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The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation

Csongor István Nagy*

I. INTRODUCTION

The European collective action¹ is probably one of the most exciting legal transplantations comparative law has seen. Collective litigation, which U.S. law did not inherit from common law but invented with the 1966 revision of class actions, has been among the most successful export products of American legal scholarship.² Today in the European Union, seventeen out of twenty-eight Member States have adopted a special regime for collective actions.³ At the same time, collective actions are intrinsically linked to various extraneous components of the legal system; hence, their transplantation calls for a comprehensive adaptation. The need to rethink class actions has not only generated a heated debate in Europe about whether and how to introduce collective actions, but resulted in Europe's making collective actions in its own image, producing something truly European: a model of collective actions *à l'euro péenne*.

This Article presents the process of developing the European collective action and its outcome. It represents the first attempt to give a transsystemic account of European collective actions and to elucidate them in light of the peculiarities and idiosyncrasies of the mindset of European jurisprudence. Further, this Article gives

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1. This Article examines the collective enforcement of claims for monetary recovery; European mechanisms for non-monetary remedies (such as declaratory judgments, injunctions) fall outside of this paper's focus. Procedural mechanisms where individual actions are coordinated after they have been launched, such as the German Capital Markets Model Case Act, and collective settlement mechanisms, such as the Dutch Act on Collective Settlement of Mass Damages, also do not fall within the scope of the analysis because they do not advance the collective enforcement of claims. In this Article, the term "opt-out system" means that group representatives may institute a collective action without any explicit authorization from the members of the group, who, in turn, may (or may not) leave the group through an express declaration (opt-out). Those who are given notice but do not opt out expressly are considered to be assenting to the procedure. The term "U.S. class action" will be used as the rough equivalent of the opt-out system. The term "opt-in system" means that group representatives may act only on behalf of those group members who explicitly authorized them to do so, in other words, those who opted in. Further, in this Article, "collective action" will be used as a general term referring to group litigation mechanisms at large, while the term "class action" will refer to the U.S. system.

2. See Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965, 965-66 (2017).

3. CSONGOR ISTVAN NAGY, *COLLECTIVE ACTIONS IN EUROPE: A COMPARATIVE, ECONOMIC AND TRANSSYSTEMIC ANALYSIS* 73-74 (2019).

an analytical presentation of the emerging European collective action model and demonstrates how it was shaped by Europe's legal thinking and societal attitudes.

First, this Article sets out the factors that make Europe different as to collective litigation—specifically, in Section II(A), the predominant role of the compensatory function and the disinclination to attribute to private entities a significant public policy role and to privatize public enforcement; the major, albeit unfounded, European fears concerning U.S. class actions which had a fundamental impact on European collective actions in Section II(B); and the special regulatory questions raised by Europe's legal environment that do not emerge on the other side of the Atlantic in Section II(C). Second, this Article gives a transsystemic presentation of European collective actions, including key issues such as purview (sectoral or general), standing, opt-in and opt-out principles, pre-requisites, status of group members (i.e., whether they are considered parties or non-parties), legal costs, funding, and res judicata effects.

Ultimately, this Article demonstrates how Europe's legal traditions and the mindset of European jurisprudence shaped the reception of collective actions, as well as how European legal systems have struggled with accommodating this conception. It also points out the creative efforts of certain European countries to reconcile representation without authorization (the opt-out rule) with the taboo of party autonomy and the notion that the enforcement of public policy cannot be privatized.

II. WHAT MAKES EUROPEAN COLLECTIVE ACTIONS SO “EUROPEAN”

U.S. class actions have unquestionably been a reference point for European collective litigation. While this mechanism had appeared in some Member States well before collective redress became a European issue,⁴ it came into the European scholarly discourse's focus with the emergence of the European movement for competition law's private enforcement.⁵ Although it was evident that the E.U. would not implement U.S. antitrust law's scheme in its entirety, this was still regarded as a point of reference. For a long time, it seemed that the E.U. would incorporate a collective redress mechanism into the legal regime on competition law's private enforcement.⁶ Finally, however, this question was detached from competition law and became a general issue of E.U. law.⁷ As a result of this process,

4. For instance, in Spain in 1984, Greece in 1994, Portugal in 1995, and Hungary in 1996. For an overview, see *infra* Section III.

5. See *Green Paper: Damages Actions for Breach of the EC Antitrust Rules*, at 8, COM (2005) 672 final (Dec. 19, 2005); *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 4, COM (2008) 165 final (Apr. 2, 2008).

6. See ENNO AHLENSTIEL ET AL., EUROPEAN COMPETITION LAW ANNUAL 2011: INTEGRATING PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW—IMPLICATIONS FOR COURTS AND AGENCIES 511–36 (Philip Lowe & Mel Marquis eds., 2014).

7. See *Green Paper: Consumer Collective Redress*, at 2–3, COM (2008) 794 final (Nov. 11, 2008); *Commission Communication Towards a European Horizontal Framework for Collective Redress*, at 11, COM (2013) 401 final (June 6, 2013) [hereinafter *Commission Communication Towards a European Horizontal Framework for Collective Redress*]; Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, 2013 O.J. (L 201/60) 60–65 [hereinafter *Commission on Principles for Injunctive and Compensatory Collective Redress*].

the E.U. issued the Recommendation on Collective Redress,⁸ which takes a very conservative approach but requires Member States to create a mechanism of collective litigation for the application of E.U. law. The European discourse on group proceedings channeled in the various national collective mechanisms that had developed prior to and in parallel with these European efforts.

The emerging European model differs from U.S. class actions in various important aspects, all of which are determined by European peculiarities. Europe is transplanting a legal concept that originates from a completely different legal mindset, implying the mechanism needs to be fundamentally adapted to the receiving legal environment and remade. In the end, it seems that U.S. class actions were not adopted but, rather, used as a source of inspiration.

The European approach and its divergence from U.S. class actions is determined by three factors. First, in Europe, the purpose of collective actions is different; contrary to the U.S. where class actions fulfill a primarily public policy function, in the E.U., it is the compensatory function that determines their operation. Second, the European discourse on collective litigation has featured various apprehensions, aversions, and fears about U.S. class actions. Although these fears have been exaggerated, they did play a role in shaping the European model. Third, while the U.S. class action provides patterns as to most regulatory questions, which can be adopted, adapted, or rejected, collective litigation in Europe raises a number of regulatory issues that do not emerge in the U.S. context and, consequently, for which there is simply no reference point on the other side of the Atlantic.

A. The Predominant Regulatory Purpose of Collective Litigation in Europe

Collective actions, as private law remedies in general, have essentially two concurring functions: reparation for the injury and prevention of future violations. Of course, these functions are undoubtedly interlinked. A compensation driven by purely reparatory considerations also deters future wrong-doing, and a private law remedy serving a preventive purpose also provides compensation. Because they are not mutually exclusive but complementary, the relationship and role of these two functions—reparation and deterrence—cannot be described as a categorical choice. Instead, the relevant question is their relative weight.

In the U.S., actions for damages may have a clear and predominant public policy function. The private plaintiff is, in some cases, regarded as the “private attorney general”⁹ who makes use of the incentives offered by the law to protect the public interest. As noted by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, in the context of antitrust law, “the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”¹⁰ In the same

8. Commission on Principles for Injunctive and Compensatory Collective Redress, *supra* note 7, at 60.

9. See Christopher Hodges, *Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress*, in MASS JUSTICE 101–17 (Jenny Steele & Willem H. van Boom eds., 2011); JOANNE BLENNERHASSETT, A COMPARATIVE EXAMINATION OF MULTI-PARTY ACTIONS: THE CASE OF ENVIRONMENTAL MASS HARM 28 (2016).

10. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 130–31 (1969); Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States*

vein, in *Hawaii v. Standard Oil Co.*, the Supreme Court, in referring to treble damages available under U.S. antitrust law, stressed that “[b]y offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”¹¹

The public policy purpose stands out markedly in the case of class actions.¹² The 1966 introduction of opt-out collective actions was inspired by the idea that collective litigation on behalf of large groups of people could effectively supplement the government’s regulatory and enforcement efforts, especially in cases of small claims which would not otherwise get to court.¹³ Furthermore, “[c]ivil rights cases and other suits seeking social change or to implement institutional reform were, in many ways, the quintessential type of class action envisioned at the time of the 1966 amendments.”¹⁴

The prevalence of this public policy function, at least in terms of extent, is alien to E.U. law in which collective actions have been regarded as serving a predominantly compensatory function. While the practical non-enforceability of small value claims is often conceived as a question of effectiveness,¹⁵ it also has serious human rights and rule-of-law implications.¹⁶ Even though the public policy function is being upgraded in certain fields, such as competition law,¹⁷ in terms of

and *Europe: A View Across the Atlantic*, 14 U.N.H.L. REV. 303, 308 (2016) (“Private parties can also be empowered to file lawsuits and serve as ‘private attorneys general.’”).

11. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 147 (1968) (Fortas, J., concurring in the result); S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899, 899 (2012); Sándor Udvarý, *The Advantages and Disadvantages of Class Action*, 9 IUSTUM AEQUUM SALUTARE 67, 74 (2013), <http://ias.jak.ppke.hu/hir/ias/20131sz/05.pdf> (Hung.).

12. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 130–31.

13. See Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941).

14. Nicholas M. Pace, *Class Actions in the United States of America: An Overview of the Process & the Empirical Literature*, GLOBAL CLASS ACTION EXCHANGE: COUNTRY REPORTS 8 (2008), http://globalclassactions.stanford.edu/sites/default/files/documents/USA_National_Report.pdf.

15. See Karl-Alexander Neumann & Landon Wade Magnusson, *Pour Une Action Collective Européenne Dans le Droit de la Concurrence*, 24 REV. QUÉBÉCOISE DE DROIT INT’L [R.Q.D.I.] 149, 154–55 (2011), https://www.sqdi.org/wp-content/uploads/24-2_5_Neumaa_Magnusson.pdf (Can.); Zygimantas Juska, *Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress*, 7 EUR. J. LEGAL STUD. 114, 128 (2014); THIJS BOSTERS, *COLLECTIVE REDRESS AND PRIVATE INTERNATIONAL LAW IN THE E.U.* 17 (2017).

16. For an overview on the intersection between collective actions and human rights, and access to justice in particular, see CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* 187–92 (2008); SONJA LANGE, *DAS BEGRENZTE GRUPPENVERFAHREN: KONZEPTION EINES VERFAHRENS ZUR BEWÄLTIGUNG VON GROBSCHÄDEN AUF DER BASIS DES KAPITALANLEGER–MUSTERVERFAHRENSGESETZES* 95–106 (2011) (Ger.); Neumann & Magnusson, *supra* note 15, at 151–52; Stefan Wrška et al., *Access to Justice and Collective Actions: “Florence” and Beyond*, in *COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?* 1–22 (Stefan Wrška, Steven J. van Uytsel, & Mathias M. Siems eds., 2012); Maria-José Azar-Baud, *La Nature Juridique Des Actions Collectives en Droit de la Consommation*, 2012 (1) REV. EUROPÉENNE DE DROIT DE LA CONSOMMATION [R.E.D.C.] 3, 15–18 (2012) (Fr.); Maria Teresa Vanikiotis, *Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom*, 37 FORDHAM INT’L L.J. 1639, 1640–41 (2014); RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 52–57 (2014).

17. See Case C-724/17, *Vantaan Kaupunki v. Skanska Indus. Sols. Oy*, NCC Indus. Oy, *Asfaltmix Oy Skanska*, 2019 CURIA paras. 43–45 (Mar. 13, 2019). Attorney General Wahl took the position that in competition law, private enforcement’s major rationale is deterrence and the compensatory function is secondary. This stance, however, seems not to have questioned the private enforcement’s traditional

effects, collective actions are not granted more room than justified by the compensatory function.

This symbiosis of compensatory and public policy purposes has shaped European collective actions. The European Commission's Recommendation on Collective Redress defines collective actions as a means to "facilitate access to justice in relation to violations of rights under Union law" and to reinforce the effectiveness of E.U. law.¹⁸ The Recommendation is based on the premise that collective actions enhance both the effectiveness of the law through stopping and deterring unlawful practices and the chance to obtain a real legal remedy through compensation.¹⁹

It is because of the above considerations that statistical comparisons between E.U. and U.S. collective actions are misleading. E.U. collective actions were never meant to *replace* public enforcement, but simply to *assist* it. Hence, they are not expected to operate at the same intensity as U.S. class actions. In Europe, the purpose of collective actions is to ensure an effective remedy and to reap the benefits of this to further the effectiveness of law.

The above regulatory purpose points out the root cause of most European fears against collective actions, especially opt-out proceedings. In the European mindset, private litigation having a remarkable public policy function is undesirable and considered to encroach on the exclusive prerogative of the state. This aversion emerges in spite of the fact that collective actions are closely supervised and controlled by the court, from the opening of the procedure until the approval of the settlement and adoption of the final judgment.²⁰ While the opposition against collective actions has been using various labels, it should not be forgotten that the root cause of all these fears and criticisms is the notion that, in the U.S., class actions have been used as a means to privatize the enforcement of public policy, but in Europe, this should be avoided by all means.

It is very telling that European resistance was less strong in cases where the opt-out principle's social impact was limited or even insignificant. This may suggest that the apprehension about the privatization of a parcel of public policy was an unspoken argument against class actions. For instance, Directive 2009/22/EC, which consolidated Directive 98/27/EC and its amendments, authorizes administrative agencies and consumer organizations to institute proceedings in an opt-out system for the infringement of the E.U.'s consumer protection rules.²¹ Still, this opt-out mechanism has met no major criticism. The fact that the Directive is limited to claims for injunction and declaratory judgment²² arguably played a role in this. Because the Directive's opt-out mechanism is not

civil law foundations and to have simply confirmed that the main reason why civil liability is so important for E.U. law is that it also has a deterrent effect. *Id.* at ¶¶ 28, 50.

18. *Commission Recommendation of 11 June 2013*, *supra* note 7, at 61.

19. *Id.*

20. See ÉLODIE FALLA, *THE ROLE OF THE COURT IN COLLECTIVE REDRESS LITIGATION: COMPARATIVE REPORT* (2014).

21. Currently, Directive 2009/22/EC lists 16 E.U. consumer protection Union acts that are strengthened by the possibility of collective action. See Directive 2009/22/EC of the European Parliament and of The Council of 23 Apr. 2009 on Injunctions for the Protection of Consumers' Interests, 2009 O.J. (L110) 30.

22. Article 7 provides that Member States are free to give these organizations "more extensive rights to bring action at [the] national level." Directive 2009/22/EC of the European Parliament and of The Council of 23 Apr. 2009 on Injunctions for the Protection of Consumers' Interests, *supra* note 21, at 32.

available for monetary remedies,²³ it was not perceived to be a tool of privatizing public policy.

B. European Fears and Aversions to Collective Litigation

Collective litigation, particularly the notion that group members may be represented without express authorization, has given rise to fear and revulsion in Europe. First, “representation without authorization” is claimed to be unconstitutional due to its encroachment on private autonomy. Second, the practical feasibility of class actions to actually deliver redress has been impugned with reference to technical difficulties of identification and proof. Third, class actions have been claimed to inflict significant social damages due to their being prone to abusive litigation (blackmailing potential). Although all these fears have been exaggerated, they had an impact on the European model.

1. The Taboo of Private Autonomy

It is widely accepted that the opt-out system may raise constitutional concerns. “Representation without authorization” may impair group members’ private autonomy, which consists of, in this context, the right to decide whether or not to enforce a claim and, if so, how to enforce it.²⁴ This gives a golden opportunity for European traditionalism to wrap up its aversion against collective litigation in constitutional parlance.

It is true that mandatory representation—that is, representation without authorization not supplemented by the right to opt-out—may be irreconcilable with constitutional requirements. For instance, in Spain, where the judgment’s res judicata effects may extend to non-litigant group members, it has been convincingly argued that absent a specific statutory provision, the right to opt out arises from the constitutional principles of due process and access to justice.²⁵ Nevertheless, representation without authorization supplemented with the right to opt out may merit a different treatment. It is noteworthy that this is in line with the U.S. Supreme Court’s stance that class actions based on representation without authorization meet the requirements of due process as long as members have the

23. See J. Silguero Estagnan, *Las Acciones Colectivas de Grupo*, 3 ARANZADI CIVIL: REVISTA QUINCENAL 2261 (2004) (Spain).

24. See *Commission Communication Towards a European Horizontal Framework for Collective Redress*, *supra* note 7; See also S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 ARIZ. ST. L.J. 233, 244–45 (2013) (referring to these considerations as the plaintiff’s “individual participatory right”).

25. For a comprehensive analysis on the Spanish class action mechanism, see LUIS JAVIER MIERES, *ACERCA DE LA CONSTITUCIONALIDAD DE LA NUEVA REGULACIÓN DE LAS ACCIONES COLECTIVAS PROMOVIDAS POR ASOCIACIONES DE CONSUMIDORES Y USUARIOS* (Barcelona, 2000). See also LAURA CARBALLO PIÑEIRO, *LAS ACCIONES COLECTIVAS Y SU EFICACIA EXTRATERRITORIAL: PROBLEMAS DE RECEPCIÓN Y TRANSPLANTE DE LAS “CLASS ACTIONS” EN EUROPA* 61–88 (Santiago de Compostela, 2009); J. M. López Jiménez, *Las Acciones Colectivas Como Medio de Protección de los Derechos e Intereses de los Consumidores*, 6852 DIARIO LA LEY (2008), http://blog.adicae.net/consumidores-2014/files/2014/12/Las_acciones_colectivas_como_medio_de_proteccion%C3%B3n_de_los_derechos_e_intereses_de_los_consumidores.pdf (Spain); J. J. Marín López, *Las Acciones de Clase en el Derecho Español*, INDRET 3, 3–13 (2001), http://www.indret.com/pdf/057_es.pdf (Spain); J. Estagnan, *supra* note 23, at 9.

right to opt out.²⁶ Interestingly, the rigid unconstitutionality arguments have found no reflection in the constitutional case-law.

The European Court of Human Rights (“ECHR”) addressed this question of representation without authorization²⁷ in *Lithgow v. United Kingdom*,²⁸ specifically in the context of a scheme that established mandatory representation without authorization where group members were forced to join and could not opt out. The U.K. expropriated a British company and, led by the desire to avoid the mass of individual actions, appointed a “stockholders’ representative” whose power of attorney to claim compensation precluded group members’ individual actions. The ECHR held:

The right of access to the courts secured by Article 6 para. 1 (art. 6–1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals.”²⁹

The limitations may not impair the very essence of the right and need to “pursue a legitimate aim,” and there needs to be “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”³⁰ As to the scheme at stake, the ECHR concluded that these conditions were met. The very essence of the right to a trial (court) was not impaired³¹ because individual rights were safeguarded, albeit indirectly: the group representative was “appointed by and represented the interests of all” group members, and individual group members could seek remedy in case the representative breached one of his duties. This conclusion was not undermined by the fact that the group members’ right to control the representative was very limited, and it was not the individual shareholders but their community that was entitled to exercise these rights.³² Furthermore, the Court held that the scheme “pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalization measure, a multiplicity of claims and proceedings brought by individual shareholders,” and there was “a reasonable relationship of proportionality between the means employed and this aim.”³³

The above jurisprudence was confirmed in *Wendenburg*.³⁴ In the context of a procedure before the German Federal Constitutional Court (*Bundesverfassungsgericht*), the ECHR, referring to *Lithgow*, held that while “the applicants were barred from appearing individually before that court, . . . in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court.”³⁵

26. *Philipps Petroleum v. Shutts*, 472 U.S. 797, 813–14 (1985).

27. For an analysis on the ECHR case-law, see Strong, *supra* note 24, at 243–45.

28. *Lithgow v. United Kingdom*, 8 Eur. Ct. H.R. 329 (1986).

29. *Id.* at ¶ 194(a).

30. *Id.* at ¶ 194(c).

31. *Id.* at ¶ 196.

32. *Id.*

33. *Id.* at ¶ 197.

34. *Wendenburg and Others v. Germany*, 2003–II Eur. Ct. H.R. 347, 353.

35. *Id.* at ¶ 3.

The French Constitutional Council (“Conseil Constitutionnel”) examined the de facto opt-out collective action introduced by the French legislature in 2014 and found it constitutional. It is a central feature of the French regime that although the group representative may launch a collective action without the group members’ express authorization, the final judgment, in essence, will extend only to those who expressly accept the award; at this stage, tacit adherence is not sufficient. It seems that it was decisive for the French Constitutional Council that the res judicata effects covered solely those group members who received compensation at the end of the procedure.³⁶ Apparently, the fact that only benefits accrued to group members and that the judgment’s res judicata effects covered only those who assented to it (since compensation can be paid only if the group member accepts the final judgment) were sufficient to do away with the constitutional concerns.

Notwithstanding the above constitutional jurisprudence, party autonomy has played a huge role in some Member States’ rejection of collective actions, particularly opt-out proceedings. In Germany, opt-out class actions were rejected for constitutional reasons; for example, it may impair the right to a hearing (*Recht zum rechtlichen Gehör*) and the right of disposition (*Dispositionsgrundsatz*).³⁷ While it could be argued that silence should imply acceptance, such a legal consequence may emerge only if there is proper notice, and it is highly questionable whether constructive knowledge would suffice in this regard.³⁸ The foregoing constitutional concerns have been taken so seriously that in 2005, the German Federal Cartel Office (*Bundeskartellamt*), notwithstanding the very strong policy for competition law’s private enforcement, discarded the idea of opt-out class actions apparently because it was said to restrict the right to a hearing and to violate the principle that the party is the master of his or her own case (right of disposition).³⁹

In the context of French law, the protection of party autonomy has been consistently described by the principle of *nul ne plaide par procureur*, meaning “no

36. Conseil Constitutionnel, *Decision 2014–690 du 13 Mars 2014: Loi Relative à la Consommation*, CONSEIL CONSTITUTIONNEL 5–7 (Mar. 13, 2014), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014690dc/2014690dc.pdf (Fr.).

37. See CHRISTOPH GREINER, DIE CLASS ACTION IM AMERIKANISCHEN RECHT UND DEUTSCHER ORDRE PUBLIC 189 (1998); LILLY FIEDLER, CLASS ACTIONS ZUR DURCHSETZUNG DES EUROPÄISCHEN KARTELLRECHTS: NUTZEN UND MÖGLICHE PROZESSUALE AUSGESTALTUNG VON KOLLEKTIVEN RECHTSSCHUTZVERFAHREN IM DEUTSCHEN RECHT ZUR PRIVATEN DURCHSETZUNG DES EUROPÄISCHEN KARTELLRECHTS 237–45 (2010); LANGE, *supra* note 16, at 129–73; Astrid Stadler, *Mass Tort Litigation*, in COMPARATIVE STUDIES ON BUSINESS TORT LITIGATION 163, 172–73 (Rolf Stürmer & Masanori Kawano eds., 2011); CAROLINE GEIGER, KOLLEKTIVER RECHTSSCHUTZ IM ZIVILPROZESS: DIE GRUPPENKLAGE ZUR DURCHSETZUNG VON MASSENSCHÄDEN UND IHRE AUSWIRKUNGEN 245–55 (2015).

38. Astrid Stadler, *Die Internationale Anerkennung von Urteilen und Vergleichen aus Verfahren des Kollektiven Rechtsschutzes mit opt-out Mechanismen*, in *Ars Aequi et Boni in Mundo. Festschrift für Rolf A. Schütze zum 80. Geburtstag* 561, 569–78 (Reinhold Geimer, Athanassios Kaissis, & Roderich C. Thümmel eds., 2015). For arguments that public notice in collective actions does not violate the principle of disposition, see Axel Halfmeier, *Recognition of a WCAM settlement in Germany*, 30(2) NEDERLANDS INT’L PRIVAATRECHT [NIPR] 176, 183 (2012).

39. Bundeskartellamt, *Diskussionspapier: Private Kartellrechtsdurchsetzung: Stand, Probleme, Perspektiven* 30–31 (2005), <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/DiskussionsHintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.html?nn=3590858>.

one pleads by proxy.”⁴⁰ According to this entrenched principle of French civil procedural law, to have standing, the plaintiff must have a legitimate interest in the case, and to be legitimate, the interest must be direct and personal; hence, all persons involved in the lawsuit must be identified and represented in the procedure.⁴¹ This consideration and the sanctity of party autonomy presumably played a role in shaping the French opt-out system adopted in 2014, where the binding effect of the collective judgment was evaded by giving group members the right to accept the judgment after it was delivered.⁴² While the Constitutional Council’s decision examined above does not suggest that this was the only way for a collective action to satisfy the constitutional requirements, the legislature’s careful approach shows the concept of private autonomy plays a very important role that goes beyond mandatory constitutional requirements.

2. *Collective Redress is Infeasible and Fails to Enrich Group Members*

A frequent argument against opt-out class actions is that group members frequently do not get their money and, instead, the benefits go to the law firm that represents the group.⁴³ This view emerges from the fact that group members are not identified beforehand, which may cause difficulties when distributing the award. This concern reinforces the argument that opt-out class actions may be driven by illicit financial motivations. In other words, law firms push collective actions forward to earn money and may leave group members without any real compensation.

This criticism exaggerates the problem of identification and overlooks that in opt-out systems, as a general rule, the award is normally distributed to group members.⁴⁴ Nonetheless, it did obsess European collective action law with the idea

40. Noël J. Mazen, *Le Recours Collectif: Réalité Québécoise et Projet Français*, 39(2) REV. INT’L DE DROIT COMPARE 373, 383–84 (1987).

41. Laurel Harbour et al., *Proposed Reforms in France in Chapter 4: Representative Actions and Proposed Reforms in the European Union*, in *WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* 166 (Paul G. Karlsgodt ed., 2012).

42. NAGY, *supra* note 3, at 64–66.

43. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, at 12, COM (2013) 0401 final (2013) (“[A]n ‘opt-out’ system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them.”) (emphasis added).

44. As regards claims administration, see Katherine Kinsella & Shannon Wheatman, *Chapter 14: Class Notice and Claims Administration*, in *THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW* 264, 273–74 (Albert A. Foer & Jonathan W. Cuneo eds., 2010); Katherine Kinsella & Shannon Wheatman, *Chapter 13: Class Notice and Claims Administration*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES* 338 (Albert A. Foer & Randy M. Stutz eds., 2012). Although in certain systems “fluid recovery” or “cy pres” is available, this does not necessarily have to be adopted along with the introduction of collective actions (though it is advisable). See Janet C. Alexander, *An Introduction to Class Action Procedure in the United States* 21–22 (July 21–22, 2000), <http://law.duke.edu/grouplit/papers/classactionalexander.pdf> (Conference Paper: Debates Over Group Litigation in Comparative Perspective); Albert A. Foer, *Chapter 14: Cy Pres as a Remedy in Private Antitrust Litigation*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES* 349 (Albert A. Foer & Randy M. Stutz eds., 2012) (“The normal remedies in a private antitrust case are a combination of injunctions and treble damages that are paid to the victim or victims of the anticompetitive activity. When an aggregate amount of damages is established, the primary objective is

that there is a need for a heightened requirement of definability; opt-out collective actions should be allowed only if group members are clearly identifiable by means of the group definition. Definability is, of course, not a major issue in opt-in proceedings, as the judgment extends to a list of specific persons who opted in.

3. *Financial Incentives Lead to Abusive Litigation (Blackmail)*

Perhaps the gravest fear against collective actions, especially opt-out proceedings, is that they may lead to a litigation boom and enable group representatives to blackmail defendants and wring illegitimate settlements.⁴⁵ The U.S. is often used to demonstrate the risks of opt-out collective actions. There is a general distrust of privatizing the enforcement of public policy and a fear that private financial incentives and interests are not reconcilable with the protection of the public interest. This is based on the notion that market-based mechanisms operating by means of financial incentives cannot secure outcomes that adequately further the public interest.

U.S. law contains a large set of financial incentives that make up a financing pattern for collective plaintiffs: gargantuan punitive damages, treble damages in certain fields, the absence of a “loser pays” principle,⁴⁶ one-way cost-shifting in certain fields,⁴⁷ contingency fees, and entrepreneurial lawyering.⁴⁸ Even though these financial incentives are equally available to individual plaintiffs, they catalyze collective litigation.

The above consideration has two key implications. First, the financial incentives provided by U.S. law, although largely unknown in Europe, are considered to be especially dangerous in the context of collective litigation. Second, the European model of collective actions rejects any market-based funding that uses risk-sharing to finance collective litigation. These two aspects exist not only in relation to opt-out collective proceedings, but also opt-in actions. This is reflected in the Recommendation on Collective Redress, which proposes the introduction of opt-in collective actions but still bans contingency fees and all other financial incentives for lawyers, punitive damages, and award-based returns in third-party financing.⁴⁹

to distribute the damages to those who were injured. In antitrust class action litigation, however, it is often impossible or impracticable to compensate all victims. Administrative concerns may work against payments to individual plaintiffs, as in the case of an extremely large class where the fund is not sufficient to justify the transaction costs of distribution to individual claimants. Consequently, in some cases, there is money left over in the form of unclaimed funds. In such cases, courts sometimes employ the doctrine of ‘cy pres’ to put the unclaimed funds to ‘the next best use,’ which may include awarding funds to public interest organizations or charities for purposes related to the case.”).

45. See, e.g., HODGES, *supra* note 16, at 131–32.

46. *Id.* (under the “American rule” on attorney’s fees, the parties pay their attorney irrespective of the action’s outcome).

47. If the claimant wins, he is entitled to compensation for his reasonable attorney’s fees, but this does not work the other way around. See, e.g., Sherman Act, 15 U.S.C. § 4304(a) (2020); Fair Labor Standards Act, 29 U.S.C. § 216 (2020); Magnuson–Moss Warranty Act, 15 U.S.C. § 2310(d)(2) (2020).

48. The law–firm invests money and working hours in the action. Thus, in exchange for an appropriate risk premium, it takes over the risks of litigation from the parties. See Alexander, *supra* note 44.

49. Commission on Principles for Injunctive and Compensatory Collective Redress, *supra* note 7, at 64, ¶¶ 29–32 (E.U.).

*C. Novel Questions of Collective
Actions in Europe*

Collective actions are legal transplants alien to traditional civil law thinking. Hence, once introduced, they call for the re-consideration of a wide array of questions.⁵⁰

*1. Funding and Distrust of Market-Based Mechanisms
in the Enforcement of Public Policy*

As noted above, European legal systems are largely devoid of the financial incentives that stimulate litigation in the U.S. In the U.S., class actions are normally financed by law firms, which are incited by the reward of a contingency fee and, due to American law, protected against the risks related to the defendant's attorney's fees. In Europe, on the other hand, there is no comparable market, not only because class actions have no history, but also because litigation is less profitable. In the U.S., law firms are compensated via legal institutions of general application (such as punitive and treble damages, one-way cost-shifting, etc.) for the immense risk they assume. At the same time, there are no such mechanisms on the other side of the Atlantic. This circumstance calls for regulatory intervention, given that financing is the oil in the engine of collective actions.⁵¹

Unfortunately, European collective action laws have failed to settle or even address the problem of financing. While they ruled out the American institutions that stimulate the operation of U.S. class actions, they failed to replace these with appropriate substitutes. The European fear of American-style financial incentives has been so immense that the Recommendation on Collective Redress suggests the introduction of safeguards in order to obviate incentives to abuse the opt-in mechanism it proposes. It makes the use of the "loser pays" principle mandatory,⁵² excludes, at least in principle, contingency fees,⁵³ and prohibits punitive damages.⁵⁴ Furthermore, it restricts group representation to non-profit entities.⁵⁵ The exclusion of market-based mechanisms inevitably calls for public and charitable funding.

2. Two-Way Cost-Shifting

In the U.S., group members do not run the risk of becoming responsible for the defendant's attorney's fees. In Europe, however, the principle of two-way cost-shifting prevails, implying that group members' financial liability for legal costs

50. On the financing options in Europe, see Stefaan Voet, *The Crux of the Matter: Funding and Financing Collective Redress Mechanisms*, in E.U. CIVIL JUSTICE: CURRENT ISSUES AND FUTURE OUTLOOK 201 (Burkhard Hess, Maria Bergström, & Eva Storskrubb eds., 2016).

51. See Csongor Istvan Nagy, *The European Collective Redress Debate After the European Commission's Recommendation: One Step Forward, Two Steps Back?*, 22(4) MAASTRICHT J. EUROPEAN & COMP. L. 530, 548–550 (2015).

52. Commission on Principles for Injunctive and Compensatory Collective Redress, *supra* note 7, ¶ 13.

53. *Id.* at ¶¶ 29–30. According to the Recommendation, contingency fees can be permitted only exceptionally.

54. *Id.* at ¶ 31.

55. *Id.* at ¶ 4.

has to be addressed. The general principle of civil procedure requires that someone be obliged to reimburse the winning party for his legal expenses, and there is no reason to deprive the defendants of collective actions of this protection. This obligation may be placed either on individual group members or on the group representative. In opt-in systems both variations are conceivable, as group members join the collective action voluntarily. Opt-out systems, however, contain an additional twist: the strongest argument for the constitutionality of opt-out class actions is that they confer only benefits and no disadvantages on group members; this argument would lose weight if group members were exposed to the risk of being liable for the defendant's legal costs.

III. EUROPEAN MODELS OF COLLECTIVE ACTIONS

Collective actions have not been “federalized” in the E.U. The application of E.U. law is, for the most part, carried out by Member States, which have procedural autonomy.⁵⁶ While national law must not discriminate between the application of E.U. and domestic law (principle of equivalence)⁵⁷ and “must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness),”⁵⁸ Member States are free to determine the structure and method of application and enforcement. There have been no legislative efforts to federalize collective actions, with the exception of the European Commission's 2013 Recommendation on Collective Redress,⁵⁹ a non-binding instrument that only holds “persuasive authority” for national legislators.⁶⁰

The European history of collective actions started in the late 1980's and early 1990's.⁶¹ Aside from the English representative action, a doctrine rooted in common law but rarely used in practice,⁶² collective action legislation first appeared in Spain (1984), Greece (1994), Portugal (1995), and Hungary (1996).⁶³ Interestingly, all these systems were based on the opt-out principle and, even more interestingly, they proved to be less effective than one would expect from an opt-out scheme. These were followed by the introduction of various opt-in and opt-out schemes. Today, seventeen out of twenty-eight Member States provide for

56. See, e.g., Case 51–54/71 International Fruit Company, 1971 E.C.R. 1107, ¶¶ 3–4.

57. See, e.g., Case 33/76, Rewe–Zentralfinanz eG and Rewe–Zentral AG v. Landwirtschaftskammer für das Saarland, 1976 E.C.R. 1989, ¶ 5.

58. See, e.g., Case C–261/95 Rosalba Palmisani v. Istituto Nazionale Della Previdenza Sociale [INPS], 1997 E.C.R. I–4025, ¶ 27.

59. For an analysis of the Recommendation, see Laura Carballo Piñeiro, *Recomendación de la Comisión Europea Sobre los Principios Comunes Aplicables a los Mecanismos de Recurso Colectivo de Cesación o de Indemnización en los Estados Miembros en caso de Violación de los Derechos Reconocidos por el Derecho de la Unión Europea* (11 de Junio de 2013), 65(2) REV. ESPAÑOLA DE DERECHO INT'L 395 (2013); Ákos Szalai, *Kollektív Keresetek Joggazdaságtana*, 10(1) IUSTUM AEQUUM SALUTARE 163 (2014); Nagy, *supra* note 51, at 530–31.

60. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012 O.J. (C–326).

61. See Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures: European Debates*, 58 INT'L & COMP. L. Q. 379, 383–401 (2009).

62. Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Actions*, 52 DEPAUL L. REV. 401, 402 (2002).

63. 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Act LVII of 1996 on the Law Prohibiting Unfair Market Conduct and Restrictions on Competition of 1996, § 85/A).

collective actions,⁶⁴ and ten of them have a system based, at least partially, on the opt-out principle⁶⁵ (Belgium,⁶⁶ Bulgaria,⁶⁷ Denmark,⁶⁸ France,⁶⁹ Greece,⁷⁰ Hungary,⁷¹ Portugal,⁷² Slovenia,⁷³ Spain,⁷⁴ and the U.K.⁷⁵). Accordingly, more than

64. The Commission's Report on the implementation of the Recommendation on Collective Redress asserts that "Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK)." Commission on Principles for Injunctive and Compensatory Collective Redress, *supra* note 7, at 3. However, somewhat misleadingly, it also lists Member States where there is admittedly no "legislation on compensatory relief" but "collective actions are carried out on the basis of the assignment of claims or the joinder of cases." *Id.*

65. *Contra* Commission Recommendation, *supra* note 7, at 13 (considering the French, the Hungarian, and the Spanish law to contain an opt-in system).

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

67. BULGARIAN CODE OF CIVIL PROCEDURE, Ch. 33, ¶¶ 379–88 (2008), <https://kenarova.com/law/Code%20of%20Civil%20Procedure.pdf> (Bulg.). See Alexander Katzarsky & Georgi Georgiev, *Chapter 11: Bulgaria*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CLASS & GROUP ACTIONS 64 (Ian Dodds-Smith & Alison Brown eds., 2012).

68. Bekendtgørelse Af Lov Om Rettens Pleje [Administration of Justice Act], LBK No. 1139, §§ 254a–254e (2014) (DK).

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

70. Protection of Consumers, Art. 10(16)–(29), (Act No. 2251/1994), <https://www.eccgreece.gr/wp-content/uploads/2015/07/N2251-1994-enc2007-en1.pdf> (Greece).

71. 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenyszabályozás tilalmáról (Act LVII of 1996 on the Law Prohibiting Unfair Market Conduct and Restrictions on Competition of 1996, § 85/A); 1997. évi CLV. törvény a fogyasztóvédelemről (Act CLV of 1997 on the Law of Consumer Protection, § 38–39); 2016. évi CXXX. törvény a polgári perrendtartásról (Act CXXX of 2016 on the Code of Civil Procedure, §§ 580–91) (Hung.).

72. Right to Procedural Participation and Popular Action, No. 83/95, http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=722&tabela=leis&so_miolo= (Port.). See also Leonor Rossi & Miguel Sousa Ferro, *Private Enforcement of Competition Law in Portugal (II): Actio Popularis—Facts, Fictions and Dreams*, 4 REV. DE CONCORRÊNCIA E REGULAÇÃO 35, 46–64 (2013); Miguel Sousa Ferro, *Collective Redress: Will Portugal Show the Way?*, 6 J. EUROPEAN COMPETITION L. & PRAC. 299, 299–300 (2015).

73. Zakon o kolektivnih tožbah ZkolT [Law on Collective Action], No. 55/17, <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7399> (Slo.).

74. See Defense of Consumers and Users § 20 (B.O.E 1984, 26) (Spain), *superseded by* Consolidated Text of the General Law for the Defense of Consumers and Users and other complementary laws § 24 (R.D.L. 2007, 287) (Spain). This provision was later developed in almost every special consumer law issued by the Spanish legislature. See Laura Carballo Piñeiro, *La Tipicidad de las Acciones Colectivas en el Ordenamiento Jurídico Español*, 27(3)–(4) JUSTICIA: REV. DE DERECHO PROCESAL 63, 63–65 (2007). The Spanish Civil Procedure Act of 2000, though, is the first attempt to systematize collective proceedings and its provisions (Articles 6, 11, 15, 15bis, 221, 222(2), 256(1)(6), 519).

75. See, e.g., Enterprise Act of 2002, c. 40, §§ 18–19 (U.K.), *amending* Competition Act of 1998, c. 41, §§ 47/A–47/D (U.K.). See also rules 19.10 & 19.11 Group Litigation Order, U.K. SI 1998/3132 Pt 19(III).

half of the Member States have sanctioned collective actions, and from those who did, more than half chose the opt-out system while the rest stuck fully to the more conservative opt-in principle⁷⁶ (Finland,⁷⁷ Germany,⁷⁸ Italy,⁷⁹ Lithuania,⁸⁰ Malta,⁸¹ Poland,⁸² and Sweden⁸³).

A. The European Landscape: An Overview

While Europe is generally considered to feature the opt-in scheme, this observation is only partially valid. On the one hand, it is true that the opt-out rule is generally disapproved of, evidenced by the fact that representation without authorization is not in place in two-thirds of the Member States. In fact, in forty percent of them, no collective action is available, and traditional joinder of parties and assignments are the only means to bring collective claims to court.⁸⁴ Twenty-five percent of them adopted the opt-in collective action.⁸⁵ Furthermore, the E.U.

76. A couple of states adopted mechanisms that may resemble collective actions but cannot be regarded as a means of collective civil litigation. Although usually listed among Europe's opt-out collective proceedings, the Dutch collective settlement is not considered to be a collective action, as it merely provides a framework for cases where the defendant concedes liability and is ready to settle. For a comprehensive analysis on the Act, see Bart Krans, *The Dutch Act on Collective Settlement of Mass Damages*, 27(2) GLOBAL BUS. & DEV. L. J. 281 (2014); Thijs Bosters, *Collective Redress and Private International Law in the E.U.* 47–59 (TMC Asser Press, The Hague, 2017). Likewise, regimes providing for the disgorgement of illicitly obtained proceeds for the public budget are not regarded as collective actions, as they are not meant to compensate the victims. See ACT AGAINST UNFAIR COMPETITION (GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB), § 10, Gesetz Gegen den Unlauteren Wettbewerb in der Fassung der Bekanntmachung vom 3 März 2010 (BGBl. I S. 254), last amended GESETZ VOM § 4, 17 Feb. 2016 (BGBl. I S. 233); ACT AGAINST RESTRICTIONS OF COMPETITION (GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN), § 34(a), Gesetz Gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26 Juni 2013 (BGBl. I S. 1750, 3245), last amended GESETZ VOM § 4, 13 Okt. 2016 (BGBl. I S. 2258). Judicial mechanisms that help coordinate the adjudication of parallel individual proceedings after they have been launched are also not considered to be collective actions, as they are not related to access to justice and are not aimed at enhancing the effectiveness of law. See LAW ON MODEL PROCEEDINGS IN CAPITAL MARKET DISPUTES (GESETZ ÜBER MUSTERVERFAHREN IN KAPITALMARKTRECHTLICHEN STREITIGKEITEN), Aug. 16, 2005 (BGBl. I S. 2437). See Axel Halfmeier & Eberhard Feess, *The German Capital Markets Model Case Act (KapMuG)—A European Role Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform* (2012); Elisabeth Steinberger, *Die Gruppenklage im Kapitalmarktrecht: Vorschläge zur Weiterentwicklung des Kapitalanleger—Musterverfahrensgesetzes (KapMuG)* 44–132 (2016); THIJS BOSTERS, COLLECTIVE REDRESS AND PRIVATE INTERNATIONAL LAW IN THE E.U. 27–34 (2017).

77. ACT ON CLASS ACTIONS [RYHMÄKANNELAKI] [CIVIL CODE] art. 444/2007 (Fin.).

78. GESETZ ZUR EINFÜHRUNG EINER ZIVILPROZESSUALEN MUSTERFESTSTELLUNGSKLAGE [MUFKLAG K.A.ABK.] [CIVIL CODE], § 119 (Ger.).

79. See L. 12 Luglio 2009 n. 99, Lug. 31, 2009, n.176 (It.).

80. CODE OF CIVIL PROCEDURE OF THE REPUBLIC OF LITHUANIA [CIVIL CODE] c. XXIV art. 441 (Ltu.).

81. ACT VI OF 2012 [COLLECTIVE PROCEEDINGS ACT] [CIVIL CODE] (Malta).

82. ACT OF 17 DECEMBER 2009 [CIVIL CODE] J. of L. of 2010 n.7, 44 (Pol.); ACT OF 7 APRIL 2017 [CIVIL CODE], J. of L. of 2017, n. 19, 933 (Pol.). The law was comprehensively amended by Act of 7 April 2017 amending different laws in order to facilitate recovery of debts (Ustawa z dnia 7 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności), Journal of Laws of 2017, item 933. The amendments entered into force on June 1, 2017.

83. GROUP PROCEEDINGS ACT (SFS 2002:599) (Swed.).

84. NAGY, *supra* note 3, at 77.

85. *Id.* at 78.

Recommendation expresses a strong preference towards the opt-in system.⁸⁶ On the other hand, from the seventeen Member States that created a special regime for collective litigation, the majority (ten Member States), one way or another, accepted the opt-out principle.⁸⁷

In seven Member States, solely opt-in collective actions are available. The 2002 Swedish Act on Group Proceedings⁸⁸ was one of the first comprehensive, national codifications that covered the whole spectrum of civil claims.⁸⁹ It created an opt-in system. The Finnish Act on Collective Proceedings was adopted in 2007, following a fifteen-year-long debate.⁹⁰ It authorizes the Consumer Ombudsman to launch opt-in consumer collective actions.⁹¹ Italy's first collective action law was also adopted in 2007,⁹² then replaced in 2009⁹³ and again in 2019.⁹⁴ Poland introduced opt-in collective actions in 2009 (Act on Pursuing Claims in Group Proceedings),⁹⁵ but it underwent significant changes in 2017.⁹⁶ Malta adopted opt-in collective actions in 2012 in consumer, competition, and product safety matters.⁹⁷ Lithuania created an opt-in scheme of general application in 2015.⁹⁸ Germany

86. Verica Trstenjak, *Les Mécanismes de Recours Collectif et leur Importance pour la Protection des Consommateurs*, in LA COUR DE JUSTICE DE L'UNION EUROPÉENNE SOUS LA PRÉSIDENTE DE VASSILIOS SKOURIS (2003–2015): LIBER AMICORUM VASSILIOS SKOURIS 681 (Antonio Tizzano et al. eds., 2015).

87. NAGY, *supra* note 3, at 78.

88. GROUP PROCEEDINGS ACT (SFS 2002:599) (Swed.). For a comprehensive analysis of the draft version, see Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 824–30 (1997); Roberth Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381, 395–402 (2001); Henrik Lindblom, *Globalization of Class Action*, NATIONAL REPORT: GROUP LITIGATION IN SWEDEN (2007); Annina H. Persson, *Collective Enforcement: European Prospects in Light of the Swedish Experience*, in COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS? 341–63 (Stefan Wrba, Steven J. van Uytsel, & Mathias M. Siems eds., 2012).

89. GROUP PROCEEDINGS ACT (SFS 2002:599) §§ 1–2 (Swed.).

90. The Act came into force on October 1, 2007. ACT ON CLASS ACTIONS [RYHMÄKÄNNÄKÄ] [CIVIL CODE] art. 444/2007 § 19 (Fin.). For an analysis on the Act, see Klaus Vittingen, *Collective Litigation in Finland*, GLOBAL CLASS ACTIONS EXCHANGE (2007).

91. ACT ON CLASS ACTIONS [RYHMÄKÄNNÄKÄ] [CIVIL CODE] art. 444/2007 (Fin.).

92. Legge 24 Dec. 2007, n. 244, Dec. 28, 2008, n. 300 (It.). For a comprehensive analysis of the Italian legislation, see Remo Caponi, *Collective Redress in Europe: Current Developments of 'Class Action' Suits in Italy*, 16 ZEITSCHRIFT FÜR ZIVILPROZESS INT'L [ZZPINT] 61 (2011); Remo Caponi, *Class Action. Il Nuovo volto della Tutela Collettiva in Italia*, 1987 IL FORO ITALIANO 1 (Giuffrè, 2011); CESARO ERNESTO & BOCCHINI FERNANDO, LA NUOVA CLASS ACTION A TUTELA DEI CONSUMATORI E DEGLI UTENTI (2012).

93. Decreto Legislativo 23 July 2009, n. 1195–b, Leggi 6 Sept. 2005 (It.). For an overview of the Italian legislation, see Elisabetta Silvestri, *The Globalization of Class Actions—Italian Report*, GLOBAL CLASS ACTIONS EXCHANGE (2007); Elisabetta Silvestri, *Consumers' Collective Actions: An Update on Italian Draft Legislation*, GLOBAL CLASS ACTIONS EXCHANGE (2007); Elisabetta Silvestri, *The Italian 'Collective Action for Damages': An Update*, GLOBAL CLASS ACTIONS EXCHANGE (2008). In 2012, the pre-requisites of collective action were softened. Since March 25, 2012, it suffices if the rights of group members are “homogeneous”; they no longer have to be “identical.” Legge 24 March 2012 no. 27.

94. Legge, Aprile 12, 2019 n. 31, G.U. Apr. 18, 2019, n.92 (It.). This Article does not incorporate the changes introduced by this recent Italian legislation.

95. ACT OF 17 DECEMBER 2009 [CIVIL CODE] J. of L. of 2010 n.7, 44 (Pol.).

96. ACT OF 7 APRIL 2017 [CIVIL CODE], J. of L. of 2017, n.19, 933 (Pol.).

97. ACT VI OF 2012 [COLLECTIVE PROCEEDINGS ACT] [CIVIL CODE] art. 3 (Malta); ACT VI OF 2012 [COLLECTIVE PROCEEDINGS ACT] [CIVIL CODE] art. 4 (Malta).

98. It must be noted that group actions were theoretically also available before 2015. Section 49(6) of the Lithuanian Code of Civil Procedure, introduced in 2003, provided for group actions when necessary to protect the public interest. CODE OF CIVIL PROCEDURE OF THE REPUBLIC OF LITHUANIA [CIVIL CODE] c. V art. 49(6) (Ltu.). However, as confirmed by ruling Nr. 2–492/2009 of the Court of

introduced a “model declaratory claim” (*Musterfeststellungsklage*), an opt-in scheme available in consumer matters, in 2018.⁹⁹ Technically, German courts have no power to award damages. Instead, they may enter a declaratory judgment as to the pre-conditions of liability,¹⁰⁰ and group members may seek individual monetary relief on the basis of this judicial determination.¹⁰¹

There are ten Member States that have an opt-out scheme. Led by the consideration to limit representation without authorization to cases where this is inevitable, four of these Member States leave the choice between opt-in and opt-out to the presiding judge.¹⁰² This is in line with the Recommendation on Collective Redress, which provides that “[a]ny exception to [the opt-in] principle, by law or by court order, should be duly justified by reasons of sound administration of justice.”¹⁰³

The 2007 Danish collective action law authorizes the court to decide whether to carry out the action in the opt-in or the opt-out scheme.¹⁰⁴ The court chooses the opt-out pattern if individual litigation is not feasible due to a claim’s low monetary value.¹⁰⁵ Similarly, in Belgium,¹⁰⁶ the choice between the opt-in and the opt-out scheme is at the court’s discretion.¹⁰⁷ The U.K. introduced collective actions in 2015 in the field of competition law,¹⁰⁸ where the Competition Appeal Tribunal (“CAT”) decides whether the procedure will be carried out in the opt-in

Appeal of Lithuania, this provision could not be put into practice because it was not accompanied by an effective implementation mechanism. Court of Appeal of Lithuania, 2009, case Nr. 2–492/2009. Chapter XXIV1 on Collective Redress was inserted into the Code of Civil Procedure and came into effect on January 1, 2015, repealing Section 49(6). CODE OF CIVIL PROCEDURE OF THE REPUBLIC OF LITHUANIA [CIVIL CODE] c. XXIV art. 441 (Ltu.).

99. It was inserted as Book 6 (Sections 606–614) in the Code of Civil Procedure (Zivilprozessordnung). See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] §§ 606–14 (Ger.); see Hans-Bernd Schäfer, *Musterfeststellungsklage: Ein Schritt in die Richtige Richtung*, 98(7) WIRTSCHAFTSDIENST 456 (2018).

100. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 606(1) (Ger.).

101. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 613(1) (Ger.).

102. For a scholarly proposal suggesting that the choice between the opt-in and the opt-out scheme should be made dependent on the sum of the claims, see Karl-Alexander Neumann & Landon Wade Magnusson, *Pour Une Class-Action Européenne Dans Le Droit de la Concurrence*, 24(2) REV. QUÉBÉCOISE DE DROIT INT’L 149, 169–170 (2011).

103. 2013 O.J. (L 201) 26.7.

104. STANDING COMMITTEE ON PROCEDURAL LAW (RETSPLEJERÅDET) [CIV. CODE] art. 1468/2005 (Den.). For an English summary of the Danish legislation, see Erik Werlauff, *Class Actions in Denmark—From 2008*, GLOBAL CLASS ACTIONS EXCHANGE 3 (2008).

105. Peter Mogelvang-Hansen, *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union: Country-Report Denmark*, in EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION BERLIN: CIVIC CONSULTING 47 (2008); Peter Arnt Nielsen & Karin Linhart, *Danish Class Actions—A European Model?*, 5(3) INT’L J. PRIV. L. 229, 236 (2012).

106. See Jacques Laffineur & Grégory Renier, *L’action en Réparation Collective: Un Premier état des Lieux Deux ans Après son Introduction en droit Belge*, (112) DROIT DE LA CONSOMMATION–CONSUMENTENRECHT 3 (2016).

107. For an overview, see Sofia Oliveira Paris, *Private Antitrust Enforcement: A New Era for Collective Redress*, 8 Y.B. ANTITRUST & REG. STUD. 11, 23 (2015). However, group members residing habitually or having their principal place of business outside Belgium are covered only if they opt in. CODE OF ECONOMIC LAW [C. CIV.] art. XVII.38 and XVII.43 (Belg.). Furthermore, only the opt-in scheme may be used in cases of physical and moral damages. CODE OF ECONOMIC LAW [C. CIV.] art. XVII.43 (Belg.).

108. Consumer Rights Act 2015, c. 15 (Eng.). For a comprehensive analysis, see Barry J. Rodger, *The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the U.K.: A Class Act?*, 3 J. ANTITRUST ENFORCEMENT 258 (2015).

or the opt-out scheme.¹⁰⁹ Yet, the Competition Act does not set out the considerations that should determine this choice. The Competition Appeal Tribunal Rules of 2015 list two factors: “the strength of the claims” and “whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.”¹¹⁰ The CAT’s 2015 Guide to proceedings¹¹¹ amplifies these requirements. Without carrying out a full merits assessment:

[The CAT] will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. . . . For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.¹¹²

As to whether it is practicable for the proceedings to be brought in the opt-in scheme, the CAT “will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in.”¹¹³ It bears emphasizing that “[t]here is a general preference for proceedings to be opt-in where practicable.”¹¹⁴ Opt-in proceedings may be justified, if the class is small and individual losses high, or if class members can be easily identified and contacted.¹¹⁵ In Slovenia, the law on collective actions adopted in 2017¹¹⁶ leaves the choice between opt-in and opt-out to the court.¹¹⁷ The opt-in system has to be used if

109. 1998 Competition Act, c. 41, § 47/B(7)(c) (Eng.). It is worth noting that class members domiciled outside the U.K. must opt-in, even if the CAT chose the opt-out scheme for the case. See 1998 Competition Act, c. 41, § 47/B(10)–(11) (Eng.).

110. Guide to Proceedings, Competition Appeal Tribunal § 6.39, https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf (Eng.).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Law on Collective Actions (Zakon o kolektivnih tožbah—ZkolT), OFFICIAL J. REP. SLOVENIA. No. 55/2017. See Jorg Sladič, *Slovenian Law on Collective Actions: A Legal Transplant in Post Socialist Legal System*, (3) EUROPEAN J. CONSUMER L. 417 (2016); Jorg Sladič, *Das Slowenische Gesetz über Sammelklagen*, 22(1) ZEITSCHRIFT FÜR ZIVILPROZESS 137 (2017).

117. Article 29 of the Slovenian Law on Collective Actions. See British Institute of International and Comparative Law, *State of Collective Redress in the E.U. in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099 14–15 (Nov. 2017), https://www.biic.lorg/documents/1881_StudyontheStateofCollectiveRedress.pdf?showdocument=1; Jorg Sladič, *A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions?*, in TRANSFORMATION OF CIVIL JUSTICE: UNITY AND DIVERSITY 213, 214 (Alan Uzelac & Cornelis Hendrik Remco van Rhee eds., 2018).

non-pecuniary damages are involved or if at least ten percent of group members have claims in a value exceeding 2,000 Euros.¹¹⁸

Seven Member States established a statutory right to opt-out collective action.¹¹⁹ Greece introduced opt-out consumer collective actions very early, in 1994,¹²⁰ and authorized consumer protection organizations to claim damages. The Portuguese collective action law dates back to 1995 and has a constitutional basis.¹²¹ It has a general application and enables actions for any civil claim.¹²² Spanish law¹²³ contains a hybrid opt-in-opt-out scheme with a restricted sectoral approach.¹²⁴ In Hungary, opt-out collective action mechanisms exist in competition and consumer protection law.¹²⁵ The Hungarian Code of Civil Procedure also contains an opt-in joint action scheme concerning certain matters such as consumer protection, employment, and environmental damages.¹²⁶ Bulgaria adopted an opt-out class action scheme of general application in its Code of Civil Procedure of 2007.¹²⁷ The

118. Nonetheless, even if the opt-out system is chosen by the court, group members not domiciled in Slovenia can become part of the proceedings only if they opt in. Article 30 of the Slovenian Law on Collective Actions.

119. As noted above, the U.K. also, in the field of competition law, leaves the decision between the opt-in and opt-out scheme to the judge. British Institute of International and Comparative Law, *State of Collective Redress in the E.U. in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099 16 (Nov. 2017), https://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf?showdocument=1.

120. Law 2251/1994 on Consumers' Protection art. 10(16)–(29) (Gr.).

121. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] art. 52(3) (Pt.).

122. The general rules on popular actions (ação popular) are included in Act 83/95, and there are special provisions in particular fields. See, e.g., Law No. 19/2014 of 14 April on Environment Policy (Port.); Law No. 24/96 of 31 July on Consumer Protection Act (Port.); Law No. 107/2001 of 8 September on Cultural Heritage (Port.); Securities Code and Law 23/2018 of 5 June on Antitrust Damages Actions (Port.).

123. LEY DE ENJUICIAMIENTO CIVIL [L.E. CIV.] [CODE OF CIVIL PROCEDURE] art. 11 (Spain). For an English translation of the Spanish provisions, see Pablo Gutiérrez de Cabiedes Hidalgo, *Spanish Legislation on Collective Actions: Selected Excerpts* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/Spain_Legislation.pdf. For an analysis of the Spanish system, see Pablo Gutiérrez de Cabiedes Hidalgo, *Group Litigation in Spain*, National Report (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf.

Collective actions have been part of Spanish law since 1984. See Laura Carballo Piñeiro, *Consumer Collective Arbitration in Spain. What's in a Name?*, in CLASS AND GROUP ACTIONS IN ARBITRATION. DOSSIERS ICC INSTITUTE OF WORLD BUSINESS LAW 88 (Bernard Hanotiau & Eric A. Schwarz eds., 2016).

124. This scheme applies to consumer matters. See Fernando Gomez & Marian Gili, Country–Report Spain, EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION 6–7 (2008). In 2007, a similar provision was inserted as to matters concerning equal treatment between men and women. Section 11bis introduced by L.O. 3/2007, de 22 de Marzo, para la igualdad efectiva de mujeres y hombres («B.O.E.» 23 Marzo).

125. Magyar Közlöny [Hungarian Official Gazette], art. 85/A (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról); see also §§ 38–38/A (1997. évi CLV. törvény a fogyasztóvédelemről).

126. Polgári Perrendtartás [Civil Procedure Code] §§ 580–591 (2018) (Hung.).

127. Promulgated in State Gazette No. 59/20.07.2007, amended and supplemented by SG No. 50/30.05.2008, modified by Judgment No. 3 of the Constitutional Court of the Republic of Bulgaria of 8.07.2008–SG No. 63/15.07.2008, amended by SG No. 69/5.08.2008. The class action provisions can be found CODE OF CIVIL PROCEDURE OF BULGARIA, Ch. 33, §§ 379–88. Courts continuously apply high requirements on class formation and representation, effectively transforming the procedure into an opt-in system, with the exception of where the plaintiff is a public authority (the Commission on Consumer Protection) or a representative consumer association pursuing injunctive measures. Tatiana Markova, *Колективните иски: екс анте анализ на предявяването им в България* [Collective

French Consumer Code (*Code de la Consommation*) contains two patterns of collective action where monetary relief may be sought. First, in 1992, an opt-in scheme was inserted into the Consumer Code (*action en représentation conjointe*)¹²⁸ and, subsequently, extended to other matters (e.g., investor protection¹²⁹ and environmental protection).¹³⁰ Second, and more importantly, in 2014, the French legislature created an opt-out collective action regime in the Consumer Code (*action de groupe*), which was later extended to healthcare matters and, in 2016, converted into a general scheme also applicable to discrimination, environmental protection, and personal data.¹³¹ English law contains three mechanisms of collective litigation: representative proceedings, group litigation orders,¹³² and competition law collective actions. Although representative proceedings may be carried out in the opt-out scheme, they remained ineffective due to the strict construction of the preconditions in the case-law.¹³³

B. Purview and Scope: A Sectoral Approach

Most European collective action laws have a limited (sectoral) purview,¹³⁴ reflecting the notion that collective actions should be confined to cases where there is a pressing need for them. In Greece,¹³⁵ Finland,¹³⁶ Germany,¹³⁷ and Italy,¹³⁸

Claims: Ex Ante Analysis of Claim Submissions in Bulgaria], (1) [Икономически и социални алтернативи [ECONOMIC AND SOCIAL ALTERNATIVES] 142 (2015).

128. Consumer Protection Law, Loi n° 92–60, 18 Janv. 1992 devenue les articles L. 422–1 à L. 422–3 du Code de la Consommation, réd. Loi 93–949, 26 juillet 1993; R. 422–1 à 422–10, réd. Décr. 92–1306, 11 Décembre 1992 (Fr.).

129. L452–2 of the Monetary and Financial Code. See Véronique Magnier & Ralf Alleweldt, *Country-Report France*, in *EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION* 7–9 (2008).

130. This appeared to be less efficient given that it produced, in the first one and a half decades of its history, only a few cases. See Véronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation—France* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf.

131. Law on Group Actions, Loi n° 2014–344 du 17 Mars 2014 Relative à la Consommation et Décr. 2014–1081 du 24 Sept. 2014 Relatif à l'action de Groupe en Matière de Consommation; Loi n° 2016–41 du 26 Janv. 2016 de Modernisation de notre Système de santé et Décr. 2016–1249 du 26 Sept. 2016 Relatif à l'action de Groupe en Matière de santé; Loi 2016–1547 du 18 Novembre 2016 de Modernisation de la Justice du XXI^e Siècle, JORF 0269 du 19 Novembre 2016 texte 1.

132. For an analysis of group litigation orders, see RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 94–111 (2014).

133. See Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11(2) *DUKE J. COMP. & INT'L L.* 249, 253 (2001).

134. Commission Report on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM (2018) 40 final, 3.

135. Dimitris Emvalomenos, E.U. Collective Redress Project, Oxford, 12–13 December 2016, 2. <https://www.law.ox.ac.uk/sites/files/oxlaw/greece.docx> (Greece); British Institute of International and Comparative Law, *State of Collective Redress in the E.U. in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099 181 (Nov. 2017).

136. Act on Class Actions, § 4 (2007) (Fin.).

137. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 606(1) (Ger.).

138. Act 244 of 24 December 2007 and Act 99 of 23 July 2009, http://www.tedioli.com/Italian_class_action_text_english_version.pdf. Section 140bis (2) of the Italian Consumer Code; Giulia Principe, *Italian Class Actions. An Update* (2012), <http://globalclassactions.stanford.edu/sites/default/files/documents/Italian%20Class%20Actions%20Principe.pdf>. Recently, in *Adusbef v. Monte dei Paschi di Siena*, the court of appeals of Florence held that retail investors are not consumers and, hence, are not covered

collective actions are available only in consumer matters. The purview of Maltese collective actions is confined to competition, consumer protection, and product safety law.¹³⁹ The Slovenian regime on collective actions applies to consumer, competition, securities, labor, and environmental law matters.¹⁴⁰ Hungary introduced opt-out class actions in 1996 in the Competition Act and again in 1997 in the Consumer Protection Act.¹⁴¹ The new Hungarian Code of Civil Procedure, having gone into effect on January 1, 2018, introduced an opt-in scheme applicable to consumer, employment and environmental tort matters.¹⁴²

Some Member States have used “leapfrogging” to extend the scheme to other sectors, demonstrating the cautious approach of European legal systems as to collective litigation. Spanish class-action rules¹⁴³ apply to consumer matters,¹⁴⁴ but in 2007, a similar provision was inserted as to gender-based discrimination.¹⁴⁵ The Polish regime introduced in 2009¹⁴⁶ initially applied only to consumer law, product liability, and tort liability (with the exception of the protection of personal interests) but was extended in 2017 to claims resulting from the non-performance or defective performance of an obligation, unjust enrichment, and certain infringements of personal interests (bodily injury or health disorder).¹⁴⁷ After the introduction of group actions in the field of consumer protection in 2014¹⁴⁸ and health care in January 2016,¹⁴⁹ the French legislature created a general framework for group actions in November 2016¹⁵⁰ that extended the purview of the mechanism to discrimination, environmental protection, personal data, and healthcare matters.¹⁵¹

by the Italian class action legislation. Giorgio Afferni, ‘Opt-In’ Class Actions in Italy: Why are They Failing?, 7(1) J. EUROPEAN TORT L. 82, 85 (2016).

139. Collective Proceedings Act, art. 3–4 (2012) (Malta).

140. See Jorg Sladič, *A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions?*, in TRANSFORMATION OF CIVIL JUSTICE: UNITY AND DIVERSITY 213, 214 (Alan Uzelac et al. eds., 2018); British Institute of International and Comparative Law, *State of Collective Redress in the E.U. in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIV/0099 249 (Nov. 2017). Article 2(2) refers to anti-discrimination disputes, but it also provides that in this regard only collective injunctions are permissible.

141. 1997. évi CLV. törvény a fogyasztóvédelemről (Act CLV of 1997 on Consumer Protection).

142. Polgári Perrendtartás [Civil Procedure Code] §§ 580–91 (2018) (Hung.).

143. LEY DE ENJUICIAMIENTO CIVIL [L.E. CIV.] (CODE OF CIVIL PROCEDURE) art. 11 (Spain).

144. Fernando Gomez & Marian Gili, *Country-Report Spain*, in EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION 6–7 (2008).

145. LEY DE ENJUICIAMIENTO CIVIL [L.E. CIV.] (CODE OF CIVIL PROCEDURE) art. 11 (Spain).

146. Act on Class Actions of 17 December 2009 [Ustawa o dochodzeniu roszczeń w postępowaniu grupowym], Journal of Laws of 2010, no 7; item 44, 1 (Pol.).

147. New Sections 1(2) and 1(2)(a)–(b) of the Polish Act on Class Actions.

148. Loi 2014–344 du 17 Mars 2014 relative à la consommation et Décr. 2014–1081 du 24 Sept. 2014 relatif à l’action de groupe en matière de consommation (Fr.).

149. Loi 2016–41 du 26 Janv. 2016 de modernisation de notre système de santé et Décr. 2016–1249 du 26 Sept. 2016 relatif à l’action de groupe en matière de santé (2016) (Fr.).

150. Loi 2016–1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle, JORF 0269 du 19 Novembre 2016 texte 1 (2016) (Fr.).

151. Loi 2014–344 du 17 Mars 2014 relative à la consommation et Décr. 2014–1081 du 24 Sept. 2014 relatif à l’action de groupe en matière de consommation; Loi n° 2016–41 du 26 Janv. 2016 de modernisation de notre système de santé et Décr. 2016–1249 du 26 Sept. 2016 relatif à l’action de groupe en matière de santé; Loi 2016–1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle, JORF 0269 du 19 Novembre 2016 texte 1 (Fr.).

In Belgium, collective actions were initially available only for consumers, but in 2018, they were extended to small and medium-sized enterprises (“SMEs”).¹⁵² The regime applies to cases where an enterprise¹⁵³ breaches one of its contractual obligations or violates one of the Belgian or European laws enumerated in the Code of Economic Law (*Code de droit économique*).¹⁵⁴ These extend to fields like banking, competition law, consumer protection, energy, insurance, intellectual property, passengers’ rights, payment and credit services, privacy, product safety, and professional liability.¹⁵⁵

In English law, opt-out representative proceedings have been traditionally available, though they remained ineffective due to the strict construction of the preconditions in the judicial practice.¹⁵⁶ After introducing a general opt-in procedural tool (group litigation order),¹⁵⁷ the English government rejected the introduction of an opt-out scheme of general application and decided to introduce this mechanism on a sector-by-sector basis.¹⁵⁸ As a result, an opt-out scheme was made available in competition matters.¹⁵⁹

A few Member States have class action regimes of general application. The 2002 Swedish law on group proceedings covers the whole spectrum of civil claims, as opposed to only specific sectors or branches of law.¹⁶⁰ Likewise, the Portuguese collective action law of 1995 has a general application and enables actions for any civil claim, albeit special provisions can be found also in particular fields (e.g., Law No. 19/2014 of April 14 on Environment Policy; Law No. 24/96 of July 31 on Consumer Protection Act; Law No. 107/2001 of September 8 on Cultural Heritage, Securities Code; and Law 23/2018 of June 5 on Antitrust Damages Actions). The Bulgarian opt-out collective action scheme inserted into the Code of Civil Procedure of 2007 also covers all violations of law, although the case-law has the tendency to limit the scope to injunctive measures concerning consumer disputes.¹⁶¹ The Lithuanian system introduced in 2015 is also of general application.¹⁶² The Danish rules on collective actions that went into effect on January 1, 2008 introduced a generally applicable system where it is up to the judge to decide whether to approve the collective action under the opt-in or the opt-out scheme.¹⁶³

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

153. Article I.21 of the Belgian Code of Economic Law defines enterprise as a group of consumers or SMEs, while Articles XVII.36 and XVII.38 refer to a violation committed by an enterprise.

154. Code de Droit Économique [CEL] art. XVII.37 (Belg.).

155. *Id.*

156. See Andrews, *supra* note 133, at 253.

157. See Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 427–31 (2009).

158. The Government’s Response to the Civil Justice Council’s Report, *Improving Access to Justice Through Collective Actions* (2009). See Christopher Hodges, *Collective Redress in Europe: The New Model*, 2010/7 CIV. JUST. Q. 370, 377 (2010); Christopher Hodges, *From Class Actions to Collective Redress: A Revolution in Approach to Compensation*, 28 CIV. JUST. Q. 41, 50–66 (2009).

159. Competition Act 1998, c. IV, §§ 47A–49E (Eng.); Consumer Rights Act, sch 8, (Eng.).

160. Group Proceedings Act §§1–2 (SFS 2002:599) (Swed.).

161. Alexander Katzarsky & Georgi Georgiev, *Chapter 11: Bulgaria*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CLASS & GROUP ACTIONS 2013 64 ¶ 1.2 (Ian Dodds-Smith & Alison Brown eds., 2012).

162. The Republic of Lithuania Civil Procedure Code, art. 441 § 1 (2014).

163. CSONGAR ISTVAN NAGY, *COLLECTIVE ACTIONS IN EUROPE—A COMPARATIVE, ECONOMIC AND TRANSSYSTEMIC ANALYSIS* 81 ¶ 4 (2019).

*C. Prerequisites of Collective Action:
Superiority and Definability*

In Europe, the pre-requisites of collective actions normally encompass U.S. law's requirements of class certification (numerosity, commonality, typicality and adequate representation).¹⁶⁴ Some of the laws do not specify all these requirements, perhaps because, owing to the rules on scope and standing, such a specification might appear redundant. Quite a few systems limit the availability of collective actions to consumer matters where it is assumed that a number of victims are concerned and their small claims would be difficult to bring to court but for collective litigation.¹⁶⁵ Similarly, several systems lean towards ensuring adequate representation through limiting standing to public entities and recognized civil organizations or granting these plaintiffs a privileged status.¹⁶⁶ The peculiar traits of European collective actions are given by the pre-conditions that go beyond the

164. For instance, in France, opt-out collective actions may be launched if numerous persons (numerosity) placed in a similar situation suffer damages caused by the same person, the common cause of which is a similar breach of legal or contractual obligations (commonality). Article 62 of Loi n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle ("Lorsque plusieurs personnes placées dans une situation similaire subissent un dommage causé par une même personne, ayant pour cause commune un manquement de même nature à ses obligations légales ou contractuelles, une action de groupe peut être exercée en justice au vu des cas individuels présentés par le demandeur."). Under Greek law, consumers' associations may bring consumer collective actions "for the protection of the general interests of the consuming public" or if "an illegal behavior hurts the interests of at least thirty (30) consumers." Articles 10(16) of Law 2251/1994 on Consumers' Protection. In Poland, the court certifies a collective action if the following conditions are met: numerosity (the group shall consist at least of 10 people); commonality (the class action has to cover claims of the same kind and with the same or similar factual basis). The Polish Act contains an idiosyncratic requirement which may be regarded as an emanation of the requirement of commonality: if a suit concerns a monetary claim, a collective action may be launched only if the amounts claimed by individual group members are equal; however, representative plaintiffs may obviate the problems emerging from this requirement through forming sub-classes and requesting a declaratory judgment. Polish Act on Pursuing Claims in Group Proceedings, §§ 1(1), 2(1), & 2(2).

165. For example, although Spanish law attaches high importance to definability, it does not specify the pre-conditions of collective actions in consumer matters. See Fernando Gomez & Marian Gili, *Country-Report Spain*, in EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION 6 (2008).

166. In Hungary, the Competition Act and the Consumer Protection Act have no express requirement as to the adequacy of representation but confer standing solely on public bodies and recognized consumer rights organizations (on the Hungarian Competition Office as to the Competition Act and on the consumer protection agency, the public prosecutor, and consumer rights organizations as to the Consumer Protection Act). 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Act LVII of 1996 on the Law Prohibiting Unfair Market Conduct and Restrictions on Competition of 1996, § 85/A); 1997. évi CLV. törvény a fogyasztóvédelemről (Act CLV of 1997 on the Law of Consumer Protection, § 38-39). In Germany, model declaratory claims may be submitted only by qualified consumer protection organizations. It is noteworthy that heightened requirements apply here: in addition to the conditions applicable to organizations eligible to launch actions for an injunction, organizations engaging in actions for compensation need to fulfill extra requirements (adequate representation). German Code of Civil Procedure § 606(3)1. "Furthermore, the matter is eligible if, at the time of submission, it is substantiated that it concerns at least 10 consumers and, within two months after the procedure's publication, at least 50 consumers register their cases (numerosity)." NAGY, *supra* note 3 (translating Bürgerliches Gesetzbuch [BGB] [Civil Code] 606 ¶ 3 (Ger.)).

American quadriga. These extra requirements are the reflections of the European fears and special considerations set out above.¹⁶⁷

Most European collective action laws require that the collective action be expedient or superior to individual litigation. The requirement of expediency is met if the collective action is an appropriate means to enforce the claims of group members. Superiority goes beyond this expectation and requires that a collective action be more expedient than individual litigation. This reflects the notion that collective actions have imminent dangers; hence, their use must be limited to cases where they are truly necessary. Simply stated, the law tolerates collective actions only if proven expedient or more effective than individual litigation.

In Malta, the court certifies the action¹⁶⁸ if the collective proceedings “are the most appropriate means for the fair and efficient resolution of the common issues.”¹⁶⁹ In Sweden, the institution of the collective action is subject to the condition that:

[G]roup proceedings do not appear to be inappropriate owing to some claims of the members of the group, as regards grounds, differing substantially from other claims, [and] the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group.¹⁷⁰

In Finland, collective proceedings may be launched if “the hearing of the case as a class action is expedient in view of the size of the class, the subject-matter of the claims presented in it and the proof offered in it.”¹⁷¹ In Denmark, a collective action may be initiated if it is the best mechanism to settle the claims. This condition is met if the collective action is more expedient than traditional joinder of parties.¹⁷² Under the new Hungarian Code of Civil Procedure, the court may decline a request for certification if it was not reasonable to certify the collective action. Class certification should be denied if the burden in terms of work and time related to the collective nature of the action would outweigh the efficiency benefits of the collective proceedings.¹⁷³ In Lithuania, a collective action may be launched if “it is a more expedient, effective and appropriate means of resolving the particular dispute than individual actions.”¹⁷⁴ In U.K. competition law, although the statutory language does not go beyond the requirement of suitability (the CAT may certify a collective action¹⁷⁵ if the claims “are suitable to be brought in collective

167. In Italy, a collective action may be launched only if the group has a *prima facie* case (the claim is not manifestly unfounded). § 140-bis(6) Codice di Commercio [C. Comm.] (It.).

168. Collective Proceedings Act § 9(1) (2012) (Malta).

169. As to superiority, among others, the following circumstances need to be taken into account: “(a) the benefits of the proposed collective proceedings; and (b) the nature of the class.” *Id.* at § 9(2).

170. Group Proceedings Act § 2 (SFS 2002:599) (Swed.).

171. Act on Class Actions § 2 (440/2007) (Fin.).

172. Peter Møgelvang-Hansen, *Country-Report Denmark*, in *EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION* 4 (2008).

173. Code of Civ. P. § 585 (2016) (Hung.) (the explanatory memorandum confirms that this is a superiority requirement, as the court has to investigate whether the joint action is more efficient than pursuing the claims individually).

174. The Republic of Lithuanian Civil Procedure Code, art. 441, § 1–2 (2014).

175. For an analysis of the CAT’s decision practice, see generally Cento Velkanovcki, *Collective Certification in U.K. Competition Law: Commonality, Costs and Funding*, 42 *WORLD COMPETITION* 121 (2019).

proceedings”),¹⁷⁶ the Competition Appeal Tribunal Rules of 2015 contain a list of factors to be taken into account as to the interpretation of the requirement of suitability.¹⁷⁷ These factors suggest that collective proceedings may be certified only if they are more efficient than individual actions (superiority).¹⁷⁸ In Belgium, a collective action may be certified only if it is more effective than individual litigation.¹⁷⁹ As to the superiority of collective litigation, the court may consider the size of the group, the relationship between individual damages and collective harm, and the collective action’s complexity and efficiency.¹⁸⁰

A similarly motivated requirement is definability. As noted above, due to the difficulties related to the identification of group members and the distribution of monetary relief, there is a general distrust, chiefly concerning opt-out collective actions, as to the feasibility of collective redress in terms of actually delivering individual relief. The general concern is that the mechanism serves the financial interests of law firms more than those of group members. The requirement of definability responds to these concerns.

In Bulgaria, a collective action may be launched if group members are identifiable.¹⁸¹ In Finland, it is a prerequisite that “the class has been defined with adequate precision.”¹⁸² In Denmark, it is a requirement that group members are identifiable and may be informed in an appropriate manner.¹⁸³ In Hungary, the Competition Act and the Consumer Protection Act require that the victims of the violation be identifiable on the basis of the circumstances of the violation.¹⁸⁴ Spanish law also embeds the requirement of definability in certain cases.¹⁸⁵ In England, courts have been reluctant to endorse representative proceedings where group members were not readily ascertainable.¹⁸⁶ If the damages suffered by the group and the loss sustained by individual group members are not ascertainable, claims for damages may be pursued in a two-stage procedure where, in the first phase, a declaratory judgment is requested with respect to issues group members have in common, followed by group members’ individual actions for damages.¹⁸⁷ In competition law, the CAT may certify¹⁸⁸ a collective action (also known as a collective proceedings order, or “CPO”), if the claims “are brought on behalf of an identifiable class of persons” (definability).¹⁸⁹ In *Merricks v Mastercard, Inc.*,¹⁹⁰

176. Competition Act 1998, c. IV, §§ 47B(6) (1998) (Eng.).

177. Competition Appeal Tribunal Rules § 79(3) (2015) (Eng.).

178. The CAT takes into account not only whether the collective action is “an appropriate means for the fair and efficient resolution of the common issues,” but also its costs and benefits, whether individual actions have already been commenced, and the size and nature of the group. Competition Appeal Tribunal Rules § 79(2) (2015) (Eng.).

179. Code de Droit Économique [CEL] art. XVII.37 (Belg.).

180. Stefaan Voet, *Class Action Developments in Belgium*, STANFORD (Apr. 2017), <http://globalclassactions.stanford.edu/sites/default/files/documents/BELGIUM.pdf>.

181. Bulgarian Code of Civil Procedure art. 379(1) (2008) (Bulg.).

182. § 2 Act on Class Actions (440/2007) (Fin.).

183. Peter Møgelvang-Hansen, *supra* note 172, at 4.

184. Act LVII of 1996 on the Law Prohibiting Unfair Market Conduct and Restrictions on Competition of 1996, § 85/A (Hung.).

185. Gomez & Gili, *supra* note 165, at 6.

186. See *Emerald Supplies Ltd. & Anor v. British Airways Plc* [2009] EWHC 741, ¶ 37 (Ch) (Eng.).

187. *Prudential Assurance Co. v. Newman Indus. Ltd.*, 2 WLR 339 (Ch 1980) (Eng.).

188. For an analysis of the CAT’s decision practice, see Cento Velkanovcki, *Collective Certification in U.K. Competition Law: Commonality, Costs and Funding*, 42 WORLD COMPETITION 121 (2019).

189. Competition Appeal Tribunal Rules § 79(1)(a) (2015) (Eng.).

190. *Merricks v. Mastercard, Inc.* [2019] EWCA Civ 674, [2019] Bus LR 3025, [2019] WLR(D) 239.

the Court of Appeals held that the certification of a claim and the grant of a CPO may not be refused merely because individual losses cannot be ascertained.¹⁹¹

The extra requirements seem to have a higher significance in opt-out proceedings. They are expected to be more expedient than individual actions, and definability plays a much more important role here, as group members are unknown, necessitating that the beneficiaries be identified on the basis of the final judgment's group definition. Of course, legal counsel may go as far as possible with the common questions, to the extent permitted by the definability of the group. For instance, they may request the court establish the legal basis (defendant's liability) but leave quantum to collective actions covering sub-classes or to individual litigation. In this sense, due to the requirements of superiority, expediency, and definability, the purview of European collective actions is more restricted than that of its U.S. counterpart.

D. Non-Profit Civil Organizations: Heroes of Collective Actions

In Europe, the heroes of collective actions are non-profit civil organizations. As a result of the distrust of incentive-driven, market-based mechanisms and the notion that collective actions' chief purpose is not the enforcement of public policy, European legislators have been reluctant to vest for-profit private entities with the power to launch collective proceedings. The general attitude is that financial incentives may provide a stimulus that is not reconcilable with the public interest.¹⁹² The consequence of this attitude is that the main authors of collective actions are non-profit organizations presumed to be free of reprehensible incentives.¹⁹³

In some Member States, standing is formally reserved¹⁹⁴ for public entities (administrative agencies, the attorney general, etc.) and qualified non-profit civil organizations such as consumer protection non-governmental organizations

191. *Id.* ¶ 60.

192. See Commission Communication Towards a European Horizontal Framework for Collective Redress § 3.9, COM (2013) 401 final (June 11, 2013).

193. See Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures—European Debates*, 58 INT'L & COMP. L. Q. 379, 400, 407 (2009) (arguing that the European model regards "public agencies or accredited consumer organizations as a gatekeeper to a system of collective redress.").

194. *But see* CODICE DEL CONSUMO [C.C.] [CIVIL CODE] art. 140 bis (It.) (codifying that collective action may be initiated by any consumer, or authorized consumer organization, as standing goes to the consumer who initiated the procedure).

(“NGOs”).¹⁹⁵ In quite a few Member States, non-profit civil organizations dominate the field, though group members also have standing.¹⁹⁶

According to European thinking, conferring standing on these public and not-for-profit organizations with the exclusion of group members and for-profit entities mitigates the risk of abuse. It is argued that because these organizations are not profit-oriented, they are attentive to the public interest. Furthermore, they are registered, regulated, and supervised. There is a clear tendency to reserve “hard cases” (which are difficult to manage or raise higher risks of abuse) for public entities and recognized civil organizations. Such cases involve opt-out proceedings and cases where it is difficult to define the group.

The E.U. Recommendation suggests restricting group representation to non-profit entities and public authorities.¹⁹⁷ In Hungary, opt-in procedures launched under the new Code of Civil Procedure confer standing on group members. Opt-out collective actions under the Competition Act and the Consumer Protection Act may be launched by the competition authority and the consumer protection agency, or the public prosecutor and consumer rights organizations, respectively. Under

195. See RYHMÄKANNELAKI [C. CIV.] [CIVIL CODE] § 4 (Fin.) (where the Consumer Ombudsman has the power to institute a collective action); LOI n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of 21st Century Justice], J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016, art. 63 (codifying that only recognized civil associations whose object extends to the protection of the interests at stake may institute opt-out proceedings); ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure] § 606, ¶ 1 (Ger.) (model declaratory claims may be submitted solely by qualified consumer protection organizations that—in addition to the conditions applicable to entities eligible to launch actions for injunction—meet a set of extra conditions); Nomos (1994:2251) [Protection of Consumers, as Applicable, Further to the Following Amendments], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 1994, A:191 (Greece) (conferring standing in art. 10, sec. 16 to certified consumer protection associations that have at least 500 active members and have been registered for at least one year); ZAKON O KOLEKTIVNIH TOŽBAH [C. CIV.] [CIVIL CODE] art. 4 (Slovn.) (codifying that standing is conferred on representative non-profit organizations and the attorney general).

196. See RZĄDOWY PROJEKT USTAWY O DOCHODZENIU ROSZCZEŃ W POSTĘPOWANIU GRUPOWYM [C. CIV.] [CIVIL CODE] art. 4 (Pol.) (confers standing on class members and the regional consumer ombudsman); ATT NRU. VI TAL-2012 [C. CIV.] [CIVIL CODE] art. 12 (Malta) (allows both registered consumers’ associations and group members to be approved as a group representative); EVA LEIN ET AL., STATE OF COLLECTIVE REDRESS IN THE E.U. IN THE CONTEXT OF THE IMPLEMENTATION OF THE COMMISSION RECOMMENDATION, JUST/2016/JCOO/FW/CIVI/0099 217 (2017); LAGEN OM GRUPPRÄTTEGÅNG (Svensk Författningssamling [SFS] 2002:599) §§ 2-6 (Swed.) (collective proceedings may be initiated by group members, civil organizations, and administrative agencies); Tommy Pettersson, Stefan Perván Lindeborg, & Malin Persson Giolito, *National Report: Sweden, in STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 4* (Mats Johnsson ed., 2004); LEIN, °23/2018, DE 5 DE JUNHO [C. CIV.] [CIVIL CODE] art. 19 (Port.) (defines standing widely: citizens, associations, foundations, municipalities, and business associations may institute an action); ГРАЖДАНСКИ ПРОЦЕСУАЛЕН КОДЕКС [C. CIV.] [CIVIL CODE] art. 379 (Bulg.) (standing is conferred on group members and civil organizations); CIVILINIO PROCESO KODEKSAS [C. CIV.] [CIVIL CODE] art. 3. (Lith.) (collective action may be launched by a group member, an association, or a trade union); Laura Carballo Piñeiro, *Consumer Collective Arbitration in Spain. What’s in a Name?, in CLASS AND GROUP ACTIONS IN ARBITRATION* 88, 91 (Bernard Hanotiau & Eric A. Schwarz eds., 2016); see generally DISPOSICIONES GENERALES (B.O.E. 2017, 126) (Spain) (Royal Legislative Decree consolidating the 1984 Law on Consumer Protection, and other consumer laws, reducing the number of these laws from over twenty-five to just a few, such as rules on collective actions; Sections 32 and 33 of Law 3/1991 of 10 January on Unfair Competition and Section 6 of Law 34/1988 of 11 November on Advertising).

197. See Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, 2013 O.J. (L 201) 60 ¶¶ 4-7.

Danish law, the court has the discretion to decide whether the case should be tried in the opt-in or the opt-out scheme. The group representative may be a group member, an association, a private institute or other organization, or an administrative agency (e.g., the Consumer Ombudsman).¹⁹⁸ If the proceedings follow the opt-out pattern, however, only an administrative agency may be appointed as the group's representative. In France, only recognized civil associations whose object extends to the protection of the interests at stake may institute opt-out proceedings.¹⁹⁹

E. Party Autonomy and the “Only Benefits” Principle

The reconciliation of party autonomy and collective litigation produced a peculiar asymmetric solution as to group members' liability for legal costs and res judicata effects. Due to the two-way cost-shifting rule, the prevailing party must be compensated for his reasonable legal costs.²⁰⁰ It is evident that in opt-out proceedings, group members may not be liable for any legal costs (except the ones they caused) and, likewise, the possibility of introducing the American rule in respect to collective actions was also generally rejected. It would have been inconsistent to do away with an entrenched principle of European civil procedure as to collective litigation, while preserving it as to individual actions. The res judicata effects raised a similar dilemma in a few Member States. It was argued that party autonomy is restricted if individual group members could have achieved a better result than the one the group representative did (i.e., they could have won in a case where the collective action failed or could have obtained a more favorable remedy).

For these situations, European systems invented the “only benefits” principle: when collective action is not based on members' explicit authorization, it may produce no detriments, only benefits, for group members. According to this principle, the opt-out rule is reconcilable with the constitutional right to party autonomy because it confers only benefits on group members, so their assent may be presumed.

In the case of opt-in systems, party autonomy should raise no major issues in this regard, given that group members join the action by means of an explicit declaration. Not surprisingly, in opt-in systems, the final judgment's res judicata effects extend to group members without any limitation.²⁰¹ Nonetheless, the “only benefits” principle emerges as to legal costs, which are normally borne by the group representative (group members are usually not liable for them).²⁰² This approach is

198. See NAGY, *supra* note 3, at 98.

199. See LOI n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of 21st Century Justice], J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016, art. 63 (Fr.).

200. See NAGY, *supra* note 3, at 62.

201. See LAGEN OM GRUPPRÄTTEGÅNG § 26 (Svensk författningssamling [SFS] 2002:599) (Swed.); Ryhmäkannelaki [C. civ.] [Civil Code] § 8, 16 (Fin.); ATT Nru. VI tal-2012 [C. CIV.] [CIVIL CODE] art. 12 (Malta); Zivilprozessordnung [ZPO] [Code of Civil Procedure] § 613, ¶ 1 (Ger.); Giorgio Afferni, ‘Opt-In’ Class Actions in Italy: Why are they Failing?, 7 J. EUR. TORT L. 82, 88 (2016); Competition Act 1998, c. 41 (Eng.); Civilinio Proceso Kodeksas [C. CIV.] [CIVIL CODE] art. 261 & 441 (Lith.).

202. See LAGEN OM GRUPPRÄTTEGÅNG §§ 33-36 (Svensk författningssamling [SFS] 2002:599) (Swed.); CIVIC CONSULTING & OXFORD ECON., EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY

based on practical considerations rather than on doctrinal issues. When group members expressly join the group, it would be plausible, both doctrinally and constitutionally, if they had to run the risks attached to failure. Nonetheless, as a matter of practice, it would be difficult to have them join in matters where the claim is small. The information asymmetry between the members and the group representative may warrant that this risk be placed on the latter.

In opt-out proceedings, the “only benefits” principle, addressing the taboo of party autonomy, played a huge role in shaping the legal consequences for group members. All opt-out schemes are based on the principle that group members cannot be held liable for the legal costs if the collective action fails.²⁰³

While numerous European opt-out systems simply extend the judgment’s res judicata effects to group members who did not opt out,²⁰⁴ a few Member States were influenced by the argument that party autonomy is restricted also if individual group members could have achieved a better result than the one the group representative did. As it is virtually impossible to assess this on a case-by-case basis, these European systems (Hungary, Greece, Portugal, and France) have developed innovative schemes to ensure judgments’ res judicata effects without formally extending them to group members and made the judgment’s binding nature asymmetric.

In Hungary, it is not obvious if, in opt-out proceedings available in competition and consumer protection law, the judgment’s res judicata effects extend to group members. The statutory text does not provide for this specifically. It deals only with the case when the group representative wins and does not address the case of plaintiff failure. More importantly, group members are not parties to the collective action, so absent a specific provision, they should not be covered by the res judicata effects. Last but not least, the law provides that the collective action does not affect the consumer’s right to pursue his rights individually.²⁰⁵ All these suggest that while group members may “use” the judgment if the group representative prevails,

OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION, FINAL REPORT—PART I: MAIN REPORT 65 (Senda Kara et al. eds., 2008); ZAKON O KOLEKTIVNIH TOŽBAH [C. CIV.] [CIVIL CODE] art. 60, 62 (Slovn.); Jorg Sladič, *A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Challenges Presented by the New Law on Collective Actions?*, in TRANSFORMATION OF CIVIL JUSTICE: UNITY AND DIVERSITY 213, 215 (Alan Uzelac & Cornelis Hendrik Remco van Rhee eds., 2018). But see CIVIC CONSULTING & OXFORD ECON., *supra* note 202 (following the “loser pays” principle in Denmark and other countries, insisting on the notion that if someone wants to have the chance of a favorable award, he also has to carry the risk of being liable for the expenses the action generates); Polgári Perrendtartás [Civil Procedure Code] § 586, 590 (Hung.) (establishing an opt-in scheme that carries some “loser pays” risks).

203. See *Overview of Existing Collective Redress Schemes in E.U. Member States*, IP/A/IMCO/NT/2011–16, PE464.433, 25 (July 2011), <https://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>; CIVIC CONSULTING & OXFORD ECON., *supra* note 202; The Competition Appeal Tribunal Rules 2015, SI 2015/1648, art. 98 (Eng.); ГРАЖДАНСКИ ПРОЦЕСУАЛЕН КОДЕКС [C. CIV.] [CIVIL CODE] art. 380, 381 (Bulg.); Peter Arnt Nielsen & Karin Linhart, *Danish Class Actions—A European Model?*, 5 INT’L J. PRIV. L. 229, 238 (2012); see generally NAGY, *supra* note 3, at 101–05.

204. See ГРАЖДАНСКИ ПРОЦЕСУАЛЕН КОДЕКС [C. CIV.] [CIVIL CODE] art. 386 (Bulg.); Ley de Enjuiciamiento Civil [L.E. civ.] [Civil Code] §§ 13, 15, 221, 519 (Spain); Piñeiro, *supra* note 196; CIVIC CONSULTING & OXFORD ECON., *supra* note 202; STEFAAN VOET, CLASS ACTION DEVELOPMENTS IN BELGIUM 3–4 (2016); Competition Act 1998, ch. 41 (Eng.).

205. See 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (Act LVII of 1996) (Hung.); see also 1997. évi CLV. törvény a fogyasztóvédelemről (Act CLV of 1997 on consumer protection) (Hung.).

they are not necessarily covered by the *res judicata* effects. This has not yet been tested in judicial practice.

In Greek consumer collective action, the judgment's *res judicata* effects extend to all group members (including those who are absent), but only if the consumer association is fully or partially successful. In case the defendant does not comply with the judgment voluntarily, a consumer may request the court to issue a payment order for him.²⁰⁶

In Portugal, the popular action follows the opt-out principle²⁰⁷ but shelters group members in various ways from the potentially detrimental consequences of *res judicata*. First, group members may opt out very late, until the end of the evidentiary procedure.²⁰⁸ Second, the law erects two exceptions to the principle that the final judgment's *res judicata* effects extend to all group members who have not opted out. Group members are not covered by the judgment's *res judicata* effects if the claim was rejected for lack of evidence. Furthermore, the judge may decide to exempt group members from this effect considering the special characteristics of the case.²⁰⁹

Judgments in collective actions have asymmetric *res judicata* effects under French law as well, which has been creative regarding the purview of *res judicata* in opt-out proceedings. The scheme appears to be a *de facto* opt-out system, although the consumer's right to opt in is retained and can be exercised after the judgment is made. Accordingly, the judgment's *res judicata* effects extend to group members on the condition that they accept the award and are compensated. The judgment's *res judicata* effects cover only those group members who, after having been duly informed, expressly accept the judgment and the compensation.²¹⁰ Notwithstanding the conditional nature of the *res judicata* effects on individual group members, the judgment adopted at the end of the group action has a general preclusion effect against subsequent group actions initiated in the same case.²¹¹

The German opt-in collective action is worthy of note in this regard, as it contains a highly creative solution to the antagonism between party autonomy and collective actions. The regulatory solution is based on an overly extensive notion of party autonomy, which prevented the legislature from authorizing the court to make a collective money judgment even in cases where a group member consented to such. The doctrinal compromise was that the law empowered the court to make

206. See Nomos (1994:2251) [Protection of Consumers, as Applicable, Further to the Following Amendments], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 1994, A:191 (Greece); see also Dimitris Emvalomenos, Greece 4 (Sept. 14, 2016) (unpublished manuscript), <https://www.law.ox.ac.uk/sites/files/oxlaw/greece.docx>; *Overview of Existing Collective Redress Schemes in EU Member States*, *supra* note 203.

207. See LEI N.º 83/95, DE 31 DE AGOSTO [C. CIV.] [CIVIL CODE] art. 15 (Port.).

208. See HENRIQUE SOUSA ANTUNES, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION (PORTUGUESE REPORT) 20–21 (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf.

209. See LEI N.º 83/95, DE 31 DE AGOSTO [C. CIV.] [CIVIL CODE] art. 19 (Port.); see generally José Manuel Lebre de Freitas, *A Acção Popular ao Serviço do Ambiente*, in AB UNO AD OMNES / 75 ANOS DA COIMBRA EDITORA 797, 809 (Antunes Varela et al. eds., 1998) (outlining a Portuguese theory which suggests that, due to considerations of constitutionality, only those legal consequences should have *res judicata* effects on group members which are beneficial to them).

210. See LOI n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of 21st Century Justice], J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016, art. 78 (Fr.).

211. See *id.* at art. 80.

a declaratory judgment establishing that the claim's or legal relationship's factual and legal pre-conditions exist or do not exist but did not vest it with the power to make a money judgment.²¹² Group members may seek monetary relief on an individual basis after the pre-conditions of the defendant's liability are established. The final declaratory judgment is binding on courts in matters between consumers who opted in and the defendant, provided these have the same aims and the same fact pattern as the collective declaratory judgment.²¹³ With this, German law avoided, at least technically, collective awards.

IV. CONCLUSIONS

The European reception of collective actions is probably one of the most exciting legal transplantations comparative law has seen, owing to the fact that Europe is adopting a legal concept that originates in a fundamentally different legal system. In the end, Europe, in essence, is not transplanting a foreign legal institution but, rather, using it as a source of inspiration to create its own version.

The emerging European collective action model is determined by three European peculiarities. First, European collective actions' primary function is to provide compensation and U.S. law's notion of privatizing the enforcement of public policy is generally rejected. Second, in Europe, collective litigation raises irrational fears: "representation without authorization" is contended to encroach on private autonomy; it is claimed that class actions often cannot deliver real compensation and cause considerable social damages. Third, the European legal environment raises various regulatory issues that simply do not emerge in the U.S.

Contrary to the common belief, Europe is not generally following the opt-in principle. From the seventeen Member States which created a special regime for collective litigation, the majority (ten Member States) has sanctioned, at least partially, an opt-out scheme (four of these leave the choice between the opt-in and the opt-out rule to the court). On the one hand, it may be argued that the opt-out rule is generally disapproved, taking into account that representation without authorization is not in place in two-thirds of the Member States: twenty-five percent of them chose the opt-in system, and in forty percent of them, no collective action is available at all (here, traditional joinder of parties and assignments are the only means to bring collective claims to court).

In most European Member States, collective action laws' purview is limited to specific sectors, reflecting the notion that collective litigation should be confined to cases where there is a compelling need. Some Member States have used a step-by-step approach to extend this mechanism from sector to sector.

The pre-conditions of collective actions in Europe often go beyond those of U.S. class actions. The collective action is generally required to be expedient or superior to individual litigation. In the same vein, it is often required that the group (group members) be definable. These extra requirements reflect the European fears and doubts concerning collective litigation and try to limit it to cases where they are apparently more expedient and distribution of the award is feasible.

In Europe, the heroes of collective actions are non-profit civil organizations. Incentive-driven, market-based mechanisms face a general distrust, and for-profit

212. See ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure] § 606, ¶ 1 (Ger.).

213. *Id.* at § 613, ¶ 1.

private entities are regarded as being influenced by unacceptable financial considerations.

The endeavor not to impair party autonomy and the ensuing “only benefits” principle produced asymmetric solutions in regard to liability for legal costs and res judicata effects. Due to the European two-way cost-shifting rule, the prevailing party has to be compensated for his reasonable legal costs. It is generally accepted that group members may not be liable for any legal costs; this risk is run by the group representative. Owing to the “only benefits” principle, in case the collective action is not based on the members’ explicit authorization, some European systems (Hungary, Greece, Portugal, and France) have developed various solutions to ensure the judgment’s res judicata effects without formally extending them to group members and made the judgment’s binding nature asymmetric.

