Stoneridge and Its Impact on European Capital Market and Consumer Law

– Is There a Sanction for Aiding and Abetting a False or Misleading Financial Statement in European Capital Market Law? –

by

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The recent decision Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.[1] *of the U.S. Supreme Court was even before it was published exposed to a severe debate about the future of the regulation of security fraud under Sec. 10 (b) Securities Exchange Act.*[2] *Especially outside of the United States it was feared that a broad interpretation of the U.S. Supreme Court would lead to a de facto worldwide application of Sec. 10 (b) Securities Exchange Act which would have had a severe impact especially on transatlantic business relations. Whereas the case and the decision was so far mainly discussed from an American perspective the following case note will examine the very same question under European capital market law and its impact on the discussion in Europe on the introduction of a European style class action.*

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1 128 S.Ct. 761 (2008).

2 15 U.S.C. § 78j.

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I. The Stoneridge case

1. Background and facts

In *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.* the respondents (*Scientific-Atlanta, Inc.* and *Motorola, Inc.*) were suppliers and also became later customers of *Charter Communications, Inc.* a publicly traded company. In late 2000 the executives of *Charter* realized that the company would miss the projected revenue and cash flow. In order to meet the expectations *Charter* and the respondent arranged an overpayment for the products of the respondents with the understanding that the respondents would return the overpayment by purchasing advertising from *Charter* for a price higher than fair value. Although the transaction had no economic substance it enabled *Charter* to improve its financial statements by recording the advertising purchases as revenue and capitalizing the purchase of the overpaid products. The documents of the transactions were drafted in way that they appeared as being unrelated and conducted in an ordinary way of business. Especially the new agreement concerning the purchase of the products of the respondent were backdated so that they appeared of being negotiated one month before the advertisement agreements. Finally the financial statements with the inflated revenue and cash flow of *Charter* were filed with the Securities and Exchange Commission (SEC) and reported to the public. Later the petitioner filed a securities fraud class action on behalf of purchasers of *Charter* stock alleging that the respondents violated § 10(b) of the Securities and Exchange Act and SEC Rule 10b-5. The District Court granted respondents' motion to dismiss for failure to state a claim. The Court of Appeals for the Eight Circuit affirmed the judgement.[3] The Court of Appeals held that the respondents did not make misstatements relied upon by the public or that they violated a duty to disclose. Although the Court of Appeals stated that the respondents had aided and abetted the misstatements of Charter it held that there is no private right of action for aiding and abetting a § 10(b) violation.

3 *In re Charter COmmunications, Inc., Securities Litigation*, 443 F.3d 987 (2006).

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I. The Stoneridge case

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3 *In re Charter COmmunications, Inc., Securities Litigation*, 443 F.3d 987 (2006).

2. Decision of the U.S. Supreme Court

Finally the U.S. Supreme Court affirmed the judgement. Initially the court made clear that due to the limitation of the text of § 10(b) Securities Exchange Act there is no private cause of action for aiding and abetting.[4] The court referred in this regard especially to the *Central Bank* decision[5] and the legislative development afterwards in which Congress created only an express cause of action for aiding and abetting within the Securities and Exchange Commission without referring to a private cause of action. Consequently the court held that the plaintiff has to prove all preconditions for a liability under § 10(b) Securities Exchange Act meaning especially reliance upon a deceptive act by the respondents. Although the court considered also oral and written statements including the backdated contracts as a deceptive act within in the reach of § 10(b) Securities Exchange Act[6] it held that the plaintiff did not prove a necessary causal connection between the misrepresentation and the suffered injury. Neither of the (usual) rebuttable presumptions of reliance can be applied in the case. The respondents did not violate a duty to disclose. The court also denied a presumption under the fraud-on-the-market doctrine because there was no public knowledge of the misstatements. Furthermore the court also denied to establish a (third) rebuttable presumption of reliance for scheme liability meaning that in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect.[7] The court held that the deceptive acts committed by the respondents were too remote to satisfy the reliance requirement. An application of the private cause of action of § 10(b) Securities Exchange Act would extend it beyond the securities markets into the realm of ordinary business mostly governed by state law. § 10(b) Securities Exchange Act does not incorporate common-law fraud into federal (securities) law. Surprisingly, the court also referred to the consequences a potential private cause of action in these cases would have for the foreign business relation of American companies and the increasing costs of being a publicly traded company under U.S. law. Finally, the court made a reference to the fact that secondary actors are subject to criminal penalties and civil enforcement of the Securities and Exchange Commission.[8]

4 128 S.Ct. 761, 768–769 (2008).
5 *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).
6 128 S.Ct. 761, 769 (2008).
7 128 S.Ct. 761, 770–773 (2008).
8 128 S.Ct. 761, 773–775 (2008).

3. *After Stoneridge*

The first major appellate case applying *Stoneridge* was the Seventh Circuit's decision in *Pugh v. Tribune Co.*[9] In this case, the plaintiffs alleged that a high-ranking executive of two publications owned by the Tribune Company masterminded a scheme to falsely inflate circulation figures with the aim of increasing the amounts the publications could charge for advertisements. The plaintiffs alleged that this conduct foreseeably caused the recognition of improper revenue in the Tribune Company's financial statements and, therefore, could support a claim of scheme liability.

In its decision, the Seventh Circuit held that *Stoneridge* barred the claim. It noted that the executive was not alleged to have played a role in preparing or disseminating the Tribune Company's financial statements or that investors were ever informed of the executive's false certifications. The court ruled that, whether or not the executive may have foreseen (or even intended) that the advertising scheme would result in improper revenue, under *Stoneridge* such an "indirect chain" between the defendants' conduct and the allegedly false financial statements was "too remote to establish primary liability."

It seems that outside professionals, including lawyers, are benefiting from the *Stoneridge* decision. In *In re DVI Securities Litigation*,[10] investors sued the issuer, DVI, as well as a number of secondary actors, including DVI's outside counsel, a law firm. The plaintiffs claimed that the defendants had perpetrated a fraudulent scheme that artificially inflated the price of DVI securities and alleged that the lawyers had participated in carrying out the fraudulent scheme and "initiat[ed] and mastermind[ed]" certain parts of the scheme. It was undisputed that the lawyers themselves had not made any public statements that affected the market for DVI securities.

The court held that *Stoneridge* "rejects an expansion of liability under section 10(b) premised on a broad conception of scheme liability." It found that "[t]hough Lead Plaintiffs allege that [the lawyers] knew of the scheme, the fact remains that none of [the lawyers'] alleged conduct was [publicly] disclosed such that it affected the market for DVI's securities." Accordingly, the court concluded that "Lead Plaintiffs have not overcome the objection that investors in DVI did not rely upon the allegedly deceptive conduct of [the lawyers]." The decision in DVI confirms that, under Stoneridge, the key element of reliance under Section 10(b) is not satisfied simply because corporate insiders or professionals working behind the scenes allegedly caused fraudulent statements to be made as part of a scheme.

9 521 F.3d 686 (7th Cir. 2008).
10 249 F.R.D. 196 (E.D. Pa. 2008).

Plaintiff lawyers' arguments for the introduction of a claim against secondary actors are that private lawsuits are essential to deter businesses from facilitating frauds by their business partners, that government enforcement resources are inadequate to detect fraud facilitation, and that there is a need to obtain funds from these third parties to compensate injured investors. There is quite a lobbying pressure on the Congress to introduce a bill expanding liability for securities fraud; thus, *Stoneridge* is not the end of the discussion in the U.S. The arguments of the business community *against* the inclusion of secondary actors are that the competitiveness of the U.S. capital markets would be harmed by expansive liability and that the competitiveness of U.S.-listed companies could be harmed as well. In their view, the system is rife with abuses by plaintiff lawyers, as demonstrated by the indictment of (and guilty pleas from) leading members of the plaintiffs' bar. The enforcement powers of the SEC and the particularized private causes of action are adequate to provide deterrence and compensation. From the standpoint of the business community, the U.S. Supreme Court kept the flood gate closed on a potential deluge of class-action law suits targeting the foreign and domestic vendors of U.S. companies involved in fraud schemes.

II. False or misleading financial statements in European Capital Market Law

The European legal framework for the publication of false or misleading financial statements is basically determined by the European legislator in the harmonisation process for the creation of a single European securities market. The specific problem of the publication of false or misleading financial statement is currently addressed in several harmonization directives being the (amended) Annual Accounts Directive (see II.1.), the Transparency Directive (see II.2.) and the Market Abuse Directive (see II.3.).

1. *(Amended) Annual Accounts Directive*

The drawing up and the publication of false or misleading financial statements is basically – without any relation to publicly traded companies – governed by the (amended) Annual Accounts Directive[11]. Art. 50b of the directive states

11 Directive 2006/46/EC of the European Parliament and of the Council of 6/14/2006 amending Council Directives 78/660/EEC on the Annual Accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the Annual Accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the Annual Accounts and consolidated accounts of insurance undertakings, OJ No. L 224 of 8/16/2006, p. 1 ff.

that among other things the Annual Accounts and the annual report have to be drawn up and published in accordance with the requirements of the directive and – if applicable – in accordance with the *International Accounting Standards/International Financial Reporting Standards* (IAS/IFRS). However, the responsibility of the drawing up and of the publication of these financial statements lies only with the members of the administrative, management and supervisory bodies of the company (Art. 50b (amended) Annual Accounts Directive). Consequently persons – other than the issuer – being responsible for the transactions the financial statements reflect are not responsible for the financial statements and therefore do not engage in an act sanctioned by the (Amended) Annual Accounts Directive.

2. *Transparency Directive*

Additionally to the provisions of the (amended) Annual Accounts Directive also the Transparency Directive[12] addresses the publication of financial statements of companies whose securities are admitted to trading on a regulated market (Art. 1 Transparency Directive). According to the Transparency Directive the issuer is obliged to publish – among other things – annual financial accounts (Art. 4 Transparency Directive), half-yearly financial accounts (Art. 5 Transparency Directive) and interim management statements (Art. 6 Transparency Directive). The responsibility for the drawing and publication of this periodic information lies *at least* with the issuer or its administrative, management or supervisory body (Art. 7 Transparency Directive). Although Art. 7 Transparency Directive seems – in contrast to the responsibility provisions of the (amended) Annual Accounts Directive (see II.1.) – to have a broader approach on responsibility for false or misleading financial statements it does not extend to mere aidors or abettors. In fact it does only set a minimum requirement for the Member States for the implementation of the directive by establishing a responsibility for the issuer or its administrative, management or supervisory body.

12 Directive 2004/109/EC of the European Parliament and of the Council of 12/15/2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ No. L 390 of 12/31/2004, p. 38 ff.

3. *Market Abuse Directive*

Finally also the Market Abuse Directive[13] addresses false or misleading financial statements as a case of market manipulation. The regulation of market abuse in the Market Abuse Directive is basically limited to a general prohibition of market manipulation in Art. 5 of the directive[14]. However Art. 1 no. 2 Market Abuse Directive gives a more specific definition of market manipulation by generally distinguishing between market manipulation by transactions giving false or misleading signals (Art. 1 no. 2 lit a) Market Abuse Directive), by transactions employing fictitious devices (Art. 1 no. 2 lit b) Market Abuse Directive) and by the dissemination of information (Art. 1 no. 2 lit. c) Market Abuse Directive).[15] Art. 1 no. 2 lit. c) Market Abuse Directive does not limit the scope of market manipulation by dissemination of information to specific publication instruments or methods. Therefore the dissemination of any information giving false or misleading signals as to financial instruments is considered a market manipulation within the meaning of the Market Abuse Directive. This does consequently also include the publication of false or misleading financial statements.[16]

The Market Abuse Directive, however, does not expressly address the sphere of persons being able to be a perpetrator of market abuse. Art. 5 Market Abuse Directive only states that *any* person is prohibited from engaging in market manipulation without distinguishing between primary and secondary actors. Nevertheless the definition of market manipulation in Art. 1 no. 2 lit. c) Market Abuse Directive only refers to persons who actually made the dissemination.[17] Consequently persons – other than the issuer – being

13 Directive 2003/6/EC of the European Parliament and of the Council of 1/28/ 2003 on insider dealing and market manipulation (market abuse), OJ No. L 96 of 4/12/2003, p. 16 ff.

14 Art. 5 Market Abuse Directive states: "*Member States shall prohibit any person from engaging in market manipulation.*"

15 For a specification of the different mechanisms of manipulation see *Avgouleas*, The mechanics and regulation of market abuse, p. 103 ff.

16 *Mock/Stoll/Eufinger*, in: Kölner Kommentar zum WpHG, 2007, § 20a note 154; *Vogel*, in: Assmann/Schneider, WpHG, 4th edition 2006, § 20a note 34.

17 Art. 1 no. 2 lit. c) Market Abuse Directive states:
"*Market manipulation shall mean:*

...

dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.
"

responsible for the transactions the financial statements reflect are not covered by the definition and therefore do not fall under the prohibition of market manipulation.

4. Conclusion

The current European capital market law addresses the drawing up and the publication of false or misleading financial instruments only concerning issuers or persons being responsible within the issuer. Therefore the persons – other than the issuer – being responsible for the transactions the financial statements reflect are not *directly* covered by the respective directives. As a consequence those persons do not violate European capital market law by engaging in acts of mere aiding and abetting.

III. Civil liability for false or misleading financial statements

Although the engagement of persons other than the issuer in the drawing up and the publication of false and misleading financial statements does not constitute a violation of European capital market law the problem of aiding and abetting in the context remains especially in the context of civil liability.

1. Harmonization and civil liability

As the federal legislator in the United States also the European legislator hardly addressed the problem of civil liability in its early harmonization of capital market law expressly. The early directives therefore did not cover the problem of civil liability for the violations of the relevant provisions.[18] If there was any regulation of sanctions at all it was mostly limited by the obligation of the Member states of establish *adequate safeguards*[19] or penalties being *sufficient to promote compliance with those measures*[20].

This self restraint of the European legislator only changed in its latest directives concerning the development of a single securities market. Especially

18 For an overview see especially *Möllers/Leisch*, in: Kölner Kommentar zum WpHG, 2007, §§ 37b, c, note 17.
19 See e. g. Art. 15 Directive 2001/34/EC of the European Parliament and of the Council of 5/28/2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, OJ No. L 184 of 7/6/2001, p. 1 ff.
20 See e. g. Art. 13 Council Directive 89/592/EEC of 11/13/1989 coordinating regulations on insider dealing, OJ No. L 334 of 11/18/1989, p. 30 ff.

the Prospectus directive[21] and the Transparency directive (see III.1.c)) address the issue of civil liability for the violations of the provisions of the directives expressly. Nevertheless these provisions do not contain a certain (substantive) regulation on civil liability but only a reference to the national law of the Member state being applied regularly in the case of a violation of this kind of provisions. As a consequence the Member states have only to ensure that the laws, regulations and administrative provisions on liability shall apply.

The High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe already called in its final report for the harmonization of the provisions concerning the civil liability for false or misleading information on capital markets.[22] Although the Commission initially supported the proposal concerning the Annual Accounts and the descriptive statement covering the key elements of their corporate governance structure and practices it was finally only adopted concerning Annual Accounts with the limitation to the members of the administrative, management and supervisory bodies.[23]

a) Market Abuse Directive

The Market Abuse Directive does not address the issue of civil liability for market manipulation at all. Art. 14 of the Market Abuse Directive[24] only contains the obligation of the Member States to impose administrative sanctions against the persons being responsible for the violation of the provisions of the directive. The harmonization of a civil liability for these violations was explicitly excluded from the directive due to the fact that the

21 Art. 6 subs. 2 Directive 2003/71/EC of the European Parliament and of the Council of 11/4/2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ No. L 345 of 12/31/2003, p. 64 ff.
22 See Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe of 11/4/2002, p. 67 f.; see also *Hopt/Voigt*, in: Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 2005, p. 1, 4 (for the introduction of a general prohibition of the publication of false or misleading information on capital markets).
23 *Commission*, Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM (2003) 284 final, p. 12 ff.
24 Directive 2003/6/EC of the European Parliament and of the Council of 1/28/ 2003 on insider dealing and market manipulation (market abuse), OJ No. L 96 of 4/12/2003, p. 16 ff.

European Commission considered this kind of harmonization being outside of its competence.[25]

b) Annual Accounts Directive

In contrast the (amended) Annual Accounts Directive contains a specific regulation on civil liability for false and misleading statements. The directive, however, does not contain a substantive rule on the liability but refers to the national law of the Member States. Besides this limited approach of the directive also the scope of the liability is somewhat limited. Art. 50c of the (amended) Annual Accounts Directive provides only the obligation for the Member States to ensure that their laws, regulations and administrative provisions on liability apply to the members of the administrative, management and supervisory bodies. Due to the explicit listing of responsible persons or group of persons in Art. 50c of the directive it has to be considered as being limited to these persons concerning the civil liability for the drawing and the publication of the Annual Accounts and reports. Consequently it does not cover the persons other than the issuer being responsible for the transactions the financial statements reflect.

c) Transparency Directive

In addition also the Transparency Directive provides a provision for civil liability. However, like in the (amended) Annual Accounts Directive the civil liability is limited to the issuer or the persons responsible within the issuer (Art. 7 Transparency Directive[26]). Therefore also in this context the liability does not cover the persons other than the issuer being responsible for the transactions the financial statements reflect.

25 See *Commission*, Exlanatory Memorandum Market Abuse Directive, COM (2001) 281 final, p. 12.

26 Art. 7 states:
"Member States shall ensure ... that their laws, regulations and administrative provisions on liability apply to the issuers, the bodies referred to in this Article or the persons responsible within the issuers."

2. Impact of the Directives?

Although the directives addressing false or misleading financial statements do not cover the civil liability of aidors or abettors the question arises whether the directives have an impact on the scope of civil liability under the law of the EU Member States. This would, however, only be the case when the directives would have to be interpreted as a harmonisation on a maximum level prohibiting national law of the Member States going beyond this level. According to European law this is only the case when the more stringent national provision protecting a certain group leads to a situation in which another group remains unprotected contrary to the aim of the directive.[27]

a) Market Abuse Directive

The purpose of the Market Abuse Directive is the establishment of market integrity by creating an integrated and efficient capital market.[28] Moreover the Market Abuse Directive expressly requires only a common minimum set of effective tools and powers for the competent authorities of the Member States.[29] As a consequence the prohibition of market manipulations in Art. 5 of the Market Abuse Directive does not preclude a civil liability going beyond the scope of perpetrators being set by the directive itself.[30]

b) (Amended) Annual Accounts and Transparency Directive

Also the (Amended) Annual Accounts Directive and the Transparency Directive do not limit the civil liability of aidors and abettors under national law. Both directives refer expressly to the national law of the Member States concerning civil liability (Art. 50c (Amended) Annual Accounts Directive,

27 See ECJ case C-42/95 (*Siemens v. Nold*) [1996] ECR I-6017 (6034–6036); see also *Grundmann*, European Company Law, 2007, note 154.

28 See Recital no. 2 Market Abuse Directive.

29 See Recital no. 37 Market Abuse Directive.

30 See especially for the civil liability for market manipulation in Austria: *Altendorfer*, in: Kalss/Oppitz/Zollner, Kapitalmarktrecht – Volume I, 2005, § 21 note 47 ff.; *Kalss/Puck*, in: Aicher/Kalss/Oppitz, Grundfragen des neuen Börsenrechts, 1998, p. 319, 354; in the United Kingdom *Avgouleas*, The mechanics and regulation of market abuse, p. 389 ff.; *Swan*, Market Abuse Regulation, 2006, p. 108 ff. and in Germany *Mock/Stoll/Eufinger*, supra note 16, § 20a note 420 ff.; see especially for the liability of aiders and abettors in Germany *Fleischer*, AG 2008, 265, 268 ff.; *Reus/Paul*, WM 2008, 1245, 1248 ff.

Art. 7 Transparency Directive).[31] This reference only completes the implementing measurers sanctioning the violations of the provisions set out in the directives. They can therefore not be interpreted as a regulation on a maximum level.

c) Conclusion

The civil liability of persons being engaged in the drawing up or the publication of false or misleading financial statements is determined solely by the national law of the Member States. The (amended) Annual Accounts Directive, the Transparency Directive and the Market Abuse Directive do not have an impact on the scope of civil liability.

IV. Stoneridge and its further impact on the European capital market law

1. Civil liability, enforcement and the absence of harmonization

Notwithstanding the considerable differences between the regulations of capital market law in the United States and the European Union the decision of the U.S. Supreme Court in *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.* shows a substantial similarity concerning the problem of aiding and abetting in security fraud in the European Union and the United States. Sec. 10 (b) Securities Exchange Act and the provisions of European capital market law concerning the publication of false or misleading financial statements have the same scope of application by sanctioning only certain kinds of security fraud committed by primary actors. Consequently, the general principle of (security) fraud is still determined by state law (in the United States) and by the national law of the Member States (in European Union). Moreover the civil liability for secondary actors of security fraud lies in the domain of the Member States (in European Union) respectively on the state level (in the United States).

However, two major differences remain. Besides the problem of the absence of a single "European Securities and Exchange Commission" there will be – due to the limited scope of the applicable directives (see II.4.) – no harmonized enforcement by the responsible authorities of the Member States concerning criminal penalties and administrative sanctions for aidors and abettors, either. The effective enforcement by the Securities and Exchange Commission was,

31 See also Recital no. 3 (Amended) Annual Accounts Directive; Recital no. 17 Transparency Directive.

however, one of the major arguments of the U.S. Supreme Court for denying a private cause of action in its decision. Moreover in the European Union the Member States can still impose a private cause of action against aidors and abettors for the violation of the respective provisions of the applicable directives in their national law (see III.3.). Due to the limited approach of the applicable directives both problems cannot be solved under the current European capital market law regime. Consequently, there will be no *Stoneridge* decision by the European Court of Justice therefore leaving an uncertainty behind the U.S. Supreme Court just resolved.

2. The long arm of American law

Core features of the U.S. legal system such as class actions, punitive damages and discovery are not known in Europe, at least not to the extent they are used in the U.S. Companies in Europe are worried by a growing tendency that U.S. legal regulations are either imposed directly on foreign companies or their effects are felt beyond the country's borders, and this is why the case *Stoneridge vs. Scientific Atlanta* was so closely monitored also in Europe.[32] The *Stoneridge* case was of critical importance to parties from Europe with exposure to U.S. class actions and sub-prime litigation[33] and had a significant impact on the discussion in Europe about the question whether Europe needs a U.S. style class action mechanism[34] which in Europe is discussed in the context of "collective redress". In the U.S., class actions were created to compensate for government's relative weakness and lack of intervention.[35] The European Union, on the contrary, has a relatively strong administrative and regulative protection in the consumer protection field; it is therefore questionable whether or not a collective redress mechanism in Europe would bring added value for consumers. The *Stoneridge* case therefore was critical, and the decision of the U.S. Supreme Court was considered a major victory not only for the American, but also the European business community, as well as their insurers. Nevertheless, U.S. attorneys continue to market their efforts to push forward class action initiatives in Europe, and European consumer representatives stress that a system of collective redress would strengthen their capacity to defend consumers. European courts and legislatures struggle to

32 See *Adler/Naumann/Wilske*, RIW 2008, 97 ff.
33 See especially *Silverman/Berger*, DAJV-Newsletter 2008, p. 50 et seq.
34 See *Buxbaum*, in: Gottwald, Europäisches Insolvenzrecht – Kollektiver Rechtsschutz, p. 215 ff.; see also from a German perspective *Hohl*, Die US-amerikanische Sammelklage im Wandel, 2008, p. 14 ff.; see also *Hopt/Voigt*, Prospekt- und Kapitalmarktinformationshaftung, 2005.
35 See only: *Hohl*, supra note 34, p. 68 ff. with further ref.

improve access to justice for mass claimants who have suffered small individual wrongs, but large aggregate harm, without introducing the excesses of American style class action litigation.

3. *The European strategy*

Redress, together with enforcement, thus is a key part of the European Commission's Consumer Policy Strategy for 2007–2013[36]. The Commission has been examining the problems that consumers face in obtaining effective redress. One problem which it has identified is that EU consumers who have small or scattered claims refrain from bringing an individual court action because the cost of bringing the action is likely to outweigh the amount of damages claimed. It has come to the conclusion that "collective redress", both judicial and non-judicial, could be a means of addressing this problem. Presently, the national class action regimes of Member States such as France, Germany, Italy, the Netherlands and Spain differ considerably.[37]

In its Consumer Policy Strategy for 2007–2013[38], the Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers. One key priority for both the European Commission and the Member States is to take action to improve access to justice by creating measures which simplify and help access to the courts, particularly in cross border cases. The Commission will in the not too far future decide whether, and if so, to which extent, an initiative on collective redress is required at EU level. The *Stoneridge* case caused a lot of attention. It not only led to a severe debate about a potential future worldwide application of Sec. 10 (b) Securities Exchange Act and the introduction of a class action model in Europe; rather, the decision of the U.S. Supreme Court has been a milestone in this process. However, even after the decision of the U.S. Supreme Court, the discussion continues and class action is on its way to Europe.

36 *Commission*, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM (2007) 99 final, see http://www.ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

37 See *Mattil/Desoutter*, WM 2008, 521 ff. with a comparative overview of several EU Member States.

38 See supra note 36.