



Multi-Party Redress Mechanisms in Europe: Squeaking Mice?

Editors:
V. Harsági
C.H. van Rhee

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Ius Commune Europaeum

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LIST OF ABBREVIATIONS

ADA	Anti-Discrimination Act
ADR	Alternative Dispute Resolution
AGB-Gesetz	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act on Standard Contract Terms)
ATCA	Anti-Counterfeiting Trade Agreement
CAE	Conseil d'analyse économique
CCC	Contrats Concurrence Consommation
CCP	Code of Civil Procedure
CDC	Cartel Damage Claims
CFA	Conditional Fee Agreement
CFF	Croatian Football Federation
CJC	Civil Justice Council
CNB	Conseil National des Barreaux
CNC	Conseil National de la Consommation
CPA	Consumer Protection Act
CPC	Code de procédure civile
CPR	Civil Procedure Rules
DG	Directorate-General
DGCCRF	Direction générale de la concurrence, de la consommation et de la répression des fraudes
EC	European Commission
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
GDP	Gross Domestic Product
GKG	Gerichtskostengesetz (Court Fees Act)
GLO	Group Litigation Order
GPA	Group Proceedings Act
GVG	Gerichtsverfassungsgesetz (Courts Act)
GVH	Gazdasági Versenyhivatal
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints on Competition)
HCA	Hungarian Competition Act

List of Abbreviations

HUF	Hungarian Forint
JVEG	Justizvergütungs- und Entschädigungsgesetz (Judicial Compensation Act)
KapMuG	Kapitalanleger-Musterverfahrensgesetz (Capital Markets Model Act)
MoJ	Ministry of Justice
MP	Member of Parliament
NCA	National Competition Authority
NGO	Non-Governmental Organisation
OJ	Official Journal
OLG	Oberlandesgericht
OTKA	Hungarian Scientific Research Fund
TFEU	Treaty on the Functioning of the European Union
AGCM	Autorità Garante della Concorrenza e del Mercato
UCPA	Hungarian Act on the prohibition of unfair business-to-consumer commercial practices
UKlaG	Unterlassungsklagengesetz (Prohibitory Injunctions Act)
US	United States
USA	United States of America
UWG	Gesetz gegen den unlauteren Wettbewerb (Act Against Unfair Competition)
VKI	Verein für Konsumenteninformationen (Association for Consumer Information)
WpHG	Wertpapierhandelsgesetz (Securities Trading Act)
ZPO	Zivilprozessordnung (Code of Civil Procedure)

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The subtitle of the present volume was inspired by J. Goldsmith, ‘European Collective Redress’, *The Law Gazette*, 20 June 2013.

V. Harsági & C.H. van Rhee
July 2014

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COLLECTIVE REDRESS IN THE EUROPE UNION – COMPARATIVE PERSPECTIVES

Introduction

The story of collective redress in the European Union up to the present day may be qualified as a story of missed opportunities and small steps forward. This is due to an (overly?) cautious approach to the topic at the European and national levels, a fear of American-style class actions (often due to a certain degree of unfamiliarity with the specific features of these class actions as opposed to those of the American system of civil litigation in general) and lobbying against the introduction of such mechanisms by those who might become subject to them as defendant parties. As a result, many of the collective redress mechanisms introduced so far in the various EU Member States may rightly be qualified as ‘Squeaking Mice’.¹ This does not only appear from the contributions to the present volume, but also from the considerable number of studies that have been published on collective redress mechanisms in Europe during the last few years. Indeed, the topic of collective redress has become very fashionable in academic literature (one only has to consult the bibliographies accompanying the contributions to this book), and the amount of writing contrasts sharply with the limited progress that has been made in this area at the European and national levels so far.

The editors of the present volume hope that the future of collective redress in Europe will be brighter than the past. They hope that this volume will contribute to the discussion on collective redress in Europe, and that this discussion will lead to the implementation of effective collective redress mechanisms in the various EU Member States, mechanisms that cannot be qualified as stillborn, as is the case with many of the reforms that until today have been introduced in a variety of European countries.

At the outset of this volume it should be remembered that the legal terminology used in the area of collective redress in Europe is sometimes

¹ See J. Goldsmith, ‘European Collective Redress’, *The Law Gazette*, 20 June 2013.

bewildering.² Although this is not necessarily the case in all contributions to this volume, the present introduction uses some of the terminology of the recent EU Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law (OJ 2013 L201/60). Since this Recommendation does not cover all types of collective redress mechanisms in depth, e.g. legal mechanisms to obtain declaratory judgments or ADR in the area of collective redress, it cannot be used to solve all terminological problems.

The volume is divided into two parts. The first part (I) starts with two contributions on developments at the EU level, and they are followed by a contribution on developments in the United States of America (the latter contribution is included since the American class action is often used as an argument for a cautious approach in Europe). The fourth and fifth contributions of Part I discuss collective redress from the perspective of EU Member States with an inefficient and ineffective Judiciary and from a Law & Economics perspective respectively.

The second part (II) of this volume is devoted to a selection of European jurisdictions (Belgium, England & Wales, France, Germany, Hungary, Italy, the Netherlands, Poland and Sweden). These encompass, on the one hand, jurisdictions where, at least for the moment, limited progress has been made with the introduction of effective collective redress mechanisms and where usually a vertical or sectorial approach has been chosen, meaning that collective redress mechanisms are only available in limited areas (e.g. only in consumer cases, capital market transactions and the environment). These jurisdictions often exhibit a cautious approach to the subject matter, especially where they combine a vertical approach with a preference for opt-in mechanisms, which often results in the available collective redress mechanisms hardly ever being used in practice. On the other hand, there are more audacious European jurisdictions, jurisdictions where collective redress has proven to be more successful. These jurisdictions have often adopted a horizontal approach to matters, meaning that collective redress is not limited to some areas of the law only, and some of them combine this approach with opt-out mechanisms and creative ways of funding collective redress,³ something that is especially important where the individual harm caused is of limited value.

² A few examples inspired by the terminology used in this volume: Group actions are also referred to as aggregate litigation, class actions, collective actions and multi-party litigation. Subtypes of group actions are called *actio popularis*, association suits, test case litigation, model case litigation, representative collective actions and substitutional collective actions. The representative action itself has various subtypes as well, and the terminology used is e.g. traditional representative action, collective representative action and joint representative action. Obviously, in Europe there is also the terminology in other languages (which may sometimes give rise to interesting translations into English when non-English authors write in English), such as the Italian *azione di classe* and in French e.g. *recours collectif*, *action de groupe* and *action collective*, the latter having as one of the various possible subtypes the *action collective de substitution*.

³ Funding is not discussed in depth in the present volume.

Part I: EU & USA

Part I of this volume opens with a contribution by the current director of the Max Planck Institute for International, European and Regulatory Procedural Law in Luxemburg, Professor Burkhard Hess, on the latest developments in the context of the European Union. These developments are influenced by the fact that, as the learned author holds, most Member States of the European Union favour representative collective redress mechanisms, meaning that only representative entities have standing in such actions, preferably entities that have a non-profit character and that are subject to certification (approval) by a court of law. Group actions in the sense of actions brought by those who claim to have suffered harm jointly are not favoured. Within this context, Professor Hess discusses the recent EU Directive on the Compensation of Cartel Damages, and the EU Recommendation on Collective Redress. The author concludes that the proposals of the EU Commission cannot be considered as ambitious legislative undertakings and that the Commission has largely renounced its initial ambition of introducing a modern and comprehensive legislative instrument of collective redress. Ironically, this is underlined by the positive reactions from the business world as regards the EU initiatives. Since collective redress mechanisms may impact the business world to a large extent as defendant parties, they may favour the cautious and non-binding approach chosen at the EU level. The Directive on Cartel Damages can be considered the 'worst' example of the cautious approach taken. According to Professor Hess, it replaces the concept of private enforcement of rights (i.e. by way of collective redress mechanisms) with a concept giving preference to public enforcement (i.e. enforcement by the Member States' authorities), and therefore undermines to a certain extent the whole idea of collective redress. This is slightly less problematic as regards the EU Recommendation which, combined with the EU Communication on a Horizontal Framework for Collective Redress, provides recommendations for EU Member States in developing collective redress mechanisms. Nevertheless, also these documents are rather conservative in their approach, since they provide for a restricted model of collective redress based on the standing of representative entities only, opt-in and strict control of the funding of collective litigation. Cross-border collective redress and ADR (although mentioned) are not covered in depth by these documents. Professor Hess states that the EU initiatives may be too reluctant in promoting effective collective redress mechanisms, and it is very likely that some of the Member States will implement more effective instruments incompatible with the principles of the Recommendation. This is certainly true for some of the jurisdictions discussed in the second part of this volume.

The second contribution to Part I is written by Professor Bándi from Budapest and discusses collective redress mechanisms in environmental protection cases, more specifically the influence of the Aarhus Convention as part of EU law. Here we are not dealing with representative actions for safeguarding an aggregate of individual interests, but with a representative action for safeguarding general interests of the public at large (according to one definition, this may be qualified as

an *actio popularis*). The idea behind this development is to involve the public in protecting the environment (public participation rights) by providing access to justice in cases which, according to the ordinary rules of procedure, would result in the inadmissibility of the claim because of lack of individual interest. Unfortunately, at the EU level a legislative proposal to provide access to justice under the Convention has not yet been implemented even though the proposal has been pending for about 10 years. This means, according to Professor Bándi, that action needs to be taken at the level of the individual Member States.

Professor Bándi also discusses the role of the Court of Justice of the European Union in interpreting the public participation guarantees encompassed in EU legislation. Given the fact that the European Legislature is not very successful in introducing new rules providing access to justice under the Aarhus Convention, activity by the Court of Justice may be welcomed. The learned author holds that 'one may see a very clear message [in the case law of the CJEU], which is, to give life to effective access to justice standards'. The starting point is the *Janecek* judgment which noted that the concept of 'interested party' should not be interpreted too narrowly at the national (German) level. It seems that the number of cases in which the CJEU finds that support of the public in the enforcement of environmental law is needed is on the rise, which is demonstrated by the large number of cases discussed by Professor Bándi. According to the author, the Commission believes that public participation in enforcement may become a strong collaborator in the proper implementation of environmental law, but the debate is still open. In the meantime, CJEU case law has turned more and more towards the guarantee of effective remedies within the judicial system, in order to grant better representation to environmental interests in general.

The contribution following that of Professor Bándi is written by a scholar involved in rule-making in the area of class actions in the United States of America, Professor Richard Marcus. At the end of his contribution, Professor Marcus states that 'those tempted to reject the American model out of hand might consider whether the features of American class actions they dislike are really a consequence of features of American litigation more generally.' For the informed observer, but apparently not for those in Europe who are afraid of American-type class actions, this seems obvious, since broad discovery, punitive damages, contingency fees and so on are evidently not features of the American class action itself, but of civil litigation in the US in general. At the same time, the American class action provides examples of deviations from the general American procedural framework which European opponents might embrace, since for example in some class actions the American rule on attorney fee recovery (meaning that each party has to bear its own costs) is abandoned in favour of the European rule that the loser has to pay the expenses of the winner, as is shown by Professor Marcus.

Nevertheless, Professor Marcus demonstrates that there is some concern about class actions in the US as well. These concerns have given rise to a series of changes in the original approach to class actions since the introduction of the modern rule on class actions in 1966 (Rule 23 of the Federal Rules of Civil Procedure). In 1996, for example, a new provision was introduced allowing an immediate review of

decisions whether to certify a class, which gave rise to important case law on standards of class certification. Furthermore, the US Congress provided ‘that the “group” with the largest potential claim should become the “lead plaintiff” in securities fraud class actions, and that this lead plaintiff should hire class counsel and take other actions instead of leaving those to the lawyer, under the review of the court, as in ordinary class actions’. Amendments that became effective in 2003 ‘clarified’, amongst other things, ‘that, when certifying a class, a judge had to define the class and the claims asserted, and also appoint class counsel’ and they increased the powers of the judge when reviewing proposed class settlements. In 2005, Congress decided to change the rules on jurisdiction, expanding the jurisdiction of the federal courts in order to have more class actions litigated at that level so as to avoid state courts’ certifying nationwide class actions while applying their own state law. This last approach was thought to give rise to unfair results due to the fact that state law in these actions differed from state to state. Although Europe does not have a system of federal European courts, this development might be of interest for Europe too, for example since some national courts of the Member States assume jurisdiction in collective redress cases over foreign nationals even where the majority of interested parties are from a state other than that of the national court. Another American amendment that, although not introduced in practice is interesting nevertheless, suggested that the judge should have the possibility to order an opt-in regime instead of the usual opt-out regime in class actions. Finally, the US Supreme Court has influenced the approach to class actions to a significant extent, although according to Professor Marcus one should be cautious in drawing general conclusions from individual cases. It seems that the Supreme Court is not favourable to an expansive use of class actions and class certification has become more difficult to obtain. For the rest, it is worthwhile repeating here what Professor Marcus has to say about class settlements – which occur much more often in the US than litigation by way of class actions – since it may eliminate some of the concerns of European observers. The learned author remarks that in these settlement situations the standards for certification on some particulars are much higher than the standards in litigation certification, and therefore it is not so likely that entities are forced into unfavourable settlements within the American system of class actions.

The fourth contribution in the first part of this volume is written by Professor Alan Uzelac from Zagreb in Croatia, the latest EU Member State, who has been involved in law-making as regards group litigation in his country of origin. This author qualifies his own jurisdiction as problematic in the sense that the Judiciary in Croatia is subject to many systemic and procedural failures. Litigation takes too long, the possibilities for appeal are extended and the career judges lack experience and are not used to teamwork in order to solve some of the more problematic factual and legal issues. Although this may be the result of the Socialist heritage of present-day Croatia, the author holds that the same problems also exist in some of the old European Union Member States of which Italy is of course the proverbial example. Professor Uzelac claims that within the context described by him, in which courts have problems in deciding ordinary cases in an efficient and timely manner,

the introduction of collective redress mechanisms is a bridge too far; it will not improve access to justice and might even be harmful. The existing mechanisms in Croatia (e.g. an association suit inspired by the German *Verbandsklage* and collective redress based on the 2009 Croatian Anti-Discrimination Act) are not particularly successful. At the same time the author states that instead of private enforcement by way of collective redress mechanisms, public enforcement by public state entities does not work well in Croatia either. Unfortunately, the same may be true for several other European jurisdictions, and this raises questions about the possible success of any new collective redress mechanisms. A conclusion might be that the introduction of collective redress mechanisms in various EU Member States is impossible without a considerable reform of the existing judicial framework in order to have it reach the high standards that may be observed in some other EU Member States. But obviously this is a much more daunting task than the publication of an EU Recommendation on collective redress mechanisms and a Directive on Collective Litigation in the area of Cartel damages.

The final contribution in the first part of this volume deals with Law & Economics. The author, Professor Szalai from Budapest, formulates a series of important propositions within the context of the Law & Economics approach to collective redress mechanisms. He discusses various issues that may arise in collective redress litigation, such as why the members of a group would participate in a collective action. Within this context the author addresses the so-called 'free-rider problem'. This problem arises in situations where the results of collective redress are available to all, even to those who have not contributed to bringing the action, meaning that these results can be classified as public goods. The free-rider problem is dominant especially when a collective action is brought in order to obtain injunctions, since once an injunction is given, e.g. as regards noise produced by a dance hall in a heavily populated neighbourhood, no one can be excluded from enjoying the benefits of the injunction. In the case of compensatory collective actions the situation may be different, according to the learned author, at least if the *res iudicata* effect of the collective action only applies to group members who have participated in the action, and not to others. However, even if non-participants can or will not be excluded from the benefits of these actions, there are possibilities to create incentives to use collective redress mechanisms. These incentives may not be very much needed in cases in which the compensation available for individual group members is high (in these cases, bringing a group action within a short amount of time might also be interesting for individual group members in order to obtain compensation within a reasonable time, given the relatively low costs of such litigation; these group members will opt for a group action instead of an individual action – because especially when the case settles, the benefits might be higher where a group action has been brought than in case of an individual action only), but in low value cases it might be necessary to create so-called club-incentives: those who are involved in the action should receive some additional benefits in comparison to those who profit from the group action but who have not participated.

Professor Szalai also discusses the opt-in and the opt-out systems in collective litigation. He claims that opt-in and opt-out should not be considered as each

other's opposites. The actual opposite of an opt-in system is a system in which group membership is established automatically. The author claims that a system with automatic group membership results in the highest settlement awards if such a system does *not* allow parties to leave the group (i.e. opt-out). This is due to the fact that such a settlement is very interesting for the liable party since only in this situation does he know for sure that he will not be confronted with additional individual actions when the case has been settled collectively. The author also underlines that the present trust in representative actions in which non-profit organizations are given standing (this is the case, for example, in Belgium, as emphasized by the contribution on this jurisdiction in the present volume but also in many other jurisdictions) is not justified. Just like profit-making entities, non-profit organizations may have interests that interfere with the interests of those in whose interest the collective action is brought.

Part II: National Perspectives

As stated, Part II of the present volume deals with national jurisdictions. Obviously, a distinction could be made between jurisdictions where, at least for the moment, limited progress has been made with the introduction of effective collective redress mechanisms and where often a rather timid sectorial approach is chosen, and jurisdictions that appear to be more successful in introducing solid, often horizontal collective redress mechanisms. Jurisdictions discussed in the present volume that have chosen the timid, sectorial approach (even though the relevant legislation may be 'state of the art') are Belgium, France, Germany, Hungary, Italy and Poland (although the results in practice in the last country are relatively promising). Bolder, horizontal approaches can be found in England & Wales, the Netherlands and Sweden. However, even within the latter group success in the sense of high numbers of court cases is not guaranteed. Sweden, for example, has chosen for a bold, horizontal approach but the number of cases is very limited. Better results were achieved in, for example, the Netherlands.

Belgium

As Stefaan Voet from the University of Ghent states in his contribution, until very recently Belgium had no or very limited tools to resolve mass cases. The available injunctive or declaratory collective actions could only be used in the area of consumer protection, the environment, and discrimination and racism, and they were rarely used in practice. A new Belgian Act which entered into force on 1 September 2014 should change this situation. The Act introduced a consumer collective redress action and is accompanied by another Act, also from 2014, concerning the out of court resolution of consumer disputes (meant to implement the EU Consumer ADR Directive). Obviously, in Belgium one has opted for a sectorial approach, but after the evaluation of the Act in 2017 the number of areas covered by the Act might be enlarged. In this sense, Belgium is following the example of France and Germany, which also will consider enlarging the ambit of their collective redress mechanisms after an evaluation in the near or not so near future. Interestingly, Dr Voet argues that this sectorial approach may be found

problematic by the Belgian Constitutional Court since it may qualify this approach as constitutional discrimination. If indeed the Belgian Constitutional Court were to qualify this approach as such, this might be an example in Europe of a Constitutional Court facilitating collective redress mechanisms instead of hampering their development, for example by arguing that opt-out systems are against the constitutional guarantee of access to justice, an argument that the Amsterdam Court of Appeal is unwilling to accept, claiming that opt-out mechanisms are – when certain requirements are met – in line with the requirements of Article 6 of the European Convention on Human Rights (it should be noted that the Netherlands, like the United Kingdom, does not have a constitutional court).

The new Belgian collective action is a representative action in the sense that only consumer associations and authorized non-profit organizations, of which the statutory aim corresponds with the collective harm, have standing in court. The Belgian Consumer Ombudsman Service only has standing to initiate a collective action and to negotiate a collective settlement. If a settlement cannot be reached, and the court has to decide the merits of the case, a consumer association has to step in to continue the procedure. The Belgian law has opted for what Stefaan Voet calls 'ideological plaintiffs' such as non-profit organizations, since they have 'no private cause of action or grievance against the defendant' and will thus focus only on the interests of the group. Whether indeed this choice can be applauded, as the learned author claims, is a matter of debate, especially when taking into consideration what has been stated in the Law & Economics contribution by Professor Szalai in Part I of this volume.

In Belgium, the lawmaker has realized that for collective redress mechanisms to work well, courts need to be specialized. Therefore, the courts in Brussels have been given exclusive jurisdiction in these matters. Unfortunately, the Brussels Court of Appeal, where most cases will end up according to the author, is a court with considerable backlogs, and therefore one may already start to worry about the successes in actual practice of the new Belgian Act, especially taking into consideration the findings of Professor Uzelac in the first part of this volume.

Apart from this worrying aspect of the new Belgian scheme, other elements look promising. Fortunately from the perspective of success in practice and contrary to the EC Recommendation, opting-in is not the default rule for group actions in Belgium. Stefaan Voet states, 'In its certification decision, the Belgian court can freely choose between an opt-in or opt-out system', with the exception of cases where the class members are not residing in Belgium; in that case only an opt-in regime is allowed.

Very complicated and rather bureaucratic is the enforcement of a collective settlement or a decision on the merits of the case in Belgium under the supervision of a collective claims settler. Again, this is one of the weak points of the Belgian Act.

Although Dr Voet holds that Belgium is a European front runner in collective consumer redress, this might only be true on paper and not in actual practice, as is also acknowledged by the learned author.

England & Wales

According to the learned author of the contribution on England & Wales, Professor Neil Andrews from Cambridge, England knows several types of multi-party litigation: test case litigation, representative proceedings and Group Litigation Orders. The fourth mechanism mentioned by Professor Andrews, the consolidation and joinder of co-claimants, would in most jurisdictions only be considered to be a 'surrogate' for collective redress, and therefore we will not discuss it here.

The test case procedure is available for public bodies which have 'legal power disinterestedly to seek legal declarations (or other relief) on behalf of the community or segments of it'. Test case procedures result in a stay of individual lawsuits until the High Court has issued a decision in the test case. This decision may give rise to appeals to the Court of Appeal and the Supreme Court, and this may, at least for foreign observers, appear to be a problematic aspect of this procedure in light of the duration of the proceedings (similar observations can be made about the test case ('model case') procedure in Germany; see below).

The other two collective redress mechanisms in England & Wales are not without flaws either. In representative proceedings the representative claimant brings an action on behalf of himself and others (these others are known as 'the represented class'). The members of the represented class will not become parties to the action but they will enjoy the benefits of a *res iudicata* decision and are bound by it unless they opt out. Representative proceedings for pecuniary relief do not occur frequently and most cases are brought to obtain a declaratory judgment or injunctions. This may change in the future due to a change in traditional restrictive case law concerning the requirement 'where more than one person has the *same interest* in a claim' (emphasis added). The new case law allows more cases to be brought by way of a representative action and as a result the Group Litigation Order discussed below may become less popular in the future according to Professor Andrews.

The Group Litigation Order was introduced in 2000 and can be defined as 'an order to provide for the case management of claims which give rise to common or related issues of fact or law'. It is currently popular for the recovery of pecuniary claims, but this may change due to the abovementioned relaxation of case law as regards representative proceedings. The procedure is started by the court's approving the order and by its ratification. Subsequently, interested parties may opt in. By doing so, they will become full-fledged parties to the action. The court will exercise extensive case management powers and, in the event the group loses, all members of the group will be liable for their 'share of the common costs of the proceedings and for any individual costs specifically incurred' with respect to their claim. When they win, however, they can recover their costs due to the applicability of the loser pays principle. The number of Group Litigation Orders that have been issued to date is limited (when Professor Andrews wrote his contribution to this volume 63 GLO's had been issued, but currently this number has risen to 81), which may amongst other things be due to problems with funding and the presence of an opt-in system instead of the more efficient opt-out system as was adopted in some other common law jurisdictions. According to the editors of this volume, it is for this reason unfortunate that a proposal for the introduction of a generic opt-out

class action in England for compensatory claims was opposed by the British Government in 2009.

France

The French story of collective redress is rather gloomy. According to Professor Ferrand, it can be characterized as a story of 'stillborn reforms'. Whether things will be different with the recent Act that was adopted in 2014 is yet to be seen, but prospects are not encouraging. The Act introduces collective redress for the compensation of damage caused to the collective interests of consumers only and in some cases also for the compensation of individual harm, and is an example of a rather timid sectorial approach to matters. Also, the procedure is rather complicated, only approved consumer associations with often limited means may bring the action, while the effective opt-out system is rejected. Sadly, it may be doubted whether this reform will indeed increase the international legal competitiveness of France as is hoped by the French Government. It might first of all be a reaction against developments in other EU Member States, notably the Netherlands, which have expanded the collective redress mechanisms extensively internationally. After all, Professor Ferrand states that the French Government is of the opinion that a French model of group litigation should be built 'in order to avoid that national disputes be indirectly dealt with by foreign courts pursuant to rules that would not necessarily be compatible with the principles of the French legal system'.

The 2014 Act introduces what is called an 'action de groupe'. The qualification of the new collective redress mechanism is problematic, but it can most likely best be qualified as an 'action de substitution' (this qualification was made by E. Jeuland), although there is discussion about this issue in France. The action is brought by an approved national consumer association and it consists of 'exercising the individual actions of the (not yet known) substituted consumers'. The consent of these consumers is not needed. The scope of the action is rather limited: it covers the financial damage suffered by consumers (natural persons) as a result of illegal practices of a professional. There is no national register of these group actions, and no preliminary stage for certification. Whether or not the action is admissible is determined in the judgment on liability.

Professor Ferrand mentions that the opt-in approach of the Act is criticized in France. She refers to the model code of the Instituto Ibero-americano de Derecho Procesal for an alternative approach, where group members will only be subject to the judgment in the group action if the court admits the claim (*res iudicata secundum eventum litis*). Another approach would be to allow a new group action where the first action was rejected because of lack of relevant evidence (*res iudicata secundum eventum probationem*).

Germany

For some readers it may be surprising that just as in France, the approach to collective redress in Germany is rather timid. According to Michael Bakowitz, who is a fellow at the Max Planck Institute for International, European and Regulatory

Procedural Law in Luxemburg, there are currently two sectorial mechanisms in place, the so-called association suit or (in German) *Verbandsklage* and the Capital Markets Model Case Act (KapMug) which provides for test case proceedings or, as the Germans have it, model case proceedings.

The association suit is an action brought by an association on behalf of a group of victims and was introduced in 1976. By way of this action, prohibitory injunctions can be obtained. Only in competition cases does the association suit allow for additionally claiming that the undertaking suspected of infringements surrenders the economic benefits obtained at the expense of consumers or competitors. If the claim is successful, this money is *not* used for the benefit of those who have brought the action, but is paid into the federal budget which, to say the least, may not serve as an incentive to bring the association suit. Therefore, Mr Bakowitz holds that in practice the association suit is mostly used to obtain prohibitory injunctions.

The other collective redress mechanism in Germany, the KapMug, was introduced on 1 November 2005. Originally it contained a sunset clause of 1 November 2010, which has been expanded to 1 November 2020. During this (very long) period (the German legislator seems to be extremely cautious) the Act is being tested and for the time being it only covers damages regarding wrong or misleading public capital markets information. According to Mr Bakowitz, this might change at the end of the period allowed for testing since it has been announced that in case of positive results horizontal model proceedings might be introduced.

The procedure is complicated, usually takes a very long period of time and consists of three stages at different courts of law. The first stage takes place at the Regional Court or *Landgericht*. In an individual lawsuit for damages, a party (claimant or defendant) may ask for the commencement of a test case. This application is published in a complaints registry on the Internet and nine other claimants have to join the application. If the necessary requirements are met, the Regional Court will submit a specific subject matter to the competent Higher Regional Court or *Oberlandesgericht*. In the second stage, the Higher Regional Court will select a model claimant, decide on the matter and issue a binding ruling. Injured parties with pending lawsuits in other courts may register their claims, resulting in periods of prescription to stop running. Finally, in the last stage, cases are dealt with on an individual basis at the Regional Court, taking into consideration the binding ruling of the Higher Regional Court.

The KapMug allows neither opting-in nor opting-out even though initially the nine claimants who need to join the application for a model case ruling clearly have to opt in. However, once this is done and the case is being dealt with at the Higher Regional Court, other pending cases that concern the same subject matter are stayed automatically (this may be qualified as automatic group membership without an option to opt out; see the contribution of Professor Szalai in this volume). Given the long duration of the proceedings, this may be problematic for them.

Finally, it should be mentioned that the model claimant and model defendant may also make a proposition for a settlement or the court itself may suggest a settlement. This settlement is valid for all those who have joined the model case, but

this only if less than 30 per cent of them decide to opt out of the settlement. Mr Bakowitz, however, notes that '[i]t is another question whether the model defendant will agree to a settlement when it has to expect ongoing proceedings with up to 30 per cent of the claimants'.

All in all, it is rather doubtful whether indeed the KapMug will be successful. Especially the rather complicated procedure, the absence of the possibility to opt in or to opt out, the long duration of the proceedings and the limited number of decided cases appear to be rather problematic, at least to the editors of this volume.

Hungary

In her contribution to this volume, Professor Viktória Harsági from Budapest states that multi-party litigation is sporadic in Hungary. It is only available vertically in certain sectors and then only by way of an *actio popularis*. The number of organizations that may bring these actions is limited and established by law. Apart from representative actions, there is no alternative in Hungary other than the traditional means of joinder of parties or joinder of actions and the assignation of claims. The author, who in her contribution to this volume discusses the available representative actions in Hungary in detail, is currently involved in drafting legislation to change this situation and advocates a comparative approach while paying attention to the particularities of the Hungarian legal system and an opt-out system in cases where the value at stake per individual is low. The author claims, however, that the basic model in Hungary should be based on the opt-in model. The only problem could be that the Hungarian Judiciary might not be able to face the challenges of multi-party litigation, something that especially appears from the contribution of Professors Tihamér Tóth and Pál Szilágyi from Budapest, a contribution that seems to prove several of the statements of Professor Uzelac in Part I of the present volume.

The learned authors claim that there are serious concerns in Hungary about American-style class actions. Collective redress in competition cases in Hungary tries to avoid the perceived problems with American-style collective litigation. The representative action that may be brought in Hungary in such cases can only be instituted by the Hungarian Competition Authority, and both injunctions and damages may be claimed. Only a single case has been litigated so far. The authors claim that the situation will not improve after Hungary has implemented the EU Directive on Cartel Damages, and they identify the lack of opt-out class actions and the absence of contingency fees as a problem. Additionally, they note that Hungarian courts are inexperienced in the application of EU or Hungarian competition law, and even if they had experience the procedural rules and the legal environment do not really favour group litigation in competition cases. Apparently, Hungary belongs to the group of countries identified as problematic by Professor Alan Uzelac in his contribution in Part I of this volume, which is underlined by the statement of the authors that especially the slow pace of litigation in Hungary is a problem where it concerns follow-on competition litigation: it takes years to reach a final decision. Hungarian courts will certainly not be favoured in matters of international collective redress according to the authors. They identify criteria for a

positive choice of forum that potential litigants may use: the language capabilities of the judges, the duration of litigation, an understanding of economic reasoning and a positive attitude towards and an understanding of EU law. Professors Tihamér Tóth and Pál Szilágyi claim that these criteria are not met by the Hungarian Judiciary.

Italy

Italy originally knew only collective redress mechanisms meant to implement EU law. Although there had been discussions as early as the 1970s, only in the early years of the new millennium were new discussions on the need to introduce group actions for damages started. This resulted in January 2010 in a statute (amended in 2012) regulating what is called a ‘class action’ (in Italian: *azione di classe*) for consumer cases only (the Italian approach is sectorial). In her contribution, Professor Elisabetta Silvestri from Pavia states that this action (the name of which is a ‘glaring misnomer’ in her opinion since it has nothing to do with the American class action) is meant for groups of individuals that claim damages as compensation for the harm suffered as a result the wrongdoing of the same defendant. A public class action was also introduced which may be brought against public bodies that do not take action even though they have a duty to act.

In Italy, individual group members may start the class action. Associations and committees may do so as well provided that they have been named by one or more class members as representative of the whole class. The Italian class action is an opt-in procedure, and requires that the individual rights of the consumers are ‘homogenous’ in nature. The action may also be brought to safeguard collective interests. According to the learned author, it is hard to define what ‘homogeneous’ interests are, and this is one of the reasons why the Act is difficult to apply. Furthermore, the fact that it provides for an opt-in procedure is according to the author not very class-friendly (few class members opt in), whereas here again appears a problem with class actions that has been identified by Professor Uzelac in his contribution to this volume as detrimental for the success of collective actions (Part I): the excessive length of procedure in Italy in general. As regards statistics, Professor Silvestri provides the following details: 40 class actions have been introduced since 2010. Fifteen were declared inadmissible, 9 admissible, 23 are still pending and only 1 class action has been decided on the merits. It seems that Italian collective redress mechanisms can rightly be described (to borrow terminology of the author) as a series of ‘empty boxes’.

The editors realize that by now the reader may have become pessimistic about the future of collective redress in the European Union. Very few successes can be mentioned so far. Therefore, it may be a relief that the Netherlands, which forms the topic of the present section, and Poland, which will be discussed afterwards, provide a more positive story (although the Polish story should be qualified as moderately successful only because of the few successful cases).

The Netherlands

In 1994, the Netherlands was one of the first European countries to provide for collective redress by way of an action brought in court. The approach is horizontal

in the sense that there are no limits to the type of cases that may be subject to the collective proceedings, although damages may not be asked (currently, however, a legislative proposal is pending to change this situation). A non-profit organization such as a foundation or an association with full legal personality may bring this collective action. The claim is not admissible if 'in the given circumstances' a sufficient attempt to achieve a settlement has not been made. The action is brought in the foundation's or association's own name but nevertheless in the interest of a group. Legal persons under public law are also allowed to bring a collective action. Interestingly, the group members are *not* a party to the action. Therefore, the final judgment in the case does *not* have *res iudicata* effect for them and the Dutch group action can therefore not be qualified as a representative action. Nevertheless, group members may use the judgment as a kind of precedent in their subsequent individual lawsuits, e.g. for damages.

An innovation is the new legislation that introduced a preliminary ruling procedure at the Supreme Court of the Netherlands which is very relevant in case of collective litigation (the procedure is not available in the collective settlement procedure discussed below).

According to Professors van Rhee and Tzankova, the Dutch collective action may be called a success. For a relatively small country with a population of about 17 million inhabitants, the number of collective actions that have been brought since 1994 is large and many of these actions were successful.

Apart from collective litigation, the Netherlands has known a collective settlement procedure since 2005. Again the approach is horizontal and not sectorial. Within the procedure, natural or legal persons having caused harm and a foundation or association (or the Consumer Authority) representing the interests of those who have suffered harm may reach an agreement which can be submitted to the Court of Appeal in Amsterdam (only a single court is competent to allow for specialization) in order to have it sanctioned as an agreement binding for all who have suffered harm in the context of the agreement (except for those who decide to opt out). This has to be done by way of a mutual petition of the organization(s) acting in the interest of the victims and the natural or legal person(s) being responsible for the harm. The submission of the petition to the court stops periods of prescription from running. At the request of the party from whom damages are being claimed the Amsterdam Court of Appeal may decide to stay pending individual actions for damages, including those which are started during the collective settlement procedure.

Again according to Professors van Rhee and Tzankova, the Dutch collective settlement procedure can be described as successful. Soon the eighth largest case might be settled by way of the 2005 collective settlement procedure, and a number of these settlements have also provided the necessary relief for foreign parties who might not have been able to obtain redress at home due to the lack of effective collective redress mechanisms (this progressive attitude of the Dutch Judiciary has, ironically, given rise to concern in other European jurisdictions where effective collective redress mechanisms are not available).

It is important to note that Dutch collective redress procedures should not be looked at in isolation. Although until now collective litigation cannot result in an

award of damages (as stated, this may change in the near future), the judgment resulting from such litigation may help parties in subsequent individual litigation for damages (or in litigation after the assignment of claims to a third party) and may also be an incentive for reaching an individual or a collective settlement, the latter being certified – as stated – by the Amsterdam Court of Appeal.

Poland

Poland introduced an Act on group actions in 2010. Apparently, the Polish legislator was not as bold as his Dutch counterpart, since Polish group actions only cover specifically defined categories of cases. This was not the original idea, but limitations were introduced in the discussions resulting in the new Act. Consequently, group actions are now only available in Poland when they concern consumer protection, liability for damage caused by a dangerous product and claims arising from prohibited acts (torts). Further requirements for admissibility are that the claims be of the same type, be brought by at least 10 persons and arise from the same or an identical factual basis. Pecuniary claims are also allowed. In this event unification of the amounts claimed is needed but if unification is not possible, a group action is still possible, but then only for establishing liability. An opt-in approach is chosen since it is felt in Poland that an opt-out approach would not be in line with the right of access to court as encompassed by the Polish Constitution (as stated above, whether this is also problematic from the perspective of the European Convention on Human Rights is doubtful; in Strasbourg, an opt-out mechanism might not be considered to be problematic for access to justice).

The action needs to be brought by a representative of the group, and this can be a group member or a District Consumer Advocate when it concerns claims related to consumer protection. There is a preliminary stage in which the admissibility of the group action is considered. The group action is announced in the Polish national mass media and indicates up to what point in time potential group members can join the group. The group representative (on whom the members of the group have to agree) is responsible for compiling a list of persons who have joined the group. Group members may decide to opt out up until a decision on the composition of the group is issued by the competent court.

From the chapter by Professor Kulski in this volume one may conclude that the Polish Act has proven to be moderately successful. In the period 2010-2013, 102 group actions were filed. Forty-one of them were unsuccessful. Most of the other cases are still pending and up to now claimants have been successful in only a few court decisions.

Sweden

In Sweden, group actions were introduced in 2003. Sweden has chosen a horizontal approach in the sense that group actions are available for all civil cases that can be brought before the general first instance courts as well as for those cases concerning environmental damage which can be brought before the environmental courts.

Three types of group actions can be distinguished in Sweden according to Professor Laura Ervo: private or individual group actions, public or governmental

group actions and actions brought by consumer organizations (these last actions will not be discussed here). Private group actions are brought by an individual that is a natural or legal person who is a member of the group concerned. Public group actions are available in cases where no private group action has been brought. In that situation, the Consumer Ombudsman may bring a public group action or, in environmental cases, the conservation authorities. Private group actions are favoured in Sweden since public group actions are only allowed if no private group action has been brought in a particular case.

According to Professor Ervo, Swedish group actions can be defined as actions brought by a plaintiff as the representative of several persons who will be bound by the judgment even though they will not become parties to the suit. An opt-in mechanism is used, and group actions are only available for small claims cases even though the definition of a small claim seems to be flexible. The following criteria are amongst those that need to be met for bringing a group action: (1) the action is founded on circumstances that are common or of a similar nature, (2) the claims of the group members do not differ substantially from each other, (3) a majority of claims cannot be pursued equally well in the individual lawsuit, (4) the group has an appropriate size and is properly defined, and (5) the plaintiff is the appropriate person to represent the members of the group, also in light of his financial situation. Enforcement of a judgment in group litigation is the task of the group members and not of their representative. The enforcement procedure is qualified as bureaucratic by Professor Ervo.

Finally, it should be mentioned that friendly settlement and mediation are allowed in group actions in Sweden, but Professor Ervo states that it seems that the Swedish legislator has not put much effort into this.

The number of cases that have been subject to group litigation is very small: to date only 17 cases can be mentioned. Therefore it seems that the Swedish approach to group actions has not been as effective as was hoped (albeit more effective than in another Nordic country, Finland, where only public group actions brought by the Consumer Ombudsman are allowed and where, according to Professor Ervo, to date no (!!) group actions have been brought even though group actions have been available since 2007 in that country). Various reasons for this can be mentioned, for example funding problems and the choice for an opt-in mechanism. It seems that as regards the latter issue the Swedish legislator should pay attention to Professor Per Hendrik Lindblom from Uppsala, who once stated, 'Opt-in is out and opt-out is in', which, perhaps, might be phrased differently in light of the various contributions to this volume as, 'Opt-in *should* be out and opt-out *should* be in'. However, in light of the general attitude towards group actions in the majority of EU Member States, this is probably only a consummation, devoutly to be wished.

Final Remarks

Within the European Union, limited progress has been made with the introduction of effective collective redress mechanisms. Many EU Member States opt for a sectorial approach only and plaintiff-friendly opt-out mechanisms (or a combination of opt-in and opt-out mechanisms) are not very popular. Recovery of damages by

way of collective litigation is often not available. The incentives for bringing collective actions are usually limited and frequently only non-profit representative entities have standing, which is especially problematic if these entities do not have the means to fulfil their tasks as for example consumer organizations. Funding of collective redress litigation in general is a problem, since many of the more 'creative' ways of financing such litigation are considered to be inappropriate in Europe (e.g. contingency fees, although this might change in the future given the fact that some European Union Member States are currently embracing this concept due to the fact that publicly funded legal aid systems have become unaffordable). In Europe, the sometimes unjustified belief in the blessings of the enforcement of rights by public authorities (a strong belief in the State) also hinders the development of effective private enforcement mechanisms. As a result of these and other reasons many EU Member States currently have collective redress mechanisms that sometimes look good on paper but that are not used very often in actual practice. Under these circumstances one would expect the European Union to take the lead in developing more vigorous collective redress mechanisms. Unfortunately, the opposite is true. When considering the latest European initiatives in this field one cannot be but disappointed in what has been produced. The Recommendation on Collective Redress is so cautious that it will most likely not produce any positive effect. It should for example have provided real alternatives for the opt-out mechanisms that many EU Member States dislike, but instead it advocates the often not so effective opt-in mechanism. Even worse is the Directive on Cartel Damages which in a way discourages private enforcement for the sake of encouraging public enforcement mechanisms. Therefore, states that are thinking about reforming their legal system and introducing effective collective redress mechanisms should in our opinion not look too hopefully at the EU for guidance, but would do better to study successful collective redress mechanisms available in the world at large. Obviously, the American class action is problematic in a variety of respects, but it deserves more serious attention than the superficial expressions of dislike which one often encounters. Furthermore, attention to developments in EU Member States that have succeeded in introducing effective collective redress mechanisms may be worthwhile. Studying black letter law only should be avoided since there are obviously no guarantees that mechanisms that look good on paper do actually work in practice. Instead, empirical studies are needed. Unfortunately, the number of such studies to date is limited. Ideally, empirical studies should not only focus on the collective redress mechanisms themselves but should also focus on the legal environment in which they have to function. Collective redress will not blossom in an environment where courts are not able to process ordinary individual lawsuits in an efficient and timely manner and where relevant knowledge of complex legal issues is missing. Unfortunately, there are still too many of these jurisdictions in the European Union and coordinated action is needed to change this situation. For collective redress the best option might be to concentrate these cases at specialized courts which are manned by judges that are enthusiastic about collective redress and that are provided with incentives to handle these cases successfully based on clear legislation that avoids vague concepts such as 'homogeneous claims' and the like. But, obviously, this needs more than a timid

European Recommendation on collective redress and a European Directive that hinders collective litigation.