DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

COLLECTIVE REDRESS IN THE MEMBER STATES OF THE EUROPEAN UNION

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, aims to assess the current state of play of collective redress at national and European levels, evaluate the opportunity of a European intervention in the matter and provide the European Parliament with concrete recommendations. Both the assessment and the recommendations have been drafted keeping in mind the essential issue raised by collective redress: access to justice. This principle, which is essential in a Union enforcing the rule of law, is currently challenged by the existing divergences. As such the creation of harmonised collective redress mechanism is becoming an increasingly pressing matter.

ABOUT THE PUBLICATION

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CAT	Competition Appeal Tribunal
GLOs	Group Litigation Orders
DGCCRF	General Directorate for Competition, Consumer Affairs and Prevention of Fraud
ADR	Alternative Dispute Resolution
GDPR	General Data Protection Regulation
SAs	Supervisory Authorities
LSA	Lead Supervisory Authority
CDE	Code de Droit Economique
CCP	Code of Civil Procedure
CACP	Code of Administrative Court Procedure
CPA	Consumer Protection Act
CMTCA	Capital Market Test Case Act

EXECUTIVE SUMMARY

Background

In his 2017 State of the Union Address, the President of the European Commission Jean-Claude Juncker pleaded for "*a Europe that protects, a Europe that empowers, a Europe that defends. (...) [A] Europe [that] can deliver for its citizens when and where it matters*". And yet, with regards to access to justice and protection in circumstances of mass harm and right to obtain compensation, it seems as though Europe could deliver more, or at least differently, for its citizens. The 2015 "Car Emissions Scandal", the 2017 flights cancellation or the 2018 Maximilian Schrems case (European Court of Justice, Case C-498/16) have already shed light on the debate regarding whether collective redress mechanisms were missing at the European Union level. Indeed, these cases have illustrated the difficulties arising from cross-border mass harm situations, as well as the current inequalities between Member States in terms of citizens' ability to bring claims and obtain remedies. Thus, the "New Deal for Consumers", which aims at revising the Injunctions Directive (2009/22/EC) in order to secure more effective consumer redress in mass harm situations, is an interesting step. This issue, which is ultimately that of effective and timely access to justice for all citizens, is broader than mere consumer collective redress. Besides, it is a particularly pressing question in a context of rising nationalisms as well as increased risks of cross-border mass harm situations due to greater interconnected economies.

Aim

Bearing in mind that, on the one hand, procedural law traditionally belongs to the regal domain of the Member States, but that, on the other hand, there is an increasing demand for more citizens protection and for fairer harmonisation between Member States, this study will aim to **analyse the on-going national trends and the role the European Union could play**. Based on the qualitative and quantitative study of the 12 Member States we have selected, as well as on the lessons drawn from the collective action mechanisms that exist or do not exist in other parts of the world (notably in the United States, Latin-America, Canada), we will also **explore all the relevant policy implications and options**. Particular attention will be paid to cross-border cases, as this is likely to be the main future policy challenge, as well as to abusive litigation, as this has been a strong justification for not implementing collective redress mechanisms in the past. Indeed, the stake is to make collective redress beneficial for all, citizens as well as businesses, and we fully endorse the Commission's Recommendation regarding the necessary balance between "*ensuring sufficient access to justice and (...) preventing abuses through appropriate safeguards*".

GENERAL INFORMATION: COLLECTIVE REDRESS IN THE MEMBER STATES OF THE EUROPEAN UNION

Definitions

Collective redress refers to a wide range of procedural mechanisms enabling a group of claimants (which may be natural or legal persons) who have suffered similar harm, resulting from the same illicit behaviour of a legal or natural person, to get redress as a group. **This encompasses mechanisms granting to a member of the affected group or to a representative entity, standing to bring an action on behalf of the group in order to obtain either compensatory relief, injunctive relief, or both**. This term is used in this study so as to avoid the use of expressions already employed by Member States. Indeed, the use of "group action" or "representative action" may lead to confusion as they already have their own meaning in national legislations. The concept of "group action" may not be understood in the same way in France, in Spain or in the United Kingdom, it might be understood more restrictively in one Member State than in another, be it from a standing or redress point of view.

Standing refers to the legal ability to bring an action before the court.

A **representative entity** is an entity which, because it complies with a number of criteria that differ from a Member State to another, is considered to sufficiently represent the group of claimants in order to bring an action on their behalf.

On the one hand, **injunctive relief** refers to a court decision ordering a defendant to put an end to an illicit behaviour. On the other hand, **compensatory relief** refers to a court decision awarding damages to the victims of an illicit behaviour who have suffered a loss because of it.

Structure of the study

This study is divided into three chapters.

Chapter 1 is dedicated to the description of the state of play at national and EU level. Having analysed the current trends in the European Member States for every characteristic of the existing national mechanisms, the best practices and main shortcomings will be brought to light. The insufficiency of the European action up to date will be highlighted by presenting the position of the European Commission, the European Parliament and the Court of Justice of the European Union.

Chapter 2 considers the strengths and weaknesses of the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. After drawing the adequate conclusions, it will aim to provide the team's own proposal for a European instrument.

Chapter 3 deals with the interaction between such a European instrument and the current regulations on private international law. More broadly speaking, this chapter will address the many important issues of private international law. It questions the

adequacy of the Brussels I (Recast) Regulation, it also focuses on the issue of determining the adequate forum where the defendant(s) and claimants are not domiciled in the same Member State and other similar issues.

Methodology

This study will provide a **comparative overview** of the collective redress systems currently available in twelve EU Member States, identified in this document. The selection made is based on the necessity to provide for a balanced picture, ensuring a geographical balance and taking into account the diversity of Member States' judicial systems, legislations and practices in the subject matter. Foreign experts, carefully selected from Trans Europe Experts' network of legal experts based on their expertise in matters relating to collective redress, provided us with information drawn from practice in their own legal systems. Some lawyers and economists were also invited to contribute to the study, as they had already undertaken extensive research in this legal area.

The twelve Member States covered by this study are: **Austria**, **Belgium**, **Estonia**, **France**, **Germany**, **Italy**, **Luxembourg**, **Poland**, **Romania**, **Spain**, **the Netherlands** and **the United-Kingdom**. The twelve aforementioned Member States' legal systems greatly vary when it comes to collective redress mechanisms. They were selected to demonstrate the different stages Member States have reached in terms of providing efficient collective redress systems within the European Union. They can be homogeneously divided into four categories: Member States where there are efficient mechanisms for collective redress (**Belgium**, **Italy**, **Spain**), Member States where there are mechanisms for collective redress but where issues of various degrees have been identified (**Germany**, **Austria**, **the Netherlands** - although a new bill is set to be enacted later this year, which will move **the Netherlands** to another category -, and **Romania**) Member States where collective redress mechanisms have recently been introduced or amended (**France**, **United-Kingdom**, **Poland**) and Member States which simply do not have a compensatory mechanism in place (**Estonia**, **Luxembourg**).

In addition, the existing mechanisms in the United States, Latin-America will also be taken into consideration to provide an external view on collective redress. The analysis of the legal systems in those countries is made possible by the presence of American* , Chinese as well as Argentinian experts in our team. Such a broad scope is necessary to determine what makes some mechanisms successful and what leads to inefficiencies in the others.

Whilst assessing European proposals and making independent recommendations, this study will always take into consideration the existing systems within the EU in order to determine what is or not working and what Member States could be ready to implement. To that end, questionnaires were sent to twelve national experts and additional experts, including judges, litigation experts, professors and lawyers were approached. These questionnaires were identical. This was a way to ensure information retrieved from each expert responded to similar queries raised by the subject of collective redress throughout the European Union. These country reports were used to produce a comparative analysis,

* We want to thank particularily Judith Resnik (Arthur Liman Professor of Law, Yale Law School, the United-States) for the discussions we had with her since the beginning of the study, which allowed us to develop a critical eye on Amercain law.

enabling us to identify where Member States differ, or in some cases, resemble one another.

1. THE STATE OF PLAY OF COLLECTIVE REDRESS AT NATIONAL AND EUROPEAN LEVELS

KEY FINDINGS

- **The forms of redress available**: Among the twelve Member States selected for the purpose of this study, there are five Member States where no actual compensatory collective redress mechanism is provided for, three Member States in which it is only available in limited areas of the law and four Member States in which it is available in vast areas of the law or even regardless of the sector or issue at stake. This is an issue as injunctive relief is not sufficient in and of itself. **This heterogeneity within the European Union is problematic as not all European citizens are awarded the same level of protection.**
- **The scope**: collective redress is confined to consumer law in two Member States; seven Member States have adopted a larger sectoral approach to collective redress and three Member States provide for a horizontal framework in their legislation. **A broad sectoral approach or even a horizontal framework should be welcomed.**
- **Opt-in and opt-out**: The legislation in six Member States imposes an opt-in only instrument; two Member States provide for a mixed system; only one Member States favours the opt-out rule; in one state the system depends on the type of redress sought; in one Member State it is neither and finally, the matter is still unclear in one Member State. **Those discrepancies are very problematic.**
- **Standing**: in eight Member States only designated entities are granted standing; in two Member States standing is granted to both affected class members and organisations and in one Member State, depending on the instrument used it is granted only to a class member or to both affected class members and organisations. Finally, in one Member State, standing is granted to a "representative" who can only be a member of the group who acts on his own behalf in the name of all the group members or to a regional consumer ombudsman. **This heterogeneity Union is problematic as eventually, European citizens are not awarded the same level of protection.**
- **Standing – qualified entities**: the criteria to give standing to qualified entities is an important issue. **Indeed, one must strike the correct balance between guaranteeing efficient safeguards against abuses and ensuring the efficiency of collective redress mechanism** often related to how long the entity has been in existence, its purpose, the relation between the said purpose and the collective interests concerned and the non-profit character of the entity. **Criteria which are too strict may lead to too few entities being authorized to bring an action.**
- **Publicity**: **there is no key trend as to who makes the information available; this varies from one Member State to another**. In five Member States the cost of publicity is borne by the party who was responsible or decided to publicize the action, in two other Member States where this is also the case the cost may form part of the recoverable costs under the loser-pays rule. In two Member States the question of the cost is decided in the settlement agreement while in two other Member States, the cost is to some extent borne by the State itself. Finally, in one Member State, the cost is simply borne by the claimants or, where there is a cost waiver, by the Treasury of State. **An important issue when it comes to publicity is its timing. A correct balance must be found between proper information of the potential claimants and protection of the reputation of the defendant.**

- **National registry**: **the implementation of a national registry in each Member State would be the best way to ensure proper information.** However, only two Member States have one.
- **Costs of proceedings**: the costs of proceedings are regulated in all twelve Member States studied.
- **Lawyers' fees**: lawyers' fees are freely agreed upon in eleven Member States while they are regulated in one Member State. Contingency fees are prohibited in seven Member States and even where they are authorized (in the other five Member States) they are usually strictly regulated. **Contingency fees are prohibited in a majority of the Member States and are considered to encourage lawyers to litigate regardless of the interests of the claimants, in other words as encouraging abusive litigations ; such a prohibition should be maintained at European level.**
- **The "loser pays" rule**: the **"loser pays" rule** is applied in all twelve Member States forming part of this study. **This rule is an adequate and efficient safeguard against abusive litigations.**
- **Third-party funding**: **third-party funding** is unregulated in all twelve Member States. **Although it should not be prohibited, it should be regulated in order to ensure transparency and avoid any conflict of interest.**
- **Alternative dispute resolution**: only six Member States have a proper alternative dispute mechanism focused on mass harm situations, or at least containing specific rules on ADR in the context of mass harm situations. **Alternative dispute mechanisms deserve to be developed and better adapted.**
- **Cross-border cases**: the international dimension of collective redress is, to a large extent, not taken into account and, even where this issue is addressed, it is only to a very limited extent on extremely precise matters (standing, joining the group or jurisdiction). **The international dimension of collective redress is a crucial issue that needs to be carefully dealt at a European level. The international dimension of collective redress is insufficiently addressed.**
- **Best practices**: **Ensuring the availability of a compensatory collective mechanism, adopting a horizontal or at least a broad sectoral approach and using a mixed-system (opt-in and opt-out) are all practices identified as the most efficient when it comes to ensuring access to justice. In addition, the comparative study of the selected Member States showed that it is best to grant standing to representative entities only, and that the criteria surrounding them should not be too strict.**
- **Shortcomings: compensatory redress is still unavailable in a number of Member States, standing is too restricted in some Member States, ADR mechanisms are not adapted to collective redress and the international dimension of collective redress is insufficiently addressed. In addition, the absence of a national registry in most Member States is problematic.**
- **Positions of European institutions:**

  - European Commission: the Commission showed it is more and more inclined to address this issue at a European level and is more and more flexible on the matter (when comparing its position in the Recommendation and its Proposal).

  - European Parliament: the European Parliament has long called upon the Commission to take action on collective redress. Its view has been consistent and coherent.

- **CJEU** : the CJEU handles collective redress systems consistently by relying on general principles, such as favoring dialogue with national jurisdictions, legal certainty and consistency within its case law. However, the CJEU handles such mechanisms in accordance with the role they play within EU law.
- **Benefits and costs of collective redress**: **collective redress** is perceived by economists as self-correction of regulatory market failure by restoring justice through compensation and serves as a deterrent. It saves administrative costs because of economies of scale. The cost of organizing a large number of potentially diverse plaintiffs to negotiate remains and the distribution of settlement award to the plaintiffs can be a highly problematic process. In addition, when plaintiffs have claims of different strengths or values, adverse selection may become a problem.

1.1 The diversity of national mechanisms

Collective redress, as already mentioned in the section dedicated to definitions, is a concept which covers a wide range of procedural mechanisms enabling a great number of claimants which form part of a group to seek redress.

The aim of this first section is to highlight the most prevalent characteristics of such mechanisms among the twelve selected Member States in order to identify the current trends in the European Union as well as the general approach to collective redress. For this purpose, each main characteristic of the diverse national mechanisms will be analysed as well as the difficulties encountered in their implementation.

1.1.1 The existence of a collective redress mechanism and the available forms of redress: the outcomes

In the likes of individual actions, collective redress mechanisms offer various remedies: claimants may be seeking to put an end to an unlawful behaviour or to be compensated for their damages. As such, there are two forms of collective redress: **injunctive collective redress** and **compensatory collective redress**. The former will merely give rise to an injunction obliging the infringing trader to cease his unlawful behaviour – for example, to remove an unlawful clause from a contract. In the latter however, the infringing trader will have to compensate the claimants for damages they have suffered because of his unlawful behaviour/practice.

As was highlighted in the report published by the Commission in January 2018 "collective redress in the form of injunctive relief exists in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive"[2]. As such, there is no Member State with absolutely no collective mechanism in place although the instrument might not be known as a "collective redress" mechanism.

However, while collective redress in the form of injunctive relief is available in all Member States to a certain extent, a number of Member States have not put a compensatory

[2] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) COM(2018) 40 final, para. 2.1.1.

collective redress mechanism in place yet. This means that in some Member States, claimants who have suffered damages because of an unlawful practice will not be able to seek for compensation as a group, but merely for the unlawful practice to cease and will have to act on their own in order to obtain said compensation. For instance, after the so-called Dieselgate the affected consumers were not treated equally among the Member States, some were compensated and some were not, depending on the mechanism existing in their State of domiciliation. The situation in the European Union is thus very disparate. Three categories of states can be identified: (1) those states where no proper compensatory collective redress mechanism is provided for in their legal system, (2) those states where compensatory collective redress is confined to designated legal areas, and finally (3) those states where compensatory collective redress is available in vast areas of the law or even regardless of the area of the law concerned.

(1) **There are five Member States among the twelve selected Member States where no fully-fledged compensatory collective redress mechanism is provided for**: Estonia, Romania, Luxembourg, Germany and Austria. Indeed, **Estonian law** only provides for injunctive relief in cases of "an action for the termination of the application of an unfair standard term or for the termination and withdrawal of a recommendation of the term by the person recommending application of the said term"[3] (putting an end to the application of an unfair standard term, or where such terms are included in contracts on the recommendation of another party, to quash this recommendation). Likewise, the **Romanian mechanism** regulated by articles 12-13 of Law n° 193/2000 on unfair terms in consumer contracts is limited to injunctive relief. Compensatory relief is only available by the means of individual actions or by common mandate of procedural representation under the general provisions of the civil Procedure Code on multiple participation in civil litigation (there are no specific legal provisions on a compensatory mechanism)[4]. A proper compensatory system also lacks in **Luxembourg**[5]. In addition, under **German law**[6] there is no fully-fledged compensatory collective redress mechanism with respect to actions for damages. There are, however, many other mechanisms taking the form of representative actions by consumer associations and other designated entities for cease-and-desist orders[7] and for skimming off illegally gained profits[8], but those are only available in a few areas of the law as will be detailed below. In securities cases, the Capital Market Test Act[9] is not a formal collective action as it only allows for the bundling of cases in an intermediate phase in order to decide issues of fact and/or law which are common to all cases pending. Once a final decision is handed (which will be a declaratory ruling), the courts of first instance will "resume their cases and will decide every single case on the basis of the results obtained in the intermediate proceeding if the parties do not agree on a settlement of the case"[10]. Therefore damages are then *individually*

[3] Article 100 of the Estonian Code of Civil procedure. See also Article 45 of the Law of Obligation Act (võlaõigusseadus) of 26 September 2001. See also Estonian questionnaire, questions 1.1 and 2.1.
[4] See Romanian questionnaire, questions 1.1 and 2.1.
[5] "Currently our [Luxembourg] law does not allow us to go further [than injunctive relief]. The lawsuit ends there. The illegal behaviour must stop but the affected consumers are not compensated from the damages they suffered because of this behaviour" - Discourse of Cindy Bauwens during the « Conférence sur le recours collectif », June 6th 2018, Abbaye de Neumünster, Luxembourg.
[6] See German questionnaire, introduction and question 2.1.
[7] Sec. 1-2, 2a Act on Injunctive Relief and sec. 8 Unfair Competition Act.
[8] Sec. 10 Unfair Competition Act and sec. 34a Antitrust Act.
[9] In cases of low value individual claims, opting-out can be burdensome for justice and for the defendant and have no legitimate interest for the victim.
[10] A. STADLER "A test case in Germany: 16 000 private investors vs. Deutsche Telekom", 2009, p. 42. This article is based on a presentation given at the conference "Collective Redress – Towards a System of Class Actions in Europe?" organised in Florence by the Academy of European Law Trier in cooperation with the

determined in *individual decisions*. Finally, while we listed **Austria**[11] as a country lacking a genuine compensatory collective redress mechanism, this position must be nuanced. Indeed, although Austria did not put an "actual", fully-fledged procedural instrument of compensatory collective redress (*stricto sensu*) in place, another mechanism is available: a mass assignment of claims to either a qualified association or to a private party who serves a class representative[12]. The mechanism is based on traditional procedural tools and therefore, there are no specific restrictions as to which claims can be brought, meaning compensatory relief is actually available.

(2) **There are three Member States among the twelve selected Member States in which compensatory collective redress is only available in limited areas of the law**, the others being restricted to injunctive relief: Belgium, Italy and Spain. In **Belgium**, the legislation has a limited scope and compensatory collective redress is only available within this rather restricted scope[13]. **Italian law** does not provide for a general regime, but only for various and somewhat different specific procedural mechanisms. In particular, while injunctive collective redress procedures are provided for in different fields, a compensatory collective redress mechanism was introduced in 2007 for the protection of consumers' rights *only*[14]. Moreover, **Spain** recognizes collective redress mechanisms in a variety of specific sectors which will be detailed below, albeit in most sectors, collective redress does not include compensation. The latter is only expressly admitted in respect of the challenge of standard terms and in actions rising from the infringement of consumer law[15].

(3) **There are four Member States among the twelve selected Member States in which compensatory collective redress is available in vast areas or even regardless of the sector or issue at stake**: France, the Netherlands, Poland and the United-Kingdom. The **French** *action de groupe*[16] allows for both injunctive and compensatory relief in all the areas where the *action de groupe* is available as further explained below. It is worth noting that for privacy and data protection, the action was initially only permissible to request the cessation of unlawful practices. Nonetheless, the bill adopted on the 20th June 2018[17] implementing the General Data Protection Regulation into French Law, broadens the scope and allows for compensatory relief[18]. Similarly, in each mechanism existing under **UK law**, the representative action, the Group Litigation Order and the mechanism under the Competition Act, injunctive as well as compensatory relief are available[19]. In **the Netherlands**, the Collective Settlements of Mass Claims Acts is a horizontal collective redress mechanism which can result in either injunctive and/or compensatory relief. However, the other existing mechanism, the collective action procedure based on articles 3:305a-d of the Dutch Civil Code, is

Fondazione per la formazione forense at the Florence Bar Association and the Giovanni Fabbrini University Centre for Studies in Civil Justice, 30–31 October, 2008.

[11] See Austrian questionnaire, questions 1.1 and 2.1.

[12] The mechanism is based on § 227 ZPO (Gesetz vom 1. August 1895 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, RGBl 1895/113) which allows for different claims against the same defendant to be heard within the same proceedings.

[13] Law of the 28th March 2014 inserting a Title 2 « Collective redress action" in the Code of Economic Law. See also Belgian questionnaire, questions 1.1 and 2.1.

[14] Article 140 *bis* Consumer Code. See also Italian questionnaire, questions 1.1 and 2.1.

[15] See Spanish questionnaire, questions 1.1 and 2.1.

[16] See French questionnaire, question 2.1.

[17] LOI n° 2018-493 du 20 juin 2018 relative à la protection des données personnelles.

[18] *Ibid*, art. 25.

[19] See British questionnaire, question 2.1.

confined to injunctive relief and/or a declaratory decision only (art 3:305d)[20]. In **Poland**, initially the Act of 17 December 2009 on Pursuing Claims in Group Proceedings had a rather limited scope as it only pertained to consumer protection, tort and product liability claims, with the exclusion of claims for the protection of personal interests. This was the most criticized aspect of the Act. The Amendment[21] rectified this problem, extending the scope of the admissible claim for damages, by adding claims regarding the non-performance or improper performance of a contract regardless of the object of such claims (including non-consumer claims) and unjust enrichment claims.

This heterogeneity within the European Union itself is problematic as not all European citizens are awarded the same level of protection. More importantly this issue calls for questioning the efficiency of the various national mechanisms. The experts working on this paper, regardless of their nationality, were unanimous in concluding that injunctive relief is not sufficient in and of itself and that compensatory relief is necessary. Indeed, the former can only bring an end to harm. It cannot make provision for any harm that has occurred prior to injunctive relief being granted, to be remedied and as such is forward-looking only. The latter, on the other hand, is aimed at fully compensating the victim for losses suffered. Where harm has been caused illegally and intentionally or negligently, victims should always have a right and a realistic chance to compensation. In addition, when redress is confined to a mere injunction, there is no real deterrent effect for potential perpetrators. There is a growing need to address this shortcoming at European level.

1.1.2 The scope of national collective redress mechanisms

It is clear that when the different mechanisms were initially put in place in the Member States, they were thought for the protection of consumer interests. This is also true at European level. After all, the Commission announced its reform on the matter through its New Deal for Consumers[22]. Again, a three-fold classification can be made between (1) states where collective redress is confined to consumer law only, (2) states which have adopted a sectoral approach, albeit larger than consumer law only and (3) states which have adopted a horizontal approach to collective redress.

(1) **Collective redress is confined to consumer law in two out of the twelve Member States studied**: Estonia and Romania. Both provide for consumer collective redress only. In **Romania**, the modifications brought on August 3rd 2012 to articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts introduced an opt-out injunctive redress mechanism based on article 12, paragraph (3). However, it enables qualified entities designated by law to bring representative actions in the collective interest of *consumers only* and strictly in the field of unfair terms in consumer contracts[23]. Under **Estonian law**, the mechanisms of collective action solely exist in the consumer sector and are injunctive procedures only as there is no specific horizontal

[20] "Collective Settlements Act, 2005 (Dutch Civil Code art. 7:900 to 7:910) and Dutch Civil Code art. 3:305a.
[21] Ustawa z dnia 7 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności, known as the Act of 7 April 2017 on Amending Certain Acts to Facilitate the Seeking of Receivables, Official Journal of 2017, item 933 of 12 May 2017. See also Polish questionnaire, question 2.1.
[22] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM/2018/0183 final.
[23] See Romanian questionnaire, question 1.1.

compensatory collective redress mechanism in Estonia[24]. Therefore, this confinement to consumer law persists nowadays and is not merely the initial approach on this matter. This has been identified as a shortcoming in those legislations because such a scope appears too restrictive and unjustified considering consumers are not always the ones affected.

(2) **Seven Member States have adopted a sectoral approach to collective redress, albeit not merely confining it to consumer law**: Belgium, France, Germany, Italy, Luxembourg, Poland and Spain. In **Belgian law**, the collective redress mechanism was originally[25] exclusively possible for consumers. Since recently[26], it is also accessible for SMEs groups in the same conditions. It is also open to enterprises in cases of infringement of antitrust law. According to articles XVII.35 and followings of the Belgian Code of Economic Law, that mechanism is admissible only if there is a "potential contravention made by an enterprise" [27]. Hence, the defendant must inevitably be an enterprise. The infringements can only concern listed EU and Belgian regulations. These are listed in article XVII.37 CDE and are mostly consumer related law and antitrust law therefore, while the scope is not confined to consumer law it is not much larger[28]. The French system, notably its evolution, is quite representative of this sectoral approach and consumer driven protection device[29]. **France** initially followed a very restricted sectoral approach and the mechanism was first made available in consumer and competition law only[30]. It was then expanded to cover other sectors, including health issues through the law on the modernisation of the health system[31], discrimination[32], environment[33] and privacy[34]. While the *action de groupe* exists in all these areas, it cannot be said that France has adopted a horizontal approach as the procedural rules vary from one sector to another. The scope of the **Italian** instrument depends on the redress sought[35]. Indeed, while injunctive collective redress procedures are provided for in many different fields (anti-discrimination, unfair competition, union busting, consumer law), the Italian collective compensatory redress mechanism is confined to the consumer protection sector. The scope of application of the mechanism set forth by Article 140 *bis* of the Italian Consumer Code is indeed subject to a dual limitation. On the one side, and from a subjective perspective, it is only available to consumers: accordingly, it is not admissible if brought on behalf of small stakeholders, irrespective of whether they can be regarded as weaker parties or not. On the other side, the mechanism is only concerned with certain consumer rights originating either in contract or, though to a lesser extent, in tort

[24] See Estonian questionnaire, question 1.1.
[25] Loi du 28 mars 2014 portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, *M.B.*, 19 avril 2014.
[26] Loi du 30 mars 2018 portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique, *M.B.*, 22 mai 2018.
[27] Art. XVII.36 CDE.
[28] See Belgian questionnaire, question 1.1.
[29] See French questionnaire, question 1.1.
[30] *Loi n° 2014-344*
[31] *LOI numéro° 2016-41 de modernisation de notre système de santé*, 26 janvier 2016, art. L 1143-1 and f. of the French Public Health Code (*Code de la santé publique*).
[32] LOI numéro° 2016-154 *de modernisation de la justice du 21ème siècle*, 18 novembre 2016, art. L. 1134-6 et *seq*. of the French Labour Code and LOI n° 2008-466 *du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*.
[33] LOI numéro° 2016-154 *de modernisation de la justice du 21ème siècle*, 18 novembre 2016, art. L142-3-1 of the Environment Code.
[34] LOI numéro° 2016-154 *de modernisation de la justice du 21ème siècle*, 18 novembre 2016 et LOI relative à la protection des données personnelles (2018, *under discussion*), art. 43 *ter* of LOI n°78-17 *relative à l'informatique, aux fichiers et aux libertés*.
[35] See Italian questionnaire, question 1.1.

law. Likewise, in **Germany** the various instruments in place don't have an identical scope but rather cover various areas of the law such as consumer law, competition law, antitrust law as well as securities law[36]. In **Luxembourg**, while collective redress, which can only take the form of injunctive relief, is not confined to consumer law, the scope of the available mechanisms is still very narrow as it is restricted to consumer law[37] and competition law[38]. In **Poland**, the relevant legislation allows collective proceedings for claims related to liability for a loss caused by a hazardous product (product liability claims), torts, liability for the non-performance or improper performance of contractual obligations, unjust enrichment, and other matters with regards to claims for consumer protection. As a rule, the Polish collective proceedings may not be used to pursue claims arising out of the violation of personal rights, with the exception of claims that result from bodily harm or disturbance of health, including claims of the closest family members of the claimant, deceased as a result of a bodily harm or disturbance of health. Regarding this category, the pursuit of pecuniary claims in group proceedings is limited to the request for the establishment of the defendant's liability[39]. Finally, **Spain** recognizes collective redress mechanisms in a variety of specific sectors including consumer law, environmental law, competition law, antidiscrimination law, labour law and industrial property law (trademarks). Additionally, standard form contracts can be challenged via collective redress actions horizontally, disregarding the sector in which they are applied. However, it is not a proper horizontal mechanism[40].

(3) **Three Member States provide for a horizontal framework in their legislation**: Austria, the Netherlands and the United Kingdom. In **Austria**, the procedural instrument in place, which without being a fully-fledged collective redress mechanism still closely resembles it, is based on existing procedural tools and as such is not limited in scope[41]. In the **United Kingdom**, apart from the Competition Act mechanism which is sector specific and applies only to competition law claims brought within the Competition Appeal Tribunal (CAT), all the mechanisms (the representative action and the group litigation order) are horizontal and capable of being applicable to any claim irrespective of its subject matter. This is consistent with the general approach in English procedure where procedural law is trans-substantive, meaning it is applied uniformly in all types of action regardless of the area of the law at stake[42]. The same can be said about **the Netherlands**, where both mechanisms are horizontal.

While, as was just illustrated, some states have adopted a horizontal approach and this must be welcomed, they are a minority, and the sectoral approach still prevails within the European Union.

1.1.3 The opt-in and opt-out systems

The procedural rule governing how affected individuals may join the group is a particularly sensitive and difficult issue. It does not only pertain to procedural law, which is already a sensitive area itself, but also to constitutionally consecrated principles which

[36] See German questionnaire, introduction and question 1.1.
[37] Code de la Consommation of the Luxembourg, in particular art. L. 320.1 to L. 320.7 (Title 2).
[38] Loi du 30 juillet 2002 réglementant certaines pratiques commerciales, sanctionnant la concurrence déloyale et transposant la directive 97/55/CE du Parlement Européen et du Conseil modifiant la directive 84/450/CEE sur la publicité trompeuse afin d'y inclure la publicité comparative.
[39] See Polish questionnaire, question 1.1.
[40] See Spanish questionnaire, question 1.1.
[41] See Austrian questionnaire, question 1.1.
[42] See British questionnaire, question 1.1.

vary amongst Member States. The divergences in the different European countries hinder the development of a European instrument.

The existing mechanisms may either be opt-in, opt-out or a mixture of both rules. The former obliges potential members of the group to expressly join the group: if they do not do so, they will not be able to avail themselves of the decision. On the contrary, under an opt-out system all potential members of the group are considered to have tacitly joined the group and will be able to avail themselves of a positive decision even if they did not ask for it, unless they expressly opted-out of the group.

The opt-in system is generally perceived as more consistent with the Member States' legal and constitutional traditions, notably with the principle of party autonomy. Moreover, it is also considered as more compatible with the so-called loser-pays principle as, under an opt-out system all members, including those who remained inactive will be liable for the counterparty's expenses if the case is lost. Conversely, in an opt-in-system only those opting in are responsible for their share of the counterparty's expenses. Vice versa, for a successful defendant it will be difficult to receive compensation for the legal costs, where the individual claimants take no active part in the proceedings and are mostly unknown. Furthermore, in terms of the preclusive effects of the court's decision, meaning that the final judicial decision is preclusive of all claims that were or could have been asserted in the first proceeding (inadmissibility of future claims between the same parties, on the same objective factual grounds), it should operate only against those who were formal parties to the first proceedings. By contrast to an opting-out mechanism, an affirmative expression to opt in to group membership is a much clearer manifestation of informed consent, in terms of accepting the potential preclusive effects of introducing the collective redress action. Nonetheless, as people tend not to actively choose an option even when they could, an opt-out solution seems to be the more powerful tool[43] as it would overcome the rational apathy of victims and provide for a better deterrent effect. An opt-out solution combined with compensatory relief could thus be considered the most efficient solution to deal with widespread and disperse damages.[44]

(1) **The legislation in five Member States imposes an opt-in only instrument**: **Austria**, **France**, **Germany**, **Italy** and **Poland**. In addition, although it is not the only collective redress mechanism existing in this Member State, the **United Kingdom** provides for one horizontal opt-in only instrument. European Member States seem to clearly favour the opt-in system. In **Italy**, once the *azione collettiva* is admitted and the class is defined (ie: the homogeneous claims that can be bundled in the collective proceedings), the seized court orders the most appropriate public notice so that all affected consumers are informed of the action and of the right to opt-in before the expiration of the term. Accordingly, the final decision is binding only on class members that opted-in[45]. Likewise, the **Austrian and Estonian (for injunctive redress only for the latter) systems** are opt-in and generally considered to be working well in practice[46]. While the **French mechanism** is also based on an opt-in system, it is worth

[43] *Statement of the European Law Institute on Collective Redress and Competition Damages Claims* (European Law Institute 2014) 43; Georg E Kodek, ‚Kollektiver Rechtsschutz in Europa – Diskussionsstand und Perspektiven', in Walter Blocher, Martin Gelter and Michael Pucher (eds.), *Festschrift für Christian Nowotny zum 65. Geburtstag* (Manz 2015) 143.
[44] Kodek, *ibid,* 148.
[45] See Italian questionnaire, question 1.5.
[46] See Austrian and Estonian questionnaires, question 1.5.

presenting it in further details as it is a peculiar form of opt-in[47]. Indeed, the French system provides for what is called a "late opt-in rule". Potential claimants can join the group only when the decision on liability has been handed down and within a period of time that is fixed by the court (e.g., for consumer matters, this period cannot be under two months and extend beyond six months). To date, the late opt-in system has not given rise to abuses. However, given no *action de groupe* has reached phase two yet, it may be too early to draw clear cut conclusions. What can already be asserted is that, in theory, late opt-in gives claimants a better view on the success of their claims as they are less exposed to the risks associated with the litigation. This should reduce the possible risks of rational apathy and incentivize them to participate. Nonetheless, late opt-in also creates some uncertainty for the court and defendant(s) since they may have no clear views on the size of the actual class and the size of the loss. Such a system also tends to extend the length of the proceedings, experience has shown that several years are already needed to go through the first phase[48]. As for the **United-Kingdom**, the issue must be presented in light of one of the three existing instruments. The question whether the system is opt-in or opt-out does not really arise when it comes to representative actions as such an instrument merely provides a definitive legal answer to a specific issue in dispute which can then be used individually by the claimants. However, the issue is relevant when it comes the Group Litigation Orders (GLOs) which is an opt-in system. Individual claims are issued as individual claims but where there is a sufficient number of claims raising the same or a similar legal or factual issue, one or more of the parties to those claims may apply to the court for a GLO. If such application is approved by the judge, directions will then be given as to the date by which further claims within the scope can opt-in and join the GLO[49]. **Poland** also implemented an opt-in only mechanism. While the mechanism appears, in principle, satisfactory in terms of access to justice (forming the group is not the reason for the rather unsatisfactory functioning of the group proceedings), the length and complexity of the certification stage are criticized by the practicing lawyers[50]. **Germany** aims at providing an opt-in system with its new instrument[51]. There are two steps in this model: once a successful action by a qualified entity for a declaratory judgment has been filed, consumers must then bring their own individual claim for damages based on the said declaratory judgment. They benefit from the declaratory judgment's binding effect only if they have their claim registered at the beginning of the representative action. This is different from the other three instruments (the different types of representative actions) in Germany, which can be considered neither opt-in nor opt-out, as no group members are involved in the group action[52]. This includes the mechanism provided for under the Capital Market Test Case Act, where individual actions by investors are required from the onset, meaning that if a test case is admitted, all claims with the same question of fact or law will be suspended and later bound to the decision in said model case. Only in the event of the test case plaintiff entering into a settlement will the investors be given the opportunity to opt-out.

[47] See French questionnaire, question 1.5.
[48] The UFC Que Choisir v. Foncia case was introduced in October 2014 and the final decision regarding phase 1 was given in 2018: TGI Nanterre, decision of 14 May 2018, n°14/11846. The Familles Rurales v. SFR case which was introduced in May 2015 is still pending.
[49] See British questionnaire, question 1.5.
[50] See Polish questionnaire, question 1.5. and 1.6.
[51] The action for a declaratory decision on the liability of the defendant to pay a compensation, this mechanism should be enacted towards the end of 2018. See more generally German questionnaire, question 1.5.
[52] Representative actions by consumer associations and other designated entities for cease-and-desist orders, representative actions for skimming-off illegally gained profits as well as actions under the Capital Market Test Case Act.

(2) **Only one Member State favours the opt-out rule**: **the Netherlands**. At the opposite end of the spectrum, the Dutch legal system imposes an opt-out rule only, for both the Collective Settlements of Mass Claims Acts procedure and the collective action procedure based on articles 3:305a-d of the Dutch Civil Code. Indeed, article 3:305a paragraph 5 provides that "a judicial decision has no effect with respect to a person whose interests are protected by the legal action, *but who has made clear that he does not want to be affected* by this decision, unless the nature of the judicial decision brings along that it is not possible to exclude this specific person from its effect".

(3) **Two Member States provide for a mixed system**: Belgium and the United-Kingdom (albeit only for one of its instruments) offer both possibilities. **Belgium** allows the courts to choose whether claimants should opt-in or out of the group having considered the demand of the representative entity and which is most appropriate in the case at hand. However, if the parties agree to the reaching of an agreement, they may choose themselves whether they prefer the system to be opt-in or opt-out.[53]. There is, however, one limit: the possibility to choose is excluded if foreign claimants are involved as they *must* opt-in, opting-in is also mandatory in the case of a collective corporal or moral prejudice[54]. The **UK mechanism** provided for under the Competition Act was reformed to be both opt-in or opt-out depending on how the CAT certifies the proceeding.

(4) **In one Member State, the system depends on the type of redress sought**: in **Romania,** the provisions of Article 12, paragraph (3) of Law no. 193/2000 on unfair terms in consumer contracts[55], introduced an **opting-out collective redress action for injunctive relief**. In the first stage, the qualified entities, e.g. associations for consumer protection that fulfil the requirements set by articles 30 and 32 of the Governmental Ordinance no. 21/1992, modified, have the right to introduce judicial claims against a professional whose standard-form contract[56] contains unfair terms. The judge's decision (ordering the professional to eliminate those unfair terms from all existing contracts) will benefit all current customers of the respective professional, unless there are individual consumers who expressly prefer remaining under the incidence of the original, unmodified contract. After the professional has been requested by the judge's final decision to remove certain clauses containing unfair terms in consumers contracts, any consumer who wishes to recover the payments made on the basis of the unfair terms **may use either an individual action in redress or compensation or an opting-in action** in cases in which several consumers (who initially benefited from the admission of the opting-out collective action on voidance of unfair terms) agree to a common mandate of representativeness. Let us note that, **as opposed to the opting-out collective action** on unfair terms (injunctive redress only) which is expressly regulated by articles 12-13 of Law no. 193/2000 (as modified in 2012), common interest representation is not described in the recently modified Law no. 193/2000 on unfair terms. Therefore, it is the traditional common interest mandate contract that is often used in collective redress actions, which implies the use of an opting-in mechanism (such in cases of collective redress in compensation in litigation against banking unfair terms in consumer credit

[53] E. FALLA, « Section III. - Particularités de la loi belge de 2014 » *in La réparation des dommages de masse*, Bruxelles, Éditions Larcier, 2017, pp. 87-92.
[54] See Belgian questionnaire, question 1.5.
[55] As modified on 3 August 2012
[56] A standard-form contract is one whose general conditions are determined in advance by one of the parties without negotiation.

contracts), as retained by the Commission in its study[57]. According to Articles 61 to 63 of the Romanian Civil Procedure Code, natural or legal persons, third party to the litigious procedures, may use the "voluntary intervention in a civil litigation" mechanism on a general basis. The procedural purpose of this mechanism is to allow a third party or a subsequent party to join an action engaged between the originating parties. Where the claim emanates from the express assent of the intervenient, the procedural intervention will be deemed "voluntary". This has been used in Romanian jurisprudence in litigious procedures involving consumers and credit professionals, in unfair contractual terms actions. Therefore, the **compensatory mechanism is an opt-in collective redress action**[58] while regarding injunctive relief, the opt-out rule is applied – the rule hence depends on the redress sought.

(5) **In two Member States it is neither opt-in nor opt-out**: Estonia and Luxembourg. It is neither in **Estonia** as the country does not have a compensatory collective redress instrument. However, this can be slightly nuanced as the Consumer Protection Act (2015) provides the possibility for Consumer associations to represent consumers in court (Consumer Protection Act § 19 (2)4)). From this rule one may conclude that it is possible that consumer associations can file the claim on the basis of mandates given by consumers and that the system is opt-in[59]. Likewise, according to article L. 311-1 of the Consumer Code in **Luxembourg** the protected interests are the collective interests of consumers, rather than those of a specific group of consumers. As such, the question of opting-in or out does not arise[60] – an individual consumer cannot opt-out of being a consumer.

(6) **It is still unclear in one Member State**: **Spain** seems to provide for neither an opt-in nor opt-out system. Indeed, the Spanish collective redress system is drafted in an extremely complex manner. There is no clear indication in the Civil Procedure Act nor in specific legislation that deals with collective redress on the system being opt-in or opt-out. Therefore, the appropriate way of understanding where the system lays is looking at the res *iudicata effects* (erga omnes or not) of judgments rendered in collective procedures. Following *Sales Sinués*[61], the Spanish Supreme Court and the Spanish Constitutional Court have been qualifying the third party effect of collective proceedings, at least in the context of B2C contracts. Although it is too early to draw a conclusion, for the time being, the Supreme Court has not extended the effects of decisions rendered in collective proceedings to third parties if the judgment was not favourable to the consumer.[62] Therefore, non-litigant consumers can profit from the *res iudicata* effects of

[57] See 'State of collective redress in the European Union in the context of the implementation of the Commission Recommendation', JUST/2016/JCOO/FW/CIVI/0099, Prepared by The British Institute of International and Comparative Law, November 2017, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847 hereinafter the Commission's study.
[58] See Romanian questionnaire, question 1.5.
[59] See Estonian questionnaire, question 1.5.
[60] Study on the State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation, JUST/2016/JCOO/FW/CIVI/0099.
[61] In *Sales Sinués* (Joined Cases C-381/14 and C-385/14, ECLI:EU:C:2016:252) the CJEU decided that a collective action could not impede consumers from bringing an individual complaint (not even the same claim, although individually, against the same party is restricted) as this would affect the right to an effective and adequate protection in the sense of Directive 93/13 (UCTD). The CJEU was dealing with pendency, the logical procedural stage prior to *res judicata*, and the defence had been brought by banks, which had been sued in both collective and individual proceedings. *Sales Sinués* proved to be a great challenge to the third party effect of collective actions, the fate of which seems to have been decided by the lack of possibility to 'opt out' in the Spanish collective redress system (which was declared contrary to Art 7 UCTD).
[62] SSTS 24 February 2017 (ES:TS:2017:477), 25 May 2017 (ES:TS:2017:2016) and 6 June 2017 (ES:TS:2017:2249) do not extend the effects that were not entirely favourable to consumers. STS 8 June 2017

collective proceedings if it favours them, whereas businesses cannot oppose non-favourable aspects of judgments rendered in collective proceedings to individual claimants. This seems to put the Spanish collective redress system, as it stands, in an awkward position in the international arena: neither opt-in (in which judgments have no *res iudicata* effects on members of the group that do not join) nor opt-out (in which judgments have *res iudicata* effects, whether favourable or not). It allows consumers to join the proceedings (as in opt-in systems) but even if they do not join, they can benefit from favourable decisions rendered in collective proceedings in subsequent individual actions[63].

Once again, those discrepancies are very problematic. They raise issues of private international law, especially in this globalised context. These divergences will potentially produce incentives for opportunistic behaviours as well as forum shopping. Issues related to the recognition of judgments applying a law favourable to collective redress and consumers will multiply within the EU. In an even more disquieting way, what will happen if a judge must recognise a decision although its own domestic legal system prohibits opt-out collective proceedings? In addition, these discrepancies will impede the development of a harmonized European instrument.

1.1.4 Standing

Standing (i.e. who can bring the action) is a crucial issue. Indeed, depending on how restricted the framework is, it is considered a possible response to potential abuses. It is generally thought that if legal standing is subject to a strict framework it will decrease the possibility of abuses. In addition, in some countries the denomination of the instrument varies depending on who can bring the action. Legal standing varies from one Member State to another. Some only grant it to representative entities, others only enable members of the group to bring an action while the rest authorizes both representative entities and members of the group to initiate the said action. Where only representative entities have legal standing, differences also lie in the type of entities authorized to bring an action as some Member States only allow qualified entities to bring an action and the criteria underlying the notion of "qualified entity" may be different from one Member State to another.

A **representative entity** is a specialised body which is representative of the interests of the group of claimants.

(1) **In seven Member States, only designated entities are granted standing**. **Belgium, Estonia, France, Germany, the Netherlands, Romania and Spain.** There thus seems to be a clear tendency to circumscribe legal standing to representative entities only. However, it is worth noting that for one of those eight Member States, namely Italy, this is only true regarding injunctive redress but not for compensatory redress.

(2) **In two out of the three existing mechanisms in the United-Kingdom standing is only granted to a class member**: representative actions and Group Litigation Orders (GLOs). Indeed, A GLO is a case management mechanism and not a form of

(ES:TS:2017:2244), instead, considers that the favourable effects should be extended to individual proceedings.

[63] See Spanish questionnaire, question 1.5.

representative action. It is a means which a large number of individual claims, which remain individual claims, are managed together. One claim, and hence one claimant, is chosen to be the lead claim.

(3) **In three Member States, standing is granted to both affected class members and organisations**: in the **Competition Act Mechanism in the United Kingdom**, in **Austria** and in **Luxembourg**. In the **United-Kingdom's** Competition Act 1998 mechanism, individuals or organisations with no direct interest in the proceeding are also authorised so long as the Competition Appeal Tribunal is satisfied that it is 'just and reasonable' to permit to act as the representative[64]. As for **Austria**, the "Austrian class action" does not need to be brought by a qualified association. Any entity or even an individual can serve as a class representative whenever potential class members are willing to assign claims to them[65]. Finally, regarding **Luxembourg**, any person, professional organisation and body referred to in article L.313-1 and following of the Consumer Code, the Minister in charge of consumer protection, the CSSF (Commission de Surveillance du Secteur Financier) and the Commissariat aux Assurances all have standing to seek an injunction in the areas covered by the Luxembourg instrument according to articles 320-1 to 320-7. A list of criteria bodies must comply with is set in article L.313-1 and relate to the social purpose of the body, the number of members, how long the body has been in existence and the non-profit character of the body.

(4) **In one Member State, standing is granted to a "representative" who can only be a member of the group who acts on his own behalf in the name of all the group members or to a regional consumer ombudsman.** This is the case in **Poland** as per the Act of 17 December 2009 on Pursuing Claims in Group Proceedings[66]. It is worth noting that while the **Belgian** rule on standing excludes members of the group, it does grant standing to "the Consumer mediation service" which is the ombudsman's service for consumers[67].

(5) **In one Member State, the rule on standing depends on the redress sought (whether injunctive or compensatory): this is the case in Italy.** As a general rule for **injunctive collective redress only**, **Italy** provides criteria, in Article 137 of the *Codice del consumo* and in the Ministerial Decree of 21 December 2012, n° 260, that private organisations must fulfil in order to be granted legal standing. They must be non-profit, have consumer protection as their exclusive statutory purpose, have demonstrated three years of continuous activity, have a minimum number of paying members and have presence in five different regions. Entities fulfilling those requirements are then presented in a list drawn up by the Ministry of Economic Development under Article 140 of the *Codice del consumo*. They must also be representative of the socio-economic category whose collective interest is at stake. This differs slightly for **compensatory collective redress** actions, as standing is granted to individual class members (Article 140 *Codice del consumo*). This can be done personally as lead plaintiff, through a committee they belong to or through a consumer association. However, in practice, most actions tend to be filed by consumer associations[68].

[64] See section 47B(8) of the Competition Act 1998 and rules 78(1) to (4) of the Competition Appeal Tribunal Rules 2015. Also see British questionnaire, question 1.2.
[65] See Austrian questionnaire, question 1.2.
[66] (Official Journal 2010 n° 7 item 44 of 18 January 2010). See more generally Polish questionnaire, question 1.2.
[67] See Belgian questionnaire, question 1.2.
[68] See Italian questionnaire, question 1.2.

Among the seven national systems where only certain entities may bring an action, differences arise regarding the characteristics of such entities. In some countries, the authorized entities are clearly designated in the law while other legal systems merely lay down criteria the entities must meet. For example, in **Estonia**, the Consumer Protection Board as well as the management board of the Financial Supervision Authority are both envisaged by the law as entities authorized to file an action[69]. Similarly, in **Spain**, specific entities can bring actions depending on the legal sector concerned. In labour law, standing is granted to trade unions. In anti-discrimination law, standing is recognized to associations whose main purpose is to pursue the equality between genders, as well as trade unions and the public prosecutor. Standard terms in contracts can be challenged by corporate associations, professional associations, consumer associations and the public prosecutor. Collective redress in consumer law, included in the national Civil Procedure Act[70], grants standing to another set of entities[71].
Contrastingly in **Belgium, France, Romania**, **the Netherlands, Germany and Italy** the law provides a number of requirements entities must meet.

The criteria often relate to the **how long the entity has been in existence**, its **purpose** and the **relation between its purpose and the collective interests concerned**. There is also a criterion related to the **non-profit character** of the entity. However, the various national frameworks are not identical as they **differ in severity**.
(1) The **Belgian legislation**[72] grants legal standing to the Federal Ombudsmen, a limited number of consumer organizations, as well as to non-profit organisations meeting certain criteria such as a minimum of three years of legal capacity, ministerial recognition, an overlap between the activity of the organisation and its statutory aim and the former must be related to the collective interest concerned. This is rather strict framework. An even stricter framework is provided by the **Romanian legislation**. Indeed, in order to be considered a qualified entity admitted under law 193/2000 for representative injunctive actions, the entity must be non-profit, its sole purpose must be the pursuit of the interests of its members or of the general interests of consumers, it must have at least 3000 members at national level and have local branches in at least 10 territorial divisions. Finally, it must have been active for at least three years in the field of consumer protection at local or regional level[73].
(2) Only accredited associations are entitled to initiate the proceedings under the **French** *action de groupe* model. Legal requirements for associations depend on the sector at stake. For example, in consumer law, associations must be representative at national level, have at least one year of existence, show evidence of effective and public activity with a view to the protection of consumer interests, and have a threshold of individually paid-up members (this covers around 15 associations to date). In health law, the action is initiated by accredited associations of users of the healthcare system. Associations must be representative at national or local levels (i.e., around 500

[69] Article 65(3) of the Consumer Protection Act for the former and Article 65(4) of the same Act for the latter. See more generally Estonian questionnaire, question 1.2.
[70] Ley n° 1/2000, de 7 de enero, de Enjuiciamiento Civil. See more generally Spanish questionnaire, question 1.2.
[71] Within consumer law (Art. 11 Civil Procedure Act), a distinction is made between "collective" interests (easily determined or determinable consumers) and "diffuse" interests (**not** easily determined or determinable consumers). Where interests are "collective", standing is granted to consumer associations, the public prosecutor, as well as a group of affected consumers that represents the majority of them. Where interests are "diffuse", standing is only granted to representative consumer associations and the public prosecutor.
[72] Law of the 28th March 2014 inserting a Title 2 « Collective redress action" in the Code of Economic Law.
[73] See Romanian questionnaire, question 1.2.

associations to date). In the field of discriminatory practices, accredited associations should have been exercising their activities in the fields of disability or fight against discriminations for at least five years or should have been active for at least five years and the purpose of which includes the protection of an interest violated by the discriminatory practice. Lawyers are not entitled to start *actions de groupe* from their own motion[74].

(3) Under article 3:305a paragraph 1 of the **Dutch** Civil code which deals with collective actions, only "a foundation or association with full legal capacity that, according to its articles of association, has the object to protect specific interests, may bring to court a legal claim that intents to protect similar interests of other persons". Under article 7:907 paragraph 1 of the same code, only associations or foundations with full legal capacity, representing the interests of the of the individuals forming the group covered by the settlement instrument may enter into such a settlement agreement. More restrictive requirements are contained in the most recent Dutch proposal on the matter which provides that only representative, non-profit bodies that can show that they have the experience and expertise to bring a collective action as well as a proper governance structure, may bring a case. However, this is only possible after it has made reasonable attempt to settle[75].

(4) In **Germany** standing depends on the instrument at hand. For representative actions for cease-and-desist orders as well as for skimming off illegally gained profits consumer associations, Chambers of Commerce, Chambers of Crafts, professional associations as and qualified entities registered with the EU register under the Injunctions Directive all have legal standing. What are the current criteria for an entity to be considered a "qualified entity"? German "qualified entities" must have the statutory function of representing consumer interests and they must either be an umbrella organization for more than 3 associations in the same field of law or must have at least 75 members. They must also have existed for at least one year and must – according to their activities in the past – be able to fulfill their statutory tasks appropriately (Sec. 4 Act on Injunctions). Foreign entities have legal standing if they are registered in the EU Commission's register as a "qualified entity". While the current criteria are not as strict as those introduced within the framework of the new instrument[76], standing is already an issue. Indeed, Germany has registered more than 75 entities in the aforementioned register and, according to our German expert, the vast majority of them have no forensic experience with collective actions. Although numerous entities in theory qualify for registration and for legal standing, only very few have the capacity, money and staff to bring collective actions. With regards to the new mechanism, which will come into force later in 2018 (the collective action for declaratory judgments) stricter criteria for qualification than those already in place will be adopted in order to avoid abuses. Associations will have to be strictly non-profit, they will not be allowed to receive more than 5% of their budget from companies (to avoid funding of actions against a defendant by a competitor). There will also be an obligation for them to have been registered in the EU register as a qualified entity at the time of the filing an action for at least 4 years (this is meant to avoid the establishment of ad hoc associations acting in the interest of the victims of a particular mass harm – as tort claims are barred under the statute of limitation after 3 years, the 4 year requirement was introduced). Associations will also have to be of a particular size (have at least 10 other associations or 350 natural persons

[74] See French questionnaire, question 1.2.
[75] Proposal of November 16 2016 of the Minister of Security and Justice.
[76] The action for a declaratory decision on the liability of the defendant to pay a compensation, this mechanism should be enacted towards the end of 2018.

as their members). These criteria are viewed as **unnecessarily strict** by our German expert, Professor Astrid Stadler. As the collective action is not one for damages, but only an action for declaratory relief, associations have no financial incentive to bring such actions and therefore there is no real possibility of misuse. It is not possible to earn money. Only a few big consumer associations will be able to afford and prepare such actions. They will not be able to pick up all cases in which collective enforcement of consumer claims are necessary. It is argued by our German expert that the German legislature deliberately establishes a new instrument which will be of very little effect. It has been labelled as "placebo" legislation and was very influenced much by the business sector[77].

Issues with standing were not only identified in the German system. It was argued by UFC-Que-Choisir and one of our French experts, Associate Professor Rafael Amaro[78], that the rather strict prerequisite currently imposed by the **French legislation** impair the effectiveness of the French collective redress instrument. It was indeed suggested that in practice, only a few associations have the actual resources (financial, human etc.) to effectively initiate and handle *actions de groupe*. A report for the French National Assembly dated October 2016 also suggested allowing for *actions de groupe* to be brought by *ad hoc* associations as well as allowing actions to be brought by the French General Directorate for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF)[79]. This view seems to be shared by our Estonian expert who identified the lack of means and resources available for institutions to have the power to represent the affected individuals in cases of collective redress as the main shortcoming of the Estonian legislation[80].

Having considered all the above, one must strike the correct balance between guaranteeing efficient safeguards against abuses and ensuring the efficiency of the collective redress mechanism.

1.1.5 Publicity and availability of information on collective redress

Proper publicity is essential to ensure not only the deterrent effect of the instrument but also and more importantly, access to justice. There are essentially three sets of issues surrounding publicity: Who bears the responsibility? Who bears the cost? What kind of publicity?

Who bears the responsibility of making the information regarding the action and the decision available? **There is no key trend on this matter, it is very scattered**. The responsibility may be borne by:

- The court or court's secretary (Estonia, Poland, Spain, Belgium),
- The plaintiffs (United-Kingdom)
- The lead plaintiff (Italy)
- The defendant (France, Luxembourg, Romania) or
- A private entity (Germany)
- A public entity (Estonia)

[77] See German questionnaire, questions 1.2 and 1.4.
[78] De Crescenzo, K., Musso, C. (4 June 2018), Personal interview directed by R. Amaro.
[79] *Rapport d'information n°4139 déposé en application de l'article 145-7 du Règlement par la commission des affaires économiques sur la mise en application de la loi n° 2014-344 du 17 mars 2014 relative à la consommation*, October 2016, p.20, available at http://www.assemblee-nationale.fr/14/pdf/rap-info/i4139.pdf.
[80] See Estonian questionnaire, question 1.7.

In the Netherlands, it is a little particular given the importance of settlements. The responsibility and modalities of the publicity are decided in the settlement agreements. Finally, there may simply be no obligation to publicize, but a mere possibility (Austria).

Who bears the cost of the publicity?

(1) **In five Member States the cost of the publicity is borne by the one who was responsible or who decided to publicize the action**. On this point, the question regarding responsibility affects the question of the cost of publicity. For example, given publicizing a collective action in **Austria** is a mere possibility and as such, whoever publicizes it will bear the costs by themselves. This logic of making the individual responsible for the publicity of the action bear its cost is also present in other countries such as **Italy** where the responsibility and cost are borne by the lead plaintiff. Likewise, in **France**, **Romania** and **Luxembourg** the cost is borne by the defendant.

(2) **In two Member States, the question of the cost is decided in the settlement agreement**: **Belgium and the Netherlands**.

(3) **In two Member States, while the cost is initially borne by the one responsible for making the information available, the publicity cost may form part of the recoverable costs in the event of the claim succeeding under the loser pays principle**: **the United-Kingdom** and **Spain**.

(4) **In two Member States the cost is, to some extent, borne by the State itself**: indeed, in **Estonia**, the Consumer Protection Board is responsible for the publicity of the trader's or producer's activities which adversely affected the interests of consumers and this board is financed from the state budget. In **Germany**, albeit only for the Capital Market Test Case Act, there is an official electronic register to publish cases and decisions. This register is run by a private publishing house on behalf of the Federal Government and financed by the Federal Government.

(5) **In one Member State, the cost is simply borne by the claimants or, where there is a cost waiver, by the Treasury of State**: Poland.

Publicizing an action may take many forms, it can either be done by publishing information on the court's website, on the Ministry for Economy's website, on the representative entities' website, or even in a newspaper article, amongst other means.

Publicity touches upon the more general issue of the availability of information on collective redress. This issue is closely linked to that of access to justice: potential claimants need to access proper information on collective redress actions, especially in an opt-in system, in order to join the group in time.

We already mentioned the issues of who provides said information, who pays for it and what form it may take. However, **the issue of when the information is to be communicated is also crucial.** In **France**, which follows a late opt-in system, the court decides on how the case will be advertised in the media after it has handed down its decision on liability, in other words, after the completion of "Phase one". Potential claimants can then opt-in. In **Spain**, the secretary of the court will publicize the action in the media (national, regional or local, depending on the scope of the action) once it has been admitted. In addition, where the consumers are identified or at least easily identifiable, they must be notified personally before the action is filed. **The timing of the publicity is a complicated issue given that the correct balance must be found between proper information of the potential claimants and protection of the reputation of the defendant before the court decision/settlement agreement**. This is perfectly illustrated by the current situation in France. Often,

associations have accompanied the launch of their actions with extensive media coverage, sometimes several months before the actual filing of their claims. For example, in the case *Confédération Nationale du Logement (CNL) v. Immobilière 3F*[81], the launch of the action was extensively relayed in off-line and online national newspapers in November 2014, even though the claim was formally registered in January 2015. Similarly, the association APESAC announced the launch its action against Sanofi[82] in December 2016 but the action officially started in May 2017. This has been done in consideration of the fact that potential claimants need to be informed early enough to preserve any proof (documentation) they may have. This is problematic as it may lead to severe reputational costs for the defendant.

It can be pointed out that an easy way to ensure proper information is the implementation of a national registry, as suggested by the European Commission in its 2013 Recommendation. However, it seems that Member States did not follow this recommendation as, within the field of this study, the **United-Kingdom** and **Germany** are the only states to have put such a registry in place. In the former, statistics are kept for Group Litigation Orders, due to the fact that a publicly available register of such claims must be kept[83]. In the latter, it has been done only for the Capital Market Test Case Act. Very interestingly, the new German mechanism (the representative action by consumer for a declaratory judgment in consumer mass harm cases) will rely on an electronic register whereby consumers can register at the beginning of the representative action. The publication will disclose the name of the defendant(s) and the action will proceed only if more than a certain number of consumers have registered within a set period of time. Although the numerosity criteria (ie: one requiring there is a minimum number of claimants) is questionable, this mechanism may be a solution to keep in mind.

1.1.6 Financial issues

The general issue of funding encompasses four sets of issues which need to be addressed: legal costs, the application of the "loser-pays" rule, legal aid and third-party funding.

Legal costs cover courts' fees, expert fees, witness fees as well as lawyers' fees, in other words they refer to the costs of proceedings. Whilst lawyers' fees are usually analysed together with all the other costs, they will be distinguished for the purpose of this section as they raise different issues.

a) Costs of proceedings (lawyers' fees excluded)

The costs of proceedings are regulated in all Member States within the scope of this study (Austria[84], Belgium[85], Estonia[86], France[87], Germany[88], Italy[89], the

[81] CA Paris, Pole 4 Ch. 3, 9 novembre 2017, n° 16/05321.
[82] TGI Paris, 21 March 2018, n°17/07001.
[83] https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders.
[84] Bundesgesetz vom 27. Nov. 1984 über die Gerichts und Justizverwaltungsgebühren, BGBl 1984/501.
[85] Arrêté royal du 26 oct. 2007 fixant le tarif des indemnités de procédure visées à l'article 1022 du Code judiciaire et fixant la date d'entrée en vigueur des articles 1er à 13 de la loi du 21 avril 2007 relative à la répétibilité des honoraires et des frais d'avocat.
[86] Riigilõivuseadus (RT I, 30.12.2014, 1), known as State Fees Act (RT I, 30.12.2014, 1).
[87] Act n°77-1468 of 30th december 1977 and Arts. 695 and 696 of the Code de Procédure Civile).
[88] Gerichtskostengesetz (GKG).
[89] Presidential Decree No 115 of 30 May 2002 (Law Gazette No 139/2002).

Netherlands[90], Luxembourg[91], Poland[92], Romania[93], Spain[94] and the United-Kingdom[95]). However, not all national provisions cap such costs and as such, those costs might act as a deterrent to individuals with meritorious claims. Moreover, in Luxembourg for example, professionals tend to also charge their own private sector fees[96]. This is why regulation of legal costs does not always ensure certainty as to the costs of the proceedings.

b) Lawyers' fees

Lawyers' fees are freely agreed upon in most Member States as it is the case in 11 out of the 12 Member States studied: Austria, Belgium, Estonia, France, Italy, Luxembourg, the Netherlands, Poland, Romania, Spain and in the United Kingdom. However, it should be noted that in **Austria** and **Italy** in the absence of an agreement, the fee may be determined by reference to legislation.

Lawyers' fees are regulated in one Member State: in **Germany** such fees are subject to the so-called RVG (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte) which is the "Law on the Remuneration of Attorneys" as well as the Bundesrechtsanwaltsordnung (Federal lawyers' Act).

Nonetheless, even in the countries where the fees are freely agreed upon there is at least one matter which is usually regulated – **contingency fees**. The latter are fees which exclusively depend on the outcome of the case and are only paid where the latter is successful, the amount is usually contingent on the damages awarded.
Contingency fees are prohibited in 8 Member States: **Austria**, **Belgium**, **France**, **Germany**, **Italy**, **Luxembourg**, **the Netherlands** and **Romania**. Nonetheless, in Germany, in very extraordinary circumstances where access to justice depends on the contingency fee arrangement, such fees may be permitted (since 2007), but this rule very rarely used in practice.
Contingency fees are allowed, albeit regulated, in 4 Member States: **Estonia**, **Poland**, **Spain** and **the United-Kingdom**. In the latter country however, contingency fees are known as damage-based agreements and are capped to 50% of the sums ultimately recovered by the claimants.

Because contingency fees are prohibited in a majority of the Member States and are considered to encourage lawyers to litigate regardless of the interests of the claimants, in other words as encouraging abusive litigations, such a prohibition should be maintained at a European level.

c) Application of the "loser-pays" rule

The "loser-pays" rule is a rule according to which the losing party supports the costs initially borne by the other party, or at least part of those costs.

[90] Wet griffierechten burgerlijke zaken, Annex.
[91] Règl. Gd. 27 décembre 1980 portant abrogation des dispositions accordant de droits et émoluments aux greffiers and Règlement grand-ducal du 24 janvier 1991 portant fixation du tarif des huissiers de justice (as modified).
[92] Ustawa o Dochodzeniu Roszczeń w Postępowaniu Grupowym, art 25.
[93] Law no. 146/1997 on court fees and Law no. 188/2000 on bailiffs.
[94] Art 241 Civil Procedure Act and Law 53/2002 of 30 dec. 2002, art. 35.
[95] Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018
[96] Mario Di Stefano, Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, Luxembourg report, 30th Dec. 2007.

This rule is applied in all twelve Member States forming part of this study and is considered as **an adequate and efficient safeguard against abusive litigations** because it calls claimants to reflect on the certainty of their rights.

Nonetheless, three experts[97]called for caution given this rule might act as a deterrent to such an extent that claimants might even be discouraged to bring a meritorious claim. As such, **it was suggested that this rule be backed-up by proper legal aid**.

d) Legal aid

Because of the aforementioned costs resulting from initiating an action as well as the application of the "loser-pays" rule, legal aid is an important issue. Legal aid refers to financial support offered to those who cannot afford to bring an action despite having a meritorious and legitimate claim.

Legal aid is particular in the context of collective redress action. Indeed, it is usually afforded to natural persons lacking financial resources, however such collective redress actions usually involve entities, which are sometimes the ones initiating the action. This partly explains why such financial support is not available in all Member States.

Legal aid is unavailable in two Member States: **Belgium** and **Luxembourg**. In the former, the Code of Economic law does not provide for financial support, whereas in the latter the legislation only grants legal aid to natural persons, thus excluding legal persons which have standing to bring a collective claim in this State.

Legal aid is available under extremely strict conditions in two Member States: **Italy** and **the United Kingdom**. In both states it is difficult to obtain legal aid because the income threshold in the national legislation is very low and thus a very limited number of claimants can benefit from it.

Legal aid is normally available in seven Member States: **Austria**, **Estonia**, **France**, **Germany**, **the Netherlands**, **Romania** and **Spain**. It is however worth noting that in the Netherlands it is quite rare for a representative entity to be granted financial aid.

The attribution of legal aid depends on the person or entity bringing the action in one state. In Poland, the relevant Act does not allow representatives to obtain legal aid (legal assistance nominated by court and a waiver of court fees). However, in cases where a regional consumer ombudsman is a representative, the court fee is waived.

e) Third-party funding

Third-party funding is a complex and novel issue which is an interesting alternative to legal aid, especially where the latter is unavailable. It is hard to detect a trend in this area as the matter is mostly unregulated and, more importantly, undefined. Indeed, there is no clear definition as to what third-party funding encompasses.

[97] Our Romanian Expert, Juanita Goicovici and our Austrian experts, Lucas Klever and Sebastian Schwamberger – see questions 4.2 and 4.3 of relevant questionnaires.

Third-party funding can generally be understood as "a controversial business arrangement whereby an outside entity—called a third-party funder—finances the legal representation of a party involved in litigation or arbitration in return for a profit"[98]. However, a number of questions remain unanswered. Should receivables assignments be considered as third party funding? What is the exact nature of third-party funding? Is it a loan contract or a *contrat aléatoire* (for example an insurance contract) or another form of contract? Given there is no consensus on this matter, **establishing an autonomous European definition is advisable**.

(1) Third-party funding is unregulated in all twelve Member States studied. However, this lack of regulation does not mean it is prohibited and unused. Whilst this issue has yet to be addressed by national legislators, it has already been considered by some national courts and addressed by other stakeholders.

(2) Three Member States seem favourable, or at least do not seem hostile, to third-party funding: **France**, **Austria** and the **United Kingdom** (from most to least favourable).

In **France** third-party funding is not directly regulated by a dedicated set of rules and no legal provision prohibits it (but none expressly allows it neither). Nonetheless, some private initiatives are supporting third-party funding for collective litigation and discussions on third-party funding have also been particularly significant in the realm of arbitration. The French International Chamber of Commerce has published guidelines on third-party funding in arbitration in 2014[99]. On 21 February 2017, the Paris Bar Council (Conseil de l'Ordre du Barreau de Paris) adopted a resolution supporting third-party funding in the context of international arbitration[100]. In parallel, several other French stakeholders have published interesting recommendations to accompany the development of third-party funding (see in particular the 2014 report by Club des Juristes[101] and the 2015 Report by the French Bars National Council (Conseil National des Barreaux))[102]. In addition**, the French Supreme Court appears to consider third party funding as permissible**. For example, in a case related to inheritance rights and in the context of third-party funding of an individual's action, the Court of Cassation quashed the Court of appeal that had "not sought, as it was invited, if the funder's remuneration was not excessive in relation to the service provided"[103]. This seems to implicitly suggest that the third-party funding agreement was valid in this case.

In principle, an agreement under which a "legal friend" should receive a pre-agreed share of the proceeds is void under **Austrian Law**. There is an ongoing debate on whether that applies also to commercial funding entities[104]. Nonetheless, litigation funding in Austria is an accepted practice. The Austrian Supreme Court has ruled that a potential invalidity of the funding agreement does not affect the validity of the assignment of claims and

[98] Sahani, V. S., "Reshaping third-party funding", *Tulane Law Review,* 2017.
[99] see here: www.icc-france.fr/docmail/Guide_pratique_financement_arbitrage_tiers.pdf
[100] see here: www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf.
[101] www.leclubdesjuristes.com/les-commissions/commission-ad-hoc-financement-de-proces-par-un-tiers/.
[102] CNB-RE2015-11-20_TXT_Financement-proces-par-les-tiers[P]%20(1).pdf.
[103] Cass. 1re civ., 23 nov. 2011, n° 10-16770.
[104] Cf Krejci, H., ‚Gilt das Quota-litis-Verbot auch für Prozessfinanzierungsverträge?' (2011) 8 *Österreichische Juristenzeitung* 342, 346 ff; Paul Oberhammer, 'Kollektiver Rechtsschutz bei Anlegerklagen', in Susanne Kalss and Paul Oberhammer, Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen, 19. Österreichischer Juristentag, vol II/1 (Manz 2015) 154.

that the defendant of the funded dispute has no standing to challenge the funding agreement[105].
In the **United Kingdom**, whilst third-party funding is not subject to statutory regulation, it is subject to regulation by the courts. Such funding was historically both contrary to public policy, a tort, and a criminal offence. It remains generally contrary to public policy. However, since the early 21st century the courts have permitted such funding as a means to facilitate access to justice, subject to court oversight.

Other Member States do not specifically address this issue because it is not a developed practice within the said states and, as such, has not yet called for much attention.

(4) When asked whether this lack of regulation on third-party funding was problematic, eight of our experts answered no[106]. Our experts pointed out that third-party funding is still very little used and given the lack of incentive for third-party funders to implicate themselves in collective redress actions this is not likely to change yet. Indeed, third-party funders participate in actions where they are almost certain to make profit; in collective redress claims the sum needed is larger than in an individual action, the outcome is extremely uncertain and even where the outcome is favourable the amount of the compensation is not very interesting for such funders, at least in the consumer law field. Moreover, **three other experts**[107] **considered that third-party funding should not automatically be forbidden in order to avoid abuses and that regulation would be sufficient**. They considered that **access to justice depended on it** as it is sometimes necessary to make use of this system.

As such, our experts are of the view that third-party funding should be regulated but it should not be the main concern of the legislator (be it national or European) when addressing the issue of collective redress.

(5) When asked how third-party funding should be regulated most of our experts mentioned:

- **Rules prohibiting potential conflicts of interest** (prohibiting one of the defendant's competitors to fund the claim for example)
- **Rules ensuring transparency of the funding** (claimant(s) obliged to declare the origin of the funds supporting the litigation)
- **Rules prohibiting the use of *quota parte litis* clauses** or at least **rules imposing a cap on such clauses**. It was for example suggested by one of our experts to consider as being against public policy agreements according to which funders claim more than 40-50% of the proceeds.
- **Rules preventing the third-party funder from influencing the proceedings** notably procedural decisions of the claimant(s).
- **Rules granting power to the courts to oversee such agreements**.

[105] Oberster Gerichtshof, Case 6 Ob 224/12b, 27 February 2013, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.
[106] Lukas KLEVER and Sebastian SCHWAMBERGER (Austria), Maître Denis PHILIPPE (Belgium), Associate professor Rafael AMARO and Alexandre BIARD (France), Professors Alberto MALATESTA and Gaetano VITELLINO (Italy), and Professor Francesco DE ELIZALDE (Spain). See questions 4.4 and 4.5 of the relevant questionnaires.
[107] Professor Astrid STADLER (Germany), Professor Joh SORABJI (United-Kingdom) and Juanita Goicovici (Romania).

1.1.7 Alternative Dispute Resolution Mechanisms

There is a general tendency, in some Member States, to shift from the traditional court system to alternative dispute resolution mechanisms. The latter are out of court procedures according to which the parties entrust one or more individuals of their choice with the task of resolving their dispute. It relieves the judiciary which cannot always follow the pace and thus enables expediency and flexibility. However, it is not without risk. Indeed, it must be pointed out that there is a risk of under-compensation of the claimants, arbitrators in the likes of mediators do not have to be legal professionals and finally, in order to work, there needs to be an incentive to use those mechanisms.

While the Directive on consumer ADR[108] was implemented in each Member State, the instrument itself does not seem to be tailored for the needs of collective actions. Besides, some countries are said to have ensured swift compliance with EU legislation, rather than having developed a genuine, collaborative ADR culture[109].

Only six Member States have a proper alternative dispute mechanism focused on mass harm situations, or at least containing specific rules on ADR in the context of mass harm situations: **Belgium, France, Italy, the Netherlands, Spain and the United Kingdom**. The mechanisms in place include the possibility to settle a collective claim or to have the dispute resolved by consumer ombudsmen. Among those countries, the alternative dispute resolution mechanism is thought to be efficient in four of them – Belgium, France, the Netherlands and Spain[110]. Our Italian experts pointed out that in their country, on the contrary, it is considered to be inefficient because neither the claimants nor the defendant have an incentive to settle whether the claim is small or not[111]. On the one hand, for low value claims the risk posed by the class action to the defendant is very limited because the number of consumers opting-in is very small. On the other hand, for high value claims, the problem is the attractiveness of the settlement mechanism itself because it will only bind the consumers who, not only opted-in the class action, but also in the settlement itself: not all consumers will take the time to opt-in twice and therefore, the settlement agreement does not entirely resolve the matter for the defendant.

A very interesting debate when it comes to the efficiency of alternative dispute resolution mechanisms is whether they should be optional or mandatory. Some[112] believe that it should be optional, so as to ensure that the claimants have the possibility to settle but do not have to, and that this would be sufficient to ensure an effective administration of justice. Others[113] however, ascertain that the optional character of such mechanisms deprives them from their effectiveness. Indeed, if there is no incentive to settle from the beginning of the action, the parties will not attempt to negotiate, whereas if they must go through this mandatory negotiation phase they might settle the claim, or at least

[108] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC
[109] This remark has been made in M.C. SOLARTE-VASQUEZ, The institutionalization process of alternative dispute resolution mechanisms in the European Union. The Estonian Legal Developments Experience, in L'Europe Unie, No. 7-8, 2014, p. 94 ff.
[110] See question 6.1 of the relevant questionnaires.
[111] See question 6.1 of the Italian questionnaire.
[112] Professor Irene Kull (Estonia).
[113] Professor Francesco de Elizalde (Spain).

certain aspects of it. The answer provided at a European level will need to take this debate into consideration.

1.1.8 Cross-border cases

As European integration progresses further, cross border cases between Member States (and non Member States for that matter) are becoming increasingly important. It has become crucial for the European Union to address multi-jurisdiction litigation through its regulations, directives, or through case-law. However, it appears that the international dimension of collective redress has yet to be homogeneously and thoroughly addressed.

Member States can be divided into two categories, **(1)** those where the national legislation does not address the international dimension of collective redress and **(2)** those where limited provisions on this matter are provided for by the national laws. It must also be noted that there is an absence of case-law on this specific matter **(3)**. This relative indifference can be explained by the absence of abuse resulting from the extension of jurisdiction **(4)**.

(1) The international dimension of collective redress is not addressed in the legislation of five Member States: **Luxembourg, Poland, Romania, Estonia** and **Austria**.
In **Romanian law**, Article 5 of Law n°193/2000 on unfair terms in consumer contracts does not address this dimension specifically.
Similarly, this issue is not addressed by the **Austrian legislation**. Nonetheless, Austrian case-law implicitly excludes the possibility of collective redress having an international dimension as it requires cases to share the 'same common core' and 'essentially the same questions of fact or law" in order for the claimants to avail from the mechanism in place[114]. A similar requirement exists in **Italy** (although this country does take the international dimension of collective redress into account) as the claims must concern "homogeneous" individual rights (Article 140 *bis* of the Codice del consumo) and in the absence of case-law on this matter, scholars assumed this requirement could not be satisfied where the claims were governed by different national laws[115]. It can be argued that if the claim stems from EU substantive law, issues of law should be considered common to all class members[116].
As pointed out by our Estonian expert, cross-border collective redress claims do not enjoy any special treatment in **Estonian** national private international law or the law of international civil procedure. This is also the case in **Luxembourg** and **Poland** which do not address this issue in their national legislation. In the latter, the relevant Act does not provide any limitation regarding nationality or place of domicile of persons joining the group (for example as regard claims for damages, where the loss was incurred on the territory of Poland, the place of domicile of the group member is irrelevant)[117].

[114] See Astrid Stadler, ‚Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen', in Matthias Casper, André Janssen, Petra Pohlmann and Reiner Schulze (eds.), Auf dem Weg zu einer europäischen Sammelklage? (Sellier 2009) 155, 160; Austrian Supreme Court, 15 September 2005, 4 Ob 116/05w. See also Austrian questionnaire, question 5.1.
[115] See G. Vitellino, "Consumer Protection Against Unfair Practices in Cross-Border Food Trade", in A. Lupone, C. Ricci, A. Santini (Eds.), *The right to safe food towards a global governance*, Torino, Giappichelli, 2013, 411 *et seq.*, at 451, fn 156, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2719048. See also Italian questionnaire, question 5.1.
[116] See G. Vitellino, *supra*. at 452-453.
[117] See Polish questionnaire, question 5.1.

(2) The international dimension of collective redress is addressed, albeit to a very limited extent in seven Member States: France, Belgium, the United-Kingdom, the Netherlands and Germany. However, cross-border cases are not acknowledged and dealt with in the same way. Some states only address the issue of **standing**, others the issue of **joining the group** and others the issue of **jurisdiction**.

France offers a general framework for ***actions de groupe***. Article 826-3 *alinéa* 2 of the *Code de procédure civile* (French Civil Procedure Code) establishes that the *Tribunal de Grande Instance de Paris* (Paris High Court of First Instance) has **exclusive jurisdiction** when the defendant is located outside of France.

In the **United-Kingdom**, as previously mentioned, a mixed system (both opt-in and opt-out) is provided for by the Competition Act 2015. Likewise, **Belgium** also provides for a mixed system. Both countries address the issue of cross border cases similarly: **where the claimants are domiciled abroad, they must opt-in the collective proceedings**, there is no more choice between opting in or out. This is a very limited answer to the issue of the international dimension of collective redress as it only pertains to rules on joining the group.

In **Spain**, article 47 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* regulates the recognition and enforcement of collective actions in article 47. It states that such judgments are recognized and enforced in Spain unless the international jurisdiction of the court of origin was not grounded on a forum equivalent to those established under Spanish law. However, there are no relevant provision on jurisdiction, standing or forming the group. Therefore, the international dimension of collective redress is addressed to an extremely limited extend[118].

The **Netherlands** and **Germany** both address the international dimension of collective redress for standing matters only. In the former, both for the Dutch collective Settlement Act and for the Dutch collective action, organisations or public body with full legal capacity which have their seat outside of the country but are on the list referred to in the so-called Injunction Directive[119] have standing to bring a legal claim before the Dutch courts for the protection of interests of individuals domiciled in the country where the entity has its seat. As for the latter, the same reference to the registry mentioned in the Injunction Directive can be found in the law. Therefore, consumer organisations from another Member State also have legal standing to bring representative actions for cease-and-desist orders or for skimming-off illegally gained profits as well as representative actions for a declaratory judgment[120]. In a similar manner, albeit not identical, the **Italian** *Codice del consumo*, under Article 139, also takes the international dimension of collective redress as far as standing is concerned[121]. However, it departs from the aforementioned legislations as, regarding injunctive relief, qualified entities from other Member States are placed on an equal footing with Italian entities. As a result, a French consumers' association may seize an Italian court whenever a collective interest of French consumers is affected, irrespective of whether it is included in the EU acts listed in Annex I to Directive 2009/22/EC. Nonetheless, as far as compensatory relief is concerned, the Italian legislation ignores the said international dimension.

[118] See Spanish questionnaire, question 5.1.
[119] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ L 110, 1.5.2009.
[120] See German questionnaire, question 5.1.
[121] See Italian questionnaire, question 5.1.

Therefore, **the international dimension of collective redress is, to a large extent, not taken into account and, even where this issue is addressed, it is only to a very limited extent on extremely precise matters**.

One of the reasons for this lack of provision, or to the very least, limited number of provisions, is that national legislators leave it to Brussels I (Recast) Regulation[122] to address such issue as they consider it provides a sufficient and efficient framework for cross-border collective redress claims, capable of avoiding potential abuses.

This tendency to not address the issue and to leave it to the Brussels I (Recast) Regulation to deal with those situations was identified as a shortcoming because the said regulation does not address this issue at all and leaves aside collective actions.

(3) There is an absence of case-law on this matter. There is limited case-law, within the Member States studied, concerning the **international dimension of collective redress**. This is significant, as it leads to an absence of national legal dispositions for **international collective redress** mechanisms. For example, the only known collective redress case brought to Italian courts (*Altroconsumo v Volkswagen AG and Volkswagen Group Italia,* frequently known as the "Dieselgate case") had no real **private international law** issues. The **law applicable** and **relevant jurisdiction** were both clearly Italian, therefore the international dimension of this case remained limited.

(4) None of our experts identified any abuses resulting from the extension of jurisdiction when it comes to collective proceedings. National courts within the European Union do not seem to have encountered abuses related to extension of jurisdiction by claimants. The lack of **parallel proceedings** may account for this absence of abuse throughout the various Member States studied. The inefficiency of **collective redress** mechanisms, where they exist, has been deemed by some as a reason for the absence of abuse.

It should be noted, however, that at EU level, the Court of Justice of the European Union has, in some cases, adopted a 'claimant-friendly' interpretation of article 5(3) of the Brussels I Regulation (now article 7(2)) in the mass competition litigation sector. This was apparent in the *Cartel Damages Claim (CDC)*[123] case-law where the victim could choose to bring actions before: "the courts for the place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered," or "the courts for the place where its own registered office is located". This was possible even where the link was tenuous or non-existent. Whilst some (notably our French legal experts, Associate Professor Rafael Amaro and Postdoctoral researcher Alexandre Biard[124]) may have considered this case-law to be an incentive to **law shopping** and ***forum* shopping** strategies for claimants-side stakeholders, others do not consider this to be negative ***forum shopping***, as Brussels I (Recast) Regulation provides for alternative *fora* regardless (e.g. defendant's domicile,

[122] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012.
[123] CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, 21 May 2015, ECLI:EU:C:2015:335.
[124] See French questionnaire, questions 5.1. and 5.2.

choice-of-court agreements or *locus damni*)[125]. Additionally, the 'claimant-friendly' interpretation of the Regulation in *CDC* seems to have been lessened by recent CJEU case-law such as *Schrems*[126] in 2018.

Therefore, whilst there has been no abuse related to cross-border collective redress yet, such abuse may result from the Brussels I (Recast) Regulation. This is notably the case as the Regulation does not specifically address collective redress. As such, the instrument does not sufficiently limit the framework for civil and commercial actions; provisions focused on individual redress may not be efficient in dealing with collective redress actions. An adequate framework, unambiguously addressing the issue of collective redress, is necessary.

1.1.9 Best practices

Having considered all main different characteristics of twelve national legal systems within the European Union, a number of aspects of the aforementioned national mechanisms are to be welcomed.

With regards to access to justice, the **availability of a compensatory collective mechanism** has proved its worth. In the same perspective, the **adoption of a horizontal or at least large sectoral approach** prevents unjustified inequalities between European citizens, going beyond the perceived dichotomy of a Europe for the citizens *versus* a Europe of the goods. This would also fill the gap created by a restricted sectoral approach.

Whilst the opt-in system is favored in a majority of European countries, it has, like the opt-out system, shown its limits. A more flexible approach should be considered, in the likes of the Belgian mechanism which is a **mixed-system** and adapts the system to the case at hand.

Standing must be regulated in order to ensure adequate safeguards against potential abuses are in place. Granting standing to **representative entities only**, excluding individuals and lawyers, is a path which has been followed by many Member States and has proved useful. This choice would avoid the potential abuses which could arise if lawyers were granted standing, such as for instance actions being brought despite them not being in the interest of the claimants. Nonetheless, the regulation surrounding representative entities should not be too strict because, whilst it would certainly prevent any abuse, it would also render the mechanism wholly inefficient as previously highlighted by our national experts.

In order to ensure the efficiency of the mechanism, the claimants and potential claimants, more generally society as a whole, should be adequately informed. Therefore, the example of the United-Kingdom where a **national registry was put in place**, in line with the Commission's Recommendation, must be underscored.

1.1.10 Shortcomings

[125] See G. Vitellino, "Consumer Protection" cited above, at 443-446.
[126] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37.

This general overview of the existing mechanisms also brought to light the many shortcomings persisting within the European Union.

Compensatory redress is still unavailable in a number of Member States.

Standing is too restricted in some Member States and this is counter-productive and dangerous as regards access to justice. Granting standing to qualified entities complying with very strict requirements results in a very limited of entities having standing which itself results in such entities not having the time nor the means to deal with every legitimate case.

Alternative dispute resolution mechanisms are not adapted to collective redress, a proper framework taking into account the specificities of such actions is essential.

The **international dimension of collective redress is insufficiently addressed** by Member States.

1.2 The insufficiency of European action up to date

1.2.1 The existing sectoral legislative rules

- In the field of consumer law: Injunctions Directive 2009/22/EC[127]

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, also called the Injunctions Directive, provides the possibility for qualified entities to bring an action to seek a court order for the cessation of violations of EU consumer law. It requires Member States to ensure such entities can act. This Directive is a big step towards consumer protection and access to justice. The definition of qualified entities is interesting and reminds the French framework introduced by the Loi Hamon (*Law of March 17, 2014, Related to Consumer Law*) as regard to standing. With the benefit of hindsight, a third option would however have been interesting and that is the option of an organisation certified by the State even if its purpose does not specifically refer to the protection of the interests referred to in the directive.

While the improvements brought by this Directive must be welcomed, one can only regret the rather limited scope of the instrument. It is only a sectoral instrument as it is confined to consumer law and only provides for injunctive relief leaving behind the issue compensatory relief. However, this has been noted by the European institutions given the most recent legislative proposals.

- In the field of commercial law: Late Payment Directive 2011/7/EU[128]

[127] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ L 110, 1.5.2009.
[128] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions Text with EEA relevance, OJ L 48, 23.2.2011

In the field of commercial law, the Late Payment Directive (2011/7/EU) requires Member States to ensure that there are adequate and effective means in place in their national legislation to prevent or to cease grossly unfair practices. Focus must be placed on the definition of such means, indeed, article 7 specifies that those adequate and interesting means should encompass a form of collective redress.

The extension of collective injunctive relief to commercial law seems like a logical follow-up of the introduction of such a mechanism in consumer law. Again, the sectoral approach and absence of compensatory redress mechanism is unfortunate.

- In the field of data protection law: General Data Protection Regulation (EU) 2016/679[129]

The General Data Protection Regulation (2016/679), more specifically article 80 of this regulation, introduces a possibility for data-subjects to mandate a non-profit organisation or association to bring an action on their behalf if the law of a member state provides for this possibility. The wording is rather unclear and by including a reference to national law, the European Parliament, the Council and other consulted European institutions (European Commission, European Economic and Social Committee and the Committee of the Regions) made it clear it was not ready to recognize a European collective action mechanism yet.

- In the field of competition law: Antitrust Directive (EU) 2014/104[130]

The 2014 Directive on competition law explicitly excludes the obligation for Member States to introduce a collective redress mechanism for the enforcement of European competition law. This is rather regrettable, especially in light of the amendment of the Competition Act in the United Kingdom which now provides for a collective redress mechanism and more importantly, a mechanism using an opt-out model.

We can only encourage the European legislator to introduce a collective redress mechanism, especially in the field of competition law. Indeed, as our competition expert, Professor Catherine Prieto, has highlighted, there is no real risk of abuse in competition cases as the claims will always follow a decision establishing a violation of EU competition law.

- In the field of environmental law: Regulation on the application of the provisions of the Aarhus Convention (EC) 1367/2006[131]

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention, was adopted in

[129] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016.
[130] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014.
[131] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006.

1998. The Convention entered into force in 2001. It aims at creating specific rights for citizens and NGOs in the field of environment democracy. It is assumed that environment legislation can only be correctly enforced with empowerment of citizens.

The European Union is a Party to the Convention since May 2005. As a consequence, the Aarhus Convention is fully integrated in EU law (article 216 of the Treaty on the Functioning of the European Union). Two Directives have been adopted for ensuring compliance of EU law with the Aarhus Convention Provisions: one Directive deals with environmental information (2003/4/EC) and one directive on participation of public to environmental decisions (2003/35/EC). However, no agreement could be reached regarding the adoption of a legislative instrument in the field of access to justice (proposal of the Commission in 2003). In 2017, the European Commission issued an Interpretative Communication on 28 April 2017[132] in order to sum-up the requirements. However, the 2017 Notice does not address the litigation between private parties (point 15 of Notice), considering that this issue is covered by Commission's Collective Redress Recommendation, 2013/396/EU.

Despite this situation, the CJEU ruled in a substantial number of cases[133] on the interpretation of the Article 9[134] of the Aarhus Convention (access to justice) and gave clear indication of the need to grant a broad access to justice to NGOs (see for instance C-240/09 8 March 2011 Slovak Brown Bear[135]).

It should also be noted that the aforementioned Regulation on the Aarhus Convention was adopted for compliance of the EU institutions. However the Aarhus Convention Compliance Committee adopted in 2017 a Recommendation[136] stating that the European Union as a Party to the Convention does not comply with the provisions of the Convention on access to justice due to the limited possibility of citizens and NGOs to challenge acts of the EU institutions related to environment in the Court of Justice (ACCC/C/2008/32).

Another important regulation to mention in this field is the Rome II Regulation[137] and more specifically article 7 which offers the claimant a choice regarding the law applicable to a non-contractual obligation arising out of an environmental damage. Based on our comparative study, it will be interesting to assess to what extent such a disposition will promote potential collective action.

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[132] Commission Notice on Access to Justice in Environmental Matters C(2017)2616.

[133] See for example, CJEC, Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening (DLV) v Stockholms kommun genom dess marknämnd, 15 October 2009, ECLI:EU:C:2009:631; CJEU, Joined Cases C-401/12 P to C-403/12 P, Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, 13 January 2015, ECLI:EU:C:2015:4; CJEU, Joined Cases C-404/12 P and C-405/12 P, Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe, 13 January 2015, ECLI:EU:C:2015:5; CJEU, Case C-137/14, European Commission v Federal Republic of Germany, 15 October 2015, ECLI:EU:C:2015:683.

[134] Article 9(3) of the Aarhus Convention : "(…) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"

[135] CJEU, Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, 8 March 2011, ECLI:EU:C:2011:125.

[136] Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union Adopted by the Compliance Committee on 17 March 2017, ACCC/C/2008/32 (EU), Part II

[137] (Regulation EC 864/2007 of the European Parliament and of the Council, 11 July 2007, on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007.

1.2.2 Position of the European Commission

In order to assess the position of the European Commission, emphasis should be placed on its follow up actions in the "New Deal for Consumers" which was officially introduced by the Commission in April 2018 in order to build on the progress already achieved within EU consumer law and address challenges affecting consumers, such as abusive practices. The aim is to enhance consumer protection in the Single Market by offering better redress mechanisms, ensuring equal treatment of consumers, better communication as well as by addressing future challenges[138]. The New Deal encompasses a Directive proposal[139] to modernise certain legislative instruments; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[140], Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers[141], the "Unfair Commercial Practices Directive" 2005/29/EC[142], as well as Directive 2011/83/EU on consumer rights[143]. There is also, and most importantly, a Directive proposal by the Commission[144] proposing to repeal Directive 2009/22/EC on injunctions for the protection of consumers' interests[145].

As such, will be mentioned the 2013 Recommendation, the 2018 Report on the implementation of the Recommendation[146] as well as, albeit very briefly, the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[147].

In its 2013 Recommendation, the Commission issued principles of three distinctive categories: some that are common to both injunctive and compensatory collective redress, some others that are specific to injunctive redress, and, lastly, some that only relate to compensatory mechanisms. This categorization will be assessed by our study,

[138] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM/2018/0183 final.
[139] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final
[140] OJ L 95, 21.4.1993.
[141] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers OJ L 80, 18.3.1998.
[142] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005.
[143] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011.
[144] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.
[145] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009.
[146] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013.
[147] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

and, based on a quantitative analysis of the 12 Members States chosen, we will conclude on the appropriateness to maintain different principles according to the nature of the relief.

(1) **Common principles***:* with regards to standing, the Commission recommends a representative action where only designated in advance or certified, non-for-profit, entities bring collective actions. Public authorities could also be entitled to bring representative actions. This recommendation seems to follow the general trend amongst Member States with collective redress mechanisms. In terms of information on a collective redress mechanism, the Commission advised that dissemination methods are possible in each Member States. In terms of admissibility of claims, the Commission seems to favour rather strict features, which would act as safeguards against unfounded and unmeritorious claims. To this end, the Recommendation encourages verification of legitimacy of a claim at the earliest stage. Regarding reimbursement of legal costs, the Commission promotes the "loser pays principles". Principles on the regulation of funding and third party funding are also issued by the Recommendation, notably regarding conflicts of interests and transparency. Cross-border cases are also briefly mentioned, the Commission recommending that national rules should not impede the admissibility of a foreign group of claimants or representative bodies.

(2) **Specific principles relating to injunctive collective redress**: the Commission calls for expedient procedures, such as summary proceedings, as well as for efficient enforcement of injunctive orders.

(3) **Specific principles relating to compensatory collective redress**: the Commission recommends an opt-in mechanism. As previously highlighted (1.1.3), while the opt-in rule has been favoured in most of the twelve Member States studied, it has demonstrated its limitations when exclusively used. The Recommendation also stresses the importance of collective Alternative Dispute Resolution, insisting that Member States should allow for collective consensus or out-of-court compensation settlements. The Commission also expresses its hostility towards contingency fees, which could lead to abusive litigations. It also calls for punitive damages to be prohibited and, in case of third party funding, that the remuneration is not based on the compensation awarded.

However, the 2018 Report shows that, overall, the Recommendation had a limited impact on national collective redress mechanisms ("*Legislative activities affected by the Recommendation have remained somewhat limited in the Member States*"), that the horizontal cross-cutting approach promoted was, in most cases, not adopted ("*the majority of projects that have led to new legislation or are in the pipeline are restricted to consumer matters*") and that some Member States even went against the principles stated in the Recommendation ("*several of them allow the use of the "opt-out" principle to a considerable extent*"). A few principles, such as provision of information on collective actions, rules with regards to third party funding, express recognition of the representative entities designed in other Member States, lawyers' fees, or registry for collective actions, **are either non-existent, ineffective or put in place in discordance with the Recommendation**. It is worth noting however, that some principles are fairly consensual amongst Member States, such as standing in representative action, admissibility of claims, the "loser pays" principle, or the prohibition of punitive damages. Nonetheless, in some fields, even slight variations between Member States can have an important impact upon access to justice and legal certainty. For

instance, with regards to the "loser pays" principle, the Commission notes that the variation of the definition of reimbursable costs generates a situation where "*the aim of preventing abusive litigation through the loser pays principle, in reality, is not equally achieved in all Member States*".

The divergences persisting between Member States, regarding both the availability and the nature of collective redress mechanisms, highlighted by the Report influenced the Commission in shaping **its Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC** published on 11 April 2018. This proposal is a huge step forward when compared to the 2013 Recommendation although it does not completely depart from it. This proposal will be addressed as part of the second chapter of this study "Towards a European instrument", with the aim of analysing it, evaluating it and drawing the necessary conclusions in order to make our own recommendations.

The Commission's justification for implementing the New Deal for Consumers is also laid out in its Inception Impact Assessment[148] on the Injunctions directive. The Commission establishes that in order for there to be fair competition within the Single Market as well as an increase in compliance to EU collective redress rules by Member States, injunctive collective redress mechanisms must be harmonised and collective compensatory redress should be introduced. To address cross border breaches, the Commission suggests a non-legislative option where a cooperation system between national consumer law enforcers is set up. Alternative dispute resolution systems should nonetheless remain available. Additionally, the legislative option proposed by the Commission suggests that qualified entities be granted capacity to act in all Member States by expanding the scope of application of the Injunctions Directive to other EU instruments. A suggested approach by the Commission is the "one stop shop" approach, whereby qualified entities would be able to seek injunctive redress from courts and administrative authorities, as well as compensation for the victims simultaneously. This redress order would be an invitation to enter out-of-court redress negotiations. Unless negotiations are unsuccessful, courts or administrative authorities would only check the fairness of the settlement. Otherwise, they would pursue the proceedings for compensation. Many positive impacts are expected from such modifications. First, the implementation of these proposals is expected to lead to the deterrence of infringing traders which will be held responsible for their breaches. In addition, compliance with EU rules is projected to increase within Member States. Finally, it is presumed that while the number of collective cases (be they injunctive redress or compensatory redress cases) will rise, this will lead to a reduction of individual actions thus resulting in "increased efficiency and rationalisation of the justice systems" as highlighted in the Inception Impact Assessment.

1.2.3 Position of the European Parliament

Broadly speaking, one could say that the European Parliament has long called for the Commission to take action on collective redress. Its view has been consistent and coherent.

- 2007

[148] Ref. Ares(2017)5324969 - 31/10/2017

The European Parliament issued a resolution on the 25th of April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules[149] where it acknowledges that "*many Member States are examining ways better to protect consumers by allowing collective actions, and […] differing courses of action may lead to the distortion of competition in the internal market*" and considers that "*in the interests of justice and or reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organisations whose statutes have this as their object*".

In the explanatory statement of a motion for a European Parliament resolution on EU Consumer Policy Strategy 2007-2013[150], it is deemed that: "*A Europe-wide collective redress system is indispensable. A genuine internal market with mobile consumers should also give them the tools to pursue compensation if something goes wrong. (...) It is important to draw lessons from the unsatisfying US Class action system. It should not become a basis for a possible European system*."

The European Parliament committee of inquiry on Equitable Life Assurance Society (2006/2199(INI)) also urged the Commission "*to investigate further the possibility of setting up a legal framework with uniform civil procedural requirements for European cross border collective actions*".

- 2008

In the European Parliament resolution of 5 June 2008 on the Green Paper on retail financial services in the single market (2007/2287(INI))[151], the European Parliament supported: "*finding a coherent solution at European level which provides consumers with access to balanced new forms of collective redress for the settlement of cross-border complaints related to retail financial products; suggests evaluating the impact of systems recently established at national level*".

- 2009

European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI))[152] also provided the opportunity for the European Parliament to express its views on collective redress: "*Recalls that individual consumers but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing individual actions for damages by the costs, delays, uncertainties, risks and burdens involved; stresses, in this context, that collective redress, which allow the aggregation of individual claims for damages for EC competition law infringements and enhance victims' ability to obtain access to justice, is an important deterrent; welcomes, in this respect,*

[149] European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), OJ C 74E, 20.3.2008.
[150] EU consumer policy strategy 2007-2013 European Parliament resolution of 20 May 2008 on EU consumer policy strategy 2007-2013 (2007/2189(INI)), OJ C 279E, 19.11.2009.
[151] Retail Financial Services in the Single Market European Parliament resolution of 5 June 2008 on the Green Paper on retail financial services in the single market (2007/2287(INI)), OJ C 285E, 26.11.2009,
[152] White Paper on damages actions for breach of the EC antitrust rules European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), OJ C 117E, 6.5.2010.

the Commission's proposals that mechanisms be set up to improve collective redress while avoiding excessive litigation".

- 2012

The European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI))[153] states very clearly the safeguard the European Parliament deemed necessary with regard to competition policy and antitrust sector: "*as regards collective redress in competition policy, safeguards need to be introduced in order to prevent the development of a class-action system involving frivolous claims and excessive litigation and to guarantee equality of arms in court proceedings; stresses that such safeguards must cover, inter alia, the following points****: the group of claimants must be clearly identified before the claim is brought (opt-in procedure); public authorities, such as ombudsmen or prosecutors, as well as representative bodies, may bring an action on behalf of a clearly identified group of claimants; the criteria used to define the representative bodies qualified to bring representative actions need to be established at EU level; a class-action system must be rejected on the grounds that it would promote excessive litigation, may be contrary to some Member States' constitutions and may affect the rights of any victim who might participate in the procedure unknowingly whilst being bound by the court's*** **decision**…". The resolution also explicitly favours prohibition of punitive damages and contingency fees, the application of the loser pays principle, as well as the prohibition of third party funding.

In its resolution of 2 February 2012 'Towards a Coherent European Approach to Collective Redress'[154], the European Parliament took the view that the Directive 2009/22/EC on Injunctions should be improved in order to address cross-border situations in a more satisfactory manner. It also took the view that "*the need to improve injunctive relief remedies is particularly great in the environmental sector*". Besides, while it insisted on the importance of taking into account the diversity of the legal traditions among the Member States, it also expressed its concerns that "*uncoordinated EU initiatives in the field of collective redress will result in a fragmentation of national procedural and damages laws, which will weaken and not strengthen access to justice within the EU*". As a result, it strongly encouraged that any proposal in the field of collective redress "*take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the EU and specifically but not exclusively dealing with the infringement of consumers' rights*". It further stressed the need for the legally binding horizontal framework to cover damages issues irrespective of the sector concerned.

- 2017

In its 4th of April 2017 recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP))[155], the European Parliament explicitly called for the Commission to "*put forward a legislative*

[153] EU competition policy European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)), OJ C 239E, 20.8.2013.
[154] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), OJ C 239E, 20.8.2013.
[155] European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP).

proposal for the establishment of a collective redress system in order to create a harmonised system for EU consumers, thus eliminating the current situation in which consumers lack protection in most Member States". It also expressed the need to include in the legislative proposal the assessment of "*existing systems within and outside the EU with a view to identifying best practices in this field*".

Finally, in its resolution of 26 October 2017 on the application of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (the 'ELD') (2016/2251(INI)), the European Parliament reminds that EU law demands that European citizens are guaranteed effective and timely access to justice, and, thus, urges "*the Commission to assess the possibility of introducing collective redress mechanisms for breaches of the Union's environmental law*".

1.2.4 The position of the Court of Justice of the European Union

Although there is no unified system of collective redress in EU Law, the CJEU has already been faced with legal constructs that have some characteristics of a collective redress system.

These constructs can be based on national law provisions of the Member State where the main proceedings take place. A prime example of this is the *Schrems II* case[156], where Maximilian Schrems sued Facebook, before an Austrian court, for alleged violations of data protection provisions in his own name but also in the name of seven other claimants who ceded their claims to him. Schrems based his action on a provision within Austrian law which allows different claims by one applicant against the same defendant to be heard jointly in the same proceedings. This is possible if certain legal conditions are met: the basis of the claims must be essentially similar and the claims have to refer to the same factual or legal question (this is the Austrian Model of Group Litigation, presented above).[157]

Some other legal constructs arise from the transposition of EU law itself, for example, Article 7(2) of the 1993 Directive on unfair terms in consumer contracts.[158] According to this article, "persons or organizations, having a legitimate interest under national law in protecting consumers, may take action [...] for a decision as to whether contractual terms drawn up for general use are unfair". It aims at preventing the continued use of unfair terms in contracts concluded with consumers by professionals pursuant to Article 7(1) of the same Directive. This provision, as well as a similar provision under Article 11 of the 2005 Directive on unfair business-to-consumer commercial practices[159], were complemented by the 1998[160] and 2009[161] Directives on injunctions for the protection of consumers' interest. Finally, other legal arrangements the CJEU had to address arose

[156] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37.
[157] See Oberster Gerichtshof (Supreme Court), Case 4Ob116/05w Bundeskammer für Arbeiter und Angestellte, 12 July 2005, ECLI:AT:OGH0002:2005:0040OB00116.05W.0712.000, and the case law cited.
[158] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[159] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.
[160] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.
[161] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version).

from international treaties signed and approved by the EU, such as the Aarhus convention on access to information, public participation in decision making and access to justice in environmental matters.[162]

Within this context, Judges and Advocates General (AG) of the CJEU take into account the specificities of collective redress systems in their judgements and opinions. However, except for some specific EU law mechanisms, such as the ones described above, many EU law provisions of central importance in procedural matters, such as the Brussels Convention[163], the Brussels I[164] and Brussels I (Recast)[165] Regulations on jurisdiction in civil and commercial matters, the Rome I[166] and Rome II[167] Regulations on the law applicable to contractual and non-contractual obligations, or even the Treaties themselves to the extent that they define the CJEU's role, do not include express provisions on the way actions for collective redress should be handled. This margin of appreciation left to Member States regarding collective redress mechanisms is consistent with the principle of procedural autonomy of the Member States.[168] According to this principle, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights arising from European Union law.[169] However, the contours of this principle remain vague.[170]

Despite this lack of regulation at EU level, the CJEU has already been asked by national jurisdictions to clarify the context of a main proceedings based on a form of collective redress system, and had to assess compliance of such actions with its own admissibility criteria. The Court also had to determine how collective redress systems interact with EU law provisions, such as the ones aforementioned, which do not explicitly take their specificities into account. Finally, a question arises as to whether there is consistency between solutions adopted by the CJEU in various cases, which could constitute the premise for a unified handling of collective redress systems.

(1) The CJEU largely accepts questions arising from a proceeding based on a collective redress system

The CJEU had the opportunity to rule on cases where a collective redress system is involved, especially when responding to questions arising from a request for preliminary ruling based on Article 267 of the Treaty on the Functioning of the European Union

[162] Convention on access to information, public participation in decision making and access to justice in environmental matters of 24/06/1998.
[163] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[164] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[165] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[166] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[167] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
[168] CJEC, Case 33-76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, 16 December 1976, ECLI: ECLI:EU:C:1976:188.
[169] See for example CJEU, Case C-93/12, ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplashtatelna agentsia, 27 June 2013, ECLI:EU:C:2013:432, para 35.
[170] Marjolaine Roccati, 'Quelle place pour l'autonomie procédurale des États membres ?', Revue internationale de droit économique, Volume XXIX, Issue 4 (2015), pp. 429-439.

(TFEU). For most situations in this context, such a collective redress system exists in the national legal system of the EU Member State concerned.

For instance, the CJEU's abovementioned *Schrems II* ruling responds to a question referred by the Austrian Supreme Court. The second question referred to the CJEU dealt with the partial or complete admissibility of the collective recourse before the national court based on EU law, but the admissibility of the case before the CJEU itself was not questioned.

There was also a series of cases where the CJEU had to rule on preliminary questions referred by English courts in relation to the English Group Litigation Orders mechanism. This mechanism allows the national court to select some cases as test cases when a number of claims arise in common or related issues of fact or law.[171] The cases brought before the CJEU based on the Group Litigation Orders provisions refer to tax law issues which affected several companies similarly.[172] The fact that the cases were based on a collective redress mechanism was a mere part of the background of the claim.[173] Since the test cases are brought before the national court and selected to "set a precedent" for the other decisions, here again there is no admissibility issue before the CJEU.

The question of admissibility arises, however, where there is a risk that the preliminary question to the CJEU is general or hypothetical, that is, not linked to objective requirement inherent to a dispute resolution. In this situation, the question would not be covered by Article 267 TFEU on requests for preliminary ruling.[174] In *Österreichischer Gewerkschaftsbund,* submitted to the Luxembourg Court by the Austrian Supreme Court,[175] the claimant, a union, submitted an application regarding certain categories of contractual teachers and teaching assistants whose periods of employment in other Member States were not taken into account to determine their pay scale. The application was based on a provision within Austrian law allowing certain employers' and employees' bodies to bring a claim before the Austrian Supreme Court for a declaration that rights or legal relationships, which concern a factual situation independent to any particular named person, exist or do not exist.[176] The Austrian Supreme Court asked the CJEU whether the procedure would entail giving an advisory opinion on the law with the appearance of a judicial decision, rather than a litigation that would enable preliminary questions to the CJEU.[177] However, the CJEU pointed out that, according to Austrian law, the application submitted by the employers' or employees' organisation must relate to a point of substantive law of importance for at least three employers or employees.[178]

[171] English Civil Procedure Rules 19.10.
[172] CJEC, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation, 12 December 2006, ECLI:EU:C:2006:773; CJEC, Case C-446/04 Test Claimants in the FII Group Litigation, 12 December 2006, ECLI:EU:C:2006:774; CJEU, Case C-35/11, Test Claimants in the FII Group Litigation, 13 November 2012, ECLI:EU:C:2012:707; CJEU, Case C-362/12, Test Claimants in the FII Group Litigation, 12 December 2013, ECLI:EU:C:2013:834.
[173] See for example CJEC, Case C-446/04 Test Claimants in the FII Group Litigation, 12 December 2006, ECLI:EU:C:2006:774, para 27 and 28.
[174] See CJEC, Case 244/80, Pasquale Foglia v Mariella Novello, 16 December 1981, ECLI:EU:C:1981:302, para 18.
[175] CJEC, Case C-195/98, Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich, 30 November 2000, ECLI:EU:C:2000:655.
[176] *ibid*, para 10.
[177] *ibid*, para 18.
[178] *ibid*, para 28.

Hence, for the CJEU, the question is not purely hypothetical.[179] One may also add that this provision confirms that the mechanism at stake is a form of collective redress.

A similar question may also have risen for the already mentioned systems, based on Article 7(2) of the 1993 Directive on unfair terms in consumer contracts. This article allows an organisation, with a legitimate interest in protecting consumers, to take action for a decision as to whether contractual terms are unfair. AG Trstenjak called such a mechanism, in her opinion in the *Invitel case*, a mechanism for verification *in abstracto*[180]*.* However, in the *Invitel* case, the Hungarian national consumer protection authority brought an action before Hungarian courts after having received a "large number of complaints" from consumers regarding general business conditions of the Invitel fixed-line telephone network operator.[181] In this action, the consumer protection authority aimed at obtaining a declaration that the contested clause was void due to it being unfair, as well as obtaining the automatic and retroactive reimbursement to subscribers of amounts wrongly invoiced based on this clause.[182] Thus, such actions can lead to an injunction to cease a given practice or lead to reimbursements to a given group of consumers. This case, with regard to the question of admissibility, is somewhat similar to *Österreichischer Gewerkschaftsbund,* previously mentioned. However, in *Invitel*, the question of admissibility was not raised and the CJEU issued a judgment on the substance of the case.

Thus, the CJEU largely responds to questions relating to the various collective redress systems, which is also consistent with the Luxembourg Court's general policy of encouraging dialogue with national jurisdictions.

(2) The CJEU adopts a cautious approach as regards to the interaction between EU law and collective redress systems

In relation to substance, the CJEU often has to determine how EU law should interact with collective redress systems existing at national level. For instance, in the *Schrems II* case, Schrems brought an action against Facebook before a Viennese court based not only on his own claim as a Facebook user, but also on claims ceded to him by other Facebook users domiciled in other parts of Austria, in other Member States such as Germany or in non-Member States such as India. The CJEU considered Schrems to be a consumer rather than a professional in the context of this case, despite his activities in the field of data protection. The transferors' consumer status were however not questioned. The second question in *Schrems II* related to whether the protective provisions within Brussels I Regulation, according to which a consumer may bring proceedings against a professional in the courts of the Member State where he/she is domiciled,[183] would allow Schrems to bring the claims ceded to him before the Vienna jurisdiction.

The recognition of the possibility for a person to act before courts, relying not only on their own claims, but also on claims ceded to him/her by transferors living in other

[179] *ibid*, para 28.
[180] Opinion of AG Trstenjak, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, 6 December 2011, ECLI:EU:C:2011:806, para 37.
[181] CJEU, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, 26 April 2012, ECLI:EU:C:2012:242, para 19.
[182] *ibid*, para 19.
[183] Brussels I Regulation, articles 15 and 16.

Member States would have had far-reaching implications; it would have allowed for EU-wide "class actions".[184] However, in its assessment of the application of the Brussels I Regulation to this form of collective redress mechanism, the CJEU adopted a cautious approach. **On the one hand, it did not recognize any special character to the collective redress mechanism at stake**. On the contrary, AG Bobek even doubted it be possible to refer to this mechanism as a "class action" instrument as far as rules on territorial jurisdiction are concerned, since no specific rules would be set in national law either.[185] He also pointed out that **allowing such a mechanism of class action would have caused legal certainty issues, such as the risk of forum shopping**[186], and the fragmentation and multiplication of *fora*.[187] According to the Judges, the recognition of a special character for this form of collective redress would have violated the rule, according to which derogations to the general rule, here on jurisdiction, must be interpreted strictly[188]. On the other hand, AG Bobek underlined that **the issue of assignment of and succession into claims is a transversal issue within the context of Brussels I Regulation, and that any solution with regard to the rules on assignment of claims under Article 16(1) would have repercussions on several other provisions of aforementioned Regulation**.[189] This would have been another reason to be cautious.

A similar approach can be found in the *Eschig* case[190], where a provision in a legal expenses insurance contract *de facto* created a form of collective action. In this case, the claimant Erhard Eschig had concluded a legal expenses insurance contract. This legal document included a clause entitling the insurer to have test cases brought by legal representatives selected by the insurer in the event that the interests of several insured persons were directed against the same opponents and based on the same or a similar cause. The clause also entitled the insurer to use a collective redress mechanism and similar forms of recourse. This type of clause aimed at reducing the costs for the insurer in cases where several insured persons faced a similar event, such as in the present case where an investment vehicle became insolvent. This clause can be seen, broadly speaking, as introducing a form of collective redress, gathering all the insured persons concerned. Eschig, having already appointed his own lawyer, considered the clause to be in violation of Article 4(1) of a 1987 Directive[191] on legal expenses insurance, according to which the insured person shall be free to choose his or her lawyer. In this case, the Commission itself argued that the right to choose a lawyer may be subject to restrictions if that is in the interest of the insured person.[192] However, the CJEU considered that Article 4(1) of the 1987 Directive was of general application[193], and that several cases

[184] See Nicolas Blanc, 'Schrems v Facebook: Jurisdiction Over Consumer Contracts Before the CJEU', European Data Protection Law Review Volume 3, Issue 3 (2017), pp. 413 - 417.
[185] Opinion of AG Bobek, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 14 November 2017, ECLI:EU:C:2017:863, para 69 sq.
[186] *ibid*, para 104.
[187] *ibid*, para 106.
[188] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37, para 43.
[189] Opinion of AG Bobek, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 14 November 2017, ECLI:EU:C:2017:863, para 112.
[190] CJEU, Case C-199/08 Erhard Eschig v UNIQA Sachversicherung AG, 10 September 2009, ECLI:EU:C:2009:538.
[191] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance.
[192] Opinion of AG Trstenjak, Case C-199/08, Erhard Eschig v UNIQA Sachversicherung AG, 4 May 2009, ECLI:EU:C:2009:310, para 42.
[193] CJEU, Case C-199/08 Erhard Eschig v UNIQA Sachversicherung AG, 10 September 2009, ECLI:EU:C:2009:538, para 19.

affecting a large number of persons in the same way had already been recorded prior to the adoption of Directive 87/344 and were known to the legislator.[194] **Here too, in the absence of specific EU legislation, the CJEU adopted a restrictive approach with respect to collective redress**.

(3) Towards a uniform treatment by the CJEU of some forms of collective redress?

One of the fundamental purposes of the CJEU is to ensure consistent interpretation of EU law.

First, this implies that new judgements must, in principle, be consistent with existing case law on the interpretation of the same provisions or of related provisions. For example, the *Schrems II* judgement refers to three other decisions relating to the transfer of claims to support its ruling, and AG Bobek also cites a fourth one.

Two of these decisions serve as a basis to assert that **the special consumer jurisdiction is not applicable to legal persons acting as assignees of the rights of a consumer**, notably because these persons are not parties to the contract, at least in the cited decisions.[195] The two other decisions are on the interpretation of Article 5(3) of the Brussels I Regulation, on jurisdiction relating to tort, delict or quasi-delict. In the *ÖFAB* case, two claims were transferred, by creditors of a company to a third party, in the aftermath of a company reconstruction order.[196] In the *CDC Hydrogen Peroxide* case, claims for damages arising from a cartel were transferred to a company created for the purpose of pursuing said claims.[197] In the latter case, the claims initially belonged to several claimants and were also directed against several defendants (the former members of the cartel). In *Schrems II*, the CJEU referred to these cases involving a form of collective redress to recall that, **according to its case law, the assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction**.[198] The reasoning that lies behind this position, initially adopted in the *ÖFAB* case without the Opinion of the AG, is that **high predictability of the rules of jurisdiction must be safeguarded**.[199]

In addition to that, the CJEU recalls in the *Schrems II* decision that it is **settled case law that rules derogating from more general rules set out in the Brussels I Regulation, such as the one on consumer jurisdiction, must be interpreted strictly**.[200] To that extent thus, **if the CJEU could identify a way to treat forms of collective redress based on the transfer of claims uniformly, it would rather be**

[194] *ibid*, para 63.
[195] CJEC, Case C-89/91, Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH. 19 January 1993, ECLI:EU:C:1993:15; and CJEC, Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, 1 October 2002, ECLI:EU: ECLI:EU:C:2002:555, cited in Opinion of AG Bobek, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 14 November 2017, ECLI:EU:C:2017:863, para 96.
[196] CJEU, Case C-147/12, ÖFAB Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV, 18 July 2013, ECLI:EU:C:2013:490.
[197] CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, 21 May 2015, ECLI:EU:C:2015:335.
[198] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37, para 48.
[199] [199] CJEU, Case C-147/12, ÖFAB Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV, 18 July 2013, ECLI:EU:C:2013:490, para 58.
[200] CJEU, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37, para 43.

qualified as restrictive because of the more general rules governing international jurisdiction in EU law.

Secondly, it is also interesting to look at the way the CJEU introduces consistency whilst handling various issues related to collective redress mechanisms but which are not based on the same legal question. **It is especially the case in fields where EU law itself opened the door to forms of collective redress**. This can be seen through the example of the protection of consumer interests pursuant to Article 7(2) of the 1993 Directive on unfair terms in consumer contracts. Two decisions provide consistent solutions regarding jurisdiction[201] and law applicable[202] respectively for proceedings based on Article 7(2) of the 1993 Directive. In these decisions, the CJEU decided that these actions related to tort, delict or quasi-delict in the context of both the Rome I and Rome II Regulations on law applicable, as well as the Brussels Convention and the Brussels I Regulation on jurisdiction. The aim was to ensure that these Regulations on law applicable and on jurisdiction are applied consistently with each other.[203] Two other decisions by the CJEU deal with the interaction between collective proceedings initiated by a consumer association and individual actions by individual consumers in the context of Article 7(2) of the 1993 Directive.[204]
Finally, AG Trstenjak began making a link between Article 7 of the 1993 Directive on unfair terms in consumer contracts and provisions within the 2009 Directive on injunctions for the protection of consumers' interest. In her Opinion in the *Köck* case on unfair business-to-consumer commercial practices, AG Trstenjak cited her Opinion in the *Invitel* case on unfair terms in consumer contracts, pointing out the similarities between the respective provisions of EU law.[205] However, the judgement itself does not cite the *Invitel* case.

Thus, except for specific purposes, such as the need for consistency between rules on law applicable and on jurisdiction, analogies between different legal questions or fields of law remain of weak strength as compared to other arguments and are more likely to be found in an Opinion than in a judgement.

(4) Conclusion

In conclusion, the CJEU handles collective redress systems consistently by relying on its general principles, such as favoring dialogue with national jurisdictions, legal certainty and consistency within its case law. However, the CJEU does not grant any special favor to collective redress systems, and handles such mechanisms in accordance with the role they play within EU law.

[201] CJEC, Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, 1 October 2002, ECLI:EU: ECLI:EU:C:2002:555.
[202] CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612.
[203] *ibid,* para 36 to 39.
[204] CJEU, Joined Cases C-381/14 and C-385/14, Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.), 14 April 2016, ECLI:EU:C:2016:252; CJEU, Joined Cases C-568/14 to C-570/14, Ismael Fernández Oliva and Others v Caixabank SA and Others, 26 October 2016, ECLI:EU:C:2016:828.
[205] Opinion of AG Trstenjak, Case C-206/11, Georg Köck v Schutzverband gegen unlauteren Wettbewerb, 17 January 2013, ECLI:EU:C:2012:543, para 46 and 47.

When collective redress systems are recognized or facilitated by specific EU law provisions, on unfair terms in consumer contracts and unfair commercial practices for example, the CJEU determines their interaction with individual actions brought by individual consumers, amongst other things. **However, in cases where the EU legislator does not give a specific role to collective redress systems, the CJEU pays particular attention to consistency of its case law**. The question of consistency arises, for example, in the context of transversal issues such as the handling of assignment of and succession into claims in various provisions of the Brussels I Regulation, as well as between the various provisions governing law applicable and jurisdiction in EU law.

All in all, it seems that AG Bobek's position in his Opinion in *Schrems II*[206] may apply more generally to the CJEU's case law: according to AG Bobek, it would be unwise for courts to give collective redress a special status or even create such systems "at the stroke of a pen" as it would, in many cases, go against the wording and the logic of existing law. Giving collective redress a special status, beyond what is explicitly stated within EU law, would effectively lead to the rewriting of existing law. The issue would also be too delicate and complex for an isolated judicial intervention. A better approach would be a comprehensive legislation. Finally, AG Bobek is aware of the legislative process currently ongoing at EU level, which should not be pre-empted by the CJEU's case law.

1.2.5 An evolving environment making this issue particularly pressing

The European Union is becoming more and more integrated, national economies are increasingly interdependent, citizens, goods and services are moving across Member States. Whilst in the past, the illicit behaviour of a company would only affect individuals domiciled within one single Member State, this is not and cannot be the case anymore. **The fact that, on the one hand damages are scattered across the European Union and, on the other hand, the legal framework for collective redress is very diverse and not unified across the European Union automatically results in European citizens being treated unequally**.

A prime example of this statement is the so-called Dieselgate case. Amongst the 8.5 millions of European consumers affected by the Volkswagen fraud[207], many encountered great difficulties in getting compensation, and the amounts varied greatly among the Member States[208]. This highlighted the need for European intervention as the lack of a harmonized European instrument left European consumers residing in a country which does not provide for a form of collective redress completely helpless.

This is why the issue needs to be addressed at a European level, and it needs to be done in the near future. A common framework can only but enhance the protection of European citizens and improve legal certainty.

[206] Opinion of AG Bobek, Case C-498/16, Maximilian Schrems v Facebook Ireland Limited, 14 November 2017, ECLI:EU:C:2017:863, para 123.
[207] European Commission Press Release of 17 July 2018, "The European Commission and EU consumer authorities publish final assessment of dialogue with Volkswagen", IP/18/4549.
[208] https://www.usinenouvelle.com/article/ou-en-sont-les-sanctions-prises-contre-volkswagen-apres-le-dieselgate.N422467

1.3 Economic benefits and costs of collective redress, lessons to be drawn from the US

1.3.1 Economic Benefits

Economists view collective actions as a self-correction of regulatory market failure. Defendants, failing to internalize the plaintiffs' cost, harm them. Plaintiffs, on the other hand, are sometimes unable to recover on their own due to the high cost of bringing individual suits: individual benefit often fails to outweigh the cost. This results in a failure for the plaintiffs to obtain compensation and for the defendants to be deterred. Collective redress law resolves this problem by allowing the plaintiffs to overcome jointly the barrier of entry, resulting in the restoration of justice through **compensation**. Moreover, successful collective action suits also serve as a **deterrence** purpose for the defendants: knowing that they will be held liable under collective redress law for failure to take precaution, defendants are incentivized to internalize the plaintiffs' cost and take precaution.

Even if plaintiffs, harmed in a similar way by the same defendant, are able to bring suits individually, the repetition of each similar case in court results in loss of efficiency. Collective redress law, grouping similar cases together, **saves administrative costs** because of economies of scale. Instead of requiring courts to hear individual cases, these similar cases can now be determined in one court; instead of having each plaintiff paying for discovery, counsel fees and other administrative fees individually, these individuals can jointly pay once.

Individuals can in theory organize themselves even without class actions, but such organization can be prohibitively costly. Collective redress procedures **lower the cost of organization**[209]. Just as IP law is a legal innovation to bundle certain rights together, so too is class action law a legal innovation to bundle similar plaintiffs together, giving rise to judicial economy by resolving the problem of **fragmentation** (each on its own is worth less than the cost but the total bundle's value outweighs the total cost)[210].
Class redress law also brings other social benefits. Without class actions, defendants may over-invest to win earlier cases, setting a precedent to deter future litigations from plaintiffs; collective actions circumvent such a problem[211]. For cases where the defendant does not have enough resources to pay all plaintiffs, class actions lead to a more even and fairer distribution of award[212]. Without collective actions, plaintiffs may rush to sue the defendant first in order to recover fully when the defendant still has financial resources, leading to low or no compensation for those plaintiffs who come after.

Collective actions have also been criticized under the same criteria of (1) compensation for victims; (2) deterrence effect (internalization of victim's costs); (3) administrative cost; and (4) other social costs. We discuss separately in detail below.

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[209] Ulen, Thomas S. "The Economics of Class Action Litigation." Backhaus, Jürgen G., Alberto Cassone and Giovanni B. Ramello. *The Law and Economics of Class Actions in Europe: Lessons from America*. Cheltenham, UK ; Northampton, MA: Edward Elgar, 2012 79.
[210] Cassone, Alberto and Giovanni B. Ramello. "Private, club and public goods: the economic boundaries of class action litigation." Backhaus, Jürgen G., Alberto Cassone and Giovanni B. Ramello. *The Law and Economics of Class Actions in Europe: Lessons from America*. Cheltenham, UK ; Northampton, MA: Edward Elgar, 2012, 106-108.
[211] Ulen (n°209), 2012, 78-79.
[212] *ibid,* 79-80.

1.3.2 Criticisms Based on Compensation and Deterrence

Note: compensation and deterrence were put together because the efficient level of deterrence is the point at which defendants fully internalize the cost imposed upon the plaintiffs. In other words, optimal deterrence corresponds to optimal compensation of the plaintiffs.

(1) **Consumers are paying** for such compensation indirectly: producers will pass on a part of the "tax" (cost) of collective redress onto consumers. Such an argument, however, assumes that demand is perfectly inelastic[213], which is unrealistic for most products. In reality, businesses can only pass on part of the cost to their consumers.

(2) **Lawyers benefit** by taking a large portion of the awards from collective actions. Indeed, the presence of legal fees means that optimal compensation and optimal deterrence cannot hold simultaneously: the amount paid by defendants (deterrence) = lawyers' fees + compensation.
One must, however, recognize that collective redress law is not a perfect solution to the regulatory market failure: it corrects the market failure at a cost. One can argue that lawyers should be compensated for leading and organizing collective actions suits to solve the collective action problem. In addition, collective redress lawyers often incur cost to identify plaintiffs and obtain funding to organize the group (since it is difficult to collect money from all the plaintiffs *ex ante*). Most importantly, collective redress lawyers take the plaintiffs' risk but are compensated only when the case is successful: collective actions "create a market for allocating the risk to the actor best equipped to manage it"[214]. Lawyers are better equipped than plaintiffs to handle such risk due to their specialization and "ability to create a portfolio of diversified risks which, taken together, lower the average risk"[215]. Viewed from this perspective, plaintiffs' lawyers play an extremely valuable role in driving forth collective actions.

(3) Perhaps the strongest argument concerning lawyers' fees is the **principal-agent problem**: whether lawyers as agents of the principal (the class of victims) fully represent the interests of the victims. Some lawyers in the US have negotiated with defendants to maximize their legal fees at the expense of the plaintiffs, who are paid coupons or other instruments without significant value[216]. In addition, collective actions are particularly problematic when group members are different (for instance, the same product can result in different diseases with uncertain future development owing to differences in plaintiffs' medical conditions). In these cases, the question is whether the counsel can fully represent the interests of and act on behalf of all plaintiffs, especially those that are absent and unaware of the suit[217].

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[213] The theory of demand and supply, covered in introductory economics, teaches us that the effect of a (Pigouvian) tax on suppliers depends on the elasticity of demand. If the demand for a certain product is perfectly inelastic, then such a tax is passed completely to consumers. On the other hand, if the demand is perfectly elastic, then producers have to bear the tax entirely. In reality, the elasticity of demand for most products lies in-between these two extremes.
[214] Cassone, Alberto and Giovanni B. Ramello (n°210), 2012, 119.
[215] *Ibid*, 119-120.
[216] Scherer, Frederic M. "Class actions in the U.S. experience: an economist's perception." Backhaus, Jürgen G., Alberto Cassone and Giovanni B. Ramello. *The Law and Economics of Class Actions in Europe: Lessons from America*. Cheltenham, UK ; Northampton, MA: Edward Elgar, 2012. 28.
[217] Issacharoff, Samuel and Geoffrey P. Miller. "Will aggregate litigation come to Europe?" Backhaus, Jürgen G., Alberto Cassone and Giovanni B. Ramello. *The Law and Economics of Class Actions in Europe: Lessons from America*. Cheltenham, UK ; Northampton, MA: Edward Elgar, 2012. 42.

(4) When plaintiffs have claims of different strengths or values, **adverse selection** may become a problem. Since collective proceedings provide uniform awards, they are more likely to attract plaintiffs with low strength/value who gain more from a winning collective redress suit. A higher percentage of low-quality claims in turn translates to lower compensation and less deterrence (as the defendant, perceiving lower aggregate quality, makes a lower settlement offer)[218].

(5) Collective redress lawyers may choose to work with only certain types of cases, leaving the other types of cases unrepresented. Collective redress lawyers, as self-insurers, reduce their risks by forming large partnerships of lawyers specializing in the same type of cases[219]. Their specialization may not be able to cover all types of potential collective redress cases, resulting in **no compensation/deterrence for some categories of cases**.

1.3.3 Administrative Costs

(1) The process of class certification gives rise to **another type of administrative costs**. Defendants often challenge class action suits in procedural terms, arguing that the plaintiffs are sufficiently different to satisfy the certification requirement in Rule 23 of the Federal Rules of Civil Procedure of the United States of America (FRCP). Furthermore, plaintiffs sometimes challenge the certification process. Collective redress does not resolve the collective action problem fully: the cost of organizing a large number of potentially diverse plaintiffs to negotiate remains. Moreover, there are also costs in managing the group due to efforts of coordination and communication; plaintiffs may also have to incur monitoring cost to ensure their counsel is diligently representing the class[220].

(2) The **distribution of settlement** award to the plaintiffs can be a highly **problematic** process involving serious agency issues, since following settlement, judges often delegate fully the task of distribution to the lawyers without monitoring the distributional outcome[221]. Prior to settlement, plaintiffs' attorneys operate under "a norm of helping every [plaintiff] out, making sure everybody gets something, even those that have the weakest claims or nonexistent claims;" but following settlement, there is a risk that the plaintiffs' attorneys, no longer under judicial monitoring, may render settlement distribution significantly different from what a judge would do: "[s]ettlement funds become a social welfare pool of money as opposed to the distribution of a judgment to each and every deserving person according to their comparative levels of desert"[222].

1.3.4 Other Social Costs

(1) A short piece by George Priest in 2000 illustrates well the danger of **settlement blackmail** stemming from the procedural sequence of certification followed by case

[218] Ulen (n° 209) 2012, 85-86.
[219] Backhaus, Jürgen G. "Class action finance and legal expense insurance." Backhaus, Jürgen G., Alberto Cassone and Giovanni B. Ramello. *The Law and Economics of Class Actions in Europe: Lessons from America*. Cheltenham, UK ; Northampton, MA: Edward Elgar, 2012. 128.
[220] Ulen (n°209) 2012, 82.
[221] Priest, George L. "Economics of Class Actions." *Kansas Journal of Law and Public Policy* 9 (2000): 484-486. 12 6 2018. <http://digitalcommons.law.yale.edu/fss_papers/633>.
[222] *Ibid*.

examination. **Successful certification of the group almost always leads defendants to settle, yet courts examine only procedural requirements and notably do not consider the merit of a case during its certification**, resulting in the absurd situation where successful certification leads immediately to settlement without the merit of the case ever receiving any judicial consideration. In the words of Priest, the successful certification of a group presents itself as "a very large risk . . . a nuclear bomb assured destruction form of risk" for defendants[223]. Defendants therefore tend to "settle out those cases that [they] might lose, even possibly might lose"[224].

Even if frivolous cases are unlikely to prevail, under the event that they do prevail (owing to judicial error), the defendant will face tremendous loss in collective actions. Fearing such loss, the defendant may rationally decide to settle even though the case has no merit[225]. According to Priest, despite the lack of statistics there is common belief that all mass tort collective actions were settled following certification prior to 2000, the year Priest[226] published this paper[227]. However, the certification process under US law does not review the merit of the claim, under Rule 23 and the *Eisen* case interpreting it[228]. This means that plaintiffs holding a meritless case who nevertheless can prove to the court that they satisfy the requirements of certification can still expect to recover from the defendant's settlement offer following certification. Blackmail collective action by entrepreneurial lawyers and law firms is a particular problem in the United States.

(2) The **choice of law/forum** option creates in the United States a "magnet forum" or "judicial hellhole": collective action plaintiffs' lawyers as first-movers choose the legal forum most favorable to the potential plaintiff-group[229].

[223] *Ibid*, 481-482.
[224] *Ibid*, 482.
[225] Ulen (n° 209) 2012, 87.
[226] Priest, George L. (n° 221) 2000, 482.
[227] One finds updated statistics on settlement rate in Eisenberg, Theodore, Geoffrey Miller and Roy Germano. "Attorneys' Fees in Class Actions." *New York University Law Review* 92 (2017): 937-970., which shows a settlement rate of 75% of the 422 class action cases in the US between 2009 and 2013 (for which the authors were able to gather data).
[228] Priest, George L. (n° 221) 2000, 482.
[229] Issacharoff and Miller (n° 217) 2012, 47.

2. TOWARDS A EUROPEAN INSTRUMENT?

KEY FINDINGS

- There is a strong need for European intervention given the insufficiency and inefficiency of the "traditional" remedies and the discrepancies in this area between Member States.
- **Legal basis**: The legal basis for such intervention would be, like stated in the Commission's Proposal, article 114 TFEU to which article 169 TFEU refers. Indeed, the European Union must participate in the protection of the economic interests of the consumers, as well as in the promotion of their right to information and education in order to secure their interests.
- European intervention will ensure both **access to justice and sound administration of justice** as it will reduce the costs and burden entailed by individual actions.
- **Nature of the instrument**: It is suggested the European instrument should take the form of a "**hybrid" regulation** in order to harmonize certain matters, whilst leaving enough margin of appreciation to Member States on other matters. This is essential because of the existing divergences and because European intervention needs to comply with both the subsidiarity and proportionality requirements**.**
- **Notion**: The use of the term "representative action" by the Commission in its proposal is questionable. A better option would have been to keep "**collective redress" or "collective actions".**
- **Forms of redress**: **Compensatory redress** (which ensures a possibility to claim compensation collectively by two or more persons claiming to have been harmed in a mass harm situation or by an entitiy entitled to bring a representative action) is essential and its introduction by the Proposal is to be welcomed, as well as the broad definition of what is to be understood as compensation.
- **Material subject matter**: The scope of the Commission's Proposal is more sectoral, albeit large, than it is horizontal. However, given the many sectors involved, this is not a problem and is seemingly more realistic (in terms of implementation in Member States) than a proper horizontal instrument, at least at the moment. However, it would be wise not to circumscribe collective redress to the protection of the collective interests of consumers, but to expand it to cover the **collective interests of persons (i.e., including fundamental rights), including both natural and legal persons.** Although the ideal solution to better protect the collective interests of persons would be a horizontal scope, a broad sectoral scope is more realistic and should thus be the preferred option.
- **Personal subject-matter**: The exclusion of legal persons in the Proposal is questionable. Encompassing **natural and legal persons** would be a better solution.
- **Implementation of a fund**: EU legislation should encourage or oblige the Member States to establish a fund to which left-overs of settlements and monies paid according to skimming-off decisions of national court can go. Such a fund should be available as a mechanism of **third-party funding** in cross-border collective actions on application of qualified claimants.

- **Punitive damages**: Compensation should be limited to the damages corresponding to effective loss, the **prohibition of punitive damages** should be maintained.
- **Admissibility**: It would be interesting to introduce a requirement for the admissibility of the claim related to the **homogeneous nature** of the joined individual claims, as is already in place in various Member States.
- **Qualified entities**: While it would be counter-productive to impose extremely strict criteriaand high standards on qualified entities, it seems important to reintroduce a requirement regarding **a minimum number of years of existence** and to maintain the criterion related to **the relevance of the subject-matter.**
- **Joining the group**: The Proposal can be criticized for the vagueness it created surrounding its position on the opt-in and opt-out systems. A solution could be the introduction of a **mixed-system**, in the likes of Belgium, accompanied by guidelines for judges.
- **Enforcement**: As suggested in the Proposal, where the defendant does not comply with an injunctive order, all **Member States** shall lay down effective, dissuasive and proportionate penalties, which will be available in the form of fines.
- **Information**: The equilibrium of the parties' rights, including freedom of expression, right to information and right to protection of the company's reputation, needs to be guaranteed by a **neutral authority**. Moreover, as already suggested by the Commission, an electronic Register providing information on collective actions or settlement negotiations in a Member State should be established.
- **Third-party funding**: It should be **authorized**, albeit regulated.
- **Evidence**: Because of its positive impact on legal certainty, the **use of presumptions** should be strongly welcomed.
- **Financial safeguards**: The application of **the "loser pays" rule and the prohibition of contingency fees**, both absent from the Proposal, should be included.
- **Alternative Dispute Resolution**: The use of an alternative dispute resolution mechanism should be **mandatory before accessing the courts**. Thus, the Proposal should have obliged the Member States to provide collective alternative dispute resolution schemes instead of giving them a mere possibility.

Providing consumers with better redress opportunities and thereby reducing consumer detriment, as well as enhancing traders' compliance, are some of the most important objectives addressed by the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[230] of 11 April 2018 (going onwards the "Proposal"). The Proposal thus endeavours to improve the effectiveness of Union Law, by lowering the risks of infringements and by eliminating their consequences.

[230] COM(2018) 184 final, 11.4.2018, hereinafter the "Proposal".

To achieve these goals, the Commission, supported by the European Parliament, had previously acknowledged the need for strong **private enforcement measures** independent from, yet complementary to, public enforcement[231]. Regarding the latter, the Consumer Protection Cooperation (CPC) Regulation[232] is now tackling cross-border infringements by empowering national consumer protection authorities to work more effectively together against widespread infringements. Additionally, in this context, the European Commission is enabled to launch and coordinate common enforcement actions to address EU-wide infringements.

However, the aforementioned Regulation has introduced neither individual nor collective right to redress to the benefit of consumers harmed by cross-border or even EU-wide infringements[233]. This is why the Proposal aims at providing adequate redress for citizens, by ensuring the implementation and the enforcement of EU Law, namely the applicable consumer protection rules. The ability of the Proposal to meet such objectives will be assessed.

2.1. The need for a European instrument

"Traditional" remedies being insufficient and the effective and efficient application of the current Injunctions Directive[234] being at stake - as the Commission[235], the Parliament[236] and the European Economic and Social Committee[237] have admitted -, the Proposal seeks to modernise and replace the system with a more appropriately designed and balanced mechanism. For this purpose, it repeals the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests[238], known as the Injunctions Directive.

The Reports by Member States annexed to this study unanimously agree there is a strong **need for a binding European instrument**. Three main structuring reasons support their statements.

- The first one relates to the **small impact the 2013 Recommendation** had on the different national systems.

[231] European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)); European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP).
[232] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) N° 2006/2004, OJ L 345, 27.12.2017.
[233] Public enforcers can only receive or seek from the trader voluntary remedial commitments to redress the harm caused to consumers by infringements covered by the Regulation, without prejudice to a consumer's right to seek redress through appropriate means. Regulation (EU) 2017/2394, Recital 46 and Article 9(4)(c).
[234] OJ L 166, 11.6.98, p. 51.
[235] Proposal's explanatory memorandum, point 1 Reasons for and objectives of the proposal 184/2018 ; 2011/2089(INI), according to which "Considerable shortcomings hinder its full effectiveness and lead to sub-optimal use".
[236] Recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector, 2016/2908(RSP).
[237] When supporting EU action on collective redress for decades and called for legislation in its opinion on the 2013 Commission Recommendation, highlighting the importance of both injunctive and compensatory collective redress.
[238] OJ L 110, 1.5.2009, p. 30–36. Amended by Regulation (EU) 2018/302 on geoblocking in order to include that Regulation in Annex I (Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60 I, 2.03.2018, p. 1). M. J. AZAR-BAUD, « Les actions en cessation en matière de protection des intérêts des consommateurs. A propos de la directive 2009/22/CE », Revue Européenne de Droit de la Consommation, Larcier, 2010/2.

- Secondly, such an instrument would **expand the scope of collective redress**, currently limited to injunctions in some countries, or would **harmonise the already existing frameworks** as they widely vary from one State to another.
- Finally, **some legislatures are not willing to implement truly efficient mechanisms of collective redress**, at least whilst awaiting the European approach.

2.1.1 Legal context

Given there are several texts addressing this issue, the Proposal on representative actions must be scrutinized together with the proposal targeting amendments of four EU consumer law Directives[239], both being part of the "New Deal for Consumers"[240].

In addition, the Proposal must be analysed in the context of the "Fitness Check"[241] and the "Collective Redress Report"[242], both addressing the Injunctions' Directive[243]. The former, as a part of the consumer and marketing law, and the latter because the principles it sets forth, are common to injunctive and collective redress mechanisms concerning violations of rights granted under Union Law.

Furthermore, the Proposal can be examined as the **continuum of provisions relating to EU-level individual redress**[244] and as the continuum of provisions which already exist in the policy area, namely **the Commission's Recommendation of 11 June 2013** on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[245], henceforth referred to as the "Recommendation".

2.1.2 Justifications and rationale

[239] COM(2018) 185, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules.
[240] See the State of the Union Address and Letter of Intent to the President of the Council and the EP, available at: https://ec.europa.eu/commission/state-union-2017_en.
[241] REFIT Fitness Check of EU consumer and marketing law, published on 23 May 2017. The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. See for results SWD (2017) 208 final and SWD (2017) 209 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item- detail.cfm?item_id=59332.
[242] Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU, COM(2018) 40 final.
[243] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30–36.
[244] Such as : 1) Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (ADR) ; 2) Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes; 3) Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure; 4) Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015, p. 1–13; 5) Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters OJ L 136, 24.5.2008, p. 3–8.
[245] Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, OJ L 201/60, 26.7.2013.

Collective redress is definitely seen as a means of reducing the burden and costs which individual proceedings entail. Therefore, it is also seen as a way of ensuring access to justice, as affected individuals are less likely to abandon justified and legitimate claims.

By creating a benchmark for setting the principles of a European model of collective redress, the Recommendation of the Commission aimed to facilitate access to justice in relation to violations of rights under Union Law and, to that end, recommended that all Member States should have collective redress systems at national level. The recommended mechanisms should follow the same basic principles throughout the Union, taking into account legal traditions of Member States and safeguarding against abuses[246]. This precaution can also be found in the Proposal, as it enshrines representative actions "while ensuring appropriate safeguards to avoid abusive litigation[247]".

According to the Recommendation, Member States should have taken necessary measures to implement its principles within two years of its publication and report its implementation to the Commission. Then, the Commission should monitor and assess measures taken by Member States to evaluate the need for any further action. The overall efficiency of the national devices would be measured by their ability to ensure access to justice, the right to obtain compensation, as well as the need to prevent abusive litigation and the mechanism's impact on the functioning of the single market, the economy of the European Union and consumer trust[248].

Subsequently, in its Report on the implementation of the above-mentioned Commission Recommendation, the Commission stated that even though collective redress was introduced almost 20 years ago[249], "the risks of cross-border or even EU-wide infringements affecting a multitude of citizens or businesses have further increased, particularly but not exclusively as a result of greater internet use and online shopping". The Dieselgate case was put forward[250] as a concrete demonstration of what happens when consumers lack protection in Member States which do not allow them to enforce their rights collectively.

Likewise, the Commission acknowledged that nine Member States still have no compensatory collective redress mechanisms in place[251] and only seven Member States have reformed their respective laws on collective redress after its adoption. Yet, these reforms have not always followed the principles of the Recommendation, neither regarding the broad scope suggested for the collective redress vehicle, nor the opt-in principle. Not only is the availability of collective redress mechanisms in the Member States unequal, but the implementation of safeguards against the potential abuse of such mechanisms is similarly very unevenly distributed across the EU.

[246] Recommendation, point (10) and point I (1) et (2).
[247] Art. 1 (1).
[248] Recommendation, point 26.
[249] Since the adoption of Directive 98/27/EC on injunctions for the protection of consumers' interests; Green Paper on antitrust actions (COM2005)672; White Paper on antitrust actions (COM(2008)165); Green Paper on consumer collective redress (COM(2008)794).
[250] European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector 2016/2908(RSP).
[251] Besides, in the Member States where collective redress devices do not formally exist, there appears to be an increasing tendency of claimants attempting to seek collective redress through the use of different legal vehicles like the joinder of cases or the assignment of claims.

Indeed, significant disparities were identified between Member States as to the effectiveness of the current Injunctions Directive and the existing national collective compensatory redress mechanisms[252].

Against that background, a European intervention, particularly in light of its cross-border implications, was required to provide consumers with better redress opportunities and thus reducing consumer detriment, as well as enhancing compliance of traders.

Convinced that defining, at Union level, a common framework for representative actions - encompassing both injunctive and compensatory redress for the protection of the collective interests of consumers - will ensure an effective and efficient treatment of infringements of Union Law arising from domestic or cross-border transactions, the Commission endorsed the Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[253] of 11 April 2018.

2.1.3 The instrument: Directive or Regulation?

The Commission's proposal of a Directive. Accomplishing high level consumer protection and contributing to the proper functioning of the internal market, by ensuring that qualified entities can seek representative actions aimed at the protection of the collective interests of consumers in case of infringements of Union Law[254], constitute the legal basis of the Proposal. To achieve these goals, the Commission would have to put in place important devices. Therefore, for legibility reasons, the Commission has proposed to repeal the Injunctions' Directive. It has acknowledged that choosing to revise an already existing instrument instead of introducing a new one would have been severely questioned.

The Commission proposed a Directive, as in terms of efficiency and enforcement, it is said to be "the only suitable instrument for addressing procedural law with the above objectives".

As for European Union competence, the fact that nine Member States do not yet provide for such mechanisms, as well as the significant variations existing in national collective compensatory redress instruments, all justify European intervention in compliance with the subsidiarity principle. Proportionality is also warranted as, in order for it to achieve its objectives, the Proposal only establishes certain key aspects of the framework, which must then be complemented by specific procedural rules to be adopted at national level.

The Member States' Reports : **from a Directive to a hybrid Regulation ?** The Member States' Reports convey that, under some circumstances, the principles of subsidiarity and proportionality would be complied with by a European instrument. Regarding the type of instrument, many opinions tend to support the choice of a Directive and some support the choice of a Regulation, either explicitly or implicitly. Arguments in support of a Directive are related to the fact that it gives more flexibility to

[252] The impact of the Recommendation is visible in the four Member States where new legislation was adopted after its adoption: Belgium, Lithuania, France and the latest reforms in the United Kingdom.
[253] COM(2018) 184 final, 11.4.2018, hereinafter the "Proposal".
[254] Art. 114 of the TFEU to which art. 169 of the TFEU refers.

Member States, taking into account that collective redress is deemed a sensitive issue across the EU, sometimes perceived as going against the legal traditions of the Member States. An intermediate position put forward is that a Regulation is convenient for cross-border class claims and a Directive is suitable for internal mass claims[255].

The Reports which favour a Regulation agree that such an instrument will need to have a limited degree of optionality within it, to avoid the prospect of *forum* shopping across Member States as the latter would reduce legal certainty and affect mutual trust between those States.

The adoption of a "hybrid Regulation[256]", such as the General Data Protection Regulation[257] (GDPR) would leave, when necessary, a margin of appreciation to Member States while imposing some mandatory rules common to all. In this respect, the General Data Protection Regulation (GDPR) can pave the way for a Collective Redress Regulation, in the construction of a Europe "united in diversity".

It is important to note that, because procedural law is such a delicate issue, and because it is sphere of competence which Member States are not ready to share with the EU, the instrument should not detail the course of the proceedings. The details of the proceedings should be left for Member States to determine.

2.2. The type of action

In light of the national mechanisms already in existence and the solutions enacted elsewhere, the notion of "representative action" used by the Proposal can be challenged.

2.2.1 The notion

The Proposal of the Commission sets out rules enabling qualified entities to seek representative actions aimed at the protection of the collective interests of consumers (art. 1).

It is worth reminding that the expression "representative action" came up in the Resolution of 2012 'Towards a Coherent European Approach to Collective Redress'[258] and in the Recommendation of 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. A general term, "**collective action**"[259], was used to embrace two types of action: - "**group actions**", which can be brought jointly by those claiming to have suffered harm[260] and - "**representative actions**", which are brought by a *representative entity*[261] on behalf and in the name of two or more natural or legal

[255] See French Report, question 2.1, page 11.
[256] B. FAUVARQUE-COSSON and W. MAXWELL, Panorama Protection des données personnelles (décembre 2016 - mai 2018), Recueil Dalloz, 24 mai 2018, n°19, n°1034.
[257] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
[258] 2011/2089(INI)
[259] Recom. (17).
[260] Recom. (17).
[261] The representative entity being an ad hoc certified entity or a public authority.

persons[262] not party to the proceedings[263]. The Recommendation only addressed "representative action" because this issue needed to be clarified, in contrast to "group actions", where standing to sue is more straightforward.

Following the outlines set forth in the Recommendation, the Proposal sets out rules enabling a representative action. This is to be understood as "an action for the protection of the *collective interests of consumers* to which the *consumers concerned are not parties*"[264]. Hence, even if the Proposal maintains the term "representative action", its meaning has changed and the notion of "representative action" itself is subject to confusion.

Indeed, denominations used for the types of collective actions vary significantly at national levels. Amongst expressions adopted by the European countries, "collective actions" and "group actions" are the most frequently used. Nonetheless, other expressions have been adopted, such as "class actions"[265], "test case proceedings" or "model case proceedings"[266], "Group Litigation Orders"[267] and even "popular actions"[268]. Consequently, at present, each denomination has to be understood in its national context to avoid misunderstanding. For instance, the French "action de groupe" should be compared to the Commissions' representative action, since it can be only brought by qualified entities, albeit in the European lexology a group action describes claims brought by members of the group. As for "representative actions", Member States often reserve this expression for the "*injunctive collective redress*", that is to say, one of two sorts of collective redress or collective actions, as will be seen *infra*.

For these reasons, the term "representative action" can be challenged.

Acknowledging the Commission's will to avoid the use of "class actions", a better option would have been to keep "**collective redress**" or "**collective actions**". This is essentially because revising the Injunctions Directive entails expanding the scope of the instrument and introducing a whole new mechanism. A change of name would have better reflected the Directive's content[269]. In the same way as in the Proposal[270], "collective redress" in the Recommendation encompassed two types of remedies: the "**injunctive collective redress**" and the "**compensatory collective redress**"[271]. These two devices were dissociated until then, as was the case in the Injunctions Directive, which seeks only for cessation or prohibition of infringements. Thus, the introduction of an action embracing both types of collective redress within its framework constitutes an important benchmark of the Recommendation. It also constitutes a first rapprochement with the Anglo-Saxon system of the class actions.

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[262] Persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation.
[263] Recom. II, 3, (d).
[264] Proposal, art. 3 (4).
[265] In Denmark and Poland.
[266] In Germany.
[267] In the United Kingdom.
[268] In Portugal.
[269] Whereas keeping representative action for a brand new scope and content is confusing.
[270] Accordingly, the different **measures** that the Commissions' Proposal requires to be sought within a single representative action are an *injunction order as an interim measure*, an *injunction order establishing an infringement* and measures aimed at the *elimination of the continuing effects of the infringements*, including *redress orders*. That is to say compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate (art. 6).
[271] Recom. II, 3 (a).

The expressions collective redress and/or collective action, would be a better option because the term is well known at European Union level, namely in the Resolution of 2012, as well as in the Recommendation and Communication of 2013. Finally, "collective redress" is not regularly referred to by national systems, which would facilitate an autonomous European meaning. Another option could be to adopt the Ibero-American expression "collective proceedings[272]".

2.2.2 The possible outcomes: injunctive and/or compensatory redress

The Recommendation urged Member States to have collective redress mechanisms, both **injunctive** and **compensatory,** at national level. They should be available in all cases where rights granted under Union Law are, or have been, violated to the detriment of more than one person[273].

The solutions adopted by Member States vary significantly. Whereas all Member States complied with injunctive collective redress, divergences with regard to compensatory devices are strong, leaving aside an interesting leeway of action in order to improve access to justice.

Thereby, the Proposal enables qualified entities to bring representative actions seeking **collective injunctive relief** and **collective compensatory redress** within a single device.

The former enables interim[274] or definitive measures[275] to stop and prohibit a trader's practice if it is considered an infringement of the law, as well as measures eliminating the continuing effects of the infringement[276]. To alleviate the conditions of admissibility of injunctions, the Proposal states that qualified entities should not have to obtain **mandate** from the individual consumers concerned nor provide proof of actual loss, damage on the part of the consumers concerned, of intention or finally of negligence on the trader's part[277]. This means that substantial conditions for an action under national laws should not be an impediment to the carrying out of a representative action seeking injunctive relief.

As for the latter, the Proposal sets specific provisions only applicable to compensatory redress measures. Article 6 of the Proposal sets out two possible outcomes in the context of representative actions seeking a redress order: a declaratory decision[278] and a redress order[279].

As a rule, qualified entities should be entitled, where appropriate, to bring representative actions seeking a **redress order** which obligates the trader to provide for, *inter alia*,

[272] See it translated from Spanish into French, in M. J. AZAR-BAUD « Les actions collectives en droit de la consommation. Etude de droit français et argentin à la lumière du droit comparé », Annex, p. 693 et s.
[273] Par. 2.
[274] Art. 5, par. 2 (a).
[275] Art. 5, par. 2 (b).
[276] Art. 5, par. 3.
[277] Art. 5, par. 2 in fine.
[278] According to art. 6, par. 2.
[279] According to art. 6, par. 1.

compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. It is explicit from this provision that **compensation is to be understood in a large sense and not limited to monetary compensation**. The broad solution adopted by the Proposal is preferable as, in national legislations, where the matter is unclear, this broad understanding of the notion could be implied but this is uncertain[280].

Exceptionally, in complex cases, Member States may empower courts and administrative authorities to issue a **declaratory decision** on the trader's liability towards consumers harmed by an infringement, instead of a redress order[281]. As a matter of fact, the Commission considers it important to provide flexibility to the Member States in cases where quantification of harm to consumers involved in the representative action is complex due to the characteristics of their individual injury. This is the case, for instance, in health care-related group actions in France. After a declaratory decision is made regarding the trader's liability in its infringement causing the victims harm, the said victims may rely upon it at a second stage of the proceedings. Victims may also rely upon the decision in subsequent redress actions.

The **Model Code of Collective Proceedings developed by the Iberia-American Institute of Procedural Law** also enacted this type of solution, in 2002, as a general rule. According to Article 22[282], "the order can be general and declare the liability of the defendant and the obligation to compensate the damages"[283].

As mass harm situations are particularly prevalent in B2C litigation, and an effective enforcement of EU rules matters to European citizens and affects their daily lives, the Proposal aims to create a robust, efficient and effective enforcement system, needed to provide adequate redress. As declaratory decisions may remain theoretical, the Proposal outlines **two mandatory scenarios where** the court or the administrative authority should issue a redress order, **the use of a declaratory decision being forbidden**[284]. This is firstly the case where consumers concerned by the *same practice are identifiable and suffered comparable harm* in relation to a period of time or a purchase, such as in the case of long-term consumer contracts[285]. No mandate should be required to initiate the action and redress shall be directed to the consumers concerned[286].

The second mandatory scenario, relates to a situation also known as "low-value cases" or "negative expected value-suits" in the class action's jargon, where consumers have suffered such a *minimal loss* and as such, it would be *disproportionate* to distribute the redress back to them. In this case, the Proposal provides a very interesting instruction regarding the specific issue of funds recovered throughout this type of representative action, a sort of cy-près remedy (further developed in the next paragraph).

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[280] M. J. AZAR-BAUD and S. CARVAL, « L'action de groupe et la réparation des dommages de consommation : bilan d'étape et préconisations », Recueil Dalloz 2015, p. 2136 et s.
[281] Art. 6, par. 2.
[282] For a translation from Spanish to French, see AZAR-BAUD, Les actions collectives op. cit., appendix.
[283] The article also provides for different possibilities for the judge to be applied as appropriate. Firstly, the judge will determine the amount owed to each member of the group (par. 1). Secondly, if damages are the same or can be determined by the same formula, the order will indicate the way to calculate it (par. 2). Thirdly, if a member of the group does not agree with the amount or the formula that has been settled, he or she will be able to introduce an individual claim for the clearance of his or her compensation's credit.
[284] Art. 6, par. 3.
[285] Art. 6, par. 3 (a).
[286] Art. 6, par. 3 (b).

From a prospective point of view, these ideas are to be maintained in the European instrument. However, the instruction according to which no mandate should be required to initiate the action might be misunderstood. Indeed, the reader may deduct from it that in the general compensatory redress litigation (the non mandatory ones) a mandate is always required in non-mandatory cases, albeit the rule states that a Member State *may* require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued (art. 6.1). This solution could also lead to important divergences in its implementation. Thus, the instrument should make it clear that no mandate is required at all, except for the members of the group belonging to a different Member State, and willing to join the action through the opt-in mechanism.

The Reports by Member States unanimously agree on the need of a mechanism to request both injunctive and compensatory relief within the same device. It should also set the main features of the forms of collective redress.

Given the extended scope granted by the draft of the Proposal, the possibility given to judges by the latter to rule through a declaratory decision seems indispensable. It may be useful for instance in health-related cases. To avoid the potential risks of misuse of the faculty, the mandatory scenarios set by the Proposal should be supported as well.

It is important to properly articulate the possible outcomes to ensure the introduction of a single action for injunctive and compensatory relief.

2.2.3 Cy-près remedies and the fate of left-overs

In every case where a trader is held liable for infringing Union Law, in matters related to the scope of the Proposal, they should compensate for damages caused. However, "traditional" redress measures, like compensation, repair, replacement, price reduction, contract termination or reimbursement of price paid, are neither appropriate nor plausible in one of the two "mandatory redress order cases", described above as low-value cases. Therefore, the Proposal establishes that, in the said case, funds awarded as redress should be "directed to a public purpose serving the collective interests of consumers[287]". The explanatory note provides the example of an awareness campaign.

This solution is very similar to the one commonly used in class action practises, known as **fluid recovery.** It is a method of distributing unclaimed or residue funds after all class members have claimed their share of the compensation awarded. Thus, the goal of fluid recovery is to ensure that the defendant is deprived of all ill-gotten gains[288].

In class actions regimes, specific fluid recovery procedures include price rollback – generally used when the defendant has a monopoly or trades non-substitutable products –, escheat. This requires deposit of the residue into the state government's general fund, as well as the establishment of a **consumer trust fund**, also known as earmarked escheat, where awarded funds are addressed to specific organizations that are in a

[287] Art. 6, par. 3 (b).
[288] See Simer v. Rios, 661 F.2d 655, 676 (7th Cir. 1981) (holding that fluid recovery must be consistent with the goal of disgorgement, as well as deterrence and compensation).

position to use the funds for lawsuits, lobbying, or other projects aimed at benefiting class members and those similarly situated. This method of fluid recovery can take the form of either awarding a grant to an existing consumer protection organization or establishing a new organization[289].

As one can see, **fluid recovery refers to a variety of procedures allowing a group of plaintiffs to recover, based on alleged "aggregate" damages suffered by the class as a whole, rather than the harm suffered by each individual plaintiff**. The defendant will pay a sum to counterbalance the injury caused to the entire group of individuals. The court will calculate the value of the group injury on an aggregate basis, and will then distribute the "classwide" recovery through an equitable process. Thus, under a fluid recovery system, each victim will not have to prove personal injury.

This "comparative law framework" could be helpful to broadly understand the Proposal's provision, according to which funds awarded as redress should be "directed to a public purpose serving the collective interests of consumers". However, as mass harm situations prevail in B2C litigation, it would, without a doubt, have been preferable to be more explicit when it comes to detailing the options given to the courts when the damages awarded cannot be distributed directly to individual class members.

One of the most important shortcomings identified in the Proposal relates to the situation where a residue subsists after an "individual-basis compensation redress" process. This is not regulated under the Proposal. It would be interesting to offer the possibility that the remnant of the adjudicated compensation be allocated to its "next best" use and to benefit as many class members as possible.

All in all, in the likes of Canada, **EU legislation should encourage or oblige Member States to establish a fund where left-overs of settlements and monies paid according to skimming-off decisions of national court can go. Such a fund should be available as a mechanism for third-party funding in cross-border collective actions on application of qualified claimants.**

2.2.4 Punitive damages

The Proposal contains no special rules regarding **punitive damages.** Neither encouraged under the Recommendation nor available in the Antitrust Damages Directive, they are alien to the majority of Member States' following the civil law tradition[290].
The Reports by Member States reject punitive damages and postulate that they should not be inflicted upon the defendant. **Compensation should be limited to damages corresponding to effective loss.**

[289] Stan Karas, The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services, 90 Cal. L. Rev. 959 (2002). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol90/iss3/10.
[290] Only three Member States allow some form of punitive damages, albeit in a very limited form. Greece, for example applies some form of damages akin to punitive damages in the form of monetary compensation for moral damages in representative consumer claims. In IE the recovery of punitive damages is generally rare and is usually limited to public policy grounds. Finally, in the UK (England and Wales) punitive damages are available in very rare circumstances where the defendant must have known he was acting unlawfully and pursued this with the expectation that his gain would exceed any compensation to be awarded to the victims of such conduct.

2.3. The scope

According to the Proposal, representative actions seek the protection of the collective interests of consumers (art. 1).

2.3.1. Material scope

Collective interests

The need for a horizontal EU approach to collective redress had been identified by the European Parliament in 2012[291], who then called on the Commission to propose legislation for a harmonised system of collective redress for EU consumers, based on best practices within and outside the EU[292]. The framework should include a common set of principles, providing uniform access to justice via collective redress within the Union and *specifically, but not exclusively, dealing with the infringement of consumer rights.*

Following the same horizontal line, the Commission presented its position in the Communication 'Towards a European Horizontal Framework for Collective Redress' and in the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[293], on 11 June 2013. These texts unveiled the context of the actual Proposal whilst seeking to facilitate access to justice, to *stop illegal practices* and to enable injured parties to *obtain compensation* through "collective redress" within the Union[294].

It must be highlighted that where the Recommendation refers to the violation of rights granted under Union Law, it covers all situations where the breach of rules established at Union level has caused or is likely to cause prejudice to natural and/or legal persons[295]. This way, representative actions deal with '**mass harm situation'**, defined as a situation where two or more *natural or legal persons* claim to have suffered harm resulting from the same illegal activity of one or more natural or legal persons[296].

It is also worth pointing out that since **collective interests are not restricted to a category of rights,** akin to divisible or indivisible rights (a distinction made in the Ibero-American countries), they should be understood as encompassing both. This can be considered another example of the European system leaning towards the Anglo-American one[297].

Fundamental rights not included as so

The solution enacted, bound to "consumers", leaves aside fundamental rights, where collective redress is also needed, particularly in view of article 47 of the EU Charter on

[291] In its 2012 Resolution 'Towards a Coherent European Approach to Collective Redress - 2011/2089(INI).
[292] 2017 Recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector - 2016/2908(RSP).
[293] Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, OJ L 201/60, 26.7.2013.
[294] Art. I (1).
[295] Recom, (6).
[296] Idem.
[297] Like in the class actions system (Rule 23 FRCP) and in the Model Code for Collective Proceedings, art. 1.

Fundamental Rights[298]. In comparative case law, Canadian congregations have faced collective actions from victims of sexual harassments and the Government of Argentina has faced collective actions from associations demanding to have access to potable water. In this sense, the Report of the Fundamental Rights Agency (2011)[299] sheds light on the link between access to justice and collective redress, and indicates that collective redress would have promoted improving the enforcement of EU legislation or for better protecting the rights of victims. Reflection ought to be applied regarding a collective redress for the protection of fundamental rights. For all these reasons, **it would not be wise to circumscribe collective redress to the protection of the collective interests of consumers, but it should rather be extended to encompass the collective interests of persons, including both natural and legal persons, as the Recommendation proposed**[300].

Protection against actual and potential damages

The Proposal targets infringements that harm or may harm the collective interests of consumers, whilst the Recommendation referred to a situation where individuals claim to have suffered harm. The scope in the former is larger than in the latter, as cessation may be related to infringements which have not caused concrete prejudice.

Going further, according to the Proposal, the representative action can be brought even if the infringements have ceased before the representative action started or was concluded. This is because it may still be necessary to prevent the repetition of the practice. Establishing that a given practice constitutes an infringement will most likely facilitate consumer redress[301].

Additionally, the Proposal makes it clear that the representative action should be enacted without prejudice to the European Union rules on private international law (in particular rules relating to court jurisdiction and applicable law - art. 2 (1, 2, 3)), to other procedural means enabling actions aimed at the protection of the collective interests of consumers at national level to be brought, and to rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law. This is why, namely, the existence of an effective system of alternative disputes resolution mechanisms, dealing with identical or similar disputes between a trader and several consumers, should be complementary and not mutually exclusive to a collective action mechanism[302]. In line with this purpose, the Proposal also promotes collective out-of-court settlements, subject to court or administrative authority scrutiny.

[298] Indeed, this article grants enabling rights, allowing those who perceive their rights as having been violated to enforce them and seek redress. Restrictive rules on who may take a case to court and a high degree of variation among Member States on the amount of compensation awarded have already been mentioned as a factor to take into account. Report of the Fundamental Rights Agency (2011).
[299] Available at: http://fra.europa.eu/en/publication/2012/annual-activity-report-2011-0.
[300] Art. 3(a).
[301] Art. 2 (1).
[302] In the same way, the 2013 Directive on consumer ADR states in its recital 27 that the Directive should be without prejudice to Member States maintaining or introducing ADR procedures Union law mechanisms to be used by individual consumers to enforce their rights are also set out in other instruments, such as Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure18 and in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. OJ L 136, 24.5.2008, p. 3–8.

The Reports mainly favour a horizontal approach, considering it the best solution to deal with cross-border mass harm situations. Those deeming this an ideal but unrealistic solution stress that the instrument should at least cover consumer law, product liability, cartel law and all cross-border mass harm situations.

2.3.2. Personal scope

Consumers' collective interests

Unlike the Recommendation, which refers to a *mass harm situation*, the Proposal refers to the expression "**collective interests of consumers**" already used in the Injunctions Directive. However, the characterisation is not the same. Whilst the **Injunctions Directive** used a "reference method", indicating "collective interests of consumers *included in the Directives listed in Annex I*"[303] (had they been violated, the injunction was conferred), the Proposal keeps the reference method, but also adds a definition of the "collective interests of consumers" as "*the interests of a number of consumers*"[304]. The question of improving the description arises. In fact, the representation seems quite laconic – one may question what "a number" is. It also appears tautological. Likewise, representative actions target infringements by traders[305] of Union Law provisions listed in Annex I that harm or may harm the collective interests of consumers.

Aside from choice of terminology, several remarks can be made about the content of the "collective interests of consumers" the representative action seeks to protect.

Legal persons

Contrasting the enlargement of the material scope of representative actions, the expression "collective interest of consumers" seems to restrict the **scope of beneficiaries**.
While the beneficiaries can be natural and legal persons according to the Recommendation[306], the Proposal refers to consumers in the same way as in the Consumers Directive; defined as any *natural* person who is acting for purposes, which are outside their trade, business, craft or profession[307]. **In the Draft, legal persons are therefore excluded from the protection.**

It is common knowledge that providing a definition might entail a reduction of the level of consumer protection established in certain national systems[308]. Under the current

[303] Injunctions Directive, art. 1 (1).
[304] Proposal, art. 3 (3). Besides, the consumer is defined as any natural person who is acting for purposes which are outside their trade, business, craft or profession, Proposal, art. 3 (1).
[305] Proposal, art. 3 (2): *'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in their name or on their behalf, for purposes relating to their trade, business, craft or profession*.
[306] Recom, (6).
[307] Proposal, art. 3 (1).
[308] Also the financial crisis has shed light on the inconsistency between the notions of "consumer" in the Brussels I bis Regulation and "retail client" in EU financial market law. When investment firms provide financial services, the retail client protection regime will apply in line with Arts.4 and 5 of Directive 2014/65/EU (MIFID II) to investors. he Directive classifies clients of investors into three groups: retail clients, professional clients and eligible counterparties (the latter being a subset of professional clients). The issue is whether only "retail clients" qualify as consumers. They are not necessarily natural persons.

Proposal certain entities, including small businesses, may not be afforded satisfactory protection, as they are not given "consumer" status.

It is also well known that the concept of consumer – while being a core notion in the European Union – differs across the Member States. For instance, depending on the regime, it might be extended to non-profit associations[309], to legal persons acting for non-commercial or personal purposes[310], to ecclesiastical entities[311] or to housing cooperatives[312].

Encompassing natural and legal persons would be a better solution, at least from two perspectives. Firstly, this would be coherent with the wide approach since in competition, financial and environmental issues victims can easily be legal persons[313]. Secondly, the current solution restricting representative actions to "consumers", considered natural persons, can be impractical and lead to problems dealing with the constitution of the groups. For instance, in follow-on actions in the context of unfair practices, where the victims are often consumers *and* companies, it would be more difficult to distinguish and separate the "non consumer" members from the group than to compensate them all.

2.3.3. The technique of the European instrument

From a purely formal point of view, the "**referral technique**" used is the same one as used in the Injunctions Directive, as they both refer to a list of texts compiled in an appendix. Nevertheless, whereas the Annex of the Injunctions Directive listed 13 Directives, as well as the recently added Regulation (EU) 2018/302 on geo-blocking, the Annex of the Proposal already lists 59 Directives or Regulations, including new matters such as discrimination[314], personal data[315], insurance distribution[316], gas[317], energy[318],

[309] National Report, Question 3: Greece (Art.1 Law Nr. 2251/1994 (Basic Definition), See "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law". Report prepared by a Consortium of European universities led by the Max Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082, June 2017.
[310] In Austria, Denmark, Lithuania, Malta, Portugal, Spain, England and Wales, and Scotland. See "An evaluation study of national procedural laws and practices… *op. cit.* p. 70, note 132.
[311] National Report, Question 3: Hungary (Act CLV of 1997 on the Consumer Protection, See "An evaluation study of national procedural laws and practices… *op. cit.*
[312] National Reports, Question 3: Lithuania (case No.3k-3-132/2010); Malta (Art.2 of the Consumer Affairs Act). See "An evaluation study of national procedural laws and practices… *op. cit.*
[313] See also the Package Travel Directive 2015/2302/EU which at recital 7 – set out in the table at para.113 above – recognises that the distinction between consumers and representatives of small businesses or professionals is not an easy one to make and that the latter may also require similar protection to consumers. The directive therefore uses the term "traveller" and not consumer, so as to provide the possibility for such protection.
[314] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60, 02.03.2018, p. 1).
[315] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88).
[316] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 26, 2.2.2016, p. 19–59).
[317] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94–136).
[318] Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (OJ L 198, 28.7.2017, p. 1–23).

market funds[319] and other security issues[320]. This is because the evaluation showed that the Directive should be made more effective, for example, by further harmonising the injunction procedure and expanding its scope to more EU instruments relevant to the protection of the collective interests of consumers[321].

The extension of the scope in the Proposal is utterly justified. As a matter of fact, most Member States do not have a "general" or "horizontal" regime, with the exceptions of the collective settlements in the Netherlands, as well as group/collective actions in Bulgaria, Lithuania, Malta, Sweden and Slovenia, class actions in Denmark and group litigation orders in the UK.

As for sectoral collective redress, important divergences between the Member States can be drawn. Many countries have put a compensatory collective redress regime in place, which is limited to specific sectors. Some of them have confined the mechanism to one single subject matter, as is the case in Germany, where it is limited to investor claims and in Belgium, where it is bound to consumer cases. Other States have extended the action to a variety of different sectors. For instance, in Hungary the action applies to consumers, competition law and financial claims; in Poland it applies to consumer cases, competition law, product liability and other torts; in Portugal, to public health, environment, quality of life, protection of consumers, cultural heritage; in Spain, to consumer, competition, discrimination, environmental and labour law; and in France the "*action de groupe*" is used for consumer cases, competition law, health, discrimination, environment and personal data cases.

To conclude on a positive note, we can say that certain matters related to consumer law – such as discrimination, environmental and financial issues – find their place in the expression "collective interest of consumers" thanks to the long list presented in the Annex of the Proposal.

This section cannot be concluded without a reference to the most developed system of class actions, the Federal Rules of Civil Procedure of the United States of America, which sums up well the practical philosophy of the common law where "situations" are described instead of rights[322]. No definitions of the rights at stake can be found in the mythic Rule 23 FRCP, this provision being coherent with the standard according to which *ubi remedium ibi jus* (where there is a right, there is a remedy).

As for the Proposal, even if it does not provide for a real definition of the collective interests of consumers, it has the merit of broadening the scope of collective redress. The absence of a clear definition could also be interpreted as a discrete rapprochement between the civil law and the common law systems.

[319] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8–45).
[320] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12–82).
[321] See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU).
[322] In the Romano-Germanic countries the tendency is towards the dogmatism, following the standard *ubi jus ibi remedium* (where there is a right, there is a remedy).

However, since the interests of consumers still have to be listed, we envisage a more expanded sectoral approach rather than a true horizontal one.

2.4. The legal standing: Pre-existing Qualified entities and Ad hoc Qualified entities

The definition of a "representative action", in the Draft, as "an action for the protection of the collective interests of consumers to which the consumers concerned are not parties"[323] is definitely of a procedural nature.

One of the pillars is, in fact, the concept of "formal[324]" parties. On the one hand, the trader having infringed the rights hailing from the texts listed in an annex, on the other hand, the entities qualified to bring a specific "representative action", to whom the Proposal dedicates a structuring chapter[325].

At least two types of "**qualified entities**" should be enabled to bring the representative action: firstly, **entities designated in advance**, at their request, by the Members States for the general purpose of a representative action and placed in a publicly available list including national or international consumer organisations and independent public bodies; secondly, **entities designated on an ad hoc basis** for a particular representative action.

The Proposal leaves to the Member States the treatment of the type of measures each qualified entity is permitted to seek[326].

Member States currently rule on this issue very differently. In some cases, namely in the Austrian model of group litigation, there are no specific provisions nor restrictions as to standing. Hence, the Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the entity and the rights granted under Union law, sufficient capacities) are currently not met. In some other States, legal standing is restricted to a slate of legal persons. Among these, Belgium offers legal standing to private legal persons (such as consumer organisations and associations with a corporate purpose directed at collective damages) and public persons (the Federal Ombudsman), whereas France limits the legal standing to certified associations, except for health group actions where an *ad hoc* certification can be conferred[327], and unions amongst other persons having standing to sue, according to the subject-matter. Between the two systems, Bulgaria, in coherence with the horizontal approach recognises standing to any harmed person or organisation established with purpose to defend the interests allegedly infringed[328]. **Against this background, the Proposal seems to be able to improve the ruling of the legal standing, as it includes *public bodies* and *ad hoc organisations* which are not entitled to bring forth an action in some Member States, like France. It also appears capable of strengthening cross-border**

[323] Proposal, art. 3 (4).
[324] M. J. AZAR-BAUD, « Les actions collectives en droit de la consommation. Etude de droit français et argentin à la lumière du droit comparé », *op. cit.,* n°434.
[325] Chapter 2.
[326] Art. 4 (4).
[327] M. J. AZAR-BAUD, « Variations autour du régime de l'action de groupe », *JCP E,* n°27, July 2017.
[328] See 'State of collective redress in the European Union in the context of the implementation of the Commission Recommendation', JUST/2016/JCOO/FW/CIVI/0099, Prepared by The British Institute of International and Comparative Law, November 2017, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847 hereinafter the Commission's study.

protection, as it provides that international consumer organisations are eligible to be qualified by the Member States.

To harmonise the issue within the Member States, under the Proposal, the qualified entities will have to satisfy minimum **reputational criteria.** They must be properly established, have a non-profit character, as well as a legitimate interest in ensuring compliance with the relevant EU law[329]. The entities must comply with these criteria in order to keep said status.

They are not required to satisfy a condition providing for minimum length of existence and continuous activity – unlike in Italy, France and the Iberian-American systems[330], where associations must have existed for five years before they can bring forth an action – nor must they satisfy a condition of representativeness at national level. This has been identified as a shortcoming by the MEDEF (the Movement of French Enterprises). This common framework was deemed insufficient as it leaves too much margin of appreciation to Member States. Some may be less demanding than others, which could lead Member States within the Union to organise themselves in order to attract lucrative litigations[331]. **Therefore, while it would be counter-productive to impose extremely strict requirements and high standards on this matter, it seems important to reintroduce the "minimum length of existence" requirement.**

Aside from legal standing, courts or administrative authorities can examine whether the qualified entity's purpose justifies it taking action in a specific case, which leads to the analysis of the petition the qualified entities claim throughout a representative action (whether this petition coincides with the entity's purpose)[332].

2.4.1. The relevance of the subject-matter

Alongside the criteria set by the rules regarding standing to sue, the Proposal requires "a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought". This condition, consisting in the consistency between the subject-matter of the case and the aims of the organisation[333], relates to the "specificity" of the entity with respect to the rights to be protected, generally arising out of the Articles of Association or Statutes of the entity. It is an additional requirement, which acutely links the two aforementioned elements (the collective interest to protect and standing to introduce a representative action). Thus, it is not to be seen as redundant but to be understood as a concrete criterion[334].

The "specificity criteria" also resembles the class actions' mandatory requirement of "typicality", which seeks to ensure that the interests of the representative entity are "aligned with the common questions affecting the class"[335], while focusing on whether

[329] Art. 4.
[330] CMPCI, art. 2.
[331] Observations du Medef Proposition de directive « Protection des intérêts collectifs des consommateurs », 5th June 2018.
[332] M. J. AZAR-BAUD, « Droits préjudices et prétention processuelle dans les actions de groupe », JCP E, n° 26, 29 juin 2017, p. 1357.
[333] Art. 4, par. 1 (b).
[334] As opposed to legal standing, understood as an abstract criterion.
[335] Newberg on Class Actions, 4th ed. 2002, p. 319.

there exists a "relationship between the plaintiff's claims and the claims alleged on behalf of the class"[336].

This condition is coherent with the aims of the Proposal, striking a balance between facilitating access to justice to safeguard consumers' interests and ensuring adequate safeguards from abusive litigation, and should thus be welcomed.

2.4.2. Pecuniary criteria

Pecuniary criteria are also required in one specific type of representative action, the compensatory redress one: the qualified entity shall demonstrate that it has sufficient financial resources, not only to represent the best interests of the consumers concerned, but also to meet any adverse costs should the action fail.

However, because collective redress commonly entails a heavy financial burden, the lack of possibility to fund it would usually prevent the qualified entity to initiate a representative action. Thus, some qualified entities resort to **third party funding**, a matter regarding which models vary. According to the Commissions' study[337], in some Member States, third party funding is used often, without being prohibited nor regulated[338]. In some other Member States, even if third party funding is not prohibited, it is rare[339]. Finally, there are systems where this mechanism unknown[340]. In the latter countries, the action can be financed with public funds, or private funds, such as private donations or the resources of associations[341]. This includes registration fees, contributions, income generated by its activity or public funds[342]. Another solution to which qualified entities may be entitled to is **legal aid**[343]. Particular provisions hail from the French system, where the court can order the defendant to provide the claimant association with advance payments in respect of costs and expenses arising out of the constitution of the group.

The Proposal's rules shed light on this matter in relation to compensatory representative actions[344]. Firstly, they provide that qualified entities must **disclose the origin of the funds supporting the representative action**. Secondly, **in case of third party funding**, **courts and administrative authorities should be able to assess the arrangements**[345], and to require the claimant to refuse funding and/or to reject standing to bring forth the action. Lastly, Member States should adopt policies **prohibiting the third party funder from influencing the claimant's decisions**,

[336] Idem, "Prerequisites for Maintaining a Class Action," §3:13, pp. 316-17 (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364 (1982); Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3rd Cir.1988).
[337] See the Commission's study, 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit., p. 18.
[338] In Germany (idem, pp. 175-180), Austria (idem, pp. 120-125) but nb that in Austria it is under dispute whether the prohibition of *pacta de quota litis* also applies to third party funding (see footnote n° 102), and Hungary (idem, p. 189).
[339] Like in Belgium (idem, p. 126) and Denmark (idem, pp. 523-540).
[340] As in Bulgaria (idem, p. 133) and Finland, (idem, p. 167).
[341] Bulgaria.
[342] France (idem, p. 170), Greece (idem, pp. 181-183), Croatia (idem, pp. 458-493).
[343] M. J. AZAR-BAUD, 8. (In)Action de groupe : Décomplexer l'action de groupe par l'aménagement du régime de l'aide juridictionnelle, des frais et dépens, Gazette du Palais 2016, 29 novembre 2016, 136e année, n°42, p. 52 à 56.
[344] Art. 7 (1).
[345] Art. 7 (2).

namely in terms of settlements and of financing an action against a competitor or a trader on whom the fund provider is dependant.

It hails from the detailed rules aforementioned, that the outlines regarding legal standing yearn at increasing the array of persons entitled to bring forth an action and are closely related to the core problem of funding multi-party litigation.
Some Member State Reports highlight the importance of giving broad discretion to Member States in granting legal standing to other organisations, to public regulators and/or even to members of the protected group (as is the case in one Member State up to date). Some Member States consider the Proposal to be too cautious in giving legal standing to non-profit organisations only and also consider that European legislation should permit financial incentives to some extent, in order to promote private enforcement as a complement of public enforcement.

Indeed, case law seems to only relate to some subject-matters[346], such as improper/ill-gotten payments in real estate and in banking services' agreements, which would suggest that qualified entities are unlikely to have enough resources to cover all cases. On this basis, according to some Reporters, the European legislature should neither exclude nor select only one person for standing to sue.

Therefore, minimal harmonisation would unveil its benefits if Member States had the possibility to go further than the European legislation.

2.5. Content and nature: the procedural regime

The Proposal sets out **general rules of proceedings applicable to representative actions** and **specific ones, only applicable to compensatory redress measures.**

Many of the general provisions, applicable to all representative actions, have already been introduced in the paragraphs above and are related to legal standing, relevance matter, costs and cooperation. Additionally, the Proposal lays out a sequence of rules, aiming at ensuring the effectiveness and the efficiency of the procedure. They deal with the admissibility stage (1), 'due expediency' of procedures (2), information of the members represented in the action (3), evidence and *res judicata* (4) and, finally, limitation period (5).

2.5.1. Admissibility

The Recommendation urged Member States to ensure that the admissibility of claims is verified at the earliest possible stage of litigation, and that cases which do not meet the conditions for collective action, as well as manifestly unfounded cases, are not pursued[347].

The Injunctions Directive does not require a specific admissibility check - apart from the standing criteria - nor included the possibility of rejecting "manifestly unfounded claim" (unlike Canadian legislation). However, in some Member States, the general rules of civil

[346] See France's report, in the appendix.
[347] Par. 8 and 9.

procedure allow for early dismissal of manifestly unfounded claims and are equally applicable in collective actions.

According to the Reports, some Member States require justification that collective action is more efficient than individual litigation[348], not dissimilar to the "superiority" requirement within rule 23(b)(3) of the Federal Rules of Civil Procedure (FRCP). **The homogeneous nature of the joint individual claims is a condition that applies in all Member States and brings the commonality pre-requisite necessary for certification of class actions to mind** [349].

2.5.2. Due expediency of procedures and effective enforcement of injunctions

The Recommendation advocated for injunctive order claims to be treated expediently, if appropriate through summary proceedings, in order to prevent any further harm[350]. It is imperative to ensure 'due expediency' of procedures and for representative actions seeking an interim injunction order to be treated by way of an accelerated procedure[351] (namely to avoid procedural costs becoming a obstacle, and to guarantee that any further harm which may be caused by a trader's practice subject to the representative action, is prevented as quickly as possible). Some jurisdictions explicitly provide for expedient procedures[352] or allow for interim measures[353]. As some Member States like France do not address this subject, the general provision stating the principle of procedural expediency and the specific one related to an accelerated procedure in injunction orders, both contained in article 12 of the Proposal, should be maintained.

Generally speaking, enforcement measures of individual decisions ought to be applied in collective proceedings. Furthermore, many jurisdictions provide that courts can impose fines in case of non-compliance[354] and/or contempt of court[355] for the purpose of enforcing injunctive orders. The size of fines also differs[356]. In France, the judge who rules on liability also deals with the difficulties related to implementing the judgment. The association bringing the action can request interim and conservatory measures to compel the defendant to perform obligations arising out of the judgement with a possibility of a penalty for non-compliance.

Likewise, the Recommendation urged Member States to ensure effective enforcement of injunctive orders through appropriate sanctions, including a fine for each day of non-compliance[357]. In the same vein, the Proposal provides an important incentive for

[348] That is the case in Belgium, Denmark, Finland, Italy and Lithuania.
[349] FRCP Rule23(a)(2).
[350] Recom., par. 19.
[351] Art. 12 of the Proposal.
[352] For instance, Belgium, Croatia for anti-discrimination cases, Greece, Poland. See the Commission's study 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit.
[353] For instance, Latvia, Finland, Malta, Slovenia, Spain etc. See the Commission's study 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit.
[354] Such as Belgium, Bulgaria, Croatia, Cyprus, UK. See the Commission's study 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit.
[355] Such as Denmark, Estonia, Finland, Germany, Greece, Italy. See the Commission's study 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit.
[356] In Denmark, according to case law, they vary between 2000 et 3500 euros. See the Commission's study 'State of collective redress in the EU in the context of the implementation of the Commission Recommendation', op. cit.
[357] Par. 20.

defendant traders to quickly comply with final injunctions and enforce redress orders, as well as approved settlements[358].

Hence, in case the defendant trader does not comply with a final decision issued by a court or administrative authority within a representative action, all Member States shall lay down effective, dissuasive and proportionate penalties, which will be available in the form of fines.

2.5.3. Opt-in and/or opt-out

The Recommendation urged Member States to introduce the principle of "**opt-in",** whereby the individuals willing to join the action should explicitly express their consent to do so. Furthermore, it was stated that to avoid abusive litigation and its negative effects, the possibility to join or withdraw from the action should remain open until the final decision is handed or the case is settled. Exceptions to this principle should only be based on sound administration of justice. As a matter of fact, whilst the majority of Member States have followed the Recommendation word for word and exclusively apply the "opt-in" principle in their national collective redress schemes, four Member States apply both the "opt-in" and the "opt-out" principle, depending on the type of action or the specifics of the case[359]. Finally, two Member States apply the "opt-out" principle only[360].

It is well known that the "opt-out" principle is more effective[361] and even more justified in cases where the exercise of an "opt-in" would entail more damages, namely for the consumers, in terms of the cost of joining, and for the traders, in terms of the costs of notifying all parties involved. In cases of low value individual claims, the use of an opt-out system may also be burdensome for the defendant and for justice as a whole as it involves important costs of notification without involving important damages and is thus of no legitimate interest for the victim either.

Moreover, according to the Recommendation, the so-called "opt-out" principle, could be problematic in cross-border cases. As a matter of fact, unless they had expressively withdrawn, parties domiciled in other countries would be considered as automatically taking part in the litigation or in the out of court settlement even if they are unaware of this on-going action. **That is why, in cross-border litigation, the aforementioned shortcoming can be overcome by adopting Belgium's solution, whereby the foreign claimants are subjected to the "opt-in" principle**[362].

The opt-in principle has mysteriously disappeared under the Proposal[363], maybe on the basis of the evolution of the standards in the Member States. However, the vague reference to the mandate – that sometimes *may* be required and sometimes *should not* be required (see *supra*) – will raise doubts and problems of interpretation when implementing the device.

[358] Art. 14.
[359] Hybrid systems of either opt-in or opt-out, left at the discretion of the court, can be found in Belgium, Bulgaria, Denmark and competition cases in the United-Kingdom.
[360] The Netherlands and Portugal.
[361] M. J. AZAR-BAUD and H. ACCIARI, « Alternative models of res judicata and collateral estoppel in class actions. A comparative law and economics approach », REDC, 2016/1.
[362] The same trend can be seen in the new UK system in competition law cases where the "opt-out" order made by the court will preclude further litigation only for claimants domiciled in the UK.
[363] Art. 9, par. 2.

The Reports by Member States reveal the development of positions within the European Union. Whereas in 2013 the opt-in was strongly recommended, and even constituted one of the pillars of the European approach to collective redress, **nowadays the positions tend towards a mix of opt-in and opt-out systems**.

The Belgian "*action collective*" adopts this type of model and could be followed by the European Parliament, as many Member States' reporters suggested. According to it, the Belgian judge decides between the opt-in and the opt-out structure, according to the nature of the case at stake. Similarly, in the UK, opting-in is mandatory for members of the group domiciled abroad in competition cases.

The Reports by Member States unanimously agree that this point should not be left to the discretion of the European Member States.

The constitution of sub-groups should also be permitted as it may function as a managing tool when members of the group are spread or share different features.

Training for courts and guidelines for judges should accompany the European binding instrument if the choice of a mixed-system is made, leaving a margin of appreciation to national judges.

2.5.4. Publicity

To ensure the effectiveness of collective redress, the victims must properly acknowledge the outcome of representative actions and how they will benefit from them. Hence, the Proposal provides that the consumers will be adequately informed of representative actions, more precisely, informed about the final injunction orders, final decisions on measures eliminating continuing effects of the infringements including final redress orders and, if applicable, declaratory decisions regarding liability of the trader towards consumers, as well as final decisions approving collective settlements under the proposed Directive.

Some Member States do not regulate information on collective damages actions at all. Other Member States[364] entrust courts with the determination of the publicity's modalities, including the publication method and the period during which information should be accessible. Thus, to harmonise the issue, the Proposal sets rules establishing that information should be addressed to the consumers concerned, at the expense of the infringing trader. The Proposal also establishes that this should be executed within a specified time frame and through the most appropriate means according to the circumstances of a case, including notifying individually all consumers concerned. Moreover, the information shall use an intelligible language and include an explanation of the representative action's subject-matter, its legal consequences and, if relevant, the subsequent steps to be taken by the consumers concerned.

The Proposal does not specify the moment when information should be communicated. However, one should deduce it is to take place once a case is declared admissible by the

[364] Namely in Belgium, Denmark, Finland, France, Hungary, Lithuania, the Netherlands and Portugal.

court, in particular where compensation is claimed. However, **an explicit rule would have been a superior policy choice**.

Information matters in several respects. As advocated by the Recommendation, this is of particular importance in the **"opt-in"** type of collective redress mechanisms, as it ensures that those who may be interested in joining are not missing an opportunity due to lack of information. But, more broadly, information should be adapted to the circumstances of the case and should take into account any potential adverse effects on the economic situation of the defendant whose liability has not yet been established (avoid high reputational costs).

Overall, the equilibrium of the parties' rights, including freedom of expression, right to information and right to protection of the reputation of the company, needs to be guaranteed by a neutral authority.

Another complementary way of ensuring information is the implementation of a Registry of collective actions.

2.5.5. Registry of collective actions

The Recommendation invited Member States to establish national registries of collective redress actions, which would also disseminate information on the available methods of obtaining compensation, including out-of-court settlements, and share information within the European Union.

This was a major principle within the rules of the Recommendation, both to ensure that the "opt-in" system be implemented and to spread information in cross-border situations. Yet, it was not followed by Member States. Only the UK has a national registry for group litigation orders and one for competition actions. France has enacted the obligation of publicising only the collective actions brought forth before the administrative courts[365].

An electronic Register providing information on collective actions or settlement negotiations in a Member State should be established in all Member States.

2.5.6. Evidence

The Injunctions Directive did not regulate the issue of follow-on actions. Therefore, the traditional procedural principles apply. As they may have an impact on the right of access to courts, some of them need to be revisited.

The Recommendation suggested that Member States give priority to the public authority decision and to limitation periods. But the Commission's Report on the implementation of the Recommendation shows that these points have been followed only to a very limited extent[366].

[365] M. J. AZAR-BAUD, « Le cadre judiciaire et administratif des actions de groupe : quelles différences ? quelles conséquences ?, JCP E, n°28, 13 juillet 2017.
[366] In Denmark, Belgium and Italy it is possible to rely on an injunctions' decision in a follow-on collective action in consumer law cases. Collective horizontal actions can be initiated in BG. In NL follow-on actions are possible not as a matter of law but rather of practice.

Therefore, there's a dire need to empower consumers, who have suffered damages from an infringement acknowledged by a decision, in introducing a follow-on action after the completion of the procedure before a public authority, be it a court or an administrative body such as a competition authority.

Like in any proceedings, the plaintiff bears the burden of proof and must demonstrate that the case meets all requirements, firstly, for the admissibility of the action, then for the decision on the merits. For representative actions seeking compensatory redress measures, under the Proposal, the qualified entity shall provide sufficient information, as required under national law, to support the action, including a description of the consumers concerned by the action and the questions of fact and law to be resolved.
However, some of the relevant evidence needed by the qualified entity to prove the facts[367], or the information needed to adequately inform the consumers concerned about the on-going representative action may be in the possession of the defendant. This can be burdensome for the plaintiff and constitutes one more hurdle they will have to overcome.

Taking this into consideration, article 13 of the Proposal sets out rules to ensure that, in all Member States, there is a minimum level of effective access to the information needed by qualified entities to prove their claim and adequately inform consumers concerned by the on-going representative action. **The qualified entity should have the possibility to request that the court or administrative authority overseeing the representative action order the defendant to provide evidence, which is relevant to the case and lies within their control. Disclosure will always be subject to strict judicial or administrative scrutiny as to its necessity, scope and proportionality.**

By doing this, the Proposal circumvents the debate regarding pre-trial discoveries that the Recommendation advised strongly against, as well as other matters relating to procedural safeguards such as punitive damages, and jury awards, most of which are foreign to the legal traditions of most Member States[368].

2.5.7. Effects of final decisions: *res judicata*

Article 10 of the Proposal establishes that final decisions by a court or authority, establishing an infringement of Union Law covered by the Directive in domestic and cross-border redress actions, will have a probative effect in subsequent actions for redress.

It also makes a distinction between decisions made within a Member State and cases brought in another Member State. In the former, the decision establishing the existence of an infringement of the law will provide for *irrefutable evidence* in redress actions

Such cases were reported from NL, FI and UK. One interesting consumer case in the area of financial services was reported from Finland, where subsequent to the administrative and the court decisions on an infringement, successful direct negotiations were engaged between the consumer association and the defendant.

[367] For instance, she will have to establish an infringement, causality between the infringement and the harm of consumers, and quantifying actual damages of consumers.

[368] Par. 15.

whereas, in the latter, it provides for a rebuttable presumption that the infringement has occurred[369]. The solution is similar to the one adopted by the Directive on certain rules governing actions for damages (known as the Antitrust Damages Directive), where establishment of an infringement by a final decision of a national competition authority or by a review court is deemed to be irrefutably established in domestic follow-on actions for damages and at least *prima facie* evidence in follow-on actions in other Member States[370].

It hails from this provision that **legal uncertainty and unnecessary costs for all parties involved, including the judiciary, will be removed** in the following cases where:

- Final decisions have been handed down by a court or an administrative authority within public enforcement procedures,
- Final injunction orders establishing a breach of Union law or final declaratory decisions on a trader's liability towards consumers concerned by an infringement have been issued within the representative action for redress or, if available, within other collective redress mechanisms under national rules.

Given their positive effect on legal certainty, the rules provided for by Article 10 are strongly welcomed.

2.5.8. Limitation periods

Complementing the provisions on effects of final decisions, article 11 of the Proposal provides for the suspension effects of a representative action in relation to limitation periods for redress actions. This is done to avoid the effect of expiry of limitation periods. The solution is, once again, the same as the one set out in the Antitrust Damages Directive[371].

2.6. Funding

2.6.1. Third party funding

Specific rules in the Proposal[372] deal with the transparency of compensatory collective redress, rules which would be worth applying to all collective redress mechanisms. It is referred to as an additional requirement for the admissibility of the action in order to avoid frivolous litigation or connivance.

Qualified entities should be fully transparent, in general, as to the source of funding for their activity and, specifically, regarding the funds supporting a specific representative action for redress. It follows that, for compensatory collective redress actions, qualified

[369] Art. 8.
[370] Dir. 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, art. 9. See R. AMARO et M. J. AZAR-BAUD, « L'effet des décisions des autorités de concurrence devant les juridictions nationales: autorité de chose jugée, autorité de chose décidée, présomption irréfragable, notion sui generis », *in L'intensification de la réparation des dommages issus des pratiques anticoncurrentielles,* M. BEHAR-TOUCHAIS, D. BOSCO, C. PRIETO, (dirs), IRJS éditions, Tome 70, p. 95-128.
[371] It also provides for the **suspension of limitation periods**, where collective actions exist (art. 9).
[372] Mainly those contained in article 7.

entities would also be required to disclose their financial capacity and the origin of the funds supporting their action to the courts or administrative authorities.

Courts or administrative authorities will be empowered to assess third party funding arrangements, to evaluate whether there may be a conflict of interest between the third party funder and the qualified entity, and to avoid the risk of abusive litigation, for example between competitors, as well as to assess whether the third party funder has sufficient resources in order to meet its financial commitments to the qualified entity should the action fail.

The disclosure of the funding was already suggested in the Recommendation[373], but has not been implemented in any of the Member States[374].

As for financial capacity, the Model Code of Collective Proceedings of the Iberia-American Institute of Procedural Law[375] requires the adequacy of representation and provides that the judge shall scrutinise different criteria, namely, the plaintiff's capacity, their experience and background regarding protection in and out-of-courts and the relevance of the subject-matter.

The Reports by Member States are in favour of third party funding and consider it should be regulated, in line with the rules of the Proposal.

2.6.2. Lawyers' remuneration

Akin to punitive damages, there are two other issues the Recommendation dealt with and that the Proposal has not ruled on[376]. First, the issue of **lawyers' fees** regarding which the Recommendation preconized they should not create unnecessary incentives for litigation that is not in the interest of any of the parties. A particular reference was made to contingency fees. Second, the "**loser pays"** principle, which is largely followed in the Member States, is not mentioned either.

All reporters supported that the "loser pays" principle should be maintained, as it corresponds to the various legal traditions and will function as a safeguard against abusive litigation.

Overall, **the EU legislator should be reluctant to provide too many safeguards as this might make collective actions impossible in practice. However, some principles laid down in the 2013 Recommendation, which constitute in safeguards, are missing in the Directive Draft – the prohibition of contingency fees and the "loser pays" rule.**

2.7. Alternative Dispute Resolution

[373] Par. 14 to 16 and 32.
[374] See the Report of 2018.
None of them have regulated third party financing, let alone in accordance with the Recommendation. EL and IE generally prohibit third party funding. However, the new pending legislation in SI is the exception to this general situation, as according to that legislation, private third party funding is regulated in accordance with the principles set out in the Recommendation.
[375] Art. 2.
[376] Par 13.

There is an important trend in relation to collective out-of-court dispute resolution. Eleven Member States have introduced specific provisions on collective out-of-court dispute resolution mechanisms[377], either implementing them after the Recommendation or pursuant to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

In some cases, agreements are concluded consensually through direct settlement negotiations, without the involvement of a third party. The subsequent control of settlements by courts is necessary[378] but has not been provided for.

Consequently, the Proposal rules on collective settlements[379] and sets out the procedure within which the court or administrative authority could **approve** a collective settlement reached between a qualified entity and the alleged author of the infringement.

The scrutiny needed before the approval seeks to ensure the legality and fairness of the agreement's outcome to ensure that it takes into consideration the interests of all parties involved. Approval of the settlement can be sought *before the representative action*, regarding the same practice by the same trader, *started*. This will be in front of the court or administrative authority of the same Member State.

Moreover, in case of an on-going representative action, the court or administrative authority overseeing the action should always be able to *invite parties to settle on redress* or to request the parties of the representative action to reach a settlement on redress.

Consumers concerned by an approved collective settlement will always be given a possibility to accept or reject redress offered therein, solution which recalls the second opt-out given in class action regime[380].

Overall the system of the Proposal is well-tailored for representative actions, but we can regret that, according to article 8, it is a mere possibility for Member States to provide collective alternative dispute resolution schemes[381]. Setting an obligation would have been better suited to the objective in mind and is judged advisable by the reporters.

It is suggested that the online platforms put in place by the 2013 ADR Directive be adapted to the specificity of collective redress so that they can also be used for collective mediation or arbitration. This would avoid creating a whole new mechanism as the platforms are already in place and merely necessitate some adjustments.

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[377] Namely, Belgium, Bulgaria, Denmark, France, Italy, Lithuania, the Netherlands, Portugal and the United Kingdom. As the Recommendation suggested, collective out-of-court dispute resolution schemes should take into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
[378] Par. 25 to 28.
[379] Art. 8.
[380] Rule 23(b)(2) FRCP.
[381] In particular, in line with the Directive on consumer alternative dispute resolution (ADR), (Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes) and on the online dispute resolution platform set up by the Commission and available since 15 February 2016, based on Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.

3. ARTICULATION BETWEEN PRIVATE INTERNATIONAL LAW AND A EUROPEAN INSTRUMENT ON COLLECTIVE REDRESS

KEY FINDINGS

- The absence of a harmonized European approach for "international" cases, which are cases subject to private international law rules, can result in unjustified discriminations within Europe (private international law encompasses choice of law and choice of jurisdiction rules, as well as the rules related to the recognition and enforcement of foreign judgements). The Europan instruments in the area of private international law are based on a mere individual conception of litigation. This conceptual framework is incomplete and some instruments have to be amended to allow collective redress to develop. **It notably follows from the current choice of law and choice of jurisdiction rules that the bundling of claims is particularly burdensome and unattractive, if not completely impossible.**
- **Jurisdiction**: The rules on jurisdiction under the Brussels I (Recast) Regulation are not adapted to collective redress. The **general choice of jurisdiction** designating the courts of the Member State of the defendant's domicile (art. 4) allows the consolidation of multiple claims, but it should not be the only ground of jurisdiction available for collective redress. The **special rules** of article 7 for contractual and non-contractual matters are ill-suited for collective redress and will potentially lead to parallel proceedings. The **plaintiff-friendly choice of jurisdiction** offered by article 18 is not available for collective redress, neither for preventive actions of consumer associations seeking injunctive relief nor for collective proceedings based on the voluntary assignment of individual consumer claims to a member of the group.
- The **rules on lis pendens** (Art. 29 and 33) are generally not applicable to collective redress as they only apply to proceedings involving the same parties and the same cause of action. In most situations, parallel collective proceedings fall within the scope of the provisions on related actions, which are subject to judicial discretion and do not always allow the joining of the proceedings. In addition, the current rules of the Brussels I (Recast) Regulation on parallel proceedings do not take into account ADR mechanisms, although the latter have gained considerable importance, notably for collective redress, in order to facilitate an agreed solution. Therefore, rules on lis-pendens regarding collective redress could be modelled on article 81 of the GDPR, which means that if proceedings concerning the same activities are already pending before a court in another Member State, any court other than the one first seized has the discretion

to stay its proceedings. Thereon, it would be necessary to foresee cooperation and coordination between the different courts.

- **Applicable law:** The law applicable to the substance of the claims is, in a vast majority of cases, governed by the Rome I or the Rome II Regulation. Within the current legal framework, multiple laws can be applicable to the substance of the claims, making collective redress much more complex, if not impossible. Where multiple plaintiffs, multiple markets and multiple defendants are involved, situations reach a level of complexity such that the choice of law is simply not practicable anymore. Collective redress can only succeed if these complexities of choice of law are overcome.
- **Recognition and enforcement:** The cross-border effectiveness of the judgment or settlement is a primary concern for collective claimants as well as for the defendant. If the recognition of the preclusive effect of the judgment is uncertain, there will be an incentive to instigate parallel litigation. However, as the European rules on recognition and enforcement were designed according to purely individual conceptions of procedural justice, some of them are clearly not appropriate for collective redress. Besides, the recognition of settlements must be addressed specifically, because the rules on the free movement of settlements under the current legal framework are not sufficiently clear to meet the needs of collective redress.
- **Transnational representation** should be considered in the perspective of collective redress. It should be possible for a representative entity to bring actions on behalf of a group of individuals who are not themselves parties to the proceedings, even if they are residing in different States. In light of this, inspiration can be drawn from the Insolvency Regulations, as well as the GDPR.
- **Coordination of the proceedings** should be considered as being the main issue when authorizing a collective action where plaintiffs reside in different States. Indeed, as parallel proceedings should be avoided in cross-border situations, there should be a leading proceeding, and if secondary proceedings can be opened, they shall be restricted.
- **Determination of the *forum***: In order to avoid *forum* shopping, one single *forum* should have jurisdiction where this is possible, as a centralised collective action has multiple benefits. Although jurisdictional options should still be considered, it seems that the courts of the Member State within the territory of which the centre of the group's main interests is located shall have jurisdiction to open the main proceeding. When the centre of the group's main interested cannot be determined, the courts of the Member State within the territory of which the defendant has his or her domicile or residence should have jurisdiction.
- Concerning **alternative dispute resolution**, the scheme of a main and eventually single proceeding should be preferred.

The **international dimension** of collective redress is, to a large extent, **not taken into account by the collective redress mechanisms at national level** and, even where cross-border aspects are addressed, it is only to a very limited extent on extremely precise matters (see above, 1.1.7). Thus, with only a few exceptions[382], Member States

[382] The German Capital Market Model Case Act of 2005 provides for exclusive jurisdiction at the seat of the issuer who disseminated misleading information (§ 32b ZPO).

have not introduced specific heads of jurisdiction for collective litigation, preferring to leave it to the Brussels I (Recast) Regulation to deal with those situations. Moreover, by not considering the possibility for qualified entities to represent transnational collective interests, several national laws seem to rely on the tacit assumption that only national collective redress is conceivable. Hence, from the perspective of private international law (i.e. the area of the law covered by EU instruments on judicial cooperation in civil matters; Art. 81 TFEU), the current state of play has to be assessed on the basis of the existing rules dealing, in general, with international jurisdiction, applicable law and free movement of judgments and settlements (3.1). As these general rules are ill-equipped to deal with collective litigation, specific private international law rules are urgently needed (3.2).

3.1. Assessment of the current state of play

3.1.1. Distinction between European and international cross-border cases

The ***summa divisio*** on which the current legal framework is relying **distinguishes between "European" and "international" cross border cases**. "European" cross-border cases are those, which fall within the scope of application of EU instruments on judicial cooperation in civil matters and which are handled in the same way in all Member States, whereas "international" cross-border cases are governed by the private international law of the Member States. Summarized roughly, one may say that private international law of the Member States governs the jurisdiction of courts in cases where the defendant is domiciled outside the EU, as well as the recognition and enforcement, in a Member State, of third-country judgments and settlements.

In such "international" cases, the outcomes differ from one Member State to another, insofar as the **Hague Conference on Private International Law**, to which all Member States as well as the EU itself are members, does not provide a comprehensive legal framework for civil and commercial matters. The 2005 Hague Convention on choice of court agreements only applies where the jurisdiction of the court is based on an exclusive choice of court agreement (which is hardly ever the case in the area of collective redress) and only in disputes involving one of the few non-EU Contracting States[383]. The United States are not among the Contracting States and it is unlikely that the country ratifies the convention in the future. As to the current negotiations of the so-called Hague Judgments Convention, they are still far from resulting in positive, present-day law[384]. However, once applicable, the future convention will, according to the 2018 Draft Convention, encompass in its scope of application the recognition and enforcement in a Contracting State of judgments on the merits derived from collective actions given in another Contracting State[385]. Moreover, it is meant to also govern the enforcement of judicial settlements. The actual contribution of the future convention will eventually depend on the number of its ratifications. Today, it is unfortunately too early to predict

[383] Hague Convention of 30 June 2005 on Choice of Court Agreements. In addition to the 28 Member States of the EU, only Mexico, Singapore and Montenegro have ratified the convention to date.
[384] See the 2018 Draft Convention adopted by the Special Commission on the Recognition and Enforcement of Foreign Judgments on 24-29 May 2018: https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf.
[385] F.J. Garcimartín Alférez, G. Saumier, "Judgments Convention: Revised Preliminary Explanatory Report", Preliminary Document no 10 of May 2018, Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments 24-29 May 2018, para 75, p. 17 : https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf.

the success of the ongoing negotiations and, in particular, the final position the US will take[386].

Thus, the jurisdiction of national courts with respect to US domiciled defendants for instance, is currently not harmonized across Europe, and the same holds true when it comes to the recognition and enforcement of US judgments and settlements within the EU. This situation has important consequences for transatlantic relationships. A US class action, involving a US defendant and plaintiffs from different Member States, who claim that their compensation in the US was insufficient or unfair, will not have the same legal effects for all European members of the group. For instance, if the preclusive effect of the US decision is not recognized in Germany under German private international law, German plaintiffs will be able to start new proceedings against the US defendant in Germany, whereas Dutch plaintiffs will not have the same possibility, if the preclusive effect is recognized in the Netherlands under Dutch private international law. Hence, **the absence of a harmonized European approach for "international" cases can result in discrimination between EU plaintiffs**, and is therefore not satisfactory.

Only the question of the **law applicable to the substance of the claim** (which is a separate issue, not to be confused with the jurisdiction of courts) is harmonized in a general manner, regardless of the countries involved, because the relevant EU regulations (the Rome I and Rome II Regulations) have a universal scope of application; and determine the applicable law in contractual and non-contractual matters whenever a claim is brought before the court of a Member State.

However, even **in "European" cross border cases** where the harmonized rules of European private international law do apply, the situation is not satisfactory either. Indeed, the **three main EU regulations** (the Brussels I Recast Regulation, and the Rome I and Rome II Regulations) **are fundamentally grounded on the assumption of two parties being opposed in the proceedings**. Litigation is generally regarded as taking place between one specific plaintiff and one specific defendant. In other words, **there is currently a complete lack of any specific jurisdictional rule for multiple claimants, and no choice of law rule takes the particularities of collective redress into account either**. Apart from the Directive on injunctions for the protection of consumer interests, the few exceptions that exist are only dealing with the multiplicity of defendants, not the multiplicity of plaintiffs[387]. Consequently, **as the European model rests on a mere individual conception of litigation, it has to be amended to allow collective redress to develop**.

This conclusion also flows from **the case law of the Court of justice**. To date, all cases of collective redress brought before the CJEU were **dealing with one of the two following scenarios** (for a presentation of the different models of collective redress under national law, see above, 1.1.). They were related either to claims for injunctive relief of consumer associations (the cases *Henkel*[388] and *Amazon*[389]), or to claims for

[386] See more generally on this topic : de Miguel Asensio/Cuniberti/Franzina/Heinze/Requejo Isidro, Study for the JURI Committee of the EP, « The Hague Conference on Private International Law 'Judgments Convention' », PE 604.954 - April 2018.
[387] Art. 8 of the Brussels I (Recast) Regulation, which however is defendant-oriented and does not provide appropriate rules for collective redress.
[388] CJEU, Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, 1 October 2002, ECLI:EU: ECLI:EU:C:2002:555.

compensation in situations where the plaintiffs had had recourse to a voluntary assignment of their claims: by assigning multiple individual claims to the same assignee – the lead plaintiff-, the latter bundles the claims in one single procedure. Examples of this second scenario exist in the area of anti-trust litigation (*the Cartel Damage Claims*[390] case), as well as regarding the rights of posted workers (the case *Sähköalojen ammattiliitto ry*[391]*,* where workers assigned their claims to a trade union), or in the field of consumer claims (the *Schrems*[392] case). Such assignments of claims do not affect the rules on jurisdiction and applicable law, which still have to be determined for each assigned claim specifically, depending on its original nature and connections. In all these examples for compensatory collective redress, except the employment case, the outcome was not satisfactory. **The current rules on jurisdiction and applicable law are making the bundling of claims particularly burdensome and unattractive, if not completely impossible.**

Before considering different means to further promote collective redress in the EU in cases with cross-border implications, the current legal framework consisting of the Brussels I (Recast), the Rome I and the Rome II Regulation, is to be assessed more precisely with respect to the jurisdiction of courts (3.1.2), the applicable law (3.1.3) and the recognition and enforcement of foreign judgments and settlements (3.1.4).

3.1.2. Jurisdiction under the Brussels I (Recast) Regulation

3.1.2.1. General jurisdiction (Article 4)

The general jurisdictional rule designates the courts of the Member State of the defendant's domicile (Art. 4). It **is the only provision of the regulation allowing a consolidation of claims before the courts of one single State**[393]. However, the *forum* of the defendant is not fully satisfactory, at least not if it is the only ground of jurisdiction available for collective redress. It provides, indeed, a considerable procedural advantage for the defendant. Proceedings in a foreign country induce additional costs and risks and can therefore have a deterrent effect on plaintiffs. For instance, in a Europe-wide product liability case, Art. 4 would require Greek, Estonian and Portuguese victims of a defective product manufactured by an undertaking domiciled in Germany to sue the manufacturer at his headquarters in Germany. Moreover, the *forum* of the defendant's domicile creates a safe-haven in Member States which do not provide for effective collective redress mechanisms[394]. Furthermore, it distorts the competition within the internal market by subjecting companies domiciled in Member States with the most effective forms of collective redress to higher litigation risks than others.

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[389] CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612.
[390] CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v **Evonik Degussa GmbH and Others,** 21 May 2015, ECLI:EU:C:2015:335.
[391] CJEU, Case C-396/13, Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna, 12 February 2015, ECLI:EU:C:2015:86.
[392] CJEU, Case **C-498/16,** Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37
[393] If the proceedings involve more than one defendant, for instance in cartel cases, please refer to Art. 8(1) of the Regulation on co-defendants.
[394] See A. Nuyts, « The Consolidation of Collective Claims Under Brussels I », in Nuyts/Hatzimihail (eds), Cross-Border Class Actions. The European Way, Selp, 2014, p. 69 f. (72).

Difficulties of interpretation exist with respect to collective settlements of mass claims, such as settlements according to the Dutch Act on the Collective Settlement of Mass Claims, because the procedural position of the parties is not always clear. The Dutch procedure is based on an out-of-court settlement, which is subsequently declared binding by the Amsterdam Court of Appeal. The court is seized by the parties in common, and it is therefore not obvious who holds the procedural position of the defendant, as the *Converium Settlement*[395] decision of 12 November 2010 illustrates, where the Court considered the group as the defendants.

3.1.2.2. Special jurisdiction (Article 7 and 8)

In matters relating to contracts, Art. 7(1) gives an option to sue the defendant in the courts for the place of performance, which can be the place of delivery of the goods, the place where the services were provided, or the place of performance of the obligation in question, depending on the nature of the contract. If contractual claims against the same defendant are bundled, Art. 7(1) leads to a multiplicity of courts every time the place of performance of the contracts, or of the obligations in question, is not identical. Therefore, this head of jurisdiction is **ill-suited for collective redress;** it is only available for multiples claims relating to contracts performed locally, at the same place. In addition, it **potentially leads to parallel proceedings**, as similar claims against the same defendant but relating to contracts performed in different Member States can be brought before different courts. Currently, such a result can only be avoided if all claimants are willing to sue the defendant at his own seat, under Art. 4 of the regulation.

Moreover, one has to keep in mind that in contractual matters, parties often conclude ***forum* selection clauses**. Jurisdiction conferred by such clauses is deemed to be exclusive, according to Art. 25, if not otherwise agreed, and therefore **prohibits any consolidation of claims if the agreements do not designate the same court.**

In matters relating to tort, delict, or quasi-delict, Art. 7(2) gives an option to sue the defendant in the courts for the place where the harmful event occurred. According to the CJEU, if the harmful event was committed in a different State than the State where the damage occurred, the plaintiff has the choice between these different places. The famous environmental damage case *Mines de potasse d'Alsace*[396] illustrates the potential of this head of jurisdiction to prompt parallel proceedings, if plaintiffs from different Member States do not agree on suing the defendant at the latter's seat. In this case, the pollution of the Rhine River by the French defendant had caused damage to Dutch horticulturists, but could have similarly harmed German farmers established alongside the Rhine. **As the damage sustained by the plaintiffs would have occurred in different States, the place of the damage would not have allowed a consolidation of the claims**. It would even have furthered multiple parallel proceedings, given the fact that the place where the damage was suffered only provides jurisdiction limited to the damage sustained within the territory of that State. Multiple victims with damages in different Member States cannot consolidate their claims before one single court under this head of jurisdiction. On the contrary, it allows the victims to

[395] Gerechtshof Amsterdam [HoF] [Amsterdam Court of Appeal], Scor Holdings AG (f/k/a Converium Holdings AG), 12 November 2010, NJ—(Neth.), ECLI:NL:GHAMS:2010:BO3908.
[396] CJEU, Case **21-76, Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA, 30 November 1976,** ECLI:EU:C:1976:166.

sue the defendant in parallel proceedings in different Member States and each decision to be rendered will compensate the sole damage suffered locally. As to the place where the harmful event was committed, it coincided in *Mines de potasse d'Alsace*[397] with the defendant's seat, leaving eventually no choice for the plaintiffs. Such an outcome is not exceptional, because in practice **the place of the causal event frequently coincides with the domicile of the defendant. Admittedly, it allows the consolidation of multiple claims, but does not provide the plaintiffs with any alternative to Art. 4**. The situation however can be different in anti-trust cases. According to the conclusions reached by the CJEU in *CDC*[398] and very recently in *AB flyLAL-Lithuanian Airlines*[399], the notion 'place where the harmful event occurred' may be understood to mean either the place of conclusion of an anticompetitive agreement (infringements of Article 101 TFEU), or the place in which the predatory prices were offered and applied (infringements of Article 102 TFEU). These places do not necessarily coincide with the defendant's seat and thus offer an additional head of jurisdiction, regardless of the place where the damage occurred.

The coexistence of different heads of jurisdiction for contractual and non-contractual matters raises **issues of characterization and leads to different outcomes depending on the model of collective redress at stake**. This can be illustrated by the *Henkel*[400] case, whose solution was later on confirmed by the CJEU in *Amazon*[401]. A preventive action for injunctive relief of a representative association, e.g. a consumer association, is always non-contractual in nature and therefore falls within the scope of Art. 7(2). On the contrary, if multiple claims for damages are bundled on the basis of their voluntary assignment to one lead plaintiff, the same characterization is not applicable. Each assigned claim conserves its original nature which, depending on the matter at issue, can be contractual, for instance if consumer claims against the same trader are assigned to a lead plaintiff (see *Schrems*[402]), or non-contractual, for instance if victims of an environmental damage assign their claims against the polluter to a representative. The situation is even more complex in the area of collective anti-trust litigation. In the *Cartel Damage Claims*[403] case, the claims assigned by the victims of the cartel to CDC were not all of the same nature. Some were non-contractual, others were contractual because some of the victims had purchased hydrogen peroxide from one of the defendants and therefore were in a contractual relationship with this defendant, and in a non-contractual relationship with the other defendants. **Once again, the only available head of jurisdiction for collective redress in such situations is the defendant's domicile**.

Art. 8 of the Brussels I (Recast) Regulation is an important provision for collective proceedings where not only multiple claimants but also several defendants are involved, like in cartel cases or when the defendant belongs to a multinational group and the

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397 *ibid.*
398 CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v **Evonik Degussa GmbH and Others,** 21 May 2015, ECLI:EU:C:2015:335.
399 CJEU, Case C-27/17, AB 'flyLAL-Lithunian Airlines' v Starptautiskā lidosta 'Rīga' VAS and 'Air Baltic Corporation' AS, 5 July 2018, ECLI:EU:C:2018:533.
400 CJEU, Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, 1 October 2002, ECLI:EU: ECLI:EU:C:2002:555.
401 CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612.
402 CJEU, Case **C-498/16,** Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37, See above, point 1.2.4.
403 CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v **Evonik Degussa GmbH and Others,** 21 May 2015, ECLI:EU:C:2015:335.

plaintiffs are suing not only the subsidiary but also the mother company. **According to Art. 8(1), co-defendants can be sued in the courts for the place of the domicile of one of them** (the so-called 'anchor defendant'), provided that the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments. It is noteworthy that such a centralization of jurisdiction under Art. 8(1) was admitted in the *CDC*[404] case against the different members of the cartel, and this head of jurisdiction is also regularly used in practice for proceedings against multinational enterprises. However, *forum* selection clauses have priority over jurisdiction under Art. 8. Thus, if some of the victims of the cartel have concluded a choice of court agreement on an individual basis with one of the members of the cartel, the consolidation of all claims becomes impossible.

3.1.2.3. Jurisdiction over consumer contracts (Article 17-19)

With the aim of strengthening consumers' access to justice, Art. 18 provides the consumer with an option allowing him to sue the professional either in the courts of the Member State of the defendant's domicile, or in the courts for the place where the consumer himself is domiciled. As already stated, **this plaintiff-friendly head of jurisdiction is not available for collective redress**, **neither is it for preventive actions of consumer associations seeking injunctive relief** (see *Shearson Lehmann Hutton*[405], *Henkel*[406] and *Amazon*[407]), **nor for collective proceedings based on the voluntary assignment of individual consumer claims** to a member of the group, even though the latter is himself a consumer and has his own right against the defendant (see *Schrems*[408]). Indeed, on the one hand, the CJEU has ruled out in *Schrems* the possibility to rely on the assignee's domicile to bundle all the claims, and on the other hand, the jurisdictional rule based on the consumer's domicile does not allow the consolidation of claims, if the group comprises consumers from different Member States. **Obviously, this situation leaves the door wide open to multiple, parallel proceedings**. Only a court of the Member State where the professional is domiciled has jurisdiction to hear all claims.

Moreover, the protective rules of jurisdiction over consumer claims **only apply in matters relating to consumer contracts**. No similar regime is available to consumers whose claims are non-contractual in nature. For instance, in the *Dieselgate* case, if the consumers suing the German manufacturer of the defective product purchased their car from an intermediary seller, their claim against the manufacturer is non-contractual and therefore falls under Art. 7(2) combined with Art. 4 (see *Jakob Handte*[409] decision of the CJEU).

3.1.2.4. Parallel proceedings (*Lis pendens* and related actions, Article 29-34)

[404] *ibid.*
[405] CJEU, Case C-89/91, Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH. 19 January 1993, ECLI:EU:C:1993:15.
[406] CJEU, Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, 1 October 2002, ECLI:EU: ECLI:EU:C:2002:555.
[407] CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612.
[408] CJEU, Case **C-498/16,** Maximilian Schrems v Facebook Ireland Limited, 25 January 2018, ECLI:EU:C:2018:37, See above, point 1.2.4.
[409] CJEU, Case C-26/91, **Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA, 17 June 1992,** ECLI:EU:C:1992:268

As explained above, concurrent jurisdiction exists in many circumstances and seems to express the current trend of collective redress in Europe. Local plaintiffs mainly use national collective redress mechanisms on a national basis, in the absence of an appropriate European procedure. **This situation is in contradiction with the very purpose of collective redress, whose efficiency calls for a cross-border bundling of a large number of claims**. Insofar as separate parallel proceedings in different States entail a further risk of unequal treatment of EU plaintiffs, abuses, *forum shopping* and irreconcilable judgments, the issue requires careful attention.

The rules on *lis pendens* (Art. 29 and 33) only apply to proceedings involving the same parties and the same cause of action. Therefore, they **are generally not applicable to collective redress**, because the parties to the different proceedings tend to be not the same. For instance, in consumer cases, the parties are not the same if the consumers are relying on a representative entity in one State, and claim themselves compensation individually in another State. Particularities however may exist with respect to opt-out proceedings, which could purport to cover absent plaintiffs from other States[410].

In most situations, **parallel collective proceedings fall within the scope of the provisions on related actions** (Art. 30 and 34). Related actions are actions that are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. For instance, in the *Dieselgate* case, one could argue that collective actions brought against Volkswagen in two different Member States by local plaintiffs, are related actions in the sense of Art. 30, if a risk of irreconcilability exists. According to the provisions of the regulation, the court second seized may stay its proceedings in order to await the outcome of the proceedings in the court first seized. If certain conditions are met, the second court can also decline jurisdiction so that only one court will hear the claims. In this respect, two important principles are to be stressed. First, the decision of the court second seized is completely discretionary, in the sense that the court is never obliged to stay the proceedings or to decline jurisdiction, even if no third-country court is involved. Second, the court can only decline jurisdiction in favor of the court first seized if the latter has jurisdiction over the actions in question. The rules on related actions do not confer such jurisdiction. Jurisdiction has to be assessed independently, according to the applicable jurisdictional rules, which can be those of the Brussels I (Recast) Regulation or of private international law of the third State where the court first seized is sitting. Thus, even if the second court is convinced that the related actions should be heard together, the joining of the proceedings is not always possible.

Moreover, the provisions on *lis pendens* and related actions are based on a traditional conception of civil procedure, where disputes are assumed to be solved exclusively through litigation. Summarized broadly, Art. 32 provides that a court is deemed to be seized at the time when the document instituting the proceedings is lodged with the court, or at the time when this document is received by the authority responsible for service. This temporal criterion decides which court was first seized and will have priority over proceedings instituted at a later stage in a different country. **The increasing role that ADR mechanisms play, especially in the context of collective redress, does**

[410] See on this issue A. Nuyts, « The Consolidation of Collective Claims Under Brussels I », in Nuyts/Hatzimihail (eds), Cross-Border Class Actions. The European Way, Selp, 2014, p. 69 f. (80).

not fit into this approach. Indeed, **not only are a significant number of collective disputes terminated by a settlement, but lawmakers tend more generally to promote any form of dialogue between the parties, prior to the proceedings, in order to facilitate an agreed solution**. In line with this trend, the present study proposes the mandatory use of ADR mechanisms prior to any access to courts (see above, 2.7). **The current rules of the Brussels I (Recast) Regulation on parallel proceedings are unable to accompany this evolution, as they do not take into account ADR mechanisms**. From this perspective, no incentives for preliminary recourse to ADR mechanisms exist. On the contrary, parties risk to be penalized if they engage in in-depth negotiations because their action may be trumped by proceedings in a different State, if the latter immediately start with the document instituting the proceedings being lodged with the court or served on the defendant.

3.1.3. Applicable law under the Rome I and Rome II Regulations

Collective redress relies on the principle of having one singular dispute resolution mechanism for multiple similar claims. It **implies the defendant's liability against the different plaintiffs be subjected to similar conditions**, allowing for a collective treatment in the same proceedings. For instance, in the area of securities fraud, a collective solution granting hundreds of shareholders an identical flat rate per share to compensate their losses[411], would be difficult to put in place if the claims were governed by different laws.

According to a general principle of private international law, **procedural issues are always governed by the law of the forum**. Therefore, the proceedings are conducted uniformly, for all members of the group, according to the procedural law of the State of the court seized. **The law applicable to the substance of the claims is a different question, though, which is governed by the Rome I or the Rome II Regulation** on contractual and non-contractual obligations, depending on the matter at stake. Within the current legal framework, **multiple laws can be applicable to the substance of the claims, making collective redress much more complex, if not impossible**. Indeed, if the members of the group are domiciled in different States or have sustained damages in different States, their claims are likely to be governed by different laws.

A few examples may illustrate the difficulties collective redress in the EU is currently facing. For **cross-border torts** like the *Dieselgate* case, the general rule of Article 4 of the Rome II Regulation designates the law of the country in which the damage occurred. Plaintiffs from Italy would not have their claims against Volkswagen governed by the same law as plaintiffs from the UK.

A similar outcome is to be expected in **product liability** cases, where Article 5 of the Rome II Regulation (as well as the 1973 Hague Convention on the Law Applicable to Products Liability) refers to connecting factors such as the habitual residence of the victim or the place where the victim had acquired the product, both combined with the place where the product was marketed. These places systematically differ for victims living in different States.

[411] See for instance the French *Sidel* case, where the spreading of false information had influenced the share price: Criminal Court of Paris, 12 Sept. 2006, upheld by the Paris Court of Appeals on 31 Oct. 2008.

For investors on **financial markets** (e.g. prospectus liability cases), the general rule of Article 4 of the Rome II Regulation applies. Here, the purely financial nature of the loss makes it difficult to locate the place where the damage occurred. Is it the place of the financial market, the place of the investor's habitual residence, or the place where the affected account was held? Only the first interpretation would result in the application of the same law to all investors, and thus facilitate collective redress.

In an **environmental damage** case like *Mines de potasse d'Alsace*[412] (see above, 3.1.2.2*),* Article 7 of the Rome II Regulation would designate, depending on the plaintiff's choice, either Dutch or French law for Dutch victims, and either German or French law for German victims. If French law turns out to be less favorable to the victims than Dutch and German law, the plaintiffs would be inclined to choose different laws, rendering collective redress difficult.

In contractual matters, according to Article 6 of the Rome I Regulation, **claims of consumers** domiciled in different Member States are governed by different laws even if the contracts contain a choice of law clause designating the seller's home State, unless the chosen law provides the same level of protection as the law of the consumer's habitual residence.

Cartels affecting more than one national market (i.e. infringements of Article 101 TFEU) are particularly complex, insofar as their anti-competitive effects have an impact on interests in several States and often involve non-contractual as well as contractual claims, which may all be governed by different laws. For non-contractual claims, Article 6(3) of the Rome II Regulation designates the law of the country where the market is affected. Europe-wide cartels regularly affect the markets in many different States, leading automatically to a multiplicity of laws, not only from one plaintiff to another, but also for each single claim of each plaintiff, which have to be divided into as much specific torts as national markets are affected (the so-called 'mosaic approach'). In the *CDC*[413] case, for instance, defendants from several Member States participated in different places in a single infringement of Art. 101 TFEU, whereas the victims who had assigned their claims to CDC, were domiciled in 13 different States. Admittedly, Article 6(3)b) allows the plaintiffs to choose the law of the *forum* if more than one market is affected, but additional requirements have to be met. **Where multiple plaintiffs, multiple markets and multiple defendants are involved, situations reach a level of complexity such that the choice of law rule is simply not practicable anymore**. And this is regardless of the fact that some of the claims in *CDC* were contractual in nature and therefore had to be submitted to an autonomous determination of the applicable law. Indeed, every contract is governed by its own law, either chosen by the parties or determined according to objective connecting factors, such as the habitual residence of the seller. **Collective redress can only succeed if these complexities of choice of law are overcome**.

The multiplicity of applicable laws is not only rendering collective redress more complex. It may even become an obstacle, because **national procedural laws often require the claims to be sufficiently similar (in fact and in law)** to treat them together**. If**

[412] CJEC, Case **21-76, Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA, 30 November 1976,** ECLI:EU:C:1976:166

[413] CJEU, Case C-352/13, Cartel Damages Claims (CDC) Hydrogen Peroxide SA v **Evonik Degussa GmbH and Others,** 21 May 2015, ECLI:EU:C:2015:335.

different laws apply on the substance, this requirement might not be met. In this respect, a distinction is to be made according to the level of harmonization reached by the EU in different areas of the law. Whenever national laws are substantially harmonized on the basis of EU directives (e.g. consumer law or product liability), the multiplicity of applicable laws should not be an obstacle *per se* to collective redress, because sufficient commonality exists in that case within the EU. In the absence of any harmonization, on the contrary, the multiplicity of applicable laws may in some instances lead to the conclusion that the claims are not sufficiently similar to be treated together (e.g. tort law). **Such a barrier to collective redress calls for an intervention of the EU legislator**.

3.1.4. Recognition and enforcement of foreign judgments and settlements under the Brussels I (Recast) Regulation

The cross-border effectiveness of the judgment or settlement is a primary concern for collective claimants as well as for the defendant. The recognition of the preclusive effect (the force of *res judicata*), in particular, prevents class members from re-litigating their claims independently abroad. For instance, one may imagine the situation of a European claimant, who has recovered only a very small amount in the foreign collective proceedings, and who decides to bring an individual claim in a different State, in order to obtain a better compensation. The defendant responds by relying on the preclusive effect of the foreign judgment, whereas the claimant argues that public policy considerations prevent its recognition. The risk in such situations that the collective judgment may not have preclusive effect in foreign proceedings is generally seen as an obstacle to the development of transnational class-action procedures. **If the preclusion issue is not addressed, there will be an incentive to instigate parallel litigation** designed to trump the main action, to the detriment of the fundamental objectives of the common judicial area.

The effects of third-state collective judgments (e.g. US judgments) do not fall within the scope of application of the Brussels I (Recast) Regulation. Each Member State applies its national rules on recognition and enforcement. Thus, **a judgment given in a third State has to meet the specific (more or less liberal) requirements of all the States in which recognition is sought. The lack of any EU harmonization is a major concern especially for US class actions involving claimants from different Member States** (see above, point 3.1.1). Only human rights instruments, especially the European Convention on Human Rights, provide some common fundamental principles for all Member States.

Within the EU, a collective judgment given in a Member State is recognized automatically in the other Member States, **according to Article 36 of the Brussels I (Recast) Regulation, without any special procedure being required. However, such recognition is precarious in nature, because it can be contested at any time by any interested party.** In other words, the foreign judgment is presumed to fulfill all requirements to be recognized, but the presumption is rebuttable if a ground for refusal of recognition exists under Article 45.

Regarding collective redress, the **most important question is whether recognition and enforcement may be denied on grounds of public policy**, according to Article 45(1)a. Objections to recognition may indeed be based on the lack of fairness, especially

when the foreign proceedings purport to bind non-participating members of a claimant group (opt-out model). Another difficulty relates to the fundamental assumption that compensation must be individually assessed. The dominant European conception of justice is based on individuals as the only right holders. If the foreign judgment is not based on the specific assessment of the injuries sustained by each individual member of the group, it may be contrary to the fundamental conceptions of justice of the State where recognition and enforcement is sought (the requested State). These are sensitive issues on which States are keen to have a final say. However, the Court of Justice (settled case law since the *Krombach* case[414]) imposes a very high standard for non-recognition on the grounds of public policy. **Recourse to the public-policy exception may be envisaged only where recognition would constitute a manifest breach of a rule of law regarded as essential or of a right recognized as being fundamental in the requested State. This leaves little margin of discretion to national courts**.

As the European rules on recognition and enforcement were designed according to purely individual conceptions of procedural justice, some of them are clearly not appropriate for collective redress. This is particularly the case of Article 45(1)b on foreign default judgments if the defendant was not properly served with the document instituting the proceedings. With respect to collective proceedings, it is rather the default of appearance of a *plaintiff* which may be a ground for non-recognition, but that situation is not addressed by the regulation. Indeed, Article 45(1)b is exclusively defendant-oriented, whereas collective redress also requires a plaintiff-oriented approach. As a matter of fact, with respect to the opt-out model, the situation of a plaintiff, who was not participating in the group but who might be encompassed automatically, requires specific attention from the perspective of procedural fairness. Here it is to be asked whether the plaintiff was properly informed of the proceedings.

The free movement of judgments is an important question not only from the perspective of the requested State, but also from the perspective of the State where the collective claim is litigated (State of origin). Indeed, the **State of origin may hesitate to certify as members of the group claimants from States in which recognition of the future judgment would be denied**. Hence, divergent national interpretations and implementations of the rules on recognition may impact the equal treatment, in the State where the collective proceedings are taking place, of plaintiffs from different Member States. This holds particularly true for third-State proceedings, but even within the EU, a divergent interpretation of the public policy clause may create such risks of unequal treatment.

The recognition of settlements is of paramount importance and must be addressed specifically. Under the current legal framework, the rules on the free movement of settlements are not sufficiently clear to meet the needs of collective redress. Numerous collective disputes result in court-approved settlements. In collective proceedings litigants are likely to prefer a negotiated outcome and the general policy trend of many States is to encourage settlements. This entails ensuring that settlements are effective and have preclusive effect.

[414] CJEU, Case C-7/98, **Dieter Krombach v André Bamberski, 28 March 2000,** ECLI:EU:C:2000:164

A first question here is **to what extent settlements** obtained in collective proceedings **can be regarded as judgments** and thus circulate under the same conditions. If a settlement forms part of a court-supervised procedure and is court-approved, it should be considered as a judgment and circulate as such, at least where the court exercised a judicial function beyond the mere certification of a private compromise.

A second question relates to the wording of Article 59 on court settlements (to be combined with Article 2(b) providing a definition of the concept). **Article 59 only refers to the *enforcement* of a court settlement** which is enforceable in the Member State of origin. It provides that such settlements shall be enforced under the same conditions as authentic instruments, i.e. without any declaration of enforceability being required. However, as pointed out above, **the major concern for collective redress is the *recognition* of the settlement**, because the concept of recognition comprises the preclusive effect of the latter, which is necessary to avoid the instigation of parallel litigation. Here again, the current rules of the regulation are not fit for purpose to deal with collective proceedings. **In the future, a provision is required in which the recognition of foreign court settlements is expressly stated**.

Specific issues may arise with respect to certain national laws. For instance, under the Dutch Act on the Collective Settlement of Mass Claims, if the group is considered to be the defendant (see above, 3.1.1.1), and the settlement is court-approved in the State of the domicile of the undertaking sued by the group, the lack of jurisdiction of that court could be a ground for refusal of recognition under Article. 45(1)e)i. Indeed, whenever the group comprises consumers domiciled in a different State and the consumers are in the position of the defendant, the settlement will not circulate under the regulation.

Thus, the current rules seem to be insufficient to effectively ensure the development of collective redress. If a new text is to be adopted, the question may be raised on whether specific rules regarding cross-border should be established.

3.2 Specific private international law rules within the European instrument on collective redress to address cross-border cases

In order to address cross-border cases from an efficient perspective, some specific elements have to be taken into consideration. Indeed, it is necessary to set rules which :
- guarantee the effectiveness of EU law
- protect the weaker parties
-prevent forum shopping as well as parallel proceedings.

Collective redress mechanisms are various: they can take the form of a procedure whereby claimants bring actions in one procedure to enforce their claims together, or of a procedure according to which a representative body brings actions on behalf of a group of individuals who are not themselves parties to the proceedings, or finally of a mechanism enabling a plaintiff to act on behalf of a group of individuals who will be bound by the outcome of the procedure, according to an opting-in or opting-out system. Therefore, depending on the system at stake, private international law issues will differ.

The legislative corpus and the preliminary works on the second mechanism mentioned, the one whereby a representative entity brings actions on behalf of a group of individuals (known as the *representative action* in some European instruments) are still in progress[415].

Regarding cross-border collective actions, **the possibility of a transnational representation should be considered**. Hence an association registered in another Member State should be considered to be representative at each national level. As such, the Commission's Proposal according to which : "Each qualified entity designated in advance in one Member State may apply to the courts or administrative authorities of another Member State upon the presentation of the publicly available list referred to in that Article" should be approved. On the one hand, many associations should join their actions, as the Commission proposed: "Member States shall ensure that where the infringement affect or is likely to affect consumers from different Member States, the representative action may be brought to the competent court or administrative authority of a Member State by several qualified entities from different Member States, acting jointly for the protection of the collective interest of consumers from different Member States". This proposal should be extended to other fields such as environmental law for instance. On the other hand, a single association should be able to bring a claim for plaintiffs residing in other Member States on its own. Plaintiffs could be represented by a single qualified entity. Therefore**, it should be possible for a representative entity to bring a sole action in the name of all the plaintiffs even if they are residing in different States**. For instance, in the *Amazon* case[416], the "Verein" could have represented not only the consumers residing in Austria but also the consumers residing in other Member States.

The field in which collective redress operates is also crucial. In the absence of unified rules within the European Union, the applicable law is to be taken into consideration. Where there are some harmonized rules (such as for consumer claims where there are many harmonized European rules), the cross-border mechanism is easier to build than where there are no such common rules (such as in tort claims for instance). **It is difficult to conceive a European collective redress mechanism in which different claims are governed by different laws**. The issue of the applicable law is central and leads to contemplate two different systems:

- The creation of a system authorising a sole collective redress action at the European level;
- The creation of a system authorising several collective redress actions in the EU, at least when a sole collective action is impossible because there are different applicable laws.

Inspiration can be drawn from the Insolvency Regulations (Regulation EC 1346/200; Regulation EU 2015/848). The latter aims to reduce the parallel procedures, and the issue is also a collective one. In insolvency matters, there is a need of a decision which will bind the debtor and all the creditors. The same is true for collective redress: stakeholders can be located in different States and the aim of the procedure is to obtain a collective decision which will bind all of them.

[415] See Commission Proposal.
[416] CJEU, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612.

The Regulation EU 2015/848 seeks to have a sole insolvency procedure even if the numerous stakeholders are located in different States in order to facilitate the progress of the restructuring (or possibly of the winding-up). In the **Insolvency Regulation**, different provisions focus on the determination of an adequate jurisdiction ground (the centre of main interests) for the opening of main insolvency proceedings. The regulation authorizes secondary proceedings to protect some interests. However, no parallel proceedings can be opened. Indeed, the Regulation organises the coordination of these procedures and contains some mechanisms to avoid secondary proceedings (the insolvency practitioner in the main proceedings is expressly permitted to provide undertakings to treat local creditors as they would be treated under secondary proceedings). To reduce the risk of irreconcilable judgments resulting from separate proceedings, in case of closely linked actions, **the courts of the Member State where the main insolvency proceedings are opened will also have jurisdiction to hear actions derived directly from the insolvency proceedings that are closely linked**, such as avoidance actions.

Two other main concerns are also to be taken into consideration for the purpose of a regulation on collective redress:

- The first one is **information regarding proceedings**. It is of main importance that the different stakeholders but also the jurisdictions are well informed about the ongoing proceedings. Every Member State is required to publish relevant information in cross-border insolvency cases in a publicly accessible electronic register. These registers are interconnected via the European e-Justice Portal.
- The second one is **group of companies**. The Regulation EU 2015/848 introduces a framework for insolvency group proceedings with the aim of improving the efficiency of insolvency proceedings concerning different members of a group of companies. In that perspective, group coordination proceedings may be requested. If the coordination occurs – that is not mandatory -, insolvency practitioners of group companies (and courts involved with) are obliged to cooperate where two or more members of the group are subject to insolvency proceedings. It appears that the topic can be relevant for collective redress. For instance, in the *Dieselgate* case, we could imagine a collective redress against the French subsidiary of a German group, another one against the Italian (or Spanish, or Swedish…) subsidiary and another one against the German mother. It could be interesting to have a solution to organize these different redresses in order to find the most appropriate solution and avoid irreconcilable judments. Thus, the solution given for a group coordination plan can be used to offer a bundled collective redress.

Besides, another source of inspiration can be found in the GDPR: a European policy has been built to protect all the data subjects regardless of where they live and where the defendant is established but at the same time, it aims to facilitate business transactions, or at least not to impede them. For cross-border cases, it introduces a consistency and cooperation system (see GDPR, Chapter VII, article 67 and f.) that could be a guide for a cooperation system between jurisdictions. See above 3.2.3.2.

3.2.1 The aim of the suggestion: authorize the collective action where plaintiffs reside in different States

3.2.1.1 Within the EU

In order to authorize such collective action, two routes are possible.

- A single collective action

In the case of a single collective action, where all claimants are suffering from the same damage, parallel proceedings must be avoided. Therefore, the main issue is the one of jurisdiction (see *infra*).

A single action should lead to one single applicable law and this reinforces the need for some harmonised rules, which already exist in: consumer law, data protection, and partially competition law.

- Several collective actions

When a sole collective action is not possible (for instance, because of the different applicable laws), several collective actions should be brought. The experience of several groups of plaintiffs – one group for plaintiffs living in Member State A, another group for plaintiffs living in Member State B (comparable to US case law in *Royal Dutch settlement*[417]) should not be followed, as it infringes the non-discrimination principle. **In such situations, he main issue is the coordination of the proceedings**. **One of them should be the main proceeding. The others should be secondary proceedings.** This approach is based on the idea that in a cross-border situation, parallel proceedings should be avoided. The proceeding seen as the main proceeding is not in "competition" with the other proceedings qualified as secondary proceedings. It should be a leading proceeding. The effects of the secondary proceedings shall therefore be restricted. The coordination of these proceedings could be inspired by the solution given in the Insolvency Regulation Recast which is, with the first Insolvency Regulation, the sole instrument which is dealing whith those types of proceedings. The Member State which has jurisdiction on the main proceeding should be determined first (see *infra*).

An alternative solution should also be considered: in light of the existing mechanism in insolvency, **the opening of secondary proceedings to protect some interests, should be considered even if a single class action is possible**. Nonetheless, in the field of insolvency, the rationale behind opening secondary proceedings is frequently the application of another *lex concursus*. Such an aspect is missing where a single collective action is possible given it is only possible where only one single law is applicable. **Therefore, the interests taken into consideration to justify a secondary collective action – which may be access to justice - need to be further investigated**.

3.2.1.2 Plaintiffs residing in third States

The issue that arises is whether the proposal should facilitate the participation of plaintiffs from third States. On the one hand, EU consumer law protects EU consumers, so that the collective action could be restricted to consumers residing in EU Member

[417] In this case, the European shareholders were split off into a separate European class from the main US action under the leadership of another law-firm. The interest for the defendant of such splitting-off appears to lie in the Most Favored Nation clauses, which effectively encourage early acceptance of a deal so as to be able to share any surplus awarded to later settling plaintiffs. See H. Muir Watt, IPRax 2010.

States; on the other hand, when fundamental rights are involved, such as the rights of data subjects (see the GDPR), a broader scope may be given so as to include plaintiffs residing in third States.

3.2.2. Determination of the *forum*

Regarding the determination of the *forum*, **where this is possible, there should only be one forum**.

In our view, **a centralised collective action has many benefits**. In particular, it avoids the problems caused by parallel proceedings. Nevertheless, parallel proceedings should not be condemned. A main asset of European private international law is to allow the coordination of proceedings, and the cooperation between authorities and judges. The comparison with cross-border insolvency is still relevant here: pluralism; coordination and cooperation (which are the main assets of EU private international law); main procedure – secondary proceedings.

The main head jurisdiction is the defendant's domicile (see above benefits and shortcomings). **In some fields of the law, the shortcomings of this main head jurisdiction are obvious and the need for other jurisdictions is clear. This explains why jurisdictional options are left to the plaintiffs**: in consumer law, the residence of the consumer; in competition law, the Member State where the collective interests are mainly affected; in environmental law, the Member State in which the main harm is suffered….

For the main collective action, **the courts of the Member State within the territory of which the centre of the group's main interests is located shall have jurisdiction to open the main proceeding**. The determination of the centre of the group's main interests is a delicate issue. **The solutions given by Brussels I Recast for individual claims should be a basis for our recommendation**: the country of residence of the consumers mainly affected, the country of the affected market[418], the country in which the event giving rise to the damage occurred; the country in which the damages occurred…

When the centre of the group's main interests cannot be determined, the courts of the Member State within the territory of which the defendant has his domicile should have jurisdiction. In this case, regarding access to justice, secondary proceedings are likely to arise.

3.2.3. Avoiding abuses

For cross-border collective actions, the most efficient way to limit the possibility of forum shopping for the most favourable regime would be to have both a common procedure and a common substantive law. Absent this, clear rules are needed concerning which Member State's courts should have jurisdiction and which court should be first seized. However, a common procedure will not be a complete answer, as forum shopping

[418] See H. Muir Watt, IPRax 2010 : « for market torts such as torts involving anti-competitive market conduct, it may be suitable that judicial jurisdiction be exercised alongside the activities of the market authorities concerned ». See the CJEU case law regarding Brussels I, article 5 (3).

consists in seeking the regime with most favourable substantive law. Given that, clear rules on jurisdiction would still be needed to eliminate the risk of forum shopping. That would require delicate policy questions to be answered in respect of, for instance, whether the forum ought to be that of the majority of the claimants, of the defendant, dependent on the nature of the claim e.g., tort, contract etc.

3.2.3.1. Avoid *forum* shopping

Harmonised procedural rules should be adopted to avoid *forum* shopping.

For the main collective actions, the claimants should not have the choice of their jurisdiction. The Courts where the centre of the group's main interest is situated have jurisdiction and if it is not possible to determine this centre, it is the courts of the defendant's domicile which have jurisdiction.

The solution given by the Insolvency Regulation to avoid forum shopping should be followed: **the court seized of a collective action shall, of its own motion, examine whether it has jurisdiction pursuant the harmonised rules of jurisdiction**. **The judgment opening the proceeding shall specify the grounds on which the jurisdiction of the court is based** (Regulation 2015/848).

This obligation of the court is of great importance. It is well known that, in the past, British judges have retained very easily their jurisdiction in competition law or in insolvency law.
Regarding competition law[419], emblematic cases are *Provimi*[420], *Cooper Tire*[421] and *Toshiba*[422]. Regarding insolvency law[423], the British courts ruled on companies that had seat in other Member States, deciding that the decisions relating to these companies were taken in England where the mother company had its seat (for instance, the *Rover* case, or the *Daisytek* case regarding a French company). The British courts also ruled on the letter-box company. This issue was pointed out by the Commission in its report on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[424].

3.2.3.2. Lis-pendens / related actions

Regarding the *lis-pendens*, the solution could be modelled on Article 81 of the GDPR. **If proceedings concerning the same activities are already pending before a court in another Member State, any court other than the one first seized has the discretion (not the obligation) to stay its proceedings**. The same court may also

[419] See R. Amaro, Le contentieux privé des pratiques anticoncurrentielles, Bruylant 2014, n° 248 ; see for the same case : M. Wilderspin, Jurisdiction Issues : Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation, International Antitrust Litigation : Conflict of Laws and Coordination, Hart Publishing, 2012, p. 41 et s., spéc. pp. 43 à 53).
[420] Roche Products Ltd. & Ors v. Provimi Ltd [2003] EWHC 961
[421] Cooper Tire & Rubber Company Europe Ltd & Ors v. Dow Deutschland Inc & Ors, [2009] EWHC 2609 (Comm), [2010] EWCA Civ 864
[422] Toshiba Carrier UK v. KME Yorkshire [2011] EWHC 2665 (Ch), [2012] EWCA Civ 1190
[423] See for example, J.-L. Vallens, « Tourisme judiciaire et insolvabilité : les risques du forum shopping, Revue des procédures collectives n° 4, Juillet 2012, étude 21; W. Hergenröder, Entschuldung durch Restschuldbefreiungstourismus, DZWIR, 2009, 309 ff.; C. Paulus, Ein Kaleidoskop aus der Geschichte des Insolvenzrechts, JZ 2009, 1153; H. Vallender, Gefahren für den Insolvenzstandort Deutschland, NZI 2007, 129.
[424] https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-743-EN-F1-1.Pdf.

decide to decline jurisdiction in favour of the court first seized, provided that the latter court has jurisdiction over the proceedings in question and its law permits the consolidation of related proceedings. It is not, as already pointed out (see 3.1.2.4), real lis-pendens. It is rather a question of related action, which is why there is no obligation for the court.

Thus parallel proceedings will persist. **It is therefore necessary to set rules that foster and regulate cooperation and coordination between the different courts**.

Cooperation and coordination are often recommended in the European judicial area but clear provisions are generally missing in the several Brussels regulations. [425]. The Insolvency Regulation has made some progress and another source of inspiration may be found in the GDPR. For cross-border cases, the GDPR introduces a consistency and cooperation system (see GDPR, Chapter VII, article 67 and f.). Although this mechanism relates to cooperation **between supervisory authorities, not between jurisdictions**, it could still be a useful guide for a cooperation system between jurisdictions. In the GDPR, supervisory authorities (SAs) have to cooperate in order to ensure a consistent application of the GDPR. In the cooperation phase, it is the Lead Supervisory Authority (LSA) that acts as the main point of contact for the controller and processor and drafts a decision. The LSA needs to submit a draft decision to the SAs concerned. The SAs concerned can express objections to the draft decision and the LSA can decide to follow or not to follow the objection. When none of the SAs concerned objects, they shall be deemed in agreement with the draft decision. If the LSA intends to follow the objection, it shall submit a revised draft decision to the other SAs concerned. If the LSA has rejected a reasonable or relevant objection, the case is referred to the European Data Protection Board (EDPB). The Board then issues a binding decision. The LSA shall adopt its final decision on the basis of the Board's binding decision.

Regarding the information and cooperation procedures, the system is based on an IT platform : the Internal Market Information System (IMI). The so-called consistency mechanism can also be triggered to ask the Board to issue an opinion, as regards a draft decision submitted by a supervisory authority or following a request concerning a matter of general application or producing effects in more than one Member State.

3.2.3.3. Avoid commercialisation of the proceedings

Harmonised rules on funding and on contingency fees should be adopted to avoid abuse. Presently, there are major differences (see the national reports in the Annex).

3.2.4. The recognition and enforcement of judgments

The rules on recognition and enforcement of judgements should distinguish between the determination of the group and the judgment itself.

Currently, some commentators wonder if the opt-out system is compatible with Article 47 of the European Charter of fundamental rights and whether it could be a ground for

[425] An exception is to be seen in Article 15 (Transfer to a court better placed to hear the case) and in Article 11 (fast track proceeding for the return of the child) of the Regulation Brussels IIa regarding parental responsability

refusing the recognition of the judgment[426]. If the European instrument on collective actions chooses the opt-out system, this question will need to be considered and solved. The European collective action system necessarily needs to be compatible with the Charter.

In our view, there is no reason to adopt specific rules on the recognition and enforcement of judgements for collective redress. As other procedural regulations do, the European collective action instrument should refer to Brussels I Recast.

For third States judgements, a specific and separate issue arises. So far, the competence of the EU has been denied. This can be problematic: for instance, how will a French judge deal with a US judgment already recognized in Ireland ? Great care has been taken in the GPDR: the Regulation includes a provision regarding the recognition and enforcement of 'any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data'. Thus, pursuant to Article 48 of the GDPR, such judgments or decisions may be recognised or enforced solely on the basis of an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State.
The Hague Judgements Conventions may help solving such situation, but so far, the project does not deal with the class action issue.

3.2.5. Alternative dispute resolution from a private international law perspective

Claims can be brought before non-judicial bodies, like arbitrators, mediators or ombudsmen[427] and it would **certainly make sense to elaborate principles encompassing both judicial and alternative dispute resolution processes**[428]. In doing so, new issues may arise, such as the role of mediation authorities, the question of the res judicata of the settlements or other understandings. **Brussels I Recast is not of a great help for those who will have to deal with such issues**.
The general guidelines should be inspired from the key findings established in this study. In particular, the scheme of a main, eventually single proceeding should be preferred. The GDPR, more specifically its provisions regarding the supervisory authorities, could be a source of inspiration. One of the key innovations brought along by the GDPR is the **so-called one-stop-shop mechanism**. Where a data controller or processor processes information relating to individuals in more than one Member State, a supervisory authority in one EU Member State should be in charge of controlling the controller's or processor's activities, with the assistance and oversight of the corresponding authorities of the other Member States concerned (Article 52). The main idea is to simplify proceedings A similar mechanism exists in the Regulation (EU)

426 See for instance B. Hess, Cross-border Collective Litigation and the Regulation Brussels I, IPRax 2010. 116. Comp. French constitutional court, Decision no. 89-257 of July 25, 1989, 24–26 : a statute authorizing trade unions to bring suit on behalf of individual members complies with the free access ogf justice guaranted by French Constitution if any individual be guaranteed actual personal notice in fact of the proceeding before being included in it; each retain the right to determine how his or her interest should be represented in the proceeding;" and (each employee be entitled to freely terminate his or her involvement in the action at any point in time prior to judgment.
427 See in the US the Class Action Fairness Act in 2005 leading to the development of class arbitration.
428 H. Muir Watt, Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation, IPrax 2010. 111.

2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Chapter V of this Regulation deals with coordinated investigation and enforcement mechanisms for widespread infringements and for widespread infringements with a union dimension and sets general principles of cooperation (art. 16) as well as specific rules.

Conclusion of the Study

A regulation setting down a horizontal compensatory collective redress mechanism with detailed procedural rules is desirable but unrealistic as illustrated by the persisting divergences between the twelve national systems studied (Chapter 1). It would most certainly be rejected as disproportionate in view of the proportionality and subsidiarity principles, and perceived as going against the legal traditions of Member States. Yet, tools for compensating consumers and other affected persons who suffer mass harm appear insufficient in view of the fast-increasing digitalisation and globalisation of goods and services. As previously highlighted, in April 2017, the European Parliament called for a legislative proposal for the establishment of a collective redress mechanism in order to create a harmonised system for EU consumers, thus eliminating the current situation in which consumers lack protection in most Member States. In April 2018, the Commission presented a legislative package entitled 'a New deal for consumers' with new measures supporting collective redress for consumers. As the EU gives incentives to Member States to provide for effective collective redress in various cases, including cases of business-related human rights abuse (data protection for instance), some of the key issues that could contribute to an effective resolution of mass claims still needed to be addressed.

In order to give the European legislator a complete overview of what needs to be done, it appeared necessary to address cross-border issues in this Study and, in doing so, to analyse the existing EU instruments in the field of private international law. These instruments do not deal with the particular issue of collective proceedings and, often, the general rules they contain are ill-adapted. This is the reason why more specific instruments, whose scope are restricted to specific matters (such as insolvency or data protection) were examined in this study. If the European legislator decided that new specialised rules were needed, it could usefully draw inspiration from these models as well as from CJEU cases on this topic. It would also be necessary to keep in mind the following objectives: guaranteeing the effectiveness of EU law, protecting the weaker parties and preventing abuses as well as parallel proceedings.

Since national law cannot deviate from the Brussels I Recast Regulation, the influence of national legislation on potential abuses and forum shopping has been rather limited so far. Besides, to some extent, forum shopping under the Brussels I Recast Regulation is legitimate since in some specific situations, several courts have jurisdiction to hear a case (in the *Schrems* case, the CJEU restricted the availability of special jurisdiction for consumers under the Brussels I Recast Regulation in case of an assignment of claims from consumers to consumers). Moreover, the number of cross-border cases where claims are brought together before one single court is still very limited. This is mainly due to the fact that national consumer associations tend to represent only consumers living in their own country. Indeed, in practice, cooperation among consumer associations from different Member States is difficult and costly. The situation may

change: national laws are becoming more open to collective actions, national consumer associations as well as authorities gain power and, last but not least, the European Union favours cross border trade and the Digital Single market is well on its way. For all these reasons, cross border issues should be given particular attention.

ANNEX I : QUESTONNAIRE AND NATIONAL REPORTS by alphabetical order of the countries (Austria, Belgium, Estonia, France, Germany, Italy, Luxembourg, Poland, Romania, Spain, the Netherlands, the United Kingdom)

QUESTIONNAIRE

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…) ?
1.2 Who has standing ?
1.3 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?
1.4 What are your views on certification of the entity (eg. qualified association) ? What are your views on certification of the group ?
1.5 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses ? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?
1.6 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?
1.7 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?
2.2 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?
2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?
2.4 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

3. Publicity issues

3.1 How are collective actions publicized in your country ?
3.2 Who is responsible for the publicity of collection actions ? Who bears the costs of such publicity ?
3.3 Overall, is publicity regarding collective actions an issue in your country ?

4. Financial issues

4.1 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

4.2 What are your views on "the loser pays" principle ?
4.3 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?
4.4 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?
4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?
4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?
5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?
5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.) ?
6.2 What opportunities do you identify with alternative dispute mechanisms ?
6.3 What shortcomings do you identify with alternative dispute mechanisms ?

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices ?
7.2 What impact have actors with legal standing (for example, qualified entities) experienced ?
7.3 Overall, what are the difficulties and opportunities experienced by all actors involved ?

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason ?

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not ?
1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?
1.3 In you view, would your country benefit from such an instrument, or be negatively impacted ?

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend ?

2.2 What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress) ?

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

3. A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with ?

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress ?

III. DATA AND STATISTICS

1. Are data and statistics on collective redress available in your country ?
2. **Types of data available** : Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ? **Please provide appropriate statistics for each**.

If you are unable to provide us with such data, could you please indicate us why (lack of publicised information etc.) and/or who to contact ?

Thank you very sincerely in advance for your time and input.

NATIONAL REPORTS

Austria

Lukas Klever and Sebastian Schwamberger

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.8 What is its scope (consumer only, horizontal…) ?

The mechanism which most closely resembles a collective redress mechanism is the so called "Austrian model of group litigation" or "Austrian-style class action"[429]. It is not a genuine procedural instrument of a class action[430] but rather a mass assignment of claims to either a qualified association (in practice: Austrian Association for Consumer Information („Verein für Konsumenteninformation"), Federal Chamber for Workers and Employees („Arbeiterkammer") or also to a private party (e.g. "ADVOFIN Prozessfinanzierung AG", "COBIN Claims"), who serves as a class representative. As it is based on existing procedural tools[431] it is not limited in scope[432].

1.9 Who has standing ?

Regarding compensatory claims, the "Austrian class action" does not need to be brought by a qualified association. Any entity or even an individual can serve as a class representative whenever potential class members are willing to assign claims to them[433].

[429] See eg Walter H Rechberger, ‚Class Actions' in Bea Verschraegen (ed) *Austrian Law – An International Perspective* [Jan Sramek 2010] 151, 162 f.

[430] cf British Institute of International and Comparative Law, *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099, 11.

[431] In particular § 227 ZPO (Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, RGBl 1895/113 idgF) and § 55 JN (Gesetz vom 1. August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen, RGBl 1895/111 idgF); cf Rechberger (n 429) 162; Alexander Klauser and Peter Hadler, 'Kollektiver Rechtsschutz in der österreichischen Praxis – Rechtsbehelfe zur Bewältigung von Massenansprüchen aus anwaltlicher und gerichtlicher Sicht unter besonderer Berücksichtigung der österreichischen Sammelklage', [2013] *Zeitschrift für Zivilprozess International* 103, 114; British Institute of International and Comparative Law (n 430) 376 f.

[432] Consideration shall also be given to the action on behalf of collective interests ("Verbandsklage"), which is a tool for injunctive or declaratory relief. It is based on Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, [2009] OJ L2009/110, 30 and therefore not a distinct feature of Austrian Law. Another instrument is the so called test case ("Musterprozess"). An individual claim giving rise to issues common to other actions is assigned to a qualified entity. Meanwhile, the parties to the other actions agree to stay their cases to await the decision in the test case. The judgment in the test case has no precedent effect for the stayed cases. Therefore, the parties must come to an agreement according to which the decision in the test case shall be binding for the other cases as well. Test case proceedings are purely based on consent and, thus, cannot be considered as a tool of collective redress. See eg Rechberger (n 429) 156 f; Klauser and Hadler (n 429) 107 f.

[433] Note, however, that under § 27 (1) ZPO only claims up to a value in dispute of € 5.000 can be brought by an individual in person, otherwise the claimant(s) must be represented by an attorney.

1.10 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?

There is no certification mechanism in Austria[434]. Yet, according to the Austrian Supreme Court's case law, the individual cases must share at least "essentially a common core" and "essentially the same questions of fact or law"[435].

1.11 What are your views on certification of the entity (e.g. qualified association) ? What are your views on certification of the group ?

The Austrian system under which both qualified associations and private individuals can bring claims is considered as satisfactory. However, it has been suggested that class representatives should be subject to increased court supervision (comparable to administrators in insolvency proceedings)[436].

1.12 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses ? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

The system is opt-in and is generally considered to be working well in practice. Austrian civil procedure follows the "loser-pays principle" and claimants can be held liable for abusive litigation, which is why there are no reports of malpractice suits[437]. In general, it is satisfactory in terms of access to justice and in terms of length of proceedings. The length of proceedings can be problematic, though, where different findings are needed for the evaluation of different individual cases (such as e.g. in cases of deficient investment advice)[438].

1.13 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?

An opt-out model can serve the desire of defendants to know the scale of the action they face[439] and to have all claims resolved within the same proceedings[440]. As people tend not to actively choose an option even when they could (*inertia bias*), an opt-out solution seems to be the more powerful tool.[441] An opt-out solution combined with compensatory relief would be the best solution to deal with widespread and disperse damages.[442]

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[434] British Institute of International and Comparative Law (n 430) 373, 379.
[435] Oberster Gerichtshof (Supreme Court), case 4 Ob 116/05w, 12 July 2005, ECLI:AT:OGH0002:2005:0040OB00116.05W.0712.000.
[436] Paul Oberhammer, ‚Kollektiver Rechtsschutz bei Anlegerklagen', in Susanne Kalss and Paul Oberhammer, *Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen, 19. Österreichischer Juristentag*, vol II/1 (Manz 2015) 134, 148 f.
[437] Oberhammer (n 436) 83, 135.
[438] Roland Parzmayr, ‚Prozessökonomie bei Groß- und Massenverfahren – einige praktische Anmerkungen', in Matthias Neumayr (ed), *Beschleunigung von Zivil- und Strafverfahren* (Manz 2014) 101.
[439] Alexander Klauser, in Hannes Jarolim (ed), *Beschleunigung von Verfahren als Gebot der Stunde* (LexisNexis 2016) 63.
[440] cf Georg E Kodek, ‚Kollektiver Rechtsschutz in Europa – Diskussionsstand und Perspektiven', in Walter Blocher, Martin Gelter and Michael Pucher (eds), *Festschrift für Christian Nowotny zum 65. Geburtstag* (Manz 2015) 144.
[441] *Statement of the European Law Institute on Collective Redress and Competition Damages Claims* (European Law Institute 2014) 43; Kodek (n 440) 143.
[442] Kodek (n 440) 148; cf Caroline Meller-Hannich, 'Sammelklagen, Gruppenklagen, Verbandsklagen – Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?, Gutachten A zum 72. Deutschen Juristentag', in Ständige Deputation des deutschen Juristentages (ed), *Verhandlungen des 72. Deutschen Juristentages Leipzig 2018*, vol I (C.H. Beck 2018) A 58 f.

However, a pure opt-out might be criticised for violating the procedural autonomy (or even the right to access to court) of those who do not wish to join the group[443]. Also, an opt-out system would need a mechanism according to which it is determined who will be identifiable as a member of the group.[444] Further, in a pure opt-out system a consolidation mechanism is needed whenever multiple class action suits are filed or tried to be filed on the same matter[445]. Finally, in a pure opt-out system the loser-pays principle might be problematic: all members – including those who remained inactive – would be liable for the counterparty's expenses if the case is lost, whereas in an opt-in-system only those opting in are responsible for their share of the counterparty´s expenses. Vice versa, for a successful defendant it will be difficult to receive compensation for the legal costs where the individual claimants take no active part in the proceedings or are even mostly not known.

Given the variety of views expressed, it is doubtful whether a consensus at EU level could be found in favour of either an opt-in or an opt-out-model.[446] Therefore, we suppose that a mixed model should be aimed in which qualified entities would be entitled to bring an opt-out class action in particular circumstances (e.g. in "low value cases").

1.14 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

The "Austrian model of group litigation" allows bundling claims and thus makes recovery cost effective.[447] It is criticised, however, that victims whose claims are not economically viable on their own are unlikely to opt into collective action[448]. Parallel litigation may result in diverging decisions[449]. Claims with high amounts in dispute may result in uncertain and excessive litigation expenses, which might make it difficult to receive third party funding. As the limitation period for other claims based on the same facts is not suspended, a final decision is of no use to victims who have not taken part in the action.[450]

2. Issues related to compensation

2.5 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?

The mechanism is based on traditional procedural tools. Thus, there are no specific restrictions as to which claims can be brought. Compensatory relief is available as well.

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[443] Rechberger (n 429) 174.; cf Oberhammer (n 436) 129 f; Georg Kodek, ‚Keine Angst vor Verfahrensrationalisierungen – sie sind ein Gebot der Stunde', in Hannes Jarolim (ed), *Beschleunigung von Verfahren als Gebot der Stunde* (LexisNexis 2016) 32; Kodek, (n 440) 144.

[444] cf Georg E Kodek, ‚Class Actions – Some Reflections from a European Perspective', in Eva Lein and others (eds), *Collective Redress in Europe – why and how?* (British Institute of International and Comparative Law 2015) 117, 122.

[445] Oberhammer (n 436) 131, 136. This is even more so where claims are filed before different courts: Rechberger (n 429) 153 f.

[446] ELI Statement (n 43) 15.

[447] Parzmayr (n 438) 103; Kodek (n 440) 138.

[448] ELI Statement (n 43) 43 f; Kodek (n 43) 138.

[449] Parzmayr (n 438) 86 ff, 100; Klauser and Hadler (n 429) 109 f; Rechberger (n 429) 154.

[450] Klauser and Hadler (n 429) 110; Verein für Konsumenteninformation, 'Höchste Zeit für Gruppenklagen!' [2017] VR Info H 8, 9.

2.6 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

As individual claims for compensation might become time-barred while litigation for an injunction is still pending, injunctive relief is often insufficient. The same holds true for "low value cases", where prospective claimants are unlikely to engage themselves in subsequent litigation for compensatory relief.[451] On the other hand, class-wide compensation will not be useful in cases where an individual assessment of the amount of damages recoverable is necessary. In such cases, a declaratory judgment would be preferable.

2.7 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?

There is no such a fund in place. However, it is discussed whether a fund (or another mechanism, e.g. that surplus or unallocated damages will be given to charity or can be used by qualified entities to fund further litigation) should be established in order to allow to skim off a defendant's ill-gotten gains.[452] Otherwise, businesses respecting the law would suffer competition disadvantages compared to those violating the law.[453] It should be borne in mind, however, that private action is based on the idea of compensation. Any punitive measures should remain in the hands of public authorities and private claims should be distinguished from public enforcement.[454]

2.8 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

An advantage of the Austrian system is that it is based on existing procedural tools and therefore not limited in scope. Either injunctive or compensatory relief can be claimed. As the system is purely opt-in, it is insufficient in "low value cases" where the affected individuals are unlikely to join an action[455]. For that reason, enterprises who violate the law can keep the received ill-gotten gains in such cases, which is adverse to fair competition.

3. Publicity issues

3.4 How are collective actions publicized in your country ?

There are no rules in place dealing with publication of collective actions. Whenever collective actions are brought by the "Verein für Konsumenteninformation" or the

[451] Meller-Hannich (n 442) A 59 f.
[452] Kodek (n 440) 147 ff.
[453] cf the recent proposals for collective redress in the Austrian Parliament: IA 82/A XXVI. GP 12, 14; IA 2296/A XXVI. GP 13.
[454] Kodek (n 440) 150.
[455] Kodek (n 440) 147 ff.

"Arbeiterkammer", the information is published on their respective homepages.[456] The same holds true for actions being brought by professional private parties (e.g. ADVOFIN, COBIN claims).

3.5 Who is responsible for the publicity of collective actions ? Who bears the costs of such publicity ?

As publication is not regulated, there is no duty to publicize collective actions. Whoever publicizes bears the costs by themselves.

3.6 Overall, is publicity regarding collective actions an issue in your country ?

Due to the opt-in system and in the absence of a *res judicata* effect on subsequent decisions, publicity is not an issue. This would be much more the case though if an opt-out-system were to be established.

4. Financial issues

4.7 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

Courts' fees are regulated in the Court Fees Act ("Gerichtsgebührengesetz[457]") and are flat fees depending on the amount in dispute. Attorneys' fees are either agreed upon or (in the absence of an agreement) they are based on the Attorney Rate Act ("Rechtsanwaltstarifgesetz[458]"), according to which attorneys are remunerated for every single step they take during the proceedings[459]. Contingency fees are not permitted; agreements under which such fees are agreed upon are void[460]. Lawyer's fees are relatively low compared to many other jurisdictions[461].

4.8 What are your views on "the loser pays" principle ?

The authors are in favour of the loser-pays-principle. Since a prospective claimant would be liable for the defendant's costs, the principle operates as a strong safeguard against abusive claims. Indeed, under the risk of bearing the counterparty's expenses, potential claimants might also refrain from taking action in meritorious cases. That is, however, an obstacle which is inherent to ligation as such and not a genuine problem of class litigation.

4.9 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?

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[456] See for the "Verein für Konsumenteninformation": https://vki.at/unsere-sammelaktionen-im-ueberblick; "Arbeiterkammer": https://wien.arbeiterkammer.at/beratung/konsumentenschutz/index.html.
[457] Bundesgesetz vom 27. November 1984 über die Gerichts- und Justizverwaltungsgebühren, BGBl 1984/501 idgF.
[458] Bundesgesetz vom 22. Mai 1969 über den Rechtsanwaltstarif, BGBl 1969/189 idgF.
[459] cf Clemens Thiele, *Anwaltskosten* (3rd ed, LexisNexis 2011) 16 ff.
[460] § 879(2)(2) ABGB (Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS 1811/946 idgF – Austrian Civil Code).
[461] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, ‚Costs and Funding of Civil Litigation: A Comparative Study' (2009) University of Oxford Legal Research Paper 55/2009, 18.

The "loser-pays"-principle is applied[462]. The unsuccessful party must bear the court fees, its own and its counterparty's attorneys' fees as well as the experts' fees and the parties' expenses. However, this holds true only as far as these costs have been reasonable and necessary for adequate proceedings (eg the costs caused by unnecessary procedural steps such as the filing of a claim before an incompetent court are not reimbursed). Furthermore, attorneys' fees are only reimbursed to the amount specified in the Attorney Rate Act[463].

4.10 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?

In principle, an agreement under which a "legal friend" should receive a pre-agreed share of the proceeds is void under Austrian Law. There is an ongoing debate on whether that applies also to commercial funding entities[464].

Nonetheless, litigation funding in Austria is an accepted practice. The Austrian Supreme Court has ruled that a potential invalidity of the funding agreement does not affect the validity of the assignment of claims and that the defendant of the funded dispute has no standing to challenge the funding agreement[465].

4.11 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?

Due to the loser-pays-principle, the risk of third party-funded abusive litigation is rather low.[466] Facing the risk to pay for the opponent's litigation expenses, commercial funders are likely to back meritorious claims only (mostly claims starting with a value in dispute of around € 50.000 to € 100.000[467]). Court control is recommended wherever there is a risk of undue influence of the funding entity (e.g. where the funder has no interest in an out-of-court settlement, where there is pressure to settle rapidly etc.)[468].

4.12 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

Prospective claimants are dependent on whether a class representative who is willing and able to represent the group can be found. Qualified entities are at risk to be lacking adequate resources and might refrain from taking certain actions due to their limited

[462] See § 41 (1) ZPO.
[463] cf Marianne Roth, ‚Cost and Fee Allocation in Austrian Procedure Law', in Bea Verschraegen (ed) *Austrian Law – An International Perspective* [Jan Sramek 2010] 140 f.
[464] cf Heinz Krejci, ‚Gilt das Quota-litis-Verbot auch für Prozessfinanzierungsverträge?' (2011) 8 *Österreichische Juristenzeitung* 342, 346 ff; Oberhammer (n 436) 154 with further references. According to Oberster Gerichtshof (Supreme Court), Case 4 Ob 14/18i, 17 July 2018, ECLI:AT:OGH0002:2018:0040OB00014.18I.0717.000 the prohibition of *quota-litis*-agreements also applies to individuals; cf also Elisabeth Scheuba, '"Sammelklage" – Einklang mit der ZPO erbeten' [2005] *ecolex* 747, 748 ff.
[465] Oberster Gerichtshof (Supreme Court), Case 6 Ob 224/12b, 27 February 2013, ECLI:AT:OGH0002:2013:0060OB00224.12B.0227.000.
[466] cf Meller-Hannich (n 442) A 77.
[467] Georg E Kodek, ‚Groß- und Massenverfahren de lege lata und de lege ferenda', in Matthias Neumayr (ed), *Beschleunigung von Zivil- und Strafverfahren* (Manz 2014) 54.
[468] Oberhammer (n 436) 147 ff, 155 f.

capacities.[469] Therefore, qualified entities should receive adequate public funding. Undue influence by third party funders should be prevented by court control.

5. Issues of private international law

5.4 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?

The international dimension is not taken into account in Austrian legislation. As cases must share the "same common core", the Austrian model of group litigation is unlikely to be used for actions in which the different individual claims are subject to different laws.[470]

5.5 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?

No.

5.6 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

The easiest solution, which would be to allow only nationwide collective redress[471], does not consider that mass litigation rarely has a pure domestic background. A politically achievable way might be a choice of law rule for mass harm events according to which the action is subject to the law of the defendant's domicile or the defendant's place of business.[472] The defendant as well as every claimant has a significant relationship with that substantive law[473] whilst there might be no connection to the place where the majority of victims or where the group representative is domiciled. In that regard, an adoption of Article 6 Rome I Regulation and Art 4 Rome II Regulation in light of the needs of collective action should be discussed.[474]

6. Issues related to alternative dispute mechanisms

6.4 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

[469] Kodek (n 440) 141.
[470] cf Astrid Stadler, ‚Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen', in Matthias Casper and others (eds), *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier 2009) 149, 160 f.
[471] Ralf Michaels, 'European Class Actions and Applicable Law', in Arnaud Nuyts and Nikits E. Hatzmihail (eds), *Cross-Border class actions: the European Way* (Sellier 2014) 111, 125 f.
[472] Astrid Stadler, 'Conflicts of Laws in Multinational Collective Actions – a Judicial Nightmare?', in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (OUP 2012) 191, 207 ff; Michaels (n 471) 126; European Commission, 'Green Paper on Consumer Collective Redress', COM(2008) 794 final, para 59 f.
[473] cf Stadler (n 472) 209.
[474] European Commission, 'Green Paper on Consumer Collective Redress', COM(2008) 794 final, para 59.

The ADR directive has been implemented by the Alternative Dispute Resolution Act[475]. However, the procedure under the ADR Act does not seem to be tailored for the needs of collective action[476]. There are little to no cases reported in which a procedure under the ADR Act has been used for mass harm events[477]. In contrast, ordinary court-directed settlements and out-of-court settlements are commonly used to resolve mass harm events[478].

6.5 What opportunities do you identify with alternative dispute mechanisms ?

If a workable system to channel claims into an alternative process can be found, a less costly and less time-consuming informal procedure might be preferable over court proceedings. Such a mechanism should be a supplementary legal mechanism which cannot be a replacement for appropriate court mechanisms.

6.6 What shortcomings do you identify with alternative dispute mechanisms ?

The ADR mechanism can defer court proceedings and thus increase overall costs[479]. Some authors rise concern as to the impartiality and the qualification of the members of the ADR entities[480]. Finally, corporate defendants might use ADR to under-compensate their consumers[481].

7. Issues for practitioners

7.4 What impact have legal practitioners experienced on their practices ?

"The Austrian model of class action" is widely accepted as a useful tool[482]. Nevertheless, throughout the last years calls for a reform have been made from the consumer side.[483] Collective redress minimizes the risk of diverging judgments and thus favours legal certainty[484]. Further, class-wide relief is often the only way to receive the necessary funding and thus to allow for claims being litigated[485]. On the other hand, claims being brought under "the Austrian model of group litigation" may lead to time-consuming litigation on whether the respective action could be heard.[486] As claims assigned by other

[475] Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten, BGBl I 2015/105 idgF.
[476] Oberhammer (n 436) 117.
[477] According to the annual report of the Austrian Consumer ADR Entity, (Verbraucherschlichtungsstelle, Jahresbericht 2016, 31) in 2016 only 15 victims were affected by a problem concerning more than one person.
[478] eg in the proceedings in the AWD case where the „Verein für Konsumenteninformation" brought a claim for 2.500 victims of deficient investment advisory services, the case was finally settled out of court and AWD paid a sum of € 11.144.000,-, see https://www.konsument.at/geld-recht/awd-sammelklagen.
[479] Arthur Schuschnigg, ‚Sammelklage aus Sicht der Wirtschaft, in Hannes Jarolim (ed), *Beschleunigung von Verfahren als Gebot der Stunde* (LexisNexis 2016) 48, 59.
[480] Schuschnigg (n 479) 59; Oberhammer (n 436) 118.
[481] Oberhammer (n 436) 118 f.
[482] See eg Kodek (n 440) 141; Peter Kolba and others, VKI Study: *Sammelklagen in Österreich* (2009) 32, available at https://verbraucherrecht.at/cms/uploads/media/VKI_Studie_Sammelklage_02.pdf; Stefan Albiez, ‚Die vielfältigen Mittel des kollektiven Rechtsschutzes in Österreich' [2017] *Zeitschrift für Verbraucherrecht* 111; Alexander Klauser, ‚Alpine, VW und noch immer keine echte österreichische Sammelklage' [2015] *Zeitschrift für Verbraucherrecht* 182.
[483] Peter Kolba, ‚Europa braucht die Sammelklage' [2017] *Zeitschrift für Verbraucherrecht* 110; Klauser (n 482) 182. However, there are also calls against new legislation, see eg Albiez (n 482) 111 ff; Schuschnigg (n 479) 48 ff.
[484] Kodek (n 43) 138; Rechberger (n 429) 154, 164; Klauser and Hadler (n 429) 117.
[485] Due to the regressive rates, court fees and attorney's fees are proportionately lower in cases with high aggregate sums: Georg E Kodek, ‚Die „Sammelklage" nach österreichischem Recht' [2004] *Österreichisches Bankarchiv* 617; Rechberger (n 429) 164; Klauser and Hadler (n 429) 117; Parzmayr (n 438) 103.
[486] VKI Study (n 482) 33; Klauser (n 482) 183.

consumers domiciled in different member states or in non-member states cannot be brought before a court at the place of jurisdiction for consumer cases,[487] mass litigation in cross-border cases is even more burdensome.[488]

7.5 What impact have actors with legal standing (for example, qualified entities) experienced ?

The Austrian Consumer Protection Association (VKI) does not consider the Austrian model of group litigation as entirely adequate for mass claims.[489] Many consumers do not understand why they are asked to assign their claim to a certain entity and consider that as a barrier.[490] Often, consumers do not take part in collective action because such action is not or is insufficiently publicized.[491] Although litigation expenses might be covered by third-party funding, prospective claimants remain under a certain risk to find themselves liable for litigation expenses.[492] In test case proceedings, it is considered as unsatisfactory that individual claims might become time-barred while qualified associations are litigating.[493]

7.6 Overall, what are the difficulties and opportunities experienced by all actors involved ?

The Austrian model of group litigation is considered as useful but weak. There is no guarantee that a qualified entity is willing to bring a claim to court. Due to limited resources, qualified entities may find themselves incapable of taking action. Frequently, it is observed that consumers do not understand why they have to assign their claim. On the positive side, the Austrian model of group litigation combined with third party funding is an accepted tool for cost-efficient recovery. The risk of diverging judgments is reduced. The claimants as well as the defendants have an interest in fast and joint uniform judgments.[494]

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason ?

The "Austrian model" was created in 2001. It has been increasingly used after the financial crisis in 2007/2008 which gave rise to many consumer-investor claims[495]. A recent example is the VW-scandal, where many thousands of customers were affected by the same product fraud and where expensive studies and expert witness statements were needed for the claim.

[487] CJEU Maximilian Schrems v Facebook Ireland Limited., Case C-498/16, 25 January 2018, ECLI:EU:C:2018:37.
[488] Kodek (n 43) 146 f; Stadler (n 470) 149 ff.
[489] VKI Study (n 482) 22.
[490] See for example VKI Study (n 482) 32; Kolba (n 482) 110.
[491] cf Kodek (n 440) 138.
[492] VKI Study (n 482) 32.
[493] VKI Study (n 482) 32; Klauser (n 482) 183.
[494] cf Kodek (n 440) 139.
[495] See Oberhammer (n 436) 93 ff; British Institute of International and Comparative Law (n 430) 382.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

7. Impact of EU instruments on your legislation

1.5 In your opinion, is there a need for a binding instrument at the EU level or not?

As mass claims will mostly have an international dimension, the authors support a European instrument, given that such instrument complies with the principles of subsidiarity and proportionality. Diverging legislation may give rise to forum shopping or even to a race to the courts. Consideration shall be given to how such a European instrument would work within the Brussels I (Recast) Regulation and the Rome I and Rome II Regulation.

1.6 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

There is an ongoing debate on collective redress following a call for an Austrian legislative instrument since 2007[496]. So far, EU Recommendations on the common principles for collective redress of 2013 did not have a direct impact on Austrian legislation. The latest proposal for a collective redress instrument is dated from January 31st, 2018. Two different parliamentary fractions presented two different proposals.[497]

Proposal 2296/A:

The proposal features procedural (and some substantive) rules on group actions ("Gruppenverfahren") and on test cases ("Musterverfahren"). The model for a group action is not limited to consumer-contracts. A group must consist of at least 10 claimants. The system is opt-in. Any prospective claimant can join the procedure within 4 months after the action is publicized. The action does not affect the claims of those who do not wish to join the group, ie there is no lis pendens or res judicata effect. The group representative, be it a qualified entity or an individual, is nominated and monitored by the court. The court decides which claims and aspects will be part of the proceedings. The loser pays principle is applied. Upon finalisation of the proceedings, the group must pay the group representative 30% of the fees specified in the Attorney Rate Act.

Under the test case model, only qualified entities are entitled to bring an action. Limitation of all other claims is suspended until 6 months after the final decision in the test case.

[496] British Institute of International and Comparative Law (n 430) 383.
[497] Proposal 2296/A, 20 September 2017: https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_02296/fname_670608.pdf. Proposal 82/A, 31 January 2018: https://www.parlament.gv.at/PAKT/VHG/XXVI/A/A_00082/imfname_679388.pdf.

Finally, in certain "low value cases"[498] qualified entities can claim for ill-gotten gains, which will not be distributed to every claimant but are deducted to the federal budget. An exception is made where the defendant can demonstrate that the unlawful act was neither committed by intention nor by gross negligence. The deducted sum is used for future measures of law enforcement and consumer projects. Where the amount of the ill-gotten gains cannot be determined, a profit of 10 % of the annual turnover of the defendant is assumed. This is done in order to create a deterrence effect and to promote fair competition.

Proposal 82/A:

This proposal provides rules for a declaratory action on behalf of collective interests („Verbandsmusterfeststellungsklage") and for a compensatory action on behalf of collective interests („Verbandsmusterverfahren"). For the declaratory action, the class representative can either be a qualified entity or a non-profit trust. The system is opt-out and has res judicata effects on all claims of those who do not choose to opt out. If the action is unsuccessful, the class representative (ie the qualified entity or the non-profit trust) must bear the costs of the proceedings.

The compensatory action on behalf of collective interest must be brought by a qualified entity. The limitation period for all other claims based on the same facts is suspended until 9 months after the final judgment is rendered. In "low value cases", the system is similar as described in proposal 2296/A. In cases of gross negligence, a profit of 20% of the defendant's annual turnover is deducted as long as the defendant is unable to demonstrate that the actual ill-gotten gain was below that amount. 30 % of that sum is given to the class representative.

Both proposals were unsuccessful. In parliamentary debate, it has been argued that a collective redress instrument might be incapable of avoiding the well-known abuses of the US class action system. In particular, there is concern that establishing a collective redress mechanism would go hand in hand with a right to claim punitive damages.[499]

1.7 In your view, would your country benefit from such an instrument, or be negatively impacted ?

Regarding the call for a reform since 2007 and the latest legislator activities (see II.1.2.), Austria would benefit from a European instrument. The current Austrian position in the political debate is to stay away from national measures and to first await the European approach.[500]

1.8 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

[498] For example in case of void clauses in standard terms and conditions and in cases of § 28a KSchG (Bundesgesetz vom 8. März 1979, mit dem Bestimmungen zum Schutz der Verbraucher getroffen werden, BGBl 1979/140 idgF – Austrian Consumer Code) in which Annex I of the Directive 2009/22/EC has been implemented.

[499] StenProtNR 28.02.2018, 9. Sitzung, XXVI. GP 119 f: https://www.parlament.gv.at/PAKT/VHG/XXVI/NRSITZ/NRSITZ_00009/fname_688505.pdf.

[500] StenProtNR 28.02.2018, 9. Sitzung, XXVI. GP 119: https://www.parlament.gv.at/PAKT/VHG/XXVI/NRSITZ/NRSITZ_00009/fname_688505.pdf.

Any mechanism should provide safeguards against abusive litigation. A "pan-EU" system could decrease the risk of forum shopping if properly coordinated with Brussels I (recast) Regulation and Rome I and Rome II Regulations. The authors are in favour of a system in which the loser pays principle is enabled. Further, a reasonable court supervision of the class representatives and the funding of the collective action are desirable.

8. Building an EU instrument

2.4 If you are in favour of a European instrument, what level of harmonization would you recommend ?

In light of the very diverging national instruments available and the variety of different approaches in the member states, a full harmonization is unlikely to be politically achievable; thus we recommend a minimum harmonization.

2.5 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress) ?

Minimum requirements for the certification of qualified entities should be established. Only qualified entities should be entitled to bring representative actions before the member states' courts. The authors support a solution which allows for injunctive and at least declaratory relief. Third party funding should be permitted, but be subject to appropriate court supervision. Further, any situation in which claims are brought first and foremost for profit reasons must be avoided[501]. Where individual damages are so low that it is unlikely that a representative action is brought, we recommend a mechanism according to which unlawful profits which could not be distributed to the affected individuals are deducted in order to secure healthy competitive conditions in the internal market. Yet, this should be done via a sectoral public enforcement approach (eg by penalties which must be effective, proportionate and dissuasive) rather than via private action.

2.6 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

The instrument should be horizontal and follow the opt-in mechanism. For "low value cases", an opt-out mechanism should be discussed.[502] In any case, a publication mechanism meeting the obligations under Article 6 of the European Convention on Human Rights should be established. The general principle in relation to litigation costs should be "loser pays".

9. A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the

[501] See, however, Jürgen Basedow, 'Trippelschritte zum kollektiven Rechtsschutz', [2018] *Europäische Zeitschrift für Wirtschaftsrecht* 609, 612, according to whom the profit such actions yield will most likely make it impossible to prevent a "private enforcement market" to emerge.
[502] cf Meller-Hannich (n 442) A 57 f.

protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

The authors do not consider the restriction to consumer cases as justified. The restriction to consumer cases does not only disadvantage businesses (in particular SME's) but also leads to a situation in which consumer disputes and b2b disputes must be resolved in a different manner. Further, litigation on whether a prospective member of the group can be considered as a consumer under Article 3 (1) of the proposal might defer the entire action.

Under Article 6 (3) (b) of the proposal, in certain low-value cases the redress shall be directed "to a public purpose serving the interests of consumers". In the absence of a European fund for consumer interests it is unclear in which member state the funds received should be distributed in cross-border cases. If, for example, an Austrian qualified entity brings a successful claim in Germany, and the consumers concerned are domiciled in eight different member states, in which Member State should then the redress be used for public purposes?

The (rebuttable or non-rebuttable) presumption of an infringement under Article 10 of the proposal is problematic: While a successful claimant could rely on the findings of an earlier decision, a successful defendant could not. In theory, other qualified entities could continue bringing further actions on the same matter until the claim is successful[503].

In the light of the effects of final decisions under Article 10 and the suspension of limitation under Article 11 of the proposal for all of the consumers concerned, there are little to no incentives for consumers to take part in a redress action. Given that a third party funder receives a share of the recoveries received, it would be unattractive for a third party funder to support claims in which it is unlikely that many consumers would join the action.

10. Alternative dispute resolution

4.2 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

As ADR is said to be less costly and faster than court proceedings[504] the authors welcome every effort to be put into avoiding litigation and are thus in support of any incentives to enter ADR. However, we are opposed to introducing a *mandatory* ADR mechanism in whatever form, as ADR should be purely based on consent. In order to prevent an abusive use of such mechanisms it might be wise to subject the outcome of the ADR to a fairness control by a court.[505]

[503] Axel Halfmeier and Peter Rott, 'Verbandsklage mit Zähnen? – Zum Vorschlag einer Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher', [2018] *Verbraucher und Recht* 243, 248 f.

[504] cf the annual report of the Austrian Consumer ADR Entity 2017, (Verbraucherschlichtungsstelle, Jahresbericht 2017, 19 f) according to which more than 80 % of the consumers having taken part in ADR considered the ADR mechanism as satisfactory.

[505] cf Oberhammer (n 436) 145 ff.

III. DATA AND STATISTICS

3. *Are data and statistics on collective redress available in your country ?*

Data and statistics on collective redress provided by official bodies are not available in Austria.

4. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ?* ***Please provide appropriate statistics for each****.*

The "Verein für Konsumenteninformation" regularly publicizes statistics of their collective actions. In 2016, the "Verein für Konsumenteninformation" brought 290 cases, consisting of test cases, representative actions and claims based on the Austrian model of group litigation.[506] 85 % of those actions were either settled or successful and a total sum of € 15 million was recovered. Well-known examples of the past years are the Maxx Invest Case, which was dealing life insurances settled at a sum of € 6.1 million; the Santander Case, in which the VKI represented 5.200 consumers and which was settled at a sum of € 6 million; and finally the AWD which was settled at € 11.1 million for 2.500 victims of deficient investment advice.

[506] https://vki.at/vki-klagen-im-ueberblick.

Belgium

Maître Denis Philippe

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

In Belgian Law, the collective redress mechanism was originally[507] exclusively possible for consumers. Since recently[508], it is also accessible for SMEs groups in the same conditions. It is also possible for enterprises in case of infringement of antitrust law.

According to articles XVII.35 and followings of the Belgian Code of Economic Law[509], that mechanism is admissible only if there is a "potential contravention made by the enterprise"[510]. Hence, the defender must inevitably be an enterprise.

The claim must concern a contravention to a listed EU regulation or Belgian disposition. These are listed in article XVII.37 CDE and are mostly consumer related law and antitrust law.

1.2 Who has standing?

Only certified associations (for instance a consumer association) are entitled to launch such a procedure. Law firms or companies are excluded.

In Belgium, collective redress have been introduced mostly by Test Achats (against VW – dieselgate; Proximus (telecom company) – an amicable settlement has been reached in this case; against Thomas Cook which was also settled amicably).

According to article XVII.39 CDE, the association must be represented by an authorized person. If there is no representative that satisfies to the conditions required to represent the group, the judge will put an end to the procedure[511].

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

The collective redress must be approved by the tribunal and a pro.

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[507] Loi du 28 mars 2014 portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, *M.B.*, 19 avril 2014.
[508] Loi du 30 mars 2018 portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique, *M.B.*, 22 mai 2018.
[509] Hereafter « CDE » for « Code de droit économique ».
[510] Art. XVII.36 CDE.
[511] Art. XVII.40 CDE.

1.4 What are your views on certification of the entity (e.g. qualified association)? What are your views on certification of the group?

For me, the fact that only a few number of class actions has been launched, is due to the certification.

1.5 Is the system opt-in or opt-out? How does it work in practice ? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

The current Belgian system is a mixed system; the judge has the choice between opt-in and opt-out. This choice is discretionary since no criteria is embodied in the law itself. This decision will hence be taken according to the facts presented. However, if the parties agree to the reaching of an agreement, they may choose themselves whether they prefer the system to be opt-in or opt-out.[512]

Nevertheless, there are two situations in which the system will inevitably be an opt-in one. First, in the case of a collective corporal or moral prejudice (according to art. XVII.43, § 2 CDE). Second, according to article XVII.38 CDE, a plaintiff who is not a Belgian resident has to opt-in in any case.

In Belgium, the number of class actions is very limited.

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

For me an opt-out system is better for the efficiency of the procedure.

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

The procedure is slow because you need the homologation of the court.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available?

Compensatory relief is possible.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

It is very important for the consumer to get a compensation if products are defect.

[512] E. FALLA, « Section III. - Particularités de la loi belge de 2014 » *in La réparation des dommages de masse*, Bruxelles, Éditions Larcier, 2017, pp. 87-92.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated? If not would you advise such a fund ?

No.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any ?

It is fairly complex and the introduction of the procedure is not a real success.

3. Publicity issues

3.1 How are collective actions publicized in your country?

According to article XVII.55 CDE, the judicial decision is published in the official gazette ("Moniteur belge") and also on the website of the Ministry of Economy ("SPF Économie, P.M.E., Classes moyennes et Énergie"). The judge may also require other means of publicity according to article XVII.54, §1, 6° CDE).

3.2 Who is responsible for the publicity of collection actions? Who bears the costs of such publicity?

The court is responsible; publication in the official gazette: additional measures can be taken; the issue of the costs is fixed in the settlement or the judgement.

3.3 Overall, is publicity regarding collective actions an issue in your country?

No.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

No but the settlement or the

4.2 What are your views on "the loser pays" principle?

It seems to be a good principle.

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

There is no experience on this.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

This topic is not regulated in Belgium.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

It is a difficult topic and at this stage, it is not necessary because the consumer association has funds.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice ?

No. All the cases must go to the Brussels court.

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

The amicable settlement and mediation prevails in the Belgian law.

Whenever a request is introduced for a judiciary collective redress procedure and the judge agrees to the introduction of this request, the parties must try to find an agreement.

There is a mandatory negotiation phase taking place between the parties for a duration fixed by the judge according to article XVII.45, § 1 CDE. If the parties so request, the duration of this phase may be extended by the judge once.

The judicial phase concerning the substance of the case really begins only when the parties have notified the judge their failure to reach an agreement.

Furthermore, according to article XVII.56 CDE, the parties may always, at any moment of the procedure, decide to reach an agreement as long as the judge has not given his final decision. If they do so, the judge will have to homologate their agreement the same way as in the case of an agreement reached before the judicial procedure.

6.2 What opportunities do you identify with alternative dispute mechanisms?

It was successful in the *Proximus* case.

6.3 What shortcomings do you identify with alternative dispute mechanisms?

Since the agreement has to be homologated by the judge, the procedure takes a lot of time.

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices?

The impact on practitioners is fairly limited.

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country? If so, in which fields in particular and why? If not, is there any specific reason?

I do not see a significant trend.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

It is a wish, but not a necessity but it is more than welcome for European law.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise? If so, of which nature (satisfactory or not)? And if not, why is that?

Yes for private enforcement in antitrust law.

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

Positively.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place?

Not in my country.

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

I would recommend maximal harmonization.

2.2 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress)?

All the examples you give are to be harmonized.

2.3 What should be the scope of the instrument (horizontal, standing, certification, opt-in, etc.) ?

These aspects (horizontal…) must be regulated.

3. A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities)?

Yes.

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

III. DATA AND STATISTICS

1. *Are data and statistics on collective redress available in your country?*

Statistics on collective redress actions are not available in Belgium.

Nevertheless, since every judicial decision concerning a collective redress must be published on the website of the Ministry of Economy, it should be possible to collect these data.

However, the website of the Ministry of Economy does only provide decisions on the admissibility of the actions.

Lastly, it is possible to find some data on the website of the association bringing the action.

2. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ?* ***Please provide appropriate statistics for each****.*

According to the website of the Ministry of Economy, there have been 3 collective redress actions brought and the three of them were declared admissible: Test Achats c. VW; Test Achats c. Proximus; Test Achats c. Thomas Cook. Apart from the decision on the admissibility, there is no other data on this website concerning the collective redress actions.

According to the website of "Test Achats" (a consumer association), there have also been 2 other collective redress actions brought: Test Achats c. Facebook; Test Achats c. ticketsbelgie.be, topticketshop.nl & topticketshop.nl. But these actions do not appear anywhere else.

There are no published tools gathering statistics and ratios in Belgium. All the information has to be found manually and individually for each action.

Estonia

Irene Kull, Professor at the Universty of Tartu, Estonia

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…) ?

The mechanism of collective action solely exists in the consumer sector and is injunctive procedure. There is no specific horizontal collective redress mechanism in Estonia.

1.2 Who has standing ?

The Consumer Protection Board may file an action with a county court on behalf of the Republic of Estonia and require a trader to terminate the violation of the rights of consumers and refrain from such violation under the § 65(3) of the Consumer Protection Act (hereby referred as CPA).[513] According to § 19(3)(1) CPA, consumer associations and federations of associations have the right to represent consumers in court and the Consumer Protection Board has a right to demand through county courts that the application of standard terms which cause unfair harm to the collective interests of consumers and unfair commercial practices be prohibited and that any other activities which violate consumer rights be terminated (§ 21(2)(8) CPA). The rights granted to the Consumer Protection Board apply to the management board of the Financial Supervision Authority upon exercising supervision over creditors and credit intermediaries to the extent of the rights and obligations provided in the Creditors and Credit Intermediaries Act (§ 65(4) CPA).
Also a non-profit association whose objectives include protection of the rights of undertakings or persons engaged in professional activities and who is actually able to protect these interests resulting from the organization and financing of the activities thereof may file the requirement of termination of the use of unfair standard term. It is provided for in the § 45 of the Law of Obligations Act (hereby referred as LOA)[514].
Also under the CACP[515] an association of persons may possess standing as an applicant in cases provided in the law.

1.3 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?

There is no certification procedure established in Estonia, the authority competent to file a claim in the interest of third persons has to be certified (qualified) in the law. The Estonian Code of Civil Procedure (§ 3(2) of the CCP) allows file a claim with the court for the protection of a presumed right or interest protected by law of another person or the public only in the cases prescribed by law. There are several authorities who have this right:

- The Consumer Protection Board (§ 65(3) CPA)

[513] See Consumer Protection Act (tarbijakaitseadus) of 9 December 2015, § 65(4). Available in English at: https://www.riigiteataja.ee/en/eli/ee/504012018004/consolide/current.
[514] See Law of Obligations Act (võlaõigusseadus) of 26 September 2001. Available in English at: https://www.riigiteataja.ee/en/eli/510012018003/consolide.
[515] See Code of Administrative Court Procedure (halduskohtumenetluse seadus) of 21 November 2011. Available in English at: https://www.riigiteataja.ee/en/eli/512122017007/consolide.

- The Financial Supervision Authority ((§ 65(4) CPA)
- non-profit association which objectives include protection of the rights of undertakings or persons engaged in professional activities (§ 45(2) LOA)

1.4 What are your views on certification of the entity (e.g. qualified association) ? What are your views on certification of the group ?

I think that certification of the entity is justified to guarantee high quality of the legal service and protection of the interests of the consumers. I think the same is applied to certification of the group as far as it is not diminishing the quality assurance of the service.

1.5 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

In Estonia, no fully-fledged compensatory collective redress mechanism is provided for. The representative action and opt-in group actions are two possibilities that could be used as a forms of collective action. The representative action can be used also for redress claims.

1.6 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?

Regardless of the form of the collective action, the regulation should be based on an opt-in principle. Although the problems with scattered loss could be reasonably resolved only by a procedure basing on the concept of opt-out, there are several fundamental and constitutional issues which such procedure would touch upon. Opt-out procedure would violate or at least hinder constitutional rights stipulated in the §§ 24, 25, 32 of the Constitution of the Estonian Republic[516]. The opt-in system would be in line with the material principles of the code of civil procedure, namely the principle of disposition.

1.7 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

The main shortcoming would be the lack of means and resources available for institutions who have the power to represent persons in cases of collective redress.

3. Issues related to compensation

3.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?

Law provides only possibility of injunctive relief in cases of an action for termination of application of an unfair standard term or for termination and withdrawal of recommendation of the term by the person recommending application of the term (§ 100 CCP and § 45 LOA).

3.2 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

[516] The Constitution of the Republic of Estonia (Eesti Vabariigi põhiseadus) from 3 July 1992. Available in English at: https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide/current.

It is difficult to judge if it is sufficient. There is only one case of an action for termination of application of an unfair standard term. However, I think that the introduction of the collective action law (into the Estonian Code of Civil Procedure) is justified and necessary action, in particular in the aim of reducing the workload of courts and ensure better access to justice. It provides better compensation mechanisms for individual consumers as well as for small and medium-sized enterprises, which would allow, unlike the individual case, to consider the principle of cost-effectiveness. This compensatory mechanism is needed also for cases of financial services where the loss of a single customer is small, but given the number of customers, the total damage can be noticeable.

3.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?

There is no such fund in place. I do not think that there is a need for such fund, taking into account small size of the country.

3.4 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

There are some shortcomings in Estonian Constitution. However, the principles embodied in the Estonian Constitution and the Code of Civil Procedure, developed in the light of the concept of individual legal protection, are not insurmountable barriers to the introduction of collective compensatory claims into Estonian national law. The representative action and opt-in group actions are two possibilities that could considered as forms of collective action that could be introduced to the Estonian legal system without essential changes in Estonian law.

3. Publicity issues

3.1 How are collective actions publicized in your country ?

The only case which was about the claim for termination of the use of unfair standard term was reported in the local media, on the homepage of the Estonian Supreme Court and also commented in the legal scholarship.[517]

3.2 Who is responsible for the publicity of collection actions ? Who bears the costs of such publicity ?

The Consumer Protection Board is responsible for the publicity of the trader's or producer's activities that adversely affect the interests of the consumer (§ 21(2)4) CPA). The Consumer Protection Board is financed from the state budget.

3.3 Overall, is publicity regarding collective actions an issue in your country ?

It is not an issue due to the lack of cases. However, I think that it is important that results of collective actions in other countries are also made public.

4. Financial issues

[517] Sein, Karin (2017). A consumer's right to a free paper bill in mobile phone contracts. Journal of European Consumer and Market Law, 3–9.

4.1 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

As there is no special regulation on collective redress, usual rules on claims with several claimants will apply. The courts costs are fixed (state fee, the costs of bailiffs serving procedural documents; the costs of publishing summonses or notices in the official publication *Ametlikud Teadaanded* (Official Announcements) or in a newspaper; remuneration for experts; interpreters and translators; other costs of hearing a case and extra-judicial costs) and can be quite high depending from the amount of the remuneration[518].
The fees of attorneys-at-law are not regulated in Estonia, but there is a possibility to apply for a state legal aid.

4.2 What are your views on "the loser pays" principle ?

I think that it is fair in "normal" cases, but in cases of collective redress, "the loser pays" principle may diminish the chances to achieve the purposes of the mechanism.

4.3 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?

Yes, it works as a general rule with number of exceptions. I do not have any information about the problems in practice. However, as we do not have collective redress mechanisms, it is difficult to predict whether is it a deterrent or not.

4.4 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?

There are no special provisions on third party funding in Estonian Law.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?

I do not have good arguments to support any opinion for or against the regulation.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

I do not have any arguments about the risks related to economic or financial issues. Due to the small number of inhabitants and lack of big players on the market, I do not think that the introduction of this system would entail any significant risks that need to be addressed.

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?

Collective redress claims do not enjoy any special treatment in Estonian national private international law or the law of international civil procedure. It is noteworthy, however,

[518] See State Fees Act (riigilõivuseadus) from 10 December 2014. Available in English at: https://www.riigiteataja.ee/en/eli/516032018002/consolide.

that as a Member State of the EU, the Republic of Estonia is bound by the relevant EU regulations (Brussels I (Recast) Regulation, Rome I Regulation) which contain rules that may have implications for the collective redress cases (e.g. rules of jurisdiction in cases involving several defendants).

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?

There are no abuses in the case-law of the Supreme Court or circuit courts.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

The rules contained in the Brussels I (Recast) Regulation and the Rome instruments deal sufficiently with possible problems.

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.) ?

There are number of ADR mechanisms which provide conciliation and mediation:

- The Consumer Complaints Committee (in Estonian *Tarbijakaebuste komisjon*) has been assigned competence on the EU ODR platform and its projection to the public.
- The MTPL Insurance Dispute Committee (in Estonian *Liikluskindlustuse vaidluskomisjon)* concerned with traffic related insurance claims.[519]
- The Insurance Mediator (IM) (in Estonian *Kindlustuse lepitusorgan)* is an organization founded by the Estonian Insurance Association to help settle disputes arising from contracts.[520]
- In the field of Collective Labour Disputes, the 'public Conciliator' is appointed as an impartial expert. The Conciliator should help all parties to overcome or handle the intractability of their disputes and reach a proper settlement, which in the terms of the legal act in question is called a "compromise".

In addition, the Estonian Association of Mediators or «*Eesti Lepitajate Uhing*» (ELÜ) offers family mediation services, information about mediation and training opportunities and has primarily focused on matters outside the realm of the Mediation Directive.[521]

Despite of these developments, Estonia has pursued pragmatic goals, for example a swift compliance with EU legislation, rather than the development of a genuine, collaborative ADR culture.[522] None of these institutions is authorized for collective redress. On the other hand, these institutions function effectively, but it is doubtful that if they would be prepared to take on the right to file a collective action.

6.2 What opportunities do you identify with alternative dispute mechanisms ?

[519] Detailed explanations are available at their webpage: http://www.lkf.ee.
[520] Homepage is available at: http://www.eksl.ee.
[521] Homepage is available at: http://www.lepitus.ee/.

[522] This remark has been made in M.C. SOLARTE-VASQUEZ, The institutionalization process of alternative dispute resolution mechanisms in the European Union. The Estonian Legal Developments Experience, in L'Europe Unie, No. 7-8, 2014, p. 94 ff.

ADR is a cost-saving procedure and as a rule, it takes less time to reach an amicable settlement than a court decision. A conciliator's fee is generally a matter for the parties, but there are also disputes for which a fixed amount is set. For example, the insurance dispute committee provides for a conciliation fee of 50 euros and, in addition, the insurer is required to pay the insurer's fee up to a maximum of 160 euros. Consequently, in the conciliation procedure, it is possible to take into account all the factors relevant to the parties and give them the weight that the parties themselves consider fit. This in turn means that, irrespective of the rules provided by the law, the parties can depart from the legal norms and consider other circumstances when reaching the agreement. Also, the parties are more interested in voluntary performance of the decision made in the course of ADR.

6.3 What shortcomings do you identify with alternative dispute mechanisms ?

Alternative dispute mechanisms should be voluntary so that the individual has the opportunity to refrain from conciliation at the request and continue to resolve the dispute through court proceedings. If a compulsory procedure is introduced, it must be ensured that it is not disproportionate to the achievement of an effective administration of justice. However, the structure, financing, or regulation of ADR may be an obstacle to its realization.

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices ?

The impact of ADR to legal practitioners can be described in general as positive because it is attractive for commerce to settle disputes quickly and put an end to uncertainty about future financial commitments. However, the use of alternative dispute mechanisms is not very active. The situation is better in the field of commercial disputes, insurance, financial services and consumer protection. The present situation can easily be associated with the lack of a consolidated ADR culture in the country, as well as with the actual shortage of experts and/or enthusiasts who could promote mediation as the most convenient, effective and non-intrusive assisted negotiation procedure that it could be. After the adaption of the Chamber of Notaries lists, there are 41 out of a total of 91 notaries active by May 2018 (the same number as in 2015) willing to act as mediators according to the terms of the Conciliation act; and there are also number of advocates (87 advocates out of a total 1033 members of the Estonian Bar Association) acting as mediators, which has not changed since 2015. There is no information about the total number of cases solved through the ADR mechanisms. However, it influences only some areas, which is evident from the unchanged number of notaries and advocates listed as conciliators or mediators.

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

There is no information about special impact on actors with legal standing.

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved ?

The main difficulty is that people are not informed about the possibilities, the persons who are acting as mediators and conciliators are not experienced and trained, e.g. more publicity and training is needed.

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason?

There are no such mechanisms, and there is also no public interest in introducing these mechanisms (yet).

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

11.Impact of EU instruments on your legislation

11.1 In your opinion, is there a need for a binding instrument at the EU level or not ?

Taking into account the small number of court cases and cases solved in the course of ADR, such a binding instrument would not be the most important one for EU (especially for Estonia).
However, in the perspective of globalization, digitalization and new possibilities to cause harm to consumers, the idea of having a binding instrument on the EU level might be reasonable, but preferably for cross-border cases. It has to be flexible to avoid too burdensome expenses in comparison to probable gain from the mechanism.
It seems to me that granting the right to submit collective actions to subjects provided by law could be justified.

11.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU Law did not have any important impact in Estonia. There are several reasons for this, which are explained below.
The Constitution of the Estonian Republic provides quite limited possibilities to introduce mechanisms of collective actions. Article 25 of the Constitution provides that everyone is entitled to compensation for proprietary as well as non-proprietary harm that he or she has suffered because of the unlawful actions of any person and everyone whose rights and freedoms have been violated has the right of recourse to the courts. Article 15 of the Constitution adds that everyone has a right to petition in order to declare any law unconstitutional, as well as other legislative instruments, administrative decisions, or to measure which is relevant in his or her case. From the wording of the Constitution, the right of recourse to a court as a fundamental right is guaranteed only to protect persons' own rights and freedoms. However, that does not have to mean that the mechanism of collective redress is something against the Constitution yet it diminishes indirectly the importance of the use of means of collective protection.
Article 45(1) of the Law of Obligations Act[523] (LOA) provides[524] that a person or body provided by law may, pursuant to the procedure provided by law, require that a party supplying an unfair standard term terminate the application of the term and that the person recommending that application terminates and withdraws such recommendation. In 2013, the LOA was amended with the rule that the non-profit association may submit

[523] Law of Obligations Act (*võlaõigusseadus*) of 26 September 2001. Available in English at: https://www.riigiteataja.ee/en/eli/510012018003/consolide.
[524] In compatibility with Art 7(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

a claim for termination of the use of the contract terms or practices concerning such term of payment, penalty for late payment or compensation for collection costs or recommendation for the use thereof which, based on the circumstances, are grossly unfair with regard to the obligee. Such claim may also be submitted in the case of an individually agreed term (§ 45(2) of the LOA). It follows that Estonian law guarantees for certain persons the right to take actions before the courts in general interests of the consumers and in order to obtain prohibition as to the application of an unfair standard term by the supplier of that term.

The Code of Civil Procedure (§ 457(7) of the CCP) provides that if a person applying the standard terms violates a court judgment, the standard term is deemed to be invalid if the other contracting party relies on the judgment. It does mean that the persons have to be informed about the court's decision to rely on the judgment. This rule seems to violate the directive as the obligation of finding the invalidity of standard terms has been put on consumers.[525] CCP provides also a possibility of joinder and consolidation. Under the § 207 of the CCP, several persons may also file a joint action if the object of the proceeding is a joint right of several persons, if rights or obligations arising from the same grounds or if similar claims or obligations arising from the grounds which are essentially similar are the object of the proceeding. In that case, if a disputed legal relationship can be established only with regard to all co-plaintiffs or co-defendants jointly, and even one of the co-plaintiffs or co-defendants adheres to a procedural term, participates in the proceeding, files an appeal or participates in the performance of any other procedural act, the acts of such participant in the proceeding are deemed to be valid with respect to all the other co-plaintiffs or co-defendants (§ 207(3) of the CCP). If several claims of the same type, which involve the same parties, or which are filed by one plaintiff against different defendants or by several plaintiffs against the same defendant are subject to concurrent court proceedings, the court may join such claims in one proceeding if the claims are legally related or the claims could have been filed by a single action. This allows for a more expeditious or facilitated hearing of the matter (§ 374 of the CACP).
There is also a possibility under the Code of Administrative Court Procedure[526] (CACP) that an association of persons can possess standing as an applicant, but only in cases provided in the law. Unless the law provides otherwise, a decision is only binding on the parties to the action (§ 16, 19 of the CACP). There are also provisions providing joint representation in cases with more than 50 parties (§ 34 of the CACP).
The Consumer Protection Board may file an action before a county court on behalf of the Republic of Estonia and require a trader to terminate the violation of the rights of consumers and refrain the trader from such violation (§ 65(3) of the CPA[527]). The Estonian Consumer Protection Board managed to file only one collective injunction claim and demanded before county courts the cessation of the application of standard terms which caused unfair harm to the collective interests of consumers.[528]

Today, the cooperation between different national authorities appears to be good, and the possibility that the situation will be improved through collective redress seems to be dubious. Estonia is a small country, which means there are is small number of cases. One of the obstacles is also a low level of financing of the Estonian Consumer Protection Board, and a lack of means and resources. Also, the Consumer Protection Board manages very well the out-of-court solution of disputes between consumers and businesses and the existing mechanisms seem to work quite well.

[525] See more about the collective consumer claim in Estonian law in K. Sein, P. Kalamees. Case law of the Court of Justice of European Union on Unfair Contract Terms Directive: Implications on Estonian Domestic Law. International Comparative Jurisprudence, 2017, 128-129.
[526] Code of Administrative Court Procedure (*halduskohtumenetluse seadus*) of 21th November 2011. Available in English at: https://www.riigiteataja.ee/en/eli/512122017007/consolide.
[527] Consumer Protection Act (*tarbijakaitseseadus*) of 9 December 2015. Available in English at: https://www.riigiteataja.ee/en/eli/504012018004/consolide-
[528] The judgment of the Civil Chamber of the Supreme Court of Estonia of 24th of November 2015 in the civil case no. 3-2-1-135-15.

In conclusion, Estonian legal system does not provide a proper system of collective redress, but does provide a mechanism of collective injunction in cases of unfair contract terms and legal rules which in general could be used as a basis for the introduction of a mechanism of collective redress. On the other hand, this is not the most urgent problem concerning the protection of consumer rights.

11.3 In you view, would your country benefit from such an instrument, or be negatively impacted ?

I do not think that Estonia will benefit from such an instrument due to the small size of the country and the small number of cases where such interest may rise.

11.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

It is difficult to answer. I think that keeping European culture of litigation in the case of introduction of mechanisms of collective redress is possible and on this matter, the experience of different countries has to be taken into account.

12.Building an EU instrument

12.1 If you are in favour of a European instrument, what level of harmonization would you recommend ?

I am not convinced that we need such an instrument on European level, however it does not harm either. In any case, it should be minimum harmonisation if it happens to be costly to the state to establish this system. From the position of a small country, I would prefer minimum harmonisation.

12.2 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress) ?

There is a need for definition of admissibility of the action, also standing and principle of joining the group and payment obligation of state fees (no loser pays system shall be applied). Forms of redress shall be left to each Member State to decide. It seriously influences the competition, the market position of the businesses and also market behaviour in general (for better).

12.3 What should be the scope of the instrument (horizontal, standing, certification, opt-in etc.) ?

I think that scope shall be horizontal, certification, opt-in.

13.A New Deal for Consumers

13.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

I think it is sufficient and no additional rules are needed.

14.Alternative dispute resolution

14.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

ADR has got a great potential in collective claims. Its advantages are reduced costs and time in dispute, the possibility to maintain the reputation of the businesses and consumers trust. Out-of-court procedure is more effective in small countries which means that the mechanism of collective redress shall exist together with the ADR.

15. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

15.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

16. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

16.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress ?

III. DATA AND STATISTICS

1. *Are data and statistics on collective redress available in your country ?*

There are no collective redress cases in Estonia.

2. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ?* ***Please provide appropriate statistics for each****. If you are unable to provide us with such data, could you please indicate us why (lack of publicised information etc.) and/or who to contact ?*

There is no data available. The main reason is that there is no possibility to file collective redress claims in Estonia. There are also no several and joint claims filed by representatives of number of persons which may be used as replacement to collective redress claims.

France

Rafael Amaro and Alexandre Biard

In France, issues pertaining to collective redress have been particularly sensitive and subject of controversial discussions within political and economic circles for several decades. In particular, lobbying from businesses has been effective in delaying the action of the legislator. Existing judicial mechanisms appears today still ineffective for resolving mass claims.

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

Several mechanisms exist in France to resolve mass claims:

- **Judicial mechanisms:**

➢ The ***action de groupe***[529] was introduced into French law in 2014 after several decades of lengthy and difficult discussions. According to a note from the Ministry of Justice dated September 2014, the objective of the *action de groupe* is first and foremost to facilitate compensation in case of mass harm situations. France initially followed a sectoral approach and the mechanism was first made available in consumer and competition law. It was then extended to other sectors, including health, discrimination, environment and privacy. A horizontal framework for *actions de groupe* before administrative and judicial courts has also been adopted.

Figure 1 presents an overview on successive legislative developments:

Figure 1

Sector	***Legislation***	***Relevant provisions***
Consumer law	Loi n° 2014-344 *relative à la consommation* (17 March 2014)	Art. L623-1 *et seq*. of French Consumer Code (*Code de la consommation)*
Competition	Loi n° 2014-344 *relative à la consummation*	Art. L623-1 *et seq.* of French Consumer Code + Article L. 623-24 / 26 for special rules related to competition litigation
Health	Loi n° 2016-41 *de modernisation de notre système de santé* (26 January 2016)	Art. L1143-1 *et seq.* of the French Public Health Code (*Code de la santé publique)*
Privacy & data protection	Loi n°2016-154 *de modernisation de la justice du 21e siècle* (18 November 2016) + *Loi relative à la protection des données personnelles* (2018, under discussion)	Art. 43 ter of Loi n° 78-17 *relative à l'informatique, aux fichiers et aux libertés*
Environment	Loi n°2016-*154 de modernisation de la justice du 21e siècle* (18 November 2016)	Art. L142-3-1 of the Environment Code *(Code de l'environnement)*
Discriminations	Loi n°2016-154 *de modernisation de la justice du 21e* siècle (18 November 2016)	Art. L. 1134-6 *et seq.* of the French Labour Code *(Code du travail)*+ *Loi n° 2008-496 du 27 mai 2008 portant*

[529] For the sake of clarity, we will use the French terminology (*action de groupe*) throughout this report.

		diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations
General framework	Loi n° 2016-154 *de modernisation de la justice du 21e siècle* (18 November 2016)	Art. 66 *et seq.* of the Loi 2016-154 (main principles) Art. 826-2 *et seq.* of the French Code of Civil Procedure (*Code de procedure civile)* for procedural matters Art. L.77-10-1 *et seq.* of the Administrative Justice Code (*Code de justice administrative*)

The rest of this report will mainly focus on the *action de groupe*. However, it is worth noting other judicial mechanisms that have been used to resolve mass claims in the past.

- The ***action en representation conjointe***[530]. Prior to the implementation of the *action the groupe*, this action was the closest mechanism to a collective redress scheme. Initially limited to consumer law, its scope was afterwards extended to other sectors, including environmental matters and securities. Like the *action de groupe,* the *action en représentation conjointe* is initiated by accredited associations and aims to defend the individual interests of consumers who are in similar situations and have suffered from the same misconduct. The action follows an opt-in system and is used to aggregate individual claims into one single litigation. If the association prevails, damages are distributed to the individuals who, beforehand, should have duly authorised the association to act on their behalf. However, if the association fails, represented individuals do no longer have the right to file individual lawsuits for the same facts. The French Parliament adopted this restrictive approach to avoid the purported excesses associated with US class actions. Importantly, advertising is prohibited and associations cannot approach consumers directly. In particular, associations may not solicit individuals by means of public announcements on radio or television, tracts or personalized letters. In addition, each consumer must necessarily give his/her consent in written prior to the start of the proceedings. In practice, the *action en représentation conjointe* has been an inefficient tool for dealing with mass claims. In particular, four main obstacles have limited its overall effectiveness: (1) the prohibition of advertising; (2) heavy liability risks on associations; (3) heavy administrative and procedural costs for associations, and (4) limited numbers of associations entitled to bring the action. One of the reasons explaining the adoption of the *action de groupe* was to overcome the inefficiency of the *action en representation conjointe.*
- The ***action of associations for the protection of the individual interests of their members*** (horizontal scope).
- The ***action en défense d'un intérêt collectif*** (horizontal scope).

- **<u>Other mechanisms:</u>**

  - **Mass settlement agreements reviewed by a court** (see below under 'ADR' section).
  - **Mass claims resolved by an ombudsman** (see below under 'ADR' section)
  - **Compensation schemes**. Several compensation schemes have been created to deal with mass damage in specific fields, such as terrorism, asbestos, *etc.* In most cases, those funds were created as a response to emergency situations. Noteworthy, the ONIAM (*Office National d'Indemnisation des Accidents Médicaux, des Affections Iatrogènes et des Infections Nosocomiales*) was created in 2002 to

[530] Art L. 622-1 *et seq* of Consumer Code; Art of L. 142-3 Environmental Code; Art. L. 452-2 *et seq* of Monetary and Financial Code (*Code monétaire et financier*).

compensate victims of medical accidents. Its scope was extended to cover people suffering from HIV contamination, hepathitis, *etc*.

1.2 Who has standing?

Only accredited associations are entitled to initiate the proceedings under the French *action de groupe* model. Legal requirements for associations depend on the sector at stake. For example, in consumer law, associations must be representative at national level, have at least one year of existence, show evidence of effective and public activity with a view to the protection of consumer interests, and have a threshold of individually paid-up members (this covers around 15 associations to date). In health law, the action is initiated by accredited associations of users of the healthcare system. Associations must be representative at national or local levels (*i.e.,* around 500 associations to date). In the field of discriminatory practices, accredited associations should have been exercising their activities in the fields of disability or fight against discriminations for at least five years or should have been active for at least five years and the purpose of which includes the protection of an interest violated by the discriminatory practice.
Lawyers (*avocats*) are not entitled to start *actions de groupe* from their own motion. This restriction was criticized by the Bar. In practice, lawyers still assist associations throughout the proceedings. This is because representation by lawyers remains mandatory before High Courts of First Instance (*Tribunal de Grande Instance*).

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

The *action de groupe* follows a complex procedural model where **associations** and the **court** play central roles for filtering and certifying the group. The procedure follows a two-stage process and can be sketched as follows:[531]

- During the **liability phase (*Phase 1*)**, the court decides on the liability of the defendant on the basis of **individual model cases** presented by the association in the summons (*assignation*). The role played by these model cases is essential. Formally, there is no class of claimants at the beginning of the procedure and the decision of the court is exclusively based on the review of those individual cases. The objective of the policymaker was to avoid a 'massification' of the dispute at early stages. The law does not specify how many model cases the association must bring (in theory, two individual cases could thus be sufficient). The cases should be representative enough of the entire group and the court needs to be confident that the underlying facts and legal issues can be extrapolated to other individuals. Based on the review of model cases, the court will then define the group of potential claimants and the parameters that individual claimants must meet to join the group. Challenging the representativeness and relevance of model cases has therefore become cornerstone in the litigation strategies of defendants. Several *actions de groupe* have failed because of the lack of probative value of the cases presented by the association. During this first phase, the court will also define the scope of the defendant's liability, the damage to be compensated and available remedies. It also specifies how the case will be publicized in the media and sets cut-off dates for plaintiffs to join the group.

- During the **compensation/award distribution phase (*Phase 2*)**, claimants meeting the criteria fixed by the court can join the group via an opt in system (see below). Once the award has been distributed, the court terminates the proceedings and addresses any unresolved issues or disagreements linked to the

[531] Please that this is only the general framework. Some procedural peculiarities may apply depending on the sectors in which the action is initiated.

award distribution. To date (*i.e.,* May 2018), no *action de groupe* has reached Phase 2.

1.4 *What are your views on certification of the entity (eg. qualified association)? What are your views on certification of the group?*

As regards certification of associations, experience tends to show that the prerequisites and requirements imposed on associations are too restrictive. In practice, only a few have the actual resources (financial, human, *etc.*) to effectively initiate and handle *actions de groupe*. A report for the National Assembly dated October 2016 also suggested to allow for *actions de groupe* brought by *ad hoc* associations as well as actions brought by the French General Directorate for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF)[532] .

As regards certification of the group, the French model is peculiar in the sense that the group does not formally exist at the start of the proceedings. It is only represented by model cases brought forward by the association. Potential plaintiffs can join the group later on once the court has handed down its decision on liability. However, to date, no *action de groupe* has reached Phase 2.

1.5 Is the system opt-in or opt-out? How does it work in practice? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings?

The French model follows a peculiar **late opt-in system**: potential claimants can join the group only when the decision on liability has been handed down and within a period of time that is fixed by the court (*e.g.,* for consumer matters, this period cannot be under 2 months and extend beyond 6 months. The starting date is the date of publicity in the media. In the healthcare sector, this period should be between 6 months and 5 years).

To date, the late opt-in system has not given rise to abuses. However, as no *action de groupe* has reached Phase 2 yet, it may be too early to draw clear cut conclusions. In theory, late opt-in give claimants better views on the success of their claims. They are less exposed to the risks associated with the litigation and this should limit possible risks of rational apathy and incentivize them to participate. However, late opt-in also creates some uncertainty for the court and defendant(s) since they may have no clear views on the size of the actual class and the size of the loss (as explained below, the court will ground its decision on the review of individual model cases). Moreover, the French late opt-in system tends to extend the length of the proceedings (experience has shown that several years are already needed to go through Phase 1).

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

Opt-in was preferred because it was perceived as more in line with the French legal tradition and constitutional principles. However, a mixed-system allowing courts to use either an opt-in or an opt-out system depending on the circumstances of the case at stake (see for example in Belgium) would be worth investigating. This should however be accompanied with guidelines for assisting and guiding judges.

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

Shortcomings

[532] see here: www.assemblee-nationale.fr/14/rap-info/i4139.asp.

Several issues were identified in a report for the National Assembly dated October 2016.[533] They are also often enumerated by stakeholders themselves. Key problems can be summarized as follows:

- **Limited effects on access to justice and compensation***:* Since 2014, 3 actions have been rejected by courts, 2 have been settled (a third one is expected to be settled in the coming months) and 7 are still pending (see Appendix).
- **Costs and duration of the proceedings**: The action is usually costly, burdensome and time-consuming for associations. For example, the first *action de groupe* in France (*UFC v. Foncia*) was filed in October 2014 but the court issued its (negative) decision on Phase 1 only in May 2018. Only a small number of associations have the resources for launching actions. As explained above, to date, no *action de groupe* has reached Phase 2 (the award distribution phase) but it is expected that Phase 2 will also be lengthy and burdensome for all stakeholders (including associations, defendants and courts).
- **Difficulties in quantifying individual loss.** Quantifying individual loss may be difficult in practice. Several associations have called for the adoption of damages scheduling systems.
- **Problems with the type of damage that can be compensated.** In consumer *actions de groupe*, only material damage affecting consumers' assets can be compensated. The mechanism cannot be used for compensating non-material damage. In practice, this has limited its use by associations, in particular in the context of the Dieselgate/Volkswagen scandal.
- **Multiplication of online collective actions outside the realm of *actions de groupe*.** Several private initiatives have been launched to collect and aggregate individual claims via digital platforms[534]. These actions are not subject to the same rules as those applying to *actions de groupe*. They also tend to create confusion.
- **Reluctance/scepticism from courts when handling *actions de groupe*.** Some judges appear to be still unfamiliar with this procedure.

<u>*Benefits*</u>:

- **Media impact**: from the viewpoint of associations, *actions de groupe* can have media impacts on businesses, which are likely to trigger some behavioural changes. This is because *actions de groupe* are usually accompanied with intensive media coverage organised by associations from the very start of the proceedings (see below under 'publicity' for more information).
- **Incentive to settle** (?) In some cases, the action seems to have incentivized defendants and association(s) to settle their case. However, given the limited experience to date, it is still premature to draw clear conclusions on this aspect.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available?

The *action de groupe* allows for injunctive and/or compensatory relief. However, please note that in privacy and data protection, the action was initially only permissible to request the cessation of unlawful practices. The upcoming bill implementing the General Data Protection Regulation (GDPR) into French law is expected to broaden its scope to also allow for compensatory relief.

[533] see here: www.assemblee-nationale.fr/14/rap-info/i4139.asp.
[534] see for example: www.actioncivile.com/action-collective.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms?

Both are necessary. The latter is required to compensate the loss suffered by the victims of the unlawful conduct.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated? If not would you advise such a fund?

Such a fund does not exist and would indeed be necessary.

The fund would also facilitate compensation when the defendant is/becomes insolvent.

2.4 *What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any?*

N/A (as explained above, to date, no action de groupe has reached phase 2).

3. Publicity issues

3.1 How are collective actions publicized in your country?

The court decides on how the case will be advertised in the media when it hands down its decision on liability. However, in practice, associations often launch extensive media coverage before starting/when starting the proceedings (see below).

3.2 Who is responsible for the publicity of collection actions? Who bears the costs of such publicity?

The court orders publicity measures. Advertising can only be done only when the court decision is no longer subject to appeal or cassation. The defendant remains responsible for the publicity and bears the costs.

3.3 Overall, is publicity regarding collective actions an issue in your country?

Three elements should be noted here:

- Initially, *actions de groupe* were supposed to be advertised in the media only after the court had handed down its decision on liability (*i.e.,* after the end of Phase 1). The objective was to minimize reputation costs for companies. However, this is not how things have materialized in practice. Often, associations have accompanied the launch of their actions with extensive media coverage, sometimes several months before the actual filing of their claims. For example, in the case *Confédération Nationale du Logement (CNL) v. Immobilière 3F*, the launch of the action was extensively relayed in off-line and online national newspapers in November 2014 even though the claim was formally registered in January 2015. Similarly, the association APESAC announced the launch its action against Sanofi in December 2016 but the action officially started in May 2017. This has forced businesses to adapt their communication strategies. Importantly, these early communication strategies from associations can be regarded as a consequence of the *action de groupe*'s multi-stage procedural design. Indeed, potential group members will need to keep proofs and receipts for joining the group and being compensated. However, given the length of the proceedings (up

to several years), potential group members need to be informed at early stages so as to facilitate the preservation of evidence.
- As highlighted above, the main added value of *action de groupe* has been its media impact on defendants.
- There is no official horizontal register listing all ongoing and past *actions de groupe*.[535] It remains thus difficult to collect and retrieve information. In addition, experience has shown that subsequent judicial decisions on on-going *actions de groupe* remains often unnoticed and media coverage is overall fairly limited once the proceedings have started.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

The French rules on *actions de groupe* do not provide for public funding. The court may order the defendant to provide the association with an advance on payment in respect of the costs and expenses arising out of Phase 2. The exact amount is left to the court's discretion but should reflect the nature and the complexity of the diligences borne by the association. In November 2017, the association APESAC requested from the pharmaceutical company Sanofi an advance on payment of more than €660,000 as legal fees. The request was rejected by the court.

In parallel, several private initiatives allowing for third-party financing have progressively emerged in France (see below).

4.2 What are your views on "the loser pays" principle?

The rule may act as a disincentive for non-profit qualified entities, such as consumer organisations.

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

Yes, it does. See question 4.2.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

Third-party funding is still a new phenomenon in France. Some private initiatives are supporting third-party funding for collective litigation.[536] Discussions on third-party funding have also been particularly significant in the realm of arbitration. The French International Chamber of Commerce has published guidelines on third-party funding in arbitration in 2014.[537] On 21 February 2017, the Paris Bar Council (*Conseil de l'Ordre du Barreau de Paris*) adopted a resolution supporting third-party funding in the context of international arbitration.[538] In parallel, several other French stakeholders have published interesting recommendations to accompany the development of third-party funding (see

[535] Please note that the State Council (*Conseil d'Etat*) keeps a registry of *actions de groupe* filed before administrative courts only. For more information, see here: www.conseil-etat.fr/Conseil-d-Etat/Actions-collectives.
[536] see for example *Alter Litigation*, more information at www.alterlitigation.com/wp-content/uploads/2015/02/Interview-ODA-.pdf.
[537] see here: www.icc-france.fr/docmail/Guide_pratique_financement_arbitrage_tiers.pdf
[538] see here: www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf.

in particular the 2014 report by *Club des Juristes*[539] and the 2015 Report by the French Bars National Council (*Conseil National des Barreaux*)).[540]

Under French law, third-party funding is not directly regulated by a dedicated set of rules and no legal provision prohibits it (but none expressly allows it neither). The French Supreme Court appears to consider third party funding as permissible. For example, in a case related to inheritance rights and in the context of third-party funding of an individual's action, the Court of Cassation quashed the Court of appeal that had *"not sought, as it was invited, if the funder's remuneration was not excessive in relation to the service provided"*[541]. This seems to implicitly suggest that the third-party funding's agreement was valid in this case.

All in all, the legal nature of third-party funding agreements remains still unclear to date.

Two options seem possible:

1) Third party funding may be a composite contract that combines *sui generis* contract aspects[542] and different kinds of contractual mechanisms laid down by the French Civil Code, especially rules dealing with special contracts (*droit des contrats spéciaux)*, service contract (*contrat d'entreprise*), mandate (*mandat*), aleatory agreement (*contrat aléatoire*), receivables assignment agreement (*contrat de cession de créances*).
2) Third-party funding may also be a bank loan contract in the meaning of the Monetary and Financial Code that falls under the banking monopoly.

Other rules may apply directly or indirectly to third-party funding (*e.g.,* lawyers' rules on professional ethics.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

To date, no clear abuses have been reported in France.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants /absent parties) should be put in place?

Until now, such risks (*e.g.,* blackmail actions, excessive remuneration of funders, agency costs, *etc*…) have not materialized in France. It may also be assumed that third party funders will only finance trials with high chance of success. Frivolous or abusive actions appear unlikely in the current state of play. For this reason, it seems premature at this stage to impose statutory regulation that could hinder the development of collective redress mechanisms. Soft law instruments (*e.g.,* Best Practices, Recommendations, *etc.*) may be valuable in this field though.

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice ?

French rules on *actions de groupe* provide limited elements for the resolution of international mass claims. The only dedicated statutory provision is set out in the general

[539] www.leclubdesjuristes.com/les-commissions/commission-ad-hoc-financement-de-proces-par-un-tiers/.
[540] CNB-RE2015-11-20_TXT_Financement-proces-par-les-tiers[P]%20(1).pdf.
[541] Cass. 1re civ., 23 nov. 2011, n° 10-16770.
[542] CA Versailles, 12e ch., sect. 2, 1er juin 2006, n° 05/010038.

framework for *actions de groupe* that is laid down in the French Code of Civil Procedure (*Code de procedure civile*). In particular, Article 826-3 *alinea* 2 states that the Paris High Court of First Instance *(Tribunal de Grande Instance de Paris*) has exclusive jurisdiction when the defendant is located outside France.

Please note that, to date (*i.e.,* May 2018), no cross-border mass claims have been filed in France.

In theory, international collective redress proceedings will be governed by common principles of private international law (*droit international privé commun)* and EU private international law for intra-EU litigation (*droit international privé européen)*.

In the specific context of mass competition litigation, the Court of Justice of the European Union adopted a 'claimants friendly' interpretation of Brussels I Regulation in its landmark ***CDC* case**.[543] It was notably decided that under Article 5(3) (now Article 7(2), victims may choose to bring actions before the courts of:

- 'The place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered,'
- 'The courts of the place where its own registered office is located;'

In practice, it resulted from this interpretation a wide extension of jurisdiction to Member States courts (especially British and Dutch courts) to claimants and defendants from all over the EU. Some litigation brought to these MS courts had remote links with these MS markets (and sometimes no links at all). In cases related to EU-wide cartels, French victims have thus brought their actions abroad. For some scholars, this flexible interpretation of Brussels I Regulation created a new *forum actoris* jurisdiction regime in competition litigation. This new regime is seen as being at odd with the domicile of the defendant principle laid down by former Article 2 (now Article 4). It has also been stated that the CDC case is a strong incentive to law and forum shopping strategies for claimants-side stakeholders. (see question 5.2 below)

However, please note that the recent decision of the Court of Justice of the European Union (***Schrems II*** case)[544] adopted a less 'claimant-friendly' approach (the case did not relate to proceedings in France).

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

No abuses have been identified to date.

In France, most of mass claims have not led to clear abuses from claimants (see however above on the use of advertising by associations). This is mainly due to the inefficiency of available collective redress mechanisms. That said, mass competition litigation should be set apart (as highlighted in question 5.1, law and forum shopping have been eased by the *CDC* decision of the Court of Justice of the European Union).

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

The reporters' view is that, behind the circumvention strategies allowed by the instruments of private international law, the real problem emerges, that is the delay of certain internal laws in offering effective collective redress. In other words, forum and

[543] Case C-352/13, 21 May 2015, ECLI:EU:C:2015:335.
[544] Case C-498/16, 25 January 2018, ECLI:EU:C:2018:37.

law shopping is just the symptom of disparities between Member States not the real problem. Rather than dealing with the symptom by reforming the rules of private international law to prevent litigants from moving to more hospitable jurisdictional systems, it might better to deal with the real problem. The most appropriate way seems to implement a harmonised set of procedural and substantive rules that will discourage law and forum shopping. Directive 2014/104 is a first step in that direction but it is too early to assess its outcome.

That said, it is clear that Brussels I bis regulation has not been tailored for resolving mass claims. It does not set out any clear solution for multijurisdictional litigation. For this reason, Brussels I bis Regulation should be revised (see below answer to question II - 6.2).

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

Several elements should be noted here:

- Rules on collective settlements have emerged from practice in France. As early as 2009, CMAP (Paris Mediation and Arbitration Centre) participated in a mediation process to resolve a dispute between a bank and several associations. The dispute dealt with misleading information on variable rate housing loans. Parties managed to reach an agreement in only six months, which was perceived as a success. Based on this first experience, CMAP developed a set of rules aimed at facilitating collective settlement of mass claims.
- Rules on collective settlements were enshrined into French law in 2014 (Art. L623-22 and L.623-23 of French Consumer Code). In October 2016, the Act on the modernisation of Justice also introduced a general framework for settlements of mass claims. Association(s) and defendant(s) may agree to settle their case. If so, the settlement must be submitted to the court for review. The court must conduct an in-depth evaluation of the terms of the proposed settlement agreement. In particular, judges must ensure that the interests of all potential class members are adequately protected. The settlement agreement must then be advertised in the media to allow individuals to opt in.
- In 2015 and 2017, two *actions de groupe* were settled:
  - The case CSF v. Paris Habitat OPH was settled for an amount of €2M for 100,000 individuals;
  - The case UFC v. Free Mobile was settled for an amount of €1,7M. Group members received between €1 and €12 individually.
  - A third one (*Familles Rurales v. Manoir de Ker an Poul*) is also in the process of being settled.
- In parallel, there are example of mass claims handled by an Ombudsman. In particular, the Financial Markets Ombudsman (*Médiateur de* l'*Autorité des Marchés Financiers* – AMF) resolved mass cases in 2012 and 2016:
  - in 2012 the Ombudsman was contacted by a lawyer representing 143 investors complaining that they had not been properly informed by around 20 financial institutions when acquiring shares in a listed company that had since been placed into court-ordered insolvency proceedings. After reviewing each investor's profile, the Ombudsman in some cases recommended no compensation while in other cases proposing a gesture of goodwill in line with the degree to which the investor
  - In 2016, a case was brought before the Ombudsman's Office comprising 102 individual cases, of which 97 were closed by the end of the year. It

related to the financial disclosure by French account keepers to their clients, shareholders of a large foreign company, and to the tax consequences under French law of a spin-off voted for by said foreign company.

6.2 What opportunities do you identify with alternative dispute mechanisms?

Benefits of ADR for the resolution of mass claims can be the following:

- Faster resolution of mass claims
- Flexible outcomes, less costly and burdensome for associations and traders. In particular, the intervention of the Ombudsman turned out to be effective. As the AMF Ombudsman for instance highlighted in its 2012 annual report: 'mediation allows equity to be restored – something that no court can do. In this particular case, this was an argument to which the financial institutions involved were sensitive. From the claimants' perspective, the involvement of the Ombudsman enabled imbalances between them and the institutions in question to be corrected'.[545]

6.3 What shortcomings do you identify with alternative dispute mechanisms?

- Confidentiality of settlement agreements can be an issue, depending on the nature of the case at stake;
- Parties need to have an incentive to settle their cases;
- Reviewing settlement agreements can be difficult for judges as their task will be to ensure that the rights and interests of all parties are protected. It may be useful to develop guidelines that courts could refer to when reviewing mass settlements. These guidelines would list some key points requiring specific scrutiny. This is the path followed by the US Federal Judicial Centre with the publication of a 'pocket guide' assisting judges when reviewing mass settlements.[546] This guidance has been designed in the US context and should be adapted to the EU/French framework. However, the underlying problems remain the same as courts must in all cases protect the interests of all represented and absent parties.
- Enforcing settlement agreements can be burdensome for associations, in particular in cases where the situations of claimants are heterogeneous.

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices?

As said above, French law did not entitle lawyers to start *actions de groupe* on their own motion. As a reaction, the Paris Bar decided to launch a website (*'avocat actions conjointes'*) to collect and aggregate individual claims, which are assigned to one or several lawyers. This initiative was perceived as unfair competition by some associations[547].

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

[545] see AMF Ombudsman 2012 Annual report, p.5, available at: www.amf-france.org/en_US/Publications/Rapports-annuels/Rapports-annuels-du-mediateur/Archives?docId=workspace%3A%2F%2FSpacesStore%2Fe45ad67a-835c-4cd9-bb27-68bd1ed9c369.

[546] See in particular: B. Rothstein & T. Willging, *Managing class action litigation : a pocket guide for judges*, 2010, 3rd ed., available at: www.fjc.gov/sites/default/files/2012/ClassGd3.pdf

[547] The website's first report is available here: www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-le-site-avocats-actions-conjointes.

Please see above. *Actions de groupe* are usually burdensome, time-consuming and costly for associations. Only a few have the actual resources to initiate and conduct such proceedings.

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

For past research on similar issues, the two reporters carried out interviews with associations' representatives involved in collective redress proceedings. Some of them seemed to praise the "name and shame" effect of the action and recognise the lack of efficiency of the mechanism. Other representatives found the *action de groupe* particularly time-consuming, lengthy, expensive and inefficient for obtaining compensation.

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country? If so, in which fields in particular and why? If not, is there any specific reason?

The following conclusions can be made (to date):

- The number of *actions de groupe* remains low and their impact is still fairly limited.
- Some associations tend to select cases in which criminal or administrative sanctions have been issued beforehand (follow-on *action de groupe*) so as to reduce uncertainty. However, this strategy is not always conclusive and tends to delay the conduct of proceeding.s[548]
- In December 2017, the *Cour des comptes* recommended to the Minister of Economy and Minister of Justice to proceed to a revision of the rules of *action de groupe* so as to maximize their potential.[549]

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

17.Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

The multiplication of cross-border mass harm situations (Ryan Air, Dieselgate, *etc.*) combined with the limited effect of the 2013 Recommendation of the European Commission on collective redress have made the adoption of a binding instrument necessary at the EU Level.

1.2 Did the EU Recommendations on- the common principles for collective redress of 2013 have an impact in your country / field of expertise? If so, of which nature (satisfactory or not)? And if not, why is that?

The *action de groupe* was implemented in France in 2014. However, its procedural design had been under discussions for several decades before. Therefore, it remains difficult to assess the practical impact of the 2013 Recommendation in France.

[548] see for instance case *UFC v. BNP Garantie Jet 3.*
[549] see here: www.ccomptes.fr/sites/default/files/2018-02/20180305-refere-S2017-3908-DGCCRF-protection-eco-consommateur.pdf.

It should be noted that the General Data Protection Regulation has contributed to extend the scope of *actions de groupe* in privacy/data protection (they should be soon available to request injunctive and/or compensatory relief. Before, compensatory relief was excluded).

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

As shown above, *actions de groupe* have failed to provide an efficient tool for the resolution of mass claims. Arguably, France could potentially benefit from such an instrument.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place ?

In theory, the introduction of collective redress mechanisms could introduce a risk of abusive litigation. However, in France, these risks have not materialized so far.

The accurate question is rather how to find the right balance between sufficient safeguards preventing abusive litigation without preventing actions from qualified entities.

In particular, reporters consider that the following issues are worth investigating:
- Giving standing to public authorities (DGCCRF) and/or public ombudsmen (as independent entities, risks of abuses seem low).
- An early certification phase by the courts might be enough to minimize the risks of abusive litigation. This safeguard would allow to give legal standing to representative individuals and not only to associations or public bodies.

2 Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

A non-binding instrument is not sufficient, as evidenced by the 2013 Recommendation, which have failed to secure a coherent and consistent framework for collective redress in the EU.

The two reporters slightly disagree on the type of needed European instrument. One takes the view that a regulation is politically unlikely at the European level as the issue of collective redress continues to be sensitive across the EU and still strongly divides Member States and stakeholders. It would also be perceived as disproportionate and going against the legal traditions of Member States. A directive fixing a common framework with clear rules but giving some flexibility to Member States would thus be preferable. The other considers that a regulation will be necessary given the critical need to: 1) grant the same level of protection on the internal market and an equal access to collective redress to all EU citizens and businesses; 2) deal with the sudden surge of EU wide mass litigation (e. g. in data protection, competition or consumer law fields); 3) avoid the lack of efficiency of Member States. These objectives could be better achieved at EU level and this why a regulation could comply with the principles of proportionality and subsidiarity.

All in all, we consider that two EU instruments would be valuable:
- 1°) a regulation for cross-borders mass claims and
- 2°) a directive for (internal) mass claims.

2.2 What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress) ?

The directive / regulation should clearly address the following issues:

- **Scope** should be horizontal. The mechanism should be available to request injunctive and compensatory relief.
- **Standing** of qualified entities: non-profit bodies, including ombudsmen and independent public authorities (for example, DGCCRF in France)
- **Funding**: the issue of funding is essential and the mechanisms should provide tools for supporting the action of qualified entities
- **Private International Rules**: clear jurisdictional rules for the resolution of cross-border mass claims are necessary given the multiplication of cross border mass disputes (see below)
- Mix of **opt-**in and opt-out system depending on the nature of the case at stake.

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

See above.

3 A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

The draft directive is certainly a step forward after the failure of the 2013 Recommendation. However, several preliminary remarks can be made:

- **Standing** should be given to independent public bodies, in particular ombudsmen and public authorities. These authorities are not profit-driven entities and independent. As such, risks of abuses are likely to remain limited.
- Issues relating to **funding** of representative actions will be essential (in particular measures taken at national levels to financially support the actions of qualified entities).
- The draft directive should build up and **consolidate the principles laid down in the Recommendation**. Clear connections with the principles laid down in the 2013 Recommendation appear lacking;
- The success of the proposed mechanism will be **highly dependent on the good articulation between the injunction order and the redress mechanism**.
- The draft directive includes some measures supporting the action of qualified entities. The type of measures that will be introduced by Member States later on in this respect **will need to be carefully scrutinised and assessed**.
- Member States should be required to keep **up-to-date registers** listing all ongoing and past actions.
- The draft directive should be accompanied by **trainings for courts and guidelines/best practices for judges**.
- The draft directive should include **rules for the resolution of cross border mass claims**.

4 Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

A way to facilitate the articulation between (judicial) collective redress proceedings and ADR would be to give to (public) ombudsmen the possibilities to initiate the action. Also, as judges will be performing key roles when reviewing settlement agreements, guidance documents listing issues requesting specific scrutiny by the court could be beneficial. This is the path followed in the US with the publication of a 'pocket guide' assisting judges when reviewing mass settlements.

5 Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

6 Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress?

Brussels 1 Regulation has not been tailored for mass claims. Yet the multiplication of cross border cases affecting individuals located in several Member States combined with recent case law from the Court of the Justice of the European Union have made the issue pressing.[550] The issue of jurisdiction rules for cross border cases may either be addressed as part of a revision of Brussels 1 bis Regulation or through a new instrument, as long as clear rules are ultimately provided.

III. DATA AND STATISTICS

There is no official register listing all actions de groupe in France. Information available in the table below has been retrieved from online sources and contacts with associations.

See Appendix.

[550] see CJEU, Case C-498/16 *Schrems v Facebook Ireland Ltd*, EU:C:2018:37.

Germany

Professor Astrid Stadler

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

Under German law there is no "real" collective redress mechanism with respect to actions for damages. There are, however, (1) representative actions by consumer associations and other designated entities which allows them to bring actions for cease-and-desist orders, and (2) for skimming-off illegally gained profits (only in case of violations of the rules against unfair competition and antitrust law). (3) In securities cases there is the Capital Market Test Case Act (CMTCA), which is not a real collective action as it requires individual actions by investors. The Act only allows for a bundling of the cases in an intermediate phase in order to decide issues of fact and/or law which are common to all cases pending. The Court of Appeals will render a binding decision on these issues for all claimants. (4) Another collective mechanism will be available from 1 November 2018 (the following description is based on the tentative draft of the Government published in May 2018): It is a representative action by consumer associations for a declaratory judgment in consumer mass harm cases. The qualified entity can bring (on behalf of consumers) an action for a declaratory decision (not for the recovery of damages) on the liability of the defendant to pay a compensation or on certain aspects of the defendants liability (wrongful violation of consumer law, fraudulent behaviour etc.).
The following answers refer to these instruments (1) – (4) and to these numbers respectively.

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…) ?

Consumer law (1), (2), (4); competition law (1), (2); antitrust law (2), securities law (3).

1.2 Who has standing ?

Consumer associations, chambers of commerce, chambers of crafts, professional associations, qualifed entities registered with the EU register under the Injunctions Directive (1), (2); non-profit organisations with a designated number of members and which have been registered for at least 4 years in the EU register (4).

1.3 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?

There is no explicit certification stage for the collective actions, the court will only check whether the claimant has legal standing and whether the general requirements for admissibility of a civil action are fulfilled. According to the CMTCA there are complex rules to establish the test case proceedings and to identify the test case plaintiff.

1.4 What are your views on certification of the entity (e.g. qualified association) ? What are your views on certification of the group ?

(1), (2): German "qualified entities" must have the statutory function of representing consumer interests and they must either be an umbrella organisation for more than 3 associations in the same field of law or must have 75 persons as member, they must have existed for at least one year and must – according to their activities in the past - be able to fulfill their statutory tasks appropriately (Sec. 4 Act on Injunctions). Foreign entities have legal standing if they are registered in the Eu Commission's register as a "qualified entity". Germany has registered more than 75 entities in this register and the great majority of them has no forensic experience with collective actions. Although numerous entities in theory qualify for registration and for legal standing, only very few have the capacitiy, money and staff to bring collective actions (e.g. "vzbv" [umbrella organisation of all German consumer associations] and some consumer associations).
For the new mechanism (4) – the collective action for declaratory judgments – the criteria for qualification will be stricter in order to avoid misuse. Associations must be strictly non-profit, they are not allowed to receive more than 5% of their budget from companies (to avoid funding of actions against a defendant by a competitor), they must have been registered in the EU register as a qualified entity at the time of the filing an action for at least 4 yrs (this is meant to avoid the establishment of ad hoc associations acting in the interest of the victims of a particular mass harm – as tort claims are barred under the statue of limitation after 3 yrs, the 4 year requirement was introduced); associations must also have a particular size (they must have at least 10 other associations or 350 natural persons as their members). In my view the criteria are unnecessarily strict. As the collective action (4) is not one for damages, but only an action for declaratory relief, associations have no financial incentive to bring such actions and therefore there is no need to be afraid of misuse. US law firms will not be interested to establish such entities because it is not possible to earn money. Again only a few big consumer associations will be able to afford and prepare such actions. They will not be able to pick up all cases in which collective enforcement of consumer claims would be necessary. The German legislature deliberately establishes a new instrument which will be of very little effect. It has been labelled as "placebo" legislation and was influenced very much by the business sector.

1.5 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses ? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

As (1), (2) and (4) are purely representative actions where no group members are involved in the action brought by the qualified entity. So it is neither opt-in nor opt-out. The new instrument (4) follows a two-step model: once there has been a successful action by a qualified entity for a declaratory judgment, consumers must in the next step bring their own individual actions for damages based on the declaratory judgment. They benefit from the binding effect of the declaratory judgment only if they had registered their claim at the commencement of the representative action. In this respect it is an opt-in mechanism.
The CMTCA (3) is neither opt-in nor opt-out. It requires individual actions by investors from the outset. Once a test case has been selected for the intermediate stage all other actions pending for which the outcome depends on the same questions of fact or law to be decided in the model case are suspended and all the claimants will finally be bound by

the test case decision. There is no opt-out. Only where the test case plaintiff enters into a settlement with the defendant, the settlement becomes binding for investors who have already sued the defendant based on an opt-out mechanism.
In terms of access to justice the mechanism provided in (3) is completely unsatisfactory when it comes to cases of small individual damages, because individual actions are necessary from the outset. The new mechanism (4) will face the same problems: as consumers have to bring individual actions for damages based on the declaratory judgment obtained by a consumer association, very few consumers or none of them will use this next step if the individual damage is too low to take the procedural risk. Thus the instruments will probably gain no practical importance with respect to unfair contract terms in the banking, insurance, telecommunications or travel package sector with its typically small consumer losses.
With respect to the length of proceedings mechanisms (1) and (2) are satisfactory, cases under the CMTCA however take many years (the famous Telekom case which forced the legislature to implement the Act back in 2005 is its 15th year and there is no end in sight). Since 2005 not a single case under th CMTCA has run through all the stages of the proceedings and with the exception on one settlement investors have not received compensation based on a court decision under the CMTCA. It is consensus among practioners and scholars today that the Act did not contribute to a quicker handling of mass securities cases, rather the contrary is true.

1.6 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?

Opt-out is acceptable for very small individual damages in order to overcome rational apathy of victims or consumers, but for bigger or medium sized damages the opt-out mechanism faces constitutional concern with respect to the right to be heard and the principle of party autonomy. However, even though the opt-out mechanism is acceptable for small individual losses, group actions for damages resulting in the establishment of an compensation fund are often no good solution in these cases. Only very few victims will claim their (small or trivial) amounts of compensation (due to the still existing rational apathy) and many will face problems to prove that they are entitled to receive compensation (e.g. in antitrust cases consumer will normally not be able to present a receipt as evidence that they have bought an over-priced product years ago). There are two preferable solutions: No.1: the court decides on a case-by-case basis whether opt-in or opt-out should apply = mixed system. No. 2: group actions with an opt-in mechanism for medium size or large individual damages on the one handside are supplemented by representative actions for skimming-off illegally gained profits on the other side in case of small individual damages (the amount to be paid by the defendant should go to a fund which allows upon application the financial support of collective actions in the future).

1.7 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

There is no effective bundling of mass claims for damages in Germany and the new mechanism (4) which will come into force in 2018 will not solve the problem, because it is a two-step model where consumers still have to sue the defendant individually in the second phase. The exisiting mechanism for skimming-off illgotten gains (2) was not successful in practice due to a too high threshold in substantive law

and due to the fact that qualified entities have no financial incentive to bring such actions, but face a high procedural risk.
In the German tradition of representative actions consumer associations have been very successfull in bringing actions for cease-and-desist orders in the last 40 years, but that is not enough as there is no compensation for consumers.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?

As described above there is no collective action for compensatory relief.

2.2 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

Of course injunctive relief is not sufficient as it can only stop illegal behaviour, but does not provide compensation for the harm caused. Thus there is no really deterrent effect for potential perpetrators. Where harm has been caused illegally and intentionally or negligently, victims should always have a right and a realistic chance to compensation. Only in case of very small individual damages distribution to the victims might be too difficult and skimming-off illgotten gains instead might be a better solution.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?

In Germany, there is no fund in place to which damages or the money skimmed-off from a violator as illegal profit have to be paid. I strongly advocate the establishment of such a national (or European) fund. It should be fed from actions for skimming-off illgotten gains, fines imposed on defendants who do not comply with cease-and-desist orders and the leftover of funds established in individual group action cases (very often group members do not claim their compensation although the collective redress action was successful and the money should not go back to the defendant!). Such a fund will avoid the necessity of third-party funding in consumer cases which are anyhow not very attractive for funders. It can also help to avoid contingency fee arrangements with lawyers or the use of special purpose vehicles like "myRight" which offer legal services for the enforcement of consumer claims base on success fee agreements. In both cases, consumers must accept a deduction of approx. 30-35% of the amount paid by the defendants.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

As described above, in any legal system it is necessary to provide a mechanism for the bundling of damages claims stemming from a mass accident or mass harm situation. The German system currently fails to provide such instruments. There are two problems to be

tackled: a) in case of large individual damages absent a group or class action the victims will sue the defendant individually and thus clog courts; therefore an efficient mechanism to handle mass actions efficiently is pivotal; b) in case of small individual damages the rational apathy of victims must be overcome in order to maintain the market regulatory function of tort law and consumer law. The two situations should not be mixed and it takes different approaches to solve the problems.

3. Publicity issues

3.1 How are collective actions publicized in your country ?

Representative actions by consumer associations are published very often on their websites. Only for the CMTCA (3) there is an official electronic register to publish cases and decisions. In case of representative actions for cease-and-desist orders, claimants may obtain court approval to publish the judgment including the name of the defendant (normally official publications of court decisions must not disclose the identitiy of the parties).

3.2 Who is responsible for the publicity of collection actions ? Who bears the costs of such publicity ?

The CMTCA register is run by a private publishing house on behalf of the Federal Government and financed by the Federal Government.

3.3 Overall, is publicity regarding collective actions an issue in your country ?

The business sector is strictly against publications of actions because of the "naming and shaming" effect, particulary against a publication at the commencement of the litigation. However, the new mechanism (4) which will come into force in 2018 relies on an electronic register where consumers can register at the beginning of the representative action. The publication will disclose the name of the defendant(s). The action can proceed only if more than 50 consumers have registered within 2 month.

4. Financial issues

4.1 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

Germany has a clearly structured system of court fees and lawyers fees. Both types of fees are fixed by the legislature and depend on the amount in controversy in the case at hand (without regard to the hours or efforts spend by lawyers for example). For court fees there is a cap of the amount in controversy of 30 Mio. Euros. Lawyers are, in principle, not allowed to act on the basis of contingency fees. Only in very extraordinary situations, where access to justice depends on the contingency fee arrangement, it has been permitted since 2007, but rarely used in practice. Lawyers may ask their clients for a payment on an hourly basis, but any amount higher than the legally fixed fees cannot be collected from the opponent based on the loser pays principle. All in all, legal costs are highly predictable in the German system and compared to other MS quite modest. Legal aid is available for claimants who cannot afford legal costs, but have a case with good propects.

4.2 What are your views on "the loser pays" principle ?

It is the best way to prevent unmeritorious claims and frivilous lawsuits, but it must be backed-up by adequate access to legal aid.

4.3 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?

It is strictly applied in German civil proceedings and there is normally a full cost shifting from the winning party to the losing party. There is of course no data available on the deterrent effect, but there is consensus that it has such an effect in practice. Even where claimants have a before-the-event policy (which is widepread among German households) there is a deterrent effect, because insurers must give their consent in each individal case to file an action and will do so only after scrutinizing the claimants case.

4.4 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?

Apart from the fact that lawyers are prohibited from funding litigation there is no regulation on third party funding. Funding agreements with claimants are theoretically subject to court review (e.g. with respect to unfair contract terms), but normally there will be an arbitration clause in funding agreements.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?

Third party funding should not be prohibited from the outset as it is necessary in many mass litigations. Legal regulation should be restricted to provisions which avoid an abuse or misuse of the funders position. E.g. funders should not put the plaintiff's lawyer's independence at risk or interfere with ethical standards, and funders should not be allowed to retreat from the funding contract easily, but it is not adequate to prohibit any influence of the funder on the litigation, on settlement negotiations or key decisions to be made by claimants. Funders who take the procedural risk have a legitimate interest to be informed and to participate in settlement negotiations to some extent. However, misuse must be avoided. A cap oncontingency fees of funders could be advisable, but should leave room for negotiation and party autonomy. Where funders claim more than 40-50 percent of the proceeds, this could be estimated to be against public policy.
At the commencement of litigation, claimants should be obliged to dislcose the fact of third-party funding and the name of the funder, but no details of the funding agreement (if inevitable, disclosure should be made only to the court in camera, not to the defendant).
It can also be necessary for legislatures to ban general contract terms which prohibit the assignment of claims to a third-party funder (in practice, in the field of travel contracts some companies already try to prohibit such assignments in their general contract terms, eg. Ryan Air, Air Baltic, in order to avoid that passengers use SPVs like "myRight" or "flightright" to enforce their claims against them).

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

Third-party funders must have sufficient financial ressources to litigate (in the interest of the group members) and to meet adverse cost orders (for the protection of the defendant). A quite good example for regulating TPF is the Code of Conduct of the UK Association of Litigation Funders.

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?

No, not to a large extent. There is only a reference with resepect to legal standing to the EU register of qualified entities established under the Injunctions Directive. Therefore, e.g. consumer organisations from another MS also have legal standing with respect to (1), (2) and with some extra requirements under (4). As there is no real group action which decides on damages claims, this situation is acceptable.

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?

No that I know of.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

National law cannot deviate from the Brussels Ibis Regulation, therefore the influence of national legislation on potential abuse is very limited. Forum shopping under the Brussels Ibis Regulation is legitimate where several courts have jurisdiction to hear a case. The CJEU recently restricted the availability of special jurisdiction for consumers under the Brussels Ibis Regulation in case of an assignment of claims from c2c ("Schrems"). I am not aware of any misuse in cross-border cases, because there is anyhow only a very small number of cross-border cases where claims are brought together before one single court. National consumer associations tend to represent only consumers living in their own country and co-operation among consumer associations from different MS seems to be difficult for several reasons (language, costs, …).

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.) ?

Germany has implemented the 2013 ADR Directive, but the instrument has a focus on individual dispute resolution. There is no particular ADR instrument for mass harm situations, but ADR institutions or ombudsmen can of course try to negotiate voluntary payments to consumers. The more consumers they represent, the better the chance for an amicable solution with a company.

6.2 What opportunities do you identify with alternative dispute mechanisms ?

Not much, because ADR mechanisms are helpful only in cases where no particular legal issues are at stake and no taking of evidence is necessary.

6.3 What shortcomings do you identify with alternative dispute mechanisms ?

The ADR Directive does not require that arbitrators or mediators are legal professionals. EU consumer law is much too complicated to be applied by persons without full legal education; ADR solutions which, in principle, disregard the existing law are not acceptable and are only a second-best option for consumers. In Germany, most ADR institutions established under the ADR Directive are not really neutral and independent because most of them have been founded and are funded by the business sector.

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices ?

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7.2 What impact have actors with legal standing (for example, qualified entities) experienced ?

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7.3 Overall, what are the difficulties and opportunities experienced by all actors involved ?

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8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason ?

In the absence of legal mechanisms German consumers tend to use platforms like "myRight" and "flightright" (established by US law firms) to enforce their claims. These SPVs offer legal service free of cost and risks and consumers are obviously willing to accept a success fee of approx. 30-35%. Particularly in the VW Dieselgate thousands of car owners have turned to "myRight" and assigned their claims against VW to this vehicle. The service of "myRight" and similar companies fills in a gap in Germany where no procedural instruments to pool claims are available and where lawyers are not allowed to operate on the basis of contingency fees.

II. TOWARDS A EUROPEAN INSTRUMENT

Please note that the ELI/UNIDROIT Project on European Rules of Civil Procedure (https://www.unidroit.org/work-in-progress/transnational-civil-procedure?id=2378) include a proposal for rules on collective redress. The paper is still confidential, but might be available from UNIDROIT or ELI upon request.

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not ?

Yes, because the German legislature is not willing to implement really efficient mechanisms of collective redress.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

No. The German legislature was strongly influenced by the business sector which fears "US style class actions" and frivilous actions. The arguments lack a realistic background in the German civil procedural system and stem from anecdotical experience in the US, but there is a strong political will to protect businesses (as illustrated in the VW Dieselgate case).

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted ?

Such an instrument would be an important progress for consumer protection in Germany. As the proposals of the EU Commission from April 2018 include many safeguards against misuse there is no risk of frivilous litigation. On the contrary, restricting legal standing to non-profit organisations may turn out to be unrealistic, because these organisations will not have the money and capacity to cover all cases.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

No, there is no such risk as long as the loser pays principle applies. Courts should be given broad discretion to accept collective actions and will – at least in Germany – be able to dismiss apparently unmeritorious claims at the commencement of the litigation. Acceptance of TPF is also a safeguard against misuse, because funder will support only cases with good prospect to win.

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend ?

The European legislature should implement a Directive on Collective Redress Actions providing a framework for the Member States in consumer law and for cross-border mass harm situation.

2.2 What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress) ?

The European legislature should provide a solide framework of collective redress by describing the main features of collective redress and the forms of redress MS should make available such as actions for damages, injunctive relief, any other remedies of impairment and the criteria for legal standing. In this respect MS should have a broad discretion to grant legal standing according to their national tradition to long-standing organisations or public regulators. EU law should allow or provide legal standing for ad hoc founded associations representing the interests of the victims of a particular mass harm event. EU legislation should also fix the application of the loser pays principle and should allow TPF, but should be reluctant to provide too many safeguards because this might in practice make collective actions impossible. It is not necessary to provide details for the proceedings. EU legislation should also oblige MS to implement mechanisms for mass settlements without contentious litigation, but neither for collective actions nor for the settlement instrument is it necessary that a decision is made whether opt-in or opt-ou systems should apply. In case of mass settlement which courts can declare binding, it should be left to the parties to the settlement to decide whether the settlement shall become binding for the group members based on an opt-in or opt-out mechanism. In case of collective court actions, it should be left to the court to decide which kind of mechanism is the most appropriate for the case at hand.
EU legislation could establish a fund at the European level to which left-overs of settlements and monies paid according to skimming-off decisions of national court can go in cross-border mass harm cases if parties or national courts chose that option. Such a fund should be available as a mechanism of third-party funding in cross-border collective actions on application of qualified claimants.

2.3 What should be the scope of the instrument (horizontal, standing, certification, opt-in etc.)?

Taking into account the limited competence of the EU to implement rules for national civil proceedings, a horizontal instrument with a broad scope of application will be difficult. However, the instrument should at least cover consumer law, product liability, cartel law and all cases of a cross-border mass harm situations.
For details s. above.

3. A New Deal for Consumers

3. The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

The proposal is of course definitely a progress compared to the mere Recommendation published in 2013. The scope of redress available is rightly broad, however, not clearly defined. It is for example not clear whether collective actions for damages are allowed only as a second step once, in a separate proceeding there has been a court decision

according to which the defendant committed a tort or has violated provisions of consumer law (e.g. an action for injunctive relief). It would be much more efficient to implement collective actions which – after a certification phase – in a first step decide on the defendant's liability and wrongdoing (with the possiblity of an appeal) and then allow the court to decide in a second step (if there is no settlment) on the compensation (or other redress/impairment) for the group members. The French "action de groupe" is a good example in this respect.

The proposal is too cautious by giving legal standing to non-profit organisations only. Where legislatures want to promote private enforcement as a substitute or as supplement to public enforcement they must permit financial incentives to some extent. Claimants in collective redress actions cannot be expected to enforce consumer interests, group interests or even a public interest free of cost. If only non-profit organisation have legal standing, they will depend on public funding, i.d. tax payers money, and will inevitably dependent on the government. This opens room for regulators to influence the financial capacity and manpower of qualified claimants. Furthermore it is not very likely that such entities will ever have enough capacity to cover all cases. It needs a much broader approach in terms of legal standing to make sure that there will be a potential claimant in all mass harm situations (for example individual group members or an ad hoc founded SPV). Mass litigation is expensive and involves high risks, if individual consumers or group members should be disburdened from this imponderabilities, legal costs and procedural risks must be shouldered by someone else. In essence, there are only three options: it is either the state who pays for the litigation (which is the solution in Art. 15 of the Commission's proposal and which involves the risk of misuse by regulators), the claimant's lawyer (on the basis of contingency fees or extra success fees) or third-party funders (having as a consequence that the group members will have to pay a success fee to the funder and will not receive full compensation). All three options have downsides and it is not necessary to make a decision at the European level. On the contrary, the European legislature should neither exclude one of the options nor select only one of them as an acceptable solution (as in the "New Deal" proposal).

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

It is necessary to implement an instrument like the Dutch WCAM.

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with ?

Cross-border collective actions with group members living in different MS should be possible. For the better information of qualified entities an electronic register providing information on collective actions or settlement negotiations in a MS must be established.
Where defendants reside in different states, Art. 8 no. 1 Brussels Ibis should be interpreted in a broad way. It is also necessary to allow courts in collective actions to

establish sub-group according to different substantive laws applicable to the group members. There should be a rule that the opt-out mechanism should apply only for the group members of the forum state and that group members residing outside the forum state should be allowed to opt-in (such as in the UK and Belgium). The reason is that cross-border information of group members can be very difficult and maybe not sufficient to protect the group members right to be heard and their right to party disposition.

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ?

This depends on the level of harmonisation of the collective instruments. If the level of harmonization is high and the same instruments will be available more or less in all MS, there is no particular need for forum shopping in this respect any more and no need for a special rule on jurisdiction. Where MS have broad discretion to implement collective redress instruments, forum shopping is likely and the existing rules of jurisdiction may not always provide for the international jurisdiction of a MS where efficient mechanisms are available. In such a case it would be advisable to have additional rules which also allow to bring a collective redress action in a cross-border setting at the domicile of the qualified claimant or in a MS where the majority of group members/victims live.

6.2. If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress ?

For the sake of clarity new rules should be implemented in the Brussels I bis Regulation.

III. DATA AND STATISTICS

1. *Are data and statistics on collective redress available in your country ?*

There are no official statistics with respect to most collective redress mechanisms in Germany. Only data on cases under the Capital Market Test Case Act are published and available: 2010: 10 cases, 2011: 11 cases, 2012: 18 cases, 2013: 89 cases, 2014: 14 cases. It is, however, noteworthy that not a single case has run through all stages of the CMTCA proceedings. Apart from the dismissal of some actions, there is no final decision until now according to which investors have received a compensation based on a court decision. In at least one case there was a settlement.

2. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ?* ***Please provide appropriate statistics for each****.*

See above 1.

Italy

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I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

In Italy, like in many Member States, there are two forms of collective redress: injunctive and compensatory collective redress. The two forms do not merely differ from each other by the relief which may be sought, i.e. cessation of the defendant's unlawful behaviour, on the one hand, and compensation for damage suffered by many people, on the other[551].

However, a further difference between the two models lies in the interests dealt with and, then, in the subject-matter of the collective proceedings[552].

a) **Actions for injunction** deal with 'collective' or 'super-individual' interests, i.e. interests common to many people, none of whom is however entitled to enjoy them exclusively; such interests are deemed worthy of legal protection only if legal standing to pursue an action for enforcing them is conferred by the law upon some "qualified entities"[553]. The rationale behind such scheme is that the same unlawful act – for instance, an unfair commercial practice – is able to affect not only individual rights (in the example, those of people who were actually induced by the unfair practice to buy a product they would not have bought otherwise), but also a distinct super-individual interest, which is distinguished from the accumulated interests of individuals who have been harmed by the unlawful behaviour[554]. Consequently, injunctive collective redress proceedings are not concerned with the infringement of individual rights but are only

[551] This seems however the only difference pointed out by the European Commission: see Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union law, point 3(a); Communication of 11 June 2013, *Towards a European Horizontal Framework for Collective Redress*, COM(2013) 401 final, point 1.2.

[552] On the differences between the two models, see notably: M. TARUFFO, *Modelli di tutela giurisdizionale degli interessi collettivi*, in L. LANFRANCHI (a cura di), *La tutela giurisdizionale degli interessi diffusi e collettivi*, Torino, 2003, 53 et seq.; R. CAPONI, *Azioni collettive: interessi protetti e modelli processuali di tutela*, in *Rivista di diritto processuale*, 2008, 1205 et seq.; S. CHIARLONI, *Per la chiarezza di idee in tema di tutele collettive dei consumatori*, *ivi*, 2007, 567 et seq.; S. MENCHINI, *La tutela giurisdizionale dei diritti individuali omogenei: aspetti critici e prospettive ricostruttive*, in ID. (a cura di), *Le azioni seriali*, Napoli, 2008, 55 et seq.; A. GIUSSANI, *Azioni collettive risarcitorie nel processo civile*, Bologna, 2008, 13 et seq. See also G. VITELLINO, *EU Food Law and Consumer Protection: Is Private Enforcement a Viable Option?*, in *Diritto dell'Unione europea*, 2013, 832 et seq.

[553] In fact, legal standing is not recognized upon individuals. Thus, if it were not conferred upon qualified entities the collective interest would remain deprived of legal protection. Cf. R. CAPONI, *Azioni collettive* cited above, 1210 et seq.; Corte di Cassazione (plenary session), order 28 March 2006 No 7036, in *Corriere giuridico*, 2006, 784 et seq., annotated by A. DI MAJO, *I diritti soggettivi (collettivi) delle associazioni dei consumatori*; Corte di Cassazione, 18 August 2011 No 17351, in *Corriere giuridico*, 2012, 214 et seq., annotated by R. DONZELLI, *La tutela collettiva dei consumatori davanti alla Corte di Cassazione*, and in *Foro italiano*, 2012, I, 2304 et seq., annotated by D. DE SANTIS.

[554] Cf. Recital No 3 Directive 2009/22/EC of 23 April 2009, on injunctions for the protection of consumers' interests (Codified version; so-called 'Injunctions Directive').

designed to determine whether collective interests have been (or could be) hampered, i.e. whether the rules aimed at protecting them have been breached.

b) On the contrary, **compensatory collective redress** mechanisms seek to enforce individual rights of many people, by enabling multiple claims to be bundled in one single proceedings if they are 'related', i.e. concerned with "homogeneous" individual rights. Accordingly, firstly, the subject-matter of these collective proceedings is the same than that of the individual claims aggregated therein, i.e. to determine whether the multiple individual rights have been infringed; secondly, the collective proceedings give rise to compensatory and/or restitutionary redress for such individual positions.

Italian law does not provide for a general regime, but only for various and somewhat different specific procedural mechanisms. In particular, while injunctive collective redress procedures are provided for in different fields, a compensatory collective redress mechanism was introduced in 2007 for the protection of consumers' rights only.

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

a) Injunctive collective redress. Italian law provides for various procedural devices falling within this basic model in many instances, such as unfair competition (Article 2601 Civil Code), union busting (Article 28 of Act 20 May 1970 No 300, *Statuto dei lavoratori*), anti-discrimination and consumer protection[555]. This could lead to some discrepancies or inconsistencies.

For example, although Italian law prohibits discriminations on a wide range of grounds, actions for injunction are only set forth by a limited set of specific provisions. Standing is then expressly conferred on qualified entities in some instances – for example, discriminations on grounds of sex, race or ethnic origin – but not in other, notably in case of discriminations on nationality grounds. However, in order to avoid any inconsistency between substantive law prohibiting provisions and procedural rules on collective redress, the Labour Section of the Court of Cassation has recently recognized to representative entities the legal standing to file an injunctive lawsuit also against collective discriminations on grounds of nationality[556].

In the field of consumer protection, the Italian Consumer Code[557] provides for two separate, although closely intertwined, actions of injunction: the first set forth by Article 37 is only concerned with the prohibition on unfair terms in consumer contracts, while the second – laid down in Articles 139 and 140 – covers any infringement of the collective interests of the consumers. This latter was introduced by Act 30 July 1998 No 281 and then amended in order to implement Directive 98/27/EC of 19 May 1998 (the 'Injunctions Directive', now codified by Directive 2009/22/EC of 23 April 2009).

It is worth stressing that, unlike in most other Member States, the material scope of the action for injunction under Articles 139 and 140 ConsC is wider than that provided for by the Injunctions Directive. This latter applies, indeed, only where collective interests of the consumers have been harmed as a result of the infringement of one or more of the

[555] See R. DONZELLI, *Azione collettiva inibitoria*, in *Diritto on line* (2012), http://www.treccani.it/enciclopedia/-azione-collettiva-inibitoria_(Diritto-on-line); ID., *La tutela giurisdizionale degli interessi collettivi*, Napoli, 2008.
[556] Corte di Cassazione, 8 May 2017 No 11165, nyr. The Supreme Court ruled that standing of qualified entities to bring actions for injunction is not an exception, but a rule widely applied in the field of anti-discrimination law.
[557] Legislative Decree 6 September 2005 No 206, *Codice del consumo* (hereinafter "ConsC").

(currently 15) Union acts listed in Annex I of the Directive; the Italian procedural device has instead a general scope of application, since it is aimed at enforcing *any* consumers' collective interests, either protected by national or by EU law. Thus, for example, a collective action for injunction may be brought before Italian courts in case of breach of rules on product safety or product liability, that is rules laid down by Directives – 2001/95/EC and 85/374/EEC respectively – which are not included in the list annexed to the Injunctions Directive[558]. The injunctive action is also available in case of breach of both national and EU competition rules, to the extent that they are also designed to protect consumers' interests[559].

b) Compensatory collective redress. In Italy this procedural model, allowing for consolidation of multiple individual claims, is confined to the consumer protection area. The scope of application of the class action (*azione di classe*) set forth by Article 140 bis ConsC is indeed subject to a dual limitation. On the one side, and from a subjective perspective, it is only available to consumers: accordingly, it is not admissible if brought on behalf of small stakeholders, irrespective of whether they can be regarded as weaker parties or not[560]. On the other side, the mechanism is only concerned with certain consumer rights originating either in contract or, though to a lesser extent, in tort law (i.e., product or services provider liability, unfair commercial practices and breach of competition rules).

1.2 Who has standing?

a) Injunctive collective redress. Generally speaking, legal standing is not conferred on public bodies, but upon private organizations deemed to be representative of the socio-economic category whose collective interests are at stake (for instance, labour unions, professional associations). In particular, only consumer associations fulfilling the criteria laid down in Article 137 ConsC (as well as in Ministerial Decree 21 December 2012 No 260) and, accordingly, placed in a publicly available list drawn up by the Ministry of Economic Development have standing to claim for injunctive collective redress under Article 140 ConsC. To this end the associations are notably required to have a non-profit making character and to have consumer protection as their exclusive statutory purpose; they must also demonstrate three years of continuous activity, a minimum number of paying members and presence in five different regions.

b) Compensatory collective redress. Under Article 140 bis ConsC, as it currently stands, legal standing is conferred only upon each member of the class. He may file the lawsuit personally, acting as lead plaintiff on behalf of other class members, or through a committee he belongs to or through a consumer association. Accordingly, consumer associations do not have standing, they are not entitled to bring a class action on their own but can only act as direct representative of one or more class members. Besides, a consumer may file a class lawsuit through *any* consumer association, even though this latter does not meet the criteria laid down in Art 137 ConsC[561].

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[558] On this aspect let us refer to G. VITELLINO, *Attuazione della direttiva CE sui provvedimenti inibitori transfrontalieri*, in *Rivista di diritto internazionale privato e processuale*, 2001, at 849-851; ID., *Conflitti di leggi e di giurisdizioni in materia di azione inibitoria collettiva*, in G. VENTURINI, S. BARIATTI (a cura di), *Nuovi strumenti del diritto internazionale privato. Liber F. Pocar*, Milano, 2009, 985 *et seq.*, at 987-988.

[559] See Court of Cassation, judgment 18 August 2011 No 17351 cited above.

[560] See Florence Court of Appeal, order 15 July 2014, in *Giurisprudenza italiana*, 2015, 89 et seq., holding that class action under Article 140 bis ConsC is not a general mechanism granting judicial protection to all weaker parties, but a special procedure aimed at protecting consumers only.

[561] Pursuant to Article 139 ConsC, the criteria set out by Article 137 ConsC have indeed to be satisfied by a consumer association only for having been granted the legal standing, as qualified entity, to bring an action for injunction under Article 140 ConsC.

Bearing that in mind, it must be remarked that, in practice, almost all class actions have so far been filed through and financed by consumer associations. In this regard, two entities – Altroconsumo and, to a lesser extent, Codacons – are particularly active.

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

Pursuant to Article 140 bis para. 6 ConsC, at the preliminary hearing the seised court must verify the admissibility of the class action in light of the following requirements, relating to both the aggregate claims and the claimant.

On the one hand, the claim must be (*i*) concerned with homogeneous individual rights and (*ii*) not manifestly ungrounded. On the other hand, the lead plaintiff must (*i*) not be in conflict of interests and (*ii*) appear capable to 'lead' the class action, i.e. to properly take care of the interest of the class.

If one considers that the class action was introduced in the Italian legal system less than ten years ago, it does not come as a surprise that the case-law has so far mainly dealt with preliminary issues, notably as to whether the abovementioned admissibility requirements are satisfied or not. The homogeneity of the aggregate claims has been the most controversial in practice, but the issue seems now quite settled. In a few cases (for instance, in the class action brought against Volkswagen before the Venice court as to the Dieselgate case), the problem was whether the lawsuit was manifestly ungrounded or not, which necessarily implies a preliminary assessment on the merits of the claim.

1.4 What are your views on certification of the entity (eg. qualified association)? What are your views on certification of the group?

In the Italian system, there is no specific need to certify representative entities since, as we have seen above *sub* 1.2, legal standing is not conferred on such entities but solely upon each class member. However, we have also seen that, among the admissibility criteria, two relate to the lead plaintiff, notably the absence of conflict of interests and his capacity to properly take care of the interest of the class. In this latter regard, the courts necessarily show a different approach depending on whether the lawsuit is filed by one or more consumers, personally or through an *ad hoc* committee, on the one hand, or through a consumer association, on the other hand. In this latter case, a further distinction should be made depending on whether the class action is filed through a 'certified' entity, i.e. one that meets the criteria laid down in Article 137 ConsC, or a non-certified association[562].

Thus, in most cases where the class action is brought through certified consumer associations, Italian courts seem to take for granted their capacity to 'lead' the class action, notably in terms of financial resources deployed to this end. Instead, to our knowledge, only in one case the court scrutinised the financial and managerial resources of the lead plaintiff in order to assess his capacity to properly take care of the interest of the class; but in that case the lawsuit had been filed through an *ad hoc* committee[563].

Bearing in mind the 'consumptive' effect of the class action in Italian law[564], it is submitted that courts should pay more attention to the risk of conflict of interests

[562] See R. DONZELLI, *Azione di classe risarcitoria*, in *Diritto on line* (2014), http://www.treccani.it/enciclopedia/azione-di-classe-risarcitoria_(Diritto-on-line)/.

[563] Cagliari Court of first instance (Tribunale), order 19 February 2014 No 2248, reformed by Cagliari Court of Appeal, 18 July 2014, both in *Rivista giuridica sarda*, 2014, 75 et seq.

[564] Italian law provides indeed that for every single infringement only one class action may be decided by the court first seised. Accordingly, pursuant to Article 140 bis para. 14 ConsC, after the term for opting-in has expired, no further class actions may be filed against the same defendant for the same facts.

between the lead plaintiff, including qualified associations, and the class. This holds true not only at the certification stage, but during the entire course of the proceedings.

In the Italian system, under Article 140 bis ConsC aggregate litigation is allowed only if multiple individual claims are concerned with "homogeneous" individual rights. As we have seen above sub 1.3, homogeneity is indeed one the criteria for the admissibility of the collective proceedings. Accordingly, the certification of the group essentially depends on how such requirement is interpreted. In this regard, the Italian case law shows a trend towards a functional interpretation: multiple individual claims can be bundled in one single group proceedings whenever they have the same cause of action. If so, differences in the quantification of damages do not prevent the class action from being certified. Furthermore, it seems quite clear that class actions may also seek for compensation of non-pecuniary damages[565].

1.5 Is the system opt-in or opt-out? How does it work in practice? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings?

The Italian class action is based on an opt-in system. In practice, once admitted the class action and defined the class itself, i.e. the homogeneous claims that can be bundled in the collective proceedings, the seised court orders the most appropriate public notice so that all affected consumers are informed of the action and of the right to opt-in before the expiring of the term (Article 140 bis para. 9 ConsC). Accordingly, the final decision is binding only on class members that opted-in.

Such a system does not appear to give rise to abuses. On the contrary, it is doubtful whether the mechanism ensures effective access to justice, if one considers how few consumers usually opt-in. For example, in the *Trenord* case, the most important one among the few decided on the merits so far, damages were granted to 3 000 consumers only, for a total amount of 300 000 euros. In the *Dieselgate* case, more than 850 000 Italian consumers are supposed to have been affected by the allegedly unfair commercial practice, but only 100 000 are expected to join the class action pending before Venice courts. Furthermore, in some cases, the number of consumers joining the class action was negatively affected by administrative difficulties in collecting the individual declarations opting-in (see the *Altroconsumo vs Intesa Sanpaolo* case brought before Turin courts).

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

Although the opt-in system seems to be the most consistent with the civil law tradition, and thus should in principle be preferred, some doubts arise as to whether it is capable not only to provide consumers with effective redress, but also to ensure an efficient level of deterrence. The capacity of an opt-in system to achieve these results essentially depends, in fact, on how many class members will join the collective proceedings. Thus, if only a very low percentage of consumers opt-in, as the Italian practice clearly shows, the mechanism does not prove to work in an efficient way.

[565] See, for instance, Milan Court of Appeal, 25 August 2017 No 2828, in *Corriere giuridico*, 2018, 243 et seq., commented by B. ZUFFI, *Arriva la prima maxi condanna di classe, anche se i diritti di molti aderenti risultano prescritti… ma davvero la citazione notificata* ex *art. 140 c. cons. non ha effetto interruttivo istantaneo "collettivo"?*

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

In our view, the most important shortcoming of the Italian system lies in the difficulties incurred in the implementation of the opting-in system. This does not mean, however, that law reforms are needed, since most of those difficulties could be overcome by developing best practices in the case management, for instance in respect of how collective actions are publicised (see below sub Part I, 3).

A further important drawback is related to the limited personal scope of the Italian compensatory collective redress mechanism that, as we have seen above sub 1.1, only applies to consumer claims. This may give rise, inter alia, to practical difficulties. For example, in the Dieselgate case, it is not so easy to distinguish people having bought one of the VW vehicles involved depending on whether they may be characterised as consumers or not, in order to determine who is entitled to opt-in.

The Italian experience also shows that many class actions, even after they are admitted, are abandoned by the lead plaintiffs and left to die. The main reason is that the costs of bringing the proceedings forward are too much high if compared with the aggregate value of the claims of all consumers that are likely to opt-in[566].

On the other hand, the flexibility allowed to the court in the case management is, at least potentially, one of the most satisfactory characteristics.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available?

As explained above, both injunctive and compensatory reliefs are available in the Italian legal order, at least in the consumer protection area.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms?

Compensatory relief is needed, in our view, not only for ensuring effective redress to people harmed by the illegal conduct, that implies effective enforcement of individual rights, but also from the perspective of the deterrent effect.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated? If not would you advise such a fund?

No, in Italy there is not such a fund.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any?

3. Publicity issues

[566] Cf. G. AFFERNI, *Class Actions in Italy: A Farewell to America*, in *The Digest National Italian America Bar Association Law Journal*, 2015, at 59. According to Paolo Martinello, President of Altroconsumo, a leading consumer association, an accurate economic analysis is now carried out in order to decide whether a class action is worth to be filed.

3.1 How are collective actions publicized in your country?

As we have shown above sub 1.5, courts must order the most appropriate public notice of the decision to admit the class action. It is then submitted that, when making its choice, the court should take duly into account that the class action shall not be allowed to proceed, if the lead plaintiff – or the consumer association acting on his behalf – does not give public notice of the court's decision. Unfortunately, this does not occur in practice, since courts usually order publication on one or two national newspapers[567].

Furthermore, in accordance with Article 140 bis para. 9 litt. B) ConsC, any court's decision declaring admissible a class action must also be noticed and published on the website of the Ministry of Economic Development.

3.2 Who is responsible for the publicity of collective actions? Who bears the costs of such publicity?

The lead plaintiff – or the consumer association acting on his behalf – is responsible for giving public notice of the judicial decision admitting the class action, which otherwise shall not be allowed to proceed, as we have seen above. The lead plaintiff also bears the relevant costs, which will be refunded by the defendant only if the case is finally won.

3.3 Overall, is publicity regarding collective actions an issue in your country?

Publicity regarding collective actions is a serious issue in Italy. It suffices to consider that, as we have seen, courts typically order publication on newspapers, that apply special tariffs which are significantly higher than regular ones (they may amount up to 100 000 euros). In our view, courts should be more aware of the wide discretion they have in the choice of the most appropriate public notice, thus searching for other means for informing the class members, more targeted and less expensive than publication on newspapers. In this regard, it is argued by stakeholders (consumer associations) – but this idea is far from convincing – that the most effective solution would be a judicial order compelling the defendant to provide disclosure of the identity of its customers, i.e. the consumers that could have been harmed by the trader's illegal conduct. So far, however, courts have refused to grant such orders.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

Traditional general rules provide that "costs follow the event" or the "loser pays": the losing party must reimburse to the winning party all its legal costs, while he has to bear its own costs and the proceedings' costs. This principle is laid down in Article 91 of the Code of Civil Procedure. Furthermore, contingency fee arrangements between client and lawyer are forbidden (see Article 13 para. 4 Statute No. 247/2012). However, pursuant to the specific provision set out in Article 4 para. 10 Ministerial Decree 10 March 2014 No 55, lawyers' fee applicable to class proceedings can be up to three times higher than those applicable to individual lawsuits.

4.2 What are your views on "the loser pays" principle?

[567] It is also worth noting that newspapers typically apply special tariffs for such publications, which are significantly higher than regular tariffs: see G. AFFERNI, *Class Actions in Italy* cited above, at 59.

We agree with Paolo Martinello, President of Altroconsumo (one of the most important consumer associations in Italy), who holds that neither how legal costs are regulated, including the prohibition on contingency fees, nor the duty to reimburse the costs borne by the winning party might have a deterrent effect. This is instead primarily due to other factors, such as the need (and the costs) of finding the necessary evidence before filing a class lawsuit; or the high costs for giving public notice of judicial decision certifying the class action, that will be refunded by the trader only if the case is finally won (see above sub 3.2).

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

Yes, the "loser pays" principle provided for by general rules also applies to class actions, but it does not work as a deterrent.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

Third party funding is neither regulated nor prohibited in Italy. However, to our knowledge, so far consumer associations have not yet made recourse to this form of financial support.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

Bearing in mind some of the main features of the Italian class action mechanism (notably the opt-in system and the lack of incentives to amicably settle the dispute: see below sub Part I, 6.1), third parties seem to have little or no incentive for funding class actions in Italy. As a result, we don't see serious risks of abuse to the detriment of the defendant.

This does not entail, however, to leave the matter unregulated. In this perspective, principles set out in the 2013 Commission Recommendation, paras. 14-16, must be carefully taken into account. It is notably of utmost importance that (i) the claimant is obliged to declare its identity and the origin of the funds used to support the legal action, (ii) the third party funding the collective redress is prevented from influencing procedural decisions of the claimant, including settlement, and (iii) the court verifies, notably at the certification stage, whether the interests of the third party and the claimant conflict with that of the class.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place?

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice?

There is no reported case of collective proceedings where private international law issues have been dealt with by Italian courts. To our knowledge, indeed, only one cross-border class action has been brought before Italian courts so far, i.e. *Altroconsumo vs*

Volkswagen AG and Volkswagen Group Italia s.p.a. (the Dieselgate case)[568]. In this case, however, no p.i.l. issue has been raised before the court, probably because it was fairly clear that Italian courts have jurisdiction and that Italian law applies.

a) Injunctive collective redress. The international dimension of the injunctive lawsuits under Article 139 ConsC is considered only with regard to the legal standing. In fact, pursuant to Article 139 para. 2 ConsC, qualified entities from other Member States are placed on an equal footing with Italian entities. As a result, a French consumers' association may seize an Italian court whenever a collective interest of French consumers is affected, irrespective of whether it is included in the EU acts listed in Annex I to Directive 2009/22/EC. So, for example, an action for injunction may be filed in product liability or competition cases[569].

b) Compensatory collective redress. The international dimension of class actions is totally ignored by Article 140 bis ConsC. With regard to the standing issue, however, this should not be a cause for concern. In fact, as we have seen above sub 1.1.b), the Italian class action is not based on the model of the representative action, which can be brought only by qualified entities, with the exclusion of individuals[570]. On the contrary, standing is granted to any member of the class, irrespective of whether she/he resides in Italy or abroad; such plaintiff may file the class action suit either personally or through any consumer association (or committee), even though it is not placed in the registry under Article 137 ConsC.

It follows therefrom that:

(i) consumers residing abroad are neither prevented from bringing a class action in Italy as lead plaintiffs nor from opting-in in a class action already filed before an Italian court;

(ii) nothing prevents a foreign consumer from filing the class lawsuit through a foreign consumer association. This latter must demonstrate, like domestic entities, to be in the position to adequately protect the interests of the class; but there is no need for mutual recognition of qualifications.

It is then submitted that, at least in this respect, Italian legal system seems to cope well with the requirements laid down in the 2013 Commission Recommendation, para. 17.

It is instead far from clear whether aggregate litigation is possible for multi-jurisdiction infringements, i.e. where the same unlawful conduct affects or is likely to affect consumers from different States. On the one hand, indeed, the pertinent EU choice-of-law rules set out in Rome I and II Regulations lead to a multiplicity of applicable law. For instance, as regards non-contractual obligations falling within Article 6(1) Rome II Regulation, such as those arising from the unfair commercial practices dealt with in the Dieselgate case, the law of each country whose market has been affected by the unlawful behaviour will apply on a distributive basis. But, on the other hand, multiple claims can be bundled in one single class action only if they are concerned with homogeneous rights, i.e. they have the same cause of action (homogeneity

[568] The class action, after having been declared admissible (see Tribunale di Venezia, order 25 May 2017, confirmed by Venezia Court of Appeal, order 15 October 2017), is still pending before the court of first instance.
[569] Cf. above sub 1.1.a). It may then be argued that, also from the perspective of the mutual recognition of legal standing in case of cross-border infringements, Italian law affords a higher level of consumer protection than the minimum required by Directive 2009/22/EC: see again G. VITELLINO, *Conflitti di leggi* cited above, 988.
[570] Cf. Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final of 11 April 2018, Article 4 and Recital No 10.

requirements): otherwise, the class action cannot be certified[571]. The question then arises as to whether collective redress might be allowed in such circumstances.

In the absence of case-law, the majority view holds that the commonality or homogeneity requirement is not satisfied: indeed, individual claims governed by different laws do not share common issues of law, do not concern homogeneous rights[572]. The US experience would seem to lend some support to this view in that, when different substantive laws would apply to different class members, US federal courts usually deny certification of nationwide class actions[573]. Consequently, assuming that the current conflict rules in Rome I and II Regulations are not tailored to collective redress cases connected with more than one State, some scholars suggest that new specific provisions should be enacted to make sure that only one substantive law applies to the merits of the entire litigation[574]. This view is far from convincing. Leaving aside the practical difficulties that its implementation entails, it fails to explain why different laws would apply to one and the same claim depending on whether it is brought on an individual or on an aggregate basis.

In our view, it is worth further exploring whether the law, as it now stands, might offer other viable solutions. In this perspective, it can be argued that, if the aggregate claims stem from EU substantive law, issues of law should be considered common to all class members[575]. This holds *a fortiori* true if individual claims are deemed to be homogeneous whenever they arise from the same unlawful conduct[576], to the extent that the lawfulness of the trader's behaviour is to be assessed in accordance with harmonised standards, such as those relating to the unfairness of commercial practices set forth by Directive 2005/29/EC.

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

[571] See above sub 1.4. A similar commonality requirement is provided for by US law – Rule 23(a)(2) Federal Rules of Civil Procedure – and by the law of other Member States. In this latter regard, see for example, in English law, Section 47B of the Competition Act 1998 (as substituted by the Consumer Rights Act 2015, Schedule 8(1)), pursuant to which "claims are eligible for inclusion in collective proceedings only if … they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings"; in French law, Article L623-1 Code de la consummation, referring to "consommateurs placés dans une situation similaire ou identique et ayant pour cause commune un manquement d'un ou des mêmes professionnels à leurs obligations légales ou contractuelles".

[572] See S. BARIATTI, *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale,* in *Rivista di diritto internazionale privato e processuale*, 2011, 30 et seq., at 42-46; E. LEIN, *Jurisdiction and Applicable Law in Cross-Border Mass Litigation*, in F. POCAR, I. VIARENGO, F. VILLATA (eds.), *Recasting Brussels I*, Padova, 2012, 166 et seq.; C. SCHEPISI, *Azione risarcitoria di classe e controversie transnazionali: competenza giurisdizionale e legge applicabile*, in *Rivista di diritto internazionale*, 2010, 1077 et seq.; Z.S. TANG, *Consumer Collective Redress in European Private International Law, in Journal of Private International Law*, 2011, 101 et seq., at 138-140.

[573] See G.G. YORK-ERWIN, *The Choice-of-Law Problem(s) in the Class Action Context*, in *NYU Law Review*, 2009, 1793 et seq.; L. SILBERMAN, *The Role of Choice of Law in National Class Actions*, in *University of Pennsylvania Law Review*, 2008, 2001 et seq.; G.P. MILLER, *Compensation and Deterrence in Consumer Class Actions in the United States and Europe*, in F. CAFAGGI, H.-W. MICKLITZ (eds.), *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement*, Antwerp-Oxford-New York, 2009, at 276-278; G. SAUMIER, *Transborder Litigation and Private International Law: The View from Canada*, *ibidem*, 374 et seq.

[574] See E. LEIN, *Jurisdiction and Applicable Law* cited above, at 170; Z.S. TANG, *Consumer Collective Redress* cited above, at 143-145.

[575] See A. STADLER, *Conflicts of Laws in Multinational Collective Actions – A Judicial Nightmare?*, in D. FAIRGRIEVE, E. LEIN (eds.), *Extraterritoriality and Collective Redress*, Oxford, 2012, 207 et seq., at 212; P. ROTT, *Cross-Border Collective Damage Actions in the EU*, in F. CAFAGGI, H.-W. MICKLITZ (eds.), *New Frontiers* cited above, at 391; G. VITELLINO, *Consumer Protection Against Unfair Practices in Cross-Border Food Trade*, in A. LUPONE, C. RICCI, A. SANTINI (Eds.), *The right to safe food towards a global governance*, Torino, Giappichelli, 2013, 411 et seq., at 452-453, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2719048.

[576] See Tribunale di Venezia, order 25 May 2017.

The Brussels I-a Regulation system of jurisdiction discourages aggregate claims against infringements having an EU-wide impact. In practice, a single class action embracing all the consumers affected – i.e. a pan-European class action – may only be brought at the place of the defendant's domicile. Class actions may be filed also in other fora, namely in the place(s) of damage (Art. 7 no. 2 Brussel I-a), but these proceedings will only be concerned with separate state-wide groups of consumers.

Indeed, the Brussels I-a Regulation rests upon an individualistic perspective of jurisdiction which implies that the existing connecting factors actually do not look at the mass claim as a whole, so that jurisdiction has to be determined in relation to the individual claims of all plaintiffs[577].

This is clearly demonstrated by the Dieselgate case. Courts in different Member States have been simultaneously seised, but each of them has only jurisdiction with regard to the claims of consumers who suffered damage in the forum State. Consequently, those courts cannot be regarded has having competing jurisdiction on similar collective claims and, hence, no problem of *lis pendens* under Article 29 Brussels I-a Regulation arises. It can then be argued that, with regard to collective redress, Brussels I-a Regulation prevents a real forum shopping among Member States, so that there is no serious risk of abuses.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

6. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

In the Italian system, not only class action may be settled, but the parties to the collective proceedings are also encouraged to reach a settlement as to the quantification of damages or the criteria for calculating them (see Article 140 bis para. 12 ConsC). It is the lead plaintiff who is entitled to settle.

However, as the law currently stands, there is very little or no incentive for the defendant to settle a class action even after it has been admitted. On the one hand, for low value claims the risk posed by the class action to the defendant is very limited, because the number of consumers opting-in is very small. On the other hand, for high value claims the attractiveness of the settlement is very limited because, in accordance with Article 140 bis para. 15 ConsC, it will only bind consumers that opted not only in the class-action, but also in the settlement itself: in other words, consumers must opt-in twice[578].

6.2 What opportunities do you identify with alternative dispute mechanisms?

6.3 What shortcomings do you identify with alternative dispute mechanisms?

[577] See E. LEIN, *Jurisdiction and Applicable Law* cited above, at 162. For further details and bibliographic references, let us refer to G. VITELLINO, *Consumer Protection* cited above, at 443-446.
[578] See G. AFFERNI, *Class Actions in Italy* cited above, 60.

7. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices?

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country? If so, in which fields in particular and why? If not, is there any specific reason?

As regards compensatory collective redress, the number of lawsuits brought before Italian courts is not growing. However, stakeholders are becoming more familiar with the new mechanism, notably with regard to the certification requirements. It is also worth noting that, in some cases, the class action, even after it is admitted, is abandoned by the lead plaintiff and left to die (see above sub 1.7).

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

In our view, the Commission Recommendation of 2013 failed, because compensatory collective redress mechanisms existing in the Member States are still widely different from each other. Therefore, the enactment of a binding instrument at the EU level seems to us the only viable option.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

The EU Recommendation of 2013 had little or no impact in Italy. A legislative proposal designated to implement those common principles by enacting a damage class action with horizontal application was indeed approved, in June 2015, only by one Chamber of the Italian Parliament (Camera dei Deputati).

However, the Court of Cassation recently referred to the EU Recommendation to hold that the lack of legal standing to bring injunctive relief against collective discrimination on nationality grounds would be at odds with the principle of effective judicial protection enshrined in EU law[579].

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

The implementation of the principles laid down by the EU Recommendation as regards funding of collective redress would have a positive impact on the Italian system.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place?

In our view, the disparities between the collective redress mechanisms existing in the Member States are *per se* a cause of concern, so that their harmonization would avoid or reduce a risk of abusive litigation. This should *a fortiori* be the case if harmonized rules were to provide for minimum safeguards, as those put forward by the Recommendation (for instance, as to funding or contingency fees).

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

A minimum harmonization directive, making binding the principles currently laid down in the 2013 Recommendation, seems to be a good compromise. It should notably take duly into account the cross-border implications of collective redress.

2.2 What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress)?

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

First of all, the EU instrument should not be confined to consumer protection, but should instead have an horizontal scope of application.

Moreover, the following issues should notably be caught by:

(i) as to legal standing, it could be left to domestic law, allowing Member States to adopt a model other than the representative action, provided that standing is equally recognized to class members and/or qualified entities from other Member States. So, for example, Italy should be allowed to maintain its model granting standing to any class member;

(ii) certification requirements;

(iii) opting-in could be the minimum common denominator, but Member States should be free, to some extent, to allow opting-out mechanisms;

(iv) litigation funding.

3. A New Deal for Consumers

[579] See judgment No 11165/2017 cited above, para. 5.3 et seq.

3. *The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities)?*

As to the scope of the draft Directive, as defined by its Article 2, it is quite surprising that it only deals with infringements of provisions of EU secondary law listed in Annex I, which however includes some EU acts falling outside the scope of Directive 2009/22/EC (such as, for instance, the Directive on product liability). It is submitted that infringements of EU primary competition rules should be equally covered, to the extent that those rules are designed to protect also consumers- interests. In this perspective, the Italian model should be followed by the European legislature (see above sub Part I, 1.1.a).

It is further suggested that the representative action model, granting standing to qualified entities only, which the Proposal rests upon (Article 4 para. 1 and Recital No 10), be replaced with the Italian model, recognizing standing to sue to each affected consumer (see above sub Part I, 1.2). This solution would be more satisfactory in terms both of access to justice and of deterrent effect of collective redress. Moreover, it sounds inconsistent to confer substantive rights on consumers, while denying them standing to bring a collective action aimed at enforcing those rights. It is finally argued that Member States like Italy should not be prevented from maintaining their own model; this is however far from being clear in light of Article 1(2) Proposal[580].

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

On the one hand, certification of the class action should not depend upon the failure of a previous recourse to alternative dispute resolution mechanisms. On the other hand, parties should be allowed and encouraged to amicably settle their collective dispute. For the sake of effectiveness, the problem essentially lies in the lack of incentives for both parties, as the Italian experience clearly shows (see above sub Part I, 6.1).

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases? If so, do you reckon collective redress entails the revision of

[580] It is worth noting that the first draft of Article 140 bis ConsC adopted a solution quite similar to that followed by the Draft Proposal. Cp. R. CAPONI, *Collective Redress in Europe: Current Developments of "class action" suits in Italy*, in *ZZPInt*, 2011, at 8-9.

Regulation Brussels I bis? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress?

In light of the considerations already put forward (see above, sub Part I, 5.2), new specific rules on jurisdiction are not needed. On the one hand, as we have seen, Brussels I-a rules currently in force do not give rise to abusive litigation. On the other hand, the right upon the claimant to bring a pan-European collective action, i.e. covering consumers from different Member States, before a court other than that of the defendant's domicile should not be considered as necessary in order to facilitate access to justice.

III. DATA AND STATISTICS

1. *Are data and statistics on collective redress available in your country?*

In Italy there is no national registry of collective redress actions, available to the public.

2. ***Types of data available**: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc.? **Please provide appropriate statistics for each**.*

We are not able to provide you with all the data required, essentially because exhaustive information are not available to the public. The most useful albeit not updated source of information is the *Osservatorio antitrust* of the University of Trento, which provides not only with a database of the case law but also with important statistical data: see Azioni di classe incardinate nei tribunali italiani [Class actions brought before Italian courts], http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/. According to the *Osservatorio antitrust*, up to 12 January 2016 (that is six years after this procedural instrument has become available in Italy), 58 class actions have been filed before Italian courts, but only 3 of them have been decided on the merits; 18 have been declared non-admissible and 40 were still pending, 10 of which having been admitted.

A bit less useful is the website of the Ministry of Economic Development, where any court's order admitting a class action should be noticed and published pursuant to Article 140 bis para. 9 litt. b) ConsC: see http://www.sviluppoeconomico.gov.it/index.php/it/mercato-e-consumatori/tutela-del-consumatore/class-action/ordinanze-class-action.

To our knowledge there is only a few cross-border cases so far, all relating to the class actions filed by Altroconsumo against Volkswagen AG and its Italian subsidiary. However, no p.i.l. issue has been dealt with since the German company did not contest the jurisdiction upon Italian courts and no party touched upon the issue of which law apply to the merits of the aggregate claims.

There are no available data on the number of class actions that have been settled.

Luxembourg

This questionnaire was circulated among Luxembourgish practitioners. It was answered by Thierry Hoscheit (Premier Vice-Président du Tribunal d'Arrondissement de Luxembourg), Lynn Jonckheere, (student of the LLM in European Private Law), Séverine Ménetrey;(Professeur de procédure civile at the University of Luxembourg), Elise Poillot (Professeur de droit civil at the University of Luxembourg), and Bob Schmitz (representative of the Union Luxembourgeoise des Consommateurs). The report was drafted by Elise Poillot with the support of Cécile Pellegrini (Post-doctoral researcher at the University of Luxembourg). Other practitioners were contacted but failed to answer given the short deadline.

II. TOWARDS A EUROPEAN INSTRUMENT

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

All the people who were consulted agreed that there is a need for a binding instrument at the EU level. A lack of standardisation would lead to a complexity and fragmentation of rules, which would not play in favour of the efficiency of such an instrument. In fact, the "Study on the State of collective redress in the EU in the context of the implementation of the commission recommendation" (JUST/2016/JCOO/FW/CIVI/0099) shows that domestic legal contexts within the EU very much differ. Besides, among the many different existing systems, the efficiency of such actions differs from one Member State to another. This is particularly due to the fact that "compensatory collective redress enabling large groups of victims to claim damages is not broadly available" (p. 9) and that "most jurisdictions do not have a regime specifically tailored to mass claims which potentially covers all types of claims across various sectors (a "general" or "horizontal" regime)" (*ibid)*.
In a small State such as the Grand Duchy of Luxembourg, where many disputes will be dealt with abroad, since residents are very much often involved in cross border transactions, the existence of a binding instrument at the EU level would guarantee a certain uniformity of treatment. Consequently, one of the conclusions reached by the group of persons who answered this questionnaire is that a specific provision regarding consumers' collective redresses should be provided by the Brussels I (recast) regulation (see *infra*). In this context, the existence of a binding instrument at the EU level is even more desirable, as it would guarantee a minimum if not maximum legal frame for claimants having to take their dispute in front of a domestic court.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that?

There was no impact in Luxembourg. No official reasons were expressed (we reached out to some representatives of the Ministry to answer the questionnaire but they declined our request). One explanation could be that the real need for such a type of action is not at the domestic level but at the EU one (see answer to 1. 1.). However, with the publication of the new proposal of the Commission, the possibility of a bill on collective redress is

now being examined. It is at its very first stage. From the conference that was held on the 6th of June 2018 in Luxembourg, it looks like the two main models will be Belgium and France with some adjustments inspired by other jurisdictions (Spain and Quebec) being made on problematic points. The proposal would allow small businesses to take part into a collective address (Belgian model). As for the entities, consumer associations are seen as "natural" claimant, but some regulatory authorities should also be given the possibility to bring an action (e. g. the Commission de Surveillance du Secteur Financier). Luxembourg considers the possibility to establish a specific jurisdiction for collective redresses.

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

The common opinion is that Luxembourg would definitely benefit from such an instrument. It would certainly be a political impetus and source of inspiration for the Luxembourg legislature. Thierry Hoscheit (Premier Vice-Président du Tribunal d'Arrondissement de Luxembourg) stressed that the potential benefits "will depend on how the system is shaped and how it is accepted by businesses". His main points of concerns regard the entity that is supposed to administrate the collective redress. On one hand he does not favour the fact that lawyers could play such role (as there could be some risk of abuses, with lawyers specialising in collective redresses if the fees to be charged are not under strict control), on the other hand he fears, as does Elise Poillot that private entities such as consumers' association may not be adequately equipped, especially with regard to the means necessary to administrate mass claims (among which the necessity of sufficient staff).

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place?

With regard to the above question, several points of view were expressed. Bob Schmitz from the Union Luxembourgeoise des consommateurs supports the view that there is no risk of abuse as "the proposed directive foresees adequate safeguards".
Thierry Hoscheit is of the opinion that such a risk could exists – even though he takes the view that in Luxembourg this risk is low, given the specific smallness of the country and economic markets– but that it could be avoided by minimum safeguards. These safeguards should aim at preventing the creation of a "collective redress business modal", strict prohibition of commercial funding of actions/entities in order to avoid forum shopping (*i. e.* attracting collective actions where control/conditions might be less stringent). Thierry Hoscheit and Elise Poillot would however not be opposed to the imposition of punitive damages in case of misconduct of the business (gross neglicence). The award of punitive damages should be restricted to the specific field of collective redress.

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

With regard to this aspect of the questions, opinions are dissident. According to Bob Schmitz, the only possibility is to adopt a minimum harmonisation directive "given the impossibility to overcome existing/planned procedural differences regrading collective redress".

Both Thierry Hoscheit and Elise Poillot argue in favour of a full harmonisation directive in order to minimize the differences that could exist in the different member States, taking the view that common procedural principles already exist in MS and that it could certainly be possible to frame a redress that would be acceptable by all MS as the procedural issues at stake can be limited to a core body of rules (see question *infra*).
Séverine Menétrey supports the use of an optional regulation that in her opinion only permits to have a full coherent approach over the MS.

Overall, we all agree that, as stated by Lyn Jonckheree, that "maximum harmonisation by laying down a detailed framework" is the most appropriate solution. In the Commission's Report of 25 January581, the general conclusion is drawn that the procedures of Member States very much differ. Only a detailed framework will make sure that Member States provide for an effective procedure. Furthermore, a detailed framework also mitigates the risk of forum shopping".

2.2 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress)?

Bob Schmitz stated that "the proposal of a directive provides the right framework for discussion but some key issues need thorough discussion/amendment such as the possibility to ask for redress measures before the final decision on the trader's responsibility and to not force individual court action for redress measures in case of a declaratory judgment (complex issues)".

According to Thierry Hoscheit, the crucial issues are provisions related to the date of the bringing of the legal action, a strict definition of the entities able to bring such an action in front of or a strict definition of criteria allowing to determine which entities can bring an action. The rules applying to availability of the evidence as well as those regarding the principles related to the evaluation of damages, not to mention the opting system chosen (opt-in or opt-out).

Lynn Jonckheere observes that "The minimum rules that should be included in the instrument are rules on standing, joining the group, forms of redress, who will pay the procedure, financing of the representative entity, publicity and "coordination" of the (cross-border) representative action.

To summarize the minimum rules should be:

So-called "substantive rules":

[581] Report from the Commission of 25 january 2018 to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM (2018) 40 final (hereinafter " Commission report of 25 January 2018").

- ✓ Rules regarding the determination of legal entities authorized to bring an action and the modalities of their financing
- ✓ Rules concerning the system to join the group (opt-in; opt-out)
- ✓ Rules on the evaluation of damages
- ✓ Rules related to publicity and "coordination" of the (cross-border) representative action

Specific procedural rules:

- ✓ A rule regarding the date of bringing of the legal the action
- ✓ Rules concerning the form of redress
- ✓ Rules as to the availability of evidences

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

All the persons questioned agreed with Lynn Jonckheere's statements regarding both the material and personal scope of the legislation:

As to the material scope:

- The instrument should have a horizontal scope of application covering e.g. financial services, energy, telecommunications, environment...

As to the personal scope:

- The instrument should have broad personal scope of application that includes both consumers (within the meaning of any natural person that is acting for non-professional purposes) as well as small and medium-sized enterprises (SME's) and self-employed persons. SME's and self-employed persons will equally benefit from the possibility to bundle their claims in a representative action, given the fact that they often find themselves in the same situation as consumers. The underlying reasons why consumers are protected (information asymmetry and weak bargaining position), are often equally applicable to them.582For instance in Belgian law, the collective redress mechanism is recently amended so that also SME's and self-employed persons can be represented.

3. A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities)?

The main criticism that the Luxembourg working group addresses to the proposal of the Commission is the **limited suggestions made with regard to cross-borders cases and rules applying to them**. This is of course of great concern for Luxembourg as the scenario of cross-border cases will be a rather common one (one cannot but think of the diesel gate). For the rest, we agree that the broad material scope proposed is adequate.

[582] For a good overview of this problem see M.W. HESSELINK, "Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive", in *ERPL* 2010, 57-102.

As the working group argues in favour of an equally broad material scope of application, the limitation to consumers does not look appropriate. As stated by Lynn Jonckheere:
"With regard to the personal scope of application, the proposal only allows that representative actions be brought for the benefit of consumers, within the meaning of any natural person who is acting for purposes outside their trade, craft, business or profession. However, also traders can be confronted with violations of their collective interests. Therefore, […] the European Parliament [may] reconsider the personal scope of application in order to also include SME's and self-employed persons."
With regard to **remedies**, there is a consensus as to the Introduction of compensatory damages seen as a positive step, though the lack of a binding EU instrument is considered as a significant shortcoming. Thierry Hoscheit and Elise Poillot would go one step further as they support the introduction of punitive damages in the case of gross negligence of the defendant. Punitive damages are generally not allowed under the civil law tradition. However, many comparative studies demonstrate that collective redresses in Europe are far from being as efficient as thy are in the US. One of the reasons for such inefficiency (and ineffectiveness) could stem from the lack of possibility to award punitive damages. They would also benefit to the qualified entities who could be awarded part of them. In France for example, qualified entities are awarded a compensation for the damage caused to the collective interest. It has been stressed that such an interest is very difficult to evaluate from a financial point of view and that sometimes they could be perceived as punitive damages. There is therefore room for such a rule which would also facilitate the financing of the qualified entities. Since such damages would be limited to cases of gross negligence and thus awarded under a strict judicial control, possibilities of abuse seem inexistent.

As to the **repealing of the injunctions Directive (2009/22)** opinions are differing. Lynn Jonckheere considers it "a good decision" as "there will only be one instrument regulating both injunctive as well as compensatory collective redress, which improves clarity and reduces complexity." Elise Poillot regrets that the proposal, though it is not doubtful that it aims to improve the existing system by enabling qualified entities to bring representative actions seeking different types of measures as appropriate, depending on the circumstances of the case which include interim or definitive measures to stop and prohibit a trader's practice, if it is considered an infringement of the law, and measures eliminating the continuing effects of the infringement. The latter could include redress orders and declaratory decisions establishing the trader's liability towards the consumers harmed by the infringements. Theoratically speaking, this proposal is convincing. However its efficiency may be questionned. To rely on qualified entities certainly guarantees the quality and the independacy of the system. However, since many of these qualified entities will be public agencies, already overburdened by the tasks they have to achieve and which most of the times lack means – may they be financiary or intellectual, in the sense that the complexity of the system requires special –skills– may be a serious obstacles to the functioning of that system. Private entities such as consumer associations are not put in a better position.

Eventually, as stressed by Lynn Jonckheere: Many fundamental issues remain unregulated in the proposal. For instance, no provisions can be found on whether the opt-in or the opt-out principle should apply, what should be done with the "loser pays"-rule… Neither can much information be found on the publicity with regard to the notification of interested parties, which is a fundamental issue on the effectiveness of the representative actions (certainly with regard to cross-border cases). However, the

Explanatory Memorandum of the proposal states that "*the principle in the Recommendation are self-standing and this proposal does not reproduce all procedural elements addressed by the principles*".[583] It can thus be considered that with regard to the unregulated aspects, the Commission still holds on to the principles as set out in the Recommendation. There are still doubts with regard to the effectiveness of some provisions in the Recommendation.. Furthermore, the Explanatory Memorandum also announces that the directive will just create a framework and thus leaves many issues up to the Member States (e.g. the aforementioned opt-in or opt-out rule, the loser pays-rule,…). In the Commission Report of 25 January 2018 it has however been found that the provisions in the Member States applicable on representative actions differ from one Member State to another. Therefore, it can be regretted that the Commission did not clearly address the applicable provisions in the proposal.

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

We contacted some ADR entities which communicated that they would have liked to have more time to elaborate on this issue.

Bob Schmitz expressed his agreement with the content of the directive with regard to that specific topic. According to him, as proposed by the proposal for a directive, amicable settlements should be encouraged at all stages of judicial proceedings. He however considers questionable the fact to make it a compulsory phase as under Belgian law.

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

There is a unanimous view from Luxembourg that the manner in which the proposal of the Commission addresses this crucial topic does not sufficiently take into account cross border issues. The proposed directive only provides for rules on the standing of foreign representative entities that want to bring a representative action before the courts of another Member State. This is clearly not sufficient. The existing legislation, both the "Rome I" and "Brussels I" (recast) regulation provides a very complex system which could hinder the smooth administration of a collective redress by a Court. The plurality of applicable laws – especially given the fact that the proposed instrument has a broader scope than consumer law and will therefore concern the application of legislations less harmonized than the consumer ones, combined with the fact that the competent jurisdiction will most of the time have to deal with several applicable laws (under the Rome I regime stating that the applicable law is that of the member state where the

[583] Explanatory Memorandum of the Commission's proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM (2018) 184 final, 4.

damage was suffered) could seriously hinder the efficiency and effectiveness of the instrument.
There are several ways to address this difficulty. One is of course to provide a maximum harmonization for the rules regarding the evaluation of the damage. The other one would be to allow the application of the law of the competent jurisdiction. This approach is supported by Elise Poillot, who like other members of the working group, supports the view that the Brussels I regulation should be amended in order to facilitate the bringing of collective redresses before European Courts. The application of the law of the competent jurisdiction would be justified on the ground of the principle of mutual recognition.

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress?

There is a unanimous view that a new rule on jurisdiction for cross border collective redress is needed and that this rule should be dealt with by the Brussels I (recast) regulation.
As stated by Lynn Jonckheere: in legal doctrine many contributions have been written on the applicability of the private international law rules on collective actions and the conclusion has been drawn that these rules are not designed for multi-party procedures.[584]

Two proposals were made:
According to Lynn Jonckheere Member States courts should remain competent to deal with cross-border representative actions, under the coordination of a European "Multidistrict litigation"- Panel (hereinafter "MDL-Panel"). Such Panel is part of the judicial power and has as its main aim the transfer of actions concerning related facts brought in different federal districts to one court for consolidation.[585] The court to which the cases have been transferred for consolidation is called the "transferee court", the court before the cases were initially brought "the transferor" court. The Panel consists of seven judges from different circuit or district courts, and assembles once a month.[586] The Panel can decide on consolidation of cases on its own motion or on the basis of the request of the parties.[587] The Panel has a wide discretion on whether or not it will consolidate the cases, on the transferee court and on the appointment of the judge within that transferee court. It will allow the transfer and the consolidation of the cases when three conditions are fulfilled: the cases need to have common facts, there needs to be a filling within at least two federal district courts and the consolidation needs to be

[584] See for instance T. BOSTERS, *Collective Redress and Private International Law in the EU,* The Hague, Asser Press, 2017, pp. 268; B.A. TERRADAS, "Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles", *JPIL* 2015, 143-162; A. STADLER, "The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues" in E. LEIN, D. FAIRGRIEVE et al. (ed.), *Collective Redress in Europe – Why and How?,* London, The British Institute of International and Comparative Law, 2015, 235-249.
[585] M.S. WILLIAMS and T. E. GEORGE, "Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation' in *JELS* 2013, 430.
[586] *Ibid.,* p.433.
[587] *Ibid.,* p. 426.

beneficial to the "just and efficient" resolution of the case.[588] One of the most important factors which led the MDL-Panel to transfer and consolidate is the avoidance of conflicting decisions.[589] With regard to the appointment of the transferee district court, an important factor for the Panel to decide on that is the experience of the court with similar cases in the past or whether the court is located in the district where most parties are domiciled.[590] For the appointment of the judge within that court, the most important factor on which the MDL Panel based the appointment is his experience with similar cases and the workload of the judge.[591] At European level such a Panel can also be established. When a representative entity would like to start a representative action concerning a cross-border case, it can be made obligatory to register this in a special register established at EU level in order to allow the Panel to coordinate and to decide on the one hand, which representative entity will be the "leading entity" or whether it is more appropriate that several representative entities bring a joint action. On the other hand, the Panel can decide in which jurisdiction the representative action would be brought, based on the new jurisdiction rules. The mandatory consultation of this Panel can thus reduce the fact that several procedures will be started, entailing the risk of conflicting decisions. Furthermore, the Panel is a helpful tool to establish a European procedure for cross-border representative actions to allow that one procedure can be started for all consumers within the European Union. This Panel also offers a solution against forum shopping and the "race to court" that goes along with it. I consider the competence of the Member States under the coordination of a coordinating Panel at EU level more appropriate than one specialized court that would be competent to deal with cross-border cases (e.g. a judicial panel within the European Court of Justice[592]).[593] In that case, this judicial panel would be competent regardless of the domicile of the defendant or of the harmed parties, having no connection with the case whatsoever. Furthermore, I consider it particularly important that consumers can be represented in court in their own jurisdiction (or at least the largest part of the consumers).
As to the special register at EU level, it should be set up to allow on the one hand, for the MDL-Panel (comparable with the MDL-Panel in the United States[594]) to decide where the case should be brought and to coordinate, and on the other hand, to grant more publicity on the representative actions that have been started. They can also insert information for instance on how many consumers they will be representing in a certain Member State. On the basis of this register, the European MDL Panel can decide on the transfer and consolidation of the case, so that one representative action can be started for all European interested parties.

With regard to the introduction of a new competence rule in Brussels I (recast), Lynn Jonckheere supports the view that competence should be granted to the court of the jurisdiction where most interested parties are domiciled.[595] By introducing this jurisdiction ground, the largest group of consumers will thus be represented before the court of their domicile. The second new jurisdiction ground grants competence to the

[588] *Ibid.,* p.434.
[589] *Ibid.,* p. 442.
[590] *Ibid.,* p., 445.
[591] *Ibid.,* p. 450.
[592] Communication from the Commission of 11 June 2013 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – "Towards a European Horizontal Framework for Collective Redress", COM (2013) 401 final, 13.
[593] See also on this point T. BOSTERS, *Collective Redress and Private International Law in the EU,* The Hague, Asser Press, 2017, 249.
[594] T. BOSTERS, *Collective Redress and Private International Law in the EU,* The Hague, Asser Press, 2017, 238.
[595] T. BOSTERS, *Collective Redress and Private International Law in the EU,* The Hague, Asser Press, 2017, 238.

court of the jurisdiction where the representative organisation is domiciled representing the largest group of consumers.[596] The courts that comply with these jurisdiction grounds will have exclusive jurisdiction for deciding on the cross-border representative action. If several courts can be competent (e.g. when two or more Member States are the domicile of an equal amount of consumers), then the abovementioned MDL-Panel can coordinate and decide which court will be competent, in order to avoid conflicting decisions and parallel proceedings.

Elise Poillot supports the view that the competent jurisdiction should be that of the defendant. In her opinion, this system is much simpler than the "most interested parties" one as it does not require a counting of the parties. It is an application of the defendant's forum rule that can be justified by the fact that the defendant is facing a very specific action with a multiplicity of claimants. As already mentioned in that case, the applicable law should also be that of the defendant. In order to facilitate the bringing of an action in front of the Court, she recommends the establishment of several liaison offices which would control the admissibility of the claim. The decision of such offices should be subject to appeal under the Member States procedural rules.

Last but not least, Séverine Menétrey stressed the necessity to have a specific rule in the Brussels I (recast) regulation regarding collective redresses brought against defendants situated outside the EU.

[596] T. BOSTERS, *Collective Redress and Private International Law in the EU,* The Hague, Asser Press, 2017, 238.

Poland

Dr. Aneta Wiewiórowska-Domagalska

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

The collective redress mechanism was introduced in Poland in 2009 by the Act on Pursuing Claims in Group Proceedings of 17 December 2009 (Official Journal 2010 number 7 item 44 of 18 January 2010) (further: the Act). The Act was amended by the Act on Amending Certain Acts to Facilitate the Seeking of Receivables of 7 April 2017 (Official Journal of 2017 item 933 of 12 May 2017) (further: the Amendment), which entered into force on 1 June 2017. The cases available at the moment were all decided on the basis of the Act in its initial wording; the impact of the Amendment has not yet been utilised in legal practice in a way that allows it to be reported.

An issued Explanatory Note (*Ustawa o pozwach zbiorowych wraz z uzasadnieniem,* Druk Sejmowy nr. 1829, pp. 2-3) clarified that the Act aims to enhance access to justice in cases where pursuing a claim as a part of a group is more advantageous than pursuing a claim individually (for example: pursuing very small individual claims from a person who caused the damage) and enhancing the effectiveness of justice. The Act was supposed to bring about benefits for the entire judicial system by enhancing the procedural economy and efficiency of justice, as well as securing greater uniformity of the judicial approach in similar cases. The Explanatory Note also mentions lightening the burden of the courts, which must otherwise adjudicate many similar cases, as well as decreasing the costs of proceedings (collaboration of the class members in the evidence gathering process).

Group proceedings can be brought by a class member or by a regional consumer ombudsman (public body) in the name of at least 10 people. Group proceedings can be adjudicated by circuit courts (not lower regional courts), in front of a panel of three judges.

The limited scope of application in the initial version of the Act (only consumer protection, tort and product liability claims were allowed, with the exclusion of claims for the protection of personal interests, which – as some authors stressed – were the main reason for initiating work on group proceedings and which were removed from the proposal during the legislative process) was the most criticised aspect of the Act. The Amendment rectified this problem, extending the scope of admissible claims by adding claims for the non-performance or improper performance of a contract, regardless of the object of such claims (including non-consumer claims) and unjust enrichment claims. The scope of objective exclusion, based on the origin of the claim (violation of personal rights), was also limited.

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

Group proceedings are not generally permitted in civil cases. The Act (after the Amendment) allows group proceedings for the following claims (a sectoral approach):

1. liability for a loss caused by a hazardous product (product liability claims);
2. torts;
3. liability for the non-performance or improper performance of contractual obligations;
4. unjust enrichment; and
5. other matters with regard to claims for consumer protection.

As a rule, group proceedings may not be used to pursue claims arising out of a violation of personal rights, with the exception of claims that result from bodily harm or a disturbance to health, including claims of the closest family members of the claimant who has deceased as a result of a bodily harm or disturbance to health. Regarding this category, the pursuit of pecuniary claims in group proceedings is limited to the request to establish the defendant's liability.

1.2 Who has standing?

Proceedings can only be initiated by a representative acting on his own behalf in the name of all of the group members (there must be at least 10 group members). The function of the representative may only be performed by a member of the group or a regional consumer ombudsman (regional consumer ombudsmen are public local officers). The group members must agree on establishing a representative. Representatives mediate disputes between consumers and traders, advise consumers, bring litigation or join litigation in consumer matters (in Poland, the scope of consumer protection rules, with very few exceptions, reflects the scope of EU consumer protection rules).

From a procedural point of view, the representative is just a claimant in the group proceedings. The representative is required to act through professional legal counsel (so either the representative must be a professional legal counsel, or one must be established for the representative). The Act does not regulate the internal relations between the representative and group members in great detail; in practice, there is normally an agreement to regulate this (A. Trzaska, The Class Action Law Review, ed. R. Swallow, Law Business Research 2018, p. 158). The rules regulating the representative have been criticised in the literature by Iwo Garbysiak (a lawyer who is currently acting in one of the largest class actions in Poland; "*Postepowanie grupowe w polskim prawie",* Instytut Spraw Publicznych, Warszawa, 2014, pp. 4-6) who claims that it is more difficult to keep an objective and unbiased position when (for example) negotiating a settlement for a representative who is at the same time a member of the group than it is for a person who is not personally involved in the case. He advocates extending the list of the potential representatives by adding, for example, the Insurance Ombudsman.

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

Certification takes place at the first stage of the proceedings, which begins with a lawsuit brought by the representative. The court notifies the defendant of the lawsuit, and considers whether all the requirements have been met and whether the group proceedings can be certified. The preconditions for the admissibility the following (Art. 1 (1) and (2)):

1. the homogeneity of claims of the group members;
2. identical or, similar factual grounds of claims;
3. the size of the group;
4. whether the claims can be examined in group proceedings, given their object;
5. for pecuniary claims – standardisation of the amount of the claims of individual group members (Art. 2 (1)).

The first stage of proceeding ends with a decision to certify group proceedings, or to reject the suit. The court decision includes information about the action, the class representative, arrangements concerning the remuneration of lawyers and the names of class members who have joined so far. Initially (the original wording of the Act), the decision was passed after the court hearing (which prolonged the first stage of proceedings). For lawsuits brought after 1 June 2017, the decision may be made at a closed session. Before the decision is made, the court orders the defendants to submit a response to the lawsuit, where the defendants may object to the case being examined in this procedure.

The certification decision may be challenged in the court of appeals. According to the changes introduced by the Amendment, when the certification decision becomes final, the admissibility of the group proceedings cannot be re-examined in the further course of the proceedings.

The decision can be appealed against with a cassation complaint in the Supreme Court. The Supreme Court may repeal the appealed decision and issue a ruling on the examination of the case in group proceedings.

Establishing the admissibility of the proceedings is one of the most problematic issues in court practice. The existing case law does not present a homogeneous understanding of the preconditions, in particular regarding the homogeneity of claims and pecuniary claims. This, however, is of crucial importance for the proper functioning of the Act, because meeting the preconditions is necessary in order to obtain certification for the group proceedings (this was also confirmed by research made by M. Szafrańska-Rejdak for the Polish Justice Institute, in which she analysed the existing group proceedings cases: *Funkcjonowanie w praktyce sądowej ustawy z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym, Instytut Wymiaru Sprawiedliwości*, Warszawa 2017).

1.4 What are your views on certification of the entity (e.g. qualified association) ? What are your views on certification of the group?

In Poland there is no certification of an entity, which is not surprising considering how ineffective entities like consumer organisations are in practice.

Regarding the certification of the group, this stage of the proceedings is seen by practicing lawyers as the most complex part of the proceedings. In addition, the court expects a response to the lawsuit before it makes the decision on certification, which makes preparing the response very challenging. This phase becomes the most important part of the proceedings. The adjudication on the merits of the case loses its importance for the sake of the decision on certification. While the rules on evidence are more flexible in the case of group proceedings, and there is a chance to provide evidence also at a later stage of the proceedings (not only in the response to the lawsuit), the gravity of the adjudication is shifted to the certification phase.

1.5 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

The Polish system is based on the opt-in model. Only those who directly expressed their will to participate in the proceedings by submitting a declaration on joining the group can be participants of the group proceedings (members of the group). This can be done before the proceedings are instituted or during the second stage of the proceedings, while the group is being formed.

The announcement on the commencement of proceedings sets out the information on which claims can be referred to the proceedings by submitting a declaration on joining the group. The declaration can be submitted by anyone who has a claim that can be covered by the proceedings.

The group proceedings do not preclude the option for the individual pursuit of claims by anyone who did not join the group, or who subsequently left the group (the admissibility of leaving the group is limited by certain time frames). A binding judgment is effective upon all members of the group, although they are not formally a party to the proceedings in which the judgment is issued.

While the Polish opt-in system seems to be in principle satisfactory in terms of access to justice (forming the group is not the reason for the rather unsatisfactory functioning of group proceedings), the length and complexity of the certification stage are criticised by the practicing lawyers.

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

The opt-in system is definitely preferable, given the nature of the Polish legal system. Its drawback is certainly the fact that normally it does not deal with all the cases arising on the basis of a given factual situation.

The opt-out system raises doubts in terms of the constitutionality of the solution and requires (from the point of view of ensuring fundamental rights) much more stringent guarantees that potential parties are informed about the proceedings. At the same time, this could be the optimal solution in small cases involving large groups of potential claimants who, due to the inconsequential amount of individual damages, are not interested in practice in pursuing their claims (see for example the Green Book COM(2008) 794 of 27 November 2008, p. 4, which indicates that that for half of EU15 consumers, a claim worth EUR 200 would not be worth pursuing, and for 20 % a claim of EUR 1000).

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

The statistical data published by the Ministry of Justice shows that between 2010 and the first half of 2017, 227 suits in civil law cases were filed and only 7 in cases brought by enterprises (this number has not changed since 2015) (*Pozwy zbiorowe w latach 2010–2016 oraz w pierwszym półroczu 2017 roku,*

https://danepubliczne.gov.pl/dataset/pozwy-zbiorowe-w-latach-2010-i-p-2016, accessed on 04.09.2018). Only about 30% cases were examined on substantive grounds in that period (the data for 2010 – 2015 indicated 38% - see: M. Szafrańska-Rejdak, pp. 5-6).

Group cases in civil matters in first instance circuit courts in 2010-2017

Year	Cases initiated	Cases managed				Remaining
		Total	including			
			rejected	dismissed	returned	
2010	21	.	.	.	.	.
2011	37	21	4	–	11	20
2012	35	20	6	1	10	33
2013	22	26	5	6	5	29
2014	41	19	9	2	7	51
2015	32	31	9	2	7	52
2016	30	23	5	2	10	59
2017	16	27	6	3	4	48

Group cases in commercial matters in first instance circuit courts in 2010-2017

Year	Cases initiated	Cases managed				Remaining
		Together	including			
			Rejected	Dismissed	Returned	
2010	–	.	.	.	.	.
2011	1	.	.	.	.	.
2012	4	1	1	–	–	4
2013	–	2	1	–	–	2
2014	1	2	2	–	–	1
2015	1	–	–	–	–	1
2016	–	–	–	–	–	2
2017	1	1	–	–	–	2

No data for 2010 - 2011 concerning the number of cases settled and the ones remaining for the next period.

Some (maybe even most) authors claim that the number of reported cases proves that group proceedings are quite popular in Poland, and it is certainly very much needed. However, considering how many individual cases have been brought recently in individual consumer cases, which could have been litigated in group proceedings (especially in cases involving consumer credits in Swiss francs), it seems that the potential for group proceedings has hardly been scratched in Poland.

Practicing lawyers (I spoke with some leading lawyers in this area while preparing this report) are actually discouraging their clients from forming groups. There are several reasons for that. The length of the proceedings and the need for the law firm to handle the case for a very long time (financing the process) seem to be the main repellents. In addition (which might be the most important issue), none of the group proceedings initiated so far have ended with spectacular success, which would attract lawyers, meaning that law firms are simply not interested (although there is, for example, software available on the market to deal with group proceedings).

The most famous cases ended either with rejection by the court (on the grounds of admissibility) or were literally stuck in proceedings (a highly publicised case, involving more than 1000 consumers, has been going on for more than eight years now). This also makes it very challenging from the point of view of evidence.

The factor that contributes significantly to the present situation is the lack of proper case management by judges. The courts take a classical approach to the proceedings, and are not sufficiently involved to make sure that the cases proceed swiftly. Szafrańska-Rejdak (p. 33) says for example that the judges should indicate which issues and evidence are useful, or should actively encourage parties to mediation; this is also reflected in the opinions of the practicing lawyers.

In addition (on that, see more below), there are problems when it comes to the standardisation of pecuniary claims, so lawyers prefer cases that would aim at establishing liability. Then, however, there is a problem with establishing the lawyer's fee (in compensatory cases – it is a rather clear 20 %).

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief, or is compensatory relief also available?

General

In Poland, both injunctive relief and compensatory relief are allowed.

The Act does not limit the methods of defining the demand in the group proceedings. It may take the form of an action to establish the content of the legal relation or the right (Art. 189 of the Civil Proceedings Code), shaping the right or legal relation (where the Act allows), an action to establish liability (Art. 2(3) of the Act), as well as adjudication (monetary and non-monetary claims). In relation to monetary claims, there is requirement to standardise the amount of claims, i.e. a requirement that group members who have monetary claims make them equal with the other class members, Article 2(1). After the Amendment, this means that the group members must, together or in groups of at least two, seek payment from the defendant in an equal amount. The Act originally required that the standardisation took place after considering the common circumstances of the case, which gave rise to doubts and resulted in a different approach of the courts as to the interpretation of the common circumstances. Hence, lawyers representing group members often advised them to limit the claim to declaratory relief only, which was expressly allowed by Article 2(3) of the Act. To rectify this, standardisation is currently based on the amount criterion. There are further specific regulations with relation to monetary claims, regarding the remuneration (no more than 20%), burden of proof and the composition of the judgement.

Proceedings for establishing liability

In cases involving monetary claims, the suit may be limited to declaratory relief, which may be subsequently followed by individual claims. In an action to establish liability, the defendant's liability is separated from the size of such liability. The Supreme Court explained, in the judgement of 28 January 2015 (I CSK 533/14), that the proceedings based on art. 3(2) of the Act, the understanding of establishing liability is autonomous and determined by the aims and functions of the group proceedings (solving cases that involve large groups of individuals faster and in a more effective manner). Declaratory judgment that the court issues in such proceedings aims solely at establishing the defendant's liability for a specific event, and does not deal with establishing whether damage was indeed incurred by each of the group members. This might, but does not have to be, the subject of assessment in individual claims, as long as, after the suit for establishing liability is accepted, no individual out-of-court settlements are concluded, which is one of the purposes of issuing such a judgment. In individual cases, where the judgment issued on the basis of Article 2(3) is a precedent, the courts examine individual circumstances of the case (for example: the origin of the damage and its amount, a causal link, contribution or limitation if any). It must, however, apply only to individual claims, and not to all group members. The subject of group proceedings for establishing liability are only the circumstances that are common to all group members, and not the individual circumstances of individual members, which are examined during individual trials at a later date.

The legislator used the solutions proposed by the Supreme Court, and Articles 2(3) and 2(4) after the Amendment deal with establishing defendant's liability for a specific event or events (Trzaska, p. 158). Article 2 (3) of the Act excludes the requirement to standardise monetary claims, as required by Article 2 (1).

Between 2000 and 2016, a majority of the group proceedings sought to establish the defendant's liability. Cases for the payment of monetary performance made up a small fraction of group proceedings cases. The main reason for that were the problems with standarising claims.

Compensatory relief

In a case involving a monetary claim examined in group proceedings, where the amount of the claim of any of the group member cannot be precisely proven, or proving it is particularly difficult, the court may adjudicate, in the judgment, at its own discretion, an amount in favour of that group member that is not greater than the standardised amount of the claim (given the prohibition on make a judgment in excess of the demand, see: Trzaska p. 161). The court may adjudicate, in favour of a member of the group or subgroup, an amount that is not higher than the standardised amount of the claim, at its own discretion, after considering all the circumstances of the case (Art. 20a(1) on the Act, that refers to art. 322 of the civil procedure code). In such a case, the court should hear the parties on the amounts adjudicated in favour of members of the group or subgroup (Art. 20a(2)). If the parties present agreeing motions on the amounts attributable to members of the group or subgroup on accepting the statement of claim, the court will be bound by such motions, in accordance with Article 20a(3) of the Act, with regard to the amount attributable to members of the group or subgroup.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms?

While both types of relief are allowed in Poland, compensatory relief does not really work in practice. Compensatory relief cases constitute a small fraction of the claims pursued in group proceedings, and many of the claims end at the stage of rejecting the claim on the basis of not meeting the preconditions of admissibility (Explanatory Note of the Amendment, *Uzasadnienie projektu ustawy z dnia 7 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności, Sejm VIII kadencji, druk sejmowy nr 1185*). Compensatory relief is, however, necessary if the group proceedings are to provide effective enforcement, in particular, of consumer rights. This is particularly important in light of the EU law requirements.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it), is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund?

There is no national fund in place in which damages can be allocated. Considering how the present Polish system is constructed and functions, the creation of such a fund would not be problematic.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any?

See the points above, generally speaking, compensatory relief does not work.

3. Publicity issues

3.1 How are collective actions publicized in your country?

The second stage of the proceedings (forming the group) begins with an announcement on the commencement of the proceedings. At present, the provisions of the Act allow the court to choose the method most appropriate for the given case.

While the content of the announcement is proposed by the claimant, the publication of the announcement is ordered by the court. The announcement may be published, in particular, on the pages of the public information bulletin of the competent court, on websites of the parties or their legal counsels, and/or in the nationwide or local press. The announcement on the commencement of group proceedings can be skipped if the circumstances of the case show that all group members submitted declarations on joining the group.

3.2 Who is responsible for the publicity of collection actions? Who bears the costs of such publicity?

Publication is made by the court order. The costs are borne by the claimant or, if costs are waived – by the State Treasury.

3.3 Overall, is publicity regarding collective actions an issue in your country?

Not particularly.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

The Act establishes the court fee for lodging the case at 2% of the value of the claim (between PLN 30 and PLN 100 000). While this amount is lower than for most litigation, it might still be a substantial amount considering the potentially high numbers of people involved in the group proceedings. Legal representation is obligatory for both types of representatives (group members as well as regional consumer ombudsmen, in the latter case, according to the Supreme Court judgement of 13 July 2011, III CZP 28/11), but the Act does not allow representatives to obtain legal aid (legal assistance nominated by court and a waiver of court fees). However, in cases where a regional consumer ombudsman is the representative, the court fee is waived.

The representative is the claimant, formally required to bear the costs of the proceedings. The Act allows a success fee limited to no more than 20% of the amount recovered for the group (in contrast to the rules of lawyers' ethics). The Act does not regulate the redistribution of the costs related to group proceedings (including the costs of legal services), as well as any allocation to common costs and the costs attributable to individual claims inside the group. These issues are to be arranged among the group members. Usually the group members participate in the costs related to the commencement and conducting the group proceedings, but the Act does not provide for such a requirement. The group members may freely arrange relations among them. It is usually agreed that each member pays a fixed or lump-sum amount, or the costs are shared in proportion to the value of the claims pursued by a given person.

The loser pays the costs principle applies. It is, however, barred by a tariff for lawyers' fees, and the discretion of the judge when it comes to awarding a percentage, or even no costs, to the winner if the loser's circumstances call for it, or if the winner behaved unreasonably during the proceedings (Art. 98 and 108 of the Civil Procedure Code). Therefore, even if a 20% success fee is agreed, the lawyer will only be able to recover from the loser what the tariff system indicates. The remainder will need to be covered by the group members.

According to Article 98 of the Civil Procedure Code, only reasonably incurred costs can be reimbursed to the winner, subject to the court's discretion. If one of the parties behaved unreasonably, or if the loser's financial position is difficult, the court may decide not to award costs to the winner, or to reduce the amount that would normally be awarded (Civil Procedure Code, Art. 100- 105).

4.2 What are your views on "the loser pays" principle?

While it is a necessary systematic security against abusive litigation, it should not be applied in a way that would prevent group proceedings from being initiated (cost caps, legal aid, etc.).

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

The loser pays principle is the main principle of costs allocation in Polish civil proceedings law, and applies also for group proceedings. While the group members must consider the risk of having to pay the defendant's costs, these costs are not necessarily exorbitant, due to the tariff system for lawyers' fees for the cost-shifting purposes. The tariff depends on the type and value of the case, and it can in some cases be multiplied by the court (no more than six times) if the case is particularly complex or the workload especially heavy. Depending on the situation, the tariff system can be advantageous or disadvantageous to the members of the group.

The representative, who is formally the claimant in the case, is the sole addressee of the costs award and recovers legal fees regulated by the tariff. The representative can distribute the recovered amount among the group members, subject to an agreement between the group and the representative. The court does not intervene in the arrangements when making the decision on costs, and in particular the tariff cannot be multiplied by the number of the group members. Group proceedings constitutes one case and, even though the court may be willing to multiply the tariff (up to six times), this is all that the law allows. The multiplication is due to the particular complexity and workload of a particular case, not to the number of people in the group. The cost allocation decisions are taken at the conclusion of proceedings in each instance.

While the application of the tariff system and the exceptions from the loser pays principle are subject to judicial discretion, the risks for the group members are not that significant. Of course, there are always certain risks entailed, especially if the case is lost, but their position may never be entirely cost-risk-free, even if they win the case.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

The Act does not include any specific regulations on financing the group proceedings, and in particular there is no regulation on third persons financing the proceedings.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

While the idea as such is very interesting, as it could fuel the flow of group proceedings, it requires a carefully designed structure to ensure on the one hand effectiveness, and on the other limiting the possibility of abuses. The decision of not including it in the Polish system was probably the correct one.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place?

The Act introduces an option for the defendant to demand that the claimant pays a deposit to secure the costs of the proceedings (Article 8 of the Act). The Explanatory Note to the Act stresses (p. 7) that the group proceeding not only might put significant

pressure on the defendant, who is accused publicly, but also, will often be financially burdensome for him. Bu introducing the deposit, the drafters wanted to prevent such dangers. In practice, however, as rightly highlighted by Tulibacka (p. 22), the deposit seems to be working as an impediment that restricts initiating group proceedings (it increases the cost exposure of the group members, who cannot claim legal aid)

While the request can only be made during the first procedural activity in the case (Art. 8), the court adjudicates on the deposit when the decision on the composition of the group becomes final. This is a rule introduced by the Amendment, to make sure that the deposit can be incurred equally by the group (although formally only the claimant, i.e. the representative, is obliged to pay it). The defendant may demand additional security if later on during the case the deposit appears to be insufficient to secure the costs of proceedings. If the deposit has not been submitted during the time frame set by the court, the court suspends the proceedings, and if the deposit is not paid within the next three months, the court rejects the statement of claim or the appeals measure.

The criteria that the court has to apply when deciding about the request were introduced by the Amendment (initially the Act did not specify them). At the moment, according to Article 8, the court may oblige the claimant to submit a deposit to secure the costs of proceedings, where the defendant makes it plausible that the action is groundless and that the lack of a deposit would prevent or considerably hinder the execution of the ruling on the costs of proceedings if the action is dismissed. The circumstances that justify it could be, for example, the poor financial situation of the representative (a party) and the lack of regulations applicable to the rules of payment of the costs of proceedings within the group.

The court decides on the amount of the deposit in its decision, considering the sum of costs likely to be incurred by the defendant The deposit cannot exceed 20 % of the value of the object of the dispute (although there are some doubts expressed here, as it seems to clash with the general costs rule applied in civil procedure).

The deposit institution raises certain doubts. As pointed out by Tulibacka (p. 22), a representative cannot claim legal aid, and may be unable to obtain contributions from other group members. She also stresses that the regional consumer ombudsmen are not required to pay court fees, so it is unclear why they should have to pay security for costs. Tulibacka (p. 22) reports that there is no comprehensive data on how many requests of security for costs were actually made in Poland. Some anecdotal evidence appeared that they are made often, but rarely granted.

5. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice?

The Act does not provide any limitations regarding nationality or place of domicile of persons joining the group (for example, as regards claims for damages, where the loss was incurred in Poland, the place of domicile of the group member is irrelevant).

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

Not that I am aware of.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

Not applicable.

7. Issues related to alternative dispute mechanisms

7.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

Practically nothing apart from the implementation of the ADR Directive, though the approach adopted there is different from the approach in the group proceedings, i.e. it does not correspond well with the objectives of the group proceedings.

The system is monitored by the Office for Competition and Consumer Protection. Mainly due to the efforts of the office, which supports and coordinates activities of nine (so far) sectoral bodies entitled to handle ADRs, the use of ADRs in Poland is beginning to take off (in 2017 there were 18 123 petitions filed to ADR bodies). The number of ADR proceedings is, however, still insufficient to change the market patterns.

7.2 What opportunities do you identify with alternative dispute mechanisms?

It could limit the number of cases that end up before courts, resolving consumer disputes by alternative methods.

7.3 What shortcomings do you identify with alternative dispute mechanisms?

Voluntary nature – traders seem to be resisting it, which may (at least partly) be explained by the insufficient standard of consumer protection established by the courts. The alternative of having consumer charges in court does not seem to provide sufficient incentives for businesses to agree for ADR at present.

8. Issues for practitioners

8.1 What impact have legal practitioners experienced on their practices?

8.2 What impact have actors with legal standing (for example, qualified entities) experienced?

8.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

9. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason?

It remains to be seen whether the Amendment will indeed increase the number of cases initiated in group proceedings.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

Please note that I am absolutely unable to predict what the current Polish government could or would accept and implement. I can only hope that Poland will remain in the EU.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

I think there is a need for a binding legal instrument at the EU level. There are two types of argument to support this.

First, one should consider that the internal market is developing at increasing speed. The number of cross-border transactions is rising, partly due to the intensifying impact of global online intermediary platforms (Amazon, ebay, Facebook, etc.), and generally speaking the digitalisation of trade. Should this trend continue (and this seems likely), national borders will become less and less relevant when it comes to mass harm situations, so the need to coordinate an effective redress mechanism at an EU level is evident.

Second, the collective redress mechanism could constitute a very fitting element of the EU enforcement scheme. EU law, by requiring a particular effectiveness of enforcement, is pushing member states in the direction of public enforcement. This is creating tensions at the national level, because the public-style enforcement must then be implemented in private law cases and by courts that adjudicate private law matters. In Poland, the courts are facing major difficulties in this regards (including in group proceedings). The EU collective redress system, however, has the great potential to, on the one hand ensure the effectiveness of enforcement, and on the other provide instruments and guidelines that would be better understandable and easier to follow by national judges. For countries like Poland, that would require very clear guidelines on the position of the judge in a trial, and his/her duties and powers when it comes to managing the case.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

No. National rules were already in place and the changes introduced after 2013 were due to the shortcomings of the existing regulation.

1.3 In your view, would your country benefit from such an instrument, or be negatively impacted?

The existing Polish instrument does not function with sufficient efficiency. The reasons for its practical shortcomings are mostly rooted in the Polish legal culture (the lack of case management skills among judges), as well as the lack of financial incentives for the lawyer to pursue such claims. At first sight therefore, the answer is obviously yes.

However, the real challenge is to establish whether an EU instrument would be able to effectively address the problems that impede the efficiency of the current national legislative solutions. As these problems are closely related to the Polish legal culture (judiciary activity at the level of the procedure, and an insufficient degree of understanding of the consumer axiology at the level of substance) any proposed legislative solution would require more incentives than simply the introduction of EU rules (the most obvious: intensive judiciary training that would make sure that the judges understand their position in such trials properly, accompanied by an intensive educational effort regarding EU consumer law).

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place?

Certainly, there is always a risk of abusive litigation, but any system can be accompanied by safety measures such as the loser pays principle, which would substantially reduce this.

2. Building an EU instrument

2.1 *If you are in favour of a European instrument, what level of harmonization would you recommend?*

Full harmonisation directive (fixed rules to be coordinated with the national civil procedure rules).

2.2 *What should be the minimum requirements / rules contained in such an instrument (eg. admissibility of such actions, standing, joining the group, forms of redress)?*

For obvious reasons (i.e. the potential acceptability of the rules by the Polish legal system), I would advocate for a system based on principles allowing relatively smooth structural integration with the Polish legislative solutions. One way of certainly adding value (which it seems the Polish legislator was too modest when deciding on that) is by ensuring proper financial incentives for conducting group proceedings (possibly including third party funding) and simplifying the certification phase.

2.3 *What should be the scope of the instrument (horizontal, standing, certification, opt-in etc.)?*

In principle, covering the scope of the EU substantial regulation, while clearly articulated that the MS are free to use it elsewhere.

3. A New Deal for Consumers

7. The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities)?

The scope seems to be sufficiently broad; to ensure coherence of the national systems, there should be a clear possibility to apply it to purely national rules. In addition, the scope of the potential redress options seems to be appropriate. A question that might arise is whether a reference to contractual and non-contractual remedies that are not infringed by the proposed directive constitutes sufficient assurance for understanding the relation between the directive and national private law. The use of the trader/consumer dichotomy, while understandable in light of the EU consumer *acquis* structure, does not correspond with the changing market structure. However, EU law lacks effective regulation (on a wider scale) of B2B contracts, so extending rules to also cover B2B relations (in particular SMEs acting on the platform economy) would only make sense if adequately supported by a substantial regulation. Considering how time-consuming and expensive group proceedings tend to be, a question arises whether non-profit organisations with a consumer profile would be able to handle them (financially and organisationally).

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

The Dutch solution (the WCAM) provides a very interesting example of a possible solution, but requires strong institutional bodies (like those in the Netherlands) in order to function properly.

III. DATA AND STATISTICS

1. Are data and statistics on collective redress available in your country ?

On the basis of the Amendment, the Minister of Justice was obliged to open a register of group proceedings (pending and closed). The data available in the register is presented in point 1.7 above.

For cases initiated in years 2010-2015, a report has been prepared by M. Szafrańska-Rejdak for the Polish Justice Institute. This report analyses the existing cases of group proceedings (Funkcjonowanie w praktyce sądowej ustawy z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym, Instytut Wymiaru Sprawiedliwości, Warszaw 2017, available at: https://www.iws.org.pl/pliki/files/IWS_Szafrańska-

Rejdak%20M._%20Dochodzenie%20roszczeń%20w%20postępowaniu%20grupowym%20po%20red%20bez%20rej.%20zmian.pdf)

This, however, is not a periodical analysis, and I am unable to predict whether the Justice Institute will continue to analyse the functioning of the Act.

2. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ?* ***Please provide appropriate statistics for each****.*

Number of cases initiated, number of cases managed (adjudicated, rejected, dismissed, returned), distinguishing B2B cases.

If you are unable to provide us with such data, could you please indicate us why (lack of publicised information etc.) and/or who to contact?

Romania

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I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

In the Romanian system on collective redress, the opting-in – opting-out dichotomy depends on the type of redress sought by the plaintiff; while it can be described as an opting-out mechanism regarding the injunctive relief instrument, it is an opting-in type of action when it comes to compensation actions.

According to the provisions of article 12, paragraph (3) of Law no. 193/2000 on unfair terms in consumer contracts, the legislator introduced an opting-out collective redress action, based on which in the first stage, the "qualified entities", e.g. associations for consumer protection that fulfil the requirements set by the Governmental Ordinance no. 21/1992, respectively or the Romanian National Authority for Consumer Protection, have the right to introduce judicial claims against unfair terms in consumer contracts. In the second stage, after the professional has been requested by the judge's final decision to remove certain clauses as being found to contain unfair terms from all contracts pending to be executed, any consumer who wishes to recover the payments made on the bases of the unfair terms may use either an individual action in redress or compensation (a), either an opting-in action (b).

However, the two-stages mechanism is based on an opting-out system only in cases in which the consumers are represented by the qualified entities described by the cited legal provisions, such as associations for consumer protection or the Romanian National Authority for Consumer Protection.

On the contrary, should consumers be represented in unfair terms litigation by attorneys, or lawyers as litigators, or by law firms, which are not mentioned by Law no. 193/2000 on unfair terms in consumer contracts between the "qualified entities", the system is an **opting-in,** based on the traditional "common interest mandate agreement" described in the Romanian Civil Code general provisions on the mandate contract[597], since no special legal provisions are dealing with the problematic of collective redress actions in which several plaintiffs are represented by the law firm, based on the same source of litigation against the professionals. The qualification as a "common interest mandate agreement" between the principal (law firm / attorney) and the represented plaintiffs generates the applicability of specific rules on the revocability of the common mandate[598]. For instance, in collective redress actions in compensation against banking creditors, based on the use of unfair banking terms in consumer credit contracts,

[597] Articles 2009-2042 of the Romanian Civil Code on the mandate contracts.

[598] The common interest mandate agreement remains revocable *ad nutum* by the principal, although the intemperate revocation generated the principal's duty to compensate the agent. Similarly, since the parties concluded a common interest mandate contract, the agent (attorney / law firm) shares with the represented consumers a common interest in the action success, by stipulating a *quota litis* compensation clause (honorary of success), the amount of which is censurable by the court. For further details on common interest mandates, see D. Chirica, *Contracte speciale,* 1st volume, C.H. Beck, Bucharest, 2015, p. 211-214.

consumers used common mandate contracts concluded by law firms who represented them based on an opting-in system.

The Romanian Civil Procedure Code does not address the issue of collective redress and does not contain specific provisions on collective redress mechanisms, nor are the issues of admissibility, certification, standing, costs and funding of the collective redress action expressly or thoroughly regulated. However, article 37 of the Romanian Civil Procedure Code postulates the possibility of bringing into court an action based on collective legitimate interests.

According to article 37 of the Code of Civil Procedure, "In the cases and under the conditions set by legal provisions, the right of action is also available to natural persons or the legal persons, organisations, institutions or authorities who, without having a personal interest in the success or dismissal of a claim, represent the legitimate interests of other persons or, upon the case, represent collective or general legitimate interests." Article 59 of the Code of Civil Procedure mentions that "Several persons may be jointly plaintiffs or defendants, should the rights or obligations subject to litigation have a common origin or be strongly connected by source."

It is also worth noting that, according to articles 61-63 of the Romanian Civil Procedure Code, the natural or legal persons, other than the parties of the litigious procedures, may use the "voluntary intervention in a civil litigation". The third-party intervention describes a claim the procedural purpose of which is to allow a third party or a subsequent party to join a lawsuit engaged between the originating parties; where the claim emanates from the express assent of the intervenient, the procedural intervention will be voluntary and it has been used in Romanian jurisprudence in litigious procedures involving consumers and credit professionals, in unfair contractual terms actions.

The text of article 61 of the Code of Civil Procedure states that "(1) Other persons justifying a legitimate interest may intervene in a lawsuit engaged between the originating parties. (2) The main intervention implies that the intervenient pretends to have direct or accessory rights connected to the rights which form the object of the lawsuit between the originating parties. (3) The accessory intervention implies that the intervener intends to sustain the defence of one litigating parties."

Article 62 of the Romanian Code of Civil Procedure mentions that " (1) The main intervention claims must be conceived in the form requested by the Civil Procedure Code provisions on the ordinary civil judicial claims. (2) The main intervention claim must be introduced before the closing of the substantial debates in first instance. (3) If the originating parties give their consent, the main intervention claim is also admissible during the appeal proceedings".

On the subject of accessory interventions, article 63 of the Romanian Code of Civil Procedure states that "(1) The claim for an accessory intervention must be introduced in writing, containing all elements requested by article 148, par. (1). (2) The claim for an accessory intervention may be introduced no later than the closing of the substantial debates, in front of the first instance, as well as during the ordinary and extraordinary procedures of revision" (including the appeal in cassation procedures).

According to article 60, paragraph (1) of the Romanian Civil Procedure Code on the **multiple participation in civil litigation**, where the claim is made by or against several persons with a common interest, "The procedural acts performed by or against one of the persons with a common interest will neither benefit nor prejudice the others" subject to the provisions of article 60, paragraph (2), stating that "Nevertheless, should the effects of the judicial redress, by virtue of the nature of the judicial relationship or the existence of certain express legal provisions, be opposable to all the plaintiffs or the

defendants in that particular action, the procedural acts performed by some of these persons will benefit the others. In the cases in which the effects of some procedural acts are contrasting or incompatible to the procedural acts made by other participants, only the most favourable acts will be opposable to the other participants."

As stated in article 139 of the Romanian Civil Procedure Code on **joinder and disjoinder of proceedings,** "(1) The judge may, order the joinder of several procedeengs pending before the court where there is a close relationship between the disputes such that it would be in the interest of justice to examine them together. (2) The judge's decision of joinder may be taken *sua sponte* or upon the request of the parties made no later than on the first term of appearance in from of the invested court. (3) Should the several courts had different degrees of material competence, the joinder will fall under the competence of the one court, the degree of competence of which is superior to the others".

The multiple participants in civil litigation may also resort to a common mandate of procedural representation. According to article 202 of the Romanian Civil Procedure Code on **the legal representation and assistance in court of multiple co-participation** in civil litigation, "(1) During the proceedings implying multiple plaintiffs or multiple defendants, under the provisions of article 59, the judge may decide by resolution on the empowering of a common representative, at the domicile or premises of which will be done the notification of all further procedural acts. (2) The representative(s) may be selected from the natural or legal persons who fulfil the legal conditions for judicial representation. (3) Should the parties disagree on the common representative nominalisation, the judge will appoint a special curator, who under the provisions of article 58, paragraph (3) will represent the multiple participants, at the domicile or premises of which will be done the notification of all further procedural acts. The representative will be remunerated by the represented participants."

According to article 72 of the Romanian Civil Procedure Code on the **impleader** procedures, in cases in which a third-party is partly responsible for the plaintiff's injuries in a manner that fundaments the impleader on mechanisms such as indemnity, subrogation or breach of warranty, „(1) The party who justifies a legitimate interest may implead a third person, against the party could have introduced a separate claim on indemnity or warranty. (2) At its turn, the impleader may implead another person for the breach of warranty". As mentioned in article 74, paragraph (4), "The impleader claim and the main claim will be discussed simultaneously. Nevertheless, should the discussions on the impleader claim unjustifiably delay the judgement on the main claim, the judge may decide on its disjunction in order to have the impleader claim judged separately. In the later case, the judgement on the impleader will be suspended until the judge reaches a decision on the main claim."

Litigating parties may also resort on the **cross-claim procedure**, as a demand for relief made in civil litigation by one or several plaintiffs against another plaintiff or by one defendant against another defendant, in a personal injury or similar tort cases. As opposed to the counter-claims, in which a defendant demands relief from the plaintiff or, for instance, a compensation claim (each of the parties being simultaneously the debtor and the creditor of the other party), cross-claims imply the existence of multiple obligations of payment between the members of the group constituted as plaintiff (or having the procedural position of the defendant).

Compulsory intervention in civil litigation is also regulated; for instance, according to article 75 of the Romanian Civil Procedure Code, "The defendant who possesses movable or immovable goods on behalf of the legal owner may resort to the nominalisation of the legal owner, in the cases in the plaintiff pretend concurrent rights

on those movable or immovable goods, no later than at the first term of discussions in first instance." As article 78 postulates, "In the cases expressly nominated by legal provisions, as well as in the non-contentious procedures, the judge may decide *sua sponde* on the compulsory intervention of third persons, despite the eventual oppositions of these intervenors. (2) In contentious litigation, the judge will address the parties the necessity of compulsory intervening of third persons. Should neither party formulate objections, the judge will draw up the resolution on the third person' intervention."

Despite the fact that the Romanian legal system is lacking cohesiveness on the collective redress mechanisms, which are not legally regulated as autonomous procedural mechanisms, **consumer collective claims** have be brought *de facto* on a collective basis where they raised the same, similar or related issues such as, for instance, the presence of **unfair terms** in contracts concluded between profesionals and consumers.

The Romanian legal system currently has a number of procedural mechanisms available to multiple claimants: only some of those operate on an opt-in basis, claimants electing to join the proceedings in order to be considered a member of the class and to be entitled to any damages awarded. This is in clear contrast to the collective redress mechanism which has been used in practice by plaintiffs such as non-profit consumer organizations or the National Authority for Consumer Protection for unfair contractual terms claims, introducing an opt-out class action system based on article 12, paragraph (3) of Law no. 193/2000, modified in August 3rd, 2012, on unfair terms in consumers' contracts.

In what concerns the representative actions by qualified entities, the modifications brought on August 3rd 2012 to the text of articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts, enabled "qualified entities" designated by law to bring representative actions in the collective interest of consumers, strictly in the field of unfair terms in consumer contracts. Under the modified legal text, these qualified entities will have to satisfy minimum reputational criteria set by articles 30 and 32 of the Governmental Ordinance no. 21/1992, modified, on consumer legal protection (they must be properly established, not for profit and have a legitimate interest in ensuring compliance with the relevant consumer protection law). There are no express legal provisions in the Romanian legislation, in the field of compensatory collective redress actions, imposing on qualified entities the legal obligation to disclose to the courts or administrative authorities their financial capacity and the origin of their funds supporting the action.

The provisions of article 12, paragraph (3) of Law no. 193/2000 on unfair terms in consumer contracts, introduced an **opting-out collective redress action for injunctive relief** of consumers, stating that "The associations for consumer protection that fulfil the requirements set by articles 30 and 32 of the Governmental Ordinance no. 21/1992 on consumer legal protection, modified and republished, have the right of judicial claim against any professional whose unilaterally elaborated contracts contain unfair terms, in order for the judge to deliberate on the existence of unfair terms and to order the professional to eliminate those unfair terms from all existing contracts containing obligations the pursuance of which is not completed."

According to paragraph (4) of article 12, of Law no. 193/2000 on unfair terms in consumer contracts, modified, "The provisions of the above paragraphs (1)-(3) have no effect on individual consumer's right to introduce a judicial claim in voidance or nullity

against any professional whose unilaterally elaborated contracts contain unfair terms." The opting-out mechanism is also supported by the provisions of article 14 of Law no. 193/2000 on unfair terms in consumer contracts, modified, stating that "The consumers who can justify a right to compensation based on the existence of a prejudice generated by the use of unfair contractual terms under the conditions set by the above legal provisions, have the right to introduce judicial actions in accordance with the provisions of the Civil Code and the Civil Procedure Code."

For the compensatory relief actions, there are no express legal provisions allowing qualified entities to obtain financial compensation for their members or for individual consumers, only individual actions being admissible according to positive Civil Procedure Law, as resulting from the cited article 14 of Law no. 193/2000 on unfair terms in consumer contracts.

Consumer associations who fulfil the legal representative requirements may introduce judicial claims supporting collective interests of consumers in the **opting-out injunctive relief procedure,** in the field of unfair terms in consumer contracts; subsequently, after the judge had finally decided on the existence of unfair terms and ordered the defendant / professional to eliminate those unfair terms from all existing contracts, individual consumers who intend to compensate reciprocal payment obligations or to obtain redress for the past payments collected by the professional based on those unfair terms, must resort to individual actions in compensatory relief. Therefore, the judge may decide, in a collective injunctive action introduced by a qualified entity, that the professional creditor has a duty to eliminate a certain clause in all banking credit contracts (requesting the debtor consumer to pay a fee based on non-transparent contractual terms). Should a individual consumer intend to obtain refund for the amount of payments made as an effect of that particular clause, the individuals must introduce a judicial claim for compensatory relief, since the judge's decision when admitting the consumer association's action had only effects on the professional's duty to eliminate further use of certain unfair contractual terms.

For the **qualified entities** to be admitted as representative in a collective injunctive relief action based on article 12(3) of Law no. 193/2000 on unfair terms in consumer contracts, they must fulfil, on one hand, the conditions mentioned in article 30 of the Governmental Ordinance no. 21/1992, modified, on consumer legal protection, referring to the **non profit purpose** and the legal prohibition of simultaneously pursuing interests other than their members or the general interest of consumers. On the other hand, each consumer association qualifies for being a representative in a collective redress procedure based on the provisions of Law no. 193/2000 on unfair terms in consumer contracts should they have:

(a) At least 3000 members at national level and local branches in at least 10 territorial divisions;

(b) At local or regional level, to have activated for at least 3 years in the field of consumer protection (article 32 of the Governmental Ordinance no. 21/1992, modified, on consumer legal protection).

The collective impact of the qualified entities' action against the use of unfair terms in consumer contracts is described in article 13 of Law no. 193/2000 on unfair terms in consumer contracts as follows: "Should the judge decide affirmatively on the

existence of the alleged unfair terms, the court will order the defendant to eliminate the unfair terms respectively from all pending contracts concluded by consumers and to refrain from the further use of the contractual terms which have been found to be unfair." The court's decision will benefit to all consumers having a contractual relationship with the defendant which implied the use of those unfair terms, regardless of the consumers expressed or unexpressed will to have their interests represented, unless individual consumers decide to pursue separate individual requests, by making use of the opting-put latent mechanism.

The main existing mechanisms which most closely resemble a collective redress mechanism, according to the above description, are: representative actions, cross-claim procedures, impleader procedures, joinder procedures, voluntary and compulsory intervention as forms of multiple participation on civil litigation.

1. Issues related to the scope and mechanism of the instrument(s)

1.1. The scope of the main existing mechanisms in the Romanian Civil Procedure Code which most closely resemble a collective redress mechanism, above described (representative actions, cross-claim procedures, impleader procedures, joinder procedures, voluntary and compulsory intervention as forms of multiple participation on civil litigation) is horizontal and it is not consumer only, any natural or legal person being able to benefit from their mechanisms.

(a) The scope of the **opting-out injunctive relief procedure,** in the field of unfair terms in consumer contracts, as referring to the collective impact of the qualified entities' action against the use of unfair terms in consumer contracts (based on articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts) is **consumer only**, not being available for legal persons or for natural persons pursuing professional interests.

(b) The procedure of injunctive relief based on the claim of representative qualified entities is without prejudice to individual consumers' right to claim for voidance or nullity of unilaterally elaborated contracts containing unfair terms or the refund of the paid sum.

1.2. The **qualified entities** who have standing as representative in collective injunctive relief actions based on article 12(3) of Law no. 193/2000 on unfair terms in consumer contracts, were non-profit associations for the protection of consumer rights, fulfilling the conditions mentioned in article 30-32 of the Governmental Ordinance no. 21/1992, modified, on consumer legal protection: (a) having at least 3000 members at national level and local branches in at least 10 territorial divisions; (b) at local or regional level, to have activated for at least 3 years in the field of consumer protection.

1.3. Romanian legislation contains no provisions on a specific **certification mechanism** for group certification, while in terms of the certifying of qualified entities, express legal provisions are incident in the field of collective injunctive relief actions based on article 12(3) of Law no. 193/2000 on unfair terms in consumer contracts, were non-profit associations for the protection of consumer rights, fulfilling the conditions mentioned in article 30-32 of the Governmental Ordinance no. 21/1992, modified: (a) having at least 3000 members at national level and local

branches in at least 10 territorial divisions; (b) at local or regional level, to have activated for at least 3 years in the field of consumer protection.

1.4. In my views, there is a need for express legal provisions requirements on the testing the efficiency and representational quality of group treatment, in terms of **ascertainability, cohesiveness, and representational** matters. Firstly, legal provisions should require group members to be "ascertainable" in opting-in collective redress procedures. Ascertainability criteria would describe an objective and administratively feasible manner to determine exactly who is a member of the group. Ancillary matters in opting-in actions would depend on the ascertainability of group members, in terms of notification of each member on the procedural acts, preclusion of procedures etc. Numerosity should not be a compulsory criterion, as to require the group to demonstrate that the membership insufficiently numerous that joinder would be impracticable. On the contrary, the existence of at least two persons cumulated with the common source of prejudice may be sufficient to sustain the existence of a group. In the past 3 years, numerosity has not generally been a difficult criterion to satisfy group requirements in collective actions on voidance of contractual unfair terms in consumer contracts. Nevertheless, in opting-in actions, proof of impracticability of joinder would be far easier having identified those who expressly intended to be part of the group litigation.

1.5. The provisions of article 12, paragraph (3) of Law no. 193/2000 on **unfair terms** in consumer contracts, introduced an **opting-out** collective redress action. In the first stage, the qualified entities, e.g. associations for consumer protection that fulfil the requirements set by articles 30 and 32 of the Governmental Ordinance no. 21/1992, modified, have the right to introduce judicial claims against a professional whose unilaterally elaborated contracts contain unfair terms. The judge's decision (ordering the professional to eliminate those unfair terms from all existing contracts) will benefit all current customers of the respective professional, unless there are individual consumers who expressly prefer the remaining under the incidence of the original, unmodified contract.

After the professional has been requested by the judge's final decision to remove certain clauses as being found to contain unfair terms in consumers contracts, any consumer who wishes to recover the payments made on the bases of the unfair terms may use either an individual action in redress or compensation (a), either an opting-in action in cases in which several consumers (who initially benefited from the admission of the opting-out collective action on voidance of unfair terms) agree to a common mandate of representativeness. Let us note, however, that, as opposed to the opting-out collective action on unfair terms which is expressly regulated in terms of articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts, there are no specific provisions in Romanian legislation on the subsequent opting-out action in compensatory relief (re-imbursement of previously paid sums based on unfair contractual terms). The later have been admitted by jurisprudence based on the use of consecrated, general procedural mechanisms such as the common mandate of procedural representation (article 60, paragraph (1) of the Romanian Civil Procedure Code).

In matters concerning the opting-out procedural mechanism existent in the field of unfair terms in consumer contracts, no procedural abuses have been signalised. The mentioned system seems to be satisfactory in terms of access to justice and length of procedures.

1.6. An opt-in collective redress mechanism can approach satisfaction of certification requirements more easily than an opt-out group action. As an opt-out group, the personal-injury claimants could have difficulty meeting the ascertainability requirements. Secondly, an opt-in option positively affects notice requirements in two important ways: first, in order to apprise group members of their rights and the opportunity to participate in collective litigation, an opting-in mechanism makes **notification** of potential group members easier and more reliable, due to the fact that the opt-in process permits group members to identify themselves and supply an effective means of future communication. In addition, more active opt-in group members could ultimately reduce notice costs through the use of technology; thus, notice to opt-in group members can be individualized and imply potentially lesser costs.

Furthermore, in terms of the **preclusive effects** of the court's decision, meaning that the final judicial decision is preclusive of all claims that were or could have been asserted in the first proceeding (inadmisibility of future claims between the same parties, on the same objective factual grounds), preclusion should operate only against persons who were formal parties to the first proceedings. By contrast to an opting-out mechanism, an affirmative expression to opt in to group membership is a much clearer manifestation of informed consent, in terms of accepting the potential preclusive effects of introducing the collective redress action.

Finally, group **settlement** between plaintiffs and defendants in litigious circumstances are more transparent and efficient in the case of voluntary adhesion to group proceedings, such as the opting-in mechanisms, mainly due to the fact that opt-in collective redress suffer less from an agency deficit / representativeness deficit than opt-out groups.

In my views, a **mixed system** of collective redress can also favour the ancillary issues of notification of group members, group settlement and preclusion of courts' decisions. For instance, in the cases of collective redress of consumers against the effects of unfair contractual terms, in **injunctive procedures**, the qualified entities may use an **opting-out mechanism** in order to obtain an order imposing the professional to cease the use of the respective unfair terms and to remove the respective clauses from all contracts, including those signed by consumers who did not express an explicit consent to be included, nor excluded (opting-out system). Subsequently, after the emission of the judge's decision in the opting-out injunctive procedure, individual consumers may use an **opting-in collective mechanism for compensatory relief** (not specifically regulated) aiming to obtain reimbursement of the payments made as effect of the unfair contractual terms. The use of an opting-in compensatory relief mechanism is not necessarily subsequent to the admission of qualified entities' opting-out action. Therefore, in my views, opting-out mechanisms are more compatible with the injunctive procedures (the professional being ordered to cease the use of unfair terms in all future and present contracts, all consumers automatically beneficiating from that measure, unless an auto-exclusion act is emitted); opting-in mechanisms are also useful in compensatory relief collective claims (the necessity of establishing individual / total amount of group prejudice). Mixed mechanisms are useful in certain procedural chronology, such as in the case of opting-out collective actions of qualified entities in voidance of professional unfair terms, followed by an opting-in collective action in compensation, based on individual consumers' voluntarily consenting to be part of litigation aiming to obtain reimbursement of the payments previously made as effect of the unfair contractual terms.

1.7. As **shortcomings** of the procedure in national legislation are concerned, at least the following can be mentioned (regarding the application of the mechanism described in the modified version of articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts):

(a) Its material (substantial) sphere of incidence is limited to claims based on the existence of unfair contractual terms, while its subjective or personal sphere of incidence is limited to qualified entities representing collective interests of consumers (not applicable in competition matters);
(b) The mechanisms of qualified entities funding are not explicit, while legal provisions on third party funding of collective redress actions are absent;
(c) The criteria for group certification are not set by the cited regulation;
(d) There are no legal provisions on the matter of who can be admitted as group representative (lawyers, group members, consumer associations, other than the qualified entities in group actions concerning unfair terms);
(e) There is a need for an electronic registration of collective redress claims at national level, implying the electronic registration of each group action after the accomplishing of the certification procedure;
(f) The judicial appeal against collective redress decisions should be expressly regulated[599], in terms of establishing who can be the appellant (group members, representatives, qualified entities, compulsory intervenors) and procedural terms of prescription (for example, 60 days from the notification of member groups on the judge's decision in first instance).

Amongst the satisfactory characteristics of the procedure, at least the following deserve being mentioned:

(i) The certification criteria for qualified entities are thoroughly regulated (although applicable in unfair terms cases only and only to consumer protection associations);
(ii) There are no punitive effects of the collective redress mechanism; thus, the professional defendant would not face a duty to reimburse larger sums than those effectively paid by the plaintiffs, based on the contractual unfair terms;
(iii) Pre-litigation agreements and settlements are admissible in injunctive collective redress, as well as in compensatory collective claims.

2. Issues related to compensation

2.1. The mechanism in place (regulated by articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts) is **limited to injunctive relief**. Compensatory relief is available by the means of individual actions or by common mandate of procedural representation (signed by interested consumers), under the general provisions of the Civil Procedure Code on multiple participation in civil litigation (there are no specific legal provisions on opting-in compensatory mechanisms).

Another injunctive relief mechanism (on collective basis), followed by a subsequent compensatory relief (on individual basis) are described in article 64, paragraphs (5) and (6) of Law no. 21/1996, re-published in February 29, 2016, on **competition,** stating that "(5) Physical or legal persons who consider themselves to have been prejudiced by a commercial practice forbidden by legal provisions on

[599] See, for further details, I. Ilieș Neamț, "Acțiunea colectivă ca mijloc de reparare a prejudiciilor în masă", Bucharest: Universul Juridic, 2017, p. 532-536; E. Roșu, "Acțiunea civilă. Condiții de exercitare. Abuzul de drept", Bucharest: C.H. Beck, 2010, p. 214-217; M. Tăbârcă, "Drept procesual civil", vol. 1, Bucharest: Universul Juridic, 2013, p. 278-281.

competition, may introduce a subsidiary claim in compensation during the next 2 years since the date on which the decision of the Competition Committee remained final or has been confirmed by a court decision. (6) The compensatory claim may also be introduced by an organisation for consumer protection legally registered, as well as by a professional organisation representing the competitors whose legitimate interests have been affected by the anti-competition practice, based on their specific mandate of representation."

Conclusively, the two types of collective relief are described as a hierarchical mechanism by the cited legal texts; (I) first, there is an injunctive procedure, finalised by the Competition Committee' decision or by a court decision ordering the unfair competitor to cease the use of certain anti-competition practices. (II) Subsequently, the legal entities which are entitled to protect the interests of competitors or consumers can bring an action against the violator to refrain from its unlawful conduct and to remedy the defective state in the matters of unfair competition, the admissibility of the later collective action on compensatory grounds being conditioned by the existence of specific mandate of representation from each of the individual consumers or competitors that have been prejudiced by the unfair practice.

2.2. The opting-out collective mechanism for qualified entities regulated by articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts is limited to injunctive relief. Subsequently, after the emission of the judge's decision in the opting-out injunctive procedure, individual consumers may introduce claims for compensatory relief aiming to obtain reimbursement of the payments made as effect of the unfair contractual terms. Amongst the benefits of having compensatory mechanisms, the following deserve to be mentioned:

(a) The court must respect the principle that harm must be fully redressed and may not grant punitive damages; therefore, compensatory collective redress is likely to be more compatible with an opting-in system, especially in cases of bodily and non-pecuniary harm of consumers, as well as in the case of patrimonial loss, in which there is a need for establishing the total / individual amount of prejudice based on the declaration of each individual consumer ;
(b) Reimbursement of the group representative's expenses in injunctive procedures for qualified entities regulated by articles 12-13 of Law no. 193/2000 on unfair terms in consumer contracts allow the qualified entities to recover only any costs of publicising the action (and, obviously, disbursements) of successful proceedings, not compensatory sums for the represented consumers; thus, a compensatory opting-in mechanism is necessary in order to permit consumers to give their consent to a litigious procedure on compensatory grounds.

2.3. There is no specific national fund in place in which damages can or must be allocated, in hypotheses in which there is no individual compensation (for instance, when the individual amounts are too small). I would strongly advise the establishing of this type of national fund.

2.4. Several **shortcomings** could be identified in Romanian legislation regarding these issues:

(a) According to current legislation the competent organizations can sue only for injunctive infringement, not for compensation for individual damaged persons (and only on the ground of Law. 193/2000 on unfair terms in consumer contracts). After this stage, consumers have to file separate lawsuits against professional traders with a claim for damages. Most of the consumers are waiting

for a result of a dispute of a consumer organization as qualified entity and only then according to the particular result they are deciding on whether bringing their claim for compensation to the court;

(b) On settlement issues, settlement between the collective claimants and the defendant could only become binding if all interested parties consented to the settlement. As a result, it might be virtually impossible to conclude settlements in injunctive proceedings initiated by qualified entities, resembling to an opting-out system. In my views, the legislator should provide for a maximum percentage of out-requests; for example, specific legislation could provide that a court-approved settlement will become binding, unless more than 25 percent of the interested parties opt out from the settlement within a month after the settlement has been concluded and served upon the parties.

Amongst the strengths of the national legislation regarding these issues, the following are worth mentioning:

(i) The consumer keeps the possibility of introducing, on individual basis, a direct action; consumers be also be represented in unfair terms litigation by attorneys in an **opting-in system,** based on the traditional "common interest mandate agreement";

(ii) The court would establish the responsibility of the defendant professional, order the defendant to cease future use of unfair terms or unfair practices and would order the measures of information of the consumer potentially concerned towards the professional;

(iii) The court' decision must respect the principle that patrimonial harm must be fully redressed and may not grant punitive damages.

3. Publicity issues

3.1. Publication of judicial decision in collective actions in consumer protection matters is made on the expense of the defendant. According to article 51, paragraph (5) of the Governmental Ordinance no. 21/1992, re-published, on consumer legal protection (the applicability of which is general, as the cited text do not mention collective redress), there are rules requiring the infringing trader to adequately inform the consumers concerned about the final injunction orders, final decisions on measures eliminating continuing effects of the infringements, including final redress orders.

3.2. The judge's orders in collective injunctive relief (decisions ordering the professional defendant to cease the use of certain unfair terms or unfair practices) are may be published in the form and by the means established by court, being exposed for a period between one and three months. Should the court had decided to order the defendant to expose the judicial decision in mass-media, the court decides on the number of displaying issues in audiovisual media (no less than 10) or, upon the case, on the period of decision display (no longer than three months).

3.3. In my views, further attention should be paid to the terms and modalities of the most appropriate form of notice to communicate to the public the admission of the collective injunctive claim (introduced by a qualified entity, on an opting-out bases), so that those belonging to the group might join the potential subsequent action in compensatory relief. For instance, there should be a term (not longer than 90 days or three months) starting from the date in which the succesful group action in injunctive relief is communicated to the public, within which the persons falling into the category of

the consumers or competitors qualified to join the subsequent compensatory action must file their application to join the subsequential compensatory proceedings (on an opting-in basis).

4. Financial issues

4.1. The Romanian civil procedure legislation doesn't provide for particular provisions with regard to the legal costs and funding of the collective redress action. The Civil Procedure Code contains only general provisions, mentioning that the court will not approve collective settlements if the representative's pretended procedural costs exceed the costs that were effectively made. There are no specific legal provisions on the contingency fees in collective redress actions. Similarly, the court will not approve the total amount of the lawyers' remuneration if it is obviously disproportionate to the complexity of the litigating procedures (article 451, second paragraph of the Civil Procedure Code).

On the other hand, the defendant who, on the first term of discussions in court admitted / agreed to the entire plaintiff' claim, will be exonerated from the obligation to pay the procedural expenses, pursuant to article 454 of the Civil Procedure Code.

4.2. In my views, "the loser lays principle" should be correlated with the existence of a national fund from which procedural expenses for injunctive collective redress to be financed, thus not deterring consumers or competitors from remaining under the litigation (not motivating the use of their right to opt out on financial concerns related to a potential lack of success of the group action. Current legal provisions are silent on the possibility of establishing a national fund for collective redress; the practical consequence of this legislative gap is that the group members, acting as claimant party, might be held responsible for all the costs and funding related to the collective action, which in practice might have **deterrent effects** on the use of group actions.

4.3. The successful party can recover the court fees, as well as its own legal costs and other expenses in proportion to the amount for which the claim granted, pursuant to art. 453, paragraph (1) of the Civil Procedure Code. The "one who loses pays" rule applies but the "losing party" could also request cost recovery in proportion to the amount of the claim, which was not grounded, should the plaintiffs' claim be admitted *pro parte,* as stated in art. 453, paragraph (2) of the Civil Procedure Code. If the collective claimant loses the group litigious proceedings, the legal costs will be shared *pro rata* by all the claimants (depending on the value of the respective claims, according to article 455 of the Civil Procedure Code).

4.4. Third party funding of collective actions is **not regulated** in the Romanian legal system (not expressly allowed under specific conditions, nor is it expressly prohibited).

4.5. In my views, there is definitely a need for express regulation on third party funding of collective actions that would avoid abusive conduct (for example, prohibiting the financing of a group action by one of the defendant's competitors, in competition law). There is also a need for drawing up the criteria based on which the third party funding would be admissible (transparency of the funding, **prohibiting the use of *quota parte litis* clauses or pacts** – legal provisions should prohibit the third party

financer to participate on certain percentage basis to the distribution of compensatory sums obtained by the admitted group action of consumers / competitors.

4.6. There are at least two potential risks related to the funding of collective actions: the one related to the deterring effect of the "loses pays principle" in the case of rejection of group actions and consequently, the necessity for establishing national fund; the second relates to the need for express regulation on third party funding as to avoid abusive exploitation of the defendant' vulnerability by its competitors, as well as the abuse generated by the use of *quota litis* pacts or clauses allowing third parties to participate in the distribution of consumers' compensatory sums.

5. Issues of private international law

5.1. The Romanian legislation does not specifically address the matters of international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.). According to article 15 of Law no. 193/2000 on unfair terms in consumer contracts, "In cases in which the contractual parties have selected the legislation of another state non-member of the EU, as applicable to their contract, and the contract presents a strong conection to the Romanian territory or to the territory of another Member-State(s), if the Romanian law contains more favourable provisions, these will become automatically incident in that case."

5.2. In terms of potential abuses related to the extension of jurisdiction or to parallel proceedings, there is a need for harmonised certification criteria (group certification / qualified entities certification).

5.3. As mentioned in the cited legal text, in terms of appropriate ways of dealing with abuses, choice of law by litigants remains the rule; nevertheless, the most favourable national legal provisions will prevail over the parties' choice of law, in cases in which at least one party is a consumer (natural person acting outside a professional purpose).

6. Issues related to alternative dispute mechanisms

6.1. In the Romanian legal system, mass harm events could be alternatively solved through the mechanism of consumer ADR partly regulated by the 2013 ADR directive, transposed in national law by the Governmental Ordinance no. 38/2015 on the alternative dispute resolution of conflicts between consumers and professionals.

6.2. There are undeniable opportunities lying with alternative dispute mechanisms, such as lesser costs, prompt response (up to one to three months), etc.

6.3. Amongst the shortcomings of the legislation on alternative dispute mechanisms it deserves to be mentioned the lack of sanctions for the professional who generates for the consumer the legitimate expectations that the dispute will be subject to the ADR *online* mechanisms, followed by the professional deliberate or negligent delay in displaying or providing proofs (contractual documents, for instance) on the request of the specific ADR entity, thus disabling the task of the mediation committee to assist the parties in reaching a solution and unjustifiably delaying the prompt response to consumers' claims.

7. Issues for practitioners

7.1. Legal practitioners experienced on their practices difficulties relying on the proper criteria for group certification (meaning of the common cause, mass damage, similitude of members' prejudices, non-sustainability of procedural joinder of claims, third parties as intervenors in collective litigation etc.)[600].

7.2. Certain actors with legal standing (for example, lawyers standing as group representatives in collective actions in compensation) experienced difficulties in proving the existence of a valid mandate of representation; future legislation should provide criteria for delimiting specific mandates (for one specific litigious object) from general mandates (all procedural acts necessary for the discussing of the collective claim); similarly, it should specify if the general mandate of representation includes or not the mandate to agree to settlements or to introduce an appealing action against the decision in first instance.

7.3. One of the difficulties experienced in practice is that of lacking regulatory provisions on the judge's possibility of imposing on the defendant, per request of the group plaintiff filed no later than with the first action pertinent to the litigation, to make a **deposit** (for instance, within a deadline of no less than a month), to secure legal costs. The value of the deposit would be set by the court, taking into account the probable total costs to be incurred by the litigating party.

Another difficulty lies with the facts that repair of mass injury is not legally set out, or the fact that future legal provisions should separate compensation for damages to identified holders of interests, calculated under the general terms of civil liability, and the global **determination of compensation** for violation of the interests of unidentified holders, on the other hand. However, the Romanian law does not establish any system for sharing the global compensation between injured parties in collective redress actions, nor does it set out the possibility of payment of moratory damages (for the professional defendant who lost the case, causing deliberate or negligently delay in the payment of compensatory sums as stated in the judge's decision) in line with the general rules of civil liability compensation (future legislation on collective actions should address the issue of moratory interest relating to or resulting from delay in the payment or performance of an obligation).

8. Trends. In Romanian jurisprudence, one witnessed a trend towards a growing use of collective redress mechanisms in the field of collective actions in voidance of unfair banking terms in consumer credit contracts[601], favoured by the large number of consumer credit contracts in which the allegedly unfair terms were inserted (for example, more than 400 clients of the same bank / creditor opting in for a collective compensatory claim and requesting the refund of the sums previously paid as the effect of unfair terms on onerous banking services).

II. TOWARDS A EUROPEAN INSTRUMENT

1. Impact of EU instruments on your legislation

[600] See, for details, E. Roșu, "Acțiunea civilă. Condiții de exercitare. Abuzul de drept", *cit. supra*, p. 226-232;
[601] See, for further details, I. Ilieș Neamț, "Acțiunea colectivă ca mijloc de reparare a prejudiciilor în masă", *cit. supra*, p. 241-244.

1.1. In my views, there a need for a binding instrument at the EU level, not only in terms of accelerating the adopting of harmonised national regulations on injunctive / compensatory collective actions, but also in terms of setting a common frame of reference for crucial issues such as: certification procedure for group / qualified entities, collective action funding, third party funding, settlement and appealing.

1.2. The EU Recommendations on the common principles for collective redress of 2013 had a small impact on Romanian legislation and jurisprudence, mainly due to the non-binding nature of the instrument (recommendation), as well as to the traditionally favouring of individual actions in the provisions of Civil Procedure Code.

1.3. In my view, Romanian legal system will definitely benefit from such an instrument, which will have a positive impact, in terms of extending the applicability of collective mechanisms (currently limited in Romanian legislation to the cases of collective action for removal of the abusive provisions comprised by the standard agreements concluded between professionals and consumers and to collective actions for the cease of unfair competition practices).

1.4. The implementation of a collective redress mechanism at a EU level will nor introduce, in my opinion, a significant risk of abusive litigation. However, minimum safeguards should be put in place concerning: (a) the criteria for third party funding of collective actions, (b) postulating the principle that no punitive damages may be inflicted upon the defendant, other than the compensatory damages for effective loss, (c) setting out adequate criteria for group / entities certification, (d) avoiding the artificial character of numerical standards for group admission (for instance, requesting groups to overpass a fixed number of members, such as 500 or 900 members, would abusively deter smaller groups to use collective redress mechanisms; therefore, the existence of a group would be considered starting from two persons the legitimate interests of whom have been prejudiced by a common cause etc.).

2. Building an EU instrument

2.1. The **minimum harmonisation** would be recommendable, regardless of the type of collective mechanisms which are regulated (opting-in, opting-out or mixed mechanisms). This way, national legislation may exceed the terms of the regulation if desired (for example, by establishing national criteria for the certification of qualified entities, such as a certain period of activating in the field of consumer protection or in competition law).

2.2. The minimum requirements / rules contained in such an instrument are those referring to the admissibility of actions, plaintiffs' standing, joining the group, forms of redress (injunctive / compensatory).

2.3. In my views, there is a need for disjunction between the injunctive collective procedures (which might be opting-out based) and the compensatory collective relief (which might be regulated on an opting-in basis. In both cases, the certification procedure must be thoroughly regulated, both in terms of group certification criteria and of qualified entities certification.

3. A New Deal for Consumers

3.1. In my opinion, the European Commission's proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" is sufficient, in terms of scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy and determination criteria for qualified entities.

5. Alternative dispute resolution

In order for a European instrument on collective redress to be articulated with alternative dispute resolution mechanisms / amicable settlements, there is a need for:

(a) national / European electronic registration of collective actions, permitting consumers / competitors under Competition law the *online* filing of the mandate of representation forms in opting-in compensatory claims,

(b) the expanding of the existing ADR online mechanisms as to include the possibility of pursuing group claims both for compulsory and for non-compulsory mediation,

(c) the use of ADR online mechanisms would be exceptionally useful in cross-border disputes, in terms of reducing the procedural costs and time saving.

III. DATA AND STATISTICS

There are no reliable statistics for representative collective claims or for collective redress actions in injunctive procedures concerning unfair terms in consumer contracts, although these have been regulated by articles 12-13 of Law no. 193 / 2000, modified in 2012. Since the collective redress mechanisms are not autonomously or expressly regulated by specific legal provisions or by the Romanian Code of Civil Procedure (except in the case of unfair terms legislation on consumer protection), only indirect mechanisms are used (joinder, voluntary and compulsory third party intervention, common interest mandate etc.). Another reason for this is the lack of publicized information (on the number of actions brought which are most resembling to group litigation, number of claimants, success rates, failure, damages awarded, percentage of actions).

Spain

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I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…)?

Spain recognizes collective redress mechanisms in a variety of specific sectors including consumer law, environmental law, competition law, antidiscrimination law, labour law and industrial property law (trademarks). Additionally, standard form contracts can be challenged via collective redress actions horizontally, disregarding the sector in which they are applied.
In most of the sectors, collective redress does not include compensation. Instead, this is expressly admitted in respect of the challenge of standard terms and in actions arising from the infringement of consumer law.

1.2 Who has standing?

In the absence of a horizontal mechanism of collective redress, standing depends on the sector. In labour law, standing is granted to trade unions. In anti-discrimination law, standing is recognized to associations whose main purpose is to pursue the equality between genders, as well as trade unions and the public prosecutor. Standard terms can be challenged by: corporate associations, professional associations, consumer associations and the public prosecutor.
Collective redress in consumer law deserves a special mention for its importance (is one of the two –with anti-discrimination- included in the national *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil,* Civil Procedure Act) and complexity.[603] The Spanish system of collective redress is based upon the distinction of "collective" and "diffuse" interests (Art 11 Civil Procedure Act). This two-fold categorisation is original and has no relation with, for example, the definition of "collective interests" that the Injunctions Directive (Dir. 2009/22/EC, Recital 3)[604] provides for.
An action based on collective interests can be filed when it affects consumers who are determined or may be easily determined. Instead, interests are deemed to be "diffuse" when the consumers affected by a certain event are undetermined or it is difficult to individualise them. Therefore, the degree of possibility to determine the consumers aggrieved marks the action.

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[602] I am grateful to Prof Sara Sánchez for her insights on private international law. Usual disclaimer applies.
[603] BOE Nr 7 of 8.1.2000.
[604] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ [2009] L 110/30.

Standing is also dependent on the aforementioned two-fold categorisation of interests. Where the interests are collective –i.e. consumers easily identified-, standing is granted to consumer associations, the public prosecutor, as well as a group of affected consumers that represents the majority of them. All the class should be notified before the action is filed. If the interests are diffuse, standing is only granted to representative consumer associations and the public prosecutor. There is no need to previous notification but this is ordered by the court once the action is filed. However, if the action seeks injunctive relief, there is no need for notification at all.[605]

1.3 How does certification work in practice in your country? If there is no such mechanism, what is there instead?

There is no express regulation on certification. Judges decide this on a case-by-case basis with no clear legal rules. Admission of a collective action controls the standing of the claimant. It additionally includes an implied control of commonality – yet it is not expressly regulated as a requirement, beyond the aforementioned distinction of collective and diffuse interests.

1.4 What are your views on certification of the entity (e.g. qualified association)? What are your views on certification of the group?

In the absence of a formal certification of the action, in practice control is mostly restricted to a formal assessment of the characteristics of the claimant.
As regards the group, in the absence of certification, collective redress has not been admitted when courts have not found sufficient commonality. This occurred, for example, in an action for the annulment of identical contracts on the basis of mistake, as the individual elements involved in an action for a vice of consent where considered to impede a collective action.[606] On the contrary, the action for collective redress was admitted in several procedures that challenged standard terms in consumer banking contracts, even though the action was based on a lack of transparency – and despite the Supreme Court seems now leaning to a subjective (or personal) assessment of transparency,[607] allegedly departing from CJEU *Kásler*.[608]

1.5 Is the system opt-in or opt-out? How does it work in practice? Does it give rise to abuses? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings?

The Spanish collective redress system is drafted in an extremely complex manner and it is very difficult to provide a straightforward answer to the issue. The system does not expressly decide for an opt-in nor for an opt-out mechanism. Additionally, due to an increase in litigation, its contours are still being heavily shaped by case law. The inconsistencies of the Spanish system to this respect create uncertainties to stakeholders.
As said, there is no clear indication in the Civil Procedure Act nor in specific legislation that deals with collective redress on the system being opt-in or opt-out. Therefore, the

[605] Arts 11 and 15 Civil Procedure Act.
[606] Decision of the Commercial Court Nr 5 of Madrid of 16 February 2017 (ES:JMM:2017:12).
[607] STS (1ª) 9.3.2017 (ES:TS:2017:788) and STS (1ª) 8.6.2017 (ES:TS:2017:2244).
[608] CJEU C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt* [2014] EU:C:2014:282.

appropriate way of understanding where the system lays is looking at the res judicata effects (erga omnes or not) of judgments rendered in collective procedures.

As a rule, the Civil Procedure Act (Art 221.1) allows courts to extend to third parties (on a case by case basis) the effects of decisions rendered in consumer collective proceedings, when the ruling condemns the business to do, not to do or give something (including monetary obligations). Judgments can also have erga omnes effects (which is to be decided by the court) if they declare that a certain activity of the business is illegal or against mandatory law. This may give the impression that only decisions that favour consumers could have erga omnes effects ('*secundum eventum litis*'). However, when dealing with res judicata (in general, i.e. not restricted to consumer protection), the Civil Procedure Act (Art 222.3) establishes that res judicata of collective proceedings affects all members of the class whether litigant or not. Following this, the majority of scholars understood that judgments rendered in collective redress proceedings had erga omnes effects (whether favourable to the claimant or not. In this sense, STS 1ª 17.6.2010). Therefore, the prevailing opinion was that the effects of the Spanish collective redress system as regards third parties (erga omnes) was similar to that of an opt-out. This is curious as the system seemed to operate in a way similar to opt-out legislations (res judicata effects for all affected parties), but without the possibility of, precisely, opting-out.

However, in *Sales Sinués*[609] the CJEU limited this possibility by deciding that a collective action could not impede consumers from bringing an individual complaint (not even the same claim, although individually, against the same party is restricted) as this would affect the right to an effective and adequate protection in the sense of Directive 93/13 (UCTD).[610] The CJEU was dealing with pendency, the logical procedural stage prior to *res judicata*, and the defence had been brought by banks, which had been sued in both collective and individual proceedings. *Sales Sinués* proved to be a great challenge to the third party effect of collective actions, the fate of which seems to have been decided by the lack of possibility to 'opt out' in the Spanish collective redress system (which was declared contrary to Art 7 UCTD).

Following *Sales Sinués*, the Spanish Supreme Court and the Spanish Constitutional Court have been seriously qualifying the third party effect of collective proceedings, at least in the context of B2C contracts. Although it is early to draw a conclusion, for the time being the Supreme Court has not extended the effects of decisions rendered in collective proceedings to third parties if the judgment was not favourable to the consumer.[611] Therefore, non-litigant consumers can profit from the res judicata effects of collective proceedings if it favours them, whereas businesses cannot oppose non-favourable aspects of judgments rendered in collective proceedings to individual claimants. This seems to put the Spanish collective redress system, as it stands, in an awkward position in the international arena: neither opt-in (in which judgments have no res judicata effects on members of the class that do not join) nor opt-out (in which judgments have res judicata effects, whether favourable or not). It admits consumers to join the proceedings (as in opt-in systems) but even if they do not join they can profit from favourable decisions rendered in collective proceedings in subsequent individual actions.

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[609] CJEU C-381 & 385/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)* EU:C:2016:252.

[610] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/29.

[611] SSTS 24 February 2017 (ES:TS:2017:477), 25 May 2017 (ES:TS:2017:2016) and 6 June 2017 (ES:TS:2017:2249) do not extend the effects that were not entirely favourable to consumers. STS 8 June 2017 (ES:TS:2017:2244), instead, considers that the favourable effects should be extended to individual proceedings.

1.6 What are your views on both systems (opt-in / opt-out)? What are your views on mixed systems?

Based on the Spanish experience, clarity is an asset. Opt-out systems seem to be the best in achieving the aims of collective redress, in particular, deterrence especially in small (but spread) claims. Opt-in mechanisms are less efficient to that end. Mixed systems (as the Spanish now looks) are not necessarily worse. However they might foster the dissemination of proceedings, complicating the functioning and timing of the administration of justice. Nevertheless, they can provide an optimal combination of respect for the individual right to justice (especially when information to the members is not easy) and deterrence of defendants.

1.7 What shortcomings could you identify, if any? What satisfactory characteristics of your system could you identify?

See 1.5 and 1.6.

2. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available?

The system of collective redress is not horizontal but sectorial. The answer to this, thus, depends on the sector. For the purpose of this study, consumer collective redress allows for both injunctive and compensatory relief.

2.2 Is injunctive relief sufficient or compensatory relief also necessary? In the latter case, could you please specify the benefits of having compensatory mechanisms?

Injunctive relief has proven to be insufficient for mass damages and, particularly, as regards small claims, both typical of consumer cases. Compensatory mechanisms are better suited for them and they additionally augment the deterrent effect. Recent case law in Spain regarding unfair terms in banking contracts has shown the efficacy of collective redress not limited to injunctive relief.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated? If not would you advise such a fund?

Such fund does not exist. Depending on the rules that would create that fund, it could foster deterrence of unlawful practices while, at the time, preventing abusive litigation.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any? What are the strengths of your legislation regarding these issues, if any?

The Spanish collective redress system, as it stands, has simplified compensation of consumers and has even fostered ADR with non-litigant parties in similar situations to

those in litigation. The alternative to collective compensation would be joint actions but these have not worked well with large number of claimants, as the law does not provide for specialities. Therefore, joint actions follow ordinary proceedings. In a recent case with nearly 15,000 claimants, proceedings were unduly long and complex, to the detriment of both consumers and the functioning of courts.

3. Publicity issues

3.1 How are collective actions publicized in your country?

This is detailed for consumer collective redress (Art 15 Civil Procedure Act). The secretary of the court shall publicize the action in the media (national, regional or local, depending on the scope of the action) once it has been admitted. Thus, this effective way of communication replaces the traditional means of making court orders public (the Official Gazette). In addition to this, if the affected interest is "collective" (see supra 1.2), all the class should be notified before the action is filed. Instead, if the action seeks injunctive relief only, there is no need for notification at all.

3.2 Who is responsible for the publicity of collection actions? Who bears the costs of such publicity?

As said, the court secretary is responsible for the publicity of a collective action. It is unclear who bears the costs of publicity. In the absence of an indication to the contrary, the claimant should pay for it and, if successful, could pass the cost to the defendant, following the 'loser pays rule'.

3.3 Overall, is publicity regarding collective actions an issue in your country?

The main issue concerning publicity has to do with the type of publicity required. As seen (3.1 above) this depends on the action (injunctive or compensatory) and the type of affected interest (collective or diffuse). Issues have arisen in respect of injunctive proceedings that cumulate compensatory actions. In certain cases, consumer associations asked for the exemption of notification (admitted for injunctions), with their request being accepted on occasion. This gave room for defendants to challenge the validity of proceedings. Additionally, in case of the protection of "collective interests" (in the sense of the Civil Procedure Act), individual notice of the action can cause serious delays in proceedings, stemming from the difficulties in identifying the aggrieved parties.

4. Financial issues

4.1 Are legal costs regulated? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction?

The Civil Procedure Act regulates legal costs (art 241), although there is no specificity for collective actions. Legal costs include representation fees (attorney and court representative), the costs of publications, expert reports, copies of documents and the court fees whenever applicable. Of these, the most expensive cost is usually the fee of attorneys. The party and her attorney can freely agree on the latter's fees, including contingency. However, when the winner is entitled to allocate that cost to the loser party,

the court takes into consideration a scale that regional bar associations prepare. This scale takes the quantum of the proceeding as a basis for calculation and does not accept contingency fees. Therefore, it is possible that, via the application of the loser pays rule, the claimant or the defendant receive from the counterparty less or even more than she actually paid to her attorney.

4.2 What are your views on "the loser pays" principle?

It is traditional in Spanish litigation and works well. From a practitioners' point of view, it calls claimants to reflection of the certainty of their rights and it thus serves as a deterrent to abusive litigation.

4.3 Is the "loser pays" principle applied? If so, does it work as a deterrent in practice?

See 4.2.

4.4 Is third party funding regulated in your country? If so, how? If third party funding is prohibited, does it have an impact on access to justice?

Spain has not regulated third party funding and, for the time being, it is not an extended practice in litigation.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.)?

If we focus on collective redress and its current regulation in Spain third party funding does not seem to be of prime importance as the parties that have standing (consumer associations, public prosecutor, etc.) have the right to litigate for free (including the right to a lawyer and the exemption from court fees). These fees and honoraria are a relevant cause for third party funding, which might make it redundant in Spain (once again, in this context). However, it is also true that parties tend to prefer to choose their lawyer of trust, which is not comprised in the right to litigate without costs. Here is where third party funding could (and does) make sense. Third party funding would require regulation to prevent conflict of interests and an inflated litigation.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place?

Spain has a generous system of legal aid that ensures that people with low income have free access to court and free representation.[612] Therefore, costs are not a significant barrier to justice. This can also be enjoyed by the major entities who have standing in collective redress. The main risk could come from a larger presence of third party litigation that might bring along abusive litigation.

5. Issues of private international law

[612] Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita, BOE Nr 11 of 12.1.1996. Art 3 sets the cap in the double of the minimum wage (EUR 537,84/month in 2018; i.e. EUR 1.075,68/month for these purposes).

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation? If so, how? Is it satisfactory in practice?

The basic regulation in Spain of international jurisdiction is Regulation 1215/2012 (Brussels I Regulation recast) does not contain any provision in relation to collective redress. Scholars complain about the lack of a clear answer. If Brussels I recast is not applicable (or any other convention), arts. 22 et seq of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*, as amended in 2015, apply.[613] The rules in this statute are similar (no specific provision).

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings?

N/A in respect of collective redress.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants?

Brussels I Regulation recast offers alternative fora for claimants (e.g. defendant's domicile, choice-of-court agreements or *locus damni*) and thus it provides for forum shopping, which is not regarded as negative (claimants can choose the most favourable system for their interests). As fora are alternative in the Brussels I recast system, a *lis pendens* rule is established (within the EU, based either on temporal priority or priority of the court chosen -in the case of choice-of-court agreements-).
It seems that a way to deal with abuses may be by means of recognition and enforcement in another jurisdiction under Brussels I recast (for instance, refusing to recognize/enforce on public policy grounds if the system follows an "opt-out" mechanism, as some scholars argue). If a judgment is made by the courts of a Member State, Brussels I recast applies. Otherwise, and unless a specific international convention applies, Ley 29/2015, de 30 de julio, *de cooperación jurídica internacional* would be applicable.[614] It regulates the recognition and enforcement of collective actions in article 47. It states that such judgments are recognized and enforced in Spain unless the international jurisdiction of the court of origin was not grounded on a forum equivalent to those established under Spanish law. However, such judgment would not have effects vis-à-vis those who did not expressly adhere to the foreign collective action, unless the collective action has been published in Spain by means similar to those established under Spanish law, and they had had the same opportunities to participate/opt out the foreign collective action to those parties domiciled in the State of origin.

5. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

[613] BOE Nr 157 of 2.7.1985.
[614] BOE Nr 182 of 31.7.2015.

Three successful mechanisms are worthy to be mentioned. (1) Consumer arbitration which according to official figures has solved 1/3 of contentious claims; (2) Codes of Good Practices that in certain sectors prevent conflicts by self-regulation of traders (Advertising and insurance, for example); and (3) Specific administrative proceedings that exist in regulated sectors (such as telecommunications) in which reimbursements of undue payments can be ordered – yet not damages.

6.2 What opportunities do you identify with alternative dispute mechanisms?

Shortening of proceedings, reduction of costs (in self-regulated ADR mechanisms or state-funded) and increase of settlements.

6.3 What shortcomings do you identify with alternative dispute mechanisms?

The lack of an established tradition in the country. The optional character of ADR, which deprives it from effectiveness.

6. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices?

There has been an increase in consumer litigation. This is evident from the fact that qualified entities have filed more collective redress actions. As a side effect, it is now that the system of collective redress is really being put to the test and when its flaws appear. In addition to collective actions, a notorious number of individual (but identical) actions, especially against financial institutions, have invaded the scenery. This is (among others) the result of a defective regulation of certification, especially in respect of commonality – with practitioners fearing to claim collectively. The decreasing scale of fees that courts take as a reference when applying the loser pays rule might also explain why practitioners prefer to claim individually.

7.2 What impact have actors with legal standing (for example, qualified entities) experienced?

N/A

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved?

Collective consumer redress has seriously altered the administration of justice in Spain. Collective actions have been followed, in most cases, by individual proceedings claiming compensation. In order to tackle this issue and prevent general delays in all courts, handling of similar cases has been, on a particular occasion (the challenge of floor clauses in loans) allocated to specifically assigned courts. The interaction of national law with EU law has incremented the requests for a preliminary rulings of lower instance courts to the CJEU, often challenging the views of the Supreme Court. This has introduced certain inconsistencies in the hierarchy of national courts. Overall, the whole system has been put to the test, not with entire success.

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country? If so, in which fields in particular and why? If not, is there any specific reason?

Indeed, Spain has experienced a notorious growth of collective actions, specifically in consumer law (banking contracts in particular). The origin can be traced to the global financial crisis that, in Spain, shook family economies particularly harsh. Relevant collective actions succeeded in respect of unfair terms in mortgage loans that brought relief to consumers. Other mass claims followed. From there, a new culture seems to be rooting in the country with collective redress expanding as a result of it.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

Indeed. In fact, recent cases (such as the so-called Dieselgate) demonstrate that a common framework would enhance the protection of consumers. Harmonisation could bring along clear basis for the central aspects of collective redress that are absent in Spanish law.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise? If so, of which nature (satisfactory or not)? And if not, why is that?

The EU Recommendations of 2013 did not have a practical impact in Spain. The non-binding character of the instrument entailed no reform to the national system of collective redress.

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted?

Spain would certainly benefit from an instrument at EU level that could provide clarity and legal certainty in the field, as fundamental requirements of collective redress actions are dubious in Spanish law. It could also be beneficial for cross-border litigation.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation? If so, what minimum safeguards should be put in place?

I do not envisage that a collective redress mechanism at a EU level would lead to abusive litigation. Instead, I believe that it would bring more litigation of currently unclaimed credits. This could have a positive deterrence effect. In any case, the EU instrument should take certain measures in order to prevent abusive litigation. In respect of

standing, representative (not for profit) consumer associations should be accepted as well as public prosecutors. Others should be carefully assessed. As regards fees, contingency fees should be restricted.

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend?

It is difficult at this stage to decide upon the level of harmonization. Increasing cross border cases would justify a maximum harmonization approach (Regulation or a Directive that seeks maximum harmonization). However as some EU member have already developed established collective redress mechanisms, a less intrusive approach could also make sense.

2.2 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress)?

As regards the minimum requirements, the EU instrument should provide for certification (and exceptions) and the main requirements for admissible collective actions including numerosity, commonality, typicality and the adequacy of representation. Of course, the instrument should decide if collective redress actions would be opt-in or opt-out (as said, the latter is to be preferred).

2.3 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)? At this stage, the instrument should be restricted to consumer protection.

3. A New Deal for Consumers

8. The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities)?

No. The proposal is rather vague in certain aspects, notoriously as regards procedural complications.

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements?

The EU instrument should be coordinated with ADR mechanisms and should regulate collective settlements as the experience of foreign jurisdictions show that most actions for collective redress are settled once certified. In particular, it should allow for judicial assessment of the settlement that, ideally, should also be opt-out.

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with?

A distinction should be made between claimants and defendants. The main difficulty of opt-out collective redress mechanisms relates to the notification of the action to third country nationals – an essential component of the right to a fair trial. This could justify an opt-in mechanism for aggrieved parties whose permanent residence were not located in the EU. This problem does not occur as regards traders, which can be identified and (with more or less difficulties) be notified.

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress?

III. DATA AND STATISTICS

1. Are data and statistics on collective redress available in your country?

No.

*2. **Types of data available** : Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ? **Please provide appropriate statistics for each**.*

N/A

If you are unable to provide us with such data, could you please indicate us why (lack of publicised information etc.) and/or who to contact? The information on judicial proceedings is organized upon the type of proceeding. As collective redress actions follow the ordinary one, it is not possible to isolate data concerning them.

The Netherlands

Members of TEE

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

Brief overview:

In the Netherlands a new law with regard to mass claims is in the making. Article 3:305a Civil Code (introduced in 1994) authorises incorporated foundations and associations with full legal capacity to file claims pertaining to the protection of common interests of other persons, requesting either a declaratory judgment, a prohibitory in-junction or mandatory positive injunction, or the publication of the court decision if and insofar such an organisation represents these interests pursuant to its articles of association. The article doesn't allow for any collective claim for monetary compensation. New legislation which will allow for a damages class action, has been proposed and is now being discussed in parliament. The new legislation will leave the Collective Settlement of Mass Damage Act (WCAM, introduced in 2005) in place. The WCAM, based on article 7:907 of the Dutch Civil Code enables the Amsterdam Court of Appeal to declare binding a settlement concerning payment of compensation, concluded between the allegedly liable party on the one hand and a foundation/association acting in the aligned common interest of individuals involved (and injured) on the other hand. If the Court rules in favour of the settlement, it will declare the settlement binding upon all persons to whom damage was caused and that are accommodated by the settlement. Individual interested parties are given the opportunity to opt out of the settlement; original parties have limited possibilities to appeal; nullification of the settlement for misrepresentation is not allowed.

1. Issues related to the scope and mechanism of the instrument(s)

1.15 What is its scope (consumer only, horizontal…) ?

The Collective Settlements of Mass Claims Acts and the collective action procedure based on articles 3:305a-d of the Dutch Civil Code are both **horizontal** collective redress mechanisms.

1.16 Who has standing ?

Under Dutch law, standing is **only granted to specific entities**, therefore a natural person or member of the group will not have standing. The criteria surrounding standing are contained in article 3:305a paragraph 1 and article 7:907 paragraph 1 of the Dutch Civil code depending on the instrument at stake. Those criteria refer to legal capacity as well as the foundation or association's statutory object or articles of association. It is worth mentioning that more restrictive requirements are contained in the most recent Dutch proposal on the matter which provides that only representative, non-profit bodies that can show that they have the experience and expertise to bring a collective action as well as a proper governance structure, may bring a case. However, this is only possible after it has made reasonable attempt to settle.

1.17 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?

There is no certification of the group. There are criteria surrounding the ability of an entity to have standing.

1.18 What are your views on certification of the entity (eg. qualified association) ? What are your views on certification of the group ?

1.19 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses ? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

The system is opt-out for both instruments, one of the rare opt-out only system in Europe. The opt-out rule can be found in article 3:305a paragraph 5 of the Dutch Civil Code.

1.20 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?

1.21 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

2. Issues related to compensation

2.9 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?

The result depends on the instrument at stake. Indeed, while under the Collective Settlements of Mass Claims act injunctive as well as compensatory relief may be sought, the other instrument (the collective action procedure based on articles 3:305a-d) is confined to injunctive relief and/or a declaratory decision.

2.10 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

Compensatory relief is also necessary as injunctive relief merely puts an end to the harm but does not repair the harm which has been done and the damages it has caused.

2.11 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?

2.12 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

3. Publicity issues

3.7 How are collective actions publicized in your country ?

Notification is done by an announcement in one or more newspapers chosen by the court which approved the settlement.

3.8 Who is responsible for the publicity of collection actions ? Who bears the costs of such publicity ?

Regarding the Collective Settlements of Mass Claims Act, such modalities are determined in the settlement agreement.

3.9 Overall, is publicity regarding collective actions an issue in your country ?

No.

4. Financial issues

4.13 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

Several aspects of legal costs are regulated by Dutch Law. Court fees are regulated by the Wet griffierechten burgerlijke zaken and the amount of the fee is based on the table annexed to the law. As for lawyers' fees, they are freely agreed upon with one limit: contingency fees are prohibited.

4.14 What are your views on "the loser pays" principle ?

It is necessary in order to avoid illegitimate and frivolous proceedings.

4.15 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?

Yes.

4.16 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?

Third-party funding is not regulated yet.

4.17 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?

4.18 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

5. Issues of private international law

5.7 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?

The international dimension of collective redress is taken into account by the Dutch Civil Code but only regarding standing. Indeed, for both instruments organisations or public body with full legal capacity which have their seat outside of the country but are on the list referred to in the Injunction Directive have standing to bring a legal claim before the Dutch courts for the protection of interests of individuals domiciled in the country where the entity has its seat. However, there is no specific rule regarding joining the group where claimants reside in different states nor regarding publicity.

5.8 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?

No.

5.9 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

6. Issues related to alternative dispute mechanisms

6.7 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.) ?

The main procedural tool in the Netherlands is based on an alternative dispute mechanism.

6.8 What opportunities do you identify with alternative dispute mechanisms ?

Flexibility, speed of the proceedings and relieving the judiciary.

6.9 What shortcomings do you identify with alternative dispute mechanisms ?

7. Issues for practitioners

7.7 What impact have legal practitioners experienced on their practices ?

7.8 What impact have actors with legal standing (for example, qualified entities) experienced ?

7.9 Overall, what are the difficulties and opportunities experienced by all actors involved ?

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason ?

II. TOWARDS A EUROPEAN INSTRUMENT – *refer to study.*

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

18.Impact of EU instruments on your legislation

1.9 In your opinion, is there a need for a binding instrument at the EU level or not ?

1.10 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

1.11 In you view, would your country benefit from such an instrument, or be negatively impacted ?

1.12 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

19.Building an EU instrument

2.7 If you are in favour of a European instrument, what level of harmonization would you recommend ?

2.8 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress) ?

2.9 What should be scope of the instrument (horizontal, standing, certification, opt-in etc.)?

20.A New Deal for Consumers

3.1 The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?

21.Alternative dispute resolution

4.3 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

22.Cross-border cases

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with ?

23.Issues related to Brussels I bis

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress ?

III. DATA AND STATISTICS

5. Are data and statistics on collective redress available in your country ?

*6. **Types of data available** : Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields (competition, consumer law…), number of cross border cases (and success / failure rates) etc. ? **Please provide appropriate statistics for each**.*

If you are unable to provide us with such data, could you please indicate us why (lack of publicised information etc.) and/or who to contact ?

The United-Kingdom

John Sorabji

I. NATIONAL LEGAL SYSTEMS

If a collective redress mechanism is already in place in your country, could you please describe the legislation in place ? If you do not have such a mechanism in place in your country, we invite you to describe the alternatives in place / mechanisms which most closely resemble a collective redress mechanism (if any).

1. Issues related to the scope and mechanism of the instrument(s)

1.1 What is its scope (consumer only, horizontal…) ?

There are three main collective redress mechanisms in England and Wales: the representative action under CPR r.19.6; the Group Litigation Order (GLOs) under CPR r.19.10; and the Competition Act 1998 opt-in/opt-out collective action under section 47B of the Competition Act 1998 (as amended).

In addition there are a number of case management mechanisms that permit multi-party actions to be brought e.g., test case procedures (e.g., The Office of Fair Trading v Abbey National Plc & Others [2008] EWHC 875 (Comm)); joinder and consolidation of parties and actions under CPR r.3.1(2)(g) and (h).

In this response the three main mechanisms will be focused on.

Apart from the Competition Act mechanism, which is sector specific and applies only to competition law claims brought within the Competition Appeal Tribunal (CAT), all the mechanisms are horizontal and capable of being applicable to any claim irrespective of its subject matter consistently with the general approach in English procedure where procedural law is trans-substantive.

1.2 Who has standing ?

- Representative action: only affected class members have standing to bring such an action as a representative claimant i.e., those who could bring a claim in their own right in respect of the harm caused, have standing;

- GLOs: only affected class members can bring claims under the GLO. A GLO is a case management mechanism and not a form of representative action. It is a means which a large number of individual claims, which remain individual claims, are managed together. One claim, and hence claimant, is chosen to be the lead claim;

- Competition Act mechanism: either an individual affected class member has standing to act as the representative claimant, or an individual who has no direct interest in the claim may be permitted by the CAT to be the representative. In order for an individual or organisation that has no direct interest in the proceeding to be authorised the CAT must be satisfied that it is 'just and reasonable' to permit to act as the representative: see section 47B(8) of the Competition Act 1998; rules 78(1) to (4) of the

CAT Rule 2015 < http://www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf>)
No specific prohibition on certain types of organisation acting as a representative exists e.g., law firms and third party funders could act as the representative, subject to satisfying the authorisation criteria: see Guidance on CAT Rules page 72-73 < http://www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf>.

1.3 How does certification work in practice in your country ? If there is no such mechanism, what is there instead ?

Representation action: before a claim can proceed under this form of action, the court must be persuaded that the individual claims all raise the 'same' legal or factual issue: CPR r.19.6(1)(b). The court also has the power to prohibit a class member from acting as the representative party, but note only class members can be representative parties.

GLO: Generally a party must apply to the court to make a GLO where a number of claims have been issued which raise a 'common' legal or factual issue. The application must contain the following information (CPR PD19B para.3.2):

(1) a summary of the nature of the litigation;
(2) the number and nature of claims already issued;
(3) the number of parties likely to be involved;
(4) the common issues of fact or law (the 'GLO issues') that are likely to arise in the litigation; and
(5) whether there are any matters that distinguish smaller groups of claims within the wider group.

If the court is content that a GLO should be made, it must refer the application to a senior judge for their consent to the GLO being made (CPR PD19B para 3.3-4).

Competition Act mechanism: The approach is set out in rule 79 of the CAT Rules 2015, which provides as follows:

'***79.***—*(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—*

1. *(a) are brought on behalf of an identifiable class of persons;*
2. *(b) raise common issues; and*
3. *(c) are suitable to be brought in collective proceedings.*

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

1. *(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;*
2. *(b) the costs and the benefits of continuing the collective proceedings;*
3. *(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;*

4. *(d) the size and the nature of the class;*
5. *(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;*
6. *(f) whether the claims are suitable for an aggregate award of damages; and*
7. *(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act(**a**) or otherwise.*

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

1. *(a) the strength of the claims; and*
2. *(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.*

(4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant—

1. *(a) under rule 41(1), to strike out in whole or part any or all of the claims sought to be included in the collective proceedings; or*
2. *(b) under rule 43(1), for summary judgment.*

(5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order.'

1.4 What are your views on certification of the entity (eg. qualified association) ? What are your views on certification of the group ?

Certification of entities is an essential feature of any collective redress mechanism that permits non-parties, or non-State bodies such as Consumer Ombudsman, to act as a representative party. It is necessary to ensure that: i) the entity can properly represent the interests of the class i.e., it is best able to do so where others wish to represent the class; ii) that it can fairly and properly represent the class (where it is the only entity wishing to do so; iii) to ensure that no entity can represent the class where there are conflicts of interest between it and the class; iv) to ascertain it has the necessary resources and expertise to represent the class; v) to ascertain whether and to what extent it has an effective case management plan for the litigation.

Certification of the group is important to ensure that there is: i) a clearly defined and identifiable class of claimant; ii) that if there are sub-classes within the overall class they are delineated (e.g., by strength of claim; by specific features such as legal issues (causation) or defences common to some but not all class members) and can be dealt with in terms of those issues separately within the overall class proceeding and, as such, have their own representative party and/or legal representative act for them in the proceedings.

Certification of both the representative entity and of the group should form features of the wider certification process.

1.5 Is the system opt-in or opt-out ? How does it work in practice ? Does it give rise to abuses ? Is your system, whether opt-in or opt-out, satisfactory in terms of access to justice and length of proceedings ?

Representative action: The question whether this is opt-in or opt-out does not really arise. As the procedure does not enable a judgment in damages to be given (except in very limited circumstances) it is not a real issue. Judgments from this procedure generally give rise to declarations of rights. As such once the judgment has been rendered it is a matter for the individual class members to then procedure individually to claim in individual proceedings: the representative action simply provides a definitive legal answer to a specific or specific issues in dispute. If, the judgment results in injunctive relief, all class members benefit from it without the question of opting in or out arising: they cannot but benefit from the injunction. In some senses then this would be better described as either a non-joinder or a mandatory joinder process. It does not tend to give rise to any abuses, the reason being that due to the procedural technicalities surrounding how it can be used, it is a rarely used form of process. In terms of access to justice, it is generally and widely criticised as being wholly inadequate; in other common law systems (such as Canada) which historically adopted the same form of process, it has been reformed to remove the technical limitations on its utility.

GLO: Opt-in. Individual clams are issued as individual claims. Where there is a sufficient number of claims which raise the same or similar legal or factual issues an application. One or more of the parties to those claims must/will then apply to the court for a GLO. This will be considered by the court, and if it considers that such an order should be made the judge will refer the application a senior judge (the Master of the Rolls, Chancellor of the High Court or President of the Queen's Bench Division) for approval. Once approved a judge will be designated as the judge in charge of managing the GLO. Directions will be given for the management of the GLO, which will indicate a date by which further claims within its scope can opt-in to the GLO. It does not give rise to any abuses. It works very well for the types of claims which it is aimed at i.e., claims which are economically viable in their own right and could and are issued independently of the GLO and could continue to trial and judgment in the absence of a GLO being made. It is not well-suited to claims that are on their own not economically viable i.e., small claims. The GLO process does not take noticeably longer than individual claims, and through its incorporation of a 'lead case' procedure which enables one or more claims to go forward as test cases it enables the various claims to be determined efficiently and proportionately.

Competition Act mechanism: Originally this was an opt-in only form of process. It was only used once, the claim ending in settlement and with the sole body authorised to bring such claims in a representative capacity stating publicly that it would never bring such an action again due to its, in its view, manifest deficiencies. Since the procedure was reformed to be both opt-in or opt-out depending on how the CAT certifies the proceeding only two claims have been brought. As noted above one was withdrawn and the other was refused certification, albeit that is subject to appeal. It cannot be said whether the reformed opt-in/opt-out procedure is subject to abuse given its underuse. Arguably the original opt-in scheme failed to secure effective access to justice, albeit it could be said that in that it secured damages via a settlement for those who did opt-in it achieved access to justice for those individual class claimants. For those who did not opt-

in, either before or after the settlement was reached, it is difficult to see how they were denied access to justice as the decision whether to claim under the settlement, which they did not take, was arguably their own choice.

1.6 What are your views on both systems (opt-in / opt-out) ? What are your views on mixed systems ?

From my own perspective opt-in systems are preferable as they are the only means to ensure that those individual litigations who genuinely want to claim do so. Opt-in systems secure access to justice for those who want it, rather than opt-out systems which in truth are more focused on regulatory action or deterrent action rather than securing compensation for those who genuinely want to claim it. That being said, mixed systems can work well if they are opt-out on liability and opt-into judgment.

1.7 What shortcomings could you identify, if any ? What satisfactory characteristics of your system could you identify ?

The GLO system works very well for those type of claims it was designed to secure effective access to justice i.e., claims that are on their own are economically viable. As such it provides a sophisticated procedural device to secure economically, efficient and proportionate case management for those claims.

The GLO system is entirely inadequate as a procedural means to promote access to justice for low value claims as it cannot overcome the economic barrier to entry to the justice system for such claims. But then it was not intended to do so.

The representative action is inadequate due to the very strict and narrow test applicable to determining whether individual claims raise 'the same' legal or factual issue. The case law around this issue, and the various academic commentaries such as those by Mulheron, rightly point out the drawbacks with having a very narrow test to determine if mass claims raise issues of sufficiently commonality to justify being permitted to proceed as a representative action. The stricter and narrower the test the less the prospect of certification. And the less utility the procedure has. That most common law jurisdictions that used to adopt this form of process have revised the test for whether claims raise the 'same' issue is a clear indication of the rightly perceived lack of utility of this form of action.

It is too early to comment on the shortcomings of the revised Competition Act mechanism.

3. Issues related to compensation

2.1 Is the mechanism in place limited to injunctive relief or is compensatory relief also available ?

In each of the mechanisms injunctive and compensatory relief is available.

2.2 Is injunctive relief sufficient or compensatory relief also necessary ? In the latter case, could you please specify the benefits of having compensatory mechanisms ?

It is difficult to see how injunctive relief on its own could ever be sufficient. It can only bring an end to harm or stop harm being continued. It cannot make provision for any harm that has occurred prior to injunctive relief being granted being remedied. It is forward-looking only, whereas compensatory relief is aimed at making the victim of harm whole again for losses suffered.

Injunctive relief on its own would seem to be wholly insufficient, given its inability to provide relief from harm done in multi-party action situations.

2.3 When there is no individual compensation (either because the individual amounts are too small, or because the national regulation does not permit it) is there a specific national fund in place in which damages can or must be allocated ? If not would you advise such a fund ?

There is no such fund. I would not advise it. Collective action mechanisms should exist to secure redress for those who suffer harm i.e., they should be the means to secure effective compensation. The existence of unclaimed money at the end of such a proceeding is evidence of a failure on the part of the proceeding to meet its objective. If individuals do not come forward to claim their funds, they cannot properly be said to have sought redress i.e., they have made a decision as anyone can not to pursue a breach of their rights. In those circumstances, it is at best questionable if, in terms of compensation, a defendant should be under any obligation to pay compensation. Ordinarily when a judgment is obtained in individual proceedings a claimant may elect not to enforce the judgment. In such circumstances the State does not put in place a mechanism to hold the money due under the judgment. The same ought to apply in collective action claims: a claimant who does not claim is electing not to enforce the judgment in their favour and as such, as in ordinary proceedings, the defendant should not be required to pay under the judgment. If the State wishes to require the disgorgement of money that would otherwise be paid as compensation under a judgment, then that ought to be done through other, regulatory, mechanisms and not by way of civil proceedings.

Where a settlement however has been reached in collective proceedings, a defendant has agreed to pay money under that settlement. Given the agreement to pay under the settlement, it should be paramount that terms are set out in it which deal with what is to happen to any money unclaimed. This would obviate the need for any fund. It would also place the determination of the sum of damages and how and in what way it is to be distributed to be part of the settlement.

2.4 What shortcomings could you identify in your legislation regarding these issues, if any ? What are the strengths of your legislation regarding these issues, if any ?

No such fund payment mechanisms exist under the representative action or the GLO. In the Competition Act mechanism, any damages awarded in an opt-out action that are unclaimed must be paid to the Access to Justice Foundation, which is a charity to provides funding for pro bono legal advice and assistance: section 47C(5) of the Competition Act 2005.

The shortcoming of the Competition Act 1998 mechanism is that it uses funds that claimants do not collect to provide funds for matters that are in no way connected either to the class members or the claim's substance. While the provision of such funding to this charity is clearly of public benefit, the mechanism effectively transforms the opt-out mechanism into an indirect form of legal aid and assistance taxation. (It should be noted however that there have been no successful opt-out actions brought under this mechanism as yet.)

4. Publicity issues

3.1 How are collective actions publicized in your country ?

Publicity concerning GLOs is governed by rules of court – see CPR PD19B para. 11 (http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19/pd_part19b#11.1). It requires notification of the GLO to be given to The Law Society (see its Law Society's Multi Party Action Information Service at http://www.lawsociety.org.uk/support-services/help-for-solicitors/practice-advice-service/multi-party-action-information-service/) and to the Senior Master of the Queen's Bench Division of the High Court of England and Wales.

3.2 Who is responsible for the publicity of collection actions ? Who bears the costs of such publicity ?

Typically, the court or the CAT will require the parties to take steps to publicise a GLO or a Competition Act 1998 action. This will require the GLO claimants through the lawyers to the lead claimant in the action to: i) ensure that details are placed on the website of the Court Service (see https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders); and ii) any other specific publicity details necessary in the light of the nature of the particular action.

- See paras. 13 and 14 of the standard form Group Litigation Order: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/688865/pf19-eng.doc

- See paras. 21 and 22 of the Chancery Group Litigation Order Form: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/687849/ch6-eng.doc

The cost of publicity will be costs in the action i.e., while they will be paid initially by the claimants they may form part of the recoverable costs in the even of the claim succeeding.

Where Competition Act 1998 actions are concerned publicity is required before the application to certify a proposed claim as a collective action. It is the responsibility of the applicant to secure effective publicity in the terms the CAT specifies. An example of such an order can be seen at paras. 8-10 of the Directions Order in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (http://www.catribunal.org.uk/files/1266_Walter_Hugh_Order_211116(1).pdf).

3.3 Overall, is publicity regarding collective actions an issue in your country ?

No. It is not an issue.

5. Financial issues

4.1 Are legal costs regulated ? If so, how (courts' costs, calculation of lawyers' remuneration, regulation of contingency fees etc.) and does it give satisfaction ?

Legal costs are not subject to regulation. Lawyer-client costs are a matter of contractual negotiation between the two.

The recoverability of legal costs (including court fees) by a successful party to litigation from the losing party (the loser pays rule) is however subject to control by the courts. In the absence of agreement between the parties as to recoverable costs, costs will be assessed by the court to determine the amount of costs which will be payable by the losing party. Only a proportionate amount of the successful party's costs will be recoverable as a general rule. To ensure that parties' incurred costs are kept to a proportionate level, English procedure no requires party costs to be subject to active court-based costs management, whereby parties have to submit at an early stage in the proceedings their budgeted costs for the litigation: the approved costs budget sets the limit, subject to limited exceptions, to the amount of recoverable costs.

There is a fixed recoverable costs regime for some cases, subject to financial limits. Such fixed recoverability does not apply to collective proceedings due to the financial value at stake in such claims.

Contingency fees are permissible but subject to legislative regulation.

The level of costs in English proceedings is subject to regular reform to try to contain them.

4.2 What are your views on "the loser pays" principle ?

It is an essential feature of civil litigation as a means to secure access to justice and to limit the extent to which a party bringing or defending a claim successfully is out of pocket for reasonably ascertaining their rights.

4.3 Is the "loser pays" principle applied ? If so, does it work as a deterrent in practice ?

Yes. It is assumed that it does work as a deterrent. There is, however, an absence of empirical evidence as to its efficacy as a deterrent against unmeritorious claims.

4.4 Is third party funding regulated in your country ? If so, how ? If third party funding is prohibited, does it have an impact on access to justice ?

Third party funding is not subject to statutory regulation. While there is a statutory power to regulate such funding it has never been utilised (see section 58B, Courts and Legal Services Act 1990).

It is, however, subject to regulation by the courts. Such funding was historically both contrary to public policy, a tort, and a criminal offence. It remains generally contrary to public policy. However, since the early 21st century the courts have permitted such funding as a means to facilitate access to justice, subject to court oversight.

4.5 What are your views on third party-funding (need for regulation, risks of abuse etc.) ?

With proper regulation third party funding is a valuable means to effect access to justice. As long as the court is able to maintain oversight and approval of the funding; that funders are prohibited from controlling or influencing the control of litigation; that the funding is to the benefit of all the members of a collective action; that a third party funder can be liable for security for costs, the prospect of abuse is, at best, minimal. The key is to ensure effective oversight of the funding by the court.

4.6 Overall, what risks related to economic and financial issues do you identify both in theory and in practice ? What safeguards (protecting the defendant as well as the claimants / absent parties) should be put in place ?

It is not apparent that such risks exist in practice in England due to, for instance, the loser pays rule, costs management, court regulation of third party funding, state regulation of contingency (conditional fee agreements and damages-based agreements).

It is well-known, particularly in respect of class actions in the US, that collective redress mechanisms can pose a problem for the economic viability of defendants to such actions both in terms of legal costs and damages. In terms of legal costs, such issues can be dealt with through the effective operation of the loser pays rules etc. In terms of damages posing a risk to the economic viability of defendants that is, and should properly be seen, as a consequence not of procedural rules but substantive law.

6. Issues of private international law

5.1 Is the international dimension of collective redress (claimants residing in different states, claimants and defendant residing in different states, damage occurred in another state etc.) taken into account in your national legislation ? If so, how ? Is it satisfactory in practice ?

The ordinary rules concerning claimants and defendants in different states and damage occurring in other states apply. In Competition Act proceedings, class members must opt-in to the proceedings i.e., they must positively attorn to the jurisdiction as the opt-out process does not apply: see CAT Rules 2015, section 82.

5.2 Are there abuses related to the extension of jurisdiction / to parallel proceedings ?

None that are apparent.

5.3 What are the appropriate ways of dealing with abuses (forum shopping, choice of law of more liberal countries …) by litigants ?

For cross-border collective actions, the way to limit the possibility of forum shopping for the most favourable regime would be to: i) have a common procedure; and ii) have a common substantive law. Absent this, you need clear rules concerning which Member State's courts should have jurisdiction i.e., court first seized, court in the jurisdiction where the majority (whosever defined and it would have to be clearly defined) of the harm was incurred should have jurisdiction. It should be clear however that a common procedure will not be a complete answer, as forum shopping will still seek the regime with most favourable substantive law. Given that clear rules on jurisdiction would still be needed to eliminate the risk of forum shopping. That would require delicate policy questions to be answered in respect of, for instance, whether the forum ought to be that of the majority of the claimants, of the defendant, dependent on the nature of the claim e.g., tort, contract etc.

7. Issues related to alternative dispute mechanisms

6.1 Are there other mechanisms which are used for mass harm events in your country and which can either complement or be a good alternative to collective redress (consumer ADR partly regulated by 2013 ADR directive etc.)?

A collective settlement process is available under the Competition Act 1998: see CAT Rules 2015, sections 94-97. The mechanism can operate where a collective action has been certified and where there is no collective action.

6.2 What opportunities do you identify with alternative dispute mechanisms ?

ADR tends to be quicker and cheaper than litigant. It allows for more creativity in settlement than litigation, and it is, of course, not a zero-sum game.

6.3 What shortcomings do you identify with alternative dispute mechanisms ?

ADR does not enforce or vindicate rights or secure the appropriate level of damages to a victim. It does not enable issues to come to public attention or scrutiny. It can hide breaches of the law from public and political discussion. As such it does not: i) produce the level of compensation that a claimant or class member would be entitled to through a court proceeding; ii) it does not necessarily secure effective deterrence from future improper conduct by defendants and hence is a weaker determent or regulatory enforcement effect than litigation.

8. Issues for practitioners

7.1 What impact have legal practitioners experienced on their practices ?

I can't answer this question. I imagine very little.

7.2 What impact have actors with legal standing (for example, qualified entities) experienced ?

Only claimants have standing for the representative action and for GLOs. It is too early to tell what impact if any there has been in respect of the reformed Competition Act mechanism.

7.3 Overall, what are the difficulties and opportunities experienced by all actors involved ?

The main issues in respect of collective actions are: funding, the ability to secure it for collective actions is the most significant issue in respect of the efficacy of such a mechanism; efficient management of such claims; ensuring that claims do not result in over-compensation for weak claims, under-compensation for strong claims; conflicts of interest between class members; an absence of effective control of litigation by the class representative. In terms of the regulatory or deterrent effect of collective actions it can be questioned whether they are effective in this respect. Hodges has written widely on this and has done so compellingly in questioning the utility of such mechanisms to achieve regulatory compliance and to deter, for instance, tortfeasing.

8. Trends

8.1 Do you witness a trend towards a growing use of collective redress mechanisms in your country ? If so, in which fields in particular and why ? If not, is there any specific reason ?

No. There are no discernible trends in collective redress. The use of GLOs is well-established and there has been no significant change in rates of use since it was introduced.

The use of the Competition Act 1998 opt-in/opt-out action has not been in place for long enough to generate evidence of any particular trends; if anything its lack of use since it was reformed indicates either a continued lack of utility and/or an absence of claims that could be brought under it. It is however too early to tell. It might be expected however that there will be an increase in such claims over time.

It may also be anticipated that there will be the potential for collective claims in the field of data protection to be brought in the new future. This will be facilitated by the expected introduction of a new opt-in only collective action mechanism for data protection breaches arising from the introduction of the General Data Protection Regulation (article 80(2)) and the expected section 181 (currently clause 181) Data Protection Act 2018.

II. TOWARDS A EUROPEAN INSTRUMENT

Please keep in mind that your answers must be rooted in the reality of your own country. Your recommendations/positions must correspond to what citizens and politics in your country are willing to accept and implement.

1. Impact of EU instruments on your legislation

1.1 In your opinion, is there a need for a binding instrument at the EU level or not?

I can see the rationale for an EU-wide instrument for cross-border collective actions. If such an instrument is introduced it will need to be one that has a limited degree of optionality within it i.e., it ought not to be opt-in/opt-out (a mixed approach), as the exercise of such options will very much depend on the prevailing civil procedural culture in each Member State. Inevitably some will be more willing to certify claims as opt-in others more willing to certify them as opt-out. As such the prospect of forum-shopping across Member States for the country with the most 'favourable' approach would become inevitable; something which would reduce legal certainty for parties; and undermine both mutual trust between Member States whilst injecting competition across national procedural systems into what ought to be a single, common, market for justice.

1.2 Did the EU Recommendations on the common principles for collective redress of 2013 have an impact in your country / field of expertise ? If so, of which nature (satisfactory or not) ? And if not, why is that ?

The Recommendations had no impact in England and Wales. They were specifically considered and not followed by the UK Government when it introduced reforms to the collective action provisions in the Consumer Rights Act 2015. Due, however to the substantive amount of research and evidence produced by bodies within England and Wales such as the Civil Justice Council in its extensive work published in 2007 (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improving+Access+to+Justice+through+Collective+Actions.pdf), the UK government followed their approach and recommendations to a significant extent. Furthermore, the national research was relied on to provide a basis for adopting exceptions to the general approach set out within the EU Recommendations. For an outline of this see: J. Sorabji, *Reflections on the Commission Communication on Collective Redress* [2014] 17 (1) IJEL 58; a point reflected by the then Minister, Jo Swinson MP who noted that 'There has however been extensive research carried out by the Office of Fair Trading and the Civil Justice Council, which supports that [sic] a more effective means to redress for parties affected by an infringement of competition law comes through an 'opt-out' approach. This is backed up by evidence gathered through the Government's own Impact Assessment and consultation on the draft Bill. An efficient means to redress within a competition regime is essential for making markets work. The Government believes this does provide the necessary justification 'on grounds of sound administration of justice' and therefore, sufficient leeway to take advantage of the Commission's exception.' (See Letter from Jo Swinson MP (Minister of State) to Lord Boswell (9 November 2013). In other words the UK relied on the exceptions in the Commission Recommendation in order to continue with an approach national advisory bodies had been long recommending was the right approach.

1.3 In you view, would your country benefit from such an instrument, or be negatively impacted ?

In the light of the fact that the UK is leaving the EU, it is unlikely to directly benefit from such an instrument.

1.4 Would the implementation of a collective redress mechanism at a EU level introduce a risk of abusive litigation ? If so, what minimum safeguards should be put in place ?

It would very much depend on the nature of the instrument. The fears of abusive litigation have historically in the debate concerning the introduction of an EU collective redress instrument been based on false fears of US class actions, when no system in Europe operates a civil procedural system on the same basis or with the same features as the US.

With a robust certification scheme for both claims and for representative bodies, with proper scrutiny and court oversight of litigation funding, with a loser pays rule, with an absence of US style discovery (which is markedly different in its scope, role and basis from English or Irish discovery/disclosure given the fundamental role it plays in fleshing out pleadings), with effective court-controlled active case management of such claims, there is little risk of the development or promotion of abusive litigation.

2. Building an EU instrument

2.1 If you are in favour of a European instrument, what level of harmonization would you recommend ?

N/A given the UK's leaving the EU.

2.2 What should be the minimum requirements / rules contained in such an instrument (e.g. admissibility of such actions, standing, joining the group, forms of redress) ?

At the minimum such an instrument should have rules concerning:

- Class membership, including sub-classes within the main class;
- Standing for representatives, including certification by the court of an appropriate representative;
- Certification of a claim as a collective action;
- Certification of the claim as opt-in/opt out;
- Rules concerning what is to happen to any unclaimed damages where there is an opt-out action;
- Rules concerning funding, which should not differ from the general rules as to funding;
- Rules concerning the assessment of damage i.e., to permit estimation of loss;
- Rules concerning out-of-state class members attorning to the jurisdiction;
- Rules concerning the ADR, to be taken account of as a criterion in the certification process;
- Approval of any settlement by the court;
- Rules concerning a collective settlement procedure.

There should be no rules concerning the nature of redress available.

2.3 What should be the scope of the instrument (horizontal, standing, certification, opt-in etc.)?

I would favour a horizontal instrument, as recommended by the Civil Justice Council in 2007.

3. A New Deal for Consumers

9. *The European Commission published its proposal for a "Directive of the European parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC" on April 11th. Is this proposal sufficient (scope, introduction of compensatory redress rules, continued use of the trader / consumer dichotomy, determination of qualified entities) ?*

The proposal is a step forward. It has two significant fundamental weaknesses: i) it ought to be a horizontal instrument and not focused on consumer redress; ii) limiting representatives to qualified entities pre-authorised by Member States will limit the number of claims brought, and will thus limit the efficacy of the instrument. It will do this because pre-authorised entities will operate with a specific budget and will have to determine which claims they will pursue. This will means some viable claims will not be capable of being pursed. This will reduce access to justice for claimants, and will reduce the deterrent or regulatory effective of such actions. Enabling ad hoc representatives to be authorised by the courts would overcome this defect.

4. Alternative dispute resolution

4.1 How should a European instrument on collective redress be articulated with alternative dispute resolution mechanisms / amicable settlements ?

Any such instrument should include rules concerning: i) the need to take account of available ADR schemes as a criterion at certification. If there are available ADR schemes at that stage which could provide effective redress the court should not certify unless the collective action provides a superior form of dispute resolution than the available ADR scheme; ii) should provide for a collective settlement process, such as that available under in the Netherlands or under the CAT collective action mechanism in the Competition Act 1998.

5. Cross-border cases – please note this question is optional, only answer if you wish to give suggestions on this topic.

5.1 How should cross border cases (claimants residing in different states, claimants and defendant residing in different states, damage occurred in a different state) be dealt with ?

6. Issues related to Brussels I bis – please note this question is optional, only answer if you wish to give suggestions on this topic.

6.1 Is there a need for new rules on jurisdiction for cross border collective redress cases ? If so, do you reckon collective redress entails the revision of Regulation Brussels I bis ? Or, instead, should jurisdiction issues be dealt with in a specific instrument dedicated to collective redress ?

I note questions 5 and 6 are optional. I would endorse the approach taken to both questions by the Civil Justice Council when these questions were raised in 2011 and 2012

by the Commission; the position has not altered since then notwithstanding revision to the Brussels 1 bis in the intervening period.

In essence the answer given was that adaption of the Brussels regulation regime was not appropriate. A specific cross-border collective redress regulation was necessary due to the specific features of collective actions, not least in order to provide specific rules for different types of collective action and different types of harm and spread of claimants across Member States. Specific tests would need to be formulated to deal with, for instance, the determination of the seat of a cross-border collective action where claimants were spread across a number of Member States, to discourage forum-shopping across Member States; and to provide for claimants outside the Member State which had jurisdiction to be able to actively attorn i.e., opt-in to the jurisdiction. Mechanisms would also have to be devised to ensure that such out-of-state claimants were effectively represented in the collective action through the appointment of a class representative for what would, in effect be, an extra-territorial sub-class within the collective action.

Full details of the Civil Justice Council's response can be found at pages 40-45 of Civil Justice Council, *Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC (2011) 173 Final)* <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+responses/CJC+response+to+Commission+EU+Coll+action+consulation+2011+Final.doc>.

III. DATA AND STATISTICS

1. *Are data and statistics on collective redress available in your country ?*

Statistics are kept for Group Litigation Orders, due to the fact that a publicly available register of such claims must be kept: see https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders

Statistics are not kept for any other form of collective redress mechanism. However, as there was only one action brought under the Competition Act 1998 opt-in mechanism its details are known: *Consumer Association* (also known as *Which?) v JJB Sports PLC.*[615] Furthermore, as only two actions have been brought (as of May 2018) under the revised Competition Act 1998 opt-in/opt-out mechanisms their details are also known: (i) *Dorothy Gibson v Pride Mobility Products Limited* (1257/7/7/16) <http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html>; (ii) *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (1266/7/7/16) <http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html>.

Data and statistics are not available for test cases or other forms of collective redress mechanism.

2. ***Types of data available*** *: Number of actions brought, number of claimants, success rates, failure, damages awarded, percentage of actions in different fields*

[615] Case No 1078/9/07.

*(competition, consumer law…), number of cross border cases (and success / failure rates) etc. ? **Please provide appropriate statistics for each**.*

Group Litigation Orders:
Statistics are not available in respect of: the number of claimants in each action; success rates; damages awarded; percentage of actions in difference fields; or cross border cases.

It might be possible to ascertain some of these details for the 104 GLOs through examining the available judgments, where they are available, in each case. That however would require checking through judgments available on BAILLI (http://www.bailii.org) or on subscription sources such as WESTLAW.

It is possible to ascertain the nature of the claims i.e., their legal basis by searching the GLO Register where these details are published: https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders

What can be seen from the published data is that GLOs generally arise in a specific number of areas:

- Negligence;
- Personal injury;
- Product liability;
- Environmental claims;
- Financial services;
- Pensions.

Competition claims tend to arise under GLOs and, tentatively now, under the Competition Act 1998 mechanism.

Competition Act 1998:
- *Consumer Association* (also known as *Which?) v JJB Sports PLC* – the claim settled.
- *Dorothy Gibson v Pride Mobility Products Limited* – the claim was withdrawn.
- *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* – the Tribunal refused to certify it as a collective action.

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