The Consumer Voice in Europe

Comparative Legal Study on Procedural Rules and their Impact on Collective Redress Actions in Europe

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EXECUTIVE SUMMARY

The Representative Actions Directive (EU) 2020/1828 has required Member States to allow qualified entities to initiate collective actions aimed (inter alia) at securing 'redress measures' for consumers. At the same time, the Directive left many details, and even fundamental questions of collective litigation, within the regulatory power of Member States, thereby establishing a minimum standard that is too low in certain crucial areas. Of these areas, this study focuses on three key issues that BEUC's member consumer organisations have identified as the most pressing challenges: the collective actions seeking compensation of immaterial damage, issues related to burden of proof and disclosure of information, and financing of collective redress cases.

A detailed analysis of the implementation of the Directive in Belgium, Germany, Italy and Poland, along with additional insights from the Austrian, Dutch, French and Spanish laws, reveal significant differences that affect the potential of collective redress actions. The study flags obstacles that Member States have either created or failed to remove, while highlighting "best practices" for regulating the above-mentioned issues.

In relation to **collective actions seeking immaterial damages**, two key issues need to be addressed: the quantification of immaterial damage and their similarity. In substantive law, collective redress is facilitated by the possibility of lump-sum quantification of immaterial damage, rather than requiring an individual assessment of each victim's pain and suffering. An example is the German Bundesgerichtshof's approach in the Facebook (scraping) data protection case, where the court suggested a lump-sum payment for loss of control over victims' personal data. Redress claims in relation to immaterial damage quantified in this way are also more likely to be considered sufficiently similar to be bundled into a collective action. Beyond similarity in relation to both the breach of consumer law and the amount of damage, Member States should enable collective proceedings where bundled claims arise from the same (type of) breach, even if the amount of claims differ. This could be achieved through sub-groups within the class, or quantification of individual claims at the distribution stage. For cases where the consequences of the same (type of) breach differ too significantly to be handled in a single collective redress action, Member States should allow qualified entities to bring declaratory actions. Such actions would establish the existence of an infringement, enabling consumers to subsequently seek individual redress. Finally, consumer protection in general would benefit from a collective instrument allowing traders to be stripped of unlawful gains obtained through breaches of law - an instrument that would be particularly useful in widespread small-damage cases.

With regard to the **burden of proof and disclosure of evidence**, this study has found that, regardless of the availability in all Member States of procedural mechanisms to deal with evidentiary challenges, there is still room for improvement in the area of collective redress. As regards the burden of proof, much depends on the specific breach of consumer law on which the claim is based. Many EU Directives already provide for a relaxation of the burden of proof, which of course also applies to collective redress actions. Nevertheless, a best practice for all Member States would be to introduce an evidentiary rule requiring the party that does not bear the burden of proof to share relevant information within its control with the court and the opposing party. As regards the disclosure of evidence, it is noteworthy that half of the Member States surveyed have adopted specific rules when transposing the Directive, while the other half considered their general framework to be sufficient. The Directive itself could be improved in a possible recast in two key areas: clarifying that categories of evidence can also be disclosed (as opposed to specific pieces of evidence) and introducing the possibility of pre-trial evidence gathering. Finally, a number of best practices are identified for Member States to ensure that disclosure orders are both effective and enforceable.

As regards **financing of collective redress actions**, the study finds that in all analysed jurisdictions, the costs associated with collective redress actions are mostly covered by claimant organisations themselves. While this institutional financing model is tried, tested, and successful in Europe, it lacks flexibility and is often insufficient to cover all relevant cases. The study supports, the use of contingency fees to enhance consumers' access to justice but notes that widespread scepticism in Europe makes this solution largely unworkable. Instead, the authors propose to strengthen third-party litigation financing by allowing and enabling it for representative actions in all Member States, without price controls or other undue restrictions. The study shows that even the well-resourced representative institutions need external financing for certain cases. Third-party financing has evolved as a way to provide such funds for some actions and should therefore be enabled in all Member States. However, significant practical obstacles currently limit its use in collective consumer cases across the studied jurisdictions. Moreover, the EU Member States should enable collective enforcement by making available legal aid and direct funding to representative institutions. In addition, creation of national and/or EU-level "Consumer redress action funds", similar to the fund existing in the Canadian province of Ontario, could bridge the funding gap for cases that lack other financing options.

PART 1: INTRODUCTION

Peter Rott

A. Background of the study

The Representative Actions Directive (EU) 2020/1828 was adopted in November 2020. It greatly improved the effectiveness of collective actions. Its most spectacular result is that Member States have to allow (certain) qualified entities to bring actions aiming at 'redress measures' (Article 7(4)(b)) that shall oblige the trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law (Article 9(1)). Consumers shall be able to enforce the benefits the court has foreseen for them without having to bring a separate action (Article 9(6)). Moreover, as compared to its predecessor, the Injunctions Directive, the scope of application of the Directive increased drastically beyond the core instruments of EU consumer law (Article 2(1) with Annex I).

At the same time, the Directive tries not to intrude more than necessarily into the procedural laws of the Member States. In principle, it so takes into account the principle of the procedural autonomy of the Member States (recital (12)). Another explanation, however, is that resistance from some Member States against the proposal was great, which led to numerous compromises in the form of regulatory leeway. This resistance finds its expression in Article 1(1) of the Directive: 'This Directive sets out rules ensuring that representative actions aimed at the protection of the collective interests of consumers are available in all Member States, *while providing appropriate safeguards to avoid abusive litigation*' (emphasis added). The latter part of this sentence reflects the deep distrust of certain Member States towards collective redress mechanisms, most frequently expressed in warnings against allowing a 'US style litigation industry'. As a counterbalancing measure, the Directive recalls the principle of effectiveness (again recital (12)), reminding Member States that they must not exercise their regulatory leeway in such a way that bringing a collective action and making it work for the benefit of consumers is not virtually impossible or excessively difficult.[1]

Several issues have been identified that may hamper the full effectiveness of the Directive, including national requirements for the recognition as qualified entity, procedural barriers for the inclusion of consumers into a redress action, usually by way of opting in; and financial barriers by court fees and lawyers' fees and limited access to third party funding.

A general problem of litigation in the area of consumer law is access to information or evidence, or the burden of proof. This also applies to collective procedures. And finally, the calculation of damages has proven to be a difficulty, in particular when it comes to immaterial damage.

[1] Established case law since ECJ, 16 December 1976, Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para 5, and Case 45/76 *Comet BV* v *Produktschap voor Siergewassen*, ECLI:EU:C:1976:191, para 11-18.

B. Objective of the study

Member consumer organisations of BEUC have identified the three issues of financing litigation, the burden of proof and the calculation of damages as the most pressing problems. Thus, this study focuses on these three issues although it should be noted that they cannot be considered in isolation from each other. For example, access to evidence is related to funding when it comes to the need to provide expert evidence about technical issues, as in the context of the Volkswagen diesel scandal. Or, financing problems are aggravated, in an overall perspective, if only very few consumer organisations are recognised as qualified entities that would have to shoulder a greater number of lawsuits. For good reasons, the Court of Justice has always held that the effectiveness of a particular procedural rule must be evaluated in context with the other rules of procedural and even substantive law.[2]

As experience with the new redress actions is barely available yet, not least due to the fact that almost all Member States were delayed in implementing the Directive,[3] this study does not only look at the new procedural rules on collective redress actions but also draws from experience with pre-existing collective instruments of selected Member States. It therefore focuses on Member States where such experience is available, namely, the legal systems of Belgium, Germany, Italy and Poland that represent different legal traditions and that have all made collective instruments available to consumer organisations or consumer authorities before the adoption of the Representative Actions Directive.

- Belgium has had a legal framework for representative actions for collective redress for the benefit of consumers since 2014, which was heavily inspired by the 2013 EU Recommendation[4] and was amended in May 2024 to meet the requirements of the Representative Actions Directive.
- Germany has introduced a variety of collective instruments, most of them in the hands of consumer organisations, since 2001, and some of them have been reformed several times based on experienced difficulties. Closest to the new redress action was and is the model declaratory action under previous §§ 606 ff. of the Civil Procedural Code but there are other instruments as well that are of specific interest, in particular, in relation to funding.
- Italy first introduced a consumer collective redress mechanism in 2007 and has reformed it multiple times since. In 2019, the consumer class action was repealed and replaced as part of a broader overhaul of collective redress, introducing a more general collective redress mechanism. The numerous court cases that have arisen under these frameworks offer a rich basis for researching the issues addressed in this study.
- Poland is special among the selected Member States as consumer rights are enforced by a public authority, which is typical for Member States of Central and Eastern Europe.

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[2] Established case law since ECJ, 14 December 1995, Case C-312/93 *Peterbroeck, Van Campenhout & Cie. SCS v Belgium*, [1995] ECR I-4599, para. 14.
[3] See the overview at BEUC, Collective redress two years on, 2024, https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-084_Collective_Redress_Two_years_on.pdf
[4] 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, https://eur-lex.europa.eu/eli/reco/2013/396/oj/eng.

Additionally to injunctive measures, Poland has 15 years of experience with collective redress, having introduced the Act on Pursuing Claims in Group Proceedings back in 2009.

While the situation in these four Member States is analysed in detail, experience from Austrian, Dutch, French and Spanish law is also taken into consideration.

C. Structure of the study

The study consists of four parts (including this introduction).

Part two contains four country reports in alphabetical order:

- Belgium (by Wannes Vandenbussche)
- Germany (by Axel Halfmeier and Peter Rott)
- Italy (by Laura Bugatti) and
- Poland (by Jagna Mucha).

The country reports give an overview of the relevant national implementation of the Representative Actions Directive and particularly focus on the viability of collective redress actions for immaterial damage, on burden of proof and disclosure and on financing claims.

Part three presents cross-cutting analyses of the three focus points:

- Immaterial damage (by Peter Rott)
- Burden of proof and disclosure (by Wannes Vandenbussche) and
- Financing claims (by Axel Halfmeier).

These three reports summarise the findings of the four country reports in their relevant sections but also consider developments in other legal systems, such as Austria, France, the Netherlands and Spain. Each comparative report has a concluding section with recommendations based on best practices.

In part four, the authors make policy recommendations, supported by explanations.

PART 2: COUNTRY REPORTS

A. BELGIUM

Wannes Vandenbussche[5]

I. Introduction

With the enactment of the Act of 21 April 2024,[6] the Belgian legislator transposed the Representative Actions Directive (EU) 2020/1828 into Belgian law, bringing some notable changes to the Belgian action for collective redress. This mechanism was initially established by the Act of 28 March 2014, which came into force on 1 September 2014, and was later amended by the Act of 30 March 2018, *inter alia* to open up the mechanism to small and medium enterprises (SMEs). The rules governing this action are set out in Title II of Book XVII of the Code of Economic Law ('CEL'), specifically in Articles XVII.34 to XVII.70. Since only eleven cases were brought in the first ten years of its existence, the action for collective redress cannot be considered a great success in Belgium.[7]

The implementation of the Representative Actions Directive did not bring about a major overhaul of the Belgian framework. The core features of the Belgian regime were already broadly aligned with the requirements of the Directive.[8] More precisely, only certain designated entities (both consumer organisations and SME rights organisations) were authorised to initiate collective redress actions against undertakings for harm suffered by consumers or SMEs. These actions already had to relate to a defined category of infringements (breaches of contract or breaches of specific laws listed in Art. XVII.37 CEL). Finally, it was already possible, subject to court approval, to agree on a settlement before the proceedings, during a mandatory negotiation phase and during the proceedings on the merits.[9]

Nonetheless, some modifications to the Belgian action for collective redress were still necessary to comply with the requirements of the Representative Actions Directive, including the following:

- align the scope of application with the Directive;
- align the designation and monitoring of qualified entities with the Representative Actions Directive;
- make cross-border representative actions possible;

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[5] This report has been prepared in his capacity as Professor of Civil Procedure at Ghent University and in that capacity only.

[6] The Act of 21 April 2024 amending Books I, XV and XVII of the Code of Economic Law, and transposing Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, *Belgian Official Gazette* 31 May 2024.

[7] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 186.

[8] An important reason for this is that Belgian legislation drew inspiration from the 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, which was one of the predecessors of the Representative Action Directive.

[9] S Voet, 'Class action in Belgium: Evaluation and the way forward' in A Uzelac and S Voet (eds), *Class actions in Europe. Holy grail of a wrong trail?* (Springer 2021) 131, 136.

- include rules on litigation funding (that did not exist before); and
- subject qualified entities to additional obligations (including information duties).

In addition, the Belgian legislator has taken the opportunity of this transposition to seek to improve some of the features of the Belgian action for collective redress which did arguably not function as intended since its introduction, including the following:

- replace, in most cases, the court's discretionary choice between an opt-in and an opt-out approach, with a generalised opt-in system for class composition;
- shorten the admissibility phase by stating that the court needs to make a decision on admissibility immediately at the preliminary hearing or at a nearby date;
- extend to SMEs many of the rules that the EU Directive requires for consumers (such as applying the same designation criteria for qualified entities for SMEs).

II. General overview

In the following section, several key aspects of the Belgian legal framework for collective redress will be discussed, with a particular focus on those relevant to the specific issues identified in the tender. For instance, the number of qualified entities designated may affect their financial requirements, while the scope of application of the mechanism can determine whether claims for non-material damages are admissible at all. Although Belgian law provides for actions for injunctive relief, given the scope of the study, the analyse is limited to actions for collective redress. Similarly, the procedural options available to SMEs are not specifically addressed.

1. Scope of application

In Belgium, the action for collective redress is only allowed if the claim is based on a breach by an undertaking of a contract or of specific acts or EU Regulations explicitly listed in Article XVII.37 CEL.[10] Since 2014, this list has been regularly updated. In 2018, for instance, the GDPR was added to the list to also allow actions for collective redress for data breaches,[11] which resulted in a case brought against Facebook shortly afterwards.[12]

In many areas, the Belgian list already corresponded to what can be found in Annex I of the Representative Actions Directive, with the traditional examples being, of course, breaches of general consumer protection rules (including unfair contract terms, unfair commercial practices, misleading advertising, the sale of goods, and issues related to product safety and liability) as well as non-compliance of the airline passengers regulations.

Nevertheless, this list was, in certain respects, more limited than the one in Annex I of the Directive. For example, financial services were largely absent until the implementation of the Representative

[10] In 2016, the Belgian Constitutional Court ruled that limiting collective redress proceedings to infringements of exhaustively listed rules did not violate the principle of equality (Constitutional Court, 17 March 2016, (B.16-B.20), https://www.const-court.be/public/n/2016/2016-041n.pdf).

[11] Act of 30 July 2018, Belgian Official Gazette 5 September 2018.

[12] *Test Aankoop v. Facebook*, see G-J Hendrix and X Taton, 'De rechtsvordering tot collectief herstel – Overzicht van rechtspraak (2014-2020)' (2021) TBH 864, 869, par. 11. According to publicly available information, those proceedings would have ended in 2021 after the parties involved reached a settlement agreement.

Actions Directive.[13] For example, there was no possibility to initiate an action for collective redress for violations of the Markets in Financial Instruments Directive 2014/65/EU (MiFID II)[14] and the Prospectus Regulation[15], as well as of Regulation on packaged retail and insurance-based investment products (PRIIPs)[16] and Regulation on European long-term investment funds[17].

The transposition of the Directive has thus broadened the scope of application, opening the door to collective actions for breaches of the above-mentioned financial regulations, as well as for breaches of additional regulations on energy and media services, and more recent EU instruments such as the DSA and the DMA.

Importantly, in some respects the Belgian framework had, and still has, a broader scope than that defined by Annex I of the Representative Actions Directive. First, the action for collective redress can cover all situations where a trader breaches a contract with several consumers and thereby harms the collective interests of consumers (e.g. a telecom operator that fails to deliver the agreed surfing speed).[18] Secondly, an action for collective redress can be brought for a category of infringements in specific areas which are sometimes (partially) covered by EU law, but which are not listed in Annex I of the Directive.[19] Examples include violations of competition law (particularly anti-competitive agreements and abuse of dominance)[20], as well as infringements of intellectual property rights[21]. Third, Article XVII.37 CEL contains a number of provisions that do not transpose EU directives but provide specific protection for Belgian consumers. Reference can be made to rules to protect consumers in certain construction contracts[22], rules to protect consumers against

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[13] Cf. 'Perhaps more importantly, in Belgium class actions cannot be based on the traditional grounds for bringing a securities class action' (H De Wulf, 'Class action in Belgium' in BT Fitzpatrick and R S Thomas (eds.), *The Cambridge Handbook of Class Actions* (CUP 2021) 194, 208.

[14] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) https://eur-lex.europa.eu/eli/dir/2014/65/oj.

[15] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, http://data.europa.eu/eli/reg/2017/1129/oj.

[16] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), http://data.europa.eu/eli/reg/2014/1286/oj.

[17] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, http://data.europa.eu/eli/reg/2015/760/oj.

[18] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 192.

[19] For instance, infringements of antitrust rules are absent from Annex I of the Representative Actions Directive. Moreover, the preamble of Directive 2014/104/EU 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 explicitly states that '*it does not require Member States to establish collective redress mechanisms*'. This is considered paradoxical, given that the reform of EU consumer redress was initiated by the 2005 Green Paper and the 2008 White Paper on damages actions for breaches of antitrust rules (M Sousa Ferro, 'Survey: Consumer antitrust private enforcement in Europe' (2022) 13(8) Journal of European Competition Law & Practice, 578, 578).

[20] Art XVII.37, 33° CEL referring to 'Art 101 and/or 102 TFEU'.

[21] Art XVII.37, 1° f) CEL referring to 'book XI – Intellectual Property'.

[22] Art XVII.37, 4° CEL referring to 'the Act of 9 July 1971 regulating housing construction and sale of houses to be built or under construction'. This Act governs contracts involving the transfer of ownership of houses or apartments that are under construction or yet to be built, as well as agreements where a contractor undertakes to construct such properties. Its scope is limited to buildings intended for residential use or a combination of residential and professional purposes, provided the buyer or principal is required to make one or more payments before the construction is completed.

unfair practices in the out-of-court collection of consumer debts[23], and rules on mileage fraud in the sale of used cars.[24]

2. Class representative

Under the Belgian legal framework, individual consumers (or their lawyers) cannot bring an action for collective redress, but must rely on an action brought by a class representative. Hence, the Belgian legislator clearly opted for the 'ideological plaintiff' model. This means that the plaintiff himself has no private cause of action or grievance against the defendant.[25] The aim is to ensure the efficiency and quality of collective redress actions and to avoid abusive or frivolous litigation.[26]

Previously[27], standing was only granted to consumer organisations that had legal personality and were represented on the Special Consumer Consultative Commission (which acts as the central advisory body on consumer issues)[28] or were accredited by the Minister of Economic Affairs.[29] Under the previous regime, nine out of the eleven actions for collective redress were initiated by *Test-Achats*, the largest consumer organisation in Belgium.[30] This finding highlighted the quasi-monopoly of this association in this field prior to the implementation of the Representative Actions Directive.[31]

With the transposition of the Directive, the principle of the ideological class representative was retained, but the rules on standing were modified. Two categories of class representatives can now file a (domestic) action for collective redress on behalf of consumers before the competent Belgian courts[32]: the so-called qualified entities 'Consumer' (see a) and, to some extent, the Consumer Ombudsman Service (see b).

a) Qualified entity 'Consumer'[33]

A qualified entity 'Consumer' is any legal entity that is recognised by the Minister of Economic Affairs and that meets the set of criteria prescribed in Article XVII.1, § 1 CEL. These criteria are identical to those set out in Article 4(3) of the Representative Actions Directive for qualified entities in cross-border actions. Hence, the Belgian legislator has thus made use of the option given to Member States by Article 4(5) of the Directive to decide that the criteria listed for cross-border actions also

[23] Art XVII.37, 18° CEL referring to 'the law of 20 December 2002 on the out-of-court collection of consumer debts'.
[24] Art XVII.37, 20° CEL referring to 'the Act of 11 June 2004 to curb vehicle odometer fraud'.
[25] S Voet, 'Class action in Belgium: Evaluation and the way forward' in A Uzelac and S Voet (eds), *Class actions in Europe. Holy grail of a wrong trail?* (Springer 2021) 131, 149.
[26] Explanatory Memorandum, *Parl. Doc*. Chamber of Representatives 2013-14, no.53-3300/001 and no. 53-3301/001, p. 25. See also S Voet and B Allemeersch, 'De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten' (2014-15) (17) Rechtskundig Weekblad 646, 648, para 10.
[27] See e.g. H Boularbah, 'Le cadre et les conditions de l'action en réparation collective' in J Englebert and J-L Fagnart (eds), L'action en réparation collective (Anthemis 2015) 28.
[28] In English also referred to as the Council of Consumption, see R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 194.
[29] During the period that this rule was in force, recognitions were never granted to consumer protection organizations.
[30] One action was initiated by the Consumer Ombuds Service, and one action for collective redress on behalf of SMEs was initiated by the Neutral Syndicate for the Self-Employed.
[31] E De Baere, A-S Maertens and K Willems, 'Belgische Class Action: Tien Pijnpunten' (2015) (326) 519, 524; R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 195
[32] In fact, the Brussels Commercial Court has exclusive jurisdiction (see Art XVII.35 CEL).
[33] The law uses this term to distinguish this qualified entity from the qualified entity SME, which is outside the scope of this study.

apply to the designation of qualified entities for the purpose of bringing domestic actions. More specifically, these criteria include the following:

- at least 12 months of actual public activity in the protection of consumer interests;
- legitimate interest in protecting consumer interests as enshrined in statutory purpose;
- a non-profit-making character;
- not the subject of insolvency proceedings and is not declared insolvent;
- independent, not influenced by persons having an economic interest in the action, with procedures in place to prevent undue influence and conflicts of interest;
- publicly available information on compliance with the above criteria, as well as about sources of funding in general, organisation, management, membership structure, statutory purpose, and activities.

The procedure for recognition as a qualified entity 'Consumer' involves a legal person submitting a request to the Minister of Economic Affairs. Recognition is granted if the legal entity demonstrates that it meets all of the above requirements. Recognition is generally granted for an indefinite period (to avoid disrupting ongoing collective proceedings due to delays in an administrative renewal process).

However, recognition may be withdrawn if, upon review, it is determined that the entity no longer meets the criteria for recognition. In principle, the Minister or his delegate may decide at any time, even without specific grounds, to reassess whether a qualified entity 'Consumer' continues to meet the recognition criteria (Art XVII.1/1, § 1 CEL). However, there are three situations where such a review is mandatory:

- first, when a Belgian court, following serious doubts raised by the defendant, determines that the qualified entity no longer meets the criteria;
- second, if the Minister receives a notification from the European Commission or another EU Member State questioning whether the entity meets the criteria;
- third, in any case, every five years from the date of recognition or the most recent review (as qualified entities can go through significant developments in five years) (Art XVII.1/1, § 1 *in fine* CEL)

Within the framework of such review, the Minister or his delegate may request necessary documents to verify compliance, and the entity must provide these along with any clarifications to facilitate the review. If sufficient information is not provided, recognition will be revoked.[34]

In addition, Belgian law now explicitly provides that any organisation or public body representing the collective interests of consumers and designated as a qualified entity by another EU or EEA Member State is also recognised as a qualified entity 'Consumer'. Proof of such recognition to act on behalf of a group of consumers can only be provided by presenting the list of qualified entities for cross-border representative actions published by the European Commission pursuant to Article 5(1) of the Directive (Art XVII.1/1, § 2 CEL).

Finally, the Belgian legislator has made use of the option provided by Article 4(6) of the Directive, allowing Member States to designate an entity as a qualified entity on an ad hoc basis for the

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[34] This is at least what the Explanatory Memorandum suggests, as it emphasizes that recognition as a qualified entity is considered a privilege aimed at protecting consumers. It is therefore the entity's responsibility to prove that it meets the required conditions. In cases of doubt, recognition cannot be assumed, as the entity must clearly demonstrate that it operates professionally, independently, and non-profitably in representing consumer interests (Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 16).

purpose of bringing a specific domestic action. More specifically, Article XVII.1/1, § 3 CEL stipulates that a legal entity can be recognised as a qualified entity 'Consumer' for a particular claim brought before a Belgian court. In such cases, the president of the court competent to rule on the collective redress action examines the compliance with the recognition criteria, taking into account the specific nature of the claim (Art XVII.1/1, § 3 CEL).

The Act of 21 April 2024 has, in certain respects, made the recognition of class representatives more flexible (e.g., by removing the requirement of being represented in the Special Consumer Consultative Commission and by introducing an *ad hoc* designation). While this could theoretically enable more entities to qualify for bringing collective redress actions, it is rightly questioned whether this will materialize in practice. For instance, ad hoc entities must still demonstrate, in the context of the specific claim they bring before the court, that they have been publicly active in protecting consumer interests for 12 months prior to the request for designation. Establishing an ad hoc entity solely for one action for collective redress is therefore not feasible. Consequently, the added value of permitting ad hoc entities to initiate proceedings seems limited to situations where pre-existing consumer organisations, which have not previously sought recognition due to a lack of general interest in obtaining redress measures, wish to take action in the context of a specific claim.[35]

b) Consumer Ombudsman Service

The competence of the Consumer Ombudsman to act as a class representative is a peculiarity of Belgian law. The Consumer Ombudsman Service is an autonomous public body with legal personality, comprising four public ombudsman services (the Ombudsman for Telecommunications, the Ombudsman for the Postal Sector, the Ombudsman for Energy, and the Ombudsman for Train Passengers) and two private ombudsman services (the Ombudsman for Financial Services and the Ombudsman for Insurance). It consists of a front office and a service for the out-of-court resolution of consumer disputes (Article XVI.5 CEL). It was established following the transposition of the ADR Directive into Belgian law.[36]

Under Belgian action for collective redress, the Consumer Ombudsman Service has standing, but only for the purpose of representing the group during the negotiation phase of a collective settlement (Article XVII.39 CEL). Once a collective redress action has been declared admissible, there is a period of time during which the class representative and trader must negotiate a collective settlement, which serves as a kind of cooling-off period.[37] The aim is to reach a collective settlement, *i.e.* a settlement agreement on the extent and form of redress for all consumers in the class, which must then be declared binding by the court. If the negotiation phase ends without such an agreement, the court must appoint a new group representative to proceed with the case (Article XVII.40 CEL).[38]

In the past, various authors argued that the Consumer Ombudsman Service's ability to initiate a collective redress procedure conflicted with the requirements of independence and impartiality for

[35] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 195.
[36] Article 3 of the Act of 4 April 2014, introducing Book XVI, Out-of-Court Settlement of Consumer Disputes, into the Code of Economic Law, Belgian Official Gazette 12 May 2014.
[37] S Voet, 'The Revised Class Action Regime in Belgium: Harder, Better, Faster, Stronger?' (2024) (2) Mass Claims Journal 76, 80.
[38] Cf. 'This does not make sense at all. Although changing this rule, and even abolishing the standing of the Consumer Mediation Service was discussed in the legislative process, the old rule was maintained' (S Voet, 'The Revised Class Action Regime in Belgium: Harder, Better, Faster, Stronger?' (2024) (2) Mass Claims Journal 76, 77).

qualified entities under the ADR Directive.[39] More specifically, it was asserted that businesses might be deterred from participating in individual mediation processes, knowing that the information disclosed could later be used by the Consumer Ombudsman Service in a collective redress action.

In the sole action initiated by the Consumer Ombudsman Service to date, against multiple energy suppliers, the first-instance court did not question the requirement of impartiality, stating that this requirement did not apply to the same extent in a collective redress procedure.[40] However, on appeal, the claim was declared inadmissible. The appellate court held that the Consumer Ombudsman Service had failed to demonstrate any intent to negotiate, which the court considered a prerequisite for admissibility. Furthermore, the court found that the Consumer Ombudsman Service had acted as an elevated 'mailbox' for the Energy Ombudsman, who was the actual driving force behind the procedure, which it deemed inconsistent with the legislature's intent.[41]

Despite the aforementioned criticism and the unsuccessful case, in transposing the Representative Actions Directive, the legislator retained the Consumer Ombudsman Service's standing to initiate actions for collective redress (Article XVII.39, § 1, 2° CEL), albeit still limited for the purpose of representing the group during the negotiation phase of a collective settlement. Although the wearing of 'double hats' by the Consumer Ombudsman Service can be criticised, it is far from ideal that this entity is limited to negotiating without any further leverage, maintaining the standing of the Consumer Ombudsman Service could be beneficial. It aligns with the broader trend of integrating different enforcement mechanisms for consumer law rather than treating them as separate domains.[42]

3. Cross-border actions

In the Representative Actions Directive, a central distinction is made between domestic and cross-border actions, depending on whether the qualified entity brings a claim in the Member State where it is designated or in another Member State.[43] The transposition of the Directive refined the legal framework of cross-border actions in Belgian law. Regarding this mechanism, a further distinction must be made between cases where a qualified entity from another Member State brings an action before a Belgian court and cases where a qualified entity designated in Belgium initiates a representative action in another EU Member State.

a) By qualified entities from another Member State before the Belgian court

The possibility for one or more qualified entities designated in another Member State to bring a representative action before a Belgian court was not entirely novel. Following a 2016 judgment of the Constitutional Court[44], collective redress proceedings could already be initiated by a

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[39] H Boularbah, 'Le cadre et les conditions de l'action' in J Englebert and J Fagnart (eds), *L'action en réparation collective* (Anthemis 2015) 22 ; E De Baere, *De Belgische class action* (Kluwer 2017) 37; G-J Hendrix and X Taton, 'De rechtsvordering tot collectief herstel – Overzicht van rechtspraak (2014-2020)' (2021) TBH 864, 879, para. 36.

[40] Commercial Court of Brussels, 4 November 2019, A/18/02721, *unpublished*.

[41] Court of Appeal of Brussels, 14 April 2021, 2019/AR/1763, *unpublished*.

[42] See also W Vandenbussche and P Taelman, 'Consumer Protection Proceedings' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (eds), Comparative Procedural Law and Justice (Part XII Chapter 6), cplj.org/a/12-6, accessed 26 November 2024, para 253.

[43] See Article 3(6) and 3(7) of the Representative Actions Directive.

[44] The Constitutional Court held that the former Article XVII.39 of the Belgian Code of Economic Law violated Articles 10 and 11 of the Constitution, read in conjunction with Article 16 of the Services Directive, insofar as it did not allow representative entities from other EU Member States or states within the European Economic Area that met the requirements of point 4 of Commission Recommendation 2013/396/EU to act as group representatives (Constitutional Court 17 March 2016, no. 41/2016, para. B.36).

representative entity from another EU Member State.[45] More specifically, representative entities recognised by another EU or EEA Member State that met the criteria set out in point 4 of the 2013 Commission Recommendation could act in Belgium. However, it was for the court to assess whether those criteria were fulfilled (including the entity's sufficient financial capacity).

An important change introduced by the implementation of the Directive is that, in a cross-border action, the Belgian court can no longer reassess whether the foreign qualified meets the designation criteria of Article 4(3) of the Directive. Instead, inclusion on the list of qualified entities for cross-border representative actions published by the European Commission suffices. The only review the court may still conduct, as provided for by the Directive in Article 6(3) *in fine*, is to verify whether the statutory purpose of the representative entity aligns with the subject matter of the collective redress action filed (Art XVII.36 CEL).

A further amendment to Belgian law was required to allow several qualified entities to jointly bring an action for collective redress, as mandated by Article 6(2) of the Directive. Under the previous regime, only a single qualified entity could represent a given group of consumers.[46] Under the new framework, multiple qualified entities may act in the same collective redress action, provided they represent geographically distinct groups of consumers (Art. XVII.40, § 2 CEL). For instance, a Belgian, French, and German class representative may jointly file a collective redress action in the Brussels court, provided each represents the group of Belgian, French, and German consumers, respectively. If multiple class representatives seek to represent the same group (such as two French entities applying to represent all affected consumers residing in France) the court must determine which entity is most suitable to act as the class representative (Article XVII.40 CEL). This decision will be based on the specifics of the case, including factors such as proximity to group members and familiarity with the subject matter.[47]

b) By Belgian qualified entities before courts in other Member States

A further notable innovation is that class representatives recognised in Belgium will also be able to bring cross-border actions in other Member States. The primary authority to initiate such proceedings lies with the same entities as those recognised for domestic actions, as Belgium has generalised the Directive's recognition criteria to all types of action. Interestingly, Belgian law also gives the Consumer Ombudsman the possibility to bring cross-border actions in other Member States, but solely for the purpose of representing the group during the negotiation phase of a collective settlement (Art. XVII.39, § 3 CEL).[48]

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[45] See Article 36 of the Act of 18 April 2017 containing various provisions on the economy, Belgian State Gazette 24 April 2017.

[46] W Vandenbussche and G-J Hendrix, 'Nieuwe wet past regeling voor collectieve procedures aan' (2024) (492) *Juristenkrant* 5, 5.

[47] Explanatory Memorandum, *Parl.Doc*. Chamber of Representatives 2023-2024, no. 55 3895/001, p. 34.

[48] It is highly questionable whether the Belgian law's imposition of restrictions on how a class representative conducts proceedings in another Member State complies with EU law.

4. Overview of the procedure

a) Admissibility stage

As in most jurisdictions, actions for collective redress in Belgium proceed through several phases, with the admissibility phase logically being the first. To initiate proceedings, the prospective class representative must file an application with the registry of the (Dutch- or French-speaking) Enterprise Courts of Brussels. This application must include specific mandatory information, such as evidence demonstrating that the action meets all admissibility requirements, a description of the collective harm at issue, a definition of the group the representative seeks to represent, and the redress sought (Art. XVII.42, § 1).

Since the transposition of the Directive, the application must also include information regarding any financing arrangement for the action. If third-party funding is involved, the prospective group representative must disclose this in the application and identify the third party providing the funding (Art. XVII.42, § 1, 6° CEL).

If the application is incomplete, the court registrar will instruct the applicant to provide the missing information within eight days. Failure to comply will result in the application being considered as not filed (Art. XVII.42, § 3 CEL). Once the application is complete, the court registrar will arrange for it to be notified to the defendants concerned.

Once the application has been notified to the defendants, the case moves into the admissibility phase (Art XVII.43, § 2 jo. Art XVII.36 CEL). During this stage, the court must assess whether all admissibility criteria are met, namely:

- the cause of action is a potential breach of one of the specific acts or EU regulations listed in Art XVII.37 CEL;
- the applicant is an entity that can act as a class representative (namely a qualified entity 'Consumer' or the Consumer Ombudsman Service), and its statutory purpose is directly related to the subject matter of the action[49]; and
- an action for collective redress appears more efficient than ordinary proceedings.[50]

At the same time, the court will also need to decide on various aspects of the collective action, including the definition of the group, the collective harm, the common cause of that harm, and the period allotted for negotiations, which must last at least three months (Art XVII.43, § 2 CEL).

One of the improvements the legislator aimed to implement through the Directive's transposition was to expedite the admissibility phase. As a result, the assessment of the admissibility of actions through short hearings has become the basic premise. This means that oral arguments on admissibility are heard immediately at the first hearing or shortly thereafter. Alternatively, the judge

[49] This simplified admissibility requirement, derived from Article 6(3) of the Directive, replaces the suitability assessment previously included in the legal text. However, that assessment sparked significant debates, causing delays during the admissibility phase of the proceedings. It also became an opportunity to question the quality guarantees of the class representative, despite this not being the original intent of the legislature (Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 26).

[50] In evaluating efficiency, the court should weigh the increased expenses and complexities linked to collective redress actions against alternative judicial and non-judicial methods. This consideration includes recognizing the differences among potential group members. If individual concerns surpass the shared issues presented by the claim's subject, a collective redress approach might not be suitable (R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 197).

will set a timetable for the exchange of pleadings and will endeavour to make a decision on admissibility within six months (Art XVII.43, § 1 CEL).

b) Negotiations to reach a collective settlement

If the court declares the collective redress action admissible, the admissibility decision is published online on the website of the Ministry of Economic Affairs and in the Belgian Official Gazette. Following this publication, the negotiation phase of the proceedings begins. During this phase, the parties are expected (but not obliged) to negotiate a settlement. To this end, the court may (if the parties so request or at least agree) appoint a mediator to assist in the negotiations. If one of the parties refuses to negotiate, the other party may ask the court to terminate the negotiation phase early. This is, in fact, an innovation introduced by the act implementing the Representative Actions Directive.[51] Previously, it was assumed that the negotiation period was a fixed term that the parties could not end prematurely.[52] To promote the smooth running of the procedure, this has now been changed. The court remains seized during the negotiations. This means that a party may request the court to terminate the negotiation phase early and begin the phase on the merits if the other party has been inactive for a period of 30 working days (Art XVII.45, § 4 CEL).

If the parties reach a settlement, they may submit the agreement to the court for it to be declared binding. Unlike situations where the court must rule on the matter, the parties in a settlement have the flexibility to choose either an opt-in or opt-out approach. However, an opt-in system must always be used for consumers whose habitual residence is outside Belgium, and for any group member when the harm for which redress is sought involves physical or moral harm (Art XVII.45, § 3, 7° CEL).

c) Decision on the merits

If no settlement is reached during the negotiations, if the court refuses to approve a settlement or if the parties ignore a request by the court to further complete a settlement that did not contain all necessary mentions, the matter proceeds to the so-called merits phase (Art XVII.52 CEL). During that phase, the parties are allowed to file submissions on the merits, setting out the class representative's claims and the trader's defences. At the end of this phase, a hearing is organised during which the parties can present their oral arguments (Art XVII.53 CEL). The court will then issue its judgment on the merits, which will subsequently be published online on the Ministry of Economic Affairs' website and in the Belgian Official Gazette (Art XVII.55 CEL).

If the court declares (at least part of) the class representative's claims well-founded, potential group members have four months from the publication of the judgment to opt in to the group (Art. XVII.55/1, § 1 CEL). This generalised opt-in system marks a change from the previous regime. Under the former system, Belgian law followed a mixed opt-in/opt-out approach. With two exceptions[53], the decision on whether a collective redress action required potential class members to opt in or opt out was left to the court's discretion. It seems the legislator changed this for a generalised opt-in system to avoid lengthy discussion at the admissibility stage as to which system should apply.

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[51] S Voet, 'The Revised Class Action Regime in Belgium: Harder, Better, Faster, Stronger?' (2024) (2) Mass Claims Journal 76, 80.

[52] E De Baere, *De Belgische class action* (Kluwer, 2017) 113)

[53] These exceptions are retained for class action settlement agreements, for consumers whose habitual residence is outside Belgium, and for any group member when the harm for which redress is sought involves physical or moral harm, in which case the settlement agreement must include an opt-in system. Outside of these exceptions, the parties are free to choose which system they wish to apply.

d) Pay-out phase[54]

After the deadline for potential group members to opt in the proceedings has passed, a claims administrator, which was appointed by the court in the judgment on the merits, will compile a list of group members. The claims administrator is chosen from a list maintained by the court, which includes lawyers, public officials, and court agents authorised to act as claims administrators (Art. XVII.57 CEL). If any individuals who have opted in are excluded from the list of group members, because the claims administrator believes they do not meet the criteria, a brief appeal process is available. Once the appeal period has expired, the court will make a final decision on the list of group members (Art. XVII.58, § 3 CEL).

Once the list of class members has been finalised, the defendant is required to provide the remedies set out in the approved settlement or judgment on the merits (Art. XVII.59 CEL). During this process, the claims administrator will submit quarterly reports to the court, which may continue to intervene if problems arise (Art. XVII.61, § 1 CEL).

Once compensation has been paid to all class members, the claims administrators will submit a final report to the court. This report will include a summary of the claims administrator's costs and any remaining amounts that have not been paid to consumers. Once the court has made its decision, the case is closed (Art. XVII.61, § 1/1 CEL).

III. Quantification of (immaterial) damage, especially in digital environments[55]

In Belgium, the quantification of non-material damage in the digital context has so far received limited attention. Although the collective redress action has been available for GDPR breaches since 2018[56] it has only been used for this purpose once so far. Following the Cambridge Analytica scandal, which revealed that data from millions of Facebook users had been shared without their consent, Test-Achats initiated a collective action for redress against Facebook Ireland and other Facebook entities.[57] The claims were based on breaches of the data protection regulation, unfair competition, and unfair commercial practices. Based on publicly available information, those proceedings concluded in 2021 following a settlement agreement reached by the parties involved.

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[54] The Directive's implementation act did not introduce any changes to this part, simply because, at that time, no Belgian collective redress action had yet reached this phase

[55] For this part of the report, the author wishes to thank Silke Onraedt, Master of Laws student, for her research assistance.

[56] In addition, in implementation of Article 80 of the GDPR, a similar mechanism as the Belgian action for collective redress in the CEL was implemented in the field of data protection, enabling associations to initiate collective redress actions if mandated by data subjects. See art. 220, para 1 of the Law of 30 July 2018 on the protection of natural persons with regard to the processing of personal data.

[57] At the time it brought its action, Test Achats claimed that 19,500 potential group members had already registered with it, although it estimated that there were approximately 7.1 million potential group members in Belgium (G-J Hendrix and X Taton, 'De rechtsvordering tot collectief herstel – Overzicht van rechtspraak (2014-2020)' (2021) TBH 864, 869-870, par. 11).

It has not been disclosed whether the settlement included financial compensation for the Facebook users.[58] Therefore, this case offers limited insights in the issue described here.

Moreover, in Belgian legal scholarship, most attention regarding this issue is given to the numerous recent judgments of the Court of Justice of the EU, which have established the framework within which compensation for non-material damage can occur in the various Member States.[59] This includes, among other aspects, that a mere infringement of GDPR provisions is not sufficient[60], that there is no specific threshold of seriousness[61], that no additional requirements should be imposed (such as the perceptibility of the harm or the objective nature of the breach)[62], and that the severity of the infringement and any intent cannot play a role in the assessment of damages either.[63]

Nonetheless, within the framework of the principle of procedural autonomy, Member States retain some discretion to determine the quantification of non-material damage, provided they do not undermine the EU law principles of equivalence and effectiveness.[64] It is therefore necessary to apply the principles of civil liability in conjunction with the case law of the CJEU.[65] In general, Belgian law is, at least in theory, open and flexible with regard to the concept of immaterial damages. However, the prevailing view is that it is not easy to obtain meaningful compensation, i.e. more than a symbolic amount of money.

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[58] See Test Aankoop, 'Test Aankoop en Facebook beëindigen hun geschil', *Test Aankoop* 28 mei 2021, www.test-aankoop.be/hightech/internet/nieuws/test-aankoop-facebook. De Tijd, 'Test-Aankoop staakt strijd tegen Facebook', *De Tijd* 28 mei 2021, www.tijd.be/ondernemen/technologie/test-aankoop-staakt-strijd-tegen-facebook/10309670.html. Test Aankoop, 'Gemeenschappelijk persbericht Facebook – Euroconsumers – Test Aankoop', *Test Aankoop* 28 mei 2021, www.test-aankoop.be/hightech/internet/pers/gemeenschappelijk-persbericht-facebook---euroconsumers---test-aankoop.

[59] See for instance, J Vandendriessche and F De Ridder, 'Het vraagstuk van aansprakelijkheid onder de AVG: een analyse uit verschillende oogpunten' (2024) (28) T.Verz. 215-253; L Van Roy, S Van Eekert and I Samoy, 'Schadevergoeding na gegevenslek door externe hackers: Hof van Justitie erkent AVG-gerelateerde angstschade', (2024) (482) Juristenkrant 3-4, L Van Roy, 'Geen schadevergoeding zonder schade bij schending gegevensbeschermingsverordening' (2023) (470) Juristenkrant 5. For the Netherlands, see AL Jonkers, KV Meiring, JML Van Duin and J Wassink, 'Immateriële schadevergoeding in collectieve acties onder de AVG: terug naar de kern', NTBR 2024/18.

[60] CJEU 11 April 2024, C- 741/21, ECLI:EU:C:2024:288 *GP v. juris*, para. 34 and 40.

[61] CJEU 4 May 2023, C- 300/21, ECLI:EU:C:2023:370 *UI v. Österreichische Post*, para. 49.

[62] CJEU 21 December 2023, C- 667/21, ECLI:EU:C:2023:1022 *ZQ v. Medizinischer Dienst der Krankenversicherung Nordrhein*, para. 103.

[63] CJEU 20 June 2024, C-182/22, ECLI:EU:C:2024:531 *Scalable Capital*, para. 30.

[64] Cf. 'Article 82 of the GDPR must be interpreted as meaning that, for the purposes of determining the amount of damages payable under the right to compensation enshrined in that article, national courts must apply the domestic rules of each Member State relating to the extent of financial compensation, provided that the principles of equivalence and effectiveness of EU law are complied with' (CJEU 4 May 2023, C-300/21, ECLI:EU:C:2023:370, *UI v. Österreichische Post*, para 59). Cf. 'for the purposes of assessing those damages, national courts must apply the domestic rules of each Member State relating to the extent of financial compensation, provided that the principles of equivalence and effectiveness of EU law, as defined by the settled case-law of the Court, are complied with' (CJEU 21 December 2023, C- 667/21, ECLI:EU:C:2023:1022 *ZQ v. Medizinischer Dienst der Krankenversicherung Nordrhein*, para. 101).

[65] E Caes, 'Le droit à réparation du dommage moral en cas de violation du R.G.P.D' (2024) 37 JLMB 1656, 1658. See also Article 216 of the Law of 30 July 2018 on the protection of individuals with regard to the processing of personal data (Belgian State Gazette 5 September 2018), which states that '(...) the claimant may claim compensation for his damage in accordance with contractual or extra-contractual liability'.

1. The notion of damage under Belgian law

On January 1, 2025, Book 6 of the Belgian Civil Code entered into force, introducing new rules on extracontractual liability in Belgium.[66] For the first time, statutory provisions explicitly address the concept of damage. In contrast, the old Civil Code of 1804 contained only six articles covering all aspects of extra-contractual liability, leaving the notion of damage to be shaped completely by case law from the Court of Cassation.[67]

Article 6.24 of the Civil Code defines damage as follows: 'Damage consists of the economic or non-economic consequences of an infringement on a personal interest worthy of legal protection'. The law further provides a specific definition for immaterial harm, referred to as non-pecuniary damage. This encompasses all non-economic consequences arising from an infringement on the physical or mental integrity (Article 6.25 of the Civil Code). The distinction between pecuniary and non-pecuniary damage, however, has no legal consequences, at least not regarding the right to compensation.[68] Consequently, all forms of damage are, in principle, equally eligible for compensation, without any hierarchy or priority. As highlighted in the preparatory works of Book 6, this reflects the Civil Code's highly open and flexible approach, which avoids ranking the various types of compensable damage.[69]

There is, however, one important requirement that must be met to qualify for compensation: the damage must be certain. This requirement is now codified in Article 6.25 of the Civil Code: '*Only certain damage leads to compensation*'. Hence, damage is not always a given; the injured party must assert and substantiate its existence and provide proof if contested. This rule is first and foremost a question of evidence, in the sense that damage is considered certain when its existence is indisputably established.[70] Moreover, this statutory provision codifies earlier case law of the Court of Cassation, which holds that a claim for compensation is unfounded if the plaintiff fails to provide evidence of the damage he seeks to recover.[71] Similarly, published case law of the lower courts contains decisions refusing compensation for immaterial damage on the basis of insufficient proof of the certainty of the damage.[72]

The parliamentary works provide further insight into the standards to be applied when determining whether damage can be considered certain: '*Since the required proof must establish judicial certainty rather than absolute certainty, the court must be convinced that the victim would have been in a better position had the defendant not committed the act giving rise to liability*'. This is in line with the general rules of evidence in Belgium. In principle, proof of damage is subject to the normal standard of proof in Belgium, which has been codified in Article 8.5 of the Civil Code since 2020. This standard requires that the evidence be established with a reasonable degree of certainty.

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[66] The new rules will apply to events that occur after Book 6 comes into force, while the old law will continue to apply to cases giving rise to damage that occurred before Book 6 came into force.
[67] For an overview, see for instance, E Dirix, Het begrip schade (Maklu 1998) 150 p. Or in English, M Kruithof, 'tort law' in M Kruithof and W De Bondt, Introduction to Belgian law (Kluwer Law International 2017) 244-248.
[68] The difference lies in the specific method used to quantify the damage.
[69] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2022-23, no. 55-3213/001, p. 121.
[70] Ibid, p. 136.
[71] Cass. 14 June 1984, ECLI:BE:CASS:1984:ARR.19840614.11.
[72] For instance, it is primarily the victim's responsibility to prove the damage, even when compensation is sought based on an equitable assessment (First Instance Court Mechelen, 15 January 2015, AR 12/694/A, unpublished). Immaterial damage, in particular, must be proven (Court of Appeal Antwerp, 12 March 2012, T.Gez. 2012-13, 241, with annotation by C.L.). Other decisions affirm the necessity of proving such damage: 'Immaterial damage must be proven' (Court of Appeal of Antwerp, 22 March 1994, RW 1994-95, 296); 'No evidence of any damage was provided' (First Instance Court Kortrijk, 17 November 1989, TGR 1990, 116); and 'The evidence of damage was not established' (First Instance Court Hasselt, 12 September 1989, Pas. 1990, III, 30)

However, the question arises whether a claimant seeking to prove non-material damage may invoke a lowered standard of proof as provided for in Article 8.6, paragraph 2 of the Civil Code. This provision allows a party bearing the burden of proof for a positive fact, where the nature of the fact makes it impossible or unreasonable to demand conclusive evidence, to satisfy the burden by demonstrating the probability of that fact.[73] This exception, also introduced into the new Civil Code in 2020, has not yet been applied to immaterial damage in published jurisprudence. Nevertheless, in theory, the proof of immaterial damage could qualify as such a positive fact[74], with the result that a lower standard would be applied to it.[75]

2. Quantification of damage

Once the damage has been established, it is necessary to determine its extent and select the appropriate method of compensation. The general rule for assessing damages is also codified in Book 6 of the Civil Code: '*The party liable for damages is obliged to provide full compensation, taking into account the concrete situation of the injured party*' (Art. 6.30 Civil Code). This provision enshrines two fundamental principles that govern compensation for all types of damage in the context of non-contractual liability: full reparation and quantification *in concreto*.[76]

a) Full reparation

The principle of full reparation, as enshrined in Article 6.30 of the Civil Code, applies to both pecuniary and non-pecuniary damage. Although non-pecuniary damage is typically compensated through a lump-sum payment, they must nonetheless aim to fully redress the harm suffered.[77] Article 6.31, § 1, paragraph 2 of the Civil Code provides guidance in this regard: '*Reparation of non-pecuniary damage aims to provide the injured party with fair and appropriate compensation for this damage*'.

In this respect, non-pecuniary damage differ from pecuniary damage. The modalities for compensating pecuniary damage focus on placing the injured party in the position it would have been in had the act giving rise to liability not occurred (Art. 6.33, § 1, first paragraph, Civil Code). For non-pecuniary damage, however, the concept is one of *compensation* rather than restoration of a previous state. Indeed, a lump sum awarded to the injured party for its suffering is not an exact equivalent of the moral damage suffered.[78] This is also the view of the Belgian Court of Cassation:

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[73] This exception to the normal standard of proof is inspired by Swiss law. See for instance, Tribunal Fédéral [Federal Supreme Court], 15 March 2010, 4D_151/2009, para 4.2; Tribunal Fédéral [Federal Supreme Court], 19 December 2006, 133 III 81, para 4.2.2; Tribunal Fédéral [Federal Supreme Court] 29 januari 2004, 130 III 321, no. 3.2

[74] For a similar argument, see W Vandenbussche and N De Lathauwer, 'Het hervormde bewijsrecht. Capita Selecta' in B Allemeersch and S Voet (eds), *Themis Gerechtelijk Recht* (die Keure 2020) 94, para 34.

[75] An additional complexity related to this rule is that, in the context of collective redress, the composition of the group is determined only after the decision on the merits. In principle, therefore, the class representative will not be able to prove the existence of damage for each injured class member, although such proof is required under Art 6.25 of the Civil Code (See E De Baere, A-S Maertens and K Willems, 'Belgische Class Action: Tien Pijnpunten' (2015) (326) 519, 531, para 30: These authors argue, for a similar hypothesis that previously existed in cases where the court has opted for an opt-out system in its decision on admissibility, that the court must show some flexibility and assess whether the alleged class members share common characteristics which make it plausible that they have suffered the alleged harm.

[76] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2022-23, no. 55-3213/001, p. 144.

[77] Ibid, p. 145.

[78] Ibid, p. 147.

the award of a sum of money for non-pecuniary harm is intended to alleviate pain, suffering or any other form of moral distress.[79] A similar perspective can be found in legal doctrine.[80]

It is important to emphasize that the legislature, in introducing Book 6, expressly states that the chosen approach for non-pecuniary damages must not result in an undervaluation of such damage or the application of standardised scales. In other words, merely symbolic compensation is not acceptable.[81] Whether this represents a departure from past practice or will lead to a shift in judicial decision-making remains to be seen. In the literature addressing the previous rules on non-contractual liability, it was frequently noted that compensation for non-pecuniary damage (particularly in the digital context) has historically been relatively low.[82]

Since Belgium (still) lacks a public database containing all rendered judgments and rulings, it is not possible to empirically verify these positions. As a result, reliance must be placed on the sporadic decisions of trial courts, which have been the subject of publication in the law reviews. While legal scholarship identifies loss of control over one's data (not knowing who has what information about you) as the most commonly claimed type of damage[83], a case law analysis did not identify any rulings dealing with this type of harm. The closest examples are three published judgments from labour courts, in which moral damages were awarded for violations of general principles of privacy and data protection by employers.

- In one case, the employee was awarded moral damages, estimated *ex aequo et bono* at 1,000 EUR, with the specific reasoning that the employer's review of intimate private emails during a comprehensive search of the employee's mailbox was experienced as painful and embarrassing by the employee.[84]
- In a similar case, the labour court criticised the extensive monitoring of an employee's entire mailbox and ordered the employer to pay moral damages, in this instance estimated at 1,500 EUR.[85]
- In a third case, the employer was able to track all private movements made by the employee after working hours using the company vehicle. The damages in that case were determined at 750 EUR.[86]

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[79] Cass. 20 February 2006, C.04.0366.N, ECLI:BE:CASS:2006:ARR.20060220.4; Cass. 13 October 1999, P.99.0861.F, ECLI:BE:CASS:1999:ARR.19991013.8.

[80] H Ulrichts, Schaderegeling in België (Wolters Kluwer 2018) 53-54, para. 127; M Kruithof, 'Het nodige onderscheid tussen schade en leed' (2024) (1-2) Tijdschrift voor Privaatrecht 495, 501, para 13: 'The granting of what is called moral damages is not, as in the case of actual compensation, a matter of reimbursing, through the allocation of a sum of money, society's valuation of the lost capacity to satisfy needs. Instead, it is about recognizing the suffering that consists of a negative emotional experience'.

[81] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2022-23, no. 55-3213/001, p. 147.

[82] N Debruyne, 'Persoonlijkheidsrechtelijke beschouwingen bij deepfakes' in S. De Rey, N. Vandamme en T. Gladinez (eds) Grenzen voorbij (Intersentia, 2020) 427, stressing that this is often disproportionate to the large profits made by infringers on the backs of their victims. Ibid: Y S Van Der Sype en A Vedder, 'Privacy, werk en internet of things"' (2016) (5) Or. 118, 124. In the Netherlands, the authors point to the same thing: 'In privacy cases, not only the determination of the (mostly immaterial) damages, but also the quantification typically requires attention: the cases are often difficult to compare and will usually involve low amounts of compensation' (E F D Engelhard, I Giesen and A C van Schaick, 'Nieuwe schadesoorten', (2018) (1) NTBR 1.

[83] D De Bot, 'Art. 15bis Wet Persoonsgegevens' in X., Personen- en familierecht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer (Kluwer 2001) 15; E Caes, 'Le droit à réparation du dommage moral en cas de violation du R.G.P.D' (2024) 37 JLMB 1656, 1661.

[84] Labour Court of Antwerp, October 1, 2003, JTT 2004, 510.

[85] Labour Court of Mons, December 8, 2010, Soc.Kron. 2011, 399.

[86] Labour Tribunal of Antwerp, February 13, 2015, Soc.Kron. 2015, 18.

Additionally, there is a series of rulings concerning violations of portrait rights or personality rights, often on the internet. In these cases, moral damages awarded ranged from as little as one symbolic euro[87] to 1,250 EUR[88], with exceptional awards of 11,500 EUR[89] or even 500,000 EUR[90]. However, these rulings hold limited precedential value, as the higher amounts often involve media figures, making them difficult to extrapolate to a broader, collective context.

Finally, the case law analysis identified a single instance in which 2,000 EUR was awarded as compensation for the disclosure of sensitive information. However, this again concerned a highly specific individual context: an insurance company had disclosed personal health information about a policyholder to the policyholder's mother-in-law, despite the policyholder having explicitly expressed a desire not to share this information with her.[91]

As noted earlier, non-pecuniary damage is typically compensated through a lump-sum payment awarded to the injured party for its suffering. However, Article 6.31, § 2 of the Civil Code stipulates that compensation can take the form of reparation in kind or monetary payment, meaning either non-monetary measures or a financial award. This principle was already widely accepted in Belgian law and applies equally to non-pecuniary damage.

Book 6 of the Civil Code provides a specific definition of reparation in kind: '*Reparation in kind seeks to undo the harmful consequences of an act giving rise to liability in reality*' (Art. 6.33, § 1 Civil Code). Notably, the Belgian Court of Cassation, in a decision of 26 November 2021, recognised that ordering a defendant to apologize can qualify as a form of reparation in kind for non-pecuniary damage.[92] In this regard, Belgium is a pioneer, as the Court of Justice of the European Union ruled in a judgment of 4 October 2024 that Article 82 of the GDPR, which provides for the right to compensation or remedy for data breaches, must be interpreted as meaning that the making of an apology may constitute sufficient compensation for non-pecuniary damage.[93]

Nonetheless, Article 6.33, § 2 of the Civil Code permits the combination of reparation in kind and monetary compensation when necessary to ensure full reparation of the damage. This is particularly relevant for a party seeking court-ordered apologies for non-pecuniary harm, as such a party is likely to request the court to supplement the apology with monetary damages. If the court deems the apology insufficient to guarantee full compensation, it may authorize a combination of both forms of reparation.[94]

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[87] Court of Appeal of Antwerp, 7 October 2020, NJW 2021, no. 448, pp. 688, 689, IRDI 2020, vol. 4, 308 and Court of First Instance of Mechelen 15 January 2015, AR 12/694/A, *unpublished*.
[88] Court of Appeal of Ghent 20 September 2006, A&M 2007, 386.
[89] Court of Appeal of Brussels 3 December 2013, TBBR 2015, 322, noot E. Cruysmans.
[90] Court of First Instance of Brussels 15 October 2009, AM 2010, 202.
[91] Court of Appeal Brussels, 13 May 2002, RGAR 2005/9, n° 14047.
[92] Cass. 26 November 2021, AR C.20.0578.F, ECLI:BE:CASS:2021:ARR.20211126.1F.5.
[93] CJEU 4 October 2024, C-507/23, ECLI:EU:C:2024:854, A v Patērētāju tiesību aizsardzības centrs, par. 37: 'Article 82(1) of the GDPR does not preclude the making of an apology from being able to constitute standalone or supplementary compensation for non-material damage […], provided that such a form of compensation complies with those principles of equivalence and effectiveness, in particular in that it must serve to compensate in full the non-material damage that has actually been suffered as a result of the infringement of that regulation, which it is for the national court before which the case has been brought to ascertain, taking account of the circumstances of each individual case'
[94] W Vandenbussche, 'Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies' (2020) 9(1) Journal of International Media & Entertainment Law 109, 164.

b) Quantification method

Although the starting point remains the concrete quantification of non-pecuniary damage[95], the above examples show that this is rarely the case and that the damage is most often estimated on the basis of equity (‘*ex aequo et bono’*). Article 6.36, third paragraph, of the Civil Code provides that when the extent of the damage cannot be determined in any other way, the court may determine the compensation based on equity. This aligns with established case law of the Court of Cassation.[96] Given the subsidiary nature of this method of damage assessment, it is self-evident that the court must provide an explicit reasoning to justify its application.[97]

Specifically with regard to the quantification of immaterial harm in the digital context, the literature emphasizes that this estimation on the basis of equity takes into account all circumstances. Relevant factors could include the age of the affected person (minor or adult), the impact on the victim’s honour and reputation, the scope and duration of the breach, the persons to whom the data was exposed, the specific consequences for the individual’s private, social, and professional life, and the context of use.[98]

3. Quantification of damage in actions for collective redress

Although this point extends beyond immaterial damage and applies to all types of harm, the quantification of damages in the action for collective redress also has certain distinct features. The starting principle remains that general extra-contractual liability law continues to apply.[99] However, when the court opts for monetary compensation[100], the damage can be quantified in two ways, based on Article XVII.54, § 1, 7° CEL.[101]

Firstly, the court may order the defendant to pay an individualised amount to each consumer who registers as part of the class. This means the court assesses damage on an individual or individualizable basis.[102] When a court opts to assess collective damage on this basis, it must simultaneously determine the amount that each (category of) class member(s) may claim individually during the pay-out. This amount may take the form of either a fixed lump-sum compensation, identical for each member of the (sub)group, or an individualised amount, to be calculated by the claims administrator based on the method defined by the court in its decision on the merits.[103] The total compensation will then be the sum of all individual compensation amounts.

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95 Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2022-23, no. 55-3213/001, p. 147.

96 Cass. 20 November 2012, P.120.499.N; Cass. 15 September 1999, P.991.184.F; Cass. 13 January 1999, P.980.732.F.

97 Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2022-23, no. 55-3213/001, p. 156-157.

98 N Debruyne, ‘Persoonlijkheidsrechtelijke beschouwingen bij deepfakes’ in S De Rey, N Vandamme, and T Gladinez (eds) *Grenzen voorbij* (Intersentia, 2020) 426.

99 Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2013-14, no. 53-3300/001 and no. 53-3301/001, p. 37.

100 As also provided for in Art. 9(1) of the Representative Actions Directive, the Belgian collective redress procedure already allowed for compensation in kind, such as the replacement of a defective product (S Voet and B Allemeersch, ‘De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten’ (2014-15) (17) Rechtskundig Weekblad 646, 656, para 26).

101 See also: R Steennot, ‘The Transposition of the Representative Actions Directive in Belgium’ (2024) (2) REDC 185, 198.

102 By expressly referring to the possibility of quantifying damage on an individualizable basis, the Belgian legislator did not exclude the use of mathematical formulas to evaluate individual damages for each class member (E Falla, La réparation des dommages de masse: propositions visant à renforcer l'efficacité de l'action en réparation collective (Larcier 2017) 201-20, para 18.

103 Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2013-14, no. 53-3300/001 and no. 53-3301/001, p. 38.

Importantly, this method of quantifying damage poses a significant challenge because, since the implementation act of the Representative Actions Directive, the composition of the class has been postponed until after the decision on the merits. As a result, if the court orders the defendant to pay an individual amount to each consumer in the judgment on the merits, the defendant will at that point still not know the total amount he may ultimately owe.[104]

Second, depending on the circumstances of the case, the court can decide on the appropriateness of establishing a global compensation amount (potentially divided by subcategories) to be distributed among class members. Based on the wording of Article XVII.54, § 1, 7° CEL, one might assume that the court's discretion in this matter is particularly broad. However, in practice, this is not the case.[105] When introducing this rule, the legislator emphasised that the court should only make a global assessment of the collective damage if an individual or individualizable assessment proved impossible. [106] In addition, the establishment of a global amount may also be justified when providing individualised compensation is disproportionately difficult or costly to implement (e.g., administrative expenses outweighing the benefits of individualised distribution).[107]

The main issue with this second method of quantification is that it undermines the principle of full reparation. If the global amount ultimately proves insufficient to fully compensate all individual group members, it must be distributed among them according to allocation keys determined by the court in its judgment on the merits or through the collective settlement agreement.[108] Conversely, if the total global amount exceeds the sum of individual damages, it could be perceived as a judicially imposed civil penalty on the defendant.[109]

IV. Burden of proof, access to evidence, and disclosure of information

In the eleven actions for collective redress brought so far before the Belgian courts, the issues raised were mainly legal in nature (e.g. whether the conditions for misleading commercial practices were met), without any explicit reference to the challenges posed by the establishment of the facts.[110] As

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[104] This contrasts with the earlier legal framework, where, under the opt-in system selected at the admissibility stage, the defendant could more accurately estimate the total liability (E De Baere, De Belgische class action. Een grondige commentaar op de Wet van 28 maart 2014 tot invoeging van de rechtsvordering tot collectief herstel (Wolters Kluwer 2017) 75, para 71).

[105] E Falla, La réparation des dommages de masse: propositions visant à renforcer l'efficacité de l'action en réparation collective (Larcier 2017) 200, para. 180.

[106] For example, in cases involving companies engaging in price-fixing, the court might easily determine how many products were sold at an inflated price and calculate the total overcharge. However, it would likely be unfeasible for the court to assess the specific types and quantities of products purchased by each individual consumer. This example pertains to pecuniary damage (Parl.Doc. Chamber of Representatives 14, nr. 53-3300/001, p. 38).

[107] Parl.Doc. Chamber of Representatives 14, nr. 53-3300/001, p. 38. See also: S Voet and B Allemeersch, 'De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten' (2014-15) (17) Rechtskundig Weekblad 646, 656, para 26.

[108] E De Baere, A-S Maertens and K Willems, 'Belgische Class Action: Tien Pijnpunten' (2015) Nieuw Juridisch Weekblad 519, 531, para 32.

[109] E Falla, La réparation des dommages de masse: propositions visant à renforcer l'efficacité de l'action en réparation collective (Larcier 2017) 206, para. 185.

[110] By contrast, access to evidence has been an issue in two other cases, which, although not within the scope of the action for collective redress, were collective proceedings under Belgian law (see infra).

far as could be determined, no investigative measures were requested in these cases, not even in the Volkswagen case.[111]

Notwithstanding this, both the literature on the Belgian action for collective redress[112] and one of the judgments on this mechanism[113] make it clear that it is the responsibility of the class representative to prove the existence of the infringements made by the defendant and the existence of collective damage. This approach is consistent with the principles applied in all other proceedings.[114] A comprehensive overview of the general rules of evidence in Belgian law falls outside the scope of this report. Instead, it will examine in detail the rules on burden of proof and disclosure in the specific context of collective redress.

1. Burden of proof

In 2019, Belgium modernised its rules of evidence with the introduction of Book 8 on Evidence in the Civil Code. However, the fundamental principle regarding the burden of proof has been preserved. Article 8.4 of the Civil Code, along with Article 870 of the Judicial Code, stipulates that each party must provide evidence of the facts it asserts in the proceedings as the basis for its claim. If the party fails to prove these facts, it will lose the case, at least on that particular point (Art 8.4, third para Civil Code). For this reason, the rules of evidence are often regarded as a mechanism enabling the court to decide a case '*when the facts remain obscure*'.[115]

As previously mentioned, this principle equally applies to actions for collective redress. If the class representative fails to substantiate the facts underpinning its claim, the case will be dismissed. However, when the representative relies on a substantive legal basis that incorporates specific rules easing the burden of proof for consumers, these alleviations should also apply within the action for collective redress. Specific examples include statutory alleviations of the burden of proof, often derived from EU law, such as:

- Proof of compliance with information requirements to be provided by traders in disputes over distance contracts[116];
- The possibility for courts to require traders to produce evidence verifying the accuracy of factual claims made under the framework of unfair commercial practices[117];
- The legal presumption of the pre-existence of non-conformity for goods that show defects within two years of delivery.[118]

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[111] In the Volkswagen case, the Court of First Instance noted: '*Test Achats also does not ask for an investigation measure that would support its assertion*' (Court of First Instance Brussels, 7 July 2023, 2016/2706/A, p. 50, par. 115).

[112] S Rutten, 'Beslissing ten gronde' in J Rozie, S Rutten en A Van Oevelen (eds), *Class actions* (Intersentia, 2015) 115-116, para. 14.

[113] Court of First Instance Brussels, 7 July 2023, 2016/2706/A, p. 27, par. 59.

[114] For a comprehensive overview, see P Taelman and C Van Severen, 'Belgium' in IEL Civil Procedure (Wolters Kluwer International 2021) 159-171.

[115] B Allemeersch, 'Stand van zaken en recente ontwikkelingen op het vlak van bewijs in rechte' in P. Van Orshoven (ed), *Themis Gerechtelijk Recht* (die Keure 2010) 37, nr. 5.

[116] Art VI.62 CEL, implementing Art 6(9) Directive 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, 2011/83/EU of 25 October 2011.

[117] Art XVII.13 CEL, implementing Art. 12 Directive concerning unfair business-to-consumer commercial practices in the internal market, 2005/29/EC of 11 May 2005 (EU).

[118] Art 1649quater (4) of the Old Civil Code, implementing Art 11 Directive on certain aspects concerning contracts for the sale of goods, 2019/771 of 20 May 2019.

Similarly, solutions upheld by the CJEU, where the burden of proof for consumers has been eased (such as in some product liability cases)[119] are equally applicable to collective redress mechanisms.

Moreover, even on a purely national level, Belgian law has gradually recognised that the strict application of basic rules of evidence can, in certain cases, lead to unjust outcomes. This has brought increasing attention to the phenomenon of evidentiary deficiency. This term refers to situations where parties are unable to produce evidence of the facts they rely on, despite not being at fault for these difficulties.[120] When examining Book 8 of the Civil Code, three specific mechanisms stand out as directly addressing this issue. These mechanisms aim to mitigate the potential unfairness that can arise from evidentiary problems, while ensuring that procedural justice is maintained.

The first mechanism, the parties' duty to cooperate in the administration of evidence is codified in Article 8.3 of the Civil Code. This provision formalizes a principle that had already been recognised in Belgian law. The Court of Cassation has long acknowledged the obligation of cooperation in good faith to the administration of evidence as a general principle of law in its case law.[121]

While the preparatory works of Book 8 offer limited guidance on the scope of this duty of cooperation, an analysis of case law reveals that it serves as an umbrella concept encompassing several facets[122]. This obligation entails:

- A minimum expectation that a party will present evidence in support of its own position, even when it does not bear the burden of proof;
- A rejection of a wholly passive approach, where the defendant party waits until the plaintiff has produced all its evidence before taking any initiative[123];
- A prohibition on obstructing or jeopardizing the administration of evidence[124];
- An obligation to provide information on facts which are in dispute between the parties, which will give the court a clearer picture of the facts[125];
- An obligation to produce specific items of evidence, even without a court order.[126]

Hence, in the context of an action for collective redress, traders are similarly required to cooperate in the administration of evidence. However, this obligation is subject to certain limitations. First,

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[119] For instance, Boston Scientific Medizintechnik GmbH, Joined Cases C-503/13 and C-504/13 (CJEU), Judgment 5 March 2015 [ECLI:EU:C:2015:148] para 43; N W e.a. v Sanofi Pasteur MSD SNC e.a., Case C 621/15 (CJEU), Judgment 21 June 2017 [ECLI:EU:C:2017:176] para 43.

[120] See i.a. W Vandenbussche, 'Dealing with Evidentiary Deficiency in Tort Law' (2019) (1) The International Journal of Procedural Law 50-75.

[121] Initially, in the context of the production of documents, in the sense that a party may not oppose the production on the grounds that it does not bear the burden of proof (Cass., 25 September 2000, AR C.99.0201.F, ECLI:BE:CASS:2000:ARR.20000925.6), but in subsequent judgments the Court has also accepted this general principle of law outside the context of investigative measures (Cass., 14 November 2013, AR C.13.0015.N, ECLI:BE:CASS:2013:ARR.20131114.4).

[122] W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) 334, para. 384; W Vandenbussche, 'Omgaan met bewijsnood bij aansprakelijkheid uit onrechtmatige daad', (2018-19) (9) Rechtskundig Weekblad 323, 336.

[123] Labour Court of Appeal of Antwerp, 19 January 2009, *Limb.Rechtsl*. 2009, 129, case note S. Renette; Labour Court of Appeal of Brussels 19 December 2006, *Soc.Kron*. 2008, 552.

[124] Court of Appeal of Ghent, 27 June 2019, *RW* 2020-21, 578.

[125] Cass., 14 November 2013, AR C.13.0015.N, ECLI:BE:CASS:2013:ARR.20131114.4, Cass.; 18 January 2007, *Res.Jur.Imm*. 2007, 27.

[126] Cass., 7 June 2019, AR C.18.0523.N, ECLI:BE:CASS:2019:ARR.20190607.5, *RCJB* 2021, 249, note W. Vandenbussche

there is no obligation to spontaneously produce – i.e., without a request from the opposing party or their awareness of their existence – documents that are detrimental to one's own position or that support the opposing party's case.[127] Second, the parties' duty to cooperate does not override the burden of proof, nor does it permit a reversal of the burden of proof.[128] The parties' cooperation to the administration of evidence does not infringe upon the court's discretionary power to assess whether an evidentiary measure, such as an order to produce documents, is appropriate for resolving the dispute.[129]

Second, under exceptional circumstances, the court may reverse the burden of proof if applying the standard principles would lead to manifestly unreasonable outcomes. The preparatory works for Book 8 highlight this provision as a notable departure from the law as it existed before the new rules of evidence came into force in 2020.[130] Article 8.4, paragraph 5 of the Civil Code provides: 'The judge may, in a judgment supported by special reasons and in the light of exceptional circumstances, determine who bears the burden of proof when applying the rules outlined in the preceding paragraphs would be manifestly unreasonable. This option is available only if the judge has ordered all necessary measures of enquiry and ensured the parties' cooperation in evidence-taking, without thereby obtaining sufficient proof.'

The preparatory works of Book 8 explicitly state that this mechanism is inspired by Article 150 of the Dutch Code of Civil Procedure. Unlike Dutch law, which relies on the principles of reasonableness and fairness, Belgian law operates based on statutory defined criteria. Some authors were slightly positive about the introduction of this mechanism[131], while others expressed concerns that it could grant judges excessive discretion, potentially reducing legal predictability and increasing litigation.[132]

Importantly, the legislator explicitly stated that this mechanism is intended as an *ultimum remedium* or safety net, to be used only when no other solution is available.[133] The scenarios envisioned as justifying a reversal of the burden of proof include instances where the duty to cooperate in the administration of evidence is ineffective because the other party cannot produce the items of evidence it once held, whether or not this results from intentional misconduct. The provision also seeks to sanction improper violations of the duty to cooperate. Additionally, this mechanism would enable Belgian courts to address significant imbalances in the access to evidence, particularly when the creations, maintenance, or provision of certain items of proof imposes excessive burdens or costs on one party.[134]

The case law applying this provision since 2020 shows that the mechanism has mainly been used in situations where the defendant has actively obstructed the taking of evidence.[135] However,

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[127] W. Vandenbussche, 'Belgian law' in C J-A Seinen et al, Fact Finding in Civil Proceedings (Boom 2024) 102, para 14.
[128] Cass., 5 October 2023, AR C.23.0089.N, ECLI:BE:CASS:2023:ARR.20231005.1N.8, RW 2023-24, 1023.
[129] Cass., 27 January 2022, AR C.21.0189.N, ECLI:BE:CASS:2022:ARR.20220127.1N.8.

[130] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2018-19, no. 2018-19, no. 3349/001, p. 5.
[131] N Clijmans, 'Het nieuwe bewijsrecht in burgerlijke en handelszaken. Een kennismaking middels artikelgewijze commentaar in M-C Van den Bossche and C De Backere (eds), *Proces- en bewijsrecht: capita selecta* (Wolters Kluwer 2019) 93.
[132] B Vanlerberghe, 'Hoofdstuk III. Bewijslast' in T Vansweevelt and B Weyts (eds), *Handboek Verbintenissenrecht* (Intersentia 2019) 1039-1040, para. 1407.
[133] Ibid., p. 14.
[134] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2018-19, no. 2018-19, no. 3349/001, p. 14.
[135] Enterprise Court, Liège, 25 June 2021, JT 2021, 1456 ; Court of Appeal, Antwerp, 22 November 2021, T.Gez. 2021-22, afl. 5, 416, case note T. Vansweevelt.

several requests for reversal of the burden of proof have also been rejected, according to an analysis of the available case law, as judges often find that the conditions for its application (such as exceptional circumstances, subsidiarity) are not met[136], or emphasize that it must be truly a measure of last resort or applied with the utmost caution.[137]

Thirdly, as noted earlier, the judge may lower the standard of proof in some cases, regardless of the specific subject matter of the dispute.[138] The normal standard of proof is a reasonable degree of certainty (Art 8.5 Civil Code). However, under Article 8.6, in two broadly defined situations, the court may accept a lower threshold: probability. As a guideline for interpreting the concept of probability, the preparatory works of Book 8 clarify: '*If one were to speak in terms of a percentage of certainty, it would likely be 75%*'.[139] While some authors find this numerical reference surprising or argue that such an approach promotes legal uncertainty[140], it is clear that the legislator did not intend for everything to be strictly measurable or verifiable. These percentages should instead be viewed as a rough indication of the degree of certainty expected from an average judge (i.e., 75%) and, conversely, the risk of error (i.e., 25%).[141]

Article 8.6, paragraph 1 of the Civil Code codifies an exception to the normal standard of proof, already recognised in case law[142], by lowering the standard in cases involving negative facts. Notably, the party required to prove a negative fact is not relieved of its burden of proof but benefits from a reduced standard. In other words, it does not have to provide proof with a reasonable degree of certainty, but it can limit itself to establishing the fact with a probability. A practical example, potentially applicable in collective redress cases, is when a party entitled to information must prove that a trader failed to provide certain information. In such cases, it suffices for the party to demonstrate the non-receipt of the required information with a (high) probability.[143]

Article 8.6, paragraph 2 of the Civil Code introduces a second general exception to the normal standard of proof, which applies to certain positive facts: 'The same applies to positive facts for which, due to the very nature of the fact to be proven, it is not possible or reasonable to require certain proof.' As mentioned earlier, it remains somewhat uncertain in which cases this exception may be applied. In addition to proving damage, a class representative could potentially invoke this exception when proving the causal link between the trader's infringement and the collective harm.[144]

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[136] Court of Appeal, Antwerp, 6 January 2022, *Limb.Rechtsl.* 2023, afl. 3, 169.

[137] Labour Court of Appeal, Brussels, 24 April 2023, ECLI:BE:CTBRL:2023:ARR.20230424.2.

[138] In addition, a lower standard of proof can also arise directly from statutory provisions. For example, the Court of Cassation has interpreted Article 8(b) of the Product Liability Act to mean that the producer only needs to make it plausible that the defect did not exist at the time the product was put into circulation (see Cass. 4 mei 2007, AR C.05.0275.N, ECLI:BE:CASS:2007:ARR.20070504.3).

[139] Explanatory Memorandum, Parl.Doc. Chamber of Representatives 2018-19, no. 2018-19, no. 3349/001, p. 17.

[140] F George and B Hubeau, 'La réforme de la preuve' in F George, B Havet and A Putz (eds), *Les grandes évolutions du droit des obligations* (Anthemis 2019) 179, 188, para. 15 ; N Clijmans, 'Het nieuwe bewijsrecht in burgerlijke en handelszaken. Een kennismaking middels artikelgewijze commentaar in M-C Van den Bossche and C De Backere (eds), *Proces- en bewijsrecht: capita selecta* (Wolters Kluwer 2019) 96.

[141] W Vandenbussche and N De Lathauwer, 'Het hervormde bewijsrecht. Capita Selecta' in B Allemeersch and S Voet (eds), Themis Gerechtelijk Recht (die Keure 2020) 89-90, para 27.

[142] See for instance, Cass., 10 December 2004, AR C.03.0143.N, ECLI:BE:CASS:2004:ARR.20041210.3, *Arr.Cass*. 2004.

[143] For applications (in two-party dispute), see Court of Appeal, Liège, 1 June 2016, *DAOR* 2016, 85; Court of Appeal, Antwerp, 12 November 2012, 2011/AR/548, ECLI:BE:HBANT:2012:ARR.20121112.4, para. 4.2.1.

[144] The Belgian Court of Cassation has accepted the application of Article 8(6)(2) to prove causation (in a two-party dispute), see Cass., 14 November 2022, AR C.22.0092.F, ECLI:BE:CASS:2022:ARR.20221114.3F.5.

2. Disclosure of information

Regarding the disclosure of information, when implementing the Representative Actions Directive, the Belgian legislator did not consider a specific provision on access to evidence necessary. The preparatory work for the transposition law explicitly stated that the existing rule on document production, namely Article 877 of the Judicial Code, met the requirements of the EU Directive.[145]

That in itself is somewhat surprising. The provision on access to evidence in Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions is almost identical to that in the Representative Actions Directive. Nevertheless, in transposing Directive 2014/104/EU, the Belgian legislator has created a specific procedural framework for the production of documents in Article XVII.74 CEL. Therefore, requests for disclosure of documents in this type of action for damages deviate from the general approach to disclosure in Article 877 of the Judicial Code.[146] The key difference is that, in the context of damages actions for breaches of competition law, Article XVII.74 CEL explicitly provides for the judge to order the production of relevant *categories* of evidence from another party or a third party. As will be shown below, this is still not a given under the general rule of Article 877 of the Judicial Code. Nevertheless, the class representative pursuing a collective redress action for anti-competitive agreements and abuse of dominance will be able to make use of this specific legal framework for disclosure of documents.

When examining Article 877 of the Judicial Code, which the class representative must rely upon in all other cases, the following points are noteworthy. According to this statutory provision, the court can order the production of a relevant document if there are serious and precise indications that a party or third party has in its possession a document containing the proof of a relevant fact. This article does not explicitly indicate on whose initiative the production of the documents can take place. However, it is generally accepted that this can happen both at the request of the parties and *ex officio* by the court.[147]

Experience indicates that Belgian courts do not readily grant applications under Article 877 of the Judicial Code. According to one author, this is especially true in the context of collective actions.[148] To obtain document production, three conditions must be met. It must relate to a specific document or documents containing evidence of a relevant fact and there must be precise and serious indications that a party has them in its possession (a). Even if these conditions are met, the court may decide not to grant the request, as courts retain the discretion to decide on the relevance of the request (b). Finally, it is worth examining the penalties for non-compliance, as Article 19 of the Representative Actions Directive requires Member States to lay down rules on penalties applicable to failures or refusals to comply with disclosure duties (c).

a) Requirements

First, a request under Article 877 of the Judicial Code must, by definition, pertain to one or more specifically identified documents. Although the provision refers to ‘a document’, this term is interpreted broadly and extends beyond written texts. It encompasses any information or evidence

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[145] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 6-7.

[146] See also: J Nowak, ‘Considerations on the impact of EU Law on national civil procedure: Recent examples from Belgium’ in V. Lazic and S. Stuij (eds), *International dispute resolution. Short studies in private international law* (TMC Asser Press, 2018) 27.

[147] B Allemeersch, *Taakverdeling in het burgerlijk proces* (Intersentia 2007) 407, para 96; W. Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) no. 455.

[148] E Van Espen, ‘De gemeenrechtelijke groepsvordering naar Belgisch recht’ in E Plasschaert et al, Collectief procederen in België, een kritisch overzicht (Intersentia 2024) 28.

recorded on a durable medium. For example, emails clearly fall within the scope of the term. Additionally, orders for production may include photographs, drawings, plans, sound recordings, memory cards, USB sticks, and similar items.[149]

Nevertheless, this requirement also implies that the document must exist. Consequently, the court cannot order the production of a document that has yet to be created.[150] Similarly, the production of documents cannot oblige the opposing party to carry out a database search and compile a detailed list of results.[151] Nor can Article 877 of the Judicial Code be invoked to compel a party or third party to prepare a document.[152] Finally, the Court of Cassation ruled that a request for the provision of necessary information does not qualify as a document within the meaning of this provision.[153] In short, if the request concerns such a non-existent document, the court will not be able to order its production.

In collective redress cases, this requirement for specifically identified documents has already caused procedures to fail, as seen in the Arco case. This collective action involved over 2,400 cooperative shareholders who lost their entire investment following the split of a financial institution.[154] This case was dismissed, partly due to the plaintiffs' inability to meet their burden of proof and the court's refusal to order document production. In their request for production of documents, the plaintiffs had sought information from the defendants to identify their original contracting parties. After all, the cooperative shares in question had been sold by various institutions many years earlier. The court ruled that the plaintiffs' request did not comply with the requirement for precisely identified documents, as it effectively sought a declaration as to whether or not their shareholding with the defendants had been established.[155]

Finally, Belgian law demonstrates significant restraint regarding requests formulated in vague or general terms. Requests for the production of 'all documents relating to the dispute' or 'all relevant documents' are considered too broad.[156] Case law analysis also reveals that Belgian trial courts are often reluctant to grant requests that include terms such as 'all' or 'complete'.[157]

This is further illustrated by another collective action, also outside the scope of the Belgian action of collective redress. In this case, a group of smaller shareholders brought together by Deminor accused the Belgian State of breaching the law and its duty of care in the sale of Fortis Bank to the Dutch State and the French bank BNP Paribas during the financial crisis in 2007. They claimed moral and material damages due to the Belgian State's mistakes and requested full disclosure of Fortis

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[149] G-L Ballon, 'Overlegging van stukken in een proces' (1999-2000) Algemeen Juridisch Tijdschrift 725, 726; J. Laenens e.a., *Handboek Gerechtelijk Recht* (Intersentia 2020) 580, para 1365.

[150] W Vandenbussche and I Samoy, 'Uitkeringen tot onderhoud na echtscheiding en het recht op bewijs' (2012) *T.Fam*. 152, 155.

[151] Court of Appeal, Mons, 1 October 2002, *JT* 2002, 815.

[152] Court of Appeal, Antwerp, 17 December 2019, *P&B* 2020, 22; Labour Court of Appeal, Ghent 8 October 2018, *RW* 2022-23, ed. 7, 275, case note and *P&B* 2022, ed. 4, 196.

[153] Cass., 27 January 2022, AR C.21.0189.N, ECLI:BE:CASS:2022:ARR.20220127.1N.8.

[154] It is important to note, however, that this was not an action for collective redress as provided for in the CEL, as it was initiated before the Act entered into force. Instead, it was a collective action brought by means of a mandate ad agendum, whereby several claimants authorise a legal entity (in this case Deminor) to bring proceedings on their behalf. This technique has been widely used in investor litigation in Belgium.

[155] Enterprise Court, Brussels, 3 November 2021, TRV-RPS 2022, 101.

[156] B Samyn, Privaatrechtelijk Bewijs, een diepgaand en praktisch overzicht (Story-Publishers 2012) 449, para 642; S Stijns, 'De overlegging van stukken in het Gerechtelijk Wetboek', (1984-85) Jur.Falc. 199, 209; W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) 403, para 471.

[157] See i.a. Court of Appeal, Antwerp, 17 December 2019, P&B 2020, 22; Court of Appeal, Antwerp, 21 October 2015, *P&B* 2016, 99; Court of Appeal, Antwerp, 17 March 2015, *T.Not*. 2015, 609.

Bank's files and related third-party documents. The president of the Brussels First Instance Court rejected their request as too broad and vague, noting that it sought full disclosure of all Fortis Bank files, including internal and external reports and notes from the time of the sale without any clear limitations.[158]

The second requirement for applying Article 877 of the Judicial Code is that the document must contain proof of a relevant fact. In Belgian law, this requirement involves assessing two aspects: whether the fact is sufficiently substantiated and whether it is relevant to the dispute.[159] Regarding the first aspect, the fact must be sufficiently detailed, meaning it should be as precise as possible in terms of time and place.[160] However, it is not necessary to fully specify the content of the requested document in advance. It should simply be reasonably clear to the court and the parties what is being sought.[161] The rationale for this requirement is to prevent so-called fishing expeditions, where a party seeks to uncover unknown information that it can later use to substantiate its claim.[162] As for the second aspect, the relevance of the fact, the evidence must be useful and connected to the subject matter of the dispute.[163] However, it is not necessary for the fact to be decisive[164], i.e. for the case to be won or lost depending on whether it is established or not. The relevance of a fact may also vary according to what has already been established on the basis of the available evidence. If the court has already formed an opinion on a particular fact, it may refuse to order the production of a related document.[165]

In the context of collective claims, a request for document production can fail if it does not meet this specific requirement. While document production can theoretically be requested for any element of a liability claim, both case law[166] and legal commentary[167] suggest that a judge may refuse to order the production of documents to prove the quantification of damages if the claimant has not sufficiently substantiated fault, damage, and causation. In the Arco case, the plaintiffs argued that the requested information was necessary to assess their final damages. However, the court ruled that since the plaintiffs had failed to prove the essential elements of their liability claim, the estimation of the alleged damage was irrelevant.[168]

Thirdly, Article 877 of the Judicial Code requires serious and specific indications that the requested document is in the possession of the opposing or third party. It is sufficient for that party to have material access to a document; it is not necessary for them to have a legal title over it.[169] This requirement only becomes problematic when the opposing party or third party denies possessing it. In such cases, the requesting party must present elements that the judge can reasonably infer as

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[158] President of the Court of First Instance, Brussels, 3 February 2011, *TRV*- 2011, 199, case note.
[159] W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) 394-395, para 461; B Vanlerberghe, 'Actualia inzake de bewijsvoering, de overlegging van stukken en het deskundigenonderzoek' in CBR-Jaarboek 2006-07 (Intersentia 2007) 459, 464, para 8.
[160] W Vandenbussche and I Samoy, 'Uitkeringen tot onderhoud na echtscheiding en het recht op bewijs' (2012) *T.Fam*. 152, 154, para 6.
[161] B. Allemeersch, Taakverdeling in het burgerlijk proces (Intersentia 2007,) 417, nr. 108.
[162] W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) 398, para 465.
[163] D Mougenot, 'Le charme discret des "petites" mesures d'instruction' (2007) P&B 239, 240, nr. 3; S Stijns, 'De overlegging van stukken in het Gerechtelijk Wetboek' (1984-85) Jur.Falc. 199, 208.
[164] Cass., 16 October 2015, AR C.14.0512.F, ECLI:BE:CASS:2015:ARR.20151016.4.
[165] J Van Compernolle, 'La production forcée de documents dans le Code Judiciaire' (1981) Ann. Dr. Louvain 89, 91.
[166] Court of Appeal, Ghent, 14 April 2008, 2007/AR/3104, ECLI:BE:HBGNT:2008:ARR.20080414.1.
[167] E Van Espen, 'De gemeenrechtelijke groepsvordering naar Belgisch recht' in E Plasschaert, Collectief procederen in België, een kritisch overzicht (Intersentia 2024) 28.
[168] Enterprise Court, Brussels, 3 November 2021, TRV-RPS 2022, 101.
[169] P Van Leynseele & M Dal, 'Pour un modèle belge de la procédure de discovery' (1997) JT 225, 226, para. 17.

evidence of the document's existence.[170] Although the law speaks of precise and serious indications (in the plural), the Belgian Supreme Court confirmed that a judge can accept a single indication as a basis for inferring the possession of a document.[171]

b) The court's discretion

Even if all the legal conditions are met (specific document(s), proof of a relevant fact and serious and precise indications), the court may decide not to grant the request. According to the Court of Cassation, the order for production is not an obligation on the part of the court, but a possibility, the importance and necessity of which is assessed by the judge in a discretionary manner.[172] According to Article 875bis of the Judicial Code, the court should limit the choice of the investigative measure and the content of that measure 'to what is sufficient to resolve the dispute, also taking into account the ratio of the expected cost of the measure to the stakes of the dispute, and preferring the simplest, quickest and cheapest measure'. In this way, the Belgian legislator imposed a subsidiarity test with regard to the choice of measure and the content of that measure and, in addition, an opportunity test with regard to the cost of the measure in relation to the expected result.[173] In the Arco case, the request for document production also failed based on the basis of this subsidiarity test. The court held that the plaintiffs were obliged to minimize the need for document production. However, according to the court, the plaintiffs made no effort in this regard. They requested the same information from each defendant without any differentiation.[174]

Importantly, the court may not disregard the 'right to evidence' of the requesting party in its sovereign assessment of whether or not to order the production of documents.[175] This is a matter of academic debate, but it can be argued that this right limits the court's discretion in at least one specific situation, namely where the requesting party would be unable to prove the alleged facts by any means without the production order, while the opposing party could produce the document without significant effort.[176] In addition, the right to evidence means that the court cannot refuse the request for production without giving express reasons for doing so.[177] Occasionally, the Court of Cassation quashes a decision of an appeal court refusing an investigation measure on these grounds.[178]

c) Penalties for non-compliance

The Belgian legislator did not consider it necessary to introduce a specific provision on sanctions for non-compliance with disclosure requirements in order to transpose Article 19 of the Representation Directive. After all, under general procedural law, parties are already well equipped to deal with the non-cooperation of the opponent.

First, the party whose request has been granted, can seek to enforce compliance by requesting the imposition of a periodic penalty payment on the basis of Article 1385bis of the Judicial Code. In this case, it is up to the court to decide whether the imposition of a periodic penalty payment is appropriate and, if so, to determine the exact amount.

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[170] S Stijns, 'De overlegging van stukken in het Gerechtelijk Wetboek' (1984-85) Jur.Falc. 199, 208210

[171] Cass., 16 October 2015, AR C.14.0512.F, ECLI:BE:CASS:2015:ARR.20151016.4.

[172] Cass., 28 June 2012, AR C.10.0608.N, ECLI:BE:CASS:2012:ARR.20120628.10; Cass., 18 January 2005, AR P.04.1225.N, ECLI:BE:CASS:2005:ARR.20050118.25.

[173] W. Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017) 415, para 486-488.

[174] Enterprise Court, Brussels, 3 November 2021, TRV-RPS 2022, 101.

[175] Cass., 20 January 2003, AR S.02.0067.N, ECLI:BE:CASS:2003:ARR.20030120.5; Cass., 17 September 1999, AR C.98.0309.F, *ECLI:BE:CASS:1999:ARR.19990917.5*.

[176] W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017), 420, para 492.

[177] Ibid.

[178] Cass., 11 September 2020, AR C.19.0448.N, ECLI:BE:CASS:2020:ARR.20200911.1N.1.

In addition, that party can also claim compensation on the basis of Article 882 of the Judicial Code, which states that: 'Parties or third parties who, without lawful cause, fail to produce the document itself or the copy thereof in accordance with the decision of the court may be ordered to pay the damages due'. The court must check that two conditions are met.[179] Firstly, there must be no valid reason for failing to comply. Secondly, it must be shown that the refusing party has not acted as a normally diligent litigant. If this is the case, it is for the court to determine the amount of compensation.[180] This must be done in the light of the relevance of the document to be produced, the extent to which the failure to produce the documents delayed the proceedings and made it difficult for the court to reach a decision.[181] The underlying idea here is that it is not a punitive measure but rather an indemnity for which damage should be asserted and proven.

In addition to the above pecuniary sanctions, it also lies within the court's discretion to attach evidentiary consequences to the non-compliance with the production order. This occurs then as an alternative to a claim for damages claimed under Article 882 of the Judicial Code. In the past, there has been debate as to what evidential consequences the court should attach to a refusal to produce evidence, such as a presumption of fact or a finding that the alleged facts have been proved. However, the most obvious solution today is to shift the burden of proof.[182] According to Article 8.4, para. 5 of the Civil Code, the court may, in a well-founded decision and in exceptional circumstances, as a last resort, reverse the burden of proof. The parliamentary works specifically mention that Article 8.4, para. 5 of the Civil Code can be used to 'sanction the unjustified refusal of one of the parties to cooperate in the gathering of evidence'.[183]

V. Funding and costs

The financing of collective redress has historically been an underexplored topic in Belgium.[184] Upon its introduction in 2014, the matter generated little discussion, aside from occasional concerns raised by parliamentarians about the reluctance of consumer organisations to fund proceedings with significant financial risks.[185]

The implementation of the EU Directive has done little to alter this situation. As will become evident, the Belgian legislator has introduced only limited constraints on third party funding in the context of collective redress. The absence of more comprehensive rules governing the funding of actions for

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[179] W Vandenbussche, *Bewijs en onrechtmatige daad* (Intersentia 2017), para. 422.

[180] Remarkable is that an analysis of case law shows that some judges sentence the non-cooperating party ex aequo et bono to an amount that is almost the same as the amount that is the subject of the dispute.

[181] Justice of Peace, Soignies, 26 April 2017., T.Vred., 2018/5, 266.

[182] I Samoy and W Vandenbussche, 'Het nieuw bewijsrecht' in S Stijns (ed.), *Themis Verbintenissenrecht* (die Keure 2019), 117, 130, para. 22

[183] Explanatory Memorandum to Bill of 31 October 2018 inserting Book 8 'Evidence' into the new Civil Code, *Parliamentary Doc* 2018-19, no. 3349/001, 15.

[184] There are also only a limited number of contributions in the literature that focus exclusively on costs and financing of collective redress actions: F Lefèvre and G Croisant, 'Le 'third party funding', une solution aux problèmes des coûts de l'action en réparation collective pour le représentant?', (2018)(4) TBH 327-352; F Lefèvre and G Croisant, L'action en réparation collective - ses coûts et son financement, in J Englebert and J-L Fagnart (eds), L'action en réparation collective (Anthémis 2015) 99.

[185] Report of Parliamentary Discussions, *Parl. Doc.* Chamber of Representatives 2013-14, no. 3300/004, p. 23.

collective redress is considered one of the primary weaknesses of the legislation.[186] As will be further demonstrated, collective redress actions are costly procedures. The largest consumer organisation in Belgium, *Test-Achats*, who initiated nine out of the eleven actions for collective redress so far, reports an average cost of approximately EUR 150,000, with the majority of these expenses attributed to lawyers' fees.[187] These costs must be fully advanced by the class representative, who bears significant financial risks. If the court deems the case inadmissible, if no settlement is reached or if the court does not hold the trader liable in the decision on the merits, the class representative is unable to recover any of the advanced costs. Moreover, even in cases where the class representative prevails, only a fraction of the legal fees incurred are typically recovered. In the sections that follow, I will address the (ex-ante) funding of collective redress actions (see 0-3) followed by an analysis of the (ex post) allocation of costs (see 4).

1. Funding of court fees and lawyers' fees

As a starting point, actions for collective redress are based on the most common form of litigation funding in Belgium, where each party is responsible for funding its own legal costs. More specifically, this means that the consumer organisation assumes the financial burden of funding the actions for collective redress.[188] Two other funding methods, namely financing by lawyers or by the group members themselves, are not permitted.

Funding by lawyers is hindered by the legal prohibition on contingency fees. Article 446ter of the Belgian Judicial Code explicitly forbids agreements that link compensation solely to the outcome of the case.[189] In theory, however, a lawyer may charge a fixed hourly rate that can be supplemented with a success fee, provided it is fair and justified. Such arrangements must be clearly outlined in the client agreement, with the lawyer providing full transparency regarding the calculation method.[190] Furthermore, the client must give explicit consent. The success fee may take various forms, such as an increase in the hourly rate or a percentage of the result achieved.[191] However, similar to third-party funding agreements in Belgium (see below) negotiating a success fee in the context of collective redress actions is far from straightforward. This is because any damages awarded to the group of consumers are distributed individually by a claims administrator, entirely separate from the group representative.[192]

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[186] About the current framework: R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 206; S Voet, 'The Revised Class Action Regime in Belgium: Harder, Better, Faster, Stronger?' (2024) (2) Mass Claims Journal 76, 82. Likewise for the previous framework: E De Baere, A-S Maertens and K Willems, 'Belgische Class Action: Tien Pijnpunten' (2015) Nieuw Juridisch Weekblad 536-538; S Voet and B Allemeersch, 'De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten' (2014-15) (17) Rechtskundig Weekblad 646, 661.

[187] Special Consumer Consultative Commission, *Actions representatives visant a protéger les intérets collectifs des consommateurs et des PME*, www.ccecrb.fgov.be/p/fr/1029/actions-representatives-visant-a-proteger-les-interets-collectifs-des-consommateurs-et-des-pme, 10.

[188] F Lefèvre and G Croisant, 'Le 'third party funding', une solution aux problèmes des coûts de l'action en réparation collective pour le représentant?', (2018) (4) TBH 327, 336. H Boularbah, 'L'action en réparation collective; aperçu des changements attendus en 2023' in H Jacquemin, Actualités en droit de la consommation (Anthemis 2023) 199, para. 39.

[189] S Sobrie, *Procederen qualitate qua* (Intersentia 2016) 161, para 167.

[190] Article 260 of the Code of Ethics.

[191] A Villance and J-P Buyle, 'Avocats: Le success fee suppose un lien direct entre le résultat et le travail de l'avocat' (2020) (28) JLMB 1275, 1276; S Bourg and J-P Buyle, 'Détermination du moment de l'exigibilité d'un success fee' (2021) (4) JLMB 173.

[192] Compare: H Boularbah, 'L'action en réparation collective; aperçu des changements attendus en 2023' in H Jacquemin, Actualités en droit de la consommation (Anthemis 2023) 200, para. 41.

Belgian law does not provide for the possibility for individual consumers involved in an action for damages to finance the proceedings directly.[193] Hence, the Belgian legislator chose not to utilize the option under Article 20(3) of the Representative Actions Directive, which allows qualified entities to impose a modest entry fee or similar charge on consumers wishing to participate in a representative action. The rationale behind this decision lies in the fundamental premise of the Belgian action for collective redress: the class representative files the claim on behalf of passive group members, who only opt in after the decision on the merits.[194]

2. Third party funding

With regard to third-party funding in the strict sense, i.e. a financial arrangement whereby an independent entity unconnected to the dispute agrees to pay some or all of the legal costs in exchange for a share of the proceeds if the claim is successful[195], the question arises as to whether this funding model could increase the number of collective redress actions in Belgium.[196]

Historically, third-party funding received little attention in Belgium but was generally assumed to be permitted. In the absence of a specific statutory framework, such funding arrangements were governed by the general rules of contract in the Belgian Civil Code. This allowed parties to freely negotiate funding agreements, provided they did not conflict with public policy.[197] Very recently, the Flemish Bar Association, the regulatory body for all Dutch-speaking Bar associations in Belgium, adopted non-binding recommendations regarding the role of lawyers in third-party funding. These recommendations apply to all forms of commercial third-party funding, including collective redress actions. The recommendations primarily focus on lawyer independence, lawyer's fees, the information obligations of lawyers, and their impact on professional liability.[198]

Although the Representative Actions Directive left open the possibility of banning third-party funding of collective redress actions, the Belgian legislator saw no reason to impose such a ban. The legislator itself clarified that 'litigation funders' are not particularly active in Belgium[199], which it attributed to the lack of financial incentive in collective redress actions. Since the class representative can only recover its costs, the legislator assumed that the funding of such claims was unlikely to be a profitable undertaking.[200] The Belgian legislator made two limited changes to the legal framework when transposing the Representative Actions Directive in order to ensure

[193] However, indirect funding occurs through membership fees paid to consumer organizations. For instance, in the Lernout & Hauspie case, a collective procedure outside the scope of the Belgian framework for collective redress, Test-Achats members were required to pay an annual membership fee of EUR 143.40 and remain members for the duration of the proceedings, while non-member shareholders paid a flat fee of EUR 200 (see F Lefèvre and G Croisant, 'Le 'third party funding', une solution aux problèmes des coûts de l'action en réparation collective pour le représentant?', (2018) (4) TBH 327, 338, para 36).

[194] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 208.

[195] This definition is inspired on ELI, Principles Governing the Third Party Funding of Litigation, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, p. 10.

[196] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 207.

[197] See I Berger and H Boularbah, 'Litigation Funding Belgium' in J Barnes and S Friel (eds), Lexology GTDT - Litigation Funding, 28 September 2022, see www.loyensloeff.com/2023-litigation-funding---belgium.pdf.

[198] www.ordevanvlaamsebalies.be/nl/fetch-asset?path=ovb/Documenten/gerechtelijk-recht/Recommendations-Third-party-funding-EN.pdf.

[199] The largest litigation funder in Belgium is Deminor Litigation Funding. Another player with a seat in Belgium is Liesker Procesfinanciering.

[200] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 35.

adequate funding supervision. In particular, these changes focus primarily on transparency of funding, but do not include any substantive rules, such as a cap on what a litigation funder can earn.

First, to be recognised as a qualified entity, a consumer protection organisation must be independent (Article XVII.1, § 1 CEL). This requires the organisation to: make sufficiently clear information about its financing publicly available; refuse financing from persons (other than group members) who have an economic interest in the action; and establish procedures that prevent conflicts of interest between the organisation's interests and those of funders and group members.[201] The explanatory memorandum itself notes that if these conditions are not met, the minister may refuse recognition, or the court may declare the collective redress action inadmissible due to non-compliance with the recognition requirements.[202]

Second, the class representative is obliged to indicate in the application for an action for collective redress whether the proceedings are being financed by a third party. If so, the third party funder must be identified in the application (Article XVII.42, first paragraph, 6° WER). The law does not provide for the court to request further information or demand access to the funding agreement in such cases. The preparatory works merely refer to Article 10(3) of the Representative Actions Directive, which requires the group representative to submit the relevant documents, but this provision has not been explicitly transposed into Belgian law.[203] It is therefore possible that this issue may become the subject of future legal debate.

However, there is little confidence that these revised funding rules will improve the attractiveness of Belgium's action for collective redress.[204] The main issue is that Belgian law prevents the class representative from agreeing to transfer part of the consumers' compensation to the third-party funder, as the claims administrator is required to transfer the compensation directly to the consumers.[205] Consequently, unless a prior agreement has been made with each group member, the third-party funder cannot claim a portion of the outcome on the grounds of having financed the collective redress action and assisted the representative in pursuing it. Moreover, apart from the question of its validity vis-à-vis consumers, such a prior agreement is highly hypothetical, since the members of the group will not be known until they have opted in after the decision on the merits.[206]

3. Funding from the state budget

Regarding funding from the state budget, an unusual development occurred during the legislative process for transposing the EU Directive. In the Belgian Government's original proposal, which was submitted to the Special Consumer Consultative Commission, the Ministry of Economic Affairs was tasked with providing financial support to class representatives initiating a redress procedure in Belgium. Under certain conditions, class representatives would have been entitled to an annual lump sum of EUR 10,000 per representative action.[207] However, the law as enacted does not

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[201] see also above, para 0.
[202] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 35.
[203] Ibid.
[204] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 207. Comp.: 'La philosophie «altruiste» de l'action en réparation collective belge rend le financement d'une telle action totalement inintéressant'. (H Boularbah, L'action en réparation collective; aperçu des changements attendus en 2023 in H Jacquemin, Actualités en droit de la consommation (Anthemis 2023) 200, para. 41
[205] E De Baere, A-S Maertens and K Willems, 'Belgische Class Action: Tien Pijnpunten' (2015) Nieuw Juridisch Weekblad 538.
[206] Ibid.
[207] Special Consumer Consultative Commission, *Actions representatives visant a protéger les intérets collectifs des consommateurs et des PME*, www.ccecrb.fgov.be/p/fr/1029/actions-representatives-visant-a-proteger-les-interets-collectifs-des-consommateurs-et-des-pme, 10.

provide for financial support and offers no explanation for this omission. This absence effectively leaves one of the main obstacles for collective redress unresolved. It could also be questioned whether, by not providing such support, Belgium is not complying with its obligation under Article 20 of the Representative Actions Directive to ensure that the costs of proceedings relating to representative actions do not prevent qualified entities from effectively exercising their right to seek redress.[208]

4. Allocation of legal costs

Cost allocation refers to the decision determining which party ultimately bears the financial burden of the collective redress action. In this regard, a distinction must be made between the scenario where the claim leads to a collective settlement and the case where a court decision marks the end of the proceedings.

a) Collective settlement

In the event that an action for collective redress results to a settlement, Article XVII.45, § 3, 8° CEL is guiding for the allocation of costs. The minimum details of the collective settlement agreement must include the amount to be paid by the defendant to the class representative. This means that the agreed remuneration for the class representative must be determined separately and cannot be deducted from the compensation due to the class members.[209] Importantly, Article XVII.45, § 3, 8° CEL also adds that this amount "*cannot exceed the actual costs incurred by the class representative*". This means that the class representative cannot, in principle, obtain a higher amount from the settlement agreement to offer to the third party funder than the reimbursement of actual costs incurred.[210]

Moreover, it remains unclear what exactly falls under 'actual costs'. In particular, the question arises whether the parties can actually agree that the trader will bear all the actual costs of the group representative, including the full lawyers' fees, or whether the settlement agreement can solely determine the amount of the statutory compensation for lawyers' fees. This is a controversial issue in Belgian law, because, as explained below, under a court order, the class representative will receive statutory compensation for lawyers' fees based on the Judicial Code, which may differ significantly from the actual lawyers' fees incurred (see below).

In fact, it was the parliamentary preparatory work for the 2014 law that caused the confusion by including contradictory statements on this issue.[211] The literature is also divided on this issue. Some authors argue that only the statutory fee as provided for in the Judicial Code can be reimbursed.[212]

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[208] R Steennot, 'The Transposition of the Representative Actions Directive in Belgium' (2024) (2) REDC 185, 208.

[209] E De Baere, De Belgische class action. Een grondige commentaar op de Wet van 28 maart 2014 tot invoeging van de rechtsvordering tot collectief herstel (Wolters Kluwer 2017) 121.

[210] Comp. F Lefèvre and G Croisant, 'Le 'third party funding', une solution aux problèmes des coûts de l'action en réparation collective pour le représentant?', (2018)(4) TBH 327, 351, nr. 96 : '*Sauf à l'assumer sur ses fonds propres, le représentant ne pourra donc pas non plus offrir au tiers financeur plus que le remboursement des frais exposés*'. The only possible argument would be that the funder's profit share qualifies as part of the 'actual costs incurred by the class representative'. However, as the following paragraphs show, this is not self-evident. Moreover, these costs have not yet been incurred at the time of the collective settlement, but will only be due afterwards.

[211] On the one hand, the explanatory memorandum refers to 'primarily the legal fees (...) as well as other procedural costs'. On the other hand, it further states: 'The compensation and costs must be strictly calculated based on the reports prepared by the class representative, according to the modalities determined by the Judicial Code and by Royal Decree' (Explanatory Memorandum, Parl. Doc. Chamber, 2013-14, Nos. 53-3300 and 3301/001, 34).

[212] E De Baere and E Terryn, 'Het akkoord tot collectief herstel' in J Rozie, S Rutten and A Van Oevelen (eds), Class actions (Intersentia 2015) 92-93.

Otherwise, they fear that the class representative's internal costs, such as staff expenses related to managing the claim, may be passed on to the trader.[213] On the contrary, others believe that more costs than the statutory fee can be included, especially since the law refers to actual costs and aims to avoid profit motives.[214]

The latter view seems justified, since in Belgium the text of the law remains the reference (in any case above the parliamentary works) and Article XVII.45, § 3, 8° CEL explicitly refers to actual costs. The basic principle is to exclude the possibility of the class representative (or the third party funder) benefiting financially from bringing the action. Moreover, the settlement in the first collective redress action in Belgium, namely the case of Test-Achats against Thomas Cook Airlines, demonstrates that the defendant committed to reimbursing the costs already incurred by Test-Achats (including its legal fees, court fees, summons costs, service costs of the admissibility ruling, and administrative and operating costs of Test-Achats).[215]

In addition, the assumption that the class representative can recover its actual costs (including lawyers' fees and internal staff/operating costs) in the context of a collective settlement may act as an incentive to reach a negotiated settlement. This aligns with the Belgian legislator's preference for negotiated settlements[216], a preference also shared by the EU legislator[217]. However, there is a concern that the class representative may prioritise covering its own costs over securing a fair deal for class members, particularly in cases where the representative could negotiate lower compensation for the class in exchange for full reimbursement of its own costs.[218] Nevertheless, this problem should not be addressed by abolishing the costs regime for collective settlements, but rather by ensuring that appropriate provisions are in place when a court decision is taken.

b) Court decision

When the action for collective redress is not resolved through a settlement, the general rules laid down in Articles 1017 et seq. of the Judicial Code apply. The defendant is required to reimburse the litigation costs, including the lawyers' fees, of the class representative. However, there is a significant distinction between lawyers' fees and all other costs. While other costs are reimbursed based on their actual amount, the recovery of lawyer's fees is limited to a statutory indemnification.

When first considering those other costs, it should be noted that Article 1018 of the Judicial Code contains a non-exhaustive list of litigation costs that can be recovered. Since this list is non-exhaustive, it is clear that costs incurred by the class representative during the admissibility phase and the negotiation and homologation phases are also eligible for reimbursement.[219]. An analysis of

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[213] F Danis, E Falla and F Lefèvre, 'Introduction aux principes de la loi relative à l'action en réparation collective et premiers commentaires critiques' (2014) TBH 2014, 574-575.

[214] E De Baere, De Belgische class action. Een grondige commentaar op de Wet van 28 maart 2014 tot invoeging van de rechtsvordering tot collectief herstel (Wolters Kluwer 2017) 120.

[215] A total of EUR 9.770,12 was included in this settlement as a compensation of the class representative, see Court of First Instance, Brussels, 19 June 2017, AR 2015/4019/A, referred to by G-J Hendrix and X Taton, 'De rechtsvordering tot collectief herstel – Overzicht van rechtspraak (2014-2020)' (2021) TBH 864, 866, par. 5.

[216] Explanatory Memorandum, *Parl. Doc.* Chamber of Representatives 2013-14, no.53-3300/001 and no. 53-3301/001, p. 33.

[217] See recital (53) of the Representative Actions Directive: 'Collective settlements aimed at providing redress to consumers that have suffered harm should be encouraged in representative actions for redress measures'.

[218] This is an example of the principal-agent problem.

[219] S Rutten, 'Beslissing ten gronde' in J Rozie, S Rutten, A Van Oevelen (eds.), *Class Actions* (Intersentia 2015) 121, para. 37.

the actions for collective redress in which a decision on the merits was rendered[220] provides an indication of the general costs for which the class representative or the trader were held liable, respectively:

- The court fees (‘*rolrechten*’) payable to the Belgian State for making use of the civil justice system (currently, court fees for the enterprise court are approximately 165 euros, and for appellate courts around 400 euros).
- The cost of serving the decision on the merits to the other party.
- The costs of the claims administrator, for which the court imposes a provision at the time of the decision on the merits.

The legal framework for collective redress actions in Belgium includes specific provisions on the allocation of publication costs.

First, it follows from Article XVII.54, § 4 CEL that the costs relating to the publication of decisions on admissibility and merits, such as announcements in the Belgian State Gazette or other supplementary measures, are to be borne by the losing party. To reduce the costs of Publication in the Belgian State Gazette, the Act of 2 February 2021[221], introduced a change. Instead of requiring the full text of decisions to be published in the Belgian State Gazette, only a reference to the decision and a link to its full text on the website of the Federal Public Service Economy now need to be included. This amendment has significantly lowered these publication expenses. Regarding the other supplementary measures, in the case of *Test Achats v. Proximus*, for example, the court had ordered the defendant to send a letter to its customers.[222] In the case of *Test Achats v. Volkswagen*, Volkswagen was required to publish the judgment on the merits in several newspapers, which also resulted in additional costs.[223] Finally, the transposition of the Representative Actions Directive brought another modification to Article XVII.54, § 4 CEL. Previously, the winning party advanced the publication costs and later reclaimed them from the losing party. To enhance efficiency, the legislation now requires these costs to be directly paid by the losing party, as clarified in the explanatory memorandum accompanying the bill.[224]

Second, in implementation of the Representative Actions Directive, a new provision has been added to Article XVII.61, §4, establishing that in exceptional circumstances, after a group member has been summoned by either the defendant or the group representative, the court can order that group member to pay costs and expenses, including legal fees, caused by his or her intentional or negligent behavior. The legislator has, however, emphasised that this kind of orders would be very rare and apply only in exceptional cases.[225] Moreover, throughout the proceedings, group members have almost no involvement in an action for collective redress. The only conceivable scenario in which a consumer could trigger costs is if he or she wrongly challenges, for example, his or her exclusion from the claims administrator’s list of eligible class members (e.g., because he or she has already been compensated). This could result in additional litigation costs, as such disputes would have to

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[220] Court of First Instance, Brussels, 27 July 2023, 2016/2706/A, Test Aankoop v. Volkswagen, p. 65, nr. 144; Court of Appeal, Brussels, 30 January 2019, Test Achats v. Proximus, *Belgian State Gazette* 20 February 2019, ed. 2, p. 17.763

[221] The Act of 2 February 2021 containing various provisions on Economy, Belgian Official Gazette 11 February 2021.

[222] As Proximus was ultimately put in the right, it could recover an amount of EUR 13,119.25 for copy costs and printing expenses, see Court of Appeal, Brussels, 30 January 2019, Test Achats v. Proximus, *Belgian State Gazette* 20 February 2019, ed. 2, p. 17.763.

[223] Court of First Instance, Brussels, 27 July 2023, 2016/2706/A, Test Aankoop v. Volkswagen, p. 65, no. 144.

[224] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 59.

[225] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 46.

be brought before the courts. Since group members are not formal parties to the lawsuit, it is therefore necessary for either the defendant or the class representative to formally summon the group member for intervention. This type of ruling may only be included in the judgment ending the proceedings.[226]

Finally, Belgium has a specific form of the loser pays rule, the statutory compensation of lawyers' fees. This means that the compensation for lawyers' fees awarded to the winning party is completely disconnected from the actual costs of the lawyer. Instead, the lump sum awarded to the successful party to cover their lawyer's fees is determined according to a statutory fee table based on the value of the claim. For example, for claims valued between EUR 5,000.01 and EUR 10,000.00, the winning party who was assisted by a lawyer will generally receive EUR 1,350 to cover their lawyer's fees, regardless of whether the actual fees paid are lower or higher than that amount. Additionally, there is a fixed amount for claims that cannot be valued in monetary terms, currently set at EUR 1,800. This amount is due per instance, meaning that if the winning party is awarded on appeal, it will be able to recover this amount twice, even if it was originally unsuccessful.

This rule applies equally to actions for collective redress.[227] In the two decisions rendered so far, there was no clear consensus on whether a collective redress action should be considered a monetary claim. In the case of Proximus v. Test Achats, the court ruled that it was not, because the class representative does not claim for itself but on behalf of a collective of injured parties, the number of which may not be known. As a result, the prevailing party, Proximus, could only claim EUR 1,440 at that time.[228] In the Volkswagen case, the court awarded Test Achats a statutory indemnification based on the value of a claim that could be assessed in monetary terms, amounting to EUR 22,500.[229]

VI. Conclusion

The Representative Actions Directive did not have a significant impact on the Belgian action for collective redress. As mentioned in the general overview, the implementation act has led to a further expansion of the scope, the introduction of a new system for the designation and monitoring of class representatives, which now also incorporates the concept of qualified entities, the extension of cross-border representative actions, and the introduction of rules on litigation funding.

Regarding the specific issues identified in the study, it is first worth noting that Belgian law, at least in theory, is open and flexible with regard to the concept of immaterial damages. However, according to the prevailing view, it is not considered easy to obtain meaningful compensation, in the sense of monetary compensation exceeding a symbolic amount.

With respect to the burden of proof and access to evidence, it should be noted that the general rules of civil procedure must be fully applied. In other words, no special rules have been provided within the framework of the action for collective redress. Nonetheless, the civil rules of evidence have recently undergone significant changes, introducing three techniques to address the evidence-related challenges of the parties: the parties' duty to cooperate in the administration of evidence,

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[226] Explanatory Memorandum, Parl. Doc. Chamber of Representatives 2023-24, no. 55-3895/001, 46.

[227] S Rutten, 'Beslissing ten gronde' in J Rozie, S Rutten, A Van Oevelen (eds.), *Class Actions* (Intersentia 2015) 121, para. 37.

[228] Court of Appeal, Brussels, 30 January 2019, Test Achats v. Proximus, *Belgian State Gazette* 20 February 2019, ed. 2, p. 17.763.

[229] Rb. Brussel 27 July 2023, 2016/2706/A, Test Aankoop v. Volkswagen, p. 65, nr. 144

the court's power to reverse the burden of proof in exceptional circumstances, and a similar power to lower the standard of proof in two specific situations.

Finally, with regard to funding and costs, Belgium does not present an attractive model for collective redress. Although third-party funding – unlike contingency fees – is permitted, the cost allocation rule is such that the recovery of incurred costs is particularly difficult, if not impossible.

B. GERMANY

Axel Halfmeier and Peter Rott

I. Introduction

When the German legislator implemented the rules of the Representative Actions Directive (EU) 2020/1828 on redress actions ('RAD'), it created the new Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgesetz*; VDuG). Still, this new act was not entirely new as the new provisions partly built on an earlier form of collective proceedings, the model declaratory action that had been introduced in 2018. The rules on injunctions were only slightly modified and remain in the Injunctions Act (Unterlassungsklagengesetz; UKlaG), which had implemented the earlier Injunctions Directives from 1998 and 2009.[230]

The model declaratory action was not a redress action but ended (ideally) with a declaratory judgment that would confirm, for example, the defectiveness of a car with deceptive software; actually, the Volkswagen diesel scandal had been the reason for the introduction of the model declaratory action. On the basis of such a judgment, consumers then had to enforce damage claims or other remedies individually. The model declaratory action was not abolished in the aftermath of the Representative Actions Directive but modestly reformed and also included in the new VDuG. Indeed, it may still be useful in the future, as this study will show.

To complete the picture, one should also mention the skimming-off procedure of § 10 of the Law on Unfair Competition (UWG), which allows certain consumer organisations to take action against traders who have breached unfair commercial practices law (which includes many breaches of consumer contract law that are at the same time unfair commercial practices). The main difference between the skimming-off procedure and a redress action is that traders have to pay skimmed off profits into the state budget, while consumers that suffered harm from the breach do not benefit.

In contrast, no true group action was introduced that could be initiated by a group of consumers (or their lawyers). In practice, however, consumer organisations compete with legal tech claims management service providers who enforce consumer claims usually under a no-win-no-fee agreement against a contingency fee of 25 to 35%.[231] While their business model was heavily contested at the outset, many legal issues have been settled in their favour in the meantime. Thus, in principle, they can collect claims that consumers assign to them and bring them collectively to court in one single procedure.[232] No decision of the Bundesgerichtshof is available yet on the controversially discussed question whether claims for immaterial damage under data protection

[230] For further details, see P. Rott, The new German representative action - a mixed bag, Revue européenne de droit de la consummation 2024, 255 ff.
[231] See F. Skupin, Rechtsdurchsetzende nichtanwaltliche Dienstleister (Univ. Trier, 2022); P. Rott, Verbraucherpolitischer Handlungsbedarf bei Legal Tech?, 2023.
[232] See BGH, 13 June 2022 – Via ZR 418/21, NJW 2022, 3350, 3352.

law are assignable to third parties. OLG Hamm, as the highest court that has decided on the matter until now, considered this to be lawful.[233]

This study focuses on the German implementation of the redress action but considers other collective instruments where they may fill gaps in situations where the redress action is less helpful. After a general overview, it offers in-depth insights on three particular issues: (1) the viability of collective actions related to immaterial damage; (2) discovery and the burden of proof; and (3) costs and the financing of redress actions.

II. Overview

1. Competent courts

The competent courts for actions under VDuG are the higher regional courts (*Oberlandesgerichte*), and there is only one appeal instance, the BGH, as it had already been the case for model declaratory actions. Thus, the competent courts already avail of some experience with collective actions, which may be helpful when dealing with redress actions.

2. Scope of application

The scope of application of the redress action under the VDuG is broader than the scope of application of the Representative Actions Directive, as it follows the design of the model declaratory action. As the latter was mainly triggered by the Volkswagen diesel scandal, where claims against Volkswagen AG were based on tort law rather than consumer sales law, the scope of application of the model declaratory action included all legal relationships on which consumers could base claims against traders. The same is now true for redress actions,[234] and the scope of application includes, for example, cartel damage claims.[235]

Moreover, small enterprises that have less than ten employees and whose annual turnover does not exceed two million Euros are treated as consumers for the purposes of the VDuG.[236] Thus, they can also join redress actions. Again, the reason must be seen in the Volkswagen diesel scandal that did not only affect consumers but also many small enterprises that had bought such cars in order to act more sustainably.

3. Qualified entities

Only qualified entities have legal standing. In this regard, Germany was rather generous when only the injunction was available. Until now, 78 consumer organisations have been registered, among them 38 tenants associations. In 2020, with the so-called Act to Strengthen Fair Competition

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[233] OLG Hamm, 24 July 2024 – 11 U 69/23, GRUR-RS 2024, 24099. Against assignability: J. Spittka, Datenschutzklagen als Geschäftsmodell?, GRUR-Prax 2023, 31, 32 f.

[234] See § 1 para. 1 VDuG. For critique of the extension of the scope of application, see L. Giesberts, Verbandsklagen für Kollektivinteressen – Die EU-Richtlinie und der Entwurf des deutschen Umsetzungsgesetzes, Zeitschrift für Product Compliance 2023, 7; for an extension to medium-sized enterprises, see K. Engler, Kollektives Legal Tech in Zeiten der Abhilfe-Verbandsklage, Legal Tech Zeitschrift 2023, 15, 18,

[235] See L. Schultze-Moderow, C. Steinle and L. Muchow, Die neue Sammelklage – Ein Balanceakt zwischen Verbraucher- und Unternehmensinteressen, Betriebs-Berater 2023, 72, 73 and 76 ff.

[236] § 1 para. 2 VDuG.

(*Gesetz zur Stärkung des fairen Wettbewerbs*),[237] both the recognition requirements and recognition practice were tightened though, and less mainstream consumer organisations, such as organisations specialising in the areas of elderly care or handicapped consumers experienced strict examination by the competent authority, the *Bundesamt für Justiz*, that took several years. A tenants association even had to sue the *Bundesamt für Justiz* to be registered.[238]

In the ambit of the model declaratory action, recognition requirements were even stricter at the outset, and it was the legislative aim to give legal standing only to consumer organisations that the legislator regarded as the most trusted and responsible, so as to avoid what they called "abuse of litigation".[239] For redress actions, legal standing was then relaxed a bit, under the then new coalition government, and the relaxation was also applied to the reformed model declaratory action.

Application for registration presupposes activities in the areas of consumer information and advice for a minimum of one year,[240] which means that ad hoc organisations cannot have legal standing in Germany.[241] Moreover, the consumer organisation needs sufficient financial means and an organisational structure that makes sure that it will fulfil its tasks in the future; another criterion that is so vague that it opens the doors for the *Bundesamt für Justiz* to deny registration, although the authority has already been overruled by the Administrative Court (Verwaltungsgericht; VG) of Köln in the past.[242] Finally, qualified entities must not obtain more than 5% of their financial means through contributions from enterprises. In addition to that, courts interpreted the requirements for legal standing narrowly, thereby creating further barriers to model declaratory actions, and they even struck out three actions entirely on procedural grounds.[243]

Consumer organisations that are predominantly funded by the State, which means the Consumer Centres (*Verbraucherzentralen*) of the Länder and their umbrella organisation, the *Verbraucherzentrale Bundesverband* (vzbv), are presumed to satisfy all these requirements;[244] which reflects that they are beyond any suspicion not to act in the interest of consumers.

Business associations and the chambers of trade and industry do not have legal standing for model declaratory actions or redress actions.

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[237] BGBl. 2020 I, 2568.

[238] See VG Köln, 26 February 2020 - 1 K 3387/17, Verbraucher und Recht, 2020, 350.

[239] See the explanations of the government, BT-Drs. 19/2439, 16.

[240] § 4 … UKlaG. According to § 4 of the Qualified Entities and Qualified Business Associations Regulation (*Verordnung zu qualifizierten Einrichtungen und qualifizierten Wirtschaftsverbänden;* QEWV), BGBl. 2021 I. 1832, 4832, an implementing regulation, the *Bundesamt für Justiz* can require applicants to produce detailed documents on advice they performed in the past one year.

[241] This also explains why Germany lobbied for the exclusion of such organisations from cross-border actions that could be brought against German traders in the court of another EU Member State. This aims, in particular, at Dutch *stichtings* that were founded, among others, in the context of the Volkswagen diesel scandal. See also H. Woopen, Kollektiver Rechtsschutz – Das Desaster naht, Zeitschrift für Internationales Wirtschaftsrecht (IWRZ) 2018, 160, 161; T. B. Lühmann, Der Vorschlag einer europäischen Verbandsklage – Ein weiteres Instrument des kollektiven Rechtsschutzes, Neue Juristische Wochenschrift 2019, 570, 571.

[242] See VG Köln, 24 February 2005 – 1 K 3187/03, Beck-Rechtsprechung, 2007, 22941, in relation to the consumer organisation Verbraucherschutzverein (VSV) that is still very active, including through litigation.

[243] See BGH, 17 November 2020 – XI ZR 171/19, Neue Juristische Wochenschrift 2021, 1014, BGH, 17 November 2020 – XI ZB 1/19, Neue Juristische Wochenschrift 2021, 1018; BGH, 30 March 2023 – VII ZR 10/22, Neue Juristische Wochenschrift 2023, 1816.

[244] § 2 para. 3 VDuG.

Qualified consumer organisations can also apply to be registered as "qualified entities" for the purpose of cross-border actions but will then have to satisfy the requirements of Article 4(3) RAD (new § 4d UKlaG). It seems that no consumer organisation has been registered yet.

4. The collective element

The necessary collective element of a redress action has two aspects: a sufficient number of consumers concerned and the likeness of their claims.

In relation to the sufficient number of consumers concerned, the German implementation is not very strict.[245] Qualified entities only have to declare that action's relevance for at least 50 consumers.[246] There is no minimum requirement of consumers who actually join the redress action.

The alleged claims of those 50 consumers must be "essentially alike". This notion is a deliberately softer version that the notion of "alike", according to the redress action would have been inadmissible if the facts of individual cases differed in a relevant way, for example in relation to potential knowledge of a defect or to potential prescription of a claim.[247] This strict approach would have allowed the defendant trader to exclude consumers by raising defences based on their individual characteristics, thereby making claims "unlike" the others.[248]

Under the final implementation of the Representative Actions Directive, claims are "essentially alike" (*im Wesentlichen gleich*) where they are based on the same facts ("single event mass harm") or on a series of comparable facts ("single cause mass harm") and the same issues of facts and law are relevant for the decision on them.

Where claims are related but not even essentially alike, the claimant qualified entity can establish sub-groups that must, however, consist of at least 50 consumers each. The criterion of "essential likeness" is of course somewhat vague, and predictably, traders will see a defence line here.

5. The redress action procedure

With the new redress action procedure, the legislator pursues the twofold objective, on the one hand, to allow full satisfaction of consumer claims in one procedure and, on the other hand, to ease burdens on the court. It consists of four phases. Phase 1 starts with the application and ends with an interim judgment on the substance of the claim in principle (without calculating, for example, the exact amount of damage). On that basis, the parties shall negotiate for a settlement (phase 2). If these negotiations fail, the court will enter into calculations and make the final judgment (phase 3). Phase 4 is dedicated to the distribution of the gains to the individual consumers that have joined the action.

a) Phase 1

To start with, the qualified consumer organisation needs to file a lawsuit, which can have two different aims.

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[245] On the negotiations, see P. Rott, Revue européenne de droit de la consummation 2024, 255 ff.
[246] § 4 para. 1 VDuG.
[247] See BT-Drs. 20/6520, 78.
[248] For detailed discussion, see R. Dittmann and P. Gollnast, Anforderungen an den Klageantrag bei Abhilfeverbandsklagen nach dem VDuG-E: Zulässig oder unzulässig – das ist hier die Frage, Verbraucher und Recht 2023, 135 ff.; A.-K. Mayrhofer and T. Koller, Die „Gleichartigkeit" als Nadelöhr der Verbandsklage, Zeitschrift für Wirtschaftsrecht (ZIP) 2023, 1065 ff.

The first option of the consumer organisation is to sue for payment by the trader to each individual consumer concerned, or to perform other remedies such as repair, or the payment of a defined total amount of money.[249] This option would be suitable, for example, in a simple case concerning the delay of a plane[250] but not in a mass damage case where the individual damage of each consumer concerned cannot be predicted at the outset.

For the latter situation, the law offers a second option, under which the consumer organisation can claim payment of a total amount that would then be distributed in a special procedure to the consumers concerned (see infra, phase 4). In that case, the claimant does need to specify the exact amount at the start of the proceedings, but must at least name the method by which individual claims are to be calculated. An example would be a claim for payment of interest where the interest rate is equal for all but the amount to be paid depends on the amount and the time that interest is to be paid for.[251]

As mentioned above (at II. 4.), the application must include a declaration that at least 50 consumers are concerned by the action. No evidence is required at this stage.

Consumers only benefit from the redress action if they opt in, which they can do until three weeks after the end of the oral hearing.[252] The same applies to their withdrawal from the procedure if they change their mind. Typically, German courts indicate during the oral hearing what decision they lean towards, without of course being bound by their preliminary opinion. This should offer consumers the opportunity to join or to withdraw from the proceedings on a reasonably informed basis, although a certain risk remains that the court changes its mind during its internal consultations.[253]

Opting in is easy. Consumers only have to enter the following information: (1) name and address; (2) classification as a small enterprise, if applicable; (3) name of the court and registration number of the claim they want to join; (4) name of the defendant; (5) issue and reason of the claim; and (6) assurance of the correctness of this information. The issue and the reason of the claim is the only barrier, as the BGH required consumers (in the context of the identical requirement for model declaratory actions) to make the claim identifiable without doubt, the main reason being is that opting-in triggers the suspension of the prescription of the claim, and it must be clear the prescription of which claim is suspended. Thus, it was not sufficient to simply enter "Software manipulation VW Touran year of construction 2011"[254] but a consumer should also give precise information relating to the place and date of the purchase, or a contract number if available.[255]

The claims are in no way checked for their merits or even their plausibility at this stage. This only happens in the last phase of the procedure (if the court holds the redress action to be successful, in principle), and it leaves a certain amount of uncertainty as to how many realistic claims are actually involved in the redress action until that last phase.

The court will instead enter into the assessment of the substance of the claim, that is, for example, whether the incriminated term is unfair or whether a certain practice was in breach of consumer law. Phase 1 ends with a judgment on the substance of the claim in principle, which can itself be appealed by the parties. Where the consumers concerned are not named in the lawsuit, the court

[249] See § 14 VDuG.
[250] See P. Röthemeyer, Das Verbraucherrechtedurchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage, Verbraucher und Recht 2023, 332. 335.
[251] See BT-Drs. 20/6520, 78.
[252] § 46 paras 1 and 4 VDuG.
[253] See also Röthemeyer, Verbraucher und Recht 2023, 332. 334.
[254] See BGH, 24 April 2023 – VIa ZR 1072/22, Neue Juristische Wochenschrift 2023, 1888.
[255] See I. Scherer, § 46 VDuG, in H. Köhler and J. Feddersen, UWG, § 46 para. 28.

will determine the concrete requirements of successful individual claims and the evidence that consumers will have to bring to substantiate their claims.[256]

Where the consumer organisation considers it unlikely that many consumers will opt in, in particular due to the low value of the claim, it may resort to the skimming-off action under § 10 UWG rather than initiating a redress action.

b) Phase 2

In phase 2, the court shall make the parties attempt to settle the dispute.[257] A settlement must be confirmed by the court; which the court will do if it finds the settlement reasonable, in the light of, in particular, the interests of the consumers concerned.[258] The settlement may not only define the group of consumers whose claims are satisfied, and the calculation methods, but it can also agree on a mode of distribution, which may be cheaper for the trader than the mode of distribution in accordance with the law[259] (on which see infra, phase 4).

Consumers who do not agree with the settlement can opt out within a month from the publication of the settlement in the representative actions register.[260] In that case, they are not bound by the outcome of the redress action, and they are free to pursue their claims individually. Unlike under the old system of the model declaratory action, the validity of the settlement is not affected if a large number of consumers opt out.[261]

Although the law prescribes that the court must confirm the settlement, this does not apply to out-of-court settlements. It is therefore possible to arrange an out-of-court agreement between the claimant organisation and the defendant company, which contains a settlement recommendation aimed at the affected consumers. This option was used in 2020 by vzbv in the model declaratory action against Volkswagen AG, and the court action was then withdrawn.[262]

c) Phase 3

If the parties do not come to an agreement, the redress action is continued, and the court will hand down its final judgment (unless a party has appealed the judgment on the merits, in which case the appeal needs to be dealt with first by the *Bundesgerichtshof*).

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[256] § 16 para. 1 VDuG.
[257] § 17 para. 1 VDuG.
[258] § 9 para. 2 VDuG.
[259] See BT-Drs. 20/6520, 80 f. See also M. Merkat and A. Amhrein, Die Umsetzung der Verbandsklagen-RL in Deutschland nach dem Referentenentwurf, Recht Automobil Wirtschaft 2023, 23, 28.
[260] § 10 para. 1 VDuG.
[261] Under old § 611 para. 5 ZPO, the settlement only became valid if less than 30% of the consumers that had joined the action opted out.
[262] On this specific settlement see A. Stadler, Pyrrhussieg für den Verbraucherschutz – vzbv umgeht durch Vereinbarung mit VW gesetzliche Sicherungsmechanismen, Verbraucher und Recht 2020, 163; J. Gurkmann and R. Jahn, Außergerichtlicher Vergleich im Rahmen einer Musterfeststellungsklage, Verbraucher und Recht 2020, 243.

d) Phase 4

Phase 4 is the implementation of the judgment. The regulation of that phase was inspired by a procedure that applies in the event of an incident of a ship,[263] and it contains some special and controversial features.

The implementation of the judgment is laid in the hands of a trustee (*Sachwalter*) who must, unsurprisingly, be suitable and independent.[264] The trustee reviews all claims and assesses whether or not they comply with the conditions set in the judgment. To that end, he can order consumers to produce evidence. The trustee then pays out to those consumers that have a valid claim, according to this assessment. If the total amount is insufficient, he pays out pro rata.[265] Consumer and trader can object to the trustee's decisions in individual cases, upon which the trustee has to decide again. If the consumer or trader is still dissatisfied with the decision, they can appeal to the court.[266]

The trader has to bear the costs of the implementation procedure,[267] and he has to pay them in advance to the trustee.[268] Moreover, if the trader was successfully sued to pay a total amount that would be distributed among the consumers concerned, he would have to pay that amount to the trustee, too.

One special element relates to the total amount that the claimant consumer organisation has demanded. As mentioned above, the validity of the claims of consumers that join the redress action is only assessed in phase 4, and therefore the total amount of valid claims can only be estimated. If that estimation of the claimant consumer organisation turns out to be too low, the law allows for an "increase procedure" (*Erhöhungsverfahren*).[269] Thus, the claimant consumer organisation can apply for an increase of the total amount, based on facts that show that the already awarded amount will be insufficient to satisfy all valid claims. The implementation procedure is suspended during that increase procedure.

The trustee bears great responsibility, and indeed, the law imposes liability on him if he does not fulfil his duties with due diligence.[270] Once he has finished his task, he has to produce his final bill to the court, in particular, about his expenses. The trader can object to this bill; otherwise, it will be deemed accepted after two weeks.[271] Moreover, the trustee must prepare the final report about satisfied and rejected consumer claims.[272]

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[263] § 9 of the Distribution Order of Shipping Law (*Schifffahrtsrechtliche Verteilungsordnung*); see BT-Drs. 20/6520, 85. On parallels with insolvency procedures, see J. M. Schmittmann, Die insolvenzrechtlichen Aspekte des Referentenentwurfs zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG, Zeitschrift für Restrukturierung und Insolvenz, 2023, 277 ff.
[264] § 23 VDuG.
[265] § 27 VDuG.
[266] § 28 VDuG.
[267] These include the trustee's expenses and his remuneration, § 20 para. 1 VDuG.
[268] § 18 para. 2 and § 24 VDuG.
[269] § 21 VDuG.
[270] § 31 VDuG. For this reason, the court can ask the trustee to get professional indemnity insurance, § 23 para. 2 VDuG.
[271] § 33 VDuG.
[272] § 34 VDuG.

The procedure ends with the court's decision on the final report of the trustee. Unclaimed funds are returned to the trader,[273] in spite of an alternative policy proposal to transfer them to a fund that could be used for the purposes of consumer protection.

6. Prescription

The decisive improvement in the area of injunctions is the suspension of the prescription of individual claims, when those claims are based on a breach that is subject to the injunctions procedure under § 204a para. 1 nos 1 and 2 of the Civil Code (BGB). Thus, individual consumers can patiently wait for the outcome of, for example, a lawsuit brought by a consumer organisation related to the unfairness or otherwise of a standard term, and then pursue remedies on the basis of its outcome.

According to § 204a para. 1 nos 3 and 4 BGB, a redress action only suspends prescription for those consumers who have joined the action by opting in. Whether or not this is in line with the Representative Actions Directive is a topic of ongoing debate in German academia. According to Article 16(2) Representative Actions Directive, Member States shall ensure that a pending representative action for a redress measure has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action. The question is what the term "consumers concerned by that representative action" means. The German legislator has interpreted this term more narrowly than the same term in Article 16(1) Representative Actions Directive (as implemented for injunctions in § 204a para. 1 nos 1 and 2 BGB), arguing that the Representative Actions Directive leaves the regulation of participation in a redress action to the national law.[274] However, it seems at odds with general rules of interpretation to construct the same term in the same legal provision differently.[275] Thus, § 204a para. 1 no. 4 BGB seems to be in conflict with Article 16(2) Representative Actions Directive.

Indeed, it does not seem to make sense to grant the benefits of prescription to consumers that are affected by the same breach only if the qualified entity chooses the path of an injunction but not if it goes for the sharper sword of a redress action.[276] In that latter situation, the consumer could then either opt in and benefit directly from the redress action or wait for the outcome and take individual action afterwards.

Whereas in domestic redress actions, the prescription rule applies to all actions including those that are not in the scope of application of the Representative Actions Directive, suspension of prescription is limited to procedures concerning EU legislation as listed in Annex I of the Directive in cases of redress actions in the court or before a public authority of another EU Member State.[277]

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[273] § 37 VDuG.

[274] See BT-Drs. 20/6520, p. 108. See also Röthemeyer, Verbraucher und Recht 2023, 332. 334; A. Bruns, Rechtsgutachten Umsetzung der EU-Verbandsklagerichtlinie in deutsches Recht, 2021, 54; T. B. Lühmann, Anforderungen und Herausforderungen der RL (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen von Verbrauchern, Zeitschrift für Wirtschaftssrecht (ZIP) 2021, 824, 835.

[275] See also B. Gsell, Europäische Verbandsklagen zum Schutz kollektiver Verbraucherinteressen – Königs- oder Holzweg?, Zeitschrift für Bank- und Kapitalmarktrecht 2021, 521, 525; B. Gsell and C. Meller-Hannich, Die Umsetzung der Verbandsklagen-Richtlinie als Chance für eine Bewältigung von Streu- und Massenschadensereignissen, Juristenzeitung 2022, 421, 425; D. Synatschke, J. Wölber and J. Nicolai, Umsetzung der Verbandsklagerichtlinie ins nationale Recht, Zeitschrift für Rechtspolitik 2021, 197, 199.

[276] See also Engler, Legal Tech Zeitschrift 2023, 15, 18.

[277] See § 204 para. 2 BGB.

Prescription of claims of consumers that join a redress action is suspended retroactively from the day of the application of the redress action.[278] Suspension of prescription ends six months after the final decision in the injunction or redress action, or, if the consumer withdraws from a redress action, six months after the date of withdrawal.[279]

III. Immaterial damage

Redress actions related to immaterial damage require immaterial damage to be available as a remedy in the first place. Only then, as a second step, the question arises whether immaterial damage can be pursued in collective redress actions.

1. Availability of immaterial damages

In German private law, immaterial damage is generally not compensated, unless this is explicitly specified by law.[280] That specification by law can, first of all, stem from or be required by EU law, examples from the list of consumer legislation of Annex I of the Representative Actions Directive being the General Data Protection Regulation (EU) 2016/679 (see infra, III.1.2.) and the Package Travel Directive (EU) 2015/2302.[281] Compensation for cancelled and delayed flights under Regulation (EC) No. 261/2004 may also be classified as immaterial damage, as it is meant to compensate for the inconvenience that delay in the carriage of passengers by air causes.[282]

Secondly, where EU law leaves the Member States regulatory choices, Germany has opted to make immaterial damages available in § 8 para. 2 Product Liability Act, implementing the Product Liability Directive 85/374/EEC, and § 87 sentence 2 Drugs Act (as special product liability legislation), both in the cases of physical injury or damage to health.

Beyond these specific provisions, § 253 paragraph 2 BGB generally stipulates that monetary compensation can (only) be claimed for immaterial damage in the case of physical injury, damage to health or violation of freedom or sexual self-determination. Moreover, courts have recognised claims for the compensation of immaterial damage in the case of serious violations of personality rights.[283] The latter presupposes intrusion into the privacy of the victim rather than only the social sphere. Data protection breaches relating to general rather than sensitive personal data do not qualify as serious violation of the personality right.[284]

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[278] See already BGH, 29 July 2021 - VI ZR 1118/20, Neue Juristische Wochenschrift 2021, 3250, for the model declaratory action.

[279] See § 204 para. 3 BGB.

[280] See § 253 para. 1 BGB.

[281] See ECJ, 12 March 2002, Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG*, ECLI:EU:C:2002:163, on the old Package Travel Directive 90/314/EEC and recital (34) of Directive (EU) 2015/2302. Immaterial damage is expressly mentioned in the implementing provision of § 651n para. 2 BGB.

[282] See ECJ, 10 January 2006, Case C-344/04 *IATA and ELFAA v Department for Transport*, ECLI:EU:C:2006:10, para. 45.

[283] See, for example, *BGH, 5 October 2004 – VI ZR 255/03, Neue Juristische Wochenschrift 2005, 215, 216; BGH, 12 March 2024 – VI ZR 1370/20, Beck-Rechtsprechung 2024, 14074, para 70 with further references.*

[284] OLG Hamm, 21 June 2024 – 7 U 154/23, GRUR-RS 2024, 16856.

2. Calculation of immaterial damages

As to the amount of immaterial damages, German law awards "equitable compensation" (*billige Entschädigung in Geld*). German courts apply the same rule to immaterial damages under Article 82 GDPR.[285]

How much exactly that is in the individual case is difficult to predict, therefore lawyers normally claim "equitable compensation but at least amount x", hoping that the court will find a higher amount equitable but trying to avoid losing partly due to an overly optimistic amount.

Lump-sum immaterial damage is only explicitly available under the above-mentioned Air Passenger Rights Regulation.

Whether or not immaterial damage for data protection breaches can be calculated on a lump-sum basis is a controversial topic of discussion. German courts have insisted, relying on the Court of Justice's decision in *Österreichische Post*,[286] that a breach of data protection law as such was not sufficient to justify a damage claim but that the consumer (as data subject) must have suffered harm;[287] which the consumer must demonstrate to persuade the court. While courts tend to accept that consumers are personally affected when their financial data have appeared online or have been leaked, such as credit card numbers, they have been highly reluctant in other cases. The Facebook scraping litigation, exemplified with a judgment of OLG Hamm,[288] may illustrate this. According to the courts, hackers obtained the following personal data of users: user ID, first name, family name, country, sex and telephone number. While the breach of data protection law was clear-cut, the court could not find any immaterial damage in the particular case. The claimant's lawyer had argued that the claimant (and many others in parallel cases) feared abuse of their data but the court insisted, by reference to the identical wording in many parallel cases, to hear the claimant in person, after which the court described the claimant as a self-conscious and experienced person who knew how to handle attempts of betrayal. One reason was that the claimant was professionally dealing with data protection law. The court also rejected immaterial damage due to anger about increased cold calling and spam SMS, arguing that the claimant could not prove causation between the scraping of her personal data and increased spam.

In another case, a legal tech company had collected (alleged) damage claims of 532 data subjects and initiated legal proceedings in the OLG Hamm. The data breach resulted from an accidental e-mail, sent by a vaccination centre, with an excel table attached with the names, telephone numbers and e-mail addresses of persons who had registered for COVID-19 vaccination. The court rejected all claims but two of them, in which the affected consumers had reported, in detail, in what way they had been affected by the leakage of their personal data. In all other cases, the court rejected the general reference to fears and worries as unsubstantiated. The court emphasised that German civil procedural law requires the full persuasion of the court of the facts. According to § 286 para. 1 of the Civil Procedural Code, the court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue. German courts require, at least, a very high degree of likelihood, whereas 'mere likelihood' has explicitly been ruled out as insufficient. As a

[285] See OLG Hamm, 21 June 2024 – 7 U 154/23, GRUR-RS 2024, 16856.
[286] ECJ. 4 May 2023, Case C-300/21 *UI v Österreichische Post AG*, ECLI:EU:C:2023:370; confirmed in ECJ, 20 June 2024, Joined Cases C-182/22 and C-189/22 JU, SO v Scalable Capital GmbH, ECLI:EU:C:2024:531.
[287] See, for example, BGH, 12 December 2023 – VI ZR 277/22, Zeitschrift für Datenschutz 2024, 278.
[288] OLG Hamm, 21 June 2024 – 7 U 154/23, GRUR-RS 2024, 16856.

result, the court value one consumer's fears worth 400 Euro, another one's 200 Euro, and rejected all other claims.[289]

In this regard, however, the BGH may just have revolutionised the law. In a decision of 18 November 2024 on the Facebook (now Meta Platforms Ireland) scraping scandal, the BGH argued that the loss of control over one's personal data as such is immaterial damage, and added that OLG Köln, who has to decide on the case again, should award damages of around 100 Euro.[290] As a data leakage will always lead to the loss of control of all concerned, their damage should all be the same, unless there are special circumstances in individual cases. In that regard, the BGH stated that if a data subject demonstrates psychological harm beyond the mere loss of control, the court may have to hear that data subject in person so as to ascertain the immaterial damage and to award damages that go beyond those awarded for mere loss of control.

3. Collective actions for immaterial damage

As mentioned above, qualified consumer organisations can bring redress actions if the collected claims to be "essentially alike". This is clearly the case for passengers of the same delayed flight.[291] Essential likeness in relation to the event would also be present where consumers have bought the same product[292] that then causes harm, and in many situations of data protection law breaches, such as data leakages.[293]

As mentioned above, consumer organisations can choose two different ways of bringing redress actions. One is to claim payment of a total amount that would then be distributed in a special procedure to the consumers concerned. That total amount does not need to be determined as a figure but its estimation can be left to the court (while the court would expect the claimant to give an indication). This mechanism would seem to be particularly suitable for immaterial damage claims.[294]

As a limitation of the availability of redress actions, however, likeness of claims has been said to exclude situations in which claims need to be assessed on an individual basis, as this defeats the efficiency of collective procedures.[295] This would seem to be the situation of the same type of product that has, however, caused different types of injuries of consumers when exploding, but also of immaterial damage in data protection cases, as constructed by OLG Hamm that requires detailed evidence of the individual affectedness after a data protection breach. If that approach persisted, claims for immaterial damage resulting from data protection breaches would seem to be unsuitable for collective enforcement.[296] In contrast, the new approach of the BGH allows redress actions related to mere loss of control over personal data.

As an alternative enforcement mechanism, qualified consumer organisations may still resort to using the model declaratory action[297] to have the breach of data protection law confirmed in a

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[289] See BGH, 19.2.1970 - III ZR 139/67, NJW 1970, 946, 948.
[290] BGH, 18 November 2024 – VI ZR 10/24, GRUR-RS 2024, 31967.
[291] See the explanation of the Government, BT-Drs. 20/6520, 77.
[292] See Scherer, § 15 VDuG, in Köhler and Feddersen, UWG, para. 14.
[293] See D. Ashkar and C. Schröder, Aktuelle Entwicklungen im Bereich der Data Privacy Litigation, Betriebs-Berater 2023, 451, 454.
[294] See Ashkar and Schröder, Betriebs-Berater 2023, 451, 454.
[295] See, for example, R. Janal, Die Umsetzung der Verbandsklagenrichtlinie, Gewerblicher Rechtsschutz und Urheberrecht 2023, 985, 991; Scherer, § 15 VDuG, in Köhler and Feddersen, UWG, para. 8.
[296] See also M. Bock, Abtretbarkeit des immateriellen Schadensersatzanspruchs nach Art. 82 DS-GVO, GRUR-Prax 2024, 691.
[297] See also Janal, Gewerblicher Rechtsschutz und Urheberrecht 2023, 985, 991 f.

collective procedure, whereas individual consumers would then have to claim compensation for their specific immaterial damage based on the already clarified breach. Both, the model declaratory action and the redress action, can be initiated in parallel.

IV. Discovery and the burden of proof

1. Burden of proof in German law

In German private law, there is no general written rule on the burden of proof. However, case law and legal literature basically agree that different meanings of this concept must be distinguished. The first meaning is the substantive rule on what happens in a "non liquet" situation – that is, where the true facts cannot be established with a sufficient degree of certainty. This is seen as part of substantive law as it provides the judge with an extra rule that is to be used in a specific situation, namely in the "non liquet" situation. The second meaning of the term is to describe who is responsible for producing the evidence that is to be used to assess the truth in a civil trial. Both meanings are linked together in the way that typically, the party who carries the substantive burden of proof is also responsible for producing the relevant evidence.

These rules, however, become only relevant when the case in question relates to disputed facts. They are not relevant with regard to legal questions, because legal questions will always be decided by the court on its own initiative, and there is no "burden of proof" with regard to questions of law. In the past, most actions brought by consumer associations for injunctions turned on purely legal questions, and the underlying facts were typically not in dispute between the parties. For example, in the many actions brought against allegedly unfair contract terms, the fact that these terms were used was rarely in question. Instead, the decision turned on the legal question of whether these terms are valid or not. These cases therefore did not create any problems with regard to proof. If we look at the five redress actions that have been filed in 2023 and 2024 under the new VDuG, a similar pattern emerges: all these actions relate to the validity of contract terms, in particular those that allow for price increases.[298] Therefore, questions of proof and burden of proof will probably not be of much relevance in these actions.

2. Substantive rules on burden of proof

There are no special rules with regard to burden of proof in collective consumer cases. However, there are many such rules in substantive private and consumer law that may be used also in collective cases. Examples are the reversed burden of proof under Article 11 of the Sale of Goods Directive (EU) 2019/771 and the new presumptions of defectiveness under Article 10 of the Product Liability Directive (EU) 2024/2853.

3. Discovery and general law of evidence

The term "discovery" is typically used with respect to Anglo-American legal systems and refers to rules in these legal systems that require both parties to produce evidence before the actual trial starts. In a special "discovery" procedure, both parties in principle have the duty to produce all the

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[298] It should be noted though that in the two cases that are related to distance heating the validity of the term depends, among others, on the contractual relationship between the distance heating provider and his suppliers, and therefore on fact that are not easily accessible for vzbv.

possible evidence, although the details of such duties may vary between the different common law jurisdictions.

German law does not know such a “discovery” procedure. In German law of civil procedure, there is an interesting tension between the parties’ ability to withhold information and their duty to present the full truth to the court. As a starting point, the rules on burden of proof are used also in procedural law to determine which party has to plead which facts in order to support their case. In particular, it is for the claimant party to plead those facts that support the claim, and it is for the defendant to plead facts that support an extinction of the claim or make other relevant defences against the claim. Whenever one side pleads certain facts, the opposing party must make a truthful and exhaustive statement with regard to these facts. To simply deny such facts without further explanation is only allowed if these facts were outside the sphere of perception of that party.[299]

These principles may be helpful in certain cases. In particular, there is one pending collective case in which a dispute regarding facts is relevant. In the model declaratory action of vzbv against Mercedes-Benz AG, the consumer association seeks to establish that the defendant acted with intent to harm consumers by installing a “cheating software” in certain cars produced by the defendant. To support this claim, it may be necessary to prove that the Mercedes management was somehow involved in these decisions or at least had sufficient knowledge of the irregularities. As these facts are only within the defendant’s sphere of perception and influence, they would be impossible to plead for the plaintiff – for example to state which employee knew what at which point in time. To cope with such a situation, the German courts have developed the concept of “secondary burden of pleading” (*sekundäre Darlegungslast*): if there is sufficient indication that the defendant committed a tort, the defendant carries this burden and must plead the facts that relate to this possible tort insofar as they are situated in the defendant’s sphere of perception.[300]

In the Mercedes-Benz case, there had been a criminal procedure against at least one Mercedes employee, but the name of that person was not public knowledge. Mercedes refused to name that person, who would have been an important witness in the case. The Higher Regional Court (OLG) Stuttgart argued that Mercedes should have divulged that name, as these facts were in the defendant’s sphere.[301] It is important to note that the concept of “secondary burden of pleading” does not allow any execution against the defendant. The defendant cannot be forced to cooperate. However, if the defendant refuses to give the necessary information, the court will sanction this by assuming that the claimant’s pleadings in this respect are correct. In the Mercedes Benz case, the court thus held that the claimant had successfully shown that the Mercedes employees had intentionally implemented the “cheating software” and thus intentionally harmed the affected customers.[302]

This example shows that the existing German law is somewhat flexible and may solve certain problems of fact-finding in cases where the plaintiff must rely on facts that are within the defendant’s sphere of knowledge.

Furthermore, § 142 of the German Code of Civil Procedure (ZPO) allows the court, at the request of one party, to issue an order for the disclosure of documents or other evidentiary materials if the requesting party refers to such documents in its pleadings and the documents are in possession of

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[299] See § 138 German Code of Civil Procedure (ZPO).

[300] See, in the „Dieselgate“ context, BGH, 25 May 2020 – VI ZR 252/19, Neue Juristische Wochenschrift 2020, 1962, 1965 (individual claim against Volkswagen).

[301] OLG Stuttgart, 28 March 2024 - 24 MK 1/21, Beck-Rechtsprechung 2024, 6251, para. 239.

[302] OLG Stuttgart, 28 March 2024 - 24 MK 1/21, Beck-Rechtsprechung 2024, 6251, para. 209. Note that there is an appeal pending against this decision.

the other party or in the possession of a third party. This is a potentially powerful tool, as it applies not only to written materials, but also to electronic communication or other stored data. On the other hand, the German practice has interpreted this rule rather narrowly: the rule is not designed to allow an *Ausforschungsbeweis*.[303] This is a recurring term in German doctrine of evidence. It can be literally translated with "investigative proof", but it is supposed to prevent discovery in a "fishing expedition" style, where the claimant would order the defendant to produce all kinds of documents that may or may not be related to the case and then hopes to find some relevant material in this large amount of documents. This is not possible in German civil procedure.

Instead, German case law requires the claimant to identify the exact document which is supposed to be disclosed by the defendant.[304] This means that the claimant must have some prior knowledge – possibly from a whistleblower or other informant – of the specific existence of such a document (for example, "show us the e-mail of 3 January 2018 from Mr. Müller to Ms. Schmidt"). It is not sufficient to trigger an order under § 142 ZPO that the claimant assumes from general experience that typically there would or should be this type of document ("show us all e-mails between your engineering department and the board of directors during January 2018").[305]

This narrow interpretation has limited the practical impact of § 142 ZPO. It can be very helpful for a claimant who already has a good amount of information, but it can typically not be used to alleviate information deficits on the claimant side. Furthermore, an order issued by the court under this provision cannot be executed against the affected party, and carries no formal sanctions with it. If the affected party – typically the defendant – refuses to comply, one can think of a similar sanction as described above for violations of the "secondary burden of pleading", but even that is disputed, as the law is silent on sanctions.[306]

4. Legislative developments

In addition to these general provisions and doctrines of German procedural law, there have been a number of legislative developments over the last years that directly relate to the issue of fact-finding and disclosure of evidence.

a) Cartel damages actions

In 2017, the German legislator implemented the EU Directive on competition law damages actions (Directive 2014/104/EU). Article 5 of this Directive orders the Member States to ensure that in cartel damages cases, national courts must be able to order the disclosure of evidence under certain conditions. In view of the existing rule in § 142 ZPO, the German legislator could have implemented the Directive by making some corrections and improvements to that general rule. This would have had the advantage that the new rules would apply to all civil cases, as the problem of fact finding is not unique to cartel damages cases. However, the German legislator did not take that path, but instead opted for a "minimum" implementation by creating a new rule on disclosure of evidence that applies only in competition law damages cases; this rule was then enacted as §33g of the German Cartel Law (GWB).

This provision creates not only a procedural tool, but also a substantive claim for information and disclosure of evidence against the party in possession of such documents, if certain requirements are fulfilled. According to § 33g para. 3 GWB, the court has to weigh the interests of the parties, so

[303] Prütting and Gehrlein, Zivilprozessordnung, 16th ed. 2024, § 142 para. 8.
[304] BGH, 16 March 2017 – I ZR 205/15, Neue Juristische Wochenschrift 2017, 3304, 3306.
[305] For a detailed analysis and critique see Stadler, in: Musielak/Voit, ZPO, 21st ed. 2024, § 142 para. 4a.
[306] Prütting and Gehrlein, Zivilprozessordnung, § 142 para. 12.

that not all requests for disclosure will be fulfilled. It is not quite clear yet how relevant the provision in § 33g GWB is in practice and whether it is really a useful tool for a claimant in a cartel damages action. Nevertheless, there are at least two decisions of the BGH on this provision. One relates to disputed cooperation agreements between railway companies, and the BGH has – contrary to the lower courts – granted a request for disclosure of evidence, and explained in detail how the requirements for such a claim should be interpreted.[307]

On the other hand, in a more recent case that relates to a truck cartel, the BGH denied a claim for disclosure of certain documents and specified further the necessary requirements for such a claim.[308] These first two judgments by the BGH show that § 33g GWB does have some additional potential for better disclosure of evidence, but that the limitations and reach of this provision must be further tested in court. Note that at the moment, cartel damages claims in Germany are brought only by companies, not by consumers or their associations. Although in theory, consumers may also suffer damage from a cartel, nobody has tested this yet before a German court.

b) Capital Markets cases

When the German legislator revised the Capital Market Model Procedure Act (*Kapitalanleger-Musterverfahrensgesetz*; KapMuG) in the summer of 2024, a new provision on the disclosure of documents in such procedures was added, § 17 KapMuG. This provision in principle follows the model and wording of § 33g GWB that was described above. The new provision of § 17 KapMuG was introduced in order to improve the situation of claimants in capital markets cases and to make the KapMuG more attractive, as it has now been turned into a voluntary, "opt-in"-type procedure. As § 17 KapMuG is only relevant in the model procedure, a plaintiff who elects not to join such a model procedure cannot directly profit from it – although one would assume that once such pieces of evidence have been made public in the KapMuG procedure, they could also be referred to in ordinary proceedings and be, for instance, become the subject of an application under § 142 ZPO (see above).

As § 17 KapMuG is only a few months old, there are no experiences with this provision yet. From the claimant lawyers' perspective, it is argued that since the provision was modelled after § 33g GWB, the same principles of interpretation should govern here.[309] This seems convincing and would be in line with the legislator's intent to create similar rules in the KapMuG proceedings as they already exist in cartel damage cases. However, a defense lawyer has pointed out that unlike § 33g GWB, the new provision in § 17 KapMuG is not an implementation of EU law, but "pure" German law. According to his opinion, § 17 KapMuG should be interpreted more restrictively in comparison to § 33g GWB and that the KapMuG procedure should stay more in line with the traditionally restrictive German provisions on access to documents, in particular § 142 ZPO.[310] This opinion does not have any basis in the legislative materials. On the contrary, the German legislator clearly wanted to go beyond the *status quo* of § 142 ZPO, because this older provision is applicable anyhow in all civil proceedings in Germany.

It will take some time, however, until the courts will interpret such issues with regard to the new § 17 KapMuG, since the legislator decided that all of the pending KapMuG proceedings – including

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[307] BGH, 4 April 2023 – KZR 20/21, Neue Zeitschrift für Kartellrecht 2023, 362.
[308] BGH, 1 October 2024 – KZR 60/23, Neue Zeitschrift für Kartellrecht 2024, 643.
[309] P. Gundermann and C. Herrmann, Die Vorlage von Beweismitteln in Kapitalanleger-Musterverfahren nach Einführung des § 17 KapMuG, Zeitschrift für Bank- und Kapitalmarktrecht 2024, 881, 883.
[310] M. Zoller, Das neue KapMuG: Kein Platz für Ausforschung!, Zeitschrift für Bank- und Kapitalmarktrecht 2024, 955, 956.

some very large cases relating to the Volkswagen and Wirecard scandals – will still be continued under the old rules, which do not contain any special provision on evidence.

c) Associations' actions under the new VDuG

When the German legislator implemented the EU Representative Actions Directive 2020/1828, Art. 18 of this Directive had to be dealt with. This provision orders that there must be some mechanism for disclosure of evidence on request of the plaintiff qualified entity, and Art. 19 par. 1 b of the Directive adds that non-compliance with such an order must be sanctioned with a penalty. In this regard, the German lawmaker found a very minimalistic solution. According to the legislative materials, the existence of the general rule on disclosure of documents in § 142 ZPO was seen as sufficient to fulfil the obligations under the EU Directive.[311]

However, as § 142 ZPO does not include an explicit sanction or penalty, the German lawmaker added a special sanctioning provision only for cases under the new VDuG: According to § 6 VDuG, if a court orders the disclosure of evidence and the affected party does not comply with this order, a penalty of up to 250,000 € is possible. Note that this provision is limited to model declaratory actions and remedial actions brought by qualified entities under the VDuG, and not in any other civil proceedings in Germany.

5. Summary on discovery and burden of proof

This overview shows that German law is rather restrictive with regard to the disclosure of evidence. The most important instruments in general procedural law are an order according to § 142 ZPO – narrowly interpreted by the courts to pre-identified documents – and the doctrine of "secondary burden of pleading" which can sometimes be used when the evidence is in the defendant's sphere. In addition to that, there are a few specific provisions in special areas of the law, in particular § 33g GWB for cartel damages cases, the new § 17 KapMuG, and the possibility of a sanction that was added to § 142 ZPO in the new § 6 VDuG.

V. Funding collective actions

The viability of funding redress actions, or even broader the financial risks that come with redress actions, depend on a number of factors, including court fees, lawyers' fees, the extent to which the losing party has to pay the winning party's lawyers' fees, and the complexity of organising a claim.

1. The financial basis for registration as a qualified entity

As mentioned above, German law requires consumer organisations that apply for registration as a qualified entity (or that want to maintain that status) to show that they will perform their tasks appropriately and on a permanent basis in the future; which presupposes a solid financial basis. What financial assets are necessary depends on the activities of the relevant consumer organisation, as defined in its by-laws. Thus, a locally active consumer organisation needs less assets than one that operates at the national level. For example, in one case, VG Köln accepted a fully equipped office and four voluntary members of staff as sufficient to act as a qualified entity, and the financial assets of that consumer organisation only needed to cover the respective costs.

[311] BT-Drs. 20/6520, 73.

Still, even that money must be acquired somehow. Here, the German consumer organisation landscape is split. Whereas the most important players, vzbv and the consumer centres of the Länder, obtain support from the state budget, all other consumer organisations need to find money elsewhere. One option is membership fees, and indeed consumer organisations must have at least 75 members to be registered as qualified entities. Typically, however, consumer organisation will not be able to charge much from consumers, not least because consumers can turn to state-funded consumer centres for advice without being members. Theoretically, consumer organisations could also have institutional members, and *Deutsche Umwelthilfe* was once supported by Toyota (although with only 0.5% of their total budget).[312] Industry members are risky though, as consumer organisations must represent the interest of consumers.[313] In 1982, the BGH decided that organisations representing both consumers and business could not have legal standing for injunctions in the interest of consumers,[314] and the same would seem to apply for registration as qualified entities.

Consumer organisations could also generate income from successful reminders and lawsuits and from traders' breach of undertakings. Again, however, they must be somewhat careful, as it is another requirement for registration as qualified entity that the consumer organisation does not make claims predominantly with the aim to generate income from reminders and penalties resulting from the breach of undertakings.[315] The BGH has previously accepted that *Deutsche Umwelthilfe* generated 30% of its income through reminders and penalties because that consumer organisation invested all this in consumer advice and in new enforcement measures, thus for the purposes of consumer protection,[316] but there is a certain risk that Bundesamt für Justiz as supervisory authority takes a different view on the matter.

In addition to that, the legislator introduced new barriers to compensation from reminders and to penalties resulting from the breach of undertakings in 2020. As a novelty, the legislator codified a number of requirements for valid reminders,[317] non-compliance with which forfeits the compensation claim,[318] and also introduced requirements related to the "appropriateness" of penalties for the breach of undertakings,[319] which have created legal uncertainty.

Overall, those consumer organisations that are not partly funded from the state budget are clearly limited in their means to generate income, and ultimately, to use income for redress actions. Support by the Länder for the consumer centres varies greatly, and most consumer centres have never taken court action either, leaving this task to vzbv.

2. Court fees and lawyers' fees

In Germany, court fees and lawyers' fees are fixed by law, depending on the value of the claim,[320] unless the parties agree otherwise. In relation to injunctions, German courts have traditionally recognised both the public function of collective litigation and the limited resources of consumer organisations and have, therefore, attached a fairly low value to the litigation of an allegedly unfair

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[312] See Deutsche Umwelthilfe, FAQs zu unserer Arbeit, https://www.duh.de/faqs-zu-unserer-arbeit, at „Finanzierung und Transprenz".
[313] § 4 para. 2 UKlaG.
[314] See BGH, 14 October 1982 - I ZR 81/81, Neue Juristische Wochenschrift 1983, 1061
[315] § 4 para. 2 no. 3 lit. b) UKlaG.
[316] See BGH, 4 July 2019 – I ZR 149/18, Neue Juristische Wochenschrift 2019, 3377.
[317] § 13 para. 2 UWG.
[318] § 13 para. 3 UWG.
[319] § 13a UWG.
[320] § 61 sent. 1 GKG; § 32 para. 1 Lawyers' Fees Act (*Rechtsanwaltsvergütungsgesetz*; RVG).

term as well as of a breach of consumer law, which then limits the court fees as well as the lawyers' fees that are related to that value.[321]

In relation to the model declaratory action, the legislator took a similar approach by introducing caps on the value of the claim. This means that even if the real value of the claims that would benefit from the court's judgment is much higher, court fees and lawyers' fees are still calculated on the basis of the fictitious capped value. For model declaratory action, the cap was and has remained 250,000 Euro, while a new cap of 300,000 Euro applies for redress actions.[322] For skimming-off procedures, a new cap of 410,000 Euro was introduced.[323]

Specialised lawyers, however, often do not work for the fee that is determined by the fee table but on the basis of fee agreements; which is explicitly allowed by the law. Thus, in some cases, the vzbv has entered into a fee agreement with its lawyers.

3. Loser-pays principle

German law applies the loser pays principle.[324] Thus, the losing party has to pay the court fees and the defendant lawyers' fees, as well as of course his own lawyer. In this context, the fee tables play an important role. The losing party that has to bear the winning party's lawyers' fees does not need to pay more than the amount that the law provides for, irrespective of any fee agreement between the winning party and their lawyers.[325] Thus, on the one hand, the litigation risk of the claimant qualified consumer organisation is limited by the above-mentioned caps but on the other hand, the victorious consumer organisation will not be compensated for the difference between the capped fee and the fee agreement with their own lawyers.

4. Third party funding

The Consumer Centres of the Länder and *vzbv* may be able to afford collective redress actions because they are partly funded by the state budget; but others will not. For them, availability of third party funding is crucial. In that regard, the VDuG stipulates that third party financers must not be promised more than 10% of the gains;[326] which is far below the usual share of 25% to 35% of the gains, depending on the risk of the individual litigation.[327]

Beyond this restriction, a number of other obstacles for third party funding have been identified.[328] First, the funding agreement must be concluded at a time when it is unknown how many consumers will opt in, and therefore what the potential gains are. Second, it is the consumers that must agree to the funding agreement as they will ultimately pay the funder from their gains. Whether that agreement could be connected with the opt-in declaration is questionable, as nothing in the law indicates that such a requirement could be imposed on the consumer.[329] Third, the law requires the

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[321] Established case law since BGH, 13 March 1991 – XII ZR 71/90, Neue Juristische Wochenschrift – Rechtsprechungsreport, 1991, 1074.
[322] See new § 48 para. 1 sent. 3 GKG.
[323] See new § 51 para. 2 sent. 2 GKG.
[324] § 91 para. 1 ZPO.
[325] § 91 para. 2 sent. 1 ZPO.
[326] § 4 para. 2 no. 3 VDuG.
[327] See A. Stadler, (Fehlende) Finanzierung der neuen Verbandsabhilfeklage nach dem VDuG, Verbraucher und Recht 2023, 321.
[328] For the following, see ibid., 322.
[329] See Röthemeyer, Verbraucher und Recht 2023, 332. 334 f.; C. A. Kern and C. Uhlmann, Kollektiver Rechtsschutz 2.0? Möglichkeiten und Chancen vor dem Hintergrund der Verbandsklagen-RL, Zeitschrift für Europäisches Privatrecht 2022, 849, 866.

claiming consumer organisation to produce the funding agreement to the court. This entails the risk that the defendant will also demand and obtain insight into this agreement and can thus adjust his litigation strategy. This could be avoided with a procedure by which an independent and impartial third person is involved that would report on the agreement; but without a legal requirement to do so, there is no certainty that courts would apply that procedure.

5. Liability of the claimant?

There is an ongoing debate related to the potential liability of the claimant consumer organisation for mistakes in the proceedings. A number of authors have suggested that such liability may exist although the consumers that opt in are in no contractual relationship with the claimant.[330] In the legislative procedure, the problem was discussed in the hearing of the Legal Committee[331] but not regulated in any way. Given the fact that the trustee's liability is explicitly regulated in the VDuG, one may conclude that, in contrast, the legislator did not envisage any liability of the claimant,[332] but a certain risk remains.

6. Conclusion

Overall, it seems that with these rules on third party funding, industry could have landed a hard strike on redress actions with the help of the liberal party. At the same time, the new 10% rule is limited to redress actions under the VDuG, whereas it does not apply to the claims management activities of legal tech service providers that have been very successful, for example, in the Volkswagen diesel cases; which gives them an advantage over consumer organisations that act entirely in the public interest.

VI. The first redress actions

Until now, vzbv has filed six redress actions and Verbraucherzentrale Sachsen has filed one. In no case, oral hearings have taken place yet, and so far, the courts have been very slow in even opening and publishing the redress actions.

The first redress action targeted the telecommunications services provider Vodafone who increased their prices by 5 Euro during running contracts, allegedly without a legal basis to do so.[333]

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[330] See, in relation to model declaratory actions, H. Merkt and J. Zimmermann, Die neue Musterfeststellungsklage: Eine erste Bewertung, Verbraucher und Recht 2018, 363, 371; E. Tuna, Musterfeststellungsverfahren von Verbraucherverbänden im Zusammenspiel mit europäischen und deutschen Grundprinzipien des Prozessrechts (Duncker & Humblot, 2023), 204 ff.; A. E. Oehmig, Die Rechtsstellung des angemeldeten Verbrauchers in der Musterfeststellungsklage (Nomos, 2021), 472 ff.

[331] See the expert statements by C. Meller-Hannich and M. Schmidt-Kessel, available at https://www.bundestag.de/dokumente/textarchiv/2023/kw19-pa-recht-verbandsklage-945426.

[332] See also Röthemeyer, Verbraucher und Recht 2023, 332. 337.

[333] See vzbv, Verbraucherzentrale Bundesverband reicht Sammelklage gegen Vodafone ein, https://www.verbraucherzentrale.de/aktuelle-meldungen/vertraege-reklamation/kundenrechte/verbraucherzentrale-bundesverband-reicht-sammelklage-gegen-vodafone-ein-89496.

Three other actions are related to excessive price increases by distance heating providers,[334] another one (against Amazon Digital Germany GmbH) is about price increases in video streaming services.[335] Finally, there is a yet unpublished action against SSS-Software Special Service GmbH who tricked consumers into a service that is also available free of charge.

Further redress actions did not even reach the stage of publication but led to an out-of-court settlement, again with energy suppliers.[336] Moreover, some traders even enter into settlement negotiations once vzbv only publishes its intention to bring a redress action and calls for consumers to share their experience with those traders.[337]

As a further problem, all cases that are currently pending in court relate to breaches of law that occurred before 13 October 2023, the date of the German implementation of the Representative Actions Directive. To these breaches, the new prescription rule does not apply,[338] and individual claims would therefore risk to be time-barred before the redress action has been decided upon. The claimant consumer organisations thought to solve that problem by combining the redress action with a model declaratory action that, under the previous law, already produced the effect of suspending prescription. However, an additional problem exists if the model declaratory action is decided long before the redress action. In such a case, the suspension of prescription ends at a time where the redress action is still pending and barring individual action of consumers who have joined the redress action.

Vzbv is therefore withdrawing three redress actions and continue these actions only as model declaratory actions.[339] In relation to the Facebook scraping scandal, vzbv already resorted to a model declaratory action only.[340]

VII. Conclusion

Overall, this report shows that the change in government has led to a fairly reasonable implementation of the RAD in Germany. Due to path dependencies from the Injunctions Act and the model declaratory action, the scope of application of both injunctive and redress actions is broader than the annex of the RAD, and in the case of redress actions it covers all possible lawsuits of

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[334] OLG Schleswig, file no. 5 VKl 1/23. See also Bundesamt für Justiz, Abhilfeklage gegen HANSEWERK NATUR GmbH, https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Klagen/202303/VRUG_3_2023_node.html.

[335] See https://www.verbraucherzentrale-sachsen.de/pressemeldungen/vertraege-reklamation/sammelklage-82941-gegen-amazon-103172

[336] See *vzbv*, Nach Vergleich: Geld zurück von primastrom, voxenergie and nowenergy, https://www.sammelklagen.de/verfahren/primaholding.

[337] Interview with Ronny Jahn on 13 December 2024.

[338] See Art. 229 § 65 of the Law introducting the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*; EGBGB); but see the critical analysis of this provision by B. Gsell, Die neue Verbands-Abhilfeklage - Verjährungshemmung auch bei Altverstößen vor dem 25.6.2023, Zeitschrift für Wirtschaftsrecht (ZIP) 2025, 113, who argues that the law must be interpreted to include older violations as well.

[339] For the redress and model declaratory action against Hansewerk Natur, see https://www.vzbv.de/meldungen/information-zur-sammelklage-gegen-hansewerk-natur.

[340] Vgl. *vzbv*, Musterfeststellungsklage gegen Meta Platforms Ltd., https://www.verbraucherzentrale.de/verbandsklagen/musterfeststellungsklage-gegen-meta-platforms-ltd-101727.

consumers against traders. Registration of qualified entities is not exactly generous but it is less burdensome than under the previous rules on model declaratory actions.

A pure opt-in procedure could be expected in the German setting, given widespread reservations against opt-out systems due to their alleged unconstitutionality. Opting in is not particularly difficult though, and thanks to the compromise with a late opt-in, consumers can make a reasonably informed decision on whether or not to join a redress action.

The procedure itself is somewhat complicated and might turn out to be lengthy but that reflects the German desire for perfectionism. A downside, and probably a breach of the Directive, is the fact that redress actions only suspend prescription of claims of those consumers who have joined the action, and even this only applies to breaches that occurred on or after 13 October 2023.

Whether or not many redress actions will be brought in the near future remains unsure. For reasons of cost and lack of third party funding opportunities, it seems likely that qualified entities will, in risky cases, resort to injunctive actions first, and only if they are successful let a redress action follow;[341] which they can do as the injunctive action now suspends prescription of the individual consumers' claims.[342] Such proceedings will take time, and less patient consumers may prefer legal tech claims management services that are now available in a vast array of fields of law.

Finally, an unsolved problem remains the lack of any *erga omnes* effect of collective actions: qualified consumer organisations still have to sue each bank individually in separate redress actions, for example for reimbursement of funds they have collected based on an unfair term, even if those banks have all applied the same unfair term. Only where the defendant traders have their domiciles in the same higher regional court district, one could think of suing them in a joint procedure;[343] which has never happened until now. This is an area where enforcement by public authorities could complement private enforcement, for example on the basis of the successful outcome of one injunctive or redress action.[344]

[341] See also See BT-Drs. 20/6520, 118.
[342] Another option would be to file an injunctive action and a redress action in parallel, see Synatschke, Wölber and Nicolai, Zeitschrift für Rechtspolitik 2021, 197, 199.
[343] § 60 ZPO.
[344] See P. Rott, Verbraucherschutz durch die BaFin – Vorschläge zur Reform von § 4 Abs. 1a FinDAG, Verbraucher und Recht 2023, 203 ff.

C. ITALY

Laura Bugatti

I. Introduction

With the implementation of the Representative Actions Directive (RAD) through law 28/2023,[345] Italy introduced a new and distinct representative procedure that complements the collective action mechanisms regulated by the Civil Procedure Code (CPC), thereby expanding the range of collective enforcement tools.[346]

After an introduction on the evolution of collective mechanisms in the Italian legal system - including the former consumer class action regulated by the Consumer Code (I.1) and the current collective proceedings under the Civil Procedure Code (I.2) – this study focuses on the implementation of the representative action, taking into account also other collective mechanisms that can work in synergy with representative actions. It is worth noting that, although the new representative actions are distinct from the general collective actions regulated by the Code of Civil Procedure, they largely mirror the key features and procedural mechanisms of the latter. Given the significant discretion afforded to Member States, the Italian approach to implementing the RAD reaffirmed, wherever feasible, the principles established in 2019 and incorporated them into this new framework of consumer legislation.

The study provides a general overview of the RAD's transposition into the Italian legal framework (II), followed by an in-depth examination of three key issues: (1) the feasibility of actions addressing non-material damage (III); (2) the burden of proof, access to evidence, and disclosure of information (IV); and (3) costs and financing mechanisms for collective actions (V). The paper concludes with a brief discussion of the initial representative actions launched in Italy (VI) and some final remarks (VII).

1. The former Experience: the Consumer Class Action

Even before the implementation of the RAD, the Italian legal system was already familiar with collective litigation mechanisms aimed at safeguarding consumer rights, including mechanisms for both injunctive relief and compensatory redress. After national discussions lasting for years, the first

[345] Decreto Legislativo 10 March 2023, n. 28, Attuazione della direttiva (UE) 2020/1828 del Parlamento europeo e del Consiglio, del 25 novembre 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE, Gazzetta Ufficiale n. 70, 23.3.2023.
[346] Artt. 140-*ter* - 140-*quaterdecies* Consumer Code.

framework for consumer collective actions was introduced in 2007 through Article 140-*bis* of the Consumer Code (Cons. Code)[347].

However, before this regulation could take effect, it was replaced in 2009[348] with a model that shifted from collective actions focused on public interests to class actions centred on individual consumer rights. This reform also transferred standing from consumer associations directly to individual consumers and users. The revised regulation became effective in 2010, but its application was short-lived. Following partial amendments in 2012[349], the consumer class action framework was ultimately repealed in 2019 as part of a broader overhaul of collective redress mechanisms (see *infra* I.2). Under this former regime, each member of the class – individual consumers and users individually or *ad hoc* associations or committees to which they granted power – could initiate class actions against businesses to protect rights stemming from contracts or tort law (notably in cases of product liability, unfair practices, or competition law breaches). The procedure involved two stages: first, the court evaluated and admitted the class action[350], defining the common features of the rights involved, issuing public notice, and setting a maximum 120-day window for opt-in adhesion by affected consumers. After this period, the court would proceed to decide the case on its merits. The judgment, binding for all opt-in consumers[351], could be appealed to the Court of Appeal.

In parallel, the Consumer Code provided for collective injunctive relief under Articles 139 and 140[352]. Registered consumer associations authorised under Article 137 were empowered to act on behalf of consumers to halt unlawful practices by traders that harmed collective consumer interests. These consumer associations could request the court to impose orders stopping the harmful behaviour, mandate corrective measures to neutralize any damage, and publicize the

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[347] Art. 2, section 446, Legge 28 December 2007 n. 224, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008), Gazzetta Ufficiale n. 300 of 28.12.2007 -S.O. 285, as amended by art. 6 of Decreto Legge 24 January 2012 n.1, Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, Gazzetta Ufficiale n. 19 of 24.01.2012 – suppl. Ord. 18, ratified by Legge 24 March 2012 n. 27, Conversione in legge, con modificazioni, del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, Gazzetta Ufficiale U n. 71 of 24.03.2012, S.O. n. 53. It emerged in response to financial scandals such as the Parmalat and Cirio cases: On the introduction of the consumer class action in Italy see L. Salvatore and others, *Guida alla Class Action*, (Milano 2009) XVI ff.

[348] Legge 23 July 2009, n. 99, recante disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia, in Gazzetta Ufficiale, 31.07.2009, n. 176, S.O. n. 136. F. Camilletti, 'Il nuovo art. 140-bis del codice del consumo e l'azione di classe' 12 *Contr.*, 1179 (2009); C. Consolo, 'Come cambia, rivelando ormai a tutti e in pieno il suo volto, l'art. 140-bis e la Class Action consumeristica' 10 *Corr. Giur.*, 1297 (2009); T. Galletto, 'L'azione di (seconda) classe (considerazioni sul novellato art. 140 bis del codice del consumo)' 11 *Nuova giur. Civ.*, 539 (2009).

[349] Decreto Legge 24 January 2012 n.1– Legge 24 March 2012 n. 27.

[350] The class could be declared inadmissible at this preliminary stage if at least one of these four elements is found to be present: (a) the claim is manifestly unfounded; (b) there is a conflict of interest; (c) the individual claims lack homogeneity; or (d) the claimant is not in the position to adequately protect the interests of the class.

[351] For more details on the former consumer class action ex 140-*bis* ICC see: R. Caponi, *Italian 'Class Action' Suits in the Field of Consumer Protection*: 2016 Update (June 16, 2016), https://ssrn.com/abstract=2796611 or http://dx.doi.org/10.2139/ssrn.2796611; G. Pailli and C. Poncibò, 'In search of an effective enforcement of consumer rights: The Italian case', in H.W. Micklitz and G. Saumier eds, *Enforcement and Effectiveness of Consumer Law* (Cham: Springer, 2018), 360, 172; G. Pailli and C. Poncibò, 'The transformation of consumer law enforcement: An Italian perspective', 8 *Comparative Law Review*, 1, 19 (2017); M.L. Chiarella, 'Overview of class actions: Italian consumer law and cross-border litigation', 4-2 *Athens Journal of Law*, 165, 172 (2018).

[352] In 2007, to comply with the Directives 98/27/EC and 2009/22/EC, the provisions were partially amended and transferred into the Consumer Code.

rulings if it may help to correct or eliminate the effects of any established breaches. Additionally, upon request of the plaintiff, courts could impose monetary penalties payable to the state in cases of non-compliance or delayed compliance by the wrongdoing trader.

Despite covering a diverse array of legal matters and handling some important cases[353], the consumer class action has been less successful than expected, with both an underuse of this collective remedy and a low success rate regarding settlements and decisions acknowledging infringements and awarding damages[354].

2. The current Collective Proceedings

The widespread dissatisfaction with the effectiveness of consumer collective actions prompted a comprehensive review of the legal framework, aiming to establish a more efficient and accessible process for resolving disputes with collective implications. In 2019, the previous consumer-focused injunction and class action laws were replaced by new general provisions incorporated into the Civil Procedure Code[355]. Currently, the relevant rules governing class actions and collective actions for injunctions are found in Section IV, Title VIII bis, of the Civil Procedure Code, specifically Articles 840-*bis* to 840-*sexiesdecies*.[356]

This reform brought several key changes to the legal landscape, addressing the limitations of the former consumer class action and making collective proceedings more accessible and 'plaintiff friendly'. The revised regulations, which apply to claims based on conduct occurring after 19 May 2021, significantly broadened the scope and subject matter of class actions. Not only does it expand the scope beyond consumer law, but it also makes this legal tool generally available to a wider range of plaintiffs. In particular, individuals (whether or not they are consumers and users) holding "individual homogeneous rights" and non-profit organisations with relevant statutory

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[353]For an overview see L. Bugatti, 'The Directive (EU) 1828/2020 and the Consumer Representative Actions in Italy: A Step Back or Forward?', *Revue Européenne de Droit de la Consommation*, 289, 293 ff. (2024).

[354] https://www.mimit.gov.it/index.php/it/mercato-e-consumatori/tutela-del-consumatore/class-action/ordinanze-class-action. F. De Dominicis, 'I numeri e lo stato dell'arte dei primi dieci anni di vita dell'istituto', in V. Barsotti, F. De Dominicis, G. Pailli and V. Varano eds, *Azione di classe: la riforma italiana e le prospettive europee*, (Torino: Giappichelli, 2020), 261; A. Bonafede, 'Il "mosaico" della class action italiana: la Legge n. 31/2019', 2022, https://www.studiolegalebonafede.it/2022/07/05/mosaico-class-action-italiana-legge-31-2019/; E. Silvestri, 'Rebooting Italian Class Action', in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Cham: Springer International Publishing AG, 2021), 201, 202; R. Pardolesi, 'La classe in azione. Finalmente', 3 *Danno e resp*., 301 (2019), who in 2019 has underlined that "I risultati positivi latitano. Li si conta sulle punte delle dita di una mano (monca…)", recalling: Corte di Appello di Milano 25 August 2017, *Rep. Foro it.* (2018), voce *Consumatori e utenti*, n. 3, and *Giur.it.*, 105 (2018), commented by A. Dondi and A. Giussani, '*Commonality* all'italiana e avvio(timido) della nostra azione di classe'; Tribunale di Napoli 18 February 2013, I *Foro it.*, 1719 (2013), commented by A. Palmieri; Cass. 31gennaio 2018, n. 2320, *Danno e resp*, 113 (2019), commented by M. Natale; Tribunale di Venezia 12 January 2016, I *Foro it*., 1017 (2016).

[355] Legge 12 April 2019, n. 31 Disposizioni in materia di azione di classe, Gazzetta Ufficiale n. 92, 18.04.2019. This applies only to claims related to conducts which took place from 19 May 2021.

[356] For a comment see, among others, A.D. De Santis, 'The new Italian class action: Hope springs eternal', *The Italian Law Journal*, 757 (2019); E. Silvestri, 'Rebooting Italian Class Action', in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Cham: Springer International Publishing AG, 2021), 203; C. Consolo, 'La terza edizione dell'azione di classe è legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplissima disciplina', *Corr. Giur.*, 737 (2019); P.F. Giuggioli, *L'azione di classe. Un nuovo procedimento collettivo* (Milano: CEDAM, 2019).

purposes linked to the claim and listed in a public registry managed by the Ministry of Justice[357], are now eligible to bring collective actions. These actions can seek compensatory or injunctive relief against businesses, public service providers, or public utilities for a variety of infringements, extending beyond the previous focus on specific issues like breach of contract, product liability, unfair commercial practices, or violations of competition rules. The updated framework allows plaintiffs to pursue both compensatory and injunctive remedies: they can seek redress claiming the establishment of liability and the award of damages and/or restitution, and can also request injunctions that require businesses to cease harmful practices, whether by commission or omission.

II. RAD Italian Implementation - Overview

With the implementation of the RAD through law 28/2023,[358] Italy added a new and distinct representative procedure that supplements the collective action regulated by the Civil Procedure Code, thus enriching the collective enforcement tools.[359]

1. Competent courts

The jurisdiction is granted to the Commercial Division of the Court where the defendant is located. While this choice aims to ensure specialisation and expertise for handling complex proceedings, concerns have been raised in the academic literature[360] regarding the efficiency of this solution, given the Divisions' significant workload. On the other hand, the Commercial Division is also responsible for collective actions under the Civil Procedure Code, which has afforded it some experience in managing collective disputes.[361]

2. Subject matter

The consumer representative action is designed to safeguard the collective interests of consumers impacted by traders' unlawful practices in specific legal areas outlined in Annex II-*septies* of the

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[357] See Decreto 17 February 2022, n. 27, Regolamento in materia di disciplina dell'elenco pubblico delle organizzazioni e associazioni di cui agli articoli 840-bis del codice di procedura civile e 196-ter delle disposizioni per l'attuazione del codice di procedura civile, come introdotti dalla legge 12 aprile 2019, n. 31, recante disposizioni in materia di azione di classe, Gazzetta Ufficiale n. 86 12.04.2022; https://www.giustizia.it/cmsresources/cms/documents/class_action_elenco_associazioni_31mag2023.pdf.
[358] Decreto Legislativo 10 March 2023, n. 28, Attuazione della direttiva (UE) 2020/1828 del Parlamento europeo e del Consiglio, del 25 novembre 2020, relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE, Gazzetta Ufficiale n. 70, 23.3.2023.
[359] Artt. 140-*ter* - 140-*quaterdecies* Consumer Code.
[360] E. Silvestri, 'Rebooting Italian class action', in A. Uzelac and S. Voet, *Class Action in Europe: Holy Grail or a Wrong Trail?* (Cham: Springer International Publishing AG 2021), 207; C. Consolo, "L'azione di classe di terza generazione", in V. Barsotti, F. De Dominicis, G. Pailli, V. Varano(eds), *Azione di classe: la riforma italiana e le prospettive europee* (Torino: Giappichelli 2020), 19, at 21 ff.
[361] The legislature has justified this choice with the aim of fostering the specialization of judges handling representative actions, a field characterized by various peculiarities – particularly in terms of case management, which also requires the use of the electronic services portal, established specifically for the implementation of class actions as provided under Articles 840-bis et seq. of the Code of Civil Procedure. See: XIX LEG - Schema di D.Lgs. - Recepimento della direttiva (UE) 2020/1828 del parlamento europeo e del consiglio del 25 novembre 2020 relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE - Consiglio dei ministri 9 marzo 2023, Relazione illustrativa, .

Consumer Code. Italy did not take advantage of the flexibility provided by the RAD and, as a result, the scope of representative actions was not extended to encompass all areas of law[362].

This choice does not keep pace with the dynamic nature of markets and the increasing demands for enhanced consumer protection. A more adaptable and flexible approach, allowing representative actions to be pursued for any violation of collective consumer interests, would have been more effective in addressing these evolving challenges.

Moreover this decision appears irrational, diverging from the principles underlying the current general class action – which apply universally, regardless of the legal subject matter – without providing any evident advantages. This leads to a significant fragmentation of private collective enforcement mechanisms. For breaches of consumer rights covered by Annex II-septies, the rules of the Consumer Code apply. However, for rights outside this list, the general framework under the Civil Procedure Code becomes applicable, creating a disjointed and inconsistent system for protecting collective consumer interests.

3. Scope of application

a) Qualified Entities

Contrary to the previous consumer class action and the collective action under the Civil Procedure Code, which allow exclusively or alternatively each class member to fill a claim, only qualified entities have legal standing in the consumer representative action.

Qualified entities include, first and foremost, nationally representative consumer associations that are registered in a special list maintained by the Ministry of Enterprises and Made in Italy.[363] To be included on this list, these organisations must meet several mandatory requirements, as outlined in Article 137 of the Consumer Code. These requirements mirror those previously established in the Consumer Code for determining the most representative consumer association. Specifically: a) The entity must have been established for at least three years, and must have a statute that establishes a democratic structure and states that the exclusive purpose is the protection of consumers and users, without profit aims; b) The entity must maintain a list of members, updated annually with the indication of the fees paid directly to the association for its statutory purposes; c) The number of members must be no less than 0.5 per thousand of the national population, and the association must be present in at least five regions or autonomous provinces, with a membership base of no less than 0.2 per thousand of the population in each of those regions; d) The entity must prepare an annual report of income and expenditures, indicating the fees paid by members, and maintain accounting records in accordance with the rules governing the accounting of unincorporated associations; e) The entity must have carried out continuous activity for the preceding three years; f) The legal representatives of the entity must not have been subject to any final conviction related to the association's activities, and they must not hold the position of traders in any form in the same sectors in which the association operates.

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[362] In particular, the Italian Annex II-*septies* lists the same provisions of EU law included in Annex I RAD, as amended.

[363] Associazione Assoutenti APS; Associazione Confconsumatori; Associazione Adiconsum - Associazione Difesa Consumatori APS; Associazione Associazione Codici - Centro per i Diritti del Cittadino; Associazione Difesa; Utenti Servizi Bancari, Finanziari, Postali, Assicurativi - Adusbef; Associazione Altroconsumo; Associazione Centro Tutela Consumatori Utenti - CTCU; Associazione Movimento Consumatori; Associazione UDICON – Unione per la Difesa dei Consumatori. (last check: 13 dec. 2024). See https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-nazionali.

The list of qualified entities authorised to represent consumer interests at the national level is complemented by a subsection specifically for those eligible to initiate cross-border actions.[364] To be included, entities must meet a separate set of mandatory conditions, which correspond to the requirements set forth in Article 4(3) of the RAD. These standards focus on the organisation's governance, operational practices, independence, and transparency. In particular, pursuant to Article 140-*quinquies*, the qualified entities must meet the following criteria: a) The entity must have been legally established and demonstrate effective public activity in protecting consumer interests during the 12 months preceding its registration request; b) Possession of a statute that identifies consumer protection, specifically in the areas outlined in Annex II-septies, as its objective, along with a non-profit aim; c) Absence of ongoing insolvency proceedings; d) Inclusion in its statute of rules – such as those addressing incompatibilities related to legal representatives – designed to safeguard the association's independence and ensure freedom from external influences, particularly from traders with an economic interest in filing representative actions. Additionally, it must implement measures to prevent and resolve conflicts of interest that may arise between the association, its funders, and consumer interests; e) Provision for appointing a supervisory body tasked with ensuring compliance with principles of independence and conflict-of-interest prevention and resolution measures[365]; f) Public disclosure on its website and other appropriate platforms of its statute and a concise, clear description of its activities. This description must include information about the entity's establishment, corporate purpose, actual consumer protection activities, registration in the special section of the list under art. 137 Cons. code, absence of insolvency proceedings, independence, and details about its funding sources.

A comparison of the two frameworks reveals significant differences. The criteria for qualified entities designated for the purpose of bringing cross-border representative actions are notably less demanding than those for qualified entities designated for the purpose of bringing domestic representative actions. For example, qualified entities designated for the purpose of bringing cross-border representative actions are required to demonstrate just 12 months of active involvement in consumer protection before applying, whereas qualified entities designated for the purpose of bringing domestic representative actions must show three years of continuous activity. Additionally, qualified entities designated for the purpose of bringing cross-border representative actions only need to establish a legitimate interest in protecting consumers, as opposed to having an exclusive statutory purpose. Other key disparities include the absence of requirements for a minimum period of establishment or representation/national relevance thresholds for cross-border entities. This imbalance is difficult to justify, especially considering that cross-border cases typically involve greater complexity than domestic ones. The resulting inconsistencies not only create unnecessary confusion but also impose additional hurdles for organisations seeking accreditation.

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[364] Altroconsumo – D.D. 11 marzo 2025; Centro Tutela Consumatori Utenti - CTCU – D.D. 11 marzo 2025; Adusbef - Associazione Difesa Utenti Servizi Bancari, Finanziari, Postali, Assicurativi – D.D.19 settembre 2024; Codici - Centro per i Diritti del Cittadino – D.D.19 settembre 2024 (last check: 17 March 2025, see https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-transfrontaliere).

[365] The establishment of the Supervisory Body aligns with the provisions of the Third Sector Code, which aims to ensure transparency for third-sector entities that meet certain size and financial criteria. The Italian legislature justified this requirement as a means of implementing Article 4(3)(e) RAD, which mandates independence and protection from external influence. It serves to reinforce the need for clear procedures and conflict-of-interest prevention rules, which must be explicitly outlined in the entity's statute. See XIX LEG - Schema di D.Lgs. - Recepimento della direttiva (UE) 2020/1828 del parlamento europeo e del consiglio del 25 novembre 2020 relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE - Consiglio dei ministri 9 marzo 2023, Relazione illustrativa, https://www.giustizia.it/giustizia/it/mg_1_2_1.page?contentId=SAN426528#rel.

In line with the RAD, among the entities authorised to initiate representative actions in Italy, Article 140-*quater* of the Consumer Code identifies the 'qualified entities' that are duly registered with the relevant national and European authorities in accordance with Article 140-*ter*, paragraph 2, of the Consumer Code.

Articles 140-*ter* and 140-*quater* of the Consumer Code broaden the range of entities eligible to initiate domestic and cross-border representative actions by including public authorities at the national, regional, or local levels tasked with enforcing EU laws that safeguard consumer interests. In Italy, a number of sector-specific public agencies are empowered to enforce consumer protection laws within their respective domains (public enforcement). While extending this capacity to public authorities enhances the scope of private enforcement mechanisms, also considering the structural weaker position of consumers, concerns have been raised regarding its alignment with the principle of equality of arms (Recital 68 RAD). These public entities, under their enforcement mandates, play a critical role in supervising markets and ensuring compliance with legal rules by businesses and professionals. They have the authority to impose sanctions, such as fines, and issue orders to cease unlawful practices. Once a violation has been identified and penalties have been imposed, the same Agency is authorised to initiate follow-up actions to claim damages on behalf of consumers. This dual role positions public agencies at an advantage when compared to traders, as they have privileged access to evidence and information obtained during their public investigations, creating an imbalance in private enforcement proceeding.[366] On the other hand, the legislature specified that the decision to include independent public agencies among the entities entitled to bring representative actions stems from the intent to enhance their institutional role, considering that these authorities are entrusted with the protection of consumer interests within their respective areas of competence. The high degree of complexity that characterizes representative actions, particularly in a cross-border context (see also Article 140-*quinquies*), has led to the choice of granting standing to these entities, given their organisational and financial solidity, as well as their expertise and experience in consumer protection – resources that ensure their ability to effectively represent consumer interests in legal proceedings.[367]

The Italian legal framework aligns with the minimum standards set forth by the RAD, choosing not to implement the option in Article 4(6) recognising 'ad hoc entities' as qualified to initiate specific domestic representative actions for consumer protection.[368] This decision reflects the approach taken in the 2019 general class action framework, which prioritizes the stability and ongoing operation of established registered associations over the flexibility of ad hoc formations. While consistent with the broader European model for collective proceedings and representative actions, this decision seems to disregard significant insights from Italy's prior experiences with consumer class actions. Notably, in past cases, consumer class actions were sometimes led either directly

[366] See R. Donzelli, Audizione informale dinanzi alle Commissioni riunite II e X, 12 January 2023; G. De Cristofaro, Audizione informale dinanzi alle Commissioni riunite II e X, 12 January 2023.
[367] XIX LEG - Schema di D.Lgs. - Recepimento della direttiva (UE) 2020/1828 del parlamento europeo e del consiglio del 25 novembre 2020 relativa alle azioni rappresentative a tutela degli interessi collettivi dei consumatori e che abroga la direttiva 2009/22/CE - Consiglio dei ministri 9 marzo 2023, Relazione illustrativa, https://www.giustizia.it/giustizia/it/mg_1_2_1.page?contentId=SAN426528#rel.
[368] See Recital 28 and Article 4(6) RAD.

by individual consumers[369] or through 'ad hoc entities'[370], rather than the most nationally representative consumer associations, particularly in instances with a more localised focus. This historical context raises questions about the rationale for narrowing the range of eligible claimants by excluding ad hoc entities from pursuing domestic representative actions. However, it is important to note that Article 4(6) of the RAD imposes strict conditions on ad hoc entities, requiring them to meet the same criteria as national qualified entities. These stringent requirements would have significantly limited the number of ad hoc entities eligible to act, thereby undermining the practical utility of extending the framework to include them. Consequently, the potential benefits of broadening the scope to incorporate ad hoc entities may have been more theoretical than actionable.

b) Traders

Representative actions, both domestic and cross-border, can be initiated by qualified entities against "traders." This term broadly includes any individual or entity, whether public or private, engaged in activities related to their trade, business, craft, or profession (including through another entity).[371] While this definition is consistent with the framework established by the RAD, it creates a notable divergence from the scope of general collective actions in Italy. The latter are more narrowly focused, being applicable exclusively to companies or entities managing public services or utilities.[372]

4. The collective element

Under the Italian Consumer Code, the representative action is defined as a legal mechanism aimed at protecting the *collective interests* of consumers in matters outlined in Annex II-septies. This action is initiated by a qualified entity acting as the claimant on behalf of consumers and seeks either injunctive or compensatory relief (Art. 140-ter, lit. e), Cons. code). The term "collective interests of consumers" refers to the interests of a group of consumers who have been, or could potentially be, harmed by violations of the provisions listed in Annex II-septies (Art. 140-ter, lit. c, Cons. code). Italian law does not specify a numerical threshold for the minimum number of consumers required to initiate a representative action. Qualified entities are authorised to bring such actions without needing a mandate from the affected consumers (Art. 140-septies, par. 1, Cons. code). However, the qualified entity must clearly identify, within the claim, the elements necessary to define the group of consumers covered by the representative action. Failure to provide this information renders the claim inadmissible (Art. 140-septies, pars. 5 and 8, Cons. code). To be admissible, a redress action must be grounded in the "homogeneity of individual rights." Under the previous consumer class action framework, defining what constitutes "homogeneous individual rights" - a fundamental aspect for initiating collective actions based on multiple individual claims - was a subject of debate. Initially, the requirement was that the rights needed to be identical in nature. Over time, however,

[369] E.g., among the most recent cases: Tribunale di Genova 2 April 2023, Joyce Ruinion c. Costa Crociere spa; Tribunale di Venezia ord. 21 October 2021, D'Amico et al. c. Evolve srl., https://www.mimit.gov.it/images/stories/normativa/class_action_evolve_link_2021.pdf; Tribunale di Cagliari ord. 8 February 2017, Vincenzo Sileu et al. C. ABBANOA S.p.a., https://www.mimit.gov.it/images/stories/documenti/Ordinanza-8-febbraio-2017-Tribunale-ord-di-Cagliari.pdf.
[370] E.g., Tribunale di Roma, sez. X, ord. 20 June 2018, Comitato composto 166 consumatori nei confronti di ACQUALATINA S.p.A, https://www.mimit.gov.it/images/stories/documenti/azione-di-classe-ACQUA-LATINA.pdf.
[371] 140-*ter*, par. 1, *lit. b)* Cons. Code.
[372] Art 840-*bis*, par. 3, CPC.

this interpretation evolved into a more flexible understanding of homogeneity.[373] Courts initially faced challenges due to a restrictive view, which led to the exclusion of certain claims from class actions. For instance, in the case of *Unione Nazionale Consumatori/Maggi v. Wecantour di GOA s.r.l.*[374], 30 consumers were excluded because their damage, stemming from the plaintiff's wrongful conduct regarding the non-compliance of the "all-inclusive" travel package, differed in amount. Similarly, in *Altroconsumo/Bianchi (et al.) v. Trenord s.r.l.*[375], the Court of Milan ruled the class action inadmissible due to the heterogeneity of the rights involved. It concluded that the railway company's inefficiency led to the failure of multiple transport contracts, each with varying financial implications for the consumers. To overcome these limitations, courts gradually embraced a more functional interpretation of "homogeneity"[376], focusing on the shared cause of action and common features among the claims, that justified joint proceedings,[377] allowing flexibility in the quantification of damage for individual consumers (see *infra*).[378]

5. The redress action procedure

The new collective redress action procedure is designed to fulfil several key objectives. Among these, it consolidates proceedings, reducing costs for both consumers and the judicial system. It also minimizes the risk of inconsistent judicial interpretations regarding similar cases. Additionally, it empowers individuals by strengthening their position when facing professionals or businesses, providing a more balanced framework for resolving disputes.[379]

To protect the collective interests of consumers, qualified entities are empowered to pursue both compensatory and injunctive relief, either independently or in combination. This includes the possibility of seeking also interim injunctions. A significant advancement in the Italian legal framework is the expansion of available remedies under the new provisions. Beyond the traditional forms of redress, such as compensation and restitution – already provided for under the general class action rules (art. 840-*bis*, par. 2, CPC) and the previous consumer class action (Art. 140-*bis* Cons. code) – the updated regulations introduce a wider range of remedial options in line with the

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[373] This choice was confirmed by the Decree 1/2012 (Law 27/2012), which has definitively replaced throughout the rules any reference to "identity" with "homogeneity". Regarding the new wording of Art. 140-*bis* Cons. Code: E. Cesaro-F. Bocchini, *La nuova* class action *a tutela dei consumatori e degli utenti*, (Padova: Cedam 2012); A.D. De Santis, *La tutela giurisdizionale collettiva* (Napoli: Jovene 2013) 532; R. Donzelli, 'Art. 140 bis c. cons.', in G. De Cristofaro- A. Zaccaria (eds), *Commentario breve al diritto dei consumatori* (Padova: Cedam 2013), 1039.
[374] Trib. Napoli, 18.02.2013, 8-9 *Danno e Resp.* 907 (2013), comment by L.C. Paolo, 'Tutela del consumatore'; App. Torino, 23.01.2011, *Foro it*. 3422 (2011).
[375] Trib. Milano, 8.11.2013, 3 *Giur.it.* 603 (2014), comment by A. Giussani, 'Intorno alla tutelabilità con l'azione di classe dei soli diritti «omogenei»'. This judgement was reformed in appeal: App. Milano, 3.03.2014, *Giur. it*. 2014, 1910, comment by A. Giussani, 'Ancora sulla tutelabilità con l'azione di classe dei soli diritti «omogenei»'; The appeals against admission of the class action were rejected: Cass., 23.03.2018, nn. 7244 and 7245. App. Milano, 25.08.2017, n. 3756, *Giur. it*. 105 (2018), comment by A. Dondi e A. Giussani, '*Commonality* all'italiana e avvio (timido) della nostra azione di classe'. Cass. civ., sez. III, 31.05.2019 n. 14886, 5 *Nuova giur. Civ*. 1002 (2019), comment by G. Ponzanelli, 'Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione'; 1 *Riv. Dir. Proc*. 356 (2020), comment by A. Giussani, 'Diritti omogenei e omogeneizzati nell'azione di classe'.
[376] E.g. App. Torino, ord. 23.09.2011, *Resp. civ. prev*. 186 (2012), comment by G. Schiavone, 'Sulla legittimazione a proporre l'azione di classe e altre questioni'; Trib. Napoli, ord. 9.12.2011, 6, I, *Foro it*. 1909 (2012, Trib. Roma 27.04.2012, 12 *Danno e resp*. 1243 (2012), comment by L. Frata, 'L'art. 140 bis cod. cons. al vaglio del legislatore e della giurisprudenza di merito'.
[377] Cass, sez. III, 31.05.2019 n. 14886, 5 *Nuova giur. Civ*. 1002 (2019), comment by G. Ponzanelli, 'Il danno non patrimoniale dei pendolari all'esame della Corte di Cassazione'; 1 *Riv. Dir. Proc*. 356 (2020), comment by A. Giussani, 'Diritti omogenei e omogeneizzati nell'azione di classe'.
[378]Trib. Di Venezia, ord. 21.10.2021, D'Amico et al. C. Evolve srl, https://www.mimit.gov.it/images/stories/normativa/class_action_evolve_link_2021.pdf.
[379] https://www.mimit.gov.it/index.php/it/component/content/article?id=2009676.

RAD provisions. These now include measures such as reparation, product replacement, price reduction, and contract termination, thereby enhancing the scope of consumer protection.[380]

The procedural framework for consumer representative actions is governed by the provisions of the Civil Procedure Code applicable to general collective actions, applied insofar as they are consistent with the specific rules for representative actions. The process unfolds in three distinct phases. The first phase begins with the filing of the action and concludes with a judicial decision on its admissibility. If deemed admissible, the second phase involves the court addressing the merits of the case through a summary procedure. Introduced in 2019 for general collective actions, the third phase is dedicated to managing and evaluating individual requests of consumers, who opted in.

The representative action is initiated through a "ricorso" (petition) filed exclusively before the Commercial Division of the court where the respondent entity is headquartered. In cases where the respondent is an individual, jurisdiction lies with the court of their residence or domicile. If these are unknown, the competent court is determined by the respondent's place of stay, or failing that, the headquarters of the claimant entity.

The petition must include: 1) Clear identification of the consumer group affected by the representative action; 2) Establishment of jurisdiction and applicable law; 3) Disclosure of any third-party funding for the action, whether received or promised.

Upon submission, the petition and the decree setting the hearing date must be published on the public area of the Telematic Services Portal managed by the Ministry of Justice.[381] This ensures that the action is publicly accessible and adheres to notification requirements, as per the procedural rules.

The action follows the simplified procedure outlined in Book II, Title I, Chapter III-*quater* of the Civil Procedure Code, adapted as necessary to suit the specific nature of representative actions. Notably: a) The expedited timeline excludes the application of Article 281-*duodecies*, par. 1: This provision ordinarily allows judges to switch from the simplified procedure to the ordinary procedure in specific circumstances; b) The right to pursue individual actions remains unaffected, barring exceptions under Art. 840-*undecies*, par. 9; c) Third-party interventions under Art. 105 are not permitted.

Within 30 days of the first hearing, the court must issue an order on the admissibility of the action. The court may, however, suspend proceedings if parallel investigations by independent authorities or administrative courts are ongoing. The court will deem the action inadmissible under specific circumstances: a) the claim is manifestly unfounded; b) it lacks the necessary elements to identify the group of consumers affected by the representative action; c) the claims lack homogeneity; d) the qualified entity lacks the requirements necessary for standing to sue; e) there is a conflict of interests towards the defendant, including when the entity financing the action is a competitor of the defendant or depends on the defendant; and f) the statutory purpose of the qualified entity that filed the application does not justify the exercise of the action (Art. 140-*septies*, par. 8, Cons. code). The court's decision regarding admissibility must be published on the public section of the Telematic Services Portal managed by the Ministry of Justice within 15 days. If a claim is deemed

[380] F. De Franceschi, 'Le «azioni rappresentative» di cui agli artt. 140- ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840- bis ss. c.p.c.', 1 *Le Nuove Leggi Civili Commentate*, 1 (2024).

[381] https://servizipst.giustizia.it/PST/it/pst_2_16.wp?actionPath=/ExtStr2/do/classaction/ricercaClassAction¤tFrame=8.

inadmissible due to manifest unfoundedness, the petitioner may re-bring the action should new circumstances arise or new factual or legal arguments be presented.

Once the class action is admitted, all potential members of the group are informed of the proceedings. They are given the opportunity to expressly join the group within a fixed time frame, which must be no less than sixty days and no more than one hundred and fifty days from the publication of the court's order. After this deadline has expired, the court proceeds to assess the case on its merits. If the action is deemed well-founded on the merits of its foundation, a second time frame begins during which consumers holding homogeneous individual rights may join the action (late opt-in) within a mandatory period of no less than sixty days and no more than one hundred and fifty days.

This is followed by the third phase, which focuses on quantifying the compensation claims.

In the final judgment on the merit, the court also appoints a delegated judge to oversee the opt-in procedure and a common representative for the members of the group (*rappresentante comune degli aderenti*). The common representative is selected from individuals qualified to serve as a kind of 'bankruptcy trustee' ('*curatore fallimentare*') and acts as a public official.

During this final phase, the common representative provides a preliminary assessment to the delegated judge, who subsequently issues their decision. Specifically, within ninety days from the expiration of the deadline granted to the defendant to file a memorandum of defence (where the defendant addresses the facts presented by the members as the basis for their claims and raises any extinguishing, modifying, or impeding objections to the asserted rights), the common representative prepares a report on the homogeneous individual rights of the members of the group, including reasoned conclusions for each case, and files it. If needed, the common representative may request the court to appoint one or more experts with specific technical expertise to assist in evaluating the facts underlying the claims. The report is then communicated to both the members of the group and the defendant.

The defendant and the group members have thirty days from the notification of the common representative's report to submit written observations and supplementary documents. The common representative then has sixty days to incorporate any changes into the report on homogeneous individual rights and file the revised report in the case's digital file.

The delegated judge, by means of a reasoned decree, when granting all or part of the opt-in claims, orders the defendant to pay the sums or deliver the items owed to each member of the group as compensation or restitution. This decree constitutes an enforceable title.

a) Settlement

Article 140-*decies* Cons. code outlines the framework for settlement and conciliation agreements. In line with the principles of collective action[382], the consumer representative action emphasizes the importance of settlements and voluntary dispute resolution. Settlement agreements can be reached at various stages of the procedure, with different stakeholders actively contributing to this process. In particular, Article 140-*decies* Cons. code establishes the framework for parties to submit a settlement or conciliation proposal (par. 1) and it grants the court the authority to promote settlement discussions between the parties (par. 2). Importantly, the court must verify that any proposed agreement complies with legal requirements and does not include unenforceable terms or obligations (par. 3). Until the oral discussion of the case, the qualified entity and the trader may

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[382] A. Giussani, 'Le composizioni amichevoli della lite nella nuova disciplina dell'azione di classe', in B. Sassani (ed), *Class action. Commento sistematico alla l. 12 aprile 2019, n. 31* (Pisa: Pacini editore 2019), 149.

jointly submit to the court a settlement or conciliation proposal regarding the claim. Moreover, up until the case is heard, the court has the power to propose settlement or conciliation agreements. Similarly, after the judgment is issued, the class representative, acting on behalf of the opt-in group members, may draft a proposed settlement with the defendant, which – after consulting with the opt-in group members – must then be reviewed and approved by the delegated judge.

This approach reflects a shift in the traditionally adversarial Italian legal culture, which has long been centred on courtroom-based dispute resolution. Although historically resistant to conciliatory practices, the system is gradually moving toward a more consensus-oriented model, incorporating mechanisms that facilitate consensual resolutions.

b) The opt-in mechanism

Italy has maintained its commitment to the opt-in model. This choice aligns with the values of the European procedural tradition and civil law principles, emphasizing the protection of individual autonomy. By requiring explicit consent from consumers before including them in collective proceedings, the opt-in system ensures that individuals retain full control over their legal rights and decisions, thereby avoiding any form of "representation without authorisation."

Although the opt-in mechanism under Italy's previous consumer class action framework was not associated with significant abuses, it remains a subject of debate. Past experience has revealed limited consumer participation, often attributed to "rational apathy".[383] Collective litigation is fundamentally aimed at securing redress for affected parties, but it also plays a critical role in influencing trader behaviour. The prospect of expensive legal proceedings can act as a deterrent, discouraging legal violations[384], while court decisions can establish standards that eliminate harmful practices and corporate misconduct from the market.[385] However, concerns persist about whether the opt-in system is effective not only in delivering compensation to consumers but also in achieving sufficient deterrence to fulfil its dual purpose. The success of this system depends heavily on the level of consumer participation, which has historically been low.

The introduction of a "late opt-in" mechanism seeks to address these challenges by extending the timeframe for consumers to join a collective action, thereby increasing the likelihood of involvement from those impacted by the defendant's misconduct. To further support consumer engagement, Italy's 2019 reforms introduced a digital platform managed by the Ministry of Justice. This platform simplifies access to information, enabling consumers to review case details and submit opt-in requests online, thereby reducing procedural barriers and increasing transparency. While these measures may address some concerns about low participation rates, it remains uncertain whether it can fully counteract the inertia often observed among consumers. Additionally, the late opt-in mechanism has drawn criticism from business groups, who argue it creates uncertainty for

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[383] G. Afferni, 'La nuova azione di classe', *Mercato concorrenza regole*, 437, 439 (2021).

[384] *Contra* see C. Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy', in A. Uzelac and S. Voet, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Cham: Springer International Publishing AG, 2021), 19, 22, who underlines that the classic economic theory according to which the 'enforcement of law through imposing financial consequences (fines or damages) and public shaming (be adjudged to be in the wrong) increases deterrence' is not supported by strong evidence, while 'extensive evidence now exists that "regulating through culture" offers the most effective way of affecting future behaviour (…)'.

[385] G. Howells, 'EU consumer access to justice and enforcement', in G. Howells, C. Twigg-Flesner, T. Wilhelmsson eds., *Rethinking EU Consumer Law* (London: Routledge, 2017), 290, 294.

defendants, making it difficult to estimate the potential financial liability tied to compensation claims, which could act as a deterrent to negotiating settlements.[386]

6. Prescription

Article 140-*duodecies* Cons. code transposes art. 16 of Directive 2020/1828 (EU) and establishes that the filing of the claim suspends the prescription of individual claim and prevents the preclusion of the rights of all consumers who could potentially be protected through the compensatory representative action.

III. Immaterial damage in representative action

1. Immaterial damage

Under Article 2059 of the Italian Civil Code (Civ. Cod.), immaterial damage is compensable only in cases explicitly provided for by law. Traditionally, this provision was interpreted narrowly. Historically, the sole "case provided for by law" was found in Article 185(2) of the Criminal Code, which mandates compensation for both material and immaterial damage resulting from a criminal offense. Consequently, it was commonly held that only wrongful acts qualifying as criminal offenses could give rise to a claim for immaterial damage. Additionally, immaterial damage was often equated solely with subjective moral harm – emotional suffering, anxiety, or transient distress caused by the wrongful act, commonly referred to as *pretium doloris* or *pecunia doloris*.

Both of these restrictive views have since been abandoned. On the one hand, there has been an increase in special legislation recognizing claims for immaterial damage in specific circumstances. Examples include compensation for damage arising from unlawful detention (Article 2, Law n. 117/1988); the wrongful collection of personal data (Article 29(9), Law n. 675/1996); racial, ethnic, or religious discrimination (Article 44(7), Legislative Decree n. 286/1998); violations of the right to a reasonable trial duration (Article 2, Law n. 89/2001), and so on.

On the other hand, the courts have adopted a constitutionally oriented interpretation of Article 2059 Civ. Cod. This broader interpretation extends compensation for immaterial damage not only to cases expressly provided for by statute but also to cases involving violations of rights enshrined in the Constitution ("*lesione di diritti inviolabili della persona riconosciuti dalla costituzione*" o "*costituzionalmente garantiti*").

The reference to cases where the law permits compensation for immaterial damage must, following the entry into force of the Constitution, also include its provisions. This is because the Constitution's recognition of personal rights of a non-economic nature necessitates their protection, thereby constituting a legally determined case for the reparation of immaterial damage.[387] The scope of this reference is not limited to rights explicitly recognised by the Constitution. The evolutionary

[386] Confindustria, Schema di decreto legislativo di recepimento della Direttiva Ue n. 1828/2020 sulle azioni rappresentative a tutela degli interessi collettivi dei consumatori – Osservazioni – Position Paper, 6 (January 2023). https://www.confindustria.it/wcm/connect/1d368c9d-15da-498a-a628-7fc0f0218546/Schema+D.Lgs+Azioni+rappresentative+-+Osservazioni+Confindustria.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-1d368c9d-15da-498a-a628-7fc0f0218546-onQd3fh.

[387] Cass. 8828/2003, in *Gius*, 2003, 22, 2575; Cass. 8827/2003, 7 *Guida al Diritto* 62 (2004).

interpretation allows for the identification of new interests reflecting societal changes that qualify as inviolable rights of constitutional standing. Judicial decisions have, for instance, recognised the constitutional guarantee of rights such as health and physical integrity (Cass. 5230/2012), protection from health risks, including fear of illness (Cass. 27324/2017), patient autonomy in medical decision-making (Cass. 10423/2019), family unity (Cass. 20928/2015), the right to freely express one's sexual identity (Cass. 1126/2015), and so on.

Therefore, the Italian legal system provides for compensation for immaterial damage in cases explicitly established by law or when a constitutionally protected right is infringed, as per the evolutionary and now well-established interpretation of Article 2059 Civ. Cod. As a result, damage unrelated to such rights – such as trivial inconveniences (e.g., a botched haircut or a power outage preventing the viewing of a football match) – are not compensable.

The courts have further clarified that immaterial damage is not confined to subjective moral harm but extends to any injury affecting non-economic personal interests. This broader understanding includes categories of harm identified over time by doctrine and case law:

1. Moral damage ("*danno morale*"): emotional distress, mental suffering, and psychological turmoil of a purely emotional nature (c.d. *danno morale soggettivo*, Cass. 8442/2019).
2. Biological damage (*danno biologico*): temporary or permanent impairment of physical or mental integrity, verified through medical assessment, that negatively impacts daily activities or social interactions, regardless of its effect on earning capacity (any reduction in earning capacity is separately compensable as material loss, specifically *lucro cessante*).
3. Existential damage (*danno esistenziale*): harm to the individual's quality of life, such as altered lifestyle, disrupted relationships, or diminished life satisfaction.[388]

These forms of harm (*danno morale, danno biologico e danno esistenziale*) are not distinct subcategories of immaterial damage but represent various aspects of the broader (and unified) category of immaterial damage. Reference should be made also to the rulings of the Corte di Cassazione (Italian Supreme Court) issued a decade after the 2008 United Sections landmark decision, which provided an updated framework on the subject of immaterial damage.[389]

In the Italian legal system, immaterial damage may be compensated not only in cases of tortious liability but also in instances of contractual breach.[390] Article 1218 Civil Code imposes an obligation

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[388] Despite the fact that the majority of legal doctrine and courts widely accept this category of damage, Corte di Cassazione in its rulings, continues to emphasize the uniqueness of non-pecuniary damage and the merely descriptive nature of its various components.

[389] Cass. 7513/2018; Cass. 23469/2018; Cass. 901/2018, 4 *Danno e Resp*. 463 (2018), commented by G. Ponzanelli; Cass. 9196/2018.

[390] C. Amato, 'Danno non patrimoniale da inadempimento contrattuale', in *DIGESTO delle Discipline Privatistiche Sezione Civile*, Agg. VI (Torino: 2011), 302; C. Amato, 'Il danno non patrimoniale da contratto', in G. Ponzanelli (a cura di), *Il "nuovo" danno non patrimoniale* (Padova, 2004); E. Navarretta, 'Il danno non patrimoniale contrattuale. Profili sistematici di una nuova disciplina', *Persona e Mercato* 185 (2010); L. Cavalaglio, 'Il danno non patrimoniale da inadempimento tra interesse del creditore e principio di solidarietà', 1 *Giust. civ.* 39 (2023); M. Natale, 'Risarcimento del danno non patrimoniale da inadempimento e azione di classe fra slanci e aporie', 1 *Nuovo dir. civ.* 135 (2021). Consumers have the right to claim compensation for damages caused by a trader's conduct, whether this constitutes a breach of contract, pre-contractual obligations, or a non-contractual violation. Relevant cases under consumer law include damages caused by unfair commercial practices under Article 27, paragraph 15-bis of the Cons. Code, damages from defective products as outlined in Articles 114 and 123 of the Consumer Code, and compensation for non-conformity in goods, digital content, or digital services as per Articles 135-septies

to compensate damage resulting from non-performance. According to the clear wording of Article 1223, such damage must encompass both the loss suffered by the creditor and the loss of profit ("*mancato guadagno*"), without making any distinction as to whether the harm is of a pecuniary or non-pecuniary nature. It is true that the concept of non-pecuniary damage was originally developed and systematized within the framework of tort law, whereas its compensability in contractual liability was historically denied. The protection of personal interests and rights was initially considered foreign to the economic sphere to which contract law was primarily directed. However, the regulation of non-pecuniary interests through contractual instruments has now become standard practice.[391] The breach of obligations that, directly or indirectly, incorporate the protection of such interests gives rise to the necessity of compensation.[392] Immaterial damage resulting from contractual non-performance is compensable under the rules governing contractual liability whenever non-pecuniary interests hold relevance within the contractual framework – either because a specific obligation is expressly designed to safeguard them or because such interests fall within the protective scope of the contract.

2. Calculation of immaterial damage

In the Italian legal system, the principle of full compensation for damage prevails.

Immaterial damage is never presumed: such damage must always be alleged and proven by the claimant in accordance with standard rules of evidence, including the use of simple presumptions or common experience maxims.[393] Accordingly, the judge cannot estimate or award compensation *ex officio*. The injured party must, at the very least, outline the unfavourable consequences arising

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and 135-vicies ter of the Cons. Code. And of course the Tourism Code's Article 43, paragraph 2, ensures travelers the right to adequate and timely compensation for damages resulting from non-conformity affecting tourism services under package travel contracts.; Article 82 of Regulation (EU) 2016/679 (GDPR) provides for the compensation of both material and non-material damage caused by violations of GDPR provisions, while Article 54 of Regulation (EU) 2022/2065 (Digital Services Act) allows service recipients to claim damages caused by breaches of intermediary service providers' obligations, etc. See De Cristofaro, 'Le «azioni rappresentative» di cui agli artt. 140-ter ss. c.cons.: ambito di applicazione, legittimazione ad agire e rapporti con la disciplina generale delle azioni di classe di cui agli artt. 840-bis ss. c.p.c.', *Le Nuove Leggi Civ. Comm* 1 (2024).

[391] See E. Navarretta, 'Danno non patrimoniale contrattuale. Profili sistematici di una nuova disciplina', cit., 191-192: "Il danno non patrimoniale contrattuale è categoria che nasce non soltanto dalla progressiva permeabilità dell'istituto del contratto rispetto ad interessi di natura personale, ma anche e soprattutto dalla recente tendenza espansiva della responsabilità contrattuale che si diffonde sia attraverso la costruzione complessa del rapporto giuridico e la dogmatica degli obblighi di protezione, sia attraverso più recenti e "ardite" concezioni, quali l'obbligazione senza prestazione e la responsabilità da contatto sociale".

[392] See Cass. S.U., 11.11.2008, nn. 26972, 26973, 26974, 26975, I *Foro It.* 120 ff. (2009), commented by Pardolesi-Simone, 'Danno esistenziale (sistema fragile): "die hard"; G. Ponzanelli, 'Sezioni Unite: il nuovo statuto del danno non patrimoniale'; E. Navarretta, 'Il valore della persona nei diritti inviolabili e la sostanza dei danni non patrimoniali'; *Resp. civ. prev.* 38 ff. (2009), commented by Monateri, 'Il pregiudizio esistenziale come voce di danno non patrimoniale'; E. Navarretta, 'Il valore della persona nei diritti inviolabili e la complessità dei danni non patrimoniali'; D. Poletti, 'La dualità del sistema risarcitorio e l'unicità della categoria dei danni non patrimoniali'; Ziviz, 'Il danno non patrimoniale: istruzioni per l'uso; Chindemi, 'Una nevicata su un campo di grano'; C. Scognamiglio, 'Il sistema del danno non patrimoniale dopo le Sezioni Unite'; *Nuova Giur. civ. comm.,* 102 (2009), commented by E. Navarretta, 'Danni non patrimoniali: il compimento della Drittwirkung e il declino delle antinomie'; G. Ponzanelli, 'La prevista esclusione del danno esistenziale e il principio di integrale riparazione del danno: verso un nuovo sistema di riparazione del danno alla persona'; P. Cendon, 'L'urlo e la furia'. See Bianca, *Diritto civile, 5. La responsabilità,* (Milano 1994), 171 ff, who already upheld the compensability of non-pecuniary damage arising from contractual breach in cases involving the impairment of fundamental rights.

[393] E.g., Cass. 3720/2019; Council of State, 28.06.2019, n. 4454.

from the violation of the constitutionally protected interest.[394] Nonetheless, recourse to prognostic evaluations and presumptions is permissible, provided these are based on objective elements that the injured party is responsible for presenting.[395]

To qualify for compensation, two conditions must be met: (a) the harm caused to the victim must be serious, and (b) the damage must not be trivial or consist merely of inconveniences or annoyances (so-called *danni bagatellari* – "bagatelle damage").

Immaterial damage, which affects non-economic personal values, poses challenges in terms of quantification: it requires translating into monetary terms the harm to interests that, by their nature, are not economically measurable.

Article 1226 Civ. Cod. stipulates that once proof of immaterial damage is established, even presumptively, its quantification is subject to the judge's equitable evaluation. Consistent case law concurs with legal scholars that equitable assessment pertains not to proving the existence of damage but to determining its extent. The principle of equitable assessment concerns the quantification of damages (the "how much") rather than the eligibility for compensation (the "if"). As a consequence, equitable evaluation requires two preconditions: certainty about the existence of damage (the "*an*"), and irreducible uncertainty regarding its extent (the "*quantum*"), where precise quantification is impossible due to evidentiary gaps that cannot be filled otherwise.[396] Importantly, this evaluation cannot compensate for the injured party's failure to prove the existence of the damage claimed. If the claimant, despite having the opportunity, omits to provide relevant evidence (e.g., because they forfeited the right to present evidence), the judge must base their decision solely on proven or commonly known elements.

The provision of Article 1226 Civ. Cod. ensures flexibility but does not guarantee uniformity of treatment: the same injury could result in different compensation depending on the court deciding the case.

Specifically, in the context of compensation for biological damage (*danno biologico*), consideration must be given to the impairment of the individual's psycho-physical integrity, addressing both temporary and permanent disability. Permanent disability is assessable only after the condition stabilizes following the illness or injury.

The compensation for biological damage must adhere to the principles of "basic uniformity" and "flexibility." Basic uniformity ensures that identical injuries in individuals of the same age are compensated equally. Flexibility, on the other hand, highlights the need to tailor compensation to the specific circumstances of the case, reflecting the actual impact of the injury on the claimant's daily life (e.g., Constitutional Court, 14.07.1986, n. 184; Cass. 2008/1993; Cass. 357/1993). Moreover, as outlined before, compensation for biological damage requires the existence of a medically verifiable injury to psycho-physical integrity (Art. 2059 Civ. Cod.).

Various methods have been developed over time to ensure compensation aligns with these principles, including the pure equitable method (*metodo equitativo puro*), the tabular method (*il criterio tabellare o genovese*), the elastic-point method (*il criterio a punto elastico, o pisan*o), and the variable-point system (*il sistema a punto variabile*). Among these, the variable-point system, derived from the Pisa method, has gained the most traction. Under this system, each degree of disability corresponds to a monetary value, which increases with higher degrees of disability and

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[394] E.g., Cass. 13546/2006; T.A.R. Campania, 13.05.2011, n. 915; Council of Administrative Justice for Sicily, 18.11.2016, n. 401.
[395] E.g., Cass. 8828/2003; Council of State, 7.02.2019, n. 910.
[396] Breccia, 'Le obbligazioni', in *Tratt. Iudica, Zatti* (Milano, 1991), 653.

decreases with the injured party's age. Following these principles, the Tribunal of Milan created a table in 1995 detailing compensation amounts for each degree of disability and age bracket. This approach quickly gained popularity, becoming the most widely used method.

Legislative intervention has planned the introduction of uniform tables for calculating compensation across Italy for impairments ranging from 10 to 100 points of disability. These tables assign monetary values to each degree of disability, factoring in age-related variations (Arts. 138 and 139, para. 4, of the Insurance Code). However, judges retain the discretion to deviate from these tables within defined limits, considering the injured party's subjective conditions (Art. 138, para. 3).

Moreover, the legislature has established criteria for compensating so-called micro-permanent damage (*micropermanenti* - minor injuries) arising from vehicle and maritime accidents (Art. 138, para. 1, Insurance Code). This regulation was later extended to minor injuries caused by medical malpractice (Art. 7, para. 4, Law n. 24 of 8.3.2017).

Nevertheless, the absence of national tables in practice has led to the proliferation of varying tables across courts. Based on the variable-point system calculated from judicial precedents, many courts have adopted tables specifying compensation amounts for each degree of disability and age range. This has resulted in disparities in compensation values nationwide.

The *Corte di Cassazione* has thus clarified that the criteria under art. 138 of the Insurance Code for micro-permanent injuries apply only to damage arising from road accidents or medical malpractice. In all other cases, immaterial damage resulting from injury to psychophysical integrity should be calculated using the tables prepared by the Milan Civil Justice Observatory at the time of the decision[397], unless specific circumstances require deviation in line with the principle of damage personalisation.[398] In fact, judges may exceed the ordinary minimum and maximum parameters when the specific case involves circumstances that the abstract parameters cannot account for, as long as these circumstances and their consideration are adequately explained in the judgment.

To enhance uniformity and predictability in the compensation of immaterial damages, consistent with the principle of equality, the Milan Civil Justice Observatory has developed not only tables for compensating biological damage but also tables addressing damages for severe injury or loss of close family relationships, premature death damages, inadequate or absent informed consent in medical contexts, terminal damages, defamation through media, and vexatious litigation under art. 96, par. 3, CPC.

In recent years, the tables developed by the Milan Civil Justice Observatory have proven inadequate for quantifying immaterial damage in the absence of biological damage. For this reason, alternative tables – such as the tables developed by the Roma Court – are increasingly being adopted in court decisions concerning the compensation of non-pecuniary damage. However, each judge remains free to apply the Table they deem most appropriate, provided they justify their choice.

3. Collective actions for immaterial damage

As previously highlighted, Italian collective actions are designed to protect either all (in the case of collective actions governed by the Civil Procedure Code) or certain (in the case of representative actions under the Consumer Code) "homogeneous individual rights" of the class members.

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[397] E.g., Cass. 16.12.2022, n. 37009; Cass., 12.09.2022, n. 26805; Cass., 28.06.2018, n. 17018; Cass. 15.05.2018, n. 11754.

[398] E.g., Cass., 4.04.2023, n. 9317; Cass., 13.12.2022, n. 36297; Cass., 31.01.2019, n. 2788.

The homogeneity of rights acts as the connective tissue between individual positions within a class. This requirement is critical to ensuring the coherence and efficiency of collective proceedings. Homogeneity refers to the nature of the individual rights involved, which must exhibit sufficient similarities to justify a unified collective action. As noted above, the definition of "homogeneous rights" has historically given rise to interpretative ambiguities and practical challenges, requiring significant doctrinal and judicial efforts to clarify its meaning. Early judicial decisions under the previous consumer class action model (especially prior to the 2012 reform) often adopted a restrictive approach, excluding rights that, despite originating from a common cause, exhibited individual differences. It was only later that courts began applying a more functional interpretation of the homogeneity criterion (see *supra*). As highlighted in legal scholarship, the homogeneity of individual rights can be identified in those legal situations belonging to class members that warrant equal treatment. These rights may arise from the same contractual breach or unlawful act, or even from multiple acts and behaviours linked by a common source, a shared cause, or one or more wrongful acts committed by the same party with a unified objective. Moreover, the harmful event must exhibit a multi-offensive nature, and the issues to be resolved for determining the existence of the right to compensation must be identical. Additionally, the claims for compensation or restitution must align, while specific individual differences among class members must remain marginal.

Closely linked to the definition and management of homogeneous rights is the particularly contentious issue of the compatibility of immaterial damages with collective procedures and, more generally, the effectiveness of the compensatory remedy within collective proceedings.

The idea that class actions can only address pecuniary damages – due to the presumed impossibility of standardising non-pecuniary damages – has been largely set aside. The protection of injured individuals must also encompass immaterial aspects within collective proceedings. There are no legal obstacles to this, particularly as the Italian legal system is grounded in the principle of full compensation for harm and the comprehensive protection of injured parties.

Courts have consistently supported this perspective. For instance, the Corte di Cassazione, in a case decided under the former consumer class action (applying Art. 140-bis Cons. Cod.), affirmed that members of a class whose homogeneous individual rights have been violated may claim compensation for immaterial damage, provided the necessary evidence is presented.

At the same time, however, the Court stressed the importance that such damages must not be individualised but instead must arise from circumstances common to all class members (Cass. 14886/2019). In fact, in the context of collective and representative actions, compensation for immaterial damages is admissible if proven and shared among all class members who have opted into the action. Individual claims focused on personalised harm remain outside the purview of collective redress and may only be pursued through individual proceedings. Collective actions, by design, aim to provide redress for "common harm", grounded in shared elements among class members, rather than requiring individualized protection of constitutionally protected rights. Claimants participating in collective proceedings accept a trade-off: reduced costs and simplified organisation in exchange for a standardised approach to compensation, derived from the homogeneity of the damage within the class. They essentially accept a lump-sum determination of individual damages in exchange for easier access to justice.

It is undeniable, however, that the traditional feature of the personalised nature of immaterial damages poses significant challenges, particularly in the context of collective actions. Balancing the general legal rules that mandate the personalisation of immaterial damages with the specific need for standardisation in collective proceedings is far from straightforward. Since class action regulations were introduced in Italy after the establishment of these principles, their effective application may require a more flexible approach to accommodate the collective framework.

Conversely, a strict application of the general principles governing immaterial damages, including the requirement of personalisation, risks undermining the effectiveness of collective actions. Such rigidity could weaken their ability to protect the homogeneous rights of claimants, ultimately compromising the fundamental purpose of collective redress mechanisms.

At the same time, it is worth emphasising that within collective proceedings, including representative actions aimed at consumer protection, the notion of damage – whether pecuniary or non-pecuniary – is not shaped by the law in a way that differs from the general concept outlined in the Civil Code. This necessitates situating the remedy of collective and representative compensatory actions within the broader system of civil liability, as well as adhering to the rules that, within the dynamics of the process, govern the allegation and proof of facts that give rise to compensable harm.

The case referenced (Cass. 14886/2019) also provides valuable insights on this issue. The case involved Trenord's rail services and the inconvenience experienced by passengers in December 2012. The trial court initially dismissed the class action due to insufficient homogeneity among the claimants' situations. However, the Milan Court of Appeal overturned this decision, recognising homogeneity in terms of liability (the "an"), arguing that individual differences only affected the amount ("quantum") of compensation. The appellate court awarded each claimant €100, citing the extraordinary inconvenience experienced by Trenord passengers, exceeding the minimal compensation contractually provided for sporadic delays. However, the Corte di Cassazione upheld Trenord's appeal, criticising the appellate court's failure to rigorously assess the homogeneity of rights as well as the damage suffered by the class members and to properly apply the principles governing immaterial damages under the Italian legal framework.

The Court emphasized that compensation for immaterial damage always requires: 1. a violation of a constitutionally significant interest (*interesse costituzionalmente rilevante*); 2. a level of harm that exceeds the threshold of social tolerability; 3. the exclusion of trivial damage, such as minor inconveniences or discomforts. These criteria, established by the Supreme Court's United Sections in 2008, aim to ensure that only legally significant harms are compensable (see *supra*). The Court noted that homogeneity of subjective situations is a prerequisite for addressing claims collectively. Damage must be assessable on a uniform basis, serially, without the need for individual customisation for each claimant. The Court further emphasised that non-pecuniary damage could only be compensated in a class action if they exhibit shared characteristics that justify collective adjudication. At the same time, however, the appellate court in this instance was criticised by the Supreme Court for failing to demonstrate the homogeneity of the damage and for not showing how the alleged harms exceeded the threshold of severity required for non-pecuniary compensation. In particular, the Corte di Cassazione found that the claimed damages, such as anxiety or frustration, were not proven to be homogeneous or distinct from mere inconvenience.

The Dieselgate case provides further insights. Adjudicated under the procedural framework of the now-repealed consumer class action, the Venice Tribunal – having established the defendants' unlawful conduct – awarded €3,000 in pecuniary damages per claimant. This amount was determined through an equitable calculation, representing 15% of the average purchase price of affected vehicles. The Court of First instance also recognised immaterial damage, citing the moral harm associated with the criminal offense established under art. 515 of the Penal Code (fraud in commerce). These damages were standardised, with each claimant receiving €300, calculated as 10% of the pecuniary damages. The Court analogically referred to the Venice compensation tables (*Tabelle del Tribunale di Venezia*), which establish a proportional relationship between moral harm and biological harm.

The Court of Appeal, while firmly confirming the unlawfulness of the multi-offensive conduct attributed to the two defendant companies, partially overturned the first-instance decision. It rejected the pecuniary damages claim due to insufficient evidence of both the existence and the quantum of pecuniary loss but upheld the award for immaterial damages. However, the Corte di Cassazione did not miss the opportunity to criticise the first-instance court's method for calculating non-pecuniary damages. Specifically, it criticised the approach of deriving immaterial damages as a percentage of pecuniary damages applying by analogy the criteria provided by the Venice Tribunal Tables *(Tabelle del Tribunale di Venezia*) for quantifying moral damage in relation to biological harm. This method involved calculating immaterial damages by increasing the pecuniary damages by 10%, effectively relying on a predefined standard designed for categories of harm distinct from moral damages arising from criminal offenses.

Moreover, while the Court of Appeal ultimately confirmed the first-instance award for immaterial damages, it nevertheless emphasised that the amount awarded could not be deemed comprehensive. At the same time, it refrained from revising the amount upward, as no incidental appeal had been filed by the claimant, the consumer association Altroconsumo.

Regarding the configuration and quantification of the damage, certain aspects of the court's reasoning stand out, which, although initially addressing pecuniary damages, would also, to some extent, be relevant for immaterial damages.

In its logical process of assessing damage, the Court of Appeal applied art. 140-bis, par. 12, Cons. Cod. in its version applicable *ratione temporis*. This provision stipulated that, when determining the amounts owed to class action participants, such liquidation must be carried out pursuant to Article 1226 Civ. Cod., or by establishing a uniform criterion for the calculation of those amounts.

As previously mentioned (see *supra*), Article 1226 Civ. Cod. allows the judge to determine the amount of damages equitably and the rule presents, according to the most recent and comprehensive interpretation of its value, a systemic rule applicable in cases of indeterminable damage. It is thus considered a legal provision capable, over time, of encompassing controversial situations involving types of harm that cannot be documented through common means of evidence available to the parties in civil liability disputes.

As also emphasised by the Court of Appeal of Venice, the explicit and textual reference to Article 1226 Civ. Cod. within the now-repealed consumer class action regulation (Art. 140-bis, par. 12, Cons. Cod.) must be interpreted as a mere acknowledgment of the specific need that characterises class actions: balancing the principle of full compensation for damage with the use of standardised criteria for all class members, without the possibility of customisation. Therefore, the rule set forth in Article 140-bis, par. 12, serves as a purely technical directive for the liquidation of damages. Its explicit reference is justified by the fact that in collective proceedings, the serial nature of the damage makes it highly likely that it will be considered indeterminable, thus necessitating the judge's equitable assessment.

In the Dieselgate case, the Court of Appeal agreed that the class action framework requires recognition of the specific need, characteristic of this procedural tool, to balance the principle of full compensation for damage with the use of standardised criteria for all class members. This, in turn, necessitates the abandonment of a precise quantification of the damage tailored to each individual claimant in favour of a standardised calculation, often based on the judge's equitable discretion. However, the Court did not consider this to justify disregarding the rules applicable to individual damages (particularly those under Article 1223 Civ. Cod.). The compensable damage remains what is known as the "consequential damage" (*danno conseguenza*), and the collective action does not alter the principles governing civil liability, which, on the one hand, reject any punitive (and thus deterrent) nuance, and on the other hand, do not permit the liquidating of damage that is *re ipsa*.

This leads to the conclusion that, not only in terms of pecuniary damage, but also with regard to non-pecuniary damage, the establishment of the obligation to compensate requires that a loss has occurred and can be causally linked to the unlawful act. That is, a deprivation or denial of utility, albeit – concerning the second form of damage – non-pecuniary.

This interpretation, which excludes the view that the explicit reference to Article 1226 Civ. Cod. in Article 140-bis, par. 12 Cons. Cod. can be read as a systematic innovation intended to reshape the concept of damage, is further supported by the evolution of collective litigation regulation in the Italian legal system. Indeed, in the new regulation concerning collective proceedings under artt. 840-bis et seq. of the Civ. proc. cod., the explicit reference to Article 1226 Civ. Cod. has disappeared. While Article 1226 Civ. Cod. remains applicable as a general systemic rule, it is clear that it does not hold any specific or innovative value within the context of collective protection. The regulation of consumer representative actions does not introduce any innovation on this point. The definition of "compensatory measure" under Article 140-ter, par. 1, letter h), Cons. Cod. is based on the assumption that the consumer has suffered harm, thus confirming the compensatory nature of the damages, and relegating the potential deterrent effect of the compensatory measure to a purely indirect outcome. This is consistent not only with the Italian legal framework but also with the European approach, as stated in Recital 42 of the RAD, which excludes the attribution of a punitive character to damage compensation.

Therefore, the necessary standardisation imposed by collective litigation does not allow deviation from the general legal principles, which require the identification and proof, in each specific case, of tangible harm. This harm is obviously standardisable only with respect to the quantification of compensation – the determination of which can also be made equitably by the judge, given the difficulty in determining serial common harm – not with regard to the harm suffered, which must always be identified and proven.

It is clear, therefore, that the tension between the practical need to adapt the concept of damage to the specific characteristics of collective proceedings – so as not to render the compensatory protection within these proceedings ineffective – and the requirement to continue referring to the traditional notion of damage, in the absence of normative indicators allowing for divergence or differentiation within collective protection, continues to challenge the Italian legal system's ability to provide meaningful redress within the various collective enforcement mechanisms, including the consumers representative actions.

IV. Discovery and the burden of proof

1. Burden of proof and access to evidence in the Italian legal system

A judge must decide *iuxta alligata et probata partium* – that is, based on the allegations and evidence presented by the parties.[399] In civil proceedings, it is typically the responsibility of the parties to identify the means of proof they wish the court to consider, including documents, witness testimony, statements from the opposing party, and other evidence they believe supports their version of the disputed facts (Art. 115, para. 1, CPC). This approach is referred to as the "*principio dispositivo*" ("principle of party disposition").

[399] See Cass. 8.05.2023, n. 12132; Cass. 24.04.2023, n. 11111.

The judge's role begins with evaluating whether the evidence proposed or requested by the parties is: a) Admissible, meaning it complies with legal requirements. For instance, testimony from an individual with a direct interest in the dispute is inadmissible under Art. 246 CPC, or evidence excluded due to procedural rules (e.g. *decadenza*); b) Relevant, meaning it pertains to facts that could influence the resolution of the case[400], whether proving or disproving those facts could impact the decision of the judge.

After admitting and examining the evidence requested or submitted, the judge assesses its conclusiveness during the deliberation phase – i.e., its ability to substantiate the alleged facts (Art. 116, par. 1, CPC). A fact is considered "proven" not only when the judge has absolute certainty about its occurrence but also when the evidence convinces the judge that one version of events aligns better with the evidentiary material presented.[401] The judge must provide a reasoned explanation for their decision, detailing the rationale behind their conclusions. This reasoning must be based solely on the evidence submitted by parties in accordance with procedural safeguards, including the principle of adversarial debate (Art. 115 CPC[402]).

An exception to the principle that facts must be proven by the parties, arises in the case of notions of common experience ("*fatti notori*"), which a judge may rely on without requiring formal evidence. The so-called "*fatti notori*" refer to facts known to the community at the time and place of the decision, with such a degree of certainty that they appear undeniable and indisputable – in other words, facts about which no reasonable doubt can arise regarding their existence or nature, thereby making formal proof unnecessary. This knowledge does not derive from the judge's private knowledge – which cannot be used – but from general public awareness, making formal proof unnecessary (Art. 115, par. 2, CPC[403]).

a) Burden of proof

A problem of proof arises concerning facts that are specifically contested between the parties.

As a general rule, it is incumbent upon the parties to present the facts they consider relevant to the case (the so-called "burden of allegation"); moreover, they also bear the burden of providing evidence for the facts they have alleged (principle of disposition). Plaintiffs must clearly state the facts underlying their claims, while defendants must respond to these allegations. Failure by the defendant to contest, or where the defendant's contestation is unclear or generic, the facts are deemed to be proven (Art. 115, par. 1, CPC). The principle that limits the admission of evidence to disputed facts has long been recognised as inherent in the adversarial system, which is guided by the doctrine of the parties' "self-responsibility." Article 115, par. 1, CPC explicitly states that the judge must base their decision not only on proven facts but also on "facts not specifically contested by the appearing party," which therefore do not require proof. Consequently, only disputed facts are subject to proof.

If evidence for a relevant fact is lacking – either because it was not presented or deemed insufficient—the judge must resolve the issue in favour of the party not bearing the burden of proof (Art. 2697 Civ. Cod.). This principle imposes the risk of insufficient evidence on the party tasked with proving the fact, incentivizing them to present compelling evidence to avoid dismissal of their claim or defense.

[400] Cass. 21.11.2022, n. 34189.
[401] Cass. 5.01.2023, n. 198.
[402] See Cass. 8.05.2023, n. 12132.
[403] See Cass. 14.02.2023, n. 4571; Cass. 13.12.2022, n. 36309.

It should be noted that the judge must base their judgment on all the evidence collected, regardless of who presented it. Therefore, it is irrelevant which party introduced a particular piece of evidence. Once evidence is introduced into the proceeding, it becomes part of the record and cannot be removed. It can be used by both the opposing party and the judge. The judge is free to use the available evidence to form their conclusions, drawing facts, reasoning, and arguments, without being restricted by the initiative of the parties. In the Italian legal system, there is a principle known as "*principio dell'acquisizione probatoria*" ("evidentiary acquisition principle"), which allows any evidence to be used by the judge in their decision-making process, regardless of its origin – whether it was presented by one of the parties or ordered by the judge *ex officio*. Thus, the judge does not need to apply the burden of proof rule when the proof of a particular fact has been provided in the case, regardless of whether it was submitted by the party burdened with the evidentiary obligation or the opposing party.[404]

As a result, the judge must apply the burden of proof rule when a contested fact, which is relevant for the decision, remains without sufficient proof at the end of the trial (see Cass. April 13, 2023, no. 9863): this is the so-called "residual nature" of the burden of proof rule.

In principle, it can be said that the burden of proving a fact falls on the party who invokes that fact to support their argument (*onus probandi incumbit ei qui dicit*). Therefore, the party claiming a right in court bears the burden of proving the facts that form the basis of that right (the so-called "*fatti costitutivi*", "constitutive facts"). Likewise, the party challenging the relevance of those facts (the defendant) has the burden of proving their ineffectiveness or of proving any other facts that may have modified or extinguished the right being asserted (the so-called "*fatti impeditivi*", "*modificativi*" or "*estintivi*"; "impeding," "modifying," or "extinguishing" facts).

The rule in question uses a primarily procedural criterion for allocating the burden of proof, as it relates to the legal facts alleged by both the plaintiff and the defendant.

However, the substantive law of the case must still be referred to in order to determine which facts are legally relevant and, as such, suitable for forming the basis of a claim or defense. In most cases, identifying the constitutive facts that the plaintiff must allege to support their claim is relatively simple. These are the facts that the applicable substantive law identifies as prerequisites or conditions for the legal effects that the law provides, which the plaintiff invokes in their claim. Often, the law itself explicitly or implicitly helps determine whether a circumstance should be considered a constitutive fact or an impeditive fact, and thus determines the burden of proof for each party.

In the case of uncertainty, determining which party bears the burden of proof is based on interpretation. In this regard, case law often refers to the "principle of the proximity of proof", which places the burden on the party best positioned to fulfil it.[405] The burden of proof can therefore be understood as the risk of a failure to prove a fact that remains uncertain in the trial. This risk is assigned by the legislator to the party who was in the best position to provide the proof. If that party fails to convince the judge, based on the evidence presented, that the fact in question occurred, the judge must treat it as if it did not happen, even if there is no certainty that the fact did not actually occur.

b) Legal presumptions

The general rule on the burden of proof (Art. 2697 Civ. Cod.) is subject to numerous exceptions established by law through legal presumptions (Art. 2727 Civ. Cod.). These presumptions often aim to ease the evidentiary burden where proof of a fact is particularly challenging or impractical. Legal

[404] See Cass. 13.04.2023, n. 9863; Cass., 16.02.2023, n. 4835.
[405] See Cass., 22.09.200, n. 26104; Cass.22.4.2022, n. 12910; Cass. 2.03.2021, n. 8018.

presumptions can be: a) irrebuttable/absolute (*presunzioni assolute*), which pertain to substantive law but do not affect evidentiary rules; b) rebuttable/relative (*presunzioni relative*): here, the law effectively shifts the evidentiary burden while exempting the asserting party from proving the presumption, allowing at the same time the opposing party to counter-proof the presumed fact. In other words, the mechanism of the relative legal presumption consists of accepting a fact as true, without requiring proof of it, that one party would otherwise need to prove if the basic rule of Article 2697 Civ. Cod. were applied. The law thus provides a *relevatio ab onere probandi* in favour of the party alleging the presumed fact: this fact does not need to be proven, yet the judge will base the decision on it. Consequently, the burden falls on the other party, if they wish to prevent this, to provide counter-evidence to the presumed fact. However, from an objective standpoint, the distribution of the burden of proof is not actually altered: the party against whom the presumption operates would still have the burden of proving the contrary, even if the presumption did not exist, in the event that the other party provides positive proof of the fact. The specific effect of the presumption is that the party alleging the presumed fact is relieved from the burden of proving it. Numerous legal presumptions are scattered throughout the substantive law of various legal scenarios. In consumer law, for example, legislative measures such as Legislative Decree 170/2021 invert the burden of proof in favour of consumers, requiring sellers to demonstrate the conformity of goods within a specified period following a defect claim.

Typically, it is the legislator who alters or reverses the burden of proof between the parties through legal presumptions. However, similar phenomena can occur outside specific legal provisions: this primarily refers to so-called *judicial presumptions ("presunzioni giurisprudenziali"),* where the judge presumes the truth of certain facts in favour of one party, placing the burden on the other party to prove otherwise. This phenomenon occurs in various areas of law, with some frequency in labour law.

Moreover, the parties can agree to allocate the burden of proof differently—known as the conventional reversal of the burden of proof ("*inversione convenzionale dell'onere della prova*) – unless the subject matter involves inalienable rights and provided that the modification does not make it excessively difficult for one party to exercise their rights (Art. 2698 Civ. Cod.).

2. Evaluation of evidence

Once the evidence is introduced into the case, the judge must evaluate it freely, based on their "*prudent judgment*" (Art. 116 CPC), meaning through reason and experience. The judge must also provide a clear yet concise explanation in the reasoning of the judgment, outlining both the logical process followed and the results of that evaluation.

However, certain forms of evidence – such as confessions or authenticated documents—are governed by rules of 'legal proof' ("*prove legali*") that limit the judge's discretion and require adherence to statutory criteria. These rules dictate the binding effectiveness of certain kinds of evidence. In such cases – considered exceptional and exhaustive—the judge cannot evaluate the evidence based on its persuasive power. Instead, the judge must simply observe the outcome of the experiment and, if it matches the model prescribed by law, infer the legal effect as established by the law itself (see Artt. 700, 2702, 2733, 2735, 2736, 2738 Civ. Cod.). In these situations, the judge's evaluation is replaced by a preemptive, abstract judgment made by the legislature, based on the experience of what usually happens and thus on probability calculations. Through this mechanism, the legislator simplifies the judge's task, making the process of fact-finding quicker and easier. For example, life experience shows that no one is willing to admit a fact that contradicts their own interests unless that fact is true. Therefore, the legislator has authorised the rule that a confession is conclusive proof, freeing the judge from the need to assess its credibility on a case-by-case basis.

The situation is different when interpreting and evaluating evidence requires specific knowledge, such as in a technical field, science, or art. In these cases, if the judge lacks the specialised knowledge needed, they may consult an expert, from whom they will gain the necessary information to fulfil their role in the case.

Behaviour of the parties during the proceedings can be also subject to the judge's discretionary evaluation.

3. Burden of proof and discovery in collective proceedings

Concerning the representative procedure, to make the process more claimant-friendly – simplifying evidence collection and easing the burden of proof – several rules introduced in 2019 for collective proceedings (Art. 840-*quinquies* CPC) have been incorporated into representative action proceedings for compensation claims (Art. 140-*novies* Cons. Code). The court, dispensing by the law with any formalities not essential to the adversarial process, conducts the proceedings as it deems appropriate to address the relevant evidence pertaining to the case. Furthermore, in assessing the defendant's liability, the court may rely on statistical data and simple presumptions.

A key element in the evidence-gathering phase is the use of disclosure orders. The rules for collective proceedings, referenced in the Consumer Code, align in some respects with Art. 3 ff. of Legislative Decree n. 3/2017, which implemented Directive 2014/104/EU on antitrust damages actions.[406]

Upon a reasoned request by the claimant, detailing facts and evidence reasonably available to the opposing party and sufficient to support the plausibility of the claim, the court may order the defendant to disclose relevant evidence within their possession. The court must specifically and narrowly identify the elements of evidence or relevant categories of evidence subject to the disclosure request or order. Categories of evidence are defined by reference to shared characteristics, such as their nature, the period during which they were created, their subject matter, or the content of the evidence within the category.

The court's disclosure order must remain proportionate to the needs of the case. In particular, the court: a) Assesses the extent to which the claim is supported by facts and evidence already available to justify the disclosure order; b) Evaluates the scope and costs of the disclosure process; c) Determines whether the requested evidence contains confidential information, especially concerning third parties.

When disclosure requests or orders involve confidential information, the court implements specific protective measures. These may include: imposing confidentiality obligations; redacting sensitive parts of documents; conducting hearings behind closed doors; limiting the number of individuals allowed to access the evidence; assigning experts to prepare summaries in aggregated or non-confidential formats. Confidential information includes documents containing personal, commercial, industrial, or financial data related to individuals or businesses, as well as trade secrets. Attorney-client communications remain privileged and protected from disclosure.

Before issuing a disclosure order, the court ensures the opposing party has the opportunity to be heard.

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[406] Decreto Legislativo 19 January 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea, in *GU* n.15 del 19-01-2017.

If a party refuses, without justified reason, to comply with a disclosure order or fails to fulfil it, the court imposes an administrative monetary sanction (fine) ranging from €10,000 to €100,000, payable to the '*Cassa delle Ammende*' (Penalties Fund). This sanction also applies when a party or a third party destroys evidence relevant to the case. In addition, if a party unjustifiably refuses to comply with a disclosure order, fails to fulfil it, or destroys relevant evidence, the court, after considering all available evidence, may deem the facts to which the evidence pertains as proven.

The legislation also addresses the potential need for court-appointed experts, with a focus on cost allocation. Unless specific reasons justify otherwise, the obligation to advance costs and provide an initial payment for the expert's compensation is assigned to the defendant. Failure to comply with this obligation does not constitute grounds for the expert to decline the assignment.

V. Funding collective actions

In transposing the RAD, Member States are required to take steps to ensure that the costs associated with representative actions do not prevent qualified entities from effectively pursuing these actions. The RAD outlines several potential measures to achieve this, including the provision of public funding, structural support for qualified entities, caps on court or administrative fees, and access to legal aid. Furthermore, Member States have the option to permit third-party funding of representative actions for redress.

In Italy the transposition of the Directive has introduced some specific features, largely in line with the regulation of collective proceedings under the CPC These include provisions for calculating lawyers' fees, setting a cap on court fees ('*contributo unificato*'; unified contribution), and allowing for third-party funding of representative actions.

1. Lawyers' fees and common representative's fee

The Italian prohibition on contingency fee agreements, or *patto quota lite*, which prevents lawyers from receiving a percentage of damages awarded to their clients in successful cases, has reduced the attractiveness of collective or representative actions for legal professionals. This is because the time and effort involved in managing complex procedures did not seem justified by proportional rewards. While the RAD no longer explicitly bans contingency fees, they remain controversial in many EU civil law countries, including Italy, where they are seen as encouraging vexatious litigation and unscrupulous legal practices.[407] Consequently, contingency fees are prohibited in Italy, meaning alternative funding methods must be sought to support representative actions. To address this issue and incentivise lawyers to engage in collective actions despite the ban on contingency fees, Italian Law 31/2019 introduced a reward fee for the lawyers and the common representative (*rappresentante comune degli aderenti*) (see *supra* II.5) involved in collective actions. The delegated judge, when ordering the respondent to pay the sums or deliver the goods owed to each class member as compensation or restitution, also orders the respondent to directly pay the common representative of the members a fee determined progressively based on the number of class members as follows: a) from 1 to 500 members, not exceeding 9%; b) from 501 to 1,000 members, not exceeding 6%; c) from 1,001 to 10,000 members, not exceeding 3%; d) from 10,001 to 100,000 members, not exceeding 2.5%; e) from 100,001 to 500,000 members, not exceeding 1.5%; f) from

[407] H. L. Buxbaum, 'Class Actions, Conflict and the Global Economy', 21-2 *Indiana Journal of Global Legal Studies*, 585 (2014), at 590.

500,001 to 1,000,000 members, not exceeding 1%; g) over 1,000,000 members, not exceeding 0.5%. These percentages are calculated on the total amount owed to all class members. However, these percentages may be adjusted by decree of the Minister of Justice. Reimbursement of documented expenses incurred is also due. The court may increase or reduce the fee determined according to the above progressive scale by up to 50%, based on the following criteria: a) the complexity of the assignment; b) the involvement of assistants; c) the quality of the work performed; d) the promptness with which the activities were carried out; e) the number of class members.

In the same order, the delegated judge also directs the respondent to directly pay the lawyer representing the claimant until the ruling on the merits an additional amount beyond the sums owed to class members as compensation or restitution. This additional amount, awarded as a success fee, is determined following the rules outlined above. While this provision aims to provide financial incentives for lawyers, it also includes a cap on fees. The court has the authority to reduce the reward fee by up to 50% -based on the criteria specified above-, but it cannot increase it.[408]

This reward system is also applied under the new regime for representative actions, maintaining the same structure to encourage legal professionals to take on collective cases. If a representative action is successful, the defendant must pay the claimant's lawyer a "success fee" in addition to the usual fees, based on the total compensation owed to the class members. However, this provision has faced criticism, particularly from trade associations, who argue that it unfairly burdens defendants. Some also view the reward mechanism as punitive, which is a departure from the primary focus on compensation in the Italian legal system.[409] Additionally, critics worry that it could prompt lawyers to pursue representative actions more aggressively, even in cases where it may not be entirely appropriate. A closer examination of the broader legal framework, however, minimizes these concerns. The economic incentives provided by the reward system, the limitations on fee increases, and the judge's ability to reduce fees (but not increase them) all mitigate the potential for abusive behaviour.[410] The reward system appears rather insufficient to fully motivate lawyers given the resources (especially in terms of time and money) to pursue a representative action compared to the potential economic benefits.

2. Court fees

Court costs are fixed amounts established by law. Specifically, under Article 13, par. 1, of Presidential Decree No. 115 of May 30, 2002[411], the unified court contribution is due in the following amounts:

a) €43 for cases valued up to €1,100, as well as cases concerning mandatory social security and assistance disputes (except as provided by Article 9, paragraph 1-bis, for joint applications under Article 473-bis.51 of the Code of Civil Procedure);

b) €98 for cases valued above €1,100 and up to €5,200, voluntary jurisdiction cases, as well as contentious proceedings under Article 473-bis.47 of the Code of Civil Procedure and special proceedings under Book IV, Title II, Chapter VI, of the same Code;

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[408] Art. 840-*novies* CPC.

[409] *Contra* see C. Consolo, 'L'azione di classe di terza generazione', in V. Barsotti, F. De Dominicis, G. Pailli, V. Varano eds, *Azione di classe: la riforma italiana e le prospettive europee*, (Torino: Giappichelli, 2020), at 28.

[410] C. Consolo, 'L'azione di classe di terza generazione', in V. Barsotti, F. De Dominicis, G. Pailli, V. Varano,eds, *Azione di classe: la riforma italiana e le prospettive europee*, (Torino: Giappichelli, 2020), 28–29.

[411] Decreto del Presidente della Repubblica, 30 May 2002, n. 115, Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia, in *GU* n.139 del 15-06-2002 - Suppl. Ordinario n. 126.

c) €237 for cases valued above €5,200 and up to €26,000, as well as contentious cases of indeterminate value under the exclusive jurisdiction of the justice of the peace;

d) €518 for cases valued above €26,000 and up to €52,000, as well as civil cases of indeterminate value;

e) €759 for cases valued above €52,000 and up to €260,000;

f) €1,214 for cases valued above €260,000 and up to €520,000;

g) €1,686 for cases valued above €520,000.

Pursuant to Article 140-*quaterdecies*, in the case of a representative action, the unified court contribution is reduced by half.

3. Allocation method for legal costs: Loser-pays principle

In the consumer representative action, the allocation of legal costs follows the principle of "loser pays", meaning that the party who loses the case is responsible for covering the costs of the proceedings, including court fees, expert costs, and legal fees. qualified entities assume the financial burden of the representative procedure, ensuring that consumers are not liable for these costs. Individual consumers can only be ordered to reimburse the respondent's expenses if the case is unsuccessful and the expenses were incurred as a result of the consumer acting in bad faith or with gross negligence.[412] Moreover, Article 140-*novies*, par. 2, Consumer Code provides that the court shall determine a modest contribution in accordance with Article 840-*sexies*, par. 1, l. h) of the Civil Procedure Code. The requirement for a contribution aims to implement Article 20(3) RAD. In particular, in the judgment approving the collective action, the judge determines, where necessary, the amount to be paid by each class member as a contribution to a fund for expenses and specifies the payment methods.[413] In line with the requirement of modesty of the contribution, the rule excludes the application of the third paragraph of the same Article 840-*sexies* of the Civil Procedure Code, which grants the judge the power to request, at any time, an additional payment from each participating member to supplement the expense fund.

4. Third party funding

In Italy, the entry of litigation funders into the national legal services market, particularly for cases involving significant costs and potentially high financial returns, remains largely unregulated. The Italian legislation transposing the RAD explicitly allows the use of third-party litigation funding (TPLF) for consumer representative actions, introducing only minimal safeguards to prevent conflicts of interest and ensure transparency. These measures, aligned with the RAD, include requirements to disclose funding arrangements and restrictions on funding sources, such as excluding competitors or employees of the defendant. In particular, in adherence to the principle of transparency, the qualified entity initiating representative action must disclose any funding received or promised by third parties (Art. 140-*septies*, par. 5, Cons. Code). A key ground for inadmissibility arises if the funder is a competitor of the defendant or dependent on the defendant. In such cases, the court grants the qualified entity a deadline within which to reject or amend the funding arrangement. Failure to comply within this timeframe will result in the action being deemed inadmissible (Art. 140-*septies*, par. 8, lit. e) Cons. code).

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[412] Art. 140-*novies*, par. 3, Cons. Cod.

[413] Art. 140-*novies*, par.2, Cons. Cod- art. 840-sexies, par. 1, lit. h) CPC.

Under the Directive's implementation, TPLF is formally recognised as a potential means of financially supporting litigation. However, while TPLF could improve consumer access to justice, concerns persist about its viability in the context of representative actions. To date, there are no known practical applications of TPLF in either collective or representative actions in Italy. Legal scholarship has instead focused on identifying potential flaws that may render the instrument unattractive or ill-suited for these types of proceedings. The combination of procedural constraints and limited financial incentives has led to speculation that TPLF may struggle to gain traction in the Italian legal landscape, with particular regards to consumer litigation. In particular, scholars have noted that many remedies offered under the RAD – such as repair, replacement, price reduction, contract termination, or reimbursement – do not align with the monetary returns typically sought by funders.[414] Additionally, consumers can easily join representative actions through a simple online process, either early or late in the proceedings, without being required to pay a success fee upon resolution. Importantly, consumers cannot be forced to accept a funding agreement as a condition for participating in the action, leading to a serious free-rider problem.[415] Against this backdrop, legal scholarship has identified two additional more general obstacles. The first is procedural, linked to the opt-in mechanism governing class membership, which may affect the efficiency of collective actions and, ultimately, the amount of compensation awarded. The second is substantive, stemming from the absence in the Italian legal system of a principle allowing for the awarding of punitive damages – an aspect that significantly reduces the potential profit margins for funders.[416]

As a result, the practical appeal of representative actions for third-party funders appears limited. This leaves the issue of how to effectively finance such proceedings unresolved at the national level.

VI. The first redress actions stemming from the RAD transposition

The Associazione CODICI – Centro per i Diritti del Cittadino (Association CODICI - Centre for the Rights of the Citizen), through a claim filed before the Tribunal of Genoa, initiated a representative action under Articles 140-ter ff. Cons. Code. The action, directed against Costa Crociere S.p.A., pertains to the modification of the itinerary of the cruise "7 Giorni da Kiel" held from August 4 to 11,

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[414] A. Standler, 'Are class actions finally (re)conquering Europe? Some remarks on Directive 2020/1828', 30 *Juridica International* 14 (2021). Moreover it has been suggested that: "It remains to be seen, however, whether in practice there will be much appetite on the part of qualified entities to seek external funding; indeed, the not-for-profit nature of these entities makes their seeking external funding somewhat unlikely (and frowned upon in some jurisdictions) and would probably require some elaborate financial engineering to achieve", D. Fairgrieve, 'Collective redress in Europe: Moving forward or treading water?', 71 *International and Comparative Law Quarterly* 465 (2020), at 476.

[415] G. Afferni, "Bundling of claims by way of assignment in Italy", 2 *Mass Claims* 30 (2022), who, with reference to collective actions – but whose considerations can also be applied to representative actions – emphasizes that: "In particular, by allowing victims to opt-in directly in court, it enables free-riding on the expense of the claimant that has anticipated the costs of litigation and bore the risk that the case is lost (because of the loser pays rule). Indeed, the new collective action regime specifically provides that the lawyer of the claimant may be awarded a success fee equal to a percentage of the total amount of damages awarded to the claimant and to all victims that have opted in the action. However, this success fee is not sufficiently high to allow law firms to engage a third-party litigation funder. Therefore, it may be expected that the new Italian collective action regime will be used only for infringements that have caused a sufficiently high individual damage and that are not too costly to litigate".

[416] M.C. Paglietti, 'Il mercato delle controversie. Il third party litigation funding come strumento di finanziamento responsabile dell'accesso alla giustizia, *Banca Borsa Titoli di credito* 821 (2023), at 844 and 845.

2023, aboard the vessel Costa Firenze, due to adverse weather conditions along the western coast of Norway. By order dated October 23, 2024 (RG No. 4482/2024), the Tribunal declared the action admissible, specifying that all purchasers of the abovementioned travel package between August 4 and 11, 2023, are included in the class and may join the action within 150 days from the publication date. The first hearing has been scheduled for May 8, 2025, at 12:00 PM.[417]

Moreover, in July 2024 Altroconsumo launched a class action against Verisure alleging that consumers were misled into believing they were purchasing the Verisure alarm system, when in reality it was only a loan. The action was concluded with a settlement at the beginning of 2025.[418] Besides, as over 170,000 owners of Citroën C3 and DS3 models in Italy were left unable to use their cars for months due to delays in the replacement of defective airbags by the manufacturers, Altroconsumo has filed a class action against Stellantis N.V. and PSA Italia S.p.A. to seek compensation for affected consumers, requesting €1,500 in non-pecuniary damages and €17.24 per day for delayed replacements.[419]

VII. Conclusion

Over the past 15 years, collective actions in Italy have made notable progress, yet they remain far from reaching a decisive breakthrough. Representative actions play a crucial role in strengthening private enforcement of consumer law, especially in addressing dispersed, low-value damages. Despite the transposition of the Representative Actions Directive into Italian law, the conservative stance adopted by the government has impeded significant advancements. The decision to adhere to the regulatory framework introduced by the 2019 reform, while understandable given its recent implementation, casts doubts on the effectiveness of the new system. Consistent with Italy's traditional “self-restraint” approach, the opportunity to create a unified legal framework for collective actions was set aside. Instead, a dual-track system has been adopted: national and cross-border representative actions are governed by the Consumer Code, while collective proceedings are regulated under the Civil Procedure Code. Although these two systems share commonalities, they are not fully aligned. For instance, general class actions under the Civil Procedure Code are designed to protect homogeneous individual rights in any matters, whereas representative actions under the Consumer Code focus on safeguarding collective consumer interests in specific areas. Furthermore, the Consumer Code adopts a broader definition of defendants, extending to “traders,” unlike the Civil Procedure Code, which targets companies and entities managing public services or utilities.

A major concern arises from the potential overlap between these frameworks. Despite Article 140-ter, par 2, Cons. code specifying that only qualified entities may initiate representative actions for matters covered by Annex II-*septies* of the Cons. code, this provision does not entirely eliminate the risk of courts addressing identical legal issues under distinct frameworks. For instance, individual consumers or ad hoc groups cannot initiate representative actions but retain the right to file collective actions under Law 31/2019, even for matters regulated by consumer representative actions. This dual-track system could lead to fragmented litigation, undermining one of the primary

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[417] https://www.mimit.gov.it/it/mercato-e-consumatori/tutela-del-consumatore/class-action/azioni-rappresentative-nazional.

[418] https://www.altroconsumo.it/azioni-collettive/class-action-verisure.

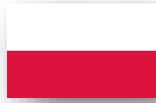
[419] https://www.altroconsumo.it/azioni-collettive/class-action-airbag-citroen

benefits of collective actions – preventing repetitive or serial litigation – and increasing the risk of conflicting judgments.

The failure to establish a unified framework consistent with the RAD principles has also precluded a reassessment of general collective actions and the exploration of more ambitious reforms. A unified system could have facilitated a shift from the opt-in to the opt-out model or introduced hybrid mechanisms, striking a balance between the two for domestic collective and representative actions.

Finally, a persistent challenge lies in financing representative actions. The Italian implementation adequately does not address this issue. The reduction of court fees or the possibility to rely on access to legal aid[420] seem inadequate in tackling the funding challenge, as court fees and lawyer fees represent only a fraction of the overall costs involved in a representative action. Although TPLF has been cited as a potential solution, the regulatory environment surrounding representative actions in Italy makes TPLF involvement highly unlikely (see *supra* V.4). Moreover, the fee structure for lawyers (reward mechanism) remains insufficiently attractive to incentivize legal professionals to engage in representative actions.

[420] Pursuant to Article 119 of DPR 115/2002, non-profit organizations that do not engage in economic activities – such as the qualified entities in question – may also be eligible for state-funded legal aid, provided the necessary conditions are met.



D. POLAND

Jagna Mucha

I. Introduction

Transposition of Representative Actions Directive (EU) 2020/1828 ('RAD') into the Polish law influences both the private and public enforcement of consumer law. Before the implementation of RAD, both paths of enforcement functioned simultaneously, however, with a very clearly established allocation of roles.[421] On the private path of law enforcement, consumers sought redress in civil proceedings before courts either in individual or group proceedings (a Polish style of collective redress). Collective redress was sought by way of the legislative framework outlined in the Act of 17 December 2009 on Pursuing Claims in Group Proceedings (in Polish: *Ustawa z dnia 17.12.2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*), (hereinafter referred to as the 'Act on Group Proceedings').[422] Public enforcement of collective consumer interests was executed by administrative proceedings conducted by the Polish President of the Office of Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów, UOKiK,* hereinafter referred to as the "President of UOKiK") – an administrative authority responsible for implementing consumer protection policy. As a central governmental authority, it acts in the public interest and institutes proceedings concerning practices involving infringement of collective consumer rights as well as cases concerning the classification of clauses in standard agreements as abusive.[423] Thereby, actions for injunctions stipulated under Directive 2009/22/EC were at the discretion of the President of UOKiK. This authority was the only entity recognised as a qualified entity entitled to start the injunction proceedings, and, at the same time, it issued decisions on the injunction.[424]

After RAD was implemented in Poland, this strict private and public division of consumer law enforcement became blurred. In addition to the existing private and public split, the mechanism of consumer representative actions has been added on the top of the existing scheme. This mechanism is placed mainly within the use of private enforcement since, in Poland, the representative entities pursue claims in the course of group proceedings before courts. The administrative authority – the President of UOKiK – maintains his competence to initiate injunctive proceedings as well as to issue decisions on injunctions, and, at the same time, it receives some critical competencies in representative proceedings. At present, the President of UOKiK runs the

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[421] M. Jagielska, *Collective Redress and Consumer Enforcement in Poland: Why Doesn't It Work?*, [in:] R. Simon, H. Mullerowa (eds.), Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?, Praha 2019, p. 39.

[422] Act of 17 December 2009 on Pursuing Claims in Group Proceedings, (Journal of Laws 2010, No. 7 Item 44 with further amendments), hereinafter referred to as Act on Group Proceedings.

[423] Act of 16 February 2007 on Competition and Consumer Protection, (Journal of Laws 2007, No. 50, Item 331 with further amendments), hereinafter referred to as 'the ACCP'.

[424] J. Mucha, *Public Enforcement of Consumer Law in Poland: Mission Impossible?*, Krytyka Prawa. Niezależne Studia nad Prawem, Vol. 13 No. 2, 2021, p. 35.

register for qualified entities and controls the fulfilment of requirements specified for the representative entities under RAD. Currently the actions for injunctions can be brought both by the President of UOKiK in administrative proceedings and by representative entities before courts.

This country report discusses the national legal provisions and domestic case law in Poland and their impact on collective redress actions in Europe. It starts with providing the overview of the legislative framework set forth in the Act on Group Proceedings, including the latest changes in consumer representative actions introduced by the implementation of RAD. Secondly, it analyses how the group proceedings operate in general. Further, it focuses on three particular issues: (1) the viability of collective actions related to immaterial damage, (ii) discovery and burden of proof in group proceedings, and (iii) costs and the financing of redress actions.

II. Overview

RAD leaves it to the discretion of the Member States whether to design the procedural mechanism for consumer representative actions as a part of an existing or as part of the new procedural mechanism for collective redress. Since in Poland the collective redress system has operated for 15 years already, the new mechanism of consumer representative action provided by RAD was combined with the existing structure of collective redress.[425] After several governmental proposals, RAD was finally transposed into Polish law by way of the Act of 24 July 2024 amending the Act on Group Proceedings and other Acts[426] (hereinafter referred to as the 'Act Amending the Act on Group Proceedings' or 'the new law'), which came into force on 29 August 2024. Requirements for qualified entities are specified by the Act of 16 February 2007 on Competition and Consumer Protection[427], (hereinafter referred to as 'the ACCP'). Additionally, provisions regarding costs of consumer representative actions are included in the Act of 28 July 2005 on Court Costs in Civil Cases.[428]

1. Competent courts

Under Article 3 of the Act on Group Proceedings, the higher district courts (*sądy okręgowe*) are competent for adjudicating cases in group proceedings. Their competence in this field is irrespective of the value of the individual claims or the aggregated value of the collective claim. The cases are adjudicated by the court composed of three judges. The judgment of the district court is subject to appeal to the court of appeal (*sąd apelacyjny*) and further to the Supreme Court (*Sąd Najwyższy*). Currently, there are 47 higher district courts in Poland competent for adjudicating cases in group proceedings in the first instance and 11 courts of appeal.[429] The competence of the courts mentioned above remains relevant for consumer representative actions.

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[425] For details on different implementation scenarios see: J. Mucha, *Sipping the Enforcement Cocktail. Polish Misadventures in Implementing the Representative Actions Directive (RAD*), European Journal of Consumer Law (R.E.D.C) No. 2, 2024, p. 335.

[426] Act of 24 July 2024 amending the Act on Pursuing Claims in Group Proceedings and Other Laws, (Journal of Laws, 2024 No. 1237), hereinafter referred to as Act Amending the Act on Group Proceedings.

[427] Act of 16 February 2007 on Competition and Consumer Protection, (Journal of Laws, 2007, No. 50, Item 331 with further amendments), hereinafter referred to as 'the ACCP.'

[428] Act of 28 July 2005 on Court Costs in Civil Cases, (Journal of Laws, 2005 No. 167 Item 1398 with further amendments).

[429] Regulation of the Polish Ministry of Justice as of 28.12.2018 on establishing seats and jurisdictions of the courts of appeal, district courts and regional courts and the scope of adjudication, (Journal of Laws 2021, Item 1269 with further amendments).

2. Scope of application

The scope of application of the Act on Group Proceedings is not limited to consumer claims only. In line with Article 1 section 2 of the Act on Group Proceedings, collective actions can be brought in product liability claims, tort liability claims, claims for liability for non-performance or improper performance of a contract, and unjustified enrichment claims, as well as in all other matters that refer to consumer claims. The Act excludes claims for the protection of personal interests from its scope, except for personal injury claims.

Implementation of RAD by the Act amending the Act on Group Proceedings extends the scope by adding to the existing scheme actions for an injunction (to cease traders' infringements of collective consumer interests) and actions for redress measures (to remedy traders' infringements of collective consumer interests), which are later referred to as "consumer representative actions" within the meaning of RAD. Collective consumer interests are defined as the general interests of consumers and, in particular, for the purposes of redress measures, the interests of a group of individual consumers. Infringement of the latter shall be understood as an infringement of the provisions of the EU law referred to in the Annex I to RAD.

It is not entirely clear whether a collective claim might still be brought on behalf of consumers in line with the provisions referring to "all consumer claims" within the Act on Group Proceedings if the infringement of collective consumer interests does not refer to any provisions of the EU law referred to in Annex I to the RAD. However, since there is no explicit restriction in this respect, it seems that group members and municipal consumer ombudsmen could still bring collective actions for pursuing all types of consumer claims within the old system of group proceedings.

3. Group representative

Collective action can be brought on behalf of a group by a group representative – either a group member, a municipal consumer ombudsman, or the Financial Ombudsman. A group representative is a party to the proceedings and, except for the Financial Ombudsman, it must be represented by a legal attorney. Apart from the above-mentioned entities entitled to start collective actions, the Act amending the Act on Group Proceedings adds the possibility of consumer representative action to be brought by qualified entities – registered by the President of UOKiK in line with the criteria specified in the new law. It mentions only one authority that shall be recognised as a qualified entity *ex lege* – namely the Financial Ombudsman – in terms of proceedings started on behalf of financial consumers.[430]

a) Group member

Article 4 (2) of the Act on Group Proceedings provides that a group proceeding may be initiated by a group member acting as a group representative (a claimant). In such cases a claimant must be represented by a legal attorney, and is obliged to provide the court with the agreement between the claimant and the attorney stating the amount of the attorney's fees. The claimant is also obliged to pay court fees, in line with the rules explained in point VI of this Country Report. Since the last amendment to the Act on Group Proceedings does not exclude the group member from representing consumers in "all matters that refer to consumer claims", it seems that the group member can currently act as a claimant on behalf of consumers opting in such group proceedings.

[430] Some constitutional doubts in this regard have been presented recently, see: A. Trzaska- Śmieszek, M. Osmęda, *Uprzywilejowany Rzecznik Finansowy*. Rzeczpospolita, 3.9.2024, electronic resource: https://www.rp.pl/rzecz-o-prawie/art41064921-agnieszka-trzaska-smieszek-magdalena-osmeda-uprzywilejowany-rzecznik-finansowy.

b) Municipal consumer ombudsman

The Polish law provides a unique scheme for several regional consumer ombudsmen. One of their tasks is to support consumers seeking redress in group proceedings.[431] According to the Act on Group Proceedings, the ombudsman may act as a group representative in consumer claims as a claimant. It is fundamental that in such a case, the group is exempt from court fees, which is particularly important, considering that legal costs are a significant barrier preventing the consumers from pursuing consumer claims in court.

It should be noted that the municipal ombudsman is not obliged to take action on behalf of consumers; it is only her or his power, which does not have to be used. In practice, various ombudsmen have different attitudes towards group proceedings. Some of them tend to agree to take on the role of group representative, and some others consistently refuse to participate in any proceedings. This is related not only to the ombudsman's personal beliefs about the appropriateness of such proceedings and the success of such litigation but, more importantly, to the human and financial resources necessary to participate in the proceedings. Unfortunately, the institution of the municipal consumer ombudsman in Poland is undercompensated, and it constantly lacks sufficient human resources. It must be underlined that the representation of consumers in group proceedings is only one of many tasks of this institution.

Experience shows that since the Act on Group Proceedings entered into force, seven municipal consumer ombudsmen have represented consumers in 17 group proceedings in total, representing a total of more than 10,000 consumers. The highest activity in this regard has been manifested by the Municipal Consumer Ombudsman in Warsaw, who represented consumers in 8 group proceedings (2 cases against mBank S.A.[432], 1 case against Spółdzielnia przy Metrze S.A.[433], 2 cases against Towarzystwo Ubezpieczeń na Życie Europa S.A.[434], 1 case against Towarzystwo Ubezpieczeń Aegon S.A.[435], 1 case against BZWBK S.A.[436]). In addition, Municipal Consumer Ombudsman in Warsaw represented consumers in a case against Getin Noble Bank S.A. where a settlement was reached at the stage of pre-trial proceedings.[437]

Quite surprisingly, under the Act amending the Act on Group Proceedings, municipal consumer ombudsmen, which have so far been the most active organisations bringing collective actions, are not deemed *ex lege* as qualified entities within the meaning of RAD. They remain competent to represent consumers in “all matters that refer to consumer claims”. However, it is questionable whether they will apply to be recognised additionally as qualified entities within the meaning of RAD and to be registered by the President of UOKiK.

c) Financial Ombudsman

In 2023, the Financial Ombudsman was granted a right to represent consumers in group proceedings instituted as a result of the claims brought against the financial market service providers. It might be expected that this institution will take over the role played by the municipal

[431] Possibility of bringing court actions on behalf of consumers is only one of many tasks of municipal consumer ombudsman, see: Article 42 of the ACCP.
[432] Group proceedings before District Court in Łódź, court file no. I C 1219/20 (previously I C 519/16); group proceedings before District Court in Łódź, court file no. II C 1693/10.
[433] Group proceedings before District Court in Warsaw, court file no. III C 976/12.
[434] Group proceedings before District Court in Warsaw, court file no. I C 464/16; group proceedings before District Court in Warsaw, court file no. XXIV C 709/15.
[435] Group proceedings before District Court in Warsaw, court file no. III C 1322/13.
[436] Group proceedings before District Court in Wrocław, court file no. I C 976/17.
[437] https://um.warszawa.pl/-/miejski-rzecznik-konsumentow-a-spor-zbiorowy-z-jednym-z-bankow.

consumer ombudsman in this area. Since the Financial Ombudsman's competence is relatively new, the authority has brought only two collective actions, and both proceedings have not been certified.[438] The District Court in Warsaw rejected the first case because the defendant had no judicial capacity – the Financial Ombudsman sued the Polish branch of the foreign trader.[439] There has been no court decision on the certification of the second case so far – the proceedings are still pending.

The Financial Ombudsman has some experience when it comes to supporting consumers pursuing claims because it is entitled to express a reasoned opinion (or so-called "important view") in consumer cases – both in the individual and group proceedings. Practice shows that, although the Financial Ombudsman's opinions are not binding on the court, due to their specialist nature, they are essential substantive and supportive material for the courts.[440] In subsequent years of the Financial Ombudsman's activity, one can observe a steady increase in the number of requests for an important view submitted by the claimants.[441] Interest in this form of institutional support is particularly evident in cases involving loans denominated or indexed to the Swiss franc. It should be noted, however, that the Financial Ombudsman expressed the vast majority of positions in the course of individual and not group proceedings. To date, the entity has exercised its authority to express its position in cases involving claims asserted in group proceedings a few times only. Most of the important views issued during these proceedings concerned claims arising from contracts concluded with insurance companies. Only one view was expressed for a pending group proceeding against a bank acting as a defendant.[442] Five group proceedings in which the Financial Ombudsman issued an important view ended in favour of the claimant (either by a judgment or settlement). Notably, in all of these cases, the groups were represented by the municipal consumer ombudsman, and this representative entity requested the Financial Ombudsman to issue an important view in those cases.

So far, the Financial Ombudsman is the only public authority recognised as a qualified entity entitled *ex lege* to bring consumer representative actions within the meaning of RAD.

d) Qualified entity entitled to bring consumer representative actions

To be recognised as a qualified entity, the applicant must prove compliance with statutory criteria and apply to the President of UOKiK, who is responsible for maintaining the register of qualified entities in Poland. Requirements for qualified entities entitled to bring consumer representative actions are specified under Article 46h of the Act on Competition and Consumer Protection, hereinafter referred to as 'the ACCP,' which directly repeats the provisions of RAD in this respect. In order to be recognised as a qualified entity, the applicant must fulfil the following criteria: it shall be a legal person; in its statutory purpose it demonstrates that it has a legitimate interest in protecting consumer interests in line with Annex I to RAD; it can demonstrate 12 months of actual

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[438] First collective action was brought by Financial Ombudsman against TF Bank AB S.A. in Warsaw, see: https://rf.gov.pl/komunikat-rzecznika-finansowego-w-sprawie-wniesienia-pierwszego-pozwu-grupowego-przeciwko-tf-bank-ab-s-a-w-sprawie-kredytowania-zakupu-pomp-ciepla/ and the second collective action was brought by Financial Ombudsman against Noble Securities S.A., see: https://archiwum.rf.gov.pl/2024/02/02/rzecznik-finansowy-sklada-powodztwo-w-postepowaniu-grupowym-przeciwko-noble-securities-s-a/.

[439] Representative action was rejected by District Court in Warsaw, court file no. I C 31/24.

[440] A. Jurkowska-Zeidler, Aktualne problemy ochrony klienta na rynku bankowym z perspektywy działalności rzecznika finansowego, Gdańskie Studia Prawnicze, 2018, Vol. 39, p. 35.

[441] Reports on activity of Financial Ombudsman in 2015-2022 are available online: https://rf.gov.pl/o-nas/sprawozdania/ (access 10.10.2024).

[442] Group proceedings pending before District Court in Gdańsk, file no. I C 280/18; reasonable opinion no. RF/WBK/POG/630/2018.

public activity in the protection of consumer interests prior to its request for designation; it is not the subject of insolvency proceedings and is not declared insolvent; it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers; it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria listed above and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities. The same criteria are to be followed for qualified entities to bring national and cross-border collective actions.

An act amending the Act on Group Proceedings does not mention any consumer organisation or foundation or any other public body representing consumer interests in representative actions other than Financial Ombudsman to be recognised *ex lege* as a qualified entity. Currently, there are 19 active consumer organisations in Poland that may be potentially interested in being recognised as representative entities.[443] They are free to decide whether they want to apply to be registered. It might be expected that in the case of a lack of proper funding and human resources, consumer organisations and foundations will not be interested in being recognised as qualified entities. This seems to be a pretty likely scenario since in the justification for the Act amending the Act on Group Proceedings, it is stated that new mechanism of consumer representative actions will not cause any additional costs for the national budget, in the disposition of the President of the UOKiK. This means that at this moment, no extra funds have been provided for the operation of the qualified entities.

e) The President of UOKiK entitled to bring actions for injunctions

It has been explained above that consumer representative actions – both for injunctive and redress measures – can be brought by qualified entities before courts. At the same time, the actions for injunction can also be brought by the President of UOKiK (within administrative proceedings). However, there is a clear priority of actions for injunctions brought by the public authority within administrative proceedings over representative actions before the courts. The President of UOKiK recently stated that the latter would complement public enforcement.[444]

This mechanism creates a risk that, in the case of a lack of flow of information, the two actions for injunctions against the same trader can be brought simultaneously on both enforcement paths. To avoid such risk, the Act Amending the Act of Group Proceedings provides the system in which the representative entity is obliged to notify the President of UOKiK of its intent to bring consumer representative action for injunction. A representative entity is obliged to provide information about the kind of claim, the trader against which the action will be brought, demands in the statement of claim, as well as circumstances justifying representative action, including a description of the infringement, its duration, the social, economic, or legal consequences of the infringement, and the legal norms which the trader infringed. As a result of such notice, within 30 days (or in particularly justified cases 3 months of the notice), the President of UOKiK shall inform the qualified entity whether administrative proceedings for injunction are pending against the same trader committing the same infringement of collective consumer interests. This obligation considerably delays the commencement of the group proceedings by the representative entity and therefore it is

[443] President of UOKiK identified 19 consumer organizations which between 2016-2021 applied for funding (subsidy) on their activity in the field of the consumer protection.

[444] UOKiK, *Więcej praw dla konsumentów- nowe postępowania grupowe*, electronic resource: https://uokik.gov.pl/wiecej-praw-dla-konsumentow-nowe-postepowania-grupowe.

questionable whether such restriction is in line with RAD which provides that national rules should not hamper the effective functioning of representative actions.[445] The reply of the President of UOKiK shall be enclosed by the claimant in the lawsuit seeking action for injunction. If administrative proceedings against the same trader regarding the same infringement of consumer rights are pending, the court shall reject the claim.[446] The representative action shall not be rejected in the case of a one-stop-shop procedure, which is when the qualified entity seeks injunctive and redress measures in one proceeding.

4. The collective element

Act amending the Act on Group Proceedings specifies that group proceedings may be instituted on behalf of a group of at least 10 people. The Polish system of group proceedings is based on the opt-in model, in which all group members must submit a statement confirming their willingness to join the group. In line with the latest amendment, this requirement will not apply to representative actions limited to injunctive measures. This is justified by the wording of RAD, which states that for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented. As a side note, such reservation would not be necessary if Directive 2009/22/EC on Injunctions was implemented adequately in Poland and if the President of UOKiK was not a sole entity entitled to institute actions for injunctions.[447] According to the Act amending the Act on Group Proceedings, if a representative action involves injunctive and redress measures (a one-stop-shop procedure), then the requirement of at least 10 group members is still in place.

For a group action to be admissible, the collective action must be brought in the name of at least 10 people with claims of the same kind and with the same or a similar factual basis. In quite a revolutionary way, the Act amending the Act on Group Proceedings provides an exception to this rule. It states that in the case of representative actions, claims might also be based on the same or a similar legal basis (as an alternative to the same or a similar factual basis). This is a significant difference. Although the requirement of the same or a similar factual basis was considered one of the most serious obstacles to the efficiency of group proceedings; it was strictly interpreted by the judges adjudicating at the certification stage of proceedings. It has been heavily criticised as overly stringent, formalistic, challenging to implement, and even, according to some, going against the very nature of a class action procedure.[448]

Additionally, according to the general rule in cases concerning monetary claims, group proceedings are admissible only if the amount claimed by each group member has been made equal with the others (the so-called "commonality requirement" included in Article 2). This can be done in groups or sub-groups of at least two people. The commonality requirement is excluded for all consumer collective claims (including consumer representative actions), which shall facilitate the greater admissibility of collective claims for the benefit of consumers.

Alternatively, in cases concerning monetary claims, the suit may be limited to declaratory relief only. This situation occurs when the circumstances related to particular group members are so diverse

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[445] On controversies surrounding the parallel injunction model in Poland see: J. Mucha, *Sipping the Enforcement Cocktail. Polish Misadventures in Implementing the Representative Actions Directive (RAD)*, European Journal of Consumer Law (R.E.D.C) No. 2, 2024, p. 341.

[446] Article 10c (1) of the Act on Group Proceedings.

[447] J. Mucha, Nowy model ochrony zbiorowych interesów konsumenckich w UE i możliwości jego wdrożenia do prawa polskiego, Internetowy Kwartalnik Antymonopolowy i Regulacyjny, Vol. 8, No. 8, 2019, p. 13.

[448] M. Tulibacka, *Poland* [in:] Delivering Collective Redress. New Technologies, C. Hodges, S. Voet (eds.) Hart 2018, p. 38.

that it is impossible to fulfil the commonality requirement. When declaratory relief is awarded, each group member may start separate follow-up proceedings and pursue claims individually.

5. The redress action procedure

Act on Group Proceedings provides a four-stage course of proceedings that are characteristic of collective redress only.[449] It consists of: (i) certification, (ii) group formation, (iii) proceedings regarding the substance of the case, and (iv) enforcement.[450]

a) Phase 1 – Certification

The first stage of group proceedings is the certification of the claim. The proceedings start with a lawsuit brought by a group representative. This person can be a member of this group, the Financial Ombudsman, a regional (municipal) consumer ombudsman, the latter acting within its prerogatives (Article 4), or a consumer qualified entity. Initiation of the proceedings by a municipal consumer ombudsman, the Financial Ombudsman, or a consumer qualified entity is particularly beneficial for group members since these entities are not required to pay court fees, which are set as 2% of the value of the claim.

Group representative acts on behalf of the group as a claimant and, except of the Financial Ombudsman, it must be represented by a legal attorney. In the decision to certify the class action (decision on the admissibility of group proceedings), the court confirms that all requirements set for group proceedings have been fulfilled. It also contains information about the action, the class representative, arrangements concerning the remuneration of lawyers, and the names of class members who have joined so far (a minimum of 10 people). It can be (and in practice, almost always is) appealable. In case of negative verification of fulfilment of the requirements specified for group proceedings, the court rejects the action. In case of positive verification of the above-mentioned criteria in the court's final decision, the admissibility of the claim is not verified at the later stages of the proceedings. The final decision on certification ends the first phase of the proceedings.

b) Phase 2 – Group Formation

The second stage, known as group formation, follows the opt-in approach. It consists of notification of all potential group members about the group action in the manner most proper for a given case. In practice, for this aim, the court issues the order to publish information about the group proceedings in national or regional press. The court can also decide that no further notification is required if all potential group members joined the action already. To join the group, a potential member meeting the requirements needs to submit a written declaration to a group representative.

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[449] J. Mucha, From Recipe to Reality: The Polish Way of Collective Redress, ERA Forum, Springer, Vol. 25, 2024, p. 98.

[450] The course of group proceedings has been broadly discussed in the Polish literature. In Polish see: M. Rejdak, *Obowiązywanie w polskim porządku prawnym postępowania grupowego (ocena i perspektywa zmian)* Wydawnictwo IWS, 2019, p. 33; M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*. Wyd. 3, 2018 p. 75; M. Asłanowicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Legalis, CH Beck, 2019, (electronic resource), A. Laskowska-Hulisz, Postępowanie grupowe jako przykład pozakodeksowego sądowego postepowania cywilnego, Gdańskie Studia Prawnicze, 2022, Vol. 5 (27), p. 232; in English see: M. Tulibacka, *Poland* In: Hodges C, Voet S (eds), Delivering collective redress. New technologies, Hart, 2018, pp. 138; A. Trzaska, *Poland* In: Sanger C (ed.), The class action law review, Law Business Research Ltd., 2019, p. 155; J. Studzińska, *Protecting the interests of the group (collective) in the jurisdiction of courts of common pleas and the Supreme Court in Poland*, Krytyka Prawa, 2016, Vol. 8 (3), p. 162; V. Nekrosius and K. Flaga-Gieruszyńska, *The class action in Lithuania and Poland: History, experiences and lessons*, Review of Central and East European Law, 2021, Vol. 46, p. 241.

After the given time limit (not more than 3 months) passes, the court sets a deadline for the defendant to raise charges regarding the participation of the members in the group or subgroups. In monetary claims, the burden of proof regarding the group membership is on the claimant, whereas in other claims, it is sufficient to make the group membership presumable (Article 16). After the deadline for the defendant has expired, the court decides on who the group consists of. In its decision, the court specifies the names of the group members. The decision of the court regarding the group composition is also appealable. After it becomes final, it is impossible to opt out from the group.

c) Phase 3 – Judgment on merits

In the third part of the proceedings, the court adjudicates on the merits of the case. The proceedings end with a judgment in which the court decides in line with the claim or denies the claim in whole or in part, stating that it is not legitimate. At this stage, the court also issues a decision on the costs of the proceedings. In line with the Act, the agreement between the attorney and the claimant may have a form of success fee of a maximum amount of 20% of the amount awarded by the court to the claimant.

d) Phase 4 – Enforcement

A final court judgment, mentioning the group members and the value of their claims, is subject to execution title for pecuniary performance. In cases of non-pecuniary performance, a group representative (group member, Financial Ombudsman, municipal consumer ombudsman) or a qualified entity for consumer representative actions is entitled to apply for commencement of execution. If the non-pecuniary performance is not fulfilled within 6 months from the final court judgment and at the same time, the group representative or qualified entity does not apply for commencement of execution, each of the group members may apply for granting an enforcement clause to the writ of execution and to start the execution.

In case of a court judgment on the injunction, when the defendant does not comply with the judgment, the court may issue a penalty of up to PLN 5 000 000 (approximately €1 200 000), (lump sum) and additionally, PLN 50 000 (approximately €12 000) per each day of non-enforcing of the court judgments. The decision on penalties is subject to appeal to the court of appeal.

III. Data and analysis

One can assume that with almost 15 years of operation, Poland has gained sufficient experience, which enables us to reflect on the functioning of the law of group proceedings. It stems from the general statistical information of the Ministry of Justice that in 2013-2021, there were 319 collective claims submitted to the district courts in Poland. However, although the number of claims submitted to the courts seems promising, only a few cases reached the final phase of proceedings in which the court decided on merits.

1. Collective actions in numbers

Year	Brought	Processed				Remaining
		Altogether	Rejected	Denied	Returned	
2010	21	.	.	.	.	.
2011	37	21	4	-	11	20
2012	35	20	6	1	10	33
2013	22	26	5	6	5	29
2014	41	19	9	2	7	51
2015	32	31	9	2	7	52
2016	30	23	5	2	10	59
2017	16	27	6	3	4	48
2018	22	18	1	4	-	52
2019	16	25	1	2	8	43
2020	19	15	2	-	4	47
2021	28	12	4	1	3	63
IN TOTAL	319	237	52	23	69	

Collective claims in civil cases (court files C) in district courts in the first instance submitted between 2010 and 2021, Source: statistical information of the Polish Ministry of Justice.

The number of collective claims provided above does not respond to the number of initiated proceedings. The data refers to the number of collective claims submitted to all relevant courts. It includes information about the number of claims that were: (i) returned due to some formal deficiencies, (ii) rejected since they did not meet formal requirements for group proceedings, and (iii) denied since they lost the case. By the end of 2021, 63 cases remained, and we cannot state whether the group proceedings had been instituted.

The above-mentioned data suggests that from 2010 to 2021, 135 cases reached the final phase of proceedings in which the court decided on merits.[451] My research conducted in the District Court in

[451] This number results from the following calculation: 319-69-52-63= 135; 319 collective actions in total; 69 group actions returned; 52 group actions rejected; 63 group actions remaining (i.e. not being processed by the court so far). The column “altogether” represents all cases that have been processed in the given year. It does not only include rejected, returned, or denied claims but also claims that were settled in court or out-of-court, adjudicated for the benefit of the claimant, or suspended, for example, because of the bankruptcy of the defendant.

Warsaw confirmed that this assumption is incorrect.[452] The main reason for the discrepancy between the statistics of the Ministry of Justice and court practice is the recurrent problem of changing the court file numbers. For statistical reasons, each collective claim is counted as a separate case, however the practice shows that many of those court files refer to the same case. For example, the same group action against the bank PKO BP, submitted to the District Court in Warsaw, got as many as four court file numbers (I C 566/15, II C 693/15, III C 55/15, XXIV C 109/16).

Several facts cause this discrepancy between the above-mentioned statistics and the total number of proceedings in practice. Firstly, the court returns some collective claims due to formal deficiencies. As a result of the correction of formal defects (most likely such as payment of the court fees), exactly the same collective claims are resubmitted to the same court, but they are registered with a separate file number. Secondly, some collective claims are rejected by the court in the first instance because they do not meet formal requirements for group proceedings. Since the court's decision is appealable, claims might be admitted to the group proceedings by the court of the second instance. In such cases, the claims are submitted again to the same court in the first instance, and again, they are registered with a separate file number. Thirdly, the same situation occurs, then the proceedings is stayed after the commencement date (for example, due to the bankruptcy of the defendant). If the claim is resubmitted, it also gets a different court file number.

Consequently, research confirms that, in practice, the same collective actions are registered under different court file numbers. Therefore, analysing the Ministry of Justice's statistical information alone is insufficient to assess the reality of collective redress in Poland.

2. Official information bulletin of group proceedings

By way of the 2017 amendment to the Act on Group Proceedings[453], the official information bulletin of group proceedings under the auspices of the Ministry of Justice has been created. The bulletin includes information about the group proceedings that are still pending and those in which the court decided on merits. The purpose of the register is to provide information for potential group members who would like to opt-in to the pending or future group proceedings.[454] Additionally, information about the final judgments included in the register shall be useful for these individuals who could have been group members. Still, they did not receive proper information on pending proceedings. Based on the information about the historical court decisions, potential group members could compare their claims with the court findings and assess their chances of success in possible future group actions.

Contrary to expectations, the bulletin has a minimal (if any) value in practice, and it does not meet the needs of potential group members. The main reason for the failure is that the register is not updated, and therefore, it is not used by its target group. It is difficult to state whether such a delay in the updates in the register is caused by the fact that the courts do not promptly provide information to the Ministry of Justice or whether the authority itself is slow in implementing the

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[452] In the study, I examined 75 court files registered as a result of collective claims submitted to the District Court in Warsaw. It turned out that 10 out of 75 cases were returned to the claimants due to formal deficiencies. Consequently, the 65 civil law cases were initiated as a result of collective claims. However, only 30 collective claims were certified by this Court as admissible for group proceedings and some of them are still pending. Between 2013 and 2020, the District Court in Warsaw adjudicated on merits only in 11 group proceedings in total, including six judgments in which the court denied the claims and five judgements in which the claimants won the case.

[453] Act of 7.4.2017 Amending Several Acts with Aim at Enabling Pursuing Receivables, (Journal of Laws 2017 Item 933).

[454] Justification for the proposal of 2017 amendment to the Act on Group Proceedings, p. 88-89.

information in the system. The practice shows that information about the pending and future proceedings, which is vital for potential group members, is in practice distributed by the attorneys representing consumers. One of the Polish law firms dealing with group actions presents on its website and social media extensive information about group proceedings in which they took part, and they often provide anonymised judgments in these cases.[455] All in all, in practice potential group members are not even aware that the register of group proceedings exists in Poland.

The bulletin of group proceedings contains information about proceedings commenced on 1 June 2017 or later. Regrettably, it does not include information about historical proceedings, initiated by this date, which limits the register's application. It is disappointing given the fact that group proceedings in Poland are lengthy (a lot of proceedings started before 1 June 2017 are still pending) and that the number of group proceedings in total is relatively low. From the claimant-oriented perspective, it would be highly beneficial to include all of the proceedings commenced under the Act on Group Proceedings in the register. Having such a complete picture would allow us to assess the chances for success of future claims.

Moreover, the bulletin includes information that is required by the court to publish the decision on the commencement of group proceedings. This information includes, among others, the subject matter of the case. In practice, this requirement is understood differently by the different persons responsible for submitting information to the bulletin. For example, it mentions the case file no. I C 7/21 commenced before the District Court in Opole, which regards the financial claims. Regrettably, there is no information at all about what the case was about. Even though this case was closed by the final court judgment, it has not been published, and it is not possible to obtain information about the submitted claim. If the goal of the bulletin is to inform potential claimants about the pending or final proceedings for future similar claims, it is indispensable to broaden the scope of the register and provide information about the details of the case.

There is a vast disproportion between the number of collective actions submitted to the Polish district courts. There are some courts where group proceedings have never been initiated and the other with quite a significant amount of cases.[456] Currently, in the official bulletin, there is information about 16 district courts with 46 group proceedings (pending or closed) in total. This implies that more than two-thirds of Polish district courts, which are competent for adjudicating cases in group proceedings, have never faced this kind of proceedings.[457] The highest number of collective proceedings is commenced before the District Court in Warsaw – 20 group proceedings in total.

IV. Immaterial damage

1. Availability of immaterial damages

In line with general rules included in the Polish Civil Code, the compensation for immaterial damage (in Polish: *zadośćuczynienie pieniężne*) can be granted by the court in claims for the protection of

[455] An excellent portal dedicated to class actions in Poland (also available in English) is run by one of the Polish law firms: https://classaction.pl/en/homepage/.
[456] Currently there are 47 district courts in Poland competent for adjudicating cases in group proceedings in the first instance, see: Regulation of the Polish Ministry of Justice as of 28.12.2018 on establishing seats and jurisdictions of the courts of appeal, district courts and regional courts and the scope of adjudication, (Journal of Laws 2021, Item 1269 with amendments).
[457] https://www.gov.pl/web/sprawiedliwosc/lista-sadow-okregowych (accessed on 20.12.2024).

the personal interests of human beings.[458] Alternatively, if the personal interests are jeopardised, the injured person may demand payment of an adequate amount of money for a specific community purpose.[459] In specific types of infringements, only the cumulation of both measures is possible.[460] Additionally, if the claim for the protection of personal interests also has a material (pecuniary) nature, the claimant may be redressed based on general principles for financial loss (in Polish: *odszkodowanie*) and to claim, for example, costs of medical treatment. Specific personal interests are listed in Article 23 of the Civil Code, and they include, but are not limited to, health, freedom, dignity, freedom of conscience, surname or pseudonym, image, the confidentiality of correspondence, the inviolability of the home, as well as scientific, artistic, inventive and reasoning activities. Moreover, compensation for immaterial damage can be granted in tort liability cases, when the immaterial damage is caused by exercising the power of official authority[461] or in personal injury cases[462].

Specific provisions that provide the possibility of compensation for immaterial damage, and are widely used in practice, are included in the Act of 24.11.2017 on Package Travels and Linked Travel Arrangements, implementing Directive 2015/2302[463] into Polish law. Since the EU law has a direct effect in Poland, compensation for immaterial damage can also be granted while directly applying Regulation 2004/261 on Air Passenger Rights[464] and General Data Protection Regulation[465].

2. Calculation of immaterial damages

There are no specific rules regarding the quantification of immaterial damage. The court calculates it *ad casum*, in view of general provisions, providing that the immaterial damage shall be adequate to compensate for the harm suffered (emotional or physical trauma, for example, pain and suffering) and that the amount of compensation is not connected to the financial loss.

In cases of breach of personal interests, the Polish Supreme Court stated that the amount of immaterial damage shall be adequate to the extent of the harm suffered.[466] To measure this harm, the court shall consider the intensity of suffering, its duration, the influence of the harm on the social life of the harmed person, and the irreversibility of the consequences of the damage. The amount of compensation shall be calculated given the circumstances of the case, in particular, the degree of fault of the infringer, the conduct of the victim/injured person, and his or her negative feelings relating

[458] Article 24, Act of 23.4.1964, Civil Code, (Journal of Laws 1964, No. 16, Item 93 with further amendments), hereinafter referred to as “Polish Civil Code.”

[459] For many years it was unclear whether under the general rule of Article 24 the injured person may claim both compensation for immaterial damage and payment for the specified community purpose. Currently, after the amendment of the Civil Code (as of 15.09.2023) the Polish word “lub” was changed for “albo” and there is no doubt that these measures cans be sought alternatively.

[460] Infringement of personal interests due to bodily injury or inducing a disorder of health, as well as cases of unlawful imprisonment or inducement by deceit, violence or abuse of relationship to perform an act of sexual indecency.

[461] Article 417 (2) Polish Civil Code, *op. cit.*

[462] Article 445 Polish Civil Code, *op. cit.*

[463] Act of 24.11.2017 on Package Travels and Linked Travel Arrangements, (Journal of Laws 2017, Item 2361), hereinafter referred to as “the Act on Package Travels”.

[464] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11.02.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJEU L 46 p.1.

[465] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJEU L 119 p.1.

[466] Polish Supreme Court, judgment of 30.7.2021 r., court file no. V CSKP 236/21.

to the breach of personal interests. The Polish Supreme Court stated that in exceptional circumstances only, the court may restrict the liability of the infringer for breach of personal interests based on common sense, considering the financial standing of the harmed person and the infringer. The court is entitled to calculate the immaterial damage based on its discretion, and this calculation can only be corrected by the court of appeal if the compensation amount is flagrantly inadequate to the level of suffering and harm.

A lot of attention is given to the calculation of immaterial damage in tort liability cases, including transportation injuries. Although there are no specific rules in this respect, the courts often adjudicate the amount of compensation considering the extent of the physical health impairment. Statistically, immaterial damages have been awarded between PLN 2 000 and 3 000 (approximately €475 to €715) per 1% of permanent health impairment.[467] This is, however, only an ancillary method toward the general principle of adequate compensation based on objective criteria.[468]

So far, the claims for immaterial damage in the digital context have not been common in Poland. In case law, one can find examples of cases relating to infringements of rights arising under the GDPR. However, the Polish courts are not very generous while awarding compensation for data breaches – the standard amount of immaterial damage is around PLN 1 000 to PLN 1 500 (approximately €240 to €350) for a single breach.[469] One of the highest compensations until now was adjudicated in the case against the State Treasury related to a data breach of the claimant – an assistant bailiff – whose data was not anonymised in the court judgment related to her disciplinary proceedings. In this case, the District Court in Warsaw awarded immaterial damage of PLN 20 000 (approximately €4 750), on the ground that the data breach affected the claimant's reputation.[470] However, the Warsaw Court of Appeal did not share this view. In the end, the amount of compensation was reduced to PLN 10 000 (approximately €2 400), since the claimant did not prove any influence of the data breach on her career.[471] Another relatively significant compensation was awarded by the District Court in Białystok to a developer whose data was disclosed in the public information bulletin.[472] The claimant unsuccessfully applied for the facility location permit. The local authority disclosed online his personal data and specific data on the planned investment, including the number of the land and mortgage register. As a result, the investor was receiving mails and phone calls to his home address regarding the investment, for which he did not obtain a permit. It was proved in the proceedings that the file with the personal data of the claimant was downloaded over 1 000 times. The trader claimed PLN 200 000 (approximately €47 500) compensation for immaterial damage, and he was awarded PLN 20 000 (approximately €4 750). As a result of the appeal, the case is still pending.

3. Group proceedings for immaterial damage

Polish case law provides examples of group proceedings in which the claimant sought compensation for immaterial damage. None of them, however, involved infringements in the digital

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[467] https://ciesielski-oczachowska.pl/porady/zadoscuczynienie-pieniezne-za-doznana-krzywde-jak-uzyskac-pieniadze/.

[468] Judgment of the Court of Appeal in Szczecin of 1.8.2019, court file no. I ACa 813/18.

[469] https://www.prawo.pl/biznes/odszkodowania-z-tytulu-rodo-skutki-wyroku-tsue,521715.html; https://www.gazetaprawna.pl/firma-i-prawo/artykuly/8733801,naruszenia-rodo-wyciek-danych-zadoscuczynienie.html.

[470] Judgment of the District Court in Warsaw of 5.12.2022, court file no. XXV C 559/22.

[471] Judgment of the Court of Appeal in Warsaw of 22.06.2023, court file no. I Aca 352/23.

[472] Judgment of the District Court in Białystok of 24.08.2023, court file no. I C 1462/22 (in appeal); see also: https://czublun.pl/ochrona-danych-osobowych/zadoscuczynienie-za-ujawnienie-danych-osobowych/

context. Usually, compensation for immaterial damage is sought together with compensation for financial loss. So far, courts have awarded compensation in group proceedings started as a result of claims brought in tort liability cases or claims based on the organizer's responsibility for performing the travel services.

Interestingly, in the first version of the Act on Group Proceedings, the claims to protect personal interests were excluded entirely from its scope. After the 2017 amendment, the exclusion of personal interests no longer includes personal injury claims. The latter, as well as the claims by the family members of the person who died as a result of personal injury, are currently admissible for group proceedings. These claims, however, must be sought as declaratory relief cases only – the claimant must bring an action to establish the liability of the defendant. Once the court declares it, the group members may bring individual follow-up actions and pursue compensation.

One of the most significant cases where the claims for immaterial damage were sought in group proceedings related to the catastrophe of Katowice International Trade Hall in 2006. As a result of the construction collapse, 65 people died, and 164 people were injured. The first claim in group proceedings, brought against the State Treasure on behalf of 16 victims and their families, was rejected by the court because, according to the court, the individual claims were not of the same kind.[473] As a result of the second group proceedings, a declaratory-relief suit brought against the State Treasury in 2013 on behalf of 82 group members, the District Court in Warsaw found the State Treasury liable for construction disaster through illegal omission to exercise public authority (a tort liability case).[474] The defendant appealed at each stage of proceedings[475], but once the case reached the Supreme Court for the second time, the parties settled in 2019, and the cassation was withdrawn.[476] At the stage of certification of the case, the Supreme Court adjudicated that the claim on the establishment of liability of State Treasure is admissible based on the future individual monetary claims indicated in group proceedings.[477] Under the settlement, the group members were divided into two subgroups. The first one (spouses, parents and children) received PLN 125 000 (~€30 000) as compensation for immaterial damage (*zadośćuczynienie*) and PLN 75 000 (~€18 000) compensation for financial loss. The second subgroup (siblings of those who died) received PLN 25 000 (~€6 000) as compensation for immaterial damage and PLN 25 000 for financial loss (~€6 000).[478]

The second type of case where compensation for immaterial damage was successfully sought in group proceedings is based on claims regarding the responsibility of the organizer for the performance of travel services. In the case brought against the tour operator – Nowa Itaka – the claimant, on behalf of 19 group members, sought compensation for financial loss (equivalent to the price paid for the holiday) and immaterial damage (compensation for loss of enjoyment of the holiday because of substantial problems in the performance of the relevant travel services) based on Article 48 of the Act on Package Travels.[479] Under the contract with Nowa Itaka, the travellers were supposed to stay in a brand-new five-star hotel in Montenegro with direct access to a sandy beach and private pools. Instead, they were placed in an old, smelly building with no direct beach

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[473] Judgment of the District Court in Warsaw of 8.04.2011, court file no. II C 121/11.
[474] Judgment of the District Court in Warsaw of 23.04.2018, court file no. II C 172/15.
[475] Judgment of the Court of Appeal in Warsaw of 23.01.2019, court file no. V ACa 630/18.
[476] Decision of the Supreme Court of 19.12.2019, court file no. I CSK 395/19.
[477] Decision of the Supreme Court of 28.01.2015, court file no. I CSK 533/14.
[478] For a very informative description of the case in English, including translation of the parts of the judgments at each stage of the proceedings see: https://classaction.pl/en/historia_postepowan/a-group-of-relatives-of-individuals-who-sustained-damage-in-the-construction-catastrophe-of-the-katowice-international-fair-hall-case-no-2/ (access 20.12.2024).
[479] Judgment of the District Court in Opole of 5.09.2022, court file no. I C 239/19.

access and pools that were not filled with water. As a result of the final judgment of the District Court in Opole, the travelers were awarded compensation in the amount of the price paid for the holidays and PLN 1 000 (~€240) of compensation for immaterial damage. Similar group proceedings against the same tour operator were brought on behalf of 14 people travelling to Kenya. The District Court in Opole adjudicated the compensation for immaterial damage for loss of enjoyment of the holiday.[480] As a result of the appeal, the amount of compensation was adjusted by the Court of Appeal in Wrocław, and each of the group members received compensation ranging from PLN 2 000 to PLN 2 500 (~€475 - €600).[481] Another example relevant here could be a group proceedings brought against tour operator Rainbow Tours.[482] After the claim was confirmed admissible for group proceedings by the District Court in Poznań, the parties settled out-of-court. The amount of compensation for loss of enjoyment of the holiday has not been disclosed in public.

V. Burden of proof and discovery

1. The burden of proof in group proceedings

As a general rule, the burden of proof lies with the person asserting the legal effects of the fact in question.[483] Further, parties to the proceedings must show evidence to establish the facts from which they derive legal effects.[484] These general rules are also applicable at each stage of group proceedings. For a group action to be certified, the claimant must prove that at least 10 group members have claims of the same kind and with the same or a similar factual basis. Implementing RAD into Polish law brought a significant change regarding one of the above-mentioned requirements. It allows consumer representative actions claiming injunctive and/or redress measures to be based on the same or a similar legal basis (as an alternative to the same or a similar factual basis), which is much easier to prove before the court.

Additionally, the Act on Group Proceedings provides a specific rule concerning the burden of proof of class membership in all types of group proceedings. It states that in cases that relate to monetary claims, the burden of proof for group membership is on the claimant. In other cases, group members shall demonstrate that it is highly probable that they belong to the group. The claimant may request the group members to give additional explanations and statements.[485] The practice shows that the defendant often questions all decisions issued by the court at each stage of the proceedings, including the decision on group membership, and it is usually just a matter of tactics to slow down the course of proceedings. Once the district court issues a decision on group membership, the defendant may file a complaint, and the court is obliged to consider it, which takes an additional year or two. Only after the decision on group membership becomes final does the court start the third phase of the proceedings and adjudicate on the case's merits.

At the merits stage of group proceedings, the general rules of civil proceedings are to be followed. In relation to sources of evidence, the Code of Civil Procedure mentions proof of documents,[486]

[480] Judgment of the District Court in Opole of 2.7.2013, court file no. I C 605/11.
[481] Judgment of the Court of Appeal in Wroclaw of 19.12.2013, court file no. I ACa 1218/13.
[482] Decision of the District Court in Poznań of 10.08.2018, court file no. XVIII C 590/18.
[483] Article 6 of the Polish Civil Code, *op. cit.;* on the concept of burden of proof in Poland see: P. Nepelski, *Selected Issues on the Burden of Proof in Polish Civil Proceedings*, Studia Iuridica, 2016, Vol. 68, p. 208.
[484] Article 232 of the Act of 17.11.1964 - Code of Civil Procedure, Journal of Laws 1964 No 43 Item 296 with further amendments, hereinafter referred to as the "Polish Code of Civil Procedure".
[485] Article 16 of the Act on Group Proceedings, *op. cit.*
[486] Article 243(1) of the Polish Code of Civil Procedure, *op. cit.*

witness statements,[487] expert opinions,[488] visual inspections,[489] hearings of the parties to the proceedings,[490] and others.[491] The court assesses the credibility and value of the evidence at its discretion, based on an extensive examination.[492]

2. Discovery in consumer representative actions

To implement RAD, the Act amending the Act on Group Proceedings provides some specific rules on pre-trial discovery that only refer to consumer representative actions. Qualified entities, seeking injunctive and/or redress measures, may apply for disclosure or the handover of evidence.[493] For this purpose, the qualified entity needs to demonstrate that the collective claim is probable and to ensure that the evidence will be used exclusively for the pending group proceedings. As a result of such an application, if the requested evidence is vital to confirm the facts necessary for the adjudication of the case, the court may ask the defendant or a third party to disclose or hand over the relevant evidence in its possession. In the application for discovery, the representative entity shall indicate the fact that is to be ascertained and provide a precise description of the evidence. If the application for discovery includes several sources of evidence of the same kind, the applicant must indicate their kind, subject, time, and place of their origin, and all other essential characteristics that allow the identification of such evidence.

The application to disclose or handover the evidence may be examined at a closed court session.[494] Before the decision on the discovery is issued, the court must either hear the entity that, according to the application, is in possession of the evidence or request him or her to provide a written statement. If the application for discovery is directed to the competent authority dealing with consumer protection in Poland or other EU Member States, the court must inform the authority and set a deadline for the authority to provide its opinion on the proportionality of the disclosure or handover of the evidence.

The court dismisses the application for disclosure or handover of evidence if the motion does not fulfil formal requirements or is not proportionate.[495] The court takes into consideration the legitimate interests of the parties and the third party who is in possession of the evidence, including: whether the motion is justified given the existing facts and other available pieces of evidence; costs of disclosure and handover of evidence to the defendant or the third party; prevention of search for information which is not likely to influence the outcome of group proceedings; whether the evidence concerns the trade secret or other confidential information which is protected by law. If the application for discovery relates to the evidence that is located in the files of the competent authority dealing with consumer protection in Poland or other EU Member States, the court must verify some additional circumstances, including whether the disclosure or handover of evidence will not negatively influence the proceedings pending before the President of UOKiK (proceedings on injunctions or determination that provisions of standards contracts are abusive). The court may request the competent authority to disclose or handover the evidence only if it is not possible or very difficult to obtain it from a party of the proceedings.

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[487] 259 et seq. of the Polish Code of Civil Procedure, *op. cit.*
[488] 278 et seq. of the Polish Code of Civil Procedure, *op. cit.*
[489] 292 et seq. of the Polish Code of Civil Procedure, *op. cit.*
[490] 299 et seq. of the Polish Code of Civil Procedure, *op. cit.*
[491] 305 et seq. of the Polish Code of Civil Procedure, *op. cit.*
[492] Article 233 of the Polish Code of Civil Procedure, *op. cit.*
[493] Article 16a of the Act on Group Proceedings, *op. cit.*
[494] Article 16b of the Act on Group Proceedings, *op. cit.*
[495] Article 16c of the Act on Group Proceedings, *op. cit.*

If the disclosed evidence relates to a business secret (in Polish: *tajemnica przedsiębiorstwa*) or other confidential information protected by law and if it is necessary to prevent the disclosure of such confidential information, the court may restrict the right to access such evidence or establish rules for getting acquainted with the evidence, taking into special consideration restrictions or prohibition on copying or recording records.

The court's decision on discovery is subject to appeal before the court of the second instance. The right to appeal is granted to the parties to the proceedings, third parties and the authority competent for consumer protection from Poland or other EU Member States that are obliged to disclose or handover the evidence. The court's final decision on discovery is subject to judicial enforcement – it constitutes an execution title against the party obliged to disclose or handover the evidence. If the party having the evidence or being able to secure the evidence declines to follow the court decision on discovery or destroys the evidence, the court may acknowledge the facts intended to be confirmed by the evidence, unless the party which is not following the decision on discovery proves otherwise and may charge such party with costs of group proceedings irrespective of its outcome.[496] Moreover, the court may fine the party or third party non-compliant with the decision on discovery with a penalty of up to PLN 50 000 (~€ 12 000), (lump-sum) and additionally, PLN 10 000 (~€2 400) per each day of non-enforcing the court decision. Decisions on penalties are subject to appeal before the court of appeal.

The court disregards the evidence if the party to the group proceedings commenced by consumer representative action applied for it in bad faith, infringed the restrictions on access to evidence, or used it for purposes other than the pending group proceedings. The court can fine such a party with a penalty of up to PLN 50 000 (~€12 000).[497] The decision on the penalty is subject to appeal before the court of appeal.

Since the provisions on pre-trial discovery in consumer representative actions have just been introduced into Polish law, there is no objective evidence so far that could prove their application in practice.

VI. Funding collective actions

There are at least three groups of costs that need to be taken into account while submitting group actions to Polish courts: court fees, attorney's fees, and – in case of consumer representative actions – fees that qualified entities may charge. The main rule governing the cost of civil proceedings in Poland is a 'loser pays' principle.[498] This makes group proceedings very risky since in situations where the claim is rejected, the claimant shall pay not only the court fees but also the costs of their legal representation as well as those of the defendant.

1. Court fees

Polish law provides some maximum limits on court fees in civil proceedings. In line with the Act on Court Costs in Civil Cases, the fee for collective action is determined depending on the value of the case, and it amounts to 50% of the fee due for monetary claims, but no less than 100 PLN (~€25)

[496] Article 16g of the Act on Group Proceedings, *op. cit.*
[497] Article 16h of the Act on Group Proceedings, *op, cit.*
[498] Article 98 of the Polish Code of Civil Procedure, *op. cit.*

and no more than 200 000 PLN (~€47 500).[499] If non-pecuniary claims are sought, a temporary fee is set at 600 PLN (€150). If the value of the claim cannot be determined initially, the temporary fee is set between 300 PLN and 20 000 PLN (~€70 and €4 750).[500] Importantly, if a collective claim is brought by the Financial Ombudsman or municipal consumer ombudsman, represented group members do not incur court costs.[501] After the implementation of RAD in Poland, qualified entities entitled to bring consumer representative actions are also exempted from the court fees.[502]

2. Charges for the qualified entities

Consumer representative actions are a specific type of group actions. The Act amending the Act on Pursuing Claims in Group Proceedings provides that qualified entities may request consumers seeking redress measures to pay a modest charge to participate in the proceedings. The act provides a maximum limit of the fee amounting to up to 5% of the value of the consumer claim, stating, however, that it cannot exceed 2 000 PLN (~€475) for monetary claims and 1 000 PLN (~€240) for non-pecuniary claims.[503] There is no charge in the case of proceedings initiated by the Financial Ombudsman. In light of the last amendment, the entry fee is the only cost which should be borne by consumers participating in the group proceedings initiated by a qualified entity.[504]

Additionally, the Act on Competition and Consumer Protection provides that activities of a qualified entity can also be financed by traders, as long as it remains "independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers".[505] In such cases, the qualified entities must enter into an agreement with the trader or group of traders financing the tasks, and the agreement must stipulate the remuneration for the trader. The ACCP provides for a third-party funder a maximum fee of 30% of the claim awarded to the claimant.

3. Attorney's fees

In view of the fact that the entry fee is the only cost that should be borne by consumers participating in group proceedings initiated by a qualified entity, one can wonder whether consumers participating in representative actions should bear the costs of attorney's fees. It is not entirely clear since, in general, the Act on Group Proceedings expressly allows for success fees to be paid by group members to the attorney in amounts of up to 20% of the claim awarded to the claimant. The last amendment does not expressly exclude this provision from applying to consumer representative actions. Since the Act on Group Proceedings allows for third-party funding, it could be reasonably expected that attorney's fees may be covered by a third-party funder with an interest in a judgment in favour of the claimant.

After the decision on the admissibility of the group proceedings becomes final, the court orders the publication of an announcement in the press about the possibility of opt-in. A vital element of this

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[499] Article 13d of the Act of 28.7.2005 on Court Costs in Civil Cases, Journal of Laws 2005 No. 167 Item 1398 with further amendments.
[500] Article 15 sec. 2 of the Act on Court Costs in Civil Cases, *op. cit.*
[501] Article 96 sec. 1 points 6 and 7 of the Act on Court Costs in Civil Cases, *op. cit.*
[502] Article 96 sec. 1 point 7a of the Act on Court Costs in Civil Cases, *op. cit.*
[503] Article 5a of the Act on Group Proceedings, *op. cit.*
[504] Article 5b of the Act on Group Proceedings, *op. cit.*
[505] Article 46f of the ACCP, *op. cit.*

announcement consists of information about the rules on attorney remuneration.[506] Since the announcement is publicly available, one can find historical information about the specific fees charged by law firms for each group member. By way of example, in a case brought by the Municipal Consumer Ombudsman in Sztum against a developer (Home Broker), the fee was dependent on the value of the claim, and it ranged from PLN 8 856 (~€2 100) for an individual claim of up to PLN 100 000 (~€24 000) to PLN 35 424 (~€8 420) for an individual claim of up to PLN 400 000 (~€95 130).[507] In a case brought by the Municipal Consumer Ombudsman in Olsztyn against the bank Millenium SA, the fee ranged between PLN 615 (~€150) for an individual claim of up to PLN 4 500 (~€1070) and PLN 1 230 (~€300) for an individual claim of up to PLN 18 000 (~€4 300).[508] The detailed information regarding attorney's fees must be included in the agreement between the claimant and the attorney, which must be attached to the claim.

4. Third-party funding

Third-party funding, expressly allowed in the Act amending the Act on Group Proceedings, is an entirely new solution previously unknown to the Polish legal system.[509] Qualified entities entitled to bring consumer representative actions may be financed by third parties – as a result of fees collected from consumers and traders, provided that funders are independent and are not in any way influenced by the trader.[510] This solution could be ground-breaking from the perspective of consumer access to justice. In Poland, one of the most significant problems faced by consumer organisations and foundations is the lack of appropriate funds for their operations. Undoubtedly, collective actions are very costly, and funding is a key factor in the success of group proceedings. Without proper funding, it seems uncertain whether any of the 19 consumer organisations in Poland would be interested in applying to be registered as qualified entities entitled to bring representative actions.

Although third-party funding may remedy the above-mentioned problem, its use might be difficult in practice. In line with the Act amending the Act on Group Proceedings, third-party funding is subject to extensive control by both the court and the President of UOKiK, who supervises the whole system of representative entities. The agreement between the claimant and the third-party funder must be attached to the claim. It is included in the court files and everyone who has been granted access to the files can access it. The defendant, at each stage of the proceedings, may question the source of funding of the representative entity. Practice shows that if the defendant has a right to question the claim, it will do so, no matter whether it is justified or not. It can reasonably be expected that this right will be used by the trader to extend the duration of proceedings, which in the case of group proceedings is particularly lengthy. As a result, the court, at each stage of the proceedings, may reject the claim if it has reasonable doubts as regards the source of funding of the representative entity. At the courts' request, the representative entity is required to reveal the source of funding for its general activity and present proof of the source of funding for specific representative actions. If the court finds that someone is influencing the proper protection of consumer interests and that this affects group proceedings, the court must oblige the qualified entity to refuse, reimburse or change the source of funding under penalty of rejection of the claim. In the case of claim rejection, the court sends an excerpt of the decision to the President of UOKiK, who shall verify whether the representative entity fulfils the requirement of financial independence and may remove this

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[506] Article 11 of the Act on Group Proceedings, *op. cit.*

[507] Group proceedings pending before District Court in Warsaw, case file no. II C 1755/20.

[508] Group proceedings pending before District Court in Warsaw, case file no. IV C 1348/19.

[509] P. Okońska, *Finansowanie sporów sądowych przez podmiot trzeci- perspektywa polska*, internetowy Kwartalnik Antymonopolowy i Regulacyjny, Vol. 13, No. 1, 2024, p. 50.

[510] Article 10a of the Act on Group Proceedings, *op.cit.* in connection with Article 46f of the ACCP, *op. cit*.

qualified entity from the register. Consumers affected by this decision can join other group proceedings or pursue their claims individually.

VII. Conclusions

It is doubtful whether the situation of consumers pursuing collective claims in Poland will change considerably after the implementation of RAD. There are some promising solutions relating to consumer representative actions that could slightly influence the number of consumer representative actions, with the most prominent one allowing for claims to be based on the same or a similar legal basis (as an alternative to the same or a similar factual basis). However, the system of group proceedings, including consumer claims, existed before, and the implementation of RAD did not bring any revolutionary reforms to the existing scheme. Not only do some old problems of group proceedings remain unsolved, but also some new issues have arisen. Two obstacles that I consider the most problematic are the hectic design of the consumer law enforcement system and the risk of ineffectiveness of representative actions in practice.

The first issue relates to the complicated structure of law enforcement. Consumers whose collective interests have been infringed have as many as three options for law enforcement. Firstly, they can notify the President of UOKiK, who, although not obliged, may institute administrative proceedings against the trader resulting in a decision on injunction. Alternatively, consumers may contact a qualified entity that will bring a consumer representative action and start group proceedings before the courts, seeking injunctive and/or redress measures. Thirdly, in all other matters that refer to consumer claims, consumers can start group proceedings based on the 'old version' of the Act on Group Proceedings, initiated by group member or consumer ombudsman on behalf of the group. This whole range of tools (not mentioning individual proceedings) could be beneficial if consumers had knowledge about the specific instruments they could use and were aware of the consequences and potential interdependence of different proceedings. It is, however, very doubtful that the average consumer will understand this complicated picture and choose an appropriate option to pursue their claim.

Additionally, the above-mentioned structure of enforcement is vague due to the twofold competence of the President of UOKiK acting on two paths of enforcement. On the one hand, this authority remains entitled to start administrative proceedings *ex officio* in order to seek injunctions, on the other, it supervises the system of representative actions (it is responsible for the registration and monitoring of representative entities entitled to start group proceedings in civil procedures). Additionally, it is very confusing that actions for injunction can be brought either by the President of UOKiK or by representative entities, however, the authority has clear priority in this respect. This renders one-stop-shop actions, in principle a great solution which could remedy the problem of ineffective proceedings, entirely pointless.

The second main concern is the problem of effectiveness of consumer representative actions in general. Representative actions must be brought within group proceedings which are considered lengthy, costly, and risky. Before starting the group action seeking the injunctive measure, the representative entity must inform the President of UOKiK and wait for the reply of the authority (between one and three months) which additionally slows down the proceedings. Polish judges are rather reluctant towards group actions and, just to mention, they used to interpret the requirements for certification of claims very strictly. Many collective claims are rejected because they do not meet the criteria set for group proceedings. Group actions have no priority over individual cases, and they are adjudicated in the order of submission.

RAD emphasizes the activity of consumer organisations as representative entities. However, it is highly questionable whether these organisations in Poland are interested in applying for the status of representative entities. The main problem faced by consumer organisations is a lack of appropriate funding, and this is particularly visible in view of the high costs of group proceedings. The President of UOKiK identified 19 consumer organisations in Poland which could be, in theory, interested in being recognised as representative entities. The authority assumes that each of these entities will bring one collective action per year, which, as I believe, is far too optimistic having in mind that no additional funds for operations of consumer organisations have been ensured in the state budget. What is more, it was demonstrated above that bringing a collective claim before a Polish court does not imply that the group proceeding is started since many collective claims are returned or rejected as not admissible for group proceedings. It is also possible, at least in theory, that the representative action will be brought by representative entities recognised in other Member States, however, this scenario, at present seems to be very unlikely.

Considering the obvious financial problems of consumer organisations in Poland, it is surprising that the Act Amending the Act on Group Proceedings indicates only one public authority entitled to bring representative actions *ex lege* – namely the Financial Ombudsman. It is predicted (again, as I believe, too optimistic) that the authority can submit between 6-8 representative actions per year. It is very surprising that, apart from the Financial Ombudsman, the new law does not mention municipal consumer ombudsmen as qualified entities entitled *ex lege* to bring consumer representative actions. Research indicates that these institutions, acting at the regional level, provide real support for consumers, submitting collective claims on their behalf.

Will the implementation of RAD increase the amount of group proceedings in Poland? Again, it is highly doubtful. The impact assessment of the last amendment of the Act on Group Proceedings indicates that consumer representative actions will cause only an insignificant increase in the total number of group actions brought to Polish courts. Therefore, the legislator found that there is no need to ensure additional funds for this purpose in the state budget. If this approach does not change, the only resort will remain third-party funding. In theory, it could be a very promising solution. Due to the fact that the source of third-party funding can be examined by the court at any stage of proceedings, it is expected that opposing parties will deliberately question it and, therefore, significantly delay the group proceedings.

PART 3: COMPARATIVE PART

A. IMMATERIAL DAMAGE

Peter Rott

I. Introduction

The Representative Actions Directive itself is silent on the availability of compensation for immaterial damage. According to its Article 9(1), a redress measure shall require a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law. Thus, redress actions related to immaterial damage require compensation for immaterial damage to be available as a remedy in other pieces of legislation. Only then, as a second step, the question arises whether immaterial damages can be pursued in collective redress actions.

II. Availability of immaterial damages

Availability of compensation for immaterial damage can be required by (extended) EU consumer law, as provided by some acts listed in the Annex I of the Representative Actions Directive, or by national law.

1. Immaterial damages under EU law

Of the legislative acts listed in the Annex I of the Representative Actions Directive, only very few expressly mention compensation for immaterial damage. Examples are:

- the Air Passengers Rights Regulation (EC) No. 261/2004 that is meant to compensate for the inconvenience that cancellation of flights or delay in the carriage of passengers by air cause,[511]
- the General Data Protection Regulation (GDPR), whose Article 82(1) states that any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered, and
- the Package Travel Directive (EU) 2015/2302,[512] where Recital (34) confirms that compensation should cover non-material damage, such as compensation for the loss of enjoyment of the trip or holiday because of substantial problems in the performance of the relevant travel services.

[511] See ECJ, 10 January 2006, Case C-344/04 *IATA and ELFAA v Department for Transport*, ECLI:EU:C:2006:10, para. 45.

[512] See ECJ, 12 March 2002, Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG*, ECLI:EU:C:2002:163, on the old Package Travel Directive 90/314/EEC and recital (34) of Directive (EU) 2015/2302.

Other legislative acts explicitly leave the decision to award immaterial damages to the national legislator. An example is the (old and new) Product Liability Directive. According to its Article 6(2) sent. 2, the right to compensation shall also cover non-material losses (...) in so far as they can be compensated for under national law. The vast majority of Member States indeed make immaterial damages available in national product liability law.[513]

Finally, a number of legislative acts in the realm of consumer law do not even grant damages to consumers. For example, the Sale of Goods Directive (EU) 2019/771 confers on consumers the remedies of repair, replacement, price reduction and rescission but has left out damages, due to the slim chances of finding agreement between Member States. Again, it is up to the Member States to regulate damages in the event of non-conformity of goods in the contract, including the decision on whether or not compensation for immaterial damage is available.

2. Immaterial damages under national law

Member States differ greatly in their approach to immaterial damages.

Traditionally, compensation for immaterial damage has been the exception rather than the rule, and this is still the approach taken by most Member States.

Thus, in German private law, immaterial damage is generally not compensated, unless this is explicitly specified by law. Beyond specific provisions, § 253 paragraph 2 BGB generally stipulates that monetary compensation can (only) be claimed for immaterial damage in the case of physical injury, damage to health, violations of freedom or freedom of sexual self-determination. Moreover, courts have recognised claims for the compensation of immaterial damage in the case of serious violations of personality rights. The latter presupposes intrusion into the privacy of the victim rather than only the social sphere,[514] and data protection breaches relating to general rather than sensitive personal data do not qualify as serious violation of the personality right.[515]

In Polish law, the compensation for immaterial damage can be granted by the court in claims for the protection of personal interests of human beings. Specific personal interests include, but are not limited to, health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home, as well as scientific, artistic, inventive and reasoning activities. Moreover, compensation for immaterial damage can be granted in tort liability cases, when the immaterial damage is caused by exercising the power of official authority[516] or in personal injury cases.[517]

In contrast, previous as well as recently updated Belgian law regards immaterial damage as a possible head of any damage claim, regardless of its legal basis; which avoids unequal treatment of victims of breaches of different laws and which is obviously preferable from a consumer point of view. French law and Italian law, or rather court practice, have also shown a tendency to opening up

[513] See ELI, European Commission's Proposal for a Revised Product Liability Directive – Feedback of the European Law Institute, available at https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-provides-feedback-on-the-european-commissions-proposal-for-a-revised-product-liability-directiv/, 12.
[514] See Country report Germany, at III. 1.
[515] OLG Hamm, 21 June 2024 – 7 U 154/23, GRUR-RS 2024, 16856.
[516] Article 417 (2) Polish Civil Code, *op. cit.*
[517] See Country report Poland, at IV. 1.

immaterial damage even in relation to the breach of contract on the grounds that worries, anxiety and hassles due to the litigation need to be compensated.[518]

III. Existence of immaterial damage

In all Member States analysed in this study, the claimant must prove that they suffered immaterial damage in the first place.[519] Thus, the mere breach of law does not suffice for an award of immaterial damage. This has also been confirmed by the Court of Justice in *Österreichische Post* for the specific field of data protection law.[520]

Typically, compensation for immaterial damage is unavailable for cases of minor inconvenience.[521] An exception is data protection law where the Court of Justice has made it clear that Article 82(1) GDPR does not contain any threshold of seriousness that must be surpassed.[522]

A further question in this regard is whether the burden of proof should be lower than in the case of material damage, as immaterial damage, by its nature, is more difficult to prove than material damage. This approach is taken by Swiss law, and it is discussed in Belgian law, but no decision has yet been taken to that effect.[523]

IV. Quantification of immaterial damage

EU law gives little indication of how immaterial damages should be calculated. Thus, national calculation methods apply, only framed by the EU principle of effectiveness that prohibits merely symbolic damages.[524]

As to the amount of immaterial damages, the typical approach is to award "equitable compensation" in accordance with the circumstances of the individual case.[525] Lump-sum immaterial damage is only explicitly available under the above-mentioned Air Passenger Rights Regulation.

Quite naturally, the exact amount that a consumer can claim outside air passenger law is difficult to predict, and experience from all Member States that are subject to this study shows that different courts' awards vary even where cases appear to be very similar. This issue is aggravated where the

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[518] See J. Knetsch, France, in B. Weyts, International Encyclopaedia of Laws: Tort Law (Kluwer Law International, 2021), 159, and Country report Italy, at III. 1.

[519] See, moreover, J.M.L. van Duin, A.L. Jonkers, J.M. Wassink and K.V. Meiring, Immateriële schadevergoeding in collectieve acties onder de AVG: terug naar de kern, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2024, 180, 183 f., on Dutch law.

[520] ECJ. 4 May 2023, Case C-300/21 *UI v Österreichische Post AG*, ECLI:EU:C:2023:370; confirmed in ECJ, 20 June 2024, Joined Cases C-182/22 and C-189/22 JU, *SO v Scalable Capital GmbH*, ECLI:EU:C:2024:531.

[521] See Country reports Germany and Italy.

[522] ECJ, 4 May 2023, Case C-300/21 *UI v Österreichische Post AG*, ECLI:EU:C:2023:370.

[523] See Country report Belgium, at III. 1.

[524] See BGH, 18 November 2024 – VI ZR 10/24, GRUR-RS 2024, 31967, in relation to the Facebook scraping case.

[525] Beyond the country reports of this study, see van Duin, Jonkers, Wassink and Meiring, NTBR 2024, 180, 189, on Dutch law.

law allows for non-pecuniary remediation of immaterial damage, such as an apology;[526] which is, however, unlikely in consumer law.

As a reaction to this, practitioners and/or courts have published tables of typical awards for typical immaterial damages that may be used by courts but that are not binding.[527] Moreover, with new types of breaches or breaches of new legislation, it may take some time until courts develop a uniform practice, as the experience with breaches of data protection law shows.

Here, the brand-new judgment of the German Bundesgerichtshof in the Facebook scraping case may serve as a model in that the court allows the award of a lump sum (of estimated 100 Euro) for the loss of control over non-sensitive personal data.[528] As a data leakage will always lead to the loss of control of all concerned, their damage should all be the same, unless there are special circumstances in individual cases. In that regard, the BGH stated that if a data subject demonstrates psychological harm beyond the mere loss of control, the court may have to hear that data subject in person so as to ascertain the immaterial damage and to award damages that go beyond those awarded for mere loss of control.

V. Collective actions for immaterial damages

The crucial issue in relation to collective actions for immaterial damage is the likeness, similarity or homogeneity of the individual claims that are assembled in one action.[529]

This is clearly the case for passengers of the same delayed flight, where both the breach and the amount of damages are the same for all passengers, or with a package travel holiday where a whole group of travellers experiences the same deviation of the holiday from the contract.[530] Otherwise, the viability of collective actions for immaterial damage depends on the way in which Member States have defined the criterion of likeness, similarity or homogeneity in their national laws.

If homogeneity is required not only for the breach at issue but also for the damage suffered, collective redress actions may fail due to the differences in individual immaterial damage experienced by the victims of the breach.

Thus, an approach is preferable where common or identical breaches suffice to justify a collective redress action. Likeness in relation to the event would, for example, be present where consumers have bought the same product that then causes harm, and in many situations of data protection law breaches, such as data leakages.

With regard to the method of calculation of the total award and individual group members' compensation in collective actions, different approaches are possible. On the one hand, as in Belgium, the court may order the defendant to pay an individualised amount to each consumer who registers as part of the group. This means the court assesses damage on an individual or individualisable basis, and the total compensation will then be the sum of all individual compensation amounts. On the other hand, if an individual or individualisable assessment proves

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[526] See Country report Belgium, at III. 2. a), as well as ECJ, 4 October 2024, Case C-507/23 *A v Patērētāju tiesību aizsardzības centrs*, ECLI:EU:C:2024:854, para. 37.
[527] See, for example, Country report Italy, at III. 2.
[528] BGH, 18 November 2024 – VI ZR 10/24, GRUR-RS 2024, 31967. For more details, see Country report Germany, at III. 2.
[529] Beyond the country reports of this study, see, for example, § 624 para. 1 of the Austrian Civil Procedural Code.
[530] On the latter, see Country report Poland, at IV. 3.

impossible, under Belgian law the court can decide to establish a global compensation amount (potentially divided into subcategories) to be distributed among class members. The individual claims are then determined during the pay-out phase. This latter approach, however, entails the risk that the principle of full reparation is undermined when global amount does not suffice to compensate all consumers concerned, or that it could be perceived as a judicially imposed civil penalty on the defendant when it is too generous.[531]

Similarly, in Germany, consumer organisations can claim payment of a total amount that would then be distributed in a special procedure to the consumers concerned. That total amount does not need to be determined as a figure, but its estimation can be left to the court (while the court would expect the claimant to give an indication). This mechanism would seem to be particularly suitable for immaterial damage claims.[532] German law avoids both the risk of undercompensation and of overcompensation. If the total amount turns out to be too low, the claimant qualified entity can initiate an increase procedure, whereas parts of the total amount that are not distributed to consumers on the basis of their actual damage are returned to the defendant trader.[533]

Dutch law also provides for this opportunity, and the Rechtbank Amsterdam confirmed in a collective redress action against Allergan that turned on defective breast implants that immaterial damage claims can, in principle, be bundled.[534]

Still, even with the possibility of only issuing a judgment that confirms the breach and gives instructions to a claims administrator who would then satisfy the individual claims of the consumers concerned, Member States or their courts may invoke one limitation to the viability of collective redress actions by excluding situations in which claims need to be assessed on an individual basis, arguing that this defeats the efficiency of collective procedures. This has been the line of the Italian *Corte di Cassazione* in the past,[535] and it is also the majority opinion of academic writers in Germany.[536] Thus, where immaterial damage cannot be standardised, at least by the use of sub-groups, for example relating to the type of personal data that was leaked, collective actions may fail. Thus, whereas a redress action concerned standardised immaterial damage due to the loss of control over one's data should be possible, it may not work if courts require consumer data subjects to lay down, in detail, their anxieties and their individual efforts to regain control, or to avoid negative consequences by changing their telephone numbers, e-mail addresses or credit card numbers.[537]

This issue was also discussed intensely in Dutch courts and academic writing. According to the case law of the Dutch Supreme Court, the claimant must make it plausible that bringing a collective action is more efficient and effective than individual actions, because the factual and legal questions to be answered are sufficiently common,[538]

In a case concerning TikTok, the Rechtbank Amsterdam ruled that the claims of data subjects were not sufficiently similar to be bundled in one collective procedure as the claims were heavily

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[531] See Country report Belgium, at III. 3.
[532] See Ashkar and Schröder, Betriebs-Berater 2023, 451, 454.
[533] See Country report Germany, at II. 5.
[534] See Rb. Amsterdam 14 February 2024, ECLI:NL:RBAMS:2024:745, para 5.62 (*Stichting Bureau Clara Wichmann/Allergan and others*).
[535] See Country report Italy, at III. 3.
[536] See, for example, R. Janal, Die Umsetzung der Verbandsklagenrichtlinie, Gewerblicher Rechtsschutz und Urheberrecht 2023, 985, 991; Scherer, § 15 VDuG, in Köhler and Feddersen, UWG, para. 8.
[537] See also M. Bock, Abtretbarkeit des immateriellen Schadensersatzanspruchs nach Art. 82 DS-GVO, GRUR-Prax 2024, 691.
[538] Dutch Supreme Court, 26 February 2010, ECLI:NL:HR:2010:BK5756, para. 4.2. See also van Duin, Jonkers, Wassink and Meiring, NTBR 2024, 180, 186.

dependent on the individual circumstances of the represented persons.[539] In contrast, the Gerechtshof Amsterdam allowed a redress action against Oracle and Salesforce.[540] The court argued that the legislative history shows that the Dutch legislator anticipated unequal damage among group members and, based on previous experiences, included the option to use different sub-groups for the necessary differentiation.[541]

Establishing sub-groups to mitigate heterogeneity of claims has also been recognised by the German *Bundesgerichtshof*.[542]

Making collective actions available for immaterial damage, and be it at the price of generalisation of compensation, seems to be the right approach. After all, the whole idea of collective instruments in consumer law is that, individually, consumers would not have sufficient access to justice. Therefore, not being able to do full justice to individual circumstances is justified by the fact that individual proceedings in that case would be (even) less effective and efficient in the sense that victims would obtain no compensation at all. The latter is most likely in the context of data protection breaches.[543] Notably, under opt-in systems, it is the consumer who decides to join a redress action or to pursue claims individually.

If a collective redress action is denied due to the variety of damage suffered by the victims from the same breach or the same type of breach, only a declaratory action remains possible where the breach is confirmed by judgment, but individual claimants then have to pursue their claims on the basis of that judgment. This is possible in Germany, with the model declaratory action, which is now indeed being used by vzbv in the Facebook scraping case, and it is also the way that Polish law foresees.

Finally, given the fairly small amounts in immaterial damage that courts have awarded until now – just remember the suggestion of 100 Euro in the German Facebook scraping case – and the limited likelihood of too many consumers joining an opt-in action for such amounts, it may be worthwhile to also have a skimming-off action available that allows consumer organisations to sue traders for paying unlawful profits from a breach of law into some kind of fund that can be used for the protection of consumers.[544] In Germany, this kind of action is available, with the limitation that the skimmed-off amount goes into the general state budget, but it has not been used yet in the context of immaterial damage.

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[539] Rb. Amsterdam 25 October 2023, ECLI:NL:RBAMS:2023:6694, para 2.44.4 (collective claim against TikTok Technology Limited).

[540] Gerechtshof Amsterdam 18 June 2024, ECLI:NL:GHAMS:2024:1651, paras 4.14-4.19 and 4.25-4.27 (*Foundation The Privacy Collective/Oracle and Salesforce*).

[541] See art. 1018i para. 2 Wetboek van Burgerlijke Rechtsvordering.

[542] See Counrty report Germany. at III. 3.

[543] See van Duin, Jonkers, Wassink and Meiring, NTBR 2024, 180, 188.

[544] See also R. Rasteger, Die Verbandsklagen-Richtlinie-Umsetzungs-Novelle (VRUN), Zeitschrift für Verbraucherrecht (VbR) 2024, 44, 45 f., on Austria where no such regime was introduced despite relevant proposals.

VI. Summary and recommendations

Experience with collective redress actions for immaterial damages is still scarce. In particular in Member States where collective redress actions are a novelty, courts seem to struggle, and they take a long time to even get those actions running. Therefore, in Germany, vzbv has started to use the new instruments in easy cases rather than adding complexity by asking for immaterial damages.

Currently, the focus seems to be on data protection breaches as they are usually mass-scale, and the Court of Justice has already clarified the most salient issues of substantive law. Nevertheless, immaterial damages could also play an important role, for example, in product liability cases that are now under the regime of the Representative Actions Directive, as the Dutch Allergan case demonstrates. In contrast, immaterial damages do not play a role in consumer contract law where most Member States do not make them available in the first place.

The crucial issue is the likeness, similarity or homogeneity of claims that allows them to be brought in one collective action. Here, Member States, and their courts, should keep the threshold for admissibility low and allow collective redress actions where the claims arise from the same event, or the same type of breach, irrespective of the difference in damage suffered by the consumer victims. In line with the *Oracle and Salesforce* decision of the Gerechtshof Amsterdam, such differences should be handled by establishing sub-groups, and they should be kept at a reasonable level by generalising the amount of immaterial damage rather than investigating the exact moral harm suffered by each individual consumer, as the German *Bundesgerichtshof* has suggested in its judgment in the Facebook scraping case.

B. BURDEN OF PROOF AND DISCLOSURE

Wannes Vandenbussche[545]

The Representative Actions Directive itself is silent on the burden of proof. However, in line with two previous Directives dealing with aspects of civil procedure[546], Article 18 contains a provision on disclosure of evidence. In addition, Article 19 requires Member States to lay down rules on penalties applicable to failure or refusal to comply with these disclosure duties. First, several overarching considerations regarding the burden of proof will be addressed. Subsequently, the focus shifts to a deeper analysis of the impact, if any, that the provision on disclosure of evidence has had in the various Member States under study, along with the key issues that arise in this context.

I. Burden of proof

A first observation that emerged from the various country reports is that discussions on the burden of proof do not arise in every collective redress action. In consumer law, it is often not the underlying facts that are contested, but rather purely legal questions.[547]

Nevertheless, according to the principle of *actori incumbit probatio*, which is codified in all the legal systems under study, each party bears the burden of proof for the elements forming the basis of its claim. This means that it is the responsibility of the class representative to prove the existence of the trader's infringements and the occurrence of collective damage. If the trader argues that the claim is time-barred or that liability is partially or entirely excluded due to the fault of a third party, the burden of proof for such arguments lies with the trader.

Moreover, the general rule concerning the burden of proof applies not only to the merits phase but to every stage of a collective redress action, some jurisdictions have specific rules of evidence that depart from this general principle. For instance, in Poland, there is a distinct phase of group formation based on the opt-in approach. After a potential member has submitted a written declaration to a class representative, the defendant may raise objections against that member's participation in the group or subgroups. In such cases, a specific rule of evidence applies to monetary claims, stipulating that the burden of proof regarding group membership lies with the claimant, *i.e.* the class representative.[548]

The importance of the burden of proof should not be overstated, but neither should it be underestimated. As recital (68) of the Representative Actions Directive suggests, it is not inconceivable that an information asymmetry in the context of business-to-consumer relationships could complicate the burden of proof for the class representative. Beyond the provision on the disclosure of evidence in the Representative Actions Directive, this challenge can be addressed in two ways.

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[545] This report has been prepared in his capacity as Professor of Civil Procedure at Ghent University and in that capacity only.

[546] See Art 6 Directive 2004/48/EC on the enforcement of intellectual property rights, and Art 5 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions (hereinafter: Antitrust Damages Directive).

[547] See country report Germany, IV.1 and country report Belgium, IV.1.

[548] Country report Poland V.1.

First, many rules in substantive private law and EU consumer law shift the burden of proof in favour of the consumer, which can also be applied in collective cases.[549] Well-known examples[550] include the alleviation of the burden of proof in cases of misleading advertising[551], the reversal of the burden of proof regarding whether and when a passenger was informed about a flight cancellation[552], and the legal presumption of the pre-existence of a lack of conformity in the sale of goods.[553]

Second, there are evidentiary techniques in national law that can help address evidentiary asymmetries. Notably, several Member States under study (Austria, Belgium, Germany, and the Netherlands) impose a form of specific duty to provide information on the party that does not bear the burden of proof in such cases.[554] The party carrying the burden of proof suffers from a lack of information, whereas its opponent has a much better knowledge about the factual circumstances, because they took place in its internal sphere. In this case, the opponent is obliged to provide information relevant to the resolution of the case, unless it is unreasonable to do so. This obligation to provide information is based on the idea that the more information that is disclosed, the more facts can be debated in the dispute.[555]

The usefulness of a duty of information imposed on the opposing party in the context of collective redress actions is illustrated by the German model action for a declaratory judgment in the case of vzbv against Mercedes-Benz AG. The case centred on whether Mercedes management was involved in or aware of certain irregularities. These were facts solely within the defendant's knowledge and control, making it impossible for the plaintiff to specify details, such as which employee knew what and when. The 'secondary burden of pleading' (*sekundäre Darlegungslast*) provided a solution. Despite a criminal procedure involving a Mercedes employee, the individual's identity remained undisclosed. Mercedes refused to reveal the name of this key witness in the case. The Higher Regional Court (OLG) Stuttgart ruled that Mercedes was obliged to disclose this information, as it was within the defendant's sphere of knowledge.[556]

We can conclude this section by noting that burden of proof issues may arise in collective redress actions, but the underlying challenges are no different from those in two-party disputes. Beyond the specific evidentiary rules introduced by the EU legislator through consumer law, general evidentiary techniques in national law also play a role. An analysis of the country reports revealed that a duty for the opposing party to provide information exists in several legal systems, though not universally,

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[549] See country report Germany, IV.3 and country report Belgium, IV.1.
[550] For a more comprehensive overview, see W Vandenbussche and P Taelman, 'Consumer Protection Proceedings' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (eds), Comparative Procedural Law and Justice (Part XII Chapter 6), cplj.org/a/12-6, accessed 8 January 2025, para 154 ff.
[551] Art 7 Directive concerning misleading and comparative advertising, 2006/114/EC of 12 December 2006 (EU).
[552] Art. 5, para. 4 Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, 261/2004 of 11 February 2004.
[553] Art 11 Directive on certain aspects concerning contracts for the sale of goods, 2019/771 of 20 May 2019.
[554] For Austria, see *Aufklarüngspflicht* (RIS-Justiz RS0040182). For Belgium, it seems to be part of the parties' duty to cooperate in the administration of evidence, which serves as an umbrella concept (country report Belgium, IV.1). For Germany, see *sekundären Darlegungslast* (country report Germany IV.3). For the Netherlands, see *verzwaarde stelplicht* (Hoge Raad [Supreme Court], 20 November 1987, ECLI:NL:HR:1987:AD0058, NJ 1988, 500 para 3.4).
[555] See also W Vandenbussche, 'Dealing with Evidentiary Deficiency in Tort Law' (2019) (1) The International Journal of Procedural Law 50, 68-69.
[556] See country report Germany, IV.3 referring to OLG Stuttgart, 28 March 2024, case no. 24 MK 1/21, at margin no. 239.

for instance, it seems to be absent in Italy. Other mechanisms may also be available, such as the power of the courts in Belgium to reverse the burden of proof in exceptional circumstances.[557]

II. Disclosure of evidence

Article 18 of the Directive provides a detailed provision on the disclosure of evidence. Unlike the Commission Proposal, which focused solely on qualified entities, the final text requires Member States to ensure that obtaining such an order to access information from the opposing party or a third party is available to both qualified entities and traders. The literature emphasizes that this rule was never intended to revolutionize Member States' procedural laws or create a form of pre-trial discovery.[558] It is explicitly stated that such disclosure must occur in accordance with the procedural rules of the Member State, as well as subject to the applicable Union and national rules on confidentiality and proportionality.

A closer analysis of Article 18 reveals that the applicant must:

- present reasonably available evidence sufficient to support a representative action. This means that the applicant cannot start from scratch and must already substantiate the infringement to some extent. By using reasonableness as a standard, a distinction is made between inadmissible fishing expeditions and acceptable, plausible assertions that are already supported by some evidence.[559]
- demonstrate that additional evidence lies within the control of the defendant or a third party. This means that the defendant or a third party cannot be expected to start compiling, collecting or gathering evidence.[560]
- undergo a proportionality assessment.

Unlike Article 5 of the Antitrust Damages Directive [561], which also includes a provision on disclosure of evidence, Article 18 of the Representative Actions Directive does not provide further guidance on how the proportionality test should be applied. However, the national reports from Poland and Italy show that these legal systems apply the same conditions in the context of collective redress actions as those introduced by the Antitrust Damages Directive. In Poland, the court will consider whether the request is justified based on the existing facts and available evidence, the costs of disclosure, and whether the search for information likely to influence the outcome of group proceedings is reasonable.[562] In Italy, the court must assess whether the disclosure is proportionate to the needs of the case, particularly by evaluating the extent to which the claim is supported by facts and evidence already available, the scope and costs of the disclosure process, and whether the requested evidence contains confidential information, especially regarding third parties. [563]

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[557] See country report Belgium, IV.1.
[558] M-J Azar-Baud, 'La directive européenne sur les actions représentatives : un texte mi-figue, mi-raisin' (2020) *Etudes et commentaires* 37-38, para. 30.
[559] Comp. ELI-UNIDROIT Model European Rules of Civil Procedure, Comments on Rule 25, 93-94, para. 1.
[560] In the same vein about the similar provision in the Damages 2014/104: F Marcos, 'Access to Evidence the 'Disclosure Scheme' of the Damages Directive' in B J Rodger, M Sousa Ferro, F Marcos (eds), Research Handbook on Private Enforcement of Competition Law in the EU (Edward Elgar 2023) 265, 288.
[561] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions.
[562] See country report Poland, V.2.
[563] See country report Italy, IV.3.

III. Implementation in the Member States under study

1. Article 18 of the Directive

Given that Article 18 of the Representative Actions Directive explicitly requires the disclosure regime to be aligned with national procedural law, it is interesting to examine how different Member States have implemented this provision. Notably, among the jurisdictions under study, there appears to be a roughly equal division between legal systems that introduced specific provisions for collective redress actions and those that deemed existing general rules on disclosure duties in procedural law sufficient.

Belgium, Germany and the Netherlands did not deem a specific provision on access to evidence necessary within the regulatory framework for collective redress. The preparatory works for the transposition law in Belgium explicitly stated that the existing rule on the production of documents (Art. 877 of the Judicial Code) met the requirements of the EU Directive.[564] The same applies in the Netherlands, where the legislator also considered the general rules of civil procedural law sufficient.[565] In the same vein, in Germany, the existence of the general rule on disclosure of documents in § 142 of the Code of Civil Procedure was deemed sufficient to fulfil the obligations under the EU Directive.[566] Similarly, in France, where a bill transposing the Representative Actions Directive is currently pending in parliament, no reference is made to the transposition of Article 18 of the Directive.[567]

Following the transposition of the Antitrust Damages Directive, it is noteworthy that in Belgium, Germany and the Netherlands, a new rule on disclosure of evidence has been introduced, which only applies in antitrust damages cases.[568] Admittedly, Article 5 of the Antitrust Damages Directive is more detailed than Article 18 of the Representative Actions Directive (particularly with regard to the application of the proportionality test (see above) and the types of evidence of which disclosure can be ordered), but both regimes also share similarities. This discrepancy illustrates that Member States do not apply a coherent policy when transposing EU legislative acts that address the same subject matter.

By contrast, Poland and Italy introduced specific disclosure regimes as part of the transposition of Representative Actions Directive in the context of collective redress cases. In Poland, a provision distinguishing between different scenarios allows qualified entities seeking injunctive or redress measures to request the disclosure or handover of evidence.[569] More specifically, a distinction is made between evidence held by opposing parties, third parties, or within the files of competent authorities dealing with consumer protection in Poland or other EU Member States.[570]

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[564] Country report Belgium, IV.2.
[565] Cf. 'The other provisions in the Directive do not require transposition. [...] They follow from the general rules of civil procedural law (e.g. on access to evidence, article 843a of the Code of Civil Procedure' (free translation of: Explanatory Memorandum to the Implementation Act of Directive on representative claims for consumers, no. 36.034, p. 13.
[566] Country report Germany, IV.4.
[567] See Projet de loi n° 529 publié par le Gouvernement français le 31 octobre 2024, www.assemblee-nationale.fr/dyn/17/textes/l17b0529_projet-loi.
[568] For Germany, see 33g of the German Cartel Law (GWB). For Belgium, see Art. XVII.74 of the Code of Economic Law. For the Netherlands, see Artikel 845 of the Code of Civil Procedure.
[569] Article 16a of the Act on Group Proceedings.
[570] See country report Poland, V.2.

Similarly, Italy adopted a specific disclosure rule for collective proceedings, incorporated into the Consumer Code. This provision allows the court, upon a reasoned request by the claimant supported by facts and available evidence, to order the defendant to disclose relevant evidence within their possession.[571] In this regard, Italy appears to achieve greater internal coherence than Belgium, Germany, and the Netherlands, as the rules for collective proceedings in the Consumer Code align in certain respects with Articles 3 ff. of Legislative Decree No. 3/2017, which implemented the Antitrust Damages Directive. As for Spain, the Directive has not yet been transposed, but a draft law is under consideration. If enacted, it will facilitate document disclosure in collective redress actions. As in Italy, it proposes a specific disclosure regime that mirrors the mechanism of the Spanish system for competition claims.[572]

2. Article 19 of the Directive

Article 19 of the Representative Actions Directive requires Member States to establish rules on penalties for failure or refusal to comply with disclosure duties. Recital (69) of the preamble clarifies that such penalties may include fines, conditional fines, periodic payments, or penalty payments.

An overview of the various country reports highlights significant differences in the amounts of fines imposed for non-compliance. While no specific provision was deemed necessary to implement Article 18 of the Directive, the German legislator has introduced a penalty mechanism to transpose Article 19. Under this provision, if a court orders the disclosure of evidence and the party fails to comply, a penalty of up to € 250,000 may be imposed. Poland follows a similar approach, imposing a lump-sum fine of up to PLN 50,000 (€ 11,695) and an additional penalty of PLN 10,000 (€ 2,339) per day for continued non-compliance.[573] Similarly, in Italy, unjustified refusal or failure to comply with a disclosure order incurs a fine of € 10,000 to € 100,000, payable to the '*Cassa delle Ammende*'.[574] In Belgium, the general procedural rules allow the court to set the amount of the periodic penalty payment at its discretion.[575] In addition, fines for procedural misconduct can range from €15 to €2,500, plus any damages that may be claimed for the loss suffered as a result of the misconduct.[576]

Although not mandated by the Directive, Member States also address the substantive effects of non-compliance. In Poland, if a party refuses to comply with a discovery order or destroys evidence, the court may accept the facts the evidence aimed to prove as established, unless the non-compliant party demonstrates otherwise.[577] Similarly, in Italy, unjustified refusal, failure to comply, or destruction of evidence allows the court, based on available evidence, to consider the related facts as proven.[578] In Belgium, it was already agreed that non-compliance with a document disclosure order should have consequences for the administration of evidence. Recently, it has become clear that this amounts to a reversal of the burden of proof, requiring the non-compliant

[571] See country report Italy, IV.3.
[572] See Artículo 838 'Acceso a fuentes de prueba' Anteproyecto de Ley de acciones de representación para la protección de los intereses colectivos de los consumidores), see www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/Anteproyecto%20de%20Ley%20acciones%20representativas.pdf.
[573] Article 16h of the Act on Group Proceedings. See country report Poland, V.2.
[574] See country report Italy, IV.3.
[575] See country report Belgium, IV.2.
[576] Article 780bis of the Judicial Code.
[577] See country report Poland, V.2.
[578] See country report Italy, IV.3.

party to prove that the facts the requesting party seeks to prove through document disclosure do not reflect reality.[579]

Finally, the situation appears less straightforward in Germany. Under the general framework of section 142 of the Code of Civil Procedure, if the affected party (typically the defendant) refuses to comply, a comparable sanction to violations of the secondary burden of pleading could apply. This would mean that if the defendant withholds necessary information, the court may assume the claimant's assertions on the matter are correct. However, this approach is disputed, as the law does not explicitly address sanctions.[580]

3. Other issues relating to disclosure of evidence

A review of the national reports prepared for this study and the analysis of the legal framework in the other Member States considered (Austria, the Netherlands, France and Spain) reveal a number of points.

Firstly, the requirement to specify the document(s) requested is a significant obstacle in various Member States in the context of collective redress actions. This issue was highlighted in the German country report, where case law requires plaintiffs to identify the exact document they wish the defendant to disclose, meaning they must have prior knowledge of its existence, for example, through a whistleblower. A general assumption that such a document exists is insufficient to trigger a disclosure order. For example, the claimant must request specific documents, such as a particular email, rather than a broad request for all emails between certain parties during a particular period.[581] Similar problems can be seen in Belgium, where case studies such as the Arco and Fortis judgments show that this requirement has led to the failure of the case.[582]

In this respect, it is unfortunate that the Representative Actions Directive, like the Antitrust Damages Directive, does not mention the possibility of requesting categories of evidence, which could be defined as narrowly as possible based on reasonably available facts in a reasoned justification. The Italian country report suggests, however, that the submission of categories of evidence is possible in collective redress actions, defined by shared characteristics such as nature, creation period, subject matter, or content.[583]

Second, a procedure unique to Spanish law and not covered by the Representative Actions Directive, is the pre-trial information gathering ('*diligencias preliminares*') in collective actions. This procedure allows a party to gather evidence before filing a formal lawsuit. If the court deems the application admissible, it grants authorisation to initiate the process, specifying its scope and deadlines. This enables the court to compel the defendant to disclose relevant information, such as details of potential class members or product purchasers. It can furthermore help class representatives assess their chances of success, identify legal challenges, and clarify the specifics of the claims, such as damages.[584]

The key point is that pre-trial information gathering could contribute to the ultimate goal of having substantial factual information available at the start of proceedings, thereby encouraging parties to reach settlements. This has been demonstrated in other legal systems, such as in England and

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[579] See country report Belgium, IV.2.
[580] See country report Germany, IV.3.
[581] Ibid.
[582] See country report Belgium, IV.2.
[583] See country report Italy, IV.3.
[584] T Ph Hamann, Die Europäische Richtlinie 2020/1828 über Verbandsklagen und ihre Umsetzung in Deutschland und Spanien, unpublished doctoral dissertation, 604-605.

Wales[585] and in the United States.[586] Given that pursuing collective settlements is a key focus of the Representative Actions Directive, both the EU legislator[587] and national lawmakers[588] could have paid more attention to this aspect.

Third, it is important to consider who takes the lead in determining the scope of the disclosure of evidence. In particular, neither the EU lawmakers nor national legislators have focused on the role of the court in this context. Courts could potentially play a more active role by issuing *ex officio* disclosure orders, but the extent of this power is unclear. For example, can the court request additional documents beyond those specifically identified by the requesting party? The Italian report emphasizes that courts, freed from formalities that are not essential to the adversarial process, may conduct proceedings as they see fit in order to deal with relevant evidence in the case.[589]

Finally, avoiding delaying tactics is crucial. In Poland, for example, a court's decision on discovery can be appealed to a higher court. This right is granted to the parties involved, third parties, and consumer protection authorities from Poland or other EU Member States required to disclose evidence. However, this may inadvertently delay the disclosure process, which is intended to enhance procedural efficiency. By contrast, under Belgium's general rules of civil procedure, orders for document production cannot be appealed, thereby reducing potential delays.

IV. Summary and recommendations

Regarding the rules on the burden of proof, it is notable that aside from specific shifts in EU consumer law, parties faced with evidential difficulties have to rely on the techniques provided by national law to try to overcome this hurdle. One such measure, found in various Member States, includes different variations of a specific duty to provide information (e.g., (*Aufklärungspflicht'* in Austria, *'sekundäre Darlegungslast'* in Germany, or *'aanvullende stelplicht'* in the Netherlands). Although this issue transcends the scope of collective redress actions, its adoption could prove advantageous for legal systems not yet acquainted with it.

With regard to the disclosure of evidence, it is perfectly legitimate for a Member State not to transpose a provision of a given Directive, especially in cases of minimum harmonisation, such as the Representative Actions Directive.[590] However, it is regrettable that some Member States, such

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[585] In the UK, early exchange of information is highlighted as a means to enable parties to make informed decisions regarding early consensual settlement (M Ahmed 'The pre-action protocols are a significant procedural aspect of the English civil justice system but reform is required' (2020) 39 (3) Civil Justice Quarterly 193, 194.

[586] Cf. 'In more than 95 percent of American civil lawsuits there is no trial [...]. In many cases information gathered in pretrial discovery become the basis for a settlement' (R A Kagan, Adversarial legalism. The American way of law (Harvard University Press 2001) 102.

[587] However, the Commission's Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence included a specific provision granting potential claimants the right to request a court order for the disclosure of relevant evidence prior to filing a claim for damages (see art. 3 Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence).

[588] It is worth noting that a pre-action collection and exchange of information was included in the draft law on the simplification and modernisation of civil procedure in the Netherlands but did not ultimately become law. The proposed provision stated: "Parties shall gather, before submitting a case to the court, the information that they can reasonably access and that, under the given circumstances, is reasonably foreseeable to be relevant for the assessment of their claim, request, or defense, and provide this to the court during the proceedings" (see Draft Law on the Simplification and Modernisation of Evidence Law, no. 35 498).

[589] See country report Italy, IV.3.

[590] See for instance, L Hornkohl, 'Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive' (2024) 15(5) Journal of European Competition Law & Practice 311, 311.

as Germany and Belgium, lack a coherent approach in this regard. For instance, while a specific disclosure rule was introduced during the transposition of the Antitrust Damages Directive, no equivalent provision was adopted for the Representative Actions Directive. This inconsistency has led to uncertainty in these jurisdictions about the required level of specificity for requested documents, a discussion that could have been avoided if both regimes had been aligned.

This comparative analysis highlights significant differences among Member States regarding the severity of penalties imposed for non-compliance with an order to disclose evidence. In some jurisdictions, such as Belgium, questions arise about whether the penalty amounts align with the triad of being effective, proportionate, and dissuasive, as required by Article 19(1) of the Directive.

Additionally, several areas remain underregulated, presenting opportunities for further refinement. These include exploring the potential for pretrial gathering of information, clarifying the role of the judiciary in disclosure proceedings, and addressing mechanisms to minimize delaying tactics.

C. FINANCING

Axel Halfmeier

I. Comparative analysis of the financing issues in collective actions

The preceding country reports clearly show that the financing of collective redress actions is a very relevant issue in evaluating the possible impact and relevance of such actions. As it is the case in any court procedure, collective actions create expenditures and cost risks for the claimant. In all of the jurisdictions covered by this study, a "loser-pays" rule applies, so that the distribution of the incurred costs depends on the outcome of the proceedings. Although this rule may vary in its details – in particular on what exactly are adequate costs to be shifted from the winning to the losing party – it clearly creates a situation in which a considerable cost risk is created with every litigation. This leads to the question of who carries this cost risk, and the country reports show that there are many different possible solutions to this issue.

While the general issue of cost risk in a loser-pays system applies to any kind of court action, there is an additional, specific issue that arises in collective actions: These actions are designed to represent a group of beneficiaries (in particular consumers) through a representative claimant such as a consumer association or other institution. As this representative is the formal claimant, it typically carries the cost risk, even though it does not directly benefit from the action. From the representative claimant's perspective, one could therefore think about spreading the cost risk to the actual beneficiaries or to other actors.

Before looking at the solutions found in reality, one could explore possible solutions to this problem in the abstract. Who could carry the cost risk of collective litigation? One could think of at least five different basic models:

- At least in theory, an intuitive solution would be a simple pooling of resources by the affected consumers to share the cost risk among themselves.
- On the other hand, the representative claimant could simply carry the risk itself, in an altruistic spirit to help other people.
- As it is typical in the U.S. and Canada, an entrepreneurial lawyer could assume the financial risks, in exchange for a share of the proceeds.
- Instead of the lawyer, a commercial litigation funder could step into this role. This is especially prevalent in jurisdictions that prohibit or otherwise discourage the use of contingency fees by lawyers.
- Finally, the state or some other institution could set up a special "collective litigation fund" from which collective litigation is financed or at least financially supported.

We will now turn to how these theoretical options play out in the European legal landscape that we have studied.

II. Financing models in the selected European jurisdictions

1. Contributions by affected consumers

The first possible model, to collect and pool contributions by the affected consumers in order to finance a collective action, is only rarely used. It requires some form of early co-ordination that may be difficult to realize in fact and is also somewhat incompatible with the applicable legal instruments. For example, in Belgium, consumers may declare their opt-in into the action after the court's decision on the merits of the case.[591] This means that if the claimant organisation loses the case on the merits, it has no possibility to recover any costs from the affected consumers. The idea of an "entry-fee" for participating consumers was thus rejected.[592] A similar situation exists in Germany: Here, the opt-in period ends a bit earlier (after the end of the oral hearings), but just like in Belgium, there is no possibility for the claimant organisation to shift parts of the cost risk to the affected consumers.

On the other hand, this option exists, although only on a small scale, in Poland: There, the law enables the claimant organisations to charge the participating consumers up to 5% of the claim value, although this is capped at a maximum amount of 2,000 PLN, which corresponds to less than 500 Euros. However, there is no experience yet with this type of co-financing by the affected consumers. In particular, the Polish Financial Ombudsman, being the only recognised qualified entity at this moment, does not and cannot charge such a fee to the affected consumers. In Austria, an entry fee for consumers of up to 250 Euros is allowed by the law.[593]

Notwithstanding these rules, an "entry fee" for consumers to participate in a group action is rather uncommon in Europe, and it does not seem to be a very promising solution to the cost risk problem: It is not easy to calculate an adequate share of the cost risk for every consumer, as this will depend on the amount of consumers joining and many other factors. A pooling of cost risks also requires an active decision by every affected consumer to do so, and monitoring of payments which creates administrative costs for the claimant institution.

However, this is to be distinguished from an agreement on third-party funding: Such an agreement may also have the effect of putting a financial burden on the affected consumers, as they may have to give up a certain fraction of their claim to the financing company. The difference is that the cost risk is then carried by the financing company. This is therefore classified as a different model and discussed separately below.

2. Altruistic risk-taking by claimant organisation

In all the studied jurisdictions, the primary burden of taking the cost risks is shouldered by the claimant organisations. This fits with the altruistic character of these organisations: They do not aim to make money for themselves, but they serve the interests of the affected consumers and thus are willing and able to take on financial risks for themselves in the interest of the affected consumers.

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[591] See country report Belgium, at II. 4 (d).
[592] Id. at V. 1.
[593] Austrian law on qualified entities: § 9 par. 4 QEG.

This means that the claimant organisation must have some reliable and sufficient source of funding to be able to carry these financial risks. In comparing the studied jurisdictions, one can distinguish at least three types of funding for such organisations: One is to create specific government institutions that are funded by tax money and are part of the government structure, such as in Poland the municipal consumer ombudsmen and the Financial Ombudsman. The second solution, used in Germany, is close to this, but separates the organisations a bit more from the government structure: The German "consumer centres" are partly financed by the government, but are formally organised in a private law structure as private law associations.

The third model, which we see in particular in Belgium with the organisation "Test-Achats", is an association that is financed by the consumers themselves that are members of this association. While the German "Verbraucherzentrale Bundesverband" receives 98% of its budget from the German government, its Belgian counterpart "Test-Achats" receives 96% of its budget from individual consumers' contributions. In Italy, the organisation "Altroconsumo" is also financed to 95% by its members' contributions. Belgium, Italy and Germany therefore show very different models of financing, although these different sources of financing both result in strong institutions that are able to bring a good number of collective actions in the interest of consumers and carry the corresponding financial risks.

In Austria, the "Verein für Konsumenteninformation" (VKI) is the most important actor in this field. It is financed mainly by its own economic activities (magazine, books), but also to about 29% by government subsidies. However, the VKI also uses third-party financing for many of its collective actions.

The model of well-financed institutions that carry the financial risks of collective actions is therefore a tried and tested model in Europe that has been successfully established over the last decades. This structure has the big advantage that the claimant organisation does not have to look for specific sources of financing for every single action, but is strong enough to bring collective actions even if they are associated with significant financial risks.

On the other hand, one must also see that the model of self-financing by the claimant organisation could have, from a theoretical point of view, some possibly negative consequences: The management of the organisation might tend to accommodate its institutional policy to its financial supporters, be it the government or its membership. Therefore, it would be in the interest of these organizations to have access to additional sources of funding such as third-party litigation financing.

In addition to these policy considerations, there are hard budgetary restrictions even for well-financed institutions such as the German consumer centres and the Belgian "Test-Achats". They have to carefully plan what actions to bring with limited resources. When the litigation budget is exhausted, no more actions can be brought, even if they would have a good chance to win on the merits. This means that even in Belgium, Italy and Germany, a probably very large number of possible collective actions remain that may be well-founded in substantive law, but cannot be taken up by the claimant institutions due to lack of their capacity. This problem of institutional capacity is even more pressing in countries where the claimant organisations may be financially less capable, such as in Poland.

As a preliminary result, one can therefore say that the institutional model of financing for collective actions, with institutions financed either by the government or by the institution's members, is tried, tested, and successful in European practice. However, it is not very flexible and probably insufficient to cover many possible areas where collective actions might also be of relevance but are outside the institutional budget and capacity of these institutions. One could therefore look at additional possible models of financing that would allow an extension of collective actions into areas that cannot be adequately covered with the existing institutions' resources.

3. Financing by entrepreneurial lawyer on contingency fee basis

From the perspective of comparative law, such additional models are easy to find, and the most prominent of these is probably the involvement of entrepreneurial claimant law firms, as it is an established practice in particular in the U.S. and Canada. These law firms take on the financial risks that are associated with individual or collective actions, in exchange for a share of the result of the action. From the perspective of the entrepreneurial lawyer, collective litigation is seen as an investment in which the lawyer has a commercial interest.

In Europe, however, many countries impose prohibitions or limitations on contingency fees for lawyers. Furthermore, even where contingency fees are allowed in general or under specific circumstances, it is not always possible in a collective action to create a contingency fee arrangement between the affected consumers and the claimant lawyer. This is because typically, the lawyer has a contract with the representative claimant only – be it an individual claimant, as in the U.S. class action, or a qualified entity such as in many European countries.

There is typically no contract between the lawyer and the individual group members. Therefore, the contract between the representative claimant and the lawyer cannot take any rights away from the group members as they are not a party to the contract. In the U.S. class action, this issue is solved by a court order that imposes a certain remuneration for the class action lawyer. The amount of the lawyers' fees and whether it is based on an hourly rate, on expenses or calculated as a fraction of the result of the action, is therefore defined not by contract, but by a unilateral court order.[594]

A comparable system appears to be created by Polish law as it explicitly allows attorneys' fees as a share of up to 20% of the claim awarded to the affected consumers.[595] Even closer to the U.S. system, Italian law allows the judge to order the payment of reward or success fees to the claimant's lawyer, although contingency fees are generally prohibited in Italy.[596] In Belgium, contingency fees for lawyers are prohibited, and the theoretical possibility of additional "success fees" has not become practical for collective actions yet.[597] In Germany, contingency fees for lawyers are possible in certain cases regulated by the law, but must be stipulated by contract and thus have so far only been used in individual cases.[598]

In theory, contingency fees for lawyers can improve consumers' access to justice in collective cases: If the expected value of the aggregated claim is high enough from the lawyers' perspective, the entrepreneurial lawyer will assume the financial risks of the action and thus shift this risk away from the consumers and from the claimant institution. From this theoretical point of view, one could therefore support a general option to use contingency fees in the interest of consumers' access to justice.

However, whether this theoretical approach works in practice will depend very much on the local rules on contingency fees and how the collective action is structured. Even though some European jurisdictions – such as Poland and Italy – appear to allow this in limited ways, there is general scepticism in Europe with regard to contingency fees for lawyers that expresses itself in many prohibitions or at least limitations regarding the use of contingency fees.

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[594] See, in U.S. Federal Courts, FRCP rule 23 (h).
[595] Country report Poland, at VI. 3.
[596] Country report Italy, at V. 1.
[597] Country report Belgium, at V. 1.
[598] See § 4a *Rechtsanwaltsvergütungsgesetz* (RVG, law on attorneys' fees).

Whether this critical view of contingency fees is justified could be the subject of a deeper analysis that cannot be undertaken here. For the moment, one has to accept that European jurisdictions are rather restrictive in this area. With regard to the financing of collective consumer claims, this means that even though in some European states a shifting of cost risks to the lawyer may be possible under specific circumstances, it does not appear to be a workable solution for most cases.

4. Third-party litigation funding

This restrictive European approach to lawyers' contingency fees means that third-party litigation funding plays a significant role in European litigation practice. This is a typical tendency for those countries that prohibit or strongly restrict lawyers' contingency fees. Outside Europe, this can be most clearly observed in Australia, which has a strong class action practice notwithstanding the prohibition of lawyers' contingency fees. Instead, Australian practice has developed established mechanisms of third-party financing.

From an economic perspective, the assumption of a collective action's financial risk by an entrepreneurial lawyer is very similar to third-party financing: In both cases, the risk is transferred to a profit-driven entity that regards litigation as an investment. The difference lies in the addition of the financing company as an additional "third" party that assumes this risk instead of the lawyer.

In the European jurisdictions that we studied, third-party financing of collective actions is generally allowed, but there are several restrictions and detailed regulations.

a) Price controls for third-party funding

A very restrictive approach is a statutory price control with regard to the share of the litigation profits that may be promised to the litigation financing company. This can be found in Poland, where a maximum share of 30% is fixed by statute.[599] While this number may be adequate for many cases, it is a bit unusual for a market economy to regulate prices for financial services like this. The price charged for a service depends on many factors, such as competition in the market and the risk-reward calculation made by the financing company. As there are no indications at the moment that a monopoly or some distortion of competition exists in the area of litigation financing, it is not quite clear why such a price regulation should be necessary.

An even more radical price control is found in Germany: In certain consumer collective actions, the price of litigation financing is restricted to 10% of the claim value. This rule is clearly designed to hinder the development of this market, as it sets a limit that is obviously below typical market prices.[600] In Belgium and Italy, third-party litigation financing is allowed without any statutory price control.

Price controls for third-party financing are certainly not useful and should be abolished. In a market economy, the price for services should be the result of supply and demand, and under a theoretical model of competition, market prices should not be disturbed unless there is some indication for market failure. At this moment, there are no indications that the market for litigation financing is not competitive enough, as there are many litigation financing companies in Europe and across the world that compete for business. Price controls will therefore artificially reduce supply and hinder the development of this business sector. This is certainly not in the interest of consumers' access to justice.

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[599] Country report Poland, at VI. 2.

[600] See country report Germany, at V. 4.

b) Transparency requirements for third party-funding

Aside from drastic price regulations, all the studied jurisdictions have certain rules on the transparency of third-party financing agreements. This is no surprise as Art. 10 par. 3 of EU Directive 2020/1828 orders the Member States to ensure a certain level of transparency in relation to the court. This is interpreted differently in the jurisdictions compared here: In Poland, a funding agreement must be attached to the claim brought forward by the claimant organisation, and apparently the defendant may look into this agreement.[601] In Germany, the law requires only to provide the court with the funding contract, and it is unclear whether the defendant may demand access to this material.[602] In Belgium, the law does not even explicitly require the disclosure of the full agreement, but only the identification of the funding company.[603] Similar rules apply in Italy.[604]

If one looks for a best practice solution in this regard, it is questionable why the defendant should have any insight into the claimant's financing arrangements. These arrangements do not relate to the facts of the case and thus should not influence the adjudication of the case. From the defendant's perspective, the details of the claimant's financing arrangement should therefore be irrelevant. The only exception would be a defendant strategy that takes into account the financial strength of the claimant or its financing company. Under such a strategy, if the claimant's financing arrangement contains a maximum investment by the financing company, the defendant could aim at dragging out the proceedings until this maximum is exhausted, and then try to force the claimant, whose financial reserves have come to an end, into a settlement that favours the defendant. Such a strategy, however, is not in the interest of adequate administration of justice and should thus not be supported by the law.

A good starting point to find best practices in the area of litigation financing could be the self-regulation that is already used by the litigation financing industry. In particular, the Code of Conduct used by the Association of Litigation Funders of England and Wales (ALF) is an existing set of generally accepted industry rules and standards.[605]

c) Limitations as to the influence of the funding company

Beyond the question of transparency of third-party funding agreements, Art. 10 par. 2 (a) of EU Directive 2020/1828 also orders the Member States to ensure that the behaviour of qualified entities in collective consumer actions is not "unduly influenced" by the funding company to the detriment of the consumers' interests. However, there is little law or practice on this issue yet, so it remains an open question what the standards are in this respect.

Again, it would make sense to turn to the ALF Code of Conduct mentioned above to find best practice standards. This code tries to strike a fair balance between the necessary independence of the claimant with regard to procedural actions and settlement in relation to the legitimate interest of the funder in controlling the fate of its investment in the litigation. For example, if there is a dispute between the claimant and the funder about whether to accept a settlement proposal, the code asks the parties to have this resolved by an independent expert, in this case a King's Counsel who shall be instructed jointly by the parties of the funding agreement or nominated by the Chairman of the Bar Council.[606]

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[601] Country report Poland, at VI. 4.
[602] Country report Germany, at V. 4.
[603] Country report Belgium, at V. 2.
[604] Country report Italy, at V. 4.
[605] Available at https://associationoflitigationfunders.com/code-of-conduct/.
[606] Id., at rule 13.2.

d) Practical obstacles to third-party funding arrangements

In all of the jurisdictions that have been studied, there are significant practical obstacles that prevent a widespread use of third-party funding arrangements in collective consumer cases. These are typically connected with the chronological order of collective cases which is not geared towards a "book-building" procedure that would first collect all consumers that are willing to enter into a funding agreement. On the contrary, in particular the Belgian, Italian and German rules make it almost impossible to force consumers into such an agreement: The affected consumers may opt into the action at a very late stage of the proceedings, and they are not forced to enter into any contract with the representative claimant or with a funding company. This creates a significant free-rider problem: Even if the claimant institution, the funding company and a number of willing consumers agree to a financing agreement, it will not be easy to prevent "outsiders" from receiving their individual claim without any reduction in favour of the funding company. With some creativity, one could think of settlement provisions that try to achieve such an effect, but there are no practical examples of this yet.

One possible solution for this free-rider problem may be observed in Australia: There, a practice has been developed in which the effect of class actions is restricted to those consumers that have concluded a financing agreement with the litigation financing company, in which they agree to give a certain share of the proceeds to that company in case of the action's success. Technically, this is realised by limiting the scope of the action – that is, the definition of the affected group – to include only those consumers that have entered into the respective financing contract. Later developments partly revised this practice and created a "Common Fund" doctrine in Australia, which means that all persons who receive money according to a class action judgment or settlement must pay a proportional share of the costs associated with the action, including the litigation funder's share.[607] Both of these approaches solve the free-rider problem in Australian class action practice. Whether one of these solutions is possible and useful in European circumstances has not been tested yet.

Nevertheless, at least one European jurisdiction has already opened up the possibility for such an approach: In Austria, the EU Directive 2020/1828 has been implemented by the new "Qualified Entities Act" (*Qualifizierte-Einrichtungen-Gesetz*, QEG).[608] In this law, § 6 par. 1 QEG not only explicitly allows third-party financing of collective actions, but it also allows the qualified entity to restrict opt-ins by consumers to those consumers that have concluded a contract with the financing company. This appears to be a workable solution and can draw on the Australian experience.

Although the collective action rules of the Netherlands have not been studied in depth here, it is important to note that third-party litigation funding plays a large practical role in the Netherlands. There, it is common to create ad hoc claims vehicles – typically in the form of foundations – that make contracts with commercial litigation funding companies to finance the action and to shift the cost risk to those financing companies. This practice has been successful in the sense that many collective actions in different areas of the law – such as consumer law, capital markets law, data protection law – have been brought in the Netherlands and that they appear to be sufficiently financed. The practice in the Netherlands also has considerable experience with the issue of free riders and the relationship between an opt-out collective action and a financing agreement between the commercial litigation funder and the claimant institution.

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[607] See the recent decision of the Australian Federal Court in *R&B Investments Pty Ltd (Trustee) v Blue Sky (reserved Question)* [2024] FCAFC 89.

[608] Bundesgesetzblatt für die Republik Österreich, 17. Juli 2024, 1.

5. Special fund for collective litigation

It is interesting to note that none of the European jurisdictions that we surveyed here makes use of an idea that has been widely discussed, namely the creation of a special fund to support collective litigation. The most prominent example in this regard is the Canadian province of Ontario, where a "Class Proceedings Fund" has been created by statute. This non-profit fund supports class actions and assumes certain cost risks for those class actions that it decides to support. In return, the fund collects 10% of any judgment or settlement money that is paid to the class. The fund has established a successful practice over the last decades and has supported a large number of class actions.[609]

With regard to the reasons why this idea has not been taken up by any of the lawmakers in the European jurisdictions studied here, one can only speculate that such a fund does not fit well with the goal of limiting the number of possible claimant organisations. In Germany, for example, the legislator apparently aims to restrict collective actions mainly to a few actors, in particular the government-funded consumer centres. Within this approach, it is therefore enough to provide these institutions with financial support, and there is no reason to create an additional fund that could be accessed by other possible claimants as well. This is different in the Canadian system, where a class action can in principle be brought by any class member, so that it makes sense to allow support for specific actions from the fund. To create such a fund implies that support for actions is determined on a case by case basis, and not so much by institutional support to certain actors.

III. Further measures to reduce cost risks for claimant organisations

In the jurisdictions that we have studied, certain other measures have been taken to reduce the costs and cost risks associated with collective actions in the consumers' interests. Many of these relate to the level of court and attorneys' fees. For example, Polish and Italian laws reduce or in some cases even waive court fees in collective consumer cases. In Germany, there are statutory limits on the determination of the amount in controversy for such action, which may also result in lower court and attorneys' fees compared to a regular action of the same value.

However, these measures do not seem to have a strong impact on the risk calculus associated with consumer collective actions. In Poland and Italy, it is reported that consumer associations struggle with the financing of such actions, regardless of the more or less symbolic reduction in court fees. In Germany, the statutory rules may indeed lower the cost risk in some cases, but at the same time they have the questionable side effect of reducing compensation for claimant lawyers and thus potentially compromising the quality of representation of consumer interests.

This type of more or less symbolic reduction of court and attorneys' fees in collective consumer cases therefore appears to have not much positive impact. It is not a promising approach to financially support litigation representing consumer interests.

[609] For details, see Kalajdzic, Class Actions in Canada (2018).

IV. Summary and recommendations

All of the available reports show that financial considerations play a large role as we look at the quantity and quality of collective actions in the interest of consumers. The best statutory or doctrinal systems do not help much if the representative organisations do not have the financial means to carry the significant cost risks associated with such litigation.

In the analysis outlined above, several models and instruments have been discussed that could support the representative organisations in this regard. These instruments may be summarised in two main groups:

1) Helpful, but not crucial

There are instruments such as contributions by individual consumers to the litigation costs ("entry fees") or the reduction of court fees that may be helpful in certain circumstances, but do not appear to be game-changing or crucial for the future of collective litigation in the interest of consumers. The possibility of creating a special fund has also been discussed, but does not fit very well with the institutional approach followed by many European jurisdictions. The same considerations apply to contingency fees for lawyers: This is an important driver of class action litigation in North America, and it can certainly create incentives for more and better collective litigation. However, contingency fees for lawyers are typically viewed with much scepticism in Europe and are prohibited or strongly restricted in many European countries. Therefore, they do not seem to be a very promising or realistic approach for collective consumer actions on this side of the Atlantic.

2) Two crucially important measures

On the other hand, there are two instruments that are tried and tested in Europe and that already had and will have a strong impact on the quantity and quality of collective litigation: strong consumer institutions and third-party litigation financing.

a) Strong institutions to support consumer interests

In several European countries, strong associations and other institutions have evolved that are financially and institutionally capable of bringing high-quality collective consumer actions. These institutions are either financed by the government or by their members. They should be strengthened and supported, as they have an excellent track record with regard to the representation of consumer interests.

b) Enabling third-party litigation funding in collective consumer cases

At the same time, our study shows that even the strong institutions have limited capacities and that additional funding from the private sector is necessary to cover the full range of consumer interests. Therefore, third-party litigation funding should be encouraged in this area. The experience in the Netherlands as well as in other areas of the law – for example in the area of competition law – shows that such funding can be very helpful in bringing well-founded claims to the courts that would otherwise not have much chance of representation.

In view of this importance of third-party litigation funding, it should be supported and enabled by the European lawmakers. Price controls in this area, such as in Poland and Germany, are inadequate in

a market economy. Furthermore, the procedural rules on collective actions should specifically enable third-party financing, as the Austrian lawmaker has recently done.

This is not to say that there are no conflicts of interest associated with third-party litigation financing. Every representation of somebody else's interests – be it by a lawyer, by a non-profit organisation or by a commercial litigation funder – creates a potential principal-agent conflict that must be dealt with. However, since litigation funding has spread around the world and become a significant business sector over the last decades, there are many best practice examples that already exist, and which can be referred to in developing a best practice code for such situations. I swapped the order of the policy recommendations to follow the order used in the country reports.

PART 4: POLICY RECOMMENDATIONS

A. Redress actions for immaterial damage

Recommendation 1: EU policy makers should review EU consumer law to ensure that compensation for suffered immaterial damage is available in all cases when such damage is suffered by a consumer, thereby avoiding unequal treatment of victims of breaches of different laws.

Explanation: The Representative Actions Directive contains no provisions on immaterial damages. Only some EU legislative acts explicitly require Member States to make compensation for immaterial harm available, one example being the General Data Protection Regulation. In most cases, the leeway of Member States is only constrained by the principle of effectiveness of EU law. EU law should therefore be adapted to avoid the unequal treatment of consumers across the EU, depending on which consumer law has been breached, how it has been transposed into national law, and which approach to immaterial damages has been adopted by the legislator.

Recommendation 2: Where a certain breach has a typical psychological effect on consumers, the burden of proof should be reversed or at the very least lowered towards *prima facie* evidence.

Explanation: Currently, national courts often require detailed proof of the immaterial harm that consumers have suffered, and frequently reject claims for immaterial damages where they find that harm is not sufficiently serious. National case law on data protection breaches that has reached the European Court of Justice provides telling examples. In order to facilitate both compensation for consumers and the work of the courts, the burden of proof should be reversed or at least lowered towards *prima facie* evidence where a certain breach has a typical psychological effect on consumers.

Recommendation 3: EU policy maker should adapt the Representative Actions Directive to include a provision that allows all national courts to quantify immaterial damage suffered as a result of mass-harm caused by a trader by way of lump-sum payments where the effects of the breach on victims are similar, while allowing individual consumers to demonstrate special circumstances that justify higher compensation.

Explanation: In relation to the collective redress of immaterial damage, two issues are critical: the quantification of damage and their similarity. Neither is addressed by the Representative Actions Directive, leaving full discretion to the Member States. Collective redress is facilitated by the court's ability to apply lump-sum quantification of immaterial damage, as opposed requiring an examination of each victim's individual pain and suffering. An example is the German Bundesgerichtshof's approach in the *Facebook (scraping)* data protection case, where the court suggested a lump-sum payment for loss of control over victims' personal data. If a data subject demonstrates psychological harm beyond the mere loss of control, the court may need to hear that data subject in person to ascertain the immaterial damage and award damages that go beyond those granted for mere loss of control. Immaterial damage suffered by class members is also more likely to be considered sufficiently similar for the individual claims to be bundled in a collective action, if they are based on the same breach or the same type of breach and are quantified as equal in amount.

Recommendation 4: EU policy maker should supplement the Representative Actions Directive with a provision that clarifies that the requirement of similarity in immaterial damage suffered by each class member should be understood to mean that claims resulting from the same breach or the same type of breach can be bundled into one collective procedure, even if the specific consequences of the breach differ for each class member.

Explanation: In relation to the similarity requirement, Recital (12) of the Representative Actions Directive leaves it to Member States "to decide on the required degree of similarity of individual claims ... in order for the case to be admitted to be heard as a representative action." The similarity requirement should, however, be interpreted more broadly to give the redress action a wider scope of application. Member States should also allow collective proceedings where bundled claims arise from the same (type of) breach, even if the amount of the claims differ. One way of addressing this is through the formation of sub-groups, which German and Dutch courts have indicated as a solution. Alternatively, individual claims could be quantified at the distribution stage, as is possible in Germany and the Netherlands.

Recommendation 5: EU policymakers should also introduce the requirement for all Member States to make declaratory actions available, in addition to the representative actions already provided for under the Representative Actions Directive.

Explanation: When individual claims are too different to be heard collectively, a collective declaratory action allows consumer organisations to at least establish a breach of consumer law in a procedure with broad effects. Consumers can then take individual action, provided that the prescription of their claims is suspended during the collective declaratory procedure. Germany provides such an instrument through its model.

Recommendation 6: Furthermore, EU law should require Member States to establish a workable skimming-off profit action for widespread small damage cases, ensuring that skimmed-off unlawful profits are paid into a fund dedicated to consumer protection measures.

Explanation: Consumer protection would benefit from a collective instrument allowing traders to be stripped of unlawful gains resulting from a breach – an approach particularly useful in small damage cases where consumers may not opt into a collective redress procedure and already existing in some Member States. Such a could serve two purposes: first, it would enhance consumer protection if skimmed-off profits are used for that purpose, and second, it would promote fair competition by preventing unfair traders from retaining financial advantages gained from breaches of consumer law. This could even apply in immaterial damage cases where, for example, a trader has profited from unlawfully collected personal data.

B. Disclosure and the burden of proof

Recommendation 1: Regarding the burden of proof, a best practice – applicable not only to collective redress actions but also relevant to individual proceedings – could be for all Member States to introduce a specific rule of evidence requiring the party that does not bear the burden of proof to provide the court and the opposing party with information within its sphere of control. Member States might also consider going one step further in this respect by allowing the court to reverse the burden of proof in cases where the application of the basic principles would be

manifestly unreasonable (for instance, when obtaining the relevant evidence is absolutely impossible for the complainant).

Explanation: While collective actions do not always face fact-finding challenges, this study has shown that evidentiary deficiencies can arise in collective redress cases. Notably, several of the examined Member States already apply variations of a rule obliging the party that does not bear the burden of proof to disclose information exclusively in its possession (e.g., *Aufklärungspflicht* in Austria, *sekundäre Darlegungslast* in Germany, *aanvullende stelplicht* in the Netherlands, and the broad duty to cooperate in the administration of evidence in Belgium). In Germany, the usefulness of such a rule for collective proceedings was demonstrated in the case of *vzbv v. Mercedes-Benz AG*. However, in some Member States, such as France, where it could also play a role, this (often judge-made) rule does not exist. Moreover, experience in Belgium has shown that the reversal of the burden of proof, as an *ultimum remedium*, can also provide a solution to manifestly unreasonable situations.

Recommendation 2: The provision on disclosure, Article 18 of the Representative Actions Directive, could be further refined. One possible adjustment would be to clarify that: "Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification."

Explanation: This proposed amendment, inspired by Article 5 of the Antitrust Damages Directive, aims to ensure that the requirement for evidence to be in the control of the defendant or a third party is not interpreted too restrictively. In collective redress cases, there is often an information asymmetry between consumers and traders. Consumers or class representatives usually have no insight into the internal organisation of the trader, making it virtually impossible to specify in detail the documents to be produced. Therefore, if the requirement to specify the requested evidence is applied too strictly (as seems to be the case in Germany and Belgium), claims may fail on this ground. In view of the principle of equality of arms and in line with the current wording of Article 18, traders should also be entitled to request disclosure of relevant categories of evidence.

Recommendation 3: Another amendment to Article 18 could allow for pre-trial disclosure in the context of collective actions. This could be formulated as follows: "Member States shall ensure that national courts are empowered, upon the request of a qualified entity that has previously asked a trader to disclose relevant evidence at its disposal but was refused, to order the disclosure of such evidence from this person. In support of that request, the qualified entity must present facts and evidence sufficient to support the plausibility of the redress action."

Explanation: This proposed amendment is inspired by Article 3 of the Commission Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence. Moreover, Spanish law already provides for pre-trial information gathering (*diligencias preliminares*) specifically for collective actions. This procedure would allow a potential class representative to obtain evidence before filing a formal lawsuit to assess whether a collective redress action is well-founded. A general extension of pre-trial information gathering to all types of proceedings would likely be unfeasible, as similar proposals have already faced strong opposition in certain Member States (such as the Netherlands). However, collective redress actions are distinct procedures involving high financial stakes. Furthermore, pre-trial information gathering is widely recognised as

increasing the likelihood of settlement, which happens to be one of the key objectives of the Representative Actions Directive.

Recommendation 4: The final recommendation in this section, which primarily outlines best practices for Member States, is to consider measures to prevent delaying tactics (such as prohibiting appeals against a disclosure order) and to ensure both effective enforcement and evidentiary consequences for non-compliance with a disclosure order. This includes imposing sanctions that incentivise compliance with disclosure orders (e.g., sufficiently high penalty payments or fines) and attaching procedural consequences to non-compliance (e.g., a reversal of the burden of proof to the detriment of the non-complying party).

Reasoning: The aim is to ensure that disclosure of evidence in the context of collective redress actions is effective and enforceable. Similar to defining the powers of the court, these measures appear to fall primarily within the procedural autonomy of Member States.

C. Financing

Recommendation 1: The Representative Actions Directive (EU) 2020/1828 should be revised to require all Member States to allow and enable third-party litigation funding for representative actions. In particular, specific price controls on third-party funding – as those currently in place in Poland and Germany – should be abolished, and Member States should explicitly allow for third-party funded collective litigation, as is the case in Austria.

Explanation: The study shows that even well-funded organisations might need to seek third-party financing for some of their representative actions. Third-party financing has developed as a way to provide such funds, with commercial third-party funders competing in the market for this financial service. This recommendation does not require additional tax payers' money. Instead, financing companies bear the costs of bringing collective claims, which is reflected in the pricing of their services. As there is already a large market for these services, government interference in pricing is neither necessary nor advisable.

Recommendation 2: As an alternative to Recommendation 1, the EU policy makers could adapt the Representative Actions Directive to require all Member States to allow lawyers' contingency fees in all representative actions.

Explanation: From an economic perspective, contingency fees for lawyers function similarly to third-party litigation funding, except that it is the claimant's lawyer rather than the financing company that assumes the economic risk of collective litigation. However, many European jurisdictions have strong historical reservations against contingency fees, making a general rule difficult to implement. Therefore, Recommendation 1 could be less intrusive and bring less interference with Member States' legal traditions.

Recommendation 3: The Representative Actions Directive should be revised to require all Member States to provide legal aid and/or public funding to claimant entities for representative actions.

Explanation: Currently, the availability of public funding for representative institutions, such as consumer associations, varies greatly across Member States. The study shows that such measures as "entry fees" for consumers and limiting court or administrative fees do not fully close the funding gap. Recital 70 of the RAD states that Member States are not required to finance representative actions. However, full reliance on private funding could prevent qualified entities from effectively exercising their rights. However, this would cost taxpayers' money and introduce new questions related to defining eligibility criteria for receiving such support.

Recommendation 4: In addition, "Consumer redress action funds" could be created at the national and/or EU level, similar to the fund existing in the Canadian province of Ontario. Claimant institutions could apply for financial support for meritorious cases that lack the other funding options.

Explanation: Such a fund would require an initial taxpayer-funded budget, but could later be replenished through successful cases. However, this would require a legal basis for courts or authorities to direct contributions to the fund, as well as a fund administration to manage resources and select cases to support, which could create additional bureaucratic costs.

The Consumer Voice in Europe