Chapter 5
European Models of Collective Actions

Aside from some general legal requirements, EU law contains no "federal" legal framework for Member States' collective action regimes. Member States have procedural autonomy in the application of EU law, that is, they are free to determine the structure and way of application and enforcement,[1] with the proviso that national law must not discriminate between the application of EU and domestic law (principle of equivalence)[2] and "must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness)."[3]

In 2013, the European Commission adopted a Recommendation on Collective Redress,[4] a non-binding legal instrument,[5] proposing that Member States adopt collective redress mechanisms for violations of EU law. Although it may certainly have an impact on Member State laws,[6] as noted above, contrary to a directive, the

[1] See e.g. Case 51-54/71 *International Fruit Company*, [1971] ECR 1107, ECLI:EU:C:1971:128, paras 3 and 4.

[2] See e.g. Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, [1976] ECR 1989, ECLI:EU:C:1976:188, para 5.

[3] See e.g. Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale* (*INPS*), [1997] ECR I-4025, ECLI:EU:C:1997:351, para 27.

[4] For an analysis of the Recommendation, see Piñeiro (2013), Szalai (2014), Stadler (2015: 61) and Nagy (2015: 530).

[5] Article 288 TFEU.

[6] In fact, the Recommendation's impact on positive law in the Member States has been rather slight, see Commission Report 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, p 20. ("As far as the transition into legislation is concerned, the analysis of the legislative developments in Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation. The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU. The impact of the Recommendation is visible in the two Member States where new legislation was adopted after its adoption (BE and LT) as well as in SI where new legislation is pending, and to a certain extent in the Member States that changed their legislation after 2013 (FR and UK).")

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Recommendation creates no framework for national regulation. Its significance and potential impact has to be assessed accordingly.

The Recommendation follows a conservative approach. It suggests restricting group representation to non-profit entities and public authorities.[7] Furthermore, it expresses a strong preference towards the opt-in system, recommending that only those group members should be involved in the collective action who expressly assented to it.[8] The Recommendation does not ban the opt-out scheme outright but leaves open a gate, even if a small one, to such mechanisms: "[a]ny exception to [the opt-in] principle, by law or by court order, should be duly justified by reasons of sound administration of justice."[9]

The Recommendation introduces safeguards in order to obviate the incentives to abuse the mechanism of collective actions: it makes the use of the "loser pays" principle mandatory,[10] excludes, at least in principle, contingency fees[11] and prohibits punitive damages.[12]

The above European federal framework may change considerably in the foreseeable future. In April 2018, the Commission proposed the adoption of a consumer collective action scheme (termed "representative action").[13] The proposed directive is in accordance with the common principles of European collective action laws: it has a sectoral approach (consumer protection), rigorous pre-conditions, confers standing on qualified representative entities, maintains the "loser pays rule" and rules out financial incentives, such as contingency fees and punitive damages. It evades the dilemma of opt-in and opt-out through leaving the choice to Member States.[14] Given that most national collective action schemes already comply with these requirements,

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[7] Recommendation on Collective Redress, paras 4–7.

[8] Trstenjak (2015: 689).

[9] Recommendation on Collective Redress, para 21. ("The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.")

[10] Recommendation on Collective Redress, para 13.

[11] Recommendation on Collective Redress, paras 29–30. According to the Recommendation, contingency fees can be permitted only exceptionally. ("The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.")

[12] Recommendation on Collective Redress, para 31.

[13] Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final. See European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184–C8-0149/2018–2018/0089(COD)).

[14] Article 6.

the directive is supposed to entail no landslide conceptual reform. Instead, its major virtue is expected to be the introduction of consumer collective action in one third of the Member States where this meachanism is still not available at all.

This chapter gives a transsystemic overview of the European national solutions and schemes along the key issues of class actions.[15] It presents the European landscape, the opt-in and opt-out systems and their main features, the purview of collective action laws featuring a precautious, step-by-step evolution, the pre-requisites of collective actions and certification, the rules on standing and adequate representation, the status of group members, their liability for legal costs and the res judicata effect in opt-in proceedings, the operation of the "only benefits" principle in opt-out proceedings and its impact on the status of group members, and the enforcement of judgments in collective actions.

5.1 The European Landscape: To Opt in or to Opt Out?

In Europe, the history of collective actions started roughly three decades ago.[16] Collective action law gained a foothold in the mid-1990s. Aside from the English representative action, a doctrine rooted in common law but rarely used in practice,[17] class action legislation first appeared in the Hispanic peninsula (Spain, 1984; Portugal, 1995), in Greece in consumer protection law (1994) and in Hungary in the field of competition law (1996). Interestingly, all these systems were based on the opt-out principle and, even more interestingly, they proved to be less effective than one would expect from an opt-out scheme, and way less effective than US class actions. These were followed by the introduction of various opt-in and opt-out schemes. Today, 17 out of 28 Member States provide for collective actions[18] and 10 out of them have

[15] For a general typology, see Hensler (2017: 971–979).

[16] See Fairgrieve and Howells (2009: 383–401).

[17] Sherman (2002: 402).

[18] Commission's Report on the implementation of the Recommendation on Collective Redress says that "Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK)." Commission Report 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, p 3. However, somewhat misleadingly, it also lists Member States where there is admittedly no "legislation on compensatory relief" but "collective actions are carried out on the basis of the assignment of claims or the joinder of cases."

a system based, at least partially, on the opt-out principle (Belgium,[19] Bulgaria,[20] Denmark,[21] France,[22] Greece,[23] Hungary,[24] Portugal,[25] Slovenia,[26] Spain,[27] and the

[19]The Belgian system leaves it to the judge to decide whether the action should be conducted according to the opt-in or the opt-out model. Law Inserting a Title 2 on 'Collective Compensation Action' in Book XVII 'Special Jurisdictional Procedures' of the Code of Economic Law, 28 March 2014, Moniteur Belge (M.B.) (Official Gazette of Belgium (29 March 2014) (Loi portant insertion d'un titre 2 «De l'action en réparation collective» au livre XVII «Procédures juridictionnelles particulières» du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique) and Section XVII.38 in conjunction with Section I.21 of the Belgian Code of Economic Law.

[20]Chapter 33, Sections 379-388 of the Bulgarian Code of Civil Procedure, for an English version of the statutory text, see https://kenarova.com/law/Code%20of%20Civil%20Procedure.pdf. Accessed 20 April 2019. See Katzarsky and Georgiev (2012: 64).

[21]Sections 254a–254e of the Administration of Justice Act.

[22]In France, de facto opt-out class actions were first introduced in the field of consumer protection in 2014, Loi n° 2014-344 du 17 mars 2014 relative à la consommation et Décr. n° 2014-1081 du 24 sept. 2014 relatif à l'action de groupe en matière de consommation, followed by the health care sector in January 2016, Loi n° 2016-41 du 26 janv. 2016 de modernisation de notre système de santé et Décr. n° 2016-1249 du 26 sept. 2016 relatif à l'action de groupe en matière de santé. In November 2016, a general framework was created in France for group actions. Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1. The new regime extended the purview of the mechanism to discrimination, environmental protection, personal data and health care matters, inserting Sections 826-2–826-24 into the French Code of Civil Procedure.

[23]Articles 10(16)-(29) of Law 2251/1994 on Consumers' Protection.

[24]Section 92 of Hungarian Competition Act (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról); Sections 38-38/A of Hungarian Consumer Protection Act (Act CLV of 1997) (1997. évi CLV. törvény a fogyasztóvédelemről); Sections 580-591 of the new Hungarian Code of Civil Procedure effective as from 1 January 2018 (Act CXXX of 2016 on the Code of Civil Procedure, in Hungarian: 2016. évi CXXX. törvény a polgári perrendtartásról).

[25]Law 83/95 on the Acção Popular. See Rossi and Ferro (2013: 46–64) and Ferro (2015: 299–300).

[26]Law on Collective Actions (Zakon o kolektivnih tožbah—ZkolT), Official Journal of the Republic of Slovenia No. 55/2017.

[27]See Section 20 of Law 26/1984 of 19 July on Consumer Protection (Ley para la defensa de los consumidores y usuarios), now Section 24 of Royal Legislative Decree 1/2007 of 16 November,

United Kingdom[28]).[29] Accordingly, more than half of the Member States have sanctioned the introduction of collective actions and from those who did, more than half chose, to some extent, the opt-out system and only less than half stuck fully to the more conservative opt-in principle (Finland,[30] Germany,[31] Italy,[32] Lithuania,[33] Malta,[34] Poland[35] and Sweden[36]).

A couple of states adopted mechanisms that may resemble collective actions but cannot be regarded as a means of collective civil litigation (Fig. 5.1). For reasons advanced above in Sect. 4.3.4, traditional procedural institutions (joinder of parties and assignment of claims) cannot be considered a form of collective action, although they are at times used for the purpose of collective litigation in a couple of Member States (e.g. Austria and the Netherlands). Virtually every single Member State law provides for this possibility and in 11 Member States (Austria, Croatia, Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, the Netherlands, Romania, Slovakia), beyond these legal instituions, no special procedural scheme is available

which issued a consolidated text on the Law on Consumer Protection and other supplementary laws (Texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias). This provision was later on inserted in almost every special consumer law issued by the Spanish legislator. See Piñeiro (2007) 63–65. The Spanish Civil Procedure Act of 2000 is, though, the first attempt to systematize the rules of collective proceedings (Articles 6, 11, 15, 15bis, 221, 222(2), 256(1)(6), 519).

[28] See e.g. Sections 18-19 of the 2002 Enterprise Act, which were inserted in Sections 47/A-47/D of the 1998 Competition Act. See also Group Litigation Orders in Sections 19.10. and 19.11. of the Civil Procedure Rules.

[29] *Contra* Commission Report 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, p 13. (Considering French, Hungarian and Spanish law to contain an opt-in system.)

[30] Act 444/2007 on Group Actions (Ryhmäkannelaki).

[31] Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage (MuFKlaG k.a.Abk.). G. v. 12.07.2018 BGBl. I S. 1151 (Nr. 26).

[32] See Law No 99 of 23 July 2009.

[33] Chapter XXIV[1], Section 441^{1-17} of the Lithuanian Code of Civil Procedure with the latest amendment on 8 November 2016 No. XII-2751.

[34] Act VI of 2012. See http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11910&l=1. Accessed 20 April 2019.

[35] Act of 17 December 2009 on Pursuing Claims in Group Proceedings (Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym), Journal of Laws from 2010, No. 7, item 44. The law was comprehensively amended by Act of 7 April 2017 amending different laws in order to facilitate recovery of debts—(Ustawa z dnia 7 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności), published in Dziennik Ustaw (Journal of Laws) of 2017, item 933. The amendments entered into force on 1 June 2017.

[36] Group Proceedings Act, SFS 2002: 599.

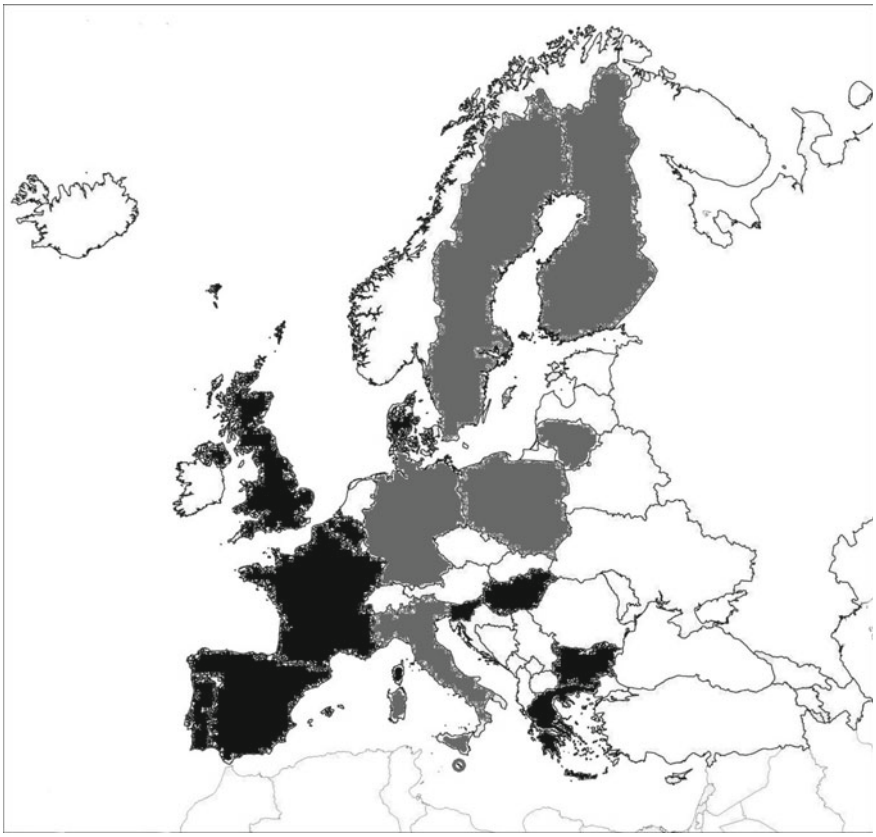

Fig. 5.1 The European collective action landscape (grey: solely opt-in collective actions are available, black: opt-out collective actions are available)

for collective monetary claims, even though collective proceedings are available for injunctions and declaratory judgments.[37]

Although usually listed among Europe's opt-out collective proceedings, the Dutch collective settlement is not considered to be a collective action, as it merely provides a framework for cases where the defendant concedes liability and is ready to settle. In 2005, the Netherlands adopted the Act on Collective Settlement of Mass Damages (Wet collectieve afwikkeling massaschade),[38] which is applicable (as its name suggests) solely to settlements and, accordingly, cannot be used to claim recovery. The group is represented by a social organization, which may conclude a settlement

[37] See British Institute of International and Comparative Law (2017: 10) and European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union (2018: 18).

[38] The Act entered into force on 27 July 2005. For a comprehensive analysis on the Act, see Krans (2014) and Bosters (2017: 47–59).

with the tortfeasor; the settlement has to be approved by the court.[39] Group members may opt-out from the settlement within three months.

Likewise, regimes providing for the disgorgement of illicitly obtained proceeds for the public budget are not regarded as collective actions, as they are not meant to compensate the victims. For instance, German law, in the field of antitrust and unfair competition law, provides for a disgorgement procedure where wrongdoers may be enjoined to surrender the illicitly acquired economic benefits, however, the proceeds, instead of the victims, go to the federal budget. In the field of unfair competition law, certain associations may sue for monetary relief equal to the illicit profits, less the sums the wrongdoer paid because of the violation, to third parties or the state. The association may enforce the creaming-off claim without the express authorization of group members, however, the money awarded does not go to the victims but to the central budget.[40] Similar rules are embedded in the German Antitrust Law, which applies in cases where the German Federal Competition Office (Bundeskartellamt) adopted no measure to cream off the illicit profits and provides that the Office shall reimburse the associations for their costs up-to the payments they secured for the federal budget.[41] Accordingly, the creaming-off mechanism's function is not to secure a private remedy for the injured parties but to supplement public enforcement.[42]

In same vein, judicial mechanisms that help to coordinate the adjudication of parallel individual proceedings after they have been launched are not considered to be collective actions, as they are not related to access to justice and are not aimed at enhancing the effectiveness of law. For instance, in 2005, Germany introduced a statutory test-case mechanism in capital market law for investor claims.[43] However, this mechanism does not unite individual claims to be submitted and enforced jointly but streamlines individual actions already launched. It creates a possibility to suspend individual actions and to have the common legal and factual issues decided by a single court.

As noted above, while Europe is generally considered to feature the opt-in scheme, this observation is only partially valid. On the one hand, it is true that representation without authorization is generally disapproved taking into account that in 40% of the Member States solely traditional joinder of parties and assignment of claims are

[39] The approval of these settlements comes under the competence of the Court of Appeals in Amsterdam.

[40] Section 10 of the German Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb—UWG), Gesetz gegen den unlauteren Wettbewerb in der Fassung der Bekanntmachung vom 3. März 2010 (BGBl. I S. 254), last amended through Section 4 of Gesetz vom 17. Februar 2016 (BGBl. I S. 233).

[41] Section 34a of the German Act against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen—GWB), Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl. I S. 1750, 3245), last amended through Section 5 of Gesetz vom 13. Oktober 2016 (BGBl. I S. 2258).

[42] Cf. Stadler (2009: 117).

[43] Law on Model Proceedings in Capital Market Disputes (Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten—KapMuG), adopted on August 16, 2005 (BGBl. I S. 2437). See Halfmeier and Feess (2012), Steinberger (2016: 44–132) and Bosters (2017: 27–34).

available as a means to bring collective claims to court. On the other hand, from the 17 Member States which created a special regime for collective litigation, only 7 stuck fully to the opt-in principle.

The 2002 Swedish Act on Group Proceedings[44] is one of the first comprehensive national codifications of collective actions that covered the whole spectrum of civil claims (and not only specific sectors or branches of law).[45] The Swedish Act entered into force on 1 January 2003. Although it adopts an opt-in system, the available statistical data suggests that the Swedish Group Proceedings Act is relatively effective: 17 group proceedings were initiated until the beginning of 2014 (that is, in the first 12 years of the law).[46] These matters include the enforcement of air passengers' rights, claims by insurance holders, a procedure against the Swedish state for violating EU law, overcharges concerning electricity supply (violation of fixed universal service prices).[47]

The Finnish parliament adopted the Act on Collective Proceedings in February 2007, after 15 years of social debate[48]; the Act came into force on 1 October 2007.[49] The central feature of the Finnish system is that is creates an opt-in system[50] empowering exclusively the Consumer Ombudsman to institute a collective action[51] in matters coming under its competence (consumer matters).[52] Until recently, there has been no proceedings instituted on the basis of the Finnish Act[53]; this may be explained with the opt-in rule and with the fact that collective actions may be launched exclusively by the Consumer Ombudsman.[54] Of course, the lack of cases does not necessarily mean that the Finnish Act has been devoid of impact on the behavior of enterprises.[55]

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[44] Group Proceedings Act, SFS 2002:599. For the non-official translation of the Act, see https://www.government.se/government-policy/judicial-system/group-proceedings-act/ and http://www.courdecassation.fr/IMG/File/loi_suedoise_swedish_law_eng.pdf. Accessed 20 April 2019. The Act entered into force on 1 January 2003. For a comprehensive analysis of the draft version, see Lindblom (1997: 824–830), Nordh (2001: 395–402), Lindblom (2007) and Persson (2012).

[45] Sections 1-2 of the Swedish Act on Group Proceedings.

[46] Ervo (2016: 188). See also Ervo et al. (Unknown).

[47] Lindblom (2008: 2–7) (reporting 12 cases.). Cf. Persson (2008: 17) (reporting 11 cases).

[48] Act 444/2007 on Class Actions (Ryhmäkannelaki), for an unofficial English translation of the Act, see http://www.finlex.fi/fi/laki/kaannokset/2007/en20070444.pdf. Accessed 20 April 2019. For an analysis on the Act, see Viitanen (2007).

[49] Section 19 of the Finnish Act on Class Action.

[50] Section 8(1) of the Finnish Act on Class Action.

[51] Section 4 of the Finnish Act on Class Action.

[52] The Act is not applicable to capital market matters.

[53] Ervo (2016: 189) and Kiurunen (2012: 226).

[54] Välimäki (2007) and Viitanen (2008: 2).

[55] It may be used as a leverage to compel a settlement. See "Caruna and the Consumer Ombudsman reached a negotiated solution—no need for a class action lawsuit, but changes in the Electricity Market Act still in the agenda". http://www.hankintajuristit.fi/caruna-and-the-consumer-ombudsman-reached-a-negotiated-solution-no-need-for-a-class-action-lawsuit-but-changes-in-the-electricity-market-act-still-in-the-agenda/. Accessed 20 April 2019.

The Italian legislator enacted a law on collective actions in December 2007 by inserting Section 140bis in the Italian Consumer Code.[56] These rules were, nevertheless, replaced by a new Section 140bis,[57] which entered into force on 1 January 2010.[58] Contrary to the rules of 2007, which referred to the "collective interests" of group members, according to the rules of 2009, the collective action aims to protect the "individual interests" of group members. In 2012, one of the pre-requisites of collective action was softened: as from 25 March 2012, it suffices if the rights of group members are "homogeneous", they do not have to be "identical" anymore.[59] The Italian class action may be used only for pursuing consumer claims arising from specific cases: standard contractual terms and conditions, defective products and services, unfair commercial practices and anticompetitive conducts.[60] According to publicly available sources, 58 class actions had been launched under this provision until January 2016, although a considerable part of them was declared inadmissible and the vast majority of them is pending.[61]

Poland introduced collective actions in 2009 (Act on Pursuing Claims in Group Proceedings). These rules went into effect on 19 July 2010.[62] The Act underwent significant changes in 2017,[63] which entered into force on 1 June 2017. The regime initially applied to consumer law, product and tort liability (with the exception of the protection of personal interests). In 2017, it was extended to claims resulting from the non-performance or undue performance of an obligation, unjust enrichment and certain infringements of personal interests (bodily injury or health disorder).[64] The Act follows the opt-in principle.[65] Members may join the group after the court certifies it.[66] Standing is conferred on class members and the regional consumer

[56] Act 244 of 24 December 2007. For a comprehensive analysis of the Italian legislation, see Caponi (2011a: 61), Caponi (2011b) and Ernesto and Fernando (2012).

[57] Act 99 of 23 July 2009. http://www.tedioli.com/Italian_class_action_text_english_version.pdf. Accessed 20 April 2019.

[58] In respect of the Italian legislation, see Silvestri (2007a, b, 2008).

[59] Law no. 27 dated 24 March 2012 under the heading "Rules to make class actions effective".

[60] Section 140bis(2) of the Italian Consumer Code; Principe (2012). Recently, in *Adusbef v Monte dei Paschi di Siena*, the court of appeals of Florence held that retail investors are not consumers and, hence, are not covered by the Italian class action legislation. Afferni (2016: 82, 85).

[61] See the overview provided at http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/. Accessed 20 April 2019. For more information on the case-law, see http://www.collectiveredress.org/collective-redress/reports/italy/caselaw. Accessed 20 April 2019.

[62] Act of 17 December 2009 on Pursuing Claims in Group Proceedings (Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym). Journal of Laws from 2010, No. 7, item 44.

[63] Act of 7 April 2017 amending different laws in order to facilitate recovery of debts—(Ustawa z dnia 7 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności), published in Dziennik Ustaw (Journal of Laws) of 2017, item 933.

[64] Sections 1(2) and 1(2)(a)–(b) of the Polish Act on Pursuing Claims in Group Proceedings.

[65] Sections 6(2), 11 and 13(2) of the Polish Act on Pursuing Claims in Group Proceedings.

[66] Section 11(1) of the Polish Act on Pursuing Claims in Group Proceedings.

ombudsman (a public body).[67] Notwithstanding the opt-in rule, the Polish system has produced numerous cases.[68]

Malta introduced opt-in collective actions in 2012 covering the violations of consumer protection, competition and product safety law.[69] Group members may join the action within the deadline specified by the court.[70] It appears that so far two cases have been launched.[71]

Lithuania introduced collective actions in 2015.[72] The regime was inserted into the Lithuanian Code of Civil Procedure[73] (articles 441^{1} to article 441^{17}).[74] The act introduced an opt-in scheme of general application having a horizontal approach. So far the Lithuanian rules have been applied in a handful of cases.[75]

Germany introduced a "model declaratory claim" (Musterfeststellungsklage) in 2018, which was inserted as Book 6 (Sections 606-614) in the Code of Civil Procedure (Zivilprozessordnung).[76] The collective action, which entered into force on 1 November 2018, created an opt-in scheme for consumer matters. As a peculiar feature of the Germany system, courts have no power to award damages but may enter a declaratory judgment as to the pre-conditions of liability (they may establish that the claim's or legal relationship's factual and legal pre-conditions exist or do not exist).[77] Group members may seek monetary relief, on an individual basis, after the pre-conditions of the defendant's liability have been established. The final declaratory judgment is binding on courts in matters between the defendant and those consumers who opted in, provided these have the same aim and concern the same fact pattern as the collective declaratory judgment.[78] Since the law's very recent entry into force, the

[67] Section 4(2) of the Polish Act on Pursuing Claims in Group Proceedings.

[68] See the statistics of the Polish Ministry of Justice for the period between 2010 and 2016, Pozwy zbiorowe w latach 2010–2016, at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,32.html. Accessed on 20 April 2019.

[69] Articles 3-4 and Schedule A of the Maltese Collective Proceedings Act.

[70] Articles 2 (definition of represented person), 7-8 and 18 of the Maltese Collective Proceedings Act.

[71] British Institute of International and Comparative Law (2017) 217.

[72] It has to be noted that group actions were theoretically available also before 2015. Section 49(6) of the Lithuanian Code of Civil Procedure, introduced in 2003, made provision for group actions in case it was necessary to protect the public interest. However, as confirmed by ruling Nr. 2-492/2009 of the Court of Appeal of Lithuania, this provision could not be put into practice as it was not accompanied by an effective implementation mechanism. New Chapter $XXIV^{1}$ on Collective Redress was inserted into the Code of Civil Procedure which came into effect on 1 January 2015 and repealed Section 49(6). See Juška (Unknown).

[73] Section 441^{1-17} of the Lithuanian Code of Civil Procedure.

[74] For an English version of the 2015 Lithuanian Class Action Act see Renata Juzikienė's unofficial translation at http://globalclassactions.stanford.edu/sites/default/files/documents/Class_Action_Lithuania.pdf. Accessed 20 April 2019. In the following, the quotes from the Lithuanian legislation refer to the foregoing translation.

[75] See Juška (Unknown).

[76] See Halfmeier (2017) and Schäfer (2018).

[77] Section 606(1) of the German Code of Civil Procedure.

[78] Section 613(1) of the German Code of Civil Procedure.

institution of three cases has been published[79]; the first "model declaratory claim" (emerging from Volkswagen's notorious diesel emissions scandal)[80] was submitted on the very day when the rules entered into force.

In the EU, there are 10 Member States which have sanctioned (at least partially) an opt-out scheme.

Four of these combine the opt-in and the opt-out rule and leave it to the judge to decide under which scheme to carry out the collective action.[81]

The Danish rules on collective action are applicable to proceedings instituted as from 1 January 2008.[82] It is up to the court to decide whether to carry out the action in the opt-in or the opt-out scheme. However, the value of this flexibility is significantly reduced by the fact that the opt-out scheme can be used only if the group representative is an administrative agency.[83] The court decides for the opt-out pattern if the claims' individual enforcement is not feasible due to their low monetary value and it may be assumed that the opt-in pattern would not be appropriate for managing the claims. According to the *travaux préparatoir*, the monetary value of the claim is low if it does not involve more than DKK 2000 (approximately € 270).[84] If the court adopts the opt-out pattern, a deadline is set for group members to abandon the collective action. Until recently, there has been nine cases launched on the basis of the Danish Act on Class Action.[85]

In the same vein, in Belgium,[86] it is up to the court's discretion whether to certify the collective action under the opt-in or the opt-out scheme.[87] However, group members residing habitually or having their principal place of business outside Belgium are covered only if they opt in.[88] Furthermore, only the opt-in scheme may be used in case of physical and moral damages.[89]

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[79] See the registry of "model declaratory claim" cases (Register für Musterfeststellungsklagen) of the German federal ministry of justice at https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Allgemeines_node.html. Accessed on 20 April 2019.

[80] Weimann (2018: 38). Interestingly, while facing technical hurdles in Germany, in the diesel emissions case an opt-out collective action was launched in Belgium. Staudt (2019: 157).

[81] For a scholarly proposal suggesting that the choice between the opt-in and the opt-out scheme should be made dependent on the sum of the claims, see Neumann and Magnusson (2011: 169–170).

[82] For an English summary of the Danish legislation, see Werlauff (2008).

[83] Although it is not an EU Member State, it is noteworthy that the Norwegian rules on collective actions entered into force on the same day as their Danish counter-parts. The rules on collective proceedings were included in Chapter 35 of the Dispute Act. For an English translation of the Norwegian rules, see http://globalclassactions.stanford.edu/sites/default/files/documents/Norway_Legislation.pdf. Accessed 20 April 2019. The two systems follow roughly the same model: both combine the opt-in and the opt-out scheme and leave the choice between the two to the court.

[84] Møgelvang-Hansen (2008: 5) and Nielsen and Linhart (2012: 236).

[85] See Ervo (2016: 189).

[86] See Laffineur and Renier (2016).

[87] For an overview, see Paris (2015: 23–24).

[88] Sections XVII.38 and XVII.43 of the Belgian Code on Economic Law (Code de droit économique).

[89] Section XVII.43 3° of the Belgian Code on Economic Law.

In the United Kingdom, due to a mechanism introduced in 2015,[90] opt-out class actions are available in competition matters and it is up to the Competition Appeal Tribunal (CAT) to decide whether the procedure will be carried out in the opt-in or the opt-out scheme.[91] It is worthy of note that class members domiciled outside the United Kingdom have to opt-in, even if the CAT chose the opt-out scheme for the case. The Competition Act does not set out the factors the CAT has to take into account when exercising its discretion, however, the Competition Appeal Tribunal Rules of 2015 list two considerations: "the strength of the claims" and "whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."[92]

The CAT's 2015 Guide to proceedings[93] amplifies these requirements. Without carrying out a full merits assessment, the CAT "will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. (…) For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion." As to whether it is practicable for the proceedings to be brought in the opt-in scheme, the CAT "will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in." It has to be emphasized that "[t]here is a general preference for proceedings to be opt-in where practicable." "Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

In Slovenia, the law on collective actions was adopted in 2017 (and entered into force in April 2018).[94] It leaves the choice between the opt-in and the opt-out scheme to the court.[95] The opt-in system has to be used if non-pecuniary damages are involved or if at least 10% of group members has a claim in value exceeding EUR 2000. Nonetheless, even if the opt-out system is chosen by the court, group members not domiciled in Slovenia can become part of the proceedings only if they opt in.[96]

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[90] Consumer Rights Act 2015. For a comprehensive analysis, see Rodger (2015).

[91] Section 47/B(7)(c) of the 1998 Competition Act. See Section 47/B(10)–(11).

[92] Section 79(3) of Competition Appeal Tribunal Rules 2015, Statutory Instrument 2015/1648.

[93] Section 6.39 of 2015 Competition Appeal Tribunal, Guide to proceedings. http://www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf. Accessed 20 April 2019.

[94] See Footnote 26.

[95] Article 29 of the Slovenian Law on Collective Actions. See British Institute of International and Comparative Law (2017: 14–15) and Sladič (2018: 214).

[96] Article 30 of the Slovenian Law on Collective Actions.

Seven Member States provide for the statutory right to opt-out collective litigation (in England this operates in addition to the foregoing competition law mechanism combining the opt-in and the opt-out system).[97]

Greece introduced opt-out collective actions very early, in 1994, in the field of consumer protection.[98] This vests certified consumer protection organizations with standing to claim damages on behalf of a group of injured consumers. Since its introduction, this mechanism has produced, on average, 2–3 cases per annum.[99]

The Portuguese collective action law dates back to 1995, long before this question became so topical in Europe, and has a constitutional basis.[100] The Portuguese provisions have a general application and enable actions for any civil claim, including financial relief. The general rules on popular actions (acção popular) are included in Act 83/95 and special provisions are to be found in particular fields, e.g. Law No. 19/2014 of 14 April on Environment Policy, Law No. 24/96 of 31 July on Consumer Protection, Law No. 107/2001 of 8 September on the Cultural Heritage, Securities Code and Law 23/2018 of 5 June on Antitrust Damages Actions. Notwithstanding the opt-out rule, the Portuguese popular action seems not to be particularly successful[101]; the information available suggests that the law's first decade saw only a few collective proceedings.[102]

The Spanish system[103] is a mixed opt-in-opt-out scheme with a restricted sectoral approach (it applies only to consumer matters).[104] In 2007, a similar provision was inserted as to matters concerning equal treatment between men and women.[105] Only some collective cases have made their way to court over the last thirty years, mostly injunctive actions. Collective actions are rare in practice due to their cost and the difficulty involved, first, in legally understanding what is needed to proceed with the action, and, second, in gathering group members and evidence and administering enforcement. In the recent years, an increase has been observed as a result of the economic downturn.[106] Notwithstanding the non-exhaustive and uncertain regulation

[97] As noted above, from these the United Kingdom also has, in the field of competition law, a scheme leaving the decision between the opt-in and opt-out scheme to the judge.

[98] See Footnote 23.

[99] Emvalomenos (2016: 6).

[100] Section 52(3) of the Portuguese Constitution.

[101] See Tortell (2008: 2–3, 5) and Rossi and Ferro (2013: 37–38).

[102] Tortell (2008: 10). Cf. Rossi and Ferro (2013: 65–66).

[103] Section 11 of Spanish Code on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil). For an English translation of the Spanish provisions, see de Cabiedes Hidalgo (2007a), for an analysis of the Spanish system, see de Cabiedes Hidalgo (2007b). Collective actions have been part of Spanish law since 1984. See Piñeiro (2016: 88).

[104] Gomez and Gili (2008: 6–7).

[105] Section 11bis introduced by L.O. 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres («B.O.E.» 23 marzo).

[106] See Piñeiro (2015: 1055–1088).

of the field[107] and the absence of a settled practice,[108] 49 collective proceedings have been recorded until 2008.[109]

In Hungarian law, opt-out collective action mechanisms exist in competition law and consumer protection law, while an opt-in joint action scheme was introduced by the new Hungarian Code of Civil Procedure as to certain subject-matters (consumer protection, employment matters and environmental damages).[110] Although the opt-out mechanism has been in force for two decades, it has produced only a single published case where monetary relief was awarded.[111]

Bulgaria adopted an opt-out class action scheme in its Code of Civil Procedure of 2007.[112] However, courts continuously apply high requirements on class formation and representation, effectively transforming the procedure into an opt-in system, with the exception where the plaintiff is a public authority (the Commission on Consumer Protection) or a representative consumer association pursuing injunctive measures.[113] In terms of statutory language, the regime may cover all violations of law, though the case-law has the tendency to limit the scope to non-contractual violations.[114]

Besides consumer associations' usual power to request an injunction or a declaratory judgment on an opt-out basis,[115] the French Consumer Code (Code de la consommation) contains two patterns of collective action where monetary relief may be sought. First, in 1992 an opt-in scheme was inserted into the Consumer Code (action en représentation conjointe),[116] and subsequently introduced as to other matters (investor protection,[117] environmental protection). This appeared to be less efficient given that it produced, in the first one and a half decade of its history, only

[107] See Gomez and Gili (2008: 3). (No special procedure was introduced for collective proceedings and the respective rules are sometimes inconsistent, self-contradictory and gappy.)

[108] See Almoguera et al. (2004: 7).

[109] Gomez and Gili (2008: 51, 19–28).

[110] Sections 580-591 of the new Hungarian Code of Civil Procedure to go into effect on 1 January 2018 (Act CXXX of 2016 on the Code of Civil Procedure, in Hungarian: 2016. évi CXXX. törvény a polgári perrendtartásról). See Szalai (2017) and Udvary (2018).

[111] Case Gf.40336/2008/7 (Budapest High Court of Appeals), published under nr ÍH 2009.125.

[112] Promulgated in State Gazette No. 59/20.07.2007, amended and supplemented by SG No. 50/30.05.2008, modified by Judgment No. 3 of the Constitutional Court of the Republic of Bulgaria of 8.07.2008–SG No. 63/15.07.2008, amended by SG No. 69/5.08.2008. The class action provisions can be found in Chapter 33, Sections 379-388 of the Bulgarian Code of Civil Procedure.

[113] Markova (2015: 142–152).

[114] Katzarsky and Georgiev (2012: 64), para 1.2.

[115] Sections L621-1-L621-6 of the French Consumer Code (Code de la consommation). The French Commercial Code (Code de Commerce) also provides for the possibility of collective actions in respect of certain unfair competition mischiefs; the public prosecutor (ministère public), the minister of economic affairs and the head of the competition council have standing. Section L442-6 of the French Commercial Code. See Momège and Bessot (2004: 8).

[116] Loi n° 92-60, 18 janv. 1992 devenue les articles L. 422-1 à L. 422-3 du Code de la consommation, réd. Loi n° 93-949, 26 juillet 1993; R. 422-1 à 422-10, réd. Décr. n° 92-1306, 11 décembre 1992.

[117] L452-2 of the Monetary and Financial Code. See Magnier and Alleweldt (2008: 7–9).

a few cases.[118] Second, recently, in 2014, the French legislator inserted an opt-out collective action regime into the Consumer Code (action de groupe), which appears to be much more effective than the *ancien régime*, having produced seven cases in two years' time. This regime was extended to health care matters and, in 2016, converted into a general scheme applicable to discrimination, environmental protection, personal data[119] and health care matters.

English law provides for three options for collective litigation: two general procedural tools (representative proceedings, group litigation orders[120]) and a sectoral tool in competition law (where, as noted above, it is at the CAT's discretion to choose the opt-out scheme). Although representative proceedings may be carried out on an opt-out basis, they have remained ineffective due to the strict construction of the preconditions in the judicial practice.

5.2 Purview: Step-by-Step Evolution of a Precautious Revolution

Most European collective action laws have a limited (sectoral) purview[121] reflecting the notion that collective actions should be limited to cases where they are badly and obviously needed. Some Member States have used "leapfrogging" to extend the scheme to other sectors demonstrating the precautious approach of the European legal systems as to collective litigation.

In Greece, collective redress is available only in consumer protection law.[122] The Finnish Act on Collective Proceedings of 2007 applies exclusively to matters coming under the remit of the Consumer Ombudsman (consumer matters).[123] Italy introduced collective actions in the Consumer Code,[124] which may be used to pursue consumer claims arising from specific cases: standard contractual terms and conditions, defective products and services, unfair commercial practices and anti-

[118] See Magnier (2007: 14).

[119] Loi n° 2014-344 du 17 mars 2014 relative à la consommation et Décr. n° 2014-1081 du 24 sept. 2014 relatif à l'action de groupe en matière de consommation; Loi n° 2016-41 du 26 janv. 2016 de modernisation de notre système de santé et Décr. n° 2016-1249 du 26 sept. 2016 relatif à l'action de groupe en matière de santé; Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1.

[120] For an analysis of group litigation orders, see Mulheron (2014: 94–111).

[121] Commission Report 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, p 3.

[122] Emvalomenos (2016: 2); British Institute of International and Comparative Law (2017: 181).

[123] See Footnote 51.

[124] Act 244 of 24 December 2007 and Act 99 of 23 July 2009. http://www.tedioli.com/Italian_class_action_text_english_version.pdf. Accessed 20 April 2019.

competitive conducts.[125] The purview of Maltese collective actions is confined to certain fields, such as competition, consumer protection and product safety law.[126] The Polish regime introduced in 2009[127] initially applied only to consumer law, product liability and tort liability (with the exception of the protection of personal interests) but was extended, in 2017, to claims resulting from the non-performance or undue performance of an obligation, unjust enrichment and certain infringements of personal interests (bodily injury or health disorder).[128] The Spanish class action rules[129] apply only to consumer matters.[130] In 2007, a similar provision was inserted as to matters concerning equal treatment between men and women.[131]

After the introduction of group actions in the field of consumer protection in 2014[132] and health care in January 2016,[133] in November 2016, the French legislator created a general framework for group actions.[134] The new regime extended the purview of the mechanism to discrimination, environmental protection, personal data and health care matters; consumer matters are not concerned by the general framework.[135]

Hungary introduced opt-out class actions in 1996 in the Competition Act and then in 1997 in the Consumer Protection Act.[136] Interestingly, while the operation of these systems attracted no criticism, the new Hungarian Code of Civil Procedure, having gone into effect on 1 January 2018, introduced an opt-in scheme applicable to consumer, employment and environmental tort matters.

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[125] Section 140bis(2) of the Italian Consumer Code; Principe (2012). Recently, in *Adusbef v Monte dei Paschi di Siena*, the court of appeals of Florence held that retail investors are not consumers and, hence, are not covered by the Italian class action legislation. Afferni (2016: 85).

[126] See Footnote 69.

[127] Act on Class Actions of 17 December 2009 (Ustawa o dochodzeniu roszczeń w postępowaniu grupowym), published in Dziennik Ustaw), published in Journal of Laws of 2010, no 7; item. 44 p. 1.

[128] New Sections 1(2) and 1(2)(a)-(b) of the Polish Act on Class Actions.

[129] Section 11 of the Spanish Code of Civil Procedure.

[130] Gomez and Gili (2008: 6–7).

[131] Section 11bis of the Spanish Code of Civil Procedure.

[132] Loi n° 2014-344 du 17 mars 2014 relative à la consommation et Décr. n° 2014-1081 du 24 sept. 2014 relatif à l'action de groupe en matière de consommation.

[133] Loi n° 2016-41 du 26 janv. 2016 de modernisation de notre système de santé et Décr. n° 2016-1249 du 26 sept. 2016 relatif à l'action de groupe en matière de santé.

[134] Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1.

[135] Loi n° 2014-344 du 17 mars 2014 relative à la consommation et Décr. n° 2014-1081 du 24 sept. 2014 relatif à l'action de groupe en matière de consommation; Loi n° 2016-41 du 26 janv. 2016 de modernisation de notre système de santé et Décr. n° 2016-1249 du 26 sept. 2016 relatif à l'action de groupe en matière de santé; Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1.

[136] Act CLV of 1997 on consumer protection (1997. évi CLV. törvény a fogyasztóvédelemről).

The Slovenian regime on collective actions applies to consumer, competition, securities, labour and environmental law matters.[137]

The German model declaratory claim procedure introduced in 2018 applies solely to consumer matters.[138]

In English law, opt-out representative proceedings have been available long since, though they remained ineffective due to the strict construction of the preconditions in the judicial practice.[139] After introducing a general opt-in procedural tool (group litigation order),[140] the English government rejected the introduction of an opt-out scheme of general application and decided to introduce this mechanism on a sector-by-sector basis.[141] As a result, an opt-out scheme was made available in competition matters.[142]

The Belgian collective action was initially available only for consumers but in 2018 it was extended to SMEs.[143] It applies to cases where an enterprise[144] breaches one of its contractual obligations or violates one of the 31 (Belgian or European) laws enumerated in Section XVII.37 of the Code of Economic Law (Code de droit économique). These extend to fields like banking, competition law, consumer protection, energy, insurance, intellectual property, passengers' rights, payment and credit services, privacy, product safety and professional liability.[145]

A few Member States have collective action regimes of general application. The 2002 Swedish law on group proceedings, introducing an opt-in scheme effective as from 1 January 2003, covers the whole spectrum of civil claims (and not only specific sectors or branches of law).[146] Likewise, the Portuguese collective action law of 1995 has a general application and enables actions for any civil claim, including financial relief, albeit special provisions can be found also in particular fields, e.g. Law No. 19/2014 of 14 April on Environment Policy, Law No. 24/96 of 31 July on Consumer Protection, Law No. 107/2001 of 8 September on Cultural Heritage, Securities Code and Law 23/2018 of 5 June on Antitrust Damages Actions. The Bulgarian opt-out

[137] Article 2 of the Slovenian Law on Collective Actions. See Sladič (2018: 214); British Institute of International and Comparative Law (2017: 249). Article 2(2) refers to anti-discrimination disputes, however, it also provides that in this regard only collective injunctions are permissible.

[138] See Footnote 77.

[139] See Andrews (2001: 253).

[140] See Mulheron (2009: 427–431).

[141] The Government's Response to the Civil Justice Council's Report, Improving Access to Justice through Collective Actions (2009). See Hodges (2010: 376–379); Hodges (2009: 50–66).

[142] The Competition Appeal Tribunal specifies in the collective proceedings order whether the procedure has to be carried out in the opt-in or the opt-out system. Sections 47A-49E of Competition Act 1998, inserted by Part 1 of Schedule 8 of the Consumer Rights Act 2015.

[143] Loi portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique. 22 May 2018, Moniteur Belge (M.B.) (Official Gazette of Belgium, 22 May 2018). See Renier (2018).

[144] Section I.21 2° of the Belgian Code of Economic Law defines the group as a group of consumers or SMEs, while Sections XVII.36 and XVII.38 refer to a violation committed by an enterprise.

[145] Section XVII.37 of the Belgian Code of Economic Law.

[146] See Footnote 45.

collective action scheme inserted into the Code of Civil Procedure of 2007 also covers all violations of law, albeit the case-law has the tendency to limit the scope to injunctive measures concerning consumer disputes.[147] The Lithuanian system introduced in 2015 is also of general application.[148] The Danish rules on collective actions having gone into effect on 1 January 2008 introduced a generally applicable system where it is up to the judge to decide whether to approve the collective action under the opt-in or the opt-out scheme.

5.3 Pre-requisites of Collective Action and Certification

The pre-conditions of collective action in Europe normally extend to those of US class action (numerousity, commonality, typicality and adequate representation),[149] however, some systems go beyond this and require that the collective actions be expedient or superior to individual litigation and that the group be definable. The requirement of expediency contents itself with that the collective action is an appropriate means to enforce the claims of group members. Superiority goes beyond this expectation and requires that a collective action be more expedient than individual litigation. The latter has a higher significance in opt-out proceedings: these are expected to be more expedient than individual actions and definability plays a much more important role here, as group members are unknown, thus, the beneficiaries will have to be identified on the basis of the final judgment's group definition. Of course, legal counsels may go as far as possible with the common questions, to the extent permitted by the definability of the group, e.g. they may request the court to establish the legal basis (defendant's liability) but leave quantum to collective actions covering sub-classes or to individual litigation. In this sense, due to the requirements of superiority/expediency and definability, the purview of European collective actions is more restricted than that of their US counterpart.

It is worthy of note that some of the laws do not specify all the traditional requirements of collective action, such as numerousity, superiority and adequate representation. However, this may be due to the circumstance that owing to the rules on scope and standing, such a specification might appear to be redundant. Quite a few systems limit the availability of collective actions to consumer matters where it is assumed that a number of victims are concerned and they have small-claims which would be difficult to bring to court but for collective litigation. Similarly, several systems lean towards ensuring adequate representation through limiting standing to public entities and recognized civil organizations or through granting these plaintiffs a privileged status.

In France, opt-out collective actions may be launched if numerous persons (numerousity) placed in a similar situation suffer damages caused by the same person, the

[147] Katzarsky and Georgiev (2012: 64), para 1.2.

[148] Section 441^1 of the Lithuanian Code of Civil Procedure.

[149] See Udvary (2012: 37–40).

common cause of which is a similar breach of legal or contractual obligations (commonality).[150]

In Germany, model declaratory claims may be submitted only by qualified consumer protection organizations. It is noteworthy that heightened requirements apply here: in addition to the conditions applicable to organizations eligible to launch actions for an injunction, organizations engaging in actions for compensation need to fulfill extra requirements (adequate representation).[151] Furthermore, the matter is eligible if, at the time of submission, it is substantiated that it concerns at least 10 consumers and within two months after the procedure's publication at least 50 consumers register their cases (numerousity).[152]

Under Greek law, consumers' associations may bring consumer collective actions "for the protection of the general interests of the consuming public" or if "an illegal behavior hurts the interests of at least thirty (30) consumers."[153]

In Poland, the court certifies a collective action if the following conditions are met:

- numerousity (the group shall consist of at least 10 people)[154];
- commonality (the class action has to cover claims of the same kind and with the same or similar factual basis)[155];
- the Polish Act contains an idiosyncratic requirement which may be regarded as an emanation of the requirement of commonality: if a law-suit concerns a monetary claim, a collective action may be launched only if the amounts claimed by individual group members are equal; however, representative plaintiffs may obviate the problems emerging from this requirement through forming sub-classes and requesting a declaratory judgment.[156]

Section 140bis of the Italian Consumer Code establishes the following preconditions for collective actions:

- prima facie case (the claim is not manifestly unfounded);
- numerousity (a number of consumers is involved);
- homogeneity (the individual rights to be enforced are homogeneous);
- adequate representation (there is no conflict of interest between the group representative and group members and the group representative shall be capable of representing the group adequately).[157]

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[150]"Lorsque plusieurs personnes placées dans une situation similaire subissent un dommage causé par une même personne, ayant pour cause commune un manquement de même nature à ses obligations légales ou contractuelles, une action de groupe peut être exercée en justice au vu des cas individuels présentés par le demandeur." Section 62 of Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle.

[151]Section 606(3)1 of the German Code of Civil Procedure.

[152]Section 606(3)2-3 of the German Code of Civil Procedure.

[153]Articles 10(16) of Law 2251/1994 on Consumers' Protection.

[154]Section 1(1) of the Polish Act on Pursuing Claims in Group Proceedings.

[155]See Footnote 154.

[156]Sections 2(1) and 2(2) of the Polish Act on Pursuing Claims in Group Proceedings.

[157]Section 140-bis(6) of the Italian Consumer Code.

In Malta, the court certifies[158] "the proceedings as appropriate for collective proceedings" if they "raise common issues" (commonality)[159] and "are the most appropriate means for the fair and efficient resolution of the common issues" (superiority).[160] Interestingly, the law expressly excludes the requirement of numerousity when it provides that "the proceedings are brought on behalf of an identified class of two or more persons." The law sets out requirements as to the adequacy of group representation: a registered consumers' association (or ad hoc constituted body) or a group member may be approved, if the court "is satisfied that the class representative (a) would fairly and adequately act in the interests of the class members; and (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members."[161]

A collective action may be launched in Bulgaria, if the following requirements are met:

- commonality (a collective action may be certified if group members' common interests were impaired by the same infringement and this may give rise to similar legal consequences for all of them)[162];
- definability (group members are identifiable)[163];
- adequate representation (it has to be proved that the group representative has the capacity "to protect the harmed interest seriously and in good faith, as well as to incur the charges related to the conduct of the case, including the costs").[164]

The requirement of numerousity does not appear in the Bulgarian Code on Civil Procedure.[165]

In Sweden, the institution of group proceedings is subject to the following preconditions.

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[158] Article 9(1) of the Maltese Collective Proceedings Act.

[159] Article 2 of the Maltese Collective Proceedings Act defines the term "common issues" as follows: "(i) common but not necessarily identical issues of fact, or (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts." Article 10 provides that "[t]he court shall not refuse to decree proceedings as collective proceedings solely on any of the following grounds: (a) the claim requires individual assessment after determination of the common issues; (b) the claim relates to separate contracts involving different class members; (c) the amount and nature of the damages sought vary among the different class members."

[160] As to superiority, among others, the following circumstances need to be taken into account: "(a) the benefits of the proposed collective proceedings; and (b) the nature of the class." Article 9(2) of the Maltese Collective Proceedings Act.

[161] Article 12 of the Maltese Collective Proceedings Act.

[162] Katzarsky and Georgiev (2012: 64–65), para 1.6.

[163] Section 379(1) of the Bulgarian Code of Civil Procedure.

[164] Sections 380(3) and 381(1) of the Bulgarian Code of Civil Procedure. The requirement of financial ability played a central role in a case where the class action initiated by a consumer association against a leasing company was dismissed when the court established that the plaintiff held a little more than BGN 3400 (approximately € 1700) in its bank account. This was deemed insufficient in the case, which concerned over 30,000 lease contracts. Ruling no 5951 of 14 November 2016 on case no. 7904/2013 of Sofia City Court, Commercial Division, panel VI-9.

[165] See Section 379 of the Bulgarian Code of Civil Procedure; Katzarsky and Georgiev (2012: 64), para 1.5.

– commonality ("the action is founded on circumstances that are common or of a similar nature for the claims of the members of the group");
– expediency ("group proceedings do not appear to be inappropriate owing to some claims of the members of the group, as regards grounds, differing substantially from other claims");
– superiority ("the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group");
– definability ("the group, taking into consideration its size, ambit and otherwise, is appropriately defined");
– adequate representation ("the plaintiff, taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action and the circumstances generally, is appropriate to represent the members of the group in the case").[166]

In Finland, collective proceedings may be launched in consumer matters, if the following requirements are met:

– numerousity ("several persons have claims");
– commonality ("several persons have claims against the same defendant, based on the same or similar circumstances");
– expediency ("the hearing of the case as a class action is expedient in view of the size of the class, the subject-matter of the claims presented in it and the proof offered in it");
– definability ("the class has been defined with adequate precision").[167]

In Denmark, a collective action may be initiated, if the following substantive conditions are met:

– commonality (the parties dispose of a common claim arising from the same factual and legal basis);
– superiority (the collective action is the best mechanism to settle the claims; this condition is met, if the collective action is more expedient than traditional joinder of parties);
– definability (group members are identifiable and may be informed in an appropriate manner);
– technicality (the judge disposes of the expertise required to adjudicate the claims);
– adequate representation (an appropriate person can be appointed as the group's representative).[168]

[166] Section 8 of the Swedish Group Proceedings Act.
[167] Section 2 of the Finnish Act on Class Action.
[168] Møgelvang-Hansen (2008: 4).

In Hungary, the pre-conditions of collective action under the Competition Act and the Consumer Protection Act may be boiled down to the following requirements[169]:

- numerousity (the violation concerns numerous consumers);
- definability (the victims of the violation are identifiable on the basis of the circumstances of the violation);
- adequate representation is not expressly required, however, as standing is conferred solely on public bodies and recognized consumer rights organizations (on the Hungarian Competition Office as to the Competition Act and on the consumer protection agency, the public prosecutor and consumer rights organizations as to the Consumer Protection Act), such a specification seems to be redundant.

Under the new Hungarian Code of Civil Procedure, the court certifies an opt-in collective action, if the following conditions are met[170]:

- numerousity (the joint action may be certified, if at least 10 plaintiffs join)[171];
- commonality—identity (the plaintiffs may bring to court one or more rights that are, in terms of content, identical in relation to all plaintiffs—"representative right"—, if the facts sustaining the representative right are, in essence, the same in relation to all plaintiffs (representative facts) and it can be proved that the individual plaintiffs are entitled to the representative right—"linking")[172];
- superiority (the court may decline the request for certification, if it is not reasonable to certify the collective action given that the burden in terms of work and time related to the action's collective nature would be so huge that the collective proceedings' efficiency benefits would likely vanish).[173]

In Lithuania, the Code of Civil Procedure establishes the following preconditions for collective actions[174]:

- numerousity ("an action shall be lodged by at least 20 natural and/or legal entities that express their will to be members of the class and bring the action to the court in writing"),[175]
- commonality (the action has to be "grounded on identical or similar factual circumstances" and to aim at "protecting natural or legal entities that set up a class and brought a claim, identical or similar substantive rights or interests protected by the law by means of the same remedy"),[176]

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[169]Section 92(1) of the Hungarian Competition Act; Section 39(1) of the Hungarian Consumer Protection Act.

[170]Section 585(1)-(2) of the new Hungarian Code of Civil Procedure.

[171]Sections 583(1) and 585(1)(a) of the new Hungarian Code of Civil Procedure.

[172]Sections 583(1) and 585(1)(b)-(e) of the new Hungarian Code of Civil Procedure.

[173]Section 585(1)(f) of the new Hungarian Code of Civil Procedure. The Code's explanatory memorandum confirms that this is a superiority requirement, as the court has to investigate whether the joint action is more efficient than pursuing the claims individually.

[174]Section 441^3 of the Lithuanian Code of Civil Procedure.

[175]Section $441^3(2)(1)$ of the Lithuanian Code of Civil Procedure.

[176]Sections $441^1(2)$ and $441^3(1)(1)$ of the Lithuanian Code of Civil Procedure.

– superiority (the "class action is a more expedient, effective and appropriate means of resolving the particular dispute than individual actions"),[177]
– adequate representation ("the class shall be represented by an appropriate representative"[178] and "by an attorney-at-law"[179]).[180]

Spanish law does not specify the pre-conditions of collection actions in consumer matters, though, it attaches high importance to definability.[181]

Although representative proceedings are available under English law if more than one person has the same interest in a claim, they have been rarely used due to the strict judicial interpretation of the pre-conditions. While definability is not specified by the law, courts have been reluctant to endorse representative proceedings where group members were not readily ascertainable. In *Emerald Supplies Ltd and Others v British Airways plc*[182] flower importers sued British Airways, because it participated in an anti-competitive collusion resulting in the increase of carriage fees. Emerald, who represented the plaintiffs, sued both on behalf of direct and indirect purchasers, and the court came to the conclusion that the procedure was not representative as at the moment when it was instituted group members could not be determined and did not have a common interest.

If the damages suffered by the group and the loss sustained by individual group members are not ascertainable, claims for damages may be pursued in a two-stage procedure. Accordingly, in the first phase, a declaratory judgment is requested in respect of the issues the group members have in common. Thereafter, individual group members may institute separate actions for damages, where they may rely on the judicial determination of the common issues.[183]

In competition law, the Competition Appeal Tribunal (CAT) may certify[184] a collective action (collective proceedings order, CPO), if the claims arise from a competition law violation,[185] they "raise the same, similar or related issues of fact or law" (commonality), "are brought on behalf of an identifiable class of persons"

[177] Section 441^3(1)(2) of the Lithuanian Code of Civil Procedure.

[178] Section 441^3(1)(4) of the Lithuanian Code of Civil Procedure.

[179] Section 441^3(2)(2) of the Lithuanian Code of Civil Procedure. See also Section 441^1(3) of the Lithuanian Code of Civil Procedure.

[180] In addition to the above-listed substantive pre-conditions, Lithuanian law also erects a procedural (pre-trial dispute settlement) requirement: the defendant has to be notified of the intention to file a class action and has to be given at least 30 days to meet the group's demands. See Sections 441^3(1)3) and 441^2 of the Lithuanian Code of Civil Procedure.

[181] Gomez and Gili (2008: 6).

[182] [2009] EWHC 741 (Ch).

[183] *Prudential Assurance Co. V. Newman Indus. Ltd.*, 2 W.L.R. 339 (Ch 1980).

[184] For an analysis of the CAT's decision practice, see Veljanovski (2019).

[185] Section 47/A(2) of the 1998 Competition Act

(definability),[186] "are suitable to be brought in collective proceedings" (expediency)[187] and adequate representation is secured.[188]

The certification of the first two collective actions was dismissed by the CAT.[189] However, in one of these, in *Merricks v Mastercard Incorporated & Anor*,[190] the case was remanded by the Court of Appeal, which held that the certification of a claim and the grant of a collective proceedings order (CPO) may not be refused merely because individual losses cannot be ascertained. The CAT refused certification because of "the absence of any plausible means of calculating the loss of individual claimants so as to devise an appropriate method of distributing any aggregate award of damages."[191] The Court of Appeal overturned the CAT's decision, ruling that

> The CAT is expressly required under Rule 79(2) to take into account whether the claims are suitable for an aggregate award of damages when considering whether to make a CPO but not whether such an award can be distributed in any particular manner. The making of an aggregate award does not (…) require the Court to calculate individual loss or importantly to assess the damages included in that award on an individual basis. Why, then, should they be distributed in that way?[192]
>
> More importantly, for present purposes, the CAT is not required under Rule 79(2)(f) for certification purposes to consider more than whether the claims are suitable for an aggregate award of damages which, by definition, does not include the assessment of individual loss. Distribution is a matter for the trial judge to consider following the making of an aggregate award: see Rules 92 and 93. We therefore consider that it was both premature and wrong for the CAT to have refused certification by reference to the proposed method of distribution: an error compounded by their view that distribution must be capable of being carried out by some means which corresponds to individual loss.[193]

Interestingly, the collective proceedings order is not conditioned on numerousity: a collective action may be certified, if it combines "two or more claims."[194] Furthermore, though the statutory language does not go beyond the requirement of suitability, the Competition Appeal Tribunal Rules of 2015 contain a list of factors to be taken into account as to the interpretation of the requirement of suitability and these suggest that collective proceedings may be certified only if they are more efficient than individual actions (superiority). Notably, the CAT takes into account not only whether the collective action is "an appropriate means for the fair and efficient resolution of the common issues" but also its costs and benefits, whether individual actions have already been commenced and the size and nature of the group.[195]

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[186] Section 79(1)(a) of Competition Appeal Tribunal Rules 2015, Statutory Instrument 2015/1648.

[187] Section 47/B(6) of the 1998 Competition Act.

[188] Section 47/B(5) of the 1998 Competition Act.

[189] *Gibson v Pride* [2017] CAT 9; *Merricks v Mastercard* [2017] CAT 16. See Veljanovski (2019).

[190] [2019] EWCA Civ 674 (16 April 2019).

[191] Para 29.

[192] Para 60.

[193] Para 62.

[194] Section 47/B(1) of the 1998 Competition Act.

[195] Section 79(2) of Competition Appeal Tribunal Rules 2015, Statutory Instrument 2015/1648.

Any person may be appointed as group representative, if he is capable of representing the group adequately. The representative does not need to be a class member, the CAT may appoint any person if it "considers that it is just and reasonable for that person to act as a representative in those proceedings."[196] Concerning the adequacy of the representative, the CAT will take into account, among others, whether there is a conflict of interest, the representative's ability to cover the defendant's legal costs if ordered to do so,[197] whether the representative has a plan concerning the litigation strategy, the notification of group members, governance issues and estimated costs.[198]

In Belgium, the law erects two requirements: superiority and adequate representation. A collective action may be certified only if it is more effective than individual litigation[199] and the judge considers representation to be adequate.[200] Interestingly, as noted above, although standing is reserved for authorized non-profit organizations, adequacy of representation has to be inquired separately. As regards the superiority of collective litigation, the court may consider the following factors: size of the group, the relationship between individual damages and collective harm and the collective action's complexity and efficiency.[201]

5.4 Standing and Adequate Representation

According to the general opinion, contrary to the US pattern, in the European Union standing is reserved for public entities (administrative agencies, the attorney general etc.) and qualified non-profit civil organizations such as consumer protection NGOs. According to European thinking, conferring standing on these public and not-for-profit organizations with the exclusion of group members and for-profit entities mitigates the risk of abuse. It is argued that because these organizations are not profit-orientated, they are attentive to the public interest, furthermore, they are registered, regulated and supervised. However, in fact, while the heroes of class actions are certainly not group members (representative parties) but public entities and civil organizations, in quite a few Member States, their standing operates in parallel to that of group members and only a few European legal systems limit standing exclusively to public entities and non-profit organizations. Nonetheless, there is a clear tendency to reserve "hard cases" (which are difficult to manage or raise higher risks of abuse) to public entities and recognized civil organizations. Such cases involve opt-out proceedings and cases where it is difficult to define the group.

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[196] Sections 47/B(2) and 47/B(8) of the 1998 Competition Act.

[197] Section 78(3) of Competition Appeal Tribunal Rules 2015, Statutory Instrument 2015/1648.

[198] Section 78(3) of the 2015 Competition Appeal Tribunal Rules, Statutory Instrument 2015/1648.

[199] Section XVII.36 3° of the Belgian Code of Economic Law.

[200] Section XVII.36 2° of the Belgian Code of Economic Law.

[201] Voet (2016: 2).

In Finland, solely the Consumer Ombudsman has the power to institute a collective action.[202] In France, only recognized civil associations whose object extends to the protection of the interests at stake may institute opt-out proceedings.[203] In Belgium, only authorized consumer associations, SMEs' organizations and non-profit organizations may launch collective actions. However, the law distinguishes between standing and adequacy of representation: the latter has to be examined independently. Interestingly, the Consumer Mediation Service (Service de médiation pour le consommateur") may also launch collective proceedings but only for negotiating a collective settlement; if no settlement can be achieved, a consumer association has to step in to continue the procedure.[204] In Germany, model declaratory claims may be submitted solely by qualified consumer protection organizations that—in addition to the conditions applicable to entities eligible to launch actions for injunction—meet five extra conditions: they have a membership made up of at least 10 associations or 350 natural persons, have been registered for four years as authorized to launch consumer actions for injunction, are engaged in non-professional educational or advisory activities, do not submit the model declaratory claim for for-profit considerations and do not gather more than 5% of their financial resources through company donations.[205] The law suggests that in case of actions for compensation, the group representative needs to meet heightened requirements as compared to actions for an injunction. It is noteworthy that, legally speaking, no compensation is awarded in the German procedure, the court may merely establish that the pre-conditions of the defendant's liability are met. In the same vein, in Greece, standing is conferred exclusively on certified consumer protection associations ("consumer unions") that have at least 500 active members (if more than one association files the case, they need to have 500 active members jointly) and have been registered for at least one year.[206] In Slovenia, standing is conferred on representative non-profit organizations and the attorney general.[207]

In Lithuania, collective action may be launched by a group member, an association or a trade union "where the pleas laid in the class claim arise out of legal relations directly related to the objective and field of activity of the association or the trade union and where at least 10 members of the class are the members of the association or trade union. Members of the class may include not only the members of the association or the trade union and in the lawsuit proceedings the association or the trade union shall represent the interests of all members of the class."[208]

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[202] See Footnote 51.

[203] Section 63 of Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle.

[204] Section XVII.39 of the Belgian Code of Economic Law.

[205] Section 606(1)2 of the German Code of Civil Procedure.

[206] Articles 10(16)-(17) of Law 2251/1994 on Consumers' Protection.

[207] Article 4 of the Slovenian Law on Collective Actions.

[208] Section 441^4(1)-(2) of the Lithuanian Code of Civil Procedure.

In Hungary, the Competition Act confers standing on the Hungarian Competition Office and the Consumer Protection Act on public entities (consumer protection agency, public prosecutor) and consumer rights organizations. In opt-in procedures launched under the new Code of Civil Procedure, standing is conferred on group members, who, before submitting the claim, have to conclude a joint action contract which, among others, has to name the group representative.

Polish law confers standing on class members and the regional consumer ombudsman (a public body).[209]

In Malta, both registered consumers' associations (and ad hoc constituted bodies) and group members may be approved as group representative. The law establishes requirements to ensure adequate representation: the court approves the group representative if it is satisfied that he "(a) would fairly and adequately act in the interests of the class members; and (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members."[210]

In Sweden, collective proceedings may be initiated by group members (private group action), civil organizations (NGO action) and administrative agencies (public group action).[211]

Portuguese law also defines standing widely: citizens, associations, foundations and municipalities (for the protection of the citizens living in their territory) may institute an action.[212]

In Bulgaria, standing is conferred on group members and civil organizations.[213]

In Spain, standing is conferred on group members, consumer organizations and public entities. The Spanish Code of Civil Procedure distinguishes between general interests (intereses generales) and collective interests (interses colectivos). The former concern an undetermined number of consumers and can be protected in an injunctive class action. Public entities (such as the Public Ministry and entities named in special consumer legislation) and representative consumer organizations have standing to bring them before courts.[214] Collective interests are those where consumers are already identified or can be easily identified; these can be brought before courts by group members, representative consumer associations and public entities (such as the Public Ministry and entities named by special consumer legislation). In this

[209] Section 4(2) of the Polish Act on Pursuing Claims in Group Proceedings.

[210] Article 12 of the Maltese Collective Proceedings Act. See British Institute of International and Comparative Law (2017: 217).

[211] Sections 2(3) and 3-6 of the Swedish Group Proceedings Act. See Pettersson et al. (2004: 4).

[212] Article 19 of Law 23/2018 of 5 June on Antitrust Damages Actions also grants standing to business associations.

[213] Section 379(2)-(3) of the Bulgarian Code on Civil Procedure.

[214] Section 11(5) of the Spanish Code of Civil Procedure, conferring standing on the Spanish Public Prosecutor (Ministerio Fiscal), was inserted in 2014. Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el R.D. Legislativo 1/2007, de 16 de noviembre («B.O.E.» 28 marzo). See de Ávila Ruiz-Peinado (2016: 14).

case, a group action is launched. Special consumer legislation may also provide for the possibility to accumulate both types of actions.[215]

In Denmark, the group representative is appointed by the court, who may be a group member, an association, a private institute or other organization or an administrative agency (e.g. the Consumer Ombudsman). As noted above, under Danish law, the court has the discretion to decide whether the case should be tried in the opt-in or the opt-out scheme. If the action follows the opt-out pattern, only an administrative agency may be appointed as group representative.

The Italian collective action may be initiated by any consumer. Albeit that the consumer may also authorize a consumer organization,[216] standing goes to the consumer who initiated the procedure.

In England, group litigation order and representative actions may be launched by group members, while (in the United Kingdom) competition law collective actions may be launched by a group member or a representative body.

5.5 Status of Group Members in Opt-in Proceedings: Liability for Legal Costs and Res Judicata Effect

Although opt-in collective litigation is based on group members' explicit approval, in most systems members are, at least formally, not parties to the procedure and this quality is conferred on the group representative. As a corollary, group members are normally affected by the outcome of the case (that is, are covered by the judgment's res judicata effects) but they are usually not liable for the prevailing defendant's legal costs. This is a risk that is normally borne by the group representative. The rationale of this approach is more practical than doctrinal. As group members expressly join the group, it would be plausible, both doctrinally and constitutionally, to expect them to run the risks attached to failure. Nonetheless, as a matter of practice, it would be rather difficult to have them join in matters where the claim is small. The information asymmetry between the members and the group representative may warrant that this risk be placed on the latter.

Under Swedish law, the cost-shifting burdens those who launched the action (group representative) and not group members, who are not considered to be parties to the proceedings. Accordingly, if the litigation is successful, group members receive their net claim; if the litigation is unsuccessful, the defendant's legal costs are shifted on the group representative.[217] Likewise, in Finland, the traditional "loser

[215] Royal Legislative Decree 1/2007 consolidating the 1984 Law on Consumer Protection and other consumer laws have reduced the number of these laws, of which there were over twenty-five. Some still remained, and include rules on collective actions, such as Sections 32 and 33 of Law 3/1991 of 10 January on Unfair Competition, and Section 6 of Law 34/1988 of 11 November on Advertising. See Piñeiro (2016: 90–91).

[216] Section 140bis(1) of the Italian Consumer Code.

[217] Sections 33-36 and 41 of the Swedish Group Proceedings Act.

pays" principle applies also to group proceedings but group members are not parties to the proceedings, hence, if joining the action, they do not run any risk in terms of legal costs.[218] Italian law's two-way cost-shifting rule is maintained also as to collective actions. However, in case the court decides against the plaintiff, it orders the group representative (and not group members) to reimburse the defendant for his reasonable legal costs. In Germany law, the model declaratory claim is submitted by the organization representing the group, which qualifies as a party and runs the risks related to legal costs.[219]

The mixed regime available in Slovenia maintains the two-way cost shifting rule,[220] nonetheless, group members are, formally, not parties to the collective action[221] and have no right to claim reimbursement and are not responsible for reimbursing the defendant.[222]

Nonetheless, a couple of opt-in systems do stick to the full application of the "loser pays" principle, insisting on the notion that if someone wants to have a chance for a favorable award, he also has to carry the risk of being liable for the expenses the action generates.

In Malta, although the "costs may be awarded in favour or against the class representative, but may not be awarded in favour of or against a represented person who is not the class representative",[223] the collective proceedings agreement, which is an agreement between the group members and the group representative and which is accepted by group members when joining the proceedings, "may also include provision for the pre-payment and, or reimbursement of any judicial costs incurred by the class representative, [p]rovided that every class member shall only be liable for costs in proportion to his claim."[224]

Danish law did not discard group members' liability for legal costs in opt-in proceedings. The court may provide that the group representative and joining group members have to bestow a security for legal costs; if the court decides so, no additional financial contribution may be requested from group members; that is, this sum functions as a cap on individual group members' liability for legal costs.[225]

Likewise, group members (and not the group representative) are liable for the legal costs in the opt-in scheme established by the Hungarian Code of Civil Procedure. Before launching the action, group members have to conclude a "joint action contract", which lists, among others, the plaintiffs, names the representative plaintiff

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[218] Viitanen (2008: 8).

[219] See Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage. https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Musterfeststellungsklage.pdf?__blob=publicationFile&v=2.15 and 26. Accessed on 20 March 2019.

[220] Article 60 of the Slovenian Law on Collective Actions; Sladič (2018: 215).

[221] Zdolšek et al. (2018: 231).

[222] "[U]nless the costs are caused by the group members' fault." Article 62 of the Slovenian Law on Collective Actions.

[223] Article 23(1) of the Maltese Collective Proceedings Act.

[224] Article 2 of the Maltese Collective Proceedings Act.

[225] Møgelvang-Hansen (2008: 7–8).

and its deputy and contains provisions on the advancement, bearing and split of costs, the preparation of the action and legal costs, the responsibility of the representative plaintiff, including its liability for damages.[226] The "joint action contract" also has to determine the conditions of adhesion and withdrawal,[227] it has to contain provisions on settlement, that is, whether a settlement may be concluded or not, and if it may, it also has to establish the minimum amount and other related conditions,[228] it has to make provision for whether the representative plaintiff's declarations have to be approved by the parties (group members).[229] Sections 586(1)(l) and 586(2) of the Hungarian Code of Civil Procedure expressly provide that the parties' share from the money awarded by the court or provided for in the settlement has to be commensurate to the proportion represented by the value of the individual party's claim and the parties may not agree otherwise. As it is banned to agree to a division that departs from the proportions of the values of the claims, the parties may not enter into arrangements where some members take higher risks in exchange for a higher share in the money awarded. Hungarian law follows the "loser pays" principle and, at the end of the day, group members run the risk of being responsible for the successful defendant's legal costs. Although legal costs are awarded to and against the representative plaintiff,[230] as noted above, in the joint action contract, group members have to reach an agreement as to the advancement, bearing and split of these costs.

In European opt-in systems, the res judicata effects extend to those group members who expressly join the group. In Sweden, the judgment covers those group members who expressly join the group and, accordingly, the judgment covers the claims of these persons (res judicata effect).[231] Similarly, settlements, which are to be approved by the court, bind only those who join the group.[232] In Finland, the group consists of those persons who get their declarations of accession to the Ombudsman within the deadline established by the court.[233] The judgment's legal effects cover solely those group members who opted in.[234] In Malta, the collective judgment on the common issues binds only those group members who joined the proceedings.[235] In Germany, courts have no power to award damages, instead, the purpose of the action is to establish that the claim's or legal relationship's factual and legal pre-conditions exist or do not exist.[236] Group members may seek monetary relief, on an individual basis, after the pre-conditions of the defendant's liability are established. The final declaratory judgment is binding on courts in matters between consumers who opted

[226] Sections 586(1)(a)-(c), 586(1)(e) & 586(1)(g) of the Hungarian Code of Civil Procedure.

[227] Section 586(1)(h) of the Hungarian Code of Civil Procedure.

[228] Section 586(1)(i) of the Hungarian Code of Civil Procedure.

[229] Section 586(1)(j) of the Hungarian Code of Civil Procedure.

[230] Section 590(3) of the Hungarian Code of Civil Procedure.

[231] Sections 13-14 of the Swedish Group Proceedings Act.

[232] Section 26 of the Swedish Group Proceedings Act.

[233] See Footnote 50.

[234] Viitanen (2008: 5).

[235] Article 18(1) of the Maltese Collective Proceedings Act.

[236] See Footnote 77.

in and the defendant, provided these concern the same aims and the same fact pattern as the collective declaratory judgment.[237] In Italy, the final judgment is binding on all group members who joined the proceedings (and the lead plaintiff and the defendant obviously). While those who failed to join are not bound, the class action has a preclusion effect as to future collective actions in the same subject: consumers not part of the group do retain their rights to launch individual law-suits but may not start another collective action against the same defendant on identical grounds.[238] In UK competition law's opt-in scheme, if the CAT carries out the procedure according to the opt-in principle, the CAT's judgments and orders will be binding only on those group members who opted in.[239] In Lithuania, final court decisions are binding on group members who opted in. The court may adjudicate the pleas common to all class members in a "common ruling"; in case class members have individual pleas, the court may adopt an "intermediate ruling" and "individual rulings."[240]

5.6 Status of Group Members in Opt-Out Proceedings: Liability for Legal Costs, Res Judicata Effect and the "Only Benefits" Principle

As noted above, due to doctrinal and constitutional reasons, European opt-out collective actions have been impregnated by the "only benefits" principle: the encroachment on party autonomy may be justified if only benefits accrue to group members. European systems have been struggling remarkably with the implementation of this principle, producing innovative and idiosyncratic solutions.

The major risks related to collective litigation in Europe are the liability for legal costs and being bound by an unfavorable judgment in case the group representative fails.

Due to the two-way cost-shifting rule, the prevailing party has to be compensated for his reasonable legal costs. It is evident that in opt-out proceedings group members may not be liable for any legal costs (except the ones they caused). Likewise, the possibility of introducing the American rule as to collective actions was also generally rejected—it would have been inconsistent to do away with an entrenched principle of European civil procedure as to collective litigation, while preserving it as to individual actions. These two factors determined that it should be the group representative who carries the risk of legal costs.

In the Greek consumer collective action, group members are not liable for legal costs if the collective action proves unsuccessful.[241] Likewise, in Portugal, it is the

[237] See Footnote 78.

[238] Afferni (2016: 89–90).

[239] Sections 47B(12) and 59(1) of the 1998 Competition Act.

[240] Section 441^9 and Section 261^1 of the Lithuanian Code of Civil Procedure.

[241] European Parliament, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies (2011: 25).

group representative (collective plaintiff) and not individual group members who carries the risk as to legal costs.[242] The same approach prevails in Spain. In order to promote collective actions, Article 37(d) of Royal Legislative Decree 1/2007 laid down the right of consumer associations' to legal aid. In Hungary, in opt-out proceedings, group members are not liable for legal costs, contrary to the opt-in scheme of the Hungarian Code of Civil Procedure. In the United Kingdom's opt-out scheme available (subject to the CAT's discretion) in competition matters, the risks related to legal costs are, in principle, run by the group representative: "costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative."[243] In Bulgaria, group members are not liable for legal costs if the collective action proves unsuccessful—the main burden is assumed by the group representative, who is required to prove his financial capacity at the outset of the procedure.[244] However, group members who expressly opted in would be also liable together with the group representative. Once they opt in, they become parties to the proceedings with the pertinent rights that allow them to influence the course of the case, which, in turn, allows the imposition of liability in case of failure.

Danish law subjects group members to partial liability for legal costs, while trying to preserve the "only benefits" principle: if the proceedings are conducted in the opt-out pattern, group members cannot be obliged to pay more for legal costs than the money actually awarded to them.[245] In other words, group members run the risk of losing money with the group action only if the opt-in scheme is used and they join the action.[246]

Legal costs are not the only risk where the need of the "only benefits" principle has been claimed. While most European opt-out systems simply extend the judgment's res judicata effects to group members who did not opt-out, a few Member States were influenced by the argument that party autonomy is restricted also if individual group members could have achieved a better result than the one the group representative did (they could have won in a case where the collective action failed or could have obtained a more favorable remedy). As it is virtually impossible to assess this on a case-by-case basis, some European systems (Hungary, Portugal, France) have developed various practices to ensure the judgment's res judicata effect without formally extending it to group members and made the judgment's binding force limping.

The majority of European opt-out regimes uses a straight approach and provides that the judgment's res judicata effect covers all group members but those who opted out.

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[242] Tortell (2008: 7).

[243] Section 98 of Competition Appeal Tribunal Rules 2015, Statutory Instrument 2015/1648.

[244] Section 380 (3) in conjunction with Section 381 (3) of the Bulgarian Code on Civil Procedure.

[245] See Footnote 225.

[246] Nielsen and Linhart (2012: 238).

In Bulgaria, group members may opt-in but the judgment will extend to all group members who did not opt-out.

> The judgment of the court shall have effect in respect of the infringer, the person or persons who have brought the action, as well as in respect of those persons who claim that they are harmed by the established infringement and who have not declared that they wish to pursue a remedy independently in a separate procedure. The excluded persons may avail themselves of the judgment whereby the class action has been granted.[247]

In Spain, group members may participate in the procedure.[248] Once the court confirms the collective action, this fact has to be announced.[249] The court's judgment has to give a detailed definition of the features and requirements that are to be met to qualify as a group member. The judgment rendered as a result of a collective action and its res judicata effects cover all group members, eventually also those, who did not opt in. If the court decides for the plaintiffs, the judgment has to determine the consumers and users benefiting from the judgment individually. When group members cannot be identified, the judgment has to set out the conditions of group membership and establish the data, characteristics and requirements that are to be met for claiming payment or requesting enforcement.[250] If consumers are not determined individually in the judgment, a writ has to be issued in the enforcement stage to establish whether a particular person, on the basis of the data, characteristics and requirements set out there, is covered by the judgment.[251]

In Denmark, as noted above, the court has the power to decide whether to carry out the proceedings in the opt-in or the opt-out scheme. The parties of the procedure are the group representative and the adversary party (defendant); group members are not parties in the conventional sense.[252] Nevertheless, in the opt-out procedure, the judgment's res judicata effects extend to the members who failed to opt out.

A similar scheme prevails in Belgium: the court has the power to decide between the opt-in and the opt-out scheme. The final judgment extends, accordingly, to those who opted in or opted out, depending on the scheme chosen by the court.[253]

In the United Kingdom, in competition matters, it is up to the CAT to decide whether the procedure will be carried out in the opt-in or the opt-out scheme.[254] In case the opt-out system is used, the CAT's judgments and orders will be binding on those who did not opt out.[255] Class members domiciled outside the UK, to be covered by the CAT's judgments or orders, have to opt in, even if the opt-out scheme

[247] Section 386(1) of the Bulgarian Code on Civil Procedure.

[248] Section 13(1) of the Spanish Code of Civil Procedure.

[249] Section 15 of the Spanish Code of Civil Procedure.

[250] Sections 221 and 222(3) of Spanish Code of Civil Procedure.

[251] Section 519 of Spanish Code of Civil Procedure. See Piñeiro (2016).

[252] Møgelvang-Hansen (2008: 3).

[253] Voet (2016: 3–4).

[254] Section 47/B(7)(c) of the 1998 Competition Act. See also Section 47/B(10)-(11) of the 1998 Competition Act.

[255] See Footnote 239.

is used. The CAT is not required to individualize the damages awarded: "[it] may make an award of damages (…) without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."[256]

As noted above, in a few Member States, judgments adopted in collective actions have limping res judicata effects.

In Hungary, it is not obvious if in opt-out proceedings available in competition and consumer protection law the judgment's res judicata effects extend to group members. The statutory text does not provide for this specifically. It deals only with the case when the group representative wins, not addressing the case of plaintiff failure. More importantly, group members are not parties to the collective action, hence, absent a specific provision, they should not be covered by the res judicata effects. Last but not least, the law provides that the collective action does not affect the consumer's right to pursue his rights individually.[257] All these suggest that while group members may "use" the judgment if the group representative prevails, they are not necessarily covered by the res judicata effect. However, this question has not been tested in judicial practice.

In the Greek consumer collective action, the judgment's res judicata effect extends to all (including absent) group members but only if the consumer association is, fully or partially, successful. In case the defendant does the comply with the judgment voluntarily, a consumer may request the court to issue a payment order for him.[258]

In Portugal, once a popular action is initiated, the court, after an appropriate public notice, sets a deadline for adherence or refusal of adherence. The popular action follows the opt-out principle[259]: silence infers adherence. However, the law shelters group members in various ways from the potentially detrimental consequences of res judicata. First, group members may opt out very late, until the end of the evidentiary procedure.[260] Second, the law erects two exceptions to the principle that the final judgment's res judicata effects extend to all group members who have not opted out: group members are not covered by the judgment's res judicata effects if the claim was rejected for lack of evidence, furthermore, the judge may decide to exempt group members from this effect considering the special characteristics of the case.[261]

Judgments in collective actions have limping res judicata effects also under French law, which has been above average creative as to the purview of res judicata in opt-out proceedings. The scheme appears to be a de facto opt-out system, although the

[256] Section 47/C(2) of the 1998 Competition Act.

[257] Section 92(8) of the Hungarian Competition Act; Section 38(7) of Act CLV of 1997 on Consumer Protection.

[258] Articles 10(20) of Law 2251/1994 on Consumers' Protection. See Emvalomenos (2016: 4) and European Parliament, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies (2011: 25).

[259] Section 15 of the Portuguese Act on Popular Action.

[260] Antunes (2007: 20–21).

[261] Section 19 of the Portuguese Act on Popular Action. It is worthy of note that there is a theory in Portuguese doctrine which suggests that, due to considerations of constitutionality, only those legal consequences should have res judicata effects on group members which are beneficial to them. de Freitas (1998: 797, 809).

consumer's right to opt in is retained and can be exercised after the judgment is made. Accordingly, the judgment's res judicata effects extend to group members on the condition that they accept the award and get compensated: the judgment's res judicata effects cover only those group members who, after having been duly informed, expressly accept the judgment and the compensation.[262] Notwithstanding the conditional nature of the res judicata effects on individual group members, the judgment adopted at the end of the group action has a general preclusion effect against subsequent group actions initiated in the same case.[263]

5.7 Enforcement

Interestingly, although, as a matter of practice, this appears to be of crucial importance for the success of collective actions, in the vast majority of the systems, collective awards come under individual enforcement.[264]

Nonetheless, a handful of Member States made provisions for the collective enforcement of the judgment accruing from the collective action. In Malta, if the court awards compensation, it "may order the defendant to credit the amount due to a specific account held by the class representative and may give such orders, as it deems necessary, to the class representative for the effective distribution of that compensation among the class members."[265] In Belgium, collective awards and settlements are enforced under the supervision of a "collective claims settler", who can claim his costs and fees from the defendant.[266] In Slovenia, enforcement is carried out with the help of a collective redress manager.[267] In France, the money has to be paid directly to group members; however, the representative plaintiff may be authorized to enforce the award and distribute it among the members.[268] In the United Kingdom, in opt-out collective proceedings available in competition matters, the CAT may order that the damages be paid either to the representative plaintiff or any third person the CAT determines.[269] In opt-in proceedings, the damages are, in principle, to be paid

[262] Section 78 of Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1.

[263] Section 80 of Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle, JORF n° 0269 du 19 novembre 2016 texte n° 1.

[264] Commission Report 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, p 12. ("The enforcement of injunctions is generally carried out through the same measures irrespective of whether the injunctive order was issued in individual or collective proceedings").

[265] Article 18(3) of the Maltese Collective Proceedings Act.

[266] Section XVII.57-62 of the Belgian Code of Economic Law. See Voet (2016: 6–7).

[267] Article 43 of the Slovenian Law on Collective Actions.

[268] Sections 826-21-826-23 of the French Code of Civil Procedure; Lustin-Le Core (2016: 20).

[269] Section 47/C(3) of the 1998 Competition Act.

directly to group members unless the CAT decides otherwise (in which case they will be paid to the representative plaintiff or any third person the CAT determines).[270]

In Bulgaria, enforcement is managed by the group representative under court supervision. The court may require that the indemnification be collected in the name of one of the representatives or in an escrow account.[271] Furthermore, the court may convene a general meeting of all injured parties, which can decide on the manner of allocation or expenditure of the indemnification amount. This meeting is chaired by the judge and can adopt valid decisions if more than 6 injured parties attend.[272]

Normally, individual claims not enforced within the term of limitation remain with the defendant. However, for instance, in Portugal, if group members do not enforce the compensation awarded to them within three years, the claim accrues to the Ministry of Justice who is expected to use it to promote access to justice.[273] In securities law, the non-distributed part of the global compensation accrues to the respective financial sector's guarantee fund.[274] In case of antitrust damages actions, the non-distributed part may be used to pay for the promoters' costs of litigation, which would otherwise go uncompensated.[275] In the United Kingdom, in competition law opt-out collective actions, provision is made for unclaimed moneys: if the CAT "makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor"[276] or the Secretary of State[277]; however, the CAT "may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."[278]

5.8 Summary

Interestingly and counter-intuitively, 10 out of the 17 EU Member States that have adopted collective litigation schemes created systems based fully or partially on the opt-out principle (Belgium, Bulgaria, Denmark, France, Greece, Hungary, Portugal, Slovenia, Spain, and the United Kingdom) and only 7 of them stuck to the opt-in principle (Finland, Germany, Italy, Lithuania, Malta, Poland and Sweden). Accordingly, while it is true that in the vast majority of the Member States no opt-out collective

[270] Section 47/C(4) of the 1998 Competition Act.

[271] Section 387 of the Bulgarian Code on Civil Procedure.

[272] Section 388 of the Bulgarian Code on Civil Procedure.

[273] Section 22 of the Portuguese Act on Popular Action. Dias and Andrade e Castro (2016: 67).

[274] Section 31 of the Securities Code (Decree-Law 486/99 as revised).

[275] Section 19 of Law 23/2018 of 5 June on Antitrust Damages Actions.

[276] Section 47/C(5) of the 1998 Competition Act.

[277] Section 47/C(7) of the 1998 Competition Act.

[278] Section 47/C(6) of the 1998 Competition Act.

litigation is available, more than half of the countries that decided to create a special regime allowed representation without authorization in general or in given sectors.

Though a few countries have regimes of general scope, most European collective litigation systems have a limited ambit (such as consumer matters), reflecting the notion that collective actions should be limited to cases where they are highly needed. Some systems have used "leapfrogging" to extend the scheme to further sectors demonstrating the precautious approach of European legal systems as to collective litigation.

European collective litigation is normally subject to more stringent requirements than US class actions. The pre-conditions of collective litigation normally embrace those of US class action (numerousity, commonality, typicality and adequate representation) but quite a few systems go beyond these and require that collective litigation be expedient or superior to individual litigation and that the group be definable and group members identifiable by means of the group definition (especially in case the opt-out scheme is used).

The heroes of European collective litigation are governmental and non-governmental not-for-profit organizations (such as administrative agencies, the attorney general and consumer protection NGOs). Although standing is not reserved solely for them (in fact, in several Member States their standing operates in parallel to that of group members and only a few systems limit standing exclusively to public entities and non-profit organizations), they are expected to be the authors of collective actions (as law firms are in the US). There is a clear tendency to reserve "hard cases", which are difficult to manage and present a higher risk of abuse, to public entities and recognized civil organizations. According to European thinking, governmental and non-governmental not-for-profit organizations are assumed to be more attentive to the public interest than for-profit enterprises.

Although in opt-in systems group members expressly join the action, contrary to the group representative, they are formally not parties to the procedure. They are bound by the final judgment but in most systems, instead of them, it is the group representative who is liable for the prevailing defendant's legal costs.

Due to doctrinal and constitutional reasons, European opt-out class action legislation has been impregnated by the "only benefits" principle: the encroachment on party autonomy is justified by the fact that only benefits accrue to group members. European systems have been struggling remarkably with the implementation of this principle, producing innovative and idiosyncratic solutions. First, it is evident that in opt-out proceedings group members may not be liable for legal costs and the group representative should carry this burden. Second, it has been argued that party autonomy is restricted also if the individual group member is bound by an unfavorable judgment. Hence, in some European opt-out systems, the res judicata effects are limping in relation to group members. For instance, in France, group members are bound by the judgment only if they expressly accept the compensation. In Hungary, it is dubious if in opt-out proceedings available in competition and consumer protection matters the judgment's res judicata effect extends to group members. In Portugal, if the court decides for the defendant due to lack of evidence, the judgment

will not be binding on group members; furthermore, as a general rule, if justified, the court may exempt group members of the judgment's res judicata effects.

Interestingly, although, as a matter of practice, this appears to be of crucial importance for the success of collective actions, in most systems, collective awards come under individual enforcement and only a handful of the Member States have made provision for collective enforcement.

The above modelling is crowned with the recent European proposal for a consumer collective action. In April 2018, the Commission proposed the adoption of a "representative action" in the field of consumer protection law.[279] The proposed directive is, in essence, based on the above common principles identified as the common core of the existing European mechanisms. Given that one third of the Member States has no collective action scheme, it is a significant virtue of the proposed directive that, if adopted, it will make consumer collective actions available in each and every Member State. On the other hand, at the present stage of the legislative process,[280] as a simple codification of the "collective action traditions common to the Member States", it is supposed to entail no landslide conceptual reform: it has a sectoral approach (consumer protection), rigorous pre-conditions, confers standing on qualified representative entities, maintains the "loser pays rule", rules out financial incentives, such as contingency fees and punitive damages and, last but not least, evades the dilemma of opt-in and opt-out through leaving the choice to Member States.[281]

References

Afferni G (2016) Opt-in class actions in Italy: why are they failing? J Eur Tort Law 7(1):82–100

Almoguera J, Perete C, de la Villa C (2004) National report: Spain. In: Study on the conditions of claims for damages in case of infringement of EC competition rules. Ashurst. http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/spain_en.pdf. Accessed 20 Apr 2019

Andrews N (2001) Multi-party proceedings in England: representative and group actions. Duke J Comp Int Law 11(2):249–267

Antunes HS (2007) Class actions, group litigation & other forms of collective litigation. Portuguese report. http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf. Accessed 20 Apr 2019

Bosters T (2017) Collective redress and private international law in the EU. TMC Asser Press, The Hague

[279] Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final. See European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184–C8-0149/2018–2018/0089(COD)).

[280] https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0089(COD)&l=en. Accessed 20 April 2019.

[281] See Footnote 14.

British Institute of International and Comparative Law (2017) State of collective redress in the EU in the context of the implementation of the Commission Recommendation. JUST/2016/JCOO/FW/CIVI/0099. Nov 2017. https://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf?showdocument=1. Accessed 20 Apr 2019

Caponi R (2011a) Class action. Il nuovo volto della tutela collettiva in Italia. Giuffrè

Caponi R (2011b) Collective redress in Europe: current developments of "class action" suits in Italy. Zeitschrift für Zivilprozess International 16:61–77

de Ávila Ruiz-Peinado FR (2016) Spanish antitrust private enforcement: enhancing consumer collective redress. Working Paper IE Law School. AJ8-229-I 20-01-2016. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603265. Accessed 20 Apr 2019

de Cabiedes Hidalgo PB (2007a) Spanish legislation on collective actions: selected excerpts. http://globalclassactions.stanford.edu/sites/default/files/documents/Spain_Legislation.pdf. Accessed 20 Apr 2019

de Cabiedes Hidalgo PB (2007b) Group litigation in Spain. National report. http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf. Accessed 20 Apr 2019

de Freitas JL (1998) A acção popular ao serviço do ambiente. In: Varela A, Freitas do Amaral D, Miranda J, Canotilho JJG (eds) Ab uno ad omnes / 75 anos da Coimbra Editora. Coimbra Editora, Coimbra

Dias SF, Andrade e Castro M (2016) Portugal. In: Feldman JS, Anderson JE (eds) Class actions—getting the deal through 2017. Law Business Research, London, pp 65–67

Emvalomenos D (2016) Greece. EU collective redress project 2016, Oxford, 12–13 Dec 2016. https://www.law.ox.ac.uk/sites/files/oxlaw/greece.docx. Accessed 20 Apr 2019

Ernesto C, Fernando B (eds) (2012) La nuova class action a tutela dei consumatori e degli utenti. CEDAM

Ervo L (2016) Opt-in is out and opt-out is in: dimensions based on nordic options and the Commission's Recommendation. In: Hess B, Bergström M, Storskrubb E (eds) EU civil justice: current issues and future outlook. Hart Publishing, Oxford, pp 185–200

Ervo L, Persson AH, Lindblom T (Unknown) Sweden. http://www.collectiveredress.org/collective-redress/reports/sweden/caselaw. Accessed 20 Apr 2019

European Parliament, Policy Department A: Economic and Scientific Policy, Directorate General for Internal Policies (2011) Overview of existing collective redress schemes in EU Member States. IP/A/IMCO/NT/2011-16, PE464.433. July 2011. http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf. Accessed 20 Apr 2018

European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union (2018) Collective redress in the Member States of the European Union. PE 608.829. Oct 2018. http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf. Accessed 20 Apr 2018

Fairgrieve D, Howells G (2009) Collective redress procedures—European debates. Int Compar Law Quart 58(2):379–409

Ferro MS (2015) Collective redress: will Portugal show the way? J Eur Compet Law Pract 6(5):299–300

Gomez F, Gili M (2008) Country-report: Spain. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Civic Consulting & Oxford Economics

Halfmeier A (2017) Musterfeststellungsklage: Nicht gut, aber besser als nichts. Z Recht 50(7):201–205

Halfmeier A, Feess E (2012) The German capital markets model case act (KapMuG)—a European role model for increasing the efficiency of capital markets? Analysis and suggestions for reform. http://ssrn.com/abstract=1684528. Accessed 20 Apr 2019

Hensler DR (2017) From sea to shining sea: how and why class actions are spreading globally. Univ Kansas Law Rev 65:965–988

Hodges C (2009) From class actions to collective redress: a revolution in approach to compensation. Civ Just Quart 28:41–66

Hodges C (2010) Collective redress in Europe: the new model. Civ Justice Quart 29(3):370–395
Juška Z (Unknown) Country report: class actions in Lithuania. http://globalclassactions.stanford.edu/sites/default/files/documents/LITHUANIA.pdf. Accessed 20 Apr 2019
Katzarsky A, Georgiev G (2012) Bulgaria. In: Dodds-Smith I, Brown A (eds) The international comparative legal guide to class & group actions. Global Legal Group, London (Chapter 11)
Kiurunen P (2012) Finland. In: Karlsgodt PG (ed) World class actions: a guide to group and representative actions around the globe. Oxford University Press, Oxford, pp 214–228 (Chapter 8)
Krans B (2014) The Dutch Act on collective settlement of mass damages. Pac McGeorge Glob Bus Deve Law J 27(2):281–301
Laffineur J, Renier G (2016) L'action en réparation collective: un premier état des lieux deux ans après son introduction en droit belge. Droit de la consommation—Consumentenrecht (DCCR) 112:3–20
Lindblom PH (1997) Individual litigation and mass justice: a Swedish perspective and proposal on group actions in civil procedure. Am J Comp Law 45(4):805–831
Lindblom PH (2007) National report: group litigation in Sweden, the globalization of class actions. http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf. Accessed 20 Apr 2019
Lindblom PH (2008) Globalization of class action. National report: group litigation in Sweden. Update paper sections 2.5 and 3. http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20-08.pdf. Accessed 20 Apr 2019
Lustin-Le Core C (2016) France. In: Feldman JS, Anderson JE (eds) Class actions—getting the deal through 2017. Law Bus Res, London
Magnier V (2007) Class actions, group litigation & other forms of collective litigation. http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf. Accessed 20 Apr 2019
Magnier V, Alleweldt R (2008) Country-report: France. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Civic Consulting & Oxford Economics
Markova T (2015) Collective claims: ex ante analysis of claim submissions in Bulgaria (Колективните искове: екс анте анализ на предявяването им в България). Econ Soc Altern (Икономически и социални алтернативи) 1:142–152
Møgelvang-Hansen P (2008) Country-report: Denmark. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Civic Consulting & Oxford Economics
Momège C, Bessot N (2004) National report: France. In: Study on the conditions of claims for damages in case of infringement of EC competition rules. Ashurst. http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/france_en.pdf. Accessed 20 Apr 2019
Mulheron R (2009) The case for an opt-out class action for European member states: a legal and empirical analysis. Columbia J Eur Law 15:409–453
Mulheron R (2014) The class action in common law legal systems: a comparative perspective. Oxford University Press, Oxford
Nagy CI (2015) The European collective redress debate after the European commission's recommendation: one step forward, two steps back? Maastricht J Eur Comp Law 22(4):530–552
Neumann K-A, Magnusson LW (2011) Pour une class-action européenne dans le droit de la concurrence. Revue québécoise de droit international 24(2):149–181
Nielsen PA, Linhart K (2012) Danish class actions—a European model? Int J Priv Law 5(3):229–242
Nordh R (2001) Group actions in Sweden: reflections on the purpose of civil litigation, the need for reforms, and a forthcoming proposal. Duke J Comp Int Law 11:381–404
Paris SO (2015) Private antitrust enforcement: a new era for collective redress. Yearb Antitrust Regul Stud 8(12):11–32
Persson AH (2008) Country-report: Sweden. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. https://pure.uva.nl/ws/files/4314114/61401_294507.pdf. Accessed 20 Apr 2019

Persson AH (2012) Collective enforcement: European prospects in light of the Swedish experience. In: Wrbka S, van Uytsel S, Siems MM (eds) Collective actions: enhancing access to justice and reconciling multilayer interests?. Cambridge University Press, Cambridge, pp 341–363

Pettersson LT, Lindeborg SP, Giolito MP (2004) National report: Sweden. In: Study on the conditions of claims for damages in case of infringement of EC competition rules. Ashurst. http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/sweden_en.pdf. Accessed 20 Apr 2019

Piñeiro CL (2013) Recomendación de la Comisión Europea sobre los Principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión Europea (Estrasburgo, 11 de junio de 2013). Revista española de derecho internacional 65(2):395–399

Piñeiro LC (2015) La construcción del mercado interior y el recurso colectivo de consumidores. In: Rosa FEdl (ed) La protección del consumidor en dos espacios de integración: Europa y América. Una perspectiva de derecho internacional, europeo y comparado. Tirant lo Blanch, Valencia, pp 1055–1096

Piñeiro LC (2016) Consumer collective arbitration in Spain. what's in a name? In: Hanotiau B, Schwarz EA (eds) Class and group actions in arbitration. Dossiers ICC Institute of World Business Law, Paris, pp 88–104

Principe G (2012) Italian class actions. An update. http://globalclassactions.stanford.edu/sites/default/files/documents/Italian%20Class%20Actions%20Principe.pdf. Accessed 20 Apr 2019

Renier G (2018) L'action en réparation collective pour les consommateurs élargie aux PME. Droit de la consommation—Consumentenrecht (DCCR) (118):141–143

Rodger BJ (2015) The consumer rights act 2015 and collective redress for competition law infringements in the UK: a class act? J Antitrust Enforcement 3(2):258–286

Rossi L, Ferro MS (2013) Private enforcement of competition law in Portugal (II): actio popularis—facts, fictions and dreams. Revista de Concorrência e Regulação 4(1):35–87

Schäfer H-B (2018) Musterfeststellungsklage: Ein Schritt in die richtige Richtung. Wirtschaftsdienst 98(7):456

Sherman EF (2002) Group litigation under foreign legal systems: variations and alternatives to American class action. DePaul Law Review 52(2):401–432

Silvestri E (2007a) Consumers' collective actions: an update on Italian draft legislation. http://globalclassactions.stanford.edu/sites/default/files/documents/Italian_National_Report_supplemtary.pdf. Accessed 20 Apr 2019

Silvestri E (2007b) The globalization of class actions. Italian report. http://globalclassactions.stanford.edu/sites/default/files/documents/Italian_National_Report_0.pdf. Accessed 20 Apr 2019

Silvestri E (2008) The Italian "collective action for damages": an update. http://globalclassactions.stanford.edu/sites/default/files/documents/Italian_Collective_Action_for_Damages.pdf. Accessed 20 Apr 2019

Sladič J (2018) A new model of civil litigation in Slovenia: is the Slovenian judiciary prepared for the challenges presented by the new law on collective actions? In: Uzelac A, van Rhee CHR (eds) Transformation of civil justice: unity and diversity. Springer, Heidelberg, pp 213–227

Stadler A (2009) Der Gewinnsbschöpfungsanspruch: eine Variante des Private enforcement? In: Augenhofer S (ed) Die Europäisierung des Kartell- und Lauterkeitsrechts. Mohr Siebeck, Tübingen, pp 117–140

Stadler A (2015) Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz. Zeitschrift für die gesamte Privatrechtswissenschaft 1(1):61–84

Staudt C (2019) Note—Dieselgate: entre solution juridique et réaction émotionnelle. Revue Générale de Droit Civil Belge 49(3):146–158

Steinberger E (2016) Die Gruppenklage im Kapitalmarktrecht: Vorschläge zur Weiterentwicklung des Kapitalanleger-Musterverfahrensgesetzes (KapMuG). Nomos, Baden-Baden

Szalai Á (2014) Kollektív keresetek joggazdaságtana. Iustum Aequum Salutare X(1):163–181

Szalai Á (2017) Társult perek: nyitott kérdések és joggazdaságtani elemzés. Eljárásjogi Szemle 2(3):22–31
Tortell L (2008) Country-report: Portugal. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Civic Consulting & Oxford Economics
Trstenjak V (2015) Les mécanismes de recours collectif et leur importance pour la protection des consommateurs. In: Tizzano A, Rosas A, de Lapuerta RS, Lenaerts K, Kokott J (eds) La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003–2015): liber amicorum Vassilios Skouris. Bruylant, Bruxelles, pp 681–696
Udvary S (2012) Some remarks on class action in antitrust cases in the US and EU. Versenytükör 8(2):36–41
Udvary S (2018) A közérdekű és társult perek a polgári perrendtartásban. Jogtudományi Közlöny 73(5):221–230
Välimäki M (2007) Introducing class actions in Finland—lawmaking without economic analysis. http://ssrn.com/abstract=1261623. Accessed on 20 Apr 2019
Veljanovski C (2019) Collective certification in UK competition law: commonality, costs and funding. World Compet 42(1):121–138
Viitanen K (2007) Collective litigation in Finland. http://globalclassactions.stanford.edu/sites/default/files/documents/Finland_National_Report.pdf. Accessed 20 Apr 2019
Viitanen K (2008) Country-report: Finland. In: Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union. Civic Consulting & Oxford Economics
Voet S (2016) Class action developments in Belgium. http://globalclassactions.stanford.edu/sites/default/files/documents/BELGIUM.pdf. Accessed 20 Apr 2019
Weimann M (2018) Kollektiver Rechtsschutz: Ein Memorandum der Praxis. Walter de Gruyter, Berlin
Werlauff E (2008) Class actions in Denmark—from 2008. http://globalclassactions.stanford.edu/sites/default/files/documents/Demark_National_Report.pdf. Accessed 20 Apr 2019
Zdolšek S, Jurca I, Zdolsek K (2018) Slovenia. In: Campbell AN (ed) Cartel regulation—getting the deal through 2019. Law Business Research, London, pp 228–233