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Are Class Actions Finally (Re)conquering Europe?

Some Remarks on Directive 2020/1828

1. Cornerstones of the development

The somewhat murky origins of class actions can be found in the European Middle Ages where Anglo-Saxon and Norse legal traditions allowed a plaintiff to bring an action on behalf of a larger group of claimants. Its original rationale that this would ‘serve the interests of judicial economy by minimizing duplicative litigation’ is still valid.^{*1} However, amid political and economic turmoil beginning in the 15th century, group litigation ceased to exist in England by 1850.^{*2} The rise of class actions on the other side of the Atlantic Ocean began more or less at the same time in 1842 with the enactment of Rule 48 of the Federal Equity Rules – the predecessor of the famous Rule 23 of the Federal Rules of Civil Procedure. Over a span of decades, US-style class actions conquered Canada^{*3} and Australia^{*4}, but their way back to Europe – at least in a modified form – was long and cumbersome.

A few scholars in Europe became interested in US class actions in the 1970s^{*5}, but Europe-wide debate about implementing similar procedural instruments did not start before the 2000s when the union’s DG Competition borrowed the idea of class actions for the private enforcement of European competition law in a Green Paper (2005^{*6}) and a White Paper (2008)^{*7}. This was also the starting signal for a highly controversy-laden debate and the business sector’s steadfast warnings against a US-style litigation industry, blackmail strategies of greedy lawyers, and entrepreneurial litigation in general. Anecdotal evidence of frivolous US class actions against European companies with extensive media coverage did not fail to impress politicians in Europe. Even within the European Commission, it took another five years and several attempts to find a

¹ John Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard UP 2015) 95. – DOI: <https://doi.org/10.4159/9780674287075>.

² Levin Papantonio, ‘History of Class Action Lawsuits’ <www.levinlaw.com/history-class-actions> accessed 2 January 2021.

³ With the exception of Prince Edward Island, all of Canada’s provinces have implemented class actions, per Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press 2018) 4.

⁴ In Australia, class actions exist at the federal level and in the state court systems of New South Wales, Victoria, Queensland, and Western Australia. See Vince Morabito, ‘An Evidence-based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia’ (11 July 2018) 8. – DOI: <https://doi.org/10.2139/ssrn.3212527>.

⁵ For example, cf Harald Koch, *Kollektiver Rechtsschutz im Zivilprozess- die class action des amerikanischen Rechts und deutsche Reformpläne* (Metzner 1976); Richard M Buxbaum, *Die private Klage als Mittel zur Durchsetzung wirtschaftspolitischer Normen* (Müller 1972).

⁶ European Commission, ‘Green Paper: Damages Actions for Breach of the EC Antitrust Rules’ COM (19 February 2005) 672.

⁷ European Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2 April 2008) 165.

coherent approach for competition and consumer law.^{*8} With respect to terminology, there was a remarkable shift in the debate from ‘class actions’ to ‘collective redress’ so as to avoid any connotations of the US instrument, but the discussion was nevertheless dominated by the negative aspects of class actions and the attempts expressed by US legislation^{*9} to fight against entrepreneurial excesses and lawyer-driven actions. The fact that the undeniable downsides of US class actions are a result of the famous ‘toxic cocktail’ of contingency fees, punitive damages, jury trials, the American rule of cost, and a generally low threshold to extensive and expensive pretrial discovery – all unique features of US law – often became lost in the noise of the debate.^{*10}

In 2013, the Commission devised a political trade-off in the form of a non-binding instrument – a recommendation on common principles for injunctive and compensatory collective redress mechanisms in the EU.^{*11} The Recommendation text contained guiding principles for the member states but also many safeguards against the misuse of collective redress. It started from a broad horizontal approach of application and also a broad concept of legal standing (encompassing individuals, legal entities such as consumer associations, and public regulators), but it largely ignored the main problem plaguing mass litigation: funding. All in all, it was considered a half-hearted attempt to harmonise collective redress instruments in Europe^{*12}, and the two-year period for implementation elapsed without a single Member State adopting the recommendation as a whole.

One reason for the Recommendation document’s failure to inspire fundamental reform activities was its late appearance, in 2013. At that time, the member states in considerable numbers had already passed legislation on new collective redress instruments and some of them, including France, which had taken the position of an ally in Germany’s resistance against any collective instrument for many years, were in the middle of a reform process.^{*13} A first wave of national reform to collective redress instruments such as (opt-out) group actions had taken its origins in the Nordic countries (Sweden 2003, Finland 2007, Norway 2008, and Denmark 2008) and the Netherlands (with the 2005 Act on Collective Settlements^{*14}). Italy (2007) and Poland (2010) followed, whereas in Germany only test-case litigation in securities law had been implemented by 2005, along with disgorgement proceedings in competition law (which were not a real success in practice). With the second wave of national reforms, from 2013–2019, the United Kingdom implemented opt-out group actions in competition law, collective settlement procedures, and a couple of ‘enhanced consumer redress measures’ strengthening the position of public regulators. France and Belgium implemented representative actions by consumer associations from 2014–2016 with a broad scope of application, and the Netherlands enacted a true group-action mechanism in 2019. Similar developments took place in Lithuania (2015), Slovenia (2018), and Scotland (2020), and even Switzerland came up with a proposal for a form of representative action, in 2018. All of these instruments were only loosely connected with the above-mentioned Recommendation. Again, only Germany did not have the courage to move forward. It was not until the Volkswagen ‘Dieselgate’ emissions scandal put considerable political pressure on the German government to improve the situation of deceived car-owners that a representative action for declaratory relief in consumer law (the *Musterfeststellungsklage*)^{*15} came into force, in 2018. Still, this was heavily criticised from the beginning, because consumer associations were not allowed to bring actions for damages, but only for a declaratory judgment based on which consumers have to pursue their damage

⁸ See the 2011 public consultation document ‘Towards a More Coherent European Approach to Collective Redress’ COM (2010), 135 final, of 31 March 2010.

⁹ Private Securities Litigation Act 1995; Class Action Fairness Act 2005.

¹⁰ For more details, see Astrid Stadler, ‘Kollektiver Rechtsschutz – Chancen und Risiken’ (2018) 182 *Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht* 623, 635 et seq.

¹¹ Recommendation 2013/396/EU, 11 June 2013.

¹² Cf Christopher Hodges, ‘“Collective Redress”: A Breakthrough or a Damp Squib?’ (2014) 37 *Journal of Consumer Policy* 67. – DOI: <https://doi.org/10.1007/s10603-013-9242-0>; Astrid Stadler, ‘Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz’ [2015] *Zeitschrift für die gesamte Privatrechtswissenschaft* 61; Stefaan Voet, ‘European Collective Redress: A *Status Quaestionis*’ (2014) *International Journal of Procedural Law* 97 et seq.

¹³ For a detailed comparative survey of the situation of collective redress in the member states, see the write-up of the British Institute of International and Comparative Law, ‘Collective Redress Study for the European Commission’ (BIICL 2018) <www.collectiveredress.org/newsitem/6045> accessed 2 January 2021.

¹⁴ Wet collectieve affwikking massaschade (WCAM) arts 1013–18 Dutch Civil Procedure Code; Dutch Civil Code, Book 7, Title 14.

¹⁵ See German Civil Procedure Code, pp 606–13.

claims individually against the defendant. The *Musterfeststellungsklage* fell far short of complying with the 2013 EU Recommendation.

Together, the fact that the non-binding Recommendation of 2013 failed to achieve the aim of harmonising the instruments of collective redress in the member states and the political pressure in the aftermath of the Volkswagen emission scandal united policymakers in an effort to develop a binding EU instrument. The image of US class actions was polished up for once, by the early US settlements with Volkswagen in California: European car-owners and consumer associations envied the swift and satisfying agreement in favour of US diesel-car-owners.^{*16} In Europe, in contrast, consumers faced lengthy proceedings against Volkswagen, which, for a long time, had absolutely no inclination to settle the cases.^{*17} Finally, a Commission proposal for a European group action was published, in April 2018^{*18}, and Germany, fighting a losing battle, could not prevent the European legislative process from ultimately resulting in the adoption of the new Directive 2020/1828, ‘on representative actions for the protection of the collective interests of consumers’.^{*19} Now the member states have time to adopt and publish regulations to comply with the directive, until 25 December 2022, and the new instruments must apply from 25 June 2023.^{*20}

2. Guidelines provided by Directive 2020/1828

The directive provides a minimum harmonisation threshold for the enforcement of consumer rights. The member states may adopt or keep in force procedural instruments of collective redress in their national law. According to Article 1 of this directive, at least one procedural mechanism must comply with said directive and allow qualified entities to bring representative actions for both injunctive relief and redress measures. A ‘qualified entity’ is any organisation or public body representing consumers’ interests that has been designated by a Member State (Article 3 No 4). These entities may bring actions as a claimant party (in their own name) in the interest of consumers who do not become party to the proceedings themselves. If the qualified entity seeks injunctive measures against the defendant, individual consumers are not required to express their wish to be represented by the claimant party (no opt-in but equally no opt-out is necessary). In cases of a representative action for redress measures (compensation, repair, replacement, etc.^{*21}), the situation is different: Article 9’s paragraph 2 requires the member states to provide rules on whether and at which stage of the proceedings consumers shall opt in or opt out (‘explicitly or tacitly express their wish [...] to be represented or not by the qualified entity [...] and to be bound or not by the outcome of the representative action’). Thus, a key issue that has been very much debated over the years is left to be decided by each the member states. Only a few Member States have so far implemented group actions or representative actions based on a (US-style) mechanism for opting out.^{*22} Irrespective of the fact that consumers might stay passive in the event of a small individual loss and are unlikely to bother to opt in, most of the collective redress

¹⁶ For details on the settlement, see the information provided on the Web site of the US District Court for the Northern District of California at <www.cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-volkswagen-clean-diesel-mdl/final-2-0-1-settlement/> accessed 2 January 2021.

¹⁷ In Germany, Volkswagen settled individual cases in mounting numbers so as to avoid a decision by the Federal High Court. In February 2020, the German umbrella consumer organisation Verbraucherzentrale Bundesverband (vzbv) entered into a settlement with Volkswagen AG for approx. 250,000 car-owners who had registered for the ‘Musterfeststellungsklage’ action of the vzbv. The settlement bypassed safeguards such as court approval of the settlement terms as provided for by the German Civil Procedure Code, by establishing only a framework for individual settlements between consumers and Volkswagen. Again, the settlement was dictated by time pressure, because both parties wanted to settle the dispute before the Federal High Court issued a basic decision on Volkswagen’s tort liability, due in May 2020. For a critical review of the settlement procedure, see Astrid Stadler, ‘Pyrrhussieg für den Verbraucherschutz – vzbv umgeht durch Vereinbarung mit VW gesetzliche Sicherungsmechanismen’ [2020] *Verbraucher und Recht* 163–65.

¹⁸ ‘Proposal for a Directive on representative actions for the protection of the collective interest of consumers, repealing Directive 2009/22/EC’ COM (2018) 184 final, of 11 April 2018.

¹⁹ Directive 2020/1828/EC [2020] OJ L409/1, of 4 December 2020.

²⁰ Directive 2020/1828/EC, art 24.

²¹ Redress measures are defined in the directive’s art 3 (under No 10).

²² Belgium (Code de droit économique, art XVII: opt-in in case of personal injury, moral damages; Bulgaria (art 379-388 Civil Procedure Code); England/Wales (Sec. 47A Competition Act [11] [b], on non-UK residents); Portugal (law 83/95, art 12 (No 84/96) and art 13); Spain (Ley Enjuiciamiento Civil, art 6 (7), 7 (2), 11, 13, 15, and 221). Also, according to the Dutch WCAM, the opt-out mechanism applies for mass settlements too.

mechanisms in the EU express preference for the opt-in model.^{*23} Lately, there has been a tendency to conclude that whether an opt-in or an opt-out *modus* applies should be decided on a case-by-case basis by the court seised.^{*24} Also, the directive adopts the idea that consumers who are not habitually resident in the Member State where the court seised is located must explicitly join the action by an opt-in declaration. This follows national examples in Belgium and the UK^{*25}, and it is suggested also in the collective-redress-related part of the ELI/UNIDROIT project on Model Rules for European Civil Procedure 2020^{*26}.^{*27}

With this directive, there is no longer a provision for lower-value claims. Recommendation 2013/396 allowed an exception to the opt-in mechanism for this type of claim, and the 2018 Draft Directive document (in its Article 6, para. 3, lit. b) went even further and suggested a mandatory opt-out scheme without distribution of the compensation to the affected consumers. The amount is to be directed instead to a public purpose.^{*28} In fact, such disgorgement proceedings are the more adequate solution in cases wherein the distribution of small amounts of compensation would be disproportionate. The money could also be used to establish and feed an ‘access-to-justice fund’ for the financial support of future mass litigation (see subsection 3.3 below).

On the basis of the mechanism that had already been used in the Injunctions Directive 2009, the member states may designate qualified entities in accordance with the criteria established in Article 4 of the directive. The member state may distinguish among entities qualified for the purpose of bringing domestic representative actions, cross-border representative actions^{*29}, and both (see Article 4, para. 2).

A list of entities qualified for cross-border representative actions shall be published and communicated to the Commission (per Article 5, para. 1). The list must be accepted in each of the member states as proof of the legal standing of the qualified entities (under Article 6, para. 3), and member states must ensure that the entities listed can indeed bring representative actions before their courts or administrative bodies (per Article 6, para. 1). Where consumers in several member states are affected by a mass-harm event, the member states must allow several qualified entities, from different member states, to bring a (joint) action. With regard to the international jurisdiction of courts, the directive does not provide any specific rules but simply refers to the application of the Brussels Ia Regulation instead (see Article 2, para. 3).

Finally, a lesson learned from the German handling of the Volkswagen Dieselgate affair and the German *Musterfeststellungsklage* is reflected in Article 9 paragraph 6. The member states must ensure that consumers benefit from the remedies sought in the representative action without having to bring a separate (individual) action.

3. What has changed over the years

The drafts and ideas for a harmonised collective redress instrument in Europe have changed considerably over the years.

²³ France (art L.423-5, on the opt-in system applied after a court judgment on liability has been rendered); Denmark (Administration of Justice Act, § 254e (2)); Finland (Class Action Act (444/07), s 8); Lithuania (Civil Procedure Code, art 441–3); Sweden (Group Proceedings Act 2003, s 14. Also, cf the regulations in Italy (Consumer Code 2009, art 140bis; Law No 244 2007, amended 2009 and 2012), Poland (the law of 17 December 2009), and Scotland (since July 2020). The same position has been taken under Recommendation 2013/396 (No 10–11 and 21) and the Commission’s relevant report, COM (2018) 40 final) p 13–15.

²⁴ Belgium (Code de droit économique, art XVII.43, s 2, No 2); Denmark (Administration of Justice Act, s 254e (8)); England/Wales (CAT Rules, rule 79 [1], 79.3); Norway (Disputes Act, s 35-7); Slovenia.

²⁵ Belgium (Code de droit économique (art XVII.38, s 1, no 2); England/Wales Competition Act, s 47A [11] [b], on non-UK residents); Commission Report COM (2018) 40 final, p 13–14.

²⁶ For more information on the project, consult the Model European Rules of Civil Procedure <www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/> accessed 15 July 2021.

²⁷ Rule 215 of the European Civil Procedure Rules (ECPR). The English-language version and an unofficial German translation of the collective-redress-related portion of the ECPR are available at <www.jura.uni-konstanz.de/typo3temp/secure_downloads/90161/0/1d54b518ac0d5638005f871d5dab2d607586b14f/Deutsche_U__bersetzung_Part_XI_CR.pdf> accessed 2 January 2021.

²⁸ Its art 6 states in para 3, lit. b, that ‘Paragraph 2 shall not apply in the cases where: [...] consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, the member states shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers’.

²⁹ For a definition, see art 3 of the directive, No 7.

3.1. Scope of application

Beyond the shift in terminology already mentioned (from ‘collective redress’ to ‘group or class action’), the European Commission’s proposal underwent major changes related to the scope of application and legal standing. Whereas the 2013 Recommendation took a non-sectorial approach and, hence, showed broad scope for application, the final Directive 2020/1828 is restricted to addressing violations of consumer law, and its Annex I provides a list of 66 directives and regulations of Union law substantiating the scope of application defined in Article 2.^{*30} The change is most likely to be due to the fact that the Commission did not want the question of jurisdiction to be raised and therefore declared the new directive to be a further development of the Injunctions Directive 2009. The Volkswagen emission scandal showed, however, that small and medium-sized enterprises too may need to benefit from a representative action with one claimant party. Furthermore, cartel-damages actions by direct purchasers serve as another example attesting to the practical importance of pooling claims by companies. They will still have to resort to the services of special-purpose vehicles (‘Rechtsverfolgungsgesellschaften’), which operate on an assignment model (see Subsection 3.3 below).

3.2. Legal standing

Also, the new directive adopts a much stricter attitude toward legal standing than does the Recommendation of 2013. This could have a negative impact on the directive’s use in practice. According to the Recommendation document, legal standing to bring a representative action on behalf of a group of tort victims or consumers was to be granted also to individual members of the group, not merely to representative entities or public bodies. Directive 2020/1828 requires the member states to give legal standing only to ‘qualified entities’ as defined in Article 4, however. Under Article 4 para 2, this includes only entities that can demonstrate 12 months of actual public activity in consumer protection and have a statutory purpose of protecting consumer interests. Therefore, *ad-hoc*-founded interest groups or entities that would represent only the victims of a particular mass-harm event are not within the scope of application of the directive. The directive concedes only that member states may allow such entities to bring a particular domestic representative action; there is no mutual obligation to grant legal standing for cross-border litigation.^{*31}

Qualified entities must have a non-profit-making character and fulfil certain criteria with respect to their funding and the transparency of their organisational, management, and membership structure.^{*32} Existing consumer organisations normally have limited personnel and financial resources, often depend on public funding by the state, and will not be able to deal with all cases.^{*33} In some member states and in sectors such as securities law, there are, in simple terms, no associations that are willing and able to represent hundreds or thousands of consumers in court.^{*34}

3.3. Funding of representative actions

Legal standing and funding are closely related issues. The directive’s main deficiency is that it does not provide a clear framework for the funding of mass litigation. An earlier draft’s provision requesting the member states to take care of sufficient funding of the qualified entities^{*35} did not survive the legislative process, for

³⁰ The list focuses on consumer law. It does not address, for example Directive 2014/104/EU, on certain rules governing actions for damages under national law for infringement of the competition-law provisions of the member states and the EU, so it does not protect consumers who are victims of price-fixing cartels. It does, however, include directives on securities and investments and, thereby, may protect small-scale investors.

³¹ Directive 2020/1828, art 4, para 6.

³² Directive 2020/1828, art 4, para 3.

³³ For a more detailed review, see Astrid Stadler, ‘Kollektiver Rechtsschutz quo vadis?’, *Juristenzeitung (JZ)* 2018, 793, 793 et seqq. – DOI: <https://doi.org/10.1628/jz-2018-0235>.

³⁴ In Germany, there are a couple of associations for the protection of small shareholders, but the activities of these bodies are restricted to representing shareholders in stockholders’ meetings, conducting information campaigns, and providing support for individual actions. They have neither the staff nor the financial capacity to conduct mass litigation.

³⁵ Article 15 of the proposal COM (2018) 184 final stipulates: ‘Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively

reason of the – non-surprising – resistance of the member states. Instead, there is now a ‘soft law’ provision in Article 20, para. 1: ‘Member States shall take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures referred to in Article 7.’ This is no funding guarantee for qualified entities, but public funding is not the optimal solution in any event. Qualified entities, which more or less exclusively depend on public funding, may become subject to political influence with their enforcement policy.³⁶ In addition, however, the directive provides no guarantee of qualified entities’ access to third-party funding. Instead, Article 10 builds on national legislation, and only where national law allows third-party funding does the directive provide additional safeguards against conflicts of interest and require a certain level of transparency.

In most member states, there is no legal framework for commercial litigation funding. In Germany, the Federal High Court (Bundesgerichtshof), in a rather surprising decision from 2018³⁷, stated that consumer associations that use litigation funding companies will lose legal standing to bring actions that address skimming off illegally gained profits from companies violating competition rules (see § 10 of the Unfair Competition Act). The main argument was that there is a considerable risk that profit-seeking by funders will prevail over consumer interests and that consumer associations will no longer be independent in selecting cases for litigation. The decision reflects the strong resistance against commercial funders and the fear of a litigation industry developing in Germany. Despite considerable criticism³⁸ in legal writings, the court confirmed its position in 2019.³⁹ If the legislature does not overrule these decisions, defendants will certainly try to apply this case law to representative actions under the new directive, and it cannot be precluded that the Federal High Court will confirm such an approach. Therefore, funding the new representative actions might become extremely difficult. Without the possibility of seeking support from third-party funders, the directive will prove useless for consumer associations, and one could only hope for the European Court of Justice to intervene someday on the basis of a ‘effet utile’ argument.

In response to the inability of German consumer associations to pick up all mass-harm events and the lack of an efficient instrument for collective redress in German civil procedure law, a new market for legal services has emerged in recent years. Legal-tech companies and special-purpose vehicles (the above-mentioned *Rechtsverfolgungsgesellschaften*) are the new entrepreneurs in the mass litigation market, and they bring in a considerable share of the attractive proceedings. Their business models are based on the pooling of claims by assignment under substantive law. They also offer litigation funding by acting on the basis of success fees of 25–30%. In this respect, they benefit from a legal gap in German law. Whereas tight restrictions exist on lawyers’ entry into contingency-fee arrangements or offering of litigation funding⁴⁰, no corresponding prohibition is imposed for debt-collection companies, even if they are run by lawyers. Cartel-damages actions are very often brought by such collection companies, and, even in consumer law (Dieselgate is again a good example), legal-tech companies such as myRight and similar start-ups offer legal services to risk-averse individuals who do not want to litigate at their own procedural risk.

The Federal High Court has confirmed the business model of legal-tech-domain debt collectors in principle⁴¹, but numerous questions are still open and lawyers complain harshly that there is not a level playing field. Recently, the German government published a proposal according to which lawyers will be allowed to

exercise the right to seek the measures referred to in Articles 5 and 6, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or [...] providing them with public funding for this purpose.’

³⁶ For examples of such development in the US, see Richard Marcus, ‘Revolution and Evolution in Class Action Reform’, (2018) 96 North California Law Review 903, 914. In Germany, some authors (Herbert Woopen, ‘Kollektiver Rechtsschutz – Ziele und Wege’, *Neue Juristische Wochenschrift* (NJW) 2018, 133, 136) and actors in the business sector also (Stellungnahme Deutsche Kreditwirtschaft (materials from 31 May 2018) 7 <https://die-dk.de/media/files/180531_DK-Stgn_Musterfeststellungsklage_FINAL.pdf> accessed 2 January 2021) argued in favour of the exclusive legal standing of public regulators when the *Musterfeststellungsklage* was established in 2018 – ‘evil to him who evil thinks’.

³⁷ Bundesgerichtshof (BGH) I ZR 26/17, 13 September 2018, per NJW 2018, 3581.

³⁸ For critical assessment of the decision, see Astrid Stadler, ‘Sittenwidrigkeit der Prozessfinanzierung eines gemeinnützigen Verbraucherschutzverbandes’, *Juristenzeitung* (JZ) 2019, 198; Michael Loschelder, ‘Prozessfinanzierung bei Gewinnabschöpfungsansprüchen unzulässig’ *GRUR-Prax* 2018, 534; Axel Halfmeier, ‘Anmerkung zu BGH: Rechtsmissbrauch durch Prozessfinanzierung bei Gewinnabschöpfungsklage’, *WuB* 201927.

³⁹ BGH I ZR 205/17, 9 May 2019 (‘Prozessfinanzierer II’), *Neue Juristischen Wochenschrift* (NJW) 2019, 2691.

⁴⁰ Federal Code for the Legal Profession, s 49b.

⁴¹ BGH VIII ZR/285/18, 27 November 2019 (‘wenigermiete.de I’), *BeckRS* 2019, 30591; BGH VIII ZR 130/19, 8 April 2020 (‘wenigermiete.de II’), *BeckRS* 2020, 8218.

ask for contingency fees in cases involving small amounts (up to 2,000 euros) and for out-of court activities.⁴² That proposal may be an important, albeit very cautious, step toward bringing lawyers onto a level playing field with expanding and innovative legal-tech companies. However, the success of this attempt to strengthen the position of consumers seeking legal advice depends also on how the German government will implement Directive 2020/1828. If consumer associations do not have the opportunity of obtaining external funding, because of the applicability of the above-mentioned case law, numerous cases will be left to legal-tech companies, with consumers being able to obtain compensation for the violation of their rights only upon giving a considerable portion of the indemnity to these companies as a success fee.

National legislatures in Europe should therefore consider an alternative way of funding mass litigation: by establishing the so-called access-to-justice fund that can offer financial support to qualified entities or individual claimants acting on behalf of a group of consumers.⁴³ Such a fund should be able to fill the gap when no other funding sources are available. Third-party funders, for example, are interested only in certain types of cases, particularly those with high amounts at stake and actions that are for monetary relief from which they can deduct their success fee. Directive 2020/1828, however, covers proceedings that will not be attractive for commercial funders. Besides injunctive measures (Article 8), it covers redress measures of all kinds, such as compensation, repair, replacement, price reduction, contract termination, and reimbursement of the price paid (Article 9). Third-party funders will not be interested in taking up all these kinds of actions; therefore, state-run funds at the national or the European level to which consumer associations or individuals (if given legal standing by national law) may apply for funding are very important for the success of Directive 2020/1828. Whereas such funds already exist in Canada⁴⁴, legislatures in EU Member States have been very reluctant to establish these vehicles so far, because of the lack of seed money. There are several options for feeding such funds, though: Where mass litigation is successful and ends in a settlement, the compensation funds often are not claimed in their entirety by the group members. This is particularly true in cases of small individual losses. The residues should not be returned to the defendants⁴⁵ but be directed to such a fund as a kind of *cy-près* solution.⁴⁶ Administrative fines in antitrust cases could be another source of funding or monetary penalties, with one example being the billion-euro fine imposed on Volkswagen in 2019 for using the emissions-cheating device in their diesel cars.⁴⁷ Moreover, defendants in many member states have to pay administrative fines for violating cease-and-desist orders in competition or consumer law. These fines too could be used to establish and run a fund for future cases of mass harm.

Access-to-justice funds have additional advantages: Funding normally gets granted only upon application to an independent board managing the fund. Unmeritorious or frivolous claims therefore have no chance of proceeding, and thereby the fund is, similarly to third-party funders' due diligence, an important safeguard against the misuse of collective redress actions.

⁴² *Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt* (20 January 2021) <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Rechtsdienstleister.html> accessed 15 July 2021. The new rules will come into force on 1 October 2021.

⁴³ The idea is not new; cf the proposal by Gerhard Wagner, *Verhandlungen des 66. DJT, Vol. II* (2006) A 14ff; H-W Micklitz and Astrid Stadler, *Unrechtsgewinnabschöpfung* (Nomos 2003) 129; H-W Micklitz and Astrid Stadler, 'Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft' [2005] *Gutachten BMVEL* 1142; Stadler, 'Kollektiver Rechtsschutz quo vadis?' (n 33) 801–802; Karl-Heinz Fezer, 'Zweckgebundene Verwendung von Unrechtserlösen und Kartellbußen zur Finanzierung der Verbraucherarbeit' (27 February 2019) <<https://kops.uni-konstanz.de/handle/123456789/23103>> accessed 15 July 2021; Stefaan Voet, 'Cultural Dimensions of Group Litigation: The Belgian Case' (2013) 41 *Georgia Journal of International & Comparative Law* 433, 469; J Buchner, *Kollektiver Rechtsschutz für Verbraucher in Europa* (Vandenhoeck & Ruprecht 2015) 202. – DOI: <https://doi.org/10.14220/9783737004343>; Caroline Meller-Hannich, *Gutachten 72. DJT* (C.H. Beck 2018) p A 60, A 88.

⁴⁴ For Quebec, see 'Fonds d'aide aux recours collectifs' (29 December 2020) <www.farc.justice.gouv.qc.ca/> accessed on 15 July 2021; for Ontario, see 'Access to Justice Funds (29 December 2020)' <www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/> accessed on 15 July 2021.

⁴⁵ Reversion of the leftovers to the defendant is not only included in many settlements but also a statutory rule in some states: Australia Federal Class Action Part IV A, s 33ZA (5); Victoria Supreme Court Act 1986, Part 4A, s 33ZA (5); Ontario Class Action Act, s 26 [10]; British Columbia Class Action Act, s 34 (5) (c). Also, the new Slovenian Law on Group Actions, from March 2018 [ZkolT] states the same rule in its art 46, para 3; however, ss 47C (5–6) of the Competition Act for England/Wales clarifies that the awards not claimed shall be directed to charity.

⁴⁶ *Cy-près* has its origin in US common law and describes use of settlement residues in a manner that comes as close as possible to compensation of the group members in a class action; cf Rachel Mulheron, *The Modern Cy-près Doctrine: Application and Implications* (2006).

⁴⁷ The Office of the Public Prosecutor in Braunschweig imposed on Volkswagen a fine of five million euros and issued a disgorgement order for 995 million euros.

3.4. Collective settlements

The 2018 draft Directive document included a proposal for a standalone mechanism for obtaining court approval for out-of-court mass settlements and for a declaration upon which they become binding for all victims. This idea is rooted in the 2005 Dutch collective settlement act (WCAM), which turned out to be quite successful for settling big international cases. Where settlement negotiations between a representative entity and a prospective defendant succeed without the initiation of contentious court proceedings, this is a much faster and less expensive way to settle a mass dispute. Such mechanisms can be found today in a couple of member states.^{*48} Nevertheless, the directive does not provide any suggestions in this respect. Article 11 applies only to redress settlements accomplished in a situation wherein a representative action is already pending. This is an unnecessarily narrow approach. Practical experience with the Dutch WCAM tells us that a company that has caused a global mass-harm event might be willing to settle the dispute with its European victims without court proceedings (e.g. after a US class-action settlement for victims in the United States).^{*49} This requires only a mechanism for declaring a settlement binding for all victims on the basis of court approval of the settlement terms. In purely domestic or European mass-harm events, there might also be incentives for the accountable companies to settle the whole dispute without mass litigation (e.g. in the wake of a test-case decision or a declaratory judgment against the defendant). Despite the lack of a relevant provision in the new directive, the member states should therefore consider establishing such a standalone mechanism for mass settlements, based on joint application by the parties negotiating the out-of-court settlement. This approach has been taken by the ELI/UNIDROIT project on Model Rules for European civil procedure.^{*50}

Also, the parties negotiating a mass settlement – irrespective of whether it is an out-of-court settlement or a settlement entered into while a representative action is already pending – should be aware of the fact that the Brussels Ia Regulation does not guarantee a preclusive effect of the settlement in cases wherein individual consumers bound by a mass settlement nevertheless file an individual action for (a greater amount of) damages against the defendant in another member state. Article 59 of the latter regulation allows only cross-border enforcement of settlements (as defined in Art. 1, para. 2, lit. b^{*51}); it does not mention recognition in other member states. Mutual recognition as stipulated in Article 36 Brussels Ia, in turn, refers only to judgments.^{*52}

4. Conclusions

Group actions will be available in the near future in all member states, but they follow a completely different pattern than US class actions. The rise of ‘private enforcement’ in European consumer law is occurring simultaneously with class actions’ practical importance hitting rock bottom in the US. *John Coffee*, one of the leading experts in US class-action law, describes the situation in his 2015 book on ‘entrepreneurial litigation’ as follows: class actions are ‘much like a grape in the sun drying slowly into a raisin’, in conditions where ‘the class action may be dying the death of the one thousands cuts’.^{*53} Some of the most important cuts came from the US Supreme Court, which drew a line on a few highly controversial class-action issues in recent years: (1) the court approved class-action waivers in consumer- and labour-law contracts^{*54}, (2) it set

⁴⁸ England/Wales: Consumer Rights Act 2015, s 49B; Competition Act 1998 and s 49C of the Competition Act 1998 (on approval of redress schemes by the CMA); CAT Rules, Rule 96. Slovenia: ZKoliT 2018, arts 12–25; see also the Swiss Tentative Draft of March 2018, arts 352a–52k; Swiss Civil Procedure Code, Recommendation 2013/396, no 26; Commission Report COM (2018) 40 final) p 14–15.

⁴⁹ For a study of the WCAM settlements, see Ianika Tzankova and Deborah Hensler, ‘Collective Settlements in the Netherlands: Some Empirical Observations’ in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes* (Edward Elgar 2013, Chapter 5. – DOI: <https://doi.org/10.4337/9781782546917.00011>).

⁵⁰ ERCP on Collective Settlements outside Collective Proceedings, rules 229–32.

⁵¹ Article 1’s para 2 states, in lit. b, that ‘court settlement’ refers to a settlement that has been approved by the court of a Member State or ‘concluded before a court of a Member State in the course of proceedings’. Therefore, it is no longer an option to argue that a court-approved settlement is not a settlement but a judgment.

⁵² For more details, see Astrid Stadler, ‘Grenzüberschreitende Wirkung von Vergleichen und Urteilen im Musterfeststellungsverfahren(NJW) 2020, 265 et seq.

⁵³ Coffee (n 1) 130 and 132.

⁵⁴ *AT&T Mobility LLC v Concepcion* 563 US 333 (2011); *National Labor Relations Board v Murphy Oil USA, Inc.* 16-307, 21 May 2018.

strict benchmarks for product-liability-related mass settlements^{*55}, and (3) it decided in favour of a strict interpretation of the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure^{*56}.^{*57} As they implement the new directive, the member states will be well advised to take a closer look at these tendencies if they wish to avoid making the same mistakes.

Notwithstanding (and probably unaware of) this development in the US, the European legislature has, first of all, adopted a completely different concept of legal standing, for purposes of avoiding excessive entrepreneurial litigation. Giving legal standing only to consumer associations follows a certain tradition in civil-law countries and can be considered an aspect of a 'European-style class action'. That said, reform efforts tend to pile more and more tasks on consumer associations and impose a snowballing burden on them to enforce consumer rights in connection with all manner of mass-harm events without providing adequate options for financing the enforcement. The member states will have to handle the ambivalence of Directive 2020/1828 and try to balance the safeguards against misuse, on the one hand, with the efficiency of the new mechanism, on the other. In the worst-case scenario, representative actions will not be used at all or will be employed to only a small extent, because there is either no consumer association willing to take the case or very few consumer associations can afford expensive mass litigation. Particularly complex cross-border cases may, accordingly, fall by the wayside. Even the Injunctions Directive of 2009, which forms the basis for Directive 2020/1828, was not a real success for handling of cross-border violations of consumer rights, and prospects are not much brighter today, in that redress measures are much more difficult to litigate for a large number of consumers and they involve considerably higher procedural risks.

All in all, Directive 2020/1828 is a step in the right direction since it imposes an obligation on the member states heretofore reluctant to put into effect a basic model of representative actions in consumer law. Nevertheless, it takes more to ensure that collective redress instruments are effective, unfold a preventive effect, and regulate the behaviour of the markets. The member states should expand legal standing for representative actions to organisations founded *ad hoc* and individual consumers, allow third-party funding within some rough legal framework, and provide additional funding options by establishing access-to-justice funds for mass litigation.

⁵⁵ *Anchem Products, Inc. v Windsor* 521 US 591 (1997); *Ortiz v Fibreboard Corp.* 527 US 815 (1999).

⁵⁶ *Comcast v Behrend* 569 US 27 (2013); *Wal-Mart Stores, Inc. v Dukes* 131 S.Ct. 2541 (2011).

⁵⁷ For more detailed analysis of the development, see Marcus (n 36) 903f; Stadler, 'Kollektiver Rechtsschutz – Chancen' (n 10) 623et seq.