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Collective action between regulatory goals and individual claimants' rights – Collective redress mechanisms in EU Member States as points of departure for procedural innovation

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Abstract: The EU Collective Redress Recommendation has invited Member States to introduce collective redress mechanisms by 26 July 2015. The well-known reservations claim potentially abusive litigation and potential settlement of not well-founded claims resulting from controversial funding of cases by means of contingency fees and from 'opt-out' class action procedures. The paper posits that there may also be some fear that the European Commission may try to pursue the enforcement of its regulatory agenda in this way at the expense of individual claimants' interests. Therefore a comparative analysis is carried out to see to what extent concerns about individual rights as opposed to regulatory goals are reflected in the different newly revised systems in place across Europe. As an interim result the Dutch settlement procedure for mass damage claims, the English Group Litigation Order and the German test case procedure turn out to be relatively well-suited to deal with mass damage claims. At the same time, none of them can quite reach an optimal balance between individual rights and regulatory goals and therefore each of them is subject to criticism. That is why the further question is raised in how far these procedures could complement each other, thus contributing to the enforcement of individual rights without overregulating markets in Europe.

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I. INTRODUCTION

- 1 Against the backdrop of the development of collective redress in consumer law, its general thrust points in two directions: Not only does collective redress aim at ensuring implementation of laws, sanctioning breaches of law ex post; but in doing so, it is also targeted towards avoiding the danger of future breaches on the basis of its erga omnes effect. Despite its immediate link to the enforcement of individual rights, this latter regulative effect through private litigation without government sponsorship has been addressed particularly clearly in the US legal discussion on so-called “private attorney general provisions” in the areas of consumer protection, civil rights, and employment discrimination. It is criticized by some, who view the pertinent litigation as an effort by private interest groups to sidestep the legislature and to establish regulatory policy objectives which they could not achieve through regular legislative or regulatory procedures.¹

¹ Kip Viskusi, *Overview*, in REGULATION THROUGH LITIGATION 1, 2-4 (K. Viscusi ed., 2002).

- 2 From this perspective, the 1998 Master Settlement Agreement (MSA) on smoking-related medical costs, which resolved cigarette litigation, was viewed as an example of a settlement that sidestepped legislative procedures in order to impose taxes.² A similar reasoning has been applied to the ban on advertising, which was also included as an “additional regulatory provision” in the MSA and was compensating for a lack of regulatory control.³ These functions are clearly reaching beyond the traditional European understanding of civil procedure. The latter is centered on the enforcement of individual rights in a two-party relationship. At the same time, this concept aims to grant access to the courts for individuals with small claims, which may not otherwise be ensured for individual claims of this kind.⁴ In contrast, from the individual claimants’ perspective, a very different, new challenge for the effectiveness of collective redress has been emerging in the US, in light of the entrepreneurial and profit-oriented approach to lawsuits and their underlying proceedings, resulting inter alia from the legality of contingency fee arrangements. With financial investors funding a growing number of lawsuits and assuming a growing amount of risk in return for a substantial profit share, third-party interests play an increasingly significant role.⁵ Individual claimants may therefore have to be protected against an overwhelming influence emanating from these private forces under this regime.
- 3 With respect to collective action in Europe, this raises the question as to how far EU legislation and legislative policy on collective redress are subject to a parallel dichotomy. Regulatory policy and collective redress are two sides of the same coin. This issue may prove to be particularly relevant in light of the experience obtained so far in the implementation of the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms, which invites Member States to introduce collective redress mechanisms by 26 July 2015 (II).⁶ In order to evaluate these legislative initiatives

² Kip Viscusi & Joni Hersh, Tobacco Regulation Through Litigation: The Master Settlement Agreement 10-11, 29-30 (National Bureau of Economic Research Working Paper 15422, October 2009), <http://www.nber.org/papers/w15422.pdf>.

³ *Id.* at 13-14.

⁴ Astrid Stadler, *Class Actions in den USA als Vorbild für Europa?*, in DIE EU-SAMMELKLAGE 91, 94 (Christoph Brömmelmeyer ed., 2013).

⁵ *Id.* at 106.

⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law, 2013 O.J. (L 201) 60.

against the background of the above-mentioned risks of regulation through litigation, one would have to look for loopholes they may create for private interest groups and regulatory policy interests to bypass legislation through litigation. This may then possibly lead to conclusions on the effectiveness of the respective legal rules. However, different application contexts in the US and in Europe may call for different effectiveness benchmarks and different parameters. Whereas in the US ineffective regulation marked the beginning of the regulatory role of collective action, these parameters may fundamentally differ in Europe. The relatively far-reaching strict consumer regulation in the EU and regulatory oversight have only left limited room for collective action and may still be the reason behind the relatively lax version of collective action in place in Europe in general. Looking more closely at regulation and regulatory enforcement in Europe, we see that another key actor comes into play. It is proposed that, in Europe, regulation through litigation may be, to some degree, determined by the power of private interest-groups who may have secured themselves access to courts on the basis of collective proceedings in their own (lobbying) interests, foreclosing individual claimants and possibly thwarting the very goal of civil procedure (III.). The concept of regulation through litigation could therefore be explored from a new angle, examining the meaning of individual rights in collective action suits. This analysis will form the basis for such a distinctly European and context-specific perspective on regulation through litigation, leading to more innovative and open collective proceedings (IV.) and a more thorough balancing of individual and regulatory interests in Europe.

II. COLLECTIVE REDRESS ON THE EU AGENDA

- 4 Therefore, according to the EU regulatory concept, in terms of policy strategy, collective redress is targeted towards an effective enforcement of the underlying regulatory goals, supplementing any public enforcement.⁷ This is why collective redress can be regarded as a means to improve consumers' material rights – a means that has gradually been introduced to a growing number of fields of regulation. Under the Directive on misleading advertising of 1984, Member States may empower persons or organizations with a “legitimate interest” to bring legal

⁷ Burkhard Hess, “Private law enforcement” und Kollektivklagen, 2011 Juristenzeitung [JZ] 66, 70 (Ger.).

action.⁸ The Directive on injunctions for the protection of consumers' interests enacted in 2009⁹ provides that any payment by the defendant for noncompliance with a court order will benefit public funds, thus resulting in a potential tool for the implementation of regulatory policy. The Directive 2004/48/EC on the enforcement of intellectual property rights aims at an effective prevention of counterfeiting and product piracy, thus pursuing a similar regulatory strategy in the field of collective redress.¹⁰ The White Paper on damages actions for breach of the EC antitrust rules published by the Commission on 2 April 2008, treating, among other measures to ensure effective antitrust enforcement, the regulation of collective redress, did not forward any concrete legislative proposals.¹¹ The subsequent draft proposal, presented informally in 2009, was withdrawn because it met with intense internal debate and fierce criticism raised by the Member States.¹²

- 5 On 11 June 2013, the European Commission published another set of proposals on private antitrust litigation, including among others a Draft Recommendation on promoting group claims, which, by its nature, is non-binding. It was jointly issued by the Justice, Consumer Affairs and Competition departments of the Commission. The Directive 2014/104/EU on Antitrust Damages Actions was formally signed into law on 26 November 2014.¹³ It provides for rules on the use of evidence, the effect of decisions by national competition authorities, the applicability of joint and several liability, and the availability of a pass-on defense, but does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.

⁸ Art. 4 (1) of the Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 1984 O.J. (L 250) 17.

⁹ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, 2009 O.J. (L 110) 30.

¹⁰ Directive 2004/48/EC of the European Parliament and the Council on the enforcement of intellectual property rights of 29 April 2004, 2004 OJ (L 195) 16.

¹¹ White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final (Apr. 04, 2008).

¹² For details of the draft proposal see Wagner-v. Papp, Der Richtlinien-Entwurf zu kartellrechtlichen Schadensersatzklagen, , 2009 Europäisches Wirtschafts- und Steuerrecht [EWS] 445 (Ger.).

¹³ **Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union 2014 O.J. (L 349) 1.**

6 In contrast, the non-binding Collective Redress Recommendation invites Member States to introduce collective redress mechanisms by 26 July 2015.¹⁴ It aims at a coherent approach envisaging the regulation of collective redress across different sectors, urging Member States to provide relief for private plaintiffs in cases of violations of competition, consumer protection, environmental and other laws on a collective basis under certain circumstances.¹⁵ It is not, however, targeted towards harmonization as in the case of private antitrust damages actions. Instead, its common, non-binding principles are intended to serve as guidelines for the Member States' conceptions of collective redress mechanisms, overall aiming at facilitating access to justice, stopping illegal practices, and enabling victims of mass damages to obtain compensation.¹⁶ At the same time, it underlines the need for safeguards against a "US style litigation culture", such as allowing only pre-approved representative entities to bring collective actions and implementing a ban on punitive damages and pre-trial discovery, thereby avoiding excessive and abusive litigation as found in the United States.¹⁷ Overall, this development at the EU level can be characterized as a shift in the Commission's perspective in recent years regarding the role of collective redress and how to regulate it, that is to say the shift from sector-specific regulation with a focus on the cross-border aspect of protecting consumers towards a "coherent approach" to strengthening the enforcement of EU law. In conclusion, this might be seen as a reinforcement of the regulatory dimension of collective redress. At the same time, the European Parliament stressed in its resolution on the "coherent approach", which forms the basis of the Collective Redress Recommendation, the "need to take due account of the legal traditions and legal orders of the individual Member States".¹⁸ Therefore, a further look at the state of reform of collective redress in the Member States is necessary in order to come to preliminary conclusions as to the balance between regulatory goals and

¹⁴ Supra note 6.

¹⁵ European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11.6.2013.

¹⁶ Supra note 6, at 61, consideration 9.

¹⁷ Astrid Stadler, Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz, 2015 Zeitschrift für die gesamte Privatrechtswissenschaft [ZfPW] 61, 62 (Ger.).

¹⁸ European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), 2013 O.J. (C 239) E/36.

individual rights and the resultant role for a specific European risk of regulation through litigation.

III. CONSTRAINTS ON STANDING AS A BASIS FOR A EUROPEAN VERSION OF REGULATION THROUGH LITIGATION

A. STARTING POINTS UNDER EU LAW

- 7 The issue of legal standing may prove to have important implications for the afore-mentioned necessary balance between individual rights and regulatory goals. The Collective Redress Recommendation provides for two types of collective redress mechanisms, i.e. group actions brought jointly by natural and legal persons who claim to have suffered harm, and representative actions. Group actions do not raise any particular issue of standing because the parties enforce their own claims. In the case of representative actions, this question must be answered because these actions are by definition brought on behalf of third parties and under the continental legal tradition such actions are not generally recognized. The Collective Redress Recommendation therefore provides in para. 4 for three types of representative bodies that should have standing to bring actions on behalf of a defined group of individuals or legal persons. These entities should be duly designated, or, if they are not designated public authorities certified on an ad hoc basis for a specific action. Duly designated entities should have a non-profit-making character and sufficient capacity in terms of financial resources, human resources, and legal expertise; there should be a direct relationship between the main objectives of the entity and the rights that are claimed to be violated for purposes of the action. These restrictions reflect the Commission's safeguards against a US-style litigation culture that would be focused on the strong economic incentives for parties to bring a case independent of the merits of the claim. This is why they limit the number of potential complainants and why they secure funding for the collective actions for representative claimants but not for third parties. In comparison with the Injunctions Directive, the Collective Redress recommendation follows a stricter approach in that the first does not require an official certification.¹⁹

¹⁹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Art. 3, 1998 O.J. (L 166) 51.

8 More importantly, these differences may produce notable results on the enforcement side, as far as the link between public policy and enforcement in collective redress is concerned.²⁰ Whereas the judgment following a group collective action can be enforced by all members of the group separately, in representative collective actions the person, organization or authority acting on behalf of a group of individuals can enforce the judgment he or she obtained, but not all members of the group represented.²¹ It follows from this that this latter type of collective action can be used for injunction procedures. In contrast, it does not, in principle, lead to financial damages being awarded to consumers, except in the cases of, for example France, Germany, Greece, and the United Kingdom. Damages obtained by the representative, without being enforceable by the individual victims, are used for public policy purposes after being collected by the representative consumer organization, without being distributed among the victims.²² Therefore the payment into the public purse seems to remove a representative collective action from its enforcement purpose for the benefit of regulatory policy, which might at times nurture a fear of private interest group lobbying.

B. RISK OF CAPTURE UNDER FRENCH LAW

9 These potential shortcomings of collective (representative) action with respect to individual enforcement are highlighted by French law and in particular by its procedural instruments of a representative nature, that is the collective interest action (*action d'intérêt collectif*) and the joint representative action. For the first of these, standing is granted to certain consumer associations to bring claims in cases of an infringement of the so-called 'collective consumer interest' (Art. 421-1(1) of the Code de la consommation).²³ The representative nature of the

²⁰ This point is already made in Brigitte Haar, Investor Protection through model case procedures – implementing collective goals and individual rights under the 2012 Amendment of the German Capital Markets Model Case Act (KapMuG), 15 Eur. Bus. Org. L. Rev. 83, 89 (2014).

²¹ For this classification see Overview of existing collective redress schemes in EU Member States, EUR. PARL. DOC., 38 (July 2011), <http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>; Iris Benöhr, *Consumer Dispute Resolution after the Lisbon Treaty: Collective Actions and Alternative Procedures*, 36 J. CONSUM. POL'Y 87, 91 (2013).

²² Benöhr, *supra* note 21, at 91.

²³ Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures: European Debates*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 15, 23 (Duncan Fairgrieve & Eva Lein eds., 2012);

procedural mechanism follows from its exclusive availability to accredited consumer associations and the award of the resulting damages to these associations.²⁴ In contrast, the joint representative action can be initiated in the individual interests of consumers. But since the way in which the mandate to act can be solicited is very restricted, the practicality of this action is highly limited.²⁵ Against this background, the French parliament passed a new Consumers Act providing for compensatory group actions (*action de groupe*) in arts. 1 and 2 on February 13, 2014.²⁶ According to art. 1, these actions can only be brought in consumer and competition cases (Art. L 423-1). Only material damages, not moral damages, can be claimed by national consumer associations, who act on behalf of consumers and are the only entities with standing to initiate such an action (art. L. 423-1). In addition, class actions for health-related cases have been permissible since 1 July 2016. Under art. L.1143-1 et seq. of the French Code of Public Health (*Code de la santé publique*), a specific class action procedure for the compensation of bodily injuries caused by health products, targeting manufacturers or suppliers of such health products, or service providers using any such products, was created.²⁷ The structure is similar to the class action in consumer law. Standing is conferred on accredited associations of users of the healthcare system that are representative at national or regional levels; class actions for health-related cases may be used to compensate personal injury damage as specified in the court judgment. Expected to be further discussed, the draft legislation on justice modernization (*Projet de loi de modernization de la justice du XXI^e siècle*) provides for additional class action procedures in the field of discriminatory practices and labor law, the environment, data protection and privacy. Each of them is characterized by a limited grant of standing only to associations that have been exercising their statutory activities in the respective fields (e.g. trade unions, environmental protection associations). In light of the

Véronique Magnier, *France*, in *THE GLOBALIZATION OF CLASS ACTIONS* 114, 116 (Deborah Hensler et al. eds., 2009).

²⁴ Magnier, *supra* note 23, at 116-117.

²⁵ For the prohibition of solicitation through a website cf. Cour de cassation [Cass.] [Supreme Court for Judicial Matters], 1^e civ., May 26, 2011, Bull. civ. I, No. 98 (Fr.).

²⁶ ²⁶ Loi 2014-344 du 18 mars 2014 de relative à la consommation [Law 2014-344 of March 18, 2014 on the Consumer Affairs], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 18, 2014, p. 5400.

²⁷ Alexandre Biard, *Class Action Developments in France*, *GLOBAL CLASS ACTIONS EXCHANGE* (Nov. 28, 2016, 10:00 AM), http://globalclassactions.stanford.edu/sites/default/files/documents/FRANCE_0.pdf.

great influence of well-organized strong lobbying interests on class action procedures in France, the danger of capture by regulatory policy interests seems to be real. It remains to be seen whether individual rights are nevertheless brought to bear with respect to monetary compensation. As far as standing is concerned, a true balance between regulatory concerns and individual rights does not immediately become apparent from the law as it stands today, so that the risk of a specific European version of regulation through litigation seems quite real.

C. JUDICIAL AND ADMINISTRATIVE CONTROL OVER STANDING UNDER BELGIAN LAW

- 10 Broadly speaking, a comparable approach is taken by the relatively new law on group actions that was introduced in Belgium in 2014 as part of the Code of Economic Law.²⁸ As seen in the example of class action developments in France, the legislator precisely defines the scope of class action procedure by specifically enumerating European or Belgian consumer regulations or acts relating to other regulatory fields, such as competition law, banking, market practices, consumer protection, payment and credit services, product safety, intellectual property, privacy, electronic signature, prices, insurance and professional liability, travel, energy, and transport of passengers.²⁹ Thus an expansion of collective enforcement into unspecified and yet unknown areas of regulation is excluded from the outset. This link between regulation and enforcement via class action is also particularly highlighted by the explicit refusal to apply Belgian class action procedure to shareholder litigation.³⁰
- 11 It shows even more with respect to standing. Similarly to the compensatory group actions under French law, standing for class actions under Belgian law is limited to authorized consumer associations and authorized non-profit organizations

²⁸ *Loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique* [Act Introducing a Consumer Collective Redress Action in the Code of Economic Law] of 28 March 2014, *Moniteur Belge* of 29 April 2014, p. 35201

²⁹ For criticism see Stefaan Voet, *Consumer Collective Redress in Belgium: Class Actions to the Rescue?*, 16 EUR. BUS. ORG. L. REV. 121, 125-127 (2015).

³⁰ Chambre des représentant de Belgique, *Projet de loi portant insertion du Livre XVI, 'Règlement extrajudiciaire des litiges de consommation' dans le Code de droit économique*. Rapport [Proposal to Introduce an Act Regarding the Out-of-Court Resolution of Consumer Disputes. Report], 5e Session de la 53e législature, Doc. 3360/004, 28 Feb. 2014, p. 13/14, (Belg.).

whose statutory aims cover the collective harm. What is more, in order to be able to sue, adequacy of representation in a specific case, which has to be distinguished from standing, is required.³¹ In the event that more than one association claims adequacy of representation with respect to a class in a specific case, the court has to decide on which association is most adequate and is therefore to represent the class, irrespective of 'first come, first serve' considerations.³² Therefore, the requirement of adequacy of representation puts the judge in a position to reject plaintiffs whose associational interests are prevailing over the economic interests of those who should be represented. In this extreme case, the balance between regulatory interests and individual enforcement is struck by the court in favor of individual rights.

- 12 Overall, however, it turns out that, under Belgian law, standing and adequacy of representation depend on decisions taken by public authorities, in the case of consumer associations and non-profit organizations on ministerial decisions for their authorization and on judicial decisions with regard to the adequacy of representation.³³ This limit on the admissibility to class action procedures in Belgium can prove unduly restrictive for EU consumer protection organizations of other Member States. The requirement of a ministerial authorization may violate the freedom to provide services under arts. 56 and 57 TFEU. This is the reason why, in its decision of 17 March 2016, the Belgian Constitutional Court held this requirement to be unconstitutional, since it does not provide the possibility of EU consumer protection organizations of other Member States acting as class action representatives without such an authorization. As a result of this decision, the Belgian legislator is under the obligation to amend the class action law and eliminate its unconstitutionality. For the time being, Belgian judges can base their decisions on the admissibility of EU consumer protection organizations of other Member States on interpretation guidelines issued by the Constitutional Court. These guidelines refer to the list under art. 4 para. 3 of the EU Injunction Directive.³⁴

³¹ Voet, *supra* note 29, at 128.

³² Voet, *supra* note 25, at 128-129.

³³ For the ministerial decision on the authorization of consumer associations or non-profit organizations see Chambre des représentants de Belgique, Rapport, *supra* note 30, at 14.

³⁴ *Supra* note 9.

- 13 The bottom line is that the Belgian class action law points to a bifurcated regime. On the one hand, it clearly aims to enforce a distinct set of regulatory regimes, namely insurance, energy, data protection, competition, and travel law. Along the same lines, the restrictions with respect to standing and especially those concerning adequacy of representation seem to follow a system of an “ideological plaintiff” because they exclude natural persons and may leave the enforcement to groups whose statutory aims correspond with the cause of action.³⁵ On the other hand, this approach may reduce the number of frivolous lawsuits, thus legitimately restraining the enforcement of individual rights. In addition, proponents point out that, in the case of a conflict of interest, the judge can withdraw from an association or organization the right to represent the class, even during the procedure, or substitute it at the request of a class member, so that the requirement of adequacy indeed reduces the danger of a conflict of interest, instead of exceedingly raising the risk of an undue prevalence of regulatory interests.³⁶
- 14 Notwithstanding these arguments, there is no denying the fact that conflicts of interests on the part of the representative plaintiff, and resultant agency costs, cannot be completely eliminated by administrative control or judicial decision. On the contrary, from a public choice perspective the divergence may be even greater because of the monopoly of the representative and the subsequent concentration of lobbying interests as opposed to the indifference of the large and diffuse group of class members, who are not in a position to actually control the representative plaintiff.³⁷

IV. OPEN COLLECTIVE PROCEEDINGS FOR A EUROPEAN PERSPECTIVE ON REGULATION THROUGH LITIGATION

A. OPT-OUT AND OPT-IN MECHANISMS UNDER DUTCH LAW

- 15 Under Dutch law, the issue of control over the plaintiff by the class members is dealt with on the basis of an opt-out mechanism, which facilitates the

³⁵ Code de droit économique, art. XVII.32 no.2; Astrid Stadler, *supra* note 17, at 68; Stefaan Voet, *Cultural Dimensions of Group Litigation: The Belgian Case*, 41 GA. J. INT'L & COMP. L. 432, 444 (2013).

³⁶ Stefaan Voet, *supra* note 35, at 463-464.

³⁷ Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3186 (2013).

implementation of a collective settlement because class members have to opt out in order to avoid being bound by the court decision. The Dutch legal rules on collective redress offer two distinct mechanisms: the representative collective action under Articles 3:305a-c of the Dutch Civil Code (*Burgerlijk Wetboek*; BW) and the 2005 Dutch Act on Collective Settlements of Mass Damage Claims (*Wet collectieve afhandeling massaschade* [WCAM]).³⁸ The first is a representative group action in line with general principles of the Dutch law of civil procedure based on an opt-in approach, but does not provide for monetary relief.³⁹ In contrast, the WCAM procedure can be best described as a settlement procedure. Its scope of application is quite broad and has included high-profile cases in the recent past. Overall, final decisions rendered within this framework have covered a broad range of areas, the *DES*⁴⁰ (regarding personal injury allegedly caused by a harmful drug), the *Dexia*⁴¹ (concerning financial loss allegedly caused by certain retail investment products), *Vie d'Or*⁴² (dealing with financial loss allegedly suffered by life insurance policy holders), *Vedior*⁴³ (on financial loss allegedly suffered by shareholders resulting from late disclosure of takeover discussions), *Shell*⁴⁴ (on financial loss suffered by shareholders and allegedly caused by misleading statements made by the company in a certain period), *Converium*⁴⁵ (similar to the *Shell*-case), and *DSB Bank* (possible damages suffered by customers as a result of an alleged violation of duty of care) cases.

- 16 In each of these cases, the Court declared the settlement agreements binding. The interested parties' obligation to opt out in order to avoid being bound by such a decision highlights the balance struck under Dutch law between regulation and individual rights because the rather far-reaching binding effect under Dutch law may eventually come at the expense of the plaintiffs' individual rights. The way in which such an obligation can possibly arise out of a public notification in newspapers or on websites etc. if the interested parties' names and addresses

³⁸ For details cf. Marie-José van der Heijden, *Class Action/Actions Collectives*, 14.3 ELEC. J. COMP. L., Dec. 2010, <http://www.ejcl.org/143/art143-18.pdf> (last visited Nov. 28, 2016).

³⁹ *Burgerlijk Wetboek* (Civil Code) [BW] art. 3.305a(3).

⁴⁰ Hof's-Amsterdam [Court of Appeal of Amsterdam] 1 juni 2006, NJ 2006, 461.

⁴¹ Hof's-Amsterdam [Court of Appeal of Amsterdam] 25 januari 2007, NJ 2007, 427.

⁴² Hof's-Amsterdam [Court of Appeal of Amsterdam] 29 april 2009, NJ 2009, 448.

⁴³ Hof's-Amsterdam [Court of Appeal of Amsterdam] 15 juli 2009, JOR 2009, 325.

⁴⁴ Hof's-Amsterdam [Court of Appeal of Amsterdam] 29 mei 2009, NJ 2009, 506.

⁴⁵ Hof's-Amsterdam [Court of Appeal of Amsterdam] 17 januari 2012, NJ 2012, 35.

are not known makes clear that the collective settlement under the WCAM regime has an almost regulatory effect.⁴⁶ The latter is, however, subject to judicial control in that court approval of a proposed settlement is necessary. Certain requirements under the BW therefore have to be met and the amount of the compensation has to be reasonable “...having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage...” (BW art. 907 para. 3). There still remains some room for a mismatch between lobbying and individual claimants’ interests, considering that, in the past, courts have taken the apathy of the aggrieved parties as evidence of the reasonableness of the settlement without regard for any obstacles to individual actions and lawsuits.⁴⁷ What is also disturbing about the reasonableness test in an international context is the missing consideration of the potentially substantial difference in the strength of the interested parties’ claims. The latter may arise from the considerable differences in substantive laws that would apply from the point of view of private international law.⁴⁸ Therefore the opt-out regime, in combination with the reasonableness test, does not clearly imply any priority of either strategic goal of the settlement regime under WCAM, the regulatory aspect or the perspective of an enforcement of individual rights.

- 17 The more recent legislative development of WCAM seems to continue its attempt at implementing an equilibrium strategy. The 2013 amendment of WCAM extended its scope of application to cover settlements reached if the liable person is declared bankrupt in the Netherlands.⁴⁹ This provision became relevant in the *DSB Bank* decision in 2014, when 100,000 customers claimed damages from the

⁴⁶ For the notice requirements cf. Ianika Tsankova & H el ene van Lith, *Class Actions and Class Settlements going Global: The Netherlands*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 67, 72 (Duncan Fairgrieve & Eva Lein eds., 2012).

⁴⁷ Pointing out the *Converium* decision of the Amsterdam Court of January 2012 as an example: Astrid Stadler, *Collective Redress Litigation – A New Challenge for Courts in Europe* in FESTSCHRIFT F UR ROLF ST URNER ZUM 70. GEBURTSTAG 1801, 1815 (Alexander Bruns et al. eds., 2013).

⁴⁸ Astrid Stadler, *id.* at 1814-1815.

⁴⁹ See the considerations in Consultatie versie Julie 2014, *Wijziging van het Burgerlijk Wetboek en het Wetboek von Burgerlijke Rechtsvordering teneinde de afwikkeling ven massaschade in een collective actie mobielijk te maken*, 4.

bankrupt estate because of a possible violation of the duty of care of *DSB Bank*.⁵⁰ The settlement in the case provided for an arrangement that included various categories of damages and determined the applicability of each category to a respective interested person. In light of this detailed arrangement and the court decision on the reasonableness of the compensation amount and the necessary amendments, the regulatory substance of a WCAM settlement under this amendment becomes apparent. Ultimately, in this case, the settlement functions as an alternative to regulatory instruments of the regular Dutch bankruptcy proceedings, so that its regulatory content goes hand in hand with the enforcement of individual rights.

18 The ongoing tension continues to be at the center of the legislative debate on collective redress in the Netherlands, as becomes apparent in the new bill for collective damages actions presented to Parliament by the Dutch Ministry of Justice on 16 November 2016. This law aims to introduce a collective claim for monetary damages and at the same time to reduce the risk of abusive claims as much as possible.⁵¹ This is why the new regime wishes to streamline the process within a framework of so-called ‘lead representative organizations’ or – if appropriate for the specific action – co-lead representative organizations, as opposed to the possibility of having multiple competing collective actions. In fact, in the Netherlands the main collective redress organizations have so far been the Dutch Consumer Association (Consumentenbond) and the Dutch Shareholders Association (VEB), as well as special purpose vehicles and ad hoc foundations established only after the harmful event occurred.⁵²

19 Prior to the presentation of the bill, business and consumer lobbies expressed concerns about the risk of abusive claims and ensuing inefficiencies; these concerns are reflected in the strict criteria for the award of collective monetary

⁵⁰ Hof’s-Amsterdam [Court of Appeal of Amsterdam] 4 november 2014, JOR 2015, 10 m. nt. Prof. Tzankova (Neth.). Court of Appeal Amsterdam of 4 November, 2014, download at <http://www.dsbcompensatie.nl/media/36388/eindbeschikking.pdf>.

⁵¹ Xandra Kramer, *Dutch draft bill on collective action for compensation – a note on extraterritorial application*, (last visited Jan. 31, 2017, 17:08 PM), <http://conflictoflaws.net/2014/dutch-draft-bill-on-collective-action-for-compensation-a-note-on-extraterritorial-application/>.

⁵² For details cf. Ianika Tzankova, *Everything you Wanted to Know About Dutch Foundations but Never Dared to Ask: a Check List for Investors 3* (Tilburg Private Law Working Paper Series No. 1, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730618.

damages as a last resort if negotiations for a settlement fail.⁵³ Only non-profit entities that comply with stringent requirements qualify as such representatives under the bill. It is true that ad hoc foundations are also allowed, but, in any case, all of these representative organizations must have supervisory bodies, mechanisms that secure the involvement of the aggrieved parties represented, and the necessary financial means to bear the cost of litigation and to supply a website to publish the necessary information to the public. Apart from the expertise and the track record in class actions that ad hoc foundations have to demonstrate, these strict criteria for the logistical infrastructure of lead representative organizations represent a serious challenge for ad hoc foundations. In comparison to ad hoc foundations, pre-existing non-profit organizations may find it much easier to comply with this regime. As a result, pre-organized interests will find it easier to bring their presumably idealistic policy objectives to bear than individuals who want to give more impetus to the enforcement of their individual rights on an ad hoc basis within the framework of collective redress.

20 On the other hand, the requirement for lead representatives to demonstrate their expertise and track record in class actions as well as a sufficient amount of claims they represent could point in the other direction. This is closely linked to the effect this requirement has on the opt-out regime, which, for the most part, remains the general rule under the new regime. Its importance will, however, be diluted if lead representatives have to lobby for support. This may, at times, turn the opt-out into an opt-in regime and, as a consequence, leave more room for the perspective of a realization of the claimants' rights rather than the regulatory policy interests of the foundations.

21 Another requirement flowing from the concerns about potential abuses that may work against the realization of individual rights turns on the jurisdictional background as a determinant of the scope of application of the collective action regime. Since the Bill aims to preclude an undue influx of cases in collective actions without a sufficient link with the Netherlands, it provides for a scope rule that excludes claims with an insufficient nexus with the Netherlands on grounds

⁵³ Tzankova, *id.*, at 10.

of inadmissibility.⁵⁴ These limitations are considered to be a reaction to recent cases where lead representatives filed collective actions for all investors with only minimal contacts, such as shares in bank accounts in the Netherlands, thus taking into account the criteria for jurisdiction of Dutch courts under the *Kolassa* decision of the ECJ.⁵⁵ The *Kolassa* case can be read to require direct contact between the parties for a contractual claim to arise.⁵⁶ It is clear that – taken to the extreme – such restrictions may at some point stand in the way of the realization of individual rights. On the contrary, under an opt-out regime, far-reaching jurisdiction can also preclude individuals from bringing their claims after possibly being drawn into a collective action proceeding against their wills.⁵⁷ It is therefore true that the number of representative group action cases may increase as a result of the enactment of the bill, which will be read within the next months, but possibly not before the elections in March 2017.⁵⁸ However, since the new collective action regime is a continuation of the existing system of collective redress, it stands to reason that a settlement preceding any collective action will be viewed as the first viable solution to come along. Collective actions and the possibility of monetary compensation may indeed act as an incentive to enter into a settlement.⁵⁹ Even though the opt-out regime also applies to the WCAM procedure, the latter may still offer additional perspectives for a reliable realization of individual rights, i.e. global competition that may put regimes offering effective investor protection and legal certainty at an advantage.⁶⁰ At this point, however,

⁵⁴ Art. 3:305a para.6 lit a and c BW.

⁵⁵ Case C-375/13, *Kolassa v. Barclay Bank*, 2015 E.C.R. I-37; Ianika Tzankova, *New Dutch Bill proposing a collective damages action submitted to Dutch Parliament*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (Jan. 28, 2017), <http://www.collectiveredress.org/newsitem/6041>.

⁵⁶ *Id.*, at 41, 57 download at <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:62013CJ0375>; see also the opinion of the Attorney General in the decision in *Profit Investment Case C-366/13*, *SIM v. Ossi* 2015 Consideration 51 ECLI:EU:C:2015:274, (It.) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163893&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1963195>.

⁵⁷ For the question whether this consequence is in line with the Council Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters cf. Astrid Stadler, *supra* note 17, at 74-75.

⁵⁸ For the large number of collective redress cases in the financial sector and the *Dexia* and *Shell* cases in particular see Iris Benöhr, *supra* note 21, at 92.

⁵⁹ For the opposite view under the former system without the possibility of monetary compensation cf. Ianika Tzankova & Héléne van Lith, *supra* note 46, at 74-75.

⁶⁰ For this on the basis of recent case law of the European Court of Justice cf. Matteo Gargantini, *Capital Markets and the Markets for Judicial Decisions: In Search for Consistence*, (MPIILux, Working Paper 1, 2016).

the stance of the Bill on the extra-territorial application of WCAM does not seem to be completely clear, but globally settling parties who directly rely on WCAM without recourse to the collective action regime are expected to be able to enter into a settlement under the WCAM rules.

B. COLLECTIVE PROCEEDINGS AND THEIR TRANSITION TO TEST CASES IN THE UK (ENGLAND AND WALES)

- 22 This potential attractiveness, which may mitigate the dangers to the enforcement of individual rights under the new regime proposed by the Dutch bill for collective damages actions, raises the question whether jurisdictional competition may have led to other examples of an opening of systems in the field of collective redress. Despite the widely-cited research-based support for the introduction of generic opt-out collective action in the UK,⁶¹ the starting points under UK law are characterized by a sectoral and therefore necessarily restrictive approach. A flexible form of collective action which could be brought on either an opt-in or opt-out basis, depending on the court's decision in light of the circumstances of the individual case, was recommended by the Civil Justice Council of England and Wales to the Lord Chancellor in July 2008.⁶² Notwithstanding this detailed recommendation, Part 19.6 of the Civil Procedure Rules provides for a representative action granting standing for a claim for damages to an entity with no interest in the action itself, other than that of acting in a representative capacity.⁶³ Sectoral examples can be found in competition law (section 47B Competition Act 1998). With respect to consumer law, the Consumers' Association is the only such body that may bring such a representative action

⁶¹ Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for Submission to the Civil Justice Council of England and Wales, 2008) available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/reform-of-collective-redress.pdf>;

for the ensuing recommendation of the Civil Justice Council cf. John Sorabji et al., "IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS" FINAL REPORT (John Sorabji et al. eds., 2008), available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improving+Access+to+Justice+through+Collective+Actions.pdf> (last visited Jan. 30, 2017).

⁶² John Sorabji et al., *supra* note 61, at 145; overview and further details about the repercussions of the report cf. John Sorabji *Collective Action Reform in England and Wales*, in *EXTRATERRITORIALITY AND COLLECTIVE REDRESS* 43, 56-59 (Duncan Fairgrieve & Eva Lein eds., 2012).

⁶³ Christopher Hodges, *England and Wales*, in *THE GLOBALIZATION OF CLASS ACTIONS* 105, 106-108 (Deborah Hensler et al. eds., 2009).

(Specified Body [Consumer Claims] Order 2005 SI 2005/2365).⁶⁴ The shortcomings of this system became particularly clear in the *JJB Sports* case of 2009.⁶⁵ After an out-of-court settlement of litigation involving price-fixing agreements concerning replica football kits, the follow-on claim on behalf of 130 consumers was brought under sec. 47B of the Competition Act 1998 by the Consumers' Association. As a result of the opt-in mechanism, only these 130 consumers, i.e. less than 0.1% of the estimated victims, joined the action. The exclusive standing of the Consumers' Association to bring a representative action combined with the opt-in mechanism turned out to create a bottleneck that stood in the way of an effective enforcement of individual consumer rights.

23 More constraints on standing for bringing a claim in a collective action suit under UK law became clear in the decision in *Emerald Supplies Ltd v British Airways plc.*,⁶⁶ where the court had to determine whether more than one claimant had the "same interest" in a claim under the representative rule of CPR 19.6. It held that at "...all stages of the proceedings, and not just at the date of judgment at the end..." it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having "the same interest": the parties must have "the same interest" in the proceedings. At the same time, the membership could possibly fluctuate and it would not have to be possible to compile a complete list at the beginning of the litigation as to who is a member of the class or group represented.⁶⁷

24 These requirements created a substantial barrier against representative actions in competition law, thus making it difficult to enforce individual rights in this area. Under these rules, enforcement activities were mostly undertaken by public authorities, or possibly by consumer bodies when approved by the government.⁶⁸ Section 47B (old) of the Competition Act 1998 gives specified bodies the right to bring a competition claim on behalf of consumers in the Competition Appeal

⁶⁴ For more details about the development cf. J. Sorabji, *supra* note 62, at 49-56.

⁶⁵ For details cf. Philipp Eckel, Kollektiver Rechtsschutz gegen kartellrechtliche Streuschäden: Das Vereinigte Königreich als Vorbild?, 65 WIRTSCHAFT UND WETTBEWERB [WUW] 4, 6 (2015) (Ger.).

⁶⁶ *Emerald Supplies Ltd & Anor v. British Airways plc*, [2010] EWCA Civ 1284, [2011] Ch 345 (Eng. & Wales).

⁶⁷ *Ibid.*

⁶⁸ Christopher Hodges, *supra* note 63, at 106.

Tribunal (CAT). Only the consumer organization which received the special status that enables it to bring such claims. A successful individual claim for damages before the CAT required a two-step procedure because before the claimant could bring a damages claim, a breach of competition law had to be established by the former Office of Fair Trading (OFT, today Competition and Markets Authority [CMA]) or the European Commission.⁶⁹ There was therefore a very close linkage between the regulatory and the collective proceeding, so that the latter arguably served the enforcement of the former. Since the collective action is in the hands of a body to be specified according to criteria published by the secretary of state, the individuals whose rights are potentially affected by the regulatory proceeding in question cannot take matters into their own hands. Regulation prevails over litigation.

25 Finally, the Financial Services Bill of 2009 aimed to adopt the reforms proposed in the CJC report by enlarging the range of potential claimants in the newly-created class action to include pre-designated bodies, individual claimants, and bodies authorized on an ad hoc basis by the court.⁷⁰ In light of the upcoming general election, these provisions relating to collective actions were withdrawn from the bill in April 2010. In addition, in the Finance Bill 2010 a provision aimed to ensure that the Financial Services Authority, the Financial Conduct Authority respectively, could intervene in cases of retail mis-selling and award compensation to those investors it believed were affected. In light of the general elections in 2010, this initiative, however, had to be dropped.⁷¹

26 In 2015, another initiative to remove these hurdles to collective redress in the UK was successfully launched, introducing a new class action regime in the Consumer Rights Act 2015 and facilitating collective proceedings in the CAT. The Consumer Rights Act 2015 completely replaces the old section 47B (old) of the Competition Act 1998.⁷² The new regime will substantially loosen the collective

⁶⁹ Christopher Hodges, *supra* note 63, at 108 (Deborah Hensler et al. eds., 2009).

⁷⁰ ⁷⁰ FINANCIAL SERVICES BILL, 2009-10, H.C. Bill [6] cls. 18(5), 22(2)(b), (c), 24(2)(b) (Eng.), available at <http://www.publications.parliament.uk/pa/cm200910/cmbills/006/2010006.pdf>; for details cf. John Sorabji, *supra* note 62, at 60-61.

⁷¹ Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures: European Debates, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS* 13, 32 (Duncan Fairgrieve & Eva Lein eds., 2012).

⁷² Consumer Rights Act, (2015), c. 15, sch. 8, p. 1 (U.K.).

redress mechanisms in several respects. Stand-alone claims as well as follow-on claims can be heard by the CAT. Opt-out claims will be possible for claimants within the UK. These new provisions empower small businesses to go against anti-competitive behavior, even though this scope of action may at times be limited because of the newly introduced opt-out collective actions system. Overall, facilitating private actions may ultimately complement the public enforcement system, especially by creating incentives for companies to whistle-blow on cartels. In addition, the Consumer Rights Act 2015 takes into account parties' interests as they evolve throughout the proceedings. Since most follow-on damages actions settle, as do many standalone actions, Part 1 of Schedule 8 paras. 10-11 of the Consumer Rights Act 2015 provides the CAT with the ability to approve collective settlements in opt-out collective actions. The CAT shall, at the request of the claimants' representative plus each defendant who wishes to be bound by a collective settlement, approve a collective settlement where it is just and reasonable to do so.⁷³ As a result, the settlement is binding on all persons falling within the class of persons described in the collective proceedings order, other than those who have opted-out. Thus, the Consumer Rights Act 2015 ties together, more closely, collective settlement proceedings and opt-out mechanisms and the ensuing regulatory effects with claimants' individual rights and the private actions necessary for their enforcement.

- 27 The potentially regulatory impact resulting from the court order and the subsequent binding force of the settlement shows a certain parallel with the Dutch WCAM procedure and also sheds light on the important and active role of judges in the UK system. The latter is reflected even more clearly by another system provided for under the English civil procedural rules which enables courts to select and determine a small number of claims in order to manage mass litigation, when there are a lot of claims raising the same factual or legal issues. This scope of the courts' powers of action turned out to be crucial in the bank charges litigation.⁷⁴ In this case, the Financial Ombudsman Service and the County courts were flooded with individual claims, so that the two institutions came to a standstill

⁷³ Consumer Rights Act, (2015), c. 15, sch. 8, p. 1, para. 10 (U.K.).

⁷⁴ *The Office of Fair Trading v. Abbey National plc & others*, [2009] UKSC 6, [2010] 1 AC 696 (U.K.).

until the Office of Fair Trading and the bank set up what virtually amounted to a test case.⁷⁵ The *Railtrack* case of 2005 can be cited as another example, where almost 48,000 former shareholders sued the Government for allegedly trying to withhold shareholder compensation upon the re-nationalization of the business.⁷⁶ Specifically, the Group Litigation Order according to Part 19 III of the Civil Procedure Rules⁷⁷ confers considerable discretion on the judge, thus opening up possibilities for flexible case management. For the Group Litigation Order to work, a register is necessary, as is a binding effect of the ensuing judgment for the registered parties. The discretion of the court covers the selection of a claim from the register as a test claim (Rule 19.13 [b]), after identifying the relevant issues.⁷⁸ The move away from hands-on case management by the court under the Group Litigation Order system and a test case highlights the seamless transition from collective proceedings via an aggregation of claims to individual claims-based test case procedures. Therefore, regulatory elements and elements of individual enforcement are inextricably intertwined in this proceeding, so that the dichotomy of regulation through litigation seems to be losing its shaping force.

C. PARTY VS. COURT CONTROL OVER TEST CASE PROCEDURES UNDER THE GERMAN CAPITAL INVESTORS' TEST CASES ACT (KAPITALANLEGER-MUSTERVERFAHRENSGESETZ [KAPMUG])

- 28 One of the most prominent examples of a test case procedure is the German Capital Investors' Test Cases Act (Kapitalanleger-Musterverfahrensgesetz [KapMuG]), which is targeted towards effective investor protection and its enforcement.⁷⁹ It was enacted in reaction to the congestion of the Frankfurt trial court that resulted from lawsuits filed by thousands of retail investors claiming

⁷⁵ Christopher Hodges, *Developments in Collective Redress in the European Union and United Kingdom* (2010), 6-7, GLOBAL CLASS ACTION EXCHANGE, <http://globalclassactions.stanford.edu/sites/default/files/documents/1010%20Class%20Actions%20UK%202010%20Report.pdf>.

⁷⁶ Geoffrey Rutherford Weir & Ors v. (1) Secretary of State for Transport (2) Department for Transport, [2005] EWHC 2192 (Ch).

⁷⁷ Civil Procedure Rules, 1998, S.I. 1998/3132, rules 19.10-15 (U.K.).

⁷⁸ For the active role of the judges in this proceeding see Astrid Stadler, *Collective Redress Litigation – A New Challenge for Courts in Europe*, in *FESTSCHRIFT FÜR ROLF STÜRNER ZUM 70. GEBURTSTAG 1801, 1806* (Alexander Bruns et al. eds., 2013).

⁷⁹ For details on the test case procedure under the German KapMuG see also Brigitte Haar, *Investor Protection Through Model Case Procedures – Implementing Collective Goals and Individual Rights Under the 2012 Amendment to the German Capital Markets Model Case Act (KapMuG)*, 15 *Eur. Bus. Org. L. Rev.* 83-105 (2014).

damages for alleged misrepresentations in the *Telekom* prospectus after buying this company's shares.⁸⁰ This procedure contrasts sharply with other fields of collective redress under German law, where consumer and certain qualified associations as well as interest groups play a crucial role, such as in the case of the association or interest group complaint under the Act against Unfair Competition of 1896 and that of injunctive relief under the Act on Injunctive Relief of 2002. In test case procedures, the emphasis is placed on individual rights. This focus is in line with the German law of civil procedure and its principles more generally. The principle of party control over the proceedings (*Dispositionsmaxime*) and the closely related principle of party control of facts and means of proof (*Verhandlungsgrundsatz* or *Beibringungsgrundsatz*) are closely linked with the dominant role of the individual parties and the resulting procedural problems, thereby bundling the underlying claims that belong to different claimants. Germany has therefore been one of only a few jurisdictions to introduce individual rights-based test cases, alongside Austria in sect. 502 of the Austrian Code of Civil Procedure, England and Wales as explained above, and Switzerland with the use of such a proceeding on a case-by-case basis.⁸¹

1. STANDING IN TEST CASES AS A LINK BETWEEN INDIVIDUAL PROCEDURAL RIGHTS AND REGULATORY ENFORCEMENT

- 29 The individualistic approach shines through in the rules with respect to standing. In contrast to the important role of consumer associations and interest groups in the aforementioned fields of consumer-related mass litigation, test case proceedings are in principle characterized by the grant of standing to individuals. In an Austrian representative test case action, the Consumer Information Association can represent a consumer who assigns claims to it, so that there is agreement between the parties and other claims are then subject to the binding result of the test case.⁸² This procedure goes back to a statute of 1874 related to

⁸⁰ For the legislative history cf. Christian Dube & Tanja Pfitzner, *Braucht der Kapitalmarkt ein neues Gesetz für Massenverfahren?*, 2005 BETRIEBSBERATER [BB] 673 (Ger.); Christoph Keller & Annabella Kolling, *Das Gesetz zur Einführung von Kapitalanleger-Musterverfahren – Ein Überblick*, 2005 BANK- UND KAPITALMARKTRECHT [BKR] 399 (Ger.).

⁸¹ Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 Nw. J. INT'L L. & Bus. 301, 342-344 (2007).

⁸² Overview of existing collective redress schemes in EU Member States, EUR. PARL. DOC., 39 (July 2011),

the field of partial debenture, authorizing the appointment of a curator representing investors in court, thus exemplifying an early test case procedure for investor protection purposes.⁸³ In a different vein, in Switzerland these procedures emanate from agreements between the defendant and the claimants on the binding effect of a test case between the defendant and all claimants, which will not, however, produce *res iudicata* effect for anyone not formally party to the litigation.⁸⁴ According to the Swiss Collective Investment Schemes Act (art. 86), a representative individual can also represent a group of investors and claim in the name of the group.⁸⁵ The resulting judgment then has a binding effect on all affected investors.

- 30 The German KapMuG imposes constraints on standing without any explicit provision, but by limiting the scope of the application of this law. This approach is again closely linked with the individual rights-based civil procedure. Before its amendment in 2012, sect. 1 para. 1 no. 1 of the KapMuG 2005 precluded claims for damages based on alleged breaches of duties of an investment advisory contract from KapMuG test case procedures.⁸⁶ This highlights the fact that test case decisions under the KapMuG were not primarily targeted towards the award of damages to investors, but rather at the clarification of common questions of fact or law with binding effect for a large number of similar cases. Test case proceedings were therefore marked by considerable regulatory impact. As far as the underlying damage claims are concerned, it stands to reason that the following related issues are dealt with in a test case decision: (a) the materiality of specific information; (b) its accurate and possibly misleading content; (c) the

<http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>.

⁸³ Georg Kodek, *Austria*, in THE GLOBALIZATION OF CLASS ACTIONS, 86, 87 (Deborah Hensler et al. eds., 2009).

⁸⁴ Baumgartner, *supra* note 81, at 342.

⁸⁵ Kollektivanlagengesetz [KAG] [Federal Act on Collective Investment Schemes] June 23, 2006, 951.31 (Switz.).

⁸⁶ As stated in the explicit wording of the former § 1 para. 1 no. 1 of the Kapitalanleger-Musterverfahrensgesetz [KapMuG]; see the case law of the German Federal Court of Justice, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 2, 2007, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 350, 2007 (Ger.); 177 BGHZ 88 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 30, 2008, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 513, 2009 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] June 16, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2539, 2009 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 30, 2010, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 151, 2011, (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Sep. 11, 2012, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1268, 2012 (Ger.).

knowledge of the defendant about the deficiencies of this information.⁸⁷ Given the relevance of these questions for a variety of claims in typical cases, jurisdiction for a test case decision does not lie with trial courts, but with the higher-level regional appellate courts. This rather limited scope of application of the KapMuG of 2005 underlines its two parallel goals – to implement the Prospectus Directive and to enforce individual retail investor rights.⁸⁸ Since 2012, the amendment to KapMuG now includes claims for damages resulting from the use of inaccurate or misleading public capital market information as well as those flowing from a failure to inform about such inaccurate or misleading content in its scope of application.⁸⁹

2. PING-PONG PROCEDURE BETWEEN INDIVIDUAL RIGHTS AND REGULATORY IMPACT

31 As a consequence of the inclusion of such an increased number of claims, the proceedings in the individual lawsuit of a retail investor may be stayed if the trial court finds of its own motion that the decision will depend on the declaratory judgment as desired in the test case procedure (§ 8 of the German Model Case Act 2012). Subsequently, the individual claimant is faced with a mass litigation and the resulting delays. Despite its adversarial structure involving two parties, the main characteristics of the test case procedure imply some regulatory control over the progress of the proceedings. The decision as to whether to stay an individual lawsuit with a view to a pending test case is left, more or less, to the judgment of the courts.⁹⁰ This was the reason for the proposal to avoid ensuing delays on the basis of an opt-in or opt-out mechanism as is common in other jurisdictions.⁹¹

⁸⁷ For a more detailed look at the legal questions typically highly relevant for a test case, see Axel Halfmeier et al. eds., *Evaluation des Kapitalanleger-Musterverfahrensgesetzes*, Forschungsvorhaben im Auftrag des Bundesministeriums der Justiz, Abschlussbericht, 43-48 (2009); for a very brief overview cf. Franca Contratto, *Access to Justice for Investors in the Wake of the Financial Crisis*, 2009 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT [SZW] 176, 185-187 (Switz.).

⁸⁸ On the regulatory goal to be implemented by the KapMuG see DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 15/5091, 16; Burkhard Hess, *supra* note 7, at 68.

⁸⁹ Explanatory Memorandum to the Amendment to the German Model Test Case Act of 2012 DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/8799, 16; for more details see Axel Halfmeier, *Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen*, 2012 DER BETRIEB [DB], 2145 (Ger.).

⁹⁰ For the margin of discretion of the court in this question see DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 15/5091, 20 (Ger.).

⁹¹ Axel Halfmeier, *supra* note 89, at 2146.

32 The three-tier German test case procedure starts from the petition for a test case decision in the trial court, leading to the resolution of the legal issues raised in the petition by the higher regional court and going back to the individual lawsuits before the trial courts. Under the old KapMuG of 2005, an inefficient ping-pong match between the lower and the higher court sometimes produced long delays. This was the reason for the amendment of 2012, which aimed to accelerate the test case procedure and to enhance its efficiency. These changes notwithstanding, the tension between the procedural needs necessarily arising from the bundling of individual claims and the regulatory goals sometimes closely associated with this bundling has remained. This is illustrated by the inefficient division of responsibilities between the trial court and the higher regional court after the announcement of the order for reference to the higher regional court under the KapMuG of 2005. It was removed in sect. 15 of the 2012 KapMuG and replaced by a transition of the control over the proceeding to the higher regional court.⁹² Notwithstanding this improvement, serious delays and inefficiencies still result from the plaintiffs' right, unlimited in time, to submit a motion to extend the scope of the determination in the test case procedure. This seems to be one of the greatest obstacles to a rapid and reliable conduct of the test case procedure.⁹³ Therefore, even though a KapMuG test case procedure is marked by its adversarial structure involving two parties, its main characteristics indicate some regulatory control over the progress of the proceedings and a certain tension between these two different procedural principles.⁹⁴

3. EMBEDDING INDIVIDUAL TEST CLAIMS INTO A COLLECTIVIZING SETTLEMENT

33 This also becomes clear from the opt-out settlement introduced by sect. 17-19 of the 2012 KapMuG. Following the 2005 Dutch WCAM as mentioned above, this procedure offers plaintiffs in a test case procedure the opportunity to submit to

⁹² For criticism against the former rule see for example Axel Halfmeier et al., *supra* note 87, at 57; for a positive evaluation of the new sect. 15 KapMuG 2012 see Klaus Rotter, *Der Referentenentwurf des BMJ zum KapMuG – Ein Schritt in die richtige Richtung!*, 2011 VERBRAUCHER UND RECHT [VUR] 443, 447 (Ger.).

⁹³ See with references to court decisions Bernd-Wilhelm Schmitz & Jörn Rudolf, *Entwicklungen der Rechtsprechung zum KapMuG*, 2011 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1201, 1206 (Ger.).

⁹⁴ For a discussion of the KapMuG of 2005 against the background of basic principles of German civil procedure see Burkhard Hess, *Der Regierungsentwurf für ein Kapitalanlegermusterfahrgesetz – eine kritische Bestandsaufnahme*, 2004 WERTPAPIER-MITTEILUNGEN [WM] 2329-2331 (Ger.).

the court a proposal for settlement.⁹⁵ The latter requires court approval, which is granted by way of an order, against which there can be no further appeal. The approval depends on the court's evaluation of the reasonableness of the proposal in light of the previous presentation of the main features of the case and the results of the hearings conducted with the parties so far (sect. 18 para. 1 of the 2012 KapMuG).

34 At first glance, this relatively high degree of court control over the settlement might be taken as evidence of regulatory interests prevailing in the opt-out settlement. Considering the Explanatory Memorandum, however, the legislator's primary aim was to ensure practicality and non-discrimination⁹⁶. From this perspective, sect. 18 para. 1 KapMuG 2012 can be viewed as a procedural safeguard to ensure a judicial assessment as to the basic fairness of the settlement proposal. This idea is reinforced by the possibility of invalidating the settlement by an opt-out of at least 30% of the joined parties pursuant to sect. 17 para. 1 sent. 4 of KapMuG 2012. In addition, the amendment of 2012 also offers the possibility to a joined party to opt-out on his or her own in case of discontent, pursuant to sect. 19 para. 2.

35 A comparison of their legal effects reveals considerable differences between the settlement under the KapMuG 2012 and that under the Dutch WCAM. To begin with, the reach of their binding effects is very different. Only parties to the proceedings are included under the KapMuG as opposed to the binding effect under WCAM, which extends to every affected person irrespective of a lawsuit that has been filed.⁹⁷ In addition, the baselines for court approval of the reasonableness of the settlements seem to differ. Whereas the Dutch provision states a few reasons why a settlement may not be considered to be reasonable and therefore may not be approved by the court, the German KapMuG, in contrast, seems to be based on the assumption that the proposal is reasonable without giving a single reason in its pertinent sect. 18 para. 1 why a settlement

⁹⁵ For parallels and differences with regard to the Dutch rule see Axel Halfmeier, *supra* note 89, at 2150.

⁹⁶ Explanatory Memorandum to the Amendment to the German Model Test Case Act of 2012, DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/8799, 24-25 (Ger.).

⁹⁷ Andreas Mom, *Kollektiver Rechtsschutz in den Niederlanden* 363 (2011).

would not be reasonable.⁹⁸ Overall, these observations could imply that the German procedure leaves a little more room for individual investor interests vs. regulatory goals than is the case in the settlement pursuant to WCAM. Nevertheless, the absorption of individual claims by a collective settlement on the basis of an opt-out settlement under the individual rights-based German civil procedure highlights the amalgamation of the two key diverging interests at stake in collective litigation, forming another important piece in the jigsaw of a European version of regulation through litigation.

V. CONCLUSION

36 The Collective Redress Recommendation has given rise to an intensive debate on collective action and to a broad range of legislative initiatives in this field. One of the key criticisms of collective actions in consumer law in the American debate has been based on the idea that this kind of litigation could provide private interest groups with the procedural instruments to establish regulatory goals without adhering to the necessary legislative procedures: the concept of regulation through litigation. In light of the ongoing reforms of collective redress mechanisms in the European Member States, this raises the question of whether a similar dichotomy is evolving in the Member States' laws of collective redress. It is clear that some modification of this concept is needed in order to adjust it to a different regulatory context and different players. One essential factor is related to the key players dominating the regulatory process, in particular private interest groups and consumer associations, who may sometimes threaten to prevail over voices of mainstream opinion in public debate. The European version of regulation through litigation will therefore be determined by a balancing of regulatory goals against individual rights.

37 The legal models of collective redress of some Member States reveal instances of corresponding potential for dominance of private interest groups and preclusion of individual claimants in the framework of collective proceedings. This particularly applies to some of the constraints on standing to bring actions in collective proceedings. In France, the danger of capture by regulatory interests does not seem to be too far-fetched under the new Consumers Act of 2014

⁹⁸ For details on the Dutch provisions concerning the settlement, see MOM, *id.* at 456-457.

because of the limited grant of standing only to associations that have been exercising their statutory activities in the respective fields. Even though Belgian law appears more open because it leaves the decision on standing to public authorities, this approach may pose its own risks from the point of view of freedom to provide services under EU law.

38 These constraints, resulting from the one-way nature of the aforementioned legal systems, can be partly avoided by more open approaches that leave some scope of action to the parties without, however, excluding judicial control. This holds true in the case of the Dutch WCAM regime, which ensures a judicial reasonableness test of settlements under an opt-out regime. The latter, and its implications for the individual rights of a party, may change its meaning under the new but not yet legislated Bill for collective damages actions of November 2016, which introduces the framework of so-called 'lead representative organizations'. The openness and transition between individual lawsuits and collective proceedings also becomes clear in the case of the new class action and the Group Litigation Order system in the UK. In addition to a new class action regime in the Consumer Rights Act 2015 and facilitating collective proceedings in the CAT, under the Group Litigation Order system, courts can select test cases after identifying relevant issues, thus turning from a case management system to individual rights-based lawsuits. The test case procedure regime under the German KapMuG has developed in the opposite direction. Starting out from the individualistic roots of German civil procedure, the 2012 amendment of the KapMuG has added a more collectivist flavor to its regime.

39 The effectiveness of collective action proceedings depends on the enforcement of regulatory policy and individual rights. This cannot be achieved without a balance between a party-driven and a settlement-oriented procedure. The systems legislated in the Member States show weaknesses in one or the other respect, as evidenced by the path-dependent evolutions of different class action regimes triggered by the Coherent Approach of the Commission and the resulting Collective Redress Recommendation. Overall, the rules put in place in the Member States so far seem to be quite vulnerable to the risk of an excessive influence of private interest groups and of resulting preclusion of individual

claimants. The future therefore seems to lie in a combination of an amicable settlement and an individual rights-based litigation trial with the permanent possibility of switching to an opt-out court settlement. In order to be binding, the latter should, however, need the approval of judges. Only this careful balancing might eliminate the danger of a European version of regulation through litigation.