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Semi Final C:

EU and European Civil Procedure

Justice at your Service

– Collective Redress Between Access to Justice and Abusive Litigation –

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1 Introduction

In November 2020, the European Union passed a Directive on Representative Actions for the Protection of Collective Interests of Consumers[1] (in the following: "the Directive"). The EU Member States now face the task of implementing the proposed rules in accordance with their national legal traditions until 25 December 2022. This essay seizes the opportunity to provide historical context to the development of collective redress, to categorize existing collective redress mechanisms, to critique the policy choices made by the Directive and to propose guidelines for its harmonized implementation.

Our line of argument centres around the idea of justice as a service for consumers which allows to give effect to their claims by overcoming the practical, procedural and financial hurdles which consumers often face in traditional individual litigation against companies.

In order to understand the pillars of collective redress, certain dichotomies need to be explained and defined. The first one has to do with standing. If a collective claim is brought, that can happen by a group whose members actively express their desire to sue, which is called opt-in participation. Alternatively, a party who wants to bring a claim can decide to represent all potentially injured parties without their prior consent, provided that those passive group members do not actively revoke their participation in the suit. This is called opt-out participation.

Secondly, the suit can be brought by the collective of injured parties themselves being represented by a so-called "representative plaintiff". This is the system of the US class action. Alternatively, the European system of "qualified entities" in charge of bringing a claim is based on the idea that the protection of consumer rights is a public interest served by certain organizations without the intention of making profit.

These independent organizations would initiate litigation representing the injured consumers as a collective without financial self-interest. The second system is sometimes connected to a two-step mechanism of litigation, where the suit brought by the qualified entity only establishes liability in an abstract way and the consumer afterwards needs to bring an individual claim for damages.

The first part of the essay will present a historical introduction to collective redress. Afterwards follows a categorization of existing collective redress mechanisms in EU Member States.

[1] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, pp. 1–27.

Thirdly, we will argue that consumer-friendly law enforcement is based on five essential criteria. These criteria should be considered during the implementation process of the Directive. Finally, we will provide suggestions for the implementation in our fifth chapter.

2 From US Class Actions to an EU Directive on Consumer Collective Redress

Collective redress is not a recent phenomenon. In common law countries, the roots of class actions have been found in a writ of Henry III from 1125.[2] The modern class action in the United States, probably the most established and widely used type of collective redress, was introduced in 1937 with Rule 23 of the Federal Rules of Civil Procedure. In those days, class litigation would only bind members of a class who actively participated in the litigation (opt-in mechanism) and class actions were not very effective for the first decades after their introduction into American procedural law.

This changed in 1966 with the revision of Rule 23. The civil rights movements of the 1960s had created a critical perception of the government's interest and ability to achieve social justice. The establishment of strict liability for producers, first introduced by the Supreme Court of California in 1963,[3] was one judicial reaction to this movement. The introduction of an opt-out mechanism to the class action system gave rise to a spread of class actions as an attractive tool for the protection of civil rights.[4] The case of Roe v. Wade,[5] in which the U.S. Supreme Court decided that a Texas law prohibiting abortion was unconstitutional, is a famous example of such a class action.

Unfortunately, the popularity of class actions entailed a heightened potential for abuse in unmeritorious litigation. This was due to a combination of factors. First of all, at the certification stage, the courts did not take into account the merits of the case, which means that a class action could be initiated without having to prove that any damage had occurred.

The opt-out system created a pool of potential class members whose size could amount to millions of claimants, for example amongst customers of banks. Even if the loss suffered by the individual claimant was miniscule, the number of claimants would drive up the total amount of damages.

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[2] *Stephen C. Yeazell*, The Past and Future of Defendant and Settlement Classes in Collective Litigation, Arizona Law Review 1997, pp. 687-704, at 689.
[3] Greenman v. Yuba Power Products, Inc. - 59 Cal.2d 57 (1963).
[4] *Andre Fiebig*, The Reality of U.S. Class Actions, GRUR International 2016, pp. 313-325, at 314.
[5] Roe v. Wade - 410 U.S. 113, 93 S. Ct. 705 (1973).

Under the US class action system, redress would not only include compensation of loss suffered, but also punitive damages, usually in the amount of three times the loss. The punitive damages were meant to serve as a deterrent against future infringements.[6] This could lead to a single suit being able to threaten the economic viability of a company, which is why many companies would agree to early settlements rather than risking a court decision, even if their liability had not been established.[7] During the 1990s, the judiciary became aware of that and expressed their concern. As Judge Posner stated in 1995:

> "One jury […] will hold the fate of an industry in the palm of its hand.[…] That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle – whether or not it really is liable) without violating anyone's legal rights."[8]

Since then, the US Supreme Court has mandated the courts dealing with class actions to apply a more vigorous certification process for a class action, the requirements of which will be explained further below.

In contrast to the US, collective redress has traditionally played a rather insignificant role in the EU Member States. One reason might be that punitive damages are not part of the European legal tradition and therefore litigation might be regarded as less profitable than in the US. In addition, the requirements for standing to initiate litigation in the US are comparatively low, which means that a class action will likely be decided on the merits if it passes the certification process, rather than being dismissed on procedural grounds.[9]

However, there are legal areas in EU law with a high number of potential claimants having suffered the same loss, such as final purchasers of products sold in violation of competition rules. The deterring effect for the defendant of private litigation by a high number of claimants might give useful effect to EU antitrust law which cannot be achieved by mere public oversight.[10] It is therefore no coincidence that the European Commission first introduced the idea of collective redress through the Green Paper on damages actions for breach of EC antitrust rules in 2005:

> "It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law.

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[6] *Andre Fiebig*, The Reality of US Class Actions, GRUR Int. 2016, pp. 313-325, at 319.
[7] *Ibid.*
[8] In the Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, at 1298 (7th Cir. 1995).
[9] *Andre Fiebig*, The Reality of US Class Actions, GRUR Int. 2016, pp. 313-325, at 320.
[10] Judgment of the European Court of Justice (Third Chamber) of 13 July 2006 in joined Cases C-295/04 and C-298/04 – *Manfredi*, ECLI:EU:C:2006:461.

> Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money."[11]

Broadening the scope of this idea, the European Commission published a Green Paper in 2008 on consumer collective redress, addressing the low confidence of consumers to effectively bring claims in national courts for redress in cross-border purchases, especially in the areas of financial services, telecommunication, transport and tourism.[12]

The Green Paper argued that consumers are hesitant to litigate for small claims against businesses, highlighting the high cost and risk of litigation as well as the length and complexity of procedures as major hindrances.[13] In contrast to that, 76% of consumers stated they would be more willing to sue if they could more easily join suits with other consumers.[14]

One suggestion of the Green Paper was to introduce collective redress mechanisms in all Member States. However, those mechanisms should avoid encouraging "a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements."[15]

This interest to avoid unmeritorious claims is a direct reaction to what is regarded as abusive litigation in US class actions. However, as was mentioned above, US courts have already addressed those dangers and have introduced a rigid certification process.

2.1 Class Actions in the United States

The most common means of collective redress in the United States is the class action as regulated by Rule 23 of the Federal Rules of Civil Procedure. In order to receive judicial certification to bring a class action, the plaintiff who seeks to represent a class must meet the following requirements:

2.1.1 Numerosity requirement

According to Rule 23(a), the plaintiff must demonstrate that there is a sufficient number of class members and that a joinder of plaintiffs would be impractical. In practice, approximately 40

[11] *European Commission*, COM(2005) 672 final.
[12] Green Paper On Consumer Collective Redress, COM(2008) 794 final, p. 4.
[13] Green Paper On Consumer Collective Redress, COM(2008) 794 final, p. 4.
[14] *Ibid*, p. 6.
[15] *Ibid*, p. 12.

members would generally be regarded as sufficient, whereas 21 members would likely not meet the numerosity requirement.[16]

2.1.2 Commonality requirement

The second requirement under Rule 23(a) is that there are questions of law or fact common to the class, which means that the class members "must have suffered the same injury".[17]

2.1.3 Typicality requirement

Thirdly, the claims or defences of the representative parties must be typical of the claims or defences of the class. According to the US Supreme Court, the requirements of commonality and typicality have to be understood in conjunction to test "whether the maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[18] This is necessary because of the opt-out principle in US class actions, which leads to most class members having no direct involvement in the case.

2.1.4 Adequacy requirement

The last requirement under Rule 23(a) is that the representative plaintiff must fairly and adequately protect the interests of the class. This is to ensure that there is no conflict of interest between the representative and the other class members.[19] Such a conflict of interest could arguably arise in situations where law firms initiate class actions with the sole purpose of "blackmailing" defendants into early settlements in order to receive contingency fees without having to argue the case on the merits. The court in charge of certifying a class action must ensure that such a settlement is in the best interests of all class members.

2.1.5 Predominance and superiority requirement

According to Rule 23(b), the questions common to the class must predominate over any questions that affect only individual class members, and the use of class actions must be superior to other available procedural methods to fairly and efficiently adjudicate the controversy.[20] This

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[16] Stewart v. Abraham - 275 F.3d 220, at 226 (3rd Cir. 2001); Atkins v. Morgan Stanley - 307 F.R.D. 119, at 137 (S.D.N.Y 2015); Saini v. BMW of North America, LLC - 2015 WL 2448846 at *3 (D.N.J. May 21, 2015); Vega v. T-Mobile USA, Inc. - 564 F.3d 1256, at 1267 (11th Cir. 2009); In re Florida Cement and Concrete Antitrust Litig. - 278 F.R.D. 674 (S.D. Fla. Jan. 3, 2012).

[17] General Tel. Co. v. Falcon - 457 U.S. 147, at 157 (1982).

[18] *Ibid.*

[19] *Andre Fiebig*, The Reality of U.S. Class Actions, GRUR Int. 2016, pp. 313-325, at 319.

[20] *Alexander Stöhr*, The Implementation of Collective Redress – A Comparative Approach, German Law Journal 2020, pp. 1606-1624, at 1610.

requires a sufficient cohesion within the proposed class and that individual claims would put a higher burden on the judicial system and the individual plaintiffs.

All of these requirements are vigorously applied by the US courts before certification of a class action to make sure that there is no abusive litigation. Without certification, the representative plaintiff has no standing to represent the class and the action would be dismissed. There has even been speculation that the scope of application of class actions will be significantly limited in the future if these requirements are applied more strictly.[21]

2.2 European reservations towards the US class action

In spite of the efforts to limit abusive litigation in the US, European legislators are reluctant to adapt US-style collective redress mechanisms. Whilst the intended redress amongst EU Member States is limited to compensation in damages, the US class action allows to claim punitive damages in order to deter companies from repeating infringements.

However, punitive damages are a foreign concept in most EU jurisdictions and would hardly fit in with current civil procedure in most Member States. The deterrent effect of punitive damages can arguably be achieved by a robust system of public oversight through the issuing of fines in case of infringement, as applied in antitrust cases by the European Commission and the national competition authorities.

Europeans seem particularly critical of the US opt-out mechanisms, in which class members must actively refuse to participate in class actions and are otherwise considered party to the proceedings. This is regarded as a violation of due process. For example, the German Bundestag argued that individuals must have the chance to actively and purposefully participate in legal proceedings in order to find satisfaction of their individual claims, which might not be completely congruent to those of the group.[22]

In a similar vein, the European Commission received input via a stakeholder consultation on the matter in 2011:

> "As regards the question whether an opt-in or an opt-out mechanism should be favoured, the majority of national governments, some sectoral regulators, almost all business representatives and most legal experts, especially lawyers, propose an opt-in system. In

[21] *Andre Fiebig*, The Reality of U.S. Class Actions, GRUR Int. 2016, pp. 313-325, at 319.
[22] Report of the Committee on Legal Affairs of the German Parliament, BT-Drucks. 17/5956 (25.5.2011), p. 9.

their view, opt-out-mechanisms violate basic principles of law as well as constitutional procedural guarantees of Member States and the ECHR."[23]

However, in response to that same consultation, the European Consumer Organisation BEUC painted a different picture, arguing that, "the possibility for a representative body, including consumer associations, to launch a collective action on behalf of all identified, identifiable and nonidentifiable victims (opt-out), without the requirement of an official mandate from each one of them, is necessary."[24]

An opt-out mechanism would allow the largest number of claimants to seek compensation. In contrast, only around 1% of all consumers qualifying for collective redress participate in existing opt-in procedures.[25]

In our opinion, the risks for abusive litigation are not inherent in an opt-out mechanism. In Portugal, which introduced an opt-out collective action for damages in 1995, no incidents of abusive litigation in collective redress have been reported so far.[26]

As to the question of punitive damages favouring unmeritorious litigation, we would argue that with the absence of such a concept in the EU, this does not pose a risk in the European context. The same is true for the matter of contingency fees, which are subject to national civil procedure and not specific to class actions.

As we will explain below, in the absence of effective collective redress, national civil procedure already allows for ways to circumvent the high hurdles which opt-in mechanisms pose for consumers.

3 Systems of collective redress

In most EU Member States, collective redress has unfortunately played a rather insignificant role.[27] Although 16 Member States have introduced consumer collective redress mechanisms, these turned out to be highly ineffective. For instance, the French *action de groupe,* which was introduced in France in 2014, has not produced a single court ruling so far, due to its high costs and the burden on consumers who have to actively register by way of an opt-in mechanism.[28] In

[23] Evaluation of contributions to the public consultation and hearing 'Towards a Coherent European Approach to Collective Redress' prepared for the Commission by Prof Dr Burkhard Hess and the University of Heidelberg, cited in *Fiebig*, The Reality of U.S. Class Actions, GRUR Int. 2016, pp. 313-325, at 317.
[24] https://www.beuc.eu/publications/2011-00352-01-e.pdf, p. 12.
[25] *Ibid*.
[26] https://www.beuc.eu/publications/beuc-x-2018-048_myths_and_realities_on_collective_redress.pdf, p. 2.
[27] Cf. *Stadler,* JZ 2009, pp. 121-131, at 122.
[28] *Maurice Nürnberg*, Die Durchsetzung von Verbraucherrechten, Nomos 2020, p. 212.

Germany, only 15 model declaratory actions have been filed to date. In comparison: The German Government predicted 450 annual claims in 2018.[29]

In general, collective redress has been an unharmonized subject in the EU. While some Member States developed a system of collective redress, others did not. Also, each Member State adapted its own mechanism, which differs from the scope of application to standing. Naturally, there are different types and variations of class actions, such as group actions, representative or model declaratory actions which should be distinguished.

3.1 National models of collective redress

In a study from 2018, the European Parliament analysed the existing mechanisms and differentiated three categories of Member States:[30] The first category entails Member States, which do not provide compensatory collective redress.[31] Member States of the second category provide for such a redress only in specific legal fields.[32] And finally, those who provide far-reaching collective redress form the third category.[33]

For example, the comparison of the German, French and Portuguese model already reveals serious differences among the Member States:

In Germany, the so-called *model declaratory action* was implemented in 2018 as a response to mass consumer claims against *Volkswagen* during the so-called Diesel-scandal.[34] Consumers could register via an opt-in mechanism. A qualified entity, usually a consumer organisation, will then bring a declaratory action against a defendant. The result is binding for all registered consumers.

However, for concrete compensatory measures, they will have to file a separate lawsuit. The benefit of such a two-step system is, that the consumers do not bear a cost risk in the declaratory proceedings. Additionally, they can benefit from the declaratory action directly or indirectly through the fostering of a settlement. In the event of an in-court settlement, the consumers can accept it or opt out and pursue their individual action.[35]

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[29] Cf. Draft bill of the model declaratory action, BT-Drs.19/2439, pp. 19f.
[30] European Parliament, Collective redress in the Member States of the Union, Policy Department for Citizens´ Rights and Constitutional Affairs, October 2018, p. 18.
[31] e.g. Estonia, Romania, Luxembourg, Germany and Austria, *ibid*.
[32] e.g. Belgium, Italy and Spain, *ibid*., p. 19.
[33] e.g. France, the Netherlands and Poland, *ibid*.
[34] *Schneider*, BB 2018, pp. 1986ff.
[35] Cf. § 611 ZPO (German Civil Procedural Code).

On the other hand, the procedure is complex and the admissibility criteria are rather strict.[36] Qualified entities are required to organize the whole proceeding without direct financial interest in the outcome. As for the consumers the procedure is for free. Therefore, other models of obtaining direct collective redress remain more attractive to many consumers.

The French *action de groupe* allows claims only in connection to sales of goods, contracts of services, property leases and violations of antitrust law.[37] The only damages covered are economic, not physical or immaterial injuries. The *action de groupe* is also a two-step procedure.

Only nationally registered consumer organisations have standing to initiate proceedings as representative actions, injured parties do not qualify as claimants during the first step. The consumer organisation presents an individual case which serves as a model on which the court establishes fault on the side of the defendant and defines the group of potential claimants. Afterwards, individual consumers can join the proceedings in the second step via an opt-in mechanism in order to claim individual damages.[38]

In contrast, Portugal's *actio popularis* law introduced an opt-out collective redress mechanism in 1995.[39] Every consumer and consumer organisation can bring a group action on behalf of all citizens holding the same legal interest without a complicated certification process. The court fees are limited and it is the task of the court or the public prosecutor to decide whether the collective action is legitimate.[40]

In reality, where national procedural law does not provide a genuine framework for class actions or where existing procedures are complicated, expensive and time consuming, there still is a practical need and desire for collective redress mechanisms. That is the status quo in many EU member states today. For that reason, an already existing legal mechanism became widely used to circumvent the lack of effective collective redress.

3.2 The Emergence of Legal Tech Assignment models

The individual assignment of claims is an established institute of civil law. However, if such assignments happen in numerous similar lawsuits, it becomes apparent that this can be a way to

[36] According to § 606 ZPO, the entities must not pursue an economic interest and need to represent at least 10 consumers amongst other preconditions. 50 consumers must register after two months from the beginning of proceedings to make the action finally admissible.
[37] Art. L623-1 Code de la Consommation.
[38] Art. L623-8 Code de la Consommation.
[39] Lei no. 83/85 - Direito de participação procedimental e de acção popular.
[40] *Miguel Sousa Ferro*, Collective Redress: Will Portugal Show the Way?, Journal Of European Competition Law and Practice 2015, Vol. 6, No. 5, p. 299.

bypass the unavailability of class actions. Especially with the emergence of legal technology, which allows an online fact checking via algorithms and a partially automated processing of similar cases, the multiple assignment of claims became easier.

Member States like Germany, France and Austria already benefit largely from this legal instrument. In Austria, that mechanism was developed already in the 2000s and sometimes named the "Austrian-style class action".[41] For a more detailed analysis and evaluation of the legality and potential of the new business models, it is necessary to differentiate between different types of allocation and assignment of claims.

3.3 Different Models for the Assignment of Claims

So far, we found two main different models on how such an assignment of claims takes place in practice. First, it is possible that individual claims are acquired by a third party, usually a professional litigation funder, who bundles similar claims against the same undertaking or group of undertakings. If alternative dispute resolution is not successful, these claims can be brought in one procedure provided a joinder of causes is possible under the relevant national procedural law.[42]

This is the easiest case as it would not constitute a representative action and the legality of each assignment is not put in question. The main obstacles are rather of economic nature. A litigation funder must assess in advance the risks and costs in order to calculate the price to be offered to the original claimholders.

It is conceivable that the economic process and risk calculation will go to the detriment of the original claimholder who will often be a consumer. This option is especially viable, if numerous claims with a significant amount exist, as for example in the case of cartel damages, where this business model emerged.[43]

However, due to the complexity and economic constraints, the success story of bundled cartel damages litigation cannot easily be transferred to other fields of consumer mass litigation. Therefore, this method will presumably not generally prevail as a consumer-friendly remedy.

Second, individual claims can be bundled by a legal service provider without the prior acquisition. In this case, the assignment takes place for free, while all procedural risks are

[41] European Parliament, Collective redress in the Member States of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, October 2018, p. 119.
[42] E.g., in Germany, § 260 of the Code of Civil Procedure provides for such a possibility.
[43] Cf. https://carteldamageclaims.com/our-cases/hydrogen-peroxide/

covered by a litigation funder. If the claim is successfully asserted, the sum is then paid to the former claimholders minus a certain contingency fee, which varies between 20-30%.[44] Therefore, the consumer maintains an economic interest in the success of the proceeding. This model is primarily used by legal service providers operating with high numbers of relatively easy and legally unproblematic cases, such as air passenger compensation.[45]

The efficient pursuit of numerous claims can place a high burden on the defendants. Recent developments reveal efforts by companies to attack the standing of legal tech companies. In Germany, the *Bundesgerichtshof* already had to intervene several times clarifying, that these business models are in principle compatible with professional law.[46] National courts are currently still occupied with the review of individual issues and the legality of assignments in particular cases.

For example, a German court recently stated, that standardized assignments of claims to litigators are not only in accordance with the law, but that non-assignment clauses in airline contracts were even deemed void as they would mean an unfair disadvantage to consumers.[47]

Usually, legal technology is used in the processing of facts and collection of debts but in court proceedings, each case is still litigated separately. Otherwise, legal problems of the accumulation of claims can call the legality of the assignments into question.

If on the other hand a number of bundled claims is litigated together in one court proceeding, that poses higher risk of a strict review of standing under national procedural law. The regional court of Munich recently declared the assignment of hundreds of cartel damages claims in the Trucks-cartel void as the assignment opposed the professional law of lawyers and therefore was deemed illegal.[48]

The Munich court found that the legal service provider, which was a collection company, would have to represent opposing legal interests and therefore would act illegally if it represented all clients in one court proceeding.

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[44] Cf. for example https://www.flightright.co.uk/faq with a fee of 20-30 % plus additionally 14 % in case a lawyer needed to become involved.

[45] Cf. *Remmertz*, AnwBl 2020, p. 186, fn. 3; *Stadler*, JZ 2009, pp. 121-133, at 122.

[46] Cf. Federal Court of Justice (BGH), judgment of 27.11.2019 – VIII ZR 285/18 – *Wenigermiete.de* where the court held that a collection company can provide legal services as long as those are necessary to collect the assigned debts and do not involve further legal counselling; for the distinction between these cases and the bundling of claims cf. *Meul*, CR 2020, pp. 246ff. at 250.

[47] LG Nürnberg-Fürth, VuR 2019, 28 & LG Frankfurt a. M., judgment of 19.11.2020 – 24 O 99/19, BeckRS 2020, 32499 para. 17; both on the basis of § 307 I BGB (German Civil Code).

[48] LG München I, judgment of 7.2.2020 – 37 O 18934/17, EuZW 2020, p. 279.

3.4 Conflict of objectives between legal traditions and facilitated access to justice

The attitude towards the emergence of a new form of class action is clearly diverse all over Europe, but generally rather sceptical and cautious. Particularly in Germany, the commercialisation of the assignment model and the compatibility with national procedural law is especially controversial, as the legal service providers act as collection companies and not as lawyers.

The reason for this is the strict regulation of the profession of lawyers. While those are only exceptionally permitted to accept contingency fees and shall not benefit from third party funding,[49] registered collection companies benefit from more permissive regulations, which allow contingency fees[50] as well as third party funding.

However, both shall not represent opposing interests.[51] Opposing interests between assignors are apparent when assigned claims are bundled with one law firm in one proceeding whilst each individual case is despite general similarities still composed of different facts and evidence.

As soon as alternative dispute resolution mechanisms such as in-court settlements become an option, the genuine interests of the assignors might differ. As a settlement would usually lead to a generalized quota for all assignors, the economic revenue would be equal, but the original success rate of each individual claim depending on evidence, data, etc., will typically not be the same. Therefore, a settlement will be more attractive to some then to others. Nonetheless, it is necessary for an efficient court procedure that the legal service provider is authorized to settle a case on a generalized analysis of the merits.

To avoid the risk of illegality of assignments due to opposed interests, it might be a reasonable option that a litigation funder acquires all claims and then only one party would bear all procedural and economic risks and interests in the case which would preclude opposing interests.

If the involvement of a third party (the litigation funder) was not intended, it is equally conceivable that the legal service provider itself forms a corporation with all claimholders. These models would require a certain degree of organisation under company law but seem feasible.[52] If all affected parties, assignors and assignee, form one corporation with a mutual goal, their

[49] § 49b II 1 BRAO (Federal Lawyers' Act), § 4a RVG (Lawyers' Remuneration Act).
[50] BGH, judgment of 27.11.2019 – VIII ZR 285/18 – *Wenigermiete.de,* paras 101ff.
[51] § 43a (4) BRAO and § 4 RDG (Legal Services Act).
[52] *Katharina Engler*, AnwBl 2020, pp. 513-517, at 515.

common interest lies in the pursuance of court proceedings. It seems unjustifiable then to certify them opposed interests.[53]

Besides, this nationally led discussion also ignores the possibility of forum shopping and the less strict professional law in other member states such as the Netherlands.[54] Whereas in the *Schrems*-case, the ECJ has limited collective claims on the basis of the consumer law clause in Art. 18 Regulation (EU) 1215/2012 ("Brussels Ia Regulation"),[55] that does not limit the application of the Regulation otherwise. Art. 8 Nr. 1 Brussels Ia provides for a bundling of proceedings in one Member State in cases with multiple defendants to prevent irreconcilable judgments resulting from separate proceedings in different Member States. Then, all defendants can be sued in any of the affected Member State, provided that (at least) one of the defendants is domiciled in that respective Member State.

Thus, the larger the case (e.g. due to the tort) and the larger the number of affected legal entities, the more forums might be available to claimants. It is conceivable that in collective redress cases, defendants are often corporations which are internationally active. If different parties are (partially) responsible for a tort or a breach of contractual obligations, that would already allow forum shopping and bundling of all claims in the chosen Member State in accordance with the given procedural law under the *lex fori* principle. Consequently, forum shopping allows for a certain circumvention of particularly strict professional law requirements.

In addition, alternative dispute resolution, in particular out-of-court settlements, seem equally possible. The objection that out-of-court enforcement of bundled claims in the sense of real debt-collection would be unrealistic[56] is itself not very well substantiated: rather, there are numerous incentives for mostly large companies as defendants in collective redress proceedings to settle a case (clearing the books, upholding good reputation, fostering future economic relations, etc.) if only a realistic threat of court proceedings existed.[57]

Thus, the question of the legality of assignment models in the EU involves multiple factors and an analysis of the national procedural law of all member states which would go beyond the scope of this article. It is precisely the conflict of goals between access to justice for a wider group of people, predominantly consumers, and the protection of the order of the legal profession that is often not sufficiently highlighted. This initially nationally oriented discussion has already been

[53] *Engler*, AnwBl 2020, pp. 513-517, at 515-516.
[54] Cf. with examples *Astrid Stadler*, WuW 2018, pp. 189-194, at 190.
[55] Court of Justice of the European Union, judgment of 25.01.2018, C-498/16 – *Schrems,* ECLI:EU:C:2018:37.
[56] *Sebastian Meul*, CR 2020, pp. 246-251, at 250.
[57] cf. *Barry Rodger*, Competition Law: Comparative Private Enforcement and Collective Redress across the EU, pp. 286ff.

Europeanised by the introduction of the EU representative action at the end of 2020 and should now be resolved on a European level.

4 Five criteria for consumer-friendly law enforcement

In view of the models presented above, an evaluation of the effectiveness of the status quo is mandatory in order to establish clear requirements for the implementation of the EU representative action. What is actually important to the consumer when it comes to enforcing his rights? The comparison of the different redress models shows that the popularity of the assignment models is mainly based on five criteria:

4.1 Minimal effort for the consumer

Legal tech debt collectors all advertise the simplicity of their business model. It is said to take five to ten minutes to assign the service provider. This is an enticing proposition for consumers. The claims concerned are generally legally unproblematic, nevertheless their enforcement fails in practice. Obstacles are deliberately placed in the way of consumers to deter them from asserting their claims, the best-known example being the waiting time at the telephone customer service. Putting customers off is a well-known tactic. It usually takes several months before the consumer receives a useful response from the company, if one is received at all. The effort required from the consumer is therefore disproportionately high, considering the small amounts involved. Many consumers therefore refrain from asserting their claims right from the start.

This burden is now assumed by legal-tech tools. All the consumer has to do is enter the facts of the case with some simple clicks on their website. Their case is then checked by an algorithm in just a few minutes. If a claim exists, the declaration of assignment is signed and send to the provider. From this point on, the consumer no longer has to worry about anything, especially not about any payments.

4.2 No win, no fee

And this brings us to the most important aspect of consumer-friendly law enforcement: the costs. After all, the ordinary consumer wants to avoid lawyer and court fees at all expenses. Bearing in mind that the loser pays principle applies in all EU Member States, it may be generally very difficult for laypersons to estimate the probability of success and the overall costs of the law enforcement. Therefore, only few people seek legal advice in the first place.

Even consumers with legal support insurances covering such costs, may shy away from the effort. We argue that the main reason for this is the amount in dispute, above which one would start a legal dispute in the first place. The average amount in dispute at which people would go to court in the event of financial damage is currently 1,840 euros in Germany.[58] Legal tech companies counter the consumer's fear of costly proceedings with purely success-oriented remuneration models: if the claim is successful, the consumer pays a contingency fee between 20-30% of the enforced claim. If the claim cannot be successfully asserted, the consumer incurs no costs.

4.3 Expertise and success guarantee

The debt collection business model regularly becomes attractive to consumers once a certain reputation and success rate has been established. Legal tech companies advertise this convincingly. Established collection service providers, like flightright[59] or myright[60] indicate a success ratio above 90%. The significance of this percentage must be put into perspective, as it says nothing about the actual amount of the claim recovered. A partial victory is generally considered a success.

However, the companies indisputably benefit from their established reputation and expertise in the individual areas of law. This promotes a reputable opponent that the defending companies take seriously. Therefore, the willingness of companies to settle regularly increases which in turn increases the success rate of the 'debt collecting' companies.

4.4 User-friendly digital interface

The simplicity of hiring the debt collection legal service providers is mainly due to the way the contract is concluded online. The consumer clicks through the website and fills in his data into the online forms. This usually takes 10 minutes as the websites of the legal tech companies are perfectly designed for fast processing. They are clear, easy to navigate and understandable. The path to concluding a contract is described in a few steps by animated and written instructions. Often there are also explanatory videos. The user-friendliness naturally encourages consumers to use such online offers.

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[58] *Institut für Demoskopie Allenbach*, Roland Rechtsreport 2020, https://www.ifd-allensbach.de/fileadmin/IfD/sonstige_pdfs/ROLAND_Rechtsreport_2020.pdf

[59]https://www.flightright.de/faq#:~:text=Flightright%20ist%20das%20Fluggastrechte%2DPortal,Gericht%20liegt%20bei%2099%20Prozent.

[60] https://www.myright.de/abgasskandal.

4.5 Availability and transparency

At the same time, it is especially important for online offers to give consumers a feeling of availability and transparency. Customer hotlines and the publication of customer ratings on the websites are intended to achieve this. Some companies even benefit from a quality certificate of public consumer centres.[61] After commissioning, consumers are also informed at regular intervals about the status of their procedure. A prime example of customer service, which is indeed praised by the majority of consumers.

In our opinion, these criteria set the standards to which future legal remedies must adhere in order to ensure competitiveness compared to commercial legal tech tools. Of course, the first three points are the most important ones. But points 4 and 5 should not be underestimated either, as they contribute to the improvement of the overall reputation and acceptance of Legal-Tech offers.

5 Transposing the EU Directive on Consumer Collective Redress

We argue that the above-mentioned criteria must necessarily be considered when transposing the Directive on consumer collective redress. In 2018, the European Commission concluded in its Communication “A New Deal for Consumers”[62] that “existing individual redress mechanisms are not sufficient in 'mass harm situations' affecting large numbers of consumers in the EU.” Consequently, the EU passed the Directive on representative actions for the protection of the collective interests of consumers in 2020.[63] However, in our opinion, the minimum harmonization will pose a problem in the implementation of the Directive. The Member States have been given a wide margin of manoeuvre, which can jeopardise the aim of the Directive. We see four difficulties in particular that are likely to affect the effectiveness of the new EU representative action.

5.1 Opt-in vs. Opt-out

The Directive proposed that Member States make the decision in favour of an opt-in or opt-out mechanism in accordance with their national legal traditions We suggest that an opt-out system for consumers for such representative actions would be the most desirable system, as has also

[61] https://www.test.de/Conny-Mietpreisbremse-per-Inkasso-durchsetzen-5145113-0/.
[62] A New Deal for Consumers, COM(2018) 183 final, p. 3.
[63] Directive (EU) 2020/182, *supra* note 1.

been argued by the BEUC.[64] Opt-in systems are very costly for consumer organisations due to their administrative requirements, which prevents actions even in cases with a positive outlook for the affected consumers. The issue with opt-out procedures of potential due process violations can be solved with explicit rules on information duties towards consumers, so that they can refuse participation in the action. For example, the representative plaintiff in US class actions is required to give notice to the group, "including individual notice to all members who can be identified through reasonable effort."[65]

Especially for cross-border representative actions as proposed in Art. 6 of the Directive, the access to information would otherwise be overwhelmingly difficult to obtain for consumers in one Member State coordinating with qualified entities of another Member State.

However, a wider choice of an opt-out system seems unfortunately unlikely, given the fact that the majority of Member States seem to shy away from an opt-out implementation. In the EU, only Portugal and the Netherlands apply an opt-out system, while Belgium has a mixed system.

5.2 Qualified entities

Following the legal traditions in most Member States, Art. 4 par. 2 of the Directive grants standing only to qualified entities, which have demonstrated financial and political independence and are acting on behalf of consumers. Such consumer organizations are already existent in many Member States.

Looking at the historical development of the class action in the US, the hurdles to be recognized as qualified entity should not be too high, either for domestic or cross-border cases, as that would hinder the effectiveness of the representative action. The fate of the German model declaratory action, which inspired the selected criteria, confirms this assumption.[66] In order to avoid further complexity, it is desirable that qualified entities registered in one Member State are more easily granted standing in other Member States.[67] In contrast to the requirement of twelve months public activity proposed by the Directive, especially cross-border collective actions would benefit from qualified entities being able to form *ad-hoc* as subject-specific representatives of consumer interest.[68] For that purpose, we suggest an alignment of the criteria for standing in domestic and cross-border cases.

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[64] https://www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf, p. 10.
[65] *Andre Fiebig*, The Reality of U.S. Class Actions, GRUR Int. 2016, pp. 313-325, at 321.
[66] *Peter Röthemeyer*, Die neue Verbandsklagen-Richtlinie, VuR 2021, p. 43.
[67] *Peter Röthemeyer*, Die neue Verbandsklagen-Richtlinie, VuR 2021, p. 43.
[68] *Maurice Nürnberg*, Die Durchsetzung von Verbraucherrechten, Nomos 2020, p. 322.

5.3 Funding

Additionally, the financing of future mass trials will remain an important issue. The exact financing arrangements of those qualified entities is still unclear. The Directive requires in its Article 4 par. 3 e), that the qualified entities are independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties. The Directive suggests entry fees or similar charges payable by the consumers interested to participate. We would advise against such fees, as otherwise the competitiveness of the class action with assignment-based collective redress mechanisms would be endangered.

In US class actions, the problem of conflict of interest is dealt with by the certification process taking place in the courts as explained above. A case-by-case assessment of potential conflicts of interests might be more efficient to prevent abuse than a sweeping rejection of litigation financing in such cases.

If the representative body bringing the action can support the claim that it is acting in the interest of the consumers, what would be the harm in receiving third-party financing? Furthermore, the empirical evidence for abusive use of collective action is lacking. Neither Portugal nor the Netherlands, which introduced an opt-out collective action in 2020,[69] have reported any cases of abusive litigation.

In addition, a routine attack on the standing of qualified quantities must be avoided. Especially the judicial review envisioned in Art. 10 par. 3 of the Directive could be misused for delaying tactics.[70] This provision allows for the disclosure of all financial support and thus constitutes a significant formal obstacle. Given the effort involved, it should at least be ensured that the courts only grant such a review in cases of substantial doubt.

5.4 Information on representative action

Finally, the future internet appearance and marketing of qualified entities will be crucial for an effective collective redress mechanism. This concerns above all cross-border cases, where consumers have to gain information about foreign entities and register to representative actions in foreign legal systems.

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[69] *Maurice Nürnberg*, Die Durchsetzung von Verbraucherrechten, Nomos 2020, p. 266.
[70] *Peter Röthemeyer*, Die neue Verbandsklagen-Richtlinie, VuR 2021, p. 43.

Therefore, qualified entities must be easy to find online. The Directive obliges each Member State to not only communicate the list of qualified entities to the Commission, but also to make it publicly available, Art. 5 par. 1 of the Directive. Many Member States already comply with this requirement. Also, Art. 13 of the Directive provides, that Members States should ensure that qualified entities provide sufficient information about current representative actions on their website for consumers, which express their desire to participate in such actions.

Based on our view, such information should be available in all EU languages, at least in English and French. The consumer should not take more than five minutes to find and verify, whether a consumer association would actually be entitled to file a domestic and/or cross-border action. The Austrian Association for consumer action[71] or the German Consumer Center[72] are good examples of such simple websites.

6 Conclusion

In conclusion, the European development of class actions is strongly influenced by the fear against a US-style litigation industry. In our eyes, unfortunately, too much so. This is confirmed by the Directive on consumer collective redress, which aims to prevent the possibility of abuse through the restrictions on standing and the regulation of litigation funding. On the one hand, this is a legitimate goal, but on the other hand, the question arises as to whether precisely these mechanisms are suitable or necessary for this purpose. After all, the development of collective redress mechanisms to date, especially the emergence of legal tech service providers, does not give rise to such fears. Nor will the implementation of the EU representative action. The Directive must first be implemented by 25 December 2022. The date of application will then be 25 June 2023. However, the Member States should use their large margin of discretion given by the Directive in order to implement a coherent and effective procedural system. A too strict transposition could, on the other hand, completely undermine the competitiveness of the class action.

[71] https://vki.at/klagen-konsumenten-zu-ihrem-recht-verhelfen/5197
[72] https://www.musterfeststellungsklagen.de/