

XIV WORLD CONFERENCE ON PROCEDURAL LAW
PRIVATE LAW ENFORCEMENT
GENERAL REPORT

**Protecting supra-individual legal interests: enforcement action by Public
Administration Institutions, Civil Justice and a combination of protection systems**

MANUEL ORTELLS RAMOS
Professor of Procedural Law
University of Valencia (Spain)

I. SCOPE OF THE SUBJECT AND SOME ISSUES OF METHOD	6
1. Justification for the contents of the paper	6
2. Issues of method and working technique. In particular, the collaboration of national contributors.....	7
II. A NEW SOCIAL AND ECONOMIC REALITY, A NEW LAW AND ITS EFFECTS ON THE INSTITUTIONS RESPONSIBLE FOR ITS ENFORCEMENT	8
1. New reality and new law.....	8
<i>A) Awareness of personality rights and civil rights, and new risks involved.....</i>	<i>8</i>
<i>B) Mass contractual activity</i>	<i>9</i>
<i>C) The public economic order and the phenomenon of mass tort liability.....</i>	<i>9</i>
2. Responses of States: Legislation and types of enforcement	10
III. ENFORCEMENT BY PUBLIC AUTHORITIES OF THE LAW PROTECTING SUPRA-INDIVIDUAL INTERESTS: QUESTIONS, ANSWERS AND SILENCES IN DIFFERENT LEGAL SYSTEMS	11
1. Areas of law in which law enforcement powers are vested in Public Administration Institutions.....	11
2. Ordinary Public Administration Institutions or independent administrative authorities?	11
3. What legal effects can be produced by the law enforcement powers vested in Public Administration Institutions?	13
<i>A) Powers of authorization, prohibition and imposition of sanctions against a person's assets, mainly of a pecuniary nature.....</i>	<i>13</i>
<i>B) Powers of restitution to the state prior to the commission of an infringement.....</i>	<i>13</i>
<i>C) Powers to award monetary damages to the injured parties concerned.....</i>	<i>15</i>
4. Effectiveness and enforceability by Public Administration Institutions of the law protecting supra-individual interests.....	15
<i>A) Why is law enforcement by Public Administration Institutions more effective – or considered to be more effective – than enforcement by the courts of justice?.....</i>	<i>15</i>
<i>a) The main advantages.....</i>	<i>15</i>
<i>b) Some clarifications about the advantages.....</i>	<i>16</i>
<i>B) Counterweight to the effectiveness arisen from the control exercised by the courts over the actions of Public Administration Institutions</i>	<i>17</i>
<i>a) Suspension of the effects of challenged administrative decisions and other types of interim legal remedies.....</i>	<i>17</i>
<i>b) Extent of jurisdictional review of previous administrative activity, particularly in the case of independent agencies</i>	<i>17</i>

C) Law enforcement by Public Administration Institutions, public expenditure and impact on macroeconomics	18
--	-----------

IV. PROTECTING SUPRA-INDIVIDUAL INTERESTS IN CIVIL PROCEDURE AND A CIVIL PROCEDURE FOR THE PROTECTION OF SUPRA-INDIVIDUAL INTERESTS.....	18
---	-----------

1. A reference to the protection of supra-individual interests in the traditional arrangement of civil proceedings	19
---	-----------

A) Powers of the court to dismiss claims of its own initiative	19
---	-----------

B) Legal provision establishing that a natural or legal person entrusted with the defence of supra-individual interests can file an opinion or report in a proceeding	19
--	-----------

C) Multiple holders of locus standi and granting of locus standi to natural or legal persons beyond the parties involved in litigation.....	20
--	-----------

D) Appeal before the highest court in a legal system	20
---	-----------

2. Core issues for renewing the protection of supra-individual interests through a civil procedure: locus standi, types of legal remedies, subjective extension and the value of its effects.	20
---	-----------

A) Legal systems that have established a general framework.....	21
--	-----------

a) Brazil	21
------------------------	-----------

b) Colombia	22
--------------------------	-----------

c) Argentina	22
---------------------------	-----------

d) Works on a Model Code of Collective Actions for Iberoamerica	23
--	-----------

e) References to other legal systems.....	23
--	-----------

B) Protection of consumer rights and interests	24
---	-----------

a) Locus standi and types of protection for consumer collective and diffuse interests.....	24
---	-----------

b) Locus standi for the defence of individual rights and interests of consumers damaged by a common cause	25
--	-----------

C) Legal remedies for supra-individual interests in other legal matters	28
--	-----------

a) Framework of General Conditions of Contracting	28
--	-----------

b) Unfair Competition and Violation of Antitrust or Competition Defence Regulations	29
--	-----------

c) Protection of the Environment and Protection of Historic-Artistic Heritage	29
--	-----------

d) A reference to the protection of supra-individual rights regarding employment and intellectual property	31
---	-----------

e) Protection against discriminatory acts and behaviours.....	32
--	-----------

3. Adjustments to the procedural structure.....	33
--	-----------

A) Peculiarities of the proceedings in case of an action brought by a person having locus standi to claim protection over a plurality of individual homogeneous or neighbouring (related) rights	33
---	-----------

B) Efficient management of mass proceedings.....	34
---	-----------

a) Joinder of proceedings	34
--	-----------

<i>b) Suspension of most proceedings and conduct of a “model” (“pattern”, “test”, or “sample”) proceeding.....</i>	<i>35</i>
4. The evidence in civil procedure for the protection of supra-individual interests: challenges and special regulations to overcome those challenges.....	35
<i>A) Facilitating access to evidence</i>	<i>36</i>
<i>B) Facilitating evidentiary findings</i>	<i>37</i>
5. Peculiarities of a review before the highest ordinary court	38
6. The strengthening of the efficiency of legal remedies.....	39
7. Procedural costs and their financing.....	40
<i>A) Costs initially borne by the claimant and special rules that benefit the claimant in this regard.....</i>	<i>40</i>
<i>B) Chances of reimbursement and risks of increased costs after the award of costs</i>	<i>41</i>
8. The efficiency of the protection of supra-individual interests in civil proceedings	42
 V. COMPLEMENTARITIES BETWEEN THE ACTION OF NON-JUDICIAL PUBLIC AUTHORITIES AND CIVIL COURTS IN THE PROTECTION OF SUPRA-INDIVIDUAL INTERESTS	43
1. Overlap of powers over the same matters but with different legal effects	43
<i>A) Matters on which there is an overlap of powers and the different effects thereof.....</i>	<i>43</i>
<i>B) The coordination –or poor coordination- of the exercise of overlapping powers.....</i>	<i>44</i>
<i>a) Suspension of the judicial process due to the pendency of the administrative process or vice versa</i>	<i>44</i>
<i>b) Access to the evidence held by Public Administration Institutions in a civil process</i>	<i>45</i>
<i>c) Efficiency of the decisions made by Public Administration Institutions regarding court judgements.....</i>	<i>45</i>
2. Law enforcement by public bodies in civil processes	46
<i>A) Granting of locus standi upon public bodies</i>	<i>46</i>
<i>B) The assignment of passive locus standi, the power of procedural intervention or lesser powers</i>	<i>48</i>
 VI. FINAL CONSIDERATIONS.....	48
1. Some notes on terminology and (legal) reality: ¿Private enforcement vs. public enforcement or judicial enforcement vs. administrative enforcement?.....	49
2. Constitutional frameworks of law enforcement.....	50
<i>A) The extent of the power of dispute resolution by Public Administration Institutions, the power to judge and the rule for conferring such power.....</i>	<i>51</i>

<i>B) The “legitimization” of locus standi and the effectiveness of the right to defend one’s own legal interest before the court</i>	<i>53</i>
<i>C) Equality in law regarding the means for the judicial protection of supraindividual legal rights and interests</i>	<i>57</i>
2. A final comment on the “measurement” of the efficiency of the different types of enforcement.....	58

I. SCOPE OF THE SUBJECT AND SOME ISSUES OF METHOD

1. Justification for the contents of the paper

The issues discussed in this paper,¹ of which an overview is given in the corresponding table, have been selected on the basis of two classes of reasons.

I have been aware from the outset of the different nuances that arise from the titles of the paper in three languages. “*Private Justice (Private Law Enforcement)*” is imprecise in its literal meaning, although not in the context of the legal culture of the United States, and alludes both to the nature of the law enforcement authority and to the status of the person who may apply for such enforcement. “*Justice Privée (Poursuite privée de la loi)*” focuses attention on the (private) right to bring an action for law enforcement. The German title - “*Durchsetzung öffentlicher Interessen im Zivilprozess*” - highlights both the status of the protected interests – public interests – and the instrument of protection – the civil process.

On the other hand, a number of rules of European law leave the legal systems of Member States free to delegate powers for the enforcement of rules protecting supra-individual interests to administrative authorities or courts.² This solution reveals some uncertainty about what the ideal option is, and this uncertainty is also apparent in the ongoing debate in the European Union as to which authorities – administrative or court – should enforce Competition Law and Consumer and User Protection Law; and as to who should have the right to bring actions to have the law enforced and what kind of legal protection they can obtain.³ On the academic level, there is a wealth of literature which analyzes and evaluates the *public* and *private enforcement* options in different sectors of the law.⁴ This debate is a good

¹ The preparation of this report and the presentation thereof has been financed by the Spanish *Ministerio de Ciencia e Innovación* (Project DER 2008-03240).

² A useful summary can be found in HODGES, CH., “Global Class Actions Project. Summary of European Union Developments”, *The Globalization of Class Actions, International Conference co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies, Oxford University*, 13-14 December 2007, available at http://www.law.stanford.edu/calendar/details/1066/#related_media.

³ See, for example, in the area of competition law, the *White Paper on Damages actions for breach of the EC antitrust rules*. Brussels, 2.4.2008. COM(2008) 165 final, and the *Communication from the Commission to the European Parliament and the Council. Report on the functioning of Regulation 1/2003*. Brussels, 29.4.2009. COM(2009) 206 final. With regard to the enforcement of rules for consumer and user protection, see the *Green Paper on Consumer Collective Redress*, Brussels, 27.11.2008. COM(2008) 794 final, and the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Enforcement of the Consumer Acquis*. Brussels, 2.7.2009. COM(2009) 330 final.

⁴ Without claiming to be exhaustive, on a more general basis, see HODGES, CH., *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, 2008. With regard to competition law, HODGES, CH., “Competition Enforcement, Regulation and Civil Justice: What’s the Case”, in *Common Market Law Review*, Oct 2006, 43, pp. 1381-1407; EGER, TH., WEISE, P., “Limits to the private enforcement of antitrust law”, available at <http://www.cbs.dk/content/download/67269/930127/file/Thomas%20Eger.doc>.; SALERNO, F. M., “The Competition Law-ization of Enforcement: The Way Forward for

indicator of the main contents of this paper, even though the latter must necessarily go beyond the terms of the former.

2. Issues of method and working technique. In particular, the collaboration of national contributors

This subject cannot be sufficiently dealt with as a matter of procedural law and with the methods appropriate for that area. Aspects of constitutional law and administrative law are also involved and the area of procedural law must be considered in broad terms.

Secondly, non-binding techniques of dispute resolution, such as arbitration, mediation, conciliation and others, also play an important role. Sometimes, the effectiveness of these techniques depends on the parties in dispute being aware that binding conflict resolution techniques – with their sometimes inconvenient and undesired effects – always hovering over the conflicts. In order to obtain a fuller picture, legal considerations are not sufficient; economic and sociological factors, as well as factors of social psychology, also have to be taken into account.

Finally, the analysis and evaluation of law enforcement systems depends – after legal science has helped us to understand their formal structure and operation – on economic considerations,⁵ as well as considerations of a sociological or social psychology-related nature and, finally, on historical considerations; insofar as the attitudes of members of different societies to the law enforcement systems that govern them are largely based on conditioning factors of a factual and ideological nature which develop throughout history and remain in place or evolve at different *tempos*.

The baggage of information and of knowledge of appropriate methods for processing it fully is so demanding that the honest approach is to acknowledge that this paper can only offer an overview of the subject with which it is concerned.

Finally, a few words on the working technique. I sent my questionnaire – which I drew up after a preliminary study – to various academic colleagues working in countries that can be classified as operating under *civil law* systems. My invitation was accepted by most of its recipients. The assistance I asked them for required a considerable effort on their part. I am therefore extremely grateful to *Andrea A. Meroi*, Professor of Procedural Law, National

Making The Energy Market Work?”, *EUI Working Papers, RCSCAS*, 2008/07; ALFARO ÁGUILA-REAL, J., “Contra la armonización positiva: la Propuesta de la Comisión para reforzar el *private enforcement* del Derecho de la Competencia, in *Indret. Revista para el Análisis del Derecho* (www.indret.com), July, 2009, pp. 2-35; MÖLLERS, TH. M. L., HEINEMANN, A., Eds., *The Enforcement of Competition Law in Europe*, Cambridge University Press, New York, 2009. On consumer protection, CAFAGGI, F., MICKLITZ, H-W, “Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community”, *EUI Working Papers, Law* 2007/22; CAFAGGI, F., MICKLITZ, H-W, “Administrative and Judicial Enforcement in Consumer Protection: The Way Forward”, *EUI Working Papers, Law* 2008/29; as well as essays by those authors and others in the collective work edited by CAFAGGI, F., MICKLITZ, H-W, Eds., *New Frontiers of Consumers Protection. The Interplay between Private and Public Enforcement*, Intersentia, 2009.

⁵ And economic considerations are of various kinds: aspects of microeconomics, e.g. evaluating the opportunity of bringing an action based on its cost and the expectations of results; of public finance economics – efficiency of public expenditure according to the different systems of law enforcement; and the macroeconomic perspective – effects of those systems on the economy as a whole.

University of Rosario (ARGENTINA); *Juan Bautista Parada Caicedo*, university lecturer and member of the Academia Colombiana de Jurisprudencia [Colombian Academy of Law] (COLOMBIA) – who was assisted by Dr. Bernardo Florez Ruiz, a judge specializing in administrative law; *Soraya Amrani Mekki*, Professor at the Université Paris-Ouest Nanterre La Défense (FRANCE) – who was assisted in a few sections by Frédéric Rolin; *Giorgios Orfanidis*, Professor at the University of Athens (GREECE); *Michele Angelo Lupoi*, Professor at the Università degli Studi di Bologna (ITALY) – who was assisted by Dr. Caterina Pasini and Dr. Teresa Vestrucci; *Manabu Honma*, Associate Professor, Law Faculty of Tezukayama University (JAPAN); *Robert Kulski*, Professor at the University of Łódź (POLAND); and *Maria Filatova*, Associate Professor at the Russian Academy of Foreign Trade, Deputy Director of the Russian Constitutional Court Representative Office in Moscow (RUSSIA). *Antonio Gidi*, Ass. Professor University of Houston, Law Center, was unable to prepare the national report on BRAZIL, but kindly provided me with extensive bibliographical material. I also offer my apologies to all concerned, because I have been unable to reflect the richness of their contributions to this paper, due to the limitations of space.

In order to fill some gaps in the information provided, in addition to the bibliography cited in this paper, I have also used the *UNCTAD Guidebook on Competition Systems*, United Nations, New York and Geneva, 2007, which contains a synthesis of information on worldwide competition law enforcement systems; and, also by UNCTAD, the *Model Law on Competition. Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation*, United Nations, New York and Geneva, 2010, which is a good indicator of the problems and issues being debated, and mainly takes the form of commentaries on the text of the model law which is in the process of being drafted. I have also made extensive use of the academic contributions and legislative information contained in *The Globalization of Class Actions, International Conference co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies, Oxford University*, 13-14 December 2007, organized by Prof. Deborah Hensler and Dr. Christopher Hodges.⁶

II. A NEW SOCIAL AND ECONOMIC REALITY, A NEW LAW AND ITS EFFECTS ON THE INSTITUTIONS RESPONSIBLE FOR ITS ENFORCEMENT

1. New reality and new law

The law that governs relations between the members of civil society (organized politically to form a State or some other political structure) has undergone major changes in comparison with the situation as it was during the late 19th and early 20th centuries.

There is now much greater regulation, extending to the most diverse areas of social life. The main reason for this is to be found in the significant transformations that occurred in the regulation of social affairs as a result of social, economic and technological development. The situation has evolved from a stage in which legal relationships tended to be individualized and isolated to a new stage characterized by mass legal relations, consisting of legal situations which affect relatively large groups of people.

A) Awareness of personality rights and civil rights, and new risks involved

There are powerful processes whereby social groups that have been previously subjected to discriminatory treatment and are exposed to the continuation of such treatment or the risk of going backwards, are becoming increasingly aware and assertive of their civil

⁶ The materials of this conference are cited from the documents that are available at http://www.law.stanford.edu/calendar/details/1066/#related_media.

rights. This explains the equality legislations that protect against discrimination on different grounds (race, gender, religion, disability, etc.) and in different areas of social life (employment, access to goods and public services, etc.).

There is a growing need for the protection of personality rights – the right to personal and family privacy – which are especially threatened by technological advances with extensive potential for harm. This justifies regulation to protect against unlawful behaviour in the automatic processing of personal data.

B) Mass contractual activity

In economic terms, the new social situation is characterized by mass contractual activity which is expressed in different forms:

- 1) Industrial mass production, together with the intensive exploitation of natural resources, requires the establishment of a variety of contractual agreements to connect the different agents involved in production processes, and the standardization of those agreements in order to optimize results.
- 2) Foremost among those contractual agreements are those that regulate employment relationships, which are necessarily on a mass scale due to the production levels of goods and services that companies seek to achieve. Linked to those employment relationships are other – also mass – relationships designed to protect against a range of work-related risks.
- 3) Industrial mass production is accompanied by mass marketing processes, which tend to result in contractual standards.
- 4) The service sector – above and beyond the marketing of manufactured products – has also developed along the same lines of mass production and a tendency towards contractual standardization (transport, tourism, telecommunications services and particularly, due to their systemic importance, financial services).
- 5) Obviously, the mass production of goods and services aims to produce a final series of mass contractual operations for the purchase of those goods and services by consumers and users.

These realities give rise to needs for regulation which are met in each legal system by legislation that tends to cover the following areas (obviously with significant differences as regards the scope of the areas regulated and the purpose of the regulation): employment relationships and associated social security relationships; general terms and conditions of contract – with regulations to protect economic agents (manufacturers and service providers) and consumers and users; and a general system for the protection of consumers and users. There are also more specialized regulations – aimed at protecting different economic agents, including, mainly, consumers – that cover activities such as the provision of telecommunications services, the electricity and gas market, the activities of institutions providing credit facilities and collective investment fund management – especially funds linked to pension schemes; activities relating to the issue and negotiation of financial instruments in securities markets, and, to end this non-exhaustive list, the provision of insurance services.

C) The public economic order and the phenomenon of mass tort liability

The economic system requires objective rules to ensure its proper operation, and breach of these rules also has a wide spectrum of harmful potential. Legal systems respond to this need mainly by a system of prohibitions against anti-competitive behaviour, aimed at

protecting the well-ordered economy, economic agents, and consumers and users. They also sometimes achieve this through a system of sanctions against particular types of advertising activity that are held to be unlawful.

On the other hand, the intensive exploitation of natural resources and certain technologies used in production processes create risks that pose a threat to large population groups. Hence the need for legal rules to protect the environment and regulate the exploitation of nuclear energy.

Finally, while technological advances make it possible to produce effective therapeutic substances, they can also create collateral health risks. It is therefore advisable to establish specific regulations for the production and marketing of substances that can damage public health. Public health grounds also justify regulation to limit the public consumption of tobacco, based on knowledge acquired through scientific progress.

2. Responses of States: Legislation and types of enforcement

States, and other political structures of a supra-state level, have faced up to these realities, and continue to do so, by entering, with varying degrees of intensity, into the legal relationships between the persons who form part of civil society.

A first step consists of establishing legal rules to regulate these relationships. Within this first response there are different degrees. One possibility is to opt for legislation with a very limited objective scope that allows people a large measure of self-determination; alternatively, legislation can be omnipresent in all areas of social life. The State may also decide for a legislation with predominantly peremptory norms, or for a type of legislation where there are many rules that supplement the freedom of choice of private individuals.

Once the type of legislation has been established, the second level consists of proposing the alternatives as to who is to enforce these rules and how they are to be enforced.

As a starting point, and in principle, the most neutral State in dealing with the legal relationships between persons comprising civil society will always be subject, as a minimum, to the constitutional imperative to create and provide access to judicial institutions for the fair resolution of any disputes that may arise.

However, if the interests protected by law are collective or social interests of varying importance, or are public or general interests, as is often the case with the law governing a society with the characteristics we have described above, it is necessary to make more specific provisions about law enforcement by the courts, and non-judicial enforcement methods may even be established.

Specifically:

- 1) If the option chosen has been to entrust law enforcement to the courts of justice, a principle of consistency requires a correlation between the status of the interest protected by the rule – individual, collective or social, general or public – and the status of the person or entity in whom the right to bring an action before the courts to enforce that rule in a specific case is vested. It would not make sense for enforcement of the law protecting social, collective and general or public interests to be made to depend on the sole and exclusive decision of an individual.
- 2) If, on the other hand, what is at stake is the protection of the abovementioned interests, the State can go beyond granting to a social or public entity the right of initiative to obtain judicial protection. The State can assume – through the

Executive and the Public Administration – the function of requiring compliance with the legal rules through powers to authorize or prohibit activities, accompanied by powers of sanctioning those who have carried out unauthorized or prohibited activities. And the Administration can impose its resolutions without the need to apply, as a general rule, to the courts of justice. This is a law enforcement model that corresponds to the continental law tradition of European countries, although not only to them, as we will see later, on which H. Kelsen theorized, describing it as “indirect administration”.⁷

III. ENFORCEMENT BY PUBLIC AUTHORITIES OF THE LAW PROTECTING SUPRA-INDIVIDUAL INTERESTS: QUESTIONS, ANSWERS AND SILENCES IN DIFFERENT LEGAL SYSTEMS

A first part of my questionnaire was aimed at clarifying in which areas of law, which have rules to protect supra-individual interests, the power of enforcement is vested in the Public Administration Institutions. I have proposed a range of questions about the status of the competent administrative authority, the powers of that authority – what legal effects the exercise of such powers may produce – the effectiveness of the exercise of such powers, and their usefulness for the holders of the protected interests. I have also requested information about the differences in effectiveness of this type of enforcement due to the jurisdictional control of the Public Administration Institutions. Finally, I asked for opinions about the efficiency (benefit-cost ratio) of this type of law enforcement, in terms of the efficiency of the public expenditure allocated to finance it and its effects on the economy.

1. Areas of law in which law enforcement powers are vested in Public Administration Institutions

Taking as a reference the list of areas of law that I set out in Section II.1 above, the authors of the national reports have not expressed any substantial divergences of opinion. Some confirmed that the legal systems coincide on essential points,⁸ or presented a list that demonstrated such coincidence.⁹ Others have chosen to highlight the paradigmatic areas in their national legal systems,¹⁰ which coincide with the main areas of the more specific list in Section II.1. The report on Russia, in particular, highlights the wide range of areas in which administrative powers of law enforcement may be exercised.¹¹

2. Ordinary Public Administration Institutions or independent administrative authorities?

It is interesting to study the information on whether the powers protecting supra-individual interests are vested in what we can call the ‘ordinary administration’ – with a hierarchical structure and dependent on the political leadership of the Executive – or

⁷ H. Kelsen, *Teoría General del Derecho y del Estado* [General Theory of Law and State], I have used a Mexican edition, 1969, (trad. GARCIA MAINEZ, E.), pp. 323-334

⁸ MEROI, *Informe Argentina*; AMRANI MEKKI, *Rapport France*.

⁹ PARADA CAICEDO, *Informe Colombia*.

¹⁰ AMRANI MEKKI, *Rapport France*; HONMA, *Japan Report*; KULSKI, *Poland Report*, and, also in relation to the protection of competition and consumers by administrative authorities in Poland, SENGAYEN, M., “Poland. Legal system in transition”, *The Globalization of Class Actions*, pp. 30-32.

¹¹ FILATOVA, *Russia Report*.

independent administrative authorities which, notwithstanding an extraordinary diversification, are to a lesser or greater extent removed from that leadership.

A statute ensuring the independence and impartiality of these authorities, together with the technical or scientific qualifications or experience required of those who discharge their duties in those authorities, influence the degree to which the exercise of the powers vested in them enjoys greater or lesser public acceptance, both generally and in the specific sectors concerned.

In some legal systems, this form of administrative organization has not been introduced¹² or only in a very limited way.¹³ In Argentinean law the phenomenon has arisen of administrative bodies with quasi-judisdictional functions, whose constitutionality has been recognized by the Supreme Court provided that they meet requirements similar to those of the independent administrative authorities.¹⁴

In other legal systems, independent administrative authorities have been fully introduced and are generally vested with law enforcement powers to protect supra-individual interests – in the material areas mentioned in Section II.1 – or to participate in the exercise of those powers. In this sense, some reports note that these powers lie with the competition authority,¹⁵ or with the authority responsible for the protection of competition and consumers.¹⁶ This organizational model extends to a wide variety of sectors in France,¹⁷ Italy¹⁸ and Spain.¹⁹

It is also relevant that, in the work on a Model Law on Competition, although it is recognized that determining the appropriate competition authority is a matter to be decided by each country: “The present Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi autonomous or independent body of the Government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the

¹² FILATOVA, *Russia Report*.

¹³ PARADA CAICEDO, *Informe Colombia y, también, UNCTAD Guidebook on Competition Systems*, United Nations, New York and Geneva, 2007, available at <http://www.unctad.org/templates/Page.asp?intItemID=4150&lang=1>, p. 39.

¹⁴ MEROI, *Informe Argentina*.

¹⁵ HONMA, *Japan Report* (the Japanese Fair Trade Commission).

¹⁶ KULSKI, *Poland Report* (the President of UOKiK). Concerning this authority, see also *UNCTAD Guidebook*, p. 111, and SENGAYEN, “Poland”, *The Globalization of Class Actions*, pp. 30-32.

¹⁷ AMRANI MEKKI (ROLIN), *Rapport France*. A detailed analysis can be seen in the *Rapport d'information fait au nom du comité d'évaluation et de contrôle des politiques publiques sur les autorités administratives indépendantes*. Enregistré à la Présidence de l'Assemblée nationale le 28 octobre 2010. N° 2925. Assemblée Nationale. Constitution du 4 Octobre 1958. Treizième Législature.

¹⁸ LUPOI, *Italy Report*.

¹⁹ In Spain, to mention just a few by way of illustration, we have the Comisión Nacional del Mercado de Valores [National Stock market Commission], the Comisión Nacional de las Telecomunicaciones [National Telecommunications Commission], the Comisión Nacional de la Energía [National Energy Commission], the Consejo de Seguridad Nuclear [Nuclear Safety Council], the Comisión Nacional de la Competencia [National Competition Commission], and the Agencia Estatal de Protección de Datos [State Data Protection Agency].

possibility of recourse to a higher judicial body.”²⁰ And indeed, that organizational option is the one that has been implemented in a substantial number of legal systems.²¹

3. What legal effects can be produced by the law enforcement powers vested in Public Administration Institutions?

The answer to this question determines the extent of protection that can be obtained, through the actions of Public Administration Institutions, by stakeholders in the supra-individual interests protected by the law applied. The effects differ from one legal system to another and even from one field of law to another within the same system. Nevertheless, it can be observed that some effects are very widely established, whereas with others provision is more diversified, and some, finally, can rarely be achieved by actions by the public administration.

A) Powers of authorization, prohibition and imposition of sanctions against a person's assets, mainly of a pecuniary nature

It is quite common for Public Administration Institutions, sometimes together with powers of regulation of infra-legal level, to be authorized to carry out specific administrative acts to authorize or license, as well as to prohibit certain types of behaviour and activities. In conjunction with this, they have authority to impose monetary sanctions – perhaps, generally, sanctions against a person's assets – either as a result of the infringement of abstract norms of prohibition, or for failure to obtain the requisite authorizations or licences, or for breaching the terms of those authorizations or specific acts of prohibition.²²

In short, the results of protecting the interested parties will arise provided that the deterrent force associated with the envisaged sanctions, and with their effective imposition, are inducements to comply with both the abstract norms and the specific orders. That compliance entails the ability to enjoy the protected interests.

B) Powers of restitution to the state prior to the commission of an infringement

²⁰ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Model Law on Competition. Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation*, United Nations, New York and Geneva, 2010, p. 66.

²¹ See *UNCTAD Guidebook*, which mentions, amongst other countries, Belgium (pp. 23-24), Brazil (p. 33), Chile (p. 37), Mexico (pp. 81-82), Holland (pp. 91-92) and Portugal (pp. 115-116).

²² HONMA, *Japan Report*; AMRANI MEKKI (ROLIN), *Rapport France*; FILATOVA, *Russia Report*; PARADA CAICEDO, *Informe Colombia*; LUPOI, *Italy Report*; KULSKI, *Poland Report*. In Spanish law, the vesting of powers in administrative authorities to authorize or license activities, and to prohibit such activities, accompanied by powers to impose sanctions, is provided for in a very wide variety of areas of law: competition, regulation of advertising in specific areas, telecommunications, protection of general interests of consumers and users, activities relating to health and to the production and marketing of medicinal products, exploitation of nuclear energy, activities that may affect the environment, stock market, creation and operation of lending institutions, collective investment institutions, insurance companies, etc. In the UNCTAD work on a Model Law on Competition, it is left to each national legal system to regulate on whether the administrative body with powers to prohibit or authorize activities relating to free competition should also be able to impose fines for violation of the law or failure to comply with implementing resolutions (UNCTAD, *Model Law on Competition*, pp. 7-8, 72).

Once an infringement has been committed and, therefore, the interests protected by the norms have been harmed, a new need for protection arises: to re-establish compliance with the norm, eliminating the results produced by its violation.

It is appropriate to distinguish two types of this restitution to the previous state.

On the one hand, the elimination of results may consist in re-establishing a material state of affairs that existed prior to the infringement. The administration could order the liable party to ensure this re-establishment and, in the event of failure to do so, implement the restoration itself at the cost of the liable party's assets. We find administrative powers that can produce this type of effect clearly provided for in some legal systems.²³

On the other hand, the results of an infringement might have consisted of the execution of legal transactions, the conclusion of contracts with particular clauses. The question is whether Public Administration Institutions are authorized to declare the invalidity of those transactions or contracts, or of the parts thereof that are unlawful. The answer is almost universally in the negative: such a declaration can only be sought and obtained from the courts of justice.²⁴

Nevertheless, there are still administrative powers that can indirectly bring about that remedy or a result close to it.²⁵ Thus, for example, powers of recommendation regarding the unfair nature of contractual clauses which, even if they are not binding statements regarding their validity, are in fact respected by the courts when deciding disputes where those clauses

²³ HONMA, *Japan Report*; FILATOVA, *Russia Report*. In Spanish competition law, the competent authority may order the removal of effects caused by a restrictive business practice and apply coercive fines until that duty has been discharged; in the event of infringements under consumer and user protection law, the competent authority may require the infringing party to restore the situation altered by the infringement to its original state. Reparation of the injury caused and coercive fines or enforcement by substitution, at the cost of the assets of the liable party, are provided for in environmental law. On the restrictions on such powers of enforceability in French law, AMRANI MEKKI (ROLIN), *Rapport France*; FRIER, P. L., PETIT, J., *Précis de droit administratif*, Montchrestien, Paris, 2010, pp. 333-39.

Furthermore, Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, provides that the competent authority – which may be an administrative authority – has certain powers in regard to “preventive action” (Art. 5) and “remedial action” (Art. 6) which enable it to order the cessation of the harmful activity and the re-establishment of the state free from contamination. Apart from some reasonable exceptions laid down in the Directive, the costs are to be borne by the operator. Accordingly, the competent authority will recover from the liable operator the costs of any measures taken under the Directive: HINTEREGGER, M., (Ed.), *Environmental Liability and Ecological Damage in European Law*, Cambridge University Press, 2008, pp. 438-439. A similar measure is provided for in Chapter XI, II, iv of the draft of the Model Law on Competition (Chapter XI, II, V) (UNCTAD, *Model Law on Competition*, p. 72).

²⁴ AMRANI MEKKI (ROLIN), *Rapport France*; FILATOVA, *Russia Report*; PARADA CAICEDO, *Informe Colombia*.

²⁵ I am not referring to the exceptional vesting of jurisdictional functions in certain administrative authorities, such as, in Colombia, certain powers of the Superintendency of Industry and Commerce: PARADA CAICEDO, *Informe Colombia*; and also UNCTAD *Guidebook*, p. 39.

have to be considered;²⁶ powers to order parties responsible for unlawful transactions or contracts to carry out the necessary acts of revocation, termination or novation of contract themselves in order to comply with the legal norm, accompanying that order with coercive fines until compliance.²⁷

C) Powers to award monetary damages to the injured parties concerned

The different legal systems once again coincide, but with a negative response: the administrative powers of enforcement of the law protecting supra-individual interests cannot award damages in favour of the injured parties, or order those liable to pay them. This legal effect is available only to the power vested in the courts of justice.²⁸

4. Effectiveness and enforceability by Public Administration Institutions of the law protecting supra-individual interests

The administrative powers that we have been considering must also be assessed from the point of view of their effectiveness – their actual exercise and the production of practical results.

A) Why is law enforcement by Public Administration Institutions more effective – or considered to be more effective – than enforcement by the courts of justice?

a) The main advantages

There are several reasons in favour of the effectiveness of administrative action.²⁹ The protection of supra-individual interests benefits from an administrative structure organized for that purpose and from the professionalism of the administration institutions responsible for it. This usually includes the existence of inspection services for the discovery of infringing behaviour and a facility for gathering evidence and documentation. Furthermore, Public Administration Institutions employ personnel with the skills to carry out not only legal assessments, but also scientific-technical assessments of another nature, which are frequently necessary for the enforcement of the legal rules related to the areas mentioned in Section II.1.³⁰ Moreover, the procedure is quick, almost expeditious, and, very often, the administration institutions are vested with coercive powers to overcome certain types of resistance. This is particularly suitable for preventive protection.³¹

²⁶ AMRANI MEKKI (ROLIN), *Rapport France*.

²⁷ It is a technique that is applied, e.g. in Spanish competition law. The same is also referred to by the measure provided in Chapter XI, II, V of the draft of the Model Law on Competition (Chapter XI, II, v) (UNCTAD, *Model Law on Competition*, p. 72).

²⁸ In this sense, see AMRANI MEKKI (ROLIN), *Rapport France*, FILATOVA, *Russia Report*, PARADA CAICEDO, *Informe Colombia*. In Spanish law, see, for example, art. 19 of the Personal Data Protection Act and art. 48 of the General Consumer and User Protection Act. With regard to the types of legal protection available to consumers, see CAFAGGI, MICKLITZ, “Administrative and Judicial Collective Enforcement”, p. 24. For the lack of jurisdiction to award damages on the part of the administrative authorities responsible for the protection of competition in the European area, see MÖLLERS, HEINEMANN, Eds., *The Enforcement of Competition Law*, pp. 397-421.

²⁹ AMRANI MEKKI (ROLIN), *Rapport France*; LUIPOI, *Italy Report*. For a critique of this effectiveness, see FILATOVA, *Russia Report*.

³⁰ KULSKI, *Poland Report*; FILATOVA, *Russia Report*; PARADA CAICEDO, *Informe Colombia*.

³¹ HONMA, *Japan Report*; LUIPOI, *Italy Report*.

The fact that the Administration must act on its own initiative is *per se* very beneficial for the interested parties.³² Moreover, if they deem it appropriate to urge the Administration to act³³ this system offers additional benefits,³⁴ as it does not require— at least not by law- hiring any technical-legal or other kind of assistance nor boosting any administrative action once it has started.

Studies on the draft Model Law on Competition also reveal the key importance of the above-mentioned issues with a view to providing the best possible regulation of the functions and powers of the competition authority.³⁵

b) Some clarifications about the advantages

However, these advantages can be subject to restrictions.

The first challenge may arise from the impossibility to react effectively to the lack of activity by Public Administration Institutions. The degree of this difficulty depends on the provision of the different national systems to review the lack of activity of Public Administration Institutions. Some reports include positive views about the efficiency of such control³⁶ while others containing more accurate data reveal a more restrictive approach.³⁷

Secondly, the expeditious nature of administrative action and the immediacy of the legal remedies it provides are restrained due to the incorporation of defence guarantees into the proceeding, especially for the imposition of sanctions.³⁸

Finally, despite not having obtained sufficient confirmation on national reports,³⁹ the advantages that an administrative procedure offers the interested party- specially not having to continuously boost the procedure and not having to bear the cost of expert's cooperation- may disappear in practice due to a faulty application of the legal system.

³² AMRANI MEKKI (ROLIN), *Rapport France*.

³³ Each legal system establishes whether the interested parties are entitled to initiate and take part in a proceeding before Public Administration Institutions, as well as who is to be regarded as an interested party. The approach designed in the first place by Directive 2004/35/EC of 21 April, 2004, of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, reveals possible restrictions in this respect. As to the powers of those interested in the Rights of Member States and regarding their effectiveness to cause the exercise of the powers vested on Public Administration Institutions, see HINTEREGGER, (Ed.), *Environmental Liability*, pp. 436-438, 622-623.

³⁴ HONMA, *Japan Report*; FILATOVA, *Russia Report*.

³⁵ UNCTAD, *Model Law on Competition*, pp. 68-69.

³⁶ FILATOVA, *Russia Report*; HONMA, *Japan Report*, refers to an amendment of administrative procedural law that would have improved control over the lack of activity.

³⁷ AMRANI MEKKI (ROLIN), *Rapport France*; PARADA CAICEDO, *Informe Colombia*. Limitation of jurisdictional control over administrative inaction lies on the accuracy with which the administration's law enforcement powers must be established— by a norm, agreement, former administrative decision (e. g. article 29 of the Spanish Administrative Procedural Law).

³⁸ AMRANI MEKKI (ROLIN), *Rapport France*; HONMA, *Japan Report*.

³⁹ FILATOVA, *Russia Report*, questions the speed of the Authority's activity unless the interested party boosts such activity with the support of legal experts.

B) Counterweight to the effectiveness arisen from the control exercised by the courts over the actions of Public Administration Institutions

Jurisdictional control over the activity of Public Administration Institutions— one of the postulates of the Rule of Law- can affect the effectiveness of the protection of supra-individual interests that would have been granted, for instance, by an administrative decision. Administrative protection will have more chances to be preserved or, on the contrary, will be more likely to be diminished or deleted, even during the course of the legal proceedings, depending on the regulation of such control, particularly in the two aspects described below.

a) Suspension of the effects of challenged administrative decisions and other types of interim legal remedies

Challenging an administrative decision before the courts can affect the effectiveness of its enforcement, whose immediacy was key to the effectiveness of administrative law enforcement. Some legal systems are inclined to maintain it – because regulations are restrictive of suspension or because courts tend to refuse it in practice-, while others are in favour of suspension unless specific justifications can be provided in support of maintaining such enforcement; all in all, interim legal remedies against administrative activity (or lack of activity) allow the court to take some actions other than suspension which establish other kind of an interim protection of interests different from that resulting from administrative decision that has been challenged.

Unless the former solution prevails,⁴⁰ the other two counteract the effectiveness of the administrative decision by provisionally excluding the protection granted,⁴¹ or by changing such protection in recognition of other affected interests.⁴²

b) Extent of jurisdictional review of previous administrative activity, particularly in the case of independent agencies

The factor of effectiveness consisting in the administrative decision being made by an agency specialized in the matter at issue, capable of appreciating the non-legal aspects of the case and with access to the right information, can be counteracted with intensive jurisdictional control:

- 1) Many regulations on the matters covered by section II.1 include vague legal concepts and discretionary powers—most often in their technical

⁴⁰ HONMA, *Japan Report*, although reforms have been implemented in favour of suspension; FILATOVA, *Russia Report*; PARADA CAICEDO, *Informe Colombia*.

⁴¹ The mere suspension of the enforcement of a decision. E.g., although it does not specify the requirements or the frequency of its application, KULSKI, *Poland Report*. In German law, the so-called *Widerspruchsverfahren* (challenge of an act in administrative procedure) has, as a general rule, suspensive effect: HUFEN, F., *Verwaltungsprozessrecht*, C.H. Beck, 3 Auf., München, 1998, pp.118-119.

⁴² A system of provisional judicial protection that is more comprehensive than suspension is envisaged by German law - HUFEN, *Verwaltungsprozessrecht*, pp. 531 et seq.-, Italian law –articles 55, 56 and 61 of the *Codice del Processo Amministrativo* of 2 July, 2010-, French law -FRIER, PETIT, *Précis de droit administratif*, pp. 463-468- and Spanish law -ORTELLS RAMOS, M., “La tutela cautelar en el nuevo proceso contencioso-administrativo”, in *La nueva Ley de la Jurisdicción contencioso-administrativa*, Diputación de Valencia, Valencia, 1999, pp. 75-102-.

form- of administrative authorities. When exercising jurisdictional control, the issue arises of the extent to which courts can review and replace assessments made by non-judicial administrative authorities whose jurisdictional review, therefore, is rather questionable.

- 2) Had the administrative decision been made by an independent agency, the above problem would be even bigger since, in addition to the technical qualities of the administrative authority, the rule of independence and impartiality should also be observed, all of which could justify the contention of jurisdictional control either by law or by means of a self-restrictive legal practice.

Some national reports refer only to the provision of jurisdictional control,⁴³ while others place the emphasis on full jurisdictional control even if the decision has been issued by independent agencies.⁴⁴ However, in the important matter of competition defence, studies on the draft Model Law on Competition reveal a remarkable variety in the scope of jurisdictional control over the decisions made by independent agencies.⁴⁵

C) Law enforcement by Public Administration Institutions, public expenditure and impact on macroeconomics

The assessment of the efficiency of this law enforcement procedure has to be considered from a two-level perspective:

- 1) The proportion between the public funding required for the provision of the services and the level of the results achieved.
- 2) Following a more complex analysis, it would be necessary to examine the connexion among different degrees of intensity in law enforcement by Public Administration Institutions (regulation, intervention) and the development and the results of the economy within the scope of the relevant legal system.

The data provided in national reports have been scarce and, rather than quantitative references,⁴⁶ consist of qualitative assessments, some of which were very critical with an extremely intensive administrative intervention;⁴⁷ others were only critical in part,⁴⁸ others, in favour of a considerable degree of administrative action.⁴⁹

IV. PROTECTING SUPRA-INDIVIDUAL INTERESTS IN CIVIL PROCEDURE AND A CIVIL PROCEDURE FOR THE PROTECTION OF SUPRA-INDIVIDUAL INTERESTS

In addition to the scenario described in section III above there is also the possibility or the reality- whether infant or extensively developed- that the protection of

⁴³ HONMA, *Japan Report*; FILATOVA, *Russia Report*; PARADA CAICEDO, *Informe Colombia*.

⁴⁴ MEROI, *Informe Argentina*; KULSKI, *Poland Report*; LUPOI, *Italy Report*.

⁴⁵ UNCTAD, *Model Law on Competition*, p. 75.

⁴⁶ FILATOVA, *Russia Report*, refers to estimated data available from The Global Enabling Trade Index and from The Global Competitiveness Index 2010-2011.

⁴⁷ FILATOVA, *Russia Report*.

⁴⁸ HONMA, *Japan Report*.

⁴⁹ AMRANI MEKKI (ROLIN), *Rapport France*.

those interests covered by the law regulating the matters briefly recalled in section II may be sought directly before the courts.

1. A reference to the protection of supra-individual interests in the traditional arrangement of civil proceedings

The protection of supra-individual interests in traditional civil procedure was not unknown, but very limited.

A) Powers of the court to dismiss claims of its own initiative

The power to dismiss claims due to lack of legal grounds has a very wide and generic scope and consists of the authority of the court to protect on its own initiative the imperative boundaries to the autonomy of will. It works as a sort of power not to enforce the law because, although the court cannot set aside a decision, it must resolve without knowing the validity of the acts or contracts infringing those boundaries.⁵⁰

The authority of the court would be more powerful if it could declare the agreement void, even when this was not part of the primary claim or counterclaim.⁵¹

Those powers are little effective in practice. The court cannot exercise those powers unless the interested parties- who decide their procedural action strictly based of their private interests - refer a case that makes such exercise possible. Once the case has been raised, limitations arise as a result of the prevailing powers of the parties in the civil procedure over the contribution of the matters of fact⁵² and the limitation of the court's decision-making power.⁵³

B) Legal provision establishing that a natural or legal person entrusted with the defence of supra-individual interests can file an opinion or report in a proceeding

An additional step is the provision that a representative of supra-individual interests (normally the Public Prosecutor's Office) be able to express their allegations and appraisals in the proceedings without being a party in it, and therefore their position would not be relevant in determining the congruence of the jurisdictional judgement. Despite such limitation, the importance of this provision is that it promotes and facilitates the exercise of such judicial powers as can be exercised *ex officio* –building the reasoning for the assessment of evidence, interpretation and enforcement of regulations, regulatory integration, clarification of vague legal concepts -, which, in fact,

⁵⁰ MEROI, *Informe Argentina*.

⁵¹ The First Chamber of the European Union Court of Justice, by a judgement granted on 17th December, 2009, and in response to a preliminary issue raised by a Spanish court, has declared that Article 4 of Directive 1985/577/EEC of the Council, of 20 December 1985, on consumer protection in respect of contracts negotiated away from business premises, can be interpreted as authorising courts, in cases of omission of the duty of information of the specific right of cancellation- which affects public interests protected by such Directive-, to declare, on its own initiative, that the relevant agreement is void, even though the defendant did not make such a claim at any stage in the course of the proceedings.

⁵² AMRANI MEKKI, *Rapport France*.

⁵³ In this regard, see AMRANI MEKKI, *Rapport France*. Otherwise, for Italian law, see LUPOI, *Italy Report*. With some qualifications, negative answers can be found in MEROI, *Informe Argentina* as well as in FILATOVA, *Russia Report*.

could be exercised other than based on the supra-individual interests at stake or not be exercised at all.

C) Multiple holders of locus standi and granting of locus standi to natural or legal persons beyond the parties involved in litigation

Specific and full protection of supra-individual interests existed (and still exists) in traditional civil procedure in two very distinct areas.

On the one hand there are joint litigation phenomena related to litigation over subjective rights involving more than one holder or in respect of legal acts or contracts that involve more than one holder or that have effects for a large number of people.

On the other hand there are suppositions –very limited in those legal systems where substantive law is shaped by the principle of free will – in which the substantive law that governs some institutions (generally matters of civil status) is, as a whole, peremptory law, and so, for this law not to be materially altered when enforced by the courts, the powers of the parties and of the court are different from those exercised generally in civil procedures.

The most radical expression of a non-dispositive civil procedure involves granting *locus standi* upon a public authority (the Public Prosecutor's Office) who must act following the principle of legality. Similarly, there are some regulations which –although not conferring such powers – extend the circle of *locus standi* holders beyond the parties involved in the litigious relationship so that their eventual failure to act does not completely exclude a potential jurisdictional judgement.

D) Appeal before the highest court in a legal system

The consideration of public interests- in this case to protect an equal application of the law and legal certainty – reveals itself in the selection criteria of appealable decisions, with the main objective, *inter alia*, that the recourse facilitates the establishment of a case-law doctrine about the meaning of the regulations and leads towards an aligned understanding of such meaning; it also shows in the rules on admission of the grounds for appeal and on the burdens and duties of the parties to the recourse proceedings; in sum, in the establishment of regulations or practices that acknowledge some value in the judgements awarded in the “supreme” recourse additional to the value of the decision resulting from the litigation at issue⁵⁴.

2. Core issues for renewing the protection of supra-individual interests through a civil procedure: *locus standi*, types of legal remedies, subjective extension and the value of its effects.

The main changes required for the civil procedure to serve the purpose of protecting supra-individual interests are those regarding the core issues related to the configuration of legal remedies, namely:

- 1) Who has *locus standi*?
- 2) In respect of which legal matters and types of rights or legal interests?
- 3) What kind of legal remedy can be obtained?

⁵⁴ By way of example, this provision of the Spanish Insurance Contracts Act: “If any of the clauses in the general conditions of an agreement should be declared void by the Supreme Court, the competent Public Administration Authority will force the insurer to change other identical clauses contained in their policies”.

- 4) What is the subjective scope of the effects of such legal remedy and of the status of *res judicata*?

We have gathered a complex set of answers that will not be easy to present in a clear and comprehensive manner, perhaps because the reality itself is neither clear nor complete. I have chosen a systematization criterion that highlights some interesting information: some legal systems have adopted a general framework that places more emphasis on procedural aspects; others have incorporated regulation as a complement to the legal system of certain areas of substantive law with different degrees of specialization.

A) Legal systems that have established a general framework

a) Brazil

The *Lei de Ação Civil Pública* created an action to “protect environmental and consumer interests and the rights of artistic, aesthetic, touristic and scenic value”. The scope of application of class actions extended, following subsequent legislative interventions, to the protection of all kinds of diffuse or collective rights. The *Lei n° 8.078, de 11 de setembro de 1990, dispõe sobre a proteção do consumidor e dá outras providências* (hereinafter, *Código do Consumidor*), regulated the litigation of collective actions for individual damages and determined that its regulations on collective proceedings should be applicable to all litigations for the protection of group rights.⁵⁵

Locus standi is granted upon private associations (NGOs) as well as upon public entities (section V.2.A). Individuals, though affected as group components, do not have *locus standi* to individually seek the protection of group interests.⁵⁶ Associations must meet some legal requirements but are not subject to administrative authorisations or certifications.⁵⁷

They can enjoy legal remedies to declare the unlawfulness of some conducts, order the discontinuance thereof, restore the state of affairs and even to pay a compensation for the global damage caused to the group.⁵⁸ However, protection for the individual rights and interests that depend on the collective litigious subject-matter must be sought individually by each of their individual holders.⁵⁹

The subjective extent of the *res judicata* resulting from the process of actions for the protection of diffuse and collective interest is consistent with the general rule. In respect of actions to protect individual rights— which in essence depend on the judgement on collective actions *stricto sensu*—, if the claim on such actions is dismissed there is no *res judicata* for the individual action. However, if it is allowed, the person

⁵⁵ GIDI, A., *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de Derecho civil*, Universidad Autónoma Nacional de México, México D. F., 2004, pp. 19-23; PELLEGRINI GRINOVER, A., “The defence of transindividual interests: Brazil and Iberoamerica”, *The Globalization of Class Actions*, sections 5, 7, 12 y 14.

⁵⁶ GIDI, *Las acciones colectivas*, pp. 72-73; PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, section 7.

⁵⁷ GIDI, *Las acciones colectivas*, pp. 74, 81, 84-85.

⁵⁸ GIDI, *Las acciones colectivas*, pp. 57-59.

⁵⁹ GIDI, *Las acciones colectivas*, pp. 61-63; PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, section 8.

entitled to take individual action can benefit from such part of the judgement on the collective action as can help them found their individual claim.⁶⁰

b) Colombia

A law of 1998 develops Article 88 of Colombia's Political Constitution in respect of the enforcement of popular and group actions. Popular actions protect collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and others of a similar nature.

Any natural individual has *locus standi* to initiate popular actions, without the need to proof any legitimate interest, as well as associations, foundations, unions, and other legal persons subject only to the general requirements established for the customary incorporation of those entities.

They can seek any type of remedies for restoration or protection of the collective rights or interests that have been jeopardised or damaged.

The law also regulates the actions arising out of damages caused to a large number of people; without barring appropriate individual action, it regulates a group action exercised by a claim filed by an attorney appointed by one or more members of a group formed by 20 people or more. A compensation order can be sought and *res judicata* shall affect any member of the group, except those with an expressed intention to separate from the action.⁶¹

c) Argentina

The so-called collective protection (*amparo colectivo*) has been envisaged by the National Constitution since 1994 as a protective measure "against any form of discrimination and with regard to the rights protecting the environment, competition, users and consumers, as well as collective incidence rights in general". It remains unclear whether the general clause includes "homogeneous plural interests". Legislation has so interpreted in terms of consumer protection, but there has been no general clarification. The Supreme Court's case-law (v. Halabi case) has also replied in the affirmative in respect of non-proprietary rights.

A public body (the Obudsman) has *locus standi*, as well as the person affected and the associations related to the protection of such interests, registered pursuant to a specific regulation. Although that law has not yet been enacted, case-law has acknowledged *locus standi* according to the general requirements laid down in the Constitution.⁶² Also from the point of view of case-law the lack of regulation of an action exercised by a "group of affected people" has been overcome.⁶³

As to the type of legal remedies that can be obtained and the scope of the effects of the judgement and its status of *res judicata*, reference is made to sections IV.B and C, c.

⁶⁰ PELLEGRINI GRINOVER, "Brazil and Iberoamerica", *The Globalization of Class Actions*, sections 12-14; GIDI, *Las acciones colectivas*, pp. 100-102.

⁶¹ PARADA CAICEDO, *Informe Colombia*.

⁶² MEROI, *Informe Argentina*, with quote from Lorenzetti.

⁶³ MEROI, *Informe Argentina*.

d) Works on a Model Code of Collective Actions for Iberoamerica

In its provisional draft approved in Caracas in 2004, class actions are intended to protect both diffuse and homogeneous individual interests and rights –the latter being a collection of individual subjective rights of a common origin, not limited to those arising from specific legal fields (art. 1).

Locus standi is awarded to some public institutions, but also to the members of the group and to any associations whose purposes include the defence of litigious interests (art. 3). The judge assesses the representation capacity of the holder of *locus standi* rights, beyond formal satisfaction of the legal requirements.

All kinds of protection can be obtained, including compensation orders for collective damages (arts. 4 y 8). An order to pay individual damages can be obtained as a generic judgement; as a general rule, individualized claims are filed by the holders of the rights to be individually compensated in proceedings incidental to that which resulted in the generic judgement (arts. 20-24).

A collective judgement affects all the co-holders of the litigious diffuse or collective interests, but holders of homogeneous individual rights or interests may seek protection therefor by filing individual claims (and thus are not affected by *res judicata*). If the collective claim is dismissed, there is no *res judicata* in respect of the individualized compensation claims (art. 33).

e) References to other legal systems

In Japan, litigation by appointment of a party, whereby the action is exercised by a large number of co-holders of a common interest, is widespread.⁶⁴ The representing party must be appointed in writing.⁶⁵ The effects of the judgement extend to the appointors. All types of legal remedies may be sought, and for that reason this approach is very convenient to complement the collective protection of consumers, limited to the claims of cessation.⁶⁶

In Russia, the federal legislation on self-regulated organizations grants *locus standi* upon them in respect of the interests of their members as a whole, in order to seek an imposition of the cessation of conducts infringing those interests. A compensation order is reserved to each individual, who benefits from the order obtained by the organization in such part as is shared by the legal grounds of their claim.⁶⁷ On the other hand, in a material, non-general but broad sphere,⁶⁸ a reform of 2009 regulated the claims filed by an actor on behalf of a group of five or more affected individuals whose common or homogeneous rights had been infringed. They can seek any type of judicial

⁶⁴ HONMA, *Japan Report*.

⁶⁵ This complicates the application of this mechanism if the number of potential interested parties is very large, although the form of this requirement was revised to facilitate compliance (mere letter of adherence to the already made appointment): SUGAWARA, I., “The current situation of class action in Japan”, *The Globalization of Class Actions*, pp. 5-6, 9-11.

⁶⁶ HONMA, *Japan Report*.

⁶⁷ FILATOVA, *Russia Report*.

⁶⁸ FILATOVA, *Russia Report*: “(R)esolution of disputes arising from corporate relationships, claims related to the activities of the securities market actors, and other claims of economic nature meeting the established requirements for group litigation”.

protection and *res judicata* extends to those members of the group who have expressed their adherence.

Beyond specific legal provisions, French case-law has acknowledged that legally incorporated associations have standing to defend the collective interests included in their social object.⁶⁹ However, this *locus standi* does not comprise the defence of public or private interests.⁷⁰

B) Protection of consumer rights and interests

Considering the generality of the legal matters in respect of which suitable regulations on *locus standi* for the protection of supra-individual interests have been established, those aimed at protecting consumers⁷¹ rank second.

a) Locus standi and types of protection for consumer collective and diffuse interests

Judicial protection of common, shared, non-individualized consumer interests has several variations in the regime of *locus standi*.

Some legal systems limit special regulations on *locus standi* to specific legal fields.⁷² However, the option of establishing such regulations with reference to any

⁶⁹ AMRANI MEKKI, *Rapport France*, with quote from Civ. 1, 18 September 2008, JCP 2009, I, 142, n° 5.

⁷⁰ MAGNIER, V., “Class Actions, Group Litigation and Other Forms of collective litigation. France”, *The Globalization of Class Actions*, pp. 5-9; CADIET, L., “Future Prospects for Collective Redress in Europe- Towards a System of Class Actions? The State of Play in France”, en *ZZPInt* 13 (2008), pp. 5-6.

⁷¹ Such capacity tends to be extended, for instance, to investors, for whom special regulations on judicial protection are established similar to those regarding consumers. Thus, BAETGE, D., “Class Actions, Group Litigation and other Forms of Collective Litigation. Germany”, *The Globalization of Class Actions*, p. 5; MAGNIER, “France”, *The Globalization of Class Actions*, pp. 8-9.

⁷² See, under section IV.2, sub-section C. The level of specialization may be higher than the one we can present here. For example, according to Spanish law, provisions on the standing of consumer associations and of some public bodies to seek the imposition of the cessation of conducts infringing the *Ley de Crédito al Consumo* (Consumer Credit Act), the *Ley General de Publicidad* (General Advertising Law) and the regulation of e-commerce.

violation of consumer interests prevails,⁷³ subject to additional regulations in some specific areas.⁷⁴

In addition to the *locus standi* held by public bodies (section V.2.A), there are two models for granting *locus standi*: associations or other bodies created pursuant to general regulations, whose social objects include the defence of consumer interests,⁷⁵ and special associations, sometimes subject to authorization or accreditation by Public Administration Institutions.⁷⁶

Judicial protection is limited to making declarations of lawfulness in respect of some conducts and to ordering the discontinuance thereof; it does not seek to obtain damages for each consumer.⁷⁷ Nevertheless, in some legal systems, consumers can benefit from previous judgements on collective legal remedies, invoking the declarations of lawfulness in order to integrate the legal grounds of their particular actions.⁷⁸

b) Locus standi for the defence of individual rights and interests of consumers damaged by a common cause

⁷³ MAIRAL, “Argentina”, *The Globalization of Class Actions*, p. 6; MEROI, *Informe Argentina*; PARADA CAICEDO, *Informe Colombia*; BAETGE, “Germany”, *The Globalization of Class Actions*, p. 5; ORFANIDIS, *Griechenland Bericht*; KULSKI, *Poland Report*; FILATOVA, *Russia Report*; LUPOI, *Italy Report*. In Spain, legally incorporated consumers’ and users’ associations have *locus standi* to defend their interests which can be regarded as general consumer and user interests and enjoy such standing because the defence of those interests is one of their statutory purposes. (GUTIERREZ DE CABIEDES, P., en *Comentarios a la Ley de Enjuiciamiento Civil*, (coord. Cordón, Armenta, Muerza y Tapia), I, Aranzadi, 2001, pp. 155-157, who believes the expression “collective or diffuse interests” is more appropriate.)

⁷⁴ See, under section IV.2, sub-section C and the following sub-sections. A close examination could identify some differences between the most general regulation and special regulations or a strict concurrence between them.

⁷⁵ PARADA CAICEDO, *Informe Colombia*; KULSKI, *Poland Report*; SENGAYEN, “Poland”, *The Globalization of Class Actions*, p. 26; FILATOVA, *Russia Report*.

⁷⁶ MEROI, *Informe Argentina*; BAETGE, “Germany”, *The Globalization of Class Actions*, pp. 4-6, 16; ORFANIDIS, *Griechenland Bericht*; LUPOI, *Italy Report*. Also in Spain, where art. 11 of civil procedural law (*Ley Procesal Civil*) regulates the specific incorporation as a consumer association or the additional qualification of being one of the most representative.

⁷⁷ In Argentina, the 2008 reform of the *Ley de Defensa del Consumidor* (Consumer Protection Act) allowed associations to seek compensation orders (MEROI, *Informe Argentina*), but in this case they need some kind of consent from the holders of the respective rights (arts. 53 and 54 of said Law). For France, see section IV.2.A.e. above. Also, ORFANIDIS, *Griechenland Bericht*; BAETGE, “Germany”, *The Globalization of Class Actions*, p. 22); SENGAYEN, “Poland”, *The Globalization of Class Actions*, p. 48; FILATOVA, *Russia Report*. For Italian law, the provisions of art. 140.1 of *Codice del Consumo*, which do not include an order for compensation, are significant.

⁷⁸ In this regard, see KULSKI, *Poland Report*; FILATOVA, *Russia Report*; BAETGE, “Germany”, *The Globalization of Class Actions*, p. 14. On the contrary, the problem has not yet been successfully solved in France, AMRANI MEKKI, *Rapport France*; nor in Japan: HONMA, *Japan Report*.

Individual consumer rights and interests are very often damaged; That is why some legal systems establish, in addition to the standing allowed to every consumer, special *locus standi* rights to formulate all their compensation claims as a whole. Next there is an overview on the most outstanding features of this highly diversified scene.

In Argentina, consumers associations that enjoy standing to defend collective and diffuse interests may seek protection of individual rights and interests if they can prove the (simplified) power of attorney granted upon them by the holders of said rights and interests; however, a reform of such law highlights the lack of an express declaration of self-exclusion by a well-informed consumer from the pendency of a process the outcome of which may affect them.⁷⁹

In Colombia, Law 472/1998 regulates (art. 46) the actions brought by 20 people or more who have suffered individual damages arising out of the same cause and seeking compensation for those damages. The group will act through an appointed lawyer or, in the case of several lawyers, through the coordinator of the created committee. The initial claimant or claimants will represent the other people who have been individually affected without the need to bring their own actions separately or grant any power of attorney (art. 48). However, these people must be informed of the pendency of the process by an effective means (art. 53), and may positively express their adherence to it -by providing relevant data to the process- or express their desire to be excluded from the claimants (art. 56), whereby they will not be affected by the judgement.

In France, the *Code de la Consommation* provides that national registered consumer associations, with the previous written consent of two consumers or more who have been damaged by a common cause attributable to the same professional, may seek a compensation for damages on behalf of those consumers. An express, positive and formalized statement of will cannot be required by some mass media.⁸⁰

According to German law, “In 2002, a provision was introduced into the law on Legal Advice, according to which individual consumers may assign their claims, including claims for monetary relief, to a consumer association. The association may then file suit on their behalf “if this is necessary in the interest of consumer protection.” The provision is an exception to the rule that only specially qualified persons or institutions have the right to offer legal services”.⁸¹ The need for a positive and express statement by the affected consumer should be noted.

In Italy, the wording of the new art. 140-bis of the *Codice del Consumo* (2007) provides that consumers who have been damaged by certain facts⁸² may seek a

⁷⁹ Arts. 53 and 54 –reformulation- of the *Ley argentina de Defensa del Consumidor* (Consumer Protection Law).

⁸⁰ AMRANI MEKKI, *Rapport France*; CADIET, “Future Prospects for Collective Redress”, pp. 6-7.

⁸¹ BAETGE, “Germany”, *The Globalization of Class Actions*, pp. 22-23.

⁸² “2. L'azione tutela: a) i diritti contrattuali di una pluralità di consumatori e utenti che versano nei confronti di una stessa impresa in situazione identica (...); b) i diritti identici spettanti ai consumatori finali di un determinato prodotto nei confronti del relativo produttore, anche a prescindere da un diretto rapporto contrattuale; c) i diritti identici al ristoro del pregiudizio derivante agli stessi consumatori e utenti da pratiche commerciali scorrette o da comportamenti anticoncorrenziali”.

statement of liability and an award for damages and restitution through the action filed by an association,—even if this is not qualified – upon which they have conferred a power of attorney, or through a committee in which they take part.⁸³ Other consumers may join in without the ordinary prescribed form to act as parties in the proceedings. In order to make this joining possible, the law regulates its proper publicity. Only those consumers who have joined the action will be affected by the judgement.

The *status quo* in Spanish law, where some important issues remain unclear, is as follows: 1) Legally incorporated users' and consumers' associations enjoy *locus standi* to defend the rights and interests held by their members if these have agreed to the legal action; they may seek any form of protection; the judgement shall affect those members who have agreed to the legal action and have the status of *res judicata* against them.⁸⁴

2) Consumers' and users' associations incorporated pursuant to the *Ley General de Consumidores* (General Consumer Act) are allowed *locus standi* to defend the rights and interests held by their members regarding consumption (subject to the prescribed conditions) as well as those held by determined or determinable consumers and users; they may seek any form of legal remedies (the Spanish civil procedural law refers to "damaged" and "damage", what implies resolutions on the validity of damaging legal acts and a compensation order or other special provision);⁸⁵ the judgement shall affect their members and determined and determinable consumers and users and *res judicata* will also affect them (art. 222.3 of Spanish civil procedural law).⁸⁶

3) The same procedural standing laid down in 2) corresponds to other legally incorporated entities whose social purpose is the defence of consumers and users and of groups of people affected by the damaging fact, acting by decision of the majority of affected people.

4) Consumers' and users' associations incorporated under the General Consumers Act that qualify as "most representative" have the *locus standi* mentioned in 2), but with a broader subjective scope (rights of consumers and users who are non-determined or difficult to determine).

Other legal systems examined make no provisions on this special *locus standi*,⁸⁷ have a very limited material scope of application,⁸⁸ or do not contain detailed information about its characteristics.⁸⁹

⁸³ LUPOLI, *Italy Report*.

⁸⁴ GUTIÉRREZ DE CABIEDES, *Comentarios*, I, pp. 153-155, which also points out that these are related "multi-personal"- rather than collective- interests.

⁸⁵ GUTIÉRREZ DE CABIEDES, *Comentarios*, I, p. 148-149; GASCÓN INCHAUSTI, F., *Tutela judicial de los consumidores y transacciones colectivas*, Civitas, Madrid, 2010, pp. 110-114.

⁸⁶ The law does not set clear whether it establishes an *opt-in* or *opt-out* system, but the most solid doctrine - GUTIERREZ DE CABIEDES, *Comentarios*, I, pp. 158, 159, 217-218; GASCÓN, *Tutela judicial de los consumidores*, pp. 125-127- deems necessary an express or unspoken consent- i.e. not waiving or abandoning the action- (or perhaps a less formal separation) after the information provided by article 15 of civil procedural law.

⁸⁷ ORFANIDIS, *Griechenland Bericht*.

⁸⁸ See last part of section IV.2.A.e.

C) Legal remedies for supra-individual interests in other legal matters

This last systematic section is not intended to be comprehensive. It deals with special *locus standi* regulations which have a smaller scope compared to other provisions previously mentioned regarding consumption, but which introduce new scenarios of *locus standi* from the subjective point of view. Moreover, they can combine with other cases of *locus standi* considered in sections A and B above.

a) Framework of General Conditions of Contracting

In France, consumers' associations that meet the requirements of the *Code de la Consommation* are allowed procedural standing to claim the cessation in the use of illegal contractual clauses.⁹⁰

In Germany, associations incorporated with the purpose of promoting commercial interests and consumers' associations⁹¹ have *locus standi* to claim the discontinuance in the use of unlawful clauses.⁹² This declaration, which is subject to the discontinuance order, may be invoked by any third-parties who can benefit from it.⁹³

In Italy, art. 137 of the *Codice del Consumo* makes the following provision: "Le associazioni dei consumatori, di cui all'art. 137, le associazioni rappresentative dei professionisti e le camere di commercio, industria, artigianato e agricoltura, possono convenire in giudizio il professionista o l'associazione di professionisti che utilizzano, o che raccomandano l'utilizzo di condizioni generali di contratto e richiedere al giudice competente che inibisca l'uso delle condizioni di cui sia accertata l'abusività".

In Poland, in addition to each contracting party and public bodies, consumers' associations have *locus standi* rights to seek the discontinuance in the use of clauses infringing the law, with effect for third parties as of the registration of the prohibited clause in an official registry.⁹⁴

According to Spanish law, standing corresponds not only to the contracting party –with effects on their contractual relationship only- and to some public bodies, but also to associations or corporations of employers, professionals and farmers which, according to their articles of association, are entrusted with defending their members' interests, as well as to professional associations and Chambers of Commerce, Industry and Navigation. They can claim the legal remedies of cessation, retraction (prohibition to recommend the use of a particular clause) and a declarative remedy, none of which implies a declaration on its validity as a contractual clause nor a compensation order. The judgement involves the same individuals affected by the unlawful behaviour - (cessation and retraction) since its enforcement will benefit them indirectly- and by the clause declared a general condition – because they will not need to prove such

⁸⁹ KULSKI, *Poland Report*.

⁹⁰ MAGNIER, "France", *The Globalization of Class Actions*, pp. 6-7; AMRANI MEKKI, *Rapport France*, which regrets the lack of effects in respect of third parties of the declaration of unlawfulness of the clauses. Similarly, in Japanese law: HONMA, *Japan Report*.

⁹¹ BAETGE, "Germany", *The Globalization of Class Actions*, p. 4.

⁹² BAETGE, "Germany", *The Globalization of Class Actions*, p. 22.

⁹³ BAETGE, "Germany", *The Globalization of Class Actions*, p. 14.

⁹⁴ KULSKI, *Poland Report*.

qualification in a proceeding where this may be relevant. Consumers' and users' associations that meet the requirements imposed by their special regulation are also allowed *locus standi* to claim the same legal remedies⁹⁵.

b) Unfair Competition and Violation of Antitrust or Competition Defence Regulations

In Germany, in addition to the holders of affected rights, the associations established for the protection of commercial interests and qualified consumers associations are allowed *locus standi* to claim orders imposing the cessation of unfair competition activities.⁹⁶ On the contrary, collective *locus standi* is limited to the former kind of associations and is a difficulty for consumers associations in terms of actions on infringement of competition defence regulations.⁹⁷

In Spain, *locus standi* regarding unfair competition corresponds to consumers associations, as well as to the holders of affected rights and interests and to some public bodies. They may claim a declaration of unfair conduct, an order imposing the cessation of such conduct, the removal of its effects and the rectification of unlawful informations. In terms of competition defence the problem is, to some extent, the reverse to that of Germany.⁹⁸

Greek law has long regulated the *locus standi* of trade and industry associations and of other groups involved in the operation of the market to claim orders for the cessation of unfair competition conducts, but it is not very common in practice.⁹⁹

Preliminary work on the Draft Model Law on Competition does not take into account the *locus standi* of associations, but only that of individuals and to the State "in the exercise of its protection duties (*parens patriae* suit)".¹⁰⁰

c) Protection of the Environment and Protection of Historic-Artistic Heritage

With regard to these issues, information is limited in some legal systems,¹⁰¹ or otherwise answers are clearly negative.¹⁰²

⁹⁵ Nevertheless, due to the *locus standi* rights attributed to these associations by other regulations (see section IV.2.B), wider legal remedies can be obtained.

⁹⁶ BAETGE, "Germany", *The Globalization of Class Actions*, p. 4. Although an order for individualized damages may not be obtained, the court may order that the proceeds from illegal activities be handed to the Treasury (p. 23).

⁹⁷ BAETGE, "Germany", *The Globalization of Class Actions*, p. 6.

⁹⁸ The reform of the Competition Defence Law has made it possible to bring actions before the civil courts, but has not provided any additional special regulations on *locus standi*. Thus, apart from the individual holders of damaged rights and interests, only the regulations on *locus standi* regarding consumer protection are at stake (see section IV.2.B). In Italy, the damaged individuals and some consumer associations and committees are also allowed *locus standi* in Italy (art. 140-bis, 2, c of the Codice del Consumo).

⁹⁹ ORFANIDIS, *Griechenland Bericht*.

¹⁰⁰ UNCTAD, *Model Law on Competition*, p. 76: "Under such "class actions", users or consumers of a specific service or good who have suffered damage from *anticompetitive* behaviour, and whose individual claim would be too insignificant, have the right to institute action against enterprises".

In Argentina the regulation in force is the *Ley General del Ambiente*,¹⁰³ which grants *locus standi* to the affected persons and to some public bodies, but also to environmental protection associations, which may claim the cessation of the damaging behaviour, the restitution to the previous state and a compensation for the environmental damage caused. A declaratory judgement produces *res judicata* effects, *erga omnes*, although discussions have arisen on whether those having standing are entitled to seek a compensation order for individual damages other than their own.¹⁰⁴

In Colombia, judicial protection of collective interests in respect of the environment –and also in respect of “the Nation’s cultural heritage”- may be sought through a popular action brought by any natural person, NGO and some public bodies. Protection of homogeneous individual rights, even by way of compensation for damages arising out of the environmental illegal action, may be obtained through a group action.¹⁰⁵

Under French law, associations incorporated with the legal purpose of defending the environment and which meet certain requirements may claim the protection of collective interests against conducts infringing the regulations that protect nature and the environment.¹⁰⁶

In Italy, the *locus standi* of associations qualified for the defence of the environment and the historic-artistic heritage appears limited to bringing proceedings before the courts of administrative jurisdiction.¹⁰⁷ This limitation to the administrative jurisdiction- but not the limitation of *locus standi*, which has a wider scope- is also typical of Spanish law.¹⁰⁸

Under German law, “since 2002, the Federal Environmental Protection Law confers the right upon qualified environmental interest groups to enforce environmental standards and rules in the courts without having to assert an injury to their own proprietary interests”.¹⁰⁹

¹⁰¹ HONMA, *Japan Report*.

¹⁰² FILATOVA, *Russia Report*.

¹⁰³ According to MEROI, *Informe Argentina*, with regard to the defence of the historic heritage and to antidiscrimination, when there is a lack of specific legislation, the *locus standi* of those associations whose legal object includes the protection of this kind of interests within their legal object is broadly admitted.

¹⁰⁴ MEROI, *Informe Argentina*.

¹⁰⁵ PARADA CAICEDO, *Informe Colombia*. Furthermore, see section IV.2.B.b.

¹⁰⁶ AMRANI MEKKI, *Rapport France*; MAGNIER, “France”, *The Globalization of Class Actions*, p. 7.

¹⁰⁷ LUPOI, *Italy Report*.

¹⁰⁸ Arts. 22 and 23 of Law 27/2006, of 18th July, regulating the rights of access to information, public participation and access to justice with regard to the environment.

¹⁰⁹ BAETGE, “Germany”, *The Globalization of Class Actions*, p. 7.

The requirement to obtain the claimant's consent under Polish law makes it difficult to understand the *locus standi* of social organizations for the defence of the environment to act in the relevant proceedings.¹¹⁰

Otherwise, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on June 25, 1998,¹¹¹ establishes relevant provisions on access to courts in environmental matters even if the claim arises out of an act or omission by private persons (art. 9.3). In its art. 2 it refers to potential holders of *locus standi*, which may consist of "one or more natural or legal persons, and according to the legislation or the customary practice of the country, the associations, the organizations or the groups integrated by those people".

d) A reference to the protection of supra-individual rights regarding employment and intellectual property

A special framework of *locus standi* to claim some collective legal remedies is highly relevant for the two matters contained in the heading.¹¹² This has long been a tradition in employment matters. The protection of collective intellectual property rights is a more recent issue, but one that has developed extensively. The number of issues is overwhelming, so I will only make a brief reference.

With regard to employment, there seems to be a clear distinction between the *locus standi* of trade unions and business associations to claim collective legal remedies –collective conflicts and agreements, defence of union rights, etc.-¹¹³ and the authority of those entities –particularly of trade unions- to act in proceedings to seek the protection of the individual rights of each worker. The latter is either excluded¹¹⁴ or restricted to a limited procedural intervention,¹¹⁵ or otherwise its efficiency depends on the express consent of the interested worker.¹¹⁶

¹¹⁰ KULSKI, *Poland Report*; SENGAYEN, "Poland", *The Globalization of Class Actions*, pp. 26-27, 32-35, 48. In fact, the issue is to identify who can be the claimant when it comes to the defence of collective interests.

¹¹¹ <http://www.unece.org/env/pp/welcome.html>

¹¹² I have deemed it appropriate to include the consideration of intellectual property collective rights at this point because, all in all, it means the protection of non-dependent creative work.

¹¹³ CADIET, "Future Prospects for Collective Redress", p. 6, note 15; ORFANIDIS, *Griechenland Bericht*; LUPOI, *Italy Report*; FILATOVA, *Russia Report*; MEROI, *Informe Argentina*. In Spain, art. 17 of the Law on Employment Procedure (*Ley Procesal Laboral*) provides that "trade unions and business associations shall have *locus standi* rights to defend the economic and social interests attached to them" –and it goes on to detail the framework of this *locus standi* in the promotion of proceedings on collective disputes and the challenge of collective agreements.

¹¹⁴ LUPOI, *Italy Report*; FILATOVA, *Russia Report*.

¹¹⁵ ORFANIDIS, *Griechenland Bericht*. Under Spanish law, when the violation of the right to freedom of association affects the individual rights and interests of an employee, trade unions may act, but may not resume the proceedings if the main party abandons (art. 175 of the Spanish law on Employment Procedure).

¹¹⁶ MEROI, *Informe Argentina*; AMRANI MEKKI, *Rapport France*; SENGAYEN, "Poland", *The Globalization of Class Actions*, p. 33.

In the complex myriad of rights deriving from intellectual property, the standing to claim the protection of some corresponds to each of their holders taken separately. Other intellectual property rights need to be subject to collective management,¹¹⁷ entrusted to bodies that must meet some requirements to ensure compliance of their function in favour of the authors and tend to be supervised by Public Administration Institutions.¹¹⁸ Those entities are granted *locus standi* rights to claim the protection of such collective rights, including an order to pay any amounts owed by virtue thereof.

e) Protection against discriminatory acts and behaviours

In some legal systems, the lack of a specific legislation leads to a lack of specific *locus standi* to seek legal remedies against discriminatory treatment.¹¹⁹ However, in Argentina, the generic constitutional framework grants *locus standi* upon associations whose social object includes the defence of discriminated groups.¹²⁰

In several legal systems that contain express regulations, *locus standi* is granted not only to those affected and, sometimes, to public bodies, but also to associations that meet specific requirements. These associations may not file a claim by their own initiative, but –perhaps because regulations take into account, exclusively or essentially, the discriminatory acts suffered by certain people– they require the express consent from the affected person.¹²¹

This last requirement is disregarded when the discriminatory action or behaviour has non-determined or hard to determine passive subjects.¹²² That happens in

¹¹⁷ E.g., compensation for the private copy of several classes of works, remuneration for the public communication of phonograms (sound recordings), for the showing of audiovisual works without charging an entry fee, for the renting and borrowing of works falling into the last two classes.

¹¹⁸ In France, civil societies authorised by the competent Ministry; In Italy, the Italian association of authors and editors; in Germany, right management entities authorised by the competent public administrations; in Spain, copyright management entities—ARMENGOT VILAPLANA, A., *La tutela civil de la propiedad intelectual*, La Ley, Madrid, 2003, pp. 229-265-; in Colombia, rights management companies authorised by the Administration; in Argentina, the *Sociedad Argentina de Autores y Compositores de Música*, over which the State exercise a permanent control; in Brazil, collective management companies incorporated under the Law of 19 February, 1998.

¹¹⁹ FILATOVA, *Russia Report*.

¹²⁰ MEROI, *Informe Argentina*.

¹²¹ KULSKI, *Poland Report*; AMRANI MEKKI, *Rapport France*. Under Spanish law, trade unions and legally incorporated associations whose purpose is gender equality have *locus standi* rights to defend their members and associates if authorised by them; art. 19 of the *Ley de protección de la igualdad de los discapacitados* (Law on Defence of Equality for the Disabled) makes a similar provision.

¹²² For instance, in Spanish law, competent public bodies, the most representative trade unions and legally incorporated national associations whose legal object is the defence of gender equality have *locus standi* to defend the interests of affected people who are non-determined or hard to determine. Whether the affected people decide to take advantage (or not) of the favourable effects of a possible judgement is quite another story.

any event when the unlawful conduct is an advertising activity damaging the dignity of the people, taken as a whole, whose equal treatment the law seeks to protect.¹²³

3. Adjustments to the procedural structure

It is especially advisable to make adjustments to secure a better treatment of the subject-matters at issue if, as is often the case, supra-individual interests are deemed to include individual homogeneous or related rights and interests when claiming legal remedies for a number of such rights and interests.

Adjustments will vary according to whether *locus standi* has been granted to a natural or legal person so that they can claim judicial protection over a set of individual rights of the above-mentioned nature, or if *locus standi* is only acknowledged to each holder of those rights, which leaves the possibility open for bringing a number of actions with common or identical elements (respondent, legal reasons of the claim, etc.).

A) Peculiarities of the proceedings in case of an action brought by a person having locus standi to claim protection over a plurality of individual homogeneous or neighbouring (related) rights

The main particularities consist of:

1) The provision of a procedural stage to examine the specific requirements to the admission of a claim, particularly the claimant's representation capacity, if the regulations confer the judge a scope of consideration over their standing.¹²⁴

2) A framework for the adhesion or abandonment by the holders of the individual rights, following the regulation of the forms of communicating the pendency of the proceedings to such holders. It may also regulate their individual participation in the proceedings.¹²⁵

3) Bipartition of the declarative procedural action. The purpose of the first stage is the declaration about the liability of the respondent, the generic order to pay a

¹²³ Another example in Spanish law: in addition to some public bodies, those associations that meet specific legal requirements shall have *locus standi* to defend –by means of an action of cessation – collective and diffuse interests of women in the case of unlawful advertising arising out of a degrading or discriminatory use of a woman's image.

¹²⁴ Thus, e.g., art. 11 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica* (art. 11), and art. 140-bis, section 6 of the Italian *Codice del Consumo*.

¹²⁵ Arts. 94 and 133 § 2° of the Brazilian *Código do Consumidor*, as interpreted *a contrario sensu*. In Argentina, a Law of 2008 amending several articles of the Consumer Protection Act (*Ley de defensa del consumidor*) of 1993, grants judges the authority to fix the time and form to express the withdrawal of the holders of individual rights. In Colombian law, arts. 53, 55 and 56 of the Law on the Enforcement of People and Group Actions (*Ley sobre ejercicio de las acciones populares y de grupo*). In the draft *Código Modelo de Procesos Colectivos para Iberoamérica*, arts. 20, 21 and 31. Under Italian law, account must be taken of the provisions of sections 3 and 9 of art. 140-bis of the *Codice del Consumo*. In Spain, art. 15 of civil procedural law regulates the information provided to consumers whose individual rights may be affected, their power to intervene in the proceedings, but not the time and form of their self-exclusion, which must be deemed bound by the general rules on abandonment, if any.

compensation¹²⁶ and, perhaps, the determination of some parameters for fixing individual compensations.¹²⁷ The purpose of the second stage, also a declarative one, is to quantify individual compensations¹²⁸ or even, previously, to declare that the situation of the claimant for compensation fits into the parameters established by the judgement.¹²⁹

B) Efficient management of mass proceedings

If the claims of holders of individual rights and interests must be filed by each of them individually, given the massive number of unlawful acts on which they are based a large amount of claims may be brought, with the subsequent workload of the courts. Two types of techniques seek a more effective management of this situation.

a) Joinder of proceedings

This mechanism helps simplify court actions only partially, but in any case produces the general effect of reducing the risk of contradictory judgements.

The joinder of claims in a single action is very practical as it combines the procedural activity of the parties and of the judge, both the pleadings and evidence and the procedural management, and the formulation of the final judgement. However, it can have difficulties in practice: firstly, if regulation thereon is restrictive;¹³⁰ and secondly, due to the need for those having *locus standi* rights to agree on filing a single suit encompassing all the claims. This is a true challenge when such claims are based on mass unlawful acts.¹³¹

The joinder of pending proceedings¹³² does not necessarily result in a procedural economy of the parties' court activities –since the parties continue to act individually,

¹²⁶ Art. 95 of Brazilian *Código do Consumidor*, and on the same, PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, pp. 7-8, y GIDI, *Las acciones colectivas*, pp. 62-63.

¹²⁷ In Colombia, art. 65 of the *Ley sobre ejercicio de las acciones populares y de grupo*. Under Argentinian law, art. 54 of the Consumer Protection Act. In Italy, art. 140-bis, section 12 of the *Codice del Consumo*. And art. 221, section 1, rule 1^a, of the Spanish civil procedural law.

¹²⁸ CAPONI, R., “The Collective Redress action in the Italian Legal System”, in *ZZPInt* 13 (2008), p. 17.

¹²⁹ PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, p. 8. For Argentina, art. 54 of the Consumer Protection Act. In the draft *Código Modelo de Procesos Colectivos para Iberoamérica*, art. 23. Under Spanish law, arts. 221 and 519 of civil procedural law regulate the extension of the enforcement of the judgement granted to consumers who are not designated in such judgement but who have suffered the damages for which it orders a compensation.

¹³⁰ MEROL, *Informe Argentina*; AMRANI MEKKI, *Rapport France*; KULSKI, *Poland Report*. It appears that in Russia this joinder of claims tends to be made easier, as indicated by FILATOVA, *Russia Report*.

¹³¹ Another difficulty arising from mass claims is the complexity it adds to the legal debate, which can lead the court to separate the proceedings: HONMA, *Japan Report*.

¹³² Facilitated generally in several legal systems, as inferred from the general informations in AMRANI MEKKI, *Rapport France*, FILATOVA, *Russia Report*, KULSKI, *Poland Report*, HONMA, *Japan Report*.

although following single procedures (verbal or written) -, nor in court management –as the court must deal with the court actions of each of the parties constituted in the proceedings separately.¹³³

On the other hand, the joinder of claims may cause delays in all or part of the accumulated proceedings due to the very system of joinder or to the frequency of incidences related to its application.

b) Suspension of most proceedings and conduct of a “model” (“pattern”, “test”, or “sample”) proceeding

The technique of “model” case or proceeding allows to overcome the challenge of the accumulation of proceedings consisting in the individualized court actions of each party and in case management, similarly individualized, by the court.

The framework established in Germany by the Capital Markets Model Case Act in disputes regarding capital markets is paradigmatic. Very briefly:¹³⁴ The appellate court determines the “model case” – taking into account the common elements which are relevant for all the cases raised in the different claims -, as well as the claimant who will defend such case; the proceedings on the “model case” is conducted and the other proceedings are suspended, although their claimants may act as adhering parties to the ongoing proceedings; the resulting judgement on the “model case” –which may be appealed for judicial review before the Federal Supreme Court – binds all the parties who have filed claims, save in case of abandonment subject to some legal conditions. In the final stage, the court –in connexion with the issues of common relevance resolved in the judgement of the “model case”- grants a judgement on the proceedings that were left suspended and which still remain pending, at the request of the parties holding locus standi.

In other European legal systems there is a similar mechanism in place in contentious-administrative proceedings, but not in a procedure in Civil Justice.¹³⁵ In fact, that used to be the case also in Germany.¹³⁶ The explanation is that contentious-administrative proceedings had to face mass processes efficiently ahead of civil proceedings.

4. The evidence in civil procedure for the protection of supra-individual interests: challenges and special regulations to overcome those challenges

Every study on the legal matters for which it is recommended or valued that the relevant regulations be enforced by civil courts and by the proceedings they manage, includes two sets of considerations; the first one refers to the strengthening of the claimant’s rights and the powers of the court to obtain the evidence held by the

¹³³ BAETGE, “Germany”, *The Globalization of Class Actions*, p. 12.

¹³⁴ BAETGE, “Germany”, *The Globalization of Class Actions*, pp. 7-10, 12-16, 18-20, 22 ; HESS, B., „Private law enforcement“, und Kollektivklagen“, *Juristenzeitung*, 2/2011, pp. 68-69.

¹³⁵ AMRANI MEKKI, *Rapport France*. In Spain, such regulation is contained in arts. 37 and 111 of the Administrative Procedural Law (*Ley Procesal Administrativa*); in that regard, see ROSENDE VILLAR, C., *La eficacia frente a terceros de las sentencias contencioso-administrativas*, Aranzadi, 2002, pp. 232-246. MEROI, *Informe Argentina*, about approximations to this technique in the legal practice.

¹³⁶ BAETGE, “Germany”, *The Globalization of Class Actions*, p. 19.

respondent which is difficult to access by the claimant;¹³⁷ the second group of considerations deals with the incorporation of special rules regarding the burden of proof or rules that otherwise facilitate evidentiary findings that are specially difficult to obtain but necessary for the court to be able to admit particular claims.¹³⁸

A) Facilitating access to evidence

Firstly, before filing the claim and for it to be admissible and sufficiently grounded, the claimant may need to access data in possession of the respondent or of third parties, in order to:

- 1) Determine and identify the affected people to inform them of the filing of the claim so that they can adhere to it or exclude themselves from the same. Some legal systems lack specific provisions in that regard,¹³⁹ while others contain special regulations.¹⁴⁰
- 2) Sufficiently verify the chances of success of the claims to be filed, to the extent this influences the decision to commence proceedings which will have high costs and additional financial risks in case of failure. Sometimes the prospective claimant does not have the opportunity to know or obtain certain evidence the access to which is only possible through court intervention. This need is not contemplated by some legal systems,¹⁴¹ while others emphasize the accessibility of data held by

¹³⁷ See, e.g., regarding competition defence, MÖLLERS, HEINEMANN, Eds., *The Enforcement of Competition Law*, pp. 649-650; *White Paper on Damages ... EC antitrust rules*, 2.2. With regard to these matters as considered in the Green Book prior to the one mentioned above, see EGER, WEISE, "Limits to the private enforcement of antitrust law", pp. 3-4; HODGES, "Competition Enforcement", p. 1383; ALFARO, "Contra la armonización positiva", pp. 14-15.

¹³⁸ For instance, regarding environmental protection, see HINTEREGGER, (Ed.), *Environmental Liability*, pp. 610-612. With regard to unlawful advertising and unfair competition, see MÖLLERS, HEINEMANN, Eds., *The Enforcement of Competition Law*, pp. 60, 65-66. And regarding competition defence, see again MÖLLERS, HEINEMANN, Eds., *The Enforcement of Competition Law*, pp. 649-650; *White Paper on Damages ... EC antitrust rules*, 2.4.

¹³⁹ MEROI, *Informe Argentina*; FILATOVA, *Russia Report*.

¹⁴⁰ Thus, art. 256.6° of Spanish Civil Procedural Law and art. 20 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica*, version Caracas of 28th October, 2004.

¹⁴¹ FILATOVA, *Russia Report*. Spanish law regulates preliminary proceedings with regard to industrial and intellectual property, but not in general or regarding the legal matters being considered in this report.

Public Administration Institutions;¹⁴² finally, others provide positive answers, thought these must be clarified from a realistic point of view.¹⁴³

Secondly, once the proceedings has commenced, there are two types of regulations that may help towards a complete presentation of evidence (*instrucción probatoria*):

- 1) The authority of the court to order *ex officio* the leading of evidence, which is a general rule in some civil proceedings,¹⁴⁴ or which is established specifically, with a different reach, in proceedings regarding the matters under consideration.¹⁴⁵
- 2) The authority of the parties and the powers of the court to obtain the evidence held by the other party or by third-parties. In some legal systems it is a general regulation of the relevant civil proceedings,¹⁴⁶ while in others it is regulated by specific provisions.¹⁴⁷

B) Facilitating evidentiary findings

Particularly relevant are the special rules concerning the allocation of the burden of proof on matters related to non-contractual liability,¹⁴⁸ contractual liability in agreements entered into with consumers¹⁴⁹ and in cases where protection rules against

¹⁴² MEROI, *Informe Argentina*. Furthermore, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* establishes relevant provisions about the access to the information Administrations had to gather and preserve on such matters; the signatory States commit to provide it to the “interested public” under the terms of articles 4 and 5 of the Convention, with jurisdictional control over administrative inaction.

¹⁴³ HONMA, *Japan Report*. In Brazilian law, art. 8 of the *Lei de Ação Civil Pública* refers to the investigation powers of Public Attorneys; however, the practical scope of this regulatory provision seems to be limited, according to GIDI, *Las acciones colectivas*, p. 107: “The lack of this powerful instrument in Brazil (MOR: it refers to the system of *discovery* results in decisions that are often based on limited evidence and informations.”

¹⁴⁴ AMRANI MEKKI, *Rapport France*; PARADA CAICEDO, *Informe Colombia*.

¹⁴⁵ ORFANIDIS, *Griechenland Bericht*; MEROI, *Informe Argentina*. *Ex officio* evidence is also the option of choice in the draft *Código Modelo de Procesos Colectivos para Iberoamérica* (art. 12, para. 3).

¹⁴⁶ AMRANI MEKKI, *Rapport France*; KULSKI, *Poland Report*. Also FILATOVA, *Russia Report*, although it highlights that the court “is not obliged to grant such taking: decision is left on the court’s discretion”.

¹⁴⁷ HONMA, *Japan Report*; MEROI, *Informe Argentina*. On the other hand, it should be remembered what we stated previously in respect of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

¹⁴⁸ ORFANIDIS, *Griechenland Bericht*.

¹⁴⁹ ORFANIDIS, *Griechenland Bericht*. In the Spanish General Consumers Protection Law (*Ley General de Protección de Consumidores*), special regulations on the burden of proof are plenty (arts. 76, 80, 82, 88, 100), and Civil Procedural Law provides that “In proceedings on unfair competition and unlawful advertising the burden shall lie on the respondent to prove that the statements and representations made and the material data contained in such advertising, respectively, are true and faithful”.

discriminatory behaviours are applicable.¹⁵⁰ These special rules may be more or less necessary depending on whether the general framework on allocation of the burden of proof entitles the court to allocate the burden to the party that is more likely to prove some particular facts.¹⁵¹

On the other hand, it is possible to facilitate access to difficult evidentiary findings by reducing the intensity or the strength of the conviction generally required in order to deem that a fact has been proven.¹⁵²

Finally, setting aside the evidentiary benefits of a material principle of objective liability¹⁵³ or of a limitation of the exemptions of liability-¹⁵⁴, the exclusion of the *res judicata* also makes it easier to obtain evidentiary findings when the judgement expressly provides that the claim has not been allowed for lack of evidence.¹⁵⁵ This *non liquet* on the matter of fact for lack of evidence opens up new alternatives to bring proceedings successfully in the future.

5. Peculiarities of a review before the highest ordinary court

The fundamental question is whether, given the social or public interest that is at stake in the proceedings for the protection of supra-individual interests, access to the highest court is allowed to a higher or lesser extent than in other civil proceedings or if

¹⁵⁰ AMRANI MEKKI, *Rapport France*. Under Spanish law. Although I will not quote specific articles of acts, I consider it useful to reproduce their contents: “In accordance with procedural regulations, in those proceedings where the pleadings of the actor are based on gender-discriminatory actions, the respondent shall be required to prove the lack of discrimination in the actions taken as well as their proportionality”; and “In those proceedings where the existence of well-grounded signs of discrimination on grounds of gender, racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation can be inferred from the claimant’s pleadings, the respondent shall be required to provide an objective reasonable and sufficiently proven justification of the actions taken and of the proportionality thereof”.

¹⁵¹ MEROI, *Informe Argentina*; MAIRAL, “Argentina”, *The Globalization of Class Actions*, p. 21; PARADA CAICEDO, *Informe Colombia*. Spanish Civil Procedural Law establishes legal rules regulating the allocation of the burden of the proof, but also provides that the court “shall take into account the availability of evidence and the ease of proving it that correspond to each of the parties”. The draft *Código Modelo de Procesos Colectivos para Iberoamérica* (art. 12, para. 1) opts directly for the rule of ease of proving evidence.

¹⁵² HONMA, *Japan Report*; MEROI, *Informe Argentina*. Also in terms of environmental protection it may be useful to refer to the review made in HINTEREGGER, (Ed.), *Environmental Liability*, pp. 609-615, on the treatment of the levels of certainty, facilitation of the burden of proof and consideration of statistical evidence in various European legal systems. By the way, the draft *Código Modelo de Procesos Colectivos para Iberoamérica* (art. 12) contains the following express provision: “Every means of evidence, including statistical or sampling evidence shall be admissible in court”.

¹⁵³ E.g., although this technique is very widespread, HONMA, *Japan Report*.

¹⁵⁴ ORFANIDIS, *Griechenland Bericht*.

¹⁵⁵ According to art. 16 of Brazilian *Lei de Ação Civil Pública* and, in that regard, see art. 103 of the *Código do Consumidor*. Regarding the justification of these rules, see GIDI, *Las acciones colectivas*, pp. 104-108. This solution has also been adopted in the draft of the *Código Modelo de Procesos Colectivos para Iberoamérica* (art. 33).

such court exercises the discretionary powers it may be entitled to in favour of the admission.

The positive answers that I have managed to record do not reveal a widespread use of such treatment, neither in those legal systems that claim to contain signs thereof, nor in terms of the legal matters in which such treatment that is more favourable to “reviewability”, is established in a legally clear manner.¹⁵⁶

Another issue that is also justified by the broad subjective incidence of the legal matters that are dealt with in these proceedings, is whether, under a legal rule or pursuant to an accepted legal practice, judgements passed by the highest court are binding.¹⁵⁷ In particular, under Greek and Spanish law, such binding value is indirectly introduced by empowering the Government to impose changes into the general conditions of contracting that have been rendered unlawful.¹⁵⁸ Spanish law has even established a direct norm on *stare decisis* (*vinculación al precedente*) in one particular event.¹⁵⁹

6. The strengthening of the efficiency of legal remedies

The preference for granting upon Public Administration Institutions the enforcement of the law that protects supra-individual interests, based on the higher efficiency of administrative actions (section III.4) may change if courts can be shown to have the appropriate powers to make legal remedies more effective. The main regulations to be considered are the system of interim measures—certainly the best way to make up for the lack of speed of judicial response - and the intensity of the executive actions available to the court to enforce judgements and precautionary decisions.

Regarding the system of interim measures, as a general rule there are no special regulations for the protection of supra-individual interests,¹⁶⁰ although the ordinary system is deemed satisfactory for the protection of such interests.¹⁶¹ The requirement for the claimant of interim legal remedies to provide a guarantee against any possible damage to the passive subject of such measure does not always arise, either because it is not always legally enforceable,¹⁶² or because it is specifically excluded.¹⁶³

¹⁵⁶ MEROI, *Informe Argentina*; FILATOVA, *Russia Report*. More specific rules establishing appealability can be found, in German law, in § 15 (1) of the Procedural Law on model case with respect to capital market investors (BAETGE, “Germany”, *The Globalization of Class Actions*, p. 13), and in Spanish law (art. 18.3 of the Law on General Conditions of Contracting- *Condiciones Generales de Contratación*).

¹⁵⁷ I refer to its value as a case-law precedent, not to the subjective extensión of the *res judicata* of those proceedings, beyond those who have been a party therein.

¹⁵⁸ ORFANIDIS, *Griechenland Bericht*. For Spanish law, see the provision mentioned in section IV.1.D.

¹⁵⁹ Art. 20.4 of the Law on General Conditions of Contracting.

¹⁶⁰ MEROI, *Informe Argentina*; KULSKI, *Poland Report*; LUPOI, *Italy Report*; FILATOVA, *Russia Report*. However, in its own purpose to help enhance national legal systems that are likely to have an inadequate system of interim legal remedies, the draft *Código Modelo de Procesos Colectivos para Iberoamérica* does suggest a set of anticipatory measures with far-reaching effects (art. 5).

¹⁶¹ MEROI, *Informe Argentina*; LUPOI, *Italy Report*; FILATOVA, *Russia Report*; AMRANI MEKKI, *Rapport France*.

¹⁶² LUPOI, *Italy Report*; FILATOVA, *Russia Report*.

As to the availability of more powerful and incisive enforcement instruments, the answers have generally been negative,¹⁶⁴ which does not necessarily mean a less effective protection, unless general executive instruments are not severe enough.¹⁶⁵ However, there are some signs of the introduction of more rigorous instruments,¹⁶⁶ mainly aggravating the system of coercive fines.¹⁶⁷

7. Procedural costs and their financing

The consideration of procedural costs influences largely the decision of filing a claim. Such consideration becomes ever more important and is more objective if, as is the case in most of the scenarios examined in this report, the person having *locus standi* is not the holder- or the exclusive holder- of the rights and interests on which legal remedies are sought.¹⁶⁸

A) Costs initially borne by the claimant and special rules that benefit the claimant in this regard

The main items included in the costs that, in principle, must be borne by the claimant are: the legal fees, the expenses related to the publicity of the claim –if an *opt-in* or *opt-out* system is to be applied –, and the expenses regarding expert testimony.

Legal fees could no longer be a discouraging factor if legal systems start considering the strict *pactum de quota litis* valid. Regulations on this matter are varying: some legal systems establish full freedom to the fixing of fees;¹⁶⁹ others do not fix compulsory minimum fees, but limit the share in the amounts of the outcome;¹⁷⁰ finally, others do not ban the fixing of fees according to those shares, but do allow for lawyers receiving no pay if their case is dismissed.¹⁷¹

¹⁶³ MEROI, *Informe Argentina*; PARADA CAICEDO, *Informe Colombia*. Art. 728 of the Spanish Civil Procedural Law provides that such guarantee is discretionary for the judge in the case the precautionary measures consisting of actions of cessation to defend consumer interests.

¹⁶⁴ MEROI, *Informe Argentina*; FILATOVA, *Russia Report*.

¹⁶⁵ Since it would have to fill in eventual gaps in national legal systems, it is understandable that the draft *Código Modelo de Procesos Colectivos para Iberoamérica* does suggest a severe system of coercive fines (art. 60).

¹⁶⁶ See the system of coercive fines and other enforcement instruments in articles 84.4° and 5° of Brazilian *Código do Consumidor* and in art. 11 of Brazilian *Lei de Ação Civil Pública*. AMRANI MEKKI, *Rapport France*.

¹⁶⁷ HONMA, *Japan Report*. Art. 711 of Spanish Civil Procedural Law extends the events in which coercive fines may be imposed, as well as the amount of such fines.

¹⁶⁸ The somehow altruist nature of this action could explain the occasional “rewards” provided to the claimant: see PARADA CAICEDO, *Informe Colombia* and art. 15 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica*.

¹⁶⁹ SENGAYEN, “Poland”, *The Globalization of Class Actions*, p. 43. LUPOI, *Italy Report* (D.L. 4 luglio 2006, n. 233).

¹⁷⁰ MEROI, *Informe Argentina*

¹⁷¹ AMRANI MEKKI, *Rapport France*. The approach is similar in Spain, GUTIERREZ DE CABIEDES, P., “Group litigation in Spain”, *The Globalization of Class Actions*, section 12. The regulation reported in FILATOVA, *Russia Report* contains a different kind of limitation.

The legal systems examined¹⁷² do not consider the possibility of the expenses payable by the claimant being financed by aleatory contracts, whereby the financing party bears the costs with the (future and uncertain) consideration of a share of the outcome of the matter.

The bearing of costs by those having *locus standi* may be facilitated through several techniques. On the one hand, associations that meet certain requirements can obtain public subsidies and apply them to their social duty to defend (also judicially) certain interests.¹⁷³ However, the main technique¹⁷⁴ consists in granting those having *locus standi*, by means of a special favourable rule,¹⁷⁵ the right to remain fully or partially free of litigation costs. That happens in several legal systems, with differing subjective scopes.¹⁷⁶

B) Chances of reimbursement and risks of increased costs after the award of costs

The way the initial obligation to pay procedural costs impacts the litigation options depends ultimately on the outcome of the award of costs.

Generally the “loser pays” rule (*vencimiento*) applies.¹⁷⁷ The law tends to specify this rule and to allow the court to reasonably disallow the award of costs on the party that loses the case, but this power is rarely exercised.¹⁷⁸ On the other hand, and although the “loser pays” rule may seem not to affect the decision to litigate –in fact, it can both damage and benefit the claimant-, it initially holds back the decision to file a suit. In order to counteract its influence, some legal systems¹⁷⁹ and some proposals of

¹⁷² BAETGE, “Germany”, *The Globalization of Class Actions*, p. 11; AMRANI MEKKI, *Rapport France*. However SENGAYEN, “Poland”, *The Globalization of Class Actions*, p. 48, notes that: “although speculative financing arrangements are banned, they have been known to be in place between lawyers and clients in practice”.

¹⁷³ According to PARADA CAICEDO, *Informe Colombia*; HONMA, *Japan Report*; LUPOI, *Italy Report*; FILATOVA, *Russia Report* such subsidies are not provided. On the contrary: MEROI, *Informe Argentina* y BAETGE, “Germany”, *The Globalization of Class Actions*, p. 26.

¹⁷⁴ There are others techniques, like that of the Fund for the Defence of Collective and Group Rights (*Fondo para la Defensa de los Derechos Colectivos y de Grupo*), applicable in Colombia: PARADA CAICEDO, *Informe Colombia*.

¹⁷⁵ In some legal systems only general rules appear to be applicable: AMRANI MEKKI, *Rapport France*; HONMA, *Japan Report*.

¹⁷⁶ KULSKI, *Poland Report*; FILATOVA, *Russia Report*; MEROI, *Informe Argentina*. In Spain the law directly exempts Consumers’ and Users’ Associations and Spanish public utility associations (*asociaciones de utilidad pública*) created for the promotion and defence of the rights of disabled people from such payment (*gratuidad*).

¹⁷⁷ Thus, with minor qualifications, MEROI, *Informe Argentina*, AMRANI MEKKI, *Rapport France*, LUPOI, *Italy Report*, SENGAYEN, “Poland”, *The Globalization of Class Actions*, p. 43. Under Spanish law the “loser pays” principle also applies. There is an important clarification in Japan, HONMA, *Japan Report*: “there is a general principle in Japan to disallow the payments of attorney fees by the party who loses the case”.

¹⁷⁸ PARADA CAICEDO, *Informe Colombia*, advises that exception is the rule.

¹⁷⁹ Notably Brazilian law; see PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, section 18; GIDI, *Las acciones colectivas*, pp. 39-40.

reform¹⁸⁰ opt for different rules to regulate the payment of costs: for the claimant, the rule of recklessness or bad faith; for the respondent, the “loser pays” rule.

8. The efficiency of the protection of supra-individual interests in civil proceedings

National reports have not illustrated well enough the efficiency of the legal rules that we have just presented. This may be because more attention has been placed on legal matters than on sociological ones. However, we can speculate that the explanation for that silence is that practical application is minor.

The information collected few years ago under a well-known research project,¹⁸¹ reveals, in sum, the following:

- 1) A lack of statistics with accurate data about the cases.¹⁸² In those cases where there are data, these are difficult to assess because there is not enough information about the number of people affected or a comparison against aggregate figures on civil litigation.¹⁸³
- 2) Assessments are predominant: some of them are positive for the present¹⁸⁴ or in the long term;¹⁸⁵ but others reveal the poor use- or non use at all- of the regulations examined.¹⁸⁶
- 3) Also interesting is the consideration, sometimes supported by figures, that the most active holders of *locus standi* are public bodies.¹⁸⁷ This conclusion is relevant in order to assess the combination of protection systems we are going to deal with below.

¹⁸⁰ Art. 15 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica* establishes such provision, although with aggravated liability for litigants in bad faith—whether claimant or respondent.

¹⁸¹ I refer to *The Globalization of Class Actions*, which has been mentioned several times in this report and which contains the papers mentioned in the notes below.

¹⁸² PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, section 19; and GUTIERREZ DE CABIEDES, “Spain”, section 6, acknowledge the lack of statistical data. TZANKOVA, I. N., LUNSINGH SCHEULEER, D. F., “Class Actions, Group litigation and Other Forms of Collective Litigation. Dutch Report”, pp. 13-15 extract the data from the information published in legal literature. SENGAYEN, “Poland”, pp. 45-46 provides fragmentary data.

¹⁸³ TZANKOVA, LUNSINGH SCHEULEER, “Dutch Report”, pp. 13-15; BAETGE, “Germany”, pp. 17-18.

¹⁸⁴ PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, section 19; GUBBINS, M., LÓPEZ, C., “Class Actions in Chile”, p. 37.

¹⁸⁵ GUTIERREZ DE CABIEDES, “Spain”, section 6.

¹⁸⁶ SUGAWARA, “Japan”, p. 6; MAGNIER, “France”, pp. 14-15; SOUSA ANTUNES, “Class Actions, Group litigation and Other Forms of Collective Litigation. Portuguese Report”, p.20; BERNT-HAMRE, “Class Actions, Group litigation and Other Forms of Collective Litigation in the Norwegian Courts”, p.18.

¹⁸⁷ SENGAYEN, “Poland”, p. 45 (the President of the Office for the Protection of Competition and Consumers, regional consumer ombudsmen, prosecutors); MEROL, *Informe Argentina*, (el “Defensor del Pueblo”); PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, section 19 (the General Attorney).

V. COMPLEMENTARITIES BETWEEN THE ACTION OF NON-JUDICIAL PUBLIC AUTHORITIES AND CIVIL COURTS IN THE PROTECTION OF SUPRA-INDIVIDUAL INTERESTS

The different enforcement procedures of the law that regulates the protection of supra-individual interests do not work separately –Public Administration Institutions, on the one hand, and civil courts on the other- and their point of contact is not limited to the judicial control of the Administration’s activity.¹⁸⁸ In this section we suggest an approach¹⁸⁹ to several expressions of complementarity between the action of non-judicial public authorities¹⁹⁰ and that of civil courts.

1. Overlap of powers over the same matters but with different legal effects

The overlap of powers (of Administration Institutions and civil courts) over the same matter may cause inefficiencies in the systems of protection of legal interests. The challenge of complementarity is to regulate the exercise of both powers so that they do not disturb each other, but enhance their efficiencies instead.

A) Matters on which there is an overlap of powers and the different effects thereof

In addition to a reference to section III. 1 and 3, attention should be drawn on the matters highlighted in the national reports: Competition Defence or Anti-monopoly law¹⁹¹ -save for the provisions on unfair competition, the enforcement of which, with few exceptions, corresponds to civil courts-,¹⁹² consumers’ protection,¹⁹³ and the law that regulates personal data protection.¹⁹⁴

Within the European Union overlap has special relevance and may arise from the reform of the enforcement of the regulations on competition defence inside the Union (Regulation 2003/1/EE, of 16 December). Courts have jurisdiction to apply arts. 81 and 82 of the EC Treaty (arts. 1, 3 and 6 of Regulation 1/2003) directly and such authority concurs with the one granted upon Competence public authorities.¹⁹⁵

¹⁸⁸ See section III, 4.A.b and 4.B

¹⁸⁹ I have used this term to indicate that this presentation will not be comprehensive due to the limited extension of this report and to the limited information that I have obtained.

¹⁹⁰ This term is more accurate, because they are not always Public Administration Institutions, but in all cases public bodies with no authority to judge, regardless of the proximity of their role to the scope of the courts of justice- as in the case of public attorneys (*Ministerio Público*).

¹⁹¹ HONMA, *Japan Report*; MEROI, *Informe Argentina*; KULSKI, *Poland Report*; LUPOI, *Italy Report*.

¹⁹² KULSKI, *Poland Report*. A similar situation exists in Spain, where this attribution is only granted upon agencies in charge of the defence of competition if unfair conducts have affected public interests.

¹⁹³ HONMA, *Japan Report*; MEROI, *Informe Argentina*; and in many other legal systems.

¹⁹⁴ LUPOI, *Italy Report*.

¹⁹⁵ Under Spanish law a new Competition Defence Act (*Ley de Defensa de la Competencia*) was enacted and other laws were reformed to adapt them to Regulation 1/2003, also for national issues only (arts. 1 y 2 and first additional provision of 2007

However, while the latter have discretionary powers to hear or not a particular case (see, e.g. arts. 5, 6, 49.3, 53.1 b of the Spanish Competition Defence Law – hereinafter, LDC)-, courts must, in principle, admit any claim that is referred to them. National regulations – which, for instance, do not exist in Spanish law – provide for a claim be not admitted on the grounds that the civil procedure is not suitable for the kind of matter at issue.

Regarding the differing legal effects of both types of powers I refer to section III.3. There may be some coincidence as to the legal effect of ordering the discontinuance of unlawful conducts,¹⁹⁶ but, whereas the powers to authorise activities and inspections correspond only to Public Administration Institutions, the powers to issue statements about the validity of agreements and to award damages are, with little exceptions,¹⁹⁷ limited to the courts of justice.¹⁹⁸

B) The coordination –or poor coordination- of the exercise of overlapping powers

Despite producing different legal effects, administrative and judicial powers may coincide in the verification of the relevant facts and in the appreciation of their unlawfulness. For the sake of coherence, it is advisable to lay down some regulations to coordinate the exercise of those powers.

a) Suspension of the judicial process due to the pendency of the administrative process or vice versa

Regarding the suspension of a civil process the aims of which overlap, in whole or in part, with the offending conduct which is the subject of the procedure being tried by Public Administration Institutions, some regulations impose such suspension directly,¹⁹⁹ but more often there are no such regulations²⁰⁰ or else they grant the court a scope of appreciation to decide about the suspension.²⁰¹

Consumer Protection Act–hereinafter: LDC- and art. 86ter.2 of the Organic Law of the Judiciary (*Ley Orgánica del Poder Judicial*).

¹⁹⁶ Especially since the legal action of cessation has been widely established. Nevertheless, differences may continue to exist in terms of the coercive intensity of the powers of Competence public authorities and the less strict powers, according to Spanish law, of the courts.

¹⁹⁷ PARADA CAICEDO, *Informe Colombia*: in unfair competition, if the Superintendence of Industry and Commerce acts in the first place, it replaces ordinary justice. MEROI, *Informe Argentina*: “With regard to the imposition of compensation orders in favour of persons damaged by the offending conduct, the reform of the Consumer Protection Act (*Ley de Defensa del Consumidor*) introduced the possibility for the Competence authority to order the provider to pay for the “direct damage” caused (...) Authors are divided as to the constitutionality of this regulation”.

¹⁹⁸ FILATOVA, *Russia Report*; AMRANI MEKKI, *Rapport France*; LUPOI, *Italy Report*. According to European Competition Law—as well as under Spanish law – the powers of Public Administration Institutions may have differing and very powerful legal effects (arts. 5 and 7 of Regulation 1/2003; arts. 53, 61-67 LDC), but these do not include those mentioned herein. Another example of the same, in Spanish law, can be found in art. 19 of the Data Protection Act (*Ley de Protección de Datos*).

¹⁹⁹ LUPOI, *Italy Report*. According to European Competition Law, it can be inferred from art. 35.3 in relation to art. 11.6 of Regulation 1/2003, that courts will be

The admission of a claim by the civil courts does not ban the possibility to start administrative proceedings on the same matter, nor does it suspend the process already initiated. The reason is clearly the public interest sought by the administrative action, which requires immediate attention. Suspension occurs only in specific cases of criminal first ruling procedure (e.g. art. 46 LDC) and for the enforcement of law by Public Administration Institutions on a national level, not for the Administration of the European Union.

b) Access to the evidence held by Public Administration Institutions in a civil process

This point of coordination has huge practical interest due to the extreme difficulty involved in the private preparation of a set of means of proof which, otherwise, would be held by Public Administration Institutions as a result of their functions in that matter.

In some legal systems access to this evidence is restricted and uncommon.²⁰² In others, however, it is the general rule²⁰³ and reforms have recently been introduced in order to facilitate such access.²⁰⁴

Within the scope of European Competition Law, art. 15 of Regulation 1/2003 provides that the Commission may submit information, with no request from the court. On a national level only, Spanish Law establishes a similar framework (arts. 16 LDC, 15 of Civil Procedural Law), although it excludes the submission of data or documents that have been obtained under “clemency programs”.

c) Efficiency of the decisions made by Public Administration Institutions regarding court judgements

Must administrative decisions be legally binding to some extent or have privileged evidentiary value, or will the court be free to appreciate the evidentiary value of the *de facto* verifications of the administrative authority and accept the legal valuations issued by such authority?

In addition to some negative answers regarding this binding nature,²⁰⁵ there are others that come close to a positive answer,²⁰⁶ and others that are clearly positive.²⁰⁷

deprived of jurisdiction to hear legal proceedings on claims other than damages (e.g. cessation order and other instrumental effects).

²⁰⁰ FILATOVA, *Russia Report*; AMRANI MEKKI, *Rapport France*.

²⁰¹ Regarding the enforcement of European Competition Law, the subject of art. 16.1 of Regulation 1/2003 is broader than the norms that impose an imperative suspension, but entrusts the court with the decision to suspend any proceedings. KULSKI, *Poland Report*; LUPOI, *Italy Report*. Under Spanish Law, art. 42.3 of the Civil Procedural Law authorises the court to suspend the proceedings in view of the pendency of an administrative process; particularly, art. 434 of the same Law authorises the court to suspend the period allowed to give judgement if it deems necessary to know the decision of a Competition Authority.

²⁰² FILATOVA, *Russia Report*.

²⁰³ MEROI, *Informe Argentina*.

²⁰⁴ HONMA, *Japan Report*.

²⁰⁵ FILATOVA, *Russia Report*; HONMA, *Japan Report*.

There are also some ambiguous regulations providing for the courts to pay special attention to administrative decisions, but which fail to regulate the impact of such decisions on the court's judgement.²⁰⁸ In my opinion, in the issue of coordination it is expected that the courts, both *de facto* and considering the reliability of the deciding administration authority's specialization, be inclined to accept the contents of administrative decisions to the extent they are relevant to the judgement passed on the litigious matter.²⁰⁹

2. Law enforcement by public bodies in civil processes

Another form of complementarities would be for a public body to be able to submit the position it deems appropriate for the public interest before a civil court, so that it can impact the decision on the judicial protection of supraindividual interests.

A) Granting of locus standi upon public bodies

In this scenario, the public body that is allowed *locus standi* is not a mere party in the proceedings, but can also claim judicial protection.

In some legal systems and in non-criminal proceedings, public bodies, particularly the Public Prosecutor's Office, are only awarded *locus standi* in the most traditional cases (civil status, defence of unprotected people);²¹⁰ but in any case not in the events that have been the subject of this paper.²¹¹

Furthermore, a new phenomenon should be pointed out: the Public Prosecutor's Office is not any more the only public body entrusted with the defence of social and public interests before the courts; other public entities –sometimes the same ones that have administrative jurisdiction in the litigious matter –, can file claims. The reason for this would be that the Public Prosecutor's Office is mainly focused on criminal

²⁰⁶ MEROI, *Informe Argentina*. The works of the UNCTAD, *Model Law on Competition*, p. 8, point out the potential "Treatment of the administrative (...) finding or illegality as prima facie evidence of liability in all damage actions by injured persons".

²⁰⁷ Therefore the link established by art. 16.1 of Regulation 1/2003: "When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission".

²⁰⁸ E.g., art. 271 of Spanish Civil Procedural Law, which establishes an exceptional period for the incorporation of "determining or decisive" administrative decisions into the proceedings; and art. 434 of the same Law, which authorizes the suspension of the civil proceeding in case "it is necessary to know the decision" of a competition authority.

²⁰⁹ For this reason it may be possible to understand the procedural strategy referred to by AMRANI MEKKI, *Rapport France*: "les plaignants attendent souvent que les autorités administratives statuent sur un différend avant d'engager des poursuites au civil ».

²¹⁰ HONMA, *Japan Report*; AMRANI MEKKI, *Rapport France*; ORFANIDIS, *Griechenland Bericht*; FILATOVA, *Russia Report*.

²¹¹ This fact can be verified precisely due to the lack of references to this assignment of *locus standi* in the cases that we will examine later on in the text.

proceedings,²¹² but in some legal systems the Public Prosecutor's Office has proven the most active body in defending supraindividual interests.²¹³

The legal matters and the types of legal remedies for which public bodies are allowed *locus standi* have a different scope. Some legal systems allow standing for the protection of supraindividual interests, including homogeneous individual interests, with a general or very wide scope.^{214 215} Others restrict such standing to special cases only.²¹⁶

In order to assess this granting of *locus standi* it is important to determine whether it overlaps strictly with other *locus standi* rights,²¹⁷ or if it is subsidiary in respect thereto. While some legal systems do not contain any provisions in that respect, others emphasize this overlapping.²¹⁸ This does not exclude some level of subsidiarity, but claims that it arises from a *de facto* or social situation—the lack of activity by other

²¹² MEROL, *Informe Argentina*.

²¹³ GIDI, A., “La legitimación para demandar en las acciones colectivas”, en *La tutela de los derechos difusos, colectivos e individuales homogéneos. Hacia un Código Modelo para Iberoamerica*, Gidi, Ferrer Mac-Gregor (coord.), Editorial Porrúa, 2004, pp. 88-89.

²¹⁴ In Brazil, art. 5 of the *Lei de Ação Civil Pública* and art. 82 of the *Código do Consumidor*; regarding the same, PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, section 7, and GIDI, *Las acciones colectivas*, pp. 72-73. For Colombia, arts. 12 and 48 of the 472 Act, of 5 August, 1998, that regulates art. 88 of the Constitution with regard to the exercise of popular and group actions. And art. 3 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica*.

²¹⁵ Special reference should be made to Polish Law: KULSKI, *Poland Report*; SENGAYEN, “Poland”, *The Globalization of Class Actions*, pp. 24-26, 28-29.

²¹⁶ E.g., in Spanish Law *locus standi* is allowed to: 1) the Public Prosecutor's Office, the *Instituto Nacional de Consumo* and related entities, with regard to consumer protection, to defend their diffuse and collective interests and to claim the cessation of damaging conducts. 2) the Public Prosecutor's Office, the *Instituto Nacional de Consumo* and related entities, with regard to the defence of affected collective interests regarding general conditions of contracting, unfair competition and unlawful advertising. This *locus standi* does not extend to the protection of homogeneous individual rights. 3) In respect of supraindividual rights related to employment, the Public Prosecutor's Office (to challenge collective agreements and the articles of association of trade unions and business associations) and the administrative industrial authority (in specific legal cases). 4) Public bodies entrusted with the defence of the interests of affected people who are undetermined or difficult to determine in the case of damage to the right to equal treatment of men and women. In particular, the special government delegation against violence toward women, the *Instituto de la Mujer*, and its dependent entities may claim an imposition of the cessation of unlawful advertising that degrades or discriminates the image of women.

²¹⁷ See the scenarios mentioned in section IV.2.

²¹⁸ Art. 82 of Brazilian *Código do Consumidor*; on this topic, see PELLEGRINI GRINOVER, “Brazil and Iberoamerica”, *The Globalization of Class Actions*, section 7. In the same regard, art. 3 of the draft *Código Modelo de Procesos Colectivos para Iberoamérica*.

holders of *locus standi* due to a lack of organization or funding²¹⁹ – and not from a legal imperative.²²⁰

Finally, in the assessment of this *locus standi*, in case it allows the formulation of claims for the protection of homogeneous individual rights or interests, we should also consider whether the decision of the public body is subordinated to or influenced by the decision of the affected persons, either expressed positively by means of an authorisation or by their failure to express their separation from the action.

B) The assignment of passive locus standi, the power of procedural intervention or lesser powers

There can be some regulations providing that the public body (the Public Prosecutor's Office) must be a party in a proceeding even when it has no *locus standi* rights to complain. In such a case it will not be able to claim legal remedies but, without the risk of being subject to the limitations on procedural intervention that exist in some legal systems – it will be allowed all the powers that any party would have in any proceedings.

Each legal system may choose to confer upon the public body the power to intervene in the proceedings. If so, their influence will depend on the scope of the intervention, particularly on whether the powers to make submissions on the facts, to disclose and intervene in the leading of evidence and to appeal against decisions are more or less subordinated to the procedural action of the main parties.

Finally, I believe there is a third way for a public body to submit its position before a civil court. It consists in vesting in that entity, not acting as a party or intervening party, some isolated, singular powers for procedural action. In this regard, the framework of the European Competition Law laid down in article 15, para. 3 and 4 of Regulation 1/2003 seems paradigmatic. Whereas para. 4 allows for national legal systems to confer upon competition authorities (EU or national) the status of party or powers to intervene in the proceedings, para. 3 only secures those authorities the transmission of information about the procedural actions and the power to submit oral or written observations before the court.²²¹ The efficiency of the observations submitted implies, in my opinion –and since they are not pleadings made by a party or a participant –, helping the court to exercise more efficiently the *ex officio* powers vested in it by the relevant legal system.

VI. FINAL CONSIDERATIONS

²¹⁹ GIDI, “La legitimación para demandar en las acciones colectivas”, pp. 108-109.

²²⁰ This obligation arises when it is provided that, in case of unjustified abandonment or waiver by other person having *locus standi*, the Public Prosecutor's Office must resume the action (art. 5 of Brazilian *Lei de Ação Civil Pública*).

²²¹ Spanish internal law (arts. 16 LCD and 15bis of Civil Procedural Law) adds to the power to submit observations, the power to “submit information”. This may be interpreted as a new power regarding the introduction of documentary evidence, even if these had not been agreed by the court, at the request of a party or *ex officio*.

By way of conclusion, I would like to comment on the results achieved. Unfortunately, due to the limited extension of this paper, I have not been able to explain my reasoning in more detail.

1. Some notes on terminology and (legal) reality: ¿Private enforcement vs. public enforcement or judicial enforcement vs. administrative enforcement?

Language is the vehicle of expression for the Law and the Legal Science. When a specific legal terminology is used in its social-cultural context, it is not necessary to reflect on the meaning thereof. However, this Conference –as its very own title indicates: “Procedural Justice in a Globalized World”- extends its focus to a wide variety of contexts. This calls for a brief reflection on the meaning of the expression *private enforcement* and at least an attempt to outline the different modalities of law *enforcement* based to their actual features and not only on their names.

In the context of USA law, *private enforcement* means the private initiative before the courts to seek the protection of private rights that have been damaged, which, at the same time, may be understood –at least for some types of cases- as a way of ensuring respect for the legal system, which serves the general interest.²²²

It is striking that this expression has acquired that principal meaning because, strictly speaking, enforcement is not private –in the sense that it is not self-protection, i.e. the enforcement of law by the individual or collective power of a person or a group of people-, but judicial, even if the court’s activity depends on and is limited by the initiative of individuals.

Also in US law, *public enforcement* means both that a public body is entitled to seek the enforcement of law by the courts,²²³ and that a government agency has the power to enforce the law, subject to any subsequent judicial review.²²⁴ These two meanings of *public enforcement* also prevail among the theoreticians of Economic Analysis of Law.²²⁵

²²² HESS, “Private law enforcement”, p. 67; GERBER, D. J., “Private enforcement of competition law: a comparative perspective”, en MÖLLERS, HEINEMANN, Eds., *The Enforcement of Competition Law*, pp. 434, 437; among many others that will be mentioned below.

²²³ GERBER, “Private enforcement of competition law”, pp. 434-436, 438.

²²⁴ GERBER, “Private enforcement of competition law”, p. 438. See, however, HODGES, “Competition Enforcement”, p. 1394.

²²⁵ POLINSKY, A. M., SHAPELL, S., “The theory of public enforcement of law”, pp. 405-406, in *Handbook of Law and Economics*, Volume 1, Edited by A. Mitchell Polinsky and Steven Shavell © 2007 Elsevier B.V. Available at <http://www.sciencedirect.com>. JACKSON, H. E., ROE, M. J., “Public and Private Enforcement of Securities Laws: Resource-Based Evidence”, (March 16, 2009). *Journal of Financial Economics (JFE)*, Vol. 93, 2009; *Harvard Public Law Working Paper No. 0-28*; *Harvard Law and Economics Discussion Paper No. 638*. Available at SSRN: <http://ssrn.com/abstract=1000086>. KLÖHN, L., “Private versus public enforcement of laws – a Law & Economics perspective”, paper presented at the Conference “Compensation of Private Losses – The Evolution of Torts in the European Business Law” on November 25, 2010 in Münster, Germany. Electronic copy available at: <http://ssrn.com/abstract=1730308>.

In this last expression the signifier and the meaning are closer to one other. However, both contain a considerable degree of vagueness, since there is a difference between having power of initiative for the enforcement and having the power to execute the enforcement of law. Furthermore, this last kind of power may be different in itself.

In the European context, the meaning of *private enforcement* is attached to *judicial enforcement*, but it is opposite to *administrative enforcement*, where an agent of a non-judicial authority has been vested with law enforcement powers.²²⁶ That is why, although the expression *private enforcement* has also become to mean the direct access of individuals to courts in order to instigate the enforcement of Competition Law and of other fields of law,²²⁷ the relevant distinction is established between enforcement by administrative authorities –subject to any subsequent judicial review- and enforcement by the courts.²²⁸

However, in this last context there is also the other perspective of differentiation between private and public based on those qualities in bodies that have the power of initiative to claim the enforcement before the courts.²²⁹

Thus, the incidence of public and private condition must be considered with a focus on two different components of the system of enforcement: the holder of the power to execute the enforcement and the holder of the power to claim judicial enforcement. We will for now dispense with the examination of the application of administrative enforcement.

Constitutional matters in respect of each of those elements of the system of enforcement are varied. Their varying designs lead also to different appreciations on their effectiveness and efficiency.

2. Constitutional frameworks of law enforcement

The first parameter in the regulation of law enforcement is normative and, in particular, constitutional. Not in the sense of a formal written constitution, but as an issue included in the area of the fundamental political and legal options of a legal

²²⁶ GERBER, “Private enforcement of competition law”, pp. 442-445; SALERNO, “The Competition Law-ization of Enforcement”, pp. 1-7; EGER, WEISE, “Limits to the private enforcement of antitrust law”, parts I to III.

²²⁷ SALERNO, “The Competition Law-ization of Enforcement”, pp. 1-7; EGER, WEISE, “Limits to the private enforcement of antitrust law”, parts I to III; ALFARO, “Contra la armonización positiva”.

²²⁸ *White Paper on Damages ...EC antitrust rules*, 1.2; *Communication from the Commission to the European Parliament and the Council. Report on the functioning of Regulation 1/2003*, 1 and 6; HODGES, “Competition Enforcement”, p. 1394. This distinction is already highlighted in the terminology, for example, in CAFAGGI, MICKLITZ, “Administrative and Judicial Collective Enforcement”; the same authors develop it in part 1 of the paper, as well as in the “Administrative and judicial enforcement in consumer protection: The way forward”, in CAFAGGI, MICKLITZ, Eds., *New Frontiers of Consumers Protection. The Interplay between Private and Public Enforcement*.

²²⁹ CAFAGGI, MICKLITZ, “Administrative and Judicial Collective Enforcement”, section 5; CAFAGGI, MICKLITZ, “Administrative and judicial enforcement in consumer protection”, pp. 406-407; HODGES, CH., *The reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hard Publishing, Oxford, Portland, 2008, pp. 20-23, 29-35.

system. For that reason this parameter is diversified according to politically organized societies. There are two sets of important questions that should be considered based on this constitutional parameter, and perhaps a third one should be added.

A) The extent of the power of dispute resolution by Public Administration Institutions, the power to judge and the rule for conferring such power

The options on the power of enforcement and the granting thereof are determined by constitutional decisions on the issues summarized in the heading. Those issues could be reduced even further, since the root question is the respective determination of the power that must be conferred on the courts and of the power to be vested on Public Administration Institutions.

The answers are not easy,²³⁰ especially bearing in mind that they depend on each constitutional framework, which may not only specify the conferring of those powers differently, but also pay a different level of attention to such delimitation. See some references below by way of example:

1) Spanish Constitution of 1978 provides the establishment of a single judicial organization, regulates the main requirements for the judges and courts comprising it, lays down specifically the exceptions to the general rule stated at the beginning, grants exclusive jurisdictional power upon those courts and regulates, to some extent, what such power involves.²³¹

2) German *Grundgesetz* entrusts judges with the so-called *rechtsprechende Gewalt* (art. 92), establishes the basic requirements for judges and courts (arts. 97 and 98), although the federal structure tends to leave open several aspects of judicial organizations. It contains rules that specify what decisions are reserved to jurisdictional power, but the most general and broad rule in that respect is the one contained in art. 19 (4), whereby the right to initiate legal actions for any damage of rights by the authorities is recognised, assuming that the authorities may have resolved previously, even with legal authorization.

3) The consideration of the European Court for Human Rights case law on art. 6 of the European Convention on Human Rights is paradigmatic. In order to enforce the guarantees laid down by this article the Court has had to elaborate autonomous notions of “court”, “criminal matter” and “litigations on civil rights and duties”, in order to avoid being limited by the various formal descriptions of the different legal systems.²³²

Having considered this variety of constitutional frameworks, it is possible that in some of them, enforcement powers are conferred on Public Administration Institutions

²³⁰ See the recent presentation by CADIET, L., NORMAND, J., AMRANI MEKKI, S., *Théorie Générale du procès*, PUF, Paris, 2010, pp. 396-499.

²³¹ See a practical summary in ORTELLS RAMOS, M., ET ALT., *Introducción al Derecho Procesal*, Aranzadi-Thomson Reuters, Cizur Menor (Pamplona), 2010, pp. 57-135.

²³² CADIET, NORMAND, AMRANI MEKKI, *Théorie Générale*, pp. 399, 406; ORTELLS RAMOS, M., “Jurisprudencia del TEDH sobre el art. 6 del CEDH en el proceso penal (La doctrina de la “noción autónoma de materia penal”. derechos a un tribunal independiente e imparcial y a que la causa sea oída equitativamente. Presunción de inocencia)”, in *La jurisprudencia del Tribunal Europeo de Derecho Humanos*, Consejo General del Poder Judicial, Madrid, 1993, pp. 175-213.

dependent on the Government according to a model of administrative self-protection.²³³ In that case, Public Administration Institutions are invested, firstly, with regulatory powers binding a particular group of people, and secondly -based on that-, in case of default by those bound by such powers, they are also empowered to exercise correlative enforcement powers. That way, their role as a regulator is more effective than going to court in respect of such default.

This way of conferring powers of enforcement does not contradict the jurisdictional power reserved to the courts under the Constitution, since the Administration acts in its own relationship, one that has become controversial due to the default by those bound by the regulatory powers. It does not act as a judge, as a third-party in the –litigious- relationship among other parties.²³⁴

However, some models may be less clearly defined than the one described above. In particular, constitutional practice may lead:

1) To a subtle change in the way of understanding the jurisdictional power that, seen as the power to enforce the law in the resolution of disputes among people other than those having the power to resolve, tends towards the idea of a power to review previous resolutions of a non-judicial entity.²³⁵

2) To the establishment of public entities with enforcement powers that, due to their organizational characteristics (independence from the Executive, mainly), are half-way between the courts and strictly administrative bodies. This organizational structure helps legitimate some phenomena like the one that has just been described, and is largely facilitated in those legal systems in which, save for the independence and other related requirements, there is a lack of formal clarity in the definition of the entities with the status of courts.

In any constitutional framework allowing it, administrative enforcement may be established in some areas of law for two reasons:

1) Primarily, as a necessary condition, because a political appreciation—which I only find acceptable if democratically legitimated - deems that public or social interests justify the intervention or a regulatory action by Public Administration Institutions on a particular area of social relationships.

²³³ Regarding this model, with a focus beyond Spanish law, see GARCÍA DE ENTERRÍA, E., “Las relaciones entre Administración y Justicia y el principio de autotutela”, in GARCÍA DE ENTERRÍA, E., FERNÁNDEZ, T-R, *Curso de Derecho Administrativo*, Civitas, Madrid, 2002, pp. 491-521.

²³⁴ I quote an interesting citation from BETTERMANN in DÜTZ, W., *Rechtsstaatlicher Gerichtsschutz im Privatrecht*, Berlin-Zürich, 1970, p. 202: “Bestehe der Rechtsstreit dagegen zwischen dem Bürger und der Verwaltung, so sei deren Streitentscheidung keine Rechtsprechung und kollidiere daher nicht mit der Rechtsprechungsmonopole der Gerichte”.

²³⁵ On administrative self-protection abuse see GARCÍA DE ENTERRÍA, “Las relaciones entre Administración y Justicia y el principio de autotutela”, pp. 522-524 and the bibliography included on p. 538. Regarding the subtle change in Spanish constitutional practice referred to in the text, see ORTELLS RAMOS, M., *Prólogo* to the monograph by BELLIDO PENADÉS, R., *La tutela frente a la competencia desleal en el proceso civil*, Comares, Granada, 1998, pp. XXI-XXIV.

2) Assuming the foregoing, the next reason is that the effectiveness of that political option could be lost or minimized if, when regulatory decisions are not complied with, Public Administration Institutions had to seek judicial enforcement as an individual.

Having said that, the constitutional framework also imposes:

1) Respect for the jurisdictional power reserved to the courts. In my opinion this is what, in the matters that we have covered in part II of this paper, prevents the powers of enforcement – that are supplemental to the regulatory powers of Public Administration Institutions - from authorising such Administrations to make statements on the validity and effectiveness of contracts entered into by private individuals and from imposing compensations for the damages that these may have suffered. While the orders of cessation–supported by sanctions – and restitution to the state of affairs prior to the commission of an offending act are still a solution adjusted to the general interest or to the interest of a social group, whose protection is conferred on the authorities, the statement and imposition mentioned *ut supra* would refer to relationships among individuals, among third-parties in respect of the Administration, which could not claim the power of self-protection, but would unconstitutionally assume jurisdictional power.

2) The legal design of future full jurisdictional control, so that the deferred exercise of the power to judge does not result in a loss of the essence of such power.²³⁶

3) Protection of fundamental rights and, particularly in this subject-matter, of the right to obtain legal protection, which must be effective even when it can only be sought before the courts after Public Administration Institutions have issued a decision and, perhaps, even claimed the compliance thereof.²³⁷

B) The “legitimization” of locus standi and the effectiveness of the right to defend one’s own legal interest before the court

Seeking legal protection for a right or legal interest produces, on the one hand, the expectation to obtain several favourable results but, at the same time, opens up prospects of unfavourable results, in particular that of missing every chance to obtain another judgement on the same matter due to the *res judicata*; also the imposition of

²³⁶ The discussion about the extent of the power of jurisdictional review over administration activity is broad and deep. In Spanish legal literature, but with many references to the doctrine of other countries and to Comparative law, see: GARCÍA DE ENTERRÍA, E., *La lucha contra las inmunidades del poder*, Madrid, 1979; PAREJO ALFONSO, L., *Administrar y juzgar: dos funciones constitucionales distintas y complementarias*, Madrid, 1993; FERNÁNDEZ RODRÍGUEZ, T. R., *De la arbitrariedad de la Administración*, Madrid, 1994; SÁNCHEZ MORÓN, M., *Discrecionalidad administrativa y control judicial*, Madrid, 1994; BELTRÁN DE FELIPE, M., *Discrecionalidad administrativa y Constitución*, Madrid, 1995; DESDENTADO DAROCA, E., *Los problemas del control judicial de la discrecionalidad técnica (Un estudio crítico de la jurisprudencia)*, Madrid, 1997; GARCÍA DE ENTERRÍA, E., *Democracia, jueces y control de la Administración*, Madrid, 1997.

²³⁷ This must lead mainly to an appropriate regime of interim legal remedies in the process of judicial control. I refer to several contributions made by a distinguished Spanish legal expert in Administrative law, which also focus on Comparative law approaches and analyze the impact of the “Factortame” judgement granted by the Court of Justice of the European Communities: GARCÍA DE ENTERRÍA, E., *La batalla por las medidas cautelares*, Madrid, 1992.

obligations and liabilities as a result of court actions (own costs and, in some cases, the other party's legal costs)-. Furthermore, those possible and different results depend to some extent on the activity, the lack of activity and on the suitability of both, by the person who has filed the claim or who intervenes as a party in the proceedings.

The foregoing justifies that the quality required in order to seek (with potential success) judicial protection in respect of a particular legal right or interest be made to coincide with the ownership (for now simply claimed) thereof. Such coincidence should be both positive and negative:

1) The holder of the right or legal interest must be able to seek legal protection whenever this is needed.

2) No one should seek protection without the agreement of such holder because then, the holder would be exposed to potentially unfavourable results, and be deprived of the power to influence the same.

Since legal interests have a different subjective extent, the verification of the above mentioned coincidence must help establish a correlation between the subjective extent of the interest, which is a determining factor in the ownership of such interest, and the conferring of the power to seek its legal protection- that is, who has that power and what protection may be sought, particularly in terms of the subjective extent of its effects-. As a general rule, that necessary correlation imposes that:

1) If the right or interest of a private natural or legal person are at stake, only that person may seek and obtain protection and, in any case, a judgement affecting such person only.²³⁸

2) In cases of collective or social interest with different subjective extent and even with different difficulties to specify such extent, the power to seek enforcement, with subjective extent to all the co-holders, must be conferred on a group of interested people, formally or informally constituted, that legitimately represents those interested.

3) In a democratic society, general or public interest corresponds to the citizens or, more generically, to the components of that society. However, they show and exercise their ownership through public institutions that represent them, which must also be conferred with the power to seek judicial enforcement in case they are not granted administrative enforcement.

The consent of the holder of the right or interest is actually the key element: that expression of will means both their wish to obtain protection (positive aspect), and their willingness to assume the risks of the proceeding in order to have the possibility to obtain it (negative aspect).

²³⁸ Regulations on basic or fundamental rights before the courts—which are the constitutional framework of this matter - usually refer to the holders of individual rights and express the required bond between the person and *their* right stating that this person is entitled to be heard by a court in the “determination of *their* rights and obligations” (art. 10 of the Universal Declaration of Human Rights; art. 14 of the International Covenant on Civil and Political Rights; art. 6 of the European Convention on Human Rights; art. 8 of the American Convention on Human Rights), or that “they are entitled to have *their* case heard” for the purposes of that determination (art. 6 of the European Convention on Human Rights; art. 47 of the Charter of Fundamental Rights of the European Union) or that the person “*whose* rights and freedoms are violated” has the right to an effective legal protection (art. 47 of the Charter of Fundamental Rights of the European Union).

However, several scenarios can justify exceptions or specifications to that general rule. We will have a look at the main ones:

1) The damaging of public and/or social interests may combine with the damaging of a set of individual interests whose holders may or may not be identified.²³⁹ Even if the main effects of the judicial action taken by those having locus standi to defend their public and/or social interest are limited to those that are suitable for the protection of such interests (declaration of unlawfulness of the conducts, imposition of cessation and restitution to the prior state –except in respect of relationships between individuals): The fact that such action produces a partial –prejudicial (favourable or unfavourable)- effect in respect of the actions for the defence of individual interests, should be considered contrary to the constitutional framework? Certainly, this difficulty would not exist if the holders of individual interests had been informed of the pendency of the process and been given the opportunity to intervene; but, beyond the complexity that this would add to the proceeding, would this requirement be reasonable considering that those who have exercised the judicial action have the locus standi that the legal system deems justified? One last option: would it be possible to make the prejudicial effect dependent on whether each holder of locus standi claims it or not, as they think advisable, when seeking the protection of their individual interest?

2) In the case of damaged public and/or social interests, if the “ordinary” holders of locus standi do not claim legal remedies, the individuals who enjoy such interests—because they also find individual satisfaction with the satisfaction of public and/or social interests- may be subject to a double restriction. On the one hand, the legal protection of their individual interests may be limited if the obtaining of such protection is subject to the prior prosecution of an element that may only be claimed before the court by the “ordinary” holders of locus standi rights to defend public and/or social interests.²⁴⁰ This difficulty could be overcome by simply maintaining the traditional subjective extent of the *res judicata*, which would not affect any possible future action by those holding locus standi to defend public and/or social interests.²⁴¹ A second restriction will affect their enjoyment of the public and/or social interest: since there is no declaration of the unlawfulness of the conduct, an imposition of cessation or restoration to the state prior to the commission of the infringing conduct –together with sanctions -, all those taking part in the enjoyment of such interests will still be exposed to the situation of risk or effective damage. Would subsidiary locus standi of those individuals be justified in such cases? Subject to what conditions? Perhaps a prior requirement to the “ordinary” holders of locus standi? We should specially consider whether there are reasons to authorise an individual who is less legitimated- or no

²³⁹ For example: as a result of a conduct that contravenes free competition or an action infringing the general conditions of contracting, some clauses from a series of contracts may be declared void or individual rights to compensation may arise.

²⁴⁰ That would be the case when actions on the validity and effectiveness of individual contracts or on individual compensations for infringing norms on competition defence could only be exercised after a declaration of such infringing conduct at the request of some specific holders of locus standi. This will continue to be so in those legal systems where such prejudicial factor exists.

²⁴¹ One person may seek the application of the general conditions of contracting to their own contract even if the holder of the necessary locus standi has not previously succeeded in the exercise of a declarative action stating that a particular contractual clause is a general condition.

legitimated at all- to appreciate the public and/or social interests at stake and, maybe, who is less prepared to defend those interests in court, to expose those interests to the “risk” of the *res judicata*.

3) The third situation is different from the first two, since the justification of specifications to the general rule does not lie, at least at a first glance, on the connexion between public and/or social interests and individual interests, each with their relevant locus standi holders. Now there is double justification. On the one hand, we are presented with cases where a high number of individual interests have been damaged due to a common cause, but it is likely that each of their holders is not willing to claim legal remedies because the cost of the process is disproportionate in respect of the possible results they may obtain. Individual interest will not be protected but, in fact, justice will not be done either, and that is certainly contrary to public interest. On the other hand, if in those cases legal protection is sought by each interested party, according to the general rule, the courts will experience a work overload with plenty similar cases of a minimum economic value, with the subsequent result of a slower legal system and the risk of contradictory decisions. This alternative also affects the public interest that judicial responses are coherent and provided within a reasonable time. In such cases the issue is whether someone other than each individual locus standi holder²⁴² could raise the claims of all or most of the holders in the proceedings, in order to ensure an approach to avoid the above mentioned defects.

The main questions remain open in the last described scenario²⁴³ and deal with several aspects of the statement or expression of the will of those locus standi holders who, initially, did not attend to court. The reason is that such will is relevant so that, despite their initial inactivity, their individual legal interests (the nullity of their contract, the satisfaction in their favour of an obligation or responsibility arising therefrom, compensation for the damages suffered by each of them) receive legal protection in the proceedings brought in by third parties, but they could also be exposed to the risk of being denied such protection.

I would like to outline the following aspects:

1) The way of communicating those locus standi holders that the process they may be affected by is pending. This matter is in the core of the right to be heard by the court or, in other words, to procedural contradiction or to a fair trial, but it does not mean that there is only one solution adjusted to these fundamental criteria.

²⁴² For example, the public body, the association or other more informal groups having locus standi to seek the protection of public and/or social interests, the damage of which has also caused damages to plural individual interests; or else one or more holders of individual interests in need of legal protection.

²⁴³ See, *inter alia*, *Green Paper on Consumer Collective Redress*, sections 54-57; HODGES, *The Reform of Class and Representative Actions in European Legal Systems*, pp. 26-27, 89-90, 118-125; HESS, “Private law enforcement”, p. 72; CAPONI, B., “Litisconsorzio “aggregato”. L’azione risarcitoria in forma collettiva dei consumatori”, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2008, pp. 827-828; CAPONI, B., “La class action in materia di tutela del consumatore in Italia”, in *Il Foro Italiano*, novembre 2008, pp. 7-9; STADLER, A., “Group actions as a remedy to enforce consumers interests”, in CAFAGGI, MICKLITZ, Eds., *New Frontiers of Consumers Protection*, pp. 317-318, 327-328.

2) The behaviour of locus standi holders towards such communication and the consequences procedural law assigns to different conducts. In this regard the alternative is that either an express positive statement by each locus standi holder may be required so that their individual legal interest can be the subject-matter of the process (*opt-in*), or else an express negative statement may be required to withdraw it from the subject-matter of an already initiated process (*opt-out*). Certainly, the second term of the alternative implies a very heavy procedural burden; however, the first one is not free of the considerable burden of having to assume the inconveniences of an individual legal claim. In either case, I believe that an important criterion for making a choice in this difficult alternative is the degree of suitability of the form of communication to effectively reach locus standi holders. I do not believe that the issue of the formal requirements of their statement of will is difficult to solve either, providing always that certain guarantees ensure sufficiently the reliability of the authorship and the sense of such statement are respected.

Together with other considerations that have been presented to justify the best solutions to the above matters, it is advisable to bear in mind that, traditionally, procedural laws have been based on varied reasons both in order to consider enough forms of communication - even when these do not fully guarantee the knowledge by the interested party -, and to establish procedural burdens with serious consequences (waiver of rights, acceptance of a claim, etc.). In the kind of matters herein considered, especially when the amount of the individual claims is small, there is the very powerful reason that the lack of a specific and easily applicable procedural system means that the legal protection of particular legal interests would be, in fact, unattainable.²⁴⁴

3) The need to avoid the separate conduct of many processes on similar matters or, in the case of accumulation thereof in one single proceeding, the need that this may be processed with enough speed, may lead to a restriction of the procedural rights pertaining to each of the persons that constitute a party in the proceeding. From the point of view of these rights I find that the imposition of the procedural action on those individuals through a single legal defence is less justifiable than the application of the process-model or process-witness technique. This technique does not preclude the exercise of individual procedural rights, as it does not prevent originally suspended processes from developing further after the judgement of the process-model.²⁴⁵ It does not violate either the right to a process without undue delays, because the delay it imposes is justified and, on the other hand, because some considerable delays would be precisely unavoidable if this technique were not to be applied.

C) Equality in law regarding the means for the judicial protection of supraindividual legal rights and interests

I would like to start by saying that the principle of equal treatment in law does not strictly require a specific- and identical- regulation, for all cases in which

²⁴⁴ *Green Paper on Consumer Collective Redress*, section 9; HODGES, *The reform of Class and Representative Actions*, pp. 88-89, 129; CAPONI, “Liticonsorzio “aggregato”. L’azione risarcitoria in forma collettiva”, p. 821; STADLER, “Group actions as a remedy to enforce consumers interests”, pp. 325-327.

²⁴⁵ It can, in fact, be a deterrent against the resumption of suspended processes, either because the judgement of the process-model generates a clear perspective of failure for the resumed processes or because the evolution of that process has led to attractive transactional solutions worth adhering to.

supraindividual interests are at stake. Freedom of legislative power, which constitutionally lies on legislators, justifies a choice among several options for the judicial protection of supraindividual rights and interests.

Nevertheless, from a technical-legal point of view,²⁴⁶ the increase in litigation related to that kind of legal interests justifies an arrangement that covers the overall phenomenon and that provides solutions consistent with it as a whole. Due to this proximity to the constitutional principle mentioned above, I have allowed myself to include in this section some considerations in which the focus on the equality in law criterion leads to quite differing results.

On the one hand there is the issue of the rules on locus standi and the different kinds of legal remedies that those having locus standi may obtain in cases where supraindividual interests are at stake.²⁴⁷ It is understandable that, in the initial stages of a new social reality, legislators decide to establish norms that refer only to those legal matters that have first experienced the need of regulation. However, the characteristics of current private law and its mass utilization in social relationships spread the need for an appropriate regulation of such issues as are essential for accessing judicial protection.

But there are other procedural matters in respect of which special regulations for litigation regarding supraindividual interests have been established or projected. Based on the equality in law criteria, it is not so clear whether those regulations should be generalized in that kind of litigation or exclusively in it. I refer to issues such as facilitating access to evidence, facilitating evidentiary findings,²⁴⁸ the possibility of filing a appeal before the highest ordinary court,²⁴⁹ the strengthening of legal remedies – with effective interim measures and instruments in support of executive judicial protection-²⁵⁰ and procedural costs and their financing.²⁵¹ The norms regulating theses matters should be suitable for the civil procedure to be more effective, not only in some kinds of litigations, but generally.²⁵² And if special norms had to be established, these should be justified by the objective characteristics of the litigious matters and not only by the quality of the legal interests at stake.

2. A final comment on the “measurement” of the efficiency of the different types of enforcement

²⁴⁶ HESS, „Private law enforcement“, p. 74, appeals, precisely, for the preservation of „die Kohärenz und Ordnungsfunktion der Kodifikation für die Zivilprozess“.

²⁴⁷ See *supra*, section IV.2.

²⁴⁸ See *supra*, section IV.4.

²⁴⁹ See *supra*, section IV.5.

²⁵⁰ See *supra*, section IV.6.

²⁵¹ See *supra*, section IV.7.

²⁵² This thought is often found in the contributions of HODGES, “Competition Enforcement”, p. 1400-1401; HODGES, *The reform of Class and Representative Actions*, pp. 51-54, 184, 189-190.

A logical aim of social sciences is to design methods that allow an increasingly accurate assessment of the efficiency of the different types of law enforcement.²⁵³ On the other hand, it is legitimate to demand that political choices be made based on such assessments.

However, while assessment tools are improved- even when they are thought to be perfect -, I believe that political options must be driven by sensible reservations as to their reliability to predict the results, since the seriousness of the wrong results may easily have a disproportionate significance in comparison with the costs of reinforcing the preventive actions taken by the authorities.

During the preparation of this paper I have often wondered: what is more efficient, an administrative enforcement system –with sufficient resources and properly managed - or a judicial enforcement system –equally well-regulated, empowered to take preventive measures and to impose compensations in deterrent amounts, but which would act at the request of individuals affected by a present or impending damage? This efficiency comparison is based on good data, bad data or on no data at all.²⁵⁴ At the most, I have convinced myself that it is more efficient to combine both enforcement systems and to grant locus standi to seek the protection of civil courts in a way that does not allow any gaps in the protection of public and/or social interests or homogeneous individual interests which do not have access to legal protection due to the strength of the facts, and not to the free decision of their holders.

Accidentally, during the preparation of this paper, that is, in the historic timeframe surrounding my work- an event took place that should be taken seriously into account when facing that dilemma: the biggest financial and economic crisis since 1929. Expert opinions about the causes of this crisis have revealed the crucial impact of the weakening of regulation by public authorities.²⁵⁵ Some will interpret that a decline in the presence of the authorities was the result of a strict ideological option, while others will claim that the negative consequences only mean a crack in a technical option that is generally sound and that must be preserved. The irrefutable fact is that some undesirable results have been produced, and that the high costs of correcting those results and

²⁵³ I believe it is impossible to “measure or calculate” such efficiency, since there are always non-measurable components in the enforcement of law which, for that reason, could not be integrated in the model of “calculation”.

²⁵⁴ On the comparison between the efficiency of the enforcement systems—in particular Competition Law – and the importance of data on which to base appreciations, see HODGES, “Competition Enforcement”, p. 1385, and, by the same author, *The reform of Class and Representative Actions*, pp. 137-139, 175-177, 194-202; EGER, WEISE, “Limits to the private enforcement of antitrust law”; ALFARO, “Contra la armonización positiva”. More generally, see the authors cited in note 225.

²⁵⁵ I refer, firstly, to *The Financial Crisis Inquiry Report. Final Report of the National Commission on the Causes of the Financial and Economic Crisis in The United States, January 2011*. Available at <http://fcic.law.stanford.edu>. From this report I would like to highlight pages XVIII and XXII-XXIII of the conclusions, pages 13, 28, 33-36, 47-48, chapters IV and XII, and pages 307-308. See also the report issued by the INDEPENDENT EVALUATION OFFICE OF INTERNATIONAL MONETARY FUND, *IMF Performance in the Run-Up to the Financial and Economic Crisis: IMF Surveillance in 2004–07*, January 10, 2011. Available at <http://www.ieo-imf.org/pub/issues.html>. Particularly interesting in this report are the executive summary and sections 2, 11, 13, 24, 25 and 34.

minimizing their impact have had to be borne by the States and, ultimately, by the citizens. This is a good opportunity to verify, by comparing the theories against an immediately available empirical referent, if the option of reducing the intervention of the authorities –with the subsequent budget savings - was or was not the best option based on efficiency criteria. Furthermore, it is advisable not to miss this opportunity because, if conditions concur for a similar event to take place, its consequences may be lethal, not only for the economy.²⁵⁶

²⁵⁶ Someone as little revolutionary –if I may say so- as Jean Claude TRICHET, stated at a speech given in Madrid on 13th May 2011 with the title *Financial reform: what has been achieved and what remains to be done*, that: “Thanks, in particular, to prompt and resolute action by central banks and by governments, the international community avoided a great depression, after the intensification of the crisis in mid-September 2008. With the global recovery being confirmed, numerous voices in the financial sector are arguing that we are now back to business as usual. Achieving an ambitious programme of reforms of rules, regulations and oversight of the financial sector is considered by some as unnecessary and counterproductive. I do not at all share those views. It is an absolute obligation, for all of us, to do all what is necessary to reinforce the resilience of the financial system and ensure its sustainable contribution to growth. We must be sure that the excessive fragility that was revealed in 2008 and 2009 is eliminated. Not only because the costs of financial crises in terms of growth is always considerable but, *even more, because it is extremely likely that our democracies would not be ready to provide once again the financial commitments to avoid a great depression in case of a new crisis of the same nature. Our people would not permit, for a second time, that governments mobilize 27% of GDP of tax payer risk, on both sides of the Atlantic, to avoid the collapse of the financial sector* (Italics by MOR)”. Available at <http://www.ecb.int/press/key/date/2011/html/sp110513.en.html>