



U.S. CHAMBER  
Institute for Legal Reform



# The Growth of Collective Redress in the EU

*A Survey of Developments in 10 Member States*

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MARCH 2017



**U.S. CHAMBER**  
**Institute for Legal Reform**

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# Executive Summary

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Collective redress in the EU is at an important crossroads. After some years of hesitation, it is now clear that collective redress or 'class action' models are proliferating across the EU, with a significant majority of Member States now having at least one way for claimants to combine their claims and sue for damages before national courts.

EU initiatives in this area are also at an important crossroads. While a number of separate and sectoral initiatives have sought to make it easier to pursue redress in civil courts (*e.g.*, in relation to competition, data protection, environmental law, financial services, and others), the most comprehensive examination of collective redress at the EU level came with the European Commission's 2013 Recommendation on Collective Redress.

This Recommendation invited Member States to adopt a collective redress framework that included features described in the Recommendation by July 2016, and to report back on the extent to which they had done so by July 2017, at which point the Commission would evaluate whether further EU action is needed.

The Commission is currently undertaking this work. Its findings may lead to any number of outcomes, from the preservation of the status quo to a proposal for EU legislation governing how

collective redress cases in the EU can or should occur.

It has long been accepted that the advantages of collective redress (mainly the potential efficiency of dealing with multiple, similar claims at the same time) come with certain risks. In particular, experience in other jurisdictions has shown that the opportunity to aggregate claims certainly does not always lead to efficient outcomes, and can in some cases lead to litigation abuse. This abuse can arise in particular where the risks and rewards are out of balance, meaning that significant financial incentives exist to file weak (or even entirely meritless) claims.

The Commission's 2013 Recommendation acknowledged this risk and proposed a number of safeguards designed to deter abusive litigation by keeping the risks and rewards in check.

The number of collective redress mechanisms across the EU, the number of collective redress claims now being filed, and the aggregate value of some of the claims mean that the Commission's

assessment is extremely timely. It is particularly appropriate to assess whether safeguards have been adopted, and whether and how those safeguards are operating in practice.

To contribute to this important work, the U.S. Chamber Institute for Legal Reform (ILR) has commissioned a survey of the 'state of play' in 10 Member States (including all of the largest economies), and covering 16 separate collective redress mechanisms. This survey was coordinated by Sidley Austin LLP in Brussels and called up on the expertise of practitioners in all of the Member States surveyed.

The purpose of the survey is not to provide an exhaustive description of each different mechanism examined (this will be reported by the Member States themselves); rather, its purpose is to identify trends and issues that appear to be arising across the EU. In particular, this survey examines developments in the EU from the perspective of ILR's significant experience with class action systems around the world (notably the U.S., but also, Canada, Australia and

others). For this reason it contains a particular emphasis on where collective redress mechanisms might be vulnerable to abuse, and on safeguards to mitigate against these abuses.

## Survey Highlights

The survey demonstrates that collective redress in the EU is a growing business. A surprising number of mechanisms exist, and the volume and value of the cases being filed is on a steep upward curve.

This seems to be a response to determined action on the part of the Member States to make it easier to sue in civil courts, to address a perceived 'access to justice deficit'. The trend across the Member States is therefore towards skewing the balance between risks and rewards. In most cases this involves the removal or reduction of traditional safeguards that have prevented abusive litigation.

The reduction of these safeguards is new, and the EU is not currently gripped by waves of abusive litigation. However, there are a number of very powerful

*“ The significant and various early warning signals include the filing of multiple billion euro claims, the arrival of U.S. class action firms, the explosive growth of a new and unregulated litigation funding industry, the exploitation of loopholes in rules regarding standing, the heavy dilution of rules regarding how representatives may be compensated, experimentation with opt-out mechanisms, the erosion of the 'loser pays' rule, and the gradual decline or dilution of a host of other traditional safeguards. ”*

indicators that all of the same incentives and forces that have led to mass abuse in other jurisdictions are also gathering force in the EU. The significant and various early warning signals include the filing of multiple billion euro claims, the arrival of U.S. class action firms, the explosive growth of a new and unregulated litigation funding industry, the exploitation of loopholes in rules regarding standing, the heavy dilution of rules regarding how representatives may be compensated, experimentation with opt-out mechanisms, the erosion of the 'loser pays' rule, and the gradual decline or dilution of a host of other traditional safeguards.

Of particular note is the fact that the Member States' systems have been

developing organically and at a fast pace, but with little or no evidence that the Commission's Recommendations regarding safeguards have been adopted.

## Findings By Topic

The survey focused on six issues and examined them horizontally across Member States.

### WHO MAY FILE A CLAIM

It is clear that some Member States have little or no procedure to assess whether a representative is the appropriate entity to bring a collective claim. There are a number of notable examples of law firms or private equity/hedge fund investors being the true instigators and main beneficiaries of mass claims, instead of the injured parties themselves.

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## COMPENSATION OF REPRESENTATIVES

Litigation abuse is fundamentally driven by financial incentives, so where representatives can profit, the risk of litigation being pursued for motives other than justice is real. There are a number of examples of Member States having weakened or eliminated traditional rules preventing 'contingency fees'. In addition, the spectacular growth in the EU of a third party litigation funding industry or TPLF (whereby private equity or hedge funds back claims in exchange for an agreed percentage of the recovery), increasingly means that lawsuits are being treated as commodity investments to be traded for private profit.

## LOSER PAYS PRINCIPLE

The principle that the party losing a case should pay its opponent's costs has long been regarded as a key safeguard against abuse. However, the survey shows that this principle is weakening significantly across the EU, and in practice it is applied mainly against corporate defendants.

## OPT-IN/OPT-OUT

Member States are increasingly experimenting with opt-out features, in which claimants are included in a lawsuit unless they take affirmative steps to be excluded. This increases the possibility of claims inspired mainly by entrepreneurial lawyering or 'investors' in litigation being greatly swollen, so that the value of their potential winnings will also swell. Experience has shown that the main beneficiaries in such scenarios are typically the lawyers, with consumers often getting nothing of value.

## ADMISSIBILITY AND CERTIFICATION STANDARDS

Some systems do not have adequate certification and admissibility procedures to filter out opportunistic claims.

## JURISDICTIONAL OVERREACH/ FORUM SHOPPING

A trend is emerging that allows claimants—backed by international plaintiff firms and litigation funds—to shop around different legal jurisdictions in order to find a sympathetic venue, even if that venue bears little or no relationship to the dispute.

## Issues for Consideration

In light of the survey's results, this paper also examines what appear to be the minimum necessary safeguards in any system to prevent litigation abuse from taking hold in the EU, and to prevent litigation systems from being captured for private gain. This includes an examination of safeguards relating to collective redress and safeguards regarding third party litigation funding.

## COLLECTIVE REDRESS SAFEGUARDS

- Implementing Stringent Class Certification Standards
- Preserving the Loser Pays Principle
- Favoring Opt-In Over Opt-Out Mechanisms
- Promoting Strict Standing Requirements
- Mandating Closure for Defendants
- Restricting Contingency Fees and Regulating TPLF for Collective Actions
- Banning Punitive Damages
- Curbing Jurisdictional Overreach/  
Forum Shopping

Some of these safeguards were identified as necessary in the Recommendation (including Preserving the Loser Pays Principle, Favoring Opt-In Over Opt-Out Mechanisms, Promoting Strict Standing Requirements, Restricting Contingency Fees and Regulating Third Party Litigation Funding for Collective Actions, and Banning Punitive Damages), but the extent to which such safeguards exist varies across the EU.


Safeguards specific to TPLF are a logical outgrowth of the need to develop an oversight regime for such funding.

### **THIRD PARTY LITIGATION FUNDING SAFEGUARDS**

- Implementing Licensing Through a Government Agency
- Requiring Capital Adequacy
- Ensuring That Claimants, Not Funders, Control Management of the Case
- Requiring That Funders Act in the Best Interest of Claimants
- Banning Law Firms From Owning Funders and Vice Versa
- Imposing Costs Liability
- Promoting Transparency
- Placing Limits on Recovery

## **Conclusion**

In conclusion, this survey notes that the pace of development of collective redress mechanisms in the EU is far higher than most will appreciate. The Commission's evaluation process is an appropriate and timely opportunity to reflect on how Member State systems have been developing, and on what the future of collective redress in the EU should be. Restoring a balance of risks and rewards is essential to a reasonable, fair system of collective redress that does not encourage abuse.



*“ Restoring a balance of risks and rewards is essential to a reasonable, fair system of collective redress that does not encourage abuse. ”*



# Introduction

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Experience with collective redress, including the notorious U.S. class action system, demonstrates that mechanisms for the aggregation of lawsuits are prone to abuse, including the filing of weak or meritless claims. In the context of collective litigation, abuse can involve mounting an action in which the premise underlying all claims in the group is frivolous, or pursuing litigation in which aggregation boosts the value of weak individual claims by including them with those of merit.

In both instances, claims are brought to extract a financial settlement that is often unrelated to achieving justice in a case, in reliance on the defendant's reluctance to incur the reputational and financial cost of fighting the claims despite having valid defenses to some or all of them.

The main drivers of such abuse are typically third parties, such as law firms, litigation funders, or other 'investors' in the disputes of others. It is those parties, rather than individuals or businesses

with claims, who are likely to be the main beneficiaries of collective redress. This phenomenon gives rise to a third facet of abuse, in which the claimants receive little or nothing and the lawyers or investors are richly rewarded. Coupon settlements in the United States—in which lawyers are awarded fees in the millions of dollars, and individual consumers each receive a coupon for a movie rental or sandwich—are perhaps the best-known form of such abuse. Wherever these third parties

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are permitted to aggregate claims, and especially where they are permitted to share directly in the proceeds, costly and often abusive litigation is likely to follow.

*“ Wherever these third parties are permitted to aggregate claims, and especially where they are permitted to share directly in the proceeds, costly and often abusive litigation is likely to follow. ”*

This survey, conducted for the U.S. Chamber Institute for Legal Reform (ILR)<sup>1</sup>, examines developments with regard to collective redress across 10 EU Member States. It illustrates that while EU Member States do not have a tradition of significant abuse of their legal systems, laudable efforts to improve access to consumer redress in justified cases is now generating the very same incentives that have led to mass abuse in other jurisdictions.

The intent of the study is not to produce a detailed reproduction or summary of all of the features of the collective redress systems examined; rather, the goal is to identify critical policy themes and to examine these themes horizontally across different Member States in order to classify trends and facilitate comparison. For this reason, the survey's findings are presented by theme, rather than by Member State.

In Part I, we describe the context of the paper. Part II provides an introduction to the concerns with collective redress mechanisms, and Part III explains the purpose of the survey and the methodology. Part IV gives an overview of the observations and trends. Part V then examines the key features of litigation systems across the Member States. In Part VI, a comparison and analysis of particular features of collective systems is presented by examining specific cases, focusing on those features that implicate important policy considerations. Part VII suggests policy questions for further consideration and recommendations to prevent or limit abuse. Finally, the Appendix summarises the key findings per Member State on a thematic basis.

# Part I: Context

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A majority of EU Member States now have some form of collective redress in their national systems, and there are multiple proposals for additional systems or features. The EU itself has also imposed legislation in several areas seeking to align Member States' litigation systems, and is considering more, though it is not yet proposing the imposition of a single pan-EU collective redress or class action model. This situation, however, may be about to change, and the debate on this topic is at an important crossroads.

In 2013 the European Commission published a non-binding Recommendation on Collective Redress (the 'Recommendation').<sup>2</sup> It recommended to all EU Member States that they adapt their national systems to include a general system of collective redress, applicable to all areas of law, which is based around a number of principles.

The Recommendation stated that Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties and the subject matter and outcome of the cases, and should communicate that information to the Commission annually.

Specifically, paragraph 41 of the Recommendation provides that:

The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

The Commission is currently gathering this information and conducting this evaluation.

The EU's work in this area does not exist in a vacuum, as the EU has for some years been considering issues regarding civil redress (including collective redress). Prior to the Recommendation, the Commission had proposed a collective redress mechanism for competition cases<sup>3</sup> (which was not adopted). The EU has adopted legislation on collective injunctions<sup>4</sup> and on collective civil redress in relation to data protection.<sup>5</sup> Legislation has been proposed in relation to environmental law breaches, including in relation to civil redress.<sup>6</sup> The EU has also adopted legislation to facilitate

redress through Alternative Dispute Resolution,<sup>7</sup> Online Dispute Resolution<sup>8</sup> and Mediation,<sup>9</sup> as well as legislation to facilitate redress in relation to competition law.<sup>10</sup> It has explored the possibility of a collective redress mechanism in relation to financial services<sup>11</sup> and has amended the rules relating to civil jurisdiction to facilitate the resolution of cross border disputes, through the recast 'Brussels Regulation'.<sup>12</sup>

This survey is therefore designed to contribute to the Commission's immediate evaluation regarding the Recommendation but also to the broader ongoing debate at the EU level regarding civil justice reform.

# Part II: An Introduction to Concerns With Collective Redress

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Collective redress in other jurisdictions has been prone to abuse and often does not deliver for consumers. Any procedure that permits a representative to aggregate the claims of hundreds, if not thousands, of individuals empowers that representative to threaten a defendant with catastrophic loss. As a result, the representative can use this power to extort money from a defendant, even if the underlying claims have little chance of success.

This unequal bargaining power is used to extract what respected jurists call ‘blackmail settlements’ from defendants.<sup>13,14</sup> This is an inherent problem with collective litigation that unfortunately cannot be eliminated—only mitigated—by adopting certain safeguards.

The benefit of class actions to consumers is often extremely limited. The experience in the United States, where the current form of class actions has existed since 1966, is informative. In many class actions in the U.S., consumers have received just a few dollars or a coupon to buy the same product about which the class action was filed, while those backing the litigation—often the lawyers or funders—have often received cash recoveries in the millions or tens of millions of dollars.

A prior study conducted for ILR entitled ‘Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions’<sup>15</sup> undertook an analysis of a neutrally selected sample set of putative consumer and employee class action lawsuits filed in or removed to U.S. federal court in 2009, and examined the outcome four years later in 2013. The findings included the following:

- In the entire data set, not one of the class actions ended in a final judgment on the merits for the plaintiffs. And none of the class actions went to trial, either before a judge or a jury.
- The vast majority of cases produced no benefits to most members of the putative class—even though in a number of those cases the lawyers who sought to represent the class

often enriched themselves in the process (and the lawyers representing the defendants always did).

- Approximately 14% of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members received no benefits—and would likely never receive any benefits.
- Over one-third (35%) of the class actions that had been resolved were dismissed voluntarily by the plaintiffs. Many of these cases settled on an individual basis, meaning the individual named plaintiff and the lawyers who brought the suit agreed to a deal whereby only the named plaintiff and the lawyers were paid, but the allegedly injured class members received nothing at all.
- Less than one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits—again, meaning that class members received nothing.
- One-third (33%) of resolved cases were settled on a class basis. Because information regarding the distribution of class action settlements is rarely available, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in the data set for which settlement distribution data were made public, five delivered funds to only minuscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66% and 12%. Those results are consistent with other available information about settlement distribution in consumer

class actions. It is noteworthy that in many cases, compensation is not delivered because the amounts in question are so negligible, or the terms so onerous, that class members do not come forward. This doesn't deter those initiating actions, because they typically base their fees on the total amounts claimed or awarded, not the amounts actually delivered to class members.

- Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members but offers significant benefits to class counsel.

Examples abound of law firms in the U.S. accepting settlements which involve payment of their fees and profits first and foremost, with the 'victims' often receiving little or nothing at all.<sup>16</sup> Cases like these show that class actions may be an ineffective way of obtaining meaningful compensation for claimants in the U.S. and that class actions often benefit the lawyers more than the claimants. In short, the hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich lawyers.<sup>17,18</sup>

It has been broadly accepted, including by the Commission itself, that the U.S. class action model is not a model that should be followed in other jurisdictions, in large part because it is very costly and delivers little or no tangible redress to consumers. Indeed, it is primarily beneficial to third parties. However, even if the most egregious aspects of the U.S. class

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action model are avoided in constructing a collective regime, a substantial risk of abuse and other negative consequences would remain. Other jurisdictions have also conducted their own class action experiments using their own models and have similarly suffered from widespread abuse (e.g., Australia<sup>19</sup> and Canada<sup>20</sup>). There is no model of collective action in existence that is free of the substantial risk of abuse.

## Incentives

The common denominator underpinning most abusive litigation is that representatives (often a lawyer or other third party who has not been injured by the alleged harm) see opportunity for themselves in organising and pursuing an action. The benefit to legal representatives is often pursued through ‘contingency fees’ (for example, a lawyer acting on a ‘no-win, no-fee’ basis in exchange for a percentage of

*Litigation abuse is fundamentally driven by financial incentives—it occurs in jurisdictions where it is profitable to engage in abusive litigation, and it does not occur in jurisdictions where it is not.*

any award made). The benefit to other representatives—notably, third party litigation funders—operates on the same basis; that is, they finance the cost of pursuing the case in exchange for a percentage of any award.

The U.S., Australia and Canada have embraced collective redress, allowing

representatives to achieve windfall rewards by bringing cases on behalf of consumers. In all of those jurisdictions, significant litigation abuse issues continue to arise. Any European debate regarding collective redress must therefore have a significant focus on financial incentives and the connection incentives have to potential litigation abuse.

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# Part III: Purpose of Survey and Methodology

## Survey Purpose

The purpose of this survey is to contribute to the body of evidence available regarding the true ‘state of play’ in relation to collective redress in the EU. As Member States will be reporting directly to the Commission regarding the mechanisms available, this survey does not seek to replicate that work. Instead, this survey seeks to offer a thematic overview and an examination of key trends, grouped around issues that have proven to be critical in other jurisdictions.

## Survey Methodology

In order to broadly examine the ‘state of play’ regarding collective redress across the EU, a cross section of Member States was chosen from different parts of the EU, with a focus on jurisdictions that represent large populations and those known to have significant collective redress activity, or those contemplating the introduction of notable collective redress systems. The Member States chosen account for roughly 79% of the population and 82% of the GDP of the EU.<sup>21,22</sup>

The study focuses on systems of collective redress designed to deliver damages to private claimants who initiate actions through civil court-based mechanisms (rather than government compensation schemes, collective actions for injunctions only, voluntary Alternative Dispute Resolution mechanisms, or those relying on ombudsmen). This is because court-based collective compensation mechanisms are still the main policy focus for most Member States and remain the

main focus of the Recommendation and the EU’s ongoing review.

This survey is not limited to collective redress in a particular sector; it includes an examination of cases relating to consumer protection, product liability, competition and securities law, among others. It also includes specialised systems, such as those open to particular categories of claimant only, as well as processes designed to be open to all those with a claim.

This survey was coordinated by Sidley Austin LLP, in collaboration with local counsel in all of the jurisdictions identified: August & Debouzy in France; Sidley Austin LLP in the United Kingdom; Stibbe in the Netherlands and Belgium; Noerr LLP in Germany; Graf & Pitkowitz Rechtsanwälte GmbH in Austria; Uría Menéndez Abogados S.L.P. in Spain; Drzewiecki, Tomaszek i Wspólnicy Sp.k. in Poland; Gianni Origoni Grippo, Cappelli & Partners in Italy; and Boyanov & Co. in Bulgaria.

The following collective redress Mechanisms were studied:

### FRANCE

- The **Common Representative Action**, whereby any one of a list of 15 pre-approved consumer associations may be mandated by multiple consumers to initiate claims for damages on their behalf.<sup>23</sup>
- **Web-Based Actions** taking advantage of the fact that, under French law, any person can request another to litigate on his or her behalf. It is now common

practice for entrepreneurs to collect a 'class' online, though, technically, individual parallel claims are filed.

- The **Consumer Class Action**, whereby an approved consumer defense association that is representative on a national level has standing before the civil courts to bring a claim. The claims must be in relation to redress for individual harm sustained by consumers relating to the sale of goods or supply of services, or to anti-competitive practices.<sup>24</sup>
- The recent **Class Action for Health** regarding health products, whereby an approved association of health care system users can bring an action with a view to obtaining compensation for individual damage suffered by users of the health care system.<sup>25</sup>

## UK<sup>26</sup>

- **Representative Proceedings**, whereby a person who has suffered damage may initiate an action on behalf of himself or herself and persons with the same interest on an opt-out basis (though damages under this procedure are rare).<sup>27</sup>
- **Group Litigation Orders (GLO)**, whereby cases giving rise to similar claims in fact or law can be joined together and dealt with simultaneously by the court.<sup>28</sup>
- The **Competition Appeals Tribunal or CAT Class Action**, an 'opt-out' class action proceeding available before the Competition Appeals Tribunal and limited to competition law claims.<sup>29</sup>

## THE NETHERLANDS

- The **Assignment Model**, whereby multiple individual claimants assign their claims to a third party—often a special purpose claim vehicle—which pursues the claim at its own risk.<sup>30</sup>
- The **WCAM**, which is a voluntary collective settlement model used to resolve collective actions under Dutch law. The collective actions are used to establish fault but do not result in damages awards. Instead, where the parties settle for damages, the court may order that all similarly situated persons be permitted to avail of the damages for a limited period (whether or not previously identified—so it is 'opt-out'), after which rights to sue on the same subject matter expire.<sup>31</sup>

## BELGIUM

- Belgium's **Collective Redress Actions** incorporate two collective mechanisms: the first entails an action for redress such as damages; the second involves an application seeking a declaration that a settlement is binding on all members of a class.<sup>32</sup>

## GERMANY

- Germany's model case system, the **KapMuG**, available to those with a claim against securities issuers, whereby common legal issues are resolved jointly by the court, potentially permitting later (individual) damages claims.<sup>33</sup>

## AUSTRIA

- The **Collective Claim**, under which multiple claims may be asserted against the same defendant in a single lawsuit, by assigning those claims to a representative claimant.<sup>34</sup>

## SPAIN

- The **Collective Action**, which is used to bring claims for the individual homogenous rights of a class (*i.e.*, a group of consumers sharing common factual and legal issues in the underlying individual cases).<sup>35</sup>

## POLAND


- Poland's **Class Proceedings**, whereby group claims for damages may be filed by any group of at least 10 claimants with similar claims and joined by others on an "opt-in" basis, allows for a consumer ombudsman to take consumer-related claims.<sup>36</sup>

## ITALY

- The **Class Action Law**, whereby a lead claimant (who may be an individual or a consumer association) can file a claim on behalf of others regarding breaches of contractual rights, product liability or unfair business practices (including antitrust violations).<sup>37</sup>

## BULGARIA

- The **Proceedings in Collective Actions**, whereby individuals, or any organisation representing their interests, may file collective damages claims.<sup>38</sup>



**FRANCE**

- Common Representative Action
- Web-Based Actions
- Consumer Class Action
- Class Action for Health



**AUSTRIA**

- Collective Claim




**UK**

- Representative Proceedings
- Group Litigation Orders (GLO)
- Competition Appeals Tribunal (CAT) Class Action




**SPAIN**

- Collective Action



**NETHERLANDS**

- Assignment Model
- WCAM



**POLAND**

- Class Proceeding



**BELGIUM**

- Collective Redress Actions



**ITALY**

- Class Action Law



**GERMANY**

- KapMuG



**BULGARIA**

- Proceedings in Collective Actions

# Part IV: Overall Observations and Trends

Before turning to individual policy themes, the following are some broad overall observations arising from the survey.

## Collective Redress Is a Growing Business

One often hears that collective redress in the EU is technically available but has not been taken up to any significant degree.

This study demonstrates that this premise is incorrect. The following chart indicates the number of cases that have been filed under each of the types of action covered by this survey.

COUNTRY	TYPE OF ACTION	APPROXIMATE NUMBER OF CASES FILED AS OF 1 JANUARY 2017 <sup>39</sup>
France	Common Representative Action	6 cases brought since 2013
France	Web-Based Actions	66 actions identified (more than 300,000 individual plaintiffs have opted-in)
France	Consumer Class Action	9 actions introduced since 2014
France	Class Action for Health	1 case announced so far (the system came into force in September 2016)
UK	Representative Proceedings	Unknown (but infrequently used)
UK	Group Litigation Orders	Approximately 100 cases since 2000
UK	CAT Class Action	2 cases (although more are expected as the system came into force on 1 October 2015)
The Netherlands	Assignment Model	Unknown (but frequently used)
The Netherlands	WCAM	Unknown (but at least 8 settlements approved)
Belgium	Collective Redress Actions	4 cases
Germany	KapMuG	41 cases <sup>40</sup>
Austria	Collective Claim	Proceedings against 12 defendants
Spain	Collective Actions	Unknown
Poland	Class Proceedings	176 cases between 2010 and 2015
Italy	Class Action Law	Approximately 60 cases filed since 2010
Bulgaria	Proceedings in Collective Actions	Limited information available (at least 17 completed with a final ruling)

“ One often hears that collective redress in the EU is technically available but has not been taken up to any significant degree. This study demonstrates that this premise is incorrect. ”

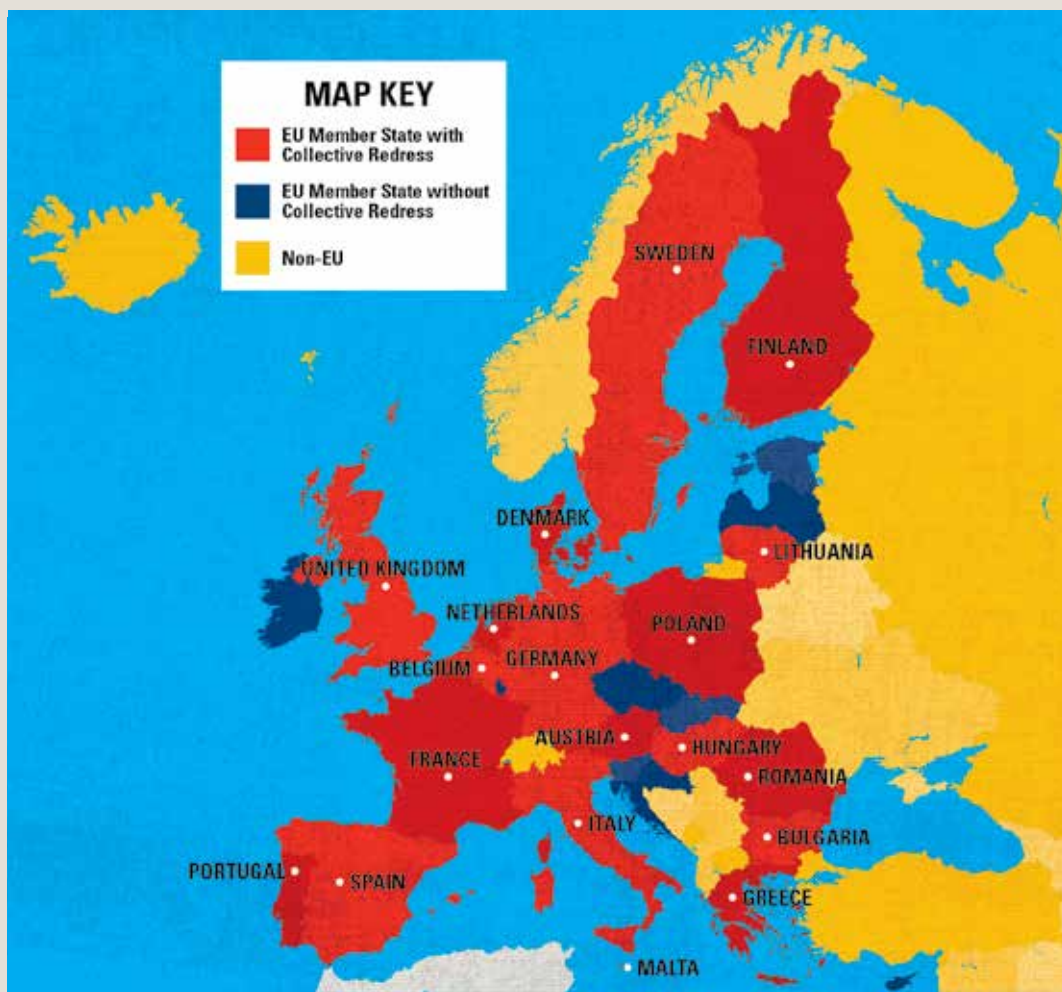
## Member State Class Action Systems Are Developing Rapidly

Most Member States now have some form of collective redress, as the map below indicates.<sup>41</sup>

From the rate of development, the number of different systems in operation and the number of different cases that have been filed, it is clear that class action laws and

models within the EU’s Member States are developing at a significant rate. Thus, even without any mandatory EU collective redress model, EU citizens increasingly have access to collective redress.

In most cases, collective redress systems have been adopted or developed in response to a general political desire to improve redress for victims of wrongdoing. The focus is typically on



the need to permit collectivisation of claims based on the belief that they will be more efficient. In almost all cases, there is recognition that safeguards are important to prevent litigation abuse, and often there is a specific recognition that emulating the U.S. class action system would lead to negative results. The assumption behind the development of collective redress systems is that they are necessary to require defendants to pay compensation where it is due, that the procedure will deliver that compensation efficiently and that, with some basic safeguards, litigation abuse will not arise.

## The Trend Is Towards Making It Easier to Sue

In some instances, collective redress litigation procedures have not initially been taken up to any significant degree. Instead of returning to the 'drawing board' and asking whether collective actions are even needed—or how compensation can be assured efficiently through other means—in some of these jurisdictions the low take-up of actions has led legislators to consider the alleviation of abuse safeguards in order to save their initial creation by making it easier to sue.

The argument is made that unless those willing to take on wrongdoers are compensated and rewarded, it may follow that no compensation reaches victims. Under this argument, allowing a lawyer, representative body or other third party, such as a third party funder, to take a share of any award is a price worth paying when the alternative is no compensation for anyone. If actions are still not pursued in significant numbers after the lowering of safeguards, the logical next step is to make it even more attractive, and so on. Under this logic, 'success' will be

achieved when collective actions are filed in significant numbers not because of any pursuit of justice, but simply because it has become economically beneficial to file them.

This logic and the opportunity for profit it creates are precisely what have led to the growth of a culture of abuse in the U.S. and other jurisdictions.

As an example of a typical set of developments, for many years the implementation of class actions in France was resisted, mainly due to (i) the financial crisis and the associated concerns about France's attractiveness to investors, and (ii) the fear of importing the defects of the U.S. system to France. Despite initial hesitation, France now has at least four separate systems of collective redress. As a safeguard, only 15 pre-approved entities were initially permitted to launch class actions under the 2014 French law on consumer protection.<sup>42</sup> However, the law introducing the Class Action for Health of 2016<sup>43</sup> resulted in the number of approved entities growing to around 500. This was further expanded in November 2016 by Act No. 2016-1547 on the Justice of the 21st Century (Justice Act),<sup>44</sup> which created specific class action procedures regarding harm arising from discrimination, misuse of personal data and breaches of environmental laws. These developments illustrate that initial reluctance has given way to wholesale adoption of collective redress as a preferred model.

Equally in the UK, a previous class action system for competition cases did not lead to significant claims or pay-outs, the largest being a settlement (relating to football shirts) valued at roughly £20,000.<sup>45</sup> This led directly to a new 'opt-out' class

action, which is highly similar to a U.S. class action, and is both designed and expected to lead to far more significant claims, thereby altering the incentives for abuse. As an indicator of the scale of the actions to come, a U.S. firm has brought a £14 billion UK consumer class action against MasterCard.<sup>46</sup> A litigation funder agreed to invest up to £40 million to pay the lawyers and costs, in exchange for a portion of the outcome.<sup>47</sup>

Other examples of Member States gradually making it easier to sue include the Netherlands, Poland and Italy, as will be explained further in the research.

### The Recommendation Has Not Been Closely Followed (If at All)

This study has not identified any changes to any of the Member States' laws which were introduced *only because* of the Recommendation. Nor has the study identified any national system which currently includes or plans to include all of the features recommended by the EC. Some of the systems have a few of the features, but almost all fail to follow the Recommendation to some extent. For example, the UK CAT Class Action, the Belgian Collective Redress Actions, the French Consumer Class Action and the French Class Action for Health have all been introduced since the Recommendation was published, but none of these systems follow the Recommendation in all respects.

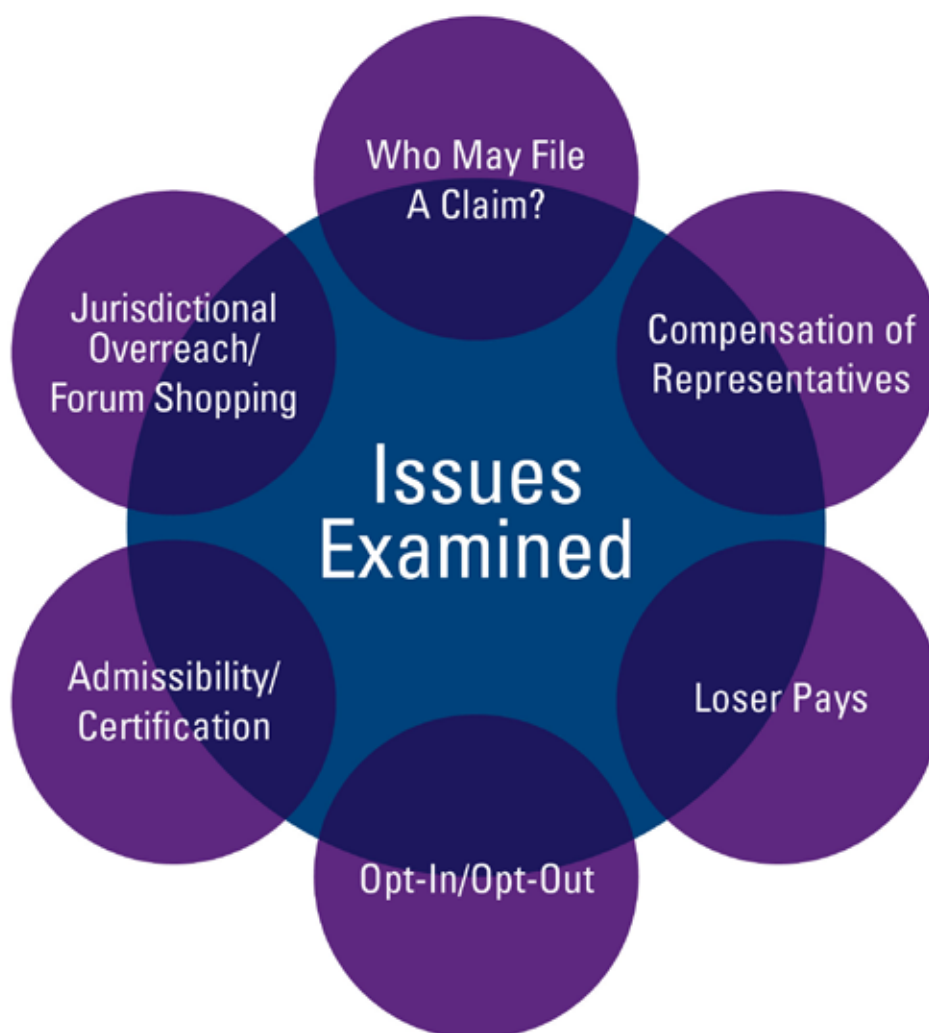
*“The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.”*

*The Recommendation, paragraph 10.*

# Part V: Survey Results in Six Key Policy Areas

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In order to examine the ‘levers’ of litigation—and what can make it more or less successful at delivering for consumers without being exposed to abuse—this survey focuses on six key features of collective redress litigation systems. It examines each theme horizontally across Member States and their respective systems. The six themes examined are as follows:





# Chapter 1: Who May File A Claim

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The Recommendation recognised that the issue of who may file a claim is critical if systems are to be capable of resisting capture by interests other than those directly harmed and wishing to claim compensation.

The Recommendation proposes a number of safeguards including that Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. According to the recommendation, these conditions should include at least the following requirements:

- (i) the entity should have a non-profit-making character;
- (ii) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and
- (iii) the entity should have sufficient capacity in terms of financial resources, human resources and legal expertise to represent multiple claimants acting in their best interests.<sup>48</sup>

The EU Member States surveyed face significant issues in satisfying these conditions.

## Examples of Member State Practices

### THE NETHERLANDS

The Dutch Assignment Model seems far from satisfying the safeguards set out in the Recommendation regarding who may file a claim, and appears highly vulnerable to abuse. In the Netherlands, ‘claims foundations’ or ‘claims vehicles’ entitled to represent consumers in litigation can be established by anyone—there are no qualification requirements such as minimum knowledge or experience. These unregulated ‘claims vehicles’ or claim foundations may take assignments of claims in a way which renders the system highly opaque, and efforts by defendants and the media to uncover whose interests such foundations really represent have often proven unsuccessful. There has been some controversy regarding the operation and financing of some claims vehicles, such as in the case of the claim foundation that was started on behalf of almost 200,000 consumers in a collective case against the national lottery for allegedly misleading information about the chances of winning

**“** *The Dutch Assignment Model seems far from satisfying the safeguards set out in the Recommendation regarding who may file a claim, and appears highly vulnerable to abuse. In the Netherlands, claims foundations or claims vehicles entitled to represent consumers in litigation can be established by anyone—there are no qualification requirements such as minimum knowledge or experience.* **”**

(‘the National Lottery Claim’). Consumers who wanted to join the claim had to pay €40 per person as a fee, totalling €8 million, to the claim foundation. According to some press reports, the director of the foundation allegedly funnelled millions of euros of this money into post-box companies in tax havens for personal gain.<sup>49</sup> There are a number of other examples of claims foundations now administering claims worth hundreds of millions of euros (e.g., a claim by the foundation ‘East West Debt’ in the Air Cargo litigation exceeds €500 million).

As an example of how the lack of sufficient safeguards makes it likely that private,

profit-motivated entities will pursue claims, in January 2017 a large securities action (the extent of the claim is not yet clear, but it involves billions of euros)<sup>50</sup> was launched on behalf of institutional investors residing outside of the U.S. against the Brazilian oil company Petrobras.<sup>51</sup> The claim was brought in the Court of Rotterdam by a claim foundation called ‘Stichting Petrobras Compensation Foundation’, which was created by a U.S.-based litigation funder and a group of international law firms, including two U.S. firms. More claims like these can be expected due to the loose standards applicable to the question of who may file a claim.

## AUSTRIA

Austrian Collective Claims are typically initiated by the Austrian Association for Consumer Information, which acts as claimant and assignee on behalf of consumers (the assignors). Additionally, the Austrian Chamber of Labour brings collective claims from time to time. Preferential treatment is granted to certain organisations explicitly named in the Consumer Protection Act by granting easier access to the Supreme Court. There is, however, no specific law or case law prescribing who may act as a claimant, and in practice other entities and persons have appeared as claimants. To date, the issue as to what extent a self-interested party acting for its own financial gain may act as a claimant does not appear to have been expressly evaluated by the Austrian Supreme Court.

## ITALY

In Italy, a class action can be initiated only by a consumer or a user who has the same rights to claim as the other members of the class. The consumer can bring the action personally or through a consumers' association or a representative body to which he or she belongs. A class action is a two-step procedure, with the first step being a certification phase in which the court decides on the admissibility of the class action. As part of this process, the court verifies that the lead plaintiff is a consumer/user and that he or she has the capacity to 'lead' the class action (including the capability to initially bear the costs related to the procedure). Most requests for class actions have not been certified, and the lead plaintiff not being 'representative' of the class has been used as grounds for refusal.<sup>52</sup> In the second stage of the procedure, the court decides on the merits of the case.

## GERMANY

Under Germany's KapMuG system, a 'model case' may be initiated by any investor who has brought an individual lawsuit claiming compensation for damages within the scope of Section 1 paragraph 1 KapMuG and, likewise, by any defendant in such a lawsuit. In order for a claimant to establish a model case, at least nine other claimants must file concurring motions for the establishment of a model case. In order for a defendant to establish a model case, it has to face at least nine other cases. Alternatively, it needs another defendant in a case with the same subject matter to also file an application for the establishment of a model case. The need to have at least 10 litigants in a similar situation is not a high threshold but does at least prevent cases being run principally by representatives/lawyers without the litigants themselves needing to participate.

## FRANCE

Under the French Web-Based Action, claims are now routinely initiated by internet-based entrepreneurs advertising class actions on their websites (e.g., by the organisations ActionCivile or Weclaim). The organisations are not selected, vetted or pre-approved by anyone. They claim up to one-third of any awards for themselves and their financial backers, in effect as a brokerage fee for establishing the website. Weclaim (and organisations like it) take no responsibility for the success or failure of any claims, and they do not hold any fiduciary responsibilities to preserve the interests of claimants (in the way, for example, a lawyer might). However, Weclaim is naturally the largest stakeholder in the claim, as it has the most to gain, and it can therefore be anticipated that it has powerful incentives to address its own interests first and over and above those of the victims in question.

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**“** *Under the French Web-Based Action, claims are now routinely initiated by internet-based entrepreneurs advertising class actions on their websites (e.g., by the organisations ActionCivile or Weclaim). The organisations are not selected, vetted or pre-approved by anyone. They claim up to one-third of any awards for themselves and their financial backers, in effect as a brokerage fee for establishing the website.* **”**

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Under the French Consumer Class Action and Class Action for Health systems, only government-approved associations may initiate class actions. These approved associations initiate claims on behalf of unidentified individual consumers who will constitute the future group/class of injured persons. Initially, there were 15 consumer associations with approval under the Consumer Class Action system, but the creation of the Class Action for Health<sup>53</sup> has changed the requirements (including abandoning a former requirement that associations be nationally representative). This means that around 500 associations are now entitled to initiate class actions in addition to the existing 15. The requirement for approved consumer associations was initially considered to be a safeguard against abuse, though the value of this safeguard is now questionable in that it has made actions by so many entities possible without any vetting required.

#### **BULGARIA**

In Bulgaria, a collective claim may be initiated by any person who claims to be a member of an injured class, as well as by any organisation for protection of injured persons or harmed collective interests.<sup>54</sup> Under this system, a representative claimant is under a legal obligation to protect the interests of a class genuinely and in good faith, as well as to bear the costs and expenses of the proceedings. The claimant's capacity to do so is examined by the court as part of the review of the admissibility of the claim, which can allow at least some vetting of whether a claimant is suitable.<sup>55</sup>

#### **BELGIUM**

Equally, under the Belgian system, the court must be satisfied, in addition to the formal eligibility criteria, that the representative is fit and proper to initiate a claim. Only the following entities meet the eligibility criteria to act as a class representative: (i) associations

defending consumers' interests, having legal personality and being a member of the Consumption Council or recognised by the Minister; (ii) associations having legal personality and existing for at least three years, approved by the Minister and whose main objective has a direct link with the collective harm suffered by the class which does not pursue an economic goal; and (iii) (only in the context of an application seeking declaration for a reached settlement to be binding) the federal government's consumer mediation service. As a result, physical persons, law firms and profit-seeking entities are excluded from bringing a claim.

## UK

Under the UK's CAT Class Action, a procedure exists to vet the appropriateness of the representative entity, and to ensure that the claims are suitable for collective determination.

However, while the representative entity will be assessed for credibility (e.g., the former Chief of the Financial Ombudsman Service has been identified as the lead claimant in a multibillion-euro claim against MasterCard in the UK), funders who may dictate aspects of the case, and often will have the most to gain, are not automatically subject to the same or any scrutiny.

## Conclusions

It is clear from the systems explored above that some Member States have little or no procedure to assess whether a representative is the appropriate entity to bring a collective claim. If the systems are too loose and too open, and representatives have the opportunity to pursue claims for their own benefit rather than the benefit of the injured parties, then there is a potential risk of improper motives spurring litigation.

*"Where the lawyers representing the claimants have a strong financial interest in the action, this can easily lead to conflicts of interest and, further, the lawyers may not necessarily act in the best interests of the claimants."*

*Private Actions in Competition Law: A consultation on options for reform – government response, paragraph 5.44.*

# Chapter 2: Compensation of Representatives and Other Third Parties

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“Where the lawyers representing the claimants have a strong financial interest in the action, this can easily lead to conflicts of interest and, further, the lawyers may not necessarily act in the best interests of the claimants.”<sup>56</sup>

The compensation of representatives and other third parties is central to the incentive to litigate and is among the main factors that can lead to litigation abuse. When the dominant interest being served is profit for representatives or other third parties, and compensation for victims becomes secondary, there is little to stop the litigation process from malfunctioning.

Compensation of representatives, in this context, covers three areas:

- compensation of the representative entity over and above the payment of any damages due for harm suffered;
- compensation of lawyers; and
- compensation of third party litigation funders.

## Representative Entities

In some Member States, private claimants do not automatically have the right to represent other claimants; instead, this opportunity falls to categories of representative entities. These can be entities that are pre-approved by government agencies (e.g., the list of government-approved consumer bodies entitled in France to lodge a Common Representative Action). In other cases the representative entities can be self-selecting (such as with the French Web-Based Actions and the Dutch Claims Foundation). In some cases the entities can be self-selecting but subject to a subsequent appropriateness check by the courts; for example, in the UK’s CAT Class Action there is a procedure to test the appropriateness of representatives against certain criteria. In other cases, no such vetting exists.

**“ It seems clear that permitting representative entities to earn profit from their activities (on top of their legal expenses and any compensation for harm that they might achieve) risks creating incentives to litigate that are about individual gain, rather than achieving justice. For this reason the Recommendation proposed that representative entities should have a non-profit making character. ”**

In circumstances where little or no vetting exists and representatives are in a position to profit from their representation of claimants, a risk arises that they will pursue claims for their own ends rather than the ends of those they represent.

It seems clear that permitting representative entities to earn profit from their activities (on top of their legal expenses and any compensation for harm that they might achieve) risks creating incentives to litigate that are about individual gain, rather than achieving justice. For this reason the Recommendation proposed that representative entities should have a non-profit making character.<sup>57</sup>

### Lawyers' Incentives

As to lawyers' fees and motivations, it should be recognised that lawyers have ethical duties and are closely regulated. In addition to these constraints, the Commission's Recommendation is resolute that it is necessary to prevent lawyers acting on a contingency fee basis in collective cases where such fees risk creating an incentive to litigate which is

unnecessary from the point of view of the parties (not the lawyer).<sup>58</sup> In many cases (e.g., Austria, France, Germany and the Netherlands) Member States have indeed chosen not to permit contingency fees for lawyers in light of the risks such fees present; however, in other systems, contingency fees are allowed. In the UK, for example, in 'opt-in' collective cases, lawyers are free to work on a contingency fee basis. This is also possible in Bulgaria. In Italy, the government is currently contemplating new legislation permitting contingency fees for lawyers for the explicit purposes of motivating them to take more collective cases.

In the U.S., despite the existence of bar regulation and the fiduciary duties owed by lawyers to their clients, the ability for lawyers to pursue collective cases on a basis which allows them to claim a share of any award has been among the chief motivating factors for abusive litigation. As discussed in Part II above, time and again the result has been that legal representatives extract significant rewards from cases, often leaving the represented class with little or nothing.

## Third Party Litigation Funding

The largest risk of skewed financial incentives in the EU, however, seems to come from third party litigation funding (TPLF). TPLF is the arrangement through which litigation costs are paid for by a party unconnected to a dispute, in exchange for an agreed percentage of any recovery.

Increasingly, financial investors (often private equity or hedge funds) are identifying, organising, instigating and managing cases by marketing to victims and then hiring and paying lawyers, all in exchange for a significant percentage of the recovery.

TPLF has now become a prominent feature of the litigation landscape in several Member States, most notably in the Netherlands and the UK. In some cases funders appear to have structural relationships with law firms.<sup>59</sup> Despite lawyers typically being prohibited from operating on a contingency fee basis

because of the risks to consumers and victims, none of the jurisdictions surveyed has any mandatory regulation of third party funding arrangements, which also operate on a contingency fee basis.

The funding industry in England and Wales has established the 'Association of Litigation Funders' which has a code of conduct.<sup>60</sup> However, the code is drafted by funders, there is no effective oversight mechanism and membership in the association is purely voluntary. Only seven of the many funders operating the UK—now estimated at over 20 and investing hundreds of millions of euros in pursuing litigation in the EU<sup>61</sup>—have signed up to the association and code.

Where funding exists in EU Member States, it operates in the shadows, without mandatory disclosure rules. It is thus very difficult to glean any information about the effects it is having on litigation in general. However, it is already clear that for-profit funders, specialised plaintiff firms, ad hoc foundations and

*“ Despite lawyers typically being prohibited from operating on a contingency fee basis because of the risks to consumers and victims, none of the jurisdictions surveyed has any mandatory regulation of third party funding arrangements, which also operate on a contingency fee basis. ”*



other litigation vehicles are now involved in much of the collective litigation in Europe.<sup>62</sup> Experience in other jurisdictions has shown that these funders find opportunity in raising consumer claims, though they do not necessarily have interests that are aligned with those they purport to assist or represent.

The rise of third party litigation funding may also have worrying implications for the relationship between lawyers and their clients. It is clear that funders with a significant stake in the litigation have every incentive to steer the litigation in their favour—and have the means to do so. As one commentator noted, “Lawyers in this arena need to acknowledge that, like it or not, they’re working for two masters. Acting for the claimant with disregard to the commercial imperatives of the funder will result in ruination for all.”<sup>63</sup>

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**“*Lawyers in this arena need to acknowledge that, like it or not, they’re working for two masters. Acting for the claimant with disregard to the commercial imperatives of the funder will result in ruination for all.*”**

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An example of litigation evaluated as an investment opportunity is the lawsuit brought against Volkswagen in Germany by its shareholders in response to the emissions case from 2015.<sup>64</sup> Bentham Europe, a London-based investment firm that is not a member of the Association of Litigation Funders, offered to cover all

costs of the action against Volkswagen in return for a share of any winnings (likely 18% to 24% depending on the size of the plaintiff’s shareholding).<sup>65</sup> Bentham Europe is owned by Elliott Management, a \$28 billion activist U.S. hedge fund. Bentham Europe is also behind the group action against Tesco in London and currently is organising a lawsuit for EU consumers who purchased trucks, following a Commission decision finding the existence of a cartel. All of these lawsuit investments are listed on Bentham Europe’s webpage.<sup>66</sup>

Hedge funds and similar entities may owe fiduciary or other duties to their investors, but they owe no duties whatsoever to the claimants in the lawsuits in which they invest. There is a clear risk of the interests of claimants being treated as a consideration which is secondary to the profit of funders.

The motives of funders are not difficult to understand. As one commentator noted, “it’s easy to see the appeal of an asset class that isn’t tethered to financial markets at a time when interest rates are at rock bottom and investment returns are anaemic. If the VW shareholders lose, [the third party investment] fund will have spent a few million euros to pay for German lawyers. If they win—and secure the €2 billion they’re seeking in damages—[the fund] could get back as much as €400 million, a potential return of 10,000 percent.”<sup>67</sup>

The Recommendation recognised that having a third party investor in a collective case gives rise to a risk of abuse. It proposed that “The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action” and that the court should be allowed to stay the action

“ It’s easy to see the appeal of an asset class that isn’t tethered to financial markets at a time when interest rates are at rock bottom and investment returns are anaemic. If the VW shareholders lose, [the third party investment] fund will have spent a few million euros to pay for German lawyers. If they win—and secure the €2 billion they’re seeking in damages—[the fund] could get back as much as €400 million, a potential return of 10,000 percent. ”

if there is a conflict of interest between the claimant and third party, if the third party has insufficient resources to meet its obligations or if the claimants have insufficient resources to meet an adverse costs order in the event of a loss. The Recommendation also makes clear that third parties should not be permitted to influence decisions regarding the course of the case, including on settlements.<sup>68</sup>

There appear to be no examples of any Member State adopting any of these safeguards.

## Examples of Member State Practices Regarding Compensation of Representatives, Lawyers and Third Party Funders

### AUSTRIA

In Austria, the law prohibits pure contingency arrangements for lawyers, but lawyers may enter into success fee arrangements under which an additional fee is payable if the claim is successful. However, the prohibition on contingency fee arrangements is not considered to apply to third party funders, despite the fact that it is common to have a

third party funder involved in Austrian Collective Claims. The funders typically receive compensation in the range of 20% to 40%, significantly reducing the amount awarded to the claimants. Although funding agreements are subject to the boundaries of Austrian law and may be deemed illegal if the funder’s share is found to be excessive, there are no specific regulations applicable to third party funders.

### GERMANY

In Germany, contingency fees for lawyers are not allowed as a matter of principle (with very limited exceptions for claimants who are not eligible for state funding but could not afford the cost of a lawsuit). However, there are no specific regulations for funders. Usually, the funders will request to approve all briefs before filing and in practice are known to seek to maintain control of how cases are run in order to protect their investments.

### THE NETHERLANDS

Article 23(2) of the Code of Conduct for the Dutch Bar (CCDB) forbids lawyers to cause unnecessary costs for their clients and other parties, and Article 5 CCDB provides

that only the interests of the client—and not the lawyers—should be taken into account in handling cases.<sup>69</sup> Additionally, Articles 25(2) and 25(3) prohibit the use of contingency fees.<sup>70</sup> All of these rules are in place to ensure that the method of remuneration does not create an incentive for lawyers to litigate a claim when it is unnecessary from the point of view of the client. However, the prohibition on contingency fees is not absolute, and lawyers’ remuneration may be based partly on the outcome of the litigation, provided that the base fees are sufficient to cover the cost of legal services.

In contrast, third party litigation funding is entirely unregulated. The parties may agree that the funder has a right of veto over the terms of any settlement or the direction of a case. The agreement may provide that if the funded party refuses to accept a settlement that the funder deems appropriate, the funded party shall reimburse all costs of the funder as well as the amount the funder would have received under the settlement. The validity of such terms was confirmed in a 2011 decision of the Amsterdam Court of Appeal, which held that such an agreement is not invalid per se.<sup>71, 72</sup>

In addition, as indicated above, there appear to be signs that ‘claims foundations’ (*i.e.*, the representative entities entitled to take collective claims) may themselves be in a position to extract profit from their activities, and they appear to be insufficiently vetted.

## UK

The UK’s voluntary regulatory regime through the above-mentioned Association of Litigation Funders is the closest that any EU Member State comes to any form of regulation of third party funders, but even this remains highly unsatisfactory. For instance, the code only requires that the litigation funding agreement shall state whether, and if so how, the funder may provide input into the claimant’s decision in relation to settlements (thus foreseeing funders’ seeking to influence case outcomes). The code also sets out circumstances in which the funder may terminate the funding. At first glance this seems to protect the claimant, but the circumstances in which the funder may terminate are extremely broad and include where the funder ‘reasonably believes that the dispute is no longer commercially viable’.<sup>73</sup> This could include

“ *The UK’s voluntary regulatory regime through the above-mentioned Association of Litigation Funders is the closest that any EU Member State comes to any form of regulation of third party funders, but even this remains highly unsatisfactory. For instance, the code only requires that the litigation funding agreement shall state whether, and if so how, the funder may provide input into the claimant’s decision in relation to settlements (thus foreseeing funders’ seeking to influence case outcomes).* ”

a situation in which the costs have escalated beyond what was originally anticipated. Considering the fact that some claimants may initiate a claim only when they have obtained third party funding, allowing funders to withdraw funding in the event of escalating costs seems to leave claimants unreasonably exposed to risk.

## FRANCE

The French Common Representative Action system allows for representative associations to ask each consumer to pay a retainer fee before initiating legal action. The associations can therefore be remunerated in addition to being reimbursed for their expenses, thereby giving them a profit motive to act.<sup>74</sup>

As indicated above, up to 500 different associations can now potentially initiate actions under the French Class Action for Health, and when a financial motive is possible, clear risks of abuse arise. Equally, the for-profit organisation of Web-Based Actions in France could also give rise to abuses, in that it is clearly a profit-seeking (rather than a justice-seeking) enterprise.

## ITALY

Currently, Italy's class action law does not appear to allow windfall profits to lawyers taking on collective actions. In the case of a favourable outcome under the current system, the lead plaintiff is entitled to a refund of legal fees on the basis of the 'loser pays' principle. However, proposed bill no. 1335<sup>75</sup> would introduce the role of a 'common representative' (the representative plaintiff or a professional appointed by the court) who is eligible to receive an additional award directly from the defendant if the claim is successful,

over and above the award for costs and compensation for any direct harm. It seems the purpose of this award is to provide a monetary incentive for representatives to bring collective claims. Where representatives stand to profit from claims, there is a real possibility of unnecessary or frivolous litigation being launched.

## BULGARIA

Under the Bulgarian system, the courts will seek to establish that the method of funding will not hamper the independence of the claimant before declaring the collective action admissible. Therefore, despite the fact that there is no regulation of third party funding of court actions under Bulgarian law, a certain degree of protection against abuse may be afforded by a court's enforcement of the rules on the independence of the claimant.

## Conclusions

These examples illustrate the ways different Member States approach remuneration of non-party representatives, lawyers and funders. Practices are developing organically, giving rise to the risk of vastly different approaches across the EU. Introducing additional remuneration for representatives and funders needs to be balanced against the risk that financial incentives could encourage the filing of dubious claims. Litigation abuse is fundamentally driven by financial incentives, so where representatives can profit, where lawyers can act on a windfall-fee basis and where third party funding is permitted for collective actions, the risk of litigation being pursued for motivations other than justice is very real.

# Chapter 3: Loser Pays

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The Recommendation provides that “Member States should ensure that the party that loses a Collective Redress Action reimburses necessary legal costs borne by the winning party (‘loser pays principle’), subject to the conditions provided for in the relevant national law.”<sup>76</sup>

This principle is regarded as an essential element in preventing the emergence of a risk-free ‘have a go’ litigation culture, which has been shown in other jurisdictions to promote unmeritorious litigation. Indeed, the EU’s loser pays principle is often cited as among the main reasons why the EU has not yet succumbed to the sort of mass litigation abuse seen in the U.S. In England and Wales, the rationale for the rule has been expressed as follows:

The main principle that underlies the rule is that if one party causes another unreasonably to incur legal costs, he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has caused the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting the claim should indemnify the defendant in respect of the costs he has caused the defendant to incur.<sup>77</sup>

In theory, the loser pays principle means that a wrongly accused defendant does not have to bear the costs of defending itself against a claim that was without merit. The rule should therefore provide an incentive for potential parties to litigation to seriously consider the merits of a case before bringing a lawsuit.

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“ However, this survey reveals that ‘loser pays’ is not the protection that many assume it to be. It exists—to some extent—in all of the jurisdictions surveyed. However, its application seems to be weakening significantly, particularly in collective contexts.”

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However, this survey reveals that ‘loser pays’ is not the protection that many assume it to be. It exists—to some extent—in all of the jurisdictions surveyed. However, its application seems to be weakening significantly, particularly in collective contexts. First, in most cases the loser pays principle applies to court costs—not the actual costs of an action, including the lawyers’ fees. Thus, claimants speculating on an action are not usually risking anything like the actual cost of defending an action.

Second, the growth of third party funding models across Europe reduces or eliminates some of the disincentive effect of loser pays. Third party funders typically pitch zero risk or ‘no-win, no-fee’ arrangements to claimants, meaning that claimants without the resources to mount a case will have all of their costs paid by the funder, and the funder will not recoup those costs nor take its fee if the case is lost. This can cause claimants to believe that they are not exposed to significant risk, and they may choose to litigate as a result.

Generally, responsibility for an adverse costs award is covered in the funding agreement. However, even though a funder may have inspired, arranged and funded an action, the courts in most jurisdictions surveyed do not have any way to hold funders directly responsible for adverse costs awards, as they often will not even know if a funder is involved. Instead, it will be up to the losing claimant to try to enforce a funding contract against a funder. There have been cases where funders have proven unwilling to meet their responsibilities once the prospect of an adverse costs award

arises.<sup>78</sup> The only exception is the UK, where funders can be held responsible for adverse costs, but even then funders’ exposure is capped by case law<sup>79</sup> (known as the ‘Arkin Cap’) to the limit of the amount the funder invested, which can be significantly short of the actual expense caused to a defendant.

Third, the loser pays principle is not being applied evenly in practice and in fact tends to apply almost exclusively against corporate defendants. In several jurisdictions, ‘loser pays’ exists in principle, but the court maintains discretion to decline to make the award against plaintiffs, even if they do lose.

## Examples of Member State Practices

### ITALY

Under Italian law, while the loser pays principle applies to class actions, the court typically orders the losing party to refund the winning party its legal costs and fees, unless it deems that it would be unfair to consent to such recovery. In theory, this is applied only in exceptional cases. However, in class actions, the courts frequently do not order the losing claimants to pay the defendants’ legal costs and fees.

### SPAIN

The situation is similar in Spain, where the loser pays principle applies, but the court does not have to apply it. Additionally, in practice, the Spanish courts tend not to apply the principle to consumer associations when collective actions are dismissed or not accepted on the basis of a procedural motion.

## FRANCE

In practice in France, lawsuits brought by individual claimants against corporate defendants rarely result in the claimants bearing any costs, even if they lose the case. For example, in its judgment of 27 January 2016, the Civil Court of Paris did not order the association CNL to pay any of the legal costs of the defendant, even though the Consumer Class Action was dismissed.<sup>80</sup>

## THE NETHERLANDS

Under Dutch law, costs can be awarded against a representative entity (such as a claims foundation) but never against the parties actually represented or any third party funders.

## UK

Under the UK's CAT Class Action, the law presumes that costs will not be awarded against individuals represented in a collective action, only against the person who has been appointed to represent all claimants. The typical level of 'actual' costs recovered for litigation in the UK varies, depending on the facts of the case and the approach taken by the court, but no costs orders have yet been made under the new opt-out proceedings.

## BELGIUM

The loser pays principle applies to Belgian Collective Redress Actions, but in practice the compensation for legal

representation is fixed at only a fraction of the actual cost. The fee awards are determined based on the amount of the claim being sought by the claimant (and if the amount exceeds €1 million, the standard procedural indemnity is fixed at a standard amount of €18,000).

## GERMANY

Only Germany's KapMuG model foresees individual claimants bearing their portion of the costs of the model case, though these costs are limited to minimum 'statutory fees' and would not equate to the actual costs of the case.

## Conclusions

The loser pays principle applies to some extent in all of the jurisdictions surveyed, but its application appears to be weakening. In practice, it is applied disproportionately to corporate defendants and therefore may not be an effective deterrent from 'have a go' litigation. Equally, the growth of third party litigation funding reduces the disincentive effect of the rule. This is a significant problem, as the loser pays principle has been a key safeguard against abusive litigation. The principle has been cited as a key way of protecting defendants against frivolous litigation, but in jurisdictions where it is applied exclusively against defendants, this cannot be seen as a protection.

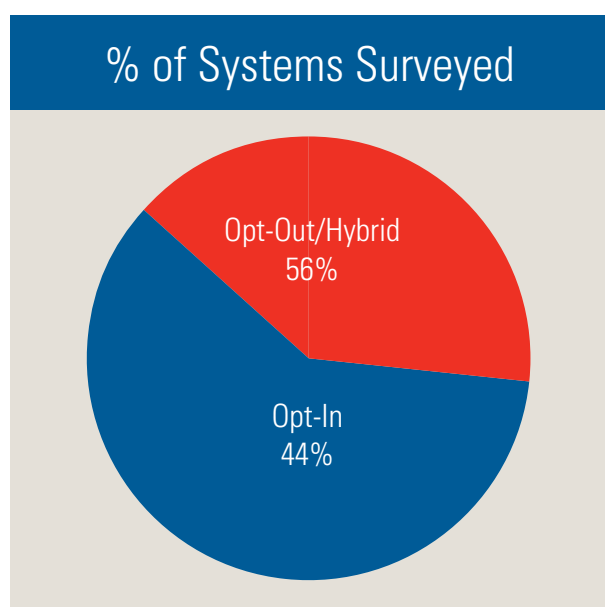
# Chapter 4: Opt-In/Opt-Out

The Recommendation provides that “[t]he 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.”<sup>81</sup>

It is an important step in the litigation process for a potential claimant to actively decide whether he or she wishes to initiate a claim. Opt-out rules remove this step and therefore undermine the autonomy of individuals, who may be parties to litigation they know nothing about. Opt-out systems (such as that in the United States) also increase the pressure of ‘blackmail settlements’ by establishing over-inclusive claimant groups, thereby inflating the risk to the defendant. A claimant lawyer need not identify all of the members of the group, nor specify their individual losses.

## Examples of Member State Practices: Opt-In

Of the systems surveyed, the following are opt-in: Austria (Austrian Collective Claim), France (Class Action for Health), France (Consumer Class Action), France (Common Representative Action), France (Web-Based Actions), Italy (Class Action Law), Netherlands (Assignment), Poland (Class Proceedings) and UK (GLO). Opt-in proceedings have the potential to provide more protection against frivolous claims, but it is not a flawless system and opportunities for abuse still abound.



## Opt-Out/Hybrid

There are strong indications that opt-out mechanisms are far more likely to be open to abuse than opt-in. The following are opt-out or hybrid mechanisms: Belgium (Collective Redress Actions), Bulgaria (Proceedings in Collective Actions), Germany (KapMuG), Netherlands (WCAM), Spain (Collective Actions), the UK (CAT) and the UK (Representative Proceedings). With the exception of the Spanish system, these opt-out or hybrid systems have all been introduced since 2005, which could indicate a possible



shift away from opt-in systems in recent years. A further example of this shift is the proposed Dutch bill (discussed in more detail below), which would create a new opt-out class action for damages in the Netherlands.

*“ A partner in a leading class action law firm stated that the opt-out proceedings in the CAT had ‘all the features of the US system’.”*

## UK

In the UK, the Consumer Rights Act of 2015 introduced opt-out proceedings for collective actions for the first time (although the CAT itself will state whether any collective proceedings will be opt-in or opt-out), and the new regime applies retrospectively. In these cases, anyone residing in the UK who is within the defined class is automatically included in the action unless he or she opts-out. There is no need for the representatives to identify all of the members or to specify their losses. Initially, the intention was to exclude funders, law firms and special purpose vehicles from acting as representatives<sup>82</sup> for either consumers or businesses in collective proceedings, but no such provision was incorporated into the legislation or the CAT rules<sup>83</sup> or Guidance.<sup>84</sup> A partner in a leading class action law firm stated that the opt-out proceedings in the CAT had ‘all the features of the US system’.<sup>85</sup>

The largest-ever damages claim in English legal history (£14 billion) is being brought against MasterCard under the (opt-out) UK CAT Class Action system. This follows a decision in September 2014 of the European Commission that MasterCard had set a minimum price for merchants processing payments in the European Economic Area, which was found to be anti-competitive. The proceedings, due to the exceedingly large number of consumers (estimated at around 46 million individuals<sup>86</sup>) and accompanying complexity, are expected to be lengthy and costly. The claim, filed in September 2016, is unlikely to be heard until 2018 at the earliest, should the claim be approved by the CAT (the application for a Collective Proceedings Order to authorise the claim and confirm whether the proceedings will be under the opt-out mechanism was heard in January 2017).

## BELGIUM

Similar to the UK system, the Belgian Collective Redress Actions system is a hybrid in the sense that the court will determine whether an action should be opt-in or opt-out. The court will typically apply the opt-in mechanism if it is difficult to estimate the number of consumers harmed or if the assessment of their loss requires their active involvement. The opt-out mechanism will usually be applied where the cases are scattered and of relatively low value.

## SPAIN

The Spanish Collective Actions system is an opt-out system in that the decision issued in collective actions is binding on all the members of the class. The procedure further allows for the possibility of any represented consumer to file supplementary allegations to the collective action, and to that end the law sets out specific procedures for

publicising the lawsuit to enable any member of the class to join the litigation on that supplementary basis. An unusual feature of the Spanish system is that the Civil Procedures Act does not provide any way for the represented consumers to opt-out of the action and thereby avoid being bound by the decision.

## Conclusions

Opt-out group proceedings are a cause for concern, as they may be seen as contrary to fundamental legal principles because they give a representative party the power to assert claims on behalf of people without their consent. This robs group members of their legal autonomy, because individuals can become participants in litigation that they do not support—or that they outright oppose. In most cases, response levels to an opt-out notice are unlikely to provide an indication of the support for the collective action, as it is difficult to determine if people have not responded because they wish to remain included in the class or because they are not at all interested in the action.

Opt-out systems also hurt consumers because they put lawyers or representatives in charge of very large cases involving groups of mostly apathetic claimants, with no real client accountability.

Jurisdictions such as Belgium and the UK have hybrid systems that provide some form of protection against abuse by giving courts discretion as to whether the claim should be opt-in or opt-out. However, while this gives a certain degree of protection, it does not change the fact that opt-out systems are more vulnerable to abuse. By contrast, in opt-in proceedings, the groups tend to include only claimants who are personally and actively interested in pursuing their rights.

*Opt-out collective litigation robs individuals of their legal autonomy and creates opportunities for abuse.*

Looking at the systems examined above, it is clear that the Member States are increasingly experimenting with opt-out features, which increases the risk of improper incentives motivating collective litigation. The provision in the Recommendation stating that exceptions to the opt-in system should be 'duly justified' has seemingly not been followed, which may lead to an increased risk of abuse in this area.

# Chapter 5: Admissibility and Certification Standards

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Experience in other jurisdictions shows that where unmeritorious claims are not identified and denied at an early stage, defendants can be subjected to extensive negative publicity and face very significant unrecoverable costs. This harm to defendants is exactly what leads to ‘blackmail settlements’—that is, cases in which defendants have little practical choice but to pay to end even manifestly unfounded collective claims because of their size and scope. The potential consequences of the lack of a certification stage have been seen in both Australian<sup>87</sup> and Canadian<sup>88</sup> class action systems.

The Recommendation notes that “[t]he Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued. . . . To this end, the courts should carry out the necessary examination of their own motion.”<sup>89</sup>

## Examples of Member State Practices

The survey reveals that rules in the EU regarding admissibility and certification are highly uneven. In a few cases, plaintiffs must seek the active permission of the relevant court to file a collective

claim, and there is a preliminary assessment of the merits. In others there are few, if any, controls.

### GERMANY

For example, under Germany’s KapMuG model, the court must receive and consider an application to establish and initiate a model case, and is required to deny the application if basic preliminary criteria are not met. Every application requesting a model case to be initiated is published in a register, so that other potential claimants have a chance to file their own applications. There is a discrepancy between the number of applications filed (51 cases in 2015 and the first half of 2016 alone) and the number of

cases that are actually opened (41 cases since the system came into force in 2005). This shows that a significant number of cases are filed that do not meet the basic criteria, and illustrates the importance of a vetting procedure.

## **UK**

In the UK's new class action model, the court must certify claims as suitable after considering a list of criteria including the merits and the appropriateness of collective action. If these tests are not met, the class action may not proceed.

## **ITALY**

In Italy, although around 50 class actions have been filed since 2010 (on the basis of the information collected in the survey), only around 10 of them have been declared as admissible. However, it seems that the trend is changing, and recent class actions in Italy have more frequently been passing the admissibility test. For example, the class actions filed by consumer associations against two automotive companies (Volkswagen and Fiat) for allegedly rigging diesel vehicles to pass emissions tests were initially declared inadmissible. However, those decisions were reversed by the relevant courts of appeals.

## **FRANCE**

Under France's Common Representative Action, there are no specific rules permitting the court to assess admissibility or certification as preliminary issues. These issues may be governed by ordinary rules of procedure that are applicable to all claims and that have not been adapted to collective contexts. Given the often complex nature of collective actions, ordinary rules of procedure may not provide an appropriate assessment of the suitability of collective claims.

Under the French Web-Based Actions, the website owners themselves assess the chances of success, but this is not a formal process and the websites are free to promote a claim or not. Additionally, there is no certification stage in the context of Web-Based Actions. The websites are designed to 'scale-up' the claims, and media coverage is encouraged (which has an immediate impact on the image of the entities targeted, whether merited or not, potentially encouraging settlement in even unmeritorious cases). This 'scaling-up' means that the defendants may end up facing thousands of actions that could be brought in different courts, without even a rudimentary examination of whether the claims are viable, leaving them vulnerable to abuse.

## **SPAIN**

In Spain, for both individual and collective cases, the procedure to instigate a lawsuit is managed by court officials rather than a judge. The Spanish 1985 Judiciary Law allows for the court to reject actions which are 'clearly flawed' or where the filing amounts to 'procedural fraud'.<sup>90</sup> This has allowed defendants to file motions against admission on the basis of a lack of commonality of the underlying cases. However, because there is no specific regulation of collective actions' admissibility, defendants do not have any guarantee that they will be able to challenge admissibility on this basis. Commonality may be challenged by means of a procedural motion as part of their defence once the collective action has been accepted; however, there is neither an admissibility procedure nor a certification process at any stage before a collective action has been accepted under the Spanish Collective Actions system.

## THE NETHERLANDS

Under Dutch law there is no procedure available to determine at an early stage whether a claim is admissible or whether it conforms to basic certification criteria. Moreover, Dutch civil procedural law does not provide for motions to dismiss or strike out applications. The Netherlands is already considered an attractive jurisdiction in which to bring a claim,<sup>91</sup> and this lack of regulation, along with the fact that proceedings are relatively cheap, is likely to contribute to this perception.

*No lawsuit should be allowed to proceed as a collective action unless the court determines, at the outset of the case, that a collective action is superior to all other procedures.*

One area where the Recommendation can be criticised is that it proposes that national admissibility rules should not prevent pan-EU class actions where a dispute concerns natural or legal persons from several Member States, and states that “any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.”

## ***Class Actions in France***

*In the consumer field, the following lessons may be drawn from the nine class actions initiated so far:*

- *Several consumer associations carried out effective media strategies when they introduced their class actions. This led to important media coverage, which had an immediate impact on the image of the defendants.*
- *In order to maximise the impact of their announcements, the consumer associations generally assessed the total amount of the alleged damages broadly in their press releases.*
- *Reputational damage arises before there is any opportunity to vet claims.*

Such critics as ILR voiced concerns at the time of the Recommendation that this would encourage claimant vehicles to seek 'official designation' in whichever Member State had the lowest thresholds, and use that as a 'passport' to litigate in other jurisdictions, thereby evading any more stringent admissibility and certification standards.<sup>92</sup> For example, France has very low standards and has granted official designation to large numbers of entities in relation to its Class Action for Health claims. If this aspect of the Recommendation were followed (which it has not been), such entities would be free to deem themselves pre-approved to litigate in other Member States without

any substantive vetting, meaning that this safeguard would lack all effectiveness.

## Conclusions

From examining the processes in these jurisdictions, it is clear that there is great diversity when it comes to admissibility and certification for collective actions. This makes it likely that some jurisdictions are vulnerable to opportunistic claimants and law firms, or those who may try their luck with speculative cases. Additionally, wide variance in admissibility standards for collective actions may encourage forum shopping and multiple duplicative actions across the EU, as discussed in the next section.

*“ [I]t is clear that there is great diversity when it comes to admissibility and certification for collective actions. This makes it likely that some jurisdictions are vulnerable to opportunistic claimants and law firms, or those who may try their luck with speculative cases. ”*

# Chapter 6: Jurisdictional Overreach/Forum Shopping

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An important issue in pan-EU collective actions is the allocation of jurisdictions to different courts within the EU, particularly in cases that might involve parties or facts that span several Member States. Many jurisdictional issues are addressed by the Brussels Regulation,<sup>93</sup> the key piece of European legislation on jurisdiction and enforcement issues in civil and commercial matters, used by the courts in all Member States to determine if they have jurisdiction in cases with links to more than one EU country.

Despite the Brussels Regulation, there are some cases (described below) in which Member State courts have been seen to overreach, asserting jurisdiction over claims in surprising ways. This dynamic matters because it can give rise to ‘forum shopping’: allowing plaintiffs to launch claims wherever the opportunity for them is greatest, as opposed to whichever is the most suitable jurisdiction based on the facts or law.

## Examples of Member State Practices

### ITALY

In Italy, the Consumer Code<sup>94</sup> states that the court with jurisdiction in a class action is the court of the capital of the region where the defendant has its registered office.

### FRANCE

In France, nothing prevents a foreign corporation from being named as a defendant, and nothing prevents foreign plaintiffs from joining a French claim. For example, in June 1995 the consumer association Union Féminine Civique et Sociale (UFCS) brought a common representation action for around 60 consumers against a German bank (Commerzbank) and a German insurance company (Deutscher Lloyd). UFCS brought proceedings against these companies on the grounds of misrepresentation, requesting the rescission of certain loan contracts. The court ruled that the contracts could be rescinded.<sup>95</sup>

Under the French Consumer Class Action system, if the defendant is located in France, the competent court is the court of the place where the contractual obligation

was or should have been performed. If France is the appropriate jurisdiction in which to bring a claim despite the defendant being located outside France, the competent court is exclusively the Paris Civil Court (confirming that Consumer Class Actions can be brought against foreign defendants).

## **BELGIUM**

In Belgium, the class in a Collective Redress Action consists of all consumers who have suffered ‘collective harm’—regardless of where they reside (although consumers outside of Belgium may participate only via an opt-in mechanism). Collective Redress Actions can therefore be brought on behalf of consumers based outside of Belgium before the Belgian courts.

## **AUSTRIA**

Under Austrian law, the provisions on jurisdiction permit a claimant to file a claim in the Austrian courts against defendants who have no domicile or seat in the EU, provided they have assets in Austria. This could give rise to claims being resolved in Austria that have little real nexus with that Member State.

One example of Austria being invited to adjudicate claims with consequences outside its jurisdiction is an Austrian Collective Claim brought in 2014 by the Austrian law student Maximilian Schrems against Facebook Ireland Ltd. on behalf of 75,000 Facebook users who are stated to have assigned or offered to assign their claims to Schrems. The claim is for damages as a result of an alleged breach of data protection laws. Schrems is relying on the jurisdictional privilege attributed by EU law to consumers to bring a claim in their country of domicile.

Schrems claims that as a consumer domiciled in Vienna, he can rely on this privilege for claims which consumers domiciled outside of Vienna, outside of Austria, and outside of the EU have assigned to him. So far in this case, the Vienna courts of the first two instances have denied jurisdiction for the claim. The case is now pending before the Austrian Supreme Court, which has referred certain questions of EU law to the Court of Justice of the European Union.<sup>96</sup>

## **UK**

In the UK, case law confirms that Representative Proceedings can be brought on behalf of claimants outside the UK. The English courts have also asserted broad jurisdiction over foreign defendants (*i.e.*, defendants located outside of the UK). For example, in *Provimi*,<sup>97</sup> a European Commission decision found that a non-UK company had participated in a cartel. An action was filed against that company’s UK subsidiary in order to vest the English courts with jurisdiction. The court found that the subsidiary was active in the same business area as its parent and, therefore, by following the directions of its parent, had unwittingly participated in the ‘implementation’ of a cartel.

Despite the subsidiary having no role in or even knowledge of the existence of the cartel, it was deemed a valid defendant and the court claimed jurisdiction. Under English law, once jurisdiction over one defendant has been established, it can be treated as an ‘anchor’, meaning that—in a cartel situation—all of the defendants’ co-cartelists (regardless of their domicile or the scope of their activities) can also be sued in the same action before the UK courts.



## THE NETHERLANDS

Equally, in the Dutch WCAM procedure, the Court of Amsterdam asserts jurisdiction over all defendants in an action if one of them has its domicile in the court's district. It also has taken a broad view of its jurisdiction in cross-border cases. In the Royal Dutch Shell case involving a securities claim, the

Dutch court assumed jurisdiction over shareholders all over the world on the grounds that 800 shareholders out of more than 100,000 were domiciled in the Netherlands.<sup>98</sup> In *Converium*, the court asserted global jurisdiction based on 2% of the shareholders being domiciled in the Netherlands.<sup>99</sup>

### **Converium Settlement**

*Converium was a Swiss reinsurance company of which the common shares were listed on the Swiss Exchange (SWX), and American Depositary Shares were listed on the New York Stock Exchange (NYSE). Converium's share prices declined after the company announced increases to its loss reserves between 2002 and 2004. These announcements led to securities class actions in the U.S., which were ultimately settled and approved by the United States District Court for the Southern District of New York. However, the District Court declined jurisdiction in respect of claims brought by any shareholder who had not bought Converium shares on the NYSE and who was at the time of his or her investment living or based outside of the United States. A Dutch foundation, Stichting Converium Securities Compensation Foundation, was created to represent non-U.S. residents who had purchased Converium securities on any non-U.S. exchange in the relevant period. Converium and the foundation went on to settle the potential claims of all those non-U.S. shareholders. This collective settlement agreement effectively complemented the settlement agreement that had been approved in the United States. The collective settlement, which represented a value of US\$58 million, was approved and declared binding on a 'worldwide' basis by the Amsterdam Court of Appeal.*

## Forum Shopping Within Member States

Forum shopping is also possible within some Member States. Under the French Class Action for Health, all civil and administrative courts, in theory, have jurisdiction regarding health class actions. This means that there is a risk of forum shopping within France, as the claimant associations could carefully choose the representative individuals to take advantage of the rules on territorial jurisdiction. Similarly, under the French Web-Based Actions, claimants may have several options regarding territorial jurisdiction. The platforms representing a high number of claimants could use these options in a strategic way, either by filing individual actions before the same court (most of the time before the court having jurisdiction over the place where the defendant has its head office), or by filing them in as many different courts as possible in order to increase procedural costs and pressure on the defendant.<sup>100</sup>

Another example of forum shopping within a Member State is under the Spanish Collective Actions regime. Recently, there have been examples of consumer associations trying to have collective actions relating to financial services allotted to a specific court in Barcelona. The court is reported to

favour cases in which consumer rights are claimed, but the allotment of cases in Spain is made arbitrarily, by means of a computer system which allots each case randomly to courts within the same city or region. In order to circumvent this system, the consumer associations have reportedly filed and withdrawn the same legal action several times until the case was allotted to the preferred court. Aside from the potential allegations of procedural fraud that may arise as a result of this conduct, it highlights the potential for abuse within systems where plaintiffs are able to ‘forum shop’.

## Conclusions

Very different jurisdictional thresholds apply across the EU. In order to prevent forum shopping among Member States, any collective redress regime must provide that a claimant may bring a claim only in the jurisdiction where the defendant is a resident or in which it would be amenable to suit under ordinary jurisdiction or venue rules—for example, the jurisdiction in which an injury was allegedly suffered by the claimants. The absence of this specific requirement in European collective redress procedures means that claimants may be able to bring claims in the friendliest jurisdictions, opening up defendants to the risk of ‘blackmail settlements’ and unmeritorious litigation.

# Part VI: Example Cases

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Having examined key issues by reference to the practices in different jurisdictions, we now shift to a holistic assessment of several recent cases that illustrate the essential characteristics of some example collective redress cases that have already been filed in the EU.

As will be shown below, these cases are arising in multiple areas (e.g., securitisation, competition law), in multiple Member States, and in some cases are among the largest legal actions ever filed in their respective Member States.

## RBS Settlement of Shareholder Action (UK)

Shareholder litigation against RBS<sup>101</sup> is the most significant UK Group Litigation Order (GLO) to date. On 18 December 2013, the High Court approved a GLO encompassing all claims by shareholders or former shareholders of the Royal Bank of Scotland Group plc who purchased shares in the RBS rights issue of April–June 2008.

The claims alleged misrepresentation in the bank’s prospectus for the £12 billion rights issue made just months before it was bailed out by the British government. Thousands of claimants, ranging from large institutional investors to individual claimants, claimed over £4 billion, making this GLO one of the most expensive lawsuits in UK history. The legal fees for RBS alone are predicted to reach £90 million.<sup>102</sup>

In December 2016, RBS reached a settlement agreement, without admitting any liability, with three of the five shareholder groups representing thousands of investors. However, one of the two groups rejecting the deal, the RBS Shareholder Action Group, represents a large number of retail

“ *The RBS case reflects new features of European class actions previously associated with the U.S. system. One of these is the involvement of third party litigation funders. Another is the involvement of a U.S. law firm...* ”

investors who may yet force the bank into a lengthy and costly trial.

The RBS case reflects new features of European class actions previously associated with the U.S. system. One of these is the involvement of third party litigation funders. Another is the involvement of a U.S. law firm, Quinn Emanuel (which is also representing the plaintiffs in the class action filed against MasterCard in the UK).

This case could be seen as an indicator of future collective action in the UK.

The RBS settlement in the UK came just several months after a €1.204 billion settlement of the collective investor claims against Fortis in the Netherlands.

### Fortis Shareholder Action (The Netherlands)

In the largest investor settlement ever under Dutch law, several shareholder foundations reached an agreement in 2016 to settle their claims for a total of €1.204 billion.<sup>103</sup> The claims related to Fortis's participation in the consortium of banks to acquire ABN AMRO (the largest bank acquisition at the time). The transaction allegedly depleted Fortis's balance sheet just prior to the start of the financial crisis.

The sheer size of the settlement makes this case significant in its own right, but also of significance is the fact that it could signal the Dutch system becoming the preferred platform for global resolution of collective shareholder claims (particularly since, as discussed above, the Amsterdam court takes a wide view of its own cross-border jurisdiction).

First, the Fortis settlement is the first time the Dutch procedures were used to reach a settlement and resolve claims that did not involve a prior settlement of a U.S. securities class action (in this case, the U.S. action was dismissed for lack of jurisdiction). Second, the defendant party to the settlement was a Belgian company, Ageas (Fortis's successor in interest). The Fortis settlement shows a trend towards Dutch procedures being used to resolve the claims of investors from multiple jurisdictions. The fact that settlements are deemed globally binding under Dutch law may make them appealing to claimants and can also be appealing to defendants in some circumstances.

As in the RBS case, the Fortis case was driven at least in part by the active involvement of two U.S. plaintiffs' class action law firms which financed one of the shareholder groups. The geographic spread of these firms could be a factor in the evolution of class actions in the Netherlands, the UK and elsewhere outside of the U.S.

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*“ As in the RBS case, the Fortis case was driven at least in part by the active involvement of two U.S. plaintiffs' class action law firms which financed one of the shareholder groups. The geographic spread of these firms could be a factor in the evolution of class actions in the Netherlands, the UK and elsewhere outside of the U.S. ”*

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## Volkswagen (Multiple Legal Areas, Multiple Jurisdictions)

On 18 September 2015, the U.S. Environmental Protection Agency alleged that certain Volkswagen and Audi cars included software that modified emissions of certain air pollutants (known as a 'defeat device').<sup>104</sup> The Volkswagen group admitted that about 11 million vehicles worldwide contained software that could distinguish between testing and road conditions. This has resulted in investors, employees, directors, suppliers and consumers having potential claims against the company.

A number of consumer lawsuits against the company have been filed collectively. On 25 September 2015, a Netherlands-based investors association announced that it had initiated a liability claim under Dutch law on behalf of shareholders who purchased Volkswagen shares through a Dutch bank or broker (it should be noted that this action also has the backing of a U.S. plaintiff firm, Bernstein Litowitz Berger & Grossmann).<sup>105</sup> In addition to the lawsuit filed in the Netherlands, several other claims have been initiated, including in Germany, Belgium and the UK. A further claim is being launched under the French Web-Based Actions system, which would potentially bring in as many individual actions as the number of people who signed up to the action online. There does not appear to be a specific time limit for individuals to join the action, and the claim is being brought under a no-win, no-fee policy.<sup>106</sup>

As a result of the allegations, Volkswagen entered into a \$15.3 billion settlement in the U.S.,<sup>107</sup> but no settlement has so far been reached in the EU. One likely reason is due to the different approaches to air-quality standards in the U.S. and

Europe as well as the fact that the legal definition of 'defeat device technology' is unclear in Europe. Another is likely to be the multitude of disjointed actions. Věra Jourová, the EU's Commissioner for Consumer Affairs, has said that if consumer authorities file 'collective actions' before the national courts, then damages could be sought, thus illustrating the increasing appetite for more collective litigation without there being a systematic focus on the need for safeguards.<sup>108</sup> This could have far-reaching consequences for the future of collective redress in Europe.

If collective redress is used as a form of punishment, rather than as genuine compensation for multiple harmed individuals, this would detract from the purpose of collective action. Punishing defendants who may or may not have violated the law, or seeking to deter them from future misconduct, should remain the exclusive responsibility of public authorities. At the same time, private collective litigation should not be used as a vehicle to promote social causes.

## Truck Makers and Competition Damages (Multiple Jurisdictions)

On 19 July 2016, the European Commission issued a record €2.9 billion fine to five major truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco and DAF)<sup>109</sup> after it found that they coordinated pricing and conspired to pass on the costs of compliance with emissions rules in the late 1990s and early 2000s.<sup>110</sup> As a result, the UK Road Haulage Association has indicated that it will be applying to become the representative body in collective proceedings on behalf of UK hauliers in the CAT. A German fruit and vegetable trade association (Deutsche Fruchthandelsverband) called for its

members to sign up to a planned joint damages action against members of the cartel, which it is looking to settle out of court.

Additionally, litigation funder Bentham Europe (owned by subsidiary entities of U.S. hedge fund Elliott Management) announced plans to fund a potential €100 billion damages claim against the cartel members.<sup>111</sup> Bentham estimates that 10 million trucks were sold across the EU in the 14 years that the cartel was in operation, and that each one was overpriced by about €10,500. It has not yet been announced which law firm will bring the claim or in which European jurisdiction it will be filed. In addition to these claims, in January 2017 it was announced that around 2,000 Italian companies have signed up to join a collective damages action against the truck manufacturers.<sup>112</sup> CNA-Fita Nazionale Imprese di Trasporto announced in July 2016 that it intended to launch a collective damages action, seemingly in Italy, and called on truck purchasers to apply.<sup>113</sup>

## Other Examples

There are numerous other examples of the dangers of collective redress and the effects it is already having in Europe. In a Green Paper on Financial Services,<sup>114</sup> the Commission explored issues relating to redress. The Commission's starting premise in discussing Collective Redress Actions in this regard was that they have proven to be an effective tool, but on closer inspection of the cases cited, this does not appear to be the case. The examples used in the Green Paper relate to Collective Redress Actions launched in regard to life insurance products in France<sup>115</sup> and in relation to preferred shares and financial pyramid schemes

in Spain.<sup>116</sup> However, it is understood that in both cases, the actions are still pending and neither has resulted in any redress for the individual claimants. It remains to be seen whether any redress will be delivered at all as a result of these claims. The mere possibility of launching a form of collective actions is entirely distinct from the question of whether a collective action is an effective means to actually deliver redress to claimants.<sup>117</sup> This is further highlighted by the case brought in Poland in 2010 against the public authorities whose duty it was to maintain flood defences in the Sandomierz area.<sup>118</sup> Due to issues with class certification and various appeals, this case is still ongoing seven years after it was filed, demonstrating the potential for inefficiency in collective claims.

A further notable example is the case brought against Immobilière 3F, a private social landlord, under the French Consumer Class Action before the Civil Court of Paris. On 3 November 2014, the consumer association Confédération Nationale du Logement (CNL) announced the action, and the writ of summons was served on Immobilière 3F on 5 January 2015 (*i.e.*, two months after the press statement). CNL claimed that Immobilière 3F breached its contractual obligations by inserting a penalty clause for delayed rent payments into its rental agreements. CNL alleged that this was abusive, pursuant to both the Consumer Code and Act No. 89-462 of 6 July 1989 aimed at improving the tenancy relations. In its initial press statement, CNL claimed that the group of victims could be composed of 480,000 tenants,<sup>119</sup> despite the fact that the class action was eventually based on only four representative plaintiffs.

On 27 January 2016, the Civil Court of Paris found the class action to be

admissible but dismissed it on the merits.<sup>120</sup> The Civil Court first noted that the 1989 Act did not expressly prohibit penalty clauses in rental leases before being amended by Act No. 2014-366 of 24 March 2014. Regarding the claims dealing with the period after the 2014 Act, the Civil Court ruled that the alleged defendant's breaches were not sufficiently substantiated for the four class representative plaintiffs, because the defendant communicated rent receipts for June 2014 mentioning that the penalties charged on the April 2014 rents had been reimbursed. An appeal on this case is currently pending before the Paris Court of Appeal, but it could be an example of how public announcements and the threat of hundreds of thousands of plaintiffs may be used to inflate claims.

These case studies demonstrate the risks that unchecked systems of collective redress may pose—not only to potential claimants and companies, but to access to justice more broadly.

## Legislative Developments— Heading Towards Ever-Lower Safeguards?

### THE NETHERLANDS

On 16 November 2016, the Dutch Minister of Security and Justice submitted a legislative proposal to the House of Representatives, aimed at clearing the way for collective actions for damages in the Netherlands under Article 3:305a Dutch Civil Code. At the time of writing, this proposal still needs to go through both Chambers of Parliament, but it has been a long time in the making and has been the subject of extensive formal and informal rounds of consultation. The proposal introduces the possibility of claiming damages in a collective action (under current law, collective actions

are limited to requesting a declaratory judgment) under an opt-out regime.<sup>121</sup>

The Netherlands is already considered an attractive jurisdiction for plaintiffs bringing actions for collective redress, and the new proposals are likely to enhance this popularity. While the proposal includes a 'scope rule' (under which the class action must have a 'sufficiently close connection' with the Netherlands in order to proceed), the threshold is not high.<sup>122</sup> The class will not necessarily be limited to Dutch claimants, and if the defendant is located in the Netherlands, the class could potentially be worldwide in scope. The proposed collective action can be brought on behalf of both consumers and businesses, and can be based on any type of legal infringement that affects the interests of a group of individuals. The proposal has strong similarities with the U.S. class action system.

### FRANCE

France has recently expanded its class action law with the Justice Act, creating specific class action procedures regarding direct and indirect discrimination, personal data, and the environment. The law, which came into force on 20 November 2016, does not limit the list of class actions provided for, leaving scope for the system to develop over time.

The Justice Act establishes a common set of rules to apply to class actions (whether current or future), except for Consumer Class Actions (which are still governed by their original law from 2014).

The French Ministry of Justice also released a preliminary bill in April 2016 aimed at reforming civil liability. The proposed bill would create a civil fine that may be ordered by a civil judge and aims to condemn the perpetrator of a 'lucrative wrongdoing'. The fine may be up to 10%

of the highest gross amount of worldwide turnover and would be allocated to a special compensation fund or, absent such fund, to the French Treasury.<sup>123</sup>

The effect of this bill would be similar to that of punitive damages: the fines would not be allocated to the plaintiff and therefore play no role in ensuring adequate redress for the plaintiffs. Instead, the purpose seems only to punish defendants, with no corresponding benefit to the claimants. Such a mechanism would therefore extend beyond the normal reaches of civil redress mechanisms and stray into public enforcement functions.

If such a system is adopted, it is likely that claimants requesting damages in a compensatory claim will also request a civil fine purely for strategic purposes. Companies faced with the prospect of both a damages action and a civil fine may face risks that are disproportionate compared to the issues raised by the compensatory claim. The proposed French bill could therefore lead to 'blackmail settlements' such as the practices already seen in the U.S., which were described by Judge Posner (quoting Judge Friendly) as "settlements induced

by a small probability of an immense judgment in a class action."<sup>124</sup>

## **POLAND**

A bill has been submitted to the Polish Parliament, amending the current law covering class actions,<sup>125</sup> which would make significant changes to the current rules. These changes would include:

- broadening the scope of claims which may be examined under a class action procedure;
- changing the rules governing security deposits (under the current law the defendant may require the plaintiff to pay a deposit to secure the costs of the proceedings);
- amending the certification process (to be made in a closed session of the court without the attendance of the parties); and
- amending the rules regarding certification (so that once a decision to certify a class becomes final, it cannot be re-examined).

These changes appear to show a relaxing of the rules governing class actions in Poland.

*“ The proposed French bill could therefore lead to ‘blackmail settlements’ such as the practices already seen in the U.S., which were described by Judge Posner (quoting Judge Friendly) as ‘settlements induced by a small probability of an immense judgment in a class action.’ ”*



## ITALY

A new bill to amend the class action rules is now under discussion at the Italian Parliament. Some of the main issues include:

- expanding the rules on who may file a claim;
- extending the type of legal claims which can be brought before the court;
- introducing the possibility of bringing the same class action again if it is initially rejected;

- introducing the possibility of a monetary reward for the attorneys of the winning party and for the 'common representative' of the class; and
- offering a late opt-in after a decision on the merits has been given.

These provisions are intended to increase the recourse to collective redress and to incentivise and facilitate claims.

# Part VII: Recommendations to Prevent or Limit Abuse

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As is clear from the previous discussion, Member States already have a very wide variety of collective redress systems in place, and others are under development. In light of the diverse range of options already available, it does not seem tenable to argue that the EU faces an ‘access to justice’ deficit that needs to be or should be addressed through EU action. Nor can it be credibly argued that Member States lack the means to introduce additional redress mechanisms where they choose to. There is ample evidence that they are doing so already.

If there is any issue that requires reflection at EU level, it is that collective redress in the EU is developing so rapidly that insufficient attention is being paid to the risks presented. There are already worrying signs that some Member States are allowing relatively unsafeguarded mechanisms to develop.

Experience in other jurisdictions has shown that once a significant ‘lawsuit industry’ takes root—in which cases are inspired not to redress legitimate grievances or to cause fair compensation to be paid, but mainly for the profit of representatives—then it can be very difficult to ‘turn back the clock’ and

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**“ [V]ery different conditions currently apply across the EU for the certification of claims, meaning that, in certain jurisdictions, meritless claims cannot be defeated early enough to deter those seeking ‘blackmail settlements’. In some Member States, such as the Netherlands, there is no admissibility or certification stage. This leaves Member States open to forum shopping to litigate in their jurisdiction... ”**

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achieve reform. Mechanisms that are insufficiently safeguarded create a drain on the economy, undermine the investment climate, foster a lack of confidence in the rule of law and do not realise the most important function of civil justice systems: providing fair and efficient redress when it is due. It is therefore far more prudent and consistent with civil justice goals to create appropriately safeguarded systems from the outset.

This being so, ensuring that Member States understand the need for safeguards—and actually adhere to those safeguards in their own systems—must be among the key priorities for EU reflection in this area.

To be effective, such safeguards should address collective redress in general and should similarly address the funding of litigation by third parties. The following identifies some key safeguards for consideration in each category.

### **Collective Redress Safeguards**

As clearly stated in the Recommendation, a suite of minimum rights and safeguards should exist alongside every system of collective redress in order to protect the rights of claimants and defendants and the integrity of national justice systems, and to contain the risks of unbridled collective redress or class actions.

### **IMPLEMENTING STRINGENT CLASS CERTIFICATION STANDARDS**

The Recommendation recognises the importance of such standards in calling for procedural safeguards and admissibility conditions set out in law.<sup>126</sup> As indicated above, very different conditions currently apply across the EU for the certification of claims, meaning that, in certain jurisdictions, meritless claims cannot be defeated early enough to deter those seeking ‘blackmail settlements’. In some Member States, such as the Netherlands, there is no admissibility or certification stage. This leaves Member States open to forum shopping to litigate in their jurisdiction—and leaves consumers and companies in these jurisdictions open to the risks associated with abusive and unwarranted claims. Therefore, stringent class certification standards should be an integral part for all systems of collective redress in the EU.

### **PRESERVING THE LOSER PAYS PRINCIPLE**

The weakening of the traditional loser pays concept in the EU, particularly in collective cases, is diminishing the risks facing opportunistic plaintiffs and allowing abuse incentives to grow. In some Member States, the loser pays principle is applied almost exclusively against corporate defendants.

This means that companies may have to pay out significant sums in legal fees defending a potentially meritless claim, with no guarantee that they will be able to recover those costs. This again leaves companies exposed to ‘blackmail settlements’ and undermines the effectiveness of the loser pays principle as a safeguard in those jurisdictions. The Recommendation advocates the loser pays principle,<sup>127</sup> and this should be addressed and strengthened in all Member States operating a system of collective redress.

### **FAVORING OPT-IN OVER OPT-OUT MECHANISMS**

The Recommendation suggests that systems of collective redress should be opt-in, and that any exception to this should be duly justified.<sup>128</sup> Requiring class members to affirmatively ‘opt-in’ to a class rather than be forced to ‘opt-out’ prevents opportunistic representatives from swelling claims by purporting to act for large sections of society without their knowledge or consent. Involving consumers in claims of which they may have no knowledge, and with which they may actively disagree, harms their legal autonomy.

Opt-out procedures also leave companies more exposed to disproportionately large claims being brought against them, which may encourage the settlement

of frivolous claims to avoid the risk of lengthy proceedings and the media attention that may follow exceptionally large claims. The apparent recent shift towards opt-out proceedings should be halted, and any form of collective redress should be exclusively opt-in. Additionally, in jurisdictions where possibility of opt-out class actions exists, these systems should be limited to domestic markets, allowing foreign claimants only the option to opt-in to the proceedings.

### **PROMOTING STRICT STANDING REQUIREMENTS**

Claims should be initiated by claimants themselves who allege they have suffered harm and therefore have a genuine interest in seeking redress. To the extent that representative organisations become involved, they should be only public organisations that meet criteria set out in law. The involvement of private representatives should be restricted. In France and the Netherlands, there are already opportunistic and profit-motivated organisations pursuing claims, opening up these jurisdictions to the risk of abuse. Rigorous standards should be imposed for consumer/representative groups authorised to bring claims, including limits on their relationships with law firms and a prohibition against such entities keeping litigation awards for themselves, the

**“ Rigorous standards should be imposed for consumer/representative groups authorised to bring claims, including limits on their relationships with law firms and a prohibition against such entities keeping litigation awards for themselves, the requirement that they have a non-profit character, and experience and statutory objectives relevant to the subject matter. ”**

requirement that they have a non-profit character, and experience and statutory objectives relevant to the subject matter.

### **MANDATING CLOSURE FOR DEFENDANTS**

It should not be possible for claims and issues decided in collective litigation to be re-litigated in future collective cases against the same defendant concerning the same subject matter, as this unfairly prejudices defendants by causing them to expend resources re-litigating issues.<sup>129</sup> Similarly, any person who is a member of a claimant group in one collective action should be prevented from becoming a member of a claimant group in any other case against the same defendant concerning the same subject matter. If one court rejects a claim, a claimant should not then be able to sue the same defendant in another court. It is important that defendants will not be subjected to repeat lawsuits over the same issue.

### **RESTRICTING CONTINGENCY FEES AND REGULATING TPLF FOR COLLECTIVE ACTIONS**

Most jurisdictions have rules preventing lawyers from seeking a percentage of awards because of the negative effect this has on litigation incentives. These rules should be maintained and reinforced.<sup>130</sup> Precisely these same issues arise with TPLF in collective cases, yet it is not regulated anywhere in the EU. In many cases, the funders will be able to influence the litigation and have a say in any settlement agreement. In the absence of government oversight of funders and their potential conflicts in funding litigation, there is a risk that consumers may be exploited by opportunistic funders seeking a profit. Potential defendants are also harmed, as the promise of funding may encourage 'have a go' litigation, with little exposure for the individual claimants.

Additionally, most systems surveyed have no way of recovering costs from funders, despite the fact that they may have been the driving force behind the claims. For these reasons, the Recommendation states that the claimant party should be required to declare the origin of the funds that it is going to use to support the legal action.<sup>131</sup> In light of the significant risks posed to consumers and potential defendants, TPLF for collective claims should be restricted and closely overseen by appropriate authorities.

### **BANNING PUNITIVE DAMAGES**

The Recommendation seeks to ban punitive damages.<sup>132</sup> Collective actions are not public enforcement proceedings and should not be treated as such. Collective actions serve to provide compensation to injured claimants and are not designed to serve as a means of punishing defendants who have allegedly violated the law. The ability to claim punitive damages is unusual in the EU but has been an important part of creating abuse incentives in other jurisdictions, notably the U.S. It should be prevented in the EU before it takes hold, and the principle of fair compensation for damage suffered (rather than punishment for defendants that can act as an undeserved windfall to claimants) should remain central to any collective redress system.<sup>133</sup>

### **CURBING JURISDICTIONAL OVERREACH/ FORUM SHOPPING**

A significant concern as collective redress systems proliferate is the possibility of competition between Member States for the most 'accessible' system to draw claims to their national courts. Equally, forum shopping by plaintiff organisations for the jurisdiction with the least stringent safeguards cannot be welcome. As was demonstrated in this report, the Netherlands and the UK seem to be

maneuvering themselves to become the go-to jurisdictions for collective claims outside of the U.S. This situation has the potential to seriously damage the Dutch business environment and to encourage plaintiffs to initiate claims in inappropriate jurisdictions. Standardising jurisdictional rules and safeguards for collective cases would ease this issue.

## Third Party Litigation Funding Safeguards

Third party litigation funding and collective actions are a combination that gives rise to potential for abuse because, among other problems, they work together to create enormous leverage against a defendant regardless of whether a claim has merit. In tandem with safeguards for collective action procedures, the following safeguards should be introduced as a way of mitigating the risks posed by third party litigation funding.

### IMPLEMENTING LICENSING THROUGH A GOVERNMENT AGENCY

Currently, funders are entirely outside the scope of any regulation and operate in the shadows. No code of ethics applies, and there is no governmental oversight. This leaves consumers exposed to the risk of funders abusing their position, unduly influencing proceedings, and potentially dropping the case if they believe the claim is no longer viable. There is currently no way of holding funders accountable for their role in litigation. Mandatory registration should be required before funders are permitted to operate in the EU.

### REQUIRING CAPITAL ADEQUACY

Funders should be bound to the financial commitments they make and be required to have sufficient capital adequacy to discharge the entirety of their liabilities during the course of the

litigation. At present, the funded party is at risk because—if a funder withdraws or has insufficient funds—the funded party could become fully liable for a case he or she might not have pursued absent the funder’s commitment. This exposes both potential claimants and potential defendants to financial risk. If the funder withdraws, the claimant could theoretically become liable to pay the costs of proceedings in the event that it loses, and defendants might not be able to recover their costs should they win the case. Funders should guarantee their capital adequacy for the duration of the proceedings.

### ENSURING THAT CLAIMANTS, NOT FUNDERS, CONTROL MANAGEMENT OF THE CASE

It is essential to impose clear limitations upon the degree to which a funder should be permitted to influence or control litigation. Allowing funders to control litigation in effect prioritises the funders’ interests over the funded party’s interests. In many jurisdictions the funders stipulate that they must approve the legal representatives, approve drafts of briefs, and even, in some cases, have a right of veto for settlement agreements. The current systems run the risk of the profit of funders being prioritised over the rights of the claimants and over access to justice. A clear, enforceable framework identifying precisely what funders may and may not do to influence outcomes is required.

### REQUIRING THAT FUNDERS ACT IN THE BEST INTEREST OF CLAIMANTS

A fiduciary duty and rules relating to conflicts of interests should be established and imposed. While the interests of the funder can be aligned with those of the funded party, this is not always the case (and the degree of alignment may also change during the

**“** *In many jurisdictions the funders stipulate that they must approve the legal representatives, approve drafts of briefs, and even, in some cases, have a right of veto for settlement agreements. The current systems run the risk of the profit of funders being prioritised over the rights of the claimants and over access to justice. A clear, enforceable framework identifying precisely what funders may and may not do to influence outcomes is required.* **”**

lifetime of a case). A funder’s targeted internal rate of return may prevent settlement or encourage the continuation of proceedings unnecessarily. A funder may wish to ‘cash out’ rather than pursue a case as a matter of principle, or establish a point of law or public policy that would be helpful to the funded party.

The participation of a funder may prevent settlement involving terms other than cash, such as agreeing to discounted terms for future business between the parties to the dispute. There is also a risk that funders may abandon funded parties during litigation, leaving them heavily exposed. These risks could be lessened through close oversight of litigation funders and imposing a duty that the funders act in the best interests of the claimants.

### **BANNING LAW FIRMS FROM OWNING FUNDERS AND VICE VERSA**

Where funders and law firms are structurally linked or have portfolio arrangements, the risk of lawyer–client duties becoming secondary to the financial rewards pursued becomes significant. Structural relationships between law firms and funders are starting to emerge in Europe (for

example, Burford Capital investing in opening a law firm in the UK).<sup>134</sup> Similar requirements should be considered in the EU, and courts should be aware if there are any third party dynamics that may complicate efforts to settle cases.<sup>135</sup>

It is only through the implementation of these minimum safeguards that the inherent risks of collective litigation can be mitigated in the EU.

### **IMPOSING COSTS LIABILITY**

An anomaly currently exists whereby funders may support litigation in exchange for an unlimited upside, while having only limited exposure to the downside risk of a potential negative costs award, resulting in mass litigation increasingly being seen as a commodity (for example, Bentham Europe in the Volkswagen litigation). This exposes both potential claimants and potential defendants to significant financial risk. Funders should be jointly and severally liable for all costs.

### **PROMOTING TRANSPARENCY**

All funding arrangements should be transparent and disclosed to the court, and as necessary to opposing parties. Courts currently have no means to

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*“ Courts should be empowered to supervise the amounts funders may take from damages awards, and funders’ recoveries should be subject to a maximum percentage limit. ”*

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know the degree of control exercised by funders, the degree to which the funder’s interests are prioritised, or who the real parties in interest are. This issue is now being considered in the U.S., where, on 26 January 2017, the U.S. District Court for the Northern District of California became the first court to mandate disclosure of litigation funding in all class actions filed before the court. Similar requirements should be considered in the EU, and courts should be aware if there are any third party dynamics that may complicate efforts to settle cases.

#### **PLACING LIMITS ON RECOVERY**

A systemic risk arises if the potential rewards for funders are so great (compared to the downsides) that incentives are created to pursue meritless litigation. This scenario arises, in particular, if claims of varying quality are bundled together, as an incentive may be created to ‘roll the dice’ on some low-quality claims that would otherwise never be taken. Limits are routinely placed upon the degree to which lawyers may benefit from their clients’ cases, so that lawyers’

incentives are not distorted (in Poland, for example, there is a cap of 20%). Equivalent restrictions should be imposed on funders. Courts should be empowered to supervise the amounts funders may take from damages awards, and funders’ recoveries should be subject to a maximum percentage limit.

The issues associated with TPLF and the disproportionate levels of recovery are being addressed in other jurisdictions. Notably in Australia, the birthplace of litigation funding, Victoria Attorney-General Martin Pakula has asked the Victorian Law Reform Commission to review the rules around litigation funders to ensure that consumers are protected from unfair costs of funding litigation, stating that “[i]t is incredibly frustrating when a person wins a case, only to walk away almost empty-handed because the money has been soaked up by unfair legal fees.”

It is only through the implementation of these minimum safeguards that the inherent risks of collective litigation can be mitigated in the EU.

*“ All funding arrangements should be transparent and disclosed to the court, and as necessary to opposing parties. Courts currently have no means to know the degree of control exercised by funders, the degree to which the funder’s interests are prioritised, or who the real parties in interest are. ”*



## POSSIBLE SAFEGUARDS

### COLLECTIVE REDRESS

1. IMPLEMENTING STRINGENT CLASS CERTIFICATION STANDARDS
2. PRESERVING THE LOSER PAYS PRINCIPLE
3. FAVORING OPT-IN OVER OPT-OUT MECHANISMS
4. PROMOTING STRICT STANDING REQUIREMENTS
5. MANDATING CLOSURE FOR DEFENDANTS
6. RESTRICTING CONTINGENCY FEES AND REGULATING TPLF FOR COLLECTIVE ACTIONS
7. BANNING PUNITIVE DAMAGES
8. CURBING JURISDICTIONAL OVERREACH/FORUM SHOPPING

### THIRD PARTY FUNDING

1. IMPLEMENTING LICENSING THROUGH A GOVERNMENT AGENCY
2. REQUIRING CAPITAL ADEQUACY
3. ENSURING THAT CLAIMANTS, NOT FUNDERS, CONTROL MANAGEMENT OF THE CASE
4. REQUIRING THAT FUNDERS ACT IN THE BEST INTEREST OF CLAIMANTS
5. BANNING LAW FIRMS FROM OWNING FUNDERS AND VICE VERSA
6. IMPOSING COSTS LIABILITY
7. PROMOTING TRANSPARENCY
8. PLACING LIMITS ON RECOVERY

# Conclusion

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The Commission's Recommendation on collective redress makes clear that in order to balance the risks inherent in collective redress systems, certain safeguards are required.

Despite Member States' prolific adoption of collective redress systems in recent years, these safeguards are being applied highly unevenly—if at all. In particular, there is growing evidence that the desire to encourage collective redress is leading to the lowering of safeguards even before systems have had an opportunity to mature. For this reason collective redress

is becoming a speculative investment opportunity for third parties and representatives who seek to profit from victims' grievances and to extract value from the justice system.

This should represent a clear warning signal that abusive litigation is arriving, and consideration of a comprehensive suite of safeguards is urgently required.

*“ [C]ollective redress is leading to the lowering of safeguards even before systems have had an opportunity to mature. For this reason collective redress is becoming a speculative investment opportunity for third parties and representatives who seek to profit from victims' grievances and to extract value from the justice system. ”*

# Appendix: Summary Table

Country and Type of Action	Who May File a Claim	Contingency Fees/ Fee Arrangements	Third Party Litigation Funding (TPLF)	Loser Pays	Opt-In/Opt-Out	Admissibility and Certification Procedure
<b>FRANCE</b> Common Representative Action	Approved consumer associations.	French law prohibits resorting only to contingency fees but allows for agreements which, besides the remuneration of the services performed, provides for the fixation of complementary fees depending on the outcome of the claim.	Recourse to TPLF is not very common yet; however, an increasing number of funders are trying to access the French market. Third party funding is not prohibited under French law.	The loser pays principle applies almost exclusively to corporate defendants or claimants.	Opt-in.	Admissibility is governed by ordinary procedural rules. Any plea of non-admissibility is examined by the court at the same stage as the arguments on the merits of the case, and therefore not at an early stage.
<b>FRANCE</b> Web-Based Actions	Websites invite every person with a claim (potential claimants, associations, lawyers or other entities) to submit an action by filling in specific forms online.	French law prohibits resorting only to contingency fees but allows for agreements which, besides the remuneration of the services performed, provides for the fixation of complementary fees depending on the outcome of the claim.	Recourse to TPLF is not very common yet; however, an increasing number of funders are trying to access the French market. Third party funding is not prohibited under French law.	The loser pays principle applies almost exclusively to corporate defendants or claimants.	Opt-in.	Admissibility is governed by ordinary procedural rules. Any plea of non-admissibility is examined by the court at the same stage as the arguments on the merits of the case, and therefore not at an early stage.
<b>FRANCE</b> Consumer Class Action	Only the approved consumer associations recognised as being representative on a national level may initiate class actions.	General principle as stated above. However, it seems that lawyers are not permitted to share in a percentage of the damages aimed at compensating the consumers in the context of a class action.	Recourse to TPLF is not very common yet; however, an increasing number of funders are trying to access the French market. Third party funding is not prohibited under French law.	The loser pays principle applies almost exclusively to corporate defendants or claimants.	Opt-in.	There is no procedure under this French class action system to determine at an early stage whether a claim is admissible.
<b>FRANCE</b> Class Action for Health	Only the associations of health care system users that are approved may initiate class actions.	General principle as stated above. However, it seems that lawyers are not permitted to share in a percentage of the damages aimed at compensating the consumers in the context of a class action.	Recourse to TPLF is not very common yet; however, an increasing number of funders are trying to access the French market. Third party funding is not prohibited under French law.	The loser pays principle applies almost exclusively to corporate defendants or claimants.	Opt-in.	There is no procedure under this French class action system to determine at an early stage whether a claim is admissible.

Country and Type of Action	Who May File a Claim	Contingency Fees/ Fee Arrangements	Third Party Litigation Funding (TPLF)	Loser Pays	Opt-In/Opt-Out	Admissibility and Certification Procedure
<p><b>UK</b> Representative Proceedings</p>	<p>Any party may apply to the court for an order. The claim will ordinarily be brought by the representative. However, the court may also order that pending proceedings be continued as a representative claim.</p>	<p>Lawyers are permitted to enter into Damages Based Agreements, which are similar to U.S.-style contingency fees. English law also allows the use of Conditional Fee Arrangements in which lawyers are entitled to recover set percentage uplift if the case is successful.</p>	<p>TPLF is not prohibited and is permitted in the context of Representative Proceedings. There is no limit on the percentage a funder may recover under its funding agreement.</p>	<p>In general, the loser pays principle applies. Should the case be lost, the representative claimant generally bears the costs of the litigation along with the defendant's costs.</p>	<p>Opt-out.</p>	<p>Aside from certain claims, a party can commence a representative claim without the permission of the court. The court can intervene once a claim has been issued, but there is no test of the merits at an early stage.</p>
<p><b>UK</b> Group Litigation Orders (GLOs)</p>	<p>GLOs can be initiated on an application by a claimant or defendant or on the court's own initiative.</p>	<p>Lawyers are permitted to enter into Damages Based Agreements, which are similar to U.S.-style contingency fees. English law also allows the use of Conditional Fee Arrangements in which lawyers are entitled to recover a set percentage uplift if the case is successful.</p>	<p>TPLF is not prohibited and is permitted in the context of GLOs. There is no limit on the percentage a funder may recover under its funding agreement.</p>	<p>In general, the loser pays principle applies. There are specific rules which distinguish between 'individual costs' and 'common costs'. Several liability usually applies to common costs.</p>	<p>Opt-in.</p>	<p>A GLO is not available to claimants as a right. Claimants must apply to the court and convince it that it is appropriate in the circumstances to grant a GLO.</p>
<p><b>UK</b> CAT Class Action</p>	<p>The application to commence the collective proceedings is made by the proposed class representative.</p>	<p>Claimant's lawyers cannot operate on a contingency fee basis for opt-out collective proceedings but can for opt-in collective proceedings. Conditional Fee Arrangements appear to be allowed for both opt-in and opt-out collective proceedings.</p>	<p>TPLF is permitted for collective proceedings (both opt-in and opt-out) before the CAT.</p>	<p>The loser pays principle applies to collective proceedings, although the CAT has discretion to order any costs it sees fit.</p>	<p>Can be either opt-in or opt-out depending on the decision of the CAT.</p>	<p>Collective proceedings can be brought only if the CAT certifies them through a CPO. The certification process has the stated aim of avoiding frivolous and unmeritorious claims.</p>
<p><b>THE NETHERLANDS</b> Assignment Model</p>	<p>Anyone can establish a legal entity which can initiate a collective claim. There are few former qualification requirements.</p>	<p>Dutch law prohibits the use of contingency fees. However, this prohibition is not absolute, and lawyers' remuneration may be partly based on the outcome of a case, provided that the base fees are sufficient to cover the costs of providing legal services.</p>	<p>TPLF is entirely unregulated in the Netherlands, whether it be in the context of individual litigation or collective redress.</p>	<p>The loser pays principle applies. However, the court has the discretion to apportion the costs differently between parties.</p>	<p>Opt-in.</p>	<p>There is no such procedure available. Dutch civil procedural law does not provide for motions to dismiss or strike out applications.</p>
<p><b>THE NETHERLANDS</b> WCAM</p>	<p>Foundations that promote or defend the interests of aggrieved parties in accordance with their bylaws are admissible.</p>	<p>Dutch law prohibits the use of contingency fees. However, this prohibition is not absolute, and lawyers' remuneration may be partly based on the outcome of a case, provided that the base fees are sufficient to cover the costs of providing legal services.</p>	<p>TPLF is entirely unregulated in the Netherlands, whether it be in the context of individual litigation or collective redress.</p>	<p>The loser pays principle applies. However, the court has the discretion to apportion the costs differently between parties. Reasonable costs incurred by the foundation are reimbursed by the opposing party in collective actions.</p>	<p>Opt-out.</p>	<p>The claim vehicle is inadmissible if the interests of the persons on whose behalf the action is instituted have not been safeguarded. Dutch civil procedural law does not provide for motions to dismiss or strike out applications.</p>

Country and Type of Action	Who May File a Claim	Contingency Fees/ Fee Arrangements	Third Party Litigation Funding (TPLF)	Loser Pays	Opt-In/Opt-Out	Admissibility and Certification Procedure
<b>BELGIUM</b> Collective Redress Actions	Only a class representative who meets the legal requirements and who has been declared 'fit and proper' by the court will have standing to bring a Collective Redress Action.	Lawyers are allowed to stipulate that their fees will depend on the outcome of the case as long as these do not exclusively depend on the outcome. Provisions that increase lawyers' fees in the event of a positive outcome are allowed.	The Economic Law Code does not address the issue of TPLF, so it is not prohibited. However, the third party funding is not widely used in Belgium, and it is doubtful whether it would work for Collective Redress Actions.	The loser pays principle applies. However, in practice, compensation is fixed at a fraction of the actual costs based on the amount of the claim being sought by the claimant.	Can be either opt-in or opt-out.	Within two months of the filing of the application, the court will decide on the admissibility of the claim. There is also a certification stage, and the court will have to decide whether the class action claim would be more efficient than traditional justice procedures.
<b>GERMANY</b> KapMuG	A model case—which is not a 'collective claim'—may be initiated by any claimant who has brought an individual lawsuit claiming for compensation for damages.	Contingency fees are not allowed as a matter of principle (with a very limited exception for claimants who would not receive state funding for their claim but could not afford the costs of the lawsuit).	While contingency fee arrangement with lawyers are prohibited, 'process financing' by third parties is allowed.	The loser pays principle applies. If the model claimant loses, costs of the model trial are shared pro rata by all claimants.	Hybrid.	The court of first instance shall deny the application for the establishment of a model case as inadmissible under certain circumstances.
<b>AUSTRIA</b> Collective Claim	There are no specific limitations as to who may initiate Austrian Collective Claims. Typically, the Austrian Association for Consumer Information or the Austrian Chamber of Labour initiate claims.	Austrian law prohibits pure contingency fee arrangements for attorneys; i.e., attorneys may not be paid a share of the claim. However, attorneys may enter into success fee arrangements under which a certain additional fee is payable if a claim is successful.	TPLF is commonly used in litigation in Austria and is generally considered to be permitted for Austrian Collective Claims.	The loser pays principle generally applies. If both parties prevail to a certain extent, the costs are split proportionally.	Opt-in.	There is no admissibility procedure specifically tailored to this type of claim; the general rules under Austrian law apply. There is no certification stage, but according to the Austrian Supreme Court, certain criteria must be met in order to bring a claim.
<b>SPAIN</b> Collective Actions	Initially, capability to start a collective action was limited to consumer associations. However, pursuant to a 2014 regulation, Spanish public prosecutors have procedural standing to start collective actions seeking compensation for consumers.	There is no specific regulation on contingency fee arrangements. However, some case law has confirmed that a client may agree to pay its lawyer a minimum and predetermined amount, plus some additional conditional fees.	There is no regulation on TPLF in Spain.	The loser pays principle applies in Spain. In practice, the courts tend not to apply the loser pays principle to consumer associations when collective actions are dismissed.	Opt-out.	There is no such procedure available.
<b>POLAND</b> Class Proceeding	A class action may be initiated by a representative of the class. A member of the class or a local consumer ombudsman may act as a representative of the class.	Agreements where lawyers fees are based exclusively on a percentage of the amount recovered are not permitted. Lawyers are permitted to enter into no-win, no-fee agreements, but their total remuneration must not be higher than 20% of the awarded amount	The Polish Class Action Law does not regulate the issue of financing class actions by third parties.	In general, the loser pays. However, it is modified to include a tariff for lawyers' fees and some judicial discretion for awarding a percentage or even no costs to the winner if the loser's circumstances call for such action or if the winner behaves unreasonably.	Opt-in.	The Polish Class Action Law provides for a certification stage, where the court decides on admissibility of the case. The court may dismiss a case if no circumstances are found to support certification.

Country and Type of Action	Who May File a Claim	Contingency Fees/ Fee Arrangements	Third Party Litigation Funding (TPLF)	Loser Pays	Opt-In/ Opt-Out	Admissibility and Certification Procedure
<b>ITALY</b> Class Action Law	A class action can be initiated by a consumer who has the same rights to claim as the other members of the class. The consumer can bring the class action personally or through a consumers' association or a representative body.	Generally, parties may agree in writing to contingency or conditional fees. However, lawyers may not negotiate the legal fees as a direct percentage of the award obtained. The proposed Bill No. 1335 would introduce a type of contingency fee with the specific purpose of creating an economic interest for lawyers to make class actions more appealing.	TPLF is possible but not frequently used.	In general, the loser pays principle applies. In class actions, courts frequently do not order losing plaintiffs to pay defendants' legal costs and fees.	Opt-in.	At the first hearing, the lead plaintiff has to provide evidence that shows the court that the conditions for the admission of the claim have been met.
<b>BULGARIA</b> Proceedings in Collective Actions	A collective claim may be initiated by any person who claims to be a member of an injured class, as well as by any organisation for protection of injured persons or harmed collective interests.	Fee arrangements where the remuneration of the lawyer is a percentage of the outcome of the proceedings are generally allowed.	There is no prohibition on TPLF.	The loser pays principle applies.	Hybrid.	In class action proceedings the court will verify that the specific conditions for filing of a class action are met prior to the commencement of the review on the merits.

# Endnotes

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- 1 ILR is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than 3 million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in the U.S. courts and has participated actively in legal reform efforts in the United States and abroad.
- 2 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013, p. 60). See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>
- 3 Joint Information Note of 5 October 2010. See [http://ec.europa.eu/competition/antitrust/actionsdamages/collective\\_redress\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html)
- 4 Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests.
- 5 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the General Data Protection Regulation).
- 6 Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, and Regulation (EU) 1257/2013 of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC.
- 7 Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes, and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC.
- 8 Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC.
- 9 Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
- 10 Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
- 11 Green Paper on retail financial services, better products, more choice and greater opportunities for consumers and businesses, Brussels, 10.12.2015 COM(2015) 630.
- 12 Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
- 13 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).

- 14 See *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013), reversing court approval of a settlement for consumers who bought HP printers between 2001 and 2010, which gave consumers e-credits of \$2.00–\$6.00 each, while awarding attorneys’ fees of \$1.5 million regardless of how many e-credits were actually used. This problem is not unique to the United States and can exist even in class action regimes that do not permit lawyers to recover contingency fees. See, e.g., *Kirby v. Centro Properties Ltd.* (No. 6) [2012] FCA 650, an Australian case involving a settlement of AUS\$200 million in which a litigation funders received AUS\$62 million, and legal fees awarded were AUS\$32 million. A leading Australian law firm estimated that claimants received only 10.6 cents on the dollar after these fees and costs. (King & Wood Mallesons, “Class Actions in Australia: The Year in Review 2012,” page 10.)
- 15 See, ‘Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions’ <http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf>.
- 16 An example in the U.S. is of a case against AOL arising out of its alleged practice of inserting third party advertising into emails sent through its free email service. A claim was brought for, *inter alia*, violation of the Electronic Communications Privacy Act, unjust enrichment and violation of various consumer protection statutes. Under the terms of the settlement, the class was to receive no money, while the class attorneys would be paid \$320,000. In addition to awarding zero compensation to the class members, the settlement included a payment of \$25,000 to each of three charities utterly unconnected to the lawsuit: (i) the Legal Aid Foundation of Los Angeles, (ii) the Federal Judicial Center Foundation and (3) the Boys and Girls Club of Los Angeles and Santa Monica. See *Fairchild v. AOL LLC*, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement) and [http://www.instituteforlegalreform.com/uploads/sites/1/cypres\\_0.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/cypres_0.pdf).
- 17 <http://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing/#d3ba9ff63c05>.
- 18 This is further highlighted by a study conducted by the U.S. Consumer Financial Protection Bureau (CFPB) which examined 251 settlements. Using CFPB’s own numbers, the 251 settlements examined had at least 34 million class members and a total of \$1.1 billion in payments. That is an average settlement payment of no more than \$32.35 per person, while lawyers averaged \$1 million. See <http://www.instituteforlegalreform.com/resource/the-plaintiffs-lawyer-protection-bureau>.
- 19 See, for example, “Ripe for Reform – Improving the Australian Class Action Regime” [http://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS\\_web1.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS_web1.pdf).
- 20 See, for example, “Painting an Unsettling Landscape – Canadian Class Actions 2011-2014” [http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction\\_v10Web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction_v10Web.pdf).
- 21 <http://www.worldometers.info/population/countries-in-the-eu-by-population/>.
- 22 [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:GDP\\_at\\_current\\_market\\_prices,\\_2005\\_and\\_2013%E2%80%932015\\_YB16.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:GDP_at_current_market_prices,_2005_and_2013%E2%80%932015_YB16.png).
- 23 Governed by the French Consumer Code (L.622-1 et seq).
- 24 Introduced in 2014 by the Hamon Act and governed by the French Consumer Code (L.623-1 et seq).
- 25 Introduced in 2016 by the Touraine Act and governed by the Public Health Code (L.1143-1 et seq).



- 26 It is noteworthy that the UK's national litigation systems are not dependent on any EU law and therefore would not appear to be directly and immediately impacted by Brexit.
- 27 Recognised in principle by English courts since the 17<sup>th</sup> century, Representative Proceedings were incorporated into Part 19.6 of the UK's Civil Procedure Rules in 2000.
- 28 Introduced in 2000 and governed by Part 19 of the Civil Procedure Rules and its related Practice Direction.
- 29 Introduced in 2015 by Schedule 8 of the Consumer Rights Act 2015.
- 30 Permitted by Article 3 of the Dutch Civil Code.
- 31 The collective settlement mechanism is set out in Articles 7:907–7:910 of the Dutch Civil Code. Collective actions are pursued under 3:305a of the Dutch Civil Code.
- 32 Incorporated into the Belgian Economic Law Code by the Act of 28 March 2014, which added a Title 2 in Book XVII "Specific judicial procedures" to the Code.
- 33 Created by the "Capital Markets Model Case Act" of 6 August 2005 (as amended).
- 34 Based on Section 227 of the Austria Code of Civil Procedure, last amended 1983.
- 35 Introduced in 2001 and governed by the Civil Procedure Act 2000.
- 36 Introduced by Poland's "Law on Asserting Claims in Class Proceedings" of 17 December 2009.
- 37 Introduced by Art 140-*bis* of the Consumer Code, Law No. 244 of 24 December 2007 (as amended).
- 38 Governed by Chapter 33 of the Civil Procedure Code of 1 March 2008.
- 39 Unless otherwise specified.
- 40 This number relates to the model cases which were actually opened (*i.e.*, where at least 10 applications were filed). This distinction is examined in more detail below.
- 41 Depending on the definition given to 'collective redress', the number of Member States could be higher or lower than represented here. This map provides a best estimate based on the qualities of the systems in each Member State.
- 42 Act No. 2014-344 of 17 March 2014 on Consumer Protection.
- 43 Act. No 2016-41 of 26 January 2016 for the Modernisation of the French Healthcare System.
- 44 Act No. 2016-1547 of 18 November 2016 on the Justice of the 21st Century.
- 45 See "JBB and Which? Settle Football Shirt Case," Financial Times, 10 January 2008, <http://www.ft.com/cms/s/0/bd0acca2-bf08-11dc-8c61-0000779fd2ac.html#axzz4GMW9eC2U>.
- 46 See "MasterCard 'Preying on Millions' Sparked \$17 Billion Fee Lawsuit" Bloomberg, 18 January 2017, <https://www.bloomberg.com/news/articles/2017-01-18/mastercard-preying-on-millions-sparked-17-billion-fee-lawsuit>.
- 47 <http://www.lexology.com/library/detail.aspx?g=e1c26f92-3afd-454d-9b9a-9453b0ebe287>.
- 48 Recommendation, paragraph 4.
- 49 <http://nos.nl/artikel/2084597-oprichter-stichting-loterijverlies-woedend-na-aantijging-van-fraude.htm>. [http://www.telegraaf.nl/binnenland/25132028/\\_\\_\\_Claimclub\\_dubieus\\_\\_\\_.html](http://www.telegraaf.nl/binnenland/25132028/___Claimclub_dubieus___.html).
- 50 <https://fd.nl/ondernemen/1184280/miljardenclaim-tegen-petrobras-voor-nederlandse-rechter>.

- 51 <http://www.businesswire.com/news/home/20170123006220/en/International-Coalition-files-Lawsuit-District-Court-Rotterdam>.
- 52 *Codacons vs Intesa San Paolo*, Court of Appeal of Turin.
- 53 Act. No 2016-41 of 26 January 2016 for the Modernisation of the French Healthcare System.
- 54 Article 379 of the CPC.
- 55 Article 381 of the CPC.
- 56 Private Actions in Competition Law: A consultation on options for reform – government response, paragraph 5.44.
- 57 Recommendation, paragraph 4.
- 58 Recommendation, paragraphs 29 and 30.
- 59 For example, litigation funder Burford Capital invested €30 million in U.S. law firm Hausfeld to open an office in Berlin — see <http://www.legalbusiness.co.uk/index.php/lb-blog-view/4850-hausfeld-to-open-berlin-office-with-30m-investment-from-litigation-funder-burford> — and started its own law firm in the UK, Burford Law. See <http://www.burfordcapital.com/newsroom/burford-capital-launches-abs-law-firm-burford-law-akin-gump-hire/>
- 60 <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf>.
- 61 <https://www.law360.com/articles/889231/uk-financial-firms-plow-723m-into-litigation-funds>.
- 62 For example, see Bentham Europe’s backing of a claim against Tesco <http://www.benthameurope.com/en/tesco-plc-overview>, and Hausfeld’s involvement in the Volkswagen litigation <http://www.hausfeld.com/what-we-do/eu/case-studies/volkswagen-clean-diesel-litigation>.
- 63 <http://www.thetimes.co.uk/article/funding-law-suits-is-only-game-in-town-twjxrwsll>.
- 64 On 14 March 2016, 278 institutional investors from around the world filed a lawsuit in the regional court of Braunschweig claiming that the company had committed several breaches on the capital markets between June 2008 and September 2015. The representatives of the investors filed a motion for a model case to initiate a KapMuG procedure, and Volkswagen itself also requested the initiation of the KapMuG proceedings.
- 65 <https://www.bloomberg.com/news/features/2016-11-22/big-bets-on-vw-lawsuit-could-lead-to-10-000-or-nothing>.
- 66 <http://www.benthameurope.com/en/>.
- 67 <https://www.bloomberg.com/news/features/2016-11-22/big-bets-on-vw-lawsuit-could-lead-to-10-000-or-nothing>.
- 68 Recommendation, paragraphs 14–16.
- 69 Article 5 of the Code of Conduct for the Dutch Bar.
- 70 Article 25(2) and 25(3) of the Code of Conduct for the Dutch Bar.
- 71 Getting the Deal Through, *Litigation Funding*, 2017 – The Netherlands, p.42.
- 72 ECLI:NL:GHAMS:2011:BU8763.
- 73 <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf> — Section 11.2 of the Code of Conduct.
- 74 Article L.421-1 7 (L.621-91) of the French Civil Code.
- 75 Italian bill no. 1335 is a reformed class action discipline that has been approved by the Italian Chamber of Deputies and is currently under examination at the Senate.
- 76 Recommendation, paragraph 13.
- 77 *Arkin v. Borchard Lines Ltd. and others* [2005] EWCA Civ 655; [2005] 2 All ER 613 at 619, dicta of Lord Phillips.

- 78 See 'An epic legal battle with big implications for litigation funding,' *The Economist* <http://www.economist.com/news/finance-and-economics/21711334-quarter-century-old-insurance-claim-approaches-legal-milestone-epic-legal>
- 79 *Arkin v. Borchard Lines Ltd. and others* [2005] EWCA Civ 655; [2005] 2 All ER 613 at 619.
- 80 Civil Court of Paris, 27 January 2016, docket No. 15/00835
- 81 Recommendation, paragraph 21.
- 82 <http://www.lexology.com/library/detail.aspx?g=e1c26f92-3afd-454d-9b9a-9453b0ebe287>.
- 83 [http://www.catribunal.org.uk/files/The\\_Competition\\_Appeal\\_Tribunal\\_Rules\\_2015.pdf](http://www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf). See Rule 78.
- 84 [http://www.catribunal.org.uk/files/Guide\\_to\\_proceedings\\_2015.pdf](http://www.catribunal.org.uk/files/Guide_to_proceedings_2015.pdf). See paragraph 6.30.
- 85 <http://www.lawgazette.co.uk/law/new-rules-herald-us-style-class-actions/5048871.fullarticle>.
- 86 <https://www.ft.com/content/2ca59f14-dd9b-11e6-9d7c-be108f1c1dce>.
- 87 [http://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS\\_web1.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/RipeForReformUS_web1.pdf).
- 88 [http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction\\_v10Web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction_v10Web.pdf).
- 89 Recommendation, paragraphs 8 and 9.
- 90 Articles 11(2) and 11(3) of the Preliminary Statement to the Spanish 1985 Judiciary Law.
- 91 <https://www.stibbe.com/en/news/2016/december/legislative-proposal-introducing-class-actions-in-the-netherlands-before-house-of-representatives>.
- 92 [http://www.instituteforlegalreform.com/uploads/sites/1/ILR\\_comments\\_to\\_DG\\_Just\\_Consultation\\_on\\_Collective\\_Redress\\_29april2011.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR_comments_to_DG_Just_Consultation_on_Collective_Redress_29april2011.pdf).
- 93 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
- 94 Article 140-*bis* of the Consumer Code, Law No. 244 of 24 December 2007 (as amended).
- 95 *Tribunal de grande instance* of Strasbourg, 27 January 2004.
- 96 Request for preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 19 September 2016 *Maximilian Schrems v Facebook Ireland Limited* (Case C-498/16). See <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185593&page-Index=0&doclang=EN&mode=-doc&dir=&occ=first&cid=52877>.
- 97 *Provimi v Aventis* [2003] EWHC 961.
- 98 See <http://www.shellsettlement.com/docs/English-JudgmentTranslation29May09.pdf>.
- 99 See <http://www.converiumsettlement.com/images/stories/documents/Decision%2017%20January%202012.pdf>.
- 100 Jérémie Assous, co-founder of ActionCivile, explained in an interview that concomitant legal actions before different courts could be used as a procedural strategy: J. Mucchielli, « L'action de groupe 2.0 bouscule déjà la profession », *Dalloz Actualité*, 17 February 2014.
- 101 See <http://www.nera.com/content/dam/nera/publications/2016/1%20bIn%20UK%20RBS%20deal%20highlights%20globalization%20of%20securities%20litigation.pdf>.

- 102 <http://www.ft.com/cms/s/0/10d140c4-6c2a-11e5-8171-ba1968cf791a.html#axzz45b65QbS6>.
- 103 See <http://www.classactionrecoverymutualfunds.com/2016/03/dutch-foundations-negotiate-1-204-billion-settlement-with-ageas-formerly-fortis/>.
- 104 Software in diesel engines that could detect when they were being tested, changing the performance accordingly to improve results. See <http://www.bbc.com/news/business-34324772>.
- 105 <https://www.ft.com/content/fff71726-d185-11e5-92a1-c5e23ef99c77>.
- 106 <https://www.weclaim.com/actions/volkswagen-group-volkswagen>.
- 107 <https://www.bloomberg.com/news/articles/2016-06-28/volkswagen-to-pay-14-7-billion-to-settle-u-s-emissions-claims>.
- 108 <http://mlexmarketinsight.com/editors-picks/vw-scandal-lingers-eu-confronts-copenhagen-legacy/>.
- 109 [http://europa.eu/rapid/press-release\\_IP-16-2582\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2582_en.htm).
- 110 [http://europa.eu/rapid/press-release\\_IP-16-2582\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2582_en.htm).
- 111 <http://uk.reuters.com/article/us-truckmakers-cartel-bentham-idUKKBN13900J>.
- 112 [https://app.parr-global.com/intelligence/view/1497857?src\\_alert\\_id=78662](https://app.parr-global.com/intelligence/view/1497857?src_alert_id=78662).
- 113 <https://app.parr-global.com/intelligence/view/1426320>.
- 114 Green Paper on retail financial services, Better products, more choice, and greater opportunities for consumers and businesses, Brussels, 10.12.2015 COM(2015) 630 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0630&from=EN>.
- 115 Understood to be a reference to the ongoing 'action de groupe' filed 14 October 2014 by Consommation Logement Cadre de vie against AXA and l'AGIP for alleged non-respect of the remuneration rate indicated in the CLER.contract.
- 116 Understood to be a reference to the ongoing class action filed in 2014 by holders of preferred participating securities against Bankia regarding alleged mis-selling/misleading statements inviting investment. The case opened on 14 February 2016.
- 117 [http://www.instituteforlegalreform.com/uploads/sites/1/ILR\\_Response\\_to\\_EC\\_Consultation\\_Green\\_paper\\_on\\_financial\\_services\\_16\\_03.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR_Response_to_EC_Consultation_Green_paper_on_financial_services_16_03.pdf).
- 118 Regional Court in Kraków, I Civil Division (court files: I C 1419/10).
- 119 Communiqué de presse (press statement) de la CNL, Action de groupe de la CNL contre Immobilière 3F, plus de 480.000 habitants concernés, 3 novembre 2014 [www.lacnl.com](http://www.lacnl.com).
- 120 Civil Court of Paris, 27 January 2016, docket No. 15/00835.
- 121 <https://www.stibbe.com/en/news/2016/december/legislative-proposal-introducing-class-actions-in-the-netherlands-before-house-of-representatives>.
- 122 <https://www.stibbe.com/en/news/2016/december/legislative-proposal-introducing-class-actions-in-the-netherlands-before-house-of-representatives>.
- 123 [http://www.textes.justice.gouv.fr/art\\_pix/avpj1-responsabilite-civile.pdf](http://www.textes.justice.gouv.fr/art_pix/avpj1-responsabilite-civile.pdf).
- 124 *Rhone-Poulenc Rorer*, at 1298, Posner citing Friendly (1973).
- 125 'Law on Asserting Claims in Class Proceedings' of 17 December 2009.
- 126 Recommendation, paragraphs 8, 15 and 20.
- 127 Recommendation, paragraph 13.

- 128 Recommendation, paragraph 21.
- 129 As with the principle of *non bis in idem*, there should be no scope for the same plaintiff to join more than one class action for the same claim against the same defendant.
- 130 This issue of lawyers' fees appears to be being addressed in the U.S., with the House of Representatives introducing the Fairness in Class Action Litigation Act of 2017. Among other provisions, the bill requires that class members get paid before lawyers and that lawyers get only a percentage of what class members actually receive [http://www.instituteforlegalreform.com/resource/us-chamber-commends-house-introduction-of-fairness-in-class-action-litigation-act?utm\\_medium=Email&utm\\_source=ExactTarget&utm\\_campaign=&utm\\_content](http://www.instituteforlegalreform.com/resource/us-chamber-commends-house-introduction-of-fairness-in-class-action-litigation-act?utm_medium=Email&utm_source=ExactTarget&utm_campaign=&utm_content).
- 131 Recommendation, paragraph 14.
- 132 Recommendation, paragraph 31. Typically under EU legal tradition, punishment for wrongdoing is regarded as a governmental/regulatory function and not a role for the civil courts. In paragraph 15 to the recitals of the Recommendation, it is expressly stated that '[c]ollective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. . . Elements such as punitive damages. . . should be avoided as a general rule'.
- 133 Illustrative of this is the General Data Protection Regulation, which provides for compensation for 'non-material damage' (Article 82) which, as described, could leave open the possibility of exaggerated claims for non-specific harm.
- 134 <http://www.lexology.com/library/detail.aspx?g=0ecc8114-ea7c-4388-bf52-7e1a3bfa5d88>.
- 135 <http://www.australasianlawyer.com.au/news/vic-ag-launches-review-of-litigation-funder-rules-229698.aspx>.







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