Chapter 4
Transatlantic Perspectives: Comparative Law Framing

Not surprisingly, collective actions' regulatory contexts in the US and in Europe differ considerably. US law features a large array of legal institutions which catalyze the operation of class actions but are completely missing in Europe (e.g. contingency fees, no or one-way cost-shifting, super-compensatory damages such as punitive and treble damages, pre-trial discovery, jury trials). In fact, notwithstanding their independent nature, these legal concepts are quite often associated with class actions.[1]

The discovery of these contextual concepts is essential for two reasons. On the one hand, class actions are a real transplant and, as such, may have a quite different operation and impact in a new legal environment than in the US. On the other hand, class actions raise a good number of regulatory issues that simply do not emerge in the home country. For instance, due to the lack of cost-shifting, the allocation of liability for the prevailing defendant's legal costs is not an issue in US law, while it is a pivotal question in Europe.

This chapter, with the purpose of providing a comparative law framing, first, takes stock of the major differences between the regulatory and social environments of class actions on the two sides of the Atlantic. Second, it demonstrates how, as a consequence of these differences, class actions entail diverging outcomes in the US and Europe. Third, it presents the truly European issues raised by class actions, which are unknown for American law.

4.1 Disparate Regulatory Environments

One of the commonplaces of comparative law is that the transplantation of legal concepts is not like organ transplantation: legal institutions are deeply rooted in the legal system that gave life to them and are a coherent part of their legal, social and

[1] See Blennerhassett (2016: 132–133).

C. I. Nagy, *Collective Actions in Europe*,
SpringerBriefs in Law, https://doi.org/10.1007/978-3-030-24222-0_4

cultural environment.[2] Hence, when assessing the potential consequences of introducing opt-out collective actions in Europe, the very first question to be addressed is the differences between the US class action and the European collective action in terms of context, in particular, because empirical data clearly suggests: the same opt-out collective action mechanism that bursts its banks in the US may only be a peaceful creek in Europe.

The ontological difference framing the comparative law analysis lies in the function of collective actions. In the US, private enforcement (individual and collective alike) may have both a compensatory and a public policy function. The concept of "private attorney general"[3] describes this expressively: the law privatizes a parcel of public enforcement and uses market forces to further public policy (while saving public resources). Albeit that class actions are an important element of this regulatory strategy, it embraces individual and collective actions alike. The key to this concept is the financial incentives offered by the law. For instance, in *Hawaii v. Standard Oil Co.*, the Supreme Court, referring to the treble damages available under US antitrust law, stressed that "[b]y offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'"[4]

On the contrary, the concept of "private attorney general" is completely alien to European law, where private enforcement is not meant to replace or supplement public enforcement and collective actions are confined merely to facilitating victims to acquire an effective private remedy. This implies that as long as this attitude is maintained, European collective actions cannot be expected to produce the same effectiveness in terms of enforcement as the US class action and their performance should be assessed in light of this consideration. The regulatory complexity of and resistance against collective actions may be traced back to the fact that Europe experiments with the importation of a mechanism that has a substantial public policy role to fulfill a purely compensatory function. Nonetheless, as demonstrated below, US class actions' public policy function is made up of a general set of contextual legal concepts and not the opt-out class action alone.

One of the most important dissimilarities is cultural and economic in essence and relates to the role of lawyers. The major difference between litigators on the two sides of the Atlantic is that "entrepreneurial lawyering" is virtually missing in Europe,[5] where the lawyer is a counsel, normally paid on an hourly or a flat-rate basis, and

[2] For an analysis on the culture of collective litigation, see Stier and Tzankova (2016).

[3] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 147 (1968) (Fortas, J., concurring in result); Strong (2012: 900), Udvary (2013: 71).

[4] 405 U.S. 251, 262 (1972).

[5] See Karlsgodt (2012: 49).

contingency fee arrangements are rare,[6] in some Member States even prohibited or restricted.[7] The lawyer usually does not take any risk in the action and law-suits are normally not financed (not even partially) by law firms. In contrast to this, US class actions are funded by lawyers and law firms, in exchange for a contingency fee.[8] US litigators enter contingency fee arrangements and, hence, take enormous risks.

In Europe, some jurisdictions prohibit only pure contingency fees, where the attorney's fee is linked exclusively to the outcome of the case and the attorney receives no remuneration in case of loss. For instance, French law expressly prohibits pure contingency fees, i.e. attorney's fees based exclusively on the outcome of the case, albeit a conditional reward, as a complimentary element, may be combined with a fixed fee.[9] Although the French Supreme Court (Cour de Cassation) held that a conditional reward does not need be proportionate to the fixed fee and may exceed the latter,[10] it is widely accepted that the fixed fee element may not be negligible. A similar approach is taken by Belgian[11] and Romanian law,[12] which prohibit agreements on fees that are exclusively linked to the outcome of the case but permit the stipulation of a complementary fee conditional on the outcome.

Some jurisdictions are more stringent and prohibit all agreements where the attorney's fee is somehow, even partially, linked to the outcome of the case. In Germany, contingency fees have been traditionally prohibited. The German Federal Constitutional Court (Bundesverfassungsgericht) held a decade ago that the categorical prohibition of contingency fee arrangements is unconstitutional but it was quick to add that this deficiency can be easily removed if creating an exception for cases where a fee (hourly fee or flat rate) would deter the plaintiff from pursuing his right by reason of his financial circumstances.[13] As a corollary, German law was amended to make it possible for the parties to agree to contingency fees but only in cases where the client, because of his economic circumstances, would otherwise not pursue his

[6] For a comparative overview, see e.g. Chieu (2010: 148), Russell (2010: 173).

[7] See Grace (2006: 287–88), Waelbroeck et al. (2004: 93–94, 116–17), Leskinen (2011: 98–105).

[8] See Hodges (2009: 42) ("[T]he claimant has no financial risk but has significant incentive to take action. In particular, any intermediary representing the claimant and funding the litigation has significant incentives."); Karlsgodt (2012: 53).

[9] Section 10 of Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, version consolidée au 12 mars 2017.

[10] Cour de Cassation, Chambre civile 1, du 10 juillet 1995, 93-20.290.

[11] Section 446ter of the Judicial Code (Code judiciaire).

[12] Section 130 of Statutul profesiei de avocat, Adoptat prin Hotărârea Consiliului U.N.B.R. nr. 64/2011 privind adoptarea Statutului profesiei de avocat (M. Of. nr. 898 din 19 decembrie 2011). See ICCJ. Decizia nr. 2131/2013. Civil. Constatare nulitate act. Recurs.

[13] Beschluss des Ersten Senats vom 12. Dezember 2006. 1 BvR 2576/04.

claim.[14] Nonetheless, as a matter of practice, contingency fee arrangements are still rare in Germany.

Not surprisingly, the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE),[15] in principal, pronounces contingency fee agreements (pactum de quota litis) unethical, unless it "is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer."[16]

Interestingly, in Spain, the ethical prohibition of contingency fee arrangements was quashed in 2008: the Spanish Supreme Court considered the Spanish Bar Association's ban on contingency fees as restrictive of competition and abolished them.[17] However, contingency fee arrangements are, as a matter of practice, rare.

Whatever the precise national rules and the specific limits are, most importantly, contingency fees are still not generally accepted in Europe and there is no market providing litigation services on this basis.

In the same vein, in most European countries, active client-acquiring and lawyer advertisements are banned or heavily restricted,[18] while, in the US, cases are often not client- but lawyer-driven[19] and this is all the more true in class actions.[20]

Furthermore, not only lawyers but also clients are different. The statistical data suggests that the American society is much more litigious than the European.[21]

In short, in the US, there is an industry that assumes the risks of litigation in exchange for an appropriate risk premium. On the other hand, in Europe there is no

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[14] Rechtsanwaltsvergütungsgesetz vom 5. Mai 2004 (BGBl. I S. 718, 788), last amended through Section 13 of Gesetz vom 21. November 2016 (BGBl. I S. 2591), Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (Rechtsanwaltsvergütungsgesetz—RVG), § 4a Erfolgshonorar: "Quota litis (Section 49b(2), first sentence of the [German] Federal Lawyers' Act (Bundesrechtsanwaltsordnung—BRAO)) may be agreed only for an individual case and only if the client, upon reasonable consideration, would be deterred from taking legal proceedings without the agreement of quota litis on account of his economic situation. In court proceedings, it may be agreed that in case of failure, no remuneration, or a lower amount than the statutory remuneration, is to be paid if it is agreed that an appropriate supplement is to be paid on the statutory remuneration in case of success." Bundesrechtsanwaltsordnung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 303-8, veröffentlichten bereinigten Fassung, last amended through Section 3 of Gesetz vom 19. Februar 2016 (BGBl. I S. 254), § 49b(2).

[15] https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf. Accessed 20 April 2019.

[16] Section 3.3. Interestingly, in 2008, the Spanish Supreme Court found the Spanish Bar Association's ban on contingency fees restrictive of competition and quashed it.

[17] Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, de 4 noviembre 2008 JUR\2009\2800, Recurso de Casación 5837/2005.

[18] While lawyer advertising is interdicted or restricted in several EU Member States, in the last period these have been eliminated in several legal systems. See Communication from the Commission: Report on Competition in Professional Services, COM (2004) 83 final, 14; Stephen and Love (2000: 987–1017).

[19] See Calabresi and Schwartz (2011: 178–79) ("The business cases are almost entirely lawyer-driven.").

[20] See Alexander (2000: 12).

[21] See Gryphon (2011: 1).

established industry to assume the litigation risks, partially because European legal systems skimp litigators in financial rewards and incentives.

The shifting of legal costs is a pivotal question of class actions.[22] According to the "American rule", each party bears his own costs and attorney's fees cannot be shifted.[23] The plaintiff does not run the risk of paying the defendant's attorney if losing the action; and likewise, the defendant does not have to reimburse the winning plaintiff for his legal costs. It is true that US law contains plentiful exceptions providing for the shifting of reasonable attorney's fees, but these rules mainly enable one-way costs shifting from the prevailing plaintiff to the losing defendant.[24] Though the prevailing defendant may request the court to shift the attorney's fees onto the unsuccessful plaintiff, this is limited to exceptional cases, such as frivolous law-suits where the plaintiff acted in bad faith.[25] In other words, in the US, as a matter of practice, the plaintiff does not run the risk of becoming liable for the prevailing defendant's attorney's fees.

In contrast to this, as most parts of the world, European jurisdictions traditionally follow the principle of two-way cost-shifting,[26] albeit shiftable legal costs are often limited and rarely cover all the expenses. In Europe, "the winner takes it all" and the loser, at least theoretically, pays all the legal costs that were induced by the proceedings, irrespective of whether these emerged on the plaintiff's or on the defendant's side.[27]

Of course, cost-shifting is never perfect and never all-embracing; but this is the principle. Some jurisdictions content themselves with limiting the shiftable sum to reasonable legal costs. In Hungarian law, the principle is full reimbursement and it is at the court's discretion whether and to what extent it shifts the prevailing party's attorney's fees. The losing party is liable for all the necessary legal costs that have a causal link to the claim's judicial enforcement, irrespective of whether they emerged

[22] Waelbroeck et al. (2004: 92–95). For a law and economics analysis of the American rule and the European two-way cost shifting principle, see Carbonara and Parisi (2012).

[23] See Rule 54(d) of the Federal Rules of Civil Procedure. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 US 240 (1975).

[24] See e.g. Sherman Act, 15 USC. § 4304(a); Fair Labor Standards Act, 29 USC. § 216; Magnuson–Moss Warranty Act, 15 USC. § 2310(d)(2).

[25] See Rule 11 of the Federal Rules of Civil Procedure; *Roadway Express, Inc. v. Piper*, 447 US 752, (1980); *Hall v. Cole*, 412 US 1, 5 (1973); Sherman Act, 15 USC. § 4304(a)(2).

[26] An exception that confirms the rule may be found in the Bulgarian administrative competition procedure. Section 69(2) of the Bulgarian Act on protection of competition provides for one-way cost-shifting. "Where the Commission [on Protection of Competition] issues a decision establishing an infringement under this Law, the Commission shall order the infringer to pay the costs of the proceedings, if so requested by the other party. If no infringement is established, the costs shall be borne by the parties who incurred them." The Act was promulgated in the State Gazette's Issue 102 of 28 November 2008. For an English translation see http://www.wipo.int/wipolex/en/text.jsp?file_id=238274. Accessed on 20 April 2019.

[27] Waelbroeck et al. (2004: 92–95). For a law and economics analysis of the American and the English (or continental) rule, see Carbonara and Parisi (2012).

before or during the law-suit.[28] The prevailing party may claim reimbursement for the attorney's fees stipulated in the mandate agreement. However, the court may reduce the shiftable attorney's fees, if it is not proportionate to the claim's value or the actual work done.[29] Likewise, in Bulgaria, the losing party my seek reduction of the attorney's fees claimed by the prevailing party, if it is exorbitant taking into account the value and complexity of the case.[30] German law also provides for the shifting of reasonable legal costs on the losing party,[31] however, the recoverable attorney's fees is capped by a statutory schedule.[32] In French law, attorney's fees, which normally make up the overwhelming majority of the expenses, are shifted on the losing party to the extent determined by the court, which has to allocate them in an equitable manner and taking into account the losing party's financial situation.[33]

The "American rule" combined with the wide-spread use of contingency fee arrangements and the entrepreneurial law firm model creates a very peculiar compound that lies at the heart of the American litigation system. The plaintiff is very motivated to litigate: he faces no risk; all hazards are devolved upon his lawyer (contingency fee) and the defendant ("American rule").[34] On the other hand, in Europe, the plaintiff, normally, cannot transfer the risks related to his own legal representation onto his lawyer, who works on the basis of an hourly rate, and has to compensate the defendant for his legal costs, if the court decides against the plaintiff.

Finally, US awards are much more generous for plaintiffs who sustained damages due to pernicious or malicious practices. Punitive[35] and treble damages and "pain and suffering" awards are magnets that are non-existent in Europe. The availability of super-compensatory remedies and intensely generous "pain and suffering" awards may make litigation more attractive in cases where the balance of the litigation's expected value and expected costs is negative.

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[28] Sections 80 and 83(1) of Act CXXX of 2016 on the Civil Procedure (2016. évi CXXX. törvény a polgári perrendtartásról).

[29] Section 2 of Ministry of Justice Decree nr 32 of 22 August 2003 on the attorney's costs that may be established in judicial proceedings (32/2003. (VIII. 22.) IM rendelet a bírósági eljárásban megállapítható ügyvédi költségekről).

[30] Section 78(5) 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.

[31] Section 91 of the German Code of Civil Procedure (Zivilprozessordnung), Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), last amended through Section of the Gesetz vom 21. November 2016 (BGBl. I S. 2591).

[32] Rechtsanwaltsvergütungsgesetz vom 5. Mai 2004 (BGBl. I S. 718, 788), last amended through Section 13 of Gesetz vom 21. November 2016 (BGBl. I S. 2591).

[33] Sections 695-700 of the French Code of Civil Procedure (Code de la procédure civile). For a detailed analysis, see Gjidara-Decaix (2010: 325).

[34] See Hodges (2009: 42).

[35] Black's Law Dictionary 416-19 (8th ed. 2004) ("damages" and "punitive damages"); *BMW of N. Am., Inc. v. Gore*, 517 US 559 (1996); *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 US 424, 432 (2001). On the interaction and combination of punitive damages and class actions from a law and economics perspective, see Parisi and Cenini (2008).

In the US, punitive damages are generally available in all but five states[36] and treble damages are provided for in various state and federal statutes. While surveys suggest that punitive damages are awarded infrequently[37] and "are not typically very large",[38] they are an integral part of the US justice system. The purpose of punitive damages is "*to punish* (…) [the wrongdoer] for his outrageous conduct and *to deter* him and others like him from similar conduct in the future."[39] The amount of damages orientates to the gravity of the mischief ("the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant")[40] and not to the weight of the harm.

On the other hand, in continental Europe, these goals and this rationale are, in principle, reserved for criminal law and damages are meant (only) to compensate the injured party for the loss suffered and may under no circumstance entail his enrichment: the purpose of damages is to restore the initial status (in integrum restitutio), that is, to compensate; they are not destined to punish the wrongdoer, although they may certainly have such a side-effect.[41] The Principles of European Tort Law, which are both a restatement of the common core of European tort law and also a proposal for a comprehensive system of tortious liability, stress the compensatory purpose of damages and treat their deterrent effects as a welcome by-product.

> Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.[42]

Interestingly, while exemplary damages are, theoretically, available under English common law, in *Rookes v Barnard*,[43] the English Supreme Court (at that time: House of Lords) almost fully evirated the legal doctrine that underlay the remarkable conceptual development in the US resulting in the current practice of punitive awards. It held that exemplary damages, aside from the case when they are provided for by a statute, can be awarded only in matters involving "oppressive, arbitrary or unconstitutional action by the servants of the government" and when "the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."[44]

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[36] Sebok (2009: 155). See Rustada (2005: 1297).

[37] Surveys suggest that punitive damages were awarded in 2–9% of all cases where plaintiffs won. Sebok (2007: 964–965).

[38] Sebok (2009: 156–158).

[39] Restatement of Torts, Second, §908 (emphasis added).

[40] Id.

[41] See e.g. BGH 4 June 1992, BGHZ 118, 312 (Bundesgerichtshof). Quotations refer to the translation in Wegen and Sherer (1993) 1320 ("[O]ften, the sole appropriate aim of the civil action taken in response to an illegal act is to compensate for the effects of that act on the financial circumstances of the parties directly concerned"); Isidro (2009) 246.

[42] Principles of European Tort Law. Text and Commentary. European Group on Tort Law. 2009, Article 10:101 (Nature and purpose of damages).

[43] *Rookes v Barnard* [1964] 1 All England Law Reports (All ER) 367.

[44] On exemplary damages in English law, see Wilcox (2009: 7–53).

Finally, it is worth briefly highlighting that the differences between the American and European patterns of civil procedure also have a significant but less quantifiable effect on the operation of collective litigation: plaintiff-friendly US discovery rules significantly contribute to the success of class actions, while the lack of them may choke off collective actions in Europe. Jury trials, a scheme almost never used in Europe, certainly add to the uncertainty of outcomes but probably to the detriment of the defendants.

The above mapping of the contextual differences points out that in a civil-law environment collective actions obviously do not work in the same way as they do in the US. This also implies that when evaluating opt-out collective actions from a European perspective, one has to distinguish its effects and operation from those of the contextual legal doctrines of US law. These are not specific to class actions and govern individual litigation too.[45] Furthermore, because of the different regulatory environment, in Europe, collective actions raise various novel questions that simply do not emerge in the US.

4.2 Why Should Europeans Not Fear the American Cowboy? Diverging Effects of Disparate Regulatory Environments

The major criticism against the US class action is that, through aggregation of individual claims, it creates a big, centrally conducted giant claim that makes the defendants settle even if the claim is unfounded (blackmailing potential).[46] "Blackmail settlements" are "settlements induced by a small probability of an immense judgment in a class action."[47] Nonetheless, both theoretical and empirical arguments suggest that this aspect of US class actions would not emerge in a European environment.[48]

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[45] Neumann and Magnusson (2011: 157), Nagy (2013: 482–485).

[46] See Ebbing (2004: 39), Weinstein (1997: 834), Calabresi and Schwartz (2011: 175), Posner (1973: 399, 2001: 925), Delatre (2011: 53). See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995), *cert. denied* 116 S. Ct. 184 (1995); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

[47] *In re Rhone-Poulenc*, 51 F.3d 1293, 1298 (1995), citing Friendly (1973: 120).

[48] See Hodges (2010: 374) ("The crucial fact that legislators and commentators failed to observe was that the American legal and constitutional system operates on a model that is fundamentally different from the European systems, in that it places considerable reliance on private enforcement as a substitute for public enforcement. The result is that the American and European systems are incomparable in many respects."). Smithka (2009: 189–190). Unfortunately, it is usually taken as granted, without any empirical evidence, that opt-out collective proceedings, by themselves, generate excesses. See Delatre (2011: 38), Buchner (2015: 51–57). For the demythologization of the claim that third-party financing of class actions entails frivolous litigation in the US, see Hensler (2014).

It has to be noted that the effectiveness and widespread use of collective litigation and the potential for abuse and adverse effects are inversely proportional to each other: the engine of US class actions is the risk premium the group representative is afforded, while the risk premium may increase the potential for abuse and adverse effects. This issue will be addressed in Sect. 4.3.

It is submitted that the efficient cause of the perceived blackmailing potential of US class actions is that, among others, due to the "American rule" and the availability of super-compensatory damages, there is a striking imbalance (to the defendant's detriment) between the litigation's expected value and expected costs and, hence, it is rational for the defendant to settle even if the claim is grossly unfounded. Namely, due to the "American rule" (i.e. each party bears his own legal costs), the law-suit unavoidably causes serious losses to the defendant, irrespective of whether he wins the case or not. This is topped by the availability of super-compensatory damages.

The diverging effects of the above disparate regulatory environments may be best shown through a numerical demonstration. It has to be stressed that these calculations are valid as to both individual and collective claims. The only difference between collective litigation and individual actions is that the former amalgamates different claims. That is, the diverging effects of the disparate regulatory environments work irrespective of whether it is an individual or a collective action. This confirms that the alleged excesses of class actions are not due to the opt-out rule itself but to its regulatory environment.[49] Hence, it seems to be unconvincing that the above phenomenon is problematic in case of collective actions but not in case of individual litigation.

The calculation in Sect. 3.1.4. demonstrates well how the legal institutions surrounding US class actions tilt the balance in the plaintiff's favor (independent of whether it is an individual or a collective plaintiff). Recall that in the antitrust case used for the purpose of the foregoing demonstration the plaintiff had a claim in value of $1,000,000, while legal costs were $200,000 − 200,000 for the plaintiff and the defendant; the plaintiff's chance to prevail was 10%. Because it was an antitrust case coming under the Sherman Act, treble damages were available[50] and the plaintiff benefitted from one-way cost shifting (reimbursement for reasonable attorney's fees).

In such an extremely weak case, it is reasonable for the plaintiff to sue and for the defendant to settle; what is more, although the plaintiff has only 10% chance to win, the defendant may reasonably accept a settlement of more than 50% of the claim's value.

A reasonable plaintiff's decision on whether or not to sue would rest on the following calculation. The plaintiff's costs are $200,000. The expected value of the law-suit is made up of two components. First, the principal claim which amounts to $1,000,000 and has to be tripled due to the treble damages rule ($3,000,000).

[49] Nagy (2013: 482–495).

[50] Though statutory provisions prescribing treble damages are relatively rare and punitive damages claims are more common, treble damages are used for the purpose of calculation, as in case of punitive damages outcomes are less predictable.

Second, the plaintiff may expect reimbursement for his reasonable attorney's fees which amount to $200,000. That is, if he wins, the plaintiff gets $3,200,000, however, both items of income may occur with a probability of 10%. Accordingly, the expected value is $320,000 = ($1.000.000 × 3 + $200.000) × 10%, and the balance between the plaintiff's costs and the expected value is $ +120,000 = $320,000 − $200,000. In other words, the balance is positive, it is reasonable for the plaintiff to sue and to accept a settlement offer higher than $ 120,000.

The defendant's side is the inverse of the above calculus, but, contrary to the plaintiff's situation, the balance of litigation is always negative: the defendant has to inevitably bear the legal costs, these cannot be shifted on the plaintiff even if the latter loses the case, while the defendant cannot expect any income in the event he wins. Furthermore, the defendant also runs the risk of losing the case, even if the probability of this is rather small.

As a corollary, the defendant has no expected value: the defendant may expect no reimbursement for his reasonable attorney's fees. The expected costs are made up of the following two items. First, the defendant will incur legal expenses in value of $ 200,000. Second, there is a 10% probability that the defendant has to pay treble damages to the plaintiff in value of $ 3,000,000 and reimbursement for the plaintiff's reasonable attorney's fees in value of $ 200,000. Altogether, the defendant's balance is $ −520,000 = $ −200.000 + ($ −1,000,000 × 3 + $ −200,000) × 10%. In other words, the balance is negative, it is reasonable for the defendant to settle and to accept a settlement offer lower than $520,000, although the plaintiff has only 10% chance to prevail as to a $ 1,000,000 claim.

If the parties act reasonably, they should settle the case between $120,000 and $520,000. The settlement value will depend on their bargaining skills and tactics.

Let us see how the above case would work in a European legal environment. Here, it would not be reasonable for the plaintiff to sue. The plaintiff's expected value is 10% of the principal claim: $100,000 = $1,000,000 × 10%. His expected costs are made up of the legal costs of both parties: if he loses, he will be liable for all the legal costs: $400,000 = 2 × $200,000; if he wins, at least theoretically, he will incur no legal costs as the expenses advanced by him will be reimbursed by the losing defendant. Taking into account that he has 90% chance to lose, the expected costs are $360,000 = $400,000 × 90%. Accordingly, the plaintiff's balance is $−260,000 = $100,000 − $360,000. In other words, the balance is negative and, hence, it is not reasonable for the plaintiff to sue.

The above calculations demonstrate well that, as noted above, the perceived excesses of class actions (e.g. black-mailing potential, forced settlements, litigation in extremely weak cases) are, in fact, not due to the opt-out class action itself but to the surrounding US regulatory environment, represented by doctrines like treble damages, the American rule and one-way cost shifting. Accordingly, these diverging effects emerge irrespective of whether it is an individual or a collective action and are not concomitant with the opt-out class action itself.

Interestingly, and perversely, the American rule makes the defendant's balance in a case with a probability of plaintiff success lower than 50% comparatively worse and the defendant comparatively more inclined to settle than in a case with a probability of plaintiff success over 50%. Below a 50% likelihood of plaintiff success, in the US the defendant will have a greater incentive to settle than in Europe, while over this threshold, a US defendant is comparatively less likely to settle than the European defendant. The reason behind this is the non-shiftability of legal costs. Assume, for the sake of simplicity, that the two sides have legal costs of the same value. The "American rule" makes the defendant bear 50% of the overall legal costs even in cases where the plaintiff's probability of success is less than 50% and, hence, in Europe, the expected legal costs would be below 50%. Likewise, the "American rule" makes the defendant bear 50% of the proceedings' overall legal costs (but not more) also in cases where the plaintiff's probability of success is more than 50% and, hence, in Europe, the expected legal costs to be borne by the defendant would be over 50%. Accordingly, the "American rule" incites defendants to settle against less substantiated claims more than the "loser pays" rule, while it incites them comparatively less in the event the plaintiff has a very good case.

Fortunately, the above theoretical analysis is not left without an empirical crutch. There are numerous opt-out systems in Europe: perhaps surprisingly, representation without a power of attorney is neither beyond example, nor exceptional.[51] As shown below, the available statistical data reinforce the above analysis and show that in Europe opt-out systems do not produce the effects they trigger in the US. Furthermore, Australia and Canada introduced US-style class actions, while their legal systems diverge in several relevant aspects from the US regulatory environment and are in line with the principles prevailing in Europe. Accordingly, the empirical experiments of these countries may provide some guidance.

[51] See Delatre (2011: 38) ("[I]t is impossible to readily exclude a model of collective redress on the ground that it would not be consistent with the European experience on the topic. Essentially every model of collective litigation may be found in Europe, and the somewhat controversial opt-out class action does not constitute an exception.").

Opt-out group proceedings are available in Belgium,[52] Bulgaria,[53] Denmark,[54] France,[55] Greece,[56] Hungary,[57] Portugal,[58] Slovenia,[59]

[52]The Belgian system leaves it to the judge to decide whether the action should be carried out in the opt-in or the opt-out scheme. Law Inserting 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.

[53]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).

[54]Sections 254a-254e of the Administration of Justice Act.

[55]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 and personal data and health care matters, inserting Sections 826-2-826-24 into the French Code of Civil Procedure.

[56]Articles 10(16)-(29) of Law 2251/1994 on Consumers' Protection. For an English translation, see https://www.eccgreece.gr/wp-content/uploads/2015/07/N2251-1994-enc2007-en1.pdf.

[57]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).

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

[59]Law on Collective Actions (Zakon o kolektivnih tožbah—ZkolT), Official Journal of the Republic of Slovenia No. 55/2017. For the English version of the statutory text, *see* http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7399. Accessed 20 April 2019.

Spain,[60] and the United Kingdom[61] without having produced any litigation boom. Section 5.1 gives an account of the statistics of European class actions in these Member States and demonstrates that these systems brought about no litigation boom and, due to the lack of appropriate financial incentives, are not particulary effective or wide-spread and do not even compare to the US class action in terms of significance.

Since European empirical experiences are rather limited in terms of territorial representation and time, it is worth taking a look at systems outside the EU that adopted the US-style class action but have a regulatory environment that is in some relevant aspects different from the US. Australia and several provinces of Canada adopted US-style class action legislation and inserted it into a regulatory context where entrepreneurial law-firms, contingency fee arrangements and jury trials, though definitely existent, are less relevant, the allocation of legal costs is, as a general principle, governed by the "loser pays" rule, and the availability of super-compensatory damages is, in comparison to the US, highly restricted.[62] Presumably due to this regulatory environment, here the opt-out class action did not entail the overgrowth and abuses some perceive in the US.[63]

In Australia, opt-out class actions were introduced on the federal level in 1991 (these provisions entered into force on 4 March 1992)[64] and in the state of Victoria in 2000.[65] A 2009 study showed that 241 class action applications were filed up to March 2009 and 245 up to 30 June 2009; that is, on average, 14 class actions were instituted annually. The number of class action proceedings was fluctuant and their frequency did not have an increasing tendency. The first quarter of the rules' 17-year-long history saw 33 proceedings, followed by an intensive period of 92 proceedings;

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[60] 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, which issued a consolidated text of 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 collective proceedings and its provisions (Articles 6, 11, 15, 15bis, 221, 222(2), 256(1)(6), 519).

[61] 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.

[62] See Heffernan (2003: 104), Branch and Montrichard (2005). See Gotanda (2004).

[63] See Stuyck et al. (2007: 379) ("Connected with concerns about (…) unmeritorious claims are fears that introducing US-type collective actions into a legal system would have a floodgate effect. That is, courts would be overwhelmed with weak cases trying to obtain compensation through collective action procedures. Experience from countries such as Sweden, Canada and Australia shows that the fears of legal blackmail and a resulting floodgate effect on the courts do not seem to have occurred."). Another point of reference could be Latin-America; several Latin-American countries adopted class action legislation and inserted this institution into a civil-law environment. See Gidi (2003: 311, 2012: 901–940).

[64] Federal Court of Australia Amendment Act 1991 (Cth). The federal class action rules are to be found in the Federal Court of Australia Act 1976 (Cth) pt IVA. See Clark and Harris (2001: 289).

[65] Supreme Court Act 1986 (Vic) pt 4A (Austl.). See Morabito (2009a: 321).

the number of the proceedings was decreasing in the last two quarters: 63 between 4 September 2000 and 3 December 2004 and 53 between 4 December 2004 and 3 March 2009.[66]

In Canada, opt-out class actions were introduced in the vast majority of the provinces (starting with Quebec's 1978 legislation[67])[68] and in the Federal Court Rules (in 2002).[69] Albeit class action litigation is frequent in Canada, it is by no means excessive, as compared to the US. Nonetheless, it is worthy of remark that Canada's empirical experiences may be taken into account only with some correction. For instance, contingency fees are lawful in Canada and lawyers fund the bulk of class actions[70]; and several provinces lifted or softened the "loser pays" principle in respect to class actions.[71]

Between 2010 and 2018, the launch of 826 class actions was reported to the Canadian Bar Association's database.[72] This is, on average, 92 cases *per annum*.[73] Other surveys show that at least 287 class action proposals were filed in Ontario between 1993 and April 2001[74] and, up to September 2004, 52 proposed class actions were certified in British Columbia, 104 in Ontario and 130 in Québec.[75] In another

[66] Morabito (2009b).

[67] Loi sur le recours collectif, L.Q. 1978, c. 8. See Bouchard (1980), Mazen (1987), Lafond (1998–1999: 19–34).

[68] British Columbia, Class Proceedings Act, R.S.B.C. 1996, c. 50; Newfoundland, Class Actions Act, S.N.L. 2001 c. C-18.1; Saskatchewan, Class Actions Act, R.S.S. 2001 c. C-12.01; Alberta, Class Proceedings Act, R.S.A. 2003 c. C-16.5; Manitoba, Class Proceedings Act, R.S.M. 2002 c. C130; New Brunswick, Class Proceedings Act, R.S.N.B. 2011 c. C-125; Nova Scotia, Class Proceedings Act, R.S.N.S. 2007 c. 28.

[69] Kalajdzic et al. (2009: note 29). For an overview of the Canadian experiences and major issues, see Watson (2001: 272–284).

[70] Kalajdzic et al. (2009: 44).

[71] Kalajdzic et al. (2009: 42). British Columbia essentially adopted the "American rule:" cost awards may be made only in case of "vexatious, frivolous or abusive conduct," improper or unnecessary applications or steps "taken for the purpose of delay or increasing costs or for any other improper purpose" and in case there are "exceptional circumstances that make it unjust to deprive the successful party of costs." See Class Proceedings Act, R.S.B.C. 1995 c. 50, art. 37 and Watson (2001: 274). In Ontario, the court, when exercising its discretion with respect to awarding costs, "may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest." Class Proceedings Act, R.S.O. 1992, c. 6, s. 31(1).

[72] National Class Action Database, The Canadian Bar Association, http://www.cba.org/ClassActions/main/gate/index/default.aspx. Accessed 20 April 2019. The database is based on voluntary reporting and is therefore not a comprehensive record of all Canadian class action lawsuits. Nonetheless, it may be used as a rough indicator as to the number of class actions in Canada within specific time periods.

[73] 2010: 116, 2011: 101, 2012: 141, 2013: n/a, 2014: 150, 2015: 85, 2016: 71, 2017: 80, 2018: 82.

[74] Baert and Guindon (2008: 3).

[75] For further statistics, see Branch and Montrichard (2005) and Lafond (2006: 35) (In Québec, between 1979 and 2004, 151 class actions ended with a settlement, and in 32 cases the court decided for the class).

survey, approximately 332 class actions were reported pending in 2009 and 427 class actions in 2014.[76]

Although these numbers do not exclude the potential of blackmail settlements and other adverse effects, they clearly suggest that collective proceedings entailed no litigation boom and the concern of blackmailing litigation seems not to be real.

4.3 The Novel Questions of Collective Actions in Europe

Collective actions are legal transplants alien to traditional civil-law thinking, hence, once introduced, they call for the re-consideration of a wide array of questions.[77] Obviously, it is perfectly legitimate to adopt foreign legal solutions without adopting their regulatory context; however, in this case, the legal transplant may raise issues that do not emerge in the donor country.

4.3.1 Funding in the Absence of One-Way Cost-Shifting, Contingency Fees and Punitive Damages

European legal systems are largely devoid of the financial incentives that so intensively stimulate litigation in the US (contingency fees, super-compensatory damages, no or one-way costs shifting). While it is neither imperative, nor necessarily justified to adopt foreign legal solutions as a package, absent this a foreign transplant may take a life of its own. In the US, class actions are normally financed by law firms (incited by the reward of a contingency fee) and protected against the risks related to the defendant's attorney's fees (due to the American rule). On the other hand, in Europe there is no comparable market, not only because class actions have no history but also because litigation is less profitable. In the US, law firms are compensated, via legal institutions of general application, for the immense risks they undertake. At the same time, there are no such mechanisms on the other side of the Atlantic. This circumstance calls for a regulatory consideration, given that financing is the oil in the engine of collective actions.[78]

Unfortunately, European collective action laws have failed to settle or even address the problem of financing. On the one had, they ruled out the American institutions that stimulated the operation of US class actions. On the other hand, they failed to replace these with appropriate substitutes. Nonetheless, European collective actions will not be effective and self-sustaining absent appropriate financial incentives providing a risk premium that compensates the group representative for the risks incurred.

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[76] Kalajdzic (2018: 16–17).

[77] On the financing options in Europe, see Voet (2016: 201–222).

[78] See Nagy (2015: 548–550).

The European fear of the American-style financial incentives has been so huge that the Recommendation on Collective Redress suggested the introduction of safeguards in order to obviate incentives to abuse the mechanism of collective action. It makes the use of the "loser pays" principle mandatory,[79] excludes, at least in principle, contingency fees[80] and prohibits punitive damages.[81] Furthermore, it restricts group representation to non-profit entities.[82]

The Recommendation demonstrates well Europe's aversion to the American litigation pattern. Namely, these safeguards appear to be excessive (even redundant), taking into account that the Recommendation explains the choice of the "opt-in" system with the consideration of obviating abusive practices. The Recommendation's insistence on not adopting legal concepts peculiar to the US regulatory environment surrounding the operation of the US class action actually suggests that, on the other side of the Atlantic, it is not the opt-out system but its legal environment that may be responsible for the alleged plethora of class actions. Furthermore, contingency fees and punitive (or exemplary) damages are available in quite of few Member States[83] and there is no reason to rule them out specifically in relation to class actions. Albeit that the amount of exemplary damages awarded in European common law systems is tiny (as compared to US punitive awards), this concept is a solid part of these.[84]

The biggest trouble is, however, that the European model, in essence, rules out the risk premium devices of US law, which are rather unpopular in Europe, anyway, while it fails to offer any surrogate. The function and effects of contingency fees and punitive damages are to provide a risk premium to group representatives, in order to compensate them for the risk they run in favour of group members. European systems scrap these legal institutions (in line with the prohibition of the Recommendation on Collective Redress) without offering anything in exchange in order to tackle the problem of risk premium.

Above, it was argued that it is economically rational for group representatives to enforce group members' claims if all the costs related to the collective action can be shifted on the losing defendant and group representatives are granted a risk premium, i.e. if they win they get a reimbursement higher than their actual costs in order to compensate them for the risk they run when instituting the proceedings.[85] The "American rule" on attorney's fees, contingency fees and punitive damages are meant to be a risk premium (or simply have such an unintended effect). The

[79] 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, para 13.

[80] Id. at para. 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.").

[81] Id. at para 31.

[82] Id. at para 4.

[83] See Grace (2006: 287–288), Waelbroeck et al. (2004: 93–94, 116–17), Leskinen (2011: 98–105).

[84] Wilcox (2009: 7–54).

[85] Nagy (2013: 495–497).

purpose of the "American rule" is to shift some of the risks attached to the plaintiff's or group representative's failure onto the defendant.[86] Super-compensatory damages are clearly risk premiums; punitive and treble damages are meant to incite the plaintiff to litigate through compensating him for the risks he runs because of the litigation.[87] Contingency fees also contain a clear risk premium, because they are presumably higher than the attorney's fees charged in case of no risk[88]; this risk premium is meant to compensate the law firm for the risks it takes over from the client. Albeit jury trials (which appear to issue in higher awards) and generous "pain and suffering" awards are probably not meant to provide a risk premium, this is one of their side-effects.

In US law, it is the provision of generous risk premiums that makes the operation of the US class action so intensive.[89] Ironically, the measures that could make collective litigation effective would move the European regulatory environment towards US law. All the measures the absence of which explained why Europe should not fear the opt-out class action are actually the functional equivalents of a risk premium, even if they are of general application and are not specific to class actions. These ensure that the scheme is effective and wide-spread.[90]

In Europe, the simplest way of compensating group representatives for the risks they assume when enforcing the group's claims would be to grant them a lump sum in excess to their expenses (organizational and ordinary legal costs). Nevertheless, all benefits in excess of compensation would be the functional equivalents of super-compensatory damages. Another solution, introduced, by way of example, in Canada,[91] could be lifting or softening the "loser pays" rule in favour of the group representative; however, again, the risk premium granted to the group representative (and borne by the defendant), whereas lifting one of the hurdles of collective litigation, may create a catalysing factor whose absence is an argument confirming why Europe should not fear the opt-out class action.

All in all, it seems that the effectiveness and widespread use of collective litigation and the potential of abuse and adverse effects are inversely proportional to each other. It would amount to an exaggeration to contend that this is a vicious circle; it is not, it is a trade-off, which does allow fine-tuning. The European legislator or legislators have to find the point of equilibrium where the marginal benefit of effective enforcement equals the marginal cost of abuse and adverse effects. Low risk premiums would encourage collective litigation in good cases but would not be sufficient to be an incentive to take up weak cases. If the risk premium embedded in the US system appears to be excessive in Europe, a lower one should be introduced.

Furthermore, the perils inherent in the risk premium certainly do not refute the proposition that the opt-out class action should not be feared if introduced in the current European regulatory environment. The fact that without an appropriate risk

[86] See Gryphon (2011: 569).

[87] Behr (2003: 120–121), Visscher (2009: 224), Koziol (2009: 304).

[88] Nagy (2013: 495–496).

[89] Nagy (2013: 489, 497).

[90] Nagy (2013: 496).

[91] See Kalajdzic et al. (2009: note 29).

premium the intensity of opt-out class actions would not exceed a certain level is not an argument against their introduction. In particular, because the group representative may espouse the collective action for different non-economic reasons; and the limited European experience shows that civil organizations may endeavour to protect the rights of group members, even in case it does not pay out for them to do so.

All in all, the main flaw of European collective actions' treatment of financial incentives is that, in essence, they scrap the risk premium devices of US law, while failing to offer any surrogate.[92] In the absence of an adequate risk premium it will not pay out for group representatives to take up the case; and even if the group representative is a non-profit organization, failing public funding, the entity's expected costs and expected income have to be in balance to make the system sustainable.

4.3.2 Two-Way Cost-Shifting

While in the US, owing to the American rule, group members do not run the risk of becoming responsible for the defendant's attorney's fees, in Europe the principle of two-way cost-shifting prevails. This implies that, even if this principle does not work to the full, group members' financial liability for the legal costs has to be addressed. The general principle of civil procedure requires that someone should be obliged to reimburse the winning party for his legal expenses and there is no reason to deprive the defendants of collective actions of this protection. This obligation may be placed either on individual group members or on the group representative. In opt-in systems both variations are conceivable, as group members join the collective action voluntarily. However, if adopted, opt-out systems entail an additional twist: the strongest argument for the constitutionality of opt-out class actions is that they confer only benefits and no disadvantages on group members; this argument would lose weight if group members were exposed to the risk of being liable for the defendant's legal costs. Hence, the argument for the opt-out scheme's constitutionality may be preserved if group members are freed from all liability and the group representative runs the full risk as to legal costs.

4.3.3 Distrust of Market-Based Mechanisms in the Enforcement of Public Policy (No Private Attorney General)

In Europe, class actions are not meant to have a public policy function and serve as a purely compensatory function. A public policy role would be difficult to reconcile with the principle that public policy is the prerogative of the state. The only legitimate purpose of collective actions is to organize the effective enforcement of private law

[92] See Geradin (2015: 1096–1099).

claims that would otherwise not be enforced. While this may certainly influence the behavior of undertakings, beyond these side-effects, all public policy aims are left to public law and public authorities. In the same vein, the concept of "private attorney general" is completely alien to European legal systems and for-profit entities' aptness to serve the public interest is normally received with doubt.

As a result, European legislators have been reluctant to vest for-profit private entities with the power to launch collective proceedings. Standing has been normally limited to public entities and non-profit organizations. The general attitude is that financial incentives may give a stimulus that is not reconcilable with the public interest to be protected.

The consequence of this attitude is that in class actions standing is normally conferred on non-profit entities (non-profit organizations, administrative agencies or public prosecutors), which are presumed not to be influenced by inadequate incentives.[93]

4.3.4 European Opt-In Collective Actions and Joinders of Parties

A few EU Member States adopted opt-in systems, ruling out representation without positive authorization. These systems embed the requirement that the group representative, one way or another, has to be explicitly authorized by group members and only those persons are part of the litigation who expressly did so.

Probably the first question that emerges as to the opt-in system is its *raison d'être*: why to have an opt-in scheme if the doctrine of joinder of parties is available for organizing group litigation. The answer lies in the details. A joinder of parties creates a very decentralized system. It is not lead by a group representative, quite the contrary, in a joinder of parties, legally speaking, there is no group representative, though the parties may hire the same attorney. The group is not centralized, group members have equal rights and obligations, they may make individual submissions and their motions may contradict. This makes a traditional joinder of parties unsuitable for mass litigation, in particular in relation to small claims.

The opt-in class action is a centralized joinder of parties that makes mass litigation feasible through the concentration of the representation and the restriction of certain procedural rights of group members (i.e. group members' procedural rights are restricted in comparison to individual litigation). That is, the opt-in class action not only simplifies adherence but also turns the group representative from a marionette into the master of the case.

[93] See Fairgrieve and Howells (2009: 400, 407) (The European model regards "public agencies or accredited consumer organizations as a gatekeeper[s].").

4.3.5 Opt-Out Systems and the "Only Benefits" Principle

The taboo of party autonomy has profoundly shaped the European model of collective actions. This entailed that some Member States adopted opt-in schemes, while those who introduced an opt-out system did this along with the "only benefits" principle (i.e. in the opt-out system only benefits may accrue to group members).

According to the "only benefits" principle, the opt-out rule is reconcilable with the constitutional right to party autonomy, because it confers only benefits on group members, so their assent may be presumed. As a corollary, opt-out systems were worked out in a way that group members run no risk as to legal costs and, at times, they are covered by the final judgment's res judicata effects only if they expressly accept it or if that is in their interest.

The French class action yarn demonstrates well how the "only benefits" principle, erected by constitutional considerations, has shaped Europe's paradigm.

France introduced a collective action mechanism for consumers in 2014,[94] which was scrutinized and endorsed by the French Constitutional Council.[95]

The French regulatory regime established a truly unique system (action de groupe à la française), which combines the elements of the opt-out and opt-in models. Even though French law retained the requirement that the consumer needs to adhere through an express declaration, this declaration needs to be submitted only after the judgment has been made, when the consumer turns the award into cash.

The scheme appears to be a de facto opt-out system, although the consumer's right to opt-in is retained and can be exercised after the judgment is made. This is, to some extent, comparable to the opt-out system, since even there, at the end of the day, group members have to act in order to receive their share of the award. At the same time, there is a real difference between the "action de groupe à la française" and opt-out class action. In the former case, the judgment's res judicata effect extends to the group member only if, after having been duly informed, he expressly accepts the judgment and the compensation. If a group member thinks that he can reach a more favourable award, he can enforce his claim individually. However, this seems to be a rather formal difference: it is highly unlikely that in the subsequent individual action the court would reach a different conclusion. Taking into account the rule that the consumer has to step in only in the last phase, after the legal situation has been fixed, and assuming that consumers will go their own way extremely rarely, this system can be reasonably characterized as a de facto opt-out scheme.

The French consumer code (Code de la consummation) establishes a standard group procedure and a simplified procedure. The simplified procedure[96] applies if the identity and the number of the injured consumers are known and they sustained either a harm of the same amount, of the same amount per a given service or of the

[94] Act 2014-344 of 17 March 2014 (Loi n° 2014-344 du 17 mars 2014 relative à la consommation publiée au Journal Officiel du 18 mars 2014).

[95] Decision 2014-690 of 13 March 2014 (Le 14 novembre 2014, JORF n°0065 du 18 mars 2014, Texte n°2, Décision n° 2014-690 DC du 13 mars 2014).

[96] Article L423-10 of the French Consumer Code.

same amount for a given period. According to these criteria, the court may establish the defendant's liability and order it to compensate group members directly and individually within the deadline set by the court. The only element which obscures the opt-out nature of this procedure is the rule providing that a consumer can be compensated only after he accepted to be compensated according to the terms of the judgment. The simplified procedure has the strongest opt-out features. From the perspective of res judicata effects, this rule preserves, indeed, the opt-in nature of the procedure, since if the consumer is not content with the judgment, he may take the route of individual litigation. However, notwithstanding the lack of res judicata effects, as noted above, it is highly unrealistic that the court would come to a different conclusion in the subsequent individual litigation. Furthermore, as a matter of fact, the simplified procedure does not make express adherence a pre-condition of the procedure and the judgment. In fact, it does not require much more activity from the consumer than opt-out systems do: the consumer would have to act at the payment or enforcement stage anyway (for example, contact the group representative or the court, initiate the enforcement of the judgment).

The standard procedure follows the same logic.[97] In the first phase, the judge—as a result of the group representative's action—decides on the merits of the case, insofar this is possible. It establishes the defendant's liability, defines the group and establishes the applicable criteria, determines the harms that can be compensated in respect of all consumers or all categories of consumers, including the amount and the elements, which permit the evaluation of the harm. Furthermore, the court establishes the measures that have to be adopted to inform group members and fixes a deadline for adherence. In the second, out-of-court phase, group members are informed and have to decide whether they want to be covered by the judgment. In the ideal case, the defendant pays compensation to them. Should this not happen, the action moves to the third phase, where the court decides on the eventual difficulties of enforcement and on individual cases. Accordingly, the court decides on the merits of the case as early as the first phase. At this stage, consumers' express adherence is not required, and they have to decide whether they want to be compensated. The third stage is left for fine-tuning and individual aspects. Again, the judgment's res judicata effect is conditional on the consumer's acceptance of the judgment. However, this appears to be a rather formal dissimilarity to the opt-out system: as noted above, it seems to be highly unrealistic that the court would come to a different conclusion in the subsequent individual litigation than in the collective action.

It appears that, during the law's constitutional review, it was decisive for the French Constitutional Council that the res judicata effect covers solely those group members who received compensation at the end of the procedure.[98] It seems that the circumstances that only benefits accrue to group members and that the judgment's res judicata effect covers only those group members who assented to it (since compen-

[97] Articles L423-3 to L423-9 of the French Consumer Code.

[98] Decision 2014-690 of 13 March 2014 (Le 14 novembre 2014, JORF n°0065 du 18 mars 2014, Texte n°2, Décision n° 2014-690 DC du 13 mars 2014), paras 10 and 16.

sation can be paid only if the group member accepts it) were sufficient to extinguish the possible constitutional concerns.

Before the adoption of the above-mentioned decision, the French Constitutional Council had been referred to as an authority to justify the unconstitutionality of the opt-out system, citing its famous decision of 1989,[99] which dealt with a law that authorized trade unions to launch any action (toutes actions) on behalf of the employee, including claims of unfair dismissal.[100] The French rules adopted in 2014 seem to have gone beyond the constitutional requirements of the decision of 1989, since, although at the end of the procedure, they do require express acceptance from group members, they do not content themselves with tacit adherence.

4.4 Summary

The regulatory and social environments of collective actions differ considerably on the two sides of the Atlantic. Contrary to the US, "entrepreneurial lawyering" is virtually missing in Europe, contingency fees are either prohibited (or available with restrictions) or, even if legal, are normally not available in the market; active client-acquiring and lawyer advertisements are banned or heavily restricted in most EU Member States. The "American rule" and especially one-way cost-shifting, as provided by various American protective statutes, are unknown to European jurisdictions, which traditionally follow the rules of two-way cost-shifting. Super-compensatory damages are not available in Europe, with some narrow and insignificant exceptions in a couple of common law jurisdictions, and the generous US discovery rules have equally no counter-part.

These differences have twofold consequences. First, due to the absence of the above pro-plaintiff incentives, the operation and impact of European collective actions differ considerably from their American ancestor. Second, European legislators have to address quite a few regulatory issues that do not emerge in the US.

Both theoretical analysis and empirical data clearly suggest that the purported negative repercussions of opt-out collective litigation (US class action) would not emerge if this regulatory mechanism were introduced in Europe. The theoretical arguments and the brief account of the empirical evidence in Europe suggest that, whereas the relatively short time that has elapsed since the wide-spread appearance of these mechanisms (both opt-in and opt-out systems) in Europe does not enable us to predict long-term consequences, opt-out collective proceedings would trigger no litigation boom in Europe. This conclusion is underpinned also by the empirical experiments of Australia and Canada, which introduced class actions in a regulatory environment different in some of the relevant aspects from the US.

The transplantation of collective actions into the European legal and social environment raises an array of novel regulatory questions.

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[99] Décision n° 89-257 DC du 25 juillet 1989.

[100] Id. at para 25.

European legal systems lack the counterparts of US legal institutions that facilitate litigation through the provision of financial incentives (one-way cost-shifting, contingency fees and punitive damages), making litigation finance a crucial regulatory issue. Unfortunately, European collective action laws have failed to settle or even address this problem: while they ruled out the American institutions that stimulate the operation of US class actions, they failed to replace these with appropriate substitutes. Arguably, failing public funding, European class actions have little chance to become effective and self-sustaining, if, one way or another, appropriate financial incentives are not provided for to ensure that the group representative receives a risk premium for running financial risks in the interest of the group. Economically speaking, the group representative's expected income and expected costs cannot be equilibrated in the absence of an appropriate risk premium and, hence, he may be incited to espouse group members' claims, if he is compensated for the risks he runs when engaging in collective litigation.

While in US class action, due to the American rule, group members are not responsible for the defendant's attorney's fees even if the class action fails, in Europe, the principle of two-way cost-shifting prevails, raising—both in opt-in and opt-out systems—the regulatory question of allocation. It is generally accepted that the opt-out scheme's constitutionality may be preserved if group members are freed from all liability and the group representative runs the full risk as to legal costs.

European class actions are not meant to have a public policy function and their role is limited to ensuring a compensatory remedy for group members. As the concept of "private attorney general" is completely alien to European legal systems and the general attitude is that financial incentives may function as an unacceptable stimulus, for-profit entities' aptness to serve the public interest is normally received with doubt. This explains why in Europe standing has been normally limited to public entities and non-profit organizations.

A peculiar element of the architecture of European collective actions is the "only benefits" principle, which prevails in opt-out systems. The strongest argument for "representation without authorization" and against the allegation that opt-out class actions encroach on party autonomy is that only benefits may accrue to group members, so it would be redundant to require express authorization. Hence, these systems were worked out in a way that group members run no risk as to legal costs and they are covered by the final judgment's res judicata effects only if they expressly accept it or if that is in their interest.

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