Report of the EU Bar Association and the Irish Society of European Law relating to

Litigation Funding and Class Actions

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Introduction

The EU Bar Association (EUBA) and the Irish Society of European Law (ISEL) have prepared this report for the Chief Justice of Ireland for the purpose of exploring the concepts of third party litigation funding and representative or class actions, which are currently not permitted as a matter of Irish law, in the context of access to justice. The report assesses whether the lack of either of these mechanisms in Ireland is a barrier to litigation and considers the comparative approaches of a number of other jurisdictions.

This report derives originally from a conference organised by the EUBA and ISEL on "*Private Damages Remedies in Competition Law*" on 6 October 2017. That conference was addressed by the Chief Justice of Ireland, who requested a report of the conference.

The conference was extremely successful, and in addition to many local participants, attracted speakers and attendees from New York, Washington DC, Brussels, London, Milan, Berlin, Dusseldorf, and the Netherlands. Legal reporters also flew in from London on behalf of PaRR and Global Competition Review to cover the event.

In general, there has been a dearth of competition damages claims in Ireland. In particular, there have been very few "*follow on*" claims by consumers, which are claims for redress following a finding of the European Commission of a breach of competition law. The most popular jurisdictions across the European Union for such claims are London, the Netherlands and Germany. These jurisdictions have a range of procedural mechanisms available to litigants which render them more suitable for managing such litigation efficiently and effectively. The two most relevant procedural mechanisms are: representative actions and litigation funding.

The aim of the conference was to learn more about the use of these mechanisms and to assess the comparative experience of other jurisdictions. The interest in this issue was, in particular, triggered by the fact that, following the Commission's finding of 19 July 2016 of competition law infringements by a number of truck manufacturers, imposing a fine of €2.93 billion on a number of truck companies, unusually, Ireland was actually the first jurisdiction in which follow-on damages claims by consumers were issued in the European Union.

While the focus of the conference was on competition law litigation, obviously, the procedural mechanisms discussed at the conference have far-reaching implications for many forms of litigation. In particular, they have implications for any situation in which there are a large number of victims of wrongdoing, each of whom may have suffered a loss, but not a sufficiently serious loss to warrant risking the costs of litigation.

The difficulties and challenges of lack of procedural mechanisms such as representative action and litigation funding were discussed at the conference, as well as the lessons to be learned from the experience of other jurisdictions. The discussion at the conference therefore sought to examine comparatively the use of representative actions and litigation funding.

Concerns were raised as to the difficulties arising where there are no representative actions and litigation funding, in particular, relating to the burdensome nature of multiple sets of proceedings on the resources of the Courts as well as the parties. Confusion can arise where substantially identical claims are pursued in multiple proceedings. The potential for disputes becomes great; with each interlocutory application, there can be debates around appropriate sample cases and the choices of such cases, as well as disputes between the parties as to the number of such cases. The burden on both litigants and the courts can be substantial. In the "*trucks*" claims, there are multiple claims, with some 30 sets of proceedings perhaps appearing in the Competition Law list each time the matters are listed for case-management.

By way of summary, it is fair to note that the overwhelming view of those presenting and attending at the conference was in favour of both representative actions and litigation funding. These mechanisms were regarded as critical for access to justice and the proper, fair and efficient administration of justice.

Litigation Funding and Access to Justice

Third party funding ("**TPF**") occurs where a party (who is not a party to the litigation) finances all or part of the costs of litigation of an individual in return for a fee (generally a % of the overall award). If the litigation is unsuccessful, the third-party funder generally has no recourse as against the party to whom it funded. Of course, third-party funders are not interested in frivolous litigation and in general are only interested in high-value claims – from their point of view, it is an investment. A third-party funder will assess the claim and look at the value of the claim, merits, probability of success and likelihood of recovering any award.

If an individual is unable to fund their own litigation, in some other jurisdictions, they would be permitted to turn to a third party to fund their case. The availability of such funding has a significant effect for a person who would otherwise be unable to fund their own case. As such, TPF can increase access to justice in certain circumstances.

In other jurisdictions, professional litigation is an option available to litigants on lower incomes or litigants who are risk-averse. It can, in certain circumstances, help bring important claims which otherwise would not be litigated. Funding agreements do not generally give funders any control over the conduct or settlement of litigation.

Whether openly acknowledged or otherwise, commercial pressure in the context of litigation is a tactic. It is open to the more financially buoyant defendant to delay proceedings in the hope that the plaintiff will run out of funds and will be unable to maintain the litigation.

However, it would be incorrect to suggest that TPF would necessarily widen access to justice in all areas as it remains the case that a funder approaches the matter as an investment. For example, planning and environmental judicial reviews by individuals who are concerned with breaches of planning laws and environmental pollution are not monetarily valuable and would likely not be of interest to third-party funders (although damages claims arising in the environmental and planning context would of course potentially benefit from TPF). Similarly, TPF would not assist individuals in small scale employment complaints before the Workplace Relations Commission, to whom free legal aid is generally not provided, for the same reasons.

The Current Irish Position

The position in relation to litigation funding by a third party in Ireland has been confirmed by the Supreme Court in the recent decision of *Persona Digital Telephony Ltd v Minister for Public Enterprise & Ors*[1]. The appeal in that matter raised issues in relation to the torts and offences of maintenance and champerty, and professional third-party funding of litigation. The Supreme Court confirmed the tort of maintenance and champerty remain and are

[1] [2017] IESC 27.

unlawful[2]. Denham CJ confirmed that third party funding to support an individual is unlawful by reason of the rules on champerty unless one of the exceptions apply[3] and that the issues raised by the plaintiffs were matters primarily for the legislature[4].

Comparative Experience of Litigation Funding

England & Wales

TPF is available in England and Wales and is governed by a code of conduct which is self-regulated by Association of Litigation Funders ("**ALF**"). Jackson LJ was appointed by the Master of the Rolls in November 2008 to carry out a review into the costs of civil litigation. Jackson LJ makes the following comments in relation to the regulation of TPF at the time in the Preliminary Report (May 2009)[5]:

> "4.1 *The present position. At the moment TPF is unregulated. The principal constraint upon the terms of funding agreements and the conduct of funders is fear of allegations of maintenance and champerty. The doctrine of maintenance and champerty is an aspect of the common law which was fashioned by judges in a different age, when such a doctrine was not seen as inhibiting access to justice*."

Jackson LJ comments that :

> "*4.2 Matters for consideration. The question now arises as to whether the common law doctrine of maintenance and champerty should be replaced by a statutory code regulating the funding of litigation by third parties. This is not a step which should be taken without analysing all the consequences. However, if this course commends itself to Parliament, then the appropriate steps would be (i) to repeal section 14(2) of the Criminal Law Act 1967 and (ii) to authorise an appropriate body to issue a code of conduct binding upon all providers of third party funding. Whether that body should be a rule making body like the Civil Procedure Rule Committee or the Secretary of State for Justice would be a matter for discussion."*

The Final Report of Jackson LJ made the following recommendations in relation to TPF[6]:

> *"6.1 I do not consider that full regulation of third party funding is presently required. I do, however, make the following recommendations:*
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> *A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and*

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[2] "*Maintenance may be defined as the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share of the litigation succeeds*." per *Persona Digital Telephony Ltd v Minister for Public Enterprise & Ors* [2017] IESC 27 at para. 25.

[3] *Ibid* at para. 54(ix).

[4] *Ibid* at para. 54(viii).

[5] Available here https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf

[6] Available here https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.

The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands.

Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge. On foot of the Jackson Report the Code."

Following from the Jackson Report the Code of Conduct for Litigation Funding was brought into effect in November 2011. While the Code of Conduct is in place, TPF is self-regulated by the ALF. The initial code brought in on foot of the Jackson Report has been updated and the current version is the Code of Conduct for Litigation Funders (January 2018). The Code of Conduct for Litigation Funders provides general standards to which funder members of the ALF must adhere and aim to counter the concerns set out in Lord Jackson's Report. The Code of Conduct provides in summary:

- Requirements that Funders maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. (§9.4)

- Requirements that Funders must behave reasonably and may only withdraw from funding in specific circumstances. Where there is a dispute about termination or settlement, a binding opinion must be obtained from an independent QC, who has been either instructed jointly or appointed by the Bar Council. (§13.2)

- Requirements that Funders will not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder (§9.3);

- Requirements that Funders take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the Litigation Funding Agreement prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute. (§9.1)

- An important aspect of the Code of Conduct is that it provides that the Funder consents to the complaints procedure as maintained by the ALF. (§15)

New Zealand

The position in New Zealand is that the Courts have taken a lenient approach to litigation funding - only intervening with a funding arrangement if it amounted to an abuse of process

per *PricewaterhouseCoopers v Walker*[7]. In 2017 the Law Reform Commission announced that it would be undertaking a review of the law relating to litigation funding and class actions and this review is currently ongoing.

Australia

New South Wales, South Australia and Victoria have abolished both the torts and crimes of maintenance and champerty pursuant to section 221 of the Civil Law (Wrongs) Act 2002 (ACT) and Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).

In relation to the remaining territories in Australia, the High Court decisions in 2006 in the cases of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[8] and *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*[9] put an end to torts of maintenance and champerty in the remaining jurisdictions.

United States

In the United States, lawsuits are often litigated on a contingency fee basis, which means that the plaintiff's lawyer agrees to advance all litigation expenses, including attorneys' fees. Should the case succeed in achieving a monetary award or settlement, the lawyer receives a percentage of the recovery as its fee, in addition to reimbursement of its costs and expenses. However, should the case fail, the lawyer receives nothing. Accordingly, contingency fees are a method of litigation financing. They also allow plaintiffs, who are financially unable to pay hourly attorneys' fees, equal access to justice, and they ensure that only meritorious cases are filed because lawyers have no incentive to waste time and resources litigating suits that have little chance of recovery.

Although in class actions, contingency fees are technically not possible because absent class members do not have the opportunity to contract with attorneys prior to the filing of the case, the same result is achieved through what is known as the "common fund doctrine."[10] This doctrine says that where a representative plaintiff creates a recovery that benefits a group of persons, it is only fair for all beneficiaries to share in the cost of obtaining such recovery, which is accomplished by paying the costs of the litigation out of the common settlement fund.[11] In class actions, however, the court is required to assess whether the percentage of the common fund claimed by the lawyers is reasonable given, inter alia, the results achieved, the difficulty of the case, and the risks associated with the litigation.[12]

Another important factor in the financing of class action litigation in the United States is the

[7] [2017] NZSC 151 at §55 & 56.
[8] [2006] 229 CLR 386; 229 ALR 58; [2006] HCA 41
[9] [2006] HCA 42
[10] *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (endorsing the common fund doctrine for use in federal class actions).
[11] *See id. at 478*
[12] *See Fed. R. Civ. P. 23(h)*.

"American Rule," which, unlike the "loser pays" rule used in Europe, requires each side of the lawsuit to pay its own attorneys' fees, regardless of who wins,[13] unless a statute or contract provides otherwise.[14] The American Rule, like contingency fees and the common fund doctrine, makes it easier for plaintiffs with limited financial resources to pursue their claims.

Third party litigation financing, where a third party (rather than, or in addition to, a plaintiffs' attorney) advances the funds required for litigation in exchange for a percentage of any judgment or settlement, has recently become more prevalent in the United States, now representing a $5 billion industry.[15] The largest financers in the United States third party litigation funding market are Burford Capital and Bentham Capital.[16] According to a study by Burford Capital, in 2017, 36% of U.S. law firms reported having used third party litigation financing, which represents a growth in use of 414% since 2013.[17]

In the United States, the legality of third party litigation financing is determined at the state, rather than the federal level, and largely involves consideration of the particular state's champerty laws.[18] Accordingly, state courts have analysed the issue differently. However, in the vast majority of states, the result has been the same; third party litigation financing has been deemed permissible and not "champertous."

For example, many states have abolished their champerty laws,[19] or never adopted them in the first place.[20] Others, like New York, have enacted statutes exempting transactions in

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[13] *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 Cornell L. Rev. 327, 328-29 (2013).

[14] Certain federal statutes (including those that govern civil rights, environmental, and consumer protection claims) provide prevailing plaintiffs with the right to recover reasonable attorneys' fees from defendants. This is sometimes referred to as one-way fee shifting, and it provides an alternative method for financing class actions, usually with respect to claims that do not involve large monetary recoveries. See Eisenberg & Miller, supra note 23, at 329 n.4.

[15] *See* Kevin LaCroix, *The Latest on Third-Party Litigation Financing*, The D&O Diary, Jan. 15, 2018, *available at* https://www.dandodiary.com/2018/01/articles/litigation-financing-2/latest-third-party-litigation-financing/.

[16] *See* Ben Hancock, *Who Rules the World of Litigation Funding?,* The American Lawyer, Mar. 30, 2017, *available* at http://www.nationallawjournal.com/supremecourtbrief/id=1202782561037/Who-Rules-the-World-of-Litigation-Funding?mcode=1202615549854&curindex=8&slreturn=20170916103347.

[17] *See* Burford Capital, 2017 Litigation Finance Survey, *available at* www.burfordcapital.com. Notably, litigation financing in the United States can be provided either to the plaintiff directly, or to the plaintiff's law firm.

[18] At common law, champerty was defined as "a bargain by the terms of which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his or her own expense, or to aid in so doing, in consideration of receiving, in the vent of success, some part of the land, property, or money recovered or deriving some benefit therefrom." 14 C.J.S. Champerty and Maintenance § 1 (2018). The purpose of champerty laws was to "prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law." *Id.*

[19] *See, e.g., Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 384 (S.C. 2000); *Saladini v. Righellis*, 426 Mass. 231, 235 (Mass. 1997); *Hardick v. Homol*, 795 S.2d 1107, 1108 (Fla. Dist. Ct. App. 2001); *Fastenau v. Engel,* 240 P.2d 1173 (Colo. 1952).

[20] *See* ABA Comm. on Ethics 20/20, Informational Report to the House of Delegates 11 (2012), *available at* https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_wh

excess of a certain amount from the prohibition against champerty.[21] Still others have held that legitimate, good faith litigation financing transactions are not champertous because champerty laws merely forbid "meritless litigation" controlled by a stranger where "the purpose, not merely the effect, of the stranger's involvement is to stir up litigation."[22] Rulings such as this are unsurprising given that the United States has long embraced contingency fee arrangements between clients and attorneys, which, at common law, were originally considered champertous as well.[23] Nevertheless, a small handful of states continue to strike down third party litigation financing agreements as champertous, including courts in the states of Kentucky and Pennsylvania.[24] In general, however, the rule in the United States is that so long as the litigants and their attorneys control the litigation, rather than the litigation funder, third party litigation financing is permissible.[25] This reflects the "consistent trend across the [United States]… toward limiting, not expanding, champerty's reach."[26]

Notably, courts in the United States have become increasingly supportive of third party litigation financing in recent years. For example, the New York State Supreme Court recently extolled the value of third party funding, noting "the sound public policy of making justice accessible to all regardless of wealth," and recognizing that the costs and expenses of litigation often otherwise deter lawsuits against "deep pocketed wrongdoers."[27] The California Supreme Court has similarly held that forbidding litigation funding would create a

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[21] *See* N.Y. Judiciary Law § 489(2) (exempting transactions in excess of $500,000 from the prohibition against champerty).

[22] *Del Webb Communities Inc. v. Partington*, 652 F.3d 1145, 1156-57 (9th Cir. 2011) ("[A]n outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery." Rather, champerty laws merely forbid "meritless litigation" controlled by a stranger where "the purpose, not merely the effect, of the stranger's involvement is to stir up litigation."); *see also Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 726 (N.D. Ill. 2014) (third party funding agreement was not champertous because "there was no intermeddling by the funder" nor any suggestion that the funder "wickedly and willfully tried to stir up a suit between [the parties]." Rather, the "funder was sought out by a cash-strapped litigant embroiled in bitterly contested litigation" and merely "enable[d] [the plaintiff] to continue with the litigation.").

[23] *See* Dawn S. Garrett, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 U. Dayton L. Rev. 221, 229 (1990) (noting that in the past, "[m]any courts held that an attorney furnishing the expenses of litigation at his own cost or with reimbursement contingent on the outcome constitutes champerty, [but] [w]ith the present day acceptance of contingent fee contracts, this view has obviously changed."); *see also* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DePaul L. Rev. 231 (1998) (providing an in-depth discussion of champerty and the evolution of contingency fees in the United States).

[24] *See Boling v. Prospect Funding Holdings, LLC*, No. 114 Civ. 00081, 2017 WL 1193064, at *6 (W.D. Ky. Mar. 30, 2017); *WFIC, LLC v. Donald Labarre, Jr., Esquire, Pafco Invs. LLC*, 148 A.3d 812 (Pa. Super. Ct. 2016).

[25] Scott Incerto, Anne Rodgers & Alex Cummings, *The Third Party Litigation Funding Law Review – Edition 1: United States*, The Law Reviews, Jan. 8, 2018, *available at* https://thelawreviews.co.uk/chapter/1152267/united-states.

[26] *Del Webb Communities Inc.*, 652 F.3d at 1156.

[27] *Hamiltan Capital VII LLC I v. Khorrami LLP*, No. 650791/2015, 2015 WL 4920281, at *5 (N.Y. Sup. Ct. Aug. 17, 2015).

"pernicious barrier to free access to the courts."[28] Accordingly, it is expected that third party litigation financing will continue to grow and thrive in the United States in the years to come.

The Netherlands

Litigation costs in the Netherlands are lower than in the United States and most other EU countries.[29] Moreover, while the Netherlands, like the rest of Europe, technically operates under a loser pays model, the losing party is not required to pay all of the winning party's attorneys' fees. Rather, in determining the amount of attorneys' fees to be awarded, the court utilizes fixed figures based upon certain factors, such as the amount in dispute and the number of court-related activities and filings that have occurred.[30] Moreover, court fees are capped.[31] In practice, therefore, the winning party usually recovers only a small percentage of its actual costs and attorneys' fees from the losing party.[32]

Under the Dutch Bar Association's Code of Conduct, Dutch lawyers are not permitted to charge on a contingency-fee basis.[33] However, WCAM settlement agreements can provide for the payment of fees to plaintiffs' lawyers. For example, the Shell settlement provided a payment of $47 million to plaintiffs' counsel,[34] and the Converium settlement provided a payment of 20% of the $58 million recovery to plaintiffs' counsel.[35] Moreover, attorneys in the Netherlands are permitted to charge "success fees." In other words, they can charge a lower hourly rate with an additional fee to be collected if the case succeeds.[36]

Litigation funding is permissible in the Netherlands and is frequently used in group and collective proceedings and settlements.[37] Such funding is virtually unregulated by the legislator, and Dutch courts generally leave the specifics of funding arrangements up to the contracting parties.[38] For example, in a 2011 decision, the Amsterdam Court of Appeals held that it was permissible for the parties to agree that if the litigant refused to accept a

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[28] *PG&E v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1136-37 (1990).

[29] *See* David L. McKnight & Paul J. Hinton, U.S. Chamber Institute for Legal Reform, International Comparisons of Litigation Costs: Canada, Europe, Japan, and the United States 2 (June 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf.

[30] *See* Pels Rijcken & Droogleever Fortuijn N.V., *Netherlands*, *in* International Comparative Legal Guides: Competition Litigation (2011), *available at* https://www.banning.nl/Banning-NL/assets/File/20110105_BIJLAGE_CL11_Netherlands%20(1).pdf; *see also* Shareholder Litigation Primer, *supra* note 52, at 37.

[31] Shareholder Litigation Primer, *supra* note 53, at 37.

[32] *See id.*; *see also* Maarten Drop, Jeroen Stal & Niek Peters, *Litigation Funding: The Netherlands*, Getting the Deal Through (2017), *available at* https://www.cleber.nl/wp-content/uploads/2017/02/Netherlands-TPF-2017.pdf.

[33] *See* Rijcken & Fortuijn, *supra* note 93.

[34] *See* Christine Caulfield, *Lawyers Are Big Winners in Shell Settlement*, Law360, Apr. 12, 2007, *available at* https://www.law360.com/articles/22573/lawyers-are-big-winners-in-shell-settlement.

[35] *See* Kortmann, *supra* note 72, at 2.

[36] *See* Rijcken & Fortuijn, *supra* note 93; Drop, Stal & Peters, *supra* note 95.

[37] *See* Drop, Stal & Peters, *supra* note 95.

[38] *See id.*

settlement that the funder deemed appropriate, the litigant would be required to reimburse all of the funder's costs in addition to the amount the funder would have received out of the settlement.[39]

Germany

Like the rest of Europe, Germany operates under a "loser pays" system.[40] However, the amount of attorneys' fees to be reimbursed by the losing party is set by the Act on Lawyers' Fees, and depends on the monetary value of the dispute.[41] The Act on Lawyers' Fees also caps the amount to be paid by the losing party at €30 million.[42]

Third party litigation funding is permissible in Germany.[43] Generally, the claimant and funder enter into a financing contract (typically a "silent partnership" under the German Civil Code), which forms the basis of their legal relationship.[44] Under the terms of the silent partnership agreement, the claimant assigns his claim to the funder by way of a security.[45] However, the claimant remains entitled to assert the claim in his own name before the court without being legally obliged to disclose the security assignment to the court.[46] In theory, third party funders are not allowed to have any control over the attorneys' actions or the litigation.[47] In practice, however, the claimant will generally waive the attorney-client privilege with respect to the funder, will agree to keep the funder apprised at all times, and will agree not to settle or otherwise dispose of his claim without the funder's prior approval.[48] This last provision of a financing contract enables the funder to exert control over the claimant, and indirectly, the claimant's lawyers.[49]

Until recently, contingency fee arrangements were flatly prohibited in Germany as contrary to lawyers' standards of professional conduct.[50] However, the prohibition was eased in 2008 after the German Federal Constitution Court ruled that a flat prohibition against contingency fees was unconstitutional because it unduly restricted attorneys' professional freedom.[51] Following this ruling, German law now provides for contingency fees in individual cases, but only if the client, because of his financial situation, would otherwise refrain from pursuing his claim. Despite this change, contingency fee arrangements remain quite rare in Germany. Rather, German lawyers generally charge flat fees, or contract in advance with their client for an hourly rate.

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[39] *See id*.
[40] Shareholder Litigation Primer, *supra* note 53, at 29.
[41] *Id.*; Beninca & Masling, *supra* note 123.
[42] Beninca & Masling, *supra* note 123.
[43] *See id.*; *see also* Shareholder Litigation Primer, *supra* note 53, at 29; Schneider, *supra* note 104.
[44] *See* Schneider, *supra* note 104.
[45] *See id.*
[46] *See id.*
[47] *See id.*
[48] *See id.*
[49] *See id.*
[50] *See id*.
[51] *See id.*

Class Actions and Access to Justice

The rationale in the aversion to what are known as "class actions" or "multi-party actions" is based on the fear that in a class action suit the Court will not be considering the individual members of the class which may result in the worst affected member not recovering enough damages and the least affected member recovering more damages than necessary. There is a fear of the loss of "party autonomy" and that the individual "member of the class" could lose the right to represent themselves or to choose who legally represents them.

While the "class action" is not something currently known in Ireland, it is a well-known mechanism in the United States and is commonly used e.g. in the environmental class action suit taken by residents of Hinkley, California in relation to contaminated water which was famously depicted in the Erin Brockovich movie.

Opt-In and Opt-Out

There are two main types of "class action": the opt-in and the opt-out.

The Opt-Out: This occurs where there is a notification to a collective group that the "claim" has been certified as suitable for a class action and anyone in that collective group can *opt-out* and choose to exclude their claim within a certain period. If you fail to opt-out during the period, your claim is deemed to be part of the collective group, and you are bound by the result achieved for the collective group.

The Opt-In: The opt-in system is different, it involves the individual actively choosing to participate, i.e. the individual chooses to be part of the class action suit.

The Irish Position

The Hon. Ms Justice Susan Denham, when launching the Law Reform Commission Report on Multi-Party Litigation in 2005, commented that:

> *"It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party action…. It is no easy task- the challenge is to find a just balance in multi-party litigation between procedural efficiency and fairness. The Law Reform Commission has met this challenge successfully. Implementation of this Report would bring us a step closer to succeeding in this task.*[52]*"*

In Ireland, a practice has arisen that where there are a number of individuals affected by an

[52] Court Service record of The Hon. Ms Justice Susan Denham, *Launch of the Report on Multi -Party Litigation by The Law Reform Commission* dated 27 September 2005 available at: http://courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/97b4a7362c75858f8025708f002f964e?OpenDocument

incident, each take their own individual case and that one generic case is used as a "test case" to establish if there is liability and thereafter the rest of the cases either settle or are heard on an assessment only basis.

The only other mechanism in Ireland which a group of litigants can invoke is the "Representative Action". Order 15, rule 9 of the Rules of the Superior Courts 1986, as amended provides that:

> *"Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested."*

The Law Reform Commission in their Report on Multi-Party Litigation notes that there have been a number of limitations placed on Order 15 Rule 9 and summarise them as follows:

> *"• Remedies available: these are limited to injunctive and declaratory relief; damages may not be sought in a representative action.*
> *• Same interest requirement: very strict requirements have been read into the nature of the link that must exist between the parties to a representative action.*
> *• Absence of civil legal aid: section 28(9)(a)(ix) of the Civil Legal Aid Act 1995 excludes from the remit of civil legal aid any application "made by or on behalf of a person who is a member, and acting on behalf of a person who is a member, and acting on behalf, of a group persons having the same interest in the proceedings concerned.[53]"*

The Law Reform Commission made the following recommendation:

> *"The Commission recommends that a formal procedural structure to be set out in Rules of Court be introduced to deal with instances of multiparty litigation.[54]"*

Comparative Experience of "The Class Action"

England & Wales

In England and Wales, it is possible to consolidate cases under the High Court's case management powers[55], by way of representative actions and also by way of group litigation orders. More recently, the Competition Appeal Tribunal has been granted power to make collective proceedings orders.

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[53] Law Reform Commission in their Report on Multi-Party Litigation (LRC 76-2005) http://www.lawreform.ie/_fileupload/reports/report%20multi-party%20litigation.pdf at para.1.19
[54] *Ibid* at para.1.46.
[55] Civil Procedure Rules (CPR) 3.1(2),

Representative Actions

Order 19.6 of the Civil Procedural Rules allows for the bringing of represented actions as follows:

> *"1) Where more than one person has the same interest in a claim –*
> *(a) the claim may be begun; or*
> *(b) the court may order that the claim be continued,*
> *by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*
> *(2) The court may direct that a person may not act as a representative.*
> *(3) Any party may apply to the court for an order under paragraph (2).*
> *(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –*
> *(a) is binding on all persons represented in the claim; but*
> *(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.*
> *(5) This rule does not apply to a claim to which rule 19.7 applies."*

The Group Litigation Order ("GLO")

A GLO is a procedure whereby a Court, if satisfied, can manage a number of individual claims which have common issues of law and fact (similar to our "test case"). In *Tew and others v BoS (Shared Appreciation Mortgages) No 1 plc and others*[56] the GLO was considered, and emphasis was placed on the need to ensure that the individual circumstances of the claimants are not shut out by the wording of the GLO:

> *"In those circumstances it seems to me to be quite wrong to allow the GLO issues to be phrased in such a way as involve a shutting out of individual circumstances from the scope of the litigation."* (para. 22)

Collective Proceedings Order (**"CPO"**)

The Competition Appeal Tribunal ("**CAT**") has the power to deal with collective actions on behalf of a group of consumers in competition law matters. The CAT will make a collective proceedings order, and in such order, it will be specified as to whether the collective action is "opt-in" or "opt-out". The Consumer Rights Act 2015, which came into force in October 2015, has permitted that claims brought under this Act can be class actions which are either opt-in or opt-out where certain criteria are satisfied. Such collective actions can arise either as a "follow-on" or as a standalone claim. Schedule 8 of the Consumer Rights Act 2015 amends section 48B of the Competition Act 1998 to allow for "collective actions".

Rule 79 of the CAT Rules provides for certification of the claims as eligible for inclusion in collective proceedings:

[56] [2010] EWHC 203 (Ch).

"79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
(a) are brought on behalf of an identifiable class of persons;
(b) raise common issues; and
(c) are suitable to be brought in collective proceedings."

Sub-rule 79(2) provides a number of matters which should be taken into consideration when determining if the claims are suitable for collective proceedings such as:

"(a)whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
(b) the costs and the benefits of continuing the collective proceedings;
(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
(d) the size and the nature of the class;
(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
(f) whether the claims are suitable for an aggregate award of damages; and
(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act(a) or otherwise."

In deciding whether to make the collection action opt-in or opt-out the CAT is to take the following matters into consideration per Rue 79(3):

"(a) the strength of the claims; and
(b) 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."

Collective Settlements are also provided for under the CAT rules aiming to regulate settlement in collective opt-out actions in the following terms:

"94.—(1) Where a collective proceedings order has been made, and the Tribunal has specified that the proceedings are opt-out collective proceedings, the claims which are the subject of the collective proceedings, may not be settled other than by a collective settlement approval order issued in accordance with this rule.
(2) Any offer to settle by a defendant in the collective proceedings shall be made to the class representative.
(3) An application for a collective settlement approval order shall be made to the Tribunal by—
(a) the class representative; and

(b) the defendant in the collective proceedings, or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.
(4) The application referred to in paragraph (3) shall—
(a) provide details of the claims to be settled by the proposed collective settlement;
(b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;
(c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;
(d) specify how any sums received under the collective settlement are to be paid and distributed;
(e) have annexed to it a draft collective settlement approval order; and
(f) set out the form and manner by which the class representative proposes to give notice of the application to—
(i) represented persons, in a case where it is expected that paragraph (11) will apply; or
(ii) class members, in a case where it is expected that paragraph (12) will apply."

Recently in *Merricks CBE v Mastercard*[57], an application was made to the CAT by the proposed class representative for an opt-out collective proceedings order in relation to a follow-on action for damages (the follow-on action was based on an EU Commission Decision that Mastercard had imposed unlawful fees on transactions). That application was dismissed by the CAT, but on appeal, the High Court set aside the order of the CAT; the matter is currently under appeal to the Supreme Court.

Netherlands

In the Netherlands, collective proceedings currently may be brought either in the form of "group actions" for damages or "collective actions" for declaratory relief, and collective settlements can be achieved through the Wet Collective Afwikkeling Massaschade ("**WCAM**") mechanism. Each of these are discussed in turn below.

Group Actions

Although the Dutch Civil Code does not specifically provide for group actions (*i.e.,* actions that bundle the claims of multiple individual victims into one lawsuit), various ways of bundling claims have developed through legal practice.[58] Typically, group actions are brought by representative entities, such as foundations or special purpose vehicles, which,

[57] [2017] CAT. 16; [2019] EWCA Civ 674 .
[58] *See* Jeroen Kortmann & Marieke Bredenoord-Spoek, *The Netherlands: A Hotspot for Class Actions?*, 2011 4 Global Comp. Litig. Rev. 1, 14 (2011).

under Dutch law, can be created easily and cheaply for purposes of filing litigation.[59] To ensure that the representative entity can obtain damages (rather than mere declaratory or injunctive relief) on behalf of the individual claimants involved,[60] the entity must either (1) obtain authorization to represent or act on behalf of those claimants through individual powers of attorney or mandates, or (2) purchase the claimants' claims by executing individual assignments.[61] As a result, group actions require individual claimants to "opt in" to the suit, rather than "opt out," as is the case in the United States. The assignment model of bundling claims is "widespread in claims for damages following an infringement of competition law in the Netherlands."[62]

Although in group actions, the individual victims' claims are generally brought in the name of the representative entity, that entity, if challenged by the court or the defendants, must be able to furnish proof of each individual authorization or assignment.[63] Thus, while the claimants' identities are generally protected from public disclosure, their identities may become known to the court and/or the defendants through the course of the litigation.[64]

One highly-publicized example of a Dutch group action for damages is the ongoing trucks cartel litigation, which Cartel Damage Claims ("CDC") filed in 2017, seeking to enforce competition law claims for damages resulting from the Europe-wide trucks cartel.[65] Prior to the suit's commencement, over 200 companies and individuals assigned their damages claims to CDC, a company specializing in corporate claims for damages resulting from the infringement of EU or national competition law.[66] CDC then filed the action in its own name

[59] *See id.* (citing Hoge Raad Dec. 21, 2001, RvdW 2002, 6 (Sobi-Hurks II); Hoge Raad Dec. 2, 1994, RvdW 1994, 263 (Coopag/ABN Amro); Hoge Raad Nov. 27, 2009, RvdW 2009, 1403 (World Online)).

[60] Group actions must be differentiated from "collective actions" under Article 3:305a of the Dutch Civil Code, which, as discussed further herein, cannot currently be used to obtain damages. *See* Kortmann & Bredenoord-Spoek, *supra* note 39, at 14.

[61] *See id.*; *see also* Albert Knigge & Jan-Willem de Jong, *Class/Collective Actions in The Netherlands: Overview*, Practical Law, Feb. 1, 2017, *available at* https://uk.practicallaw.thomsonreuters.com/6-618-0285?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; Louis Berger & Hans Bousie, *The Netherlands as Efficient Jurisdiction for Cartel Damages Claim Litigation*, International Litigation Newsletter (International Bar Association, Legal Practice Division), May 2017, at 40, *available at* https://www.bureaubrandeis.com/wp-content/uploads/2015/10/International-Litigation-May-2017-PDF.pdf.

[62] *See* JW Fanoy, MHJ van Maanen & T Raats, Private *Antitrust Litigation in The Netherlands: Overview*, Practical Law, Sep. 1, 2016, *available at* https://content.next.westlaw.com/Document/I34bd14ee7b3811e698dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.

[63] *See* Kortmann & Bredenoord-Spoek, *supra* note 39, at 14.

[64] For example, in the sodium chlorate cartel litigation, defendants argued that the damages claims were inadmissible because they had not been validly assigned to CDC. *See* Albert Knigge & Rick Cornelissen, *Dutch Court Rules that Cartel Damages Claims Under Several National Law Systems Have Expired*, Lexology, May 31, 2017, *available at* https://www.lexology.com/library/detail.aspx?g=340cd638-e775-4af1-bc04-5bb85899be73. In connection with this argument, CDC was required to submit to the court copies of all of the deeds of assignment and underlying titles related to the claims. The court ultimately determined that the assignments were valid. *See id.*

[65] *See* Trucks Cartel, Cartel Damages Claims, https://www.carteldamageclaims.com/competition-law-damage-claims/trucks-cartel/.

[66] *See id.*

to enforce the assigned claims.[67] The action is a follow-on to the July 2016 decision by the European Commission, in which the Commission fined several truck manufacturers, including MAN, Volvo/Renault, Daimler, Iveco, and DAF, 2.93 billion euro for their participation in a price-fixing cartel that covered the entire European Economic Area and lasted 14 years.[68]

Another example of group damages litigation in the Netherlands is the air cargo cartel litigation, in which victims of a Europe-wide air cargo cartel operating from 1999 through 2006 assigned their damages claims to a litigation vehicle – Stichting Cartel Compensation – which then asserted those claims against KLM, Air France, Lufthansa, and British Airways on the claimants' behalf.[69] Notably, in September 2017, the Amsterdam District Court explicitly upheld the validity of the assignments, and endorsed the assignment model for the bundling of claims – holding that the assignments were not contrary to public morals, and did not breach the determinability requirement or the prohibition on fiduciary transfer of ownership.[70]

Collective Actions

Article 3:305a of the Dutch Civil Code, introduced in 1994, provides claimants with the right to bring collective proceedings in connection with various types of claims,[71] including infringement of competition law and violations of securities laws. Collective proceedings must be filed by a claim vehicle (either a foundation ("stichting") or association ("vereniging"))[72] that is acting in its own name on behalf of other people's interests that are suitable to be bundled. Notably, the claimants themselves are not parties to the suit, and unlike in the group actions discussed above, in a collective proceeding, there is no need for

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[67] *See id.*

[68] *See id.*

[69] *See* Maverick Advocaten NV, *Cartel Damage Claims: Court Acknowledges Assignment Model for Litigation Funders*, Lexology, Oct. 19, 2017, *available at* https://www.lexology.com/library/detail.aspx?g=d8e86e65-9250-412e-a4ae-d8189bd93130; Hans Bousie et al., *Cartel Damages*, Quarterly Report II 2017 (Bureau Brandeis), Sept. 2017, at 2, *available at* https://www.bureaubrandeis.com/wp-content/uploads/2017/09/bureau-Brandeis-%E2%80%93-Cartel-Damages-Quarterly-Report-II-2017.pdf.

[70] *See* Maverick Advocaten NV, *supra* note 50. The assignment model was also endorsed by the Amsterdam District Court in connection with the sodium chlorate cartel litigation in May 2017. In that case, twelve groups of purchasers assigned and transferred their damages claims to CDC, which then asserted those claims on the claimants' behalf. *See* Knigge & Cornelissen, *supra* note 45. The court rejected the defendants' argument that the claims had not been validly assigned, holding that the assignments did not breach public policy, good morals, or the prohibition on fiduciary transfers, even though part of the purchase price was calculated on the basis of the results of the proceedings. *See id.*

[71] Kortmann & Bredenoord-Spoek, *supra* note 39, at 14.

[72] *See* Kessler Topaz Meltzer Check LLP, A Primer on Shareholder Litigation: Securities Class Actions, Non-US Jurisdiction Actions, Shareholder Derivative Actions, Mergers & Acquisitions Litigation, Appraisal Actions, and Direct Actions (Opting-Out) 38 (Feb. 2017) (hereinafter, "Shareholder Litigation Primer"), *available at* https://www.ktmc.com/files/9180_Final_Primer_2-24-17_PDF_Web_Version.pdf. A foundation or stichting is a legal entity that has no existing or set members and that may be set up solely for the purpose of pursuing collective actions or settlements. *See id.* An association or vereniging, on the other hand, has members and aims to achieve a specific purpose. *See id.* To bring a claim, both foundations and associations must be not-for-profit entities and they must be legally independent and not owned by any one person. *See id.* at 39

a formal assignment of claims. Rather, the foundation or association is permitted to act as a representative of the claimants' interests.

Unlike in the United Kingdom and the United States, Dutch law does not currently provide a mechanism for having a class certified.[73] Rather, the entity bringing the claim must simply demonstrate that it is "representative."[74] Moreover the entity need not have its own direct financial interest in the claim – its interests in pursuing the claim can be merely to further objectives in its governing documents (*e.g.,* seeking to defend the rights of its members, etc.).

Importantly, as discussed above, monetary damages are not available under Article 3:305a.[75] Rather, such proceedings aim to obtain a declaration regarding the liability of the defendant.[76] Once a declaration is achieved, the persons whose interests have been represented in the proceeding can opt out by declaring that they do not want to be bound by the judgment.[77] If they choose not to opt out, they can then commence separate proceedings to obtain monetary damages,[78] or can attempt to achieve a global settlement through the WCAM mechanism,[79] discussed further below.

However, on November 16, 2016, a draft bill was submitted to the Dutch Parliament, which would introduce collective proceedings for monetary damages in the Netherlands.[80] That bill, which was subsequently amended in January 2018.[81] The legislation was adopted by the Dutch Senate on 19 March 2019. Among other things, it introduces stricter requirements with respect to the legal entity claiming damages, including new requirements with respect to its governance, funding, and representativeness.[82] It also introduces certain jurisdictional requirements.[83] Members of the class for whose benefit the action is brought will have the ability to opt out at the beginning of the proceedings.[84] They will also have a second opportunity to opt out in the event of a collective settlement.[85] However, similar to the United Kingdom, the opt out mechanism is limited to class members domiciled in the Netherlands, and class members domiciled elsewhere will only be permitted to join the

[73] Houthoff Buruma, Class Actions in the Netherlands 4 (Mar. 2017) (one file with author).
[74] *Id.*
[75] *Id.*; *see* Shareholder Litigation Primer, *supra* note 53, at 39.
[76] Houthoff Buruma, *supra* note 54, at 5; *see* Shareholder Litigation Primer, *supra* note 53, at 39.
[77] Houthoff Buruma, *supra* note 54, at 5.
[78] *See id.*; Shareholder Litigation Primer, *supra* note 53, at 39.
[79] Shareholder Litigation Primer, *supra* note 53, at 39.
[80] *See* Houthoff Buruma, *supra* note 54, at 4; Shareholder Litigation Primer, *supra* note 53, at 40.
[81] Jeroen Kortmann, *Overview of Legislative Proposal on Collective Action (NL) – As Amended by the Amendment Bill of 11 January 2018*, Stibbe, Jan. 23, 2018, https://www.my.stibbe.com/mystibbe/news-insights/overview-of-legislative-proposal-on-collective-action-nl-as-amended-by-the-amendment-bill-of-11-january-2018/
[82] Houthoff Buruma, *supra* note 54, at 6.
[83] Shareholder Litigation Primer, *supra* note 53, at 40.
[84] *See id.*
[85] Kortmann, *supra* note 62.

action by opting in.[86] A limited exception exists for foreign class members that are readily identifiable, in which case the court may order that the opt out class extend to those class members as well.[87] If more than one legal entity brings a collective action for the same events, the legislation requires the district court to appoint an exclusive representative for all parties.[88] All other representative legal entities, however, remain parties to the proceeding.[89]

Collective Settlements

In addition to group actions and the current (and proposed) collective litigation mechanisms discussed above, Dutch law also provides a mechanism for class settlements. The WCAM, introduced in 2005, permits parties to a settlement agreement to request that the Amsterdam Court of Appeals declare the settlement binding upon a class or classes of persons.[90] Similar to the U.S. model, upon which it was inspired, it provides for a court-approved class settlement on an opt-out basis.[91] To date, the WCAM has been successfully applied in eight cases: (1) DES (2006), (2) Dexia (2007), (3) Vie d'Or (2009), (4) Vedior (2009), (5) Shell (2009), (6) Converium (2012), (7) DES (2014), and (8) DSB Bank (2014).[92]

The WCAM has four phases: (1) conclusion of a settlement agreement; (2) proceedings before the Amsterdam Court of Appeals; (3) the opt-out period for beneficiaries; and (4) the payment to beneficiaries.[93]

With respect to the first phase, a settlement agreement must be reached between (1) the parties that will pay compensation for the event that caused damage, and (2) a Dutch foundation that, pursuant to its constituent documents, represents the interests of the class of persons intended to be covered by the agreement.[94] Unlike class representatives in the United States, the Dutch entity is not appointed by the court and it need not be personally harmed by the alleged misconduct in order to have standing. However, the entity must be able to demonstrate that it represents the class sufficiently. Notably, the settlement need not be based on an existing, contested, or pending litigation. Rather, it could start with a private and undisclosed negotiation process among the representatives of the interested parties. If it is based on a pending litigation, that litigation need not be pending in the Netherlands. Moreover, the settlement agreement may be governed by Dutch or foreign law, at the parties' option, subject to certain exceptions and limitations set forth in the

[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See* Jeroen Kortmann, "Rest of the World" Class Settlements; The Dutch Solution 1 (2017) (unpublished) (on file with the American Bar Association).
[91] *Id.*
[92] *See* Jan de Bie Leuveling Tjeenk & Bart van Heeswijk, *Netherlands*, *in* The Class Actions Law Review – Edition 2 (May 2018), *available at* https://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-2/1169575/netherlands. A WCAM settlement in a ninth case (Ageas/Fortis) is currently awaiting approval.
[93] Houthoff Buruma, *supra* note 54, at 13.
[94] *Id.* at 14.

Rome I Regulation.[95]

Once the defendant and the Dutch entity agree to a settlement, they enter phase two, during which they file a formal request with the Amsterdam Court of Appeals to declare the settlement binding.[96] The Court will call a formal hearing, during which the beneficiaries and other interested parties are permitted to object to the settlement.[97] Such hearings are sometimes preceded by written submissions.[98] The parties initiating the proceeding must also notify all intended beneficiaries of the settlement. All known, interested parties must be notified in accordance with applicable treaties, regulations, Dutch rules of civil procedure and/or instructions from the Amsterdam Court.[99] Advertisements in newspapers are also required.[100] The Amsterdam Court of Appeals will declare the settlement binding upon the parties thereto and the members of the class, except in certain circumstances, including, for example, if it believes the amount of compensation is unreasonable in light of the overall damages.[101] The Court's decision cannot be appealed by class members. Rather, it may only be appealed by the initial parties to the settlement agreement, and only on matters of law, in the event that the settlement is not approved.[102]

Once the settlement is declared binding, the proceedings enter phase three, during which time (1) the settlement's final terms are published, (2) class members file claim forms, and (3) class members are given the opportunity to opt-out.[103] Class members must be given at least one year to file claim forms, and at least three months to opt-out.[104] Settlement agreements under the WCAM generally include a "blow" or "bust up" provision, pursuant to which the defendants have the right to terminate the settlement agreement if more than a certain percentage of class members opt out in a timely manner.[105] This is similar to many class action settlements in the United States.

Upon expiration of the opt-out period, all class members who did not opt-out are, in principle, bound by the settlement, unless they could not have been aware of their damage.[106] Payments are then made to all class members who have submitted a claim form.[107]

Unless it is manifestly contrary to public policy, judgments of the Amsterdam Court of

[95] *Id.*
[96] *Id.* at 15.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Kortmann & Bredenoord-Spoek, *supra* note 39, at 15.
[101] Houthoff Buruma, *supra* note 54, at 15.
[102] *Id.*
[103] *Id.* at 16.
[104] Kortmann, *supra* note 72.
[105] Houthoff Buruma, *supra* note 54, at 16.
[106] *Id.* at 17; *see also* Kortmann & Bredenoord-Spoek, *supra* note 39, at 15.
[107] Houthoff Buruma, *supra* note 54, at 17.

Appeals that declare settlements binding under the WCAM must be recognized by all EU member states in accordance with the Brussels I Regulation.[108] Whether WCAM decisions will be recognized by courts outside of Europe remains to be seen and will largely depend upon local law.[109]

Germany

Collective Securities Litigation

Germany does not have "class action" litigation like the United States because, under the German constitution, there is a fundamental right to be heard in court.[110] However, in the wake of Deutsche Telekom cases,[111] the German legislature adopted the Capital Market Model Proceedings Act (KapMuG), which gives the court a system for efficiently dealing with securities litigation involving multiple claimants.[112] This system, however, is an opt-in system, meaning that claimants must still file their own complaints (or a joint complaint with numerous plaintiffs).[113] Nevertheless, the KapMug provides a mechanism for the court to decide common legal and factual issues on the basis of a model case, the outcome of which is binding on all parties.[114]

Specifically, the KapMuG provides that any investor claiming damages due to violations of the German Securities Trading Act (Wertpapierhandelsgesetz or WpHG) may file a complaint and submit an application to institute a model case proceeding.[115] If, within four months, at least ten complaints are filed concerning the same subject matter, then the court may initiate the KapMuG model case proceeding.[116] In doing so, the court stays all pending cases on the subject matter (even those that are filed after the model case proceeding commences),[117] and it refers the matter to the higher regional court (the Oberlandesgericht or OLG).[118] The OLG then determines the issues to be decided and selects a model plaintiff from among the cases.[119]

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[108] *See* Tjeenk & Heeswijk, *supra* note 74.
[109] *See* Jan de Bie Leuveling Tjeenk & Dennis Horeman, *Class and Group Actions 2018 – International Class Action Settlements in the Netherlands Since Converium*, International Comparative Legal Guides, Oct. 23, 2017, *available at* https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/international-class-action-settlements-in-the-netherlands-since-converium#chaptercontent7.
[110] Shareholder Litigation Primer, *supra* note 53, at 30.
[111] *See id.* at 28. Specifically, the KapMug was enacted after the German court had significant difficulty administering over 13,000 individual securities actions filed against Deutsche Telekom involving substantially similar claims. *See* Burkhard Schneider, *Class and Group Actions 2018: Germany*, International Comparative Legal Guides, Oct. 23, 2017, *available at* https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/germany.
[112] *See* Ellen Braun, Allen & Overy, Collective Action: Alternative Strategies in Germany 9 (2017) (unpublished) (on file with the American Bar Association).
[113] *See* Shareholder Litigation Primer, *supra* note 53, at 30.
[114] *Id.*
[115] *Id.*
[116] *Id.*; *see* Braun, *supra* note 105, at 9.
[117] *See* Braun, *supra* note 105, at 9.
[118] Shareholder Litigation Primer, *supra* note 53, at 30.
[119] *Id.* at 30-31.

The model plaintiff is responsible for overseeing and directing the litigation of the common issues – much like the lead plaintiff does in a U.S. class action.[120] However, instead of representing absent class members, the model plaintiff only represents those claimants who have filed complaints.[121] Additional complaints may be filed and/or claims may be registered at any point after the KapMuG is initiated and up until a decision is rendered (bearing in mind, of course, the statute of limitations).[122] If a claimant chooses to register their claim, rather than file a complaint, the registration tolls any applicable limitation period.[123] However, the claimant must convert his registration to an active complaint before the KapMuG concludes if it wishes to be bound by the outcome.[124] The advantage of registering a claim rather than filing a complaint is that the former carries with it lower court costs and no risk of having to pay the defendants' attorneys' fees, at least up until the point that the claimant converts his registration into an active complaint.[125]

Once a model case reaches judgment, all individual cases resume in order to litigate individual factual and legal issues, such as the amount of each claimant's damages.[126] If the model claimant instead reaches a settlement with the defendants, it can apply to have the settlement approved by the court.[127] At that time, each stayed plaintiff is given an opportunity to opt out of the settlement.[128] If fewer than 30% of all pending but stayed claimants opt out, then the settlement is binding on all remaining claimants.[129]

Other Collective Action Mechanisms

Germany has also passed laws providing for collective actions in a handful of other specific circumstances. For example, the Act on Cease and Desist Actions (UKlaG) provides for collective actions in cases involving violations of certain consumer protection laws.[130] Under the UKlaG, however, collective actions can only be brought by specific associations or institutions and they are limited to injunctive relief.[131] The Unfair Competition Act (UWG) provides for a similar collective action for injunctive relief to be brought in cases involving a violation of the prohibition against unfair competition, and the Act Against Restraint of Competition provides for a collective action to request that ill-gained profits resulting from

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[120] *Id.* at 31.
[121] *See id.*
[122] *See id.*
[123] *See id.*
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] *See id.*
[128] *See id.*
[129] *See id.*
[130] *See* Jurgen Beninca & Michael Masling, *Class/Collective Actions in Germany: Overview*, Practical Law, Dec. 1, 2016, *available at* https://content.next.westlaw.com/Document/Ia8e684fb454411e598dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.
[131] *See id.*

violations of European or German antitrust laws be handed over to the federal budget.[132] Finally, the recently amended Environmental Damage Act (USchadG) and the Environmental Judicial Review Act (UmwRG) provide for representative actions in which certain authorized environmental associations may seek judicial review of violations of laws aimed at environmental protection.[133] Notably, none of these statutes permit collective actions for damages, nor do they provide individuals (rather than specific consumer, trade, and/or environmental organizations) with standing to bring suit.[134] However, alternative strategies have recently begun to develop.

For example, in the cement cartel case filed by CDC, the German Federal High Court held that it was permissible for multiple claimants to bundle their individual damages claims into one legal dispute by assigning those claims to a third party litigation vehicle under section 398 of the German Civil Code.[135] So long as the vehicle in question has sufficient funds to cover the potential cost exposure, and the assignment is executed in accordance with German law, this form of collective redress is now considered acceptable by the German Courts.[136]

Alternatively, multiple plaintiffs can bring a joint claim under the German Code of Civil Procedure provided that (1) the parties have a claim arising from the same factual and legal grounds, (2) their claims are substantially similar, and (3) the trial court is competent for all claims.[137]

New Zealand

While there are no specific rules permitting class actions in New Zealand, they do occur by use of the Court rules which provide for representative actions. Representative actions are provided for under Rule 4.24 which provides that: -

> *"4.24Persons having same interest*
>
> *One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—*
> ***(a)** with the consent of the other persons who have the same interest; or*
> ***(b)** as directed by the court on an application made by a party or intending party to the proceeding*."

As set out by the Court of Appeal of New Zealand in *Saunders v Houghton*[138], it is evident that a low threshold is applied to Rule 4.24:

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[132] *See id.*
[133] *See* Schneider, *supra* note 104.
[134] *See id.*
[135] *See* Braun, *supra* note 105, at 11-13.
[136] *See id.* at 13.
[137] *See id.* at 9.

[138] [2010] 3 NZLR 331

"The rule permits the making of representation orders. They are a form of what elsewhere are called class action orders. Rule 4.24 substantially reproduces a 19th century English rule which is retained also in other common law states, including Canada and Australia. There are different lines of authority, some such as Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] AC 426 (HL) adopting a generous approach to representation applications and others that do not.

***[11]** Rule 4.24 speaks of "persons with the same interest". That phrase, or its equivalent in other jurisdictions, has been read more and less widely. The Chief Justice of Canada in Western Canadian Shopping Centres Inc v Dutton [2001] 2 SCR 534 recounted at [24]-[26] the flexible and generous approach to class actions which preceded and immediately followed the Supreme Court of Judicature Act 1873 and the adoption of the r 4.24 equivalent. This was followed by a subsequent more restrictive approach. Finally, the effects of mass production and consumption revived the problem of many suitors with the same grievance and resulted in the need for recourse to the class action.*

***[12]** Nowadays, as is seen in RJ Flowers Ltd v Burns [1987] 1 NZLR 260 (HC) at 271 per McGechan J, the Taff Dale approach to an application for a representation order, with its relatively low threshold, is preferred as being consistent with r 1.2 of the High Court Rules:*

> *The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.*

Applied to claims by a group of plaintiffs such an order allows proceedings to be conducted in an efficient manner and avoiding their multiplication by the need (in this case) for at least 800 separate filings. If it is an "opt-in" form, as Mr Galbraith QC conceded, it thereby protects members of the represented group against a limitation bar arising after the date of their election to opt in to the proceeding. In New Zealand the jurisdiction in the opt-in form has been employed whenever the justice of the case requires. The validity of an "opt-out" order in the absence of legislation was not argued and we offer no comment upon that or whether it can stop time running or create res judicata for those who have opted out."

Australia

The first type of multi-party litigation regime was introduced in Australia by the Federal Court of Australia Act, 1976, which provided for representative actions under part IVA as follows: -

> ***"33C Commencement of proceeding***
>
> *(1) Subject to this Part, where:*
>
> *(a) 7 or more persons have claims against the same person; and*
>
> *(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and*

(c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

(i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding:

(i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or

(ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members."

The above model has also been adopted by the Supreme Court of Victoria and New South Wales by means of part 4A of the Supreme Court Act 1986 (Vic) and section 157 of the Civil Procedure Act 2005 (NSW) which mirror section 33C above. More recently, a similar provision was introduced to the Queensland Supreme Court by the Queensland Supreme Court, the Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016.

The United States[139]

Rule 23 of the Federal Rules of Procedure, which governs class actions brought in United States federal courts,[140] was originally promulgated in 1938, and largely re-written in 1966,

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[140] Many states have enacted class action procedures based on Rule 23 of the Federal Rules of Civil Procedure. However, in 2005, the U.S. Congress passed the Class Action Fairness Act ("CAFA"), which expanded federal jurisdiction over many class actions involving state law claims that would otherwise have been filed in state court. *See* 28 U.S.C. §§ 1332(d), 1453, 1711-15. In the wake of CAFA, there has been a notable increase in the number of class actions being filed in or removed from state court to federal court. Moreover, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") requires securities fraud class actions to be based on federal rather than state law. *See* 15 U.S.C. §§ 77p, 78bb. Accordingly, such actions are usually filed in or removed from state court to federal court.

by the Advisory Committee on Civil Rules.[141] In its present form, Rule 23 allows an individual or group of plaintiffs to bring a lawsuit on behalf of a class of similarly situated persons and entities, so long as certain requirements are met.[142]

First, Rule 23(a) sets out four prerequisites to all types of class actions:

- Numerosity – the class must be "so numerous that joinder of all members is impracticable";
- Commonality – there must be "questions of law or fact common to the class";
- Typicality – the class representatives' claims and defences must be "typical of the claims or defences of the class"; and
- Adequacy – the class representatives and their counsel must "fairly and adequately protect the interests of the class."[143]

Generally, the numerosity requirement will be satisfied when a class is comprised of 40 or more members, but not when a class is comprised of 21 or fewer members.[144] With respect to commonality, not every issue in the case must be common to all class members. Indeed, in certain circumstances, even a single common question will suffice.[145] However, there must be sufficient commonality such that relief will turn on a question of law applicable in the same manner to each class member. Similarly, for purposes of typicality, the claims of the entire class need not be identical, but the class representatives must generally possess the same interests and suffer the same injury as the absent class members.[146] Finally, the adequacy requirement is generally satisfied so long as the attorneys representing the class are qualified and competent, and the class representatives' interests are aligned with those of absent class members.[147]

In addition to Rule 23(a)'s requirements, class actions must also meet the requirements of one of the three categories of class actions set forth in Rule 23(b)(1), (b)(2), and (b)(3). The majority of class actions seeking monetary damages fall under Rule 23(b)(3), which requires that: (i) questions that are common to the class also "predominate" over any questions affecting only individual class members; and (ii) class treatment be "superior to other available methods for the fair and efficient adjudication of the controversy."[148]

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[141] Under the 1938 version of Rule 23, class members were often required to "opt in" to the litigation in order to be bound by a settlement or judgment rendered therein. In 1966, however, the Rule was amended to allow for certification of classes where participation is presumed unless a class member "opts out."

[142] Rule 23 allows for defendant classes as well. In reality, however, defendant classes are rare.

[143] Fed. R. Civ. P. 23(a).

[144] *See Sandoval v. M1 Auto Collisions Centers*, 309 F.R.D. 549, 562 (N.D. Cal. 2015) (citing cases).

[145] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

[146] *See* Beverly Reid O'Connell & Karen L. Stevenson, *Actions with Special Procedural Requirements – Class Actions*, *in* Rutter Practice Guide: Federal Civil Procedure Before Trial (National ed., Apr. 2018).

[147] *See id.*

[148] Fed. R. Civ. P. 23(b)(3). Rule 23(b)(1) class actions involve the situation in which necessary parties under Federal Rule of Civil Procedure 19(a) are too numerous to be joined, and Rule 23(b)(2) class actions are those

Rule 23(c) directs courts to determine "[a]t an early practicable time" after a case is filed, whether Rule 23(a) and (b)'s requirements have been met and therefore, whether the case may be certified as a class action.[149] In practice, however, motions for class certification are generally only filed and decided after the action has survived a motion to dismiss. If, on a motion for class certification, the court determines that Rule 23's requirements have been met, it will certify the action as a class action. However, if it determines that one or more of Rule 23's requirements have not been met, it will deny the request for class certification. Because individual claims are often too small to justify the costs of litigation, denial of class certification often sounds the "death knell" for the litigation.[150] Nevertheless, denial of class certification is not considered a final order and therefore, plaintiffs are not entitled to an immediate appeal as of right. However, Rule 23(f) provides appellate courts with discretion to permit the immediate appeal of an order denying class certification if an application for appeal is made within 14 days of the order.[151]

Assuming the court certifies the case as a class action, the litigation generally proceeds to discovery, during which time the parties exchange documents, and the parties, third-party witnesses, and experts are deposed. Thereafter, substantive motions (called motions for summary judgment) are generally filed and if necessary, the case proceeds to trial. More often, however, the parties will reach a settlement agreement prior to a final decision on the merits.[152]

In representing the class, the class representatives (also called "lead plaintiffs")[153] and their counsel (called "lead counsel" or "class counsel") have important obligations to absent class members. Moreover, Rule 23 provides structural protections to absent class members to ensure that their rights are protected. One such protection is Rule 23(b)(3)'s "notice" requirement, which mandates notice to absent class members: (i) of the pendency of a class action; (ii) of their right to opt out and pursue their claims individually, should they so desire; and (iii) that if they do not opt out, any subsequent judgment in the class action will

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involving claims for common injunctive relief, particularly those involving civil rights violations. *See* Fed. R. Civ. P. 23(b)(1) & (b)(2).

[149] Fed. R. Civ. P. 23(c).

[150] *See, e.g., In re Modafinil Antitrust Litig*., 837 F.3d 238, 249 (3d Cir. 2016) (noting that "class certification is often the defining moment in class actions [] for it may sound the 'death knell' on the part of plaintiffs").

[151] *See* Fed. R. Civ. P. 23(f).

[152] *See* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1658 (2008) ("The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial.").

[153] In securities class actions, the Private Securities Litigation Reform Act of 1995 (the "PSLRA") provides for a rebuttable presumption that the most adequate plaintiff to serve as lead plaintiff is the investor who has suffered the largest financial loss. *See* 15 U.S.C. §§ 77z-1, 78u-4, 78u-5 *et seq*. Thus, after the first class action complaint is filed in any given securities case, the PSLRA requires a notice to be published advising investors of their right to apply for appointment as lead plaintiff. Oftentimes, a number of large investors will make competing submissions for appointment as lead plaintiff. Based on these submissions, the court generally selects the investor with the largest loss to serve as lead plaintiff.

be binding upon them.[154] The U.S. Supreme Court has ruled that in Rule 23(b)(3) class actions, such notice to absent class members is constitutionally required because adjudicating absent class members' claims without notifying them of the case's existence or their right to opt out would violate due process.[155] Accordingly, after a Rule 23(b)(3) class is certified, all class members that can be "identified through reasonable effort"[156] are notified of the above information directly (generally by mail), and for those that cannot be specifically identified, notice is provided in newspapers, on television, and/or via the internet.

Another structural protection afforded by Rule 23 is court approval of settlement. When parties to a class action decide to settle the case, they must present the terms of the settlement to the court. If the court preliminarily approves the settlement, class counsel must notify the class of the proposed settlement, inform class members of their right to object to the settlement, and in Rule 23(b)(3) class actions, again inform class members of their right to opt out.[157] After such notice is disseminated, the court holds a final fairness hearing at which point it either officially approves of or rejects the settlement. If the settlement is approved, payment is then made to all class members who filed a claim form and chose not to opt out.

The class action device is used for litigating many types of claims in the United States, including cases involving securities fraud, mass torts, and violations of antitrust, consumer rights, and civil rights laws. One reason for pursuing such claims as a class, rather than individually, is economic. Because of the costs associated with complex litigation, each individual claim is often too small to litigate on its own (*i.e.,* the amount of damages incurred by any individual plaintiff is often too small to justify the expenses necessary to successful litigate the lawsuit). However, in the aggregate, these small individual harms may generate large profits for the wrongdoer and thus, are not insignificant from a societal perspective. By bundling claims into a single action, class actions provide a workable mechanism for litigating such claims.

Similarly, class actions empower the economically powerless by allowing individuals with small claims and limited financial resources to seek redress when they would otherwise be unable to do so. They also serve the function of deterrence by holding large corporations accountable for the full costs of their misconduct. Finally, class actions provide a more

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[154] *See* Fed. R. Civ. P. 23(c)(2)(B). Notably, in Rule 23(b)(1) and (b)(2) class actions, notice of the suit's pendency to absent class members following class certification is not required but is instead within the court's discretion. *See* Fed. R. Civ. P. 23(c)(2)(A). Moreover, Rule 23(b)(1) and (b)(2) class actions are "mandatory" class actions, meaning that class members are not permitted to opt out. *See id.*

[155] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)) ("In the context of a class action predominately for money damages . . . absence of notice and opt-out violates due process.").

[156] Fed. R. Civ. P. 23(c)(2)(B).

[157] *See* Fed. R. Civ. P. 23(e). Notably, unlike Rule 23(c) notice of pendency, Rule 23(e) notice of settlement and the right to object must be given in all class actions, not just in Rule 23(b)(3) class actions.

efficient way to conduct litigation by eliminating the need to re-litigate common issues in a large number of individual cases, thus easing the burden on the judiciary. In this way, class actions also ease the burden on defendants by protecting them from having to defend themselves against multiple lawsuits involving the same or substantially similar issues.

European Commission Recommendation 2013/396/EU

In June 2013 the European Commission adopted a Communication entitled "*Towards a European Horizontal Framework for Collective Redress*" and published Recommendation 2013/396/EU[158] which set out a list of non-binding principles relating to both injunctive and compensatory collective redress mechanisms that the Commission indicated should be common across the EU.

First, the Recommendation advocated a horizontal approach to collective redress, meaning that all Member States should have a collective redress mechanism in place that is available in all types of cases involving a violation of EU law.

Second, the Recommendation endorsed an opt-in, rather than an opt-out, approach to collective redress.

Third, the Recommendation adopted a narrow approach to legal standing, suggesting that (a) the claimant should have a non-profit making character with sufficient financial resources to act in the best interests of multiple claimants, and (b) there should be a direct relationship between the main objective of the entity and the rights granted under EU law that are claimed to have been violated.

Fourth, the Recommendation recommended procedural safeguards to discourage frivolous claims, in particular through the loser pays principle and the rejection of contingency fees.

Although the Recommendation is non-binding, the European Commission advised member states to implement the Recommendation's provisions by 26 July 2015 at the latest. The Commission also instructed Member States to collect annual statistics regarding collective redress procedures in their jurisdictions and to submit them to the Commission. The Commission committed to review the implementation of the Recommendation across the EU by 26 July 2017, and to consider any further measures necessary to strengthen its horizontal approach to collective redress.

[158] *See* European 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), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013H0396.

In January 2018 the Commission published a report summarising EU Member States' progress on implementing the Recommendation's principles.[159] According to the report: (i) nineteen Member States currently have some form of compensatory collective redress in place (although many are not "horizontal" as the Recommendation suggested, but are limited to specific types of claims), (ii) seven Member States enacted reforms to their laws on collective redress following the Recommendation's enactment, and (iii) nine Member States still have no compensatory collective redress mechanisms in place at all. The report reiterated that the Commission enacted the Recommendation in order to provide EU Member States with a "*concrete incentive to adopt legislation complying with [the Recommendation's] principles [on collective redress*]." Yet, the report concluded that there has been "*limited follow-up to the Recommendation*" by many of the Member States. Accordingly, the Commission stated its intention to further promote the Recommendation's principles in order to increase the availability of collective redress actions and improve access to justice in the Member States.

A New Deal for Consumers

In order to address the limitations highlighted in its January 2018 report, the European Commission presented a proposal for "*A New Deal for Consumers"*, which the Commission stated was to ensure that all consumers within the EU fully benefit from their rights under EU law. The proposal remains to come before the European Parliament and the Council.

The European Commission has stated that the proposal will provide a number of benefits to the consumer, such as:

i. *Strengthening consumers rights online;*
ii. *Giving the consumers the tools to enforce their rights and get compensation;*
iii. *Introducing effective penalties for violations of EU consumer law;*
iv. *Tackling dual quality of consumer products; and*
v. *Improved conditions for businesses.*

As part of the "*New Deal for Consumers*", the European Commission has proposed two directives to be reviewed by the European Parliament and the Council, namely:

1. a proposal to amend the unfair terms in consumer contracts directive[160], the directive on consumer protection in the indication of the prices of products offered

[159] *See* Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee 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) (Jan. 25, 2018), *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018DC0040.

[160] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

to consumers[161], the directive concerning unfair business-to-consumer commercial practices[162] and the directive on consumer rights[163]; and

2. a proposal on representative actions for the protection of the collective interests of consumers (and repealing the directive on injunctions for the protection of consumers' interests[164]).

For the purposes of this report, we have focused on the proposed latter directive relating to representative actions for the protection of the collective interests of consumers (the "**Directive**").

Proposal on Representative Actions for the Protection of the Collective Interests of Consumers

The purpose of the Directive is to further enhance consumer protection within the EU and to "*improve tools for stopping illegal practices and facilitating redress for consumers where many of them are victims of the same infringement of their rights, in a mass harm situation*".

The scope of the Directive covers all infringements by traders of European Union law listed in Annex I to the Directive that harms, or may harm, the collective interests of consumers in a variety of sectors such as financial services, energy, transport, telecommunications, health and the environment.

Under the Directive qualified entities may bring representative actions, however they must meet certain criteria before so doing. In particular, they must have a non-profit character and a legitimate interest in ensuring the provisions of relevant European Union law are complied with. This is to ensure that the legal system is not manipulated in a way whereby

[161] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *available at* https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31998L0006.

[162] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive', *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029.

[163] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0083.

[164] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0022.

the entity bringing the action is looking after its own interests rather than the interests of the consumer.

The type of order that may be sought under the Directive has been expanded and now includes:

i. an injunction order as an interim measure;
ii. an injunction order establishing an infringement; and
iii. measures aimed at the elimination of the continuing effects of the infringements, including redress orders.

Qualified entities will be allowed to seek the above measures with a single representative action.

Possibly the most important aspect of the proposal comes under Article 7, which requires that qualified entities should be fully transparent about the source of funding of their activities in general and specifically regarding the funds supporting a specific representative action for redress. This is in order to enable courts or administrative authorities assess whether there may be a conflict of interest between the third party funder and the qualified entity and to avoid the risk of abusive litigation, as well as to assess whether the funding third party has sufficient resources in order to meet its financial commitments to the qualified entity should the action fail. One of the current biggest obstacles in the Irish courts to implementing collective redress is the lack of transparency, particularly around funding, which is why this Article 7 would be vital in tackling one of the main concerns of the Irish courts.

The Directive also provides a number of procedural provisions, such as:

- a qualified entity and a trader who have reached a settlement regarding redress for consumers affected by an illegal practice of that trader can jointly request a court to approve it (Article 8); and
- a submission of a representative action shall suspend any limitation periods applicable to any redress actions for the consumers concerned (Article 11);

As a further safeguard for the consumer, qualified entities are not prevented from bringing representative actions because of the prohibitive costs involved with the procedures. This is essential to ensuring that consumers are fully protected and the benefits of the Directive are available to all consumers, which is currently one of the primary issues facing Irish consumers (Article 15).

Timeline

There is no current timeline for the review of the proposal of the European Commission. However, should the proposal be approved, it would provide a significant step forward for the protection of Irish consumers once it has been adopted into Irish law.

Conclusion

This report will not make specific recommendations regarding models of facilitating representative actions and litigation funding. However, EUBA and ISEL are agreed and strongly recommend that proper provision is made in this jurisdiction for representative actions and litigation funding. Both are essential mechanisms of access to justice, have been recognised as such across multiple jurisdictions as this report demonstrates, and are necessary to enable this jurisdiction to have a realistic prospect of attracting international and cross-border litigation and arbitration.