

PART X

COLLECTIVE LITIGATION

CHAPTER THREE

OVERARCHING ISSUES IN REPRESENTATIVE ACTIONS*

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1 DUE PROCESS CONCERNS

- 1 Admittedly, collective litigation is not a primary construct of the theory of procedural law. The classical concepts of civil procedural law were conceived to solve disputes in individualistic societies of the 19th century. Notions of standing and *res judicata* conceived in the context of individual suits were not appropriate to the new procedural tools whose goal should be to solve disputes that affect large groups of people.
- 2 In Europe, the main concepts of classical procedural law were conceived circa 1850, Oskar von Bülow being considered one of the first legal authors to deal with procedural law in a scientific way, treating it as an independent branch of law that is not to be confused with substantive law. The concepts of *procedural legal relationship*¹ and of process' *Voraussetzungen*² were thought up on the basis of the scheme of individual rights. Notions such as standing, interest, *causae petendi*, *petitum*, jurisdiction, *res judicata* were all conceived based on an individualistic approach.³ This was true also in common law regimes, although terminology and doctrine might differ.
- 3 The dogmatic way of thinking considers that legal concepts and structures of civil procedure conceived for the European society of the 19th century could last forever and thus be useful even for the post-industrial society of the 21st century.⁴ This is one of the reasons why adopting procedures to resolve collective disputes faced all sorts of resistance. In the United States, the medieval tradition of group actions, inherited by the American colonies from England, provided a friendlier basis for collective procedures, which found a home in equity.
- 4 The classical tools of civil procedure were, and still are, not able to solve certain types of disputes, mainly (i) those related to rights that belong to everyone, many of which did

¹ J Kohler, *Der Prozess als Rechtsverhältnis Prolegomena zu einem System des Civilprozesses* (Mannheim Besheimer 1888) 52.

² O Von Bülow, *La teoría de las excepciones procesales y los presupuestos procesales* (translator: Miguel Angel Rosas Lichtschein, Juridicas Europa-America 1964) ch 1, 2.

³ F Reuschle, *Bestandsaufnahme und Reformvorschläge* (BKR 2020) 605, 606: 'The Code of Civil Procedure is primarily tailored to individual proceedings and the filing of individual claims' (translated by T A A).

C Hodges and A Stadler, *Resolving Mass Disputes* (Edward Elgar Publishing, retrieved 2022) 9: 'Collective actions thus do not fit readily into the European "individualistic" civil justice systems, which are almost entirely based on the enforcement of individual claims in two-party litigation'.

R C Williams, 'Due Process, Class Action opt-outs and the right not to sue' (2015) 115(3) *Columbia Law Review* 599, 601: 'the traditional incidents of procedural due process, such as entitlement to individualized notice and a day in court to present one's case, were originally organized around the paradigm of individualized litigation between a single plaintiff and a single defendant'.

Check below further article: F Reuschle, 'Mehr kollektiver Rechtsschutz' (2017) 41 *NJW Editorial Heft*.

⁴ O Baptista da Silva, *Processo e ideologia, o paradigma racionalista* (Forense 2004) 300-305.

not have their existence recognized when traditional concepts were conceived⁵ and (ii) those related to mass societies, which also did not exist at that time.

- 5 In both civil law and common law regimes, the traditional, well-established concepts and tools of civil procedure were essentially conceived for one-to-one litigation, often governed by written rules contained in codes of civil procedure. These codes provide for different forms of joinder of parties and joinder of claims, but any type of joinder would turn out to be unmanageable when the parties or the claims to be assembled numbered in the hundreds or thousands. It was the rise of mass claims that drove efforts to devise new procedural schemes for the management of a large number of identical or similar claims.
- 6 It was felt that a new approach was needed to address issues such as legitimization (standing), interest, *causae petendi*, *petitum*, jurisdiction, *res judicata*, and decision enforcement in the collective field.⁶
- 7 And therein lies the crux of the matter: Which types of procedural schemes are suitable for mass litigation? How is it possible to perform an exercise in procedural creativity without disrupting the whole system of civil justice? How can the traditional categories of civil procedure, such as standing and *res judicata*, be adapted to the specific features of mass litigation? Or, in light of the unconventional nature of disputes involving many parties and many claims, should these very categories be set aside, and should new ones be embraced?
- 8 *Actio* (action), *legitimatío* (standing), *res judicata* and settlements are the four concepts that have to be dealt with in a different way to construct collective tools to solve disputes that involve a considerable number of people: class actions and techniques of aggregate litigation.⁷

⁵ See, eg, F Reuschle, 'Bestandsaufnahme und Reformvorschläge' (2020) 12 BKR 605, 606: 'Mass tort is a phenomenon of our modern society. Whether it is the ingestion of medication, poisoning by gaseous chemicals or drinks poisoned in baby bottles, the improper use of double-glazed windows or defeat devices used in diesel-fuelled vehicles, the spectrum of possible damage is unlimited. Mass production as well as modern technology are responsible, among other things, for the fact that, in the event of malfunction, a large number of parties is almost always equally affected. In this context, the procedural management of mass damages puts the efficiency and competitiveness of judicial systems to the test' (translated by T A A).

⁶ L G Marinoni and S C Arenhart, 'Collective litigation and due process of law: the Brazilian experience' (2014) 4 International Journal of Procedural Law, 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469345: 'In fact, in collective proceedings, it will be hard to think about the guarantee of the due process of law in the same way that one may look at it on an individual level. This does not mean that the principle, in the collective sphere, must be mutilated or sacrificed. But it is certainly necessary to review the content of the principle in light of the necessities of collective interests, adapting it to the peculiarities and requirements inherent to this type of judicial protection and of the rights subject to it'.

⁷ T Armenta Deu, *Acciones colectivas: reconocimiento, cosa juzgada y ejecución* (Marcial Pons 2013) 11.

- 9 When it comes to class actions, standing and *res judicata* had to be redesigned to fit a model whose impact extends beyond the sphere of the claimant.
- 10 This is an important classical concept that had to be remodeled to adequately fit collective litigation, the *res judicata* effects of the decision affect a whole group of people or a community.
- 11 This new concept raises some intricate problems that are not always easily solved, such as a certain deficit of the right to be heard, *because people who are going to be affected by the decision may have no opportunity to interfere in the outcome of the process unless some specific provision is adopted to invite such involvement*. However, even without their involvement, they may be affected.
- 12 In some jurisdictions, statutes solve this problem by creating the *res judicata in utilibus*, or *secundum eventus litis*. This regime means that if a class action is denied, the same pleading can be submitted again and those who did not take part in the proceedings are not affected by the denial of the claim.⁸
- 13 New theories on *res judicata* in collective litigation are presented, eg, the time limits of *res judicata* should be linked to the cause complexity. In Brazil, there is an author who considers that the stability of the judgment is inversely proportional to the complexity of the litigation.⁹
- 14 As a result of this theoretical shift from the traditional approach to civil procedure to one that can demonstrate that it can meet the needs of modern societies, many doubts have been raised, on constitutional grounds, and a large number of concerns aired.
- 15 In the US, for example, to assure that class members have an opportunity to find out about the pendency of a class action and participate in a judicial hearing on its proposed outcomes, the class action rule includes requirements for notice, a public hearing, and an opportunity to object – all elements of constitutional due process.¹⁰
- 16 These concerns are particularly acute when it comes to 'mandatory' class actions under Rules 23(b)(1) and 23(b)(2), which do not explicitly allow opting out, presumably on the practical grounds that declaratory and injunctive relief perforce affect the entire defined class, as a court cannot, for example, declare a tax statute or employment practice unconstitutional for some class members but not others. In these US class actions, due

⁸ Brazilian Consumer Protection Code, Art 103, I, II and III.

⁹ E Vitorelli, *O devido processo legal coletivo – dos direitos aos litígios coletivos* (Thomson Reuters Brasil 2019) 510.

¹⁰ *Phillips Petroleum Co. v Shutts*, No 84-233 (Supreme Court, US) [472 U.S. 797 (1985)].

process relies on judicial oversight and, in particular, the requirement that a judge ‘certify’ the appropriateness of permitting an action to proceed in collective form.¹¹

- 17 Settlements in collective litigation also present some difficulties concerning the due process of law. The US class action rule requires that judges approve class action settlements after holding a ‘fairness’ hearing at which class members can object to the settlement’s terms. Allowing class members to opt out of a class proceeding is another due process protection.¹² John C Coffee Jr explains:

Class members may simply have heterogeneous preferences such that no single counsel can satisfy all of them. Some may wish to settle early, others to hold out; some want an all-monetary recovery, while some public pension funds today desire corporate governance reforms to be incorporated into the settlement. These divergences provide an entirely alternative reason for opting out.¹³

¹¹ ‘Rule 23. Class Actions (...) (b) Types of Class Actions. A class action may be maintained if Rule (a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:
 (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
 (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole;’.

S Grossi and A Ides, ‘The modern law of class actions and due process’ (2020) 98(1) *Oregon Law Review* 53, 61: ‘One aspect of original Rule 23 might strike a modern reader as curious. While Rule 23(c) required notice of any proposed dismissal or compromise in an action filed under (a)(1), “neither rule (a)(2) nor (a)(3) required such notice.” This might appear anomalous as to (a)(3), since that section seems to be a more inclusive category and one likely to trigger the due process rights of potential class members. The explanation for this lacuna is, however, simple: judgments in (a)(3) actions were binding only on class members who chose to intervene. In other words, (a)(3) actions were not, in fact, representative suits as that phrase is now commonly understood. Thus, the actual scope of the original class action rule was quite narrow and far from visionary. And although the original rule purported to apply to both legal and equitable proceedings, the recognized types of class actions seemed to fall most naturally into the equitable category’.

¹² T Eisenberg and G Miller, ‘The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues’ (2004) 57(5) *Vanderbilt Law Review* 1529, 1536: ‘Due process-based concerns also appear to underlie the right of class members to object to proposed settlements. Such concerns are especially pronounced in the case of “mandatory” class actions under Rules 23(b)(1) and 23(b)(2), which do not explicitly confer opt-out rights. Lacking the ability to opt out, members of these classes are allowed to protect their interests, at least to some extent, by being allowed to articulate objections to any proposed resolution of the controversy’.

¹³ J C Coffee Jr., ‘Accountability and Competition in Securities Class Actions: Why “Exit” Works Better than “Voice”’ (2008) 30(2) *Cardozo Law Review* 407, 414.

- 18 Notwithstanding these protections, within the European system, there is still some skepticism about whether the American representative model of class action litigation sufficiently protects individuals in class actions.¹⁴

2 ROLE OF JUDGES IN COLLECTIVE REDRESS

- 19 In the context of collective redress, judges are expected to play pivotal roles for managing and resolving cases. As the European Commission highlighted in its 2013 Recommendation, ‘a key role should be given to courts in protecting the rights and interests of all the parties involved in a collective redress action as well as in managing the collective redress actions effectively’.¹⁵

2.1 Why Do Judges Have an Important Role to Play in Collective Redress?

- 20 Collective redress is traditionally described as a doubled-edged sword. On the one hand, these procedural tools may enhance access to justice for harmed individuals involved in mass harm situations and contribute to economies of scale (see pt 10 ch 1). On the other hand, collective redress may also raise due process concerns (see heading 1), may trigger opportunistic behaviour, for example from lawyers tempted to favour their interests over the ones of the group of represented individuals (see heading 3), might lead to possible frivolous litigation or significant increases in litigation costs. Arguing from a sceptical perspective, Thomas Ulen wrote, ‘class action litigation may have net social benefit but only under relatively narrow circumstances that requires relatively close court supervision’.¹⁶
- 21 Ultimately, judges are seen as the ones ensuring that the expected benefits associated with collective redress outweigh their expected costs. This view tends to be nowadays widely shared. Respondents to the 2011 public consultation of the European Commission on collective redress for instance ‘unanimously agree that the judge should

¹⁴ W. Lüke, ‘Der Musterentscheid nach dem neuen Kapitalanleger-Musterverfahrensgesetz: Entscheidungsmuster bei gleichgerichteten Interessen?’ (2006) 119(2) *Zeitschrift für Zivilprozess* 131, 158: ‘Some of these innovations, which have yet to prove themselves in practice, ultimately follow from the legislator’s attempt to find a solution to the mass problem that is restrained from the point of view of the individual plaintiff. The model of a joint legal representative, for example, would have an easier time of it here. Nevertheless, the legislature’s view that the individualistic structures should be retained as far as possible, even in these cases, deserves approval in principle. Even if it reduces the yield of simplification, such a procedure nevertheless encroaches less on the basic principles of civil procedural law’ (translated by T A A).

¹⁵ Commission Recommendation 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 of 11 June 2013 (EU).

¹⁶ T. ULEN, ‘An Introduction to the Law and Economics of Class Action Litigation’ (2011) 32 *European Journal of Law & Economics* 185. Developments under section 2.1 build on: A Biard, *Judges and mass litigation – a (behavioural) law & economics perspective* (Erasmus University Rotterdam 2015) <https://repub.eur.nl/pub/77279>.

have a central role as a case manager and gatekeeper'.¹⁷ In the US, Judge Jack Weinstein (who presided over several leading class action lawsuits) noted that 'when so many discordant voices are heard and so much money is at stake, a hand with no financial interest in the outcome is necessary to impose order and discipline and avoid chaos'.¹⁸ In parallel, judicial intervention may also be needed given the perceived inability of the legislature to solve mass claims. Schuck noted that legislatures might 'refuse to confront so controversial an issue as mass tort policy, involving as it does powerful political interests, enormous sums of money, serious human sufferings, conflicting values and so forth (...)'.¹⁹ He further stressed that 'the scientific, legal, economic, political and social conditions relevant to mass injuries are too complex and fluid to permit an adequate legislative response'.²⁰

2.2 What Are the Roles Expected from Judges in Collective Redress Actions?

- 22 At first sight, it may sound difficult to generalize about the role of judges in collective redress as all mechanisms follow different procedural models. As regards collective redress in Europe, Miller and Issacharoff noted that 'analysing European class actions is like shooting at a moving target'.²¹ Moreover, EU Directive 2020/1828 on representative actions for consumers does not impose uniformity on national procedures and the European Member States ultimately kept important procedural leeway in this area.²² Finally, the role of judges is also traditionally seen differently depending on countries' legal traditions and in particular whether they belong to the Common Law or Civil Law traditions.
- 23 Yet a closer look shows that, despite their procedural differences and regardless of the country's legal culture, all collective redress mechanisms have important similarities with regard to the role expected from judges.²³ As Stadler and Micklitz noted, in all jurisdictions where group proceedings are available judges perform a role that is different from the one that they usually have in individual litigation, as they must

¹⁷ Study by B Hess and T Pfeiffer, 'Evaluation of Contributions to the Public Consultation and Hearing: "Towards a Coherent European Approach to Collective Redress"' (2 October 2012) Ruprecht-Karls-Universität Heidelberg (Study JUST/2010/JCIV/CT/0027/A4) 12.

¹⁸ J B Weinstein, *Individual Justice in Mass Tort Litigation – The Effects of Class Actions, Consolidations, and Other Multi-Party Devices* (Northwestern University Press 1995) 102.

¹⁹ P H Schuck, 'Mass Torts: an Institutional Evolutionist Perspective' (1995) 80 Cornell Law Review 941.

²⁰ Ibid.

²¹ S Issacharoff and G P Miller, 'Will Aggregated Litigation Come to Europe?' (2009) 62 Vanderbilt Law Review 177.

²² A Biard and S Voet, 'Collective redress in the EU: will it finally come true?' in A Uzelac and S Voet (ed), *Class actions in Europe: Holy Grail or a wrong trail?* (Springer 2021) 287.

²³ A Biard, 'Iudex Non Calculat? Judges and the Magnitude of Mass Litigation from a Behavioural Perspective' (2017) 6(4) Journal of Risk Regulation 597; A Biard and L Visscher, 'Judges and Mass Litigation: Revisiting the Judicial Cathedral Through Rational Choice Theory and Behavioural Economics' (2014) 2 Aansprakelijkheid, Verzekering & Schade (Liability, Insurance & Damage), Rotterdam Institute of Law and Economics (RILE) Working Paper Series 2014/01 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418969.

intervene as ‘managing judges’.²⁴ Another commentator stressed that ‘the implementation of any collective redress regime will impose greater responsibility on the courts compared with traditional civil proceedings’.²⁵ Among others, judges should act as gatekeepers and check the admissibility of the actions. In the US, judges apply pleading standards, evidentiary rules and other requirements to all civil lawsuits; Rule 23 imposes additional requirements on top of these, arguing requiring greater judicial attention. Other jurisdictions may assign judges the role of filtering claims not firmly based on law during the admissibility phase, as would be true for individual claims. In collective litigation, judges may also be required to check the representativeness of the claimant party (may it be a representative entity, a named plaintiff or else (see pt 10 ch 2)), ensure that the interests of absent represented parties are adequately preserved, channel information flows, review the fairness of complex settlement agreements, decide on damages scheduling or supervise distribution processes, in addition to their more traditional roles.

- 24 One pivotal mission for judges is to be able to handle mass claims’ variable geometry, that is distinguishing those issues that should be addressed at the level of the group from those requiring individual consideration. As Hodges observed:

There are some situations in which a mass of individual claims may appear similar at first sight, but on closer inspection it appears that each contains individual issues that cannot effectively be resolved by deciding a generic question.²⁶

In the context of a Dutch collective settlement of mass claim procedure in the Dexia case (‘WCAM’), an observer highlighted this dual approach when stressing that the Amsterdam court ‘found it sufficient that the group *as a whole* had been served properly’, whereas in subsequent WCAM cases, the court made ‘extensive effort’ to serve parties with unknown domiciles.²⁷

2.3 Case Management and Need for Judicial Creativity

- 25 Many countries have for years observed an increase in civil judges’ managing powers with a view of increasing the effectiveness of civil proceedings and to reduce delays.²⁸

²⁴ H-W Micklitz, A Stadler et al, ‘Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & den Vereinigten Staaten von Amerika’ in T Gabriel (ed), *Massenverfahren: Reformbedarf für die ZPO?* (Verlag Österreich 2005) 111.

²⁵ C Hodges and A Stadler (ed), ‘Introduction’ in: C Hodges and A Stadler (ed), *Resolving Mass Disputes – ADR and settlements of Mass Claims* (Edward Elgar Publishing 2013) 1.

²⁶ C Hodges, *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe* (Hart Publishing 2008) 319.

²⁷ X E Kramer, ‘Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)’ in Hodges C and Stadler A (ed), *Resolving Mass Disputes – ADR and settlements of Mass Claims* (Edward Elgar Publishing 2013) 63.

²⁸ As Ost observes on a more general level: ‘the social game [has become] essentially a game of performance [where] the judge is asked to leave his role of passive arbitrator to adopt the one, [more] active of a coach who, by his advice and his decisions, pushes the competition towards a collective and

Collective redress has been accelerating this tendency and importantly increases the managerial powers of judges.²⁹ In certain jurisdiction, the law foresees specific powers for judges when managing mass claims (eg, in the United Kingdom), while in others, the powers of judges are determined by the existing rules of civil procedure. This is for instance the case in France where the ‘the group action’ procedure does not foresee any specific managerial powers for judges.

- 26 Importantly, in many jurisdictions, judges have developed based on their practice *ad hoc* case management techniques to resolve mass claims. While commenting on the GLO experience in the UK, Lord WOOLF for instance highlighted that ‘the need for imagination and creativity in dealing with such litigation is attested to by every judge who has tried such a case’.³⁰ Likewise, in the Netherlands, the former vice-president of the Amsterdam Court of Appeals who dealt with several collective settlements of mass claims highlighted that, although the WCAM is in principle a bilateral procedure where the discussion is organized by the two parties petitioning the court, the fact that many absent third parties may also indirectly be impacted by the final result justifies the judge’s active role. The managerial techniques used by judges are diverse and will depend on the specificities of the case. To name a few:
- 27 **a) The appointment of court assistants, special master and external support.** For example, in the US, Justice Parker presiding over the Asbestos class action *Jenkins v Raymar* appointed a Special Master who prepared a list of 109 questions addressed to the plaintiffs. The Special Master collected approximately 2.3 million pieces of evidence and information. Special Masters may also be appointed to assist the judge in complex individual litigation.
- 28 **b) Setting up registries, organising regular cases conferences and interim hearings.** For example, under the Group Litigation Order procedure in the United Kingdom, judges may schedule case conferences and hearings, and come up with non-binding indications to inform litigants about the content of future meetings and the elements that, from the judge’s viewpoint, would require additional clarification. Courts may also establish a case register accessible to all potential parties. In the Netherlands, judges presiding over WCAM procedures have sent a list of detailed questions to the parties to clarify shadowy issues and relied on external experts to clarify factual elements. In the US, Judge Weinstein who presided over the Agent Orange class action kept the work of parties

shared victory’. F Ost, ‘Le Juge Pacificateur, Juge-arbitre et Juge entraîneur. Trois modèles de justice’ in P Gerard, F Ost and M Van De Kerchove (ed), *Fonction du Juge et Pouvoir Judiciaire: Transformation et déplacement* (Presses Universitaires Saint-Louis Bruxelles 1983). Zuckerman noted that ‘Common Law countries and Civil Law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation’.

²⁹ About the United States, authors have taken the view that ‘the movement of courts toward managerial judging spurred by mass tort litigation has entailed some of the most far-reaching innovations in judicial history’.

³⁰ H Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Bernan Association 1996) chapter 17 ‘Multi-Party Actions’.

under time-pressure and close scrutiny. As an anecdotal evidence, Schuck reported that Judge Weinstein 'placed a huge calendar, with the trial date circled, on a large blackboard that he kept in prominent view of the lawyers and to which he often pointed for emphasis'.³¹ Today, in the US, judges appointed to preside over non-class mass claims under the multi-district litigation statute utilize a wide range of case management tools.

- 29 **c) Test and model cases.** Test cases are already used as a case management technique in many jurisdictions. They consist of selecting and adjudicating a limited number of cases that are considered to be representatives of the whole group. The decisions are not binding for the whole group but they provide parties with information about the weaknesses or strengths of the claims, and inform them of the view of the court for similar cases. Sometimes, judges have also used informal test cases. For example, observers highlighted the behaviour of Judge Weinstein who, 'throughout the litigation, (...) avoided issuing final decisions on potentially dispositive issues. Instead, he issued statements of preliminary decisions or indications of how he might rule on those issues'. Schuck further observed that 'while refusing to commit himself in a given and specific case management direction which would have precluded any possible way-out in case of unexpected obstacles or difficulties', Judge Weinstein pushed lawyers to 'ask [him] anything [they] like and [he]'ll tell [them] how [he] will probably rule'.³² Today, it is common for US judges presiding over multi-district non-class litigation to schedule 'bellwether' trials to yield information for parties and counsel about how juries may decide other cases in the aggregated litigation.
- 30 **d) Samples, statistics & extrapolation** - In the US class action litigation *Cimino v Raymark Industries*, 2,298 plaintiffs were divided into five categories depending on the characteristics of their respective illness. Then, the court selected random samples of plaintiffs to have their cases tried by juries. The court then established an average verdict for each category and extrapolated these amounts to the remaining cases that had not been heard. However, after extensive proceedings at the court of first instance, the 5th Circuit of Appeals reversed the jury decisions and held the approach to be invalid.³³

2.4 Judicial Behaviour and Impact on Mass Claims

- 31 The management and resolution of mass claims is highly dependent on the behaviour of judges, their readiness to deal with mass claims and their willingness to play an active role during the proceedings. More than disinterested parties, judges have sometimes been described as active 'players' in collective redress proceedings. For example, in the

³¹ *In Re Agent Orange Product Liability Litigation*, MDL No 381 (District Court for the Eastern District of New York, US) [611 F. Supp. 1396 (E.D.N.Y. 1985)]; *In Re "agent Orange" Product Liability Litigation*, MDL No 381 (Court of Appeals for the Second Circuit, US) [818 F.2d 179 (2d Cir. 1987)]; reviewed and discussed in: P H Schuck, *Agent Orange on Trial – Mass Toxic Disasters in the Courts* (The Belknap Press of Harvard University Press 1986).

³² Schuck (n 31).

³³ *Cimino v Raymark Industries, Inc.*, No 93-4452, 93-4611 (Court of Appeals, Fifth Circuit, US) [151 F.3d 297 (5th Cir. 1998)].

US context, Francis McGovern, who was frequently appointed by judges to assist with managing mass claims, took the view that there might be

no way for a court to avoid being a player in an elastic mass tort. By accommodating cases, a judge increases the elasticity of the mass tort. By being more rigid, the court decreases elasticity. In either event the judge is a player.³⁴

Similarly, Menkel-Meadow observed that

judges must decide whether to take an activist role such as judges Jack Weinstein (who presided over the Agent Orange class action), Robert R Merhige (who presided over the Dalkon Shield litigation), ... and others who actively engage in the settlement or case management process, or whether to remain more passive and disinterested from settlements.³⁵

Further, Peterson and Selvin also considered that judges cannot in such circumstances be seen as 'disinterested administrators of justice' but rather as 'deeply interested participants'.³⁶ One of the most significant examples of the impact of judges on mass claims is the possibility given to judges, in some countries like for example in Belgium, to decide to rely either on an opt in or an opt out mechanism depending on the circumstances of the case at stake.

- 32 When considering the behaviour of judges in mass claims, one should not forget that managing collective redress is costly for judges and the judiciary. First, collective redress may importantly increase the workload of judges as many mass claims may be highly burdensome for judiciaries and may require more time and resources than for individual litigation. Second, judges may not be familiar – if not sceptical – when it comes to dealing with claims potentially involving several hundred of claimants.³⁷

2.5 Specialized Courts

- 33 A few European countries have set up specialized courts/chambers for the purpose of handling collective redress actions. The objective has been to develop specific expertise and knowledge in the area, and to ensure that the relevant courts are adequately staffed and equipped (including with technological tools) to deal with mass claims. For example,

³⁴ F McGovern, 'Resolving Mature Mass Tort Litigation' (1989) 69 Boston University Law Review 659. By 'elasticity', Prof McGovern referred to the potential of the scale of a litigation to expand in the context of mass injury, including and perhaps especially when judges at the court of first instance adopt procedures aimed at maximizing efficiency (eg, by reducing litigation expense and time to disposition).

³⁵ Menkel-Meadow C, 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road' (1995) 90 Cornell Law Review 1159, 1183.

³⁶ M Selvin and M A Peterson, 'Mass Justice: The Limited and Unlimited Powers of Courts' (1991) 54 Law & Contemporary Problems 227.

³⁷ This judicial scepticism has for instance been observed in France when the group litigation was introduced in 2014.

in Belgium, the Brussels Commercial Court has exclusive competence in first instance to deal with collective redress actions ('action collective') and the Brussels Court of Appeals has exclusive jurisdiction over appeals. In the Netherlands, the Amsterdam Court of Appeal has exclusive jurisdiction to deal with collective settlements of mass claims (WCAM). In France, exclusive jurisdiction for the treatment of group actions was explicitly mentioned in a 2010 report but the idea was finally abandoned in the final 2014 legislation introducing group actions in French law.

2.6 Dialogue Between Judges: Towards A Community Of 'Mass Litigation Judges'?

- 34 At the European level, collective redress is an important topic for the judiciary and initiatives aimed at raising awareness about the EU Representative Actions Directive and triggering dialogues among judges have multiplied. For example, BEUC has been organising throughout 2022-2023 a series of online workshops for judges and the judiciary in order to give judges a possibility for exchanges on the topic in the context of the upcoming entry into application of the Directive. These workshops gathered judges from the US, Canada, the Netherlands, Spain and Germany. In the US, the Federal Judicial Centre, the research and education arm of the federal judiciary, published a 'pocket guide for judges' when managing class action litigation in order to assist US judges. Some judges involved in mass claims have also sought advice from more experienced colleagues from other jurisdictions. For example, British judges travelled to Canada to meet their counterparts and hear more about the way they deal with mass claims. In the European Union, there exist several (informal) fora where judges and other stakeholders exchange their experiences in specific areas of mass litigation such as cartel law, IP litigation etc. The European Commission has set up a digital platform at the EU level (the 'Representative Actions Collaboration Tool' – also named 'EC-REACT')³⁸ allowing different group of stakeholders (including judges) to share their experience and practical tips for the resolution of mass claims. This platform is a secured online forum where judges from various Member States can exchange (inter alia) about the pitfalls they may encounter when dealing with mass claims. The EC-REACT has been operational for only a very limited amount of time. It is therefore still too early to assess its added value and contribution to the making of an EU community of 'mass litigation judges'.

3 THE ROLE OF LAWYERS

- 35 In order to address the subject of the role played by lawyers in group litigation, it is necessary to emphasize that the issue seems to receive attention almost exclusively in the context of class actions, both with reference to the 'authentic' class action (that is, the American one) and to its offspring spread throughout a few common law legal systems, such as those in Canada and Australia. The state of the problem is well illustrated by the following statement: 'Ethical issues arise frequently in class action

³⁸ <https://representative-actions-collaboration.ec.europa.eu/>

litigation. These issues include conflict of interest, solicitation, application of the no-contact rule, the reasonableness of attorney fees, and the attorney-witness rule.³⁹ Class action lawyering is regarded as walking in ‘ethical minefields’⁴⁰ since lawyers must constantly juggle their own economic interests, the interests of the group they represent, and the public interest as well, under the constant and attentive supervision of the court.

- 36 The entrepreneurial character of class action litigation implies that plaintiff’s counsel has a distinct vested interest in the successful outcome of the case, whether it is a judgment in favour of the class or a settlement, since in some jurisdictions class action lawyers benefit from contingency fee agreements,⁴¹ and in most jurisdictions class counsel fees bear some relationship to the total amount of compensation class members obtain if the class prevails.⁴² Therefore, one may subscribe to the view according to which in class action litigation ‘the lawyer’s financial stake (...) is out of all proportion to any individual class member’s interest’,⁴³ which is a situation that is unparalleled in individual litigation, even when the claim is brought by the lawyer on a contingency fee basis. This makes it clear that a close scrutiny of the professional conduct of class action lawyers is more than necessary since the rules of ethics that lawyers at large are expected to abide by may not be sufficient to prevent conflicts of interest and other situations bordering on improper conduct that may arise in class action litigation.
- 37 One issue peculiar to class action litigation has been identified as ‘the absent client phenomenon’.⁴⁴ The alleged ‘class’ is a sort of faceless entity, since the opt-out system allows class members to remain outside the judicial procedure. This means that the class counsel neither knows the class members nor until recently has counsel been in a position to establish meaningful contact with them so as to provide information on the case and receive instructions, as happens in individual litigation. Today, in most class actions in the US, class counsel establish public websites, accessible by class members and others, that report on developments in the litigation and ultimately, if there is a class settlement, the proposed settlement terms and, post-litigation, rules for collecting compensation. Notwithstanding this, and even though rules such as Rule 23(g)(4) of the US Federal Rules of Civil Procedure provide that, ‘Class counsel must fairly and

³⁹ N J Moore, ‘Who Should Regulate Class Actions Lawyers?’ (2003) 5 University of Illinois Law Review 1477.

⁴⁰ J Kalajdzic, ‘Self-Interest, Public Interest, and the Interest of the Absent Client: Legal Ethics and Class Action Praxis’ (2011) 49 Osgoode Hall Law Journal 1, 4. Deborah Hensler notes that an alternative perspective is that collective litigation brings into sharper focus legal ethical issues and potential conflicts of interest that pertain to civil litigation generally but are often ignored.

⁴¹ For more details, para 39-40.

⁴² In the US, unlike Canada and (until recently) Australia, the judge presiding over the class action awards fees (Rule 23 (g)). In some judicial circuits, doctrine requires judges to award fees as a percentage of any common benefit fund created by the successful class action; in others, judges award fees on an hours and expense basis, but reward successful class counsel for risk taking and effort by including a ‘multiplier’ (uplift).

⁴³ Kalajdzic (n 40) 8.

⁴⁴ Ibid.

adequately represent the interests of the class', in reality, the entire litigation and its development, including the making of fundamentally important decisions, is in the sole hands of the class counsel. Therefore, the true *deus ex machina* of mass litigation is the class counsel, whose pivotal role begins even before the filing of the action, keeping in mind that the class counsel may be the one who identifies potential representative plaintiffs. Representative plaintiffs, on their turn, 'have proven to be merely figureheads: ineffective, passive, unsophisticated, and completely disregarded by both courts and class attorneys'.⁴⁵ Over time, in the US, advocates on behalf of certain groups of class members have emerged at the settlement stage to represent objectors to proposed settlement terms, including proposed class counsel fees.

- 38 In light of the above, the view of several American scholars⁴⁶ is that the usual ethical duties of lawyers, such as the duty of competence, the various duties ensuing from the client-lawyer relationship and the duty of confidentiality, do not work well for class action litigation since they were conceived for individual litigation. Whether or not specific rules of professional conduct should be drafted with a view to addressing the peculiar features of class action is still an open issue.
- 39 As mentioned previously, in the legal systems that have adopted some form of group litigation that does not follow the pattern of American class actions the role played by lawyers does not seem to be a matter that attracts specific scrutiny, often because the legislation in force does not address the issue. In the US, in class actions, class counsel fees are awarded by judges if and when the class prevails, unlike in individual litigation, where contingent fee contracts are permissible and prevail in certain types of actions, such as personal injury lawsuits. Whatever the arrangement, the financial interests of counsel are a driving force of in litigation. Contingent fee agreements are forbidden in most European legal systems, and therefore lawyers do not enjoy any particular incentive to represent the lead plaintiff in collective litigation. On the other hand, special purpose entities ('qualified entities') and the entities that finance the litigation ('third party funders') have clear financial incentives that may also produce significant conflicts of interest with class members. This potential has been overlooked by many participants in the policy debate regarding collective procedures. The fact that 'success fees' common in certain types of commercial litigation bear a close resemblance to contingent fees is also overlooked.
- 40 It is worth mentioning that, against the background of the 'loser pays' principle, applicable to individual litigation and collective actions as well, some countries have provided for a sort of 'bonus' in addition to the attorney's fee that the court can grant to the lawyer who represented the lead plaintiff when the outcome of the action is

⁴⁵ A Klement, 'Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers' (2002) 21 *The Review of Litigation* 26, 27.

⁴⁶ For instance, G P Miller, 'Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard' (2003) *University of Chicago Legal Forum* 581; G C Hazard Jr., 'Modeling Class Counsel' (2003) 81 *Nebraska Law Review* 1397.

favourable to the group. This is the case in Italy, for instance, where the most recent rules on collective redress contemplate such a ‘reward payment’ (*compenso premiale*) in favour of the lawyer. The amount of the payment is determined according to a complex system of calculation based on the number of group members who opted in.⁴⁷ Such ‘rewards’ are also the norm in court-determined fees for class counsel in US class actions under the ‘lodestar’ doctrine. Slovenia, too, provides for rules allowing lawyers agreeing to bring a collective action to be paid on the basis of a distinctive type of contingency fee agreement.⁴⁸ Arguably, legal strictness with regard to attorney fees, has fuelled the growth of third-party litigation financing which at least until now has been not only allowable but largely unregulated in European jurisdictions.

- 41 In this regard and with reference to the European Union, one may emphasize that the role played by the scheme of attorneys’ fees adopted in given legal systems as well as the rules concerning the financing of group litigation have been recognized by the Commission as a potential source of abusive litigation. In a Recommendation issued in 2013, the Commission provided that in compensatory collective redress,

The Member States should ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.⁴⁹

Furthermore, ‘The Member States should not permit contingency fees which risk creating such an incentive’,⁵⁰ even though the prohibition is mitigated by possible exceptions that national legislations could allow insofar as the right to full compensation of the group members is safeguarded. Curiously enough, the more recent Representative Actions Directive⁵¹ does not take a stand on the issue of contingent fee agreements as a way of financing collective litigation.

- 42 As to rules expressly devoted to the conduct of lawyers representing the lead plaintiff (whether the plaintiff is an entity or a single member of the class), it was not possible to find relevant information, which leads one to think that the general principles dictated by the national codes of ethics for lawyers are deemed sufficient to guarantee that the

⁴⁷ See Art 840-*novies* of the Italian Code of Civil Procedure: E Silvestri, ‘Rebooting Italian Class Actions’ in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 201, 210.

⁴⁸ A Galič and A Vlahek, ‘Challenges in Drafting and Applying the New Slovenian Collective Actions Act’ in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 215, 241.

⁴⁹ Commission Recommendation 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 of 11 June 2013 (EU) Art 29.

⁵⁰ Ibid Art 30. E Silvestri, ‘Group Actions À La Mode Européenne: A Kinder, Gentler, Class Action for Europe?’ in C B Picker and G I Seidman (ed), *The Dynamism of Civil Procedure – Global Trends and Developments* (Springer 2016) 203, 213.

⁵¹ Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU).

lawyers who agree to institute collective proceedings will act in the interest of all the members of the class

4 EUROPEAN CROSS-BORDER REPRESENTATIVE ACTIONS

- 43 It is a given fact that many mass harm situations in Europe are of a cross-border nature. This undeniably leads to problems regarding jurisdiction, the mutual recognition of collective redress decisions within the EU and the applicable law. These issues are regulated by the Brussel I Recast Regulation,⁵² and the Rome I and Rome II Regulations⁵³. Over the last years, a lot of scholarly attention has been devoted to the applicability of these Regulations in collective redress proceedings.⁵⁴
- 44 The 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law paid attention to the cross-border aspect of collective redress proceedings.⁵⁵ The Recommendation stipulates that the Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.⁵⁶ Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.⁵⁷
- 45 The European Commission believes that in cross-border mass harm cases, the current rules on judicial cooperation in civil matters are satisfactory to initiate a single collective action in a single forum. National rules on admissibility or standing may not prevent this. According to the Commission, the European rules on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters (ie, the Brussels I Recast

⁵² Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 1215/2012 of 12 December 2012 (EU).

⁵³ Regulation on the law applicable to contractual obligations (Rome I), 593/2008 of 17 June 2008 (EU) and Regulation on the law applicable to non-contractual obligations (Rome II), 864/2007 of 11 July 2007 (EU).

⁵⁴ Eg, T Bosters, *Collective Redress and Private International Law in the EU* (The Hague Asser Press 2017); D Fairgrieve and E Lein (ed), *Extraterritoriality and Collective Redress* (Oxford OUP 2012); A Nuyts and N Hatzimihail (ed), *Cross-Border Class Actions: The European Way* (Sellier European Law Publishers 2014) and A Pato, *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective* (Oxford Hart 2019). For a recent overview see P Leupold, 'Private International Law and Cross-Border Collective Redress' (2022) BEUC The European Consumer Organisation https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-085_Private_International_Law_and_Cross-Border_Collective_Redress.pdf accessed 17 November 2022.

⁵⁵ Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396 of 11 June 2013 (EU).

⁵⁶ Ibid Art 17.

⁵⁷ Ibid Art 18.

Regulation) and the rules on the applicable law (ie, the Rome I and II Regulations) are suitable and applicable in cross-border mass harm cases, and there is no need for specific rules.⁵⁸

- 46 This rationale is reflected in the 2020 Representative Actions Directive.⁵⁹ The red thread in the Representative Actions Directive is the distinction between domestic and cross-border cases. In general, a representative action means an action for the protection of the collective interests of consumers that is brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both.⁶⁰ A domestic representative action means a representative action brought by a qualified entity in the Member State in which the qualified entity was designated.⁶¹ A cross-border representative action means a representative action brought by a qualified entity in a Member State other than that in which the qualified entity was designated.⁶²
- 47 The Representative Actions Directive states that where appropriate, it could be possible, in accordance with rules of private international law, for a qualified entity to bring a representative action in the Member State where it has been designated as well as in another Member State. Building on the 2009 Injunctions Directive,⁶³ the Representative Actions Directive makes a distinction between those two types of representative actions. Where a qualified entity brings a representative action in a Member State other than that in which it is designated, that representative action should be considered a cross-border representative action. Where a qualified entity brings a representative action in the Member State in which it is designated, that representative action should be considered a domestic representative action, even if that representative action is brought against a trader domiciled in another Member State and even if consumers from several Member States are represented within that representative action. The Member State in which the representative action is brought should be the deciding criterion for determining the type of representative action that is brought. For this reason, it should not be possible for a domestic representative action to become a cross-border representative action during the course of the proceedings, or vice versa.⁶⁴
- 48 The Representative Actions Directive intends to facilitate these cross-border representative actions: Member States shall ensure that qualified entities designated in advance in another Member State for the purpose of bringing cross-border representative actions can bring such representative actions before their courts or

⁵⁸ Communication from the Commission 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) 401/2 of 11 June 2013, 13-14.

⁵⁹ Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020/1828 of 25 November 2020 (EU).

⁶⁰ Ibid Art 3 (5).

⁶¹ Ibid Art 3 (6).

⁶² Ibid Art 3 (7).

⁶³ Directive on injunctions for the protection of consumers' interests, 2009/22 of 23 April 2009 (EU).

⁶⁴ Directive (n 59) Recital (23).

administrative authorities.⁶⁵ For example, where the alleged infringement affects or is likely to affect consumers in different Member States, the representative action can be brought before the court of a Member State by several qualified entities from different Member States in order to protect the collective interests of consumers in different Member States.⁶⁶ Moreover, qualified entities from different Member States should be able to join forces within a single representative action in a single forum, subject to the relevant rules on jurisdiction. This should be without prejudice to the right of the court or administrative authority seized to examine whether the representative action is suitable to be heard as a single representative action.⁶⁷

- 49 The way of facilitating such cross-border representative actions is to make sure that the qualified entities, wanting to bring cross-border representative actions in the EU, should be subject to the same criteria for designation.⁶⁸ These criteria are laid down in the Representative Actions Directive: these qualified entities should be legal persons that are properly constituted in accordance with national law of the Member State of designation, have a certain degree of permanence and level of public activity, have a non-profit-making character and have a legitimate interest, given their statutory purpose, in protecting the interests of consumers as provided for by Union law. Qualified entities should not be the subject of insolvency proceedings or be declared to be insolvent. They should be independent and should not be influenced by persons other than consumers who have an economic interest in the bringing of a representative action, in particular by traders or hedge funds, including in the event of funding by third parties. Qualified entities should have established procedures to prevent such influence as well as to prevent conflicts of interest between themselves, their funding providers and the interests of consumers. They should make publicly available, in plain and intelligible language, by any appropriate means, in particular on their websites, information demonstrating that they comply with the criteria for designation as a qualified entity and general information about the sources of their funding in general, their organizational, management and membership structure, statutory purpose and activities.⁶⁹
- 50 Each Member State shall communicate to the Commission a list of the qualified entities that it has designated in advance for the purpose of bringing cross-border representative actions.⁷⁰ The Directive states that courts shall accept this list as proof of the legal standing of the qualified entity to bring a cross-border representative action, however

⁶⁵ Ibid Art 6.1.

⁶⁶ Ibid Art 6.2.

⁶⁷ Ibid Recital (31).

⁶⁸ Ibid Recital (25).

⁶⁹ Ibid Art 4.3.

⁷⁰ Ibid Art 5.1.

without prejudice to the right of the court to examine whether the statutory purpose of the qualified entity justifies its taking action in a specific case.⁷¹

- 51 For the purposes of cross-border representative actions, the above common safeguards are needed. Therefore, qualified entities that have been designated on an ad hoc basis should not be allowed to bring cross-border representative actions.⁷² For domestic representative actions, this is possible, if the ad hoc entity complies with the criteria for designation as a qualified entity as provided for in national law.⁷³
- 52 However, and this is in line with the 2013 Recommendation, the Representative Actions Directive does not touch upon EU private international rules. The Directive is without prejudice to Union rules on private international law, in particular rules regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and rules on the law applicable to contractual and non-contractual obligations.⁷⁴
- 53 During the preparatory discussions of the Representative Actions Directive, many stakeholders asked for additional guidance on the application of EU private international rules to mass litigation. For example, the European Parliament suggested to use the domicile of the defendant to determine the competent jurisdiction. However, no agreement could be achieved between the EU institutions and the Commission finally continued to take the view that the existing rules of the Brussels I Regulation should be fully exploited.⁷⁵ Moreover, the Commission should, within five years after the date of application of the Directive, assess whether a European ombudsman for representative actions for injunctive measures and redress measures should be created for the purposes of solving cross-border representative actions.⁷⁶
- 54 Regarding cross-border infringements, the European policymaker sees more benefit in the cooperation and the exchange of information between qualified entities from different Member States. There is a need to continue capacity-building and cooperation measures and to extend them to a larger number of qualified entities across the Union in order to increase the use of representative actions with cross-border implications.⁷⁷ The Directive also aims to set up electronic databases: Member States should set up national electronic databases that are publicly accessible through websites and that

⁷¹ Ibid Art 6.3.

⁷² Ibid Recital (25).

⁷³ Ibid Art 4.6.

⁷⁴ Ibid Art 2.3 and Recital (21). The latter states: 'this Directive should not affect the application of rules of private international law regarding jurisdiction, the recognition and enforcement of judgments or applicable law, nor should it establish such rules. Existing instruments of Union law should apply to the procedural mechanism for representative actions required by this Directive. In particular, Regulation (EC) No 864/2007 (6), Regulation (EC) No 593/2008 (7) and Regulation (EU) No 1215/2012 (8) of the European Parliament and of the Council should apply to the procedural mechanism for representative actions required by this Directive.'

⁷⁵ Communication from the Commission (n 58) 13.

⁷⁶ Directive (n 59) Art 23.3.

⁷⁷ Ibid Recital (71).

provide information on qualified entities designated in advance for the purpose of bringing domestic and cross-border representative actions and general information on ongoing and concluded representative actions.⁷⁸ Moreover, the European Commission shall also set up its own electronic database.⁷⁹ Information shared by the Member States within the electronic database of the European Commission regarding qualified entities designated for the purpose of bringing cross-border representative actions shall be publicly available.⁸⁰

- 55 In the meanwhile, the Court of Justice of the EU (CJEU) had to step in several times to clarify the application of the Brussels and Rome regimes in the context of mass cases.⁸¹ In 2000, the Court ruled in *Henkel* that the Brussels rules on jurisdiction must be interpreted as meaning that a preventive action brought by a consumer protection organization for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Art 5(3) of the (old) Brussels Convention.⁸²
- 56 In *Amazon* (2016), the Court reaffirmed its position with regards to which Member State's data protection laws should apply in a situation where there is a company established in one Member State that provides services to consumers based in various other Member States. The Court also held that a contractual standard term which chose a supplier's Member State law as the governing law, rather than the consumer's, was unfair towards consumers.⁸³
- 57 In *Schrems II* (2018) the Court ruled that Art 16(1) of the Brussels I Recast Regulation pertaining to the jurisdiction for consumer contracts⁸⁴ must be interpreted to mean that it does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he/she is domiciled, not only his/her own claims, but

⁷⁸ Ibid Art 14.1.

⁷⁹ Ibid Art 14.3. Meanwhile, the EU Commission has established 'EC-REACT' that operates as a secure and restricted electronic platform,

⁸⁰ Ibid Art 14.4.

⁸¹ For a recent overview see P Leupold, 'Private International Law and Cross-Border Collective Redress' (2022) BEUC The European Consumer Organisation https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-085_Private_International_Law_and_Cross-Border_Collective_Redress.pdf accessed 17 November 2022.

⁸² *Verein für Konsumenteninformation v Karl Heinz Henkel*, Case C-167/00 (CJEU), Judgment 1 October 2002 [ECLI:EU:C:2002:555].

Art 5(3) (old) Brussels Convention stated: 'a person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.' The Brussels Convention has been replaced by the Brussels I Recast Regulation. Art 5(3) is now Art 7(2). The contents remained unchanged.

⁸³ *Verein für Konsumenteninformation v Amazon EU Sàrl*, Case C-191/15 (CJEU), Judgment 28 July 2016 [ECLI:EU:C:2016:612].

⁸⁴ Art 16(1) Brussels I Regulation stated: 'consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.' The Brussels I Regulation has been replaced by the Brussels I Recast Regulation. Art 16(1) is now Art 18(1). The contents remained unchanged.

also claims assigned by other consumers domiciled in the same Member State, in other Member States, or in non-Member countries.⁸⁵ In other words, the jurisdiction of courts other than those expressly referred to by the Brussels I Recast Regulation cannot be established through the concentration of several claims in the person of a single applicant. Advocate General Bobek highlighted the limits of the Brussels regime and argued that the issue is too delicate and complex and cannot be solved on the basis of an instrument that is clearly unfit and is in need of comprehensive legislation.⁸⁶

- 58 In 2020, in the context of the *Dieselpgate* litigation, an Austrian court sought clarification on the notion ‘the place where the harmful event occurred or may occur’ in Art 7(2) of the Brussels I Recast Regulation and referred a question to the Court for a preliminary ruling. This case was about an action brought by the Austrian consumer organization VKI which had brought several actions representing 16,000 consumers affected by the Dieselpgate scandal. Volkswagen had challenged the competence of Austrian courts as the company is seated in Germany. In its decision, the Court held that Art 7(2) must be interpreted as meaning that, where a manufacturer in a Member State has unlawfully equipped its vehicles with software that manipulates data relating to exhaust gas emissions before those vehicles are purchased from a third party in another Member State, the place where the damage occurs is in that latter Member State.⁸⁷
- 59 *Vereniging van Effectenbezitters* (2021) concerned the international jurisdiction for a collective action based on issuer liability for inaccurate, incomplete and misleading information in capital markets. The Court ruled that under Art 7(2) Brussels I Recast Regulation such actions may be brought at the place where the issuer is subject to statutory reporting obligations, which is usually the place where the financial instruments are traded on a stock exchange. In contrast, they could not be brought at the location of the investment account in which the financial instruments are held.⁸⁸ This decision put an end, for the time being, to the practice of the Dutch courts to allow such actions in favour of foreign parties by applying Art 7(2) Brussels I Recast Regulation.
- 60 In *BMA Nederland* (2022) the Court held that Art 7(2) Brussels I Recast Regulation must be interpreted as meaning that the court for the place of establishment of a company whose debts have become irrecoverable, because the grandparent company of that company breached its duty of care towards that company’s creditors, has jurisdiction to hear a collective action for damages in matters relating to tort which the liquidator in the bankruptcy of that company has brought. The fact that a foundation acts to defend

⁸⁵ *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16 (CJEU), Judgement 25 January 2018 [ECLI:EU:C:2018:37].

⁸⁶ *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16 (CJEU), Opinion of Advocate General Bobek 14 November 2017 [ECLI:EU:C:2017:863].

⁸⁷ *Verein für Konsumenteninformation v Volkswagen AG*, Case C-343/19 (CJEU), Judgment 9 July 2020 [ECLI:EU:C:2020:534].

⁸⁸ *Vereniging van Effectenbezitters v BP plc*, Case C-709/19 (CJEU), Judgement 12 May 2021 [ECLI:EU:C:2021:377].

the collective interests of creditors and that the action brought for that purpose does not take account of the individual circumstances of the creditors does not affect this.⁸⁹

- 61 In *Meta Platforms Ireland* (2022), the Court ruled that Art 80(2) of the 2016 General Data Protection Regulation⁹⁰ must be interpreted as not precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.⁹¹
- 62 The fact that the European policymaker did not take a clear position with respect to the applicability of the Brussels and Rome regimes in collective redress proceedings – by stating in the Representative Actions Directive that these rules are without prejudice to the existing rules on private international law, is a missed opportunity.⁹²
- 63 Moreover, this statement is simply not true. The coordination of cross-border collective redress proceedings has not been sufficiently addressed by the Representative Actions Directive, and the current rules on jurisdiction, recognition, enforcement and applicable law are simply not satisfactory for the effective and efficient enforcement of mass claims. Cross-border uniformity is a remote prospect. The Directive's limited provisions on cross-border representative actions raise the prospect of forum shopping, and complex legal arguments over jurisdiction and applicable law, all of which will constitute additional barriers to justice for consumers.⁹³ As some have rightly pointed out already ten years ago:

⁸⁹ *ZK, in his capacity as successor to JM, liquidator in the bankruptcy of BMA Nederland BV v BMA Braunschweigische Maschinenbauanstalt AG and Stichting Belangbehartiging Crediteuren BMA Nederland*, Case C-498/20 (CJEU), Judgement 10 March 2022 [ECLI:EU:C:2022:173].

⁹⁰ Regulation 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, 2016/679 of 27 April 2016 (EU).

⁹¹ *Meta Platforms Ireland Limited, formerly Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*, Case C-319/20 (CJEU), Judgement 3 June 2022 [ECLI:EU:C:2022:322].

⁹² For some policy options see P Oberhammer, 'Collective redress and jurisdiction in Europe' (2021) 1 Mass Claims 27.

⁹³ R Money-Kyrle, 'Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?' in B Hess, M Bergström and E Storskrubb (ed), *EU Civil Justice. Current Issues and Future Outlook* (Oxford Hart 2016) 223, 251. See also B Hess, 'Cross-border Collective Litigation and the Regulation Brussels I' (2010) 2 *Praxis des Internationalen Privat- und Verfahrensrechts* 116 and B A Terradas, 'Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles' (2015) 11 *Journal of Private International Law* 143.

Consumers, potential litigants, lawyers and courts could at least have expected a clear framework of private international rules. Although, or even because, the issues of international jurisdiction and enforcement involve controversial arguments and require a balancing of different national interests, it is up to the European Union to take the lead and to use its core competence for regulating cross-border issues.⁹⁴

- 64 The application of the current rules of the Brussels regime indeed leads to many questions and situations of legal uncertainty. First, as the above case law of the CJEU shows, jurisdictional problems can arise.⁹⁵ The Brussels I Recast Regulation applies in civil and commercial matters,⁹⁶ including of a collective nature, although discussion can arise when public bodies (eg, regulators or public ombudsmen) are party to collective proceedings. If their claim is based on public (sovereign) powers, this is not a civil matter.⁹⁷
- 65 The general jurisdiction rule in the Brussels I Recast Regulation is the *actor sequitur forum rei* principle: the plaintiff must sue at the defendant's forum. In case of collective litigation, all claims must be concentrated at the court of the defendant's domicile.⁹⁸ Consequently, it is the forum law that must contain the possibility to bring some sort of collective litigation, and that will decide on the standing issue.
- 66 The Brussels I Recast Regulation also contains a number of special heads of jurisdiction, which are relevant when the forum of the defendant has no (suitable) collective litigation mechanism.⁹⁹ The most used ones are these relating to tort (Art 7(2)), contract (Art 7(1)) and consumer contracts (Art 17-19). In case of a mass tort situation, Art 7(2) of the Brussels I Recast Regulation stipulates that a person domiciled in a Member State may be sued in another Member State in the courts of the place where the harmful event occurred. According to the CJEU, this also includes the place where the damage occurred,¹⁰⁰ although the court having jurisdiction can only rule with respect to the damage that was caused in the state of that court.¹⁰¹

⁹⁴ A Stadler, 'The Commission's Recommendation on common principles of collective redress and private international law issues' (2013) 4 *Nederlands Internationaal Privaatrecht* 483, 488.

⁹⁵ For an overview see M Stürner, 'Cross-border issues' in A Stadler, E Jeuland and V Smith (ed) *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution* (Edward Elgar Publishing 2020) 291, 296.

⁹⁶ Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU) Art 1.1 (Brussels I Recast Regulation).

⁹⁷ See eg *Irini Lechouritou et al v Dimosio tis Omospondiakis Dimokratias tis Germanias*, Case C-292/05 (CJEU), Judgment 15 February 2007 [ECLI:EU:C:2007:102] and *Realchemie Nederland BV v Bayer CropScience AG*, Case C-406/09 (CJEU), Judgment 18 October 2011 [ECLI:EU:C:2011:668].

⁹⁸ A Pato, *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective* (Oxford Hart 2019) 123.

⁹⁹ *Ibid* 127.

¹⁰⁰ *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, Case C-21/76 (CJEU), Judgment 30 November 1976 [EU:C:1976:166].

¹⁰¹ *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, Case C-68/93 (CJEU), Judgment 7 March 1995.

- 67 According to Art 7(1), the courts for the place of performance of the obligation in question have jurisdiction. The jurisdictional rules on consumer contracts in Art 17-19 take precedence over Art 7(1). If the trader directs his activities to the Member State of the consumer's domicile – and both are bound by a contract – that consumer may bring proceedings against the trader before the courts of the state where the consumer is domiciled.¹⁰² If consumers from one Member State initiate collective litigation in that Member State, other persons may join, as long as they are consumers and if they have their domicile in the forum state. Foreign consumers can only assign their claim to an assignee who has his domicile in the forum state and who also is a consumer, and not a consumer association.¹⁰³
- 68 Secondly, recognition and enforcement problems can arise.¹⁰⁴ Both the Brussels I Recast Regulation (covering all civil and commercial matters) and the EEO Regulation¹⁰⁵ (covering uncontested pecuniary claims) are applicable. Under both regimes, enforcement is possible without any exequatur.
- 69 Many European jurisdictions prioritize court-approved collective settlements. Are these judgments in the sense of the Brussels I Recast Regulation?¹⁰⁶ If so, then they have *res iudicata* effect in the other Member States, under Art 36(1).¹⁰⁷ If they are qualified as court settlements, they do not have this effect, under Art 59 of the Brussels I Recast Regulation, according to which a court settlement shall be enforced in other Member States only if it is enforceable in the Member State of origin. More problems can arise regarding the public policy exception of the state of enforcement.¹⁰⁸ The courts of Member States that have no opt-out model could invoke this exception, stating that opt-out violates the right to be heard and the party autonomy principle.¹⁰⁹
- 70 Art 3(1)(a) EEO Regulation states that a claim shall be regarded as uncontested if the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings. Most

¹⁰² Brussels I Recast Regulation (n 96) Art 18.1.

¹⁰³ *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, Case C-89/91 (CJEU), Judgment 19 January 1993 [EU:C:1993:15] (a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party may not enjoy the benefit of the rules of special jurisdiction concerning consumer contracts).

¹⁰⁴ For an overview see Stürner (n 95) 306-309.

¹⁰⁵ Regulation creating a European Enforcement Order for uncontested claims, 805/2004 of 21 April 2004 (EU).

¹⁰⁶ According to Art 2(a) a judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

¹⁰⁷ 'A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.'

¹⁰⁸ Art 45.1, (a) and 46 Brussels I Recast Regulation. See JT Nowak, 'Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles?' in B Hess en K Lenaerts (ed), *The 50th Anniversary of the European Law of Civil Procedure* (Nomos 2020) 393.

¹⁰⁹ See A Halfmeier, 'Recognition of a WCAM settlement in Germany' (2012) 2 *Nederlands Internationaal Privaatrecht* 176.

collective settlements will not be agreed upon during the course of proceedings. Things are more complicated since the EEO Regulation requires that all parties have accepted the settlement, which is not the case when it concerns an opt-out collective settlement.

- 71 The ELI-UNIDROIT Model European Rules of Civil Procedure devote a number of Model Rules to cross-border issues.¹¹⁰ Model Rule 233 states that the recognition as a qualified claimant by a court binds every other EU court without the need for further application for recognition in relation to actions arising from the same event of mass harm. Model Rule 234 focuses on judicial coordination. When a mass harm has cross-border effects, the registry entries for each collective proceeding shall be made available on the European e-justice platform or any similarly effective platform. More importantly, EU Member States' courts must use their best effort to coordinate collective proceedings in different Member States in order to avoid irreconcilable judgments or settlement approvals. According to the comments, the latter requires the coordination of parallel collective proceedings where necessary. A superior way to manage parallel collective proceedings arising from the same mass harm event could be a consolidation of the proceedings.¹¹¹ Irrespective of jurisdictional issues, while procedural and/or evidential and/or costs rules differ considerably across Europe, consolidation, may not be a practical possibility. Consolidation solely for the purpose of evidence-taking or other pretrial activities following the principles of the US Judicial Panel on Multidistrict Litigation (MDL) may be an instrument for the future.¹¹²
- 72 Regarding the applicable law, Model Rule 236 stipulates that group members shall not be prevented from participating in a single collective proceeding if they are subject to different substantive laws (as a consequence of the applicability of the Rome regime). In any case where group members are subject to different substantive law, the court may divide the group into sub-groups.

5 FUNDING

5.1 Complex Issue

- 73 Any jurisdiction wanting to introduce a collective litigation mechanism will be confronted with the same design options: will its scope be trans-substantive or restricted? Who will have standing? How will the class be notified? Will it be an opt-in or opt-out regime? And what remedies will be available? However, the question of how the mechanism will be funded and financed transcends all these issues, simply because without appropriate

¹¹⁰ European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI-UNIDROIT Model European Rules of Civil Procedure. From Transnational Principles to European Rules of Civil Procedure* (Oxford OUP 2021) 265-268.

¹¹¹ Reference is made to Model Rule 146 regarding the consolidation of proceedings.

¹¹² 28 US Code § 1407.

and clear funding rules, they will remain a dead letter. Funding rules are an essential precondition for the proper functioning of any civil justice system.¹¹³

- 74 Funding and financing a collective litigation mechanism is a complex issue. It is challenging to embed this kind of procedure in the existing one-on-one litigation funding rules. In individual litigation, the costs and lawyer fees are (pre)financed by the identifiable plaintiff pursuing his individual claim, or a third party (eg, a lawyer, a legal expenses insurer, a legal aid scheme or a third-party litigation fund) directly connected with that plaintiff. In collective litigation, and at least at the outset of the procedure, the representative plaintiff acts on behalf of a group of unquantifiable and unidentified class members. Rational apathy and free-rider problems minimize the incentive for those members to invest in the litigation, leaving the funding to be paid for or organized by their agent who will in most cases be confronted with wealthy and sophisticated repeat players as counterparties in the litigation. This results in an investment asymmetry.¹¹⁴
- 75 The fees and costs in collective litigation are also substantial. This kind of litigation not only entails very large court costs and lawyer fees but also specific costs connected to: an intensive preparation stage; a complicated certification phase; multiple individual or non-individual notifications to class members; reaching a settlement; court ordered investigations; a possible elaborate trial on the merits of the case; internal administration and communication processes and potential distribution procedures etc. All these costs and fees need to be pre-financed, irrespective of the outcome of the case.
- 76 In a one-on-one setting, there are two principal actors: the plaintiff pursuing his individual claim and his (representing) counsel. Collective litigation proceedings are, from the plaintiff's side, characterized by a triangular structure. In addition to the class representative and the class lawyer, there are a number of unquantifiable and unidentified class members. Although they are not formal parties to the procedure, it is their rights that are being adjudicated in a decisive manner, in the sense that they are directly bound by the *res judicata* effect of the decision, unless they have not opted in or have opted out. Therefore, the funding issue should first and foremost be approached from this triangular structure, and more specifically from the standpoint of the class representative and/or the class members (Sec 5.3) and the class counsel (Sec 5.4). Similarly as in one-on-one litigation, class action litigation can be funded and financed by third parties (Sec 5.5): legal expenses insurers, government funds, legal aid schemes and, most recently, third-party litigation funders.¹¹⁵

¹¹³ M Cappelletti and B Garth (ed), *Access to Justice: A World Survey* (Sijthoff Giuffrè 1978) 1.

¹¹⁴ I Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands' (2011-2012) 8 *Journal of Law, Economics, and Policy* 549, 554.

¹¹⁵ For a recent and accessible overview see BEUC The European Consumer Organisation and noyb, 'Funding of collective redress – Financing options in the EU and beyond' (2022) https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-116_Funding_of_collective_redress.pdf accessed 21 December 2022; J Saulnier and K Müller with I Koronthalyova, 'Responsible private funding of litigation' (2021) European Parliamentary Research Service <https://www.europarl.europa.eu/RegData/etudes/>

5.2 Loser Pays Rule

- 77 An important factor is the loser pays rule, according to which the final outcome of the case will ultimately determine who will have to bear some or all of these costs and fees
- 78 The loser pays rule is well entrenched in the European legal tradition and most other jurisdictions outside the US.¹¹⁶ This is the preferred European policy option. The 2013 Recommendation states that the Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party, subject to the conditions provided for in the relevant national law'.¹¹⁷ According to the Representative Actions Directive, Member States shall ensure that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party, in accordance with conditions and exceptions provided for in national law applicable to court proceedings in general.¹¹⁸ Although in the US, the loser pay doctrine is regarded as restricting access to justice, outside the US, the rule is viewed as a safeguard against abusive litigation.¹¹⁹ These 'costs' include, for example, any costs resulting from the fact that either party was represented by a lawyer or another legal professional, or any costs resulting from the service or translation of documents.¹²⁰
- 79 The ELI-UNIDROIT Model European Rules of Civil Procedure adhere to the same principle: 'only a qualified claimant is liable for the costs and expenses of a collective redress proceeding if it is unsuccessful.'¹²¹ This Rule applies the European, or loser pays, principle to collective proceedings. Only the qualified claimant as a party will be liable for costs. Nevertheless, if the action is successful all group members must accept that the litigation costs of the qualified claimant are to be paid from the common fund, although that will be subject to any cost recovery from the losing party. The court may, however, take into consideration any lack of fairness or appropriateness in the funding agreement.¹²² On the other hand, the general rules on costs, that do not strictly adhere to the loser pays rule, allow for some flexibility and discretion. The Model Rules allow the court, in determining upon which party the obligation to reimburse costs shall be

STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf accessed 21 December 2022. See also R P Mulheron, 'Costs and Funding of Collective Actions: Realities and Possibilities. A Research Paper for submission to the European Consumers' Organisation (BEUC)' (2011) <https://www.qmul.ac.uk/law/media/law/docs/staff/department/71112.pdf> accessed 21 December 2022 and K Hamulakova, 'Funding of Collective Actions' (2016) 16 International and Comparative Law Review 127.

¹¹⁶ See C Hodges, S Vogenauer and M Tulibacka (ed), *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Oxford Hart 2010) 562.

¹¹⁷ Recommendation (n 55) Art 13.

¹¹⁸ Directive (n 59) Art 12.1 and Recital (38).

¹¹⁹ Communication from the Commission (n 58) 9.

¹²⁰ Directive (n 59) Recital (38).

¹²¹ Model Rule 238(1) ELI-UNIDROIT Model European Rules of Civil Procedure.

¹²² Model Rule 238(2) and (3) ELI-UNIDROIT Model European Rules of Civil Procedure and Comments on Rule 238 (European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI-UNIDROIT Model European Rules of Civil Procedure. From Transnational Principles to European Rules of Civil Procedure* (Oxford OUP 2021) 269).

placed, to take into account the circumstances of the specific proceedings, in particular, whether and to what extent the parties' claims were successful.¹²³ A collective action can be such a specific proceeding. Moreover, the Court may also take into account the parties' conduct, in particular, whether and to what extent they acted in good faith and contributed to the fair, efficient and speedy resolution of the dispute.¹²⁴

- 80 The US adheres to the 'American Rule': each side of the litigation bears its own costs, expenses, and attorney fees. There is no systematic empirical research measuring the consequences of different fee rules for access to justice, but it seems reasonable to assume that reducing the cost risk for plaintiffs facilitates litigation that might otherwise not be filed. Canada and Australia adhere to the continental loser pays rule.

5.3 Class Representative / Class Members

- 81 The most obvious option is that the collective litigation is financed in the same manner as an individual action, namely by the person or entity initiating the procedure: the class (or representative) plaintiff. This means that all the fees and costs regarding the preparation, initiation, settlement and adjudication of the action will have to be pre-financed by him or her.
- 82 If the class representative were an individual class member, this would mean that there would be no funding at all. This would certainly be the case for small claims, but also for individually recoverable claims. In those cases, funding collective litigation would boil down to a personal and unprofitable investment, which no one would wish to make. If at the end of the procedure the class representative ran the risk of also having to pay the costs of the defendant because of the loser pays rule, there would be a real disincentive to bring such kind of litigation. This would create another barrier to access to legal remedies of the kind which collective litigation itself aims to overcome.¹²⁵
- 83 Theoretical methods for creating greater incentives or pooling class member resources seem unlikely to succeed. It would be possible to reward the class member who stands as a qualified claimant with a financial bonus, which would constitute an impetus to act. Mulheron pertinently points out, however, that this could lead to conflicts of interest:

Where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is undoubtedly an appearance of a conflict of interest between the representative plaintiff and the class members. This view holds that a class action should not be viewed as a method by which persons can seek to receive personal

¹²³ Model Rule 241(1) ELI-UNIDROIT Model European Rules of Civil Procedure.

¹²⁴ Model Rule 241(2) ELI-UNIDROIT Model European Rules of Civil Procedure.

¹²⁵ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 107.

gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims.¹²⁶

Indeed, in the US, ‘bonus’ payments to class representatives, beyond a modest amount intended to compensate them for time spent on necessary aspects of the litigation, such as discovery, are forbidden.

- 84 This view can be shared. Allowing a class member with a greater interest than his fellow members (whose claims he alone is pursuing) to steer the litigation entails a real danger of conflict of interest. Moreover, this is at odds with the historical origin of an individual class member as class representative. In order to prevent abuses and conflicts, the class representative was required to have ‘the same interest’ as the other class members. Their interests needed to be aligned.¹²⁷ This is hardly the case if one of them is eligible for a bonus.
- 85 It would also be conceivable to allow the class representative to solicit other class members for financial contributions.¹²⁸ This is, for example, possible in British Columbia: ‘with leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors’ fees and disbursements.’¹²⁹
- 86 According to the Representative Actions Directive, Member States may lay down rules to allow qualified entities to require consumers who have expressed their wish to be represented by a qualified entity in a specific representative action for redress measures to pay a modest entry fee or similar charge in order to participate in that representative action¹³⁰ – which seems, as mentioned above, highly unlikely and unattainable. However, individual consumers concerned by a representative action for redress measures shall not pay the costs of the proceedings.¹³¹ In exceptional circumstances, an individual consumer concerned by a representative action for redress measures may be ordered to pay the costs of proceedings that were incurred as a result of the individual

¹²⁶ RP Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford Hart 2004) 466. Cf also *In re Gould Sec Litig*, 727 F Supp 1201, 1209 (ND Ill 1989) (‘if class representatives expect routinely to receive special awards in addition to their share of the recovery, the representative may be tempted to accept sub-optimal settlements at the expense of the class members whose interests they are appointed to guard’). Under the US Private Securities Litigation Reform Act, such awards are expressly prohibited (15 USC § 78u-4(a)(2)(A)(vi) (2012)).

¹²⁷ This is still a requirement in the US rule. See *Wal-Mart Stores, Inc v Dukes* (Supreme Court, US) [564 U.S. 338 (2011)] (the class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members’).

¹²⁸ V Morabito, ‘Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs’ (1995) 21(2) *Monash University Law Review* 231, 236.

¹²⁹ See 19(7) *Class Proceedings Act* (British Columbia, US).

¹³⁰ Directive (n 59) Art 20.3.

¹³¹ *Ibid* Art 12.2.

consumer's intentional or negligent conduct.¹³² The idea is that class members should be immune from any liability for costs.

- 87 If the class representative were a governmental body – which is for example the case in Denmark and Belgium, and which is allowed according to the Representative Actions Directive¹³³ – funding collective litigation would come down to taxpayer-funded litigation. Due to limited resources, they would only finance meritorious cases that are in line with their policy. According to the European Commission: ‘public authorities could be potential gatekeepers when funding collective redress, refusing to allocate resources to unmeritorious claims.’¹³⁴ However, a possible danger is that these public bodies could be caught by political imperatives or the interests of particular stakeholder groups, which could raise concerns regarding access to justice.
- 88 As mentioned in pt 10 ch 2 the preferred European policy option is to give standing to associations, or, according to the Representative Actions Directive, qualified entities: any organization or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions.¹³⁵ At first sight, one may assume that funding would be easier, or at least less problematic, if the class representative were an association or (*ad hoc* or special purpose) foundation, than if an individual member would act. It could be argued that at least the successful ones would have more financial resources, such as membership contributions, subsidies and other income. In this regard, the Representative Actions Directives states that one of the criteria for a qualified entity in order to bring a cross-border representative action is its non-profit-making character and the requirement that it is not the subject of insolvency proceedings and is not declared insolvent.¹³⁶ Moreover, the qualified entity must make publicly available information about the sources of its funding in general.¹³⁷
- 89 It should be noted that some EU consumer organizations receive public subsidies, usually designated to specific projects and research, though not to cover costs for (collective) litigation. However, in some Member States, public subsidies are specifically allocated to the financing of claims and litigation (eg, VKI (*Verein für Konsumenteninformation*) in Austria or the VZBV (*Verbraucherzentrale Bundesverband*) in Germany).¹³⁸ In the US, legislation forbids the Legal Service Corporation (funded by the government) to provide financial support for class actions.
- 90 In theory, associations would not pursue a personal interest, but only the interests of the class. Because class interests overlap with their statutory aim, a collective litigation

¹³² Ibid Art 12.3.

¹³³ Ibid Art 3(4).

¹³⁴ Green Paper on consumer collective redress, COM(2008) 794 final of 27 November 2008, 5.

¹³⁵ Directive (n 59) Art 3(4).

¹³⁶ Ibid Art 4.3(c)-(d).

¹³⁷ Ibid Art 4.3(f).

¹³⁸ BEUC and noyb (n 115) 13.

action goes to the heart of their existence.¹³⁹ Just like governmental bodies, organizational plaintiffs will therefore act as gatekeepers, because it would be unlikely for them to invest in frivolous or meritless cases with the objective of profit. In practice, of course, the officers of associations have personal interests – eg the availability of resources for continuing to support the association including their own employment, ensuring continuing incentives for members to join and pay dues to the association – that challenge the ‘purity’ of the association’s aims. The Representative Actions Directive lists as one of the criteria for qualified entities wanting to initiate a cross-border representative action that its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests.¹⁴⁰

- 91 Ideally, and to incentivize this, the direct funding and financing of collective litigation by governmental bodies or associations could be coupled with one-way cost shifting:¹⁴¹ when the class representative wins the procedure, the losing defendant has to pay the representative’s lawyer fees and costs. In case of a government fund, these costs could be transferred back to this fund to finance future collective litigation. If the defendant wins the procedure, the governmental body or association is exempted from paying lawyer fees and costs. This dispensation could be justified by the public interest in collective litigation as a legal protection tool.

5.4 Class Counsel

- 92 A second option to address the issue of collective litigation funding is allowing the class lawyer to fund and finance the litigation¹⁴², which is the default rule in the US.¹⁴³ Under Rule 23 (h), if the case is successful, the judge presiding over the case awards the lawyer a fee. If the case is lost, he does not get anything. The basis for fee award is determined by doctrine within the appellate circuit. Under the lodestar method, class counsel submits its hours and expenses; the court then applies a reasonable hourly rate and

¹³⁹ S Issacharoff and G P Miller, ‘Will Aggregate Litigation Come to Europe?’ (2009) 62 Vanderbilt Law Review 179, 193-194.

¹⁴⁰ Directive (n 59) Art 4.3(b).

¹⁴¹ See on cost-shifting in a class action context: L Inglis, K McCabe, S Rassenti, D Simmons and E Tallroth, ‘Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims’ (2005) 33(1) Florida State University Law Review 89 and T D Rowe Jr, ‘Shift Happens: Pressure on Foreign Attorney-fee Paradigms from Class Actions’ (2003) 13 Duke Journal of Comparative & International Law 125.

¹⁴² Generally, class action lawyers use four funding mechanisms: (a) self-finance, which depends on the law firm’s financial situation (ie, its cash flow) and the parameters of the case; (b) through a bank loan: most banks will only issue a loan based on the individual partners’ collateral and personal credit; (c) a partnership with another law firm to share the cost burden; or (d) approaching a private financing company that specializes in funding contingency litigation through private financing. For an overview see N Freeman Engstrom, ‘Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again’ (2013) 61 UCLA Law Review Discourse 110.

¹⁴³ L Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (Cambridge University Press 2011) and H M Kritzer, *Risks, Reputations, and Awards. Contingency Fee Legal Practice in the United States* (Stanford University Press 2004). Note that Kritzer’s study relates to individual litigation, in which parties retain counsel under contract, not to class actions.

multiplies that by the number of hours expended plus, at the judge's discretion, a 'multiplier' to reflect the risk the counsel incurred and the quality of its effort. Alternatively, in circuits that adopted the 'Percent of Fund' approach, the judge awards a percentage of the common benefit fund created by the litigation, on average between 25 and 30 %, but diminishing substantially as the amount of the common fund rises. For very large aggregate damages, attorney fees have been closer to 10 % or even less of the fund.

- 93 In Europe, contingency fees are considered to violate public order and to be incompatible with the ethics of the legal profession, although 'success' fees are often permitted.¹⁴⁴ The International Bar Association's 2011 'International Principles on Conduct for the Legal Profession' state that: 'a contingency fee or *pactum de quota litis* is permitted in certain jurisdictions provided certain requirements are met but prohibited as a matter of public policy in other jurisdictions.'¹⁴⁵ According to the 'Charter of core principles of the European legal profession & Code of conduct for European lawyers' of the Council of Bars and Law Societies of Europe a lawyer shall not be entitled to make a *pactum de quota litis*:

This reflects the common position in all Member States that an unregulated agreement for contingency fees (*pactum de quota litis*) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused.¹⁴⁶

- 94 However, an agreement by which the lawyer fees partially depend on the outcome of the case is allowed. This comes down to a permissible enhancement of the lawyer fees based on success in the litigation meaning that the fee is at least in part 'contingent'.
- 95 The 2013 Recommendation rejects contingency fees. As a general rule, the Member States should ensure that in collective redress proceedings, the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.¹⁴⁷ Although there is a widespread belief that contingency fees create such an incentive, in practice it is not in the interest of attorneys to pursue litigation that is unlikely to be successful (ie, 'frivolous' litigation), as that would likely leave them out of pocket. A lawyer on

¹⁴⁴ M Faure, F Fernhout and N Phillipsen, 'No Cure, No Pay, and Contingency Fees' in M Tuil and L Visscher (ed), *New Trends in Financing Civil Litigation in Europe: A Legal Empirical and Economic Analysis* (Edward Elgar Publishing 2010) 33.

¹⁴⁵ International Bar Association, 'International Principles on Conduct for the Legal Profession' (2011) https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_the_legal_prof.pdf accessed 17 November 2022.

¹⁴⁶ Council of Bars and Law Societies of Europe, 'Charter of core principles of the European legal profession & Code of conduct for European lawyers' (2019) https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf accessed 17 November 2022.

¹⁴⁷ Recommendation (n 55) Art 29.

contingent fee might, on the other hand, decide to settle in order to avoid further risk, when it might have been in the interest of a party to pursue the litigation further. In other words, a lawyer on a contingent fee might not take full advantage of the potential for damages that the law allows. Notwithstanding this economic understanding of legal dynamics, many jurisdictions limit or prohibit contingent fees on the ground that such a fee arrangement might lead to overuse of the court system ('abuse') or conflicts of interest between counsel and client. It is useful to note in this regard that no empirical researchers have documented the overuse of civil litigation systems in any jurisdiction, including the US. In any event, the Commission has not entirely ruled out contingency fees as a policy option for collective redress cases. The Commission proposes that if Member States exceptionally allow them, they should provide appropriate national regulation, taking into account the right to full compensation of the members of the claimant party.¹⁴⁸ The Representative Actions Directive is silent on this matter, and clearly leaves this to the national legislators.

- 96 In January 2018, the European Commission published its report on the implementation of the Recommendation.¹⁴⁹ At that time, nine Member States allowed some form of contingency fees. All these Member States have specific provisions regarding the applicability in collective redress actions. Other Member States allow for performance fees, either in the form of a success fee, or on the contrary, a reduction in the remuneration in case certain goals are not achieved. Slovenia for example generally allows contingency fees. Usually, they are set up to 15% of the awarded amount. Under the 2017 Collective Actions Act contingency fees may be set up to 30% of the awarded amount if the attorney takes on the risk, not only to work for free if the action fails, but also to cover all costs in that case.¹⁵⁰ The divergence of national rules on (the limitations on) contingency fees makes it difficult to assess the effectiveness of contingency fees generally for collective litigation in all jurisdictions.¹⁵¹
- 97 The fundamental problem with contingency and success fees in a collective litigation is that the class lawyer acquires a personal interest in the outcome of the litigation, which can be a breeding ground for conflicts of interest between the class and its counsel. Of course, all lawyers have a personal interest in the outcome of litigation in which they have been retained, whether individual or collective litigation. The lawyer's interests and the clients' interest will never be perfectly aligned, as the lawyer has an interest in preserving and likely growing his or her business, while the client's interest relates to the

¹⁴⁸ Recommendation (n 55) Recital (19).

¹⁴⁹ Report from the Commission 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 of 25 January 2018 (EU).

¹⁵⁰ A Galič and A Vlahek, 'Challenges in Drafting and Applying the New Slovenian Collective Actions Act' in A Uzelac and S Voet (ed), *Class Actions in Europe. Holy Grail or a Wrong Trail?* (Springer 2021) 215, 240-241.

¹⁵¹ BEUC and noyb (n 115) 10.

specific dispute. This is the so-called agency problem,¹⁵² which it seems likely is exacerbated in the context of mass litigation, whether aggregated in the form of a collective action or pursued in group cases, such as the KapMuG procedure. As a practical matter, in mass litigation the lawyer is highly unlikely to know all of the parties and their interests well and in the case of collective litigation, with a class comprising a large number of unknown class members, it is virtually impossible. This problem can lead to ‘sweetheart settlements’ concluded by the class lawyer and the defendant with the goal of serving their own financial interests instead of those of the class.¹⁵³ In one-on-one litigation agency issues are still relevant, but may be overcome if there is communication between lawyer and client. The potential for conflicts of interest heightens concern about class counsel selection, leading in some jurisdictions to authorize judges to appoint or approve the selection of class counsel.¹⁵⁴ Not only because of the procedural technicality and complexity, but especially because of the interests of the class members, who are absent in the procedure but bound by its outcome. Therefore, the adequacy (ie, expertise, knowledge, and financial and human resources) of the class representative, and in particular of the class lawyer, is more than vital. The class members are forced to almost blindly rely on the way the class lawyer administers, deals with and settles the case. It is left for the judge to guard against conflicts of interest between class counsel and class members and to ensure that settlements fairly serve the interests of class members and defendants.

- 98 Critics of US class actions charge that defendants are often ‘forced’ to settle class actions because of reputational risk and litigation expense in what are termed ‘blackmail settlements’. This criticism has been exported to Europe and other jurisdictions by the US Chamber of Commerce and other business interest groups. However, there is no empirical evidence that defendants are frequently ‘blackmailed’ into settling class actions in the US. The availability of class actions does not eliminate myriad other rules that protect defendants’ interest, including restrictive pleading rules and defendants’ opportunity to secure a summary judgment in their favour. Available data suggest that plaintiffs and defendants only agree to settle class actions after the legal and factual bases of claims have been tested in pre-trial proceedings, including rulings on motions to dismiss, discovery and admissibility of evidence and motions for summary judgment.
- 99 As mentioned above, the 2013 EU Recommendation leaves an opening for contingency fees, as long as they are nationally regulated. It is indeed imperative to create safeguards. In order to avoid abuses and conflicts of interest, there should be oversight or monitoring of the class counsel. One option is to allow continental judges, just like their common law counterparts, to assess and award reasonable lawyer fees and costs

¹⁵² NJ Moore, ‘Who Should Regulate Class Actions Lawyers?’ (2003) 5 University of Illinois Law Review 1477 and Kalajdzic (n 40).

¹⁵³ Tzankova (n 114) 554.

¹⁵⁴ See eg Rule 23(g)(1) US Federal Rules of Civil Procedure: ‘unless a statute provides otherwise, a court that certifies a class must appoint class counsel’, and Art 1049 Code of Civil Procedure Québec: ‘the representative or member who applies to act as such must be represented by an attorney.’

in collective redress proceedings. Such judicial oversight and approval could prevent conflicts and abuses. In that regard, reference can be made to Model Rule 224 of the ELI-UNIDROIT Model European Rules of Civil Procedure regarding settlement approval orders:

The Court shall not make an order approving a settlement agreement where (...) (d) the terms, whether contained in the proposed settlement agreement or not, as to the payment of legal and other associated costs of the action are manifestly unreasonable.¹⁵⁵

5.5 Third-Party Funding

5.5.1 Public Funding and Legal Aid

100 Finally, third parties can fund and finance collective litigation. A first option is to provide public funding through a government fund. The best example is the *Fonds d'aide aux actions collectives* in Quebec.¹⁵⁶ Under the auspices of the Ministry of Justice, the Fund helps to finance class action suits in the first instance or on appeal. Only natural persons and specific (statutory) associations can make an application, while (general) private associations cannot. The Fund does not take any particular criteria into account. It only verifies whether or not the class action would be initiated without its intervention. When the Fund grants financial aid, it sets the terms of payment and reimbursement with the applicant and the applicant's counsel. If assistance is denied, the decision may be appealed before the *Tribunal administratif du Québec*. The latest annual report reveals that in 2020-2021,¹⁵⁷ the Fund received 25 new applications. Between 1 April 2020 and 31 March 2021, the Fund paid out CAD 3 494 505 as financial aid. In 2020-2021, there were 566 class action proceedings pending in Quebec, of which 228 (40%) were financed by the Fund. When a case the Fund has financed wins, the Fund receives the legal costs paid by the defendant and a percentage of the damages awarded to the class.

101 A similar fund exists in Ontario: the Class Proceedings Fund.¹⁵⁸ It provides financial support to approved class action plaintiffs for legal disbursements and it indemnifies plaintiffs for costs that may be awarded against them in proceedings it has funded. Just like the Quebec Fund, the Class Proceedings Fund is self-sustainable. It receives a levy

¹⁵⁵ See however Tzankova (n 114) 553: 'overall Dutch judges seem to feel uncomfortable and hesitate when they must invoke financial incentives and sanction parties for their conduct in the course of the litigation. Presumably, this is not an example of Dutch exceptionalism, but rather a feature of the judiciary system in civil law jurisdictions. (...) Once could summarize the different attitudes towards costs and funding as civil law legal idealism and dogmatism versus common law legal realism and pragmatism.'

¹⁵⁶ 'Fonds d'aide aux actions collectives' <https://faac.justice.gouv.qc.ca/> accessed 11 December 2022.

¹⁵⁷ Fonds d'aide aux actions collectives, 'Rapport annuel 2020-2021', https://faac.justice.gouv.qc.ca/fileadmin/Site/Actualites_et_Publications/Publications/Rapports_annuels/RapportAnnuel2020-2021.pdf accessed 11 December 2022.

¹⁵⁸ The Law Foundation of Ontario, 'Class Proceedings Fund' <https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/> accessed 11 December 2022.

amounting to 10 % of any awards or settlements issued in favour of the plaintiffs in funded proceedings it has funded, plus a return for any disbursements it has paid for. By the end of 2020, the Fund had funded 203 cases. According to the Law Foundation of Ontario the cases that are funded by the Class Proceedings Fund ‘provide access to justice, are in the public interest, and/or raise novel issues’.¹⁵⁹

- 102 Another example is the Israeli Public Class Action Fund, which was introduced by the 2006 Israeli Class Action Law.¹⁶⁰ The goal is to offer funding for class actions of public and social importance. The Fund is composed of nine members selected by the Minister of Justice. While a judge chairs the board, the other members are representatives of regulatory agencies. The fund mainly finances expert opinion fees, reimburses court expenses for failed claims and pays court fees. Since its creation, the Fund has reviewed approximately 700 requests and has approved more than 45% of them.
- 103 The establishment of a public class action fund entails a number of questions:¹⁶¹ how should such a fund be financed (eg, via the allocation of public fines, or non-claimed damages (*cy-près* distribution))? Which selection criteria should be used to allocate funds (eg, who can apply and which types of actions can be funded)? How should the selection procedure be designed (eg, how should the fund be composed)? Which costs should the fund cover (all costs, lawyer fees, court fees, expert fees, adversary costs)?
- 104 Another form of public funding is through legal aid.¹⁶² Legal aid implies the provision by the State of funds covering legal fees. These funds are usually paid to the associations of lawyers, which then distribute them to legal aid lawyers. Legal aid is available for a small number of beneficiaries, based on the financial situation of the applicant and on the merits and subject matter of the case.¹⁶³
- 105 Legal aid in a collective litigation context is limited, since assistance usually is only provided to individual class members and not to entities, such as organizational plaintiffs. In EU Member States legal aid is characterized by a free choice of legal counsel. Legal aid has been used in mass cases in the Netherlands, and England and Wales. For example, in the *Dexia* case, the Dutch Legal Aid Board provided support to 4,200 individual class members. Between 2002 and 2010, the Board spent about 3,3 million

¹⁵⁹ See The Law Foundation of Ontario, ‘Legal Help on the Frontlines. 2017 Annual Report’, 30; *Edwards v the Law Society*, [1994] 36 CPC (3d) 116.

¹⁶⁰ E Buksan, ‘The Israeli Public Class Action Fund’ in B T Fitzpatrick and R S Thomas (ed), *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge University Press 2021) 528. This fund has to be distinguished from the public fund within the Israel Securities Authority which is related to securities class actions.

¹⁶¹ See BEUC and noyb (n 115) 15 ff.

¹⁶² See Art 47 of EU Charter of Fundamental Rights: ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’ The Directive on the right to legal aid (Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003/8 of 27 January 2003 (EU)) does not pay attention to legal aid and collective redress.

¹⁶³ BEUC and noyb (n 115) 9.

EUR on lawyer fees. Remarkably, about half of the *Dexia* class members who received legal aid, opted out of the collective settlement, while the overall opt-out percentage was 10%.¹⁶⁴

- 106 Legal aid has also been provided in England and Wales.¹⁶⁵ One of the conditions for providing legal aid is that a case must have the potential to produce ‘real benefits’ for the public at large, in addition to benefits for the applicant. The Lord Chancellor’s Guidance states that such benefits may include:

potential financial benefit – this is usually the situation for most test cases or group actions or other cases seeking to establish a legal precedent. Success in such litigation will not usually guarantee compensation for those outside the litigation, who may still need to bring their own claims and prove their own issues on liability, causation and quantum.¹⁶⁶

- 107 At the start of the collective redress debate, the European Commission did not believe in public funding as a policy option, since it considers collective redress proceedings to be civil (private) proceedings, with deterrence only as a side effect:

however, given that collective redress would be a procedure arising in the context of a civil dispute between two parties, even if one of them is composed of a number of claimants, and deterrence will be a side-effect of the proceedings, the Commission does not find it necessary to recommend direct support from public funds, since if the court finds that damage has been sustained, the party suffering that damage will obtain compensation from the losing party, including their legal costs.¹⁶⁷

- 108 Nevertheless, in the Representative Actions Directive public funding is mentioned. The Directive provides for assistance for qualified entities. Member States shall take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek appropriate remedies. These measures may take the form of public funding, including structural support for qualified entities, limitation of applicable court or administrative fees, or access to legal aid.¹⁶⁸ However, in times when public expenditure is under intense and increasing pressure, it is highly uncertain that European governments will provide resources for a government collective redress fund or legal aid.

¹⁶⁴ Tzankova (n 114) 580.

¹⁶⁵ C Hodges, *Multi-party Actions* (Oxford OUP 2001) 177-202.

¹⁶⁶ Lord Chancellor’s Guidance under section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 4.2.18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1152854/Lord_Chancellor_s_Guidance_Under_s4_of_LASPO_May2023.pdf accessed 27 December 2022.

¹⁶⁷ Communication from the Commission (n 58) 15.

¹⁶⁸ Directive (n 59) Art 20.1-2.

- 109 In the US, by act of Congress, the Legal Service Corporation is forbidden to provide financial support for class actions.¹⁶⁹

5.5.2 Legal Expenses Insurance

- 110 In some cases, legal expenses insurance can fund class action litigation. A difference is made between before and after-the-event insurance.¹⁷⁰ Before-the-event insurance (BTE) is taken out by those wishing to protect themselves against potential litigation costs that could be incurred following a usually hypothetical future event. BTE insurance is generally paid on an annual basis to an insurance company. After-the-event-insurance (ATE) is taken out after an event to insure the policyholder against disbursements, as well as any costs should they lose their case. The focus in this context is on the instruction of a qualified lawyer by a legal expenses insurer when an insurance claim occurs. Another market is the 'in-kind' policies where legal services are provided by in-house lawyers of the insurance company.
- 111 The operability of this kind of insurance is limited. It is usually employed by professionals and not consumers. Even when consumers have individual insurance, this usually cannot be used in collective litigation. In theory, qualified entities (eg, consumer organizations) could conclude an insurance agreement, however the additional cost of these premiums could be an additional financial barrier.¹⁷¹
- 112 Legal expenses insurance in Europe is regulated by the Solvency II Directive.¹⁷² The Directive lays down a series of requirements on fitness and propriety for managers of insurance and reinsurance undertakings and responsible persons of independent control functions.
- 113 As with legal aid, this funding mechanism will only in its present form provide assistance to individual class members with legal expenses insurance. It also adheres to the principle of free choice of lawyer.¹⁷³ The CJEU ruled that where a large number of insured persons suffer a loss as a result of the same event, a legal expenses insurer cannot reserve the right to select the legal representative of all the insured persons concerned.¹⁷⁴ According to the CJEU, European law guarantees the policyholder the right to choose his or her own lawyer, even in a group action where several parties wish to

¹⁶⁹ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 504(a)(7), 110 Stat. 1321, 50 (1996).

¹⁷⁰ F Regan, 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance' (2003) 30 *Journal of Law and Society* 49, 50, fn 4 (describing the two basic forms of legal expenses insurance: before-the-event and after-the-event).

¹⁷¹ BEUC and noyb (n 115) 11.

¹⁷² Directive on the taking-up and pursuit of the business of Insurance and Reinsurance, 2009/138/EC of 25 November 2009 (EU). Art 198–205 deal with legal expenses insurance.

¹⁷³ Art 201 Solvency II Directive.

¹⁷⁴ *Erhard Eschig v UNIQA Sachversicherung AG*, Case C–199/08 (CJEU), Judgment 10 September 2009. The case concerned an interpretation of old Art 4(1)(a) Legal Expenses Insurance Directive, which is now Art 201 Solvency II Directive (with the same content).

pursue a claim against the same defendant. The policyholder has the right to instruct a legal representative of his choosing from the moment that he has a right to claim from his insurer under the policy. That right is not limited to cases where proceedings have commenced but exists from the time the potential claim arose for which the claimant had valid cover. This decision of the CJEU implies that legal expenses insurers cannot insist that the insured be represented by a class representative on the insurer's panel. Just like with the previous funding mechanism legal aid, the principles of party autonomy and the right to freely choose legal counsel thus have a negative impact on the funding of mass cases.

5.5.3 Third Party Litigation Funding (TPLF)

- 114 A new kind of funding that has come to the fore is (after-the-event) third-party litigation funding (TPLF),¹⁷⁵ which has gained attraction in (international) arbitration, commercial B to B lawsuits, and collective litigation cases.¹⁷⁶
- 115 Third-party funders are private funders that enter into an agreement with one or more potential litigants. Funders usually assess the following criteria: the chances of success of the case (including the likelihood of a settlement), the estimate of the lawyer fees and the costs the procedure will entail and the solvency of the defendant. The agreement provides that the funder will meet some or all of the legal fees incurred by the law firm conducting the action, meet some or all of the out of pocket expenses incurred in the litigation, indemnify the funded party with respect to any cost orders made against that party if the litigation is unsuccessful, and pay any amount required to be provided by way of a security for costs. In return, the funder will receive a percentage of the amount recovered by the persons or entities that have entered into a funding agreement in the event that they are successful in the litigation either by way of settlement or judgment. The percentage is usually in the range of 25-40 % depending on the time taken and/or whether the case is appealed.¹⁷⁷

¹⁷⁵ J Commission and Y Mohammad, *Third Party Funding in International Arbitration* (Oxford OUP 2023); G M Solas, *Third Party Funding: Law, Economics and Policy* (Cambridge University Press 2022) and B Zhang, *Third Party Funding for Dispute Resolution: A Comparative Study of England, Hong Kong, Singapore, the Netherlands and Mainland China* (Springer 2021). There is even a Third Party Litigation Funding Law Review <https://www.lexology.com/indepth>.

¹⁷⁶ P Cashman, 'Class Action and Litigation Funding Reform. Lessons from Down Under' (2021) 2 Mass Claims 93; J Kalajdzic, P Cashman and A Longmoore, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) 61(2) American Journal of Comparative Law 93; M Legg and L Travers, 'Necessity is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions' (2009) 38 Common Law World Review 245; I Tillema, *Entrepreneurial Mass Litigation: Balancing the Building Blocks* (Eleven International Publishing 2019) and W H van Boom (ed), *Litigation, Costs, Funding and Behaviour. Implications for the Law* (Routledge 2017). For an overview see A Stadler, 'Third-Party Funding in Collective Redress' in X Kramer, S Voet, L Ködderitzsch, M Tulibacka and B Hess (ed), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges* (Hart 2022) 151.

¹⁷⁷ Kalajdzic, Cashman and Longmoore (n 176) 100.

- 116 TPLF as such is a purely contractual matter. Private third-party funders and the class members with whom they enter into an agreement are entirely free to agree on the conditions of the agreement, including the possible (partial) transferal of the strategy-making power to the funder. However, some poignant problems can arise in a collective litigation context. Besides the conversion of an opt-out scheme into an opt-in scheme, the triangular structure, as mentioned above,¹⁷⁸ turns into a complicated quadrangular structure. In addition to the class representative, the class lawyer and the class members, a third-party funder enters the stage. From the standpoint of the class lawyer this can lead to ethical and fiduciary concerns about who the actual client is and whose instructions he has to obey. Also the agency problems in the relationship between the class lawyer and the class are amplified with the presence of a third-party funder. Soft regulation, judicial oversight or statutory provisions promoting transparency and good governance could tackle these problems.¹⁷⁹
- 117 The TPLF industry has emerged in common law and civil law jurisdictions. In the US, TPLF has been used in low-value litigation, such as car accidents and personal injury cases, but is gradually shifting to complex commercial litigation.¹⁸⁰ Since class actions in the US are self-funded by class counsel on a speculative basis, private funders have not yet penetrated the US class action market.¹⁸¹ In October 2021, the US Advisory Committee on Civil Rules paid attention to third-party funding. It listed ‘a catalog of issues’ and suggested ‘the challenges that may lie ahead for rulemaking on this subject’, although ‘a very large amount of fact-gathering would be necessary to fashion a disclosure rule addressing TPLF’.¹⁸² For now, the Committee has not proposed a rule on third-party funding.
- 118 In England and Wales,¹⁸³ Lord Jackson endorsed TPLF for collective litigation, along with contingency fees.¹⁸⁴ In November 2011, the Civil Justice Council published The Code of Conduct for Litigation Funders. The Association of Litigation Funders was charged with administering self-regulation of the industry in line with the Code.¹⁸⁵ The Code sets out standards to be observed by all funders who are members of the Association of Litigation

¹⁷⁸ See para 77.

¹⁷⁹ R P Mulheron and P Cashman, ‘Third Party Funding: A Changing Landscape’ (2008) 27 Civil Justice Quarterly 312, 312.

¹⁸⁰ D R Hensler, ‘The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding’ (2011) 79 George Washington Law Review 306, 320.

¹⁸¹ Kalajdzic, Cashman and Longmoore (n 176) 127.

¹⁸² Advisory Committee on Civil Rules, 5 October 2021 https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf accessed 24 December 2022.

¹⁸³ For an overview see I Tillema, *Entrepreneurial Mass Litigation: Balancing the Building Blocks* (Eleven International Publishing 2019) 195-238.

¹⁸⁴ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (December 2009) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> accessed 27 December 2022, 334-335.

¹⁸⁵ Association of Litigation Funders of England and Wales, ‘Code of Conduct’ <http://associationoflitigationfunders.com/code-of-conduct/> accessed 14 January 2020.

Funders of England and Wales. It largely focuses on capital adequacy, the withdrawal of funding and control over the litigation.

- 119 However, there is case law in England and Wales that could (negatively) impact future cases. In 2015, in *Arkin v Borchard Lines Ltd & Ors*, the English Court of Appeal held that a commercial litigation funder's liability for adverse costs is limited to the amount equivalent of the funding provided.¹⁸⁶
- 120 This so-called 'Arkin cap' was struck down in 2019 by the High Court of Justice. In *Davey v Money & Anor*,¹⁸⁷ the Court refused to mechanically apply the 'Arkin cap' ruling that a commercial funder is liable for all of the defendants' indemnity costs incurred post the funding agreement in a successfully defended claim. The Court stated that the 'Arkin cap' should be considered only as part of its overall discretion when considering how to achieve a just result. In appeal (*Chapelgate Credit Opportunity Master Fund Ltd v James Money*), the Court of Appeal confirmed that the liability of a commercial funder of an unsuccessful action should not automatically be limited to the amount of funding it had provided. The 'Arkin cap' could not automatically be relied on by funders to limit their exposure to adverse costs, and courts should use their discretion in order to achieve a just result in cases involving third-party funders.¹⁸⁸
- 121 Finally, in *Laser Trust v CFL Finance Ltd*, the High Court granted a third-party costs order, not subject to the 'Arkin cap', against a litigation funder, due to evidence, in the funding agreement, of the funder's 'control of an extraordinarily high order' over the proceedings.¹⁸⁹
- 122 In *Excalibur Ventures v Texas Keystone and others*, the English Court of Appeal held that a private funder is required to pay the defendants' costs on an indemnity basis even if the funder is no party to the misconduct that led to the award of indemnity costs. The Court emphasized that third-party funders should seek to derive financial benefit from claims to the same extent as funded claimants and that the 'derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs' on the same basis as the funded claimant.¹⁹⁰
- 123 In Australia, all large class actions are funded by private funders.¹⁹¹ This is mainly explained by the Australian fee-shifting rules and the risk of adverse costs. If the class action is unsuccessful, class members have statutory immunity from paying any part of the costs and other expenses incurred by the winning party. These costs and expenses will have to be paid by the class representative. This creates a financial disincentive to

¹⁸⁶ *Arkin v Borchard Lines Ltd & Ors* (Court of Appeal, UK) [2005] 1 WLR 3055.

¹⁸⁷ *Davey v Money & Anor* (High Court of Justice, UK) [2019] EWHC 997.

¹⁸⁸ *Chapelgate Credit Opportunity Master Fund Ltd v James Money* (Court of Appeal, UK) [2020] EWCA Civ 246.

¹⁸⁹ *Laser Trust v CFL Finance Ltd* (High Court of Justice, UK) [2021] EWHC 1404 (Ch).

¹⁹⁰ *Excalibur Ventures v Texas Keystone and others* (Court of Appeal, UK) [2016] EWCA Civ 1144.

¹⁹¹ See Cashman (n 176).

take on this role. Therefore, and in the absence of contingency fees and lack of legal aid funding, TPLF has become the primary means of financing class action litigation in Australia.¹⁹²

- 124 However, TPLF in Australia has changed a key feature of the Australian class action rule. Because there is no certification phase, that would result in an order binding the class members to the fee agreement between the representative plaintiff and class lawyer or the funder, third-party funders require all class members to sign individual litigation funding agreements entitling the funder to a share in the proceeds of the litigation if it is successful. This has converted the Australian opt-out scheme into an opt-in scheme. The use of so-called ‘closed classes’ was permitted by the Full Federal Court, given that the legislation expressly provides that a class action may be brought on behalf of ‘some or all’ of those affected.¹⁹³ More recently, to address concerns about closed classes, Australian judges have issued common fund orders that determine fees for class counsel and funders when the class prevails. Appellate challenges ensued but at present common fund orders have gained traction.
- 125 In its Recommendation, the European Commission gives its support to TPLF as a policy option in collective redress litigation, but this support is conditional. The Commission suggests a series of safeguards if TPLF is chosen as a funding option, in order to avoid abusive litigation. First of all, it is stipulated that the plaintiff, regardless of his or her capacity, should declare to the court at the outset of the proceedings, the origin of the funds that he or she is going to use to support the legal action.¹⁹⁴ This is reiterated in the Representative Actions Directive. As already mentioned above,¹⁹⁵ the qualified entity must make publicly available information about the sources of its funding in general.¹⁹⁶ Moreover, qualified entities shall disclose to the court or administrative authority a financial overview that lists sources of funds used to support the representative action.¹⁹⁷
- 126 The rationale behind this is, on the one hand, ensuring the necessary balance between access to justice and procedural safeguards against abusive litigation, and, on the other hand, enabling courts to assess whether there may be a conflict of interest between the third-party funder and the qualified entity.¹⁹⁸ Although the same concern about ‘abusive’ litigation is articulated regarding third-party funders as is broached regarding lawyers, it is even less apt regarding the funders. By definition, third-party litigation

¹⁹² Kalajdzic, Cashman and Longmoore (n 176) 100.

¹⁹³ *Multiplex Funds Mgmt. Ltd. v P Dawson Nominees Pty Ltd.* (Federal Court, Australia) [2007] 244 ALR 600. In 2009, the Court held that litigation funding should be treated as a managed investment scheme (*Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (Federal Court, Australia) [2009] FCAFC 147). Since then, the Australian government has tried to regulate TPLF.

¹⁹⁴ Recommendation (n 55) Art 14.

¹⁹⁵ See para 50.

¹⁹⁶ Directive (n 59) Art 4.3(f).

¹⁹⁷ Ibid Art 10.3.

¹⁹⁸ Recommendation (n 55) Recitals (4) and (25).

funders care only about what they may earn by investing in litigation and the most successful of funders employ cadres of lawyer-consultants to advise them on the merits of potential claims, the likelihood of their success and the likelihood of being able to collect on any monetary awards. On the other hand, because of funders' intense focus on what their investments will earn, there is a higher likelihood of conflicts of interest between them and parties (and perhaps parties' lawyers), who may have litigation goals in addition to monetary compensation, for example, injunctive relief and behaviour change.

- 127 The Representative Actions Directive allows third-party funding for representative actions for redress measures, as long as this is also possible by national law. However, conflicts of interest need to be avoided, and funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures may not divert the representative action away from the protection of the collective interests of consumers.¹⁹⁹ This is echoed in one of the criteria for qualified entities wanting to bring cross-border representative actions: the entity must be independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties. To that end, the entity must have established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers.²⁰⁰
- 128 Moreover, Member States have to ensure that: (a) the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action and (b) the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.²⁰¹
- 129 The Directive finally imposes that courts or administrative authorities are empowered to take appropriate measures, such as requiring the qualified entity to refuse or make changes in respect of the relevant funding and, if necessary, rejecting the legal standing of the qualified entity in a specific representative action. If the legal standing of the qualified entity is rejected in a specific representative action, that rejection shall not affect the rights of the consumers concerned by that representative action.²⁰²
- 130 As an aside, it should be noted that the European policymaker clearly wants to regulate private funding of litigation within the EU more thoroughly.²⁰³ In September 2022, the

¹⁹⁹ Directive (n 59) Art 10.1.

²⁰⁰ Ibid Art 4.3(e).

²⁰¹ Ibid Art 10.2.

²⁰² Ibid Art 10.4.

²⁰³ See also R P Mulheron, 'Third Party Funding, Class Actions, and the Question of Regulation' (2022) 1 Mass Claims 5.

European Parliament adopted a resolution with recommendations to the Commission on Responsible private funding of litigation.²⁰⁴ According to the Parliament, TPLF could, if properly regulated, be used more often as a tool to support access to justice. In order to achieve this, it is necessary to establish common minimum standards at Union level, which address the key aspects relevant to TPLF, including transparency, fairness, and proportionality. The Parliament calls on the Commission to present, after the expiry of the deadline for the application of the Representative Actions Directive, a proposal for a Directive to establish common minimum standards at Union level on commercial third-party litigation funding. Such a Directive should ensure the harmonization of Member States' rules applicable to third-party funders and their activities, thus allowing access to justice, while introducing common minimum standards for the protection of the rights of funded claimants and intended beneficiaries in proceedings financed in whole or in part by third-party funding arrangements, which apply in all Member States where litigation funding is permitted.²⁰⁵

131 Finally, the ELI-UNIDROIT Model European Rules of Civil Procedure also pay attention to third-party funding. Model Rule 237 deals with TPLF and collective redress proceedings. In line with the European policy as described above, TPLF is in principle allowed. Model Rule 237(1) states that a qualified claimant may use third-party litigation funding. Model Rule 237(2) refers to Model Rule 245, which is the general rule regarding TPLF (also applying outside the scope of collective redress proceedings). However, Model Rule 237(2) adds that: 'a court may, however, require a qualified claimant to disclose the details of any such funding agreement relevant for the instance at stake to the court and, in so far as appropriate, to the parties.'

132 The comments clarify that details of the funding agreement are often confidential and should therefore be only disclosed upon the court's request and should not be available to the public or the defendant. Model Rule 245(1) – dealing with TPLF in general – states:

A party who receives funding for the proceedings from a professional third-party funder or from a crowd-funder shall disclose this fact and the identity of the funder to the Court and the other party at the commencement of proceedings. The details of such a third-party funding arrangement are, however, not subject to this requirement.

²⁰⁴ At the basis of this resolution lied the so-called Voss Report, a draft report with recommendations to the Commission on responsible private funding for litigation. The report addresses three basis points: (a) the establishment of a public law supervisory regime on funders; (b) transparency and fairness requirements, including a cap on the funder's remuneration and to impose fiduciary duties on funders and (c) safeguards to prevent undue influence by traders (see A Stadler, 'Third-Party Funding in Collective Redress' in X Kramer, S Voet, L Ködderitzsch, M Tulibacka and B Hess (ed), *Delivering Justice. A Holistic and Multidisciplinary Approach. Liber Amicorum in Honour of Christopher Hodges* (Hart 2022) 151, 156-159.

²⁰⁵ Responsible private funding of litigation, 2020/2130(INL) 13 September 2022.

- 133 This means that a qualified claimant, whose collective redress procedure is funded by a third-party funder, has the obligation to disclose this fact and the identity of the funder to the court and the other party at the commencement of proceedings. In principle, he does not have to disclose the details of the funding arrangement unless the court requires him to do so. Only when this is deemed appropriate, these details can be disclosed to the other parties. In the context of collective redress proceedings, this seems to strike the right balance between the confidentiality of a funding arrangement on the one hand, and the risk of abuses and conflicts of interest on the other hand.²⁰⁶

²⁰⁶ The comments of Model Rule 245 clarify: '[the disclosure of the details of any funding agreement] might be an adequate solution for collective redress cases; we believe that outside the scope of collective redress this internal information should simply be none of the opponent's and the court's business.'

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
CAD	Canadian Dollar
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
JCCP	Code of Civil Procedure (Japan)

JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank

LEGISLATION

International/Supranational

Commission Recommendation 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 of 11 June 2013 (EU)

Commission Recommendation 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 of 11 June 2013 (EU)

Directive on injunctions for the protection of consumers' interests, 2009/22 of 23 April 2009 (EU)

Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), 2020/1828 of 25 November 2020 (EU)

Directive on the taking-up and pursuit of the business of Insurance and Reinsurance, 2009/138/EC of 25 November 2009 (EU)

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)

Regulation creating a European Enforcement Order for uncontested claims, 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (EU)

Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU)

Regulation on the law applicable to contractual obligations (Rome I), 593/2008 of 17 June 2008 (EU)

Regulation on the law applicable to non-contractual obligations (Rome II), 864/2007 of 11 July 2007 (EU)

National

Código de Defesa do Consumidor 1990 (Brazilian Consumer Code) (Brazil)

Codice di Procedura Civile (Italy)

28 US Code (US)

CASES

International/Supranational

Meta Platforms Ireland Limited, formerly Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V., Case C-319/20 (CJEU), Judgment 3 June 2022 [ECLI:EU:C:2022:322].

ZK, in his capacity as successor to JM, liquidator in the bankruptcy of BMA Nederland BV v BMA Braunschweigische Maschinenbauanstalt AG and Stichting Belangbehartiging Crediteuren BMA Nederland, Case C-498/20 (CJEU), Judgment 10 March 2022 [ECLI:EU:C:2022:173].

Vereniging van Effectenbezitters v BP plc, Case C-709/19 (CJEU), Judgment 12 May 2021 [ECLI:EU:C:2021:377].

Verein für Konsumenteninformation v Volkswagen AG, Case C-343/19 (CJEU), Judgment 9 July 2020 [ECLI:EU:C:2020:534].

Maximilian Schrems v Facebook Ireland Limited, Case C-498/16 (CJEU), Judgment 25 January 2018 [ECLI:EU:C:2018:37].

Realchemie Nederland BV v Bayer CropScience AG, Case C-406/09 (CJEU), Judgment 18 October 2011 [ECLI:EU:C:2011:668].

Erhard Eschig v UNIQA Sachversicherung AG, Case C-199/08 (CJEU), Judgment 10 September 2009.

Irini Lechouritou et al v Dimosio tis Omospondiakis Dimokratias tis Germanias, Case C-292/05 (CJEU), Judgment 15 February 2007 [ECLI:EU:C:2007:102].

Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00 (CJEU), Judgment 1 October 2002 [ECLI:EU:C:2002:555].

Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, Case C-68/93, Judgment 7 March 1995 [ECLI:EU:C:1995:61].

Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, Case C-89/91, Judgment 19 January 1993 [EU:C:1993:15].

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

National

Australia

Multiplex Funds Mgmt. Ltd. v P Dawson Nominees Pty Ltd. (Federal Court, Australia) [2007] 244 ALR 600.

Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd [2009] FCAFC 147).

Canada

Edwards v the Law Society, [1994] 36 CPC (3d) 116.

United Kingdom

Laser Trust v CFL Finance Ltd (High Court of Justice, UK) [2021] EWHC 1404 (Ch).

Chapelgate Credit Opportunity Master Fund Ltd v James Money (Court of Appeal, UK) [2020] EWCA Civ 246.

Davey v Money & Anor (High Court of Justice, UK) [2019] EWHC 997.

Excalibur Ventures v Texas Keystone and others (Court of Appeal, UK) [2016] EWCA Civ 1144.

Arkin v Borchard Lines Ltd & Ors (Court of Appeal, UK) [2005] 1 WLR 3055.

United States

Phillips Petroleum Co. v Shutts, No 84-233 (Supreme Court, US) [472 U.S. 797 (1985)].

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In Re "agent Orange" Product Liability Litigation, MDL No 381 (Court of Appeals for the Second Circuit, US) [818 F.2d 179 (2d Cir. 1987)].

Cimino v Raymark Industries, Inc., No 93-4452, 93-4611 (Court of Appeals, Fifth Circuit, US) [151 F.3d 297 (5th Cir. 1998)].

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Wal-Mart Stores, Inc v Dukes (Supreme Court, US) [564 U.S. 338 (2011)].

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