Submission on behalf of the EU Bar Association and the Irish Society of European Law to the Review Group on the Administration of Civil Justice

Irish Society for European Law

Irish Affiliate to the International Federation for European Law

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Introduction

The EU Bar Association (EUBA) and the Irish Society of European Law (ISEL) have prepared the following submissions for the purpose of contributing to the review of Administration of Civil Justice in the Courts of Ireland that is being undertaken by the Review Group chaired by the Honourable Mr Justice Peter Kelly, President of the High Court. The Review Group has been tasked with preparing a Report for the Minister for Justice and Equality which will make recommendations with a view to improving access to civil justice in the State.

The submission derives originally from a conference organised by the EUBA and ISEL on "*Private Damages Remedies in Competition Law*" on 6 October 2017.

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

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

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

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

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

Concerns were raised as to the difficulties arising where there are no representative actions and litigation funding, in particular, relating to the burdensome nature of multiple sets of proceedings on the resources of the Courts as well as the parties. Confusion can arise where substantially identical claims are pursued in multiple proceedings. The potential for disputes

becomes great; with each interlocutory application, there can be debates around appropriate sample cases and the choices of such cases, as well as disputes between the parties as to the number of such cases. The burden on both litigants and the courts can be substantial. In the "*trucks*" claims, there are multiple claims, with some 30 sets of proceedings perhaps appearing in the Competition Law list each time the matters are listed for case-management.

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

The aim of this submission is not however to present those views but rather to present a summary of the comparative experience that was discussed at the conference in relation to representative actions.

It is also noted that the conference was addressed by the Chief Justice of Ireland, who requested a report of the conference. It is intended that the materials in this submission will be incorporated into the report which will be presented to the Chief Justice.

These submissions, which are limited to class actions, are submitted for the consideration of the Review Group.

In assessing the concept of class action, which is currently not permitted as a matter of Irish Law, the focus of these submissions is in relation to access to justice. The submissions will review the comparative approaches to class actions in the England and Wales, the Netherlands, Germany, Australia, New Zealand and the United States. Consideration is also given to European Commission Recommendation 2013/396/EU.

It is hoped that these submissions will be of assistance to the Review Group in its deliberations.

Class Actions and Access to Justice

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

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

Opt-In and Opt-Out

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

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

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

The Irish Position

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

> *"It is probable that the less well off, those disadvantaged in our society, would be the main beneficiaries of a new procedure enabling multi-party action…. It is no easy task- the challenge is to find a just balance in multi-party litigation between procedural efficiency and fairness. The Law Reform Commission has met this challenge successfully. Implementation of this Report would bring us a step closer to succeeding in this task.[1]"*

In Ireland, a practice has arisen that where there are a number of individuals affected by an incident, each take their own individual case and that one generic case is used as a "test case" to establish if there is liability and thereafter the rest of the cases either settle or are heard on an assessment only basis. We have recently seen the "test case" model used in the "slopping out" cases.

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

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

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

> *"• Remedies available: these are limited to injunctive and declaratory relief; damages may not be sought in a representative action.*

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[1] Court Service record of The Hon. Ms Justice Susan Denham (as she then was) "Launch of the Report on Multi - Party Litigation by The Law Reform Commission" dated 27th September 2005 available at: http://courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/97b4a7362c75858f8025708f002f964e?OpenDocument

• Same interest requirement: very strict requirements have been read into the nature of the link that must exist between the parties to a representative action.
• Absence of civil legal aid: section 28(9)(a)(ix) of the Civil Legal Aid Act 1995 excludes from the remit of civil legal aid any application "made by or on behalf of a person who is a member, and acting on behalf of a person who is a member, and acting on behalf, of a group persons having the same interest in the proceedings concerned.[2]"

The Law Reform Commission made the following recommendation:

> *"The Commission recommends that a formal procedural structure to be set out in Rules of Court be introduced to deal with instances of multiparty litigation.[3]"*

Comparative Experience of "The Class Action"

England & Wales

In England and Wales, it is possible to consolidate cases under the High Court's case management powers[4], by way of representative actions and also by way of group litigation orders. More recently, the Competition Appeal Tribunal has been granted power to make collective proceedings orders.

Representative Actions

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

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

The Group Litigation Order (GLO)

A GLO is a procedure whereby a Court if satisfied, can manage a number of individual claims which have common issues of law and fact (similar to our "test case"). In *Tew and others v BoS (Shared Appreciation Mortgages) No 1 plc and others* [2010] EWHC 203 (Ch) the GLO was

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

considered, and emphasis was placed on the need to ensure that the individual circumstances of the claimants are not shut out by the wording of the GLO:

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

Collective Proceeding Order

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

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

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

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

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

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

"(a) the strength of the claims; and
(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

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

"94.—(1) Where a collective proceedings order has been made, and the Tribunal has specified that the proceedings are opt-out collective proceedings, the claims which are the subject of the collective proceedings, may not be settled other than by a collective settlement approval order issued in accordance with this rule.
(2) Any offer to settle by a defendant in the collective proceedings shall be made to the class representative.
(3) An application for a collective settlement approval order shall be made to the Tribunal by—
(a) the class representative; and
(b) the defendant in the collective proceedings, or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.
(4) The application referred to in paragraph (3) shall—
(a) provide details of the claims to be settled by the proposed collective settlement;
(b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;
(c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;
(d) specify how any sums received under the collective settlement are to be paid and distributed;
(e) have annexed to it a draft collective settlement approval order; and
(f) set out the form and manner by which the class representative proposes to give notice of the application to—
(i) represented persons, in a case where it is expected that paragraph (11) will apply; or
(ii) class members, in a case where it is expected that paragraph (12) will apply."

The regime set up by the Consumer Rights Act 2015 is still in its infancy; as of yet, the CAT has not approved any CPOs, and therefore it is hard to assess the regime that is in place.

Recently in *Merricks CBE v Mastercard* [2017] C.A.T. 16, an application was made to the CAT by the proposed class representative (Mr Merricks) for an opt-out collective proceedings; in relation to a follow-on action for damages (the follow-on action was based on an EU Commission Decision that Mastercard had imposed unlawful fees on transactions). That application was dismissed by the CAT and an application to appeal this decision was also dismissed. The Applicant has made applications to the Court of Appeal for appeal and simultaneously to the Administrative Court of the High Court, by way of judicial review, to challenge the CAT's decision and these proceedings have not concluded.

Netherlands

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

Group Actions

Although the Dutch Civil Code does not specifically provide for group actions (*i.e.,* actions that bundle the claims of multiple individual victims into one lawsuit), various ways of bundling claims have developed through legal practice.[5] Typically, group actions are brought by representative entities, such as foundations or special purpose vehicles, which, under Dutch law, can be created easily and cheaply for purposes of filing litigation.[6] To ensure that the representative entity can obtain damages (rather than mere declaratory or injunctive relief) on behalf of the individual claimants involved,[7] the entity must either (1) obtain authorization to represent or act on behalf of those claimants through individual powers of attorney or mandates, or (2) purchase the claimants' claims by executing individual assignments.[8] As a result, group actions require individual claimants to "opt in" to the suit, rather than "opt out," as is the case in the United States. The assignment model of bundling claims is "widespread in claims for damages following an infringement of competition law in the Netherlands."[9]

Although in group actions, the individual victims' claims are generally brought in the name of the representative entity, that entity, if challenged by the court or the defendants, must be able to furnish proof of each individual authorization or assignment.[10] Thus, while the claimants' identities are generally protected from public disclosure, their identities may become known to the court and/or the defendants through the course of the litigation.[11]

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[5] *See* Jeroen Kortmann & Marieke Bredenoord-Spoek, *The Netherlands: A Hotspot for Class Actions?*, 2011 4 Global Comp. Litig. Rev. 1, 14 (2011).

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

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

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

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

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

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

One highly-publicized example of a Dutch group action for damages is the ongoing trucks cartel litigation, which Cartel Damage Claims ("CDC") filed in 2017, seeking to enforce competition law claims for damages resulting from the Europe-wide trucks cartel.[12] Prior to the suit's commencement, over 200 companies and individuals assigned their damages claims to CDC, a company specializing in corporate claims for damages resulting from the infringement of EU or national competition law.[13] CDC then filed the action in its own name to enforce the assigned claims.[14] The action is a follow-on to the July 2016 decision by the European Commission, in which the Commission fined several truck manufacturers, including MAN, Volvo/Renault, Daimler, Iveco, and DAF, 2.93 billion euro for their participation in a price-fixing cartel that covered the entire European Economic Area and lasted 14 years.[15]

Another example of group damages litigation in the Netherlands is the air cargo cartel litigation, in which victims of a Europe-wide air cargo cartel operating from 1999 through 2006 assigned their damages claims to a litigation vehicle – Stichting Cartel Compensation – which then asserted those claims against KLM, Air France, Lufthansa, and British Airways on the claimants' behalf.[16] Notably, in September 2017, the Amsterdam District Court explicitly upheld the validity of the assignments, and endorsed the assignment model for the bundling of claims – holding that the assignments were not contrary to public morals, and did not breach the determinability requirement or the prohibition on fiduciary transfer of ownership.[17]

Collective Actions

Article 3:305a of the Dutch Civil Code, introduced in 1994, provides claimants with the right to bring collective proceedings in connection with various types of claims,[18] including infringement of competition law and violations of securities laws. Collective proceedings must be filed by a claim vehicle (either a foundation ("stichting") or association ("vereniging"))[19]

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the deeds of assignment and underlying titles related to the claims. The court ultimately determined that the assignments were valid. *See id.*

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

[13] *See id.*

[14] *See id.*

[15] *See id.*

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

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

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

[19] *See* Kessler Topaz Meltzer Check LLP, A Primer on Shareholder Litigation: Securities Class Actions, Non-US Jurisdiction Actions, Shareholder Derivative Actions, Mergers & Acquisitions Litigation, Appraisal Actions, and Direct Actions (Opting-Out) 38 (Feb. 2017) (hereinafter, "Shareholder Litigation Primer"), *available at* https://www.ktmc.com/files/9180_Final_Primer_2-24-17_PDF_Web_Version.pdf. A foundation or stichting

that is acting in its own name on behalf of other people's interests that are suitable to be bundled. Notably, the claimants themselves are not parties to the suit, and unlike in the group actions discussed above, in a collective proceeding, there is no need for a formal assignment of claims. Rather, the foundation or association is permitted to act as a representative of the claimants' interests.

Unlike in the United Kingdom and the United States, Dutch law does not currently provide a mechanism for having a class certified.[20] Rather, the entity bringing the claim must simply demonstrate that it is "representative."[21] Moreover the entity need not have its own direct financial interest in the claim – its interests in pursuing the claim can be merely to further objectives in its governing documents (*e.g.,* seeking to defend the rights of its members, etc.).

Importantly, as discussed above, monetary damages are not available under Article 3:305a.[22] Rather, such proceedings aim to obtain a declaration regarding the liability of the defendant.[23] Once a declaration is achieved, the persons whose interests have been represented in the proceeding can opt out by declaring that they do not want to be bound by the judgment.[24] If they choose not to opt out, they can then commence separate proceedings to obtain monetary damages,[25] or can attempt to achieve a global settlement through the WCAM mechanism,[26] discussed further below.

However, on November 16, 2016, a draft bill was submitted to the Dutch Parliament, which would introduce collective proceedings for monetary damages in the Netherlands.[27] That bill, which was subsequently amended in January 2018,[28] is expected to be enacted later this year.[29] Among other things, it introduces stricter requirements with respect to the legal entity claiming damages, including new requirements with respect to its governance, funding, and representativeness.[30] It also introduces certain jurisdictional requirements.[31] Members of the class for whose benefit the action is brought will have the ability to opt out at the beginning of the proceedings.[32] They will also have a second opportunity to opt out in the event of a collective settlement.[33] However, similar to the United Kingdom, the opt out mechanism is

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is a legal entity that has no existing or set members and that may be set up solely for the purpose of pursuing collective actions or settlements. *See id.* An association or vereniging, on the other hand, has members and aims to achieve a specific purpose. *See id.* To bring a claim, both foundations and associations must be not-for-profit entities and they must be legally independent and not owned by any one person. *See id.* at 39

[20] Houthoff Buruma, Class Actions in the Netherlands 4 (Mar. 2017) (one file with author).

[21] *Id.*

[22] *Id.*; *see* Shareholder Litigation Primer, *supra* note 53, at 39.

[23] Houthoff Buruma, *supra* note 54, at 5; *see* Shareholder Litigation Primer, *supra* note 53, at 39.

[24] Houthoff Buruma, *supra* note 54, at 5.

[25] *See id.*; Shareholder Litigation Primer, *supra* note 53, at 39.

[26] Shareholder Litigation Primer, *supra* note 53, at 39.

[27] *See* Houthoff Buruma, *supra* note 54, at 4; Shareholder Litigation Primer, *supra* note 53, at 40.

[28] Jeroen Kortmann, *Overview of Legislative Proposal on Collective Action (NL) – As Amended by the Amendment Bill of 11 January 2018*, Stibbe, Jan. 23, 2018, https://www.my.stibbe.com/mystibbe/news-insights/overview-of-legislative-proposal-on-collective-action-nl-as-amended-by-the-amendment-bill-of-11-january-2018/

[29] *See id.*

[30] Houthoff Buruma, *supra* note 54, at 6.

[31] Shareholder Litigation Primer, *supra* note 53, at 40.

[32] *See id.*

[33] Kortmann, *supra* note 62.

limited to class members domiciled in the Netherlands, and class members domiciled elsewhere will only be permitted to join the action by opting in.[34] A limited exception exists for foreign class members that are readily identifiable, in which case the court may order that the opt out class extend to those class members as well.[35] If more than one legal entity brings a collective action for the same events, the legislation requires the district court to appoint an exclusive representative for all parties.[36] All other representative legal entities, however, remain parties to the proceeding.[37]

Collective Settlements

In addition to group actions and the current (and proposed) collective litigation mechanisms discussed above, Dutch law also provides a mechanism for class settlements. The WCAM, introduced in 2005, permits parties to a settlement agreement to request that the Amsterdam Court of Appeals declare the settlement binding upon a class or classes of persons.[38] Similar to the U.S. model, upon which it was inspired, it provides for a court-approved class settlement on an opt out basis.[39] To date, the WCAM has been successfully applied in eight cases: (1) DES (2006), (2) Dexia (2007), (3) Vie d'Or (2009), (4) Vedior (2009), (5) Shell (2009), (6) Converium (2012), (7) DES (2014), and (8) DSB Bank (2014).[40]

The WCAM has four phases: (1) conclusion of a settlement agreement; (2) proceedings before the Amsterdam Court of Appeals; (3) the opt-out period for beneficiaries; and (4) the payment to beneficiaries.[41]

With respect to the first phase, a settlement agreement must be reached between (1) the parties that will pay compensation for the event that caused damage, and (2) a Dutch foundation that, pursuant to its constituent documents, represents the interests of the class of persons intended to be covered by the agreement.[42] Unlike class representatives in the United States, the Dutch entity is not appointed by the court and it need not be personally harmed by the alleged misconduct in order to have standing. However, the entity must be able to demonstrate that it represents the class sufficiently. Notably, the settlement need not be based on an existing, contested, or pending litigation. Rather, it could start with a private and undisclosed negotiation process among the representatives of the interested parties. If it is based on a pending litigation, that litigation need not be pending in the Netherlands. Moreover, the settlement agreement may be governed by Dutch or foreign law, at the parties' option, subject to certain exceptions and limitations set forth in the Rome I Regulation.[43]

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

Once the defendant and the Dutch entity agree to a settlement, they enter phase two, during which they file a formal request with the Amsterdam Court of Appeals to declare the settlement binding.[44] The Court will call a formal hearing, during which the beneficiaries and other interested parties are permitted to object to the settlement.[45] Such hearings are sometimes preceded by written submissions.[46] The parties initiating the proceeding must also notify all intended beneficiaries of the settlement. All known, interested parties must be notified in accordance with applicable treaties, regulations, Dutch rules of civil procedure and/or instructions from the Amsterdam Court.[47] Advertisements in newspapers are also required.[48] The Amsterdam Court of Appeals will declare the settlement binding upon the parties thereto and the members of the class, except in certain circumstances, including, for example, if it believes the amount of compensation is unreasonable in light of the overall damages.[49] The Court's decision cannot be appealed by class members. Rather, it may only be appealed by the initial parties to the settlement agreement, and only on matters of law, in the event that the settlement is not approved.[50]

Once the settlement is declared binding, the proceedings enter phase three, during which time (1) the settlement's final terms are published, (2) class members file claim forms, and (3) class members are given the opportunity to opt out.[51] Class members must be given at least one year to file claim forms, and at least three months to opt out.[52] Settlement agreements under the WCAM generally include a "blow" or "bust up" provision, pursuant to which the defendants have the right to terminate the settlement agreement if more than a certain percentage of class members opt out in a timely manner.[53] This is similar to many class action settlements in the United States.

Upon expiration of the opt out period, all class members who did not opt out are, in principle, bound by the settlement, unless they could not have been aware of their damage.[54] Payments are then made to all class members who have submitted a claim form.[55]

Unless it is manifestly contrary to public policy, judgments of the Amsterdam Court of Appeals that declare settlements binding under the WCAM must be recognized by all EU member states in accordance with the Brussels I Regulation.[56] Whether WCAM decisions will be recognized by courts outside of Europe remains to be seen and will largely depend upon local

[44] *Id.* at 15.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Kortmann & Bredenoord-Spoek, *supra* note 39, at 15.
[49] Houthoff Buruma, *supra* note 54, at 15.
[50] *Id.*
[51] *Id.* at 16.
[52] Kortmann, *supra* note 72.
[53] Houthoff Buruma, *supra* note 54, at 16.
[54] *Id.* at 17; *see also* Kortmann & Bredenoord-Spoek, *supra* note 39, at 15.
[55] Houthoff Buruma, *supra* note 54, at 17.
[56] *See* Tjeenk & Heeswijk, *supra* note 74.

law.[57]

Germany

Collective Securities Litigation

Germany does not have "class action" litigation like the United States because under the German constitution, there is a fundamental right to be heard in court.[58] However, in the wake of Deutsche Telekom cases,[59] the German legislature adopted the Capital Market Model Proceedings Act (KapMuG), which gives the court a system for efficiently dealing with securities litigation involving multiple claimants.[60] This system, however, is an opt in system, meaning that claimants must still file their own complaints (or a joint complaint with numerous plaintiffs).[61] Nevertheless, the KapMug provides a mechanism for the court to decide common legal and factual issues on the basis of a model case, the outcome of which is binding on all parties.[62]

Specifically, the KapMuG provides that any investor claiming damages due to violations of the German Securities Trading Act (Wertpapierhandelsgesetz or WpHG) may file a complaint and submit an application to institute a model case proceeding.[63] If, within four months, at least ten complaints are filed concerning the same subject matter, then the court may initiate the KapMuG model case proceeding.[64] In doing so, the court stays all pending cases on the subject matter (even those that are filed after the model case proceeding commences),[65] and it refers the matter to the higher regional court (the Oberlandesgericht or OLG).[66] The OLG then determines the issues to be decided and selects a model plaintiff from among the cases.[67]

The model plaintiff is responsible for overseeing and directing the litigation of the common issues – much like the lead plaintiff does in a U.S. class action.[68] However, instead of representing absent class members, the model plaintiff only represents those claimants who have filed complaints.[69] Additional complaints may be filed and/or claims may be registered at any point after the KapMuG is initiated and up until a decision is rendered (bearing in mind,

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[57] *See* Jan de Bie Leuveling Tjeenk & Dennis Horeman, *Class and Group Actions 2018 – International Class Action Settlements in the Netherlands Since Converium*, International Comparative Legal Guides, Oct. 23, 2017, *available at* https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/international-class-action-settlements-in-the-netherlands-since-converium#chaptercontent7.

[58] Shareholder Litigation Primer, *supra* note 53, at 30.

[59] *See id.* at 28. Specifically, the KapMug was enacted after the German court had significant difficulty administering over 13,000 individual securities actions filed against Deutsche Telekom involving substantially similar claims. *See* Burkhard Schneider, *Class and Group Actions 2018: Germany*, International Comparative Legal Guides, Oct. 23, 2017, *available at* https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/germany.

[60] *See* Ellen Braun, Allen & Overy, Collective Action: Alternative Strategies in Germany 9 (2017) (unpublished) (on file with the American Bar Association).

[61] *See* Shareholder Litigation Primer, *supra* note 53, at 30.

[62] *Id.*

[63] *Id.*

[64] *Id.*; *see* Braun, *supra* note 105, at 9.

[65] *See* Braun, *supra* note 105, at 9.

[66] Shareholder Litigation Primer, *supra* note 53, at 30.

[67] *Id.* at 30-31.

[68] *Id.* at 31.

[69] *See id.*

of course, the statute of limitations).[70] If a claimant chooses to register their claim, rather than file a complaint, the registration tolls any applicable limitation period.[71] However, the claimant must convert his registration to an active complaint before the KapMuG concludes if it wishes to be bound by the outcome.[72] The advantage of registering a claim rather than filing a complaint is that the former carries with it lower court costs and no risk of having to pay the defendants' attorneys' fees, at least up until the point that the claimant converts his registration into an active complaint.[73]

Once a model case reaches judgment, all individual cases resume in order to litigate individual factual and legal issues, such as the amount of each claimant's damages.[74] If the model claimant instead reaches a settlement with the defendants, it can apply to have the settlement approved by the court.[75] At that time, each stayed plaintiff is given an opportunity to opt out of the settlement.[76] If fewer than 30% of all pending but stayed claimants opt out, then the settlement is binding on all remaining claimants.[77]

Other Collective Action Mechanisms

Germany has also passed laws providing for collective actions in a handful of other specific circumstances. For example, the Act on Cease and Desist Actions (UKlaG) provides for collective actions in cases involving violations of certain consumer protection laws.[78] Under the UKlaG, however, collective actions can only be brought by specific associations or institutions and they are limited to injunctive relief.[79] The Unfair Competition Act (UWG) provides for a similar collective action for injunctive relief to be brought in cases involving a violation of the prohibition against unfair competition, and the Act Against Restraint of Competition provides for a collective action to request that ill-gained profits resulting from violations of European or German antitrust laws be handed over to the federal budget.[80] Finally, the recently amended Environmental Damage Act (USchadG) and the Environmental Judicial Review Act (UmwRG) provide for representative actions in which certain authorized environmental associations may seek judicial review of violations of laws aimed at environmental protection.[81] Notably, none of these statutes permit collective actions for damages, nor do they provide individuals (rather than specific consumer, trade, and/or environmental organizations) with standing to bring suit.[82] However, alternative strategies

[70] *See id.*
[71] *See id.*
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] *See id.*
[76] *See id.*
[77] *See id.*
[78] *See* Jurgen Beninca & Michael Masling, *Class/Collective Actions in Germany: Overview*, Practical Law, Dec. 1, 2016, *available at* https://content.next.westlaw.com/Document/Ia8e684fb454411e598dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1.
[79] *See id.*
[80] *See id.*
[81] *See* Schneider, *supra* note 104.
[82] *See id.*

have recently begun to develop.

For example, in the cement cartel case filed by CDC, the German Federal High Court held that it was permissible for multiple claimants to bundle their individual damages claims into one legal dispute by assigning those claims to a third party litigation vehicle under section 398 of the German Civil Code.[83] So long as the vehicle in question has sufficient funds to cover the potential cost exposure, and the assignment is executed in accordance with German law, this form of collective redress is now considered acceptable by the German Courts.[84]

Alternatively, multiple plaintiffs can bring a joint claim under the German Code of Civil Procedure provided that (1) the parties have a claim arising from the same factual and legal grounds, (2) their claims are substantially similar, and (3) the trial court is competent for all claims.[85]

New Zealand

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

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

From a review of the decision of *Saunders v Houghton* [2010] 3 NZLR 331 made by the Court of Appeal Wellington it is evident that a low threshold is applied to rule 4.24:

> *"The rule permits the making of representation orders. They are a form of what elsewhere are called class action orders. Rule 4.24 substantially reproduces a 19th century English rule which is retained also in other common law states, including Canada and Australia. There are different lines of authority, some such as Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] AC 426 (HL) adopting a generous approach to representation applications and others that do not.*
>
> ***[11]** Rule 4.24 speaks of "persons with the same interest". That phrase, or its equivalent in other jurisdictions, has been read more and less widely. The Chief Justice of Canada in Western Canadian Shopping Centres Inc v Dutton [2001] 2 SCR 534 recounted at [24]-[26] the flexible and generous approach to class actions which preceded and immediately followed the Supreme Court of Judicature Act 1873 and the adoption of the r 4.24 equivalent. This was followed by a subsequent more restrictive*

[83] *See* Braun, *supra* note 105, at 11-13.
[84] *See id.* at 13.
[85] *See id.* at 9.

approach. Finally, the effects of mass production and consumption revived the problem of many suitors with the same grievance and resulted in the need for recourse to the class action.

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

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

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

Australia

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

"33C Commencement of proceeding

(1) Subject to this Part, where:

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

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

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

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

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

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

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

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

(b) whether or not the proceeding:

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

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

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

The United States[86]

Rule 23 of the Federal Rules of Procedure, which governs class actions brought in United States federal courts,[87] was originally promulgated in 1938, and largely re-written in 1966, by the Advisory Committee on Civil Rules.[88] In its present form, Rule 23 allows an individual or group of plaintiffs to bring a lawsuit on behalf of a class of similarly situated persons and entities, so long as certain requirements are met.[89]

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

- Numerosity – the class must be "so numerous that joinder of all members is impracticable";
- Commonality – there must be "questions of law or fact common to the class";
- Typicality – the class representatives' claims and defences must be "typical of the claims or defences of the class"; and
- Adequacy – the class representatives and their counsel must "fairly and adequately protect the interests of the class."[90]

Generally, the numerosity requirement will be satisfied when a class is comprised of 40 or

[86] This summary was written by Meghan J. Summers, Esq. for purposes of inclusion in the Report on Litigation Funding & Class Actions prepared by the European Bar Association in conjunction with the Irish Society of European Law. Ms. Summers is a Partner of Kirby McInerney LLP, a law firm with offices in New York, New York and San Diego, California that specializes in class action litigation involving, *inter alia*, securities and commodities fraud, consumer fraud, and antitrust violations.

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

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

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

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

more members, but not when a class is comprised of 21 or fewer members.[91] With respect to commonality, not every issue in the case must be common to all class members. Indeed, in certain circumstances, even a single common question will suffice.[92] However, there must be sufficient commonality such that relief will turn on a question of law applicable in the same manner to each class member. Similarly, for purposes of typicality, the claims of the entire class need not be identical, but the class representatives must generally possess the same interests and suffer the same injury as the absent class members.[93] Finally, the adequacy requirement is generally satisfied so long as the attorneys representing the class are qualified and competent, and the class representatives' interests are aligned with those of absent class members.[94]

In addition to Rule 23(a)'s requirements, class actions must also meet the requirements of one of the three categories of class actions set forth in Rule 23(b)(1), (b)(2), and (b)(3). The majority of class actions seeking monetary damages fall under Rule 23(b)(3), which requires that: (i) questions that are common to the class also "predominate" over any questions affecting only individual class members; and (ii) class treatment be "superior to other available methods for the fair and efficient adjudication of the controversy."[95]

Rule 23(c) directs courts to determine "[a]t an early practicable time" after a case is filed, whether Rule 23(a) and (b)'s requirements have been met and therefore, whether the case may be certified as a class action.[96] In practice, however, motions for class certification are generally only filed and decided after the action has survived a motion to dismiss. If, on a motion for class certification, the court determines that Rule 23's requirements have been met, it will certify the action as a class action. However, if it determines that one or more of Rule 23's requirements have not been met, it will deny the request for class certification. Because individual claims are often too small to justify the costs of litigation, denial of class certification often sounds the "death knell" for the litigation.[97] Nevertheless, denial of class certification is not considered a final order and therefore, plaintiffs are not entitled to an immediate appeal as of right. However, Rule 23(f) provides appellate courts with discretion to permit the immediate appeal of an order denying class certification if an application for appeal is made within 14 days of the order.[98]

Assuming the court certifies the case as a class action, the litigation generally proceeds to discovery, during which time the parties exchange documents, and the parties, third-party

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[91] *See Sandoval v. M1 Auto Collisions Centers*, 309 F.R.D. 549, 562 (N.D. Cal. 2015) (citing cases).
[92] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).
[93] *See* Beverly Reid O'Connell & Karen L. Stevenson, *Actions with Special Procedural Requirements – Class Actions*, *in* Rutter Practice Guide: Federal Civil Procedure Before Trial (National ed., Apr. 2018).
[94] *See id.*
[95] Fed. R. Civ. P. 23(b)(3). Rule 23(b)(1) class actions involve the situation in which necessary parties under Federal Rule of Civil Procedure 19(a) are too numerous to be joined, and Rule 23(b)(2) class actions are those involving claims for common injunctive relief, particularly those involving civil rights violations. *See* Fed. R. Civ. P. 23(b)(1) & (b)(2).
[96] Fed. R. Civ. P. 23(c).
[97] *See, e.g., In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016) (noting that "class certification is often the defining moment in class actions [] for it may sound the 'death knell' on the part of plaintiffs").
[98] *See* Fed. R. Civ. P. 23(f).

witnesses, and experts are deposed. Thereafter, substantive motions (called motions for summary judgment) are generally filed and if necessary, the case proceeds to trial. More often, however, the parties will reach a settlement agreement prior to a final decision on the merits.[99]

In representing the class, the class representatives (also called "lead plaintiffs")[100] and their counsel (called "lead counsel" or "class counsel") have important obligations to absent class members. Moreover, Rule 23 provides structural protections to absent class members to ensure that their rights are protected. One such protection is Rule 23(b)(3)'s "notice" requirement, which mandates notice to absent class members: (i) of the pendency of a class action; (ii) of their right to opt out and pursue their claims individually, should they so desire; and (iii) that if they do not opt out, any subsequent judgment in the class action will be binding upon them.[101] The U.S. Supreme Court has ruled that in Rule 23(b)(3) class actions, such notice to absent class members is constitutionally required because adjudicating absent class members' claims without notifying them of the case's existence or their right to opt out would violate due process.[102] Accordingly, after a Rule 23(b)(3) class is certified, all class members that can be "identified through reasonable effort"[103] are notified of the above information directly (generally by mail), and for those that cannot be specifically identified, notice is provided in newspapers, on television, and/or via the internet.

Another structural protection afforded by Rule 23 is court approval of settlement. When parties to a class action decide to settle the case, they must present the terms of the settlement to the court. If the court preliminarily approves the settlement, class counsel must notify the class of the proposed settlement, inform class members of their right to object to the settlement, and in Rule 23(b)(3) class actions, again inform class members of their right to opt out.[104] After such notice is disseminated, the court holds a final fairness hearing at which point it either officially approves of or rejects the settlement. If the settlement is approved, payment is then made to all class members who filed a claim form and chose not to opt out.

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

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

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

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

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

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

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

Similarly, class actions empower the economically powerless by allowing individuals with small claims and limited financial resources to seek redress when they would otherwise be unable to do so. They also serve the function of deterrence by holding large corporations accountable for the full costs of their misconduct. Finally, class actions provide a more efficient way to conduct litigation by eliminating the need to re-litigate common issues in a large number of individual cases, thus easing the burden on the judiciary. In this way, class actions also ease the burden on defendants by protecting them from having to defend themselves against multiple lawsuits involving the same or substantially similar issues.

European Commission Recommendation 2013/396/EU

In June 2013 the European Commission adopted a Communication entitled "*Towards a European Horizontal Framework for Collective Redress*" and published Recommendation 2013/396/EU[105] which set out a list of non-binding principles relating to both injunctive and compensatory collective redress mechanisms that the Commission indicated should be common across the EU.

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

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

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

[105] *See* European Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law (2013/396/EU), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013H0396.

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

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

In January 2018 the Commission published a report summarising EU Member States' progress on implementing the Recommendation's principles.[106] According to the report: (i) nineteen Member States currently have some form of compensatory collective redress in place (although many are not "horizontal" as the Recommendation suggested, but are limited to specific types of claims), (ii) seven Member States enacted reforms to their laws on collective redress following the Recommendation's enactment, and (iii) nine Member States still have no compensatory collective redress mechanisms in place at all. The report reiterated that the Commission enacted the Recommendation in order to provide EU Member States with a "*concrete incentive to adopt legislation complying with [the Recommendation's] principles [on collective redress*]." Yet, the report concluded that there has been "*limited follow-up to the Recommendation*" by many of the Member States. Accordingly, the Commission stated its intention to further promote the Recommendation's principles in order to increase the availability of collective redress actions and improve access to justice in the Member States.

A New Deal for Consumers

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

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

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

[106] *See* Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law (2013/396/EU) (COM(2018) 40) (Jan. 25, 2018), *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018DC0040.

v.*Improved conditions for businesses.*

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

1. a proposal to amend the unfair terms in consumer contracts directive[107], the directive on consumer protection in the indication of the prices of products offered to consumers[108], the directive concerning unfair business-to-consumer commercial practices[109] and the directive on consumer rights[110]; and

2. a proposal on representative actions for the protection of the collective interests of consumers (and repealing the directive on injunctions for the protection of consumers' interests[111]).

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

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

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

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

Under the Directive qualified entities may bring representative actions, however they must meet certain criteria before so doing. In particular, they must have a non-profit character and

[107] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.
[108] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *available at* https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31998L0006.
[109] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive', *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029.
[110] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0083.
[111] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0022.

a legitimate interest in ensuring the provisions of relevant European Union law are complied with. This is to ensure that the legal system is not manipulated in a way whereby the entity bringing the action is looking after its own interests rather than the interests of the consumer.

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

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

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

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

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

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

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

Timeline

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

Conclusion

It is hoped that the within submissions will be of assistance to the Review Group in compiling their Report on recommendations to improve access to civil justice in the area of class action litigation.

In particular, it is hoped that the comparative analysis of England and Wales, the Netherlands, Germany, Australia, New Zealand and the United States will assist the Review Group in assessing whether any of these other models would be suitable or could be adapted to be suitable in Ireland. Furthermore, it is hoped that our review of the European Commission's Recommendation 2013/396/EU and its related Report will assist the Review Group in highlighting the Commission's view in this area and also the proposed directive to allow for representative actions for the protection of the collective interests of consumers.

Dated this 28th June 2018