suggests an excessive romanticism on the appealing image of the class counsel as a legal entrepreneur, bringing innovative claims to courts, mobilising the class, seeking social justice, and taking risks to change the law.²¹⁶ The so-called “private attorney general” depends largely on public funding and the regulatory activities of public actors.²¹⁷

Therefore, the traditional distinction between private and public enforcement seems blurred, because enforcement results from a mixed combination of organisations and individuals.²¹⁸ Examining the class actions through the perspectives of a collective entity and a collectivisation of individual interests may provide important analytical insights.

²¹³ Garth, Nagel, and Plager (n. 171) 375-8.

²¹⁴ Garth, Nagel, and Plager (n. 171) 376.

²¹⁵ Garth, Nagel, and Plager (n. 171) 382-4.

²¹⁶ Garth, Nagel, and Plager (n. 171) 395-6.

²¹⁷ Garth, Nagel, and Plager (n. 171) 395-6.

²¹⁸ Deborah Hensler and Elisabeth Thornburg, 'The public dimension of private collective litigation', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 268.

2.3.4 Class action as an entity and as a collectivisation

The class action may be analysed as an entity and as a collectivisation of individuals.²¹⁹ Viewed as an entity the class transcends the individuals who constitute the collective entity.²²⁰ The class is the litigating entity, the party, and the attorney's client in a collective action.²²¹ From this perspective, judicial decisions should consider the interests of the class as a whole, even if individuals within the aggregate consider that they are receiving unfair treatment.²²²

Another perspective considers the class to be a multitude or a collection of individuals.²²³ From this point of view, individuals deserve to participate actively in the collective action, by developing relationships with other class members, having opportunities to voice their concerns, and to express their opinions.²²⁴ Coffee criticises efforts to improve the right to voice, vote, and participating, because it would stimulate the fragmentation of class cohesion, a cacophony of multiple voices, and difficulties in reaching compromise.²²⁵ However, he opposes the view of the class as an entity, because this legal fiction would disregard client autonomy and the individual right to exit the class - which, he argues, should be preserved and strengthened.²²⁶ Addressing the issue

²¹⁹ Alexandra Lahav, Two views of the class action, *Fordham Law Review*, vol 79 (2011) 1939.

²²⁰ Shapiro (n. 74) 919.

²²¹ Shapiro (n. 74) 940.

²²² Shapiro (n. 74) 941-2.

²²³ Yeazell (n. 76) 1071.

²²⁴ Resnik, Curtis, and Hensler (n. 60) 381-2.

²²⁵ Coffee, Class action accountability (n. 56) 406-17.

²²⁶ Coffee, Class action accountability (n. 56) 379-82 & 417-22.

of intra-group conflict within the aggregate, Rhode recommends a pluralistic approach that recognises each subgroup, providing independent representation and opportunity to accommodate the various interests affected by the collective action.²²⁷ Importantly, potential tensions involving exercise of power by individuals, intermediate groups, and the larger political entity are a classical theme of political science reproduced in the theory of group litigation.²²⁸

On the other hand, the collectivisation of individual interests normally reduces the powerlessness observed in individual actions.²²⁹ In mass torts based on collective liability, class actions produce better results than individual justice through disaggregative processes, because the collective dimension is normally ignored in an individual procedure.²³⁰ One of the major strengths of the class action is the power balance generated by the aggregation of individual interests resulting from their joint coordination as a class of potential or actual claimants.²³¹ Companies have several structural advantages – expertise, caseload management, and resources – resulting from their position as a ‘repeat player’ in litigation whereas the individual consumer is a weaker ‘one-shot’ player.²³² Aggregating all individual interests is an antidote to power imbalance and

²²⁷ Deborah Rhode, Class conflicts in class actions, *Stanford Law Review*, vol 34 (1982) 1221-2.

²²⁸ Yeazell (n. 76) 1071.

²²⁹ David Rosenberg, Class actions for mass torts: doing individual justice by collective means, *Indiana Law Journal*, vol 62 (1987) 567.

²³⁰ Rosenberg (229) 567-8.

²³¹ Galanter (n. 43) 95.

²³² Galanter (n. 43) 95.

facilitates the defence of consumer rights through class action attorneys with the necessary expertise and resources to litigate against company lawyers.²³³

The RAND Institute confirmed this theoretical insight through their comprehensive research of class action dilemmas.²³⁴ By bundling hundreds or thousands of individual lawsuits together during pre-trial development process and during settlement negotiations, plaintiff attorneys are able to achieve huge economies of scale, enhancing the benefit-risk ratio of this type of litigation and its attractiveness to them.²³⁵ Thus, the collectivisation of individuals is not only a simple technical legal device. It is also a complex socio-legal phenomenon, because it shifts the economic dimension of collective action and balances political asymmetries between the parties involved in these massive claims. More importantly, these effects turn the class action into a powerful instrument for regulatory enforcement.²³⁶ A significant number of class action negotiations result in immediate injunctive relief for the victims and payment of attorney fees without the full recovery of previous damages - therefore performing the regulatory function of class actions entirely, but not fully compensating the individual consumers.²³⁷

2.4 The European Collective Redress

²³³ Galanter (n. 43) 95.

²³⁴ Hensler and others (n. 56) 483-5.

²³⁵ Hensler (n. 115) 10.

²³⁶ Hensler and others (n. 56) 119-23 & 492.

²³⁷ Garth, Nagel, and Plager (n. 171) 381.

Collective actions are also present in Europe,²³⁸ even if commentators suggest that class actions are incompatible with European legal traditions.²³⁹ However, not only are the origins of contemporary US class actions directly connected with group litigation in England,²⁴⁰ but also the more remote historical origins of collective action may be found in the *actio popularis* of Roman law.²⁴¹ Likewise, prominent scholars for the development of the academic literature on collective actions developed their research inside European institutions.²⁴² Moreover, various forms of collective action emerged in the different European states and each jurisdiction developed a particular approach towards collective action for consumer protection.

Historically, Germany and Switzerland developed an associative action (*verbandsklagen*), in which representative plaintiffs may seek an injunctive order to protect a group.²⁴³ More recently, German law introduced a test-case

²³⁸ Deborah Hensler recently cited the presence of collective action mechanisms in Belgium, Bulgaria, Denmark, England, Finland, France, Israel, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Spain, and Sweden. See Deborah Hensler, 'The global landscape of collective litigation', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 5.

²³⁹ Hodges (n. 36) 131.

²⁴⁰ Yeazell, Group litigation and social context (n. 116) 866-8; Yeazell, *From medieval group litigation to the modern class action* (n. 116) 166-74.

²⁴¹ José Afonso da Silva, *Ação popular constitucional* (2nd edn, Malheiros 2007) 17-8.

²⁴² Notably Italian scholars developed sophisticated theoretical insights on collective actions. See, for instance, Mauro Cappelletti, Governmental and private advocates for the public interest in civil litigation: a comparative study, *Michigan law review*, vol. 73 (1975) 793-884; Michele Taruffo, Some remarks on group litigation in comparative perspective, *Duke Journal of Comparative and International Law*, vol 11 (2001) 405-21; Richard Cappalli and Claudio Consolo, Class actions for continental Europe? A preliminary enquiry, *Temple International and Comparative Law Journal*, vol 6 (1992) 217-92.

²⁴³ Dietmar Baetge, 'Germany', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (*Annals of the American Academy of Political and Social Science* 2009) 126-7; Samuel Baumgartner, 'Switzerland', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (*Annals of the American Academy of Political and Social Science* 2009) 181-3.

mechanism for judicial aggregation of individual cases particularly for capital markets.²⁴⁴ In England and Wales, the Group Litigation Order emerged as an alternative to class actions.²⁴⁵ The French enacted a joint-representative action (*action de representation conjoint*).²⁴⁶ The Portuguese developed popular actions.²⁴⁷ The Dutch established collective actions for injunctive or declaratory relief²⁴⁸ and, subsequently, a mechanism exclusively for global settlement.²⁴⁹

Diversity at local level is evident at the national legal regimes, but there is a uniform resistance in adopting the opt-out regime, contingency fees, punitive damages, and other traits of the US class action system. In 2013, the European Commission made a recommendation for a horizontal framework for European collective redress.²⁵⁰ This emerging legal architecture is discussed in the next section.

2.4.1 The architecture of collective redress

²⁴⁴ Baetge (n. 243) 127-9.

²⁴⁵ Christopher Hodges, 'England and Wales', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (Annals of the American Academy of Political and Social Science 2009) 109-10.

²⁴⁶ Véronique Magnier, 'France', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (Annals of the American Academy of Political and Social Science 2009) 117-119.

²⁴⁷ Henrique Sousa Antunes, 'Portugal', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (Annals of the American Academy of Political and Social Science 2009) 163-6.

²⁴⁸ Ianika Tzankova and Daan Lunsingh Scheurleer, 'The Netherlands', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The Globalization of class actions*, vol 622 (Annals of the American Academy of Political and Social Science 2009) 152-3.

²⁴⁹ Tzankova and Scheurleer (n. 248) 153-4.

²⁵⁰ Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights, COM (2013) 3539/3, 11.6.2013.

According to the European Commission, the professed objectives of collective redress include access to justice, cessation of illegal behaviour, compensation, and avoidance of abusive litigation.²⁵¹ Collective redress mechanisms for both injunctive and compensatory relief are expected to be fair, equitable, timely, not prohibitively expensive, and respect different legal national traditions.²⁵² Each state is expected to designate a non-profit entity with sufficient capacity to bring representative actions to courts.²⁵³ In addition to officially pre-certified entities and those judicially certified *ad hoc*,²⁵⁴ public authorities may also be empowered to file representative actions.²⁵⁵

Collective actions are admitted by judicial decision,²⁵⁶ preferably at the earliest possible stage of litigation.²⁵⁷ Once a collective redress is judicially admitted, the representative entity or group of claimants have to disseminate information about the action and the violated rights,²⁵⁸ according to the particular circumstances, freedom of expression, right to information, and the

²⁵¹ Recommendation, para 1.

²⁵² Recommendation, para 2.

²⁵³ Recommendation, para 4.

²⁵⁴ Recommendation, para 6.

²⁵⁵ Recommendation, para 7.

²⁵⁶ Recommendation, para 9.

²⁵⁷ Recommendation, para 8.

²⁵⁸ Recommendation, para 10.

right to protection of reputation or company value of a defendant before judicial establishment of liability.²⁵⁹

In terms of funding, the claimant party is expected to declare the origin of funds to the court,²⁶⁰ which will stay the collective action in case of third party funding with conflict of interests or with insufficient resources to cover litigation expenses or adverse costs of a loss.²⁶¹ Third party funders are prohibited to influence the litigation, to fund collective actions against competitors, and to charge excessive interest.²⁶² Additionally, the payment of the third party funder may not be based on the amount of settlement or recovery, unless such funding arrangement is regulated by a public authority that guarantees parties interests.²⁶³

Legal costs are regulated by the 'loser pays principle' and a losing party must reimburse the costs of the winning party.²⁶⁴ Lawyer's fees are not supposed to create incentives for unnecessary litigation²⁶⁵ and contingency fees should be prohibited or strictly regulated.²⁶⁶ Punitive damages should be prohibited.²⁶⁷ In principle, the claimant party should be formed by the express

²⁵⁹ Recommendation, para 11.

²⁶⁰ Recommendation, para 14.

²⁶¹ Recommendation, para 15.

²⁶² Recommendation, para 16.

²⁶³ Recommendation, para 32.

²⁶⁴ Recommendation, para 13.

²⁶⁵ Recommendation, para 29.

²⁶⁶ Recommendation, para 30.

²⁶⁷ Recommendation, para 31.

consent of the harmed persons ('opt in' principle).²⁶⁸ However, exceptionally by reasons of sound administration of justice, the law or a court decision could apply a different principle (for instance, an 'opt out' principle).²⁶⁹

The collective redress actions are divided into two different types: (i) injunctive collective redress; (ii) compensatory collective redress.²⁷⁰ Prevention of further damage requires that public authorities treat the injunctive orders with due expediency.²⁷¹ Effective compliance with an injunctive order is guaranteed by appropriate sanctions against a losing defendant, including payments for delay or any other amount fixed by national legislation.²⁷²

If a public authority is empowered to adopt a decision finding on the object of a collective action, the court should avoid delivering a decision in conflict with a decision by the public authority and may stay the collective redress action until the conclusion of proceedings by the public authority.²⁷³ States should also guarantee that these follow-on collective actions are not affected by the expiry of limitation or prescription periods and may be filed after final conclusion of proceedings by public authority.²⁷⁴ In cross-border cases, a single collective action may aggregate all interests from persons of various member states in a single court.²⁷⁵ Representative entities certified by any

²⁶⁸ Recommendation, para 21.

²⁶⁹ Recommendation, para 21.

²⁷⁰ Recommendation, para 3.

²⁷¹ Recommendation, para 19.

²⁷² Recommendation, para 20.

²⁷³ Recommendation, para 33.

²⁷⁴ Recommendation, para 34.

²⁷⁵ Recommendation, para 17.

member state may bring collective redress actions at any other jurisdictions within the European Union.²⁷⁶

In terms of ADR, the member states should guarantee that the mechanisms of judicial collective redress are accompanied by means of collective ADR before and during litigation, depending on the consent of the parties.²⁷⁷ Parties are encouraged to settle their disputes consensually at pre-trial stage or during trial.²⁷⁸ The limitation period is suspended during the negotiation of settlements.²⁷⁹ The legality of a settlement should be verified by courts, which should consider the protection of rights and interests of the involved parties.²⁸⁰

Finally, a national registry of collective redress actions²⁸¹ should be available to anyone interested through electronic means.²⁸² Websites should provide information on available methods for compensation, including ADR.²⁸³ The European Commission should guarantee the coherence and interoperability of the information collected in these national registries.²⁸⁴

2.4.2 The ineffectiveness of opt-in collective actions

²⁷⁶ Recommendation, para 18.

²⁷⁷ Recommendation, para 26.

²⁷⁸ Recommendation, para 25.

²⁷⁹ Recommendation, para 27.

²⁸⁰ Recommendation, para 28.

²⁸¹ Recommendation, para 35.

²⁸² Recommendation, para 36.

²⁸³ Recommendation, para 36.

²⁸⁴ Recommendation, para 37.

Before the enactment of this recommendation, commentators shared a common perception that the different European mechanisms of collective action are either insufficient²⁸⁵ or inadequate²⁸⁶ to enforce consumer rights adequately and to prevent further episodes of massive wrongdoings by European companies. This emerging architecture is unlikely to change the legal environment for consumer protection.²⁸⁷ One crucial element leading to ineffectiveness is the decision to adopt the 'opt in' regime as the general rule for judicial collective redress actions.²⁸⁸ The legal design of collective actions permits choice between variations of 'opt in'/'opt out' and 'closed'/'open' groups,²⁸⁹ but opt-out regimes are more efficient in providing comprehensive compensation for consumers.²⁹⁰

The experience reveals that such an 'opt-in' regime usually does not enable judicial collective redress.²⁹¹ For instance, the only certified entity in the UK is the English consumer association 'Which?', whose legal counsel announced that costs and complexity of collective litigation would deter them from pursuing

²⁸⁵ Hans-W. Micklitz and Astrid Stadler, The development of collective legal actions in Europe, especially in German civil procedure, *European Business Law Review*, vol 17 (2006) 1473.

²⁸⁶ Hodges (n. 189) 301.

²⁸⁷ Iris Benöhr, Collective redress in the field of European consumer law, *Legal Issues of Economic Integration*, vol 41 (2014) 252.

²⁸⁸ Benöhr (n. 287) 255-6.

²⁸⁹ Rachael Mulheron lists 10 different variations of modes for opting in and opting out in class actions. See Rachael Mulheron, Opting in, opting out, and closing the class: some dilemmas for England's class action lawmakers, *Canadian Business Law Journal*, vol 50 (2011) 379-400.

²⁹⁰ Rachael Mulheron, The case for an Opt-out Class Action for European Member States: A legal and empirical analysis, *Columbia Journal of European Law*, vol 15 (2009) 409.

²⁹¹ Even Christopher Hodges, a notorious critic of judicial collective actions, concedes that the current procedural safeguards of European collective redress are barriers to access to justice by increasing costs and slowing litigation down. See Christopher Hodges, Collective redress: a breakthrough or a *Damp Sqibb?*, *Journal of Consumer Policy*, vol 37 (2014) 83.

further judicial collective redress actions.²⁹² This entity filed only one judicial collective action since its certification in 2005.²⁹³ As a follow-on collective action after the Office of Fair Trading (OFT) found JJB Sports PLC guilty of price-fixing of football shirts, 'Which?' sought compensation for the harmed mass,²⁹⁴ but the number of consumers who opted-in was only 130 out of a universe of 800,000 individuals entitled to monetary damages.²⁹⁵ The French consumer association had a similar experience with an opt-in collective action ²⁹⁶ against telecommunication companies for abusive phone charges.²⁹⁷ These cases contrast with the Portuguese experience with an opt-out model,²⁹⁸ in which consumers are not required to opt-in²⁹⁹ and a single collective action aggregates a multitude of individual claims.³⁰⁰

The aggregation effect of opt-out collective actions is a basic pre-requisite for their economic viability, because of benefits accruing from economies of

²⁹² Rachael Mulheron, A channel apart: why the United Kingdom has departed from the European Commission's recommendation on class actions, *Cambridge Yearbook of European Legal Studies*, vol. 17 (2015) 48.

²⁹³ Mulheron (n. 292) 47-8.

²⁹⁴ *The Consumers Association v JJB Sports PLC* 1078/7/9/07. <http://catribunal.org/239-640/1078-7-9-07-The-Consumers-Association.html> (checked on 15.01.17)

²⁹⁵ Mulheron (n. 292) 47.

²⁹⁶ *UFC Que Choisir v. Orange France, SFR et Bouygues Telecom* (RG 08-09844, Cour d'appel Paris, 22.01.2010).

²⁹⁷ Mulheron (n. 290) 433-4.

²⁹⁸ PAA, articles 14 and 15.

²⁹⁹ For the necessity of maintaining the opt-out regime in the Portuguese collective redress, see Rafael Vale e Reis, 'Collective redress and health care law: the specific characteristics of group compensation under Portuguese law', in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 394.

³⁰⁰ Miguel Sousa Ferro, 'Collective redress: Will Portugal show the way?', *Journal of European Competition Law & Practice*, vol 6 (2015) 299-300.

scale.³⁰¹ The opt-out mechanism is necessary for the effectiveness of collective actions.³⁰² Hodges criticises the possibility of someone being represented in a collective litigation without express consent, based on the Kantian notion of personal autonomy.³⁰³ However, Kant conceptualises personal autonomy as the possibility of self-determination, by guaranteeing the treatment of human beings *not merely as a means* but as an *end in itself*.³⁰⁴ In the context of B2C relationships, harmed consumers may have such dignified treatment denied by corporations and their self-determination is not inhibited but rather promoted by collective procedures that enable persons to enforce their rights.³⁰⁵ In a comprehensive empirical study of procedural inclusion in collective actions, Mulheron demonstrated that the opt-out regime leads to very high participation rates in contrast to the opt-in regime.³⁰⁶

In the opt-in regime, many consumers are not represented and compensation is not provided to those less informed, vulnerable, or simply with a tendency towards inertia.³⁰⁷ On the other hand, the opt-out regime provides

³⁰¹ Fabrizio Cafaggi and Hans-W. Micklitz, *Collective enforcement of consumer law: a framework for comparative assessment*, *European Review of Private Law*, vol 3 (2008) 394; Andrew Higgins and Adrian Zuckerman (2013) *Class actions in England? Efficacy, autonomy and proportionality in collective redress*, Working Paper n 93 at the Legal research Paper Series of the University of Oxford, 17.

³⁰² Higgins and Zuckerman (n. 301) 20-1.

³⁰³ Hodges (n. 36) 5.

³⁰⁴ Immanuel Kant, *Groundwork of the metaphysics of morals* (CUP 2012) 39-40.

³⁰⁵ Higgins and Zuckerman (n. 301) 21-2.

³⁰⁶ Rachael Mulheron, 'Reform of collective redress in England and Wales: a perspective of need' (2008) Research paper for submission to the Civil Justice Council of English and Wales, 147-61.

³⁰⁷ Ferro (n. 300) 299.

the fewest barriers to access to courts, because parties do not need to take any proactive steps to join and benefit from the collective action.³⁰⁸

2.4.3 The incentives for collective redress

EU policy-makers normally exaggerate the perceived vices of US class actions and overlook their virtues regarding the achievement of deterrence, access to justice, and judicial economy through collective actions.³⁰⁹ According to Taruffo, this resistance to group litigation in Europe is produced by a combination of ignorance, negative propaganda, and distorted perspectives of the US system of litigation.³¹⁰ Regardless of the reasons, this resistance has led to excessive procedural safeguards, which may establish insurmountable obstacles for the collective protection of consumer rights.³¹¹ Collective redress has little prospects of economic viability in Europe and this recommendation simply reinforces a regime of risky funding, high costs, and a lack of consumer awards and corporate sanctions.³¹²

Collective redress is not funded by a plaintiff attorney motivated by potential monetary incentives. In the absence of a regime of lawyers' fees calculated as a percentage of the fund, the alternative becomes third party

³⁰⁸ Higgins and Zuckerman (n. 301) 20.

³⁰⁹ Mulheron (n. 292) 63.

³¹⁰ Taruffo (n. 242) 413-5.

³¹¹ Benöhr (n. 287) 253.

³¹² Benöhr (n. 287) 253-4.

funding.³¹³ However, the Commission suggests very strict rules on funding, imposing a significant barrier to the effectiveness of collective redress.³¹⁴ With the current trend of economic austerity, restrictions on legal aid, and on the financing of the civil justice system,³¹⁵ the possibility of public funding for collective redress does not appear on the normative horizons of the Commission either.³¹⁶

The payment of litigation costs is another problematic feature of collective redress. In general, there are three possible regimes: (i) the no-way costs rule or American rule, in which the parties are normally responsible only for bearing their own litigation costs;³¹⁷ (ii) the one-way costs rule, in which only the losing defendant pays litigation costs, but the representative claimant does not have to cover these costs in case of loss;³¹⁸ (iii) the two-way costs rule (also known as the English rule, costs shifting rule, or 'loser pays' rule), in which the losing party always have to pay litigation costs.³¹⁹

The recommendation adopts the 'loser pays' principle or costs shifting rule, imposing higher financial risks on consumers.³²⁰ This rule creates a real

³¹³ Benöhr (n. 287), 253.

³¹⁴ Benöhr (n. 287), 253-4.

³¹⁵ Genn (n. 198) 43-5.

³¹⁶ Benöhr (n. 287), 254.

³¹⁷ Rachael Mulheron, Costs shifting, security for costs, and class actions: lessons from elsewhere, in Deirdre Dwyer (ed), (OUP 2010) 190. In the US, there are exceptions in which cost shifting applies.

³¹⁸ Mulheron (n. 317) 190.

³¹⁹ Mulheron (n. 317) 188-9.

³²⁰ Benöhr (n. 287), 253.

disincentive for collective actions.³²¹ By doubling the potential monetary burden of the consumer representative, the risk of adverse cost order may generate a chilling effect on their willingness to pursue collective actions.³²² Additionally, the lack of consumer awards and corporate sanctions provides another disincentive for collective redress. Among the procedural safeguards suggested by the Commission is the prohibition of punitive damages.³²³ This prohibition is based again on the negative image of US class actions in Europe, which is exaggerated³²⁴ - especially because judges make judgments rather than juries. This lack of proper monetary incentives produces an environment of low compensation and regulatory enforcement.

For instance, Micklitz and Stadler criticise the absence of an adequate collective action in Germany, because harmed consumers rarely assert and recover small claims damages.³²⁵ However, they endorse a legal architecture that leads to the same under-deterrence they find unsatisfactory. First, collective action should follow the 'opt-in' regime, because the 'opt-out' alternative would imply obligatory participation in a procedure.³²⁶ Their opinion is conceptually wrong, since there would be only obligatory participation in so-called mandatory collective actions.³²⁷ In the opt-out regime, however, the collective action begins

³²¹ Mulheron (n. 317) 189.

³²² Higgins and Zuckerman (n. 301) 17.

³²³ Benöhr (n. 287) 253.

³²⁴ Micklitz and Stadler (n. 285) 1481.

³²⁵ Micklitz and Stadler (n. 285) 1474.

³²⁶ Micklitz and Stadler (n. 285) 1499.

³²⁷ See David Rosenberg, Mandatory-litigation class action: the only option for mass tort cases, *Harvard Law Review*, vol 115 (2002) 831. Ironically, the German law adopted exactly a

without express consent, but an individual group member may exercise the right to exit, precisely by opting out of the collective procedure to pursue individual litigation.³²⁸ Second, Micklitz and Stadler criticise the US model of funding and contingency fees, suggesting that there is no necessity to change the European rule and pay lawyers based on their success.³²⁹ This argument ignores that these monetary incentives explain the expansion of the US class actions and that the rejection of premium fees should be followed by the proposal of alternative economic enablers for collective actions.³³⁰

A prodigious example of failure of the German collective action comes from the *Deutsche Telekom* case.³³¹ Instead of having an opt-out regime, Germany developed a mechanism of aggregate litigation based on the judgment of a 'test-case' that requires individual financial consumers to either file an individual judicial action or register their claim as part of the collective action.³³² Consequently, even if this case led to the flooding of the Frankfurt court, the collective action consisted of only 15,000 consumers out of approximately a million individuals harmed by the misleading statement in the company

mandatory form of judicial aggregation without any of the benefits of the opt-out regime, but with all burdens of a slow, inefficient, and unmanageable 'test-case' procedure. See Axel Halfmeier, 'Litigation without end? The *Deutsche Telekom* case and the German approach to private enforcement of securities law', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 287.

³²⁸ Damian Grave and Jason Betts, 'The commission recommendation on common principles for collective redress: some reflections from Australia', in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 224.

³²⁹ Micklitz and Stadler (n. 285) 1500.

³³⁰ Myriam Doriat-Duban, Samuel Ferey, and Sophie Harney, 'The economics of class actions: fundamental issues and trends', in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 42-3.

³³¹ Halfmeier (n. 327) 279-86.

³³² Halfmeier (n. 327) 294.

prospectus - or 1,5%.³³³ Accidentally, funding was provided by the personal insurance widely used in Germany, but all insurance companies changed their policies and excluded securities litigation.³³⁴ Without an alternative economic enabler, consumers are unable to fund litigation to protect their investments. In a nutshell, ordinary citizens feel powerless, alienated, and resentful against legal institutions and the failure of the German legal system to help loss recovery has a negative effect on their decision to become a shareholder in the future.³³⁵

Unsurprisingly, the judge formerly in charge of the *Deutsche Telekom* case recently made an appeal for European states to develop more inclusive mechanisms for mass actions that guarantee access to justice and timely judicial decisions.³³⁶ In his opinion, effective collective redress may only be achieved through mechanisms that reduce individual participation and the contemporary stringent requirements of German civil procedure.³³⁷ In the words of judge Meinrad Wösthoff:

It is inconceivable that a small group of judges - or even a single judge - have to arrive in a 'timely' fashion at a satisfactory conclusion in a mass action where hundreds of lawyers submit thousands of documents forming hundreds of thousands of pages in total, and where submissions are made by lawyers in many different ways.³³⁸

³³³ Halfmeier (n. 327) 296.

³³⁴ Halfmeier (n. 327) 295.

³³⁵ Halfmeier (n. 327) 297.

³³⁶ Meinrad Wösthoff, Collective redress from a judicial perspective, in Eva Lein and others (eds), *Collective redress in Europe - why and how?* (BIICL 2015) 90.

³³⁷ Meinrad Wösthoff (n. 336) 90.

³³⁸ Meinrad Wösthoff (n. 336) 91.

Unfortunately, the *Deutsche Telekom* is not an isolated case. In the UK, only 600 out of a total of 2 million consumers included themselves in the collective action promoted by the UK consumers' association *Which?* in the case of fixed prices of replica football shirts - 0,03%.³³⁹ The failure of the current model of collective redress is also evidenced by the fact that the judges refused to adopt the legal framework of the GLO in the mass tort litigation resulting from the Buncefield explosion.³⁴⁰ The European framework for collective redress requires a careful reconsideration of its regime of incentives to guarantee access to justice and consumer compensation. One of the alternatives may be related to the institutional players that perform the role of consumer representatives, as discussed in the next section.

2.4.4 Consumer representatives, demands, and pathways

Group representation is an essential feature of the environment of collective action for consumer protection. As Koch explains, individuals may not appoint themselves as named plaintiffs, because the European tradition entrusts the public interest to public institutions³⁴¹, even if some problems may emerge:

By doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation. Under such a

³³⁹ Hodges (n. 36) 24-6.

³⁴⁰ Naomi Creutzfeldt and Christopher Hodges, 'Parallel public and private responses: the Buncefield explosion', in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar 2016) 320-1.

³⁴¹ Harald Koch, Non-class group litigation under EU and German law, *Duke Journal of Comparative and International Law*, vol 11 (2001) 357-8.

system, the interests of individual victims of unlawful behavior tend to be neglected in larger and more autonomous organisations.³⁴²

The different organisational structure and institutional dynamics of the consumer representatives definitely influence their performance. Traditionally, two types of organisations have exercised the role of consumer representatives in the European tradition: (i) private consumer associations, which constitute a particular group of members whose rights are collected for purposes of procedural economy;³⁴³ (ii) independent public bodies, which are public institutions that have an administrative mandate for law enforcement and are also granted the procedural right of collective actions.³⁴⁴ Consumer associations normally represent the identified member of their constituencies.³⁴⁵ Additionally, *ad hoc* interest groups may be formed for the special purpose of representing members in collective litigation and settlements.³⁴⁶ In terms of public bodies, regulatory agencies and the Ombudsman exercise this role of consumer representative,³⁴⁷ even if there is an objection related to reliance on government funding which may limit political autonomy.³⁴⁸

³⁴² Koch (n. 341) 358.

³⁴³ Koch (n. 341) 361.

³⁴⁴ Koch (n. 341) 362.

³⁴⁵ Koch (n. 341) 361.

³⁴⁶ Koch (n. 341) 361.

³⁴⁷ Cafaggi and Micklitz (301) 424.

³⁴⁸ Koch (n. 341) 361.

The European legal environment is diverse with some jurisdictions relying more on the consumer associations³⁴⁹ (e.g. Germany, Austria, and Portugal) and others on the public bodies³⁵⁰ (e.g. regulatory agencies in the UK and the Ombudsman Scandinavian countries). Importantly, various institutional players in constant interaction constitute the normative environment and their actions in a complex combination set standards, impose sanctions, and ensure recovery at the regulatory space.³⁵¹ Cafaggi and Micklitz suggest that this interaction depends on the leader of consumer law enforcement - in countries with a strong public body, the consumer associations play a less important role and vice versa.³⁵² Some actors develop a stronger institutional structure and possess key resources - information, wealth, organisation - that confer authority.³⁵³ The weight, governance, and accountability of the private associations vary considerably and reliance on public enforcement has grown.

These institutional actors are not responding adequately to contemporary consumer demand. European consumers consider that litigation costs, the need for legal knowledge, and lengthy procedures constitute obstacles for access to justice.³⁵⁴ In a recent survey, 79% of respondents indicated they would defend their rights in court, if collective action mechanisms were available.³⁵⁵ However,

³⁴⁹ Hodges (n. 36) 37-40.

³⁵⁰ Hodges (n. 36) 16-37.

³⁵¹ Collin Scott, *Analysing regulatory space: fragmented resources and institutional design*, *Public Law* (2001) 331; Bettina Lange, *Regulatory spaces and interactions: an introduction*, *Social & legal studies*, vol 12 (2003) 414.

³⁵² Cafaggi and Micklitz (301) 403.

³⁵³ Scott (n. 351) 333-7.

³⁵⁴ Benöhr (n. 287) 244.

since there has been an inadequate judicial response to consumers' demands, various pathways direct them towards ADR.³⁵⁶ In the last few years, member states have adopted new collective action legislation,³⁵⁷ but their practical impact remains to be seen.

2.4.5 Continuous reforms and limited transformation

This section examines reforms on competition law in the EU and the UK and also a few recent key collective litigations to provide more nuanced analysis of the EU model and its influence over member-states. Collective redress experienced continuous reforms for the past decades. In terms of EU legislation, competition law introduced the debate on the adoption of collective actions as a complementary mechanism for private enforcement and regulation of the common European market.³⁵⁸ The European Commission commissioned a research that concluded in 2004 that private enforcement of competition laws

³⁵⁵ Benöhr (n. 287) 244.

³⁵⁶ Naomi Creutzfeldt-Banda, 'The origins and evolution of consumer dispute resolution systems in Europe', in Christopher Hodges and Astrid Stradler (eds), *Resolving mass disputes: ADR and settlement of mass claims* (Edward Elgar 2013) 234-5.

³⁵⁷ Rachael Mulheron, United Kingdom and French reforms of class actions: an unfinished journey, in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 97-115; Janek Tomasz Novak, The new Belgian law on consumer collective redress and compliance with EU law requirements, in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 169-201; Danguolė Bublienė, Recent collective redress developments in Lithuania: key issues in light of the commission recommendation, in in Eva Lein and others (eds), *Collective redress in Europe: why and how?* (BIICL 2015) 153-68.

³⁵⁸ Richard Whish & David Bailey, *Competition Law* (8th edn OUP 2015) 326-7; Ariel Ezrach, *EU Competition Law: An Analytical Guide to the Leading Cases* (5th edn Hart 2016) 599-600; Andrea Renda, 'Private Antitrust Damages Actions in the EU: Chronicle of an Attempted Golpe', in Hans-W Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart 2016) 273-4.

was underdeveloped in Europe.³⁵⁹ Likewise, the European Court of Justice (ECJ) reached similar conclusions in *Courage*³⁶⁰ and *Manfredi*,³⁶¹ defending the adoption of effective remedies for better enforcement of competition rules.³⁶² As proposals for reform, the Commission issued a Green Paper in 2005³⁶³ and, subsequently, a White Paper in 2008³⁶⁴ that suggested representative actions by qualified entities or opt-in collective actions (with eventually the possibility of opt-out in some special cases).³⁶⁵

These proposals faced strong scholarly criticism. Weatherill suggested that "the almost total dearth of private litigation over several decades tells a revealing story of profound disincentives to bring such matters before a court".³⁶⁶ Fairgrieve and Howells noted that "so far the impact has been quite benign on businesses, but that consumers have only had limited benefits with a series of problems making it difficult to use such mechanisms, with the finance of litigation being the main concern".³⁶⁷ Reich criticised the EU model because of the lack of "any sincere concern for collective redress of violations of consumer

³⁵⁹ Renda (n. 358) 274.

³⁶⁰ ECJ, 20 September 2001, C-453/99, *Courage v Crehan* (2001) ECR I-6298.

³⁶¹ ECJ, 13 July 2006, C-295-298/04, *Vicenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al.* (2006) ECR I-6619.

³⁶² Reich and others (n. 28) 358-9.

³⁶³ COM (2005) 672 final.

³⁶⁴ COM (2008) 165 final.

³⁶⁵ Whish and Bailey (n. 358) 327; Reich and others (n. 28) 391.

³⁶⁶ Stephen Weatherill, *EU Law: Cases and Materials* (12th edn OUP 2016) 517. On disincentives, see also Thomas Eilmansberger, *The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action*, *Common Market Law Review*, vol. 44 (2007) 446-51.

³⁶⁷ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures: European debates', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) 36.

law and may even discourage Member States from advancing legal reform: instead it seems to aim only at rejecting any US class-action initiative".³⁶⁸

This relationship with the law of member-states means that EU Law may penetrate into domestic legal systems and make disruptive demands - including national procedural law because of the principle of judicial efficiency.³⁶⁹ Therefore, there is a continuous process of reciprocal influence between EU law and the law of member-states, because EU competition law relies on enforcement through national procedures.³⁷⁰ On one hand, member-states function as national laboratories for law enforcement.³⁷¹ On the other hand, the European Competition Network provides a forum for exchange of experiences and coordinated governance of European law and policy.³⁷²

Therefore, EU law clearly influences the development of local law. Renda refers, for instance, to the new Directive on Antitrust Damages Actions³⁷³ and how it may influence negatively attempts to introduce features of US private antitrust enforcement, particularly in the case of the collective actions system for competition law recently introduced in the UK.³⁷⁴ Aligned with the EU

³⁶⁸ Reich and others (n. 28) 392.

³⁶⁹ Alison Jones and Brenda Sufrin, *EU Competition Law: Tests, Cases, and Materials* (6th edn OUP 2016) 1049-51; Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 178-9.

³⁷⁰ Katalin Cseres, 'Competition Law Enforcement Beyond the Nation-State: A Model for Transnational Enforcement Mechanisms?', in Hans-W Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart 2016) 326.

³⁷¹ Cseres (n. 370) 339.

³⁷² Cseres (n. 370) 333-5.

³⁷³ Dir 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014) OJ L349/1.

³⁷⁴ Renda (n. 358) 297.

recommendation, the UK government established a set of strong safeguards to prevent US style litigation, by requesting strict judicial certification, maintaining the 'loser-pays' rule, and prohibiting exemplary damages and contingency fees.³⁷⁵ Likewise, the UK followed the EU recommendation by authorising courts to decide between the opt-in or the opt-out regime for particular collective actions according to the particular characteristics of the case.³⁷⁶ Small departures from the EU recommendation are the legal authorisation for standalone actions and for a person to act as the class representative.³⁷⁷

The EU leaves room for expressions of local autonomy and a sense of 'unity in diversity' in the legislation of Member States.³⁷⁸ For instance, Dutch law was influenced by the US class actions regarding its framework for collective settlements.³⁷⁹ Hybridity and experimentalism are possible, but the influence of EU institutions remains strong at local level.³⁸⁰ Particularly with collective

³⁷⁵ Denis Barry and others, *Blackstone's Guide to The Consumer Rights Act 2015* (OUP 2016) 171. The new legislation may affect the ruling of the Competition Appeal Tribunal, which imposed exemplary damages of 60,000 pounds for the first time in the recent judgment *2 Travel v Cardiff City Transport Services Ltd* - Case No 1178/5/7/11 (2012) CAT 19. On the previous precedent of *Devenish etc v Sanofi-Aventis etc* (2007) EWHC 2394 (Ch) and the impossibility of applying punitive damages in UK competition because of EU law, see Wouter P. J. Wills, The relationship between public antitrust enforcement and private actions for damages, *World Competition*, vol. 32 (2009) 26-7. In contrast, for a defence of the necessity of awarding punitive damages in competition law, see Eda Sahin, The (infamous) question of punitive damages in EU competition law, *Global Competition Litigation Review*, vol. 9 (2016) 91-2.

³⁷⁶ Barry and others (n. 375) 174; Spencer Weber Waller and Olivia Popal, The fall and rise of the antitrust class action, *World Competition Law and Economics Review*, vol. 39 (2016) 41-2.

³⁷⁷ Section 47A and 47B Competition Act 1998. See Whish and Bailey (n. 358) 342-3; Barry and others (n. 375) 173.

³⁷⁸ Weatherill (n. 369) 299-300.

³⁷⁹ Ianika Tzankova and Hélène van Lith, 'Class Actions and Class Settlements Going Global: The Netherlands', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) 71; Diego Corapi, 'Class Actions and Collective Actions', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) 9.

³⁸⁰ On this hybridity, see Norbert Reich, Horizontal Liability in EC Law: Hybridization of remedies for compensation in case of breaches of EC rights, *Common Market Law Review*, vol. 44 (2007)

actions for competition law, the new EU Directive seems unlikely to modify the incentives of victims to sue³⁸¹ and is limited in scope.³⁸² The original proposals were significantly diluted and the estimated welfare impacts are uncertain.³⁸³

On the other hand, two collective actions were already filed in 2016 under the new UK legislation. First, Dorothy Gibson, the General Secretary of the National Pensioners Convention, decided to sue a producer of mobility scooters for prohibiting retailers from advertising their products online below recommended prices.³⁸⁴ Following on a 2014 decision by the OFT that found a breach of competition law, the claimant seeks damages of 200 pounds on average for some 30,000 consumers who bought a scooter between February 2012 and February 2014.³⁸⁵ The hearing of the application was scheduled for December 2016.³⁸⁶ Second, Walter Merricks, former Chief Financial Services Ombudsman, filed a collective action against Mastercard for charging abusively "interchange fees" from half a million businesses and 46 million consumers in the UK.³⁸⁷ As a follow up action based on a decision by the European Commission,³⁸⁸ this collective action has potential to become the biggest legal

708-9 & 731; Enrico Camilleri, A decade of EU antitrust private enforcement: chronicle of a failure foretold, *European Competition Law Review*, vol. 10 (2013) 531.

³⁸¹ Renda (n. 358) 294.

³⁸² Weatherill (n. 366) 517; Renda (n. 358) 298.

³⁸³ Renda (n. 358) 297-8.

³⁸⁴ *Dorothy Gibson v Pride Mobility Products Limited* (CAT 1257/7/7/16 25/05/2016).

³⁸⁵ <http://www.scooterclassaction.co.uk/scooter/#/app/HOMENEW> (checked on 15.01.17).

³⁸⁶ <http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html> (checked on 15.01.17)

³⁸⁷ *Walter Hugh Merricks CBE v Mastercard Incorporated and others* (CAT 1266/7/7/16).

claim in the UK legal history with an estimated payment of 14 billion pounds in damages.³⁸⁹ The claimant considers that all consumers in the UK between 1992 and 2014 were a victim of this practice and remained unaware of this abusive charge.³⁹⁰ Both cases are still waiting for certification at the Competition Appeal Tribunal (CAT) and their transformative impact depends on future developments.³⁹¹ However, these collective proceedings followed the EU model in the sense that they are both 'follow on actions' rather than 'standalone' cases. Likewise, the claimants are individuals with current or previous positions of leadership in associations or ombudsmen organisations.

The UK also developed a general technique for aggregation of individual cases in line with the tenets of EU collective redress by the end of the 1990s. The Group Litigation Order (GLO) is a case management technique for judges to aggregate multi-party situations and decide the common cases together at their discretion.³⁹² One of these cases was the RBS Rights Issues Case, certified as a GLO in 2013. Claimants are shareholders who invested in shares of the Royal Bank of Scotland (RBS) between 15 May 2008 and 6 June 2008, suffering considerable losses allegedly because of inaccurate or incomplete prospectuses.³⁹³ Some 31,000 retail investors participate in two different

³⁸⁸ COMP/34.579 Mastercard, COMP/36.518 Euro-Commerce, and COMP/38.580 Commercial Cards.

³⁸⁹ <http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html> (checked on 09-01-17).

³⁹⁰ <http://www.quinnemanuel.com/the-firm/news-events/firm-news-mastercard-facing-claim-of-up-to-14-billion-damages-from-uk-consumers-in-landmark-collective-action/> (checked on 15.01.17).

³⁹¹ Bruce Wardhaugh, Bogeymen, lunatics, and fanatics: collective actions and the private enforcement of European competition law, *Legal Studies*, vol. 34 (2014) 19-21.

³⁹² Christopher Hodges, *Multi-Party Actions* (OUP 2001) 11-5.

litigation groups: RBoS Shareholders Action Group;³⁹⁴ and RBS Rights Issue Action Group.³⁹⁵ Additionally, hundreds of institutional investors are represented by these two groups or by three boutique law firms.³⁹⁶ The total volume of damages could reach 4.7 billion pounds.³⁹⁷ The three law firms settled several cases on behalf of institutional investors for a millionaire amount, but representatives of retail investors rejected the proposal of settlement from RBS and seem likely to litigate their cases in a trial scheduled for March 2017.³⁹⁸

This GLO led a commentator to suggest that US style securities class actions are now part of English civil litigation, as dozens of thousands of retail investors joined the group action, boutique law firms litigated for plaintiffs, and individuals did not have financial risk with this collective litigation.³⁹⁹ However, in contrast to US class actions, this case involved dozens of thousands of individual actions filed and aggregated through case management. Because of litigation costs, financial risk, and low economic returns, the boutique law firms actually litigated only on behalf of institutional investors. Additionally, the RBoS Shareholder Action Group secured solid litigation insurance only in 2014 after

³⁹³ The RBS Rights Issue Litigation, Re [2016] EWHC 3161 (Ch) (08 December 2016).

³⁹⁴ <http://www.rbosaction.org/> (checked on 15.01.17).

³⁹⁵ <http://www.leonkaye.co.uk/class-actions/royal-bank-of-scotland-rights-issue-action-group/> (checked on 15.01.17).

³⁹⁶ <http://www.telegraph.co.uk/business/2016/12/05/rbs-offers-settles-shareholder-lawsuit-800m/> (checked on 15.01.17).

³⁹⁷ <http://www.thesundaytimes.co.uk/sto/business/Finance/article1677723.ece> (checked on 15.01.17)

³⁹⁸ (n. 391).

³⁹⁹ Ned Beale, RBS settlement shows that US style class action is here to stay, The Times, 15th December 2016: <http://www.thetimes.co.uk/edition/law/rbs-settlement-shows-us-style-class-action-is-here-to-stay-wv8c6cj0q> (checked on 15.01.17).

aggregating 13,000 individual cases⁴⁰⁰ and, subsequently, received additional 14,000 claimants. Moreover, the US has a well-established opt-out collective action system, trials by jury, contingency fees, and possibility of punitive damages - features that are entirely absent in the RBS Rights Issue Case.⁴⁰¹ Finally, in the UK there are huge costs with experts, evidence, and the organisation of an administrative structure to deal with multiple claimants.⁴⁰² In the opinion of the head of commercial litigation of a boutique law firm involved in the RBS Rights Issue Case, the UK should "fear not - US style securities litigation isn't heading here just yet".⁴⁰³ The careful analysis of this GLO reveals that the features of this case are typical of the EU model of collective redress rather than the US class actions.

The careful examination of all GLO certified between 2000 and 2016 also reveals rare collective litigation for consumer protection in English and Wales.⁴⁰⁴ There were 95 cases in total over these 17 years (5.5 per year on average), but the number of cases is in stark decline (only 2 cases in 2015 and only 1 case in 2016).⁴⁰⁵ Moreover, the largest cohort involved cases of child abuse in care homes.⁴⁰⁶ This setting contrasts starkly with the several multi-party actions for

⁴⁰⁰ <http://www.rbosaction.org/resources/rbos-shareholders-action-group-extends-closing-date-to-join-action-against-rbs.pdf> (checked on 15.01.17).

⁴⁰¹ Clive Zietman, Fear Not - US Style Securities Litigation Isn't Heading Here Just Yet, The Times, 22nd December 2016: <http://www.thetimes.co.uk/article/fear-not-us-style-securities-litigation-isnt-heading-here-just-yet-nx8pxgnlb> (checked on 15.01.17).

⁴⁰² Zietman (n. 401).

⁴⁰³ Zietman (n. 401).

⁴⁰⁴ Fairgrieve and Howells (n. 367) 29.

⁴⁰⁵ <https://www.gov.uk/guidance/group-litigation-orders> (checked on 15.01.17).

⁴⁰⁶ Fairgrieve and Howells (n. 367) 29.

consumer protection funded with legal aid in England and Wales in the 1980s and 1990s.⁴⁰⁷ Part of the explanation for this decline in collective actions for consumer protection comes from the rejection of Lord Woolf's recommendations during the civil procedure reform. Based on comparative research carried out by Professor Ross Cranston, Lord Woolf recommended the establishment of a type of collective procedure for the multi-party situation.⁴⁰⁸ If implemented, Lord Woolf's recommendations would enact a more flexible and sophisticated form of collective action in English civil procedure.⁴⁰⁹ In contrast, the GLO is limited to the opt-in regime and not really adequate for dealing with large number of individual small claims of low value⁴¹⁰ and cases of competition law with a variety of interests.⁴¹¹ In this setting, the RBS Rights Issue Case may simply be an exception that proves the rule.⁴¹² However, only time will tell if this case is or not an outlier.

In any event, it is clear that EU model of collective redress has influenced decisively the development of the normative architecture of collective actions in

⁴⁰⁷ Hodges (n. 392) 4 & 21-5.

⁴⁰⁸ John Sorabji, 'Collective Action Reform in England and Wales', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) 46-7.

⁴⁰⁹ Sorabji (n. 408) 48.

⁴¹⁰ Sorabji (n. 408) 48-9; Wardhaugh (n. 391) 4-5; Camilleri (n. 380) 534-5.

⁴¹¹ The GLO was used in one competition case settled before trial: *Prentice Ltd v DaimlerChrysler UK Ltd*. However, the variety of interest between direct and indirect purchasers prevented the group litigation in *Emerald Supplies Ltd v British Airways plc* (2010) EWCA Civ 1284. See Whish and Bailey (n. 358) 336-7.

⁴¹² Hypothetically, perhaps the RBS Rights Issue Case is exceptional because of the strong role of institutional investors in this case of shareholders litigation, a characteristic that distinguishes securities class actions from consumer and antitrust cases also in the US and seemed decisive in this GLO too. See Coffee (n. 204) 83.

the UK. The next section explains another type of collective action system - the Latin American Civil Public Action.

2.5 The Latin American Civil Public Action

The third legal family of collective action is constituted by jurisdictions that adopted Latin American civil public actions. This family includes different countries that followed the Brazilian leadership in the continent and adopted quite similar models of collective action - Argentina; Chile; Colombia; and Mexico.⁴¹³ These Latin American countries recently enacted their legislation regarding collective action.⁴¹⁴ The paradigm document for this legal family is the Model Code of Collective Procedure for Iberian America, which was approved in 2004 by the Iberian American Institute for Procedural Law.⁴¹⁵ The next subsection describes the legal architecture designed by Brazilian scholars Ada Pellegrini Grinover, Kazuo Watanabe, and Antonio Gidi for this model.⁴¹⁶

2.5.1 *The Model Code of Collective Procedure for Iberian America.*

⁴¹³ Oquendo (n. 4) 250.

⁴¹⁴ Therefore, it is premature to make categorical claims about how each national system works empirically. Except for empirical research conducted by Agustin Barroilhet about the collective actions in Chile, there are no other evaluations of the Latin American model 'in action'. See Agustin Barroilhet, *Class Actions in Chile*, Manuscript deposited at the Library of the Stanford Law School as Thesis for the SPILS Program (2011). Except for Brazil, all systems are quite recent and are still maturing.

⁴¹⁵ See Antonio Gidi and Eduardo Ferrer MacGregor, *Comentários ao Código Modelo de Processos Coletivos* (Podium 2009) 14.

⁴¹⁶ Gidi and MacGregor (n. 415) 487.

The model establishes a typology of collective rights, distinguishing between (a) diffuse rights or interests, which are trans-subjective, indivisible, belonging to a group, category, or class of people connected by factual circumstances or a basic legal relationship; and (b) homogeneous individual rights or interests, understood as a collection of subjective individual rights, resulting from a common origin, belonging to members of a group, category, or class.⁴¹⁷

The pre-requisites of a collective action are adequacy of representation and the social relevance of the collective protection, verified by the nature of the protected good, the character of the harm, and the high number of affected persons.⁴¹⁸ Analysing the adequacy of representation, the judge shall consider: (a) the credibility, capacity, prestige, and experience of the representative; (b) her record with collective protection; (c) her conduct in other collective procedures; (d) the alignment between interests of group, category, or class members and the object of the collective action; and (e) the time period of institutionalisation of the association and its representativeness or of the individual person for the group, category, or class.⁴¹⁹ The judge may analyse this requirement at any time or procedural stage.⁴²⁰ Additionally, the predominance of common questions over individual ones and the concrete utility of the collective protection are required.⁴²¹

⁴¹⁷ MCCPIA, Article 1.

⁴¹⁸ MCCPIA, Article 2, I and II.

⁴¹⁹ MCCPIA, Article 2, § 2.

⁴²⁰ MCCPIA, Article 3.

⁴²¹ MCCPIA, Article 2, § 1.

The following actors have standing for collective action: (i) any individual person, for protection of diffuse rights and interests; (ii) the member of a group, category, or class for the protection of diffuse rights or interests belonging to a group, category, or class; (iii) the AGO, the Office of Public Defender's (OPD), and the People's Defender; (iv) public juridical persons; (v) administrative entities or bodies; (vi) unions; (vii) political parties; (viii) private associations constituted, at least one year prior to the action.⁴²² A judge may exempt this previous constitution of an association based on social interest or the protected good.⁴²³ Voluntary joinders are admitted.⁴²⁴ In case of inadequate representation or abandonment of the collective action, the judge shall notify the AGO to assume the role of plaintiff.⁴²⁵ If the AGO is not the plaintiff of an action, it shall act as a mandatory overseer.⁴²⁶ The AGO and the other public actors may settle with the interested defendant an *administrative commitment of behavioural adjustment to the legal requirements* - a binding document with potential sanctions.⁴²⁷ At first sight, this commitment may resemble a settlement, but the collective actors are not in a position to bargain because collective interests are deemed indisposable - reducing the possibility of negotiating partial payment of compensatory damages.

⁴²² MCCPIA, Article 3, I-VIII.

⁴²³ MCCPIA, Article 3, § 1.

⁴²⁴ MCCPIA, Article 3, § 2.

⁴²⁵ MCCPIA, Article 3, § 4.

⁴²⁶ MCCPIA, Article 3, § 3.

⁴²⁷ MCCPIA, Article 3, § 5.

Regarding costs and fees, the losing defendant pays costs, court usage fees, expert fees, and any other expenses, including the attorney's fees.⁴²⁸ The losing plaintiff does not pay costs, court usage fees, expert fees, or any other expenses - except for the payment of attorney's fees in cases of bad faith.⁴²⁹ The judge shall consider the collective net worth, the quantity and quality of the lawyer's work, and the complexity of the cause in setting the attorney's fees.⁴³⁰ If the plaintiff is an individual, a union, or an association, the judge may fix a monetary award when their action was relevant for the conduction and success of the collective action.⁴³¹

All kinds of judicial actions are admitted, including injunctions, damage actions, and mandatory orders requiring action, restraining, provision or restitution of goods and services.⁴³² In the class action for damages, there is no need for a list of members of the group, class, or category together with the initial petition, since recipients of compensation may be defined during the execution of the judicial sentence.⁴³³ The judge shall interpret the cause of action and judicial request in a far-reaching manner, admitting amendments, enlargements, and changes of the object of a collective action at any time and procedural stage.⁴³⁴ The judge shall prioritise the processing of the collective

⁴²⁸ MCCPIA, Article 15.

⁴²⁹ MCCPIA, Article 15, § 3.

⁴³⁰ MCCPIA, Article 15, § 1.

⁴³¹ MCCPIA, Article 15, § 2.

⁴³² MCCPIA, Articles 4-8.

⁴³³ MCCPIA, Article 20.

⁴³⁴ MCCPIA, Article 10.

action.⁴³⁵ The initial subpoena of the defendant interrupts the period of limitations for all trans-subjective and individual rights directly or indirectly related to the case.⁴³⁶ Additionally, a publication at the official gazette and a communication to the bodies and entities for protection of collective rights are expected to provide notice to the interested individuals who may intervene in the procedure.⁴³⁷

The judge shall designate a preliminary hearing, in which she may try to use or propose ADR techniques, including mediation, arbitration, and the neutral evaluation of a third-party - always preserving the undisposability of the collective good.⁴³⁸ All types of lawful evidence are admissible and the judge may have initiative in the production of evidence - including requesting expert evidence from public entities or using resources from a special public fund for protection of collective rights to determine its production.⁴³⁹ The burden of proof falls on the party with technical knowledge, specific information of facts, or who can more easily produce evidence.⁴⁴⁰ The judicial sentence may convict the defendant generically, establishing general liability for damages and the compensatory obligation.⁴⁴¹ If possible, the judge should fix the amount of individual compensation to be paid for each group member.⁴⁴²

⁴³⁵ MCCPIA, Article 16.

⁴³⁶ MCCPIA, Article 17.

⁴³⁷ MCCPIA, Article 21.

⁴³⁸ MCCPIA, Article 11, § 1 and § 3.

⁴³⁹ MCCPIA, Article 12 § 1 and § 3.

⁴⁴⁰ MCCPIA, Article 12 § 1.

⁴⁴¹ MCCPIA, Article 22.

⁴⁴² MCCPIA, Article 22, § 1.

2.5.2 - The Brazilian civil public action in perspective.

Brazil was a pioneer in collective actions with the popular actions introduced by the Constitution of 1934 and disciplined in 1965 by the Popular Action Act (PAA).⁴⁴³ The enactment of the Civil Public Action Act (CPAA) in 1985 and the CDC in 1990 established a new form of collective action: the civil public action.⁴⁴⁴ The most innovative feature of this model is the possibility of protecting broad societal interests through collective litigation, leading US professor Angel Oquendo to consider it to be 'a true revolution in the area of collective rights'.⁴⁴⁵ According to him:

The US legal world could find inspiration in Latin America to improve its own approach to collective litigation. In the first place, it could create a popular suit for the protection of diffuse entitlements. United State lawmakers could, secondly, institute an independent state body, along the lines of the Public Ministry, with power to file both communal and societal complaints.⁴⁴⁶

The AGO has exercised protagonism as a collective actor and public prosecutors have been responsible for a significant number of investigations, settlements, and collective suits.⁴⁴⁷ Analysing the role of public prosecutors in regulatory enforcement, McAllister observed the gradual development of the

⁴⁴³ CFRB (1934), Art. 113, n. 38; PAA.

⁴⁴⁴ CPAA; CDC.

⁴⁴⁵ Oquendo (n. 4) 277.

⁴⁴⁶ Oquendo (n. 4) 275.

⁴⁴⁷ Gidi (n. 106) 11.

rule of law and the reduction of regulatory capture - concluding that this model is “making law matter”.⁴⁴⁸

Additionally, other public bodies and private consumer associations perform the role of collective actors. However, individuals do not have standing for collective actions in Brazil⁴⁴⁹ - a procedural capacity adopted in the Model Code of Collective Procedure for Iberian America (MCCPIA). Brazilian scholars made a proposal for legislative reform to permit inclusion of the individual as a plaintiff for consumer protection collective actions, but very strong corporate lobby in the Brazilian congress prevented this innovation.⁴⁵⁰ Ironically, the paradigmatic rules of the MCCPIA are more progressive than the actual Brazilian legislation on collective action. Particularly the regime of economic incentives for collective action enables collective actors in the MCCPIA better than the current Brazilian architecture for collective action, summarised in the next sub-section.

2.5.3 The legal design of Brazilian civil public action

2.5.3.1 Standing and collective actors

A doctrinal explanation of the civil public action is a necessary point of departure for the understanding of its features. In 1985 the CPAA established the Brazilian civil public action, granting standing for consumer protection to the

⁴⁴⁸ Lesley McAllister, *Making law matter: environmental protection and legal institutions in Brazil* (Stanford 2008) 193-6.

⁴⁴⁹ Oquendo (n. 4) 273.

⁴⁵⁰ Interview W (RJ 12.09.14).

AGO, public entities (federal union, states, and municipalities), autarkic corporations, public corporations, public foundations, foundations, joint capital companies, and private associations.⁴⁵¹ In 1990 the CDC included also public entities and bodies without legal personality among the potential plaintiffs.⁴⁵² Therefore, it opened the possibility for judicial recognition of standing for organs from the legislative branch. Likewise, public defenders did not have standing originally, but they obtained legal recognition of standing in 2007 through the Standing for Public Defenders Act (SFPDA).⁴⁵³

The presence of the AGO in the process is mandatory, either as a plaintiff or as a guardian of laws.⁴⁵⁴ In cases of abandonment or desistance by the original plaintiff, the attorney general's office assumes the active role of plaintiff in the civil public action.⁴⁵⁵ Individuals have no standing and their role is limited to providing information on facts that may become object of a civil public action, indicating evidence and provoking the initiative of the AGO.⁴⁵⁶ If public servants, judges and courts also become aware of facts that may support a collective suit, they should send the evidence to the AGO for the adequate measures.⁴⁵⁷

The AGO may establish an official enquiry and request certificates, documents, inspections, and expert examinations from any public or private

⁴⁵¹ CPAA, article 5.

⁴⁵² CDC, article 82, III.

⁴⁵³ SFPDA altered CPAA, article 5, II.

⁴⁵⁴ CDC, article 92. The expression used in Brazil is *custos legis*, which is proximate to the English expression *custos morum*, the custodian of morals, a role attributed to the court of Queen's bench.

⁴⁵⁵ CPAA, article 5, § 3.

⁴⁵⁶ CPAA, article 6.

⁴⁵⁷ CPAA, article 6 and 7.

organisation.⁴⁵⁸ Refusal, delay, or any omission relating to this request of evidence from the attorney general's office may constitute a criminal offence.⁴⁵⁹ Whenever a public prosecutor is convinced of the lack of grounding for filing a collective suit, she will write an order of discontinuance and send the files to the attorney general's council for examination.⁴⁶⁰ The council may confirm or reject the order of discontinuance and, in the latter case, appoint a new public prosecutor for filling the suit.⁴⁶¹

2.5.3.2 Collective Procedure: Injunction, Sentence and Settlement

The civil public action may contain claims for monetary compensation and for injunctive orders to obligate defendants to take action or refrain from specified action.⁴⁶² In the case of a mandatory injunctive order, the judge will determine the fulfilment of the obligation or the interruption of the harmful activity, imposing a daily fine for the case of non-compliance of the judicial decision.⁴⁶³ The judge may grant an interim injunction, which may eventually be suspended by the president of the tribunal to avoid harm to the public order, healthcare, safety, and economy by request of the defendant.⁴⁶⁴ If the

⁴⁵⁸ CPAA, article 8, § 1.

⁴⁵⁹ CPAA, article 10.

⁴⁶⁰ CPAA, article 9.

⁴⁶¹ CPAA, article 9, § 4.

⁴⁶² CPAA, article 3.

⁴⁶³ CPAA, article 11.

⁴⁶⁴ CPAA, article 12.

corporation is convicted to compensate monetary damages for harm caused to diffuse or collective rights, the indemnity will be allocated to a common fund and the resources will be destined to the reconstitution of the harmed goods.⁴⁶⁵

The judicial sentence precludes further collective suits concerning the object of the collective action, except for acquittals grounded on insufficient evidence when any plaintiff may bring another collective suit based on new evidence of wrongdoing.⁴⁶⁶ The judge may order a consumer association to cover the legal fees only when it files a manifestly ungrounded collective suit. In case of bad faith, a consumer association and its directors may be convicted to pay ten times the legal fees and eventually compensate the defendants for any additional losses or damages.⁴⁶⁷ On the other hand, the plaintiff of a civil public action does not have ordinarily to pay legal fees, experts, or any other court fees.⁴⁶⁸

The CDC altered this legislation, authorising the public plaintiffs to negotiate settlements with the defendants as a commitment for adjustment of their conduct.⁴⁶⁹ At least in theory, these settlements could not involve any discount of the claim's value, because public plaintiffs are not authorised to dispose of consumer interests in these negotiations.⁴⁷⁰ Moreover, the CDC added a clause in the CPAA that incorporates the application of rules from the CDC into

⁴⁶⁵ CPAA, article 13.

⁴⁶⁶ CPAA, article 16.

⁴⁶⁷ CPAA, article 17; CDC, article 87.

⁴⁶⁸ CPAA, article 18; CDC, article 87.

⁴⁶⁹ CPAA, article 5, § 6.

⁴⁷⁰ Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo* (28th edn, Saraiva 2015) 474-5.

the civil public action.⁴⁷¹ It is for this reason that Brazilian commentators refer to an integrated system for collective actions.⁴⁷²

2.5.3.3 The typology of collective rights: diffuse, collective, and homogeneous individual

The CDC introduced a typology of collective rights, distinguishing diffuse, collective, and homogeneous individual interests. Diffuse interests transcend individuals, having an indivisible nature, and indeterminate persons as right holders – connected by factual circumstances.⁴⁷³ Collective interests also transcend individuals, having an indivisible nature, groups, categories or classes of people as right holders – connected by a basic juridical relationship.⁴⁷⁴ Homogeneous individual interests are due to a common origin.⁴⁷⁵ A few examples may clarify the distinction. Consumers are entitled to a well-ordered market, free of fraudulent and abusive advertisement. This is a prodigious example of a diffuse right, which transcends mere individual interests and is indivisible.⁴⁷⁶ The regularity of information throughout the marketplace does not have determinate right holders. In case of harm, victims of wrongdoing will be connected by factual circumstances and a common origin, being entitled to the

⁴⁷¹ CPAA, article 21.

⁴⁷² Ada Pellegrini Grinover, Kazuo Watanabe, and Linda Mullenix, *Os processos coletivos nos países de civil law e common law: uma análise de direito comparado* (2nd edn RT 2011) 36.

⁴⁷³ CDC, article 81, I.

⁴⁷⁴ CDC, article 81, II.

⁴⁷⁵ CDC, article 81, III.

⁴⁷⁶ Mazzilli (n. 470) 53.

individual homogeneous rights to monetary compensation. Likewise, buyers of a defective automobile are also right holders of individual homogeneous rights.⁴⁷⁷ A typical example of collective rights would be the case of a contract of adhesion with an abusive clause.⁴⁷⁸ In this case, the collective right is indivisible and transcends individuals, referring to the entire group of consumers that signed such a contract and is connected by the same basic legal relationship with the corporation.

All species of judicial actions for the adequate and effective protection of consumer rights and interests are admissible.⁴⁷⁹ If the collective action contains a claim to perform an obligation to do or not to do, the judge will determine the specific provision of such obligation or determine measures that reassure the practical result, equivalent to the due performance.⁴⁸⁰ The CDC states also that plaintiffs can file collective actions with claims for individual damages on behalf of the interests of victims of wrongdoings and their successors.⁴⁸¹ The forum should be the place of the damages – in the case of local damages – or the capital of state – in the case of national or regional damages.⁴⁸²

Once the collective suit is filed, a notice is published in the official gazette, so that interested individuals may intervene in the collective procedure as

⁴⁷⁷ Mazzilli (n. 470) 57.

⁴⁷⁸ Mazzilli (n. 470) 57. On these types of contracts, see Friedrich Kessler, Contracts of adhesion: some thoughts about freedom of contract, *Columbia Law Review*, vol. 43 (1943) 629; Nicholas Wilson, Freedom of contract and adhesion contracts, *International and Comparative Law Quarterly*, vol. 14 (1965) 172; Vera Bolgar, The contract of adhesion: a comparison of theory and practice, *American Journal of Comparative Law*, vol. 20 (1972) 53.

⁴⁷⁹ CDC, article 83.

⁴⁸⁰ CDC, article 84.

⁴⁸¹ CDC, article 91.

⁴⁸² CDC, article 93.

joining parties.⁴⁸³ The defendant has the burden to notify consumers involved in individual procedures, informing them about the existence of the collective action and forcing them to decide whether to suspend the individual procedure – if they would like to benefit from the effects of the collective action.⁴⁸⁴ The judicial sentence produces claim preclusion for the collective action, only if the verdict is favourable to the plaintiff when it will benefit all victims of the collective wrongdoing and their successors.⁴⁸⁵ However, the decision of conviction will be generic, establishing the liability of the defendant for damages.⁴⁸⁶ Victims are expected to demonstrate their condition, causation regarding the defendant's conduct, and their particular damage. The passage of one year without the application of a significant number of individual victims authorises the collective actors to promote the execution of the decision and the monetary damages should be allocated in a common fund for reconstitution of the harmed goods.⁴⁸⁷

This overview of the legal architecture ⁴⁸⁸ is essential for the understanding of the Brazilian model of civic-public action.

2.6 From models to experience.

⁴⁸³ CDC, article 94.

⁴⁸⁴ CDC, article 104.

⁴⁸⁵ CDC, article 103.

⁴⁸⁶ CDC, article 95.

⁴⁸⁷ CDC, article 100.

⁴⁸⁸ Galligan (n. 161) 299-307.

There are three different models of collective action at present in legal orders across the world. The US class action system operates predominantly through litigation, with an emphasis on private enforcement – lawyers as ‘entrepreneurs’⁴⁸⁹ or ‘private attorney generals’,⁴⁹⁰ the aggregation of multiple interests⁴⁹¹ through opt-out schemes,⁴⁹² and a regime of strong economic rewards and sanctions⁴⁹³ based on contingency fees⁴⁹⁴ and potential resort to punitive damages.⁴⁹⁵ Originated in the US, class actions motivated legal reform in other jurisdictions and characteristics of this model were adopted in countries such as Australia,⁴⁹⁶ Canada,⁴⁹⁷ among others.⁴⁹⁸ Traits of the class action

⁴⁸⁹ Coffee (n. 204) 18-29.

⁴⁹⁰ Garth, Nagel and Plager (n. 171) 353-98; Coffee (n. 210) 215-88; William Rubenstein (n. 210) 2129-73; Pamela Karlan (n. 210) 183-209. Judge Jerome Frank coined this expression in *Associated Indus v Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

⁴⁹¹ Richard Nagareda and others (n. 125) 25-7; Richard Marcus, Edward Sherman, Howard Erichson, *Complex litigation: cases and materials on advanced civil procedure*, (6th edn, West 2015) 11-3; Richard Nagareda, Aggregation and its discontents: class settlement pressure, class-wide arbitration, and CAFA, *Columbia Law Review*, vol 106 (2006) 1872-1923; Richard Epstein, Class actions: aggregation, amplification, and distortion, *University of Chicago Legal Forum* (2003) 475-518.

⁴⁹² Robert Klonoff, *Class actions and other multi-party litigation: cases and materials* (3rd edn (West 2012) 379-80 & 385-7; Mulheron (n. 37) 29-38.

⁴⁹³ Hensler and others (n. 56) 424-30 & 434-45.

⁴⁹⁴ Bruce Hay, Optimal contingent fees in a world of settlement, *Journal of legal studies*, vol 26 (1997) 259-78; Marc Galanter, Anyone can fall down a manhole: the contingency fees and its discontents, *DePaul Law Review*, vol 47 (1997) 457-77. As mentioned before, courts define the method for legal fees through the POF or lodestar formula, but the concept of contingent fees influences the way judges will arbitrate the amount to be paid for lawyers in class actions.

⁴⁹⁵ Jason Johnston, punitive liability: a new paradigm of efficiency in tort law, *Columbia Law Review*, vol 87 (1987) 1385; Catherine Sharkey, Punitive damages as societal damages, *Yale Law Journal*, vol 113 (2003) 347; Linda Mullenix, *Mass tort litigation: cases and materials* (2nd edn, West 2008) 1276-87.

⁴⁹⁶ Vince Morabito, 'Australia' in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *Globalization of class actions*, vol 622 (The Annals of the American Academy of Political and Social Science 2009) 320-6; Stuart Clark, Jocelyn Kellam, and Larissa Cook, 'Australia', in Paul Karlsgodt (ed), *World class actions: a guide to group and representative actions around the globe* (OUP 2012) 392-428.

travelled mostly by way of diffusion⁴⁹⁹ rather than transplants⁵⁰⁰ of the entire discipline brought by US FRCP.

Resistance to class actions in Europe led to the formulation of a different model predominantly based on regulation, with an emphasis on public enforcement, including ADR,⁵⁰¹ online dispute resolution (ODR),⁵⁰² ombudsmen,⁵⁰³ and a regime of individual compensation.⁵⁰⁴ In an interesting case of legal Esperanto,⁵⁰⁵ The expression 'collective redress' was coined to refer to this model - with a rhetoric that focuses on reparation and compensation rather than regulation and deterrence.⁵⁰⁶ It was created in resistance to the influence of the US – class actions were even labelled a 'toxic cocktail' by European authorities.⁵⁰⁷ Endorsed by the EU and by some European

⁴⁹⁷ Jasminka Kalajdzic, W.A. Bogart, and Ian Matthews, 'Canada', in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *Globalization of class actions*, vol 622 (The Annals of the American Academy of Political and Social Science 2009) 41-8; Jones (n. 183) 99-153.

⁴⁹⁸ Deborah Hensler (n. 115) 8-11; Karlsgodt (n. 38) xxxv-xxxvi.

⁴⁹⁹ William Twining, *General jurisprudence: understanding law from a global perspective* (CUP 2009) 269-292.

⁵⁰⁰ Alan Watson, *Legal transplants: an approach to comparative law* (2nd edn Georgia 1993) 21-30.

⁵⁰¹ Christopher Hodges, Iris Benöhr, and Naomi Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Hart 2012) 409-11.

⁵⁰² Pablo Cortés, *Online dispute resolution for consumers in the European Union* (Routledge 2012) Ch 2.

⁵⁰³ Trevor Buck, Richard Kirkham and Brian Thompson, *The ombudsman enterprise and administrative justice* (Ashgate 2011) 32-3 & 48.

⁵⁰⁴ Hodges, Benöhr and Creutzfeldt (n. 501) 449-50.

⁵⁰⁵ David Nelken, Defining and Using the Concept of Legal Culture, in Esin Örüçü and David Nelken (eds), *Comparative law: A handbook* (Hart 2007) 124.

⁵⁰⁶ Christopher Hodges, European Union Legislation, in Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *Globalization of class actions*, vol 622 (The Annals of the American Academy of Political and Social Science 2009) 78-82.

commentators, this model is emerging, but with unclear potential to influence legal reforms – current European debates include scholars resisting against foreign influence and convergence⁵⁰⁸ and others more sympathetic towards adoption of collective actions within the EU.⁵⁰⁹

Additionally, Brazil forged the Latin American model of Civil Public Actions,⁵¹⁰ which is characterised by collective litigation predominantly led by state public authorities pursuing regulatory enforcement and individual compensation motivated by institutional reputation and social capital.

Interestingly, two architects of this model have different opinions about the Brazilian experience. Ada Grinover also praises the Brazilian model of collective action as an excellent one, but acknowledges that there is no available empirical data.⁵¹¹ Antonio Gidi has a more pessimistic opinion:

“the Brazilian approach to the problem of vindicating group rights in court is still not ideal. It suffers from some structural and technical weaknesses, most of them not necessarily related to the technical qualities of the class action statutes themselves, but to a conservative

⁵⁰⁷ Christopher Hodges, Collective redress in Europe: The new model, *Civil Justice Quarterly* vol. 7 (2010) 4.

⁵⁰⁸ Roger Cotterrell, Comparative law and legal culture, in Reimann & Zimmermann, *The Oxford handbook of comparative law* (OUP 2006) 726-33; Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 102-5; Roger Cotterrell, Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity in Esin Örücü and David Nelken (eds), *Comparative law: A handbook* (Hart 2007) 145-8; Pierre Legrand, European legal systems are not converging, *International and Comparative Law Quarterly*, vol 45 (1996) 52-81; Pierre Legrand, Against a European civil code, *Modern Law Review*, vol 60 (1997) 44-63.

⁵⁰⁹ Rachael Mulheron (n. 292), 59-64 (2015); Maria Ioannidou, *Consumer involvement in private EU competition law and enforcement* (OUP 2015) 147-9.

⁵¹⁰ Gidi (n. 106) 311-408; Grinover (n. 39) 67.

⁵¹¹ Ada Pellegrini Grinover, The Defense of the Transindividual Interests: Brazil and Ibero-America, report presented at the Global Class Actions Exchange, Stanford (2007) 14, available at http://globalclassactions.stanford.edu/sites/default/files/documents/Brazil_National_Report.pdf (last checked at 15.01.17).

and inefficient approach to procedure, an inefficient judicial system, as well as broader societal problems”.⁵¹²

The statements from these two Brazilian scholars should be considered as an invitation for more empirical research on how the civil public action model operates in practice.

This part II developed the original argument that there are three different legal families or traditions of collective action. This comparative framework is important. First, the existing families provide paradigms for legal reform and development of law, as evidenced by diffusion of class actions to Canada, Australia, and Israel, collective redress to UK, France, Lithuania, and civil public actions to Chile, Colombia, and Argentina. Second, this conceptualisation facilitates understanding and classification of existing legal regimes, so that, for instance, the Dutch experience may be considered an example of collective redress with influence from class actions and the Portuguese regime exemplifies a hybrid of collective redress and civil public action. Third, awareness of these three existing models of juridical instrument for aggregation of multiple individual interests provides a cognitive framework for the study of actual experience of law in society.

Knowledge of the existing legal families and traditions provides relevant information about the historical development, the present experience, and prospects for future transformation.⁵¹³ In this sense, legal traditions emerge

⁵¹² Antonio Gidi (n. 106) 403.

⁵¹³ H. Patrick Glenn, *Legal traditions of the world* (5th edn OUP 2014) 14-16. In conversation, William Twining suggested that the Indian tradition of public interest litigation could constitute an additional family of collective action. This is an interesting hypothesis, which I explored when I taught a course on comparative models of collective action at the National University of Juridical Sciences in Kolkata in 2009. However, after reflecting about the Indian experience with

from a process of continuous interaction between different legal actors interconnected through a network that exchanges legal knowledge.⁵¹⁴ This knowledge is not static, but rather constantly developing through a flux of social change and legal transformations.⁵¹⁵ In this context, the comparative perspective developed in this part II is important not only in its own terms, but also for a full understanding of the potential features of collective actions.⁵¹⁶ Learning about different traditions facilitates understanding of similarities and differences, comparison between different juridical instruments, and evaluation of achievement of professed objectives.⁵¹⁷ Therefore, this comparative perspective is very important for the analysis of the Brazilian experience of civil public actions developed in part III of this thesis.

the epistolary jurisdiction and their mechanisms for collective action, I still consider it a variation of the US class actions. While at Oxford, I had the opportunity to discuss it again with the then Minister of Law and Justice of India, Salman Khurshid at his talk of 12.10.2012 in the Cube at the Faculty of Law and he confirmed that there is a professional plaintiff bar for collective actions, which is organised and well-funded, and that the idea of individuals sending postcards to the Indian Supreme Court and having their rights protected does not correspond to the reality of the Indian experience.

⁵¹⁴ Glenn (n. 513) 21-2.

⁵¹⁵ Glenn (n. 513) 23-7.

⁵¹⁶ Mathias Siems, *Comparative law* (CUP 2014) 2-3.

⁵¹⁷ Siems (n. 516) 3-4.

PART III - THE EMPIRICAL PERSPECTIVE

Chapter 3

The empirical perspective of collective action

Part II of this thesis presented the comparative analysis of collective actions, highlighting the different interdisciplinary dimensions of class action, collective redress, and civil public action through an analysis of their main features. However, these different frameworks and their legal architectures are not the final destination, but rather the point of departure for an empirical analysis of collective action. Different economic, political, and sociological elements influence the actual implementation of collective action and empirical research is necessary to provide answers. How is collective action influenced by the economics of litigation, the power of collective actors, and the role of law in shaping procedures, structures, and empowerment?

Part III provides the empirical perspective on collective action, based on the Brazilian experience. Chapter 4 will discuss the economic incentives for collective action, evaluating the role of funding, costs, compensation, sanctions, and social capital. Chapter 5 will address the organisational infrastructure and institutional dynamics of collective actions. Chapter 6 examines the architecture for collective action and chapter 7 analyses the legal environment. Chapter 8 presents concluding remarks. However, before these analyses, this chapter provides an empirical mapping of collective actions, by presenting empirical data of 20 years of collective action for consumer protection in Rio de Janeiro.

3.1 Empirical mapping of collective action

3.1.1 Collecting data on collective action

This part of the thesis provides a socio-legal study of collective action based on empirical perspectives and interdisciplinary analysis. In this sense, this chapter explains the research methodology, the strategy to collect empirical data, and a general overview of the empirical mapping of collective actions in Brazil.

3.1.1.1 Analysis of collective actions

The initial focus of this research was centred on the economic dimensions of collective action, examining whether courts were ordering companies to pay compensatory damages or exemplary damages. Extensive data was collected for the analysis of the actual experience of Brazilian civil public actions. This data was collected at the dockets of the Attorney General's Office of Rio de Janeiro (AGORJ), including all 405 collective actions filed against corporations on behalf of consumers between 1990 and 2010. The period of data collection was March and April of 2011, through examination of the so-called 'procedural mirror', that is the copy of judicial files kept at the dockets of the AGO for their control, analysis, and immediate use in support of their collective litigation.⁵¹⁸

⁵¹⁸ This expression 'procedural mirror' was used internally at the AGO to refer to the copies of collective actions made internally for use of the public prosecutors to follow their cases.

This data set is the largest collection of legal documents relating to collective actions in the state of Rio de Janeiro, because the AGO is the largest plaintiff and courts do not unite all their cases in a single place. Collective actions are distributed through many different commercial courts and tribunals in a decentralised manner. This data set is normally not accessible for academic research, because these are working documents for public prosecutors and the staff of AGOCPD. I only had access to this unique source of information, because I was working there as a public prosecutor during the time I conducted this preliminary empirical research.

Initially, I selected all 405 cases of collective action filed against private companies over the course of 20 years (between 1991 and 2010), which coincided with the two decades following the enactment of the CDC. This data collection was accompanied by 9 interviews, which helped me make sense of the development of the organisational structure of the AGOCPD and to divide this data set into three different periods of time.

Between 1991 and 2001, there was a team of prosecutors working under the direct supervision of the Attorney General without functional independence, infrastructure, and deep expertise - only 24 collective actions were filed by the AGO in these 11 years, which I called 'the early years'. In 2002, there was a decision to nominate independent tenured prosecutors to the AGOCPD and, consequently, there was an increase in productivity that led to 160 actions in the following 5 years (2002-2006), which I called 'the intermediate years'. Between 2007 and 2010, a total of 221 collective actions were filed and I called this period 'the recent years' when I collected the data in 2011.

The entire data set provides a comprehensive empirical map of the development of the AGOCPD and collective actions for consumer protection, but I selected the 'intermediate years' as the sample for a careful examination of the collective actions. This decision was based on the fact that only very few cases were filed in the 'early years' and these cases did not really seem to constitute a relevant data set. On the other hand, the 221 cases of the 'recent years' were representative of the collective wrongdoing of the period, but were still not ready for an examination of processing, outcomes, and time length of collective actions. It seemed premature to examine these cases by then.

Therefore, I decided to examine the 160 collective actions from the 'intermediate years', because they constituted a more mature sample of cases. This sample of 160 cases contains all collective actions against corporations filed by the AGOCPD between 2002 and 2006. My examination confirmed that most of these cases were 'mature' collective actions: parties had already collected evidence; judicial decisions had been delivered in individual cases; and there was a persistence of consumer interest.⁵¹⁹

Analysing these actions, I observed the following elements: the object of the action; the AGO's general requests; requests for injunction; injunction orders; status of the case; settlement; and outcomes. This preliminary analysis reveals that collective actions comprised requests for obligations to change a corporate practice, nullification of contractual clauses, consumer compensation, and collective moral damages. Empirical data revealed that court orders for payment

⁵¹⁹ The idea of a 'mature' collective action was first developed by Francis McGovern to refer to those cases with comprehensive evidence, multiple judicial verdicts, and a persistence of claims against the corporation. See Francis E. McGovern, *Resolving mature mass tort litigation*, Boston University Law Review, vol. 69 (1989) 659.

of collective moral damages were very rare and that consumers were almost never compensated through collective actions.

In addition to these preliminary observations on the economics of collective action, this thesis focuses also on the power of collective actors and the role of law in regulating the B2C relationship. Because a large number of collective actions was still pending in 2011, a recent analysis of the empirical data was necessary. Therefore, I reexamined the sample again in July and August 2016 for the particular observation of the development of the 72 cases that were still under trial during the preliminary analysis. This reexamination could not be made through the direct observation of the 'procedural mirrors' this time, because I did not have access to these documents. Therefore, I observed the development of these cases through internet, by checking the records of the websites of the Tribunal of Justice of Rio de Janeiro (TJRJ) and Superior Tribunal of Justice (STJ) online. These 'electronic mirrors' were the source for the recent analysis of collective actions found in this chapter. This reexamination provides more texture to this empirical research, confirms the working hypothesis, and reveals some important patterns of collective actions.

3.1.1.2 Interviews with the relevant legal actors.

In addition to the analysis of collective actions, I conducted interviews with the relevant legal actors. These interviews were conducted on two different occasions. The first period of interviews coincided with the first period of empirical observation of collective actions that resulted in the preliminary analysis. Therefore, in April 2011 I interviewed 9 relevant legal actors, including

2 judges, 3 public prosecutors, 1 public defender, 1 state assembly attorney, and 2 corporate lawyers to understand the extremely low incidence of economic sanctions in the cases I studied.⁵²⁰ These interviews were structured, based on a questionnaire designed with precise questions and a range of potential answers. The preliminary analysis of cases and interviews revealed that individual consumers rarely receive any financial compensation as a result of these civil public actions and judges rarely impose exemplary damages on corporations.

After presenting the results of this preliminary study, I was encouraged to expand the scope of my research.⁵²¹ Instead of studying only the economic inefficiency of the civil public action, this thesis examines comprehensively socio-legal aspects of collective action. In August and September of 2014 I conducted a second round of interviews, in which 21 legal actors were interviewed. Interviewees included public prosecutors, public defenders, state assembly attorneys, consumer association members, members of consumer protection agencies, and corporate lawyers.⁵²²

In contrast to the first round, these interviews were not structured, but rather involved long enquiries into the operations relating to the civil public action system. My first question sought an explanation of how collective action for consumer protection works. Even if this question may seem to steer towards description, the interviewees invariably provided interesting interdisciplinary comments and evaluative arguments of why collective action does not

⁵²⁰ For the table of interviews, see the Appendix.

⁵²¹ This preliminary research was made for a working paper that I submitted to the IV International Junior Faculty Forum (IJFF), co-organised by Stanford Law School and Harvard Law School and was one of the ten works selected.

⁵²² For the table of interviews, see the Appendix.

necessarily achieve its professed objectives. They quickly moved from a description of how it works to a diagnosis that it does not work properly and interdisciplinary explanations.

At the time of the interviews I had already collected the quantitative data regarding two decades of collective actions at the AGO in Rio de Janeiro, which gave me a concrete basis to pose questions to interviewees concerning their experience based on a comprehensive empirical perspective of collective actions. Additionally, I also had professional experience in the field. All interviewees with residence in Rio de Janeiro⁵²³ knew that I had worked as public prosecutor at the AGOCPD, because it is a small community of enforcement agents constantly observing and evaluating what each other is doing. In contrast, The interviewees from São Paulo⁵²⁴ did not know that I had professional experience as a public prosecutor, except for C'.⁵²⁵ Importantly, the dynamics of interviews were similar in both Rio de Janeiro and São Paulo, demonstrating that the fact that I worked as an enforcement agent did not negatively influence my capacity to conduct this empirical research.

In total I conducted 30 interviews and covered the relevant legal actors and key institutions for collective action, notably AGO, OPD, the Committee for Defence of Consumers (CODECON), the Bureau for Protection of Consumers (PROCON), TJRJ, and consumer associations. I used the 'snowball sampling

⁵²³ Interviews A-X and D'.

⁵²⁴ Interviews Y to C'.

⁵²⁵ In this case, T put us in contact and introduced me not only as a researcher, but also as someone who had worked for three years at the AGOCPD. Additionally, Y asked specifically about it, possibly indicating a search on my professional profile on the internet.

technique' to build my sample of participants.⁵²⁶ The choice of Rio de Janeiro as the starting point was based on the existence of an active group of collective actors whose activities seemed relevant for the empirical investigation to answer the research questions. An additional factor was access to conduct interviews with enforcement agents, who accepted to share their experiences and perspectives on collective action for consumer protection. The focus of the research oriented its design. Because the questions were oriented toward the incentives, participation, and interactions of the key collective actors, the interviews were concentrated on the enforcement agents rather than defence lawyers, and consumers who had suffered harm. Importantly, the city of São Paulo was not included in the original research project, but it was ultimately included on the suggestion of interviewees that I should interview enforcement agents there too.

Because interviews were concentrated in Rio de Janeiro and São Paulo, the present research is limited in scope. These are the two most populated cities in Brazil, with sophisticated markets and multiple private and public enforcement agents. The dynamics analysed in this thesis are possibly different from the ones observed in other parts of the country with more rural economies.⁵²⁷ However, the ideal types developed in this thesis certainly present relevant models for the understanding of competition, cooperation, coalition, deference, and moderation that may eventually be observed elsewhere too - not only in Rio de Janeiro and São Paulo. In other words, the research

⁵²⁶ Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (OUP 2010) 934.

⁵²⁷ At least this was the case with Lesley Mc Allister in her doctoral thesis on environmental enforcement in Brazil, in which she found significant institutional differences between the key actors in São Paulo and in Pará. See Mc Allister (n. 448) 8-10.

findings still have explanatory force, even for legal environments that may differ in key aspects. I finished conducting interviews after identifying and confirming that I had reached the point of saturation.⁵²⁸ In their interviews, these legal actors referred to 97 different cases to illustrate their points and I used many of them as relevant examples of the arguments advanced in this thesis.⁵²⁹ Actually, all Brazilian cases used in this part III were either mentioned by interviewees or analysed in the dockets of the AGOCPD.

3.1.1.3 Professional experience as participant observation.

My experience with collective actions is not only academic, but also professional. Between 2009 and 2012 I worked as a public prosecutor at the consumer protection department of the AGORJ. Simultaneously I taught the subject as a professor of law at Fundação Getúlio Vargas (FGV) and conducted research on complex litigation, focusing on the empirical observation of collective action for consumer protection.

Therefore, the research methodology for the present thesis combined in-depth interviews, analysis of documents, and direct observation.⁵³⁰ I observed

⁵²⁸ In the second round of interviews, I initiated the 'snowball' with members of the AGO and one lawyer, asking for references of other interviewees that I should contact. They referred to other public prosecutors, to public defenders, to state assembly attorneys, to lawyers, and members of NGOs. Some of the interviewees started to suggest that I should also travel to São Paulo and meet prosecutors, members of consumer associations, and of the state consumer protection bureau there. I scheduled these interviews for the second half of September. Importantly, I realised that I already reached the point of saturation for data collection on 11/09/14 before even travelling to São Paulo. Two interviews occupied 6 hours of my day, but all cases were repeated ones. Analytical comments were relevant, but there was essentially nothing entirely new, rather than variations over the same points. I still kept the subsequent 8 interviews, in which I heard about different cases, listened to extremely well qualified professionals, but the same themes and variations emerged again.

⁵²⁹ For the table of cases cited during the interviews, see the Appendix.

the setting directly between 2009 and 2012, by promoting consumer protection as a collective actor. I filed dozens of civil public actions, negotiated several settlements, and became the representative of the attorney general in the permanent state forum for consumer protection. I certainly drew on this knowledge resulting from direct participation in the field as a relevant actor for consumer protection and on my own observation of the environment and interactions between different actors.

This experience was important for the development of this thesis and provided me with first-hand knowledge of collective action for consumer protection as a retrospective participatory observation. I had privileged access to all collective actions filed by the attorney general's office between 1990 and 2010 and managed to analyse these documents as an academic researcher because of my professional role. I also benefitted from my access to the relevant legal actors to interview them. On the other hand, I drew on the empirical observation of 405 collective actions and to 30 interviews as sources of knowledge to mitigate against any professional bias that could affect the development of this thesis.

3.1.1.4 The Interpretative Perspective

This thesis adopts the interpretative perspective, because the research question requires an understanding of social meaning and context that emerges from social behaviour and practices.⁵³¹ Collective action seeks to provide access

⁵³⁰ Webley (n. 526) 927-8.

⁵³¹ Webley (n. 526) 930-1.

to justice, full compensation, and deterrence.⁵³² However, observing the interactions between collective actors and individuals, the collective action does not always establish an effective forum for empowerment, voice, and protection of consumers. Individuals may file an initial complaint and provide the impetus for the initiative of intermediate bodies. Normally, their complaint ('input') is fundamental for the initial investigation that will eventually lead to a collective suit, but they do not receive any notice ('feedback') or benefit from the final judicial decision ('output').⁵³³ Therefore, once the collective action begins, consumers often do not participate, receive compensation, or influence corporate behaviour. Individuals seek redress through the individual pathways of small claims courts and the ombudsman. The interpretative method recommends analysis based on experience. Therefore, various standpoints are considered, including the perspective of a consumer who may be in a more vulnerable or empowered position, depending on the circumstances.

From the interpretative perspective, the interaction of the researcher with the universe under study is also important for the understanding of social meaning and context that produce and reproduce structural relations.⁵³⁴ These symbolic interactions produce meaning within the investigated social context.⁵³⁵ First hand acquaintance with the sphere of social life is therefore an asset for this

⁵³² Mulheron (n. 37) 52-66.

⁵³³ Lawrence Friedman, *The legal system: a social science perspective* (Russel Sage 1975) 11-2.

⁵³⁴ Webley (n. 526) 929-32.

⁵³⁵ Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (University of California Press 1986) 11.

socio-legal research.⁵³⁶ Social interaction happens within the *intersubjective* motivational context.⁵³⁷ Scientific knowledge should transcend the perspective of the individual researcher to capture meaning within a particular universe. Meaning is grasped reflectively through experience in a way that concepts are understood and constituted as ideal-types.⁵³⁸ The empirical world must be the point of reference for interpretive scientific knowledge.⁵³⁹

The diagnosis of the possibilities and limitations of collective action was obtained not only by direct observation and documentation, but also thematic analysis of the interviews with the relevant social actors within the consumer protection community. This methodology is aligned with the research design because it explores subjective experience and social relationships, attributing meaning to the experience and evaluating the investigated phenomenon in depth.⁵⁴⁰ The identification of themes emerged from careful reading and re-reading of the data and captured the richness of the investigated phenomena.⁵⁴¹ The interviewees referred to limited access to justice, lack of economic sanctions, and interdisciplinary aspects that are developed throughout this thesis.

3.1.1.5 Thematic analysis.

⁵³⁶ Blumer (n. 535) 35-6.

⁵³⁷ Alfred Schutz, *The Phenomenology of the Social World* (Northwestern University Press 1972) 159.

⁵³⁸ Schutz (n. 537) 69-71.

⁵³⁹ Blumer (n. 535) 22.

⁵⁴⁰ Jennifer Fereday, Demonstrating rigor using thematic analysis: a hybrid approach of inductive and deductive coding and theme development, *International Journal of Qualitative Methods*, volume 5, number 1 (2006) 81-82.

⁵⁴¹ Fereday (n. 540) 82-3.

This empirical observation focuses on various themes that emerged from the interviews. As part of the research methodology, these themes were coded with the particular purposes of identifying the particular perspectives, the contextual meaning, and the analytical framework for this empirical research.⁵⁴² This coding consisted of recognition of patterns in the qualitative information provided by the interviews, developing themes through immersions in the data to develop knowledge, concepts, and theoretical insights on collective action for consumer protection.⁵⁴³ As it is normally the case, the development of this code occurred in a middle point between the existing theories and the raw information, because working hypotheses normally emerge through concepts developed from previous academic studies and raw information observed from empirical experience.⁵⁴⁴

The research strategy also followed the recommendation to break down a large study into a series of manageable sub-questions.⁵⁴⁵ Therefore, if the main research question focused on the analysis and evaluation of collective actions following the tradition of middle range socio-legal studies, the sub-questions addressed particular themes that emerged from the coding. The coding was assessed through the technique of segmentation, by highlighting particular

⁵⁴² Richard Boyatzis, *Transforming qualitative information: thematic analysis and code development* (Sage 1998) 4-5.

⁵⁴³ Boyatzis (n. 542) 7-12.

⁵⁴⁴ Boyatzis (n. 542) 29-31.

⁵⁴⁵ Greg Guest, Kathleen MacQueen, and Emily Namey, *Applied thematic analysis* (Sage 2012) 44.

passages, connecting to the codes, and facilitating the thematic analysis of the interviews.⁵⁴⁶

Table 1. *Thematic Analysis. Coding elements for study of collective action (label, definition, use, and examples).*

Label	Incentives	Power	Law	Environment	Complexity
Definition	Economic enablers or obstacles	Capacity or ability to act	Role of law, rights, procedure	Social relations and impact	Uncertainty of complex litigation
Use	Apply to economic advantages	Apply to agency and action	Apply to the legal architecture	Apply to the B2C relation in society	Apply to uncertainty, complexity.
Examples	Fund, fee, sanction, investment	Actors, standing, structure	Rights, law, regime, injunction	Protection, change, and impact	Complexity, adaptation, outcomes

Five important themes emerged from the interviews: incentives; power; law; environment; and complexity. These themes were developed throughout this thesis. Chapter 4 focuses on the economic incentives of collective action, analysing funding, costs, rewards, sanctions, and social capital. Chapter 5 investigates the political aspects of collective action, examining the power of collective actors, organisational infrastructure, institutional dynamics, political representation, and democratic participation. Chapter 6 discusses the role of law for collective action, by analysing the legal architecture of Brazilian civil public

⁵⁴⁶ Guest, MacQueen, and Namey (n. 545) 50-2.

actions. Chapter 7 investigates the legal environment, by discussing the B2C relationships and evaluating the possibilities and limitations of the Brazilian civil public actions. Both the introduction and the conclusion deal with the complexity of collective actions, a theme that cuts across the thesis because complex litigation develops certain identifiable patterns, but happens through relatively uncertain ways, leads to adaptations of civil justice systems to demands of mass litigation, and the emergence of innovative forums and techniques for conflict resolution.

These themes were discovered through techniques of thematic analysis, such as repetition of concepts, adoption of local categories, and use of metaphors, for instance.⁵⁴⁷ There were several references to economic, political, juridical, and sociological dimensions of collective actions that were linked to incentives, power, law, and environment. Likewise, the theme of complexity appeared repeated times in interviews, even if less frequently than the other themes. Typical elements of the civil public action were present in most interviews, justifying also the development of chapter 2 on the different legal families of collective action, so that readers may understand the similarities and differences of the traditions of class actions, collective redress, and civil public action. Metaphors and analogies were also present in interviews, especially the repeated references to Don Quixote and the life of Galileo used in the introduction. These themes are further developed in this part III of the thesis.

The codes were applied according to the internal perspective of the interviewee, based on the terms, expressions, and context in which the statements and references to cases were made. Therefore, references to power

⁵⁴⁷ Guest, MacQueen, and Namey (n. 545) 66.

or capacity to act were marked by red. References to incentives and economic enablers were marked by purple. References to the role of law and the normative architecture were marked by blue. References to social relations with consumers, businesses, and others were marked by yellow. References to complexity and uncertainty were marked by green. In cases of overlap, the code was defined according to the context in which the reference was made. For instance, a reference to lawyer's fees and how economic resources improve the capacity to perform was interpreted as a reference to economic enablers, because the contextual meaning related primarily to economic advantages rather than power of action by collective actors.

The attribution of themes to different cases followed the same logic. Therefore, the cases were coded according to the theme(s) evoked by the interviewee, based on the context in which they were referred and the explanatory force they had to address a certain point. For instance, the case of the bankrupt university certainly involved incentives, because fines imposed did not generate action. There is a legal problem concerning regulations for academic transfers and the conferral of degree. Likewise, the case reveals a capacity to act beyond the legal mandate to obtain a solution. There is also uncertainty regarding the outcome. However, the public defender used this case as an example of the consequences of social mobilization and the collaboration of different actors working together in an integrated network. Therefore, the case was coded as an analysis of the theme of 'environment'.

3.2 The preliminary analysis

The CDC was enacted in 1990 and came into force by March, 1991.⁵⁴⁸ Few consumer protection collective actions were filed immediately after the enactment of the CDC. For instance, in the capital of Rio de Janeiro, public prosecutors filed only 24 consumer protection collective actions against private companies from 1991 until 2001.

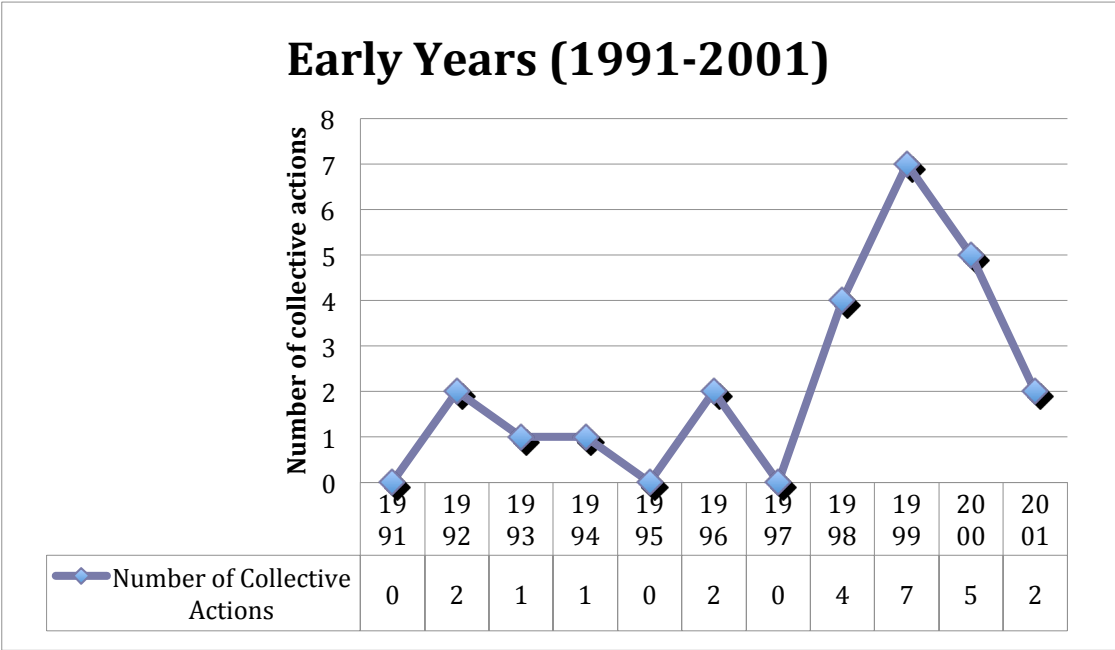


Figure 1. *Early years of Consumer Collective Actions (1991-2001)*. Source: Dockets of Attorney General Office.

There are various explanations for the low number of collective actions during this first decade: the lack of consolidated doctrine about the new legislation;⁵⁴⁹ the lack of structure to conduct investigations and collect evidence of wrongdoing;⁵⁵⁰ the lack of independence of public prosecutors, since they were subordinated to the Attorney General and had to follow his instructions;⁵⁵¹

⁵⁴⁸ CDC, article 118.

⁵⁴⁹ Interview T (RJ 10.09.14).

⁵⁵⁰ Interview T (RJ 10.09.14).

⁵⁵¹ Interview T (RJ 10.09.14).

and the lack of expertise to conduct civil investigations, since the senior prosecutors' professional background had essentially been in criminal law enforcement.⁵⁵²

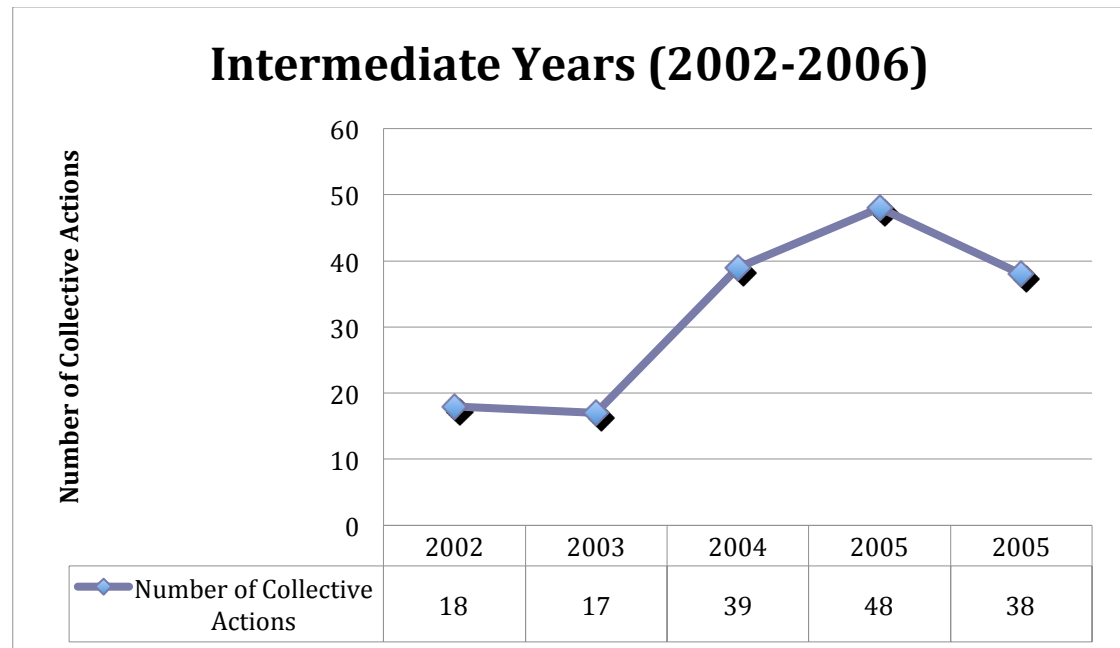


Figure 2. *Intermediate years of Consumer Collective Actions (2002-2006)*. Source: *Dockets of Attorney General Office*.

The AGORJ restructured the AGOCPD in 2001, appointing four independent prosecutors, whose investigations, deals, and litigation activities were not under the direct control of the Attorney General. Independence enhanced productivity, because seeking hierarchical approval or evaluating the political consequences of suing private companies was not necessary.⁵⁵³ Additionally, the AGORJ provided a better internal organisational structure to conduct civil inquiries and support collective actions.⁵⁵⁴ The appointment of four

⁵⁵² Interview T (RJ 10.09.14).

⁵⁵³ Interview O (RJ 26.08.14). Another view had T who thinks that it was never really an issue in practice, but admitted that perhaps the Head of AGOCPD just did not share these problematic political issues with her.

⁵⁵⁴ Interview O (RJ 26.08.14).

independent prosecutors for permanent positions also brought technical expertise since their growing experience and credence gradually improved the quality of their work and the quantity of collective actions filed. As a consequence, the consumer protection prosecutors filed 160 consumer collective actions against private companies within the following five years.

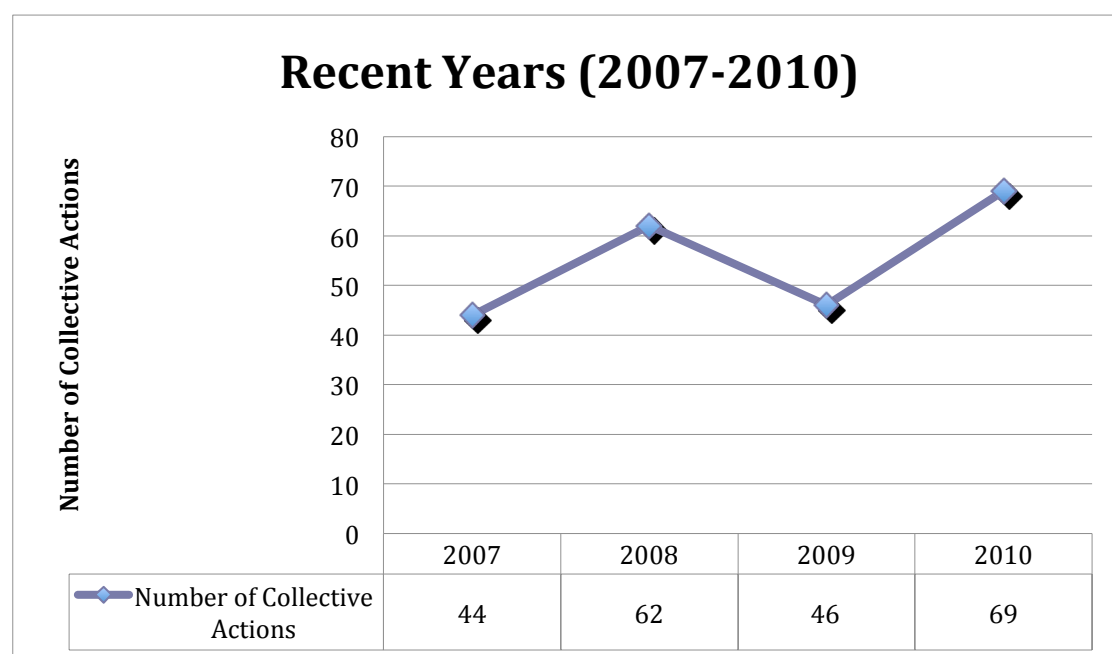


Figure 3. *Recent years of Consumer Collective Actions (2007-2010).*Source: Dockets of Attorney General Office.

These cases provide an excellent sample to evaluate the effectiveness of the Brazilian system of collective litigation. Empirical observation of these consumer protection collective actions shows that these private companies are sometimes legally sanctioned, but do not receive appropriate economic sanctions for their wrongdoings. Moreover, the excessive time length of trials undermines the effectiveness of their punishments. Therefore, private companies do not have economic incentives to comply with the law. As a result, they may commit further wrongdoing and more consumer collective action suits

need to be filed against them. Between 2007 and 2010, the consumer protection prosecutors filed 221 collective actions against private companies.

Before suing private companies, public prosecutors usually propose deals to them. The negotiation of these deals is centered on the commitment to stop breaking the law and payment of compensatory damages to the harmed consumers. The conditions of such payments are negotiable and may be parcelled according to the company’s financial capacity. However, most companies refuse to negotiate and prefer to litigate. Because companies tend to adopt risk averse positions, collective actions clearly lack economic sanctions to incentivise settlement, deter corporate wrongdoing, and discourage breaches of the law.

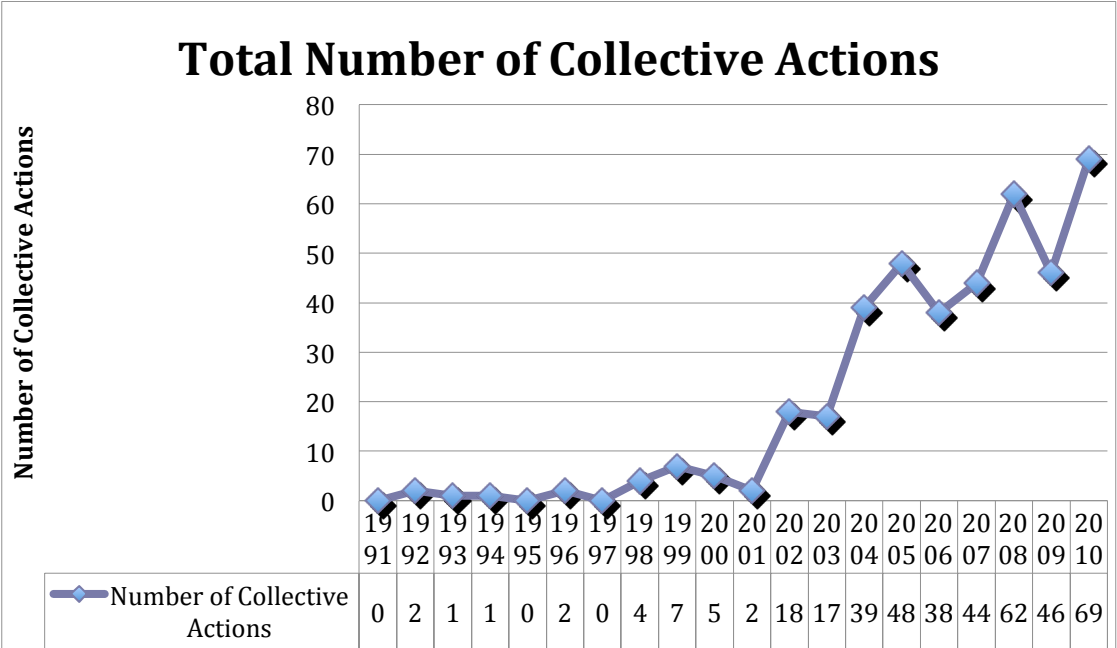


Figure 4. *Total Number of Consumer Collective Actions during two decades (1991-2010).* Source: *Dockets of Attorney General Office.*

Mapping the dockets of consumer protection collective actions, one may observe three different time periods: early years (1991-2001); intermediate years (2002-2006); and recent years (2007-2010). In the early years, 24

collective actions were filed. Financial institutions and telecommunication companies were already among the usual defendants. Some of these early collective actions tried to limit financial interest rates and were not successful, given the reluctance of the judiciary to intervene in economic matters. All the three collective actions against telecommunications companies focused on abusive advertisement practices to sell telephone lines.

Table 2. *Early years (1991-2001). Number of collective action suits by categories of defendants and percentage.*

Collective Action Defendants	Number of cases (1991-2001)	Percentage (%)
Financial institutions	7	29.1
Housing and real estate	4	16.7
Telecommunication companies	3	12.5
Health companies	3	12.5
Automobile	2	8.3
Insurance	1	4.2
Other companies	4	16.7
Total	24	100

Source: Dockets of Attorney General Office.

In those early years, there were also a significant number of collective actions against real estate and housing companies. In one of these cases, apartments were sold, but not delivered to all the future proprietors. Two other cases involved illegal charges due to inflation losses. Finally, a fourth case involved the collapse of a building that had to be demolished due to project failure and the use of low quality construction materials. This case established a relevant precedent, since it was ruled that public prosecutors should not file collective actions on behalf of apartment proprietors and that these homeowners needed to go to courts to defend their own rights. As a direct consequence, the percentage of collective actions against housing and real estate companies

decreased significantly in the following years, involving mostly contractual issues rather than construction failures.

There were no collective actions against transportation or energy companies in those early years. These types of companies gradually became repeat offenders during the intermediate years and defendants in many different collective actions in recent years. There are two different potential explanations for the complete inexistence of petitions filed against energy and transportation companies during those early years. First, civil investigation to collect evidence of malfunctioning services requires a very sophisticated structure and the public prosecutors lacked it during the 1990s. Second, during those early years, the electricity company, ferry, subway, and urban train system were public. They were privatised by the end of that decade and consumers' claims for better services significantly increased in the following years.

Table 3. *Intermediate years (2002-2006), after the restructure of the consumer protection department. Number of collective action suits by categories of defendants and percentage.*

Collective Action Defendants	Number of cases (2002-2006)	Percentage (%)
Financial institutions	36	22.5
Telecommunication companies	31	19.4
Health companies	21	13.1
Housing and real estate	11	6.9
Energy companies	09	5.6
Tourism agencies	06	3.8
Leisure (parks, music, etc)	05	3.1
Transportation of passengers	04	2.5
Sports clubs and competitions	04	2.5
Automobile	03	1.9
Department stores	03	1.9
Educational groups	03	1.9
Insurance	02	1.2
Shopping centers	01	0.6
Other companies	21	13.1
Total	160	100

Source: Dockets of Attorney General Office.

In the intermediate years, the dockets show a much wider variety of cases, including different business sectors and leisure activities. The range of cases varied from accidents in amusement parks to abusive negotiation concerning graveyards. Moreover, the rising competition between tourism agencies resulted in a series of collective actions due to false advertisement, fraudulent behaviour, and illegal charges. Educational groups were also held liable for charging illegal fees. Additionally, transportation and energy companies finally appeared as defendants in consumer protection collective actions in these intermediate years. Finally, the enactment of the Sports Fan Statute (SFS) recognised that sports fans have the status of consumers and established the legal basis for suing clubs and federations.⁵⁵⁵ Nonetheless, the usual defendants continued to violate the CDC and most collective actions were filed against financial institutions, telecommunications companies, health companies, and real estate firms. During these intermediate years, these four types of companies were defendants in 61.9% of all cases, a percentage not too far from the early years: 70.8%.

In recent years, financial institutions and telecommunication companies continued to be sued by public prosecutors. In absolute terms, there were 36 collective actions against financial institutions in each of the periods. Regarding

⁵⁵⁵ On the Sports Fan Statute, see Pedro Fortes, The Law related to Brazilian Sports Fans: An Introduction for a British Audience, *Entertainment and Sports Law Journal*, vol. 11 (2013) 2; Pedro Fortes, War and peace among organized support groups: the challenge of ensuring safety in football stadiums, *Caderno FGV Projetos*, vol. 22 (2013) 86; Pedro Fortes, We The Fans: Should International Football Have Its Own Constitution?, *Southwestern Journal of International Law*, vol. 21 (2014) 63; Pedro Fortes, Das Brasilianische Sport-Fan Gesetz: eine Einführung für das deutsche Publikum, *32 Mitteilungen der Deutsch-Brasilianischen Juristenvereinigung*, v. 32, issue 1 (2014) 68; Pedro Fortes, A responsabilidade coletiva de torcidas organizadas, *Revista do Ministério Público do Estado do Rio de Janeiro*, vol. 48 (2013) 211.

telecommunication companies, the number of consumer protection collective actions increased from 31 (2002-2006) to 36 (2007-2010).

Table 4. *Recent years (2007-2010). Number of collective action suits by categories of defendants and percentage.*

Class Action Defendants	Number of cases (2007-2010)	Percentage (%)
Transportation of passengers	51	23.0
Financial institutions	36	16.3
Telecommunication companies	36	16.3
Sports clubs and competitions	11	5.0
Energy companies	10	4.5
Department stores	10	4.5
Health companies	10	4.5
Shopping centers	10	4.5
Educational groups	06	2.8
Housing and real estate	05	2.3
Leisure (circus, music, etc)	04	1.8
Tourism agencies	03	1.4
Insurance	03	1.4
Automobile	02	0.9
Other companies	24	10.8
Total	221	100

Source: Dockets of Attorney General Office.

These companies have maintained their status of ‘usual suspects’ and are private companies that continue to break the law, regardless of the fact that they are repeat defendants in collective actions. It is also important to note the substantial growth in the number of cases involving buses, trains, subway, taxis, and the ferry system: 1275%. Although I did not collect specific data on the fines imposed on these companies by the State Transportation Agency (Agetransp) and by the Transportation Authority (DETRO and SMTr), one possible explanation may come from the lack of effective control by the regulatory agencies and executive authorities. For years, public prosecutors requested information from these bureaus and did not receive the requested reports. By 2010, however, there was a positive transformation in the Municipal Authority, whose Secretary focused more closely on inspections and quality control. Since

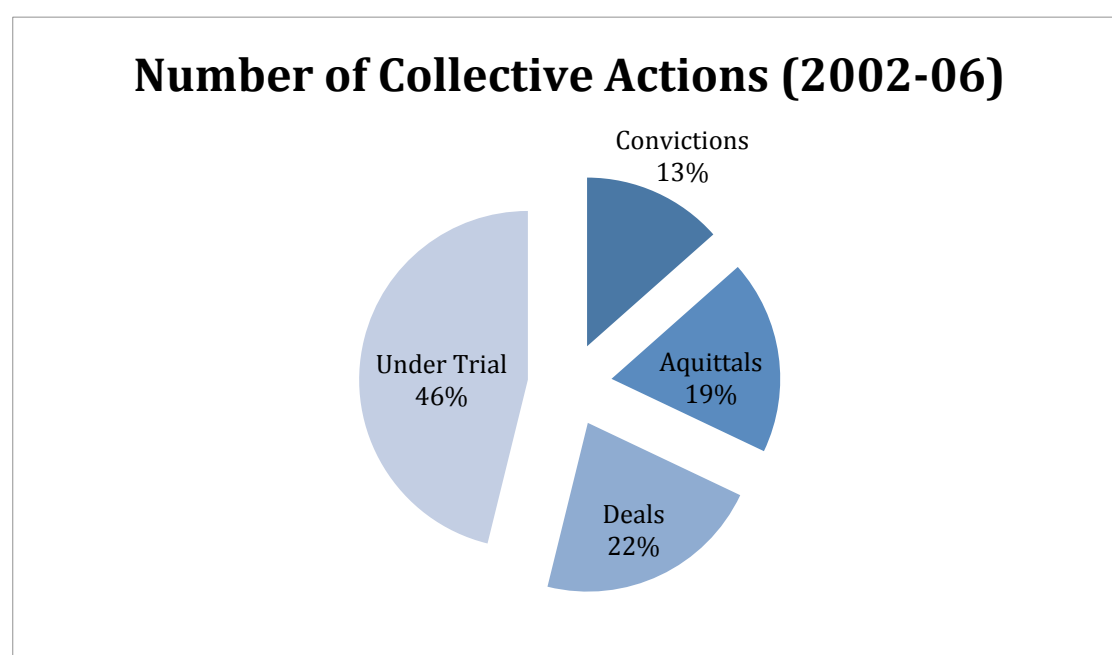
then, detailed and prompt reports have been regularly sent to the AGOCPD. In the first three months of 2011, no collective action was filed against a transportation company. Regulatory agencies and executive authorities also play an essential role in the case of consumer protection. If they regulate their markets in accordance with the CDC, private companies will have a clear set of standards to comply with. However, defining guidelines, norms, and duties is not sufficient. Without properly sanctioning wrongdoing, these agencies and authorities will witness the phenomenon of lucrative illegality: companies will continuously break the law, if they have economic incentives to do so.⁵⁵⁶

This research indicates two main reasons for the ineffectiveness of Brazilian consumers' collective actions. First, the lack of economic sanctions for wrongdoers provides economic incentives for companies to break the law. Second, the slowness and the formalism of the Brazilian justice system affect its capacity to prevent new offences. These collective procedures are part of the civil justice system and may lead to the imposition of civil sanctions. Even if these are not criminal cases, the final outcome of a judgment may be the conviction of the corporation for a collective wrongdoing, the immediate interruption of a particular corporate practice, and the payment of compensatory damages for individual consumers and the collectivity.

Analysing the sample of 160 collective action suits, there was not a single case of a definitive conviction obliging a company to pay exemplary damages. Companies were legally sanctioned in 21 cases, but effective economic sanctions were not imposed in any of these judgments. They were acquitted in 29 trials.

⁵⁵⁶ On the phenomenon of lucrative illegality, see section 4.4.3.

Public prosecutors and private companies' lawyers set deals in 34 class actions and negotiation almost always involved the defendant's commitment to compliance with the CDC without the imposition of any economic sanction due to a previous breach of legislation. Exceptionally, once, one private bank agreed to pay a R\$ 10,000,000.00 fine as part of a deal with the AGOCPD.⁵⁵⁷ 72 class actions were still waiting for sentences or final appeal judgments.



Trial Results	convictions	acquittals	deals	under trial
Number of collective actions	21	29	34	72

Figure 5. *Outcomes of consumer collective action suits from the intermediate years (2002-2006). Source: dockets of the Attorney General Office (checked in April, 2011).*

In only two cases, there was still the possibility of private companies being ordered to pay punitive damages. For abusive advertisement, a

⁵⁵⁷ This amount corresponds roughly to 2.42 million pounds sterling by August 2016. *AGO v. Bank Itaú SA, Bank Banerj SA, Bank Boston SA, Unibanco SA, Bank Safra SA, Bank Bradesco SA, Bank Sudameris SA, Bank BCN* (2002.001.130808-7, 2nd Commercial Court of Rio de Janeiro).

telecommunications company could be obliged to pay R\$ 70,000.⁵⁵⁸ Likewise, due to unlawful trade of adulterated fuel, three different gas stations were sentenced to pay R\$ 70,000.⁵⁵⁹ Both these orders to pay punitive damages were confirmed by the state court of appeals and were waiting for the judgment of a special appeal to the STJ by the time of the initial data collection.⁵⁶⁰

Examining all 21 of the collective action trials with definitive convictions, there was no case in which individual consumers were properly compensated. As a matter of fact, nine sentences declared that there was a breach of law and obliged the companies to comply with the CDC, but did not convict these defendants to pay compensatory damages. A further 12 convictions obliged companies to fully compensate victims' losses, but ultimately these decisions did not impose economic sanctions on wrongdoers since individual consumers did not claim their share of damages and prosecutors still did not enforce the fluid recovery clause.

These convictions were not merely symbolic, since judges normally take the necessary measures to enforce their own orders after trials. Therefore, once a judicial order of compliance with the law is definitive, judges will impose a significant fine on disobedient companies. Financial institutions and telecommunication enterprises normally do not challenge these judicial decisions and tend not to commit the same wrongdoing repeatedly. On the other

⁵⁵⁸ This amount corresponds roughly to 17,000 pounds sterling. See *AGO v. Telerj Celular SA* (2005.001.103567-3, 4th Commercial Court of Rio de Janeiro).

⁵⁵⁹ This amount corresponds roughly to 17,000 pounds sterling. See *AGO v. Gas Station Arara Azul and others* (2004.001.060121-8, 4th Commercial Court of Rio de Janeiro).

⁵⁶⁰ There was also a conviction to pay R\$ 500,000.00 (equivalent to 121,230.00 pounds sterling) of collective moral damages, but was reversed by an appeal to the TJRJ. See *AGO v. Federation of Companies of Transportation of Rio de Janeiro* (2005.001.105678-0, 4th Commercial Court of Rio de Janeiro).

hand, since these defendants do not experience any kind of economic punishment for their previous delinquencies, they do not have effective incentives to refrain from charging other illegal fees, breaking other clauses of the CDC, or adopting any other abusive practice. Empirical data reveals that they face minimum risk of suffering any kind of economic punishment as long as they do not challenge a judge's prohibitive order.

However, this context of under-deterrence provides the reason why settlements were negotiated without the imposition of economic compensation. Public prosecutors did not expect to impose punitive damages through consumers' class actions and are aware that individual victims are unlikely to claim compensatory damages in these cases. Therefore, these prosecutors have clear incentives to negotiate settlements in which private companies commit themselves to immediate compliance with the law. Since collective litigation in Brazil may last for many years, prosecutors seek to ensure that their cases do not remain open for excessively lengthy periods. On the other hand, companies may settle, if they foresee a concrete risk of economic punishment that they wish to prevent.

Finally, several collective actions were still waiting for a final decision by 2011. From the dockets of the intermediate years, 72 collective actions were still waiting for sentences or judgments of appeals at the TJRJ, special appeals at the STJ, and extraordinary appeals at the Supreme Tribunal Federal (STF). In 26 cases, there was already a sentence from the commercial court and the judgment of appeal by the state's higher court. These cases are waiting for a final decision from the Supreme Court or from the STJ. 29 collective actions were judged by the commercial judge and were waiting for the judgment of an appeal. There were

still 17 collective litigation trials waiting for a lower court sentence by the commercial courts.

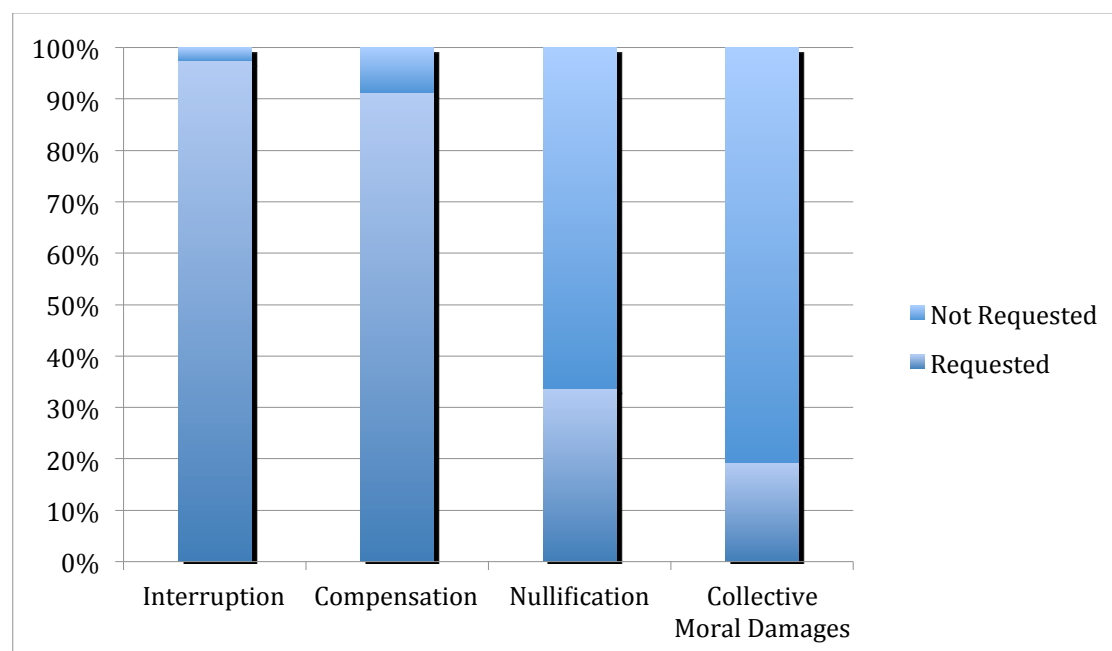
Delays may be extremely harmful to consumers for several reasons. First, they are often deprived of monetary resources illegally retained by private companies. Second, in the absence of an injunction, companies will continue to repeat the disputed practice until a definitive decision and may deprive more consumers of their rights. Third, prolonged time lengths may demobilise consumers and individual victims are not likely to be fully compensated by private companies.

3.3 The complementary analysis.

After 5 years from the preliminary data collection, I revisited the sample of 160 cases from the intermediate years, analysing their evolution, examining the outcomes of collective actions, and the economic consequences for corporations and consumers. This reexamination focused not only on the economic analysis of collective action, but also on the political, juridical, and sociological dimensions further developed in this thesis.

One important point consisted in providing evidence of the objectives of collective action. For this purpose, I decided to map empirically the types of requests made by the AGO to commercial courts in these actions and their frequency. The most frequent requests consist of demands to (i) oblige the corporation to interrupt the wrongdoing; (ii) compensate individual consumers; (iii) nullify a contractual clause; and (iv) compensate consumers collective through the application of collective moral damages. Because collective actions

have normally a much stronger regulatory than a compensatory effect, there was the possibility that the AGO demanded primarily a change of corporate conduct and secondarily monetary compensation for consumers.⁵⁶¹



Types of Requests	interrupt	compensate	nullify	collective damage
Number of times	156	146	54	31

Figure 6. Requests made by the AGO in consumer collective action suits from the intermediate years (2002-2006).

In practice, 97.5% of all collective actions contain a request for interruption of a collective wrongdoing, whose practical effect could lead to the regulatory enforcement of consumer protection law and change of corporate behaviour. However, 91.25% contain also a request for corporations to compensate individual consumers, whose practical effect could be the comprehensive compensation of all victims harmed by the collective

⁵⁶¹ These four types of requests were the ones that appeared repeatedly. Eventually there were also different requests, such as removal of an executive from a particular professional position, prohibition of celebrating contracts with the government, and promotion of vote for a change of leadership at a particular organisation.

wrongdoing. Collective actions may cumulate several requests and most combine these two objectives. Additionally, 33.75% contain a request to nullify a contractual clause, with the aim of changing the legal regime of an adhesive contract that affects a large group of actual and potential consumers of a particular corporation.⁵⁶² Because this objective seeks to change corporate conduct and the working rules-in-use for the B2C relationship, their objective is also regulatory enforcement. Moreover, 19.37% of the collective actions contained a request for imposition of collective moral damages, whose objective is both compensatory and regulatory. On one hand, the funds obtained through collective moral damages may be used to recompose the broad social interest harmed by the collective wrongdoing. On the other hand, exemplary or punitive damages may deter corporate behavior, by preventing further collective wrongdoings.

Therefore, the original objectives of the AGO include both the transformation of corporate conduct and the restitution of money to consumers. In practice, however, collective actions achieve the regulatory function more frequently and efficiently than the compensatory function. One of the explanations is provided by the examination of requests of injunctions in this sample of cases. In addition to the generic requests, the AGO may request an immediate judicial remedy through an injunctive order from a commercial court to interrupt the collective wrongdoing immediately. On the other hand, injunctions are not used for a judicial order determining the immediate restitution of money to consumers harmed by the collective wrongdoing.

⁵⁶² By adhesive contract or contract of adhesion, I refer to a standard form contract, that is a contract whose terms and conditions are set by one of the parties and the other one has no ability to negotiate any clause, being left in a position to 'take it or leave it'.

Analysing the use of a judicial remedy to interrupt immediately the collective wrongdoing, the AGO requested an injunction in 91.87% of all examined cases. In 45.58% of these 147 collective actions, the commercial courts granted the requested injunctive order immediately. Only 22.45% of these requests was rejected, normally leading to an interlocutory appeal to the TJRJ. In 31.97% of these cases, the court did not appreciate the request for an injunctive order immediately. Sometimes judges postponed their decision to after the defendant's response. In other cases, judges simply reserved this prerogative to a later procedural stage, leaving open the possibility to accept or reject this request for an interim injunction at any time. In theory, these requests should receive an immediate decision. In practice, almost one third of them are left undecided.⁵⁶³ One potential explanation is that these are hard cases, injunctive orders may not necessarily solve the collective action, and judges perhaps expect that the AGO and the corporation may settle the case under the 'shadow of a potential injunctive order'.

Intuitively, there is the impression that an injunctive order would lead a corporate defendant to seek a settlement immediately. After all, the injunction produces an immediate regulatory effect, sending a strong signal that the corporation's conduct was illegal. However, examining all 35 settlements, this intuition is not really confirmed. In only 13 of these deals there was a previous interim injunction against the defendant. Interestingly, in 16 cases the judge had

⁵⁶³ I included in this account all cases in which commercial courts expressly postponed the decision to a future stage and all cases in which the AGO requested an injunctive order and there was simply no information about an injunction in the 'procedural mirror'. Because injunctions are extremely important judicial decisions and 100 'procedural mirrors' contained copies of these decisions, I assumed that the absence of any information meant that the commercial court did not decide about it.

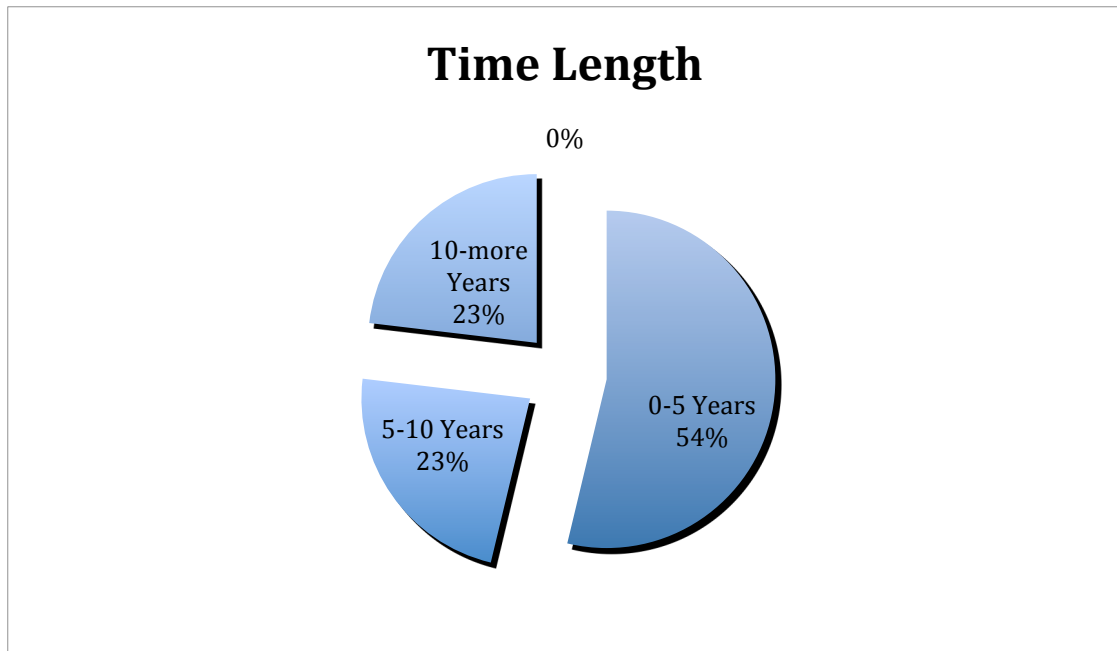
not yet decided the request of an injunctive order and parties settled under the shadow of a potential decision. In other 6 cases, the commercial court rejected the injunctive order and a settlement was signed nonetheless. Therefore, it seems that injunctions do not necessarily increase the probability of a settlement in the Brazilian setting.⁵⁶⁴

Another curious feature of the Brazilian experience is that almost all settlements occurred in the beginning of the collective litigation. For instance, in the preliminary analysis, there were 34 cases of deals. In this reexamination, there was only one additional case of settlement and it was the only case of a deal celebrated after 5 years of litigation.⁵⁶⁵ In contrast to US class actions, corporations do not have economic incentives to settle a case to avoid high litigation costs, potential punitive damages, and the duty to compensate fully individual consumers.

On the contrary, certain corporate defendants seem to adopt a strategy to promote endless litigation, delaying the final verdict for many years: 37 cases lasted between 5 and 10 years and 37 other cases lasted more than 10 years. From the latter, 27 collective actions are still pending a final judgment. Therefore, the Brazilian civil public action does not discourage long duration of procedures through economic sanctions on corporate defendants who pursue judicial delay as their defence's strategy.

⁵⁶⁴ After all, 19.40% of the injunctions resulted in a subsequent settlement. 18.18% of rejections of injunction also resulted in settlement. 34.04% of the unexamined requests of injunction resulted in settlements.

⁵⁶⁵ See *AGO v. Clube de Regatas Vasco da Gama and Confederação Brasileira de Futebol* (2006.001.055242-0, 3rd Commercial Court of Rio de Janeiro).



Time Length	0-5 Years	5-10 Years	10-more years
Number of collective actions	86	37	37

Figure 7. *Time length of consumer collective action suits from the intermediate years (2002-2006). Source: Website of the TJRJ and STJ (checked in August, 2016).*

Another important characteristic of the settlements consists of the central commitment to change the corporate practice, by interrupting the collective wrongdoing immediately. Almost all 35 settlements were primarily based on the objective of guaranteeing the regulatory enforcement of consumer protection law, but without a transaction regarding the payment of compensatory damages to individual consumers. In most of these deals, the AGO excluded the compensation from the negotiation without pardoning the debts of the corporation, but simply stating that individuals should seek compensation through the small claims courts. This was the case with 31 of these 35 settlements. In 4 settlements between the AGO and transportation companies, there were generic clauses obliging these companies to compensate their customers, but there is no evidence that they actually restituted an abusive fee of

mandatory insurance against damages.⁵⁶⁶ Therefore, these settlements changed corporate practices, but did not result in any compensation for consumers.

Exceptionally one settlement required the bank Itaú to pay R\$ 10,000,000.00 to a public fund for consumer protection.⁵⁶⁷ This seems to be a unique case, in which one of the eight corporate defendants in a collective action decided to pay a large sum of money to settle the case in the beginning of litigation. It still remains the one single episode of payment of collective moral damages from this sample of 160 cases.⁵⁶⁸ These resources supported the establishment of the PROCON in Rio de Janeiro in 2012, being therefore very important for the development of the municipal consumer agency.⁵⁶⁹ Nonetheless, this collective action produced a rather peculiar outcome, because all other corporate defendants ended up convicted and obliged to restitute twice the money abusively charged from their customers. However, there is no evidence that they actually complied with this verdict and the case was closed without any order to return these funds directly to the harmed consumers. Therefore, only the defendant that settled the case suffered economic consequences in contrast to the convicted banks, which arguably profited from

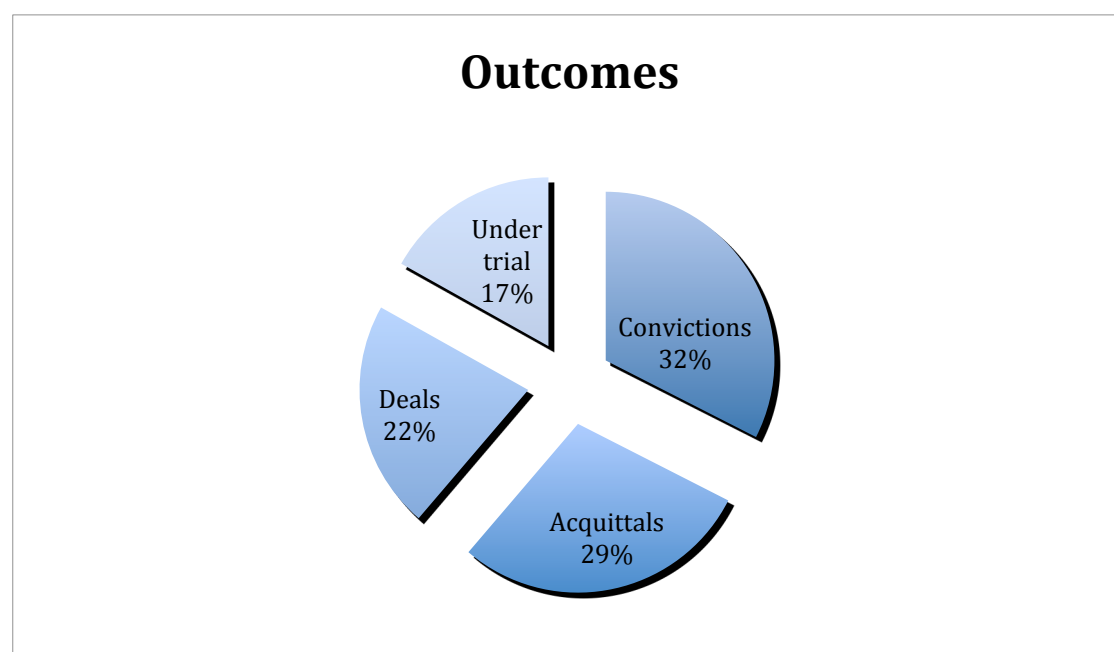
⁵⁶⁶ These cases are *AGO v. Granero Transportes Ltda* (2006.001.146236-0, 1st Commercial Court of Rio de Janeiro); *AGO v. Tip Top Transporte Ltda* (2006.001.150605-2, 1st Commercial Court of Rio de Janeiro); *AGO v. Transportes Fink Ltda* (2006.001.146243-7, 3rd Commercial Court of Rio de Janeiro); *AGO v. Metropolitan Transportes* (2006.001.146230-9, 6th Commercial Court of Rio de Janeiro).

⁵⁶⁷ This amount corresponds to 2,424,581.14 pounds sterling by August 2016. *AGO v. Bank Itaú SA, Bank Banerj SA, Bank Boston SA, Unibanco SA, Bank Safra SA, Bank Bradesco SA, Bank Sudameris SA, Bank BCN* (2002.001.130808-7, 2nd Commercial Court of Rio de Janeiro).

⁵⁶⁸ Interview B (RJ, 06.04.11).

⁵⁶⁹ Interviews P (RJ 27.08.14) and U (RJ 11.09.14).

their illegal conduct and did not suffer any economic sanction after long collective litigation.



Trial Results	convictions	acquittals	deals	under trial
Number of collective actions	52	46	35	27

Figure 8. *Outcomes of consumer collective action suits from the intermediate years (2002-2006). Source: Website of the TJRJ and STJ (checked in August, 2016).*

This is not an isolated example. Almost all collective actions simply did not result in any economic consequences for corporate defendants. This was the case in 2011 and remained the case by 2016. In the preliminary analysis, however, almost half of the cases were still under trial and there were only a very limited number of definitive convictions. After 5 years, these outcomes had changed. 52 corporations were convicted through final judicial decisions. 46 defendants were acquitted. As mentioned above, 35 cases finished through settlements and 27 are still waiting for a final verdict.

Even with such a larger number of convicted corporations, collective actions rarely provided compensation for individual consumers or for society at

large through collective moral damages. The preliminary analysis suggested a setting of under-deterrence. By 2011, there was no case of definitive conviction to pay collective moral damages and no case in which corporations were forced to retribute money to the harmed individual consumers. By 2016, the complementary analysis provides interesting examples of the limitations of the actual practice of civil public action regarding compensation of consumers. From the two cases with potential for payment of collective moral damages, one is still pending from the decision of a special appeal by the STJ.⁵⁷⁰ In the other collective action, appeal was denied and there is a definitive conviction for payment of R\$ 70,000 of collective moral damages.⁵⁷¹ However, this judicial decision was still not yet executed and the commercial court is trying to force the gas station to pay this amount since 21st of September of 2011 without success. In a rare case of a judicial order by the commercial court with economic consequences for a corporation, the telecom company Telemar paid a fine of R\$ 100,000 for failing to comply with an injunction order.⁵⁷²

The attentive study of these collective actions reveals some of the reasons for rare compensation. Consider, for instance, the case against Telemar for charging a fee for the information service that this company is obliged to provide freely for the population of Rio de Janeiro.⁵⁷³ After a long procedure, the AGO requested the payment of compensatory damages for all harmed consumers, but the commercial court refused to proceed with the collective execution, because

⁵⁷⁰ *AGO v. Telerj Celular SA* (2005.001.103567-3, 4th Commercial Court of Rio de Janeiro).

⁵⁷¹ This amount corresponds roughly to 17,000.00 pounds sterling. See *AGO v. Gas Station Arara Azul and others* (2004.001.060121-8, 4th Commercial Court of Rio de Janeiro).

⁵⁷² This amount corresponds roughly to 24,000.00 pounds sterling. *AGO v. Telemar Norte Leste SA* (2002.001.097739-1, 5th Commercial Court of Rio de Janeiro).

⁵⁷³ *AGO v. Telemar Norte Leste SA* (2005.001.142485-9, 7th Commercial Court of Rio de Janeiro).

there was no precise information about the exact value for compensation. Therefore, the case was closed without any consumer compensation. This is an example of excessive formalism, because the commercial court could estimate an amount for compensatory damages - as did the Portuguese court in a similar case.⁵⁷⁴ Alternatively, the court could determine that the company provides the information on the unlawful profit made through this abusive practice - as it may happen with the mandatory sharing of evidence in the discovery procedure connected to a class action.

Likewise, the AGO filed a collective action against the telecom company Telerj for not returning credit for consumers of pre-paid cell phones when they requested cancellation or change of line.⁵⁷⁵ After 7 years of litigation, the company was ordered to compensate all harmed consumers, but there was simply no evidence that Telerj returned this money. In 2015 the AGO requested that the corporation demonstrate that it had restituted this credit to its consumers. Telerj appealed and the TJRJ interrupted the collective execution, with the justification that the satisfaction of consumers' interests depends on their initiative and the corporation does not have any obligation to demonstrate that this money was returned to them.⁵⁷⁶ This decision prevented consumer compensation and the case was closed without any economic consequences for the corporation or consumers. This is an example of misunderstanding of the interdisciplinary problems of collective action and the possibilities of juridical

⁵⁷⁴ Ferro (n. 300) 299-300.

⁵⁷⁵ *AGO v. Telerj Celular SA* (2005.001.037991-3, 4th Commercial Court of Rio de Janeiro).

⁵⁷⁶ *AGO v. Telefonica Brasil SA* (0019865-82.2015.8.19.0000, rapporteur Peterson Barroso Simão, 3rd Civil Chamber, TJRJ, 17.06.2015).

instruments of collective action. In such a case, consumers rarely seek individual justice and the corporation benefits economically from the collective wrongdoing.

In all 160 collective actions, there was one in which individuals had the initiative to request their compensation directly at the commercial courts. This was a case in which a university had increased the cost of tuition during the academic term, and was obliged to restate twice the amount to their students.⁵⁷⁷ The AGO requested that the university compensated all students and demonstrated the payment of compensatory damages to everyone, but the commercial court rejected this request. Therefore, 217 individuals presented their individual requests to the commercial court through a formal judicial procedure called 'habilitation of credits'. A typical case involved the payment of R\$ 800 (equivalent to approximately 200 pounds sterling). However, commercial courts requested the payment of court usage fees and that a lawyer presents the habilitation before a judge. Unsurprisingly, from this universe of 217 cases, 145 were requests made by lawyers representing themselves. Only 1 consumer had the legal assistance of a public defender. In total, 160 requests led to the final payment of compensation. However, 40 requests were rejected for lack of payment of court usage fees and 2 cases were closed without payment due to desistance of the consumer. 15 cases were still pending, because each individual habilitation consists of a judicial procedure with around 30 procedural acts and 5 judicial decisions. Therefore, these habitations probably required some 6,500 procedural acts and 1,085 judicial decisions.

⁵⁷⁷ *AGO v. University Candido Mendes* (2004.001.048293-0, 7th Commercial Court of Rio de Janeiro).

On one hand, there was finally one collective action that resulted in compensation of around R\$ 800.00 (equivalent to around 200 pounds sterling) for 160 consumers, comprising a total of approximately R\$ 128,000 (corresponding roughly to 32,000 pounds sterling). On the other hand, this volume corresponds to just a fraction of the amount abusively charged and of the harmed consumers. Likewise, law students were disproportionately favoured, because they could represent themselves without any necessity to hire a lawyer for the credit habilitation. Moreover, the pragmatic decision to oblige the university to compensate everyone would have reduced the barriers imposed by court usage fees and mandatory legal assistance. Furthermore, the commercial court would increase access to justice, reduce judicial costs, and guarantee the effective compensatory function of collective actions for consumer protection.

In summary, the practical experience of civil public actions reveals several cases of regulatory enforcement of consumer protection laws, but rare episodes of compensation for individual and collective damages. The next section brings four cases that show the potential of collective actions to regulate corporate practices.

3.4 Cases of collective action for consumer protection

3.4.1 The renewal of the registration fee.

On 6th December 2007, the Brazilian Central Bank (BCB) edited a resolution, regulating bank fees.⁵⁷⁸ Some basic services would be free,⁵⁷⁹ but banks were authorised to charge for numerous other financial services.⁵⁸⁰ A former President of Bank Boston, the President of BCB did not consult any consumer groups or enforcement agents.⁵⁸¹

In 2008, banks implemented their new fees, charging customers for services traditionally provided free of charge. Based on a consumer complaint, the AGO consulted the BCB, which simply informed that the new bank fees were legally valid, being established by a resolution published by the President. The AGO considered this explanation to be insufficient. Banks charged this new fee for renewal of registration from all customers simply to maintain their client's bank account operative. For instance, Itaú charged all customers the amount of R\$ 38.00 (corresponding to 9.46 pounds sterling). Not only new clients had to pay these fees for registration of their accounts, but also all old clients had to pay an annual fee for renewal of this registration.

After receiving responses from BCB and Itaú, on 7th January 2009, the AGO filed a civil public action against Itaú.⁵⁸² The plaintiff argued that this is an

⁵⁷⁸ Resolution BCB n. 3518/07:

http://www.bcb.gov.br/pre/normativos/res/2007/pdf/res_3518_v1_0.pdf (checked on 15.01.17).

⁵⁷⁹ The original bank's card; 10 cheques per month; 4 cash withdraws per month; online account consultation in the internet; 2 account statements from the ATM per month.

⁵⁸⁰ for instance, cash transfers; credit rating; delivery of monthly bank statements to a customer's home; registration, among other services.

⁵⁸¹ http://g1.globo.com/Noticias/Economia_Negocios/0,,AA1646257-9356,00-FEBRABAN+TARIFA+REGULADA+PODE+AFETAR+OFERTA+DE+CREDITO.html (checked on 15.01.17); http://www.bcb.gov.br/pre/bc_atende/port/servicos5.asp (checked on 15.01.17).

⁵⁸² *AGO v. Itaú SA* (2009.001.001650-4, 7th Commercial Court of Rio de Janeiro).

abusive fee, because customers already pay this fee for opening a bank account and should not cover expenses of a bank to investigate their clients. Moreover, the financial consumer did not benefit from any particular service. Because this charge was made independently of any consumer request, this fee did not add any value to an individual consumer, simply representing a transfer of fixed costs from banks to customers.

On 14th January 2009, the commercial court granted an interim injunction against Itaú. According to the judicial decision, a resolution of the BCB had the character of a complex normative administrative act, whose norms should comply with the federal rules established by the CDC. In this particular case, the judge considered that the financial authority allowed banks to impose an excessive burden on consumers and to act in bad faith, by authorising the renewal of the registration fee. The case also implied a contractual imbalance between business and consumer, because customers cannot negotiate the terms of their contracts of adhesion and are forced to pay for any fees imposed by banks. Therefore, the court suspended the contractual clause authorising the bank to charge this fee and prohibited Itaú from charging it.

In its defence in this collective action, Itaú argued that investigating customers was intrinsic to its commercial activity and necessary for the financial safety of the banking system.⁵⁸³ The financial circumstances of clients matter for money loans. According to Itaú, even if a particular client had not asked for a loan, the bank is obliged to collect evidence about her financial health to respond immediately to any request and distribute financial risks through its portfolio.

⁵⁸³ On the importance for a bank to identify the customer, see Ross Cranston, *Principles of banking law* (2nd edn OUP 2002) 134-6.

Therefore, the bank defended its actions and also appealed from the decision that suspended the contractual clause and prohibited the charge of this fee.

On 20th August 2009, the commercial court sentenced the case. According to the verdict, Itaú charged this fee without providing any correlated service to customers, simply transferring fixed costs to consumers. The judge suspended the validity of the contractual clause in all contracts from Itaú, prohibiting the bank from charging this fee in the entire country. The bank was also ordered to restitute the money charged to all customers and to pay R\$ 100,000.00 (equivalent to 24,245.81 pounds sterling) to the National Fund for Diffuse Rights (NFDR) as collective moral damages caused by this abusive practice.

On 11th September 2009, the BCB decided to publish a new resolution,⁵⁸⁴ preventing all banks from charging this renewal of the registration fee. According to the financial authority, their aim was to eliminate the lack of a uniform regulatory pattern regarding banking fees, which required a general prohibition against charging this renewal of the registration fee.⁵⁸⁵

The collective action continued against Itaú. In the appeal judgment, the bank eliminated the obligation to pay collective moral damages.⁵⁸⁶ After the appeal, the AGO requested that the bank restitute the money immediately to customers through the deposit of a credit in their bank account, which was ordered by the commercial court. Itaú filed and lost an interlocutory appeal at the TJRJ, in which the high court stated that the bank was simply trying to

⁵⁸⁴ Resolution BCB n. 3467/09.

⁵⁸⁵ <http://economia.estadao.com.br/noticias/geral,bc-proibe-bancos-de-cobrar-tarifa-de-renovacao-cadastral,433515> (checked on 15.01.17).

⁵⁸⁶ *AGO v Itaú SA* (AC 0000965-58.2009.8.19.0001, rapporteur Elisabete Filizzola Assunção, 2nd Civil Chamber, TJRJ, 24.02.2010).

frustrate its obligation to compensate consumers, but it was simply not reasonable to expect that each individual consumer should have the procedural and economic burden to promote the execution of this decision, given that these are small value claims.⁵⁸⁷

However, Itaú managed to suspend this judicial order in the STJ. Furthermore, in 2016 the STJ considered the renewal of registration fee to be a legally valid banking fee and that Itaú did not have any duty to compensate consumers or to restitute the values charged in 2009.⁵⁸⁸ In the end, the collective action had the regulatory effect to strike down the renewal of registration fee, but did not result in compensation to consumers.

3.4.3 – The collapse of product delivery in e-commerce

In January 2011, hundreds of consumers complained to the AGO against e-commerce companies for failing to deliver their products according to schedule. Customers were particularly upset for not receiving Christmas gifts on time, complaints being directed to all relevant players in the Brazilian e-commerce market, such as ‘Americanas’, ‘Compra Fácil’, and ‘Submarino’.

This case seemed difficult to put in perspective, because hundreds of complaints could be simply a small fraction of an enormous volume of transactions made in this period. However, prosecutors could have a sense of the

⁵⁸⁷ *AGO v Itaú SA* (AC 0029079-39.2011.8.19.0000, rapporteur Elisabete Filizzola Assunção, 2nd Civil Chamber, TJRJ, 31.08.2011).

⁵⁸⁸ *AGO v. Itaú Bank SA* (REsp 1303646/RJ, Rapporteur João Otávio de Noronha, 3rd Chamber, STJ, 10.05.2016).

real size of the logistic failure and crisis of product delivery, by examining the open database of individual complaints provided by the site 'Complain Here'. Each company received many thousands complaints for not delivering products with delays reaching weeks in some of the cases. For instance, 'Americanas' received a total number of more than 23,000 customer complaints.

On 1st February 2011 a public prosecutor filed a civil public action against 'Americanas', requesting the company to publicise a realistic timetable for product delivery, to comply with their estimated deadlines for product delivery, and to compensate customers for delays or for not delivering items.⁵⁸⁹ On 9th February 2011, the commercial court granted an interim injunction, ordering the company to state the estimated delivery time for each product listed on their website, to deliver products on time, and to pay R\$ 500.00 (equivalent to approximately 120 pounds sterling) for each violation of the judicial order.

This judicial decision was broadly publicised in both conventional and electronic media, including the website 'Complain Here'. In interview, the prosecutor warned consumers of the company's justification that customers could not be found at their addresses. The website 'Complain Here' attributed the problem to a logistical failure, warning that higher Christmas' demand could not be an excuse for the company's failure to deliver products.⁵⁹⁰

News reports caused an increase in the number of complaints.⁵⁹¹ Moreover, the backlog affected also new purchases and consumers continued to

⁵⁸⁹ *AGO v. B2W Companhia Global do Varejo Americanas.com* (0031079-09.2011.8.19.0001, 7th Commercial Court of Rio de Janeiro).

⁵⁹⁰ <http://www1.folha.uol.com.br/fsp/mercado/me1202201108.htm> (checked on 15.01.17)

⁵⁹¹ <http://oglobo.globo.com/economia/americanascom-proibida-de-fazer-novas-vendas-no-rio-2765163> (checked on 15.01.17).

complain about problems occurring after the Christmas season. Simultaneously, the commercial court published an announcement in the official gazette that interested parties could join the civil public action. In response to this call to participate, not a single individual consumer presented a claim before the Commercial Court in this collective action.

Originally the AGO requested an injunction to interrupt electronic sales by 'Americanas', which was rejected by the commercial court. Nonetheless, because the company continued to sell products beyond its delivery capacity, the prosecutor filed an appeal and sent copies of a number of received complaints to the TJRJ. In May, a High Court judge granted this injunctive order, prohibiting the Brazilian e-commerce giant to sell any product until its logistical collapse had been solved.⁵⁹²

'Americanas' gradually improved its logistics and was liberated to operate online again, but still received an unfavourable verdict by the commercial court on 29th February 2012. According to the sentence, the company was (i) prohibited to trade until the complete regularisation of product delivery; (ii) obliged to announce a realistic deadline for product delivery on its website; (iii) ordered to pay compensation for material and moral damages caused to any individual consumer; (iv) obliged to publish the sentence in two major local newspapers with widespread circulation in Rio de Janeiro. The commercial court denied the prosecutorial claim that the company should be ordered to pay R\$ 3,000,000.00 (corresponding to around 716,741 pounds sterling) for collective moral damages.

⁵⁹² *AGO v. B2W Companhia Global do Varejo Americanas.com* (0008595-03.2011.8.19.0000, rapporteur Helda Lima Meirelles, 15th Civil Chamber, TJRJ).

Both the AGO and 'Americanas' appealed to the High Court. On 6th November 2012, the court maintained the verdict to compensate individual consumers, but rejected the application for collective moral damages because the case involved homogeneous individual interests and not diffuse or collective interests.⁵⁹³ Additionally, the court confirmed that 'Americanas' could continue to operate online, after regularising the previous crisis of product delivery. A special appeal to STJ is pending since 2012.

3.4.3 – The explosions of underground chambers.

On 6th April 2011, the AGO filed a collective action suit against both the electricity company and the gas corporation of Rio de Janeiro. Prosecutors had investigated inadequate maintenance of underground chambers for over a year. A massive explosion on 1st April destroyed a taxi in Copacabana, pushing them into filing a suit on the following week. Their collective action was distributed at the court of justice just five minutes before the end of the working day.⁵⁹⁴ On the same evening, media broadcasted the prosecutor's request for an interim injunction and for collective moral damages of R\$ 1,000,000.00 per underground explosion.⁵⁹⁵

⁵⁹³ *AGO v. B2W Companhia Global do Varejo Americanas.com* (0031079-03.2011.8.19.0000, 15th Civil Chamber, TJRJ).

⁵⁹⁴ Interview O (RJ 26.08.14).

⁵⁹⁵ This amount corresponds roughly to 240,000.00 pounds sterling by August 2016. See *AGO v. Light and CEG* (0101795-61.2011.8.19.0001, 4th Commercial Court). <http://oglobo.globo.com/rio/ministerio-publico-entra-com-acao-contra-light-ceg-por-explosoes-de-bueiros-2800490> (checked on 15.01.17).

On 7th April CODECON filed a similar collective suit. Because they requested fast track of judicial distribution, their petition was immediately delivered to the Commercial Court, thus avoiding the standard two days it takes for bureaucratic delivery to a judicial authority.⁵⁹⁶ CODECON was aware of the AGO's initiative, seeking an interim injunction before the prosecutorial request was decided.⁵⁹⁷ However, they failed to obtain the judicial remedy for lack of sufficient evidence.⁵⁹⁸

On the following days, the commercial courts analysed the AGO's collective action and ordered a mandatory session of negotiation with the companies. Prosecutors had established a partnership with the Engineers Guild, collecting evidence with support of their Chamber for Accident Prevention. Evidence revealed that 4,000 underground chambers required renovation by the electricity company and 50 kilometres of gas tubes required replacing by the gas corporation.

On 7th July, after three months of intense negotiation, prosecutors signed an agreement with the electricity company for renovation of all underground chambers within 2 years, establishment of a system of electronic monitoring, and payment of fines of R\$ 100,000.00 for any future explosion.⁵⁹⁹ On 28th July, the gas corporation signed a similar agreement.⁶⁰⁰ Negotiations were boosted by a

⁵⁹⁶ Interview S (RJ 09.09.14).

⁵⁹⁷ Interview S (RJ 09.09.14).

⁵⁹⁸ Interview S (RJ 09.09.14).

⁵⁹⁹ This amount corresponds roughly to 24,000.00 pounds sterling by August 2016. <http://brasil.estadao.com.br/noticias/geral,light-assina-acordo-que-preve-multa-por-explosoes-de-bueiros,741495> (checked on 15.01.17).

⁶⁰⁰ <http://g1.globo.com/rio-de-janeiro/noticia/2011/07/ceg-assina-tac-e-pode-ser-multada-em-r-100-mil-se-bueiro-explodir.html> (checked on 15.01.17).

further three explosions, which increased pressure from the public and the city mayor for the companies to settle.⁶⁰¹ The judge approved the terms of these agreements and closed the case. Excluded from the negotiations, CODECON appealed, but without success.⁶⁰² The electricity and gas regulatory agencies did not participate in these decisions. After two years, both companies complied with their obligations and renovated their underground infrastructures according to the settlement.

3.4.4 The bankrupted universities

On 13th January 2014, the Brazilian Ministry of Education cancelled the operational licenses of University Gama Filho and of City University, both located in Rio de Janeiro. Galileo Group controlled both academic institutions and suffered a financial crisis. The Ministry of Education had monitored the situation since 2012, devising a recovery plan for both universities. Because of late payment of salaries, academic staff took strike action, deteriorating educational quality and capacity for recovery. By August 2013, federal authorities suspended new student entries to these universities. Additionally, the Ministry of Education ordered Galileo Group to make loans and regularise payment to staff. Galileo

⁶⁰¹ <http://www.jb.com.br/rio/noticias/2011/04/02/explosao-de-bueiro-paes-determina-auditoria-externa-na-light/> (checked on 15.01.17).

⁶⁰² Interview S (RJ 09.09.14).

Group failed to comply. Both institutions collapsed and their licenses were revoked⁶⁰³.

The Ministry of Education made a call for universities interested in taking students from Gama Filho and City, reassuring students that they have the right to transfer to another university and Galileo Group a duty to provide the necessary documents for their immediate transfers. However, both Gama Filho and City retained students' documents. Since August 2013, the OPD received several complaints. Public defenders scheduled meetings with representatives of Galileo Group, who failed to attend and simply sent a letter alleging that the situation was regularised.

On 16th January 2014, the OPD finally filed a civil public action, demanding immediate termination of student contracts, release of any duty to pay tuition fees, compensation for patrimonial and moral damages, conviction for collective moral damages, and the immediate delivery of all documents necessary for academic transfer.⁶⁰⁴ Because summer vacation would be over by mid-February, students needed their transcripts immediately to change universities without interrupting their studies.

On 17th January 2014, the commercial court granted an interim injunction, prohibiting Galileo Group from charging students any fees. Additionally, the judge ordered Gama Filho and City to provide all necessary documents for academic transfer within 10 days. The fine for the violation of this

⁶⁰³ http://portal.mec.gov.br/index.php?option=com_content&view=article&id=20134:mec-descredencia-universidade-gama-filho-e-centro-universitario-da-cidade&catid=212:educacao-superior (checked in 15.01.17).

⁶⁰⁴ *OPD v. Galileo Management of Educational Resources SA and others* (0015049-88.2014.8.19.0001, 4th Commercial Court of Rio de Janeiro).

injunctive order was R\$ 500.00 (equivalent to roughly 121.23 pounds sterling) per day.

On 27th January 2014, the commercial court conducted a special hearing to evaluate Galileo's Group compliance with the previous ruling. Galileo Group had taken no concrete measures to facilitate students' transfers. In this hearing, Galileo Group proposed the delivery of 500 transcripts at every 10 days, which public defenders considered inadequate to attend an estimated total number of 12,000 students. The commercial court agreed with the OPD and increased the fine to R\$ 10,000.00 (equivalent to 2,424.58 pounds sterling) per day.

On 3rd February 2014, the commercial court conducted another special hearing. Admitting not having delivered any documents, Galileo Group proposed to hand over all documents between 25th and 28th February. The commercial court approved this proposed plan, but also raised the fine to R\$ 100,000.00 (corresponding to 24,245.81 pounds sterling) per day. Unpaid staff members volunteered to help, but IT was unreliable and slow, requiring enormous patience from students. After problems with finding information, printing slowly, and dealing with frustration, some students entered into discussions and threatened staff members who simply stopped working and closed their doors, leaving thousands of students unattended.⁶⁰⁵

On 23rd March 2014, the commercial court decided not to raise the fine, because it was already sufficiently high. Rather, the judge reported to the Ministry of Education that Galileo Group's failed to comply with the order to facilitate students' transfers. Moreover, the court notified defendants to comply

⁶⁰⁵ Interview V (RJ 11.09.14).

with the injunction immediately to avoid being arrested for disobedience to a judicial order.

By then, Universities Estácio de Sá and Veiga de Almeida had been selected as recipient institutions for transferred students. However, students did not have transfer documents. The OPD persuaded the Ministry of Education to draw on a back up from its electronic records and use incomplete information on students from Gama Filho and City. In normal circumstances, it would be unacceptable to transfer students without official transcripts and the Ministry of Education had to pass a special resolution to authorise the use of this unofficial information.⁶⁰⁶

One special case involved a sub-group of students who had already completed all academic credits by the end of 2013 and were graduating from Gama Filho and City. On one hand, they could not be transferred to Estácio de Sá and Veiga de Almeida, because they had finished their studies. On the other hand, this sub-group needed a university to provide their diplomas. In the absence of a clear rule, the OPD demanded that the recipient universities should issue their diplomas, even if these students never paid tuition or studied there. Framing this issue as a matter of social responsibility, the OPD negotiated this solution with the Ministry of Education and the recipient universities, which accepted this non-legal obligation and even sponsored their graduation ceremonies. In the meanwhile, the collective action continues its course, still waiting for a sentence from the commercial court.

3.5 From empirical data to conceptual analysis

⁶⁰⁶ Interview V (RJ 11.09.14).

Empirical observation of collective actions, interviews with relevant legal actors, and case studies reveal the possibilities and limitations of the practical experience of civil public actions. This chapter introduced the relevant points for further discussion and analysis, by explaining the research methodology, the strategy for empirical investigation, the interpretative perspective adopted in this thesis, and the thematic analysis developed in this part III. Additionally, the argumentation is based not only on the comparative framework developed in part II, but also on interdisciplinary dimensions revealed by analysis of 405 collective actions, 30 interviews, and experience as a participant observer of the investigated setting. Moreover, this chapter provided a general overview of collective actions in Rio de Janeiro, by examining a sample of 160 collective actions filed by the AGO between 2002 and 2006 through a preliminary analysis of data collected in 2011 and a recent analysis from 2016. Finally, there are also four case studies of regulatory enforcement through collective actions. These cases cover actions by relevant collective actors against corporations from different sectors of the economy and under different regulatory regimes.

Important questions emerge from this empirical data and will be addressed in the following chapters. For instance, the lack of monetary rewards did not cause the death of collective actions. On the contrary, there was a growth of collective actions between 2001 and 2010, even with rare cases of compensation for consumers and payment of economic sanctions by corporations. This issue of the economic viability of collective actions is discussed in chapter 4.

Another important aspect is the development of the organisational structure of a collective actor and how the infrastructure influences the institutional dynamics and practical experience. Between 1991 and 2000, the AGO organised itself to respond to grievances of individual consumers, mediating their complaints with corporations, and providing primarily a forum for ADR rather than for collective actions.⁶⁰⁷ Since 2001, the AGO transformed its internal organisational structure, focusing predominantly on the investigation of collective wrongdoings and regulatory enforcement of consumer protection laws through collective actions.⁶⁰⁸ This issue of the power of collective actors is examined in chapter 5.

Moreover, the role of law for collective action cannot be ignored. The recognition of collective rights influences collective litigation and distinguishes the experience of civil public action from class actions and collective redress. The legal architecture also influences the achievement of regulatory enforcement and consumer compensation, because injunctive orders normally produce the immediate effect of establishing working rules-in-use, but not the restitution of money to harmed victims of a collective wrongdoing. Legal norms also shape the conditions for negotiation of settlements, prohibiting collective actors from bargaining and leading to the exclusion of compensation from the scope of the negotiated deals with corporations. The legal architecture is subject of chapter 6.

Another important point is related to the participation and benefit of consumers in collective actions. The empirical data indicates that collective

⁶⁰⁷ This organisational structure looks similar to the consumer protection department of the AGO in Massachusetts, as studied by Silbey (n. 32) 849-51.

⁶⁰⁸ In contrast to the previous period centred on ADR and individual consumers, this period is based on collective actions and empowerment of collectivities. On collective actions as an instrument for collective empowerment, see Garth (n. 15) 255-69.

action implements consumer laws, by changing corporate conduct without compensating the consumer. This point leads us to the examination of the B2C relationships and how the asymmetry of information and power between consumers and corporations may influence their experience. In this context, collective action may function as a powerful instrument for coordination and accountability of companies. Likewise, the objective of consumer empowerment may not be achieved by an isolated individual consumer, but rather through the support of consumer groups and the intervention of collective actors, regulatory agencies, and judicial courts. Furthermore, the achievement of the professed objectives of collective action should be examined, especially regarding access to justice, judicial economy, consumer compensation, and deterrence. The legal environment is studied in chapter 7, concluding part III of this thesis.

Chapter 4

Incentives for collective action: funding, costs, compensation, sanctions, and social capital.

4.1 Introduction

The previous chapter presented empirical data regarding the Brazilian experience of collective action for consumer protection, raising important questions concerning economic, political, juridical, and social issues, which will be further examined in this thesis. A particularly important problem concerns the economic incentives for collective actions. On one hand, low funding and limited economic rewards do not provide monetary incentives for collective litigation. On the other hand, a lack of monetary incentives does not correspond to reduction of collective action, but rather to significant growth of collective suits filed by the AGO and other collective actors.

Therefore, this empirical data seems to pose a challenge to the literature that correlates economic enablers with the volume of collective litigation.⁶⁰⁹ This issue is important not only because monetary incentives influence the experience of collective action, but also because non-monetary incentives may also be relevant. I will address this problem, by analysing how low monetary incentives affect collective action and how non-monetary incentives may provide justification for its growth in practice. In summary, this chapter examines the economic incentives for collective action, by investigating how litigation funding,

⁶⁰⁹ On the unlikely survival of collective actions in the absence of large fee awards to lawyers and compensatory damages for the mass of consumers, see Deborah Hensler, Financing civil litigation: the US perspective, in Mark Tuil and Louis Visscher (eds), *New trends in financing litigation in Europe* (Edward Elgar 2010) 168-9.

judicial economy, sanctions and rewards, and social capital may influence collective action.

In the US class action plaintiff attorneys are the regular litigation funders.⁶¹⁰ Consequently, collective action is shaped not only by public goals, but also by the potential private gain of these attorneys.⁶¹¹ Because collective action is calibrated by such monetary incentives, attorneys developed a pattern of entrepreneurial litigation in which they fund litigation to pursue their rewards.⁶¹² In this context, some even refer to the emergence of a transactional model of adjudication, in which litigation resembles a transaction, the attorney functions as a dealmaker, and the magistrate performs the role of deal broker.⁶¹³

In Brazil, in contrast, law enforcers do not have the equivalent monetary resources and organisational structure to protect consumer rights effectively.⁶¹⁴ The other side of the economic equation of Brazilian collective actions explains the limited use of resources by law enforcers. In theory, collective action for consumer protection has the professed objectives of compensating consumers and applying exemplary damages to deter further wrongdoing.⁶¹⁵ In the

⁶¹⁰ Ratner (n. 167) 272. Actually, plaintiff attorneys regularly fund ordinary litigation in the US too. See, for instance, David M. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer, and Joel B. Grossman, The costs of ordinary litigation, *UCLA Law Review*, vol. 31 (1983) 76-80.

⁶¹¹ Hensler and others (n. 56) 424.

⁶¹² Coffee (n. 210) 217-20; Coffee Jr, Understanding the plaintiff's attorney: the implications of economic theory for private enforcement of law through class and derivative actions, *Columbia Law Review*, vol. 86 (1986) 669; Coffee (n. 199) 882-96; Coffee (n. 204) 18-29.

⁶¹³ Rubenstein (n. 166) 419-27.

⁶¹⁴ Interview T (RJ 10.09.14) and Z (SP 16.09.14).

⁶¹⁵ Antonio Gidi, The class action code: a model for civil law countries, *Arizona Journal of International and Comparative Law*, vol. 23 (2005) 50-2; Didier Jr and Zaneti Jr (n. 69) 79 & 125-126; Manuel Gómez, Will the birds stay south? The rise of class actions and other forms of group litigation across Latin America, *The University of Miami Inter-American Law Review*, vol. 43 (2012) 492-3.

Brazilian practice, however, individuals almost never pursue their claims in collective procedures.⁶¹⁶ Interestingly, the explanation is related to court usage fees. Collective actions for consumer protection are classified as commercial cases and are litigated in specialised commercial courts.⁶¹⁷ Consumers' legal fees in such actions are not waived, whereas parties are exempted in small claims proceedings from paying court fees.⁶¹⁸ Therefore, individuals normally seek other legal pathways and rarely participate in the collective procedures.⁶¹⁹

Additionally, Brazilian courts almost never impose exemplary damages on convicted corporations.⁶²⁰ Even if the CDC authorises economic sanctions for collective moral damages,⁶²¹ courts rarely order corporations to pay exemplary damages.⁶²² In some of these rare cases, higher courts reversed verdicts.⁶²³ In fact, enforcement agents from Rio de Janeiro and São Paulo could not refer to any case in their portfolios of collective actions in which a defendant paid exemplary

⁶¹⁶ Christopher Hodges criticises the US class action for the same reason. See Hodges (n. 190) 213-4.

⁶¹⁷ Manuel Gómez, Latin America: a regional report, in Chris Hodges, Stefan Vogenauer, and Magdalena Tulibacka (eds), *The costs and funding of civil litigation* (Hart 2010) 393.

⁶¹⁸ Gómez (n. 617) 393.

⁶¹⁹ Interview Z (SP 16.09.14).

⁶²⁰ Gómez (n. 615) 505-6; Gidi (n. 106) 319-20.

⁶²¹ CDC, article 6, VI.

⁶²² Interviews S (RJ 09.09.14), V (RJ 11.09.14), Y (SP 15.09.14) and Z (SP 16.09.14).

⁶²³ See, for instance, *AGO v. Cyrela Minas Real Estate Ltd* (AC n. 0036374-90.2012.8.19.0001, rapporteur Luiz Fernando Ribeiro de Carvalho, 3rd Chamber, TJRJ, 26.05.2014); *APRODEC v. Expresso Pegaso Ltd*, (AC n. 0132723-24.2013.8.19.0001, rapporteur Adolpho Andrade Mello, 9th chamber, TJRJ, 29.04.2014); *CODECON v. Philips, Panasonic, Sony, Samsung, and LG*, (AC n. 0070147-39.2006.8.19.0001, rapporteur Camilo Ribeiro Rulière, 1st Chamber, TJRJ, 03.07.2012); *AGO v. Bank of Brazil* (AC n. 0045074-26.2010.8.19.0001, rapporteur Sidney Hartung, 4th Chamber, TJRJ, 02.05.2012); *AGO v. Losango Sales Ltd* (AC n. 0222756-70.2007.8.19.0001, rapporteur Antonio Saldanha Palheiro, 5th Chamber, TJRJ, 25.11.2008).

damages due to a definitive judicial decision.⁶²⁴ In practice, collective procedures produce concrete consequences, because of injunctive orders that may have regulatory enforcement effects,⁶²⁵ changing the standard set for a particular market sector.⁶²⁶ However, consequences rarely involve payment of compensatory damages and the redistribution of money from corporations to consumers.⁶²⁷

Because of limited funding, low compensation, and rare exemplary damages, law enforcers have sought alternative ways to protect consumer rights.⁶²⁸ In this context, advertisement of cases in the media becomes a salient means to disseminate information to consumers about corporate wrongdoings.⁶²⁹ In the absence of effective juridical collective action, informed consumers seek individual compensation through ADR,⁶³⁰ ODR⁶³¹ or small

⁶²⁴ Interviews L (RJ 14.08.14), S (RJ 09.09.14), V (RJ 11.09.14), Y (SP 15.09.14) and Z (SP 16.09.14).

⁶²⁵ On the regulatory enforcement effects of collective actions, see Hensler and others (n. 56) 121, 431-4 & 489.

⁶²⁶ The definition of regulation comprises establishing norms and monitoring behaviour of the regulated actors. See Lange (n. 351) 411-2.

⁶²⁷ In the US class actions, the class counsel is normally well paid, but consumers may receive little - and sometimes no - recovery. See Samuel Issacharoff and Geoffrey Miller, 'Will aggregate litigation come to Europe', in Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello (eds), *The law and economics of class actions in Europe: lessons from America* (Edgar Elgar 2012) 43.

⁶²⁸ For instance, broadcasting a claim on television collectivises and repoliticises a legal dispute. See, for instance, William L. F. Felstiner, Richard L. Abel, and Austin Sarat, The emergence and transformation of disputes: Naming, blaming, claiming..., *Law & Society Review*, vol. 15 (1980) 643-4.

⁶²⁹ Interviews L (RJ 14.08.14), M (RJ 21.08.14), O (RJ 26.08.14), and A' (SP 18.09.14).

⁶³⁰ On the use of ADR within mass torts and consumer collective actions, see Deborah Hensler, Our courts, ourselves: how the alternative dispute resolution movement is reshaping our legal system, *Penn State Law Review*, vol. 108 (2003) 165; Hensler (n. 79) 1595-1602; Hodges, Benöhr and Creutzfeldt-Banda (n. 501) xxix-xxxi.

⁶³¹ On the use of ODR for consumer disputes, see Cortés (n. 502) Ch 2.

claims courts.⁶³² A collateral effect of publicising these cases is the reallocation of social capital.⁶³³ Consumers may recognise the efforts of law enforcers, granting social recognition and prestige to their institutions.⁶³⁴ Companies may suffer reputational loss and tarnishing of their corporate image in the market.⁶³⁵

4.2 Funding

4.2.1 Scarcity of resources and lack of organisational structure

Enforcement agents have the mandate and power to investigate corporations.⁶³⁶ For instance, public prosecutors may open a civil inquiry to collect evidence of a wrongdoing and request the exhibition of documents by investigated parties or public bureaus.⁶³⁷ This power is important for obtaining information from companies, regulatory agencies, and the central bank – providing evidence for their portfolio of cases.⁶³⁸ However, investigations are normally limited to information provided by consumers, corporations, and

⁶³² Interviews P (RJ 27.08.14) and C' (SP 19.09.14).

⁶³³ Social capital is the ability to benefit from social structures, networks, and relationships. See Simon Parker, *The economics of entrepreneurship* (CUP 2009) 119-21.

⁶³⁴ Felstiner, Abel, and Sarat (n. 628) 647.

⁶³⁵ Interview C' (SP 19.09.14).

⁶³⁶ In the U.S. public officers may investigate and sue corporations since the late nineteenth century. See Owen M. Fiss, *The Political Theory of the Class Action*, *Washington & Lee Law Review*, vol. 53 (1996) 22-3.

⁶³⁷ Mazzilli (n. 470) 511-535; Gómez (n. 617) 392.

⁶³⁸ Interviews L (RJ 14.08.14) and M (RJ 21.08.14).

public bureaus.⁶³⁹ Enforcement agents have limited funding⁶⁴⁰ and consequently lower capacity to produce expert-based evidence.⁶⁴¹ In contrast to U.S. class actions, plaintiffs cannot invest large funds in discovery and scientifically produced evidence.⁶⁴² Since procedural costs are connected with funding capacity,⁶⁴³ collective litigation is only marginally more expensive than individual litigation.⁶⁴⁴

A senior prosecutor – who referred to the head of AGOCPD in Rio de Janeiro during the 1990s as a Don Quixote – explained that ‘our team of consumer protection didn’t have adequate structure, financial resources, and specialized civil servants’.⁶⁴⁵ A senior prosecutor from São Paulo complained that ‘resources are scarce and the AGOCPD is normally unequipped (...) never had any experts available to me’.⁶⁴⁶ A public defender also criticised the working

⁶³⁹ Interviews L (RJ 14.08.14) and M (RJ 21.08.14).

⁶⁴⁰ In the U.S., public enforcement agents also have a limited budget and eventually resorted to partnerships with private plaintiff attorneys to pursue jointly litigation. The State Attorneys General tobacco litigation was a prominent case of fusion between public and private enforcement. See John C. Coffee Jr, "When smoke gets in your eyes": myth and reality about the synthesis of private counsel and public client', *DePaul Law Review*, vol. 51 (2001) 241-3; David A. Dana, Public interest and private lawyers: toward a normative evaluation of *parens patriae* litigation by contingency fee, vol. 51 (2001) 317-22. In Europe, public bodies also have very limited budgets, which restrict their enforcement activities. See Hodges (n. 36) 16-35.

⁶⁴¹ Interviews R (RJ 02.09.14) and Z (SP 16.09.14).

⁶⁴² Stephen C. Yeazell, Re-financing civil litigation, *DePaul Law Review*, vol. 51 (2001) 193-200.

⁶⁴³ Christopher Hodges, Stefan Vogenauer, and Magdalena Tulibacka, *The Oxford Study on Costs and Funding of Civil Litigation*, Chris Hodges, Stefan Vogenauer, and Magdalena Tulibacka (eds), *The costs and funding of civil litigation* (Hart 2010) 74.

⁶⁴⁴ Gidi (n. 106) 320-1.

⁶⁴⁵ Interview T (RJ 10.09.14).

⁶⁴⁶ Interview Z (SP 16.09.14). Exemplifying this lack of organisational structure, the prosecutor referred to a case in which he attended a lecture of an expert in financial math, approached the lecturer after his talk, and persuaded him to volunteer *pro bono* for the role of expert in a collective action against banks for charging abusive interest rates. In another case, this prosecutor wanted to assemble copies of 200 sentences from small claims courts in a civil

conditions at the OPD, stating that ‘we always had many unpaid interns, but never a technically qualified supporting team to help us affirm our role as collective actors’.⁶⁴⁷

Likewise, consumer protection non-governmental organisations (NGOs) experience restrictions because of limited funding.⁶⁴⁸ The Institute for Defence of Consumers (IDEC), the oldest and more traditional Brazilian consumer association, suffered from a significant reduction in membership that affected its capacity to pursue collective actions, especially if the case required scientific evidence.⁶⁴⁹ PROTEST, the largest and most funded Brazilian consumer association, also has restrictions to perform well its role. Membership revenues are normally insufficient to fund collective litigation by consumer associations.⁶⁵⁰ With 280,000 members PROTEST is financially independent, but their advocate for the sectors of telecommunications and energy revealed the asymmetry of powers:

in spite of our financial independence, resources are limited. If I had a larger team, I would be able to pursue a firmer parliamentary overview. The lobby of corporations from telecommunications and the energy sector are resourceful and better organised in defence of their interests. The interlocution of consumer protection in the house and the senate are very difficult, and so is unbalanced the fight to protect consumer interests in public hearings with the presence of corporations, public officials, and consumer protection entities.⁶⁵¹

inquiry against a corporation and phoned the court, trying in vain to persuade one of the judiciary’s civil servants to collaborate with him.

⁶⁴⁷ Interview D’ (RJ 22.09.14).

⁶⁴⁸ The role of consumer associations is important for collective litigation in Portugal, Spain, Italy, and Germany, but funding is also limited for these private bodies. See Hodges (n. 36) 37-43.

⁶⁴⁹ Interview R (RJ 02.09.14).

⁶⁵⁰ Ioannidou (n. 509) 146.

This is not a problem only of Brazilian collective action, but rather a general problem of litigation funding because resources are limited.⁶⁵² In the absence of legal aid and adequate litigation funding, larger corporations normally have better access to justice,⁶⁵³ because they have more resources to pay lawyers.⁶⁵⁴ However, this is normally not the case with collective action procedures in which the aggregation of multiple interests and economies of scale create sufficient incentives for well-funded cases.⁶⁵⁵

4.2.2 Potential sources of funding and reasons for their unavailability

The experience of collective action across the globe reveals multiple sources of funding: investment from third parties in Australia;⁶⁵⁶ U.S. style

⁶⁵¹ Interview B' (SP 19.09.14).

⁶⁵² Ross Cranston, 'The rational study of law': social research and access to justice, in Adrian Zuckerman and Ross Cranston (eds), *Reform of civil procedure: essays on 'Access to Justice'* (OUP 1995) 31. On the consequences of the policies of austerity for increasing scarcity of litigation funding in the UK, see Mavis Maclean, Renegotiating family justice, in Ellie Palmer and others (eds), *Access to justice: beyond the policies and politics of austerity* (Hart 2016) 201-5; for the US, see Deborah L. Rhode, *Access to Justice* (OUP 2004) 186.

⁶⁵³ By 'better access to justice', I simply mean that payment influences the effort of lawyers in a given case, but obviously it does not mean that corporate lawyers are necessarily better or will always win their cases. On the correlation between fees and performance, see Herbert M. Kritzer, William L. F. Felstiner, Austin Sarat, and David M. Trubek, The impact of fee arrangement on lawyer effort, *Law & Society Review*, vol. 19 (1985) 253-5.

⁶⁵⁴ Hodges, Vogenauer, and Tulibacka (643) 97.

⁶⁵⁵ Jones (n. 183) 86-87; Galanter (n. 43) 95; Rubenstein (n. 166) 433. In the US, the monetary incentives for plaintiff attorneys are so large that there is even a proposal for auctioning securities class action lawsuits. See Jonathan R. Macey and Geoffrey P. Miller, The plaintiff's Attorney's role in class action and derivative litigation: economic analysis and recommendations for reform, *University of Chicago Law Review*, vol. 58 (1991) 105-10. However, auctions would not be appropriate for mass tort cases. See Jonathan R. Macey and Geoffrey P. Miller, A market approach to tort reform via rule 23, *Cornell Law Review*, vol. 80 (1995) 915-6.

⁶⁵⁶ Deborah Hensler, Third-party financing of class action litigation in the United States: will the sky fall?, *DePaul Law Review*, vol. 63 (2014) 514-7; Mulheron (n. 37) 459-461.

contingency fee agreements or lodestar formula, which transfer the financial risk to the plaintiff;⁶⁵⁷ or monetary resources from a special fund, seen in the Quebec system.⁶⁵⁸ However, lenders and lawyers are only sources for funding, if there are prospects of lucrative outcome – in the absence of potential financial returns, investors do not accept the burden of a significant financial risk.⁶⁵⁹

Because the Brazilian collective action does not normally provide economic rewards for consumers or collective actors, third-party investment and contingency free agreements are not available. The use of resources from a special fund could be a potential source of funding. After all, there is a National Fund for Protection of Diffuse Rights managed by a special committee within the Ministry of Justice.⁶⁶⁰ However, since its establishment and until 2007, the NFDR did not receive sufficient funds, because of the lack of economic sanctions in collective actions.⁶⁶¹ Suddenly, the NFDR benefited from large fines imposed on corporations by the Brazilian Administrative Council for Economic Defence (CADE) for anti-competitive practices – reaching R\$ 75,000,000.00⁶⁶² in one single year.⁶⁶³ Nonetheless, the managing committee organised an annual bidding process and allocated these funds predominantly to educative programs and not to collective litigation.⁶⁶⁴ Moreover, the Ministry of Economy ordered the

⁶⁵⁷ Hensler and others (n. 56) 77-79; Mulheron (n. 37) 468-479.

⁶⁵⁸ Mulheron (n. 37) 454-459.

⁶⁵⁹ Hensler (n. 656) 501-3 & 514.

⁶⁶⁰ CPAA, articles 13 and 20.

⁶⁶¹ Interview X (RJ 12.09.14).

⁶⁶² This amount corresponds roughly to 18,000.00 pounds sterling by August 2016.

⁶⁶³ Interview X (RJ 12.09.14).

Ministry of Justice to freeze 92% of these funds, because these resources were classified in the budget as governmental expenses and the government had other priorities. Therefore, the use of resources from this special fund was very inefficient.⁶⁶⁵

The international experience also indicates the possibility of funding collective action with resources from individual consumers who have suffered collective wrongdoing.⁶⁶⁶ This source of funding is available and already regularly used by consumer NGOs in Brazil through regular solicitations of money from individual consumers who become members. Historically, IDEC managed to fund its activities very well because of collective actions filed against private banks for freezing abusively client's assets during a governmental economic plan in the early 1990s. IDEC kept a large constituency of consumers for over a decade because it was litigating this very large and complex collective action on their behalf.⁶⁶⁷ Once these cases ended, IDEC promoted individual compensation on behalf of its members and dozens of thousands of consumers recovered large amounts of money abusively taken by banks. However, these individuals also withdrew from IDEC and its constituency decreased to approximately 10,000 members.⁶⁶⁸

Because of lower funding, IDEC examines the cost-benefit of potential collective actions before filing them.⁶⁶⁹ Prosecutors also take pragmatic decisions

⁶⁶⁴ Interview X (RJ 12.09.14).

⁶⁶⁵ Interview X (RJ 12.09.14).

⁶⁶⁶ Mulheron (n. 37) 464-466.

⁶⁶⁷ Interview R (RJ 02.09.14).

⁶⁶⁸ Interview R (RJ 02.09.14).

on which cases to litigate, based on their potential larger scope and their limited resources.⁶⁷⁰ Plaintiffs cannot invest much in their cases. With low funding and limited costs, plaintiffs litigate cheaply and collective actions are not expensive.⁶⁷¹ In the absence of resources for producing expensive evidence,⁶⁷² the Brazilian system developed innovative features of shifting the burden of proof to the defendant and adopting strict liability rules that dispense with evidence of the defendant's culpability.⁶⁷³ Nonetheless, cheap litigation affects the quality and outcomes of collective action for consumer protection, as examined in the next section.

4.3 Costs

4.3.1 Cheap litigation and its discontents

As explained in the previous section, low funding limits the costs of litigation. The legal regime of costs could be favourable to plaintiffs and encourage collective action. In contrast to the traditional 'two-ways',⁶⁷⁴ 'cost shifting'⁶⁷⁵ or 'loser pays'⁶⁷⁶ rule for individual litigation, the CPAA established a

⁶⁶⁹ Interview R (RJ 02.09.14).

⁶⁷⁰ Interviews Z (SP 16.09.14) and A' (SP 18.09.14).

⁶⁷¹ Gidi (n. 106) 320-1.

⁶⁷² Yeazell, (n. 642) 193-4.

⁶⁷³ Gómez (n. 615) 503.

⁶⁷⁴ Mulheron (n. 37) 437-8.

⁶⁷⁵ Adrian Zuckerman, *Civil procedure: principles of practice* (3rd edn Sweet & Maxwell 2013) 1321-1342.

'one-way' regime,⁶⁷⁷ in which the consumer association is exempted from paying lawyers fees and litigation costs.⁶⁷⁸ Other collective actors also requested the application of this cost regime in their favour,⁶⁷⁹ but the STJ limited its application only to the consumer association, denying the reimbursement of lawyer's fees and other litigations costs to the AGO, the OPD, and other plaintiffs.⁶⁸⁰ By not immunising law enforcer's from cost awards, the court may contribute to limit access to justice and produce a chilling effect on potential representative claimants.⁶⁸¹ A senior public prosecutor considered an institutional priority to fight for funds for collective litigation:

We lose 95% of claims to reimburse lawyer's fees in collective actions and there is no institutional policy to change this setting. It could improve the funding and costs of collective action. We should fight for this, including with appeals to the STJ.⁶⁸²

Gidi suggests that Brazilian collective litigation is cheap because individual litigation is also generally cheap.⁶⁸³ Hodges claims that costs in civil law countries are lower simply because lawyers are required to perform less work.⁶⁸⁴ However, their explanations suggest that low litigation costs do not

⁶⁷⁶ Hodges, Vogenauer, and Tulibacka (643) 74.

⁶⁷⁷ Mulheron (n. 37) 436; Zuckerman (n. 675) 79.

⁶⁷⁸ CPAA, article 18.

⁶⁷⁹ See, for instance, *AGORJ v. Net* (AC n. 0108682-61.2011.8.19.0001, rapporteur Juarez Folhes, 14th chamber, TJRJ, 29.01.14).

⁶⁸⁰ Mazzilli (n. 470) 667-676.

⁶⁸¹ Mulheron (n. 317) 210.

⁶⁸² Interview T (RJ 10.09.14).

⁶⁸³ Gidi (n. 106) 322.

⁶⁸⁴ Hodges, Vogenauer, and Tulibacka (643) 85.

affect performance of plaintiffs in collective actions, being just part of the fabric of the litigation system. Additionally, their statements seem to support the idea that this underfunded cost structure is adequate to the litigation structure.

The normative architecture of the collective procedure establishes limitations to costs by setting the general parameters of the necessary work in a particular case.⁶⁸⁵ In the US class actions, for instance, plaintiffs normally invest large capital on discovery and notice of group members about the existence of the procedure and their right to exit the class action.⁶⁸⁶ In the Brazilian collective action, in contrast, the official gazette provides notice and there are no funds for sophisticated evidence.⁶⁸⁷

However, the lower quality of evidence and lack of communication with consumers affect the outcome of collective action, reducing its potential for successful consumer protection. Not surprisingly, law enforcers openly criticised the lack of financial means to pursue collective litigation effectively and called for a change of perspective on costs and funding for plaintiffs:

Our views on collective actions should change and favourable verdicts should result in the conviction to pay costs and lawyers fees to consumer associations to fund their expenses with such complex cases. Moreover, these mechanisms to stimulate funding are also applicable to the OPD and other potential plaintiffs. Self-financing could turn them into more efficient and active bodies, stimulating their intervention with application of economic sanctions and fines.⁶⁸⁸

⁶⁸⁵ Hodges, Vogenauer, and Tulibacka (643) 81.

⁶⁸⁶ James S. Kakalik and others, Discovery management: further analysis of the civil justice reform act evaluation data, *Boston College Law Review*, vol. 39 (1997) 621-34.

⁶⁸⁷ CDC, article 94.

⁶⁸⁸ Interview A' (SP 18.09.14).

Historically, US class actions were cheap and became gradually expensive with the advent of discovery and mandatory notice.⁶⁸⁹ Demands for better evidence and communication generated pressure on plaintiffs and induced them to invest more resources on their collective actions.⁶⁹⁰ The normative architecture of collective action emerges from the historical process and social demands,⁶⁹¹ not from intelligent design.⁶⁹²

Likewise, Brazilian enforcement agents also respond to social demands. With budgetary limitations to perform well, plaintiffs find their alternative ways through the pragmatic use of technology and partnerships.⁶⁹³ The dissemination of information through the media provides a cheaper alternative to notice of individual consumers by mail, but normally with distorting effects.⁶⁹⁴ Collaboration with experts in a voluntary *pro bono* regime becomes an innovative strategy for producing evidence, but with limited results⁶⁹⁵ - especially for tobacco, asbestos, breast implants, and other mass toxic tort cases that require expensive and sophisticated evidence.⁶⁹⁶ Moreover, these creative

⁶⁸⁹ Yeazell, (n. 642) 183-6.

⁶⁹⁰ Yeazell, (n. 642) 193-7.

⁶⁹¹ Coffee (n. 204) 52-85; Richard A. Nagareda, *Mass torts in a world of settlement* (Chicago 2007) 1-10.

⁶⁹² Cranston (n. 652) 31-3.

⁶⁹³ Keith S. Rosenn, The Jeito: Brazil's institutional bypass of the formal legal system and its developmental implications, *The American Journal of Comparative Law*, vol. 19 (1971) 514-5.

⁶⁹⁴ William Halton and Michael McCann, *Distorting the law: politics, media, and the litigation crisis* (Chicago 2004) 147-181.

⁶⁹⁵ On the failed attempts to litigate against the tobacco industry in Brazilian courts, see Gómez (n. 615) 503-5.

⁶⁹⁶ See Robert L. Rabin, The tobacco litigation: a tentative assessment, *DePaul Law Review*, vol. 51 (2001) 354; Deborah Hensler, Asbestos litigation in the United States: triumph and failure of the civil justice system, *Connecticut Insurance Law Journal*, vol. 12 (2006) 260-1.

efforts do not overcome a major limitation of low litigation funding. The plaintiff lawyer does not work as part of the large contemporary litigation team and resembles more like a lone rider with ‘knight-errant set of characteristics’⁶⁹⁷ – in other words, more like Don Quixote.

4.3.2 The problem of the lone rider

Originally, plaintiffs in the US were thinly capitalised sole practitioners.⁶⁹⁸ In the 20th century the plaintiffs’ bar developed expert knowledge and shared capital, by establishing small law firms to provide official standing, training, and services to a group of a dozen to twenty lawyers.⁶⁹⁹ Even if their size is not comparable to business law firms, plaintiffs became more specialised, diversified, organised, and capitalised.⁷⁰⁰ This historical development improved the quality of civil litigation and the achievement of its professed objectives.⁷⁰¹

In the Brazilian collective action, however, the plaintiff remains a sole practitioner, who litigates the collective suit without the support of a litigation team. For instance, until 2012 only one public defender was responsible for all collective consumer wrongdoing in the Office of Public Defenders of Rio de Janeiro (OPDRJ), conducting alone 13 investigations.⁷⁰² This sole practitioner

⁶⁹⁷ Yeazell (n. 642) 202; Galanter (n. 439) 470-471.

⁶⁹⁸ Yeazell (n. 642) 199-200.

⁶⁹⁹ Yeazell (n. 642) 200.

⁷⁰⁰ Yeazell (n. 642) 199-205.

⁷⁰¹ Yeazell (n. 642) 216-7.

⁷⁰² Interview V (RJ 11.09.14).

was expected to receive initial information about repetitive claims from the other seven public defenders in the Office of Public Defenders' Consumer Defence Core (NUDECON), but did not work integrated in a litigation team.⁷⁰³ Likewise, public prosecutors also develop their collective suits individually without integrated organisation:

Public prosecutors act fundamentally by the logic of all by oneself. I had affinity of ideas with 2 of the 6 prosecutors and collaborated with them, had a productive experience with mutual learning and complementary individual competences. But this was a matter of personal affinity and not an institutional matter. Only exceptionally there was unanimous agreement on some issue, when all 6 prosecutors collaborated harmoniously and integrated. However, the work at the AGO is still shaped by personal voluntarism, that is, if the person changes, the conduction of the case changes completely.⁷⁰⁴

The lone rider is a source for potential inefficiencies. First, enforcement agents need to keep an attitude of cognitive modesty on search for knowledge. Enforcement agents are not entirely aware of all aspects of their cases and need to collect the necessary information and benefit from knowledge of other organisations, institutions, and individuals.⁷⁰⁵ Cognitive limitations are limiting factors for lone riders, who should learn from available social knowledge.⁷⁰⁶ Second, lone riders are averse to reciprocal overview and institutional controls.⁷⁰⁷ Because local monitoring is important for successful

⁷⁰³ Interview V (RJ 11.09.14).

⁷⁰⁴ Interview Z (SP 16.09.14).

⁷⁰⁵ Interview M (RJ 21.08.14).

⁷⁰⁶ In Friedrich Hayek precise words, 'most of the advantages of social life, especially in its more advanced forms which we call "civilization," rest on the fact that the individual benefits from more knowledge than he is aware of', Friederich Hayek, *The constitution of liberty* (Routledge 1960) 21.

⁷⁰⁷ Interview T (RJ 10.09.14).

performance, sole practitioners are sometimes inefficient due to the absence of informal pressures and control mechanisms of collaborative work.⁷⁰⁸ Third, public officers could develop a strong intra-group sense of coordination, not only for achievement of common goals,⁷⁰⁹ but also for control of the arbitrary exercise of power.⁷¹⁰ Otherwise, the price for their political independence may be isolation and inefficiency.⁷¹¹

In contrast to lone riders, some law enforcers seek integration⁷¹² and are immersed in complex networks with other institutional actors.⁷¹³ However, this interconnectedness is often the result of a law enforcer's initiative and not of institutional policy.⁷¹⁴ Importantly, not only personal traits, but also economic incentives stimulate attorneys to act in isolation or within a legal team.⁷¹⁵

Likewise, Coffee suggests that economic incentives may explain the low participation of individual consumers in collective actions resulting from rational

⁷⁰⁸ On the importance of local monitoring for successful collaborative work, see Elinor Ostrom, *The future of the commons* (IEA 2012) 82-3.

⁷⁰⁹ See Russel Hardin, *One for all: the logic of group conflict* (Princeton 1995) 28, explaining how "successful social coordination, whether intended or not, can create extraordinary power".

⁷¹⁰ See Dimitrios Kyritsis, *Shared authority: courts and legislatures in legal theory* (Hart 2015) 154, referring to "separation of powers as the value of coordinated institutional effort for the purpose of creating and maintaining a well-ordered society".

⁷¹¹ Interestingly, political independence of judges in the U.S. is threatened exactly for opposite reasons - because they are proximate and responsive to their constituencies for need of campaign financing. See Deborah Hensler, Do we need an empirical research agenda on judicial independence?, *Southern California Law Review*, vol. 72 (1998) 717-8.

⁷¹² Interviews with J (RJ, 30.04.14), L (RJ 14.08.14), V RJ 11.09.14), Z (SP 16.09.14), and A' (SP 18.09.14).

⁷¹³ As Nicole Roughan explains, these relationships between authorities are part of the contemporary complex order of dispersed or integrated institutions: "most if not all authorities operate inside networks or webs of relationships which include others with which they share or contest subjects and/or arenas of activity". Nicole Roughan, *Authorities: conflicts, cooperation, and transnational legal theory* (OUP 2015) 43.

⁷¹⁴ Interviews L (RJ 14.08.14), Z (SP 16.09.14), and A' (SP 18.09.14).

⁷¹⁵ Yeazell (n. 642) 202-3.

apathy.⁷¹⁶ Particularly in collective actions for consumer protection, small-value claims provide prospects of more potential costs than rewards - the so-called 'negative value' claims.⁷¹⁷ Transaction costs to participate in collective actions are high⁷¹⁸ and individual consumers rarely join the collective procedure.⁷¹⁹

Nonetheless, consumers constantly make complaints against corporations to the AGO and other enforcement agents. Their behaviour is not predominantly self-centred, because there are no prospects for individual compensation or incentive rewards for their initiative.⁷²⁰ An individual communicates a consumer wrongdoing to public authorities because collective action produces social benefits or so-called positive externalities.⁷²¹ Collective litigation produces value beyond the procedural parties, especially by establishing rules of conduct for future disputes between consumers and corporations.⁷²² Therefore, even in the absence of individual compensation,⁷²³ the regulatory function of collective

⁷¹⁶ Coffee (n. 199) 920.

⁷¹⁷ Hensler (n. 56) 56.

⁷¹⁸ In Brazil, consumers have to pay cost usage fees and lawyer fees to habilitate their claims in the commercial courts in which are litigated the collective actions for consumer protection. However, no lawyer is required and no fee is charged at small claims courts, which attract more individual consumers. See Gómez (n. 617) 393. In contrast, in the US, the cost structure induces individuals not to opt out from class actions, because no fees are required, whereas court usage fees in small claims courts range from US\$ 30.00 to US\$ 75.00. See Deborah Hensler, The United States of America, in Chris Hodges, Stefan Vogenauer, and Magdalena Tulibacka (eds), *The costs and funding of civil litigation* (Hart 2010) 539.

⁷¹⁹ Interviews L (RJ 14.08.14), Z (SP 16.09.14), and A' (SP 18.09.14).

⁷²⁰ In the US there is the possibility of incentive rewards for consumers who become class action plaintiffs. See Eisenberg and Miller (n. 201) 1305-6; Nagareda (n. 202) 1488-91.

⁷²¹ William B. Rubenstein, Why enable litigation? A positive externalities theory of the small claims class action, *University of Missouri-Kansas City Law Review*, vol. 20 (2006) 722-7.

⁷²² Rubenstein (n. 721) 725.

⁷²³ In the US, some authors defend that class actions are important for deterrence and not for individual compensation. See, for instance, Brian Fitzpatrick, Do class action lawyers make too little? *University of Pennsylvania Law Review*, vol. 158 (2010) 2047; Myriam Gilles and Gary B.

action generates public goods and social value.⁷²⁴ Importantly though, potential economic sanctions calibrate the regulatory impact of collective actions for corporate defendants, as discussed in the next section.

4.4 Monetary sanctions

4.4.1 Deterrence

Economic rewards and sanctions may influence the behavior of legal actors.⁷²⁵ Polinsky and Shavell developed a standard to set exemplary damages, targeting perfect deterrence. On one hand, exaggerated punitive damages may induce excessive costs that are internalised by the company, harming either shareholders or consumers⁷²⁶. On the other hand, if judges tend not to impose punitive damages, companies may have clear economic incentives to break the law, given the fact that illegality will be lucrative. Particularly relevant is their conclusion that:

punitive damages should be imposed when deterrence otherwise would be inadequate because of the possibility that injurers would escape liability. In particular, punitive damages should be set at a level such that the expected damages of defendants equal the harm

Friedman, Exploding the class action agency costs myth: the social utility of entrepreneurial lawyers, *University of Pennsylvania Law Review*, vol. 155 (2006) 132-54.

⁷²⁴ Rubenstein (n. 721) 726.

⁷²⁵ See Mitchell Polinsky, *An introduction to law and economics* (3rd edn Aspen 2003) 43-56; Steven Shavell, *Foundations of Economic Analysis of law* (Harvard 2004) 177-206.

⁷²⁶ Polinsky and Shavell (n. 187) 955.

they have caused, for then their damage payments will, in an average sense, equal the harm.⁷²⁷

Importantly, economics is also sociologically explained, since economy is embedded in society.⁷²⁸ Likewise, the economics of litigation is explained by socio-legal studies on the judicial attitude towards imposing punitive damages in collective actions.⁷²⁹ Explanations for judges' refusal to convict corporations to pay punitive damages come from a wide range of sociological factors: the dogmatic formalism typical of traditional legal education in Brazil;⁷³⁰ the limited capacity of judges to properly assess the consequences of their decisions;⁷³¹ the concern of judges that punitive damages are too expensive and will produce negative externalities to the companies, their shareholders, and their consumers;⁷³² the mythical symbolic impact of the McDonald's coffee case on the

⁷²⁷ Polinsky and Shavell (n. 187) 954.

⁷²⁸ See generally Polanyi, (n. 35) Ch 6; see also Bettina Lange, After a romantic aspiration to society: harnessing the regulatory capacity of a social sphere, Bettina Lange, Dania Thomas, Austin Sarat (eds), *From economy to society? Perspectives on transnational risk regulation* (Emerald 2013) 6-11.

⁷²⁹ The answer to this question requires empirical research. A questionnaire was designed, so that two judges, three prosecutors, two consumer rights advocates, and two company lawyers could address the relevant issues and provide explanatory hypotheses. The questionnaire was not designed to investigate psychological behaviour of the interviewed legal actors and the limited sample of interviewees was not sufficient for any conclusions related to any possible generational differences between them.

⁷³⁰ Marc Galanter made the same point, while analysing lawyering in India. Marc Galanter, When legal worlds collide: a reflection on Bhopal, the good lawyer, and the American law school, *Journal of Legal Education*, vol. 36 (1986) 297.

⁷³¹ A picture not far from Richard Posner's depiction of American judges: "the judge's essential activity, moreover, is the making of a large number of decisions in rapid succession, with little feedback concerning their soundness or consequences." Richard A. Posner, *The problems of jurisprudence* (Harvard 1990) 192.

⁷³² A concern shared by some American academics. See, for instance, Sunstein, Kahneman, and Schkade (n. 187) 232-258.

imaginary of Brazilian lawyers;⁷³³ and the resistance of businesses and corporate lawyers against imposing exemplary damages⁷³⁴ to target deterrence and prevent lucrative illegality.⁷³⁵

In the following sub-sections, I examine the concept of 'collective moral damages', the setting of under-deterrence in Brazil, and the phenomenon of 'lucrative illegality'.

4.4.2 Collective moral damages

There is no Brazilian law that clearly admits punitive damages or that sets standards for its application by the judiciary.⁷³⁶ However, Brazilian legislation developed a doctrine of 'collective moral damages', which is the legal basis for the application of punitive damages due to the harm caused to society as a whole as a result of large-scale wrongdoings.⁷³⁷ The majority of the academic literature has considered this concept of 'collective moral damages' to provide the legal

⁷³³ See, for instance, Michael McCann, William Haltom, and Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, *University of Miami Law Review*, vol. 56 (2001) 113.

⁷³⁴ Interviews H (RJ, 27.04.11), I (RJ, 27.04.11), and W (RJ 12.09.14).

⁷³⁵ Ross Cranston also identified a scene of under-enforcement and lucrative illegality in the UK in his seminal work on consumer agencies. See Ross Cranston, *Regulating business: law and consumer agencies* (Macmillan 1979) 168.

⁷³⁶ In 2002, federal representatives tried to include in the CC an express mandate for judges to impose punitive damages, but this legislative project was never submitted to congressional vote.

⁷³⁷ According to article 6, VI, of the CDC, one of the basic rights of consumers is "the effective prevention and compensation of patrimonial and moral damages, individual, collective, and diffuse". In addition, article 1 of the CPAA also refers to moral damage liability in collective actions, recognizing the existence of moral harm as a result of environmental pollution, mass consumer violations, urban disorder, cultural or historical heritage destruction, or of anti-economic practices.

basis for the admission of punitive damages in collective litigation.⁷³⁸ On the other hand, Zavascki has become an eloquent critic of ‘collective moral damages’.⁷³⁹

Since Zavascki was also a justice of the 1st chamber of the STJ and is currently a justice at the STF,⁷⁴⁰ his opinion echoes from the bench. Coherent with his academic writing, Justice Zavascki expressed the same opinion in his

⁷³⁸ Bittar Filho explains that “collective moral damage is the unjust harm of the moral sphere of a given community or, in other words, it is the illegal violation of a certain circle of collective values.” See Carlos Alberto Bittar Filho, *Do Dano Moral Coletivo no Atual Contexto Jurídico Brasileiro*, *Revista de Direito do Consumidor*, vol. 12 (1994) 55. Likewise, André Ramos emphasises the extensive collective moral damage caused by mass torts violations, justifying extra-patrimonial compensations to the society as a whole. See André de Carvalho Ramos, *A ação civil pública e o dano moral coletivo*, *Revista de Direito do Consumidor*, vol. 25 (1998) 83. Moreover, Hugo Mazzilli, addressing the critics, states that ‘on one hand, collective damages are nothing else than a collection of individual damages; on the other hand, even those who refuse to acknowledge the sum of individual damages as the essence of the collective moral damages concept, must remember that contemporary civil liability prescribes a punitive function, granting an extra-patrimonial character to the collective moral damages. See Mazzilli (n. 415) 169-71. Additionally, Roscoe Bessa understands that the concept of ‘collective moral damages’ provides a legal basis for the recognition of punitive damages in the Brazilian collective litigation system. According to him, collective litigation forces us “to build solutions that use, simultaneously, concepts from civil liability and also the specific perspective from criminal law.” Leonardo Roscoe Bessa, *Dano Moral Coletivo*, *Revista de Direito do Consumidor*, vol. 59 (2006) 86. Furthermore, Fredie Didier Jr and Hermes Zaneti Jr also admitted the conviction to pay collective moral damages “whenever necessary to compensate the community sorrow, imposing a sanction that simultaneously represents reprehension, compensation, and that expresses the co-existential grammar of contemporary society, with mainly pedagogical character.” Fredie Didier Jr and Hermes Zaneti Jr, *Processo coletivo* (4th edn Podium 2009) 295-296. These authors eliminated this passage in a more recent edition of their book in which they still defend the judicial application of collective moral damages, even if in a less eloquent way. See Didier Jr and Zaneti Jr (n. 69) 313-7.

⁷³⁹ A Professor of Law at the University of Brasília, First, he stated that “compensation and punishment are distinguishable legal impositions” and “in the event of damages, compensation is due, according to the norms that rule the civil liability system; nonetheless, even in the event of serious illegality and offence, the imposition of any punishment not established beforehand by law is purely arbitrary, according to our normative system, an arbitrary act that is not softened – on the contrary, it becomes even more evident – when the punishment is disguised under the label of a conviction due to moral damages.” Additionally, Zavascki argued that “the victim of moral damages is, necessarily, a person. Moral damage involves, necessarily, suffering, sorrow, and psychological offence.” In his conclusion, he claimed that law may not transform the essence of phenomena, nor their legal consequences, and, therefore, one should not interpret the Brazilian Civil Public Action Law (CPAA) as having created an exotic concept of ‘collective moral damages.’ Teori Albino Zavascki, *Processo coletivo: tutela de direitos coletivos e tutela coletiva de direitos* (4th edn RT 2009) 40-3.

⁷⁴⁰ Justice Zavascki left the STJ and became a Justice of the Brazilian Supreme Court on November 29th 2012.

judgments at the 1st chamber of the STJ.⁷⁴¹ Writing the majority opinion, he stated that moral damages require individual pain and psychological suffering and collective moral damages cannot be imposed as a result of harm caused to society as such. Zavascki considers that a judicial injunctive order may restore the *status quo ante* and be sufficient to prevent further collective wrongdoings.⁷⁴²

⁷⁴¹ The leading case in question was *Attorney General Office of Minas Gerais v. Municipality of Uberlândia and Canaã Housing Enterprises Ltd* (REsp 598281, 01.06.2006). The environmental protection department of the Attorney General Office filed a petition against municipal authorities and a housing company due to an illegal project that caused environmental degradation. The housing company and the municipality were convicted and ordered to demolish all the houses, recompose the degraded areas and restore local nature. In addition, the lower court judge imposed a sanction on the defendants in the amount of R\$ 50,000 (equivalent to approximately 11,695 pounds sterling) due to the collective moral damage caused by their careless and illegal conduct. In the appeal's judgment, the higher court overruled the conviction of collective moral damages, stating that moral damages are only awarded if there is individual suffering. The higher court concluded that there is no such legal concept as 'collective moral damage' in Brazilian law. Then, the Attorney General Office of Minas Gerais filed a Special Appeal to the STJ, and the case was distributed to the 1st circuit. Justice Fux (joined by Justice Delgado) wrote the minority opinion, in which he endorsed the idea that Article 6, VI, of the Consumers Defence Code (CDC) and Article 1 of the LACP enable judges to convict class action defendants to pay collective moral damage. Citing an array of academic opinions, Justice Fux sustained that "the major concern of judges, in these cases, is to prevent environmental damages, given the constitutional status of environmental protection, one should not interpret the law in a way that restricts this protection." Concluding his opinion, Justice Fux mentioned that patrimonial damages and extra-patrimonial damages should coexist, interpretation that favours the balanced and healthy environment guaranteed by the Brazilian constitution.

⁷⁴² According to Justice Zavascki, environmental protection does not require conviction in order for the responsible party to pay moral damages, since the judicial order to recompose the degraded ecosystem is sufficient to protect nature. Justice Falcão joined the opinion. Justice Arruda concurred, but admitted the possibility of imposing collective moral damages. In her opinion, she pointed out that "there will be, surely, situations in which the extra-patrimonial damages will be compensated by objective measures of physical restoration and by a monetary compensation due to diffuse and collective moral harm." Nonetheless, Justice Arruda did not find evidence of extra-patrimonial damage to the community in the case. Despite being a split decision, the case set a precedent in the 1st chamber of the STJ. In the following judgment of the court, *Attorney General Office of Rio Grande do Sul and Municipality of Uruguaiana v. Eletrojan Lighting and Electricity Ltd* (REsp 821.891-RS, 12.05.2008), Justice Fux wrote the unanimous opinion of the court, following the precedent established in the previous judgment and stated that collective moral damages are inadmissible. The 1st chamber had another opportunity to endorse its precedents in two other cases. In *Federal Attorney General Office v. Brasil Telecom S/A and National Telecommunications Agency (ANATEL)* (REsp 971.844/RS, 12.02.2010), Justice Zavascki wrote the opinion of a unanimous court, following the previous decisions. Justice Fux wrote a concurring opinion simply to express his concern with economic risks, unpredictability of lower courts, and the necessity of guaranteeing the economic balance of contracts in the telecommunications market to protect the rising investments. In a companion case, *Federal Attorney General Office v. Brasil Telecom S/A* (REsp 1109905, 03.08.2010), Justice Carvalhido wrote the opinion for a unanimous court and followed the same line.

In contrast to these precedents of the 1st chamber, the 2nd chamber of the STJ praises the concept of collective moral damages as a relevant instrument to prevent massive illegalities. Justice Calmon vehemently disagreed with the justification of the 1st chamber: “I do not accept the conclusion of the 1st chamber, since evidence of pain, sorrow or psychological harm is inessential to characterise extra-patrimonial damage.”⁷⁴³

These contrasting precedents highlight the contentiousness of this issue. By the time of the initial empirical observation of judicial cases in 2011, the STJ was divided only by different rulings from the 1st Chamber and the 2nd chamber. By 2016, the 3rd chamber and the 4th chamber had followed the line of the 2nd chamber and also adopted a favourable position towards the recognition of collective moral damages.⁷⁴⁴ However, the 1st chamber did not reverse its original position and the issue remains divided within the STJ.

Are these extra-patrimonial damages in collective litigation necessary for the effective prevention of massive consumer rights violations? Empirical observation of collective actions for consumer protection indicates that the absence of effective economic sanctions generates imperfect enforcement and

⁷⁴³ *Attorney General Office of Rio Grande do Sul v. Bento Gonçalves Transportation Enterprises Ltd.* (REsp 1057274-RS, 01.12.2009). In a very strong opinion of a unanimous court, Justice Calmon added that “massive rights violations may not rest unrepaired”, since it would “lead to the failure of Law to prevent and compensate the social conflicts.” In a subsequent case, Justice Martins wrote the opinion for a unanimous court and upheld an order for payment of R\$ 120,000 (equivalent to about 28,068 pounds sterling) due to collective moral damages. See *Federal Attorney General Office and National Telecommunications Agency (ANATEL) v. Brasil Telecom S/A* (REsp 1150530-SC, 18.02.2010).

⁷⁴⁴ *Attorney General Office of Federal District v. Souza Cruz SA and Ogilvy Brasil Ltda* (REsp 1101949-DF, rapporteur Marco Buzzi, 4th Chamber, STJ, 10.05.2016); *Attorney General Office of Minas Gerais v. Struthio Master Avestruzes Ltd* (REsp 1250582, rapporteur Luis Felipe Salomão, 4th Chamber, STJ, 12.04.2016); *State Association for Protection of Blind People (AFAC) v. Bank of Brazil* (REsp 1315822-RJ, rapporteur Marco Aurelio Bellizze, 3rd Chamber, STJ, 24.03.2015).

induces lucrative illegality. The next section will advance this argument by explaining the phenomenon of lucrative illegality.

4.4.3 The phenomenon of lucrative illegality

Financial institutions and telecommunications companies are regular defendants in collective actions throughout the country. The main goal of the present section is to provide an interdisciplinary explanation for this phenomenon, which I term 'lucrative illegality'.⁷⁴⁵ In plain words, Brazilian companies are economically encouraged to break the law. Because of the limited application of punitive damages, companies have monetary incentives to break the CDC.⁷⁴⁶

Interviewed plaintiffs criticised the lack of exemplary damages in collective litigation. Private companies are almost never convicted to pay

⁷⁴⁵ Because private companies make rational decisions on whether to violate consumer protection laws and empirical observation shows that Brazilian companies continue to break the Consumers Defence Code (CDC), I argue that the collective litigation system fails to prevent these wrongdoings due to a lack of effective economic sanctions. Analysing all 405 class actions filed against private companies by the AGOCPD in Rio de Janeiro between 1991 and 2010, the sanctions imposed by judges have not been sufficient to prevent new delinquencies. Brazilian courts should not only convict these companies for their consumer rights violations, but also impose economic sanctions and oblige them to reimburse effectively the illegal fees that they abusively charged. Punitive damages ought to be optimal, deterring companies without causing excessive costs that could harm shareholders and consumers. Illegality should not be lucrative. In the current scenario of under-deterrence, financial institutions, telecommunication companies and other private firms will continue to break the law, once they have economic incentives to do so.

⁷⁴⁶ In addition to the quantitative analysis, nine legal actors were interviewed specifically about this point: three public prosecutors; two judges; one public defender; one attorney of the State House of Representatives Consumers' Defence Commission; two lawyers of private companies (one from a financial institution and one from a telecommunication enterprise).. Interviews were conducted with a view to find their opinions on punitive damages, economic sanctions, and the phenomenon of lucrative illegality.

punitive damages.⁷⁴⁷ Courts are considered to be conservative in the collective action, applying only concepts of classical civil liability, and rarely punishing companies for their collective wrongdoing.⁷⁴⁸ Their sentences are often limited to prohibition of an illegal act and general compensation for patrimonial damages.⁷⁴⁹

⁷⁴⁷ Interviews A (RJ, 05.04.11), B (RJ, 06.04.11), C (RJ, 07.04.11), D (RJ, 12.04.11), and E (RJ, 13.04.11).

⁷⁴⁸ Interviews A (RJ, 05.04.11), B (RJ, 06.04.11), C (RJ, 07.04.11), D (RJ, 12.04.11), and E (RJ, 13.04.11).

⁷⁴⁹ Two interviewees referred to the fact that collective litigation is relatively new in Brazil and that doctrine is still not consolidated, hoping that legal culture will admit punitive damages in the future. Two interviewees referred to the American origins of punitive damages and the prejudice that some iconic cases nurtured in the Brazilian legal community. The public defender also remembered the fact that there is no law that clearly admits punitive damages in Brazil. One of the judges also referred to the inexistence of a legal mandate as to the explanation for the lack of a culture of economic punishment. Asked specifically about whether the concept of 'collective moral damages' could allow the conviction of companies to pay punitive damages, all the interviewees agreed, except the bank's lawyer. He argued that moral damages are personal and do not affect society as such. The telecommunication's lawyer admitted punitive damages, but also mentioned the fact that 'collective moral damages' did not seem to be an accurate concept. She claimed that there is a culture of vengeance in Brazil, in which public departments sue private companies based on a false idea of economic imperialism. In her view, there is a widespread myth that private companies always attempt to maximize profits by providing minimum levels of service. According to her, punitive damage is a dangerous imitation of a foreign concept that may eventually ruin businesses and lead to the bankruptcy of private companies. Ironically, however, the same lawyer admitted that punitive damages have not been excessively expensive for private companies. As a practical matter, there were no economic sanctions imposed on her company due to consumer protection collective actions. This is not to say that there were no internal consequences. On the contrary, whenever a collective action suit is filed, the company's legal department is concerned with the possible conviction, the negative publicity, and the inherent economic risks. Risk aversion related to the imposition of punitive damages affects the business and private companies always invest more resources in order to prevent economic sanctions. On at least one occasion, the company was not originally committed to invest in a given service and massive investment in that service only came as the result of a class action suit. The lawyer explained that this case was exceptional since denying consumers' rights to maximise profits is not part of the company's policy. According to her, the company's legal department has a veto power that may be overridden only by the CEO. If the lawyers demonstrate that a contractual clause or a given practice is illegal, their legal advice is not submitted to a business plan that evaluates whether benefits are superior to potential costs. However, cost and benefit analysis is the rationale of the company whenever they commit an unpredictable illegality. In these cases, caused by market malpractices, doctrinal change, and regulatory failures, it is usually more beneficial to pay damages to the few consumers that file suits than to improve their service's quality.

On one hand, some selected legal actors criticised incentives for frivolous litigation and unreasonable convictions in other jurisdictions.⁷⁵⁰ On the other hand, they praised the Brazilian collective action, because exemplary damages would not be paid to individual consumers, but rather to the NFDR.⁷⁵¹ Enforcement agents defended the existence of exemplary damages in Brazil, stating that the lack of punitive damages would almost always produce monetary incentives for private companies to break the CDC.⁷⁵²

Asked about the factors that should be taken into consideration to fix the amount of punitive damages, they mentioned: (i) the size of the company; (ii) the amount of harm caused to the victims; (iii) the amount of profit gained due to the wrongdoing; (iv) the capacity to prevent further wrongdoings; and (v) the

⁷⁵⁰ Interviews C (RJ, 07.04.11), D (RJ, 12.04.11), E (RJ, 13.04.11), F (RJ, 19.04.11), H (RJ, 27.04.11), and I (RJ, 27.04.11).

⁷⁵¹ All considered this legal solution to be an interesting alternative to the American model of civil justice, in which punitive damages may benefit one individual litigant. One of the judges stated that such a system encourages consumers to suffer harm and eventually take steps to maximise the negative consequences of a company's wrongdoing, simply to be entitled to a higher reward. Not only does such a system stimulate bad faith, but it also produces more externalities and society would have to bear such excessive social costs. It is worth noting that most interviewees referred to iconic American cases to express their concern about exaggerated economic sanctions. Five interviewees mentioned the McDonald's coffee case as an example not to be followed by Brazilian courts. Three interviewees commented vaguely that the United States was known for excessive monetary rewards, but they did not affirm anything about these cases that were merely anecdotal evidence to them. One public prosecutor also referred to the McDonald's coffee case and to the Pinto case, but to praise the American civil justice system and its capacity to influence operational routines and decision-making within private companies. The Pinto case was also mentioned by one judge as an example of the importance of punitive damages. Another judge criticized not only the excesses of the United States, but also the apathy of France. According to her, the French consumer is often unprotected and private companies always claim that they are not liable for any harm caused to a consumer. In her opinion, the Brazilian system is the best since it is the most balanced.

⁷⁵² The bank's lawyer argued that financial institutions are too concerned with their image and with bad publicity and punitive damages are, therefore, unnecessary. The telecommunication's lawyer claimed that punitive damages would be internalised as costs, and consumers would have to pay for them through higher prices or lower quality services. Both judges mentioned that excessive punishment may be harmful to consumers. They both highlighted the fact that imposing punitive damages involves a complex equation and that the economic sanction has to be proportional. According to one judge: punishment should not ruin business; it should not discourage investors; and it should be in the consumers' interest, as opposed to detrimental to them.

degree and severity of misconduct. It was not possible to conclude from their answers whether these factors are hierarchical. As one of the public prosecutors put it, these parameters are supposed to come from a large number of practical judgments.⁷⁵³ Courts have rarely – if ever – examined the criteria for the amount of collective moral damages, which have remained largely as part of the ‘law in the books’ rather than the ‘law in action’.⁷⁵⁴

However, from the perspective of the legal actors interviewed, the phenomenon of lucrative illegality emerges from a combination of factors:

The problem is lack of effectiveness, corporations continue to harm consumers because nothing happens to them; there is also the problem of lack of oversight from public authorities, because we can't litigate all collective conflicts; oversight should be firmer; the regulatory agencies shouldn't be committed to the regulated corporations, but to consumer protection; agencies should act as market sheriffs, but in practice they don't perform their role.⁷⁵⁵

In his seminal empirical research on consumer agencies regulating business in the UK, Cranston seems to suggest that there is a similar game of lucrative illegality as well: some businesses are simply indifferent to legal and moral obligations, producing inferior products because they are simply more concerned with profit or retain a monopoly position in their markets.⁷⁵⁶

A concrete case from the Brazilian experience may clarify further the regime of incentives for lucrative illegality.

⁷⁵³ Interview A (RJ, 05.04.11).

⁷⁵⁴ Additionally, none of the Brazilian scholars who defend the existence of collective moral damages discuss the potential parameters for fixing the value of these exemplary damages of punitive character.

⁷⁵⁵ Interview T (RJ 10.09.14).

⁷⁵⁶ Cranston (n. 735) 37.

4.4.4 The game of lucrative illegality

As a case study, an on-going litigation case reveals the incentives that Brazilian companies have to break the law.⁷⁵⁷ NET, a leading cable TV company, decided to charge R\$ 10 per month for all consumers who pay their bills via banks. However, this 'bank payment fee' is prohibited by regulatory agencies. Both the BCB and the National Telecommunications Agency (ANATEL) defined the acceptance of payments as a typical banking function, which may not be subject to any fees whatsoever.⁷⁵⁸ After all, because banks profit from money lending and high interest rates, financial institutions already benefit from the accumulation of monetary resources resulting from these payments. Additionally, payment itself is not a service that adds value to the consumer, since she benefits from television broadcasting, but not from payment. Therefore, according to Brazilian regulation and laws, charging 'bank payment fees' is unlawful conduct and is consequently prohibited.

Why then would NET charge these illegal fees? NET charges its clients because the company has economic incentives to do so. Since Brazilian courts rarely convict companies to pay punitive damages and most convictions are not effectively enforced, NET has economic incentives to break the law. If the company complies with the CDC and with federal regulation, there is no payoff to NET or to its clients. In a setting of ineffective enforcement, in which a company is convicted but ultimately not forced to compensate or pay any extra-

⁷⁵⁷ *AGO v. NET* (2008.001.060622-6, 5th Commercial Court of Rio de Janeiro).

⁷⁵⁸ Article 1, § 2, of Normative Resolution BACEN n. 3518/07.

patrimonial damages, NET would have a payoff of R\$ 10 per month for every single consumer who pays his or her bills through the banking system. Conversely, each one of these cable television viewers lost R\$ 10 per month and did not recover the money. Assuming that there is perfect enforcement, then both the company and consumers would not have any payoffs, but that is not a realistic setting. On the contrary, companies almost never fully compensate for the harm caused collectively to its clients in Brazilian collective litigation. As discussed before, ineffective enforcement results in under-deterrence and fosters lucrative illegality.

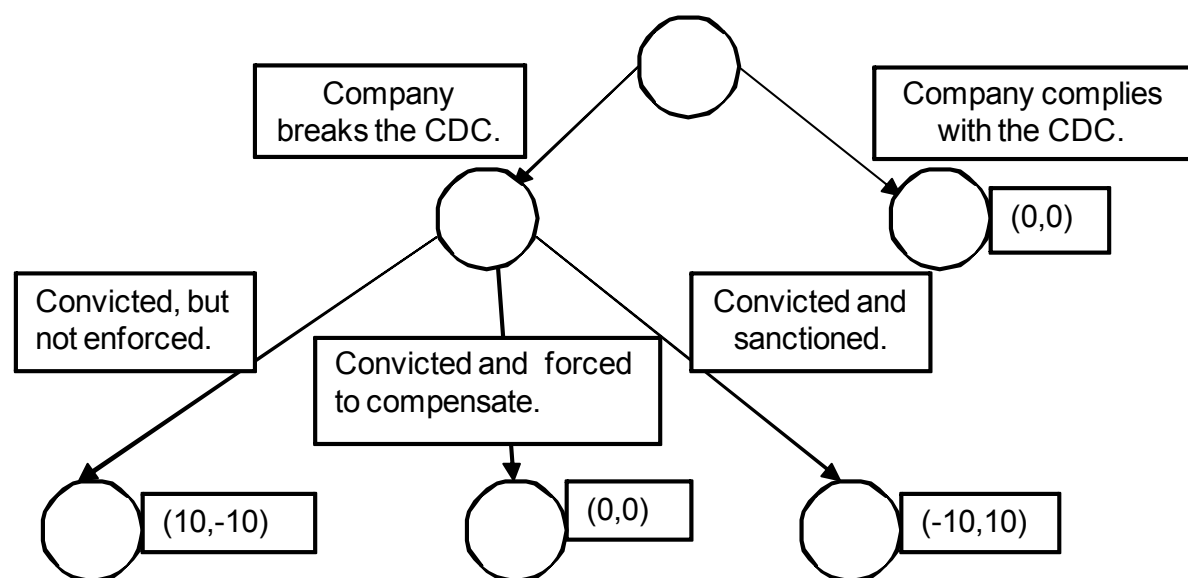


Figure 6. *Hypothesis 1. Without transaction costs and assuming perfect enforcement, it would make no difference if a company complies with the CDC or if it breaks the law and is convicted to compensate consumers.*

This hypothesis is based on the assumption that there is no difference in payoffs between (i) compliance with the law and (ii) illegality followed by

conviction and patrimonial compensation. According to Zavascki, damages are limited by essentially being the necessary monetary resources to fully compensate the wrongdoing. However, one should not admit the imposition of extra-patrimonial damages (such as 'collective moral damages') in order to punish companies for mass consumers' rights violations. Their argument follows the idea that such punitive damages would represent excessive costs that would be internalised by the companies and transferred to their shareholders or consumers. In other words, punitive damages should not be admitted in the Brazilian legal system due to the harmful economic consequences.⁷⁵⁹

However, this 'hypothesis 1' does not relate to the sociological reality in which the economics of litigation is embedded. Other elements must be included in a contextual analysis, such as transaction costs evaluation, the repeated game circumstance, and the imperfect enforcement setting of this non-constant sum game.⁷⁶⁰ One should not ignore, for instance, that law enforcement through collective action implies litigation costs estimated at R\$ 2 (20 % of the litigation value, following the Brazilian tradition). As a matter of experience, when a company is convicted, there is often reputational loss and a value reduction of the company estimated in R\$ 1. We should also consider litigation costs that affect consumers' payoff. In the Brazilian legal system, consumers do not have to cover plaintiff litigation expenses. Nonetheless, time erodes the value of their monetary compensation. Legal interest rates are 12% per year, inferior to investments and loan rates, which is a monetary loss that we could estimate to

⁷⁵⁹ Zavascki (n. 739) 40-43.

⁷⁶⁰ Martin Shubik, *Game theory in the social sciences* (MIT 1982) ch 9.

be equivalent to R\$ 2.⁷⁶¹ Calculation of interest rates is often neglected in theory, but it is an important factor of the economics of litigation in practice.⁷⁶²

This much more sophisticated socio-legal context is related to reality and I will term 'hypothesis 2'. We can see that the optimal outcome – in which companies and consumers do not have payoffs and society's wealth is not minimised – requires companies' compliance with the CDC.

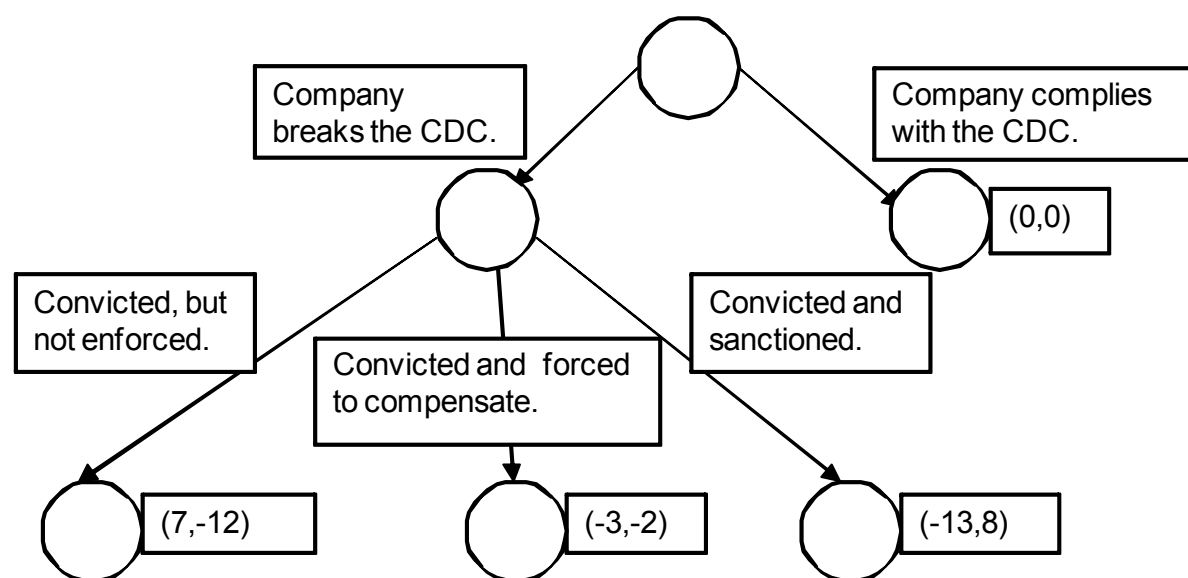


Figure 7. *Hypothesis 2. With transaction costs and imperfect enforcement, it becomes clear that a legal system without punitive damages creates economic incentives for companies to break the law and produces externalities that are negative to the social welfare.*

In addition to the transaction costs evaluation, we should also consider the imperfect enforcement setting and the repeated game circumstance.⁷⁶³

⁷⁶¹ According to Baird, Gertner, and Picker, “we shall assume that a player values a payoff in a future period less than a payoff in the future period. We account for this by introducing a discount factor, the amount by which the value of a payoff in the next period must be adjusted to reflect its value in the present period. If we have a discount factor of δ , the present value of one dollar earned in the subsequent period is δ dollars”. Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game theory and the law* (Harvard 2003) 168.

⁷⁶² Cranston (n. 652) 45.

Private companies are often repeat players in consumer protection class actions. In particular, telecommunication companies are always among the top few on the list of consumers' complaints.⁷⁶⁴ NET, the defendant in this case, had been sued several times by public prosecutors in the past ten years. Experience as a defendant certainly showed NET that the company is litigating in a scenario of imperfect enforcement, in which punitive damages are rarely imposed and most companies are convicted, but not forced to compensate consumers' damages. In this setting, NET has economic incentives to break the law.

In setting A, NET faces minimum risks of being ordered to pay punitive damages and minimum risks of being forced to pay compensatory damages. NET is likely to be sanctioned, but without the sanction's enforcement. Estimating the probabilities from data collected for this research,⁷⁶⁵ there seems to be no more than 1% chance of paying punitive damages; no more than 3% chance of paying compensatory damages; and 96 % chance of not paying anything, except litigation costs and reputational loss. In such a realistic scenario, the expected payoff for NET is \$ 6.5.⁷⁶⁶

Let us now consider a different setting B, in which legal reform improves remedies and sentences are now subject to effective judicial enforcement. However, the focus of legal reform is limited to the enforcement of compensatory

⁷⁶³ Baird, Gertner, and Picker (n. 761) 159-187.

⁷⁶⁴ http://www.procon.sp.gov.br/pdf/acs_ranking_2010.pdf (checked on 15.01.17).

⁷⁶⁵ By 2011, only two pending cases could lead to definitive orders requiring companies to pay punitive damages. The probability of such order is almost none (1%) and the amount of monetary rewards in the few orders made has been very low. My estimative of 3% for compensatory damages also comes from pending cases in which companies may eventually recognise returning a credit to consumers in their long term contractual relationship.

⁷⁶⁶ $(0.01) \times (-13) + (0.03) \times (-3) + (0.96) \times (7) = -0.13 - 0.09 + 6.72 = 6.5.$

damages, because businesses reject punitive damages and their lobbies are powerful. Thus, legislature prohibits all forms of extra-patrimonial damages in collective litigation, regardless of the given denomination ('collective moral damages,' 'punitive damages,' or any other name). Estimating the probabilities, let us assume that there is a 0% chance of paying punitive damages; 50% chance of paying compensatory damages; 50% chance of not paying anything, except litigation costs and reputational loss. In such a scenario, the expected payoff for NET is \$ 2.⁷⁶⁷

Let us finally consider setting C, in which legal reform not only improves remedies, but also establishes a regime of balanced and clear criteria to impose punitive damages on private companies. Thus, the legislature is focused on optimal deterrence and it is stated that punitive damages should be imposed when deterrence would otherwise be inadequate because of the possibility that injurers would escape liability. Estimating the probabilities, let us assume that there is a 20% chance of paying punitive damages; 40% chance of paying compensatory damages; 40% chance of not paying anything, except litigation costs and reputational loss. In such a setting, the expected payoff for NET is \$ - 1.⁷⁶⁸

Reflecting on these three different settings, we can understand why Brazilian companies continue to break consumer law, sometimes even after prohibitions from regulatory agencies and judicial injunctive orders as seen in this case. In setting A, imperfect enforcement provides excellent economic incentives for NET to charge the illegal fee. Even with litigation costs and

⁷⁶⁷ $(0.0) \times (-13) + (0.5) \times (-3) + (0.5) \times (7) = -1.5 + 3.5 = 2$

⁷⁶⁸ $(0.2) \times (-13) + (0.4) \times (-3) + (0.4) \times (7) = -2.6 - 1.2 + 2.8 = -1$

reputation loss, given the small probability of facing economic sanctions, the expected payoff is \$ 6.5. Setting A seems to be similar to the current Brazilian scenario, given the rejection of punitive damages by courts and very low enforcement. In B, a hypothetical scenario, the lack of punitive damages still creates an environment of limited economic sanctions for NET. Therefore, even though legal reform improved enforcement and reduced economic incentives to break the law, the expected payoff is still \$ 2. Private companies are still encouraged to violate the CDC. In C, an alternative scenario, legal reform improves existing remedies and establishes a regime of punitive damages, providing courts with effective tools to impose economic sanctions as a consequence of mass consumers' violations. In such scenario, the expected payoff is \$ - 1 and the private company is unlikely to break the law.

This case study and the empirical observation of consumer class actions provide explanatory factors for the phenomenon of lucrative illegality.

4.4.5 Addressing lucrative illegality

This empirical research reveals that the system could be reformed and that more effective enforcement mechanisms and economic sanctions could be developed to prevent further wrongdoing. What could be done to prevent collective wrongdoing and eliminate the phenomenon of lucrative illegality? One possibility is that corporations simply need continuous feedback.⁷⁶⁹ Nonetheless,

⁷⁶⁹ The bank's lawyer argued that dialogue between companies, regulatory agencies and class action plaintiffs is necessary. According to him, financial products and services should gain the prior approval of consumer protection departments in order to prevent further wrongdoings. Financial institutions are often liable because the CDC is not clear. See also Hodges (n. 57) 42-3.

the Central Bank, the Telecommunications Agency, and the AGO provided feedback to the cable TV company on the illegality of charging 'bank payment fees' without any result.

Other possibilities would include severe personal sanctions for the Chief Executive Officer (CEO) of the company,⁷⁷⁰ especially "criminal and regulatory prosecution of the individuals actually responsible for corporate misconduct".⁷⁷¹ However, this possibility is not always available, because the illegal conduct is sometimes a consumer wrongdoing, but not a criminal offence. For instance, charging the 'bank payment fee' is not theft, robbery, or fraud and not clearly criminal conduct, even if it is abusive behaviour.⁷⁷² Moreover, localising one individual responsible for a criminal conduct within a corporation is often very difficult in practice.⁷⁷³

Another possibility is the combination of a complex institutional and regulatory multi-layered approach to law enforcement,⁷⁷⁴ including the

⁷⁷⁰ The telecommunications company lawyer claimed that more collective action suits are necessary, since they cause real internal impact on the business. In addition, she stated that immediate measures that affect profit are the most effective ones. For instance, if the corporation is not performing a given service correctly, prohibiting the company from contracting new customers for that service is the most effective way of forcing immediate investments. In addition, negative publicity in the media is also extremely effective to prevent further wrongdoings. Finally, she added that CEOs fear personal liability much more than punitive damages. Therefore, injunctions and sentences would be more effective if they imposed economic sanctions on the CEOs and eventually prohibited them from directing a company for a given period of time. Punitive damages do not impose sanctions on CEOs; they punish shareholders or consumers.

⁷⁷¹ Jed S. Rakoff, The cure for corporate wrongdoing: class actions vs. individual prosecutions, *The New York Review of Books*, November 19, 2015 issue, 4.

⁷⁷² Cranston (n. 735) 46.

⁷⁷³ Cranston (n. 735) 36.

⁷⁷⁴ For an argument that the Brazilian system offers already a multi-layered institutional mix, see John Armour and Caroline Schmidt, *Layers of Legality: Building Enforcement Capacity for Brazilian Corporate Law*, in *Rivista di Diritto Pubblico Italiano, Comparato, Europeo*, vol. 20 (2014) 4.

disregard of the legal entity, injunction orders, and prohibition of services.⁷⁷⁵

However, punitive damages are also deemed an effective way to prevent further wrongdoings and to eliminate the phenomenon of lucrative illegality.⁷⁷⁶ Because there are no civil juries,⁷⁷⁷ concerns about erratic punitive damages seem exaggerated.⁷⁷⁸

⁷⁷⁵ One of the judges also thought that the disregard of legal entity doctrine would be an effective way of preventing lucrative illegality. According to her, there is not a single formula, but many different instruments that ought to be used more promptly and more often: injunction orders; punitive damages; prohibition of services; recall of products; and apprehension of goods. She also highlighted the importance of the media and suggested that companies should have an obligation to publish the summary of a definitive conviction, so that individual consumers may be aware that they are entitled to compensation. The other judge believes that Brazilian courts should develop a culture of imposing fines and other economic sanctions, such as punitive damages.

⁷⁷⁶ All public prosecutors, the Commission's attorney, and the public defender considered punitive damages to be an effective way to prevent further wrongdoings and to eliminate the phenomenon of lucrative illegality. One of the public prosecutors suggested that class actions suits should have priority over other cases due to their impact on multiple individuals. The other prosecutor added that the civil justice system should use new channels of information technology to broadcast class action suits. Another public prosecutor emphasised the personal liability of CEOs and the disregard of legal entity doctrine as the most effective instruments to prevent further wrongdoings. The Commission's attorney praised injunction orders as the most effective tool for eliminating lucrative illegality. Finally, the public defender suggested that proportional companies' assets should be frozen whenever they are accused of harming consumer rights so that they would not benefit from these resources during litigation.

⁷⁷⁷ Some scholars criticise the criteria for applying punitive damages in the US. Joni Hersch and W. Kip Viscusi, for instance, compared decisions made by juries and by judges, concluding that jury awards are highly unpredictable and unrelated to compensatory damages, as opposed to judicial decisions. See Joni Hersch and W. Kip Viscusi, Punitive damages: how juries and judges perform. *The Journal of Legal Studies*, Vol. 33 (2004) 1-36. Cass Sunstein also coordinated empirical research that pointed to the necessity of punitive damages reform to eliminate erratic and extremely expensive convictions. See Sunstein and others (n. 187) and also Sunstein, Kahneman, and Schkade (n. 187) 244-56. On the other hand, some studies reached contradictory conclusions. Theodore Eisenberg, Jeffrey J. Rachlinsky, and Martin T. Wells have not identified an unpredictable pattern of punitive damages awards or a shocking pattern of incoherence and unfairness. See Theodore Eisenberg, Jeffrey J. Rachlinsky, and Martin T. Wells, Reconciling experimental incoherence with real-world coherence in punitive damages. *Stanford Law Review*, Vol. 54, (2002) 1239-1271. In previous empirical research, Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin T. Wells had already demonstrated the predictability of punitive damages and the correlation between jury awards and compensatory damages. See Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin T. Wells, The predictability of punitive damages. *The Journal of Legal Studies*, Vol. 26 (1997) 623-661.

⁷⁷⁸ In a series of recent decisions, the US Supreme Court has echoed the criticisms of the unpredictability of jury awards and has imposed constitutional limits on punitive damages. See, for instance, *BMW of North America v. Gore*, 517 U.S. (1996); *State Farm Mutual Automobile Insurance Co v. Campbell*, 538 U.S. 408, 417 (2003); *Exxon Shipping Co v. Baker*, 554 U.S. 471 (2008). The premise of these judgments consisted of an assumption that excessive economic sanctions were negative for companies, stakeholders and consumers mainly due to their

Companies are more likely to break the law in less competitive markets.⁷⁷⁹ Telecommunication companies and financial institutions operate in limited markets and may establish barriers for customers to leave their contracts. Fidelity clauses, transaction costs, and other restrictions may limit the ability of a consumer to have a new bank account with a different bank or leave a phone company for its competitor. Moreover, companies do not assess the potential economic risks of consumer rights violation under a cost-benefit analysis before making decisions.⁷⁸⁰

On the other hand, it was admitted that such analysis was made after a consumer collective action suit was filed. I propose a counter-intuitive interpretation of their statements. Contrary to the common-sense idea, the inexistence of a cost-benefit analysis is not evidence that these companies respect consumers' rights and will not break the law to pursue illegal profits. The lack of cost-benefit analysis is indicative that Brazilian private companies do not expect to be punished due to massive consumers' rights violations. Unless courts take economic sanctions seriously and punish private companies for their wrongdoings, Brazilian companies will continue to break the law.

4.5 Compensation

4.5.1 Compensatory damages

unpredictability. See Jeffrey L. Fisher, *The Exxon Valdez case and regularizing punishment*. *Alaska Law Review*, Vol. 26 (2009) 1-46.

⁷⁷⁹ Interview G (RJ, 21.04.11).

⁷⁸⁰ Interviews H (RJ, 27.04.11) and I (RJ, 27.04.11).

In addition to the lack of punitive damages, the Brazilian litigation system also fails to oblige private companies to compensate consumers for their economic losses. With general communication by the official gazette and without individual notice, most consumers are unaware of these cases and do not follow the judgments.⁷⁸¹ Moreover, consumers have to be proactive to receive compensation. Once a definitive judicial decision convicts a private company to compensate victims for their economic losses, each consumer has to hire a lawyer and individually enter into the collective action to demand her share of compensation. In small consumer claims, the opportunity costs and the transaction costs are often superior to the value of the individual compensation. Moreover, due to lack of information on the detailed circumstances of the collective wrongdoing, law enforcers suffer from lack of information to oblige companies to compensate individual consumers accordingly to the suffered damages. This problem is connected to the legal architecture, because discovery has very limited use in the Brazilian civil procedure and companies are in practice not obliged to provide information on the dimensions of the collective wrongdoing.⁷⁸²

Additionally, enforcement agents are prohibited from entering into a transaction with corporations regarding consumer damages. According to Brazilian doctrine, parties of a collective action cannot enter into transactions over diffuse, collective or homogeneous individual interests, because plaintiffs

⁷⁸¹ CDC, Article 92.

⁷⁸² On the limited availability of discovery in Brazilian civil procedure, see Gidi (n. 106) 333; Keith Rosenn, Civil procedure in Brazil, *The American Journal of Comparative Law*, vol. 34 (1986) 498-9.

have no mandate to dispose of consumer interests.⁷⁸³ This expectation that consumers should always be fully compensated contradicts the proper expectations over settlements between parties, in which there is normally compromise that takes into account strengths and weaknesses of the case.⁷⁸⁴ In practice, this strict prohibition prevents any compensation for individual consumers, because plaintiffs cannot bargain.⁷⁸⁵ On one hand, accepting any reduction of the entitled compensation to consumers would be considered collusion. On the other hand, demanding that corporations fully compensate all consumers prevents the negotiation of settlements.⁷⁸⁶ The strategy developed in practice by plaintiffs was to exclude individual compensation from collective settlements, expressly informing that there was no transaction of consumer interests and that individuals may pursue their compensations for damages in small claims courts.⁷⁸⁷

By doing this, plaintiffs transform a collective actions for damages into a collective action for injunctive enforcement order. The explanation is partially economic. Because of court usage fees, consumers face higher transaction costs and rarely habilitate their credits in a collective action. The explanation is partially conceptual. Because the normative architecture of collective action prohibits compromises between parties, plaintiffs cannot bargain on behalf of consumers and guarantee automatic payment of partial compensation. The

⁷⁸³ Mazzilli (n. 470) 474-5.

⁷⁸⁴ Hensler and others (n. 56) 487.

⁷⁸⁵ Interview S (RJ 09.09.14).

⁷⁸⁶ Interview S (RJ 09.09.14).

⁷⁸⁷ Interviews L (RJ 14.08.14), S (RJ 09.09.14), and A' (SP 18.09.14).

explanation is partially political. Because courts are conservative, judges do not oblige corporations to pay automatically the compensation directly to defendants.⁷⁸⁸ On the contrary, judges consider habilitating consumer credit to be a necessary pre-requisite for individual compensation.⁷⁸⁹ Moreover, in contrast to the US, defendants benefit from the long duration of collective procedures, because there is low risk of economic sanctions and litigation costs do not increase exponentially. Therefore, corporations do not experience pressure for settlement and plaintiffs normally agree to exclude consumer compensation to be able to settle their cases.⁷⁹⁰

As the economic rationale of collective action for consumer protection is centred on judicial economy and net benefits of individual compensation and deterrence,⁷⁹¹ this setting of under-deterrence and low compensation brings us back to the phenomenon of lucrative illegality.

4.5.2 Lack of compensation and lucrative illegality

⁷⁸⁸ On the effectiveness of automatic consumer compensation, see Brian T. Fitzpatrick and Robert C. Gilbert, An empirical look at compensation in consumer class actions, *New York University Journal of Law & Business*, vol. 11 (2015) 769-72; Guido Calabresi, Class actions in the US experience: the legal perspective, in Jürgen Backhaus, Alberto Cassone, and Giovanni Ramello (eds), *The law and economics of class actions in Europe: lessons from America* (Edward Elgar 2012) 10-1.

⁷⁸⁹ Interviewees A, B, C, D, E, F, G, H, and I agreed that a less bureaucratic system would be much more effective. They all considered that the necessity to hire a lawyer to demand compensation was a strong obstacle to individual compensation in class actions. However, both judges were puzzled by the idea of abolishing this formality and could not conceive of a different system. Some plaintiffs suggested the possibility of conceiving administrative measures to enforce the judicial decisions in a hybrid system that would reconcile the independence of judges with the lower costs and higher level of information of regulatory agencies and other administrative bureaus.

⁷⁹⁰ Interview S (RJ 09.09.14).

⁷⁹¹ Roger Bernstein, Judicial economy and class actions, *The Journal of Legal Studies*, vol. 7 (1978) 354-7.

The low number of court orders for payment of exemplary damages has impacted settlements,⁷⁹² which did not include economic sanctions because punitive damages are unlikely.⁷⁹³ Likewise, companies do not suffer the economic consequences of compensating consumer for individual damages within a collective action. In only one of the 160 collective actions examined there was compensation for individual consumers.⁷⁹⁴ The economics of litigation does not even create the temptation to collude, to offer discount coupons, or to minimise the compensation unfairly.⁷⁹⁵

Both judges were aware of this phenomenon and admitted that consumers almost never benefit from a collective action.⁷⁹⁶ Their opinion is coherent with the data analysis and was shared by all other legal actors interviewed in 2011.⁷⁹⁷ Most legal actors consider injunctions to be the most

⁷⁹² Mitchell Polinsky indicated that there is a correlation between settlements and punitive damages awards in his study of the American system, the difference being that damages induced companies to make an agreement and to settle the class action suit. See A. Mitchell Polinsky, Are punitive damages really insignificant, predictable and rational? A comment on Eisenberg et al. *The Journal of Legal Studies*, Vol. 26 (1997) 663-677.

⁷⁹³ Interestingly, one public prosecutor told me in his interview that he changed his strategy and now requests payment of exemplary damages as a direct consequence of my initial research on the phenomenon of lucrative illegality in 2011. See interview L (RJ 14.08.14).

⁷⁹⁴ According to the data analysis conducted in 2011, there were only 21 definitive convictions in the intermediate years and none of them resulted in any compensation for individual victims.

⁷⁹⁵ Hensler and others (n. 56) 93-99.

⁷⁹⁶ One of them even said that he does not remember of a single individual compensation in his many years at the bench. The other judge referred to the compensation of a consumer as an extremely rare phenomenon. Interviews F (RJ, 19.04.11) and G (RJ, 21.04.11).

⁷⁹⁷ The bank's lawyer explained that the Brazilian collective litigation system is still maturing. In the early years, consumers' class actions were extremely rare and it was not clear whether the CDC also regulated financial institutions. According to him, only a few collective actions against banks got definitive sentences and are now ready to be enforced. In these cases, individual consumers usually only filed their individual suits against banks or simply didn't follow the collective action trials. Therefore, once there is a definitive sentence, individual victims are not informed or are already compensated through other means. The telecommunications' lawyer added that not only is Brazilian civil justice slow, but many collective action suits claim small

effective method of consumer protection.⁷⁹⁸ Both judges stated that their orders are almost always followed and, if not, they imposed and charged higher fines.⁷⁹⁹ Both private lawyers agreed that their companies do not defy judicial orders, even if they disagree with the decision. Unless a judicial order is unfeasible, they claim that they will never disobey.⁸⁰⁰ Plaintiffs agree that injunctions may be very effective, but complain that sometimes judges are reluctant to charge fines.⁸⁰¹ In any event, they all agree that economic sanctions may come more easily when a private company challenges a judicial order than otherwise.⁸⁰²

4.6 Social capital, prestige, and depreciation of reputation

4.6.1 Introduction

Incentives for collective action are not financial or monetary. Yet, even without any perspective of receiving compensation, consumers still make formal complaints to the AGO, OPD, CODECON, and consumer associations. Likewise,

compensatory damages. Only a few customers claim these compensatory damages through individual law suits, in which the company may make deals and pay higher extra-patrimonial damages. Only a small percentage of customers file individual suits and ultimately the company may benefit from the fact that the mass of consumers is not compensated as a whole. As the lawyer put it, her telecommunications company still had not had to pay any kind of economic sanction whatsoever due to a consumers' collective action.

⁷⁹⁸ See section 6.5.2.

⁷⁹⁹ Interviews F (RJ, 19.04.11) and G (RJ, 21.04.11).

⁸⁰⁰ Interviews H (RJ, 27.04.11) and I (RJ, 27.04.11).

⁸⁰¹ Interviews A (RJ, 05.04.11), B (RJ, 06.04.11), C (RJ, 07.04.11), D (RJ, 12.04.11), and E (RJ, 13.04.11).

⁸⁰² Interviews A (RJ, 05.04.11), B (RJ, 06.04.11), C (RJ, 07.04.11), D (RJ, 12.04.11), and E (RJ, 13.04.11).

even with the extremely low probability of exemplary damages and economic sanctions for corporations, plaintiffs continue to pursue collective litigation. Is there any explanation for their insistence on collective action? In economic terms, the explanation comes not from any form of monetary incentive, but rather from the concept of social capital.⁸⁰³

4.6.2 Social capital

Social capital explains the flourishing of collective actions for consumer protection in Brazil. Defining this concept, scholars emphasise different dimensions of this investment in non-monetary resources that may bring potential positive externalities in the future. For instance, Ostrom argues that institutional 'rules-in-use' are an essential part of social capital.⁸⁰⁴ On the other hand, Dasgupta focuses on the structure of social capital as a 'system of interpersonal networks' that affects trust, norms, and cooperation.⁸⁰⁵ These perspectives are not necessarily antagonistic, because institutional norms emerge from complex interactions within social networks.

However, some scholars consider the conceptual core of social capital to be the normativity that facilitates cooperation, labelling these emerging structures of trust, network, and civil society as mere epiphenomena.⁸⁰⁶ This

⁸⁰³ In terms of meaning of social capital, the proper definition refers to "resources embedded in a social structure which are accessed and/or mobilised in purposive actions". See Nan Lin, Building a network theory of social capital, *Connections*, vol. 22 (1999) 35.

⁸⁰⁴ Elinor Ostrom, *Crafting institutions for self-governing irrigation systems* (ICS 2002) 19-27.

⁸⁰⁵ Partha Dasgupta, Social capital and economic performance: analytics, in Elinor Ostrom and T. K. Ahn (eds) *Foundations of social capital* (Edward Elgar 2003) 311-2.

definition is too narrow, excluding the embedded social relationships that provide the necessary infrastructure for the emergence of institutional norms. Instead of a thin conceptual definition, this thesis adopts a broad one: Social capital is constituted by institutionalised social relations with embedded resources for the collective and individuals-within-the-collective, representing aggregation of valued resources of members within the network with which they interact.⁸⁰⁷ Not only institutional rules-in-use, but also economic resources, social relationships, and the representative aggregation of values are formative of social capital.

Regardless of a thin or a broad definition, social capital provides a potential solution for the dilemmas of collective action. Coleman demonstrated how social norms are valuable means for individuals to deal with collective action problems, constituting a public good that facilitates cooperation in society.⁸⁰⁸ In contrast to the first generation of collective action theories,⁸⁰⁹ experience reveals that we are not self-centred fully rational individuals in an atomized world.⁸¹⁰ This does not deny the importance of monetary incentives on behaviour, but other factors are also relevant.⁸¹¹ Collective action problems are

⁸⁰⁶ The definition found in Francis Fukuyama's work reveal an important normative dimension of social capital, but is too narrow: "social capital is an instantiated informal norm that promotes co-operation between two or more individuals". See Francis Fukuyama, *Social capital, civil society and development*, *Third world quarterly*, vol. 22 (2001) 7.

⁸⁰⁷ See Lin (n. 803) 33.

⁸⁰⁸ James Coleman, Norms as social capital, in Gerard Radnitzky and Peter Bernholz (eds), *Economic imperialism: the economic approach applied outside the field of economics* (Paragon 1988) 152-3.

⁸⁰⁹ See Olson (n. 42) 2.

⁸¹⁰ Elinor Ostrom and T. K. Ahn, Introduction, in Elinor Ostrom and T. K. Ahn (eds), *Foundations of social capital* (Edward Elgar 2003) xv.

⁸¹¹ Ostrom and Ahn (n. 810) xvi.

embedded in social relationships, networks, and organisations.⁸¹² In this sense, social capital may facilitate the capacity of individuals and groups to solve collective action problems through the formal and informal institutional rules-in-use and through the trustworthiness normally developed within their social networks.⁸¹³

This thesis points specifically to these two explanatory factors for the rise of collective actions in a legal environment without monetary incentives for collective actors.⁸¹⁴ First, collective actors are primarily focused on the development of institutional rules-in-use. Instead of being oriented for profit, they are oriented by the possibility of implementing consumer protection through regulatory enforcement of the CDC. As correctly explained by Ostrom, a very important dimension of social capital involves the effort of developing working rules: 'to provide themselves with working rules to deal with their collective-action problems, individuals need to invest in those working rules in the form of devising, revising, monitoring, and sanctioning'.⁸¹⁵ In the Brazilian experience, consumers make complaints to these collective actors and they will pursue regulatory enforcement with a primary focus on making, implementing, and enforcing the adequate rules for consumer protection. In other words, the objective is developing effective working rules for consumer protection that

⁸¹² Ostrom and Ahn (n. 810) xv.

⁸¹³ Ostrom and Ahn (n. 810) xiv.

⁸¹⁴ Coslovsky explains that public prosecutors have monetary incentives to avoid being activists and pursuing collective actions, because of the risk of harming their reputations and potential career prospects inside the AGO. Therefore, collective actions are pursued without monetary incentives. See Salo Coslovsky, *Relational regulation in the Brazilian Ministério Público: the organisational basis of regulatory responsiveness*, *Regulation & Governance*, vol. 5 (2011) 75-82.

⁸¹⁵ Ostrom and Ahn (n. 810) xxiii.

overcome collective action problems, such as rational apathy, asymmetry of power, free riders, and consumer vulnerability, for instance.

Second, collective actors depend on the trust of consumers, because consumer protection depends largely on complaints made by individual consumers.⁸¹⁶ Complaints establish patterns of corporate wrongdoing, reveal certain difficult to detect infringements, and provide organisations with democratic force.⁸¹⁷ The development of trust between consumers and collective actors cannot be explained by any monetary incentive, because individuals do not receive any award resulting from these complaints. Instead, trust develops gradually through repetitive interactions in which organisations respond to consumer demands in satisfactory ways. This process is normally accompanied by the dissemination of information through networks of consumers, which may also make complaints to collective actors, supporting their activity as a constituency.⁸¹⁸ As Ostrom explains, 'trust is enhanced when individuals are trustworthy, are networked with one another in multiple ways, and are within institutions that facilitate the growth of trust'.⁸¹⁹ Therefore, building trust is a complex process that depends on being responsive, interconnected, and building institutional rules-in-use for the common good.

In summary, social capital explains why collective actions grew between 2001 and 2010, even with rare monetary rewards and sanctions. These juridical instruments have contributed to the development of institutional rules-in-use

⁸¹⁶ Cranston (n. 735) 51-3.

⁸¹⁷ Cranston (n. 735) 52-3.

⁸¹⁸ Cranston (n. 735) 54.

⁸¹⁹ Ostrom and Ahn (n. 810) xxiii.

and supportive networked constituencies for consumer protection. Collective actors have enforced legal rules and standards, establishing working rules for the relationships between corporations, consumers, and other organisations. The regulatory enforcement has been widely publicised in the media, has attracted attention of consumers, and has encouraged tens of thousands to make further complaints of their grievances. Had courts convicted corporations to pay punitive damages and to compensate individuals, the impact of these collective actions as a juridical response to consumer demands would be arguably higher. On the other hand, the lack of exemplary damages and individual compensation did not lead to the death of collective actions. The explanation comes from social capital and the non-monetary incentives involved in building institutional rules and trust.

4.6.3 Prestige and depreciation of reputation

By complaining to one of the plaintiffs, the consumer activates an institutional infrastructure for consumer protection, which is interconnected with a particular network of regulatory agencies, media, and consumers.⁸²⁰ For instance, the AGORJ developed a reputation as a general ombudsman and a diligent collective actor for consumer protection.⁸²¹ Becoming a reference for consumer protection, the AGORJ facilitates the flow of information⁸²² by

⁸²⁰ See Lin (n. 803) 33.

⁸²¹ Interview L (RJ 14.08.14).

⁸²² Lin (n. 803) 31.

requesting explanations from corporations and regulatory agencies on behalf of consumers and also by broadcasting their collective actions in the media.⁸²³ Moreover, their influence and social credentials⁸²⁴ play an important role in communication with corporations and regulatory agencies, amplifying the political scope of a consumer complaint and also their accessibility to a proper response.⁸²⁵

Corporations are not concerned with the probability of economic sanctions, but rather with the possibility of depreciation of their reputation due to negative publicity.⁸²⁶ In the absence of exemplary damages and consumer compensation, their potential loss of capital is primarily symbolic - related to their trust and reputation among consumers.⁸²⁷ Indirectly, however, the loss of trust may lead to destruction of social capital and, consequently, to reduction of transactions and monetary capital.⁸²⁸ Therefore, the preservation of trustworthiness and social capital emerges as the most important incentive for corporations to settle a collective action for consumer protection. In this setting, the promise of not advertising a settlement becomes an additional aspect of the negotiation between law enforcers and corporations.⁸²⁹

⁸²³ Interviews L (RJ 14.08.14), O (RJ 26.08.14), Z (SP 16.09.14), A' (SP 18.09.14), and D' (RJ 22.09.14).

⁸²⁴ Lin (n. 803) 31.

⁸²⁵ Interview O (RJ 26.08.14) and S (RJ 09.09.14).

⁸²⁶ Interviews G (RJ, 21.04.11), S (RJ 09.09.14), Z (SP 16.09.14), and C' (SP 19.09.14).

⁸²⁷ On trust as a form of social capital, see Russel Hardin, *Trust & trustworthiness* (Russell Sage 2002) 83-4; Karen Cook, Russell Hardin, and Margaret Levi, *Cooperation without trust?* (Russell Sage 2005) 88.

⁸²⁸ James Coleman, The creation and destruction of social capital: implications for the law, *Notre Dame Journal of Law, Ethics & Public Policy*, vol. 3 (1988) 392-3.

⁸²⁹ Interview M (RJ 21.08.14).

On the other hand, in the absence of a settlement, plaintiffs file collective action and publicise the case in the media.⁸³⁰ Wide publicity is necessary to develop awareness of the corporate wrongdoing among large constituencies of consumers, so that individuals are empowered by information and aware that a corporate practice is deemed abusive. The growth of the AGO's institutional prestige was a by-product of the publicity given to their cases in the media.⁸³¹ Consequently, other institutional actors also invested their resources in this source of social capital and developed their own infrastructures to become collective actors for consumer protection.⁸³² The increase of these intermediate bodies in civil society also generates growth of social capital,⁸³³ because the existence of various collective actors increases opportunities for consumer complaints and the size of regulatory networks with their different constituencies. In other words, social capital is vital for the proper functioning of public institutions, civil society, and the democratic state.⁸³⁴

4.7 From economics to politics: institutions and organisations

This chapter showed that monetary incentives cannot adequately explain the rise of collective actions and of competing collective actors in Rio de Janeiro since 2001. In contrast to US class actions, large legal fees, punitive damages, and

⁸³⁰ Interviews L (RJ 14.08.14), O (RJ 26.08.14), Z (SP 16.09.14), and A' (SP 18.09.14).

⁸³¹ Interview L (RJ 14.08.14).

⁸³² Interview S (RJ 09.09.14), V (RJ 11.09.14), and D' (RJ 22.09.14).

⁸³³ Fukuyama (806) 12-3.

⁸³⁴ Fukuyama (n. 806) 11-2.

compensatory awards are not available for the plaintiffs in a civil public action. Yet, collective action grew between 2001 and 2010. This chapter indicated that social capital provides the economic explanation for this combination of very limited monetary incentives with a solid expansion of collective actions for consumer protection. Instead of profit and monetary incentives, collective actors are focused on developing institutional rules-in-use and their networked constituencies of consumers connected to their organisational infrastructures.

The next chapter investigates how the different collective actors invest their resources into building organisational infrastructures to connect the enforcement agents with the consumers. This investment in social capital is directly connected with the potential institutional dynamics of collective action in the Brazilian experience. Because there is institutional competition between the different collective actors, they invest time, resources, and physical capital in their organisational infrastructure, so that they provide adequate responses to consumers that will develop their trust. Likewise, collective actors are political representatives of consumer interests and may protect their collective rights, even if they were not elected to represent these constituencies. Additionally, the participation of consumers could increase the democratic force of collective action, but it is normally limited to the initial complaint in the Brazilian experience, as revealed in the next chapter.

Chapter 5

The power of collective actors: institutional dynamics, organisational structure, political representation, and democratic participation

5.1 Introduction

The previous chapter examined the incentives for collective action, analysing funding, costs, awards and sanctions, and social capital. Analysing the factors traditionally considered by the literature,⁸³⁵ the empirical observation of the absence of large monetary incentives would possibly lead to a conclusion that collective actions are unlikely. Yet, this is clearly not the case. Even in the absence of monetary incentives, the number of collective actions grew significantly between 2001 and 2010.⁸³⁶ As the previous chapter shows, this growth of collective actions may not be attributed to monetary incentives, but rather to the non-monetary incentives that are provided by social capital. Conceptually, this finding is directly related to the politics of collective action, because of the consequences of this investment in social capital for institutional growth and organisational infrastructure of the collective actors.

Therefore, this chapter focuses on the question of how the organisational structure and the institutional dynamics shape collective actors, examining their influence over the power of enforcement agents for consumer protection. Addressing multiple institutional possibilities for collective actors, this chapter describes the practice of public prosecutors, public defenders, state assembly

⁸³⁵ Cameron, Kalajdzic and Klement (n. 164) 151-5.

⁸³⁶ see chapter 3.

attorneys, and consumer associations.⁸³⁷ However, the reader should not be distracted by the description, because ideal typical political interactions emerge from these descriptions of practical experience. In other words, this chapter provides also a conceptual framework for the future study of these collective actors and their dynamic interactions within the complex regulatory space.

Moreover, this chapter also investigates the problem of collective action from the perspective of law and politics. In theory, groups of individuals may be presentative, that is capable of presenting themselves directly without any intermediation. In practice, however, coordinating the direct presence and joint-participation of groups of people in a judicial procedure may be impossible, depending on the size of group membership.⁸³⁸ Therefore, at least since medieval times, groups are entitled to be represented in courts instead of being obliged to be present there.⁸³⁹

This is a crucial issue for consumer protection, because of the potential of consumer groups, representative groups, consumer associations, and public

⁸³⁷ Some scholars recommend the analysis of mixed institutions as a way to understand possibilities and limits of collective action. See, for instance, Hensler and Thornburg (n. 218) 268-70; Coffee (n. 204) 219-220; Nagareda (n. 691) 58-63. This combination of private and public enforcement is observed in other jurisdictions, such as Chile and even in the US.

⁸³⁸ The problem would not be just to find a venue to accommodate 10,000 people for a judicial hearing. After all, there are football stadiums and concert halls with capacity for multitudes. The insurmountable obstacle would be the coordination of communication, scheduling, and financing to aggregate all the interested individuals simultaneously in a given venue. Likewise, if each individual received 1 minute to defend her interests, such a judicial hearing would last 166 hours or 7 continuous days for everyone to exercise their right to voice. Likewise, in most cases, the transaction costs of such a massive judicial hearing would be higher for individuals than any potential benefits. Therefore, juridical mechanisms of collective action for consumer protection solve coordination obstacles and negative value impediments, which are typical sociological and economic dimensions of collective action.

⁸³⁹ See generally Yeazell, Group litigation and social context (n. 116) 892-4; Yeazell, *From medieval group litigation to the modern class action* (n. 116) 39-41. Some even refer to the origins of collective litigation in the *actio popularis* of Roman law. See Silva (241) 17-19. However, this understanding is controversial and, in conversation with Rheinhard Zimmermann, he suggested that this action is historically linked to the origins of criminal law rather than to collective actions.

entities to solve collective action problems and effectively protect consumer rights.⁸⁴⁰ This is a relevant problem, because otherwise consumers' interests may be poorly represented in practice.⁸⁴¹ Cranston correlates this problem of political representation with the regime of monetary incentives, recalling the lesson from classical economic theory that self-interested consumers would not normally join consumer groups, and correctly concluding that this is not really correct.⁸⁴² In practice, consumers pursue their interests, but may also contribute to the common good by supporting the work of collective actors.⁸⁴³

The following subsections explain the theory and history of collective actors, summarising their institutional dynamics in the web of political relationships of the regulatory space, and the relevant issues regarding political representation and democratic participation in collective actions. Section 5.2 investigates the different institutional operations and the development of organisational infrastructure by the AGO, the OPD, the CODECON, and consumer association, explaining the role, strategy, and constituency of different enforcement agents for consumer protection in contemporary Brazil: public prosecutors, public defenders, state assembly attorneys, and consumer representatives. Their different infrastructures constitute comparative advantages for the collective actors. Section 5.3 provides a typology of institutional dynamics, by examining the initial institutional concentration, monopoly, and agenda control by the AGO, followed by growing competition

⁸⁴⁰ Ross Cranston, *Consumers and the law* (2nd edn, Weidenfeld and Nicolson 1984) 10.

⁸⁴¹ Cranston (n. 840) 11.

⁸⁴² Cranston (n. 840) 11-2.

⁸⁴³ Cranston (n. 840) 12.

between different collective actors and democratic participation. Moreover, institutional dynamics may include also cooperation, coordination, coalition, deference, mutual respect, and moderation. Section 5.4 explains the role of these dynamics by collective actors in shaping the regulatory space, by analysing information exchange, conflicts of interest, and strategic behaviour. Likewise, these dynamics are important for prevention of regulatory capture and the deleterious effects of the policy of revolving doors.

5.2 Collective Actors

5.2.1 Collective actors as agents and representatives.

Collective actors are defined as the corporate agents responsible for performing the role of consumer representatives in collective actions. Their mode of constitution, their character, their infrastructure, and their dynamic interactions are decisive for collective action, because they influence the conduct of the relevant collective actors. Collective actors emerged as corporate agents by means of the institutionalisation of certain groups as organisations capable of active participation in society.⁸⁴⁴ Legally, collective actors are representative of groups of individuals in collective litigation.⁸⁴⁵ In its original conception, the idea of representation and the political capacity of corporate agents were intrinsically

⁸⁴⁴ Jesper Strandgaard Pedersen and Frank Dobbin, The social invention of collective actors: on the rise of the organisation, *American behavioral scientist*, vol. 40 (1997) 431-2; Otto von Guericke, *Political theories of the middle age* (CUP 1900) 22-30.

⁸⁴⁵ Yeazell (n. 76) 1081-5.

linked to the collective exercise of power and not just to the private rights of a sum of individuals.⁸⁴⁶

According to medieval theories, the necessary unity of the corporate body originated from divine will and the force of the spirit.⁸⁴⁷ Nowadays the esprit de corps, culture, and ideology provide the sense of internal cohesion and external mission to the organisations.⁸⁴⁸ In juridical collective actions these dimensions are evoked by the idea that collective actors may be ideological plaintiffs, motivated not by their own self-interest, but rather by a sense of professional responsibility and the pursuit of the public good.⁸⁴⁹ In an interesting contrast with class actions, the pursuit of public good is not shaped by private gain, but rather shaped by 'the possibility to act to protect society exactly because I belong to this mass of consumers and have now the power to defend their interests in my case'.⁸⁵⁰

Moreover, the decision-making process is shaped by the organisational structure, because exercise of authority may be shared collectively.⁸⁵¹ The collective actor is an intermediate body that mediates between a wrongdoer and a group of people to vindicate their collective interests.⁸⁵² The institutional design of the corporate body may contain mechanisms for collective deliberation

⁸⁴⁶ Gierke (n. 844) 63.

⁸⁴⁷ Gierke (n. 844) 9-10.

⁸⁴⁸ See Robert Merton, *Bureaucratic structure and personality*, *Social forces*, vol. 18 (1940) 564; Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Polity Press 1996) 180-3.

⁸⁴⁹ See Vince Morabito, *Ideological plaintiffs and class actions - the Australian perspective*, *University of British Columbia Law Review*, vol. 34 (2001) 496-8; Mulheron (292) 39.

⁸⁵⁰ Interview O (RJ 26.08.14).

⁸⁵¹ List & Pettit (n. 67) 64-72; Bratman (n. 67) 30-5.

⁸⁵² Didier Jr and Zaneti Jr (n. 69) 43-4.

that change the quality of the decision-making process.⁸⁵³ Instead of producing an individual decision, turning a deliberation into the product of collective agency.⁸⁵⁴ For instance, the decision to discontinue an investigation and close a case at the AGO is subjected to a collective decision by the Attorney General's Office Superior Council (AGOSC), which affects the quality of the prosecutorial enquiries - conducted with consciousness of the future overview by the collegiate.⁸⁵⁵

On the other hand, prosecutorial decisions to litigate and to settle a case are not under any particular supervision and are taken individually by prosecutors - giving them a quixotic feeling of being lone riders.⁸⁵⁶ Paradoxically, the most important decisions are not the result of shared or collective agency, but are rather taken by an individual. Unsurprisingly, collective action depends on the role of great men and women and their public entrepreneurship.⁸⁵⁷

Another important dimension of collective actors is their character of plural subjects.⁸⁵⁸ Even if not reduced to the sum of their individual parts, the

⁸⁵³ List & Pettit (n. 67) 69-71; Bratman (n. 67) 132; Richard Ekins, *The nature of legislative intent* (OUP 2012) 71-6.

⁸⁵⁴ List & Pettit (n. 67) 69-71; Bratman (n. 67); Ekins (n. 853) 71-6.

⁸⁵⁵ Interviews Z (SP 16.09.14) and A' (SP 18.09.14). In closing an enquiry, prosecutors act under the 'shadow' of the council. On the idea of operating under the shadow of another decision-maker, see Robert Mnookin and Lewis Kornhauser, *Bargaining in the shadow of law: the case of divorce*, Yale Law Journal, vol. 88 (1979) 950.

⁸⁵⁶ Some commentators defend the idea that the AGOSC should supervise also litigation and settlement. See Mazzilli (n. 470) 452-3.

⁸⁵⁷ Deborah Hensler, *Class actions in context*, in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economic, and politics shape collective litigation* (Edward Elgar 2016) 403-4; On the role of great men for law and social change in general, see Lawrence Friedman and Jack Ladinsky, *Social change and the law of industrial accidents*, Columbia law review, vol. 67 (1967) 78-9.

⁸⁵⁸ Gilbert (n. 67) 63-80: "By definition, any population of persons who are jointly committed in a certain way constitute a *plural subject*".

composition of corporative agents consists also of collections of their individual wills, interests, inter-relationships, and joint-commitments.⁸⁵⁹ Considered as plural subjects, collective actors are composed by pluralities of individualities and their relational qualities, including the complex articulation between presentatives and representatives.⁸⁶⁰ According to Coslovsky, Brazilian prosecutors are engaged in relational regulation and refer to their "practice as *negotiating deals, building alliances, assembling networks, or stitching solutions together*".⁸⁶¹

In the case of collective action for consumer protection, for example, not only the members of the formally organised entity, but also their constituencies may cooperate in a joint-action.⁸⁶² Law enforcers and consumers constitute an integrated network and consumers may interact with voice and power.⁸⁶³ In their struggle for law, consumers sometimes have higher costs than benefits, but

⁸⁵⁹ This is also the original insight behind the social contract and the origin of the modern state. Thomas Hobbes, *Leviathan* (CUP 1996) 117-21; Carl Schmitt, *The leviathan in the state theory of Thomas Hobbes: meaning and failure of a political symbol* (Chicago 2008) 18-9. Even the powerful critique of David Hume retains the importance of the interaction of individuals to form the collective, by substituting the social contract for social convention and the will for the acquiescence. See David Hume, *Essays moral, political, and literary* (Liberty Fund 1994) 32-41; Russel Hardin, *David Hume: moral & political theorist* (OUP 2007) 81-104

⁸⁶⁰ The concept of a relational subject values human interactions beyond mere transactions, focusing on social relationships as constitutive of the *subject-in-relation*. See Pierpaolo Donati and Margaret S. Archer, *The relational subject* (CUP 2015) 3-19; Jean-Luc Nancy, *Being singular plural* (Stanford 2000) 28-47

⁸⁶¹ Coslovsky (n. 814) 75.

⁸⁶² For the idea of the collective action as an entity, see Shapiro (n. 74) 917-8. For the idea of collective action as a collectivisation, see Yeazell (n. 34) 56-68. In general, this subtle distinction is also found in contrasting the works of Michael Bratman and Margaret Gilbert on collective actors. See Donati and Archer (n. 860) 34-49.

⁸⁶³ See Resnik, Curtis, and Hensler (n. 60) 306-8; Coffee, Class action accountability (n. 56) 378-80.

may still act to protect their rights.⁸⁶⁴ On the other hand, collective action for consumer protection does not necessarily depend on individual participation,⁸⁶⁵ especially in cases of small value claims that induce inertia due to social apathy or status quo bias.⁸⁶⁶ However, treating the presentatives simply as ghosts reduces the capacity of collective actors to achieve the professed objectives of access to justice, judicial economy, compensation, and deterrence.⁸⁶⁷

Finally, individuals can perform the role of collective actors, because the PAA granted standing to citizens for the popular action.⁸⁶⁸ However, the scope of this mode of collective action is not generic and horizontally broad, but rather sectoral and limited to specific objects⁸⁶⁹ - excluding consumer issues.⁸⁷⁰ Some commentators defend the inclusion of individuals as potential collective actors for consumer protection.⁸⁷¹ However, a senior public defender feared this possibility:

⁸⁶⁴ This insight is developed in a classical study from Jhering. See Rudolph von Jhering, *The struggle for law* (Callaghan 1913) 22-30.

⁸⁶⁵ Rosenberg (n. 229) 566-8.

⁸⁶⁶ Status quo bias refers to the strong tendency people have to remain in state of inertia, follow the status quo, or a default option. See Richard Thaler and Cass Sunstein, *Nudge: improving decisions about health, wealth, and happiness* (Yale 2008) 8. Applied to collective action, it means that consumers are likely to remain in inertia instead of joining a collective action or pursuing individual justice at small claims courts or through ADR.

⁸⁶⁷ This metaphor of the collectivity as being like a ghost or a phantom client, which simultaneously exists and does not exist is borrowed from Lahav (n. 219) 1939-40.

⁸⁶⁸ PAA, article 1.

⁸⁶⁹ Mulheron (n. 292) 38-9

⁸⁷⁰ PAA, article 1, § 1, 2, 3, and 4.

⁸⁷¹ Aluisio Goncalves de Castro Mendes and Larissa Clare Pochmann da Silva, A legitimidade do indivíduo nas ações coletivas, in Ada Pellegrini Grinover, Antonio Herman Benjamin, Teresa Arruda Alvim Wambier, Vincenzo Vigoriti (eds), *Processo Coletivo: do surgimento à atualidade* (RT 2014), 1243-53.

The OPD extrapolated its original limits to obtain standing for collective action and I considered positive this increase in the list of collective actors. But I fear that granting standing for individuals may create risks of misrepresentation. My opinion is based on the example of popular actions, which are sometimes temerarious, filed on the eve of an election day. I fear our culture of *jeito*⁸⁷² and think that there is already a reasonable constellation of collective actors. We can already take care of the demand and there is already a certain competition. If a collective actor doesn't take a demand, another takes it. In addition to the OPD and the AGO, there is also CODECON. I don't really like the idea of admitting the entry of law firms as in the US. I see the collective action as an instrument for democratic participation.⁸⁷³

This prohibition of individuals as plaintiffs in collective action shows how the role of collective actor is different in US class actions and EU collective redress, as further explained in the next section.

5.2.2 *The political web of collective action*

In their institutional dynamics, collective actors are entangled in relations with representatives of NGOs, governmental officials, associations and think tanks.⁸⁷⁴ Interconnections between different collective actors and their constituencies generate an integrated web that distributes information and facilitates exchange of knowledge.⁸⁷⁵ In this sense, these collective actors are not reducible simply to fully defined bureaucratic offices, but rather are part of a

⁸⁷² Unfortunately, the expression *jeito* is really not translatable. Fortunately though, Keith Rosenn wrote an article in which he explains the *jeito* in detail. See Rosenn (n. 693) 514-549.

⁸⁷³ Interview D' (RJ 22.09.14).

⁸⁷⁴ Salo Coslovsky, Beyond bureaucracy: how prosecutors and public defenders enforce urban planning laws in São Paulo, Brazil, *International Journal of Urban and Regional Research*, vol. 39 (2015) 1112; Coslovsky (n. 814) 80-1.

⁸⁷⁵ Coslovsky (n. 874) 1114.

complex network of channels of information and influence.⁸⁷⁶ Their institutional relationships are strategic and especially important for diminishing the risks of regulatory capture.⁸⁷⁷

Their institutional dynamics are shaped by the organisational structure⁸⁷⁸ and may involve concentration, competition, cooperation, coalition, and deference.⁸⁷⁹ Institutional concentration refers to the power of an organisation to establish a monopoly or a quasi-monopoly⁸⁸⁰ for providing particular public services within a particular social group.⁸⁸¹ However, the legal environment is normally shaped by mutual interaction and reciprocal observation between organisations that invest in skills and knowledge to survive.⁸⁸²

⁸⁷⁶ Julia Black, Constructing and contesting legitimacy and accountability in polycentric regulatory regimes, *Regulation and governance*, vol. 2 (2008) 138-45.

⁸⁷⁷ McAllister (n. 448) 180-5.

⁸⁷⁸ On the importance of the organisational structure for the performance and governance of public bureaus, see Oliver Williamson, The new institutional economics: taking stock, looking ahead, *Journal of Economic Literature*, vol. 38 (2000) 602.

⁸⁷⁹ In his research on Brazilian prosecutors, Coslovsky identified in the AGO the internal institutional dynamics of competition, collaboration, interpenetration, and reconciliation. See Coslovsky (n. 814) 82-3.

⁸⁸⁰ In theory, a situation of complete monopoly is characterised when one single organisation controls 100% of the market. In practice, however, these situations are rare, because there is usually residual competition. Therefore, most cases involving high concentration rates are instances of quasi-monopoly or oligopoly. In our context of institutional competition, Sadek and Cavalcanti referred to a *de facto* monopoly of public prosecutors, because the AGO filed 96% of environmental collective actions in the early 1990's. See Maria Tereza Sadek and Rosangela Batista Cavalcanti, The new public prosecution and the efficacy of accountability mechanisms, *Conference on Institutions, Accountability, and Democratic Governance in Latin America* (2000) 5.

⁸⁸¹ On the decrease of learning, creativity, and developed caused by monopoly power in organisations, see Douglass North, The new institutional economics and third world development, in *The new institutional economics and third world development*, vol. 21 (1995) 6.

⁸⁸² Douglass North, *Institutional competition, locational competition in the world economy* (Mohr-Siebeck 1995) 27.

Institutional competition emerges from this interplay of opportunities created by these investments and limitations resulting from scarcity.⁸⁸³ In the academic literature, the expression 'institutional competition' or 'regulatory competition' may refer also to disputes between jurisdictions for establishing the more competitive regulatory system to attract foreign direct investment (FDI) and economic development.⁸⁸⁴ However, institutional competition may also take place when different organisations dispute for institutional space within a single jurisdiction.⁸⁸⁵ This phenomenon is particularly clear in the Brazilian case,⁸⁸⁶ in which each collective actor developed a particular infrastructure for mobilising constituencies of consumers.⁸⁸⁷

Additionally, different institutional actors establish partnerships towards a common objective, by combining strategies of mutual support and integrated

⁸⁸³ North (n. 882) 27-8.

⁸⁸⁴ Alexander Wulf, *Institutional competition between optional codes in European contract law: a theoretical and empirical analysis* (Springer 2014) 86-9; Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2012) 366-9.

⁸⁸⁵ In the words of Douglass North, for instance, 'It was the dynamic consequences of the competition amongst fragmented bodies that resulted in an especially creative environment'. See North (n. 882) 32.

⁸⁸⁶ Interestingly, the institutional competition between jurisdictions in the North Atlantic has become an institutional competition within jurisdictions in the global south. Therefore, there is a conflictive diffusion of ideas in Latin American countries from both the US and Europe, resulting in constant institutional competition. Particularly in the case of the Latin American model of civil public action, there is a clear competition between ideas diffused from the US and Europe, which has resulted in a hybrid system. Coming originally from the global south, young academics travel to countries of the North Atlantic countries to pursue their postgraduate programmes. During their studies abroad, these researchers are trained according to the normative foundations of a particular legal system and will internalise many of the ideas, attitudes and opinions of their host legal culture. Once they return to their home jurisdictions in the global south, they are likely to advocate the ideas they have learned and to disseminate legal concepts from the North Atlantic in the global south. On diffusion of legal ideas in general, see Twining (n. 444), Ch 9. On diffusion of legal ideas particularly in the context of collective actions, see Hensler (n. 801) 404-5. On diffusion of legal ideas from the north to the global south, see Pedro Fortes, 'Admirável Mundo Novo Pós-colonialista: Descolonizando o Ensino Jurídico' in Pedro R Fortes (Ed), *Globalização do Ensino Jurídico* (FGV 2014) 112-4.

⁸⁸⁷ On the AGO's fight for resources, see Coslovsky (n. 814) 72.

action. The joint-action between different organisations is termed institutional cooperation⁸⁸⁸ and may be necessary to equilibrate unbalanced power relationships between organisations and their adversaries.⁸⁸⁹ A particular kind of cooperation is a coalition, characterised as an integrated collaboration between multiple actors towards a commonly shared objective.⁸⁹⁰ Another important institutional dynamic is the mutual respect between different organisations and the recognition of the action developed by the other collective actor. In practice, potential conflicts between the collective actors are moderated by their mutual respect and trust.⁸⁹¹

5.2.3 Political representation and democratic participation

Individuals already have to deal with transaction costs to make a formal complaint against a corporation. Various wrongdoings against masses of consumers involve small value claims. The personal cost of complaining to the AGO includes the wasted time of entering into the website, filling an electronic form, and preparing a report of the consumer wrongdoing directed to a prosecutor. In most cases, the wasted time is more valuable than the individual harm caused by the corporation. If individuals were exclusively self-interested,

⁸⁸⁸ Salo Coslovsky refers to these partnerships as 'collaboration'. See Coslovsky (n. 814) 83. I prefer the term 'cooperation', because institutional partners do not have to necessarily work together, it being possible that one partner simply provides support by signing a document and endorsing the work produced by the other collective actor. Sometimes simply not competing already means cooperating.

⁸⁸⁹ Interviews J (RJ, 30.04.14), K (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

⁸⁹⁰ Gianluca Sgueo, *Beyond networks: interlocutory coalitions, the European and global legal orders* (Springer 2016) 75-83.

⁸⁹¹ Interviews K (RJ, 30.04.14), L (RJ 14.08.14), O (RJ 26.08.14), and V (RJ 11.09.14).

they would consider the negative value of their claims and exercise their rational apathy by not complaining.⁸⁹²

However, individuals sharing a common pool of resources are not inevitably caught in a trap of egoism that they cannot escape and have the capacity to extricate themselves from detrimental situations, acting for the common good.⁸⁹³ Consumers are not rational fools.⁸⁹⁴ Their complaints to collective actors are an essential source of evidence, suggesting a perception that the regularity of the market improves their general welfare, even if their individual cost in such complaint is higher than any expected benefit. Therefore, consumer participation facilitates collective action.

Collective action may balance B2C relationships and prevent the 'haves' from dominating the 'have-nots'.⁸⁹⁵ Public safeguards could compensate asymmetries of power and guarantee the capacity of consumers to engage in consumption enjoying their freedom from more dominant actors.⁸⁹⁶ Consumers could be in a position to pass the eyeball test, being able to look others in the eye, walking tall, and assuming equal status in a B2C relationship.⁸⁹⁷

⁸⁹² Olson (n. 42) 2.

⁸⁹³ Elinor Ostrom, *Governing the commons: the evolution of institutions for collective action* (CUP 1990) 14.

⁸⁹⁴ Amartya Sen, Rational fools: a critique of the behavioural foundations of economics, *Philosophy and public affairs*, vol. 6 (1977) 330-2.

⁸⁹⁵ Galanter (n. 43) 50-53.

⁸⁹⁶ Phillip Pettit, *On the people's terms: a republican theory and model of democracy* (CUP 2012) 84-85.

⁸⁹⁷ Pettit (n. 896) 84-85 & 90-1. This conceptualization of consumer freedom is based on its interactional social character, presupposing relationships with a pattern that rules out domination. Therefore, the meaning of consumer freedom and the necessity for empowerment and reflexive equilibrium emerge from symbolic social interactions, depending on context and

These collective actors are normally unelected, raising issues regarding their democratic credentials, especially during the collective procedure, the negotiation of settlements, and enforcement of judicial sentences. Independent institutions normally have advantages as knowledge gatherers and can speak with expert authority on the facts and their evaluation of them,⁸⁹⁸ even to make social judgments due to their evidence-based decision-making and trustworthy information.⁸⁹⁹ Because they are responding to consumer demands, unelected bodies are not anti-democratic and may expand the capacity of citizens to access the justice system to obtain redress for their grievances.⁹⁰⁰ These unelected bodies operate within a space between law and politics, controlling the boundaries of the market and the state, and subject to political oversight and judicial review of their actions.⁹⁰¹ Compensating for the loss of deliberative democracy, these new bodies develop mechanisms to communicate and get information from the public.⁹⁰² Particularly in the case of collective actors, complaints and feedback from consumers are an extremely important source of information. However, the channels of communication developed by collective actors to communicate with consumers are insufficient and the exchange of information during the collective procedure is limited.

not on a single set of transcendental values. See also Phillip Pettit, *Just freedom: a moral compass for a complex world* (W. W. Norton & Company 2014) 71.

⁸⁹⁸ Vibert (n. 61) 43.

⁸⁹⁹ Vibert (n. 61) 54.

⁹⁰⁰ Vibert (n. 61) 62.

⁹⁰¹ Vibert (n. 61) 64.

⁹⁰² Vibert (n. 61) 66.

Another important dimension of the democratic governance of consumer relationships comes from the analysis of political representation and the principal-agent dilemma. The traditional idea is that unelected bodies could perform certain political functions without a democratic loss, because they function as agents for a democratic principal,⁹⁰³ particularly consumer groups. In this sense, the representative must act independently, but in the interest of the represented, being responsive to them.⁹⁰⁴

However, new theories emphasise the dynamics of representation, moving from dyadic relationships – the principal (represented) and the agent (representative) – into systemic relationships with multiples flows of information and communication between representatives and constituencies.⁹⁰⁵ Multiple elective, semi-elective, and non-elective actors may claim representation, anticipate the preferences of their potential constituents, and influence future preferences through discourse and actions.⁹⁰⁶ Representation becomes a continuous interactive process of claim-making and claim-receiving, in which audiences are invoked by a potential agent and eventually constituted through a claim and counterclaim – mutually constituting representative and represented.⁹⁰⁷ These dynamics of representative claims are essential for the understanding of the institutional competition between AGO, OPD, CODECON, and consumer associations.

⁹⁰³ Vibert (n. 61) 70.

⁹⁰⁴ Hanna Fenichel Pitkin, *The concept of representation* (University of California Press 1967) 209.

⁹⁰⁵ Michael Saward, *The representative claim* (OUP 2010) 20.

⁹⁰⁶ Saward (n. 905) 20-25.

⁹⁰⁷ Saward (n. 905) 26-29.

The complexity of political representation is a classical subject of political science. For instance, Thomas Hobbes made a strong defence of concentrated political power of the sovereign autocrat, suggesting that separation of powers would lead to the collapse of the state.⁹⁰⁸ In contrast, David Hume considered the partition of power among several members of government to be a necessary condition for freedom.⁹⁰⁹ Hume considered the people unfit for government, but praised the dispersion of popular currents throughout small bodies, more susceptible of reason and order and capable of pursuing the public interest constantly and methodically.⁹¹⁰ Since medieval times group agents traditionally protect collective interests in Europe, operating as a mediator between the state and individuals.⁹¹¹

Collective actors are exactly intermediate bodies for the promotion of collective rights within society or the 'middle men' in more colloquial terms.⁹¹² On one hand, these corporate agents fragment the powers of the state, by independently protecting group interests. On the other hand, the internal organization of the collective actors may alienate the participation of individuals and minority sub-classes of group members, a challenge for the legal architecture of collective action.⁹¹³

⁹⁰⁸ Hobbes (n. 803) 111-5; Quentin Skinner, Hobbes on Representation, *European Journal of Philosophy*, vol. 13 (2005), 169-79.

⁹⁰⁹ Hume (n. 859) 40-1.

⁹¹⁰ Hume (n. 859) 36.

⁹¹¹ Gierke (n. 844) 37-61.

⁹¹² On the idea of a 'middle-man' as a way of positioning institutions responsible for regulation of B2C relationships, see Naomi Creutzfeldt, What people expect from Ombudsmen in the UK: a report on the findings of the project on 'Trusting the middle-man: impact and legitimacy of ombudsmen in Europe', Policy brief (CSLS 2015) 3-7.

⁹¹³ Resnik, Curtis, and Hensler (n. 60) 376-81.

5.3 – Collective actors in action

This section will show how different organisations established themselves as collective actors for consumer protection. Organisations developed their infrastructures to perform legal operations and to attend constituencies of consumers. Different organisations compete for institutional space, cooperate for specific joint-actions, and exercise deference to each other according to the case and their particular strategies.

5.3.1 – Institutional operations

The dynamics of institutional operation are very important for comparative studies of law in society. They are part and parcel of the fabric of a legal system, because these institutional operations are formative of its systemic structure.⁹¹⁴ And yet these interactions are not always identified because of their constitutive character.⁹¹⁵ Legal actors learn about these operations by being thrown into the legal world and having to use the tools available to them for advocating particular interests. These operations are internalised and actors play by these rules of the game taking them for granted⁹¹⁶. As many of these operations are established by performances, they are not expressed in verbal

⁹¹⁴ Friedman (n. 533) 14-6.

⁹¹⁵ Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (installment II of II)' *The American Journal of Comparative Law* vol. 39 (1991) 344.

⁹¹⁶ One phenomenological conceptualisation of this idea is found on Bourdieu's concept of 'doxa'. See Pierre Bordieu, 'The Force of Law: Towards a Sociology of the Juridical Field' *Hastings Law Journal*, vol. 38 (1986) 812 & 845-850.

terms within the legal acts themselves.⁹¹⁷ These unspoken institutional operations are also important for understanding the normative architecture.⁹¹⁸

Comparing and contrasting the formative institutional operations of different legal systems may elucidate these unnoticed features.⁹¹⁹ For instance, the understanding that some procedural systems are adversarial is gained through observation and comparison with other models that are considered to be inquisitorial. A careful examination of any procedural justice will reveal dynamics of competition, cooperation, and deference. For instance, different parties will compete for a successful result as adversaries in most cases of the so-called inquisitorial justice. Likewise, judicial authorities may cooperate with different parties in adversarial systems and parties may also settle their cases in a cooperative way. The fact that parties are adversaries in inquisitorial models and that opponents may reach agreements in adversarial systems does not eliminate the validity of these theoretical concepts. Analytical concepts are valid because of their explanatory force and not because of their full correspondence with reality.⁹²⁰

5.3.2 – Collective actors and their Infrastructures

⁹¹⁷ Rodolfo Sacco, *Mute Law*, *The American Journal of Comparative Law*, vol. 43 (1995) 455-467.

⁹¹⁸ Galligan (n. 161) Ch 15.

⁹¹⁹ Sacco (n. 915) 344.

⁹²⁰ Denis Galligan, 'Concepts the currency of social understanding of law: a review essay of the later work of William Twining', *Oxford Journal of Legal Studies*, vol. 35 (2015) 390-2.

Collective actors are an important part of any system of collective action. Because they represent the interests of a group of consumers, their role is pivotal in effective consumer protection. Collective actors function as intermediate bodies. They are responsible for collecting multiple consumer demands and for translating them into collective claims. A collective claim may be sustained in decision-making arenas and therefore may advance the protection of consumer interests. Particularly in the case of Brazil, these arenas comprise not only courts and regulators, but also pre-trial negotiation rooms and the public opinion tribunal.⁹²¹ Cases are also litigated through the media.⁹²² Some collective claims are protected by means of a comprehensive collective settlement that is overseen by the public prosecutors and approved by judicial authorities. In any event, collective actors are responsible for managing the collection of aggregated consumer interests and should exercise their duties as their adequate representatives⁹²³.

In the context of the Latin American civil public action, various enforcement agents pursue their collective suits based on the evidence gathered through their infrastructures. Therefore, the institutional body of collective actors is constituted to facilitate the interaction with individual consumers and to aggregate their interests as a preparation for a collective demand. Each collective actor develops a particular strategy and invests their resources accordingly. Public prosecutors, public defenders, state assembly attorneys, and

⁹²¹ Gómez (n. 5) 66-7.

⁹²² For a study of trial by media by the Australian competition and consumer authority, including deterrent effect and selective publicity, see Yeung, Karen, Does the Australian competition and consumer commission engage in "Trial by Media"?, *Law and Policy*, vol. 27 (2005) 567-74.

⁹²³ FRCP, article 23.

private associations have established particular infrastructures as focal points with links to networks of consumers that bring individual claims to them. These individual demands are collected and collectivised as a means of advancing effective consumer protection.

The following sections will show how these different collective actors developed their infrastructures, positioning themselves as protectors of constituencies of consumers.

5.3.2.1 – The Attorney General's Office (AGO)

Public prosecutors are members of the AGO and traditionally most of the prosecutorial work was criminal until the 1980's.⁹²⁴ A series of legal and constitutional reforms changed the profile of the AGO, establishing the organisation as a prominent collective actor for consumer protection.⁹²⁵ Particularly, the Constitution of the Federative Republic of Brazil (CRFB) altered the constitutional status of the AGO, considering prosecutors to be defenders of society and no longer public attorneys with a mandate to protect state

⁹²⁴ However, influenced by French law and its parquet, prosecutors also played protective roles in a selected group of private law cases (for instance, family law, children's cases, and land expropriation). Frances Deak and Max Rheinstein, *The Machinery of Law Administration in France and Germany*, *University of Pennsylvania Law Review and American Law Register*, vol. 84 (1936) 846-876.

⁹²⁵ The CPAA granted public prosecutors independent standing for filing collective actions for consumer protection. The CRFB confirmed the prosecutorial mandate for collective actions and protection of societal interests. The CDC not only brought a long repertoire of detailed consumer rights, but also reaffirmed the independent standing of public prosecutors in collective consumer suits.

interests.⁹²⁶ These legislative reforms were accompanied by political transformations, especially the increase of prosecutorial independence.⁹²⁷

Paradoxically, the independence of members is higher than institutional independence in the Brazilian case.⁹²⁸ Prosecutors do not have to follow instructions or owe obedience to the Attorney General⁹²⁹ or to the government.⁹³⁰ Except in extreme circumstances, prosecutors cannot be removed from office,⁹³¹ transferred against their will,⁹³² or be substituted in a specific case.⁹³³ On one hand, this strong prosecutorial independence may lead to institutional vulnerability due to failures of coordination and the existence of

⁹²⁶ Sadek and Cavalcanti (n. 880) 4-5.

⁹²⁷ Sadek and Cavalcanti (n. 880) 5; Ernani Carvalho and Natalia Maria Leitão de Melo, Brazilian public prosecution office and independence, APSA 2012 Annual Meeting Paper (2012) 2-3; Flavianne Fernanda Bitencourt Nóbrega, The new institutional design of the procuracy in Brazil: multiplicity of veto players and institutional vulnerability, paper presented at the ALACDE (2007) 8-10; Hugo Nigro Mazzilli, *Regime jurídico do ministério público* (5th edn Saraiva 2002) 189-91. Particularly in Rio de Janeiro during the 1990's, the consumer protection public prosecutors were working under delegated authority from the Attorney General and were not independent. In this initial period, prosecutors had close personal contact with consumers because of the prosecutorial strategy of mediating individual consumer complaints with corporations. These multiple individual interactions with consumers generated evidence of repetitive cases. However, the public prosecutors brought just 24 collective suits to courts in the 1990s, because of their lack of independence, expertise and infrastructure. During this period, their major focus was on the individual mediation of multiple individual consumer complaints and the AGO was operating primarily as a consumer ADR bureau instead of as a collective actor. In 2001, the Attorney General decided to restructure the consumer protection office. First, four offices of tenured independent public prosecutors were established in place of a team working as delegates of the Attorney General. Additionally, the newly appointed prosecutors changed their strategy and focused primarily on collective suits. Dozens of collective actions were filed each year.

⁹²⁸ Carvalho and Melo (n. 927) 24-5.

⁹²⁹ Carvalho and Melo (n. 927) 21-2.

⁹³⁰ Carvalho and Melo (n. 927) 15.

⁹³¹ Carvalho and Melo (n. 927) 22.

⁹³² Carvalho and Melo (n. 927) 23.

⁹³³ Carvalho and Melo (n. 927) 24.

multiple veto players within the organisational structure.⁹³⁴ The statement of a public prosecutor provides an important piece of evidence:

Functional independence is a mythical problem inside the AGO. We fought for it in the past, when our institution was entangled with the executive power and resisted the influence of government with reference to functional independence. But this principle was turned into a dogma and I question this idea, because functional independence should be relativised (...) Imagine the hypothesis of a collective action in which the judicial verdict is dismissive. A prosecutor can't simply acknowledge the decision without filing an appeal. A procedure can't simply be close because of one prosecutor who takes a decision against the majority. After all, there was an enormous investment of public funds and taxpayers' money with payment of salaries and budget costs with the maintenance of the AGO. A prosecutor can't have unlimited functional independence. In practice, however, that's exactly what happens, since prosecutors act fundamentally through the logic of each one on her own.⁹³⁵

This is the political dimension of the problem of the lone rider.⁹³⁶ A collective procedure is structured as a sequence of moves taken by individual players.⁹³⁷ Once prosecutors do not act integrated as a litigation team with a cohesive action towards a unified purpose, they become multiple veto players in the public cause initiated by the original prosecutor.⁹³⁸ On the other hand, the suggestion that the AGO builds an institutional identity based on top-down hierarchical mechanisms could lead to political control of the AGO.⁹³⁹ Because of the capacity for mobilisation and transformation of the organisational structure,

⁹³⁴ Nóbrega (927) 15-6.

⁹³⁵ Interview Z (SP 16.09.14).

⁹³⁶ See section 6.2.1.

⁹³⁷ George Tsebelis, *Veto players: how political institutions work* (Russel Sage 2002) 33-7.

⁹³⁸ Nóbrega (n. 927) 16.

⁹³⁹ Nóbrega (n. 927) 17-8.

by reconciling prosecutorial independence with institutional unity, prosecutors are in a position to build cohesion and to generate interdependence from within.⁹⁴⁰

The AGOCPD became a prominent collective actor as result of the leadership of public entrepreneurs. Led by a Don Quixote, the team of prosecutors gained social recognition in the 1990s by providing personalised attention to every individual consumer and establishing a regime of individual mediation with corporations before filing their suits.⁹⁴¹

He was very communicative and the theme is highly attractive, especially because we are all consumers, so the team of the AGOCPD started to call the attention of the press, having its work publicised in newspapers and in television. This visibility in the media attracted a clientele to the AGO and we started to get a growing number of injured consumers.⁹⁴²

In the 2000s, their work was followed by a new group of independent prosecutors, who continue to use the media to publicise their work, but replaced the personalised attention to individual consumers with a focus on collective litigation.⁹⁴³ Because of the personal initiative of public entrepreneurs and the official establishment of a public relations office within the AGO, proximity with the press increased the prestige and visibility of the AGOCPD.⁹⁴⁴ Prosecutors

⁹⁴⁰ Salo Coslovsky and Amit Nigam, Building prosecutorial autonomy from within: the transformation of the Ministério Público in Brazil, NYU Wagner Research Paper (2015) 34-6.

⁹⁴¹ Interview T (RJ 10.09.14).

⁹⁴² Interview T (RJ 10.09.14).

⁹⁴³ Interview L (RJ 14.08.14) and T (RJ 10.09.14).

⁹⁴⁴ Interview L (RJ 14.08.14). See also Byron Stier, The promise and peril of media and culture: the Toyota unintended acceleration litigation and the Gulf Coast Claims Facility in the United States, in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds) *Class actions in*

turned to the media to frame collective claims, blame corporations for collective wrongdoings, and claim consumer rights in courts.⁹⁴⁵ Escaping from the iron cage of their office⁹⁴⁶ and exercising charismatic leadership,⁹⁴⁷ prosecutors became the byword in rights protection.⁹⁴⁸ As their claims were widely advertised, the publicity attracted a constituency of consumers who would send more written complaints and petitions to the AGOCPD.⁹⁴⁹

In 2005, a new Attorney General decided to establish the office as a general ombudsman, creating a hotline and a website for the purposes of collecting juridical complaints from the population. The Attorney General positioned its office as the general ombudsman even in the absence of specific legislation, which would only legally consolidate this position in 2013 with the enactment of the Ombudsman Act (OA). This strategy was successful and consumer protection prosecutors now receive dozens of complaints daily, which are distributed to the appropriate individual offices.⁹⁵⁰

context: how culture, economics, and politics shape collective litigation (Edward Elgar 2016) 113-4; on the role of PR in the justice system, see Leslie Moran, Managing the "critical interdependencies" of the Media and Judiciary in the United Kingdom, in Michael Asimow, Kathryn Brown, and David Papke (eds) *Law and popular culture: international perspectives* (Cambridge Scholars Publishing 2014) 207-10.

⁹⁴⁵ Felstiner, Abel, and Sarat (n. 628) 631.

⁹⁴⁶ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Vol. 1, California 1978) 223-6.

⁹⁴⁷ Weber (n. 946) 241-54.

⁹⁴⁸ Coslovsky (n. 814) 84-5; see also Salo Coslovski, Compliance and competitiveness: how prosecutors enforce labor and environmental laws and promote economic development in Brazil, Doctoral Thesis deposited at the MIT (2009) Ch 4.

⁹⁴⁹ Interview L (RJ 14.08.14).

⁹⁵⁰ Interview L (RJ 14.08.14). Occasionally, hundreds of similar messages are received simultaneously, such as when fans complained of football ticket prices, customers reported long delays in the delivery of online purchases, and university students considered a raise of tuition during the academic year to be abusive. However, only one or a small number of individuals

In 2012, the AGO established a fifth office of consumer protection, improving the organisational structure.⁹⁵¹ Additionally, the AGO invested resources in establishing a team of forensic experts to provide technical support for public prosecutors in highly complex cases.⁹⁵² However, this scientific support is insufficient and prosecutors have to establish cooperative relationships with partners to produce their evidence.⁹⁵³ Nonetheless, the accumulation of social capital gained through widely publicised important juridical victories was accompanied by the mobilisation of resources and infrastructure improvement. The AGO established a successful model that attracted institutional competitors, which is discussed in the following subsections.

5.3.2.2 – The Office of Public Defenders (OPD)

The OPD is another collective actor.⁹⁵⁴ The CRFB established the OPD as a mandatory institution in the justice system of the union and every state.⁹⁵⁵ In

report most complaints. In this case, prosecutors have to evaluate whether the case involves a collective wrongdoing or is just an individual claim.

⁹⁵¹ Interview O (RJ 26.08.14). Now each individual prosecutor has his own secretaries, legal clerks, and legal interns. This professional structure of the civil service was insipient in the 1990s, when they had to borrow civil servants from other organisations. See Interview T (RJ 10.09.14).

⁹⁵² Interview O (RJ 26.08.14).

⁹⁵³ Coslovsky (n. 814) 81-2.

⁹⁵⁴ SFPDA, article 1.

⁹⁵⁵ The institutional history of the OPD is more recent than the AGO. See Lígia Mori Madeira, Institutionalisation, reform and independence of the public defender's office in Brazil, *Brazilian political science review*, vol. 8 (2014) 51. Originally, other institutional actors played the role of public defender. In Rio de Janeiro working as a public defender was the initial stage in the career

theory, the OPD is an autonomous organisation and public defenders are independent civil servants.⁹⁵⁶ However, in practice, autonomy and independence depend on the degree of interference in decisions, the power to organise job posts, and the financial capacity to define budget and salary.⁹⁵⁷ Even if there is a trend of increasing independence, there are still clear regional contrasts.⁹⁵⁸ Moreover, understaffed OPD with limited number of public defenders cannot keep up with the demand in many states.⁹⁵⁹ Due to all these practical limitations, public defenders have to fight for their institutional space, professional prestige, and infrastructure investments. Importantly, public defenders intend to have a professional status equivalent to judges and prosecutors, particularly regarding salary equalisation.⁹⁶⁰ Likewise, their organisational structure is not always efficient.⁹⁶¹

The OPDRJ is an exceptional case. Because it was the first OPD to be institutionalised, the number of public defenders and their earnings match those of the prosecutors.⁹⁶² Their institutional growth stemmed from strategic moves that increased their political relevance, followed by their professional recognition. Particularly in the case of consumer protection, the OPDRJ pioneered the filing of collective actions, assuming that the OPD had autonomous

of a public prosecutor. In São Paulo, state attorneys were assigned to the judicial assistance of poor criminal defendants. See Coslovsky (n. 874) 1110-1.

⁹⁵⁶ CRFB, article 134, §§ 2 and 4.

⁹⁵⁷ Madeira (n. 955) 61.

⁹⁵⁸ Madeira (n. 955) 61-6.

⁹⁵⁹ Coslovsky (n. 874) 1111.

⁹⁶⁰ Madeira (n. 955) 58.

⁹⁶¹ Coslovsky (n. 874) 1111.

⁹⁶² Madeira (n. 955) 51.

standing for collective action.⁹⁶³ Their original efforts were repeatedly rejected by judges, who mentioned the absence of the OPD in the list of potential plaintiffs for civil public action in the CPAA.⁹⁶⁴

Their initial failure was followed by success in isolated cases in which the OPD filed collective suits on behalf of civil associations that lacked the economic resources for funding their civil public action suits.⁹⁶⁵ However, their exceptional presence as a plaintiff in collective suits created momentum for more demands for recognition of the OPD as a potential independent plaintiff for group litigation.⁹⁶⁶ Gradually courts accepted this possibility⁹⁶⁷ and the OPD lobbied in the Brazilian Congress for a legal reform that expressly admitted the OPD as plaintiff for collective actions. This eventually happened with the SFPDA in 2007.⁹⁶⁸

The NUDECON is composed of a team of public defenders, who work as delegates of the Defender General. Their leader plays a political role inside the OPD, constantly promoting the institutional image of consumer protection public defenders, representing the NUDECON in various interviews, conferences, and policy meetings.⁹⁶⁹ Additionally, other public defenders work at their office in

⁹⁶³ Interview D' (RJ 22.09.14).

⁹⁶⁴ Interview D' (RJ 22.09.14).

⁹⁶⁵ Interview D' (RJ 22.09.14).

⁹⁶⁶ Interview D' (RJ 22.09.14).

⁹⁶⁷ *OPD v. Ford Factoring, GM Factoring, and others* (REsp. nº 555.111-RJ, rapporteur Castro Filho, 3rd Chamber, STJ, 05.09.2006).

⁹⁶⁸ Immediately after the enactment, the NAPP filed a constitutionality control action in the Supreme Court, claiming that this legal recognition of the standing of the OPD for group litigation was unconstitutional, a case not yet decided by the Brazilian Justices.

⁹⁶⁹ Interview V (RJ 11.09.14).

downtown Rio de Janeiro, attending to approximately 80 individual consumers a day, from Monday to Thursday. From these 320 individual cases the NUDECON may select the recurring individual cases that are considered to have a collective dimension.⁹⁷⁰ Two public defenders are specifically designated for collective suits and this position is strategic for the consolidation of their standing in collective actions.⁹⁷¹ Following the example of public prosecutors, these public defenders also publicise their cases in the media, being frequently interviewed. The OPD has a clear strategy to influence lawmakers and courts.⁹⁷²

5.3.2.3 – *The Committee for Defence of Consumers (CODECON)*

The CODECON is an additional collective actor. Institutionally, the CODECON is an organ of the state legislative assembly with the mission to provide support for lawmakers regarding consumer affairs. However, a state representative decided to increase the organ's institutional space, by providing legal assistance for individual consumers.⁹⁷³ Initially, CODECON developed its own infrastructure in downtown Rio de Janeiro, with a hotline and a space where lawyers with expertise in consumer protection assisted the public with their consumer demands. After receiving consumers' complaints at their office,

⁹⁷⁰ Fernando Fontainha and others, 'The Over-Indebtedness in Action: An Ethnographic Research at NUDECON/Brazil' (2015) 7 *International Journal of Sociology and Anthropology*, 21-37.

⁹⁷¹ Interview V (RJ 11.09.14).

⁹⁷² Public defenders even edited and distributed a leaflet with a collection of dozens of cases in which the OPD successfully filed collective actions in recent years, clearly an act of institutional propaganda.

⁹⁷³ Interview S (RJ 09.09.14).

CODECON contacted corporations via registered mail, functioning as mediator between the companies and their clients.⁹⁷⁴ In the absence of a settlement, CODECON produced a petition on behalf of the consumer, who was then expected to file her individual suit at a small claims court and defend her own rights without legal assistance.

In comparison with the AGO and the OPD, this infrastructure is less advantageous to individual consumers who would be better represented by a public defender to solve their individual problems and by a public prosecutor to solve any collective wrongdoing.⁹⁷⁵ Consequently, CODECON changed its strategy and established a new infrastructure for collecting complaints and translating them into collective actions. A team, led by a lawyer, makes a daily drive to the suburbs of Rio de Janeiro in an adapted bus called the 'citizenship bus'.⁹⁷⁶ The bus stops regularly, near busy commercial streets and the CODECON team attends to dozens of consumers with questions, problems, and complaints against corporations.⁹⁷⁷ Their cases are registered, evidence is collected, and the lawyer prepares a dossier for each consumer for future mediation with the company.⁹⁷⁸ Their strategy of circulating around various neighbourhoods on the

⁹⁷⁴ Interview S (RJ 09.09.14).

⁹⁷⁵ Individual consumers would mainly go to the NUDECON to be attended by a public defender, because the OPD would advocate their interests not only in the pre-trial procedure, but also at the small claims courts. The AGO is still perceived as the protagonist of collective action for consumer protection, even if no longer retains the dominance of a monopoly.

⁹⁷⁶ Interview S (RJ 09.09.14).

⁹⁷⁷ Interview S (RJ 09.09.14).

⁹⁷⁸ Interview S (RJ 09.09.14). Exceptionally, the lawyer may leave the bus to talk directly to a manager of a local store, for example, and attempt to solve a conflict informally without the production of a written dossier.

outskirts of Rio de Janeiro succeeded and the ‘citizenship bus’ may attend 100 individuals on a busy day.⁹⁷⁹

Subsequently, CODECON also decided to establish itself as a plaintiff for civil public actions. The CPAA granted standing for collective actions to the union, the state, and municipalities and their organs, but courts were initially reluctant to recognise standing for this organ because it lacks autonomous juridical personality.⁹⁸⁰ The head of CODECON's legal team appealed against a few judicial decisions until the STJ established a precedent that recognises standing also for the CODECON as an organ of the state⁹⁸¹. However, the formal recognition of procedural standing did not improve the political standing of CODECON and this organ needs to fight for institutional space and for credibility.⁹⁸² The organ was still perceived by different collective actors as political instrument to give visibility and votes for the state representative responsible for its direction:

I heard several times the comment that our action was political, because the plaintiff was CODECON, an organ of the State Assembly of Rio de Janeiro (SARJ). Our strategy consisted of preparing collective actions of high quality and demonstrating that we were not dealing with political matters, but with technical matters for

⁹⁷⁹ Interview S (RJ 09.09.14).

⁹⁸⁰ See, for instance, the two initial cases of denial of standing by the commercial courts reversed at appeal judgment: *CODECON v. Aerobarcos* (2006.001.30582, 4th Civil Chamber, Rapporteur Sidney Hartung, 20.12.2006); *CODECON v. NET Rio* (2006.001.39474, 6th Civil Chamber, Rapporteur Luis Felipe Salomão, 07.03.2007). Contemporarily, standing is clearly authorised as showed by these decisions: *CODECON v. Santander and others* (0186728-64.2011.8.19.0001, 16th Civil Chamber, Rapporteur Carlos Jose Martins Gomes, 21.07.2015); *CODECON v. CEDAE* (0026599-54.2012.8.19.0000, 14th Civil Chamber, Rapporteur Ronaldo Assed Machado, 27.03.2013); *CODECON v. Banco do Brasil and others* (0082503-61.2009.8.19.0001, 17th Civil Chamber, Rapporteur Elton Leite, 11.09.2013); *CODECON v. CEDAE* (0019084-65.2012.8.19.0000, 8th Civil Chamber, Rapporteur Monica Costa di Piero, 20.04.2012).

⁹⁸¹ *CODECON v. Federation of Companies of Transportation of Rio de Janeiro* (REsp Nº 1.075.392-RJ, rapporteur Herman Benjamin, 2nd Chamber, STJ, 04.05.2011).

⁹⁸² Interview S (RJ 09.09.14).

protection of consumer rights. There was a change of perception when people realised that the actions were well prepared and the issues were relevant. And of course there was some vanity, but more in a sense of institutional pride than of personal vanity. We wanted CODECON to change its status and to discuss the same issues that the AGO and the OPD discussed.⁹⁸³

The attorneys identify recurring cases from the dozen of complaints collected daily through the 'citizenship bus', and in their weekly meetings they discuss the potential civil public action suits they may bring to the courts.⁹⁸⁴

5.3.2.4 – Consumer associations

In addition to the AGO, the OPD, and CODECON, consumer civil associations are also important collective actors. The CPAA granted standing for private actors, such as political parties, unions, and civil associations.⁹⁸⁵ In the case of consumer protection, civil associations are very active, but unions are more inclined to be collective actors for the protection of labour rights, while political parties focus primarily on political questions. Contemporarily, IDEC, PROTEST, and the National Association for Consumer and Worker Assistance (ANACONT) are three consumer associations more involved with the

⁹⁸³ Interview S (RJ 09.09.14).

⁹⁸⁴ Interview S (RJ 09.09.14). Their decision to file a class action is not always motivated by the quantity of repetitive claims. Sometimes the context of a consumer rights violation indicates that a problem affects multiple consumers, even if only one single individual has made a formal complaint. For instance, the existence of an abusive clause in an adhesion contract is sufficient for filing a collective suit. Likewise, an individual case may provide evidence of the illegal design of a service, lack of information regarding a product, or asymmetry of powers in the relationship between the corporation and a consumer. All these problems are potentially collective because they are arguably repeated in every consumer experience. Particularly in the case of CODECON, another source of civil public action is a request made by the state representative responsible for the direction of this organ.

⁹⁸⁵ CPAA, article 5, V.

institutional operations of the collective action system in Rio de Janeiro and São Paulo.⁹⁸⁶

5.3.2.4.1 – Brazilian Institute for Defence of Consumers (*IDEC*)

First, the IDEC is the most traditional consumer association in Brazil.⁹⁸⁷ Funded exclusively by their associated members, IDEC refuses any support from the government or corporations.⁹⁸⁸ This civil association developed consumer trust through its many years as a market watchdog. Established in 1987, IDEC soon became a prominent collective actor by developing a legal crusade against the BCB and private banks for a freezing of financial assets determined by the government through the so-called 'Collor plan'.⁹⁸⁹ Acting as public

⁹⁸⁶ These three NGOs were mentioned in the interviews by public prosecutors as the most active ones. Nonetheless, there is currently a constellation of dozens of consumer protection associations in Brazil, which are relevant stakeholders like, for instance, the Association for Defence of the Health of Smokers (ADHS). See Gómez (n. 05) 51-54.

⁹⁸⁷ Gómez (n. 05) 65. Gómez refers cautiously to IDEC as 'perhaps the largest and best organised consumer association in Brazil'. However, PROTEST is larger than IDEC in terms of quantity of associated members. See 5.3.2.4.2.

⁹⁸⁸ Interview R (RJ 02.09.14). IDEC is very strict in its policy and positions itself as an anti-marketing institution. In contrast to other private associations, the IDEC rejects commercial promotions, branding, and product selling through the association. Members consider their credibility to be the most important asset of IDEC.

⁹⁸⁹ The 'Collor Plan' was a stabilisation plan against inflation that froze the savings and other financial assets of Brazilian financial consumers. It was named after the President Fernando Collor de Mello, who was the first democratically elected president under the new CRFB. This highly heterodox economic plan reduced the net value of assets of millions of consumers in the country in 1990, not only for retaining the money as mandatory savings for 18 months, but also for not readjusting properly the amount according to the interest rates in the market. Financial institutions benefitted highly from this economic plan, because the government authorised the banks to retain these savings without the duty to update interest rates. See Marcel Mérette, Post-mortem of a stabilization plan: the Collor plan in Brazil, *Journal of policy modelling*, vol. 22 (2000) 417-52; John Crabtree, The Collor plan: shooting the tiger?, *Bulletin of Latin American Research*, vol. 10 (1991) 119-32; Ben Ross Schneider, Brazil under Collor: anatomy of a crisis, *World policy journal*, vol. 8 (1991) 321-47; Mario Henrique Simonsen, Brazil - conditions for economic recovery, Working paper series of economic essays from EPGE n. 190 (FGV 1991) 12-4; Luiz Carlos Bresser Pereira and Yoshiaki Nakano, Hyperinflation and stabilisation in Brazil: the

entrepreneurs, the founding members of IDEC gave visibility to their actions and mobilised thousands of consumers as new associated members with the promise to protect their interests.⁹⁹⁰ Dozens of collective suits against banks were filed by IDEC from 1993 onwards and their active role in these cases improved their social capital, professional recognition, and the number of constituents.⁹⁹¹

However, many constituents were affiliated with IDEC because of the prospect of receiving damages for their losses through the Collor Plan. With closure of these collective actions and payment of damages, thousands associated members cancelled their subscription and left IDEC, reducing membership to approximately 10,000 individuals.⁹⁹² As IDEC does not receive funds from government or corporations, capacity to fund activities became limited.⁹⁹³ Particularly regarding collective actions, IDEC takes strategic decisions regarding consumer claims with potential to become suits - based on previous experience with cases of high litigation costs and limited outcome for social recognition, public visibility, and economic return. Therefore, directors discuss the potential of each collective case, reflecting on how they will influence the growth and sustainability of their consumers' network.⁹⁹⁴

first Collor plan, in Paul Davidson and Jan Kregel (eds), *Economic problems of the 1990's: Europe, the developing countries, and the United States* (Edward Elgar 1991) 49-50 & 64-5.

⁹⁹⁰ Particularly important was the leadership of Marilena Lazzarini, who supported the establishment of the PROCON between 1983 and 1986 as an executive director. In 1987, she founded the IDEC. In 1998, she participated in the creation of the National Forum of Civil Associations for Consumer Protection, a joint-initiative of 24 NGOs throughout 13 Brazilian states. She was the president of Consumers International between 2004 and 2007. See www.ashoka.org/fellow/marilena-igreja-lazzarini (last checked in 15.01.17).

⁹⁹¹ Interview R (RJ 02.09.14).

⁹⁹² Interview R (RJ 02.09.14).

⁹⁹³ Interview R (RJ 02.09.14).

⁹⁹⁴ Interview R (RJ 02.09.14).

5.3.2.4.2 - PROTEST (*PROTESTE* - Association for Defence of Consumers)

One of IDEC's competitors is another civil association of consumers named PROTEST, a play on words that simultaneously invites individuals to *protest* against abusive practices and suggests their *pro-test* attitude, which favours the rigorous testing of market products. PROTEST emphasises strong international connections as an important competitive advantage that differentiates this civil association from other institutions.⁹⁹⁵ This association is a member of an international network of consumer protection associations⁹⁹⁶ and it was founded after the refusal of IDEC to become an affiliated member of such a network.⁹⁹⁷ The fierce competition between these two consumer associations is explained not only by IDEC's rejection of a partnership, but also by the fact that some important collaborators within PROTEST were recruited from IDEC.⁹⁹⁸

In contrast to IDEC, PROTEST has a very strong marketing strategy, regularly distributing magazines and a welcome gift for new affiliated members as part of a strategy to increase membership size.⁹⁹⁹ On the other hand, even if PROTEST is legally recognised as a potential plaintiff, it rarely takes the initiative

⁹⁹⁵ Interview X (RJ 12.09.14).

⁹⁹⁶ Interview X (RJ 12.09.14).

⁹⁹⁷ Interviews X (RJ 12.09.14) and B' (SP 19.09.14).

⁹⁹⁸ Interview R (RJ 02.09.14).

⁹⁹⁹ Interview X (RJ 12.09.14). They also partnered with a few selected companies, offering a line of products - even including a credit card with PROTEST logo.

of filing its own collective suits.¹⁰⁰⁰ PROTEST normally communicates collective wrongdoings to the AGO, expecting public regulatory enforcement. This strategy leads to potential conflicts with prosecutors, who sometimes closed the case without taking any action.¹⁰⁰¹ On these occasions, PROTEST filed internal administrative appeals to the AGOSC, a board of senior public prosecutors.¹⁰⁰² Instead of initiating their own collective action as a plaintiff, PROTEST outsources some of these demands to the AGO.

Their institutional strategy is more focused on communication and advocacy. In terms of public entrepreneurship, PROTEST has recourse more to the media than to the judiciary. Their head became a columnist, writing regularly in one of Brazil's most popular newspapers.¹⁰⁰³ Likewise, the results of their tests are widely publicised in the media and shared with the general population. Additionally, PROTEST developed expertise as a watchdog of the sectors of telecommunications and energy and the lawyer responsible for monitoring these regulated industries is very active in communicating directly with consumers through her blog.¹⁰⁰⁴ Their network of consumers is very large with approximately 280.000 member, ¹⁰⁰⁵ revealing that marketing and

¹⁰⁰⁰ CPAA, article 5, V.

¹⁰⁰¹ Interview Z (SP 16.09.14).

¹⁰⁰² Public prosecutors are sometimes aggrieved by these appeals, especially when the cases are reopened and redistributed to other public prosecutors. On the other hand, PROTEST has also established sporadic partnerships with the AGO in cases of a specific product being investigated by a public prosecutor, and PROTEST considers the case to be relevant and has funded the tests to provide evidence for the prosecutorial dossier.

¹⁰⁰³ Maria Inês Dolci is a columnist and blogger for Folha de São Paulo, one of the most popular Brazilian newspapers. See mariainesdolci.blogfolha.uol.com.br (checked on 15.01.17).

¹⁰⁰⁴ Interview B' (SP 19.09.14).

¹⁰⁰⁵ Interview B' (SP 19.09.14).

communication strategies may increase the size of membership of a civil association.

5.3.2.4.3 – National Association for Consumer and Worker Assistance (ANACONT)

Another consumer association is ANACONT, referred as an exemplar of controversial strategies. ANACONT filed collective action suits to attract consumers and charge them individually to represent their interests in small claims courts.¹⁰⁰⁶ Because individuals may represent themselves or even be freely assisted by public defenders, some consumers have made formal complaints against ANACONT for operating more as a private practice law firm than a collective actor.¹⁰⁰⁷

In a rather unique case, ANACONT encouraged individuals to engage in a particular transaction just for the sole purpose of suing the corporation later. According to their advertisement in the suburbs of Rio de Janeiro, signing up to a particular rechargeable bank card would entitle a consumer to R\$ 1,000.00 in damages.¹⁰⁰⁸ This example of an advertisement for ‘Sign on the dotted line and get R\$ 1,000.00’ not only demonstrates the importance of communication channels for collective actors, but also the inter-relationship between messages, strategies and infrastructures. After all, ANACONT did not file a collective action in this particular case, requesting an interim injunction for cessation of these contractual practices and financial services. Instead, this association encouraged

¹⁰⁰⁶ Interview L (RJ 14.08.14).

¹⁰⁰⁷ Interview L (RJ 14.08.14).

¹⁰⁰⁸ Interview L (RJ 14.08.14).

individuals to enter into a contractual relationship with the bank, subsequently suing the bank for abusive conduct.

Even if this strategy can be considered unethical, it demonstrates the importance of economic incentives for corporation. Because of the financial burdens generated by high transaction costs and payment of damages in small claims courts, the bank had the initiative to approach the AGO and to propose a global settlement relating to the information to consumers and compensatory damages - excluding payment of moral damages and of attorney fees from the negotiation.¹⁰⁰⁹

5.3.2.5 – Infrastructure as a competitive advantage

Developing infrastructure is necessary for establishing an organisation as a collective actor within the consumer protection network. The AGO developed its role as ombudsman. The OPD positioned itself as provider of mass justice for the poor and vulnerable consumers. CODECON found an institutional niche in the poor suburbs, where they attended consumers at the 'citizenship bus'. Likewise, consumer associations developed infrastructures to attract and maintain constituencies of consumers.

This mobilisation of institutional resources in infrastructures may become a competitive advantage in their disputes for particular groups of consumers. Each collective actor developed an organisational structure to facilitate access to consumer demands, aggregation of multiple claims, and production of a collective action. Their dispute for social recognition and

¹⁰⁰⁹ Interview L (RJ 14.08.14).

professional prestige impacts also their capacity for resource mobilisation, including competitive and cooperative institutional dynamics. The following section theorises about institutional concentration, competition, cooperation, coalition, and deference.

5.4 – Institutional dynamics

Collective actors make institutional moves according to their dynamic interactions with each other. The AGO, OPD, CODECON, and consumer associations are active participants within the regulatory space and their actions are not isolated from other collective actors. Instead, these moves are often interactions and reactions to actions previously adopted by another actor, having future impacts on their relationships. They are not involved in one-shot actions, but are rather with repeated actions and constant interaction with other institutional actors.¹⁰¹⁰

Initially, the AGO had a *de facto* monopoly over consumer collective action and concentrated the absolute majority of cases.¹⁰¹¹ Subsequently, other collective actors competed for social capital and mobilised their resources as entrants in the collective action system. Additionally, these collective actors developed partnerships, coordinated their efforts, and established joint-actions. Another important dynamic within this network is the mutual respect or deference between different institutional actors. Deference entails a relationship of respect for the other authority's power, even if another institutional actor is

¹⁰¹⁰ Baird, Gertner, and Picker (n. 761) 178-86.

¹⁰¹¹ Sadek and Cavalcanti (n. 880) 3-5.

also entitled to authoritative action for also having power to decide the same matter¹⁰¹².

5.4.1 – Institutional concentration, monopoly, and agenda control

Institutional concentration means that one organisation assumes a dominant position, becoming responsible for performing the majority of actions - if not all of them. The degree of concentration may result from a particular institutional design, establishing strict pre-requisites for action and even previous approval. This is the case in the UK, for instance - where only one consumer association received governmental authorisation to be a collective actor and filed one single collective action.¹⁰¹³ Concentration may also originate from competitive advantages provided by the organisational structure. This was the case of Brazil, for instance. Initially, the AGO mobilised resources, developed its role of collective actor and processed the majority of people's complaints.¹⁰¹⁴

In the 1990s the AGO retained a *de facto* monopoly as a collective actor, being responsible for most collective actions in different legal fields.¹⁰¹⁵ Even if the CPAA granted standing as potential plaintiff to various actors, the AGO obtained a dominant position. Consequently, the AGO had strong control over the consumer protection agenda, by deciding on the causes to be promoted and

¹⁰¹² Roughan (n. 713) 48-59.

¹⁰¹³ Mulheron (n. 290) 439.

¹⁰¹⁴ Sadek and Cavalcanti (n. 880) 1-5.

¹⁰¹⁵ Paulo Cesar Pinheiro Carneiro, *Acesso à Justiça: Juizados Especiais e Ação Civil Pública: Uma Nova Sistematização da Teoria Geral do Processo* (Forense 1999) 192-6.

those not to be taken.¹⁰¹⁶ Particularly in Rio de Janeiro, the authority *de jure* of the Attorney General was strong, because prosecutors worked with delegated powers and there was no other strong institutional competitor.¹⁰¹⁷ Consequently, the AGO had the power of agenda setting, which resulted in a more homogeneous practice of consumer protection.¹⁰¹⁸

Agenda control is problematic for democracy, because a monopoly agenda setter may concentrate authority over political outcomes, especially eliminating certain issues of the public agenda¹⁰¹⁹. When all consumer demands are concentrated in one single institution, veto powers are not checked.¹⁰²⁰ Institutional concentration of powers may generate self-contained public authorities unresponsive to people's demands - the development of a dense internal normative structure of *administrative autonomy* may insulate institutions and authorities from the outside world.¹⁰²¹ In extreme cases, a monopoly on institutional control may even cause authoritarianism¹⁰²² and

¹⁰¹⁶ Interview D' (RJ 22.09.14): "there was a lot of competitiveness and, in some cases, the AGO interned in a collective action filed by the OPD just to request the dismissal for lack of standing".

¹⁰¹⁷ In her interview, a senior prosecutor suggested that the AGOCPD suffered no political influence from the Attorney General, but immediately admitted that perhaps the Head of Department just filtered the influence and did not share this information with the co-workers. See Interview T (RJ 10.09.14).

¹⁰¹⁸ Interviews L (RJ 14.08.14) and O (RJ 26.08.14).

¹⁰¹⁹ Giandomenico Majone, 'Agenda Setting', in Michael Moran, Martin Rein, and Robert Goodin (eds), *Oxford Handbook of Public Policy*, (OUP 2006) 230.

¹⁰²⁰ During the 1990s, if a public prosecutor rejected a consumer complaint, the immediate alternative for the individual was an internal appeal for the AGOSC. Another possibility would be to become a member of IDEC and request the consumer association to include the particular issue in its institutional agenda. In this early stage, institutional concentration permitted stronger agenda control by a monopolistic organisation, but there is no evidence of abuse or authoritarianism.

¹⁰²¹ Denis Galligan, *Authoritarianism in Government and Administration: The Promise of Administrative Justice*, (2001) *Current Legal Problems*, vol. 54 (2001) 89.

corruption.¹⁰²³ In many jurisdictions, the collective actor remains a monopolistic organisation. In Brazil, however, other collective actors entered the scene and there is no longer institutional concentration.

5.4.2 – Institutional competition, resource mobilisation, and democratic participation

In contrast to monopoly, institutional competition is characterised by open dispute between different actors, trying to maximise their presence and zone of influence within the regulatory space. Each different institutional actor positions itself in a differentiated mode, producing an infrastructure that creates a comparative advantage in relation to the others. A plurality of competing institutions develops multiple infrastructures that are concrete manifestations of different ideas, opinions, and attitudes on their objectives.¹⁰²⁴ Particularly in the case of consumer protection, these infrastructures result from continuous dialogues between different collective actors and their networks of consumers.¹⁰²⁵ Conceptually, this dialogical interaction means that collective actors conduct their organisational activities according to observations of their institutional competitors and their networks of consumers.¹⁰²⁶ Collective actors are constantly monitoring their competitors and managing their constituencies.

¹⁰²² Galligan (n. 1021) 89.

¹⁰²³ Carvalho and Melo (n. 927) 19-20.

¹⁰²⁴ Scott (n. 351) 332.

¹⁰²⁵ Black (n. 876) 138-45.

¹⁰²⁶ Roughan (n. 713) 43-4.

In a setting with a number of authorities operating as collective actors, fragmentation and decentralisation of power limits agenda control and maximizes opportunities for democratic participation.¹⁰²⁷ Actually, this aspect emerges as an additional feature of the civil public action model. Consumer complaints shape collective action because collective actors are responsive to their demands, even if the level of responsiveness varies between public entities and the private consumer associations.¹⁰²⁸ In contrast to US class actions, cost-benefit analyses are not the main rationale for filing a collective action.¹⁰²⁹ In contrast to the European collective redress, decision-making is not based on strict technocratic reasoning of market regulation.¹⁰³⁰ Collective actors are responsive to the engagement of consumers with their infrastructures, because of their mandate as consumer representatives.¹⁰³¹

The AGO no longer has agenda control, because a consumer can address a similar complaint to NUDECON, CODECON, and to consumer associations. Growing competition has brought a plurality of institutions, strategies, infrastructures, and perspectives. The experience of collective actions for consumer protection has become more heterogeneous. Nowadays, in a setting of competition between different collective actors, controls are not only internal,

¹⁰²⁷ Majone (n. 1019) 232.

¹⁰²⁸ Collin Scott, Enforcing consumer protection laws, in Geraint Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 539.

¹⁰²⁹ Hensler and others (n. 56) 71-72.

¹⁰³⁰ Hodges (n. 36) 157.

¹⁰³¹ I owe the insight that democratic participation could be another feature of the LA civil public action to a conversation with Denis Galligan.

but also inter-institutional. Different institutional actors are investigating identical cases simultaneously.

Collective actors recognise that their institutions do not set their own agendas, but rather that they respond to consumer demands made through their infrastructures.¹⁰³² Nonetheless, these collective actors recognise that they have to be responsive to consumer demands and that the source of the majority of their collective actions is their network of consumers captured through their particular infrastructures. Counter-intuitively, this limited agenda control resulting from a gradual decentralisation of authoritative powers may be positive. It means that the public agenda is determined according to demands made by the people, whose collective interests are protected through responsive institutions.¹⁰³³ The existence of a plurality of competing institutions unsettles the status quo¹⁰³⁴ and authority becomes relative, depending on the appropriate relationship between different institutional actors.¹⁰³⁵

Collective actors are constantly in competition. Interestingly, their primary objectives are similar, because AGO, OPD, CODECON, IDEC, PROTEST, and ANACONT have the same directives. Their institutional mission consists of protecting consumer rights through civil public action and other corrective instruments. However, their secondary objectives are different, because these collective actors are also disputing institutional space. A prodigious example

¹⁰³² Interviews L (RJ 14.08.14), P (RJ 27.08.14), S (RJ 09.09.14), V (RJ 11.09.14), X (RJ 12.09.14), and Z (SP 16.09.14). Some legal professionals shared their strategies to increase control over their activity and professional objectives and recognised this lack of agenda control with a degree of anxiety.

¹⁰³³ Majone (n. 1019) 232.

¹⁰³⁴ Roughan (n. 713) 5.

¹⁰³⁵ Roughan (n. 713) 10.

comes from the case of underground explosions and the attempt of CODECON to obtain an interim injunction before the AGO, using a procedural fast track to bypass the public prosecutors.¹⁰³⁶

Therefore, this limited agenda control of collective actors may result in higher responsiveness to consumers and accountability of corporations for collective wrongdoings, leading to the development of a poliarchic regime of mixed democratic control by the checks and balances provided by the continuous interaction of multiple representative actors.¹⁰³⁷ On the other hand, collective actors may realise that a constant state of competition leads to predatory practices, weakening their position against powerful corporate forces.¹⁰³⁸ In some specific cases, enforcement agents seek partnerships. In others, if everyone shares a common objective, institutional coalitions may emerge. The next subsection explains these collaborative institutional dynamics.

5.4.3 – Institutional cooperation, coordination, and coalition

Institutional cooperation is characterised by a partnership between different organisations that collaborate towards achieving a particular objective together. Such partnerships may involve joint-action in one single case, because of particular circumstances that encourage different collective actors to join forces and work together. For instance, AGO and CODECON joined forces in one

¹⁰³⁶ See chapter 3.

¹⁰³⁷ Robert Dahl, *Polyarchy: participation and opposition* (Yale 1971) 20-7.

¹⁰³⁸ Interviews J (RJ), 30.04.14) and V (RJ 11.09.14).

case against football clubs due to a potentially abusive raise of price tickets.¹⁰³⁹ Additionally, some forms of partnership may develop a permanent state of cooperation between multiple partners with characteristics of a coalition.¹⁰⁴⁰ For instance, AGO, OPD, PROCON, CODECON, and INMETRO attempted to establish a permanent forum of entities for consumer protection. Likewise, Consumer associations led the establishment of a confederation of consumer associations for exchange of information, organisation of conferences, and development of coordinated joint-actions.¹⁰⁴¹

Even if there is the possibility for cooperation based on common goals, partnerships between collective actors are sometimes fragile, depending more on interpersonal relationships than official bureaucratic agreements. For instance, the AGO and the OPD pursued joint collective actions for consumer protection in the last 20 years in Rio de Janeiro in only three cases. Not only has collaboration been very sparse, but it also originated in these cases from the intermediation of a public defender married to a public prosecutor from the AGOCPD, who suggested these joint actions.¹⁰⁴² In São Paulo, no joint-action between the AGO and the OPD was reported and the intense institutional competition seemed to prevent any potential partnership.¹⁰⁴³

The institutional dynamics within the regulatory space provide opportunity for cooperative behaviour between collective actors, particularly

¹⁰³⁹ Interview S (RJ 09.09.14).

¹⁰⁴⁰ Sgueo (n. 890) 75-83.

¹⁰⁴¹ See www.forumdoconsumidor.org.br (checked on 15.01.17).

¹⁰⁴² Interviews A (RJ, 05.04.11) and L (RJ 14.08.14).

¹⁰⁴³ Interview A' (SP 18.09.14).

because they often share the same goal and could establish a collaborative plan of joint action. On the other hand, they are constantly disputing for social recognition, professional prestige, and resource mobilisation. Therefore, their institutional interests may eventually prevent the development of more cooperative relationships. Cooperation between these collective actors may be influenced by their competition for institutional space, leading to a fragile cooperative relationship between collective actors that are primarily competitors termed by commentators as a 'coopetition'.¹⁰⁴⁴

Some enforcement agents stated that more cooperation would enhance their political strength and improve their efficiency as collective actors.¹⁰⁴⁵ Comparing themselves to corporations, these actors perceived that their efforts are less coordinated and effective. For instance, a coalition of corporate lawyers and businesses led by the FIESP successfully lobbied for the repeal of a legislative project that would facilitate the filing of collective actions for consumer protection.¹⁰⁴⁶ In contrast to these well-coordinated efforts, collective actors did not manage to organise a collaborative strategy to justify the need for this procedural reform and to show Congress that the new legislation would increase compliance without necessarily resulting in normative uncertainty and harm for investors and businesses.¹⁰⁴⁷

Moreover, a potential solution for the problem of low monetary compensation involves coordinating efforts between collective actors and

¹⁰⁴⁴ Daniel C. Esty and Damien Geradin, 'Regulatory Co-opetition', *Journal of International Economic Law*, vol. 3 (2000) 235-255.

¹⁰⁴⁵ Interviews J (RJ, 30.04.14) and V (RJ 11.09.14).

¹⁰⁴⁶ Interview W (RJ 12.09.14).

¹⁰⁴⁷ Interview D' (RJ 22.09.14).

regulatory agencies to develop a governance of mass torts. Nagareda suggests that collective actions may operate in the manner of public administration.¹⁰⁴⁸ This insight opens up interesting possibilities regarding partnerships between collective actors and regulatory agencies. Agencies should not function as gatekeepers for litigation, because of the well-known risks of capture.¹⁰⁴⁹ On the other hand, regulatory agencies may produce evidence through expert knowledge based on science and technology rather than procedural rules of evidence.¹⁰⁵⁰ They could collaborate to enforcement of consumer law, by receiving the judicial sentences and implementing these judicial decisions as part of their regulatory enforcement. Regulatory agencies have a technical infrastructure for this specific overview of the relevant market players.¹⁰⁵¹ Coordinated efforts may facilitate dialogue and internalisation of consumer protection within the regulatory space, especially given the blurred lines between adjudication and regulation.¹⁰⁵²

The development of a coalition between collective actors could lead to an integrated mode of governance of the regulatory space.¹⁰⁵³ These interlocutory coalitions may provide an important platform for mediation between consumers and corporations, leverage of the power of collective actors towards rule-

¹⁰⁴⁸ Nagareda (n. 691) 269.

¹⁰⁴⁹ David Freeman Engstrom, Agencies as litigation gatekeepers, *Yale Law Journal*, vol. 123 (2013) 674-6.

¹⁰⁵⁰ Frank Vibert, *The new regulatory space: reframing democratic governance* (Edward Elgar 2014) 49.

¹⁰⁵¹ Vibert (n. 1050) 101-2.

¹⁰⁵² Vibert (n. 1050) 107.

¹⁰⁵³ Sgueo (n. 890) 89-91.

making, and the actual implementation of consumer norms.¹⁰⁵⁴ After the failed attempt to establish a permanent forum for consumer protection in Rio de Janeiro, the AGO and OPD developed a series of joint-actions for consumer protection involving healthcare insurance plans and purchases in supermarkets.¹⁰⁵⁵ In the opinion of the enforcement agents involved in these collaborative efforts, these coalitions increase the political pressure on corporations, leading to collective settlements and more efficient implementation of consumer law.¹⁰⁵⁶

5.4.4 – Institutional deference, mutual respect, and moderation

Deference constitutes another important dynamic, consisting of a sense of polite respect between different actors. Goffman refers to deference as 'a symbolic means by which appreciation is regularly conveyed', representing the celebration and confirmation of the special relationship between two different actors.¹⁰⁵⁷ In his account, deference is normally manifested through rituals and ceremonial activities that reinforce the interpersonal relationships and the status of the recipient of the demonstration of polite respect.¹⁰⁵⁸ This concept is

¹⁰⁵⁴ On mediation, rule-making, and implementation by interlocutory coalitions, see Sgueo (n. 890) Ch 4.

¹⁰⁵⁵ Interview J (RJ, 30.04.14), U (RJ 11.09.14), and V (RJ 11.09.14).

¹⁰⁵⁶ Interview J (RJ, 30.04.14) and V (RJ 11.09.14).

¹⁰⁵⁷ Ervin Goffman, *The Nature of Deference and Demeanor*, *American Anthropologist*, vol. 58 (1956) 477.

¹⁰⁵⁸ Goffman (n. 1057) 477-8.

well established in the legal literature, because of the idea that different institutional actors are expected to express mutual respect to each other.

In this sense, the different organs of the state are expected to demonstrate a reciprocal sense of mutual respect to each other. However, there is no consensus about the rules for its exercise and the degree of deference that courts, legislatures, and the executive branch should exercise in their mutual interactions. Some commentators recommend judicial deference to the administration,¹⁰⁵⁹ while others suggest that the judiciary deserves deference from the legislature for the exercise of judicial review and control of constitutionality.¹⁰⁶⁰ In the case of collective actors, their institutional dynamics are also influenced by a sense of mutual respect, but without submission.

The case of underground explosion provides interesting examples of the dynamics of deference. First, consider that National Agency for Electrical Energy (ANEEL) was the regulatory agency responsible for the overview of the electricity company. During the pre-trial enquiry, prosecutors were deferential to the agency and requested technical information on the state of the underground chambers and the risk of explosions. However, once the evidence indicated lack of maintenance of underground chambers and the potential regulatory failure of ANEEL, prosecutors decided to lead regulatory enforcement. The AGO requested an immediate programme of reform, with more strict conditions than requested by ANEEL. In these cases, collective actors

¹⁰⁵⁹ Antonin Scalia, Judicial deference to administrative interpretations of law, *Duke Law Review*, vol. 1989 (1989) 511-21; Thomas Merrill, Judicial deference to executive precedent, *Yale Law Journal*, vol. 101 (1992) 970-2; John Manning, Constitutional structure and judicial deference to agency interpretations of agency rules, *Columbia Law Review*, vol. 96 (1996) 613-6.

¹⁰⁶⁰ Mark Graber, The nonmajoritarian difficulty: legislative deference to the judiciary, *Studies in American political development*, vol. 7 (1993) 35-73.

normally prioritise their mandate to protect consumers over any institutional sense of deference to a regulatory agency.

A negative consequence of this particular institutional dynamic lies in the distance between the collective actor and the regulatory agency. Once the collective action was filed and the AGO decided to lead the regulatory enforcement, ANEEL kept distance from the collective litigation and did not intervene. This is unfortunate, because regulatory agencies are important sources of technical knowledge over the regulatory space and may provide invaluable support in the implementation of decisions taken at collective actions.¹⁰⁶¹ The exercise of regulatory enforcement through collective action may be interpreted as lack of deference by regulatory agencies, alienating potential partnerships.¹⁰⁶² On the other hand, the intervention of collective actors may also prevent the capture of regulatory agencies by the private interests of regulated companies, enabling public officials to challenge powerful corporate interests.¹⁰⁶³

¹⁰⁶¹ Vibert (n. 1050) 101-2. The BCB could overview that all convicted banks deposit a credit in the bank account of the customers benefited by a judicial sentence in a collective action. Likewise, the ANATEL could easily overview that all convicted telecommunication companies grant a credit to all clients benefited by a decision in a civil public action. Normally, banks, mobile companies, and cable television corporations have long-term contracts with their customers and could benefit from this direct channel of communication for full recovery of the damage caused by their collective wrongdoings. However, empirical observation shows that these companies simply do not pay damages in collective actions. A lack of proper coordination between collective actors, courts, and regulatory agents prevent this potentially successful cooperation for overview of compliance with judicial sentences of collective actions.

¹⁰⁶² Cranston also observed a similar institutional dynamic between consumer agencies in the UK, when another public agency would not respect the standard developed by an agency and a corporation. See Cranston (n. 735) 31.

¹⁰⁶³ Ian Ayres and John Braithwaite, *Tripartism: regulatory capture and empowerment*, Law & social inquiry, vol. 16 (1991) 441-5.

Finally, there is an important feature of institutional design of the AGO, which is the mandatory presence in any collective action as a *custos legis*, overseeing the correct application of the law. This particular position guarantees the prominence of the AGO in the collective action scene.¹⁰⁶⁴ The AGO may exercise the power to moderate, by evaluating the performance of the other collective actors. In practice, for instance, the AGO may recommend the rejection of a collective settlement, a position taken in a case of CODECON against UNIMED because the clauses seemed too vague and difficult to execute into concrete orders.¹⁰⁶⁵ In this case, the OPD took the lead of the collective action and obtained another collective settlement with UNIMED - this time approved by both the AGO and the commercial court.¹⁰⁶⁶ Historically, the Brazilian legal tradition adopted the power of moderation (*pouvoir modérateur*) during the constitutional monarchy of the 19th century.¹⁰⁶⁷

5.5 Collective actors within the regulatory space.

This section explains how the competitive participation of collective actors shape the regulatory space, because collective action may be used to transform regulatory standards, gather information, and transform behaviour.¹⁰⁶⁸ Law enforcement agents operate with both regulatory agencies

¹⁰⁶⁴ Interviews L (RJ 14.08.14) and O (RJ 26.08.14).

¹⁰⁶⁵ Interview J (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

¹⁰⁶⁶ Interview J (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

¹⁰⁶⁷ Oscar Ferreira, Le pouvoir modérateur dans la Constitution Brésilienne de 1824 et la charte constitutionnelle Portugaise de 1826: les influences de Benjamin Constant ou de Lanjuinais, *Revue Française de droit constitutionnel*, vol. 1 (2012) 1-5.

and courts as part of their effort for consumer protection. There is constant exchange of legal knowledge with regulators and these institutionalised administrative bodies are relevant players. Additionally, the presence of consumer advocates may provide oversight on the risk of revolving doors and regulatory capture.¹⁰⁶⁹

5.5.1 – Information exchange, conflicts of interests, and strategic behaviour

Collective actors are constantly exchanging information with businesses and regulatory agencies based on consumer complaints and potential responses from courts to judicial claims. A consumer complaint circulates within the network and its meaning is negotiated by multiple different actors. Initially, the prosecutor receives a message of protest in everyday language that expresses the sense of loss from an individual. This message is sent to the corporation for defence and to the regulatory agency for clarification.

Their responses translate the everyday incident into a juridical issue, because lawyers will refer to legal materials, positive law, juridical jargon, and produce a petition for analysis of the enforcement agent. In some occasions, the investigation is closed and the consumer complaint is sent to the archives. However, in other cases, the enforcement agent disagrees with the legal response from the corporation, the justification of a regulatory agency, and

¹⁰⁶⁸ Bronwen Morgan & Karen Yeung, *An introduction to law and regulation: texts and materials* (CUP 2007) 3.

¹⁰⁶⁹ Toni Makkai and John Braithwaite, In and out of the revolving door: making sense of regulatory capture, *Journal of Public Policy*, vol. 12 (1992) 76; Daniel Schwarcz, Preventing capture through consumer empowerment programs: some evidence from insurance regulation, in Daniel Carpenter and David Moss (eds), *Preventing regulatory capture: special interest influence and how to limit it* (CUP 2014) 392-96.

insists on the consumer complaint. If the company refuses to negotiate a settlement, the enforcement agent will file a civil public action.

These dynamic interactions between the relevant players are part of a complex game for definition, implementation, and enforcement of consumer protection. Collective actors almost never file a civil public action without hearing the corporation and the regulatory agency. Requesting information is a question not only of deference, but also of cooperation. Legal enforcers demonstrate certain deference to corporations and to regulatory agencies in terms of respecting an established company and an institutionalised administrative organ. However, deference should not be understood as recognition of superiority.

In the Brazilian experience, deference is contingent and is evaluated on a case-by-case basis. There is no sense of clear hierarchy among the different players in this consumer protection network. All different actors participate in this exchange of legal knowledge with their particular contributions and influence the outcome, but neither courts, nor regulatory agencies are superior actors. In contrast to the US class action system in which courts are protagonists and the EU model of collective redress with regulatory agencies as the leading actors for regulatory enforcement,¹⁰⁷⁰ the Brazilian civil public action combines a mix of institutional actors, protagonism being divided among different actors.

Exchange information is developed through a complex game also because legal documents prepared by the corporation and the regulatory agency may be used for the production of a civil public action. Therefore, there is an evident

¹⁰⁷⁰ Hensler and others (n. 56) 445; Hodges (n. 507) 6-7.

conflict of interest between the legal enforcer and the company, whose behaviour is normally strategic for the defence of corporate interests. A company may concede that its practice violated consumer law, but will pursue this pathway strategically. Normally, in these rare cases of admission of a wrongdoing, the company informs that the problem was isolated, was already solved, and its operations are functioning normally again. A company would not provide a response to a legal enforcer in which admits that charged an abusive fee, profited a fortune, and benefited from contractual imbalance, pretending in bad faith to provide a service simply to transfer its operational costs to consumers through an excessive burden. Moreover, even after the regulatory agency admitted that the tariff for renewal of registration should not be charged and prohibited banks from charging it, the corporation continued with the civil public action to eliminate the obligations to compensate customers. Strategic behaviour is a rule of this game and the level of cooperation from corporations is always limited by this conflict of interests.

Likewise, the regulatory agency also has conflict of interests, albeit more subtle – the defence of the coherence of its acts, policies, guidelines, and resolutions. The regulatory agency normally provides a justification for the validity of the corporate act, referring to its own resolution and providing a rationale for the norms that regulate the sector - maintaining the standards set for the market players. However, this strategic behaviour is subtle and involves the defence of the institutional rules of the game as designed by the regulator.¹⁰⁷¹ Therefore, the regulators are not protecting their own private interests and may

¹⁰⁷¹ Douglass North, *Institutions, institutional change and economic performance* (CUP, 1990) 3.

eventually transform the regulatory framework into better market regulation.¹⁰⁷²

5.5.2 - Democratic Deficit, revolving doors, and regulatory capture

Regulatory agencies are often accused of simply not being interested in consumer demands.¹⁰⁷³ Involving consumers in regulatory processes and decision-making could improve the quality of regulations and prevent the establishment of measures detrimental to consumer interests.¹⁰⁷⁴ Consultation, advice, engagement, and negotiation with consumer involvement may have positive effects.¹⁰⁷⁵ However, interviewed enforcement agents suggest that Brazilian regulatory agencies are not interested in the opinion and feedback of consumers and consumer representatives.¹⁰⁷⁶

¹⁰⁷² Particularly in the case of the tariff for renewal of registration, the commercial court did not determine that the BCB should prohibit it for all banks. This judicial decision was restricted to the defendant Itaú, but had absolutely no judicial effects on the regulatory agency – a third party without any intervention in the civil public action. Nonetheless, after the judicial sentence suspending contractual clauses in all financial contracts, prohibiting this tariff for customers of this bank in the entire country, and convicting Itaú to return the amount charged to all clients and to pay compensation for collective moral damages, the BCB decided to change the market regulations. This initiative reveals concern with the regularity and normalization of the market.

¹⁰⁷³ Interviews L (RJ 14.08.14), M (RJ 21.08.14), O (RJ 26.08.14), S (RJ 09.09.14), V (RJ 11.09.14), and B' (SP 19.09.14).

¹⁰⁷⁴ Chris Decker, *The consumer knows best: involving consumers in regulatory processes and decision-making*, Network, vol. 49 (2013) 1-2.

¹⁰⁷⁵ Decker (n. 1074) 2-6.

¹⁰⁷⁶ Interviews S (RJ 09.09.14) and B' (SP 19.09.14). A public defender defended the participation of the OPD in regular meetings of regulatory agencies and companies, highlighting the importance of an active voice on behalf of consumers – but admitted that consumer representatives are often unwelcome, isolated, and she even considers that the treatment is normally hostile. The lawyer of a consumer association also endorsed this view, informing that Brazilian regulatory agencies treat the regulated companies much more favorably than consumers and consumer representatives. In her interview, she stated that regulatory agencies would prefer not to have to deal with consumer representatives.

Empirical research also revealed perception of potential capture of regulatory agencies.¹⁰⁷⁷ The problem of revolving doors was mentioned with reference to presidents of regulatory agencies being later hired as CEOs of companies in the markets previously regulated by them.¹⁰⁷⁸ Additionally, the asymmetry of power between businesses and consumers was not balanced by regulatory agencies, which were susceptible to the economic power of corporations.¹⁰⁷⁹ Moreover, the regulatory agencies may also be colonised by political parties, which install their members in supposedly technical positions. Because this political capture is practiced by various political parties, internal mechanisms of checks and balances are not sufficient to protect the regulatory agencies from this negative interference.¹⁰⁸⁰

In this setting, enforcement agents adopt positions of deference, cooperation, and competition according to the particular context and the institutional moves made within this complex network of consumer protection. None of the legal enforcers adopt a dogmatic position of strict deference to a regulatory agency or to a judicial authority. Courts and regulators are respected

¹⁰⁷⁷ On recent studies of capture that recognise the complexity of the question beyond the traditional theories, see Introduction, Daniel Carpenter and David Moss, in Daniel Carpenter and David Moss (eds), *Preventing regulatory capture: special interest influence and how to limit it* (CUP 2014) 2-5 & 20-2; Max Watson, *From regulatory capture to regulatory space* (FLJS 2013) 6-8.

¹⁰⁷⁸ The head of ANEEL became CEO of Light and was ahead of the corporation during the crisis of underground explosions mentioned in the beginning of this chapter; the head of Bank Boston became the President of the BCB and was responsible for the resolution that allowed charging tariff for renewal of registration mentioned in the beginning of this section.

¹⁰⁷⁹ An interviewee reported her struggle for control of the public infrastructure at the disposal of private corporations in the telecommunications sector and how officials from the regulatory agency criticised her and labelled her as a 'communist' for requesting a list of all public goods at disposal of the private concessionary. Not only did she not receive the requested list, but also the regulatory agency's discourse expressed confusion about exercising the role of controller and protecting public interests against powerful private economic interests.

¹⁰⁸⁰ Schwarcz (n. 1069) 395-6.

and collective actors seek consumer protection through both regulation and litigation. However, depending on the particular context, these enforcement agents may have lower trust in the technical quality of regulatory agencies. The coherence of acts, policies, guidelines, and resolutions depends on institutional controls that guarantee decisions based on public policy rather than partisan politics.

To be sure, collective actors may work in partnership with regulatory agencies.¹⁰⁸¹ Enforcement agents request information from regulators, send copies of civil public actions which challenge their acts, and give interviews in which they state that a decision of the regulatory agency would solve a case. In many occasions, a position of deference is adopted and the case is closed based on the opinion of the regulatory agency. However, it would be disingenuous to attribute these decisions to the superior technical quality of decision.

Deference originates from the exchange of legal knowledge in a case-by-case analysis, in which legal enforcers realise that their cases should not be framed as questions of rights protection, but rather of policy analysis – with deference to the regulators.¹⁰⁸² Likewise, courts also decide that a case involves policy analysis and decide to be deferential to the regulators; or may decide that it involves right protection and strike down a regulation. However, exercising deference is not a science, neither is an arbitrary exercise of power. Instead, legal actors adopt positions of deference based on dynamic interactions that influence the prospects of their case and projections of positive outcomes of consumer rights protection based on experience, context, politics, and reasonable intuition.

¹⁰⁸¹ McAllister (n. 448) 134-6.

¹⁰⁸² Interview N (RJ 21.08.14).

Legal enforcers do not endorse the idea that certain decisions are technical, related to the regulation of the market, and deserve strict deference.¹⁰⁸³ On the contrary, consumer protection involves sometimes setting different standards through litigation. However, enforcement agents may also criticise courts and potential negative effects of judicial politics in decision-making.

Courts are not always politically independent,¹⁰⁸⁴ but may eventually be responsible for standard-setting, information-gathering, and behavioural modification.¹⁰⁸⁵ On the other hand, courts often are not the final authority over consumer protection. There is constant institutional dialogue through formal and informal channels of communication within a complex network of multiple collective actors. Consumer protection depends on this web of juridical relationships between public prosecutors, public defenders, state assembly attorneys, consumer associations, consumers, corporations, executive authorities, media, regulators, and the courts.

5.6 From politics to the legal architecture

¹⁰⁸³ Interviews L (RJ 14.08.14), M (RJ 21.08.14), O (RJ 26.08.14), S (RJ 09.09.14), V (RJ 11.09.14), and B' (SP 19.09.14).

¹⁰⁸⁴ Interviewed, a public prosecutor explained that he had low trust in regulators for risk of capture and low trust in courts for lack of judicial independent, but he did not have low trust in the combination of these two actors. Low level of trust in both regulators and courts may explain the competition between regulation and litigation in the Latin American model of civil public action. In the US model of class actions, courts and private lawyers are trusted, but not state actors; in the EU model of collective redress, the state is trusted, but not courts and private lawyers. See Hensler and others (n. 56) 69-71; Hodges (n. 36) 131-154. In the Brazilian case, one hypothesis that requires further research is that reciprocal distrust may explain the institutional competition between multiple collective actors, and between regulation and litigation.

¹⁰⁸⁵ Morgan & Yeung (n. 1068) 3.

The civil public action established a model with various competing collective actors. This chapter revealed that these collective actors mobilise their resources and developed multiple strategies to establish themselves as plaintiffs. Initially, public prosecutors were the monopolist dominant force and dealt with the majority of collective actions. Among consumer associations, IDEC pioneered and established its reputation as a fierce consumer advocate. Later, public defenders benefitted from their role as providers of free legal services to build their collective actions as well. Likewise, state assembly attorneys developed a constituency of consumers in the suburbs based on the service provided through the 'citizenship bus'. Moreover, PROTEST and ANACONT also developed their own infrastructure as new entrants in the arena of collective actors for consumer protection. The Brazilian experience reveals dynamic interactions and an interesting game between the relevant players, who are fighting for institutional space and a prominent position in the consumer protection network.

This institutional competition between the different collective actors emerges as an important feature of the civil public action. Importantly, these collective actors do not have control over their institutional agenda and are responsive to demands made by consumers. This responsiveness increases the opportunity for democratic participation. A collective action is normally representative of a collective demand of consumers. Interestingly, there is constant information exchange between legal enforcers, companies, and regulatory agencies in the pre-trial procedures. Because collective actors do not have absolute trust for courts and regulatory agencies, they praise a system in which both judges and regulators may provide responses to collective

actions.¹⁰⁸⁶ In this context, both regulators and courts may equally intervene for consumer protection.

¹⁰⁸⁶ Interviews L (RJ 14.08.14) and M (RJ 21.08.14).

Chapter 6.

The architecture of collective action

6.1 – Introduction

The previous chapter investigated the power of collective actors. Their organisational structure and institutional dynamics were examined, revealing a regulatory space of competitive collective actors. The complex interaction of the AGO, OPD, CODECON, and consumer associations provides different alternatives of intermediate bodies for processing individual complaints. Consequently, the policy agenda is not controlled and democracy is enhanced. On one level, this decentralisation of power across different representative bodies may be perceived as an instance of poliarchy.¹⁰⁸⁷ On the other level, consumer relations cease to be dyadic B2C relationships, becoming networked relationships that are regulated not only by one enforcement agent, but by multiple potential regulatory actions emerging from complex interactions within the regulatory space.¹⁰⁸⁸ This fragmentation and decentralisation of the regulatory space leads not only to competitive dynamics, but also to cooperation, coalition, and

¹⁰⁸⁷ Dahl (n. 1037) 20-7.

¹⁰⁸⁸ By regulatory actions, I refer to the application of normative standards with the objective to direct or to restrict the activities of others, including laws 'that are broadly regulatory in character'. See Galligan (n. 161) 294.

deference with the potential development of institutional partnerships, integrated governance, and respectful coordination.¹⁰⁸⁹

This chapter builds on the previous one, by examining how the architecture of collective action empowers collective actors and individuals to protect consumer rights. Therefore, the power of collective actors is supported by and supports the architecture of collective action. The particular research question for this chapter is the following one: what is the role of law in specifying rights, shaping procedural pathways, defining participation and remedies for consumer protection? This issue is relevant because the empirical observation of the dynamic role of law in organising its application and implementation is relevant for the evaluation of juridical collective action and the achievement of its professed objectives.

The architecture of collective action establishes the regime for consumer protection, by creating particular mechanisms for processing legal claims,¹⁰⁹⁰ calibrating access and use through economics incentives,¹⁰⁹¹ and allocating powers for the participation of the relevant actors.¹⁰⁹² The problems for juridical collective action consist of challenges posed by interdisciplinary theories of collective action, such as rational apathy, free rider, and kidnapped rider, among

¹⁰⁸⁹ On the fragmentation and decentralisation of the regulatory space, see Julia Black, Decentring regulation: understanding the role of regulation and self-regulation in a 'Post-Regulatory' world, *Current legal problems*, vol. 54 (2001) 105-12.

¹⁰⁹⁰ Scott (n. 1028) 540-3.

¹⁰⁹¹ Cameron, Kalajdzic and Klement (n. 164) 151-5.

¹⁰⁹² Stefan Wróblewski, European Consumer Protection Law: Quo Vadis? Thoughts on the compensatory collective action debate, in Stefan Wróblewski, Steven Van Uytsel, and Mathias Siems (eds), *Collective actions: enhancing access to justice and reconciling multilayer interests* (CUP 2012) 28.

others.¹⁰⁹³ The architecture deals with these issues, by establishing the legal framework for protection of collective rights, recognising their existence and protection, enabling potential collective actors, and inducing participation through certain means, which are more or less politically and economically viable than others. Variations of design affect the legal environment and outcomes.¹⁰⁹⁴

This chapter examines the normative architecture of collective action, by focusing on the different categories of diffuse, collective, and homogeneous individual interests, the bifurcation caused by the 'force out' mechanism, the possible legal pathways for consumer protection, the multiple instances causing delayed justice, the importance of injunction orders, the structure of collective settlement, and the possibility of creative enforcement.

6.1.1 The normative architecture of collective action

The politics of collective action is constituted by and constitutes the normative architecture. Far from being a circular reasoning, this insight indicates the reciprocal influences between law and politics - there is a relationship of reflexivity, instead of the logic of cause and effect. As Galligan put it, law is foundational to the organisations of officials, which are created and given authority by the law to interpret and give meaning to the law.¹⁰⁹⁵ Further developing his idea, Galligan explains the legal architecture:

¹⁰⁹³ On the problem of free rider, see Olson (n. 42) 76; on rational apathy, see Coffee (n. 199) 920; on the kidnapped rider, see Yeazell (n. 34) 43.

¹⁰⁹⁴ Galligan (n. 161) 294-6.

The architecture is the normative structure within which officials take action; it defines their tasks and how they are to perform them. It does more: it opens the way to interaction between the legal structure and its social context. Law is implemented in a social setting; but law is itself infused with social fragments, through interpretation, discretion, incompleteness, and even contradictions, with the result that it creates around itself a social environment, which in turn interacts with the fuller social environment.¹⁰⁹⁶

This idea of the architecture indicates the existence of concrete elements that provide signals of appropriate conduct in society. However, the normative structure emerges through the interaction of officials within a social context. Applying this idea to the architecture of collective action, the mandate of collective actors to protect diffuse, collective, and individual homogeneous interests is established by the law. On the other hand, the practical exercise of this mandate reinforces the normative structure by implementing the law. In practice, the actual implementation of law requires the existence of particular organisations, processes, and remedies established by the law itself.¹⁰⁹⁷

Implementation depends on officials working in organisations.¹⁰⁹⁸ In the case of collective action, the practices, approaches, and meanings adopted by public prosecutors, public defenders, and state assembly attorneys are intimately related to the organisational structure of the AGO, the OPD, and CODECON respectively.¹⁰⁹⁹ Particularly important are the allocation of powers, the specification of rights and duties, and the definition of procedural

¹⁰⁹⁵ Galligan (n. 161) 293.

¹⁰⁹⁶ Galligan (n. 161) 297.

¹⁰⁹⁷ Galligan (n. 161) 293.

¹⁰⁹⁸ Galligan (n. 161) 298.

¹⁰⁹⁹ On the relationship between organisations and the constitution of practices and cultural meaning, see Galligan (n. 161) 298-9.

mechanisms, democratic participation, and legal remedies.¹¹⁰⁰ The exercise of discretion by authorities is directly related to the use of clear rules or open standards.¹¹⁰¹ The implementation of law may be evaluated by the analysis of outcomes and mechanisms available for compliance.¹¹⁰² On one hand, the ombudsman provides an alternative to judicial decisions, but depends on the power of persuasion, reporting and publicity.¹¹⁰³ On the other hand, courts are influenced by the level of formality of their proceedings and may construe the law in a more conservative mode - differently from collective actors.¹¹⁰⁴

This chapter will proceed in the following way. Section 6.2 will explain the conceptual design of collective rights and clarify how the different dimensions of diffuse, collective, and homogeneous interests may influence the standing and the roles of collective actors as enforcement agents for consumer protection. Collective actors frame their disputes through these categories of collective rights. Section 6.3 explains that the Brazilian civil public action adopts a 'force out' regime, which does not correspond to either 'opt out' or 'opt in' mechanisms and provides solutions to problems of representation, such as free riders and kidnapped riders. Section 6.4 discusses the different pathways to justice, contrasting the collective and the individual vehicles for consumer protection, including small claims courts, ADR, and ODR. Section 6.5 discusses special features of the architecture of collective action, like its long duration, the

¹¹⁰⁰ Galligan (n. 161) 299.

¹¹⁰¹ Galligan (n. 161) 300.

¹¹⁰² Galligan (n. 161) 301-3.

¹¹⁰³ Galligan (n. 161) 301-3.

¹¹⁰⁴ Galligan (n. 161) 302-3

relevance of injunctive orders, the structure for collective settlements, and the possibility of creative enforcement. Section 6.6 highlights that the architecture of collective actions relates diffuse, collective, and individual interests into a complex network of interconnected rights, which may influence its socio-legal mobilisation and protection in the legal environment.

6.2 The architecture of collective rights

6.2.1 The conceptual design of collective rights

One important dimension of the architecture of collective action is the legal recognition of collective rights. In terms of comparative vocabulary, for instance, Latin American civil public actions protect indivisible collective rights, labelling them 'diffuse', 'collective', and 'popular' interests.¹¹⁰⁵ Hensler claims that US class actions protect not only aggregated monetary claims of individual consumers, but also their collective interests.¹¹⁰⁶ However, Oquendo highlights the differences between collective actions in Brazil and the US, emphasising that there is no popular suit for the protection of diffuse entitlements and that normally there are restrictions of standing for plaintiffs to litigate on behalf of society as a whole.¹¹⁰⁷ Regarding EU collective redress, there is even less recognition of the trans-subjective or trans-individual dimension of consumer rights. Commentators sometimes simply refuse to recognise the collective

¹¹⁰⁵ Hensler (n. 238) 6.

¹¹⁰⁶ Hensler (n. 238) 6-7.

¹¹⁰⁷ Oquendo (n. 4) 26.

dimension of collective redress, emphasising that all cases have to be analysed individually¹¹⁰⁸ and criticising mechanisms for judicial aggregation of individual interests and regulatory enforcement of consumer law by courts.¹¹⁰⁹

Nonetheless, the idea of diffuse interests has historical origins in the Florence Access-to-Justice Project developed under the leadership of Mauro Cappelletti at the EUI.¹¹¹⁰ The idea of diffuse rights was developed to describe the fragmented interests that are spread over a large number of people and not concentrated in one or few individual right-holders.¹¹¹¹ Juridical instruments have the potential to collect these diffuse interests, by aggregating them for comprehensive judicial decision-making.¹¹¹² The adequate representation depends on a pluralistic or mixed combination of public governmental and privately organised collective actors.¹¹¹³ However, if already implemented several ideas of the Florence Project, the EU has not yet regulated at Pan-European level the legal protection of diffuse and collective interests through any directive.¹¹¹⁴

Legal theory provides important conceptual insights for this debate, by identifying the ontological difference between collective interests and the

¹¹⁰⁸ Christopher Hodges and Astrid Stadler, Introduction, in Christopher Hodges and Astrid Stadler (eds) *Resolving mass disputes: ADR and settlements of mass claims* (Edward Elgar 2013) 7.

¹¹⁰⁹ Hodges and Stadler (n. 1108) 10-13.

¹¹¹⁰ Stefan Wrzka, Steven van Uytsel, and Mathias Siems, Access to justice and collective actions: 'Florence' and beyond, in Stefan Wrzka, Steven Van Uytsel, and Mathias Siems (eds), *Collective actions: enhancing access to justice and reconciling multilayer interests* (CUP 2012) 3-10.

¹¹¹¹ Wrzka, van Uytsel, and Siems, (n. 1110) 5.

¹¹¹² Wrzka, van Uytsel, and Siems, (n. 1110) 5.

¹¹¹³ Wrzka, van Uytsel, and Siems, (n. 1110) 6-7.

¹¹¹⁴ Stefan Wrzka, *European consumer access to justice revisited* (CUP 2015) 102.

individual interests of group members, which cannot be conflated or reduced to a fragmented fraction of the whole.¹¹¹⁵ The interests of the collectivity are conceptually interconnected to the individual interests of its members through non-reductive connections.¹¹¹⁶ In terms of right-holders, both individuals and the group possess these collective rights.¹¹¹⁷

Another interesting theoretical perspective is to consider collective interests as multilayered, being divided into three sub-groups: individual interests, collective interests, and public interests.¹¹¹⁸ The idea is that damages to consumers may be interpreted through these various perspectives. For instance, if a consumer purchases one defective product, there is clearly one individual interest in reparation and compensation.¹¹¹⁹ Hypothetically, if the problem affects more than one individual and reaches a group of customers, there is a collective interest in rights enforcement.¹¹²⁰ Additionally, if the defective product leads to a more general harm and causes health issues, there is also a public interest at stake.¹¹²¹ This tridimensional classification is proximate to the legal terminology for collective rights adopted by Brazilian law. The next section discusses the Brazilian legal architecture and its influence on the experience of consumer protection.

¹¹¹⁵ Jovanovic (n. 48) 52-3.

¹¹¹⁶ Jovanovic (n. 48) 53.

¹¹¹⁷ Jovanovic (n. 48) 78.

¹¹¹⁸ Wrška (n. 1114) 119.

¹¹¹⁹ Wrška (n. 1114) 119.

¹¹²⁰ Wrška (n. 1114) 119.

¹¹²¹ Wrška (n. 1114) 119.

6.2.2 The experience of protecting collective rights

The Latin American legal tradition is known for its appreciation of legal dogmatism and doctrinal classifications.¹¹²² Not surprisingly, civil public action distinguishes diffuse, collective, and homogeneous individual interests in a fairly dogmatic and technical way.¹¹²³ The academic literature normally refers to product liability, adhesion contracts, and fraudulent advertising as examples of violations of homogeneous individual, collective, and diffuse interests.¹¹²⁴

A case involving dangerous products is classified as a collection of homogeneous individual interests, because a determinate group of product owners are in this situation due to a common origin, that is a factual circumstance of a defective industrial production and their interest is divisible, quantified, and divided between each individual.¹¹²⁵ An incident involving defective automobiles would be a good example of homogeneous individual interests. Abusive clauses in adhesion contracts are normally classified as a violation of collective interests because a determinate group of consumers are united by a contractual relationship, which affects all consumers uniformly.¹¹²⁶ A clause authorising a bank to charge an illegal tariff would be an example. Fraudulent advertising is classified as a violation of diffuse interests, because

¹¹²² Merryman and Perez-Perdomo (n. 113) 63-5.

¹¹²³ Mazzili (n. 470) 51.

¹¹²⁴ Mazzili (n. 470) 50-3.

¹¹²⁵ Mazzili (n. 470) 57.

¹¹²⁶ Mazzili (n. 470) 55.

this collective wrongdoing is related to an indeterminate group of persons, being originated by false publicity that affects everyone.¹¹²⁷

However, practical cases normally involve a complex cluster of multiple categories of interests, simultaneously combining aspects of diffuse, collective, and homogeneous individual interests.¹¹²⁸ For instance, an abusive clause in a financial adhesion contract may result in payment of abusive bank tariffs. The annulment of the abusive clause in an adhesion contract is classified as a collective interest, common to all consumers who signed the contract and are linked to the company by the same juridical relationship established by these contractual norms. On the other hand, compensation for payment of abusive tariffs is classified as a homogeneous individual interest, common to all consumers charged by the company, and being quantified and divided among individual consumers.¹¹²⁹

More than just a doctrinal classification, these legal categories of interests shape the practice of collective action, providing additional examples of the influence of normative architecture on the socio-legal environment. A series of judicial decisions have considered that the AGO lacked standing in civil public actions for the protection of homogeneous individual interests related exclusively with consumer compensation. These decisions took into consideration the fact that public prosecutors have a mandate to protect indispensable societal interests, but should not be responsible for the defence of

¹¹²⁷ Mazzili (n. 470) 53.

¹¹²⁸ Didier Jr and Zaneti Jr (n. 69) 85-7.

¹¹²⁹ Didier Jr and Zaneti Jr (n. 69) 77-9.

dispensable monetary interests of consumers – especially given its private nature.¹¹³⁰

In response to this line of judicial precedents, public prosecutors normally highlight that their collective actions present a complex cluster of multiple interests of social relevance, also providing justification for their standing for civil public actions. For example, the case of underground explosions included not only the homogeneous individual interests of the victims, but also the diffuse interest of potential future victims who deserved to be protected against the risk of new explosions. Likewise, the case of the tariff for the renewal of bank registration involved not only the repayment of abusive fees, but also the annulment of an abusive clause in everyone's contract.¹¹³¹

Additionally, there is an important practical consequence directly related to this distinction between diffuse/collective rights and homogeneous individual rights. The judicial decision regarding diffuse/collective rights sets the normative standards and, therefore, produces a direct regulatory impact.¹¹³² On the other hand, the judicial verdict regarding individual homogeneous interests orders the payment of damages to individual consumers, producing direct compensatory impact.¹¹³³ Therefore, these categories of interests are related to the potential function and direct impact of the collective action.¹¹³⁴

¹¹³⁰ See, for instance, *AGO v. Rio de Janeiro* (2006.001.118476-0, 2nd Public Interest Court of Rio de Janeiro); *ANDEC v. Bradesco and others* (1999.001.022257-2, 2nd Commercial Court of Rio de Janeiro).

¹¹³¹ See chapter 4.

¹¹³² Interview J (RJ, 30.04.14).

¹¹³³ Interview J (RJ, 30.04.14).

¹¹³⁴ Interview J (RJ, 30.04.14).

One last point deserves our attention regarding this classification. Gidi suggests that any practical case that does not fit precisely the legal categories would be unprotected in practice.¹¹³⁵ This is false. In practice, there are concrete examples involving hybrid cases that combine features of both diffuse and collective rights that are protected. For instance, all cases involving a similar basic juridical relationship are classified as a collective interest.¹¹³⁶ This would be the case of all consumers who signed the same adhesive contract containing an abusive clause. Furthermore, all cases involving future consumers - even those not yet identified - are classified as a diffuse interest.¹¹³⁷ This would be the case of all consumers who may watch a misleading advertisement in the future.

The practical experience of collective action for consumer protection includes a hybrid case that combines the collective dimension of the same basic juridical relationship with the diffuse dimension of the future consumer not yet identified. This is the case of the future consumers who may in the future sign the adhesive contract containing an abusive clause. On one hand, this is not a typical case of collective interest, because the group of consumers is not identified. On the other hand, this is not a typical case of diffuse interest because the justification for the legal protection is the existence of a basic juridical relationship. As far as I know, Brazilian academic literature has not yet paid attention to this special case of a hybrid combination of collective and diffuse interests, which I term 'adhesive interests'.

¹¹³⁵ Antonio Gidi, *A Class Action como instrumento de tutela coletiva de direitos: as ações coletivas em uma perspectiva comparada* (RT 2007) 69.

¹¹³⁶ Mazzili (n. 470) 55-6.

¹¹³⁷ Mazzili (n. 470) 53-5.

In practice, courts do not make any distinction in sentences that nullify abusive clauses in adhesive contracts, normally considering such illegal norms void in all contracts and prohibiting their use in future adhesive contracts. Therefore, Gidi seems to be wrong, when he suggests that Brazilian law would not protect collective interests that do not fit precisely any of these three categories of diffuse, collective, and homogeneous individual interests.¹¹³⁸ The next section further develops the consequences of this typology, explaining that it may lead to different pathways.

6.3 The 'force out' regime and bifurcation of pathways

The architecture of collective actions provides different paths to justice.¹¹³⁹ The Brazilian civil public action is normally classified as an 'opt out' regime of collective action,¹¹⁴⁰ but the legislation is more complex and nuanced than this label may initially suggest.¹¹⁴¹ First, there is no rule authorising a consumer to request her exclusion from the civil public action - establishing a right to exit the collective action. Therefore, if a consumer simply remains inert, the collective judgment will have a binding effect on her legally protected interests.¹¹⁴² However, if an individual decides to pursue her own individual pathway to justice, she may file an action based on her own personal claim in a

¹¹³⁸ Gidi (n. 1135) 69.

¹¹³⁹ I am borrowing here the metaphorical title from Hazel Genn, *Paths to justice: what people do and think about going to law* (Hart 1999).

¹¹⁴⁰ Gidi (n. 106) 337-8.

¹¹⁴¹ On ten variations of 'opt in' and 'opt out' regimes that shows the various norms, features, and potential outcomes, see Mulheron (n. 289) 379-400.

¹¹⁴² See Didier Jr and Zaneti Jr (n. 69) 183-5.

small claims courts or an ordinary court. This individual pathway guarantees her constitutional rights of access to justice and personal autonomy, but also leads to a procedural bifurcation.

There are two potential judicial pathways. First, there is the collective procedure and the civil public action guarantees the individual right to intervention and participation in the collective action.¹¹⁴³ However, costs normally prevent consumers from intervening in the collective procedure, because they would have to pay court usage fees and hire a lawyer to represent their interests in the commercial court. In practice, consumers rarely intervene in the collective procedure, seeking compensation through individual pathways.¹¹⁴⁴ The second judicial alternative is to file an individual action at an ordinary court or at one of the small claims courts, the latter being a very popular alternative in Rio de Janeiro.¹¹⁴⁵ Additionally, if judicial orders to pay collective moral damages are more controversial and rare,¹¹⁴⁶ courts regularly order corporations to pay moral damages at individual consumer cases in Rio de

¹¹⁴³ Some authors defend the right to exit, but a rather restricted right to participation in the class actions, based on the premise that high transaction costs would create insurmountable challenges to case management. See Coffee, *Class action accountability* (n. 56) 406-28. Other authors defend the right to voice and broad political participation of class members. See Resnik, Curtis, and Hensler (n. 60) 391-6. This right to intervention is guaranteed in other Latin American countries, notably in Chile and commentators who are familiar with US class actions, but not so well versed in the Brazilian regime seem perplex and puzzle by this right. See Agustin Barroilhet, *Self-interested gatekeeping? Clashes between public and private enforcers in two Chilean class actions*, in Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economics, and politics shape collective litigation* (Edward Elgar) 373.

¹¹⁴⁴ Interviews L (RJ 14.08.14) and M (RJ 21.08.14).

¹¹⁴⁵ Interviews P (RJ 27.08.14) and C' (SP 19.09.14).

¹¹⁴⁶ See chapter 4.

Janeiro¹¹⁴⁷ - a practice observed in other Latin American countries as well.¹¹⁴⁸ In contrast to participation in a collective procedure at the commercial courts, consumers do not have to pay court usage fees, nor do they need legal representation at a small claims court.¹¹⁴⁹

The metaphor of paths to justice is clarifying, because procedural traffic resembles vehicular traffic. Even if pathways are designed, patterns of use are not entirely controlled and flux of vehicles varies according to the complexities of conduct of the crowds of individuals that use the system.¹¹⁵⁰ In the case of collective action, the normative architecture influences the legal environment, but outcomes are not entirely predictable and eventually are not achieved as originally planned. A collective action does not necessarily produce *lis pendens* on an individual action, suspending it automatically.¹¹⁵¹ If consumers seek individual compensation in parallel with collective actions, the law establishes a prerogative for defendants.¹¹⁵² In this case, defendants may notify the court of the existence of a collective action and force the individual plaintiff to choose whether to continue with the individual action or to be bound by the collective action.¹¹⁵³ If she opts for the collective action, the court will stay the individual

¹¹⁴⁷ Interviews P (RJ 27.08.14) and C' (SP 19.09.14).

¹¹⁴⁸ Gómez (n. 615) 505.

¹¹⁴⁹ Gómez (n. 617) 393.

¹¹⁵⁰ On the complexities and uncertainties emerging from vehicular traffic, see Ilya Prigogine and Robert Herman, *Kinetic theory of vehicular traffic* (Elsevier 1971) x-xi, 37-41 & 91.

¹¹⁵¹ Federico Campolieti and Ignacio J. Minorini Lima, Latin America, in Paul Karlsgodt (ed) *World Class Actions: A guide to group and representative actions around the globe* (OUP 2012) 120.

¹¹⁵² Prerogative means a legal power according to the typology developed by Hohfeld (n. 47) 30-2.

¹¹⁵³ CDC, article 104. Mazzilli (n. 470) 278-9.

action and wait for the final decision of the collective procedure.¹¹⁵⁴ Otherwise, she will be forced out of the collective action and benefit only from the individual action she pursues.¹¹⁵⁵

This regime does not fit within any of the existing conceptual variations of 'opt in' and 'opt out' regimes¹¹⁵⁶ and could be classified as a 'force out' regime. In the civil public action, individuals are not expected to express their intention to join a collective action to be able to benefit from the judicial decision and neither have the right to exclude their participation from the collective litigation to pursue an individual action. Without a right of entry or of exit, the civil public action establishes a regime that actually depends on a combination of moves by different players. For instance, a consumer may simply wait for the low court sentence before deciding whether to file an individual action or not. In this case, during this period of strategic observation, the company may not force her to choose between the collective or the individual pathway.

On the other hand, once she decides to file an individual action, the defendant still has to notify the court of the collective action and request the plaintiff to choose one pathway. If the defendant does not notify the court, the plaintiff does not have to make any choice and may benefit from the most favourable judicial decision in the end. Since the decisive move in this regime is not the decision of the plaintiff to choose, but rather the initiative of the defendant to force the defendant out of one or the other action, the terminology

¹¹⁵⁴ CDC, article 104. Mazzilli (n. 470) 279-81.

¹¹⁵⁵ Mazzilli (n. 470) 144-8.

¹¹⁵⁶ Mulheron (n. 289) 379-80.

'force out' captures the dynamics of this regime better than the dichotomy 'opt in'/'opt out' typically found in the literature.

In practical terms, anecdotal evidence suggests that individual consumers may normally file their individual actions and corporate defendants simply do not notify the small claims courts about the collective action, which means that they are not forced to choose between the collective or the individual pathway.¹¹⁵⁷ There is no comprehensive empirical research on why corporate defendants do not exercise this prerogative in small claims courts, but a few hypotheses may be considered. First, corporate defendants may have two different law firms working in the different court systems - on one side, a highly funded legal team from a boutique law firm with expertise in collective actions and extensive experience with commercial courts; on the other side, an underfunded group of junior lawyers from a large law firm specialised in the legal retail of small claims courts that are sometimes not aware of the existence of the collective action. Therefore, one possibility is that there is a stark division between the legal teams responsible for collective actions and small claims courts, which leads to a failure of communication between senior commercial attorneys and various junior generalist lawyers.

A different possibility is that this communication about the existence of a collective action would not be an adequate legal strategy for the corporation. After all, informing the small claims court about the existence of a collective action sends a signal about the collective dimension of the corporate wrongdoing, indicating that the particular conduct transcended the individual

¹¹⁵⁷ Interviews P (RJ 27.08.14) and C' (SP 19.09.14).

case and is subjected to a collective judgment at the commercial courts. Strategically, the corporation may consider more adequate to conceal this information from the small claims courts rather than making a formal communication.

Moreover, if the consumer already decided to file an individual case, she will probably not decide for the collective pathway. Therefore, the corporate defendant may consider the exercise of this prerogative to produce little practical consequence, only precluding the consumer to benefit from the collective action in case of a more favorable judgment in the commercial court than in the small claims courts. This practical possibility seems remote, because courts regularly impose moral damages in individual actions and rarely in the collective procedures.¹¹⁵⁸ Future empirical research should investigate these hypotheses and reveal why the corporations rarely force consumers out of the collective actions in the individual procedures.

In any event, independent of the practical reasons, this architecture leads to a procedural bifurcation and to an interesting setting in which consumers protect their individual rights in the small claims courts and the collective actors protect their collective rights in the commercial courts. This bifurcation of pathways has important consequences, which are examined in the next section. Before examining the legal paths, I discuss how this architecture solves the problems of free riders and kidnapped riders in the following subsection.

6.3.1 Problems of representation: free riders and kidnapped riders.

¹¹⁵⁸ See chapter 4.

This architecture of collective action solves the coordination problems of free riders.¹¹⁵⁹ Traditionally, this problem is posed as the personal sacrifice of a handful of individuals that take the initiative on behalf of the collective. Other group members do not support the efforts of these individuals and simply free ride, by not contributing to the pursuit of their common collective goals. This may be a serious problem for societal organisations and the advancement of the common good. According to Olson, this may be particularly problematic because small groups of individuals with special interests organise themselves more efficiently than several individuals with general interests.¹¹⁶⁰

However, free riding is not a problem for the Brazilian civil public action system, because of the existence of intermediate bodies responsible for the protection of consumer interests, avoiding the unequal distribution of costs among the beneficiaries of the collective action. On the other hand, enforcement agents face the challenge of adequately representing every consumer, because sometimes the whole group does not entirely share these collective interests. This circumstance leads to the coordination problem of the kidnapped rider.¹¹⁶¹ An agent may eventually make a claim on behalf of an entire group of people, but this action may be detrimental to some of the group members. Certain cases are simply divisive and protecting the general interests of consumers inevitably affects a minority of individuals who perceive themselves to be unrepresented by the collective action.

¹¹⁵⁹ Olson (n. 42), 77-87.

¹¹⁶⁰ Olson (n. 42), 128.

¹¹⁶¹ Yeazell (n. 34) 43.

Kidnapped rider cases are rare, but they may exist in two different ways. First, a consumer may disagree with the collective actor regarding the interpretation of a consumer norm. This is the case when the collective actor pursues a judicial action to oblige a corporation to adopt a certain practice or a rule that a consumer considers detrimental to her own individual interests. Hypothetically, this could be the case of a consumer who disapproves an emergency plan to prevent explosions of underground chambers, because she lives far away from downtown and Copacabana, faces a lower risk of suffering the consequences of these explosions, and does not want to pay higher electricity bills due to these unforeseen expenses. If this consumer opposes the strategy adopted by the AGO and would like to oppose their orientation towards regulatory enforcement and the protection of diffuse rights, the architecture of civil public action guarantees the right to intervene in the collective action. An individual consumer is entitled to participate at the collective action and oppose the terms of the regulatory enforcement proposed by a collective actor. This is one architectural solution for the problem of the kidnapped rider.

A second possibility is disagreement regarding compensation. This is the case when the collective actor pursues a judicial action with requests for compensatory damages on behalf of the harmed consumers. Hypothetically, this would be the case of a victim of an explosion who disagrees with the requests for compensation, because they do not include payment for loss of opportunities, interruption of professional activities, and moral damages, for instance. If this consumer opposes the strategy adopted by the AGO and would like to seek higher compensatory damages, the architecture of collective action guarantees the right to pursue individual compensation in ordinary courts or small claims

courts. An individual consumer is entitled to ignore the collective procedure and pursue the individual pathway. The next section explains these different pathways to justice.

6.4 Pathways to justice: collective and individual vehicles

6.4.1 Pathways to justice as an explanatory metaphor.

This bifurcation of pathways leads to a particular setting, in which collective actors pursue their litigation on a commercial court and consumers pursue their personal claims through individual actions in the small claims courts. Benefitting from the metaphor of the paths of justice and the analogy between procedural traffic and vehicular traffic, this setting may be characterised by the image of an empty collective vehicle and various potential passengers travelling at individual vehicles. Some consumers are travelling by the conventional track of ordinary courts - similar to individuals driving their cars. However, the majority of individuals choose the cheaper and speedy individual track of small claims courts, some represented by lawyers and others without any legal assistance - some in motorcycles and other in bicycles, following our analogy with traffic. Therefore, this legal architecture leads to an environment, in which buses circulate empty, some individuals drive their own cars, and many motorcycles and bicycles occupy the pathways.

This metaphor is useful also to reflect on class actions and collective redress. In the US, there are several collective actions in which very few

consumers exercise their right to opt out.¹¹⁶² In these cases in which almost all individuals remain in the collective vehicle, the traffic is characterised by large collective vehicles with full occupation and very few automobiles are observed in the judicial pathways. In some mass tort cases, a larger number of class members decide to exit the collective action, because individual characteristics of their case may provide higher compensation through individual compensation.¹¹⁶³ In these particular cases, the bus travels with a relative occupation, but a number of empty places. Additionally, a larger number of automobiles in the pathways may lead to procedural traffic jams and the necessity of special techniques for traffic control - like other forms of aggregation, such as multidistrict litigation, class certification for settlement, establishment of special compensation schemes, and appointment of special masters.¹¹⁶⁴

In the case of collective redress, this metaphor provides a contrasting image. There are no collective vehicles on the pathways. Because of the lack of fuel or permission to circulate, all buses are parked in the garage.¹¹⁶⁵ In most pathways, there are only some automobiles and motorcycles, but many individuals are outside the judicial pathways. They are pedestrians, walking by the sidewalk of ADR and ODR, simply because the costs of the judicial pathway rendered this alternative economically prohibitive for them.¹¹⁶⁶ However, while

¹¹⁶² Hensler and others (n. 56) 476-7.

¹¹⁶³ Hensler and others (n.56) 483-4.

¹¹⁶⁴ On the role of special master, see Kenneth Feinberg, *What is life worth? The unprecedented effort to compensate the victims of 9/11* (Public Affairs 2005) Ch 3.

¹¹⁶⁵ On the problem of economic viability for collective actions, see Cameron, Kalajdzic, and Klement (n. 164) 141-51.

this is the general picture, some pathways have a different composition. In Frankfurt, dozens of thousands of automobiles are stucked in the middle of a long procedural traffic jam.¹¹⁶⁷ In London and Paris, pedestrians are wondering if the new architecture of collective action will facilitate the circulation of collective vehicles, but there is no one in the bus stops yet. Only one collective vehicle circulated in the last ten years in both capitals and they were almost entirely empty.¹¹⁶⁸ In contrast to their cultural experience with vehicular traffic, the US encourages collective vehicles and the EU favours individual vehicles in their procedural pathways.

6.4.2 The collective vehicle and regulatory enforcement

Particularly in the Brazilian experience, the collective vehicle may lead to the particular direction of regulatory enforcement.¹¹⁶⁹ Collective actors are more focused on the rules of the game or on a particular corporate practice rather than on the full compensation of individual consumers,¹¹⁷⁰ except for the CODECON.¹¹⁷¹ Even if their mandate includes also the possibility of requesting compensatory damages for individual consumers, depending on the particular

¹¹⁶⁶ Hazel Genn, What is civil justice for? Reform, ADR, and access to justice, *Yale Journal of Law & the Humanities*, vol. 24 (2012) 405. Cranston attributes the preference for ADR in the UK to lack of fees and other conditions of access. See Ross Cranston, *How law works: the machinery and impact of civil justice* (OUP 2006) 73.

¹¹⁶⁷ Halfmeier (n. 327) 282-4.

¹¹⁶⁸ Hodges (n. 36) 24-6.

¹¹⁶⁹ Many commentators also point to the regulatory impact of class actions in the US. See Hensler and others (n. 56) 492.

¹¹⁷⁰ Interviews L (RJ 14.08.14) and Z (SP 16.09.14).

¹¹⁷¹ Interview S (RJ 09.09.14).

characteristics of the case, their priority may be standard setting, implementation of the CDC, and the transformation of the normative landscape on behalf of future B2C experiences.

Several examples reveal a predominant focus on regulatory enforcement. Consider the case of explosions on underground chambers. The AGO settled for the comprehensive reform of the underground chambers and for the establishment of an accident prevention security apparatus, but left individual compensation for the consumers themselves.¹¹⁷² A similar profile is seen in the case of circulation of urban trains with open doors.¹¹⁷³ This was also the case with the coalition of collective actors to guarantee the inclusion of adopted children as dependents of their adoptive parents in private health insurance plans without any quarantine.¹¹⁷⁴ The settlement incorporated a rule into the health insurance policy without the request to pay compensatory damages for previously unprotected adopted children. Likewise, it was more important to change the rule of the game in the case relating to contractual clauses authorising limited performance of telecoms in the provision of cell phone services.¹¹⁷⁵ Identically, the focus on standard setting was central in the case of price display in supermarkets and of composition of whole wheat bread.¹¹⁷⁶

These cases have particular characteristics that may explain the priority on the rules of the game rather than on individual compensation. First, these are

¹¹⁷² *AGO v. Light and CEG* (0101795-61.2011.8.19.0001, 4th Commercial Court).

¹¹⁷³ Interview J (RJ, 30.04.14) and L (RJ 14.08.14).

¹¹⁷⁴ Interview J (RJ, 30.04.14) and V (RJ 11.09.14).

¹¹⁷⁵ Interview M (RJ 21.08.14).

¹¹⁷⁶ Interview L (RJ 14.08.14).

cases in which the CDC established standards for legal interpretation instead of clear rules to regulate corporate behavior. There is a general duty to care about the consumer and to prevent consumer accidents, but no clear protocol on the security of underground chambers or a clear prohibition for circulation of a train with a broken door. Likewise, the abusiveness of the clause of limitation of performance also required interpretation by the CDC, because no rule clearly prohibits this contractual norm, even if it seems clear that a corporation cannot guarantee only 10% of contractual performance and expect to receive full payment.¹¹⁷⁷ The right to information also provides a general duty to inform the consumer, but there is no clear rule imposing the display of practices per units of volume or the percentage of natural flour in whole wheat bread.¹¹⁷⁸

Moreover, the situation of adopted children seemed to be inside a regulatory loophole, because their status as a dependent within the health insurance originated from the adoption and it was not clear whether they should be protected automatically as the natural born children or with a quarantine - like other relatives who are eventually incorporated into a health insurance plan as dependents. In the absence of clear rules, enforcement agents often fear that courts may develop a conservative interpretation of statutes, which is less protective of consumers than their original evaluation.¹¹⁷⁹ Particularly in cases of open standards, the exercise of discretion may lead to decisions that are

¹¹⁷⁷ Scott (n. 1028) 542-3.

¹¹⁷⁸ Interview L (RJ 14.08.14).

¹¹⁷⁹ Galligan (n. 161) 306.

detrimental to consumer interests.¹¹⁸⁰ Therefore, enforcement agents may prioritise the consolidation of rules rather than compensation to secure the protection of consumer rights towards the future, even if the trade-off may be the exclusion of compensatory damages from these collective settlements.¹¹⁸¹

Another important characteristic of these cases is that the value of potential compensation is either minimum or large. Consider the case concerning underground explosions. There is one group of serious victims with severe damages to their personal health or property, such as the hospitalised American tourist and the cab driver whose taxi was destroyed. These few victims have the necessary economic incentives to pursue individual compensation in ordinary courts. On the other hand, the other group of potential victims would include the entire population of Rio de Janeiro, who certainly felt unsafe with the risk of becoming a victim of an explosion during the peak of the crisis in 2011 - but had really no credible claim for monetary compensation even in small claims courts. The circulation of unsafe trains would also have two distinctive groups of victims - passengers who fell from the train, getting injured or even dying; and passengers who merely felt unsafe. Likewise, the lack of protection of adopted children also had potential for large or no compensation. On one hand, denial of treatment could lead to serious health damage and subsequently to a claim for individual compensation of a large amount. On the other hand, if there were no denial of treatment to an adopted child, the mere risk of a lack of protection would hardly provide sufficient grounds for payment of compensatory damages. Likewise, ignorance about the price per unit of a product in the supermarket or

¹¹⁸⁰ On the problem of discretion due to little normative guidance, see Galligan (n. 161) 326.

¹¹⁸¹ Interviews L (RJ 14.08.14) and A' (SP 18.09.14).

the amount of natural flour in whole wheat bread would not lead to any significant consumer compensation in individual cases.

Lastly, some examples of judicial intervention involve a direct intervention in the market, by establishing a clear prohibition against a corporation. These cases are different from the ones examined above, because they set the standards by ordering that the company interrupts a particular activity. For instance, a judicial decision determined immediate transportation provision, because the bus company failed to perform its services in a satisfactory way. In the end, the company lost its public concession to explore the bus line, being substituted by other transportation company and the court closed the case after the discontinuation of the provision of regulated services.¹¹⁸² In some cases, the prohibition was imposed by regulatory agencies, such as the prohibition of new contracts for use of smart phones with third-generation wireless technology (3G) before improvement of technological infrastructure.¹¹⁸³ However, there were also other cases of judicial prohibition of new contracts, such as the order to interrupt e-commerce until product delivery was entirely regularised.¹¹⁸⁴ Because this case involved also compensatory damages, the next section discusses it.

6.4.3 The collective vehicle and compensatory damages.

¹¹⁸² *AGO v. Transportes Zona Oeste Ltd* (2007.001.042143-1, 7th Commercial court of Rio de Janeiro);

¹¹⁸³ veja.abril.com.br/economia/anatel-vai-suspender-venda-de-linhas-da-oi-tim-e-claro/ (checked on 15.01.17).

¹¹⁸⁴ (n. 592).

Collective action may also be an efficient vehicle for payment of compensatory damages. Depending on the characteristics of the particular case, collective actors may prefer to prioritise compensation. Sometimes a case may be so extraordinary that regulatory enforcement may be performed by criminal law enforcement or may simply be elusive. For instance, the abusive restriction of interest rates and retention of private funds as a consequence of the heterodox 'Collor Plan' is such an extraordinary event, that there is no point in setting a standard.¹¹⁸⁵ In historical perspective, the possibility of implementation of an analogous economic plan again by the Brazilian government is remote, justifying the preference of IDEC for compensation over the consolidation of a rule towards the future.¹¹⁸⁶ A different example comes from the case of the fall of the building Palace II.¹¹⁸⁷ Because such a case involves professional negligence and criminal liability, the regulatory function of the law may be reserved to the criminal justice system and the collective action may be reserved for compensatory damages.¹¹⁸⁸

In extreme contrast to extraordinary cases, some cases are extremely ordinary, because there is a clearly acceptable and working rule without need to prioritise regulatory enforcement over compensation.¹¹⁸⁹ Moreover, the firm pursuit of compensatory damages and the imposition of an obligation to compensate victims may actually strengthen the regulatory enforcement of

¹¹⁸⁵ (n. 989).

¹¹⁸⁶ Interview R (RJ 02.09.14).

¹¹⁸⁷ Interview O (RJ 26.08.14).

¹¹⁸⁸ Nicola Lacey, *Criminalisation as regulation: the role of criminal law*, in Christine Parker and others (eds), *Regulating law* (OUP 2004) 144; Robert Baldwin, *The New Punitive Regulation*, *The modern law review*, vol. 67 (2004) 351.

¹¹⁸⁹ Importantly, these clear rules depend on their social context. See Galligan (n.161) 60.

consumer laws.¹¹⁹⁰ Several cases reveal a focus on compensation as a means of reaffirming the force of the law. Consider, for instance, the sudden expansion of e-commerce in Brazil and the crisis of product delivery during the Christmas holidays in 2010.¹¹⁹¹ The rules of the game were absolutely clear, because the deadline for product delivery consisted of an objective date fixed in the electronic contract established by the consumer and the corporation.¹¹⁹²

Likewise, one case involved the nullification of all fines imposed by the city of Rio de Janeiro for traffic violation because fined drivers were not properly notified according to the rules established by the NCT.¹¹⁹³ Because the case did not involve open standards of procedural due process, but rather application of clearly defined rules, the AGO pursued the nullification of all fines and reimbursement of money to those who had already paid for the fines.¹¹⁹⁴ However, the court ordered the nullification of all fines, but not the reimbursement of the money in a somewhat contradictory way.¹¹⁹⁵ In São Paulo, there was an analogous case and the court also nullified the charge of an abusive fee, but did not order the reimbursement of the money illegally charged - arguably the logical consequence of considering a fine, fee, or tariff to be illegal.¹¹⁹⁶ These cases may reveal that courts are more progressive in evaluating

¹¹⁹⁰ Hensler and others (n. 56) 486.

¹¹⁹¹ Interviews L (RJ 14.08.14), M (RJ 21.08.14), and O (RJ 26.08.14).

¹¹⁹² CDC, article 39, XII.

¹¹⁹³ Interview O (RJ 26.08.14). noticias.terra.com.br/brasil/transito/moticias/0,,OI780190-EI998,00-Justica+suspende+multas+emitidas+no+Rio.html (checked on 15.01.17).

¹¹⁹⁴ Interview O (RJ 26.08.14).

¹¹⁹⁵ Interview O (RJ 26.08.14).

¹¹⁹⁶ Interview A' (SP 18.09.14).

the legality of certain commercial practices than in implementing the practical consequences of this judgment.¹¹⁹⁷

Other clear cases involved charging abusive fees in violation of legal rules or regulatory norms established by a regulatory agency. For instance, in cases involving charging illegal fees by a bank or by a telecom company, the focus on compensation may also be important as a means of reaffirming regulatory enforcement. Particularly important in these cases is the use of the longterm relationship between the corporations and their clients to impose the reimbursement of the amount illegally charged as a credit for the consumer without any need for proactive action by the consumer.¹¹⁹⁸ In many cases of small claims values, corporations benefit because of the rational apathy of consumers who simply do not follow a case, nor take any measures to guarantee their compensation.¹¹⁹⁹ Therefore, especially in the case of banks and telecoms which have relational contracts of long duration with customers, courts must determine the devolution of the amount illegally charged directly into their accounts as a consumer credit.¹²⁰⁰

6.4.4 Individual intervention in the collective procedure

¹¹⁹⁷ Interview O (RJ 26.08.14) and A' (SP 18.09.14).

¹¹⁹⁸ Fitzpatrick and Gilbert (n. 788) 769-72

¹¹⁹⁹ Tzankova and Hensler (n. 205) 102.

¹²⁰⁰ Fitzpatrick and Gilbert (n. 788) 769-72.

In theory, the civil public action authorises the intervention of individual consumers in the collective procedure.¹²⁰¹ According to some commentators, the law protects participation, because harmed victims cannot be prevented from joining the collective action relating to the wrongdoing they suffered.¹²⁰² Other commentators are concerned that the presence of a multitude of individual consumers in a joint-action would lead to a multiplicity of participants and render the management of the collective action inviable due to multiple simultaneous party requests.¹²⁰³ On one hand, there is the defence of the right to voice concerns and to be heard.¹²⁰⁴ On the other hand, there is a concern with the growing transaction costs related to the increasing participation of individuals in the collective action.¹²⁰⁵

This is not an exclusive feature of the Brazilian architecture. In his study of Chilean civil public actions, Barroilhet describes a case in which thousands of consumers exercised the right to intervene, by presenting themselves as victims of the corporate defendant La Polar and joining a collective action.¹²⁰⁶ The description of the case reveals that this collective intervention was more a strategy of an attorney for persuading the court to nominate him leading counsel instead of the Chilean National Service for Consumer Protection (SENARC) and

¹²⁰¹ CDC, article 94.

¹²⁰² Mazzilli (n. 470) 404-5.

¹²⁰³ Cândido Rangel Dinamarco, *Litisconsórcio* (8th edn, Malheiros 2009) 396-405.

¹²⁰⁴ Resnik, Curtis, Hensler (n. 60) 331.

¹²⁰⁵ Coffee Class action accountability (n. 56) 406-28.

¹²⁰⁶ *SERNAC v. La Polar* (C-12105-2011, 1st Civil Court of Santiago, 10.12.2012); Barroilhet (n. 1143) 373.

less a demonstration of political interest in participating of the decision-making process.¹²⁰⁷ Nonetheless, the rationale for this rule is the protection of the right to voice (or to be heard) and democratic participation in the collective action. In the Brazilian experience though, individuals almost never intervene in collective actions.¹²⁰⁸ The reasons are court usage fees and the need to hire a lawyer to intervene in the collective action.¹²⁰⁹ In practice, consumers protect their interests in small claims courts or through ADR/ODR as explained in the following subsections.

6.4.5 The individual vehicle for a small claim

The Brazilian legal architecture established small claims courts in 1984 for promotion of access to justice through informal, speedy, free, and accessible judicial procedures.¹²¹⁰ Historically, these courts may be traced back to the establishment of a small debt court in London in 1606, but the small claims courts movement flourished in the 20th century.¹²¹¹ These courts are normally characterised by simplified procedures, low cost, the opportunity to litigate without a lawyer, and limited rights to appeal.¹²¹²

¹²⁰⁷ Barroilhet (n. 1143) 374.

¹²⁰⁸ Interview L (RJ 14.08.14) and M (RJ 21.08.14).

¹²⁰⁹ Interview A' (SP 18.09.14).

¹²¹⁰ Leslie Sherida Ferraz, Access to justice and small claims courts: empirical research and statistical analysis in nine Brazilian states, paper presented at the 5th annual conference on Empirical Legal Studies (2010) 1.

¹²¹¹ John Montague Steadman and Richard Rosenstein, "Small claims" consumer plaintiffs in the Philadelphia municipal court: an empirical study, *University of Pennsylvania Law Review*, vol. 121 (1973) 1309.

In the Brazilian small claims courts, the legal architecture establishes a session of mandatory mediation before any trial, encouraging settlement between parties.¹²¹³ Empirical research in the US suggests that mediation in small claims courts increases the achievement of compliance through consent.¹²¹⁴ However, mediation may depend on characteristics of dispute and disputants, with a bilateral disposition for settlement increasing the possibility of success.¹²¹⁵ In Canada, mediation also leads to higher rates of compliance, but particularly also in cases in which both parties were willing to compromise - a finding analogous to research conducted in the US.¹²¹⁶

Empirical research conducted in Brazilian small claims courts reveal a rate of settlement close to one-third of all cases.¹²¹⁷ Mediation also depends on characteristics of disputes and disputants, because corporate defendants in consumer disputes reject mediated solution in higher rates than the average litigant in small claims courts.¹²¹⁸ Ferraz suggests that corporate defendants benefit from delayed justice and that long duration of procedures bring financial advantages for corporate defendants because they retain resources from

¹²¹² William O'Barr and John Conley, Litigant satisfaction versus legal adequacy in small claims courts narratives, *Law & Society Review*, vol. 19 (1985) 661.

¹²¹³ Ferraz (n. 1210) 4.

¹²¹⁴ Craig McEwen and Richard Maiman, Mediation in small claims courts: achieving compliance through consent, *Law & Society Review*, vol. 18 (1984) 45-7.

¹²¹⁵ Roselle L. Wissler, Mediation and adjudication in the small claims courts: the effects of process and case characteristics, *Law & Society Review*, vol. 29 (1995) 352.

¹²¹⁶ Neil Vidmar, The small claims courts: a reconceptualisation of disputes and an empirical investigation, *Law & Society Review*, vol. 18 (1984) 545-9.

¹²¹⁷ Ferraz (n. 1210) 8.

¹²¹⁸ Ferraz (n. 1210) 11-5.

consumers and postpone payment as much as possible.¹²¹⁹ Additionally, refusing to mediate may be a corporate strategy to prevent the establishment of any negative precedents that could stimulate the filing of similar lawsuits against a corporate defendant.¹²²⁰ Moreover, a large number of individual consumer suits may hide a typical case of collective action for consumer protection.¹²²¹

Ferraz refers to the example of a claim against a telecom company that resulted in approximately 130,000 identical individual cases in the small claims courts of São Paulo.¹²²² Referring to these cases, some commentators suggest that they are essentially collective and that consumers should be prohibited from litigating them in the small claims courts because of their regulatory impact in cases without the participation of a regulatory agency.¹²²³ Others suggest that the prohibition on litigation would be an unconstitutional violation of access to justice, but recommend that all individual cases in small claims courts be stayed until the judicial decision made through the collective action.¹²²⁴

Conceptually, these proposals ignore the fact that a collective action exists not only as an entity, but also as a collectivisation of individual interests¹²²⁵ - which deserve legal protection too. There is simply no theoretical reason to

¹²¹⁹ Ferraz (n. 1210) 15.

¹²²⁰ Ferraz (n. 1210) 15-6. Big tobacco companies adopted this litigation strategy in Brazilian courts, simply rejecting any possibility of settlement and deciding to litigate all cases against them. See Gómez (n. 5) 60-2.

¹²²¹ Ferraz (n. 1210) 15-9.

¹²²² Ferraz (n. 1210) 17.

¹²²³ Kazuo Watanabe, 'Relação entre demanda coletiva e demandas individuais', in Ada Pellegrini Grinover and others (eds), *Processo Coletivo: do surgimento à atualidade* (RT 2014) 235-6.

¹²²⁴ Didier Jr and Zaneti Jr (n. 69) 95-6.

¹²²⁵ See Lahav (n. 219) 1939; Coffee, Class action accountability (n. 56) 406-28.

privilege the vision of the collective action as an entity, establishing a rule of mandatory collective action that eliminates individual litigation.¹²²⁶ The argument regarding regulatory impact is a false one, because this is a typical effect of collective actions, even if the regulatory agencies are not parties in most of these judicial procedures.¹²²⁷ It suggests an excessive degree of judicial deference to administrative authority, which was rejected by the interviewed enforcement agents.¹²²⁸

Additionally, both suggestions are detrimental for consumers and beneficial for corporate defendants. The prohibition of this parallel litigation of multiple cases in small claims courts would simply lead to no monetary compensation for consumers, because collective actions almost never result in the payment of damages to individuals. Likewise, the suspension of this parallel litigation would harm consumers, because corporate defendants may simply procrastinate the collective litigation by filing repeated appeals to the higher court, the STJ, and the STF. If there is a judicial decision staying all individual cases until the judgment of the collective action, the outcome may be equivalent to the eternal litigation observed in the *Deutsche Telekom* case¹²²⁹ - a prodigious example of judicial failure offered by comparative law.

In contrast to the failure of the German collective action, multidistrict litigation in the US provides examples of successful judicial management. Instead of prohibiting or suspending these multiple individual cases, the tribunal could

¹²²⁶ For a defence of the mandatory collective action, see Rosenberg (n. 327) 831.

¹²²⁷ On the regulatory impact of collective actions, see Hensler and others (n. 56) 486.

¹²²⁸ Interview L (RJ 14.08.14), M (RJ 21.08.14), O (RJ 26.08.14), S (RJ 09.09.14), V (RJ 11.09.14), Z (SP 16.09.14), and A' (SP 18.09.14).

¹²²⁹ Halfmeier (n. 327) 279.

select one small claim court to concentrate all similar individual cases, so that these claims may be mediated, settled, or adjudicated through a coordinated and homogeneous judicial treatment.¹²³⁰

6.4.6 The individual vehicle of a complaint

In addition to the judicial pathway, there are currently out-of-court dispute resolution pathways inspired by the experience of Nordic countries with the ombudsman.¹²³¹ Historically, this concept indicates the existence of an intermediate body or a 'middle-man' with the particular role of mediating disputes between citizens and governmental institutions.¹²³² With the rise of consumerism and consumer law in the 1960s, non-court ADR mechanisms appeared to intermediate in disputes between consumers and corporations.¹²³³ In Brazil the PROCONs were initially implemented in the 1980s, appearing as an important intermediate body for consumer protection.

Because the civil public action is not an effective means for recovery of monetary losses caused by a collective wrongdoing, consumers are encouraged to file their own individual suit at a small claims court, to file a complaint at the PROCON or to communicate the problem at 'Complain Here' – a large private platform for ODR. Therefore, consumers have different pathways for protection of their interests.

¹²³⁰ Jack Weinstein, Federal trial judges: dealing with the real world, *University of Miami Law Review*, vol. 69 (2015) 356-63.

¹²³¹ Creutzfeldt (n. 356) 226.

¹²³² Creutzfeldt (n. 356) 226.

¹²³³ Creutzfeldt (n. 356) 227.

6.4.6.1 *The Bureau for Consumer Protection (PROCON)*

Individual consumers often find out-of-court ADR as an alternative to small claims courts.¹²³⁴ The organisations responsible for the intermediation of consumer disputes are expected to be independent, responsive, transparent, and efficient in dealing with and processing individual complaints.¹²³⁵ Particularly in the UK, there are serious concerns regarding the independence of these out-of-court ADR mechanisms because these intermediate bodies are perceived as lacking accountability, secretive and opaque, unqualified, and violating expectations relating to standards of due process.¹²³⁶ Creutzfeldt and Gill suggest that these critiques reveal a misunderstanding of the role of the ombudsman organisations,¹²³⁷ but there is reason to suppose that critics are right because their critiques are stronger against public ombudsmen - which are arguably less independent, responsive, and transparent than the private ombudsmen in the UK.¹²³⁸

In the Brazilian experience, the intermediate bodies are also shaped by their particular architectural design. The PROCONs in São Paulo and Rio de Janeiro have a different institutional design, organisational structure, and

¹²³⁴ Creutzfeldt (n. 356) 231.

¹²³⁵ Christopher Hodges, Iris Benöhr, and Naomi Creutzfeldt-Banda, *Consumer-to-business dispute resolution: the power of CADR* (2012) 209.

¹²³⁶ Naomi Creutzfeldt and Chris Gill, *Critics of the Ombudsman system: understanding and engaging online citizens*, Policy brief (CSLS 2015) 4-5.

¹²³⁷ Creutzfeldt and Gill (n. 1236) 14.

¹²³⁸ Creutzfeldt (n. 912) 45-6. Not surprisingly people place much more trust in ombudsman for financial services, with 300 ombudsmen and capacity to impose mandatory fines of up to 150,000 pounds sterling, than understaffed, underfunded, and inefficient public ombudsmen which lack the proper capacity to solve consumer issues and compensate their individual damages.

capacity to protect consumer rights. For instance, in São Paulo the PROCON is constituted as an independent foundation with the largest staff of any consumer protection organisation in the country, independent budget, and legal authority to impose substantial fines on corporations.¹²³⁹ In contrast, in Rio de Janeiro PROCON is a governmental organ directly related to a politician, with limited staff and budget, and restrictions on its ability to impose economic sanctions on corporations.¹²⁴⁰ Not surprisingly consumers in Rio de Janeiro seek individual

¹²³⁹ Interviews P (RJ 27.08.14) and C' (SP 19.09.14). In São Paulo, consumers generally approach PROCON rather than bringing their cases directly to a court. In Rio de Janeiro, individuals normally prefer to file their suits at the small claims courts. Interestingly, the reasons for these preferences are to be found in the normative architecture and how structural factors influence the conduct of consumers who are induced to seek a specific legal pathway because of a context-based regime of incentives and sanctions. Individuals protect their consumer rights by different means, even if their situation is regulated by the same federal rules of civil procedure and consumer law. PROCON was established as an independent foundation in São Paulo. It has the largest workforce and budget of any consumer agency in Brazil, being known as a serious and pro-active organisation. Their platform for mediation and alternative dispute resolution is speedy, efficient, and responsive to consumer demands. Moreover, PROCON regularly imposes steep administrative fines on corporations for their collective wrongdoing. Therefore, not only do companies respect their general recommendations and guidelines, but they also participate in the mediation process with responsibility and a willingness to solve the conflicts without the necessity of resorting to further judicial or administrative sanctioning.

¹²⁴⁰ Interview U (RJ 11.09.14). In Rio de Janeiro, PROCON is not an independent foundation, but rather an organisation of the executive branch. Consumers have low trust in PROCON and it has not enjoyed a good reputation to date. It is perceived as being inefficient in processing and mediating individual complaints. It is also viewed as being lenient with corporations that are not very responsive in the mediation processes conducted by PROCON in Rio de Janeiro. Consequently, frequent participants of the consumer protection network – repeat players, according to game theory terminology – do not consider it to be an effective arena in which to resolve consumer grievances, and seek other venues. In Minas Gerais, the AGO also performs the functions of PROCON. Therefore, public prosecutors may file collective action suits against companies, impose administrative measures, and also establish a platform for ADR. For instance, in 2010, a public prosecutor decided to prohibit the purchase of all Toyota Corolla vehicles in Minas Gerais, because this model was subject to a global recall – and the prosecutor considered that the Brazilian factory was less thorough than Toyota factories in other countries. Interestingly, Toyota Corolla sales were immediately suspended according to an administrative decision made by the AGO, which was self-enforced, independently of the judiciary. On the other hand, the AGO has a very limited structure for exercising the role of mediator, which is a typical function of PROCON. In this sense, consumers in the state of Minas Gerais have fewer legal pathways for solving their individual consumer issues. Interviewed prosecutors were divided about this normative architecture of the AGO and PROCON in Minas Gerais. Some prosecutors welcomed the fact that the AGO had immediate administrative power to halt corporate misconduct. Legal enforcers are normally restricted in their capacity for legal implementation and enforcement because they depend on courts – whose responses to their demands may not be as severe and immediate as they anticipated. On the other hand, other public prosecutors disapprove of this institutional design due to the concentration of administrative measures and

redress preferably through small claims courts rather than through the PROCONs.¹²⁴¹ Therefore, an independent PROCON like the one in São Paulo provides the adequate venue for out-of-court disputes, performing its institutional functions, maintaining a broad repertoire of measures and remedies for consumer protection in parallel with other institutional actors, and complementing the regulatory space.¹²⁴²

6.4.6.2 *'Complain Here' as the private ODR*

When interviewed, the former head of PROCON said that the website 'Complain Here' occupied institutional space as a speedy and effective platform for consumer mediation. One important reason is that the website offers automatic electronic customer service, which is extremely successful. PROCON should establish a platform for ODR as a complement to its ADR services. Additionally, Brazilian corporations are deemed to outsource their customer services to these external services such as 'Complain Here', PROCON, and small claims courts. The Brazilian Ministry of Justice even enacted a federal decree,

judicial initiative at the AGO. Actually, this critique is based on the fact that corporations are still able to seek judicial remedies against administrative measures taken by prosecutors in Minas Gerais. For instance, Toyota litigated against the AGO's administrative decision and consequently the legal pathway of a civil public action was closed.

¹²⁴¹ Interview P (RJ 27.08.14), U (RJ 11.09.14), and C' (SP 19.09.14). In Rio de Janeiro the small claims courts have a very robust structure for providing speedy trials and higher economic rewards to victims of corporate misconduct. In addition to compensation for material damages, judges normally also award compensation for individual moral damages. However, in São Paulo, small claims courts are not speedy, or efficient in dealing with the many consumer complaints; a plaintiff may have to wait more than one year for her judicial hearing. Moreover, as one interviewee explained, judges are perceived to award lower economic rewards to plaintiffs, reducing the incentives for consumers to seek redress in the small claims courts of São Paulo. In these different institutional contexts, individual consumers in São Paulo tend to seek redress via PROCON, whereas consumers will prioritise the small claims courts in Rio de Janeiro.

¹²⁴² Interview L (RJ 14.08.14), P (RJ 27.08.14), U (RJ 11.09.14), and C' (SP 19.09.14).

imposing rules for an efficient customer service. However, companies did not make sufficient investments in their customer service systems. The huge number of cases of consumer complaints in courts, ADR, and ODR indicate the collapse of corporations' internal systems for customer service.¹²⁴³

Therefore, an interesting alternative venue where consumers can deal with their individual problems is the website 'Complain Here', which receives thousands of daily complaints and notifies the offending companies directly, requesting them to respond and solve the consumers' problems. In interviews, enforcement agents revealed that they look for data on this website to check if a problem is affecting a large group of consumers or if it is an isolated issue. Interestingly, the meaning of collective wrongdoing may be socially constituted by the cascading effects of a network of consumers, whose complaints are diffused through the website 'Complain Here'.¹²⁴⁴ The collective dimension is demonstrated when they find a large number of similar cases on this private website. However, isolated complaints may also be deemed collective, for instance, when they involve an abusive clause in an adhesion contract that, by definition, will affect future consumers as well.

6.4.6.3 Reasons for choosing the individual vehicle

The normative architecture of collective action shapes the socio-legal environment and induces consumers to seek redress through different individual routes. A few important factors explain the lack of effective

¹²⁴³ Interview C' (SP 19.09.14). Customer Service Decree 2010.

¹²⁴⁴ Easley and Kleinberg (n. 95) 497-9.

compensation for consumers through collective actions. First, there is a very important economic reason. Participating in a civil public action is not free and individual consumers must pay court fees to enable themselves to join the collective suit in order to benefit from the potentially favourable decision. On the other hand, filing a suit in the small claims courts and filing a complaint with PROCON is generally free.¹²⁴⁵ Therefore, consumers have clear economic incentives to pursue an individual pathway instead of a collective action.

Second, consumer choices are affected by the long duration of civil public action suits, which may last several years. In contrast to individual suits in the small claims courts, a collective suit comprises complex issues, higher economic and political stakes, and requires a longer time before a final judicial decision is reached. From the perspective of the individual consumer, pursuing the individual pathway makes more sense because the procedure may be more efficient and with a speedy trial.

Third, the organisational design of the legal enforcers is also a very important factor. AGO, OPD, and CODECON are important intermediate bodies, which represent consumer interests in investigations, negotiations, and litigation with corporations. These public bodies are important legal enforcers of consumer rights. Their bureaucratic organisation is structured in a particular way that limits the participation of individual consumers. The architecture of Brazilian collective action does not encourage individuals to participate in a group or class of consumers without the representation of these intermediate bodies. Individuals may not file collective action suits and spontaneously

¹²⁴⁵ Small Claims Courts Act 1995, article 54.

aggregate a group of individual consumers without creating a permanent consumer association. Therefore, only an organisation may embody the representation of groups of consumers in civic-public action.

In any event, individual consumers are not directly compensated through collective actions. Settlements do not usually include individual compensation as an obligation of a corporation. Unsettled cases normally last a very long time. Interviewed legal enforcers admitted that collective actions almost never compensate individual consumers. Their legal pathways are normally the small claims courts in Rio de Janeiro and PROCON in São Paulo. In 2012, the small claims courts of the state of Rio de Janeiro received 1,477,588 new cases¹²⁴⁶ and the PROCON in the state of São Paulo received 602,611 consumers communications of corporate misconduct.¹²⁴⁷

Importantly, not all communications filed at PROCON are sent to corporations. When interviewed, a former head of PROCON in São Paulo explained that these grievances are examined and filtered, so that only complaints of significance are sent to the corporations by registered mail. In the first stage, companies are notified and have 10 days to prepare a response that may be a defence or may inform PROCON that they have contacted the consumer and solved the problem. However, the individual must respond to this information and inform PROCON that they wish to continue with the dispute. In this case, in the second stage, PROCON initiates a formal procedure of complaint, sending a new notification to the offending company and scheduling a date for

¹²⁴⁶ <http://www.amaerj.org.br/noticias/demandas-de-massa-desafiam-sistema-dos-juizados-especiais-do-tj-do-rio> (checked on 15.01.17).

¹²⁴⁷ http://www.procon.sp.gov.br/pdf/acs_ranking_2012.pdf (checked on 15.01.17).

hearing and mediation. In 2012 PROCON received 602,611 communications and sent 139,066 notifications to corporations in the first stage. Most of these cases were solved and just 29,697 formal procedures were initiated against companies.¹²⁴⁸

6.5 Special features of collective action

6.5.1 Long duration

One of the important dimensions of procedure is time length. Procedures are initiated by a claim and characterised as a sequence of juridical acts towards the final judicial decision with delivery of the public service of rights enforcement.¹²⁴⁹ Therefore, the circumstance that a procedure will have a certain duration and a particular pace of litigation is inevitable. In the case of the AGO, there is normally a civil enquiry that constitutes a pre-trial investigation in which the prosecutor investigates the existence of the collective wrongdoing.¹²⁵⁰ In practice, this investigation often leads to a proposal of settlement.¹²⁵¹ Collective actors may extend the investigation for one to two years, if they perceive the existence of a concrete possibility of settling the case without the need for litigation.¹²⁵² Sometimes the corporation refuses the proposal of

¹²⁴⁸ (n. 1247).

¹²⁴⁹ Zuckerman (n. 675) 2-4 & 168-70.

¹²⁵⁰ Mazzilli (n. 470) Ch 27.

¹²⁵¹ Interview L (RJ 14.08.14).

¹²⁵² Interview L (RJ 14.08.14).

settlement, but provides evidence of a change of conduct and compliance with the orientation of the collective actor.¹²⁵³ Even if there is no collective settlement, the cessation of the collective wrongdoing may justify the extinction of the civil enquiry without any collective action.

The empirical observation reveals that collective actors will file their collective claims in many cases as the necessary means for consumer protection. Once these mass disputes are litigated, these collective procedures may last a long time. The analysis of 160 collective actions filed by the AGO between 2002 and 2006 revealed that 72 of these collective procedures were still awaiting trial or appeal by 2011. The reexamination of this sample of cases in 2016 revealed that still 27 of these cases were pending after more than a decade since the AGO filed them.¹²⁵⁴

This long duration of collective procedures contradicts the tendency in many jurisdictions, in which parties develop strategies to make a global settlement at an early stage of the collective litigation. The explanation may come from the particular regime of incentives to settle or to litigate. In the US class actions, the continuous growth of litigation costs, the risk aversion of corporate defendants to jury trials, and the potential reputational costs generated by continuous media attention to the collective procedure provide incentives for a global settlement between class counsel and corporate defendant.¹²⁵⁵

¹²⁵³ Interview L (RJ 14.08.14).

¹²⁵⁴ See chapter 3.

¹²⁵⁵ Hensler and others (n. 56) 108-14.

In contrast, the Brazilian experience of collective actions is characterised by low litigation costs, minimum risk of economic sanctions, and low media attention during the period of appeal and judgment of the collective dispute by the superior courts.¹²⁵⁶ Therefore, collective actions tend not to end in settlements. On the other hand, settlements are reached in 1 out of every 5 collective actions, a number that contradicts the pessimistic predictions of some commentators.¹²⁵⁷ If the collective action does not end in a settlement, the collective procedure tends to last a long time. The explanations for long delays are similar to the reasons for a low number of mediations in small claims involving consumer disputes with corporations. These companies benefit from the sluggish pace of the procedure and the retention of money from consumers.¹²⁵⁸ A potential remedy for this problem may come from injunctive orders, as explained in the next subsection.

6.5.2 The importance of injunctive orders

The legal architecture increases the importance of the injunction in the civil public action. In US class actions, the most important interlocutory decision consists of the class certification, which recognises the existence of a collective action, defines the criteria for identification of class membership, and increases the pressure on corporate defendants by maximising the economic and political

¹²⁵⁶ On the risk of Brazilian collective actions being lost on the formalism of the system, see Gidi (n. 106) 332.

¹²⁵⁷ Gidi suggests that the rate of settlements is almost insignificant, which is contradicted by empirical evidence. Gidi (n. 106) 342.

¹²⁵⁸ Ferraz (n. 1210) 15.

impact of litigation as a consequence of the aggregation effects.¹²⁵⁹ However, similarly to the Australian law on class actions,¹²⁶⁰ the Brazilian procedure does not include a particular decision for certification and there is no appellate dispute over this particular issue as a consequence.¹²⁶¹

In the Brazilian experience, the most important interlocutory decision becomes the injunction, because it anticipates the final decision over the legality of the corporate contract or practice at the centre of the collective controversy. First, this provisory decision may provide an immediate remedy for the collective wrongdoing, restablishing the application of consumer norms and reaffirming the practical force of the law. Particularly in the context of collective action, this interlocutory decision is important not only because of the long duration of collective procedures, but also for the scope of application to a collectivity. Therefore, the injunction may provide an immediate judicial response at the beginning of the procedure, anticipating the practical effects of the collective action. Moreover, the impact of such a decision affects the entire group of consumers, with potential to benefit immediately a large number of individuals.

Additionally, through injunctive orders, commercial courts and appellate bodies provide signals for the collective actors, corporate defendants, regulatory

¹²⁵⁹ Richard Nagareda, Class certification in an age of aggregate proof, *New York University Law Review*, vol. 84 (2009) 171-3.

¹²⁶⁰ Mulheron (n. 37) 26-8.

¹²⁶¹ Some commentators consider the inexistence of a particular decision for class certification to be a failure of the architecture of civil public action. See Gidi (n. 1135) 213; Rachael Mulheron, Justice enhanced: framing an opt-out class action for England, *Modern law review*, vol. 70 (2007) 568. However, there is the advantage of avoiding such an intensive dispute in lower courts and appellate bodies over one issue that becomes the most important and decisive one in the US class actions system.

agencies, and interested consumers on the potential outcomes of a particular collective action.¹²⁶² The Brazilian experience provides several examples of injunctive orders that sent clear messages to corporate defendants on the necessity to correct their conducts or contractual clauses. For instance, consider the case of the crisis of product delivery from e-commerce in 2010. The rapporteur of TJRJ decided to order the immediate interruption of any sales by Americanas until the company regularised their logistics and product distribution, sending a strong signal of the court's perspective over a problem that affected dozens of thousands of consumers by then.¹²⁶³ Likewise, courts prohibited banks Itaú and Citibank from charging a fee as a 'tariff for renewal of registration' and these injunctive orders led the BCB to alter their regulation for banking fees, excluding the authorisation to charge such tariff.¹²⁶⁴ Moreover, courts also suspended the application of contractual clause from Telecom Claro that authorised limited performance in provision of cell phone services to 10% of the contractual terms.¹²⁶⁵ These decisions provide indications over the concrete meaning of normative standards of consumer law, setting them in practice with regulatory impact. On the other hand, injunctive orders rarely determine immediate payment of compensation to consumers, because the reversibility of this interim decision is considered to be difficult and costly if the final sentence considers that the corporate practice was correct.

¹²⁶² Interview L (RJ 14.08.14), W (RJ 12.09.14), and Z (SP 16.09.14).

¹²⁶³ (n .592).

¹²⁶⁴ (n. 582); *AGO v. Citibank* (0070827-82.2010.8.19.0001, 2nd Commercial Court of Rio de Janeiro).

¹²⁶⁵ *AGO v. Claro* (2008.001.288621-4, 6th Commercial Court of Rio de Janeiro). The request for injunction was denied, but the final judgment of the commercial court ordered the nulification of the clause and interruption of the abusive practice.

There are multiple interpretations concerning the correct standards for judicial application of these injunctions and some commentators complain about the lack of a precise rational parameter for these preliminary decisions.¹²⁶⁶ However, the relevance of injunctive orders is undeniable, especially for the effect they may have on defendants who could benefit from their procedural position and the long duration of a judicial action in a world without these preliminary injunctions.¹²⁶⁷ The potential imposition of injunctive orders may also have an effect on the structure of settlement, as already discussed in section 3.3. The next subsection explains how the legal architecture influences the structure of collective settlement.

6.5.3 The structure of collective settlement

The negotiation of a settlement is a very important means for resolving a collective controversy.¹²⁶⁸ From the vantage point of collective actors, the settlement provides an immediate response and a concrete framework for regulatory enforcement. From the perspective of corporate defendants, the settlement provides an immediate closure and a concrete plan for compliance with the rules. In the Brazilian experience, however, collective settlements rarely lead to the payment of compensatory damages to consumers.¹²⁶⁹ These

¹²⁶⁶ John Leubsdorf, The standard for preliminary injunctions, Harvard Law Review (1978) 565.

¹²⁶⁷ Jean Lanjouw and Josh Lerner, Tilting the table? The use of preliminary injunctions, Journal of Law and Economics, vol. 44 (2001) 576-8.

¹²⁶⁸ Particularly interesting is the Dutch mechanism for global settlements. See Tzankova Hensler (n. 11) 94-6.

settlements normally include commitments to comply with rules and standards from consumer laws, but no compensation. Brazilian consumers normally do not receive checks or coupons as part of these collective settlements.¹²⁷⁰

The explanation for this lack of compensatory damages is directly related to the normative architecture of collective action. According to Brazilian law, these collective rights are undisposable and, therefore, may not be object of any bargaining or transaction by the collective actors.¹²⁷¹ Collective actors are not legally authorised to engage in open negotiation with defendants and to accept a discount on the value to be paid by to the harmed consumers by corporations.¹²⁷² In contrast to the traditional tenets of mediated compromise and the practice of collective settlement in other jurisdictions,¹²⁷³ collective

¹²⁶⁹ Interviews L (RJ 14.08.14), S (RJ 09.09.14), Y (SP 15.09.14), and Z (SP 16.09.14). In practice, potential conflicts of representation involve complex cases with a cluster of multiple collective and homogeneous individual interests. Such cases normally involve a commercial practice that is abusive and detrimental to a group of consumers and has already caused harm to a large number of individuals. In theory, legal enforcers should take actions to halt this practice and seek compensation for all individuals who suffered monetary losses as a result of this practice. Empirical observation revealed that legal enforcers usually fight against the commercial practice, but may eventually settle the case with a clause that excludes consumer compensation from this settlement. Their priority is the immediate cessation of an abusive commercial practice, and as part of the bargaining with the company, legal enforcers usually concede that consumers may seek redress for their individual losses through small claim courts or PROCON. Public prosecutors and public defenders usually prefer to settle a case, bringing an abusive practice to an immediate halt. In contrast, state assembly attorneys almost never settle their collective actions. According to an interviewee, since his organisation is part of the legislative branch and a state representative coordinates its work, discretionary powers for bargaining are very limited. The state assembly attorneys almost always refuse to negotiate with companies and only accept settlements involving the full recognition of every claim. The justification for this attitude is not only juridical, but also political. Had CODECON accepted bargaining with corporations in these collective settlements, it would have lost its legitimacy.

¹²⁷⁰ On the importance of these mechanisms of direct consumer compensation, see Calabresi (n. 788) 10-1.

¹²⁷¹ Mazzilli (n. 470) 467-70.

¹²⁷² Mazzilli (n. 470) 474-5.

¹²⁷³ Hensler and others (n. 56) 487; Tzankova and Hensler (n. 205) 105.

actors are not supposed to enter into any negotiation that reduces the amount of money to be paid to a consumer.¹²⁷⁴

In theory, this settlement does not involve any bargaining. Instead of a negotiated compromise, this settlement is legally defined as a commitment from the corporation that it will adjust its conduct in line with the law.¹²⁷⁵ Mazzilli considers that the law provides greater security to these interests, by considering them to be undisposable and guaranteeing more protection by prohibiting bargaining.¹²⁷⁶ In practice, however, more is less. Because collective actors are not authorised to enter into any bargaining over the value of monetary compensation for individual consumers, they simply have to eliminate this entire aspect from the collective settlements.¹²⁷⁷

Instead of guaranteeing half or one third of the compensatory damages to the consumers, they simply exclude the entire discussion over compensation from the negotiation table to be able to conclude the collective settlement.¹²⁷⁸ The terms of these settlements contain normally a disclaimer, explaining that this exclusion does not mean that the corporation is exonerated from payment of compensatory damages, but rather that individuals are expected to seek individual compensation through the pathways of small claims courts or ADR/ODR. However, as a practical consequence of this exclusion, corporations do not pay any compensation for consumers, especially in cases of small value

¹²⁷⁴ Mazzilli (n. 470) 475.

¹²⁷⁵ CPAA, article 5, § 6.

¹²⁷⁶ Mazzilli (n. 470) 455-7.

¹²⁷⁷ Interviews L (RJ 14.08.14) and S (RJ 09.09.14).

¹²⁷⁸ Interview L (RJ 14.08.14) and S (RJ 09.09.14).

claims. Therefore, collective settlements normally have a regulatory, but not a compensatory effect.

6.6 From the architecture to the environment

The architecture of collective action reveals a networked structure of diffuse, collective, and homogeneous individual rights, in which there may be a dynamic interaction between the defence of individual interests of consumers and the protection of broad group or societal interests. In other words, individual consumers may simultaneously protect their own personal right through a small claims court and make a complaint to a collective actor that activates a collective procedure with potential for regulatory enforcement and transformation of the normative landscape. On the other hand, collective actors also disseminate information through the media on their collective actions to empower consumers and benefit from their own support to the collective litigation.

The next chapter will examine exactly how the legal environment is shaped by this architecture of collective rights and the collective action for consumer protection. This complex network of interconnected rights and the various mechanisms for protection may lead to socio-legal mobilisation and effective protection of consumer rights. However, other cases will simply not result in effective consumer protection and may reveal the reasons why the professed objectives of collective action are not entirely achieved.

Chapter 7

B2C relationships in the legal environment

7.1 – Introduction

This chapter is directly connected to the previous one, because it examines the legal environment, which is influenced by the normative architecture. At a more fundamental level of analysis, the environment is constituted by relationships between corporations and consumers. This analysis is relevant, because it highlights the relational aspect of consumer protection. Because this study is focused on consumer protection, this chapter addresses the concept of legal environment from the perspective of the B2C relationship. From the economic standpoint, the salient aspect is the transaction characteristic of a purchase. Examining power relations, the corporation normally retains more knowledge, capital, and control over the experience of consumption, even if the consumer holds purchase power. From the juridical perspective, law provides a normative architecture composed of contractual norms, regulatory regimes, bundles of rights and duties, procedural paths and remedies that establishes juridical relationships between multiple actors. These economic, political, and juridical dimensions influence the social relationships between businesses and consumers immersed in the legal environment.

The concept of legal environment explains the dynamic relationship between law and organisations in shaping the rules and processes for regulation

of behaviour.¹²⁷⁹ Law establishes a normative environment to which organisations adapt,¹²⁸⁰ by reconstructing the meaning of normative demands and mediating the impact of laws on society.¹²⁸¹ The complex interaction between organisations, enforcement agents, and individuals in the regulatory space leads to the emergence of consumer norms. In many cases, the organisation demonstrates a certain level of compliance, but somehow reinterprets the meaning of rules and standards in a way that minimises their impact over corporate conduct.¹²⁸² On the other hand, individuals and consumer groups may draw on consumer rules and standards to put normative pressure on corporations, because law empowers those who make demands and creates an environment that encourages organisations to comply.¹²⁸³ Therefore, the normative architecture influences these dynamics of implementation of law in the legal environment.¹²⁸⁴

The recognition of collective rights, the regime for collective action, the establishment of different judicial pathways, and the special features of the legal architecture influence the implementation and enforcement of laws. This is a crucial issue for understanding the possibilities and limitations of collective action in achieving its professed objectives of access to justice, judicial economy, and consumer protection. By examining the problems of implementation of

¹²⁷⁹ Lauren Edelman, Legal environments and organizational governance: the expansion of due process in the American workplace, *American journal of sociology*, vol. 95 (1990) 1402.

¹²⁸⁰ Edelman (n. 1279) 1402.

¹²⁸¹ Lauren Edelman, Legal ambiguity and symbolic structures: organisational mediation of civil rights, *American journal of sociology*, vol. 97 (1992) 1532.

¹²⁸² Edelman (n. 1281) 1535.

¹²⁸³ Edelman (n. 1281) 1535.

¹²⁸⁴ Galligan (n. 161) 310.

consumer law and the limitations of the legal architecture, I consider potential points for legal reform that could eventually improve collective action for consumer protection.

Section 7.2 examines the role of collective action in the environment of consumer protection based on two hypotheses of business ethics: a hypothetical society of corporate angels in which coordination justifies the existence of collective action; a society with real corporate agents in which the justification for collective action comes from blame, liability, and sanctions. After the analyses from the perspective of business, section 7.3 investigates the potential participation of the consumer in the legal environment, by examining possibilities and limitations of empowerment and consumerism. Section 7.4 examines the regulatory enforcement in a complex legal environment, analysing social relations, the role of organisations and institutions, the reflexivity of legal culture, and concrete experiences of implementation and enforcement of consumer laws in the Brazilian experience. Section 7.5 examines the reasons for the limited achievement of professed objectives by collective action in Brazil, evaluating points that may be reformed in the future. Section 7.6 highlights the importance of socio-legal factors for the analysis of the legal environment, particularly the importance of social capital as the economic enabler, of dispute for institutional space as the political objective, of collective rights as a networked structure of interrelated interests, and the complex mediated legal culture as an interpretive key of the legal environment.

7.2 Business in the legal environment

7.2.1 The ethics of business

The B2C relationship is shaped by the ethics of businesses, which are usually the strong actor in comparison with the individual consumer. In subsection 7.2.2, I consider the need for collective action in a hypothetical setting with only just and moral good corporative executives. If all CEOs of corporations were angels, would it be necessary to have juridical mechanisms of collective action for consumer protection? The conclusion is that collective action is necessary, even if all executives were angels. Additionally, subsection 7.2.3 considers the fact that executives are not really angels, examining the role of liability and deterrence for corporate compliance. It concludes that the structure of civil liability is ethical only if does not abdicate the functions of identifying blame and defining sanctions as a consequence for collective wrongdoings.

7.2.2 Collective action for corporate angels?

Legal philosophers imagine a society of angels and pose the question: would law be really necessary if we were all morally good? The answer is positive, because of the essential coordinating role of law.¹²⁸⁵ Likewise, we could imagine a society of corporative angels and ask whether juridical collective action is really necessary in a world where all executives are morally good. Consider, for instance, a world in which business are deeply committed to ethical principles and that corporate governance develops a high sense of trust within

¹²⁸⁵ Joseph Raz, *Practical reasons and norms* (OUP 1999) 159-60.

the firm and establishes a moral corporation with a high degree of morality.¹²⁸⁶ The board of the corporation develops an ethical culture within the business, by stating the ethical values of the enterprise among the most important corporate goals.¹²⁸⁷ The corporation is not focused on profit, rather concerned with "adopting the ethical standpoint of fairly delivering high quality outcomes for customers".¹²⁸⁸ In our world of corporate angels, people involved in businesses sincerely believe that they are just "doing the right thing" until someone points to them that it is just not really the case.¹²⁸⁹ If we lived in such a world, would the juridical collective action be necessary?

The answer is positive, because the juridical collective action performs essential roles in coordinating corporations in their relationships with consumers. Collective action may provide invaluable support to our corporate angels in the event of mass damages to consumers, by facilitating the compensation of all individuals, reducing transaction costs, securing uniform treatment, and guaranteeing closure to the corporation. In other words, the professed objectives of the collective action are typical of a coordinating device and relevant even in a world of corporate angels, in which everyone is morally good.

Imagine, hypothetically, that the CEO of an automobile company learned about a malfunction in the software for pollution control of millions of cars sold by his company. The problem consists of a technological failure that cannot be

¹²⁸⁶ Hodges (n. 57) 688.

¹²⁸⁷ Hodges (n. 57) 689.

¹²⁸⁸ Hodges (n. 57) 689.

¹²⁸⁹ Hodges (n. 57) 690.

attributed to any particular person and there is simply no one to blame. Nonetheless, even if this is a clear case of no-fault conduct by anyone, mass losses affected millions of consumers accross the globe. Owners of these automobiles lost money because of loss of retail value in the market for used cars. Likewise, the company has to compensate damages caused by the excessive smoke resulting from this technological failure. Moreover, the corporation received an unjustified surplus value by selling a product with lower quality than that previously attributed by the market, which may be characterised as unjust enrichment. Additionally, an intangible aspect may be identified as moral damage caused by psychological frustration for driving an automobile causing excessive pollution. Our corporate angels are morally ethical and entirely agree with the necessity of compensating all consumers in a speedy, cheap, uniform, and definitive way.

This clear example demonstrates the necessity of effective collective action mechanisms for coordination of corporations, even in the absence of collective wrongdoing. Our corporate angels would be interested in promoting a global settlement including a compensation plan for all different kinds of automobile consumers. On the other hand, fragmented and decentralised redress mechanisms like small claims courts, ADR, or ODR would simply not provide our corporate angels with the opportunity to be morally ethical regarding all customers. Because only a limited number of consumers would present individual claims, the corporation would not compensate everyone for their losses. Our corporate angels would unduly retain a large amount of money that they would prefer to return to car owners and individuals harmed by excessive pollution. Retention of such unclaimed money would result in unjustified

enrichment of the corporation, an outcome of which corporate angels would certainly disapprove. Therefore, mechanisms for juridical collective action are necessary even in a world of corporate angels.

7.2.3 The role of blame, liability and sanctions

Because we live in a world in which not all business people behave like angels, there is arguably an even stronger case for the necessity of collective action for consumer protection. In his recent work, Hodges proposes a culture of no blame for corporations and regulators,¹²⁹⁰ criticising the application of tort law as almost useless and disapproving the imposition of sanctions.¹²⁹¹ His final conclusion is that "redress should be instituted on a voluntary, speedy and fair basis, rather than through an adversarial system in which the object is to negotiate the lowest settlement".¹²⁹² This conclusion is contradicted by the comprehensive empirical study on negotiation of settlements conducted by Genn, revealing the strategies of hard bargaining adopted by corporate agents in the real world.¹²⁹³ In theory, the plaintiff is entitled to receive full compensation for losses resulting from her injury, but the defendant normally argues for no liability and no payment.¹²⁹⁴ Therefore, Genn correctly concludes that claims settlements for personal injuries are inherently adversarial in nature, because

¹²⁹⁰ Hodges (n. 57) 690.

¹²⁹¹ Hodges (n. 57) 705.

¹²⁹² Hodges (n. 57) 706.

¹²⁹³ Hazel Genn, *Hard bargaining: out of court settlement in personal injury actions* (OUP 1987) 50-2 & 62-6.

¹²⁹⁴ Genn (n. 1293) 166.

plaintiff and defendant are disputing the amount of payment for compensatory damages.¹²⁹⁵

Moreover, corrective justice implies that a civil sanction is the logical consequence for a fault-based liability.¹²⁹⁶ At least since Aristotle,¹²⁹⁷ corrective justice "treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other".¹²⁹⁸ Excluding the civil sanction from a faulty B2C relationship means eliminating the restorative element that corrects the fault. Without blame, torts, or sanctions, corporate behavior is no longer ethical, because there are no longer moral references, civil liability, and legal consequences for right and wrong. These normative guidelines for good and bad actions are important to establish cognitive frames for the identification of meaningful and meaningless organisational behaviour.¹²⁹⁹ In this sense, economic sanctions are necessary to preserve the ethical justice of B2C relationships and also to correct the power imbalance between powerful corporate actors and weaker consumers. The next section discusses consumer empowerment and other strategies to balance the B2C relationship.

7.3 Consumer empowerment

¹²⁹⁵ Genn (n. 1293) 166.

¹²⁹⁶ Ernest Weinrib, *The idea of private law* (OUP 2012) 56.

¹²⁹⁷ Aristotle, *Nicomachean ethics* (Penguin 2004) 112-8.

¹²⁹⁸ Weinrib (n. 1296) 56.

¹²⁹⁹ Lauren Edelman and Mark Suchman, The legal environment of organisations, *Annual review of sociology*, vol. 23 (1997) 493.

The political ethics of consumerism affect the conduct of both consumer protection organisations and individual consumers, through a concerted effort and interaction between collective and individual actors.¹³⁰⁰ Individuals may develop a sense of consumer not only as participant in an economic transaction in the market, but especially a sense of political participation typical of citizenship - the citizen-consumer.¹³⁰¹ In ethical consumerism, political activism may emerge through individual experiences like boycotts, contacts with the relevant authorities, and engagement in coordinated group activities of political demonstration.¹³⁰² Subsection 7.3.1 examines consumer empowerment mainly with a focus on the individual consumer. Subsection 7.3.2 analyses consumerism as a social mobilisation and how it may influence consumer protection.

7.3.1 The power of the individual consumer

The individual consumer may exercise a fundamental power in the marketplace, which is purchasing power.¹³⁰³ However, the traditional motto that "the consumer is king" is an illusion, because experience reveals a powerless individual, who lacks adequate information and is often trapped by business

¹³⁰⁰ Clive Barnett and others, The political ethics of consumerism, Consumer policy review, vol. 15 (2005) 6.

¹³⁰¹ Josee Johnston, The citizen-consumer hybrid: ideological tensions and the case of whole foods market, Theory and society, vol. 37 (2008) 233.

¹³⁰² Barnett and others (n. 1300) 10.

¹³⁰³ Dietlind Stolle, Marc Hooghe, and Michele Micheletti, Politics in the supermarket: political consumerism as a form of political participation, International political science review, vol. 26 (2005) 246.

strategies that weaken his position.¹³⁰⁴ Unsurprisingly, individuals may find themselves in circumstances of vulnerability, disadvantage, exclusion, and weakness, which are amplified by the imbalance of B2C relationships in their consumer experiences.¹³⁰⁵ In terms of classical economic theory, this is a typical problem of asymmetry of information between the parties, requiring state intervention to guarantee that consumers will have better access to information and become able to have a more informed purchasing experience.¹³⁰⁶

Information is a very important source of power for the individual consumer. Consumers are empowered through clear and simple product labels, use of trustful intermediaries for clarification, and experience ratings with guidance over previous experiences with a particular corporation.¹³⁰⁷ In this sense, the internet provides an extremely valuable source for shared information and exchange of information between individual consumers.¹³⁰⁸ For instance, through the website 'Complain Here', consumers may check evaluations of companies, the volume of complaints, their responsiveness to consumer demands, and their position in consumer rankings. This website became such a strong reference for consumer complaints that even collective actors consult it as evidence for their own cases.¹³⁰⁹

¹³⁰⁴ Umit Kucuk, Consumer empowerment model: from unspeakable to undeniable, *Direct Marketing*, vol. 3 (2009) 327.

¹³⁰⁵ Carol Brennan and Martin Coppack, Consumer empowerment: global context, UK strategies and vulnerable consumers, *International journal of consumer studies*, vol. 32 (2008) 310.

¹³⁰⁶ Gillian Hadfield, Robert Howse, and Michael Trebilcock, Information-based principles for rethinking consumer protection policy, *Journal of consumer policy*, vol. 21 (1998) 143-5.

¹³⁰⁷ Hadfield Howse, and Trebilcock (n. 1306) 159.

¹³⁰⁸ Kucuk (n. 1304) 333-7.

¹³⁰⁹ Interview with L (RJ 14.08.14) and C' (SP 19.09.14).

Knowledge about typical consumer grievances may come also from membership of one of the consumer associations, which are active in communicating with members and raising awareness about consumer wrongdoing that potentially affect their constituencies.¹³¹⁰ Moreover, collective actors normally publicise their collective actions through the media, because there is no formal notice in the collective procedure, except for an announcement at the official gazette with very limited readership. However, one relevant point relating to media reports is that newspapers almost never report cases from small claims courts or ombudsman, reducing the circulation of relevant information for vindication of consumer rights violations.¹³¹¹

Consumer empowerment may also result from education, helping people to develop a different attitude toward the consumer experience, demanding more from businesses and eventually challenging the status quo.¹³¹² Particularly in Rio de Janeiro, education may be an important source for consumer empowerment, because local laws require the existence of a copy of the CDC and of an official registrar book for consumer complaints inside every commercial venue.¹³¹³ Therefore, an informed and well-educated consumer may eventually explain the legal reasons for his complaint and request that the business respect

¹³¹⁰ Interview R (RJ 02.09.14), Y (SP 15.09.14), and B' (SP 19.09.14).

¹³¹¹ On the lack of reports on small claims courts by UK newspapers, see Leslie Moran, Mass-mediated 'open justice': court and judicial reports in the press in England and Wales, *Legal Studies*, vol. 34 (2014) 154.

¹³¹² Sue McGregor, Sustainable consumer empowerment through critical consumer education: a typology of consumer education approaches, *International journal of consumer studies*, vol. 29 (2005) 440-4.

¹³¹³ CBA, article 2.

her consumer rights in a more balanced way.¹³¹⁴ On the other hand, consumer education cannot be considered a panacea for the solution of all consumer problems, because even very well informed and educated consumers will still have less knowledge about the purchase experience than businesses.¹³¹⁵

Additionally, consumer empowerment through information also suffers from a series of other limitations. First, consumers normally lack time and cannot really benefit from additional information.¹³¹⁶ Second, the capacity to benefit from information is directly related to the general level of education, positively influencing more affluent members of a society. Normally, consumers who need more protection are disproportionately less protected.¹³¹⁷ Third, consumers suffer from a lack of alternatives and impediments to change providers, especially in the case of relational contracts with banks and utilities.¹³¹⁸ Fourth, consumers have limited ability to process information, overcome their standpoint and bias, avoid optimistic risk assessments, and neutralise the impact of presentations made by corporations.¹³¹⁹ In summary, the empowerment of individual consumers has many practical limitations that may curtail the potential to balance B2C relationships.

7.3.2 – Consumerism and socio-legal mobilisation.

¹³¹⁴ Pettit (n. 896) 84-85 & 90-1.

¹³¹⁵ Brennan and Coppack (n. 1305) 312.

¹³¹⁶ Geraint Howells, The potential and limits of consumer empowerment by information, *Journal of Law and Society*, vol. 32 (2005) 356.

¹³¹⁷ Howells (n. 1316) 357.

¹³¹⁸ Howells (n. 1316) 358.

¹³¹⁹ Howells (n. 1316) 359-61.

In addition to individualistic empowerment, consumer protection may also be pursued collectively. From the legal perspective, consumer rights may be protected through juridical mechanisms of collective action. From the socio-political perspective, consumers have developed their own social movement of consumerism through the coordinated joint-action of consumer associations, organisations, groups, and individuals. Borrowing the insight from Elias, the complex interactions between the relevant actors may be observed as dynamic 'figurations' through which multiple actors develop their actions within webs of changing human relationships that are interdependent, integrate the same network and space, and can be understood in their plural dimension.¹³²⁰

Particularly in terms of law and consumerism, collective actors may develop an interpretive and process-oriented legal mobilisation of consumer law that considers law as a resource to be used by citizens in structuring their relations with others.¹³²¹ In this sense, law may be mobilised as a lawful claim for assertion of a right.¹³²² On the other hand, law may be considered to be a constitutive element of the normative environment, shaping our understanding, expectation, and interaction as consumers.¹³²³ In this sense, consumer law emerges as a repertoire of legal knowledge that influences our socio-legal

¹³²⁰ Norbert Elias, *Civilizing process: sociogenetic and psychogenetic investigations* (Blackwell 2000) 314-6; Eric Dunning and Jason Hughes, *Norbert Elias and Modern Sociology: knowledge, interdependence, power, process* (Bloomsbury 2013) Ch 2.

¹³²¹ Michael McCann, Law and social movements, in Austin Sarat and Patricia Ewick (eds), *The Handbook of Law and Society* (Blackwell 2015) 507.

¹³²² McCann (n. 1321) 508.

¹³²³ McCann (n. 1321) 507.

perspective, particularly our sense of what constitutes a right, a power, and social possibilities for the protection of consumers in the legal environment.¹³²⁴

Social movements normally develop legal strategies in coordination with political tactics, such as lobbying, advocacy, media campaigns, disclosure, and public protest.¹³²⁵ Typically, social movements are connected with a core constituency of nonelites.¹³²⁶ The fact that these groups are often constituted by weaker members of society does not necessarily mean that they are going to lose because of lack of resources. As Braithwaite reminds us, "weak actors can play a game of jiu-jitsu", benefiting from the power structure of the status quo.¹³²⁷ Nonetheless, legal mobilisation does not necessarily empower or disempower someone, because legal dynamics are complex, depending on the context in which they play out.¹³²⁸ The literature on social movements provides important concepts to elucidate the potential socio-legal mobilisation for consumer protection, as explained in the following sections.

Finally, the civil public action empowers consumers by granting standing for collective litigation to consumer associations, one of the typical social movement organisations. IDEC, PROTEST, ANACONT, and other NGOs are activist organisations with the institutional mission of protecting consumer rights through collective litigation and legislative advocacy.¹³²⁹ The other

¹³²⁴ McCann (n. 1321) 508.

¹³²⁵ McCann (n. 1321) 508.

¹³²⁶ McCann (n. 1321) 509.

¹³²⁷ John Braithwaite, A sociology of modelling and the politics of empowerment, *The British Journal of sociology*, vol. 45 (1994) 469.

¹³²⁸ Michael McCann, Law and social movements: contemporary perspectives, *Annual Review of Law and Social Sciences* (2006) 18.

collective actors are public organisations with broader institutional mandates, but are not immune to the influence of consumerism over legal practice, because they perform the role of consumer advocates within their respective organisations and, thus, promote the goals of the social movement for consumer protection as well.¹³³⁰ However, AGO, OPD, and CODECON are not identified as social movements, but rather as organisations that may be mobilised by individuals and consumer groups for consumer protection.

7.3.2.1 – Relative Deprivation

Relative deprivation consists of the experience of loss in relation to analogous episodes experienced by an individual, a group or an individual among a group, that motivates action or expression to interrupt or to correct this perceived injustice.¹³³¹ Relative deprivation is an important concept for the comprehension of grievances, injuries, and complaints, because it provides an insight into the standards adopted to evaluate the B2C relationship and the purchase experience.¹³³² These standards are not absolute, but relative to expectations.¹³³³ They are not based on transcendental normative values, but

¹³²⁹ Lauren Edelman, Gwendolyn Leachman, and Doug McAdam, On law, organisations, and social movements, *Annual Review of Law and Social Sciences* (2010) 657.

¹³³⁰ Edelman, Leachman, and McAdam, (n. 1329) 659-60.

¹³³¹ Ian Walker and Heather Smith, Fifty years of relative deprivation research, in Ian Walker and Heather Smith, *Relative deprivation: specification, development, and integration* (CUP 2002) 2.

¹³³² Jeff Goodwin and James Jasper, *The social movements reader: cases and concepts* (2nd edn, Wiley-Blackwell 2009) 18.

¹³³³ Goodwin and Jasper (n. 1332) 18.

are rather relational.¹³³⁴ This aspect explains why the poor are not necessarily the most rebellious individuals in a society and many consumer complaints come from a middle and upper class background.¹³³⁵

Additionally, grievances sometimes exist in a particular society, but are not mobilised simply because resources are not available for everyone. This point is highlighted by the initiative of CODECON to circulate to the poor suburbs of Rio de Janeiro with the 'citizenship bus' to attend consumer complaints there.¹³³⁶ Before the itinerary service of CODECON, individuals did not go to the AGO, OPD, or CODECON offices in downtown Rio de Janeiro. Their grievances existed, but were not mobilised by any collective actor as raw material for collective action. With this initiative from CODECON, poor consumers now have a vehicle to express their grievances and seek redress.¹³³⁷

This sense of relative deprivation is related not only to wealth and social status, but also to the existing organisational infrastructure, legal culture, and particular normative architecture. Consider, for instance, the grievances suffered by Hugh Collins in English supermarkets. He always suffers from 'stock-outs' and going home without vital products seems to lead to family discussions.¹³³⁸ Even if he considers himself to be the weakest link in the chain of products distribution and sounds relatively deprived, Collins considers that there is no

¹³³⁴ This well established concept of the social movement literature also seems connected with the Hegelian insight. See Friederich Hegel, *Elements of the philosophy of right* (CUP 1991) 167.

¹³³⁵ Goodwin and Jasper (n. 1332) 18.

¹³³⁶ Interview S (RJ 09.09.14).

¹³³⁷ Interview S (RJ 09.09.14).

¹³³⁸ Hugh Collins, 'The weakest link: legal implications of the network architecture of supply chains' in Marc Amstutz and Gunther Teubner (eds), *Networks: legal issues of multilateral cooperations* (Hart 2009)188.

possibility of a legal complaint and that he is only left with the market solution of looking for another provider.¹³³⁹ However, this solution is also far from satisfactory, because consumers normally use supermarkets in their neighbourhoods and alternatives are often limited.¹³⁴⁰

This resignation results from a combination of normative architecture, legal culture, and organisational infrastructure. First, there is no broad recognition of diffuse and collective consumer rights in the UK in a way that would authorise a consumer to frame a complaint of 'stock out' as a violation to trans-individual rights.¹³⁴¹ Second, the UK has a strong tradition of self-regulation and, particularly in the regulation of product supply, there is a well-established private regulation conducted by supermarkets.¹³⁴² Third, there is no collective actor mobilised to request information for the supermarket, so that the chronicle problems of stock-outs may be solved.¹³⁴³ The only collective actor entitled for collective redress is consumer association *Which?*, but such complaint would probably be dismissed as being neither a case for individual nor collective redress.

Imagine, hypothetically, that professor Collins decides to change his position at All Souls College in Oxford for a professorship at FGV LAW SCHOOL in

¹³³⁹ Collins (1338) 188.

¹³⁴⁰ Collins (1338) 188.

¹³⁴¹ See *Consumer Rights Act* (2015).

¹³⁴² Tetty Havinga, Private regulation of food safety by supermarkets, *Law and Policy*, vol. 28 (2006) 518-9.

¹³⁴³ In his seminal study, Cranston mentioned UK consumer agencies, the discretion of enforcement agents, and eventually they could intervene, but it seemed that their strategy for regulatory enforcement was largely based on threats of criminal prosecution, which would probably not work in the case of 'stock out' supermarkets. See Cranston (n. 735) ch 5.

Rio de Janeiro, Brazil. Facing the same problem of 'stock outs' in supermarkets, he could then frame his complaint as a collective wrongdoing that affects the diffuse interests of consumers. Likewise, the legal culture would not favour a fully market-based solution, but rather admit the possibility of state intervention due to a potential market failure. Moreover, several collective actors mobilised different infrastructures and could process a complaint related to supermarket 'stock outs' as a violation to consumer rights. Actually, the AGO filed one collective action against a supermarket based on one individual complaint due to 'stock out' of products widely advertised in television for a sale.¹³⁴⁴ This comparison explains how this sense of relative deprivation is socially constituted and how the normative environment is shaped by the legal architecture.

Deprivation is an important factor for the development of any social movement.¹³⁴⁵ Mobilisation of consumer law for the vindication of collective rights may benefit from a strongly shared sense of loss. This was the case, for instance, with the bankruptcy of the Gama Filho and City universities. Thousands of students felt deprived by the termination of these universities academic activities and jointly demanded a solution for their grievances.¹³⁴⁶ Enforcement

¹³⁴⁴ In Rio de Janeiro, a consumer filed a complaint against a supermarket because it announced that several items were on sale and yet many of these products were unavailable when the store opened. The AGO investigated the complaint and the supermarket admitted to it, but provided documents demonstrating that the products were available in stock a couple of hours after opening time. The public prosecutor offered a settlement in which the company would commit to keep all sale items in stock for the duration of the sale. Because the supermarket refused the settlement, the AGO filed a civil public action and the commercial court ruled that the supermarket should keep all products of their advertised sale in stock. See *AGO v. Supermarket Guanabara* (0367270-14.2010.8.19.0001, 6th Commercial Court). The High Court later reversed this sentence, but this case of the 'stock-out' supermarket provides an example of how the relative deprivation of consumers depends on this interplay between normative architecture and the socio-legal environment.

¹³⁴⁵ Sidney Tarrow, *Power in Movement: Social movements, collective action and politics* (CUP 1994) 3.

¹³⁴⁶ Interview V (RJ 11.09.14).

agents may use this strong sense of consumer loss to reach a solution. In this case, for instance, the OPD coordinated efforts with student groups and managed to solve the relevant problems regarding continuation of studies and graduation with the Ministry of Education and the recipient universities.¹³⁴⁷

A strong sense of deprivation may facilitate group mobilisation to fight for their collective interests.¹³⁴⁸ Particularly in the case of consumers, complaints are related to their feelings of relative deprivation,¹³⁴⁹ varying according to the characteristics of the case, legal architecture and socio-legal environment. A complaint is a social interaction between consumer and consumer authorities, expected to be socially meaningful. Because the meaning of a complaint is socially constituted, it necessarily depends on context and standpoint too.¹³⁵⁰

7.3.2.2 – *Legal Entrepreneurs*

Socio-legal mobilisation depends on effective leadership.¹³⁵¹ In addition to the collectivity, networks and groups, the presence of individual leaders is extremely important.¹³⁵² This is true not only for consumer groups related to social movements, but also for public organisations that perform the role of

¹³⁴⁷ Interview V (RJ 11.09.14).

¹³⁴⁸ Tarrow (n. 1345) 3.

¹³⁴⁹ Tarrow (n. 1345) 3.

¹³⁵⁰ William Twining, *Law in context: enlarging a discipline* (OUP 1997) 49-53.

¹³⁵¹ Aldon Morris and Suzanne Staggenborg, Leadership in social movements, in David Snow, Sarah Soule, Hanspeter Kriesi (eds), *The Blackwell Companion to social movements* (Blackwell 2004) 171.

¹³⁵² Morris and Staggenborg (1351) 171.

consumer advocates. Leadership may be exercised in various ways. Some individuals are important for the protection of consumer rights, because of their talent for negotiation and integration of previously separated groups.¹³⁵³ These leaders perform the role of *brokers*, being essential for development of integrated coalitions and initiatives for governance of the regulatory space.¹³⁵⁴ Other leaders are *symbolic*, embodying the aspirations, indignations, and ideals of a given movement in a way that inspire others.¹³⁵⁵ Leaders may also be considered a *mobiliser*, an *articulator*, or *charismatic*.¹³⁵⁶

The development of consumerism in Brazil has also benefitted from the leadership of important actors, who exercised leadership. For instance, the quixotic head of the AGOCPD decided to organise their workload based on individual complaints, mediation of individual grievances, and to communication with the media to publicise their work.¹³⁵⁷ His strategic decisions determined a style of enforcement focused on personal interaction with consumers, ADR mechanisms, and broad publicity.¹³⁵⁸ Once he left his position, the new prosecutors substituted the mediation of individual grievances for a strategy of collective litigation. Again, leadership changed the organisational setting and legal environment.

¹³⁵³ Goodwin and Jasper (n. 1332) 94.

¹³⁵⁴ Goodwin and Jasper (n. 1332) 94.

¹³⁵⁵ Goodwin and Jasper (n. 1332) 94.

¹³⁵⁶ Morris and Staggenborg, (1351) 172.

¹³⁵⁷ Susan Silbey made a similar observation in her empirical study on consumer protection prosecutors of Massachusetts. See Silbey (n. 32) 854.

¹³⁵⁸ Interview T (RJ 10.09.14).

Collective actors developed their organisational infrastructure and institutional capacity through decisive entrepreneurship of their leaders. For instance, the AGO became the leading institution and one of the most prominent consumer organisations in Brazil because of the charismatic leadership of Rodrigo Terra and the technical leadership of the team of prosecutors.¹³⁵⁹ The OPD benefitted from the pioneering work of Jose Augusto Garcia and, more recently, the leadership of Marcela Oliboni.¹³⁶⁰ The CODECON depended on the political leadership of state representative Cidinha Campos and benefitted from the pioneering initiatives of Paulo Barroso, who guaranteed the recognition of standing of this legislative organ as a plaintiff for collective actions.¹³⁶¹ These examples reveal public entrepreneurship and challenge the traditional idea that public officials operate within their bureaucratic roles, being limited by their iron cages.¹³⁶²

In terms of leadership of consumer associations, IDEC owed its position in the 1990s as the leading consumer advocate to the innovative entrepreneurship of Marilena Lazarini.¹³⁶³ Later, PROTEST became a powerhouse with more than

¹³⁵⁹ Interviews L (RJ 14.08.14) and O (RJ 26.08.14). This entrepreneurship not only increased the number of consumer complaints, but also put more pressure on corporations to enter into negotiations to avoid negative publicity, a hypothesis of informal sanction suggested in the academic literature. On the power of public opinion, see, for instance, Galligan (n. 161) 352.

¹³⁶⁰ Interview with J (RJ, 30.04.14) and D' (RJ 22.09.14).

¹³⁶¹ Interview S (RJ 09.09.14).

¹³⁶² Weber (n. 946) 223-6. This active leadership was important for the protection of the collective interests of consumers. However, the European model of collective redress reveals that charismatic leadership is non-essential for consumer protection. Bureaucratic leaders are the driving force behind Eurolegalism. See R. Daniel Kelemen, *Eurolegalism: the transformation of law and regulation in the European Union* (Harvard 2011) 6-7.

¹³⁶³ Interview R (RJ 02.09.14).

280,000 constituents under the leadership of Maria Inês Dolci.¹³⁶⁴ Additionally, Claudia Lima Marques and Herman Benjamin were pointed as decisive actors for the enactment of the CDC.¹³⁶⁵

7.3.2.3 Resource mobilisation

The sustainability of a collective actor over time depends on the capacity to mobilise resources to perform its functions. According to Olson, large groups of people motivated by the general interest of protecting the public good would not manage to bear the costs of their activities on their own.¹³⁶⁶ The civil public action empowers public and private actors as potential consumer representatives and these organisations have the challenge of competing against each other to mobilise resources to fund their activities.¹³⁶⁷

I already examined this issue from the economic perspective, in terms of the regime of incentives to fund the juridical collective action.¹³⁶⁸ In this subsection, I would like to examine briefly this issue from the political and sociological perspective. In political terms, the existence of independent public actors provides stability for the consumerist movement, because the establishment of the AGO, OPD, and CODECON as consumer advocates consolidates and mobilises permanently an organisational structure especially

¹³⁶⁴ Interview Y (SP 15.09.14).

¹³⁶⁵ Interview C' (SP 19.09.14).

¹³⁶⁶ Olson (n. 42) 35.

¹³⁶⁷ Mayer Zald and John McCarthy, Social movement industries: competition and cooperation among movement organisations, CRSO Working Paper n. 201 (1979) 4-5.

¹³⁶⁸ See chapter 4.

designed for consumer protection. The relevant objectives are built into institutionalised power relations that respond to grievances through a defined political structure.¹³⁶⁹

The existence of a *formal organisation* may facilitate the socio-legal mobilisation that leads to normative transformations.¹³⁷⁰ This point indicates a relevant, but not sufficient factor for socio-legal mobilisation. On one hand, consumers and consumer groups have to mobilise these collective actors to pursue regulatory enforcement of consumer laws. This mobilisation of law by social actors occurs through complaints, individual actions at small claims courts, and production of evidence of collective wrongdoings. On the other hand, collective actors may have to mobilise groups of individual consumers.¹³⁷¹ This mobilisation of society by enforcement agents depends on how the collective dispute is framed and resonates through the media to a wider public.

This process of socio-legal mobilisation is not always necessary. Regulatory enforcement sometimes results from a settlement without any publicity that changes the law. For instance, the display of price per volume in supermarkets and the exclusion of a no-compensation clause in shopping centre parkings did not require large social mobilisation, but rather the mere convergence of interests in the negotiation of settlement between AGO and corporations. These cases look more like a silent revolution than a legal transformation through the power of social mobilisation. Nonetheless,

¹³⁶⁹ Craig Jenkins, Resource mobilisation theory and the study of social movements, *Annual Review of Sociology*, vol. 9 (1983) 528.

¹³⁷⁰ Tarrow (n. 1345) 135.

¹³⁷¹ Tarrow (n. 1345) 136.

corporations may refuse to comply with an injunctive order and to protect consumer rights. In these cases, social mobilisation may be necessary to transform the legal environment.

7.3.2.4 Framing the collective dispute

By *framing* the collective dispute, someone presents a particular articulation of the collective controversy, asserting important values to be protected on behalf of the collectivity and a potential remedy for the collective wrongdoing.¹³⁷² These frames initiate the process for establishing the terms of a particular debate and the interpretive frame of the collective controversy.¹³⁷³ Collective action frames are an important analytical concept of the social movements literature, explaining the dispute for mobilising and countermobilising ideas and meanings.¹³⁷⁴ Collective actors are important agents for production and maintenance of meaning for constituents, antagonists, and observers of collective disputes.¹³⁷⁵ Because these collective controversies are often important for a large audience, these attributions of meaning involve a *politics of signification*, through which meaning is negotiated and renegotiated by different social groups.¹³⁷⁶

¹³⁷² Robert Benford and David Snow, Framing processes and social movements: an overview and assessment, *Annual review of sociology*, vol. 26 (2000) 614.

¹³⁷³ Benford and Snow (1372) 614.

¹³⁷⁴ Benford and Snow (1372) 613.

¹³⁷⁵ Benford and Snow (1372) 613.

¹³⁷⁶ Benford and Snow (1372) 613.

In the socio-legal literature, a similar process is identified in the idea of emergence and transformation of disputes. Felstiner, Abel, and Sarat referred to the processes of *naming*, *blaming*, and *claiming* as important discursive strategies for recognition, responsabilisation, and compensation of grievances.¹³⁷⁷ In their account, there is a cycle of experiences becoming grievances and of grievances becoming disputes, characterised by awareness of naming, the attribution of blaming, and the remedying of claiming.¹³⁷⁸ This process is normally unstable, depending on the complex interaction of parties and public officials to negotiate meaning, liability, and consequences of a collective wrongdoing.¹³⁷⁹

Nonetheless, the initial frames normally simplify the message, encourage action, and project a normative meaning with a core idea and an interactive element.¹³⁸⁰ The core idea is often the articulation of a situation of injustice that calls attention to the potential identification of victims of corporate wrongdoing.¹³⁸¹ Importantly, not always do legal frames coincide with frames proposed by social movements,¹³⁸² because they have to fit within the normative benchmarks and legal requirements.¹³⁸³ In terms of the interactive element, collective action framing may include a call for action, encouraging the consumer

¹³⁷⁷ Felstiner, Abel, and Sarat (n. 628) 632.

¹³⁷⁸ Felstiner, Abel, and Sarat (n. 628) 635-6.

¹³⁷⁹ Felstiner, Abel, and Sarat (n. 628) 640.

¹³⁸⁰ Benford and Snow (1372) 614-5.

¹³⁸¹ Benford and Snow (1372) 615.

¹³⁸² Edelman, Leachman, and McAdam, (n. 1329) 665.

¹³⁸³ Galligan (n. 161) 312-3.

to take the initiative to protect her own right as well. These processes are dynamic and corporations have resources to mobilise the media with messages against consumers, suggesting that they are greedy and harmful for the market and the common good.¹³⁸⁴

Moreover, sometimes there is not even the necessity for countermobilisation strategies by corporations, because the media simply does not diffuse the collective action frame produced by the collective actor. Consider, for instance, the case in which the AGO filed a collective action suit against the ten biggest Brazilian banks because of excessive interest rates.¹³⁸⁵ Public prosecutors had a simple message that they were opposing operations with interest rates above the average in the market, a practice already considered illegal by the STJ.¹³⁸⁶ Moreover, they identified an old lady who paid exorbitant interest rates and could serve as example of grievance, putting a human face on the collective wrongdoing and fostering empathy with the mass of consumers.¹³⁸⁷ Prosecutors filed this collective action and publicised it to the leading news agencies and newspapers of São Paulo, but none of them publicised this case to their audiences.¹³⁸⁸ The case had little publicity and did not mobilise public opinion as planned.¹³⁸⁹

¹³⁸⁴ McCann, Haltom, and Bloom (n. 733) 175-8; Haltom and McCann (n. 694) 7-8.

¹³⁸⁵ Interviews Z (SP 16.09.14) and A' (SP 18.09.14).

¹³⁸⁶ Interviews Z (SP 16.09.14) and A' (SP 18.09.14).

¹³⁸⁷ Interviews Z (SP 16.09.14).

¹³⁸⁸ Interviews Z (SP 16.09.14) and A' (SP 18.09.14).

¹³⁸⁹ Interviews Z (SP 16.09.14) and A' (SP 18.09.14). By contrast, the case of the bankrupt universities received a lot of media attention and the commercial court responded quickly. In a series of judicial decisions, the court granted interim injunctions, scheduled a special hearing, and increased the fine for lack of compliance with the judicial order. The frame of this collective controversy altered its characteristics throughout the course of the case. Initially, the consumer

This effect of dissemination of the collective action frame through the media is the resonance effect. The role of the media in frame diffusion is especially relevant, because it gives resonance to these rights frames. Multiple actors in the consumer protection network may attribute their particular value and negotiate the meaning of these consumer rights frames.¹³⁹⁰

Mobilisation of consumers may facilitate protection through collective actions. Collective actors may function as legal entrepreneurs and protect consumers against relative deprivation by framing the collective controversy in a way that pressures regulators, courts, and corporations to find a solution to the case. However, collective actors do not always manage to mobilise their constituencies, promoting effective consumer protection that guarantees access to justice, judicial economy, and regulatory enforcement. The professed objectives of collective actions are not always achieved. The next sections examine how collective action operates within a complex environment and discuss why the implementation and enforcement are limited.

7.4 Collective action in a complex legal environment

demand was framed as a juridical wrongdoing, because Galileo Group violated its legal responsibilities to provide higher education and transfer documents to students at Gama Filho and City. Subsequently, the ineffectiveness of sanctions showed that the problem was eminently economic and resulted from the bankruptcy of Galileo Group. Consequently, the public defenders framed this controversy as a matter of social responsibility and attributed the social obligation of holding the graduation ceremonies and awarding diplomas to a large group of students who had just concluded their studies at the bankrupted universities to other universities Estácio de Sá and Veiga de Almeida.

¹³⁹⁰John A. Noakes and Hank Johnston, Frames of protest: a roadmap to a perspective, in Hank Johnston and John A. Noakes (eds), *Frames of protest: social movements and the framing protest* (Rowman & Littlefield 2005) 9-10. Individuals normally express their grievances in everyday language and collective actors will translate these colloquial words into juridical language. This translation of collective wrongdoings into 'legalese' involves not only the adoption of technical legal expressions and the use of other legalisms, but also the framing of these conflicts and the establishment of the initial terms of the debate for protection of consumer interests. Importantly, these narratives are socially constituted, but not socially controlled by legal enforcers.

7.4.1 Introduction

The architecture of collective action is influenced by legal traditions,¹³⁹¹ economic incentives,¹³⁹² and the power of collective actors.¹³⁹³ The law establishes the structure of collective rights, the mandate of collective actors, the different legal pathways, and the special features of collective action for consumer protection.¹³⁹⁴ These aspects shape the normative space for implementation of law. Particularly important for implementing the law is the role of social relationships and institutions.¹³⁹⁵

7.4.2 Social Relationships

Social relations between the implementers and the implementees are an important part of the legal environment, given the possibility of a continuing process shaped by potential cooperation and the threat of coercion through punishment.¹³⁹⁶ In the case of collective action for consumer protection, social relations are also important, but should not be simply examined as a dyadic relationship between one implementer and one implementee. Not only are there

¹³⁹¹ See chapter 2.

¹³⁹² See chapter 4.

¹³⁹³ See chapter 5.

¹³⁹⁴ See chapter 6.

¹³⁹⁵ Galligan (n. 161) 320-7.

¹³⁹⁶ Galligan (n. 161) 324-5.

various collective actors in competition, but also the collective interests are interconnected through a network of individuals, groups, and society at large.

In terms of the substantive juridical relationship, consumer law protects the social relation between a corporation and a consumer: the B2C relationship. Likewise, the empirical observation of the legal environment suggests that we should not simply examine this relation as a dyadic one. The 2 of B2C relationships is sometimes composed by 3, 4 ... 10,000 others, depending on the case. For instance, thousands of students mobilised the OPD and the Ministry of Education to protect their undergraduate education in the case of the bankrupted universities.¹³⁹⁷ Likewise, hundreds complained against the raising of prices for football tickets coordinated by clubs and the local football association.¹³⁹⁸ Moreover, more than 27,000 consumers filed virtual complaints against 'Americanas' and individuals make hundreds of thousands online complaints against corporations at the site 'Complain Here' every year.¹³⁹⁹

Unsurprisingly, many of these cases revealed instances of networked behaviour. Consider, for instance, the product delivery failure of e-commerce companies. Interconnected consumers realised that the problem of delayed product delivery was not individual, but rather collective. The diffusion of information on the internet produced a cascade effect, circulating critiques, influencing others to complain, and amplifying the publicity of the consumer

¹³⁹⁷ Interview V (RJ 11.09.14).

¹³⁹⁸ Interview S (RJ 09.09.14).

¹³⁹⁹ Interviews L (RJ 14.08.14) and C' (SP 19.09.14).

complaint.¹⁴⁰⁰ Consequently, thousands expressed their grievance at the website 'Complain Here' and hundreds complained at the AGO against different e-commerce traders. Because the aggregation of complaints at 'Complain Here' function as an open shared resource for collective actors,¹⁴⁰¹ prosecutors confirmed that the problem affected tens of thousands of consumers and used the complaints from the website as evidence of seriousness of this problem.¹⁴⁰² Once the AGO filed the collective actions, other consumers also learned about the collective dimension of this grievance through traditional media.¹⁴⁰³ In addition to the online complaints at 'Complain Here', consumers also filed individual suits at small claims courts, seeking redress for their personal damages.

Therefore, these social relationships between consumers and corporations are protected through the intervention of collective actors, media, ODR, ADR, and small claims courts in a complex interconnected way. The legal environment is constituted by these multiple symbolic interactions between the different relevant actors and the experience of consumer protection emerges from these complex interactions. The AGO developed the programme 'consumer winner' to publicise all legal victories obtained by public prosecutors on behalf of consumers. A website contains more than two thousand favourable outcomes for consumers from all over the country with a compilation of more than 2,000 judicial decisions and corporate commitments obtained through

¹⁴⁰⁰ Easley and Kleinberg (n. 95) 12-13.

¹⁴⁰¹ Easley and Kleinberg (n. 95) 8.

¹⁴⁰² Interview L (RJ 14.08.14).

¹⁴⁰³ Interview L (RJ 14.08.14).

collective actions promoted by the AGO.¹⁴⁰⁴ There is also a channel of communication between consumers and the AGO, through which individuals may report and even produce evidence of violations of negotiated settlements, judicial sentences, and injunctive orders.

Consider, for instance, the collective action of the AGO against Supervia because of urban trains travelling with broken doors. A relationship between the collective actor and the corporation is clearly established. Additionally, though, the AGO publicised a call for evidence of the collective wrongdoing, asking passengers to make videos of unsafe trains with open doors.¹⁴⁰⁵ Dozens of consumers filmed the violation with their cell phones and sent these videos to the AGO.¹⁴⁰⁶ This evidence was presented to the commercial court and the judge fined the company for violating an injunctive order.¹⁴⁰⁷ The web of regulatory relationships includes also regulatory agencies with their investigations, financial institutions with requirements for loans, and the state with conditions for renovation of the contractual concession for railroad transportation.¹⁴⁰⁸

In this setting, the role of institutions and organisations is also very important because they are designed by society to channel forces towards certain outcomes, consisting of rules, conventions, or mechanisms that may synthesise individual actions into a pattern of aggregate behavior.¹⁴⁰⁹ The next

¹⁴⁰⁴ www.consumidorvencedor.mp.br (checked in 15.01.17).

¹⁴⁰⁵ Interviews J (RJ, 30.04.14) and L (RJ 14.08.14).

¹⁴⁰⁶ Interviews J (RJ, 30.04.14) and L (RJ 14.08.14).

¹⁴⁰⁷ Interviews J (RJ, 30.04.14) and L (RJ 14.08.14).

¹⁴⁰⁸ On the regulatory character of contract law, see Hugh Collins, Regulating contract law, in Christine Parker and others (eds) *Regulating law* (OUP 2004) 14-7.

¹⁴⁰⁹ Easley and Kleinberg (n. 95) 15.

sub-section examines the role of institutions and organisations in the legal environment.

7.4.3 The role of institutions and organisations

The role of institutions and organisations is essential for the implementation of law. Organisations are important for its practical application, by mobilising the law and applying it to concrete cases.¹⁴¹⁰ Through a process of regular application, legal norms become institutionalised as they provide the so-called 'rules of the game'.¹⁴¹¹ Law is not just a set of standards and rules, but an institution continuously being shaped through interactions with organisations.¹⁴¹² Organisations may sometimes tend to autopoietic closure and develop their own social sphere, "an area of activity in which the participants share understanding and conventions about the activity, and which influence and guide the way they engage in it".¹⁴¹³ Social spheres provide relevant insights for the study of legal environments.

First, there is an important *cognitive* dimension, because a particular way of thinking emerges within the context of a social sphere through perceptions, expectations, and understandings.¹⁴¹⁴ Second, there is an important *normative* dimension, because of the normative horizons developed through standards of

¹⁴¹⁰ Galligan (n. 161) 325-7.

¹⁴¹¹ North (n. 1071) 3.

¹⁴¹² Edelman, Leachman, and McAdam (n. 1329) 656.

¹⁴¹³ Galligan (n. 161) 103.

¹⁴¹⁴ Galligan (n. 161) 106.

behaviour constitutive of rules, conventions, and principles within the social environment.¹⁴¹⁵ Third, there is an important *regulative* dimension, given the power exercised by coercion and pressure within a social sphere with a capacity to govern behavior and regulate its members.¹⁴¹⁶ These social spheres create their "mini-world of meanings and expectations, of conventions and practices".¹⁴¹⁷ The concept of social sphere tends to closure and autopoietic self-reference, because of the homogeneity of members and uniformity of shared normative understandings.¹⁴¹⁸ Their density is variable, impacting the level of influence exercised over individuals, the degree of distinctiveness from other social spheres, and the openness or closure to external influences.¹⁴¹⁹

However, the explanatory power of this concept seems more salient for *homophilic* groups, formed by associations of similar individuals, who share common beliefs, values, and education that facilitate their communication and inter-relationships.¹⁴²⁰ The idea of social spheres does not fit well to explain the dynamics of various *heterophilic* social groups, composed by individuals with different ideas, opinions, values and attitudes.¹⁴²¹ These heterogeneous groups do not tend to autopoietic closure, because different individuals are constantly

¹⁴¹⁵ Galligan (n. 161) 106-7.

¹⁴¹⁶ Galligan (n. 161) 106-8.

¹⁴¹⁷ Galligan (n. 161) 111.

¹⁴¹⁸ Galligan (n. 161) 109-10. See also Niklas Luhmann, *Law as a Social System* (OUP 2004) 105-20.

¹⁴¹⁹ Galligan (n. 161) 111. Using the example of resistance to the *Mental Health Act* (1983) due to the dense closure of the psychiatric profession, Galligan explains that initiatives for legal change must confront the conventions and understandings within a social sphere and may be considered compatible or incompatible depending on the case and the degree of cohesion of a social group.

¹⁴²⁰ Everett M. Rogers, *Diffusion of Innovations* (5th edn Free Press 2003) 305-8.

¹⁴²¹ Rogers (n. 1420) 306.

renegotiating normative meaning and do not necessarily share commonly fixed understandings on law. Instead of a social sphere,¹⁴²² I propose that we refer to these settings of relatively open socio-legal exchange as vehicles for collective constitution of normative meaning, that is social collectives or social *omnibus*, rescuing the original meaning of this word in Latin: "for all".

In a sense, all collective actors in the Brazilian experience may fit within this conceptualisation, because they organise themselves as vehicles for consumer's exercise of citizenship, even if only the CODECON has a 'citizenship bus' circulating. Public officials with different professional profiles, strategies, and mentalities constitute organisations like the AGO and the OPD.¹⁴²³ Because of their independence, public prosecutors and public defenders may provide differentiated treatment to the consumer grievances presented to them.¹⁴²⁴ Additionally, the competing collective actors are organised through different infrastructures and provide an opportunity of political participation to different constituencies of consumers. The 'citizenship bus' collects grievances from poor consumers in the suburbs of Rio de Janeiro and CODECON translates them into collective actions.¹⁴²⁵ Consumer associations process complaints from tens of thousands of their affiliated members.¹⁴²⁶ These organisations function as social *omnibus* or vehicles for consumers to express their grievances, which are

¹⁴²² Galligan (n.161) Ch 6.

¹⁴²³ Coslovsky (n. 814) 78-80.

¹⁴²⁴ Interview Z (SP 16.09.14).

¹⁴²⁵ Interview S (RJ 09.09.14).

¹⁴²⁶ Interviews R (RJ 02.09.14), Y (SP 15.09.14), and B' (SP 19.09.14).

processed, translated into a legal frame, and may eventually produce a rule for all consumers.

In such a particular setting, organisations are highly responsive to these demands and the legal environment becomes an "arena within which organisations collectively construct the meaning of compliance".¹⁴²⁷ In this sense, consumer law is not simply interpreted and applied with the internal perspective of an organisation, but rather through a broader normative horizon that anticipates the different perspectives, strategies, and actions taken within the complex legal environment.¹⁴²⁸ Consumer rights do not implement themselves, but depend on the recognition and protection developed by the relevant actors in the legal environment.¹⁴²⁹

This is not to suggest that these collective actors provide a 'blank slate' or a *tabula rasa*, being entirely open to any collective action frame that may be suggested by consumers.¹⁴³⁰ Organisations have their historical developments, legal mandates, social constitutions, and institutional logics.¹⁴³¹ Therefore, even

¹⁴²⁷ Edelman, Leachman, and McAdam (n. 1329) 656.

¹⁴²⁸ The expression 'normative horizon' is a variation of the idea of Hans-Georg Gadamer of the hermeneutical interpretive horizon, meaning that when the relevant legal actors propose a legal frame in a multi-institutional setting, they imagine the potential reactions of the multiple stakeholders and the fusion of the various normative perspectives projected towards the future may produce a view of the potential interpretive outcomes for the consumer norm, that is, a normative horizon. See Hans-Georg Gadamer, *Truth and method* (2nd edn Continuum 2004) 436-84; Hans-Georg Gadamer, *Philosophical investigations* (University of California Press 2008) 38-42; Günter Figal, The doing of the thing itself: Gadamer's hermeneutic ontology of language, in Robert Dostal (ed), *The Cambridge Companion to Gadamer* (CUP 2002) 118-23; Georgia Warnke, Hermeneutics, Ethics, and Politics, in Robert Dostal (ed), *The Cambridge Companion to Gadamer* (CUP 2002) 95-100.

¹⁴²⁹ Edelman, Leachman, and McAdam (n. 1329) 658.

¹⁴³⁰ This point is inspired by the well-known argument made by John Locke that human minds are 'blank slates' at birth and gradually filled by experience. See John Locke, *An essay concerning human understanding* (Hackett 1996) 7-13.

¹⁴³¹ W. Richard Scott, *Institutions and Organizations: ideas, interests, and identities* (4th edn Sage 2014) 90-1.

if they may function as social vehicles for consumer advocacy, the collective actors are not empty vessels, fully flexible and adaptable to any consumer demand. On one extreme, consumer associations seem more flexible and adaptative, because of the necessity to be responsive to their constituency to maintain consumer membership. On the other extreme, the AGO is an established public organisation, with a strong constitutional mandate, wide social recognition as a consumer advocate, and an institutional logic that recommends adopting the position of an impartial party.¹⁴³² Therefore, prosecutors are defenders of society at large and preserve their professional impartiality, even when protecting consumers' interests.¹⁴³³

The OPD and the CODECON seem to be more open to experimentalism and creative enforcement nowadays in comparison to the AGO.¹⁴³⁴ Criticising the current position of the AGOCPD and praising their own popular experience with the 'citizenship bus', an attorney from CODECON referred to the AGO as a 'castle, unknown to most of the population and not really part of their reality'.¹⁴³⁵ Likewise, a public defender criticised the fact that the AGO seems to protect an abstract consumer that transcends the real human being in contrast to the OPD,

¹⁴³² Mazzilli (n. 470) 85-90.

¹⁴³³ This institutional logic is somewhat paradoxical, but explains why sometimes prosecutors refuse to protect rights of sub-groups that may be in conflict with large societal interests, a point that Colin Crawford simply did not understand in his insufficiently expansive critique of Lesley McAllister work based on superficial anecdotes. See Colin Crawford, Defending public prosecutor's and defining Brazil's environmental public interest: a review of Lesley McAllister's *Making law matter: environmental protection and legal institutions in Brazil*, *George Washington International Law Review*, vol. 40 (2009) 631 & 635-44; and Lesley McAllister, On environmental enforcement and compliance: a reply to professor Crawford's review of *Making law matter: environmental protection and legal institutions in Brazil*, *George Washington International Law Review*, vol. 40 (2009) 649-685.

¹⁴³⁴ Interview L (RJ 14.08.14).

¹⁴³⁵ Interview S (RJ 09.09.14).

which has a large experience dealing with the public and protecting concrete rights and interests of the consumers they represent.¹⁴³⁶ Their critique actually reveals the strength of the AGO as a collective actor. This detachment and impartiality are important for the exercise of regulatory enforcement in a balanced way, protecting not only the interests of complainants, but also of society by large. This position of the AGO as an impartial party also provides political credentials for exercise of power to moderate conflicts and leadership in coalitions of collective actors for governance of the regulatory space.

The actual consumer protection emerges from this complex interaction between multiple institutional actors in the legal environment, including corporations, consumers, courts, regulators, media, and the collective actors.¹⁴³⁷ Rather than the product of an endogenous decision made inside an organisation, consumer protection is the result of normative interactions in a multi-institutional social environment.¹⁴³⁸ Far from a matter of direct rule application, the implementation of consumer law emerges from the uncertain outcomes produced by the complexity of the legal architecture and its environment.¹⁴³⁹ This complex character of the legal experience leads us to consider the concept of legal culture as a dynamic exchange of ideas, opinions, and attitudes about law.

7.4.4 The reflexivity of legal culture.

¹⁴³⁶ Interview D' (RJ 22.09.14).

¹⁴³⁷ Edelman, Leachman, and McAdam (n. 1329) 665.

¹⁴³⁸ Edelman, Leachman, and McAdam (n. 1329) 668-70.

¹⁴³⁹ Galligan (n. 161) 321.

A concept of legal culture has to be reflexive, include legal thinking and analytical elements related to ideas, opinions, and attitudes that are not generally representative of cohesive social groups. Instead of focusing exclusively on shared normative meaning, a conceptual framework of legal culture has to accommodate alternative thoughts that are not widely shared within society, acknowledging the importance of dissenting ideas, opinions, and values about law. Isolated particles of alternative understandings, cogitations and thoughts are also part and parcel of the legal culture.

This comprehensive account of the constitutive elements of a legal culture is important because original ideas are developed as isolated fragmented thoughts that through complex interactions may eventually emerge as juridical ideologies, normative principles, and legal institutions. Legal culture is not a monolithic entity like a marble block or a billiard ball. Individuals and groups reflect on law through speculative logic and their thoughts on the legal system are plurivocal. Even within relatively cohesive social groups with a deeper density of shared normative meaning, different strands of ideas, values, and opinions regularly emerge and transform their normative horizon. Therefore, minority perceptions, isolated views, and dissenting opinions are an important part of the concept of legal culture, because of their role for socio-legal transformation and the complexity of contemporary legal systems.

A theory of legal culture has to consider it also as a complex network of normative meaning, in which there is continuous exchange of ideas, opinions, and values on legal phenomena. Socio-legal scholars have already referred to legal culture as a network, but have never fully explored this insight. For

instance, when he coined this expression, Friedman described legal culture as 'the network of values and attitudes relating to law'.¹⁴⁴⁰ In his critique of Friedman, Cotterrell mentioned the 'ever changing web of norms expressing and influencing the interactions of many different networks of community'.¹⁴⁴¹ Galligan also makes reference to 'a network of informal rules whose purpose are to help in interpreting and applying the legal rules, or perhaps modifying them in accordance with other interests and values'.¹⁴⁴² Anthony Ogus and Eric Feldman also associated legal culture with the idea of network.¹⁴⁴³ The insights from network theory have to be incorporated into the analysis of legal culture, because of how normative ideas are constantly changing through this continuous exchange.

Several examples of collective action from consumer protection reveal this reflexivity of the legal culture. Think of the initiative to persuade supermarkets that they should adopt the display of price per volume of all their items to facilitate access of consumers to information.¹⁴⁴⁴ Reflect on the decision to limit the waiting time at bank queues to no more than 30 minutes and to supervise the implementation of this rule.¹⁴⁴⁵ Consider the establishment of a special fund for victims of the AF 447 accident, so that they could receive the

¹⁴⁴⁰ Lawrence Friedman, Legal culture and social development, *Law & society review*, vol. 4 (1969) 29.

¹⁴⁴¹ Roger Cotterrell, The concept of legal culture, in David Nelken (ed) *Comparing legal cultures* (Ashgate 1997) 29-30.

¹⁴⁴² Galligan (n. 161) 107.

¹⁴⁴³ Anthony Ogus, The Economic Basis of Legal Culture: Networks and Monopolization, *Oxford Journal of Legal Studies*, vol. 22 (2002) 419; Eric A. Feldman, Layers of Law: The Case of E-Cigarette, *FIU Law Review*, vol. 10 (2014) 111.

¹⁴⁴⁴ Interview L (RJ 14.08.14).

¹⁴⁴⁵ Interview O (RJ 26.08.14).

equivalent amount of judicial compensation through a special claims facility outside the courtroom system.¹⁴⁴⁶ These are just a few examples of normative ideas that emerged from multiple actors reflecting together on how to improve consumer experience.

7.4.5 Regulatory enforcement in a complex legal environment

A complex legal environment contains networked social relationships beyond a mere transaction between corporations and consumers. Multiple institutions and organisations participate as vehicles for collective action. Constant circulation of innovative normative ideas improves the consumer experience. This setting fits well with the rise of civil society in regulation, in which collectives of civil society actors emerge as regulatory agents to change corporate behaviour.¹⁴⁴⁷

In this context, collective actors emerge as intermediaries between the market and the state, building partnerships, acting competitively as an extension of public administration, and operating outside the scope of governmental action.¹⁴⁴⁸ For instance, a coalition of collective actors decided to promote regulatory overview in supermarkets to guarantee that products are not traded after the expiration date.¹⁴⁴⁹ This initiative was taken after complaints of consumers and the understanding that supermarkets would only exercise

¹⁴⁴⁶ Interview X (RJ 12.09.14).

¹⁴⁴⁷ Bettina Lange and Fiona Haines, Regulatory transformations: an introduction, in Bettina Lange, Fiona Haines, and Dania Thomas (eds), *Regulatory transformations: rethinking economy - society interactions* (Hart 2015) 1.

¹⁴⁴⁸ Lange and Haines (1447) 4.

¹⁴⁴⁹ Interviews J (RJ, 30.04.14) and V (RJ 11.09.14).

effective control under pressure of a coalition between the AGO, OPD, and PROCON.¹⁴⁵⁰ Collective actors negotiated a programme with the association of supermarkets that if a consumer finds an expired product in the shelves is entitled to receive a valid product for free.¹⁴⁵¹ This programme encourages consumers to function as regulators,¹⁴⁵² by checking the validity dates of products in the shelves and demanding a new product if they find an expired one.¹⁴⁵³

There are other examples of the important role of civil society actors in regulatory enforcement. First, consumer-citizens occupy the regulatory space, expressing their grievances, complaining for change of rules, and demanding a better consumer experience.¹⁴⁵⁴ This is true of cyberspace with hundreds of thousands of annual complaints at the website 'complain here', but it is also true of various traditional sites of regulated B2C relationships. Collective actors pursue regulatory enforcement on banks, telecoms, electrical companies, various modes of transportation, football stadiums, and shopping centres, among many other business sites.

Second, consumers are involved in the constitution of meaning for regulatory enforcement. Not only are the vast majority of collective actions implemented as a response to consumer grievances, but also consumers follow some cases, demonstrate concern with collective wrongdoings and support

¹⁴⁵⁰ Interviews J (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

¹⁴⁵¹ Interviews J (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

¹⁴⁵² Lange and Haines (1447) 2.

¹⁴⁵³ Interviews J (RJ, 30.04.14), L (RJ 14.08.14), and V (RJ 11.09.14).

¹⁴⁵⁴ On the tendency of civil society actors occupying the regulatory space, see Lange and Haines (1447) 6.

collective actors. In some cases, consumers continue in contact with collective actors during the civil enquiry and the collective litigation, providing feedback on the legal frame and additional evidence.¹⁴⁵⁵ In other cases, this engagement of civil society actors is spontaneous, such as when street artists painted the cover of underground chambers as explosive bombs, an analogy used by the AGO in its petition.¹⁴⁵⁶

Thirdly, there is the important role of public opinion and the media in the regulatory enforcement promoted by collective actors. The AGO, OPD, CODECON, IDEC, and PROTEST use the media to provide widespread notice for their collective actions and to reach a broader audience of consumers in civil society.¹⁴⁵⁷ The message publicised by the media is restricted and may not fully capture the meaning conveyed by the enforcement agent.¹⁴⁵⁸ Additionally, there is an imperfect overlapping between the interests of media coverage and those of enforcement agents in publicising their cases.¹⁴⁵⁹ A prosecutor complained about having a lot of media interest in a case relating to objectification of women in the advertisement of a brewery in contrast to no publicity for a case against the ten biggest banks for charging abusive interest rates.¹⁴⁶⁰ Media coverage is certainly selective and not always effective in providing notice to consumers of these collective actions.

¹⁴⁵⁵ Interviews J (RJ, 30.04.14), K (RJ, 30.04.14), and L (RJ 14.08.14).

¹⁴⁵⁶ noticias.uol.com.br/cotidiano/ultimas-noticias/2012/05/25/com-ou-sem-explosoes-rio-e-a-cidade-que-apresenta-maior-numero-de-bueiros-por-domicilio.htm (last checked on 15.01.17).

¹⁴⁵⁷ Moran (n. 944) 195-9.

¹⁴⁵⁸ Interviews Z (SP 16.09.14) and A' (SP 18.09.14).

¹⁴⁵⁹ On the distorting effects of media, see Haltom and McCann (n. 694) ch 1.

¹⁴⁶⁰ Interview A' (SP 18.09.14).

Fourth, the leadership of civil society actors emerges through the development of different techniques and mechanisms for regulatory enforcement. There is a variety of resources for consumer protection in the legal environment: from the potential use of a copy of the CDC and the complaint book in a commercial store and various venues for complaining online to access to justice through small claims courts and intervention in collective actions. The architecture of collective action provides various means for active participation of consumers in regulatory enforcement. However, the existence of different techniques and mechanisms is sometimes insufficient, because they may not achieve their professed objectives. The next section examines this aspect.

7.5 The implementation of law and the objectives of collective action

7.5.1 Introduction

This section discusses the actual implementation of consumer protection law in Brazil and the achievement of its professed objectives of access to justice, judicial economy, monetary compensation, and prevention of further collective wrongdoings. As I already anticipated in the introduction and the attentive reader certainly noticed while reading this thesis, the diagnosis resulting from empirical research is one of relative success and partial failure.

First, let me clarify that I am not making any normative judgment on the merits of the cases, but observing the juridical instrument for collective action and evaluating if it facilitates access to justice, judicial economy, monetary

compensation, and prevention of further collective wrongdoing.¹⁴⁶¹ Nonetheless, from the internal perspective of the interviewed legal actors, there was only one case reported by one interviewee as frivolous litigation in a universe of hundreds of cases over more than 20 years. This was a case in which a bank suffered from many individual suits in small claims courts and approached the AGO with a proposal for a global settlement to give closure to this case. Individuals sued the bank for offering a banking card that did not provide them consumer credit, but just a function of debit that was not even directly connected with a proper bank account. Consumer association ANACONT supported individual actions in small claims courts, allegedly even encouraging customers to sign the contract and sue the bank for unfair practice and misleading advertisement of a financial product.¹⁴⁶² The corporation was experiencing difficulties in producing evidence of recorded phone conversations for every business transaction and faced high transaction costs with multiple individual suits in small claims courts. Therefore, the collective action mechanism was evoked to benefit the bank, reducing high litigation costs with small claims courts, eliminating negative publicity with reputational loss, and attempting to close the litigation through a global settlement.¹⁴⁶³

The following sub-sections discuss the collective action as an instrument of access to justice, judicial economy, monetary compensation, and deterrence. In terms of access to justice, small claims courts are accessible to individual

¹⁴⁶¹ Hensler and others (n. 56) Ch 16.

¹⁴⁶² Interview L (RJ 14.08.14).

¹⁴⁶³ Some characteristics of this case are similar to the Dutch experience with collective redress, in which corporations normally have the initiative to propose a global settlement for judicial economy, procedural closure, and prestige in the public opinion. See Tzankova and Hensler (n. 205) 94-8.

consumers, but intervention in collective actions contains economic and political obstacles. Judicial economy could benefit from mechanisms for aggregation of multiple individual suits and case management techniques. Monetary compensation currently depends on individual suits in small claims courts and collective action should become a venue for bargaining and transacting on behalf of consumers. Moreover, judges could be more pragmatic, ordering corporations to compensate consumers directly through their own relational contracts and networked relationships. Finally, deterrence requires the adoption of mechanisms to eliminate lucrative illegality, such as the skimming off techniques adopted in German competition law, for instance.¹⁴⁶⁴

7.5.2 Access to justice

Access to justice is an objective that normally has to be qualified. Rhode, for instance, asks the following questions: "access for whom? For what? How much? And who should decide?"¹⁴⁶⁵ Access to justice involves the possibility of some subject to defend a legal object after covering the usage costs for funding the expenses associated with the delivery of a judgment by a decision maker. Therefore, potential restrictions involve limitations of standing, restrictions on recognition of rights, imposition of high litigation costs, and mandatory pathways that exclude the possibility of a decision by a judge.

Analysing all these aspects, access to justice is broad in Brazil. There are constitutional guarantees that protect access to courts, the protection of diffuse

¹⁴⁶⁴ Mulheron (n. 290) 418-9; Wösthoff (n. 336) 91-2.

¹⁴⁶⁵ Rhode (n. 652) 5-6.

and collective rights, legal aid for poor litigants, and small claims courts with verdicts delivered by a judge.¹⁴⁶⁶ In contrast to the US, consumers do not have to pay any court usage fees to have access to small claims courts.¹⁴⁶⁷ In contrast to the EU, there is no perception that small claims courts are bureaucratic, formalistic, or inaccessible.¹⁴⁶⁸ Moreover, in Rio de Janeiro, courts regularly impose moral damages in individual cases against corporations, creating incentives for consumers to litigate small value claims.¹⁴⁶⁹ Therefore, regarding consumer protection for individual grievances, courts are accessible.

On the other hand, there are problems in terms of access to justice through collective actions. Even if individuals have the right to intervene, individual consumers rarely do. Reasons come from different factors. First, in contrast to the individual suits in small claims courts, intervention in collective actions require legal representation and payment of court usage fees to participate in a process at the commercial court.

Second, the practical experience of collective action for consumer protection reveals that this juridical instrument functions effectively for regulatory enforcement, but rarely for compensatory damages. Therefore, the individual consumer does not foresee potential economic rewards that could justify his presence and participation at the collective procedure. Third, the Brazilian collective action already counts with the AGO as an overseer of the

¹⁴⁶⁶ CRFB, article 5 and 128.

¹⁴⁶⁷ Hensler (n. 718) 539.

¹⁴⁶⁸ Creutzfeldt (n. 356) 231.

¹⁴⁶⁹ Interviews P (RJ 27.08.14) and C' (SP 19.09.14).

collective procedures and the monitoring participation of a represented consumer as intervener is not perceived as politically important or necessary.

These issues could be potentially addressed by changes in practice or legal interpretation. For instance, the commercial court could waive court usage fees for intervention in collective actions for consumer protection, considering that the position of the individual is analogous to that of a claimant in a small claims court. Likewise, legal assistance could also be waived or attributed to the OPD to guarantee access to justice.¹⁴⁷⁰

Moreover, the presence and participation of the individual consumer could provide an additional political control and pressure over the corporations to compensate consumers as well. Courts could even create monetary incentives, by rewarding the represented consumer who actively participates and contributes to the solution of the collective dispute.¹⁴⁷¹ Furthermore, the presence and participation of consumers could lead to collective settlements with negotiation and bargaining between the collective actor and the corporation, because the monitoring consumer could verify the terms and conditions of the agreement and confirm that there was no unlawful disposition of undisposable consumer rights.

7.5.3 Judicial economy

¹⁴⁷⁰ Interview Z (SP 16.09.14).

¹⁴⁷¹ Theodore Eisenberg makes this proposal for the named plaintiff in the US class actions. See Eisenberg (n. 201) 1305-6.

Judicial economy refers to the optimisation of resources through the development of case-management techniques that lead to rational and cost-effective judicial activity. Particularly in the case of collective actions, judicial economy is achieved through mechanisms for aggregation of multiple individual claims, routinisation of judicial decision-making for simple and repetitive cases, rationalisation of bureaucracy, adoption of pragmatism, and informality to deal with the caseload and backlog in court dockets.

Empirical observation of the civil public action reveals that judicial economy has not been achieved. The legal architecture and the regime of economic incentives lead to bifurcation of judicial pathways. Therefore, the collective action functions particularly well for regulatory enforcement, but not for payment of compensatory damages. Consequently, individuals seek consumer redress through small claims courts, filing tens of thousands of judicial suits there.

This pattern is explained by the economic incentives, because there are no court usage fees or need for legal assistance in small claims courts and potential rewards with moral damages. In contrast, the intervention in a collective action requires payment of court usage fees, legal representation through a lawyer, and little probability of receiving compensatory or moral damages.

There are many potential techniques, strategies, and approaches to deal with this problem of bifurcation. One possibility is the adoption of a test-case mechanism for the judgment of one single representative case, whose decision will be binding for all other similar cases. During the period of judgment of the test-case, all individual cases are stayed, with trial suspended until the final

decision of the test-case. This technique is inspired by the German legislation and their mechanism for mandatory aggregation of repetitive cases in response to the *Deutsche Telekom* case.¹⁴⁷²

At least in Germany the experience with the test-case model led to eternal litigation, endless appeals, tens of thousands of frozen cases, and delayed justice.¹⁴⁷³ A recent procedural reform in the Brazilian law also incorporated a similar technique of collectivisation of repetitive individual claims based on the test-case model as a potential solution to this problem of judicial economy.¹⁴⁷⁴

However, the problem of judicial economy may be approached through different means. One possibility consists of developing techniques for aggregation of all individual claims under the direction of one single judge, who would then be responsible for identifying the crucial issues in the collective controversy, potential sub-groups of claimants within the whole aggregate, and possible terms of a collective settlement. This potential solution is based on the experience of the US with mass litigation.

Courts have developed case-management techniques, appointed special masters to negotiate collective settlements with corporations, and organised public hearings to learn more from consumers and corporations about the crucial issues of the case.¹⁴⁷⁵ In some cases, a collective settlement emerged as a result of this aggregation technique, the knowledge and competence of the judge, and the risks imposed on both sides of the B2C relationship in the case of an 'all-

¹⁴⁷² Halfmeier (n. 327) 282-5.

¹⁴⁷³ Halfmeier (n. 327) 282-5.

¹⁴⁷⁴ CPC, article 990, § 4, and 1050, § 9; Mazzilli (n. 470) 144-8.

¹⁴⁷⁵ Weinstein (n. 1230) 358-9.

or-nothing' outcome.¹⁴⁷⁶ Importantly, these settlements are negotiated under the 'shadow of courts', changing the degree of pressure over corporations in comparison with many out-of-court mediation venues.¹⁴⁷⁷

There are other potential successful techniques for speedy, cheap, and efficient solution of collective disputes. Because these techniques are directly related to compensation, they are examined in the next subsection.

7.5.4 Monetary compensation

As mentioned before, the Brazilian experience with civil public action led to a bifurcation of judicial pathways: collective action for regulatory enforcement; small claims courts and ADR/ODR for individual compensation. On one hand, the evaluation is relatively positive, because there are judicial pathways for monetary compensation of individual consumers. The judicial door is not closed for poor claimants or small value cases due to a conservative rhetoric of austerity.¹⁴⁷⁸

¹⁴⁷⁶ One special case was the global settlement of the Agent Orange Case conducted by court-appointed special settlement master Kenneth Feinberg under the oversight of judge Jack Weinstein. See Kenneth Feinberg, Creative use of ADR: the court-appointed special settlement master, *Albany Law Review*, vol. 59 (1996) 888; Kenneth Feinberg, Reporting from the front line: one mediator's experience with mass torts, *Loyola of Los Angeles Law Review*, vol. 31 (1998) 362-9

¹⁴⁷⁷ On the relevance of courts for settlements, see Mnookin and Kornhauser (n. 855) 990-997.

¹⁴⁷⁸ There is a relevant literature criticising contemporary trends of civil justice system, especially the rise of managerial judges, multi-door dispute resolution, and settlements. See Judith Resnik, Managerial judges, *Harvard Law Review*, vol. 96 (1982) 374; Judith Resnik, Many doors, closing doors: alternative dispute resolution and adjudication, *Ohio State Journal on Dispute Resolution*, vol. 10 (1994) 211; Owen Fiss, Against settlement, *Yale Law Journal*, vol. 93 (1983) 1073. While these critiques certainly deserve careful attention, these techniques are currently important for delivery of justice to a mass of consumers. See Cranston (n. 652) 40-43 & 46-7. Furthermore, without awareness of costs associated with the legal system, expansion of access to justice may actually curtail access to justice. See Antonio Gidi and Hermes Zaneti Jr,

On the other hand, collective action may be a powerful mechanism and better used as an instrument for payment of compensatory damages. The prohibition of bargaining and transacting homogeneous individual interests limits its potential use as a means for collective settlement. The rationale of protecting the undisposable interests of individuals is a noble one,¹⁴⁷⁹ but leads to a practical outcome of very low compensation in practice. Most individual consumers do not seek individual compensation for small value claims and the collective action could be a mechanism to guarantee the payment of some compensation for everyone, rather than none.¹⁴⁸⁰

Therefore, the possibility of bargaining and negotiating on behalf of consumers could lead to a practice of payment of compensatory damages through collective action instead of the current setting in which compensation is simply excluded from settlements. As suggested in a previous subsection, the presence and participation of a consumer representative in the collective action could provide additional political control over collective settlements, creating pressure for the inclusion of comprehensive consumer compensation by corporations too.

Moreover, courts have means for obliging corporations to restitute consumers directly. Most corporate defendants in collective actions have established a longterm contractual relationship with their customers. Consider, for instance, financial institutions, telecoms, health insurance, cable TV

Brazilian civil procedure in the 'age of austerity'? Effectiveness, speed, and legal certainty: small claims, uncontested claims, and simplification of judicial decisions and proceedings, *Erasmus Law Review*, vol. 8 (2015) 256-7.

¹⁴⁷⁹ Mazzilli (n. 470) 474-5.

¹⁴⁸⁰ Calabresi (n. 788) 10-1.

providers, or electrical companies. All these corporations have longterm contracts with consumers, being directly connected with them through managerial controls. Consumers could benefit from these socio-legal relationships to receive direct compensation. In this case, compensation may be provided through the inclusion of credit in their customer record.

Courts could be pragmatic, requiring corporations to use their own organisational infrastructure to inform and to retribute consumers directly.¹⁴⁸¹ Contemporarily, commercial courts order corporations to pay compensation to consumers, but expect the interested consumer to be proactive and request her own individual share of compensation. As mentioned before, costs are obstacles for intervening in the collective procedure. Moreover, particularly in the case of small value claims, consumers are unlikely to seek compensation directly. Pragmatic judges should simply oblige corporations to retribute consumers, by sending a letter with a check to their homes or a message in the intranet with a credit in their account.¹⁴⁸² The implementation of this decision could be made under the supervision of a special master appointed by the commercial court in partnership with a regulatory agency.¹⁴⁸³

Likewise, courts could determine that these corporations provide notice to all consumers through their regular channels of communication with customers. Instead of a publication in the official gazette, notice of collective action could be disseminated through internet banking or through the regular correspondence between corporations and their long-term clients. For instance,

¹⁴⁸¹ Fitzpatrick and Gilbert (n. 788) 769-72.

¹⁴⁸² Calabresi (n. 788) 10-1.

¹⁴⁸³ Tzankova and Hensler (n. 205) 99.

these companies send bills through letters regularly to their customers and notice of the collective action could also circulate through this regular channel of communication for benefit of the consumers.

Another important technique for compensation consists in the possibility of establishing a special fund for a particular group of victims, an experience that was adopted in the US for the victims of 9/11 with relative success.¹⁴⁸⁴ According to this technique, resources are allocated for the particular group of victims on the basis of the estimated judicial damages that they would be entitled to receive in court.¹⁴⁸⁵ There is normally a special master, establishing the criteria for payment of damages, reviewing all individual cases, and making final decisions about the payments.¹⁴⁸⁶ This special master is normally expected to inform potential participants of the compensation program, clarifying the criteria, explaining the benefits of the programme, and signaling potential compensation for particular cases.¹⁴⁸⁷

In the US, following the success of the special fund for victims of 9/11, similar compensation programs were established in other occasions, most notably for victims of the oil spil in the Gulf of Mexico as a result of direct negotiation of President Obama with British Petroleum executives.¹⁴⁸⁸ In Brazil, the US experience also inspired the establishment of special funds for

¹⁴⁸⁴ Feinberg (n. 1164) 16-29.

¹⁴⁸⁵ Feinberg (n. 1164) 34-48.

¹⁴⁸⁶ Feinberg (n. 1164) 34-48.

¹⁴⁸⁷ Feinberg (n. 1164) 48-63. These town hall meetings with victims were important because compensation is not only about money, but also the expressive meaning of justice. See Deborah Hensler, Money talks: searching for justice through compensation for personal injury and death, *DePaul Law Review*, vol. 53 (2003) 449-55.

¹⁴⁸⁸ Stier (n. 944) 104-6.

compensation programs of mass torts victims in at least three occasions: the street car accident in Santa Tereza in 2011; the accident with flight AF 447 between Rio de Janeiro and Paris in 2010; the accident with a TAM flight between Porto Alegre and São Paulo in 2007.

All these schemes were established through a coalition of different institutional actors, with direct participation of government and active overview from the AGO. In the case of the streetcar, funds were provided by the state government of Rio de Janeiro, that was responsible for the administration of the streetcar and accepted responsibility for the accident.¹⁴⁸⁹ In the cases of the accidents with air companies, insurance companies provided the funds for compensation. Moreover, the air transportation companies had incentives to reduce the costs of future insurance, which is affected by ongoing litigation.¹⁴⁹⁰

All of these compensation programmes resulted in the payment of judicial compensation for passengers in a speedy, cheap, and fair way in comparison with potentially long, expensive, and complex litigation. In the case of the streetcar, only one potential participant refused to join the programme and decided to litigate the case.¹⁴⁹¹ In the case of AF 447, there was competition with some US-based lawyers, who promised the rewards of a class action in New York and managed to sign contracts with some families of deceased passengers. In the end, the US court considered it a non-convenient forum and these people had to settle their cases out of the programme and with the discount of one third of the

¹⁴⁸⁹ Interview M (RJ 21.08.14).

¹⁴⁹⁰ Interviews M (RJ 21.08.14), Q (RJ 01.09.14), and X (RJ 12.09.14).

¹⁴⁹¹ Interview M (RJ 21.08.14).

amount to cover payment for contingency fees.¹⁴⁹² Therefore, the compensation programme was also successful, but attracted a lower percentage of potential participants because of competition with lawyers who encouraged litigation instead of the special funds scheme.

7.5.5 Deterrence

The Brazilian experience of civil public action could also improve the deterrence effect, preventing further collective wrongdoings from corporations. The current setting shows that corporations rarely compensate individual consumers or pay collective moral damages. Therefore, the regime of economic incentives could be better calibrated. On one hand, economic sanctions are important to prevent the phenomenon of lucrative illegality. On the other hand, exemplary or punitive damages should not be excessive, leading to over-deterrence and excessive punishment.

Importantly, the phenomenon of lucrative illegality is the economic facet of unjust enrichment, a well-established legal institution. Traditionally, courts are well equipped for dealing with this issue in individual cases and the challenge with collective actions involves treating the universe of mass claims. An interesting solution comes from the German doctrine of skimming-off the excessive profits in competition cases, which could be extended to consumer

¹⁴⁹² Interviews Q (RJ 01.09.14) and X (RJ 12.09.14).

protection cases as well.¹⁴⁹³ The calculation should be made on an estimation of the excessive profit resulting from the abusive commercial practice.¹⁴⁹⁴

The economic sanctions should not be directed to one specific consumer as sometimes is the case with punitive damages in the US, but rather distributed through the entire universe of harmed consumers or destined to a particular fund following the cy-pres doctrine.¹⁴⁹⁵

7.6 From the legal environment towards a socio-legal theory

This chapter examined the legal environment of collective action for consumer protection based on the empirical observation of the Brazilian experience. The analyses were based on how the B2C relationship may be influenced by the dynamics of a complex legal environment, in which there are multiple institutional actors and the consumer may benefit from the collective action to protect her rights with support of consumerist movements, civil society, and collective actors. Social relationships, organisations, and legal culture influence regulatory enforcement in a complex legal environment.

Moreover, previous chapters also identified other important socio-legal dimensions for building a socio-legal theory of collective action. Traditionally, the literature considers only the monetary incentives associated with funding, costs, rewards and sanctions, but ignores the influence of social capital for the

¹⁴⁹³ Wösthoff (n. 336) 91-2.

¹⁴⁹⁴ Wösthoff (n. 336) 91-2.

¹⁴⁹⁵ Rachael Mulheron, *The modern cy-près doctrine: applications & implications* (UCL 2006) Part II.

development of collective actions. Additionally, the focus on the class counsel as the plaintiff predominates in the US literature of class actions with little research on the power of collective actors and their participation in the regulatory space. Moreover, the analysis of the legal architecture pays little attention to the recognition of diffuse, collective, and individual interests and the potential effects of their networked structure.

This thesis shows that socio-legal dimensions are very important for the analysis of collective actions, pointing the necessity of future studies to develop a socio-legal theory of collective actions. On one hand, the traditional literature is largely based on insights from economic analysis of law and blind to the socio-legal factors that are relevant for the understanding of the Brazilian experience of civil public action. On the other hand, future research should examine the potential impact of these features elsewhere, including these socio-legal aspects: the importance of social capital as an economic enabler of collective action; the contest for institutional space as part of the politics of collective action; collective rights as a networked structure of interrelated diffuse, collective, and individual interests; the presence of social collectives in a mediated legal culture as an interpretive element of a complex legal environment.

The next chapter presents the concluding remarks, exploring the potential for developing a socio-legal theory of collective action and summarising the main findings of this thesis.

PART IV - CONCLUSION

Chapter 8

A Tractatus Logico-Omnibus Actio?: Towards a Socio-Legal Theory of Collective Action.

I shall also call the whole, consisting of language and the activities into which it is woven, a "language game".¹⁴⁹⁶

Language is a labyrinth of paths. You approach from *one* side and know your way about; you approach the same place from another side and no longer know your way about'.¹⁴⁹⁷

8.1 A Tractatus Logicus-Omnibus Actio?

Ludwig Wittgenstein famously proclaimed having solved all the relevant theoretical problems of logic with his book *Tractatus Logico-Philosophicus*.¹⁴⁹⁸ After concluding this work, Wittgenstein successfully defended it as his doctoral thesis in Cambridge. Since there were no longer any relevant philosophical questions to be solved, he returned to his family home in Vienna to enjoy a comfortable bourgeois life.¹⁴⁹⁹ However, his proclamation was premature and soon flaws in the logical chain of his short treatise were revealed. Particularly, the early Wittgenstein missed a very important point by considering that

¹⁴⁹⁶ Ludwig Wittgenstein, *Philosophical Investigations* (4th edn, Wiley-Blackwell 2009) 8e.

¹⁴⁹⁷ Wittgenstein (n. 1496) 88e.

¹⁴⁹⁸ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (Routledge Classics 2001).

¹⁴⁹⁹ David Edmonds and John Eidinow, *Wittgenstein's Poker: the story of a ten-minute argument between two great philosophers* (First Ecco 2002) 22

propositions correspond to a picture.¹⁵⁰⁰ From 1929 when he returned to philosophy in Cambridge until his death in 1951, Wittgenstein focused his philosophical investigations on the relationship between language, propositions, and their meaning.¹⁵⁰¹ If the early Wittgenstein considered certain symbols to be simply meaningless,¹⁵⁰² the late Wittgenstein became interested in the life of the sign¹⁵⁰³ and a grammar based on experience, but concerned with the possibility that this approach might lead to a parochial form of thought.¹⁵⁰⁴

8.1.1 *The point.*

What is the point? The first point concerns the dangers of imagining that any substantial research on any particular topic may solve all theoretical problems related to it. Therefore, I would like to make absolutely clear that this thesis is not a *Tractatus Logico-Omnibus Actio* in which all theoretical problems of collective action are adequately solved and dissolved. This study developed important counter-intuitive arguments on collective actions, opening many other research questions and requiring more empirical research for more academic knowledge about this subject.

¹⁵⁰⁰ Charles Travis, The proposition's progress, in Oskar Kuusela and Marie McGinn (eds) *The Oxford Handbook of Wittgenstein* (OUP 2011) 184.

¹⁵⁰¹ Travis (n. 1500) 195-202.

¹⁵⁰² Travis (n. 1500) 185.

¹⁵⁰³ Edward Minar, The life of the sign: rule-following, practice, and agreement, in Oskar Kuusela and Marie McGinn (eds) *The Oxford Handbook of Wittgenstein* (OUP 2011) 286-9

¹⁵⁰⁴ Travis (n. 1500) 192.

The second point concerns the dangers of parochialism. Developing an argument exclusively focused on a very particular local universe confines the research to a very strict context with little relevance for academia. Therefore, my research is empirically based on the Brazilian experience with collective action, but not confined to the universe of area studies and develops many insights that are helpful for a broad international audience of scholars interested not only in civil public actions, but also in class actions and collective redress. I believe that this thesis clarifies the importance of examining the Brazilian experience within the comparative framework of the three different families of collective actions. The comparative analysis reveals different concepts, mechanisms, actors, schemes, vocabularies, architectures, and environments that facilitate the understanding not only of legal experience in Brazil, but also in the US and Europe nowadays.

The third point concerns the development of a grammar based on experience. Regarding a conceptualisation from practical experience, the literature on collective actions is often based exclusively on theories developed without empirical analysis. For instance, there is the assumption that without large sources of funding, collective actions are not going to emerge within a particular legal system, because they are too expensive, profit-oriented, and only conducted by private lawyers in their roles of legal entrepreneurs. Another theoretical premise is that public officials are not capable of adequately performing the role of collective actors, because they lack competitiveness, entrepreneurship, and the capacity to mobilise large constituencies of consumers. Likewise, some theorists argue that the architecture of collective action necessarily suppresses party autonomy, damaging individual rights. All

these theoretical assumptions are contradicted by the Brazilian experience in which low funding correlated to growth of collective actions, public entrepreneurship, and the preservation of individual rights.

8.1.2 The relevance of these points.

What is the relevance? These points are relevant because many works on collective action seem to suffer from, on one side, strict rationalism and, on the other side, parochialism. On one hand, there are categorical statements on how collective action problems are unsolvable, these juridical instruments do not work, are too costly, lead to violation of individual rights and abuse. On the other hand, there are parochial observations on how collective procedure, collective litigation, collective rights are not, cannot, and will never be a part of a particular legal culture, because they just do not fit within the context. Both strict rationality and parochial thoughts are approaches that may be corrected by empirical research that reveals concepts based on practical experience.

A few anecdotes illustrate my point. At my first year in Oxford, a colleague from Lithuania compared me with students that come to the UK to study tropical diseases, suggesting that the European legal environment would never accommodate these collective actions and that they would never work in Europe. At my final year, the same colleague contacted me, inviting me for dinner to talk about collective actions. Not only had Lithuania enacted collective actions in their legislation, but his law firm was responsible for defending a corporation in the first collective suit.

Also at the last year of doctorate, at workshop in Frankfurt, a professor criticised class actions and referred to the case of the cat in the microwave as an example of how collective actions do not work and lead to abuse and rights violation. The case involves an old woman who killed her cat while using a micro-wave to dry her pet, suing the corporation, making a fortune, and forcing it to include a warning in the instruction manual to prevent other people from using microwaves to dry pets. At dinner I asked this colleague if he knew that there was never such a case of the cat in the microwave. 'Of course', he answered, 'but this case illustrates my point very well'.¹⁵⁰⁵

These anecdotes indicate that there is no determinism in law and that apocalyptic views are often better illustrated by false examples than by real ones. However, scholars should not be prophets of the impossibility of collective actions and of their absolute wrongness. Their critiques of mass litigation sometimes sound like the reflections of the Spanish conservative academic José Ortega y Gasset on the coming of the masses:

There is one fact which, whether for good or ill, is of utmost importance in public life of Europe at the present moment. This fact is the accession of the masses to complete social power. As the masses, by definition, neither should nor can direct their own personal existence, and still less rule society in general, this fact means that actually Europe is suffering from greater crisis that can affect peoples, nations, and civilisation.¹⁵⁰⁶

My research shows that the social power of the masses is intermediated by collective actors, who must translate the demands of consumers into legal

¹⁵⁰⁵ Georg Wenglorz and Patrick Ryan, Die Katze in der Microwelle? Anmerkungen zum US-amerikanischen System der punitive damages, *Recht der Internationalen Wirtschaft*, vol. 8 (2003) 599-601

¹⁵⁰⁶ Jose Ortega y Gasset, *The revolt of the masses* (Norton 1932) 11.

frames and negotiate their meaning in a complex regulatory space occupied by multiple institutional actors. Apocalyptic views seem extremely exaggerated. A class action to compensate pet owners for risks associated with lack of adequate information on microwave use is also unlikely in any normative horizon.

On the other hand, scholars should also avoid excessive optimism and not suggest that their proposals could solve all problems of collective action. In the end, the professed objectives of collective action may be in constant tension and challenges to achieve them simultaneously may simply be insurmountable. Access to justice requires vast use of resources, normally limited by the objective of judicial economy to reduce expenses and rationalise costs. Likewise, the goal of obtaining compensation may conflict with the pursuit of deterrence and regulatory enforcement.

Scott warns us about the perils of hyper-rationalism and schematics, recommending that institutions be multifunctional, plastic, diverse, and adaptable.¹⁵⁰⁷ This recommendation is important also for the analysis of collective action, because theories, policy proposals, legislative reforms should not be hyper-rationalistic, following blindly prescriptions of economic analysis of law, transcendental philosophies, or dogmatic legal doctrines. Instead of a *Tractatus Logico-Omnibus Actio*, our focus should be oriented towards a socio-legal theory of collective actions.

8.2 Towards a socio-legal theory of collective actions

¹⁵⁰⁷ James Scott, *Seeing like a state: how certain schemes to improve the human condition have failed* (Yale 1998) 353.

8.2.1 Empirical analysis

One of the goals of this research is to contribute to a growing literature on collective actions through a socio-legal perspective. While I was finishing the writing process, Hensler, Hodges, and Tzankova published their excellent book *Class Actions in Context*, with rich case studies from several countries that reveal the importance of interdisciplinary aspects of collective actions, such as economic viability, political analysis, and cultural perspectives.¹⁵⁰⁸ Likewise, the volume *The Globalization of Class Actions* resulting from the Stanford-Oxford exchange on collective actions was an excellent source of knowledge on the empirical experience of various jurisdictions.¹⁵⁰⁹ Moreover, the seminal study from the RAND Institute on the *Class Action Dilemmas* was an invaluable source of inspiration for this thesis, by developing a middle-range analysis of the US class actions system in a comprehensive and detailed way.¹⁵¹⁰

All these projects are based on empirical research and provide elements for a better understanding of the actual experience of collective actions. Additionally, the use of comprehensive methodology from the social sciences produced original evaluations of different mechanisms for aggregation of individual interests and their practical consequences for protection of consumer rights. My thesis is also based on empirical observation and analysis of the Brazilian experience.

¹⁵⁰⁸ Deborah Hensler, Christopher Hodges, and Ianika Tzankova (eds), *Class actions in context: how culture, economic, and politics shape collective litigation* (Edward Elgar 2016).

¹⁵⁰⁹ Deborah Hensler, Christopher Hodges, and Magdalena Tulibacka (eds), *The globalization of class actions*, vol 622 (The annals of the American Academy of Political and Social Science 2009).

¹⁵¹⁰ Hensler and others (n. 56) 138-42.

I examined the civil public action through a socio-legal perspective of middle range, focusing on dynamic interactions between the relevant actors, evaluating also whether collective actions achieve their professed objectives. This is the adequate way of conducting these studies. Grand theories may lead to flaws of hyper-rationalism. Micro-analytical theories may suffer from parochialism, myopia, and irrelevance. Middle-range socio-legal perspectives often capture the relevant economic, political, and social dynamics. Additionally, the reciprocal influence between the legal architecture and the legal environment may be mapped. Moreover, these observations may lead to ideal-types and conceptualisations, as explained in the next sub-section.

8.2.2 Conceptualising collective actions

My thesis develops new concepts for the socio-legal analysis of collective actions. First, this is an original study of collective action as collective action, providing a comprehensive interdisciplinary analysis of the juridical instruments of collective action. This is also an original comparative study of collective actions, being the first one to identify and provide evidence of the existence of three different legal families of collective actions: class actions; collective redress; and civil public action. It is also an original socio-legal study of the Brazilian experience with civil public actions, providing new insights and concepts for socio-legal analysis.

One important conceptual move involves abandoning an old habit of thinking of collective actions only from the perspective of the US class actions system. Not only are there other relevant experiences, but also different

conceptual frameworks potentially hidden if we only think of collective actions with the parochial view of one single model or experience. For instance, the US literature focuses extensively on the idea of the 'private attorney general' as the class hero or villain, but there is no conceptualisation of collective actors, of different organisational structures, and of institutional dynamics between collective actors.

Likewise, because of the prevalence of litigation led by class counsel and financed by profit-oriented law firm, the literature suggests that public officials cannot compete for institutional space and occupy a prominent role in the regulatory space. The literature does not address the role of social capital, building institutional trust, developing a constituency of consumers, and increasing the political relevance of an institution as substitutes for monetary incentives.

Moreover, even if there is an extensive literature on the importance of deterrence and economic sanctions for the viability of collective actions as an instrument for regulatory enforcement, this thesis provides an original contribution with the conceptualisation of the phenomenon of lucrative illegality. More than just applying a new label to an old idea, this concept provides a socio-legal framework to reflect on the legal concept of unjust enrichment, enabling us to think on the economic incentives and socio-legal circumstances that may eventually stimulate corporations to break consumer law.

In terms of legal architecture, this thesis explains the distinctive character of the typology of diffuse, collective, and homogeneous individual interests. The recognition of collective rights emerges as a special feature of the architecture of

collective action, changing the quality of the aggregation of these rights and leading to a conceptualisation of them as networked interests. Additionally, this thesis escaped from the binary classification of regimes of aggregation by classifying the Brazilian one as a 'force out' regime, rather than as an 'opt out' or 'opt in' regime.

Furthermore, this thesis explained the bifurcation of judicial pathways and the complexity of the legal environment of collective action for consumer protection. It examined the coordination role of collective actions, even if we lived in a world of corporate angels. The possibilities and limitations of consumer empowerment were discussed, explaining the dynamic interactions between individuals, consumer groups, and society at large. In this sense, consumer protection law emerges not from decisions taken inside organisations, but rather from the interaction of multiple institutional actors within the regulatory space. Therefore, organisations may be conceptualised not only as relatively closed homophilic social spheres, but also as relatively opened heterophilic social collectives or, rescuing the old latin term, a social *omnibus* – a collective vehicle “for all”.

8.2.3 Towards a socio-legal theory

One final aspect of this thesis requires clarification. This research was conducted through socio-legal methodology to provide answers on important aspects of collective actions for consumer protection, evaluating the Brazilian experience. Additionally, this thesis was also animated by the possibility of developing a socio-legal theory of collective actions. By no means, was there any

ambition to solve all problems related to collective action through a definitive theory that could explain everything. On the other hand, it seemed valuable to theorise on collective actions from a socio-legal perspective and to set the stage for future research towards developing a socio-legal theory.

Because law is embedded in society, the social dimensions of juridical collective action are essential for its analysis. Social relationships are central for theorising on collective actions. For instance, this thesis explains that not only monetary incentives, but also non-monetary ones are very important for collective action. Instead of profit, collective actors may seek social capital, investing in their social reputation, trust, and growth of their constituencies of consumers. In other words, their incentives are based on social relationships rather than money.

Moreover, the power of collective actors is also exercised through a series of social relationships and institutional dynamics of competition, cooperation, and deference. The architecture of collective rights consists of a network of inter-related interests, a web of interconnected diffuse, collective, and homogeneous individuals' interests. Furthermore, consumer protection law is centred on the B2C relationship. In a complex socio-legal environment, the study of the B2C relationship should not only consider it as an economic transaction or an abstract juridical relationship, but also as a plurality of social relationships between consumers and businesses mediated by multiple institutional actors.

Therefore, this thesis highlights essential aspects that are hidden in large part of the literature on collective actions. Instead of emphasising only the pursuit of individual interests for consumers by lawyers largely motivated by profit, this research casts light on how social relationships shape the dynamics of

collective action in society, indicating a potential path towards a socio-legal theory.

On the other hand, borrowing the insight from the late Wittgenstein,¹⁵¹¹ there is a labyrinth of paths and this research approached it through one side and found an original way of analysing collective action in a comparative and empirical perspective. Future socio-legal research may approach the same theme from another side and certainly open up new interpretive perspectives.

8.2.4 Beyond powerlessness and empowerment

This thesis revealed a complex setting in which enforcement agents deal with the limitations of collective actions to achieve an uncertain outcome in their attempt to protect consumers. They perceive the weaknesses of their juridical instruments and their limited achievements for consumer compensation. The references to Don Quixote and the life of Galileo explain the concerns about the powerlessness of collective actors and the necessity for consumer empowerment. However, these are not independent problems. In the case of collective action for consumer protection, the empowerment of consumers depends on the power of collective actors to intervene, regulate, and oblige corporations to restitute their money. The rhetoric of weakening public organisations to strengthen the power of individuals does not really make sense in the context of B2C relationships. Designing powerless organisations does not lead to empowered individuals or society. On the contrary, empowerment of consumers depends on the power of organisations.

¹⁵¹¹ (n. 1496) 88e.

Appendix: Interviews with relevant legal actors and cases.

Interviews followed all ethical standards and quality norms for qualitative research. Before the beginning of the interviews, I explained that interviewees could choose to remain anonymous and half of them chose this possibility. While writing this thesis, I realised that I had to keep them all anonymous to be able to preserve everyone. They were also briefed about the scope of the project, being able to ask questions and interrupt at any time. Most only asked one or no questions, but G, Q, W and X asked more questions about the project and I provided the answers before we started.

After the interview, many were curious to learn about how I was referred to them and I explained the 'snowballing process', apologising for not being able to reveal who indicated them. W and X were also cautious and asked me to suppress information immediately after they spoke one particular sentence, arguing confidentiality reasons with a client and a government respectively. I excluded the particular bits of information from this analysis, based on the ethics of empirical research. However, these were just two sentences in a universe of 63 hours of interviews, so this suppression did not really affect the final thesis.

Most interviewees asked me to interview them in their working places - except for D (interviewed at a café); H and I (interviewed at the AGOCPD); Q (interviewed at home); U (interviewed at a flat); and X (interviewed at a café in the airport). All interviews were conducted individually, but O asked one of his clerks to be present in silence at his working room during the two hours of interview. His request was accepted and he expressed himself comfortably without any kind of self-censorship or discomfort. It seems to me that he just

wanted to be sure that his words would not be distorted. All interviews were conducted without a recording device, because the presence of a recorder may induce a more strategic interview, instances of self-censorship, and even refusal to be interviewed.

Registration of information followed two distinct patterns: interviews A-I were registered at the structured sheet that contained the questionnaire. Differently, I took personal notes of interviews J-D' and made full reproductions of their content at the earliest possible moment. All 30 interviews and the 97 cases referred by the interviewees are listed below.

Table 5. *Interviews with relevant legal actors (source: files with author).*

Interviewee	institution	situation	duration	date
A	AGO	active	45 minutes	05/04/11
B	AGO	active	45 minutes	06/04/11
C	AGO	active	45 minutes	07/04/11
D	CODECON	active	45 minutes	12/04/11
E	NUDECON	active	45 minutes	13/04/11
F	TJRJ	active	45 minutes	19/04/11
G	TJRJ	active	1 hour	21/04/11
H	Company	active	45 minutes	27/04/11
I	Company	active	45 minutes	27/04/11
J	AGO	active	2 hours	30/04/14
K	AGO	active	1 hour	30/04/14
L	AGO	active	5 hours	14/08/14

M	AGO	active	4 hours	21/08/14
N	Company	changed job	1 hour	21/08/14
O	AGO	active	2 hours	26/08/14
P	Law Firm	active	1 hour	27/08/14
Q	AGO	retired	2 hours	01/09/14
R	IDEC	changed job	4 hours	02/09/14
S	CODECON	changed job	4 hours	09/09/14
T	AGO	promoted	3 hours	10/09/14
U	PROCON	changed job	4 hours	11/09/14
V	OPD	active	2 hours	11/09/14
W	Law Firm	active	1 hour	12/09/14
X	Ministry of Justice	changed job	2 hours	12/09/14
Y	PROTEST	active	3 hours	15/09/14
Z	AGO	promoted	3 hours	16/09/14
A'	AGO	promoted	4 hours	18/09/14
B'	PROTEST	active	2 hours	19/09/14
C'	PROCON	changed job	4 hours	19/09/14
D'	OPD	promoted	2 hours	22/09/14

Table 6. *Cases of collective action mentioned by interviewees (source:file with author).*

Case	Interviewee	Theme	Title	Potential use
1	A, O	Incentives	ItauBank paid 10 million of fluid recovery	Chapter 4
2	A, U	Incentives	Bus company fined for not complying	Chapter 4
3	C, M, Q	Architecture, Incentives, Power	Air France compensation fund	Chapters 2, 4, 5 and 6
4	C	Architecture	Judicial prohibition of e-commerce (Americanas)	Chapter 6
5	C	Architecture	Judicial interruption of activities of bus company	Chapter 6
6	D	Architecture	Delay (STJ) to replace Plasma TV	Chapter 6
7	F, P, Y	Architecture	3G regulatory prohibition of	Chapter 6

			new contracts	
8	G, R, Z	Incentives, Power	Compensation in the case of Collor Plan	Chapter 4
9	G	Incentives	Compensation leasing of cars in dollars	Chapter 4
10	J, L	Environment	Circulation of trains with open doors	Chapter 7
11	J	Environment	Compra Facil delayed delivery by e- commerce	Chapter 7
12	J, L, V	Power	AGO rejected settlement by CODECON in health insurce	Chapter 5
13	J, L, M, R, U	Power	Coalition of actors to view supermarkets	Chapter 5
14	J, V	Power	Coalition for adopted kids inclusion in	Chapter 5

			health insurce	
15	L	Environment	Darft delayed delivery by e-commerce	Chapter 7
16	L	Environment	Bus does not stop at a bus stop	Chapter 7
17	L	Architecture	Display price per volume in supermarkets	Chapter 6
18	L, V	Environment	Bankruptcy of university and student rights	Chapter 7
19	L	Environment	Product liability for children	Chapter 7
20	L	Architecture	Exclusion of hospital from health insurce	Chapter 6
21	L	Architecture	Itaubank card rechargeable	Chapter 6
22	L	Architecture	Information of whole wheat breads (%)	Chapter 1 and 6

23	M	Environment	Regulatory fines to train and subway	Chapter 7
24	M	Architecture	Unregistered insurance company	Chapter 6
25	M	Environment	Clause of cell phone limited performance	Chapter 7
26	M	Complexity	Dynamic change of demand for ferry boats	Chapter 8
27	M	Architecture	DIX Insurance coverage for surgical anesthesia	Chapter 6
28	M	Architecture	Injunction, but no fine for delays in train	Chapter 6
29	M	Architecture	B2W delay in appeals	Chapter 6
30	M	Architecture	Compensation fund streetcar	Chapter 6

			accident	
31	M	Complexity	Delayed modernisation of subway	Chapter 8
32	N	Powers	Deference in readjustment of a tariff	Chapter 5
33	N	Complexity	Interventions in tariffs of telecom	Chapter 8
34	N	Environment	Detrimental change of plan for cell phone consumers	Chapter 7
35	N	Complexity	Change of tariff or index financial regulation	Chapter 8
36	N	Environment	Electricity co free to choose control device	Chapter 7
37	N	Environment	Illegal vans led to collapse of bus in Magé	Chapter 7

38	N	Complexity	Purchase of bread school consumption	Chapter 8
39	N	Complexity	Air traffic regulation	Chapter 8
40	O	Power	Mass torts case related to fall of Palace II	Chapter 5
41	O	Complexity, Incentives, architecture	Nullification of traffic fines; no recovery	Chapter 8
42	O, R, U	Environment, Complexity	Limitation of bank queues to 30 minutes	Chapter 8
43	O, R, S, U	Power	Explosion of underground chambers	Chapter 5
44	O	Power	Regulatory decision to raise bus tariff	Chapter 5
45	O	Power	Requirements for an ICU	Chapter 5
46	P	Incentives	Water co targeted 98%	Chapter 4

			of settlements	
47	P	Incentives, Environment, Complexity	Formula for tariff raise excluded satisfaction	Chapters 4, 7, and 8.
48	Q, X, C'	Architecture, Incentives, Power	Tam compensation fund	Chapters 2, 4, 5 and 6
49	R	Incentives, Power	Compulsory tax for fuel consumption	Chapters 4, 5.
50	R, D'	Incentives	Charge of additional TV set by cable co	Chapter 4
51	S	Power, environment, complexity	Lack of water in a suburb area	Chapter 5, 7, and 8
52	S	Architecture	Additional payment in car leasing	Chapter 6
53	S	Power, environment, complexity	Abusive raise of football tickets	Chapter 5, 7, and 8
54	S	Incentives,	Itaubank	Chapter 4 and

		Architecture	abusive charge of tariff	6
55	S	Environment	Obligation to produce paper ticket at ferry	Chapter 7
56	S	Architecture	Labyrinth at a department store	Chapter 6
57	S	Complexity	Law for time fractions in parking	Chapter 8
58	S, V, D'	Power and complexity	End personal plan of health insurce co.	Chapter 5 and 8
59	T	Power	Product with chloride out of specification	Chapter 5
60	T	Power	Biodegradable washing powder out of specification	Chapter 5
61	T	Environment, complexity	Health insurce with special policy for HIV	Chapter 7, 8.

62	T	Power, architecture	Uniform raise of price for all health insurce	Chapter 5, 6
63	W	Architecture	Pharmaceutical company and medical treatments	Chapter 6
64	X	Architecture Environment	SKY Settlement for consumer education in tv	Chapter 6, 7
65	X	Architecture, Environment	Settlement & donation of tv or cookies to public schools	Chapter 6, 7
66	Y	Environment	Quality tests for ovens and wine collers	Chapter 7
67	Y	Power	Mandatory buy of line and cell phone	Chapter 5
68	Y	Environment	Technical assistance of defective products	Chapter 7

69	Y	Architecture	Injunction to prohibit abuse in e-commerce	Chapter 6
70	Y	Environment	Credit scoring	Chapter 7
71	Y, B'	Power	Concessionary companies lack of control of public goods	Chapter 5
72	Y, B'	Complexity	Varying tariff based on size of reservoir	Chapter 8
73	Y, B'	Environment	Hijacked rider invoice	Chapter 7
74	Y	Power	Prohibition of liquid alcohol	Chapter 5
75	Y	Power	Warning on gluten and allergenic products	Chapter 5
76	Y	Complexity	Quality control of cars made in Brazil and EU	Chapter 8
77	Y	Power	Prohibition of initiating 4G	Chapter 5

			services	
78	Z, A'	Environment, Complexity	Limitation of bank interest rates above the average	Chapter 7, 8
79	Z	Power	Tolerance with delays in constructions	Chapter 5
80	Z	Power	Prohibition of abuse in e- commerce	Chapter 5
81	Z	Power	Unimed failed provision of homecare	Chapter 5
82	Z	Power	McDonald's federal AGO settled case	Chapter 5
83	Z	Power	Anticipated payment of financial loan	Chapter 5
84	Z	Architecture, Complexity	Abusive bank tariff, but no compensation	Chapters 6, 8.
85	A'	Power,	Targeted	Chapter 5, 8

		Complexity	advertisement to children	
86	A'	Incentives	Failure in the provision of cell services	Chapter 4
87	A'	Environment	Hidden interest rates in contracts	Chapter 7
88	A'	Environment	Beer add on women as sexual objects	Chapter 7
89	A'	Power, Environment	Tobacco litigation	Chapter 5, 7
90	A'	Power, Environment	Fraud in a cruise contract	Chapter 5, 7
91	B'	Power, Architecture, Complexity	Change of rules for regulatory approval of telecom Oi	Chapters 5, 6, and 8.
92	B'	Power, Environment, Complexity	High cost for use of network for small telecoms	Chapter 5, 7, and 8.
93	B'	Power	Mistake in the	Chapter 5

			composition of energy tariff readjustment	
94	C'	Environment	Operations in department stores over Easter	Chapter 7
95	C'	Environment	Compensation for electrical blackout	Chapter 7
96	D'	Power	Abusive clause in credit card contract	Chapter 5
97	D'	Power	Abusive clause in schools by the parents associations	Chapter 5

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