



U.S. CHAMBER
Institute for Legal Reform

Collective Redress Tourism

*Preventing Forum
Shopping in the EU*

.....
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U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

The EU is experiencing a wave of new ‘collective redress’ or ‘class action’ mechanisms, and more are on the way. However, class actions are being considered for different reasons, at different speeds, and in different forms in each of the EU’s twenty-eight Member States.

The forms of action under development have vastly different features and are subject to very different safeguards or protections. For example, Member States take varied positions on the availability of third party litigation funding and alternative fee arrangements (such as contingency fees), and some have opt-in systems, opt-out regimes, or both. There are also significant variations in discovery rules, different rules on recovery of costs and certification standards, and the courts of some Member States are typically more efficient than others. In other words, there is little consistency across the EU regarding when or how actions may be brought, and

the features of each system are so different that there are many reasons for claimants to want to choose some jurisdictions over others—also known as ‘forum shopping’.

A network of rules already exists governing how the courts of EU Member States divide and share jurisdiction in cases that have effects in more than one country. These rules have been developed against a backdrop in which class actions did not exist and are geared more towards simpler, party-to-party litigation scenarios. In general, there are many ways and opportunities to choose between jurisdictions based on the existing

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framework. However, there are no rules at all specific to the allocation of jurisdiction in class action scenarios.

In circumstances where some Member States may have relatively poor safeguards against abusive or opportunistic collective actions and where existing rules create many opportunities to choose between jurisdictions, potentially problematic forum shopping may arise.

This paper outlines some of the issues with unsafeguarded collective actions, the

existing EU rules on jurisdiction, and how these rules are routinely used to permit choices between jurisdictions. It considers whether the increasing prevalence of collective actions and the great diversity in safeguards, coupled with the relative freedom to choose between jurisdictions, warrants a new system to prevent abusive and detrimental forum shopping.

Finally, it considers what such a system might look like and how it could be achieved.

Issues and Safeguards Relating to Collective Redress Actions

There has been significant growth in the availability of collective redress mechanisms in EU Member States in recent years. These new mechanisms have been designed and developed unilaterally by individual Member States, and there is no overarching EU-wide system in place. The EU has, however, endorsed the concept that Member States should develop collective redress systems.

In its non-binding 2013 Collective Redress Recommendation (the Recommendation),¹ the European Commission recommended

“ [T]here is no known case of any Member State following all of the Commission’s recommendations on the structure of their system, or incorporating all of the safeguards that should accompany such systems. ”

that each Member State should introduce collective redress according to its own model and legal system, but that the Member State should adhere to certain features and safeguards. The purposes of the safeguards recommended were to limit the incidence of abuse and prevent the growth of frivolous and vexatious litigation that has been so damaging in other jurisdictions, such as the U.S. and Australia.

Although many Member States have added collective redress systems—even since this Recommendation—there is no known case of any Member State following all of the Commission’s recommendations on the structure of their system, or incorporating all of the safeguards that should accompany such systems.

The main drivers of abuse in the context of collective actions are typically third parties, such as commercial ‘claims vehicles’, litigation funders, or other ‘investors’ in the

disputes of others (including, in some jurisdictions, law firms). It is those parties, rather than individuals or businesses with claims, who are likely to be the main beneficiaries of collective actions.²

This phenomenon can give rise to situations in which the claimants receive little or nothing and the third parties are richly rewarded. Coupon settlements in the United States—in which lawyers are awarded fees in the millions of dollars, and individual consumers each receive a coupon for a movie rental or sandwich—are perhaps the best-known form of such abuse. Wherever these third parties are permitted to aggregate claims, and especially where they are permitted to share directly in the proceeds, there is a significantly increased risk of costly and often abusive litigation.³

A 2013 study entitled “Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions”⁴ is instructive. The authors analyzed a random sample of putative consumer and employee class action lawsuits filed in or removed to U.S. federal court in 2009, and examined the outcome four years later. Amongst the findings was that in the entire data set, not one of the class actions ended in a final judgment on the merits for the plaintiffs. The vast majority of cases produced no benefits to most members of the putative class—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process. As shown by these and other examples referred to in the study, class actions are often an ineffective way of obtaining meaningful compensation for claimants in the U.S. Class actions often benefit the lawyers, vehicles or

associations used to front the litigation, more than the actual victims. In short, the evidence strongly suggests that U.S.-style class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich lawyers and representatives.⁵

CASE LAW EXAMPLE

Ageas/VEB, Amsterdam Court of Appeals, June 16, 2017, Case 200.191.713/01, ECLI:NL:GHAMS:2017:2257

Ageas, legal successor of the bankrupt Belgian bank and insurance company Fortis, and the Dutch claimants’ association VEB negotiated a €1.2 billion ‘opt-out’ settlement on behalf of Fortis shareholders worldwide. However, in June 2017, the Amsterdam Court of Appeals declined to approve the settlement as “fair and reasonable” under the Dutch Collective Settlements Act, holding that the proposed settlement favoured the claimants’ association and its members at the expense of the interests of other class members.

Collective redress experience has also shown that any procedure that permits a representative to aggregate the claims of hundreds, if not thousands, of individuals empowers that representative to threaten a defendant with catastrophic loss. As a result, the representative can use this power to extort money from a defendant, even if the underlying claims have little chance of success. This unequal bargaining power is used to extract what respected jurists call ‘blackmail settlements’ from defendants.⁶

Other jurisdictions have also conducted class action experiments using their own models and have similarly suffered from widespread abuse (e.g., Australia and Canada). These experiences provide a special cautionary note when considering how jurisdictional rules should apply to collective actions.

While the EU—through the European Commission—has acknowledged the need for safeguards to prevent against abuse, no system of safeguards is in place. The result

is that some Member States already have far more ‘open’ systems of collective redress than others and are increasingly becoming magnet jurisdictions for claimants. For example, the UK now permits the filing of opt-out class actions, and the Netherlands has a system in which ad-hoc litigation vehicles or foundations are accepted as representatives of large numbers of claimants, often with little nexus to the Netherlands.

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Concerns Relating to Forum Shopping in Collective Actions

Forum shopping generally occurs where a claimant elects to commence proceedings in a particular jurisdiction in preference over other jurisdictions because of advantages, or perceived advantages, offered by that jurisdiction.⁷

The EU's rules of choice on jurisdiction provide for many opportunities to select between different fora.

EU Rules on Jurisdiction

The general rules to determine which jurisdiction may hear a civil or commercial claim in the EU are set out in the recast Brussels Regulation.⁸ These rules give claimants the option, in a number of situations, to choose among different jurisdictions, and were aimed at party-to-party litigation. Overall, the Brussels Regulation provides a uniform framework for determining which courts have jurisdiction to hear civil and commercial cases.⁹

Once jurisdiction has been determined, two other regulations come into play: Rome I, which establishes a system of conflict-of-law rules relating to contractual obligations,¹⁰ and Rome II, which does the same for non-contractual obligations.¹¹ The purpose of Rome I and Rome II is not to harmonize the actual law of each of the EU Member States, but to harmonize the rules

that determine which law applies to contractual and non-contractual disputes.

The general rule on jurisdiction is that a defendant domiciled in an EU Member State should be sued in the courts of that Member State (Brussels Regulation, Article 4).¹² The Brussels Regulation also contains several provisions that apply in specific situations, which would give the courts of other Member States jurisdiction (either instead of, or in addition to, the courts in the Member State where the defendant is domiciled).

The alternatives for jurisdiction include:

EXCLUSIVE JURISDICTION

In some circumstances the default rule (defendant's domicile) is overridden, and the courts of a particular Member State have exclusive jurisdiction (Article 24). This is, for example, the case in proceedings relating to rights over immovable property or the dissolution of companies.

RULES IN RELATION TO SPECIFIC CONTRACTS

Particular rules apply for insurance, consumer contracts and individual contracts of employment (per Sections 3 to 5, Articles 10 to 23). According to these rules, the party that is perceived to be in the weaker position (the policyholder, consumer or employee) may only be sued in the courts of the Member State in which that party is domiciled. The other party (the insurer or employer) may however, depending on the facts, be sued in multiple jurisdictions. In the case of a consumer contract, for example, a consumer can only be sued in his or her Member State of domicile, whereas the party with whom the consumer contracts may be sued either in the Member State where it is domiciled or the Member State where the consumer is domiciled.

AGREEMENT BETWEEN THE PARTIES

The parties may also agree on which court will determine disputes arising out of a particular legal relationship, provided various conditions are met. In accordance with Article 27, a choice of jurisdiction clause will not prevail over the grounds of exclusive jurisdiction identified above.

SPECIAL JURISDICTION

Other provisions in the Brussels Regulation (Articles 7 to 9) give other courts 'special jurisdiction' and create options for claimants, in addition to the default possibility of suing in the place where the defendant is domiciled. For example, in matters relating to a contract, a defendant may be sued in the courts of the place of performance of the contractual obligation. In case of a sale of goods, a defendant may be sued in the Member State where the goods were delivered or should have been delivered (Article 7(1)). In matters relating to tort, a defendant may be sued in the courts of the place where the harmful event occurred or where the damage occurred (Article 7(2)).¹³ In case of a dispute arising out of the operations of a branch or agency, a defendant may be sued in the courts of the place where the branch, activity or other establishment is situated (Article 7(5)).

MULTIPLE DEFENDANTS DOMICILED IN DIFFERENT MEMBER STATES

According to Article 8(1), a person domiciled in a Member State that is one of a number of defendants may be sued in the courts of the place where any one of the defendants is domiciled, "provided the claims are so closely connected that it is

“ There are many examples where ... a jurisdiction other than the jurisdiction of the domicile of the defendant was selected ... [I]n some instances, this has led to interesting and unexpected outcomes. ”

expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.

In addition to these alternatives, the Brussels Regulation also contains rules to determine jurisdiction where proceedings concerning the same matters, and between the same parties, are commenced in more than one jurisdiction (*lis pendens*) (Articles 29 to 34).

There are many examples where these provisions have been applied and where a jurisdiction other than the jurisdiction of the domicile of the defendant was selected. As illustrated below, in some instances, this has led to interesting and unexpected outcomes.

CASE LAW EXAMPLE

Provimi Ltd v Roche Products Ltd and other actions [2003] EWHC 961 (Comm)

In the *Provimi* case, a German claimant was allowed to sue both UK companies and non-UK companies in the English courts for damages arising from a cartel. The court accepted jurisdiction over the UK companies based on the general rule that a party may be sued in the Member State in which it is domiciled (Article 4). The non-UK companies could be sued in the UK courts because the claims against them were ‘connected’ with the claims against a UK company. An argument was made that the UK companies named, which were the ‘anchor’ defendants to determine jurisdiction, had no legal connection to the cartel case and were merely subsidiaries of the legal entities that were found to have participated in the cartel (the UK subsidiary entities appeared to not even have known of the illegal activity in question), and so were not valid anchor defendants.

The English court disagreed and found that the UK-based subsidiary had “implemented [the] cartel”, albeit unknowingly, and belonged to the entity that had directly participated, so both of them could be sued in the UK. This case led to considerable uncertainty as it may not always be clear which legal entities within a corporate group are liable for an infringement of EU competition law.¹⁴

CASE LAW EXAMPLE

Case 352/13 Cartel Damages Claims (CDC) Hydrogen Peroxide SA v AkzoNobel NV and others [2015]

A commercial claims vehicle, Cartel Damages Claims, brought a case before the District Court (Landgericht) in Dortmund, Germany for damages sustained by 32 companies as a result of a cartel relating to the production of hydrogen peroxide. One of the defendants, Evonik Degussa, was domiciled in Germany and could be regarded as an 'anchor' defendant, meaning the claim could be introduced before the German courts against all defendants who were guilty of the same 'single continuous' infringement. The action against Evonik Degussa was settled, but the European Court of Justice, the highest EU court, held that such a withdrawal did not affect the jurisdiction of the German court in respect of the remaining non-German-domiciled cartelists. The European Court of Justice found that, in principle, the courts of the domicile of each of the cartel members have jurisdiction over all members of the cartel.¹⁵

CASE LAW EXAMPLE

CDC Project 13 SA v AkzoNobel and others, C/13/500953 / HA ZA 11-2560, ECLI:NL:RBAMS:2014:3190

In a 2014 case brought before the Dutch courts by CDC against AkzoNobel and others in respect to the sodium chlorate cartel, the court considered itself competent over all defendants based on the argument that the claim of CDC against the different defendants rested on the same factual situation and legal grounds. This was despite the fact that the only Dutch defendant (AkzoNobel) was not an actual cartel participant but was fined by the Commission solely in its capacity as parent company of a cartel participant.¹⁶

CASE LAW EXAMPLE

Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995]

In the *Shevill* case before the European Court of Justice,¹⁷ it was found that in case of injury caused by a defamatory publication in multiple Member States (i.e., where the damages have not occurred exclusively in one jurisdiction), a claimant may bring an action either where the publisher of the defamatory publication is established, or before the courts of each Member State in which the publication was distributed. However, the court found that in this last case, jurisdiction applies “solely in respect of the harm caused in the State of the court seised”. This finding—which has been referred to as creating a ‘mosaic’ of possible suits—suggests that multiple Member States could have jurisdiction in parallel, though in each case the courts of each Member State should determine the damage arising in their own jurisdiction only. This mosaic principle was thought to create a considerable obstacle to forum shopping, though it also raised concerns that it would give rise to a large number of parallel proceedings in multiple jurisdictions which created a risk of irreconcilable judgments.

Cases *e-Date Advertising* and *Martinez*, which were joined by the Court, involved an internet publication which was alleged to violate various rights, covering multiple jurisdictions. The Court sought to apply the *Shevill* principle but stated that “the internet reduces the usefulness of the criterion relating to [place of] distribution” as a foundation for jurisdiction.¹⁸ As an alternative, the Court said jurisdiction could be established “before the courts of the Member State in which the centre of his [i.e., the victim’s] interests is based”.¹⁹ This test is not found in any legislation, and may be difficult to apply in practice.

Although mainly used by claimants, forum shopping has not exclusively been a claimants’ prerogative. In certain instances, the *lis pendens* rule set out in the Brussels Regulation has been used by parties who are threatened by claims to introduce ‘torpedo actions’—actions introduced pre-emptively as a means of ensuring that a dispute is heard in a particular jurisdiction. According to the *lis pendens* principle set out above, the courts of the chosen jurisdiction will be seized first²⁰ and as a result, other courts in which proceedings

may be commenced in the same matter must stay proceedings. While this rule has been used to introduce actions apparently solely aimed at delaying proceedings (e.g., before Italian courts where proceedings tend to be comparatively slow),²¹ torpedo actions can serve a legitimate purpose. The European Court of Justice has issued several judgments concerning torpedo actions, thereby confirming that their use is not illegitimate per se.²² Such actions have been used in the context of competition law cases and in other areas.

CASE LAW EXAMPLE

Cooper Tire & Rubber Company and others v Shell Chemicals UK Ltd and others [2009] EWHC 2609 (Comm)

In *Cooper Tire* the English High Court considered how to address an action, allegedly designed to ‘torpedo’ a damages claim before that court. In the context of the Commission decision in a rubber chemicals cartel, an Italian group of companies introduced an action in Italy for ‘negative declaratory relief’ regarding its own alleged participation in an infringement. A private damages action was subsequently introduced in England against several of the other cartel participants, some of whom tried to get the proceedings before the English court stayed on the grounds that the Italian courts were due to consider the same or a similar subject matter. The English High Court refused, finding that although the cases were relevant to each other, they did not involve the same parties and the English courts were therefore not obliged to stay proceedings. Still, from the perspective of the Italian group of companies, this action represented an instance of ‘defensive forum shopping’.

CASE LAW EXAMPLE

KLM/Martinair/Air France (Case C/13/571990 / HA ZA 14-875 ECLI:NL:RBAMS:2015:4408)

In this case before the Amsterdam courts, KLM, Martinair and Air France introduced a request for a negative declaratory judgment establishing that they were not liable in relation to a cartel in order to ‘torpedo’ possible damages claims in another jurisdiction by potential victims of the same alleged cartel. The case followed the Commission’s 2010 decision in the *Airfreight* case (Case AT. 39258), in which Deutsche Bahn sought damages and asked the court to declare the action inadmissible as an abuse of procedural law. The court, however, accepted jurisdiction and noted that in its view, actions for negative declaratory relief serve a legitimate purpose. This case is referred to as the ‘Dutch torpedo’ case.²³

There are many more examples of parties choosing between different jurisdictions for a variety of reasons. As the above examples illustrate, the Brussels Regulation provides significant flexibility and—with some creativity—there are many opportunities to avoid a jurisdiction that

may not suit a party, or to choose a jurisdiction that may suit better. In short, the rules as they presently stand are intended to offer choices in different circumstances, however the possibility of collective redress was not a particular consideration when these rules were created.

Why the Freedom to Choose Jurisdiction in a Collective Redress Context May Be Problematic

While the freedom to choose between jurisdictions is not inevitably problematic, it does give rise to concerns in the collective redress context, because collective actions are relatively new, and the safeguards pertaining to them are under-developed.

Unlike typical party-to-party actions, collective actions are likely to involve a large number of claimants from a variety of EU Member States. In circumstances where it is relatively easy to move such claims to a jurisdiction of choice, there is little to prevent such claims from gravitating to whichever forum has the least imposing safeguards against abuse.

As a consequence, it could arise that efforts by Member States to protect their consumers, defendants and their economy by curbing litigation abuse will all be for naught, as claimants may be tempted to move actions to jurisdictions where such safeguards will not apply, or where they will apply less stringently.

This is not a hypothetical concern. Considerable differences between collective redress mechanisms already exist between the EU Member States. These differences include the availability of third party litigation funding, alternative fee arrangements (such as contingency fees), the existence of an opt-in and/or opt-out system, rules for recovery of costs, certification standards, efficiency of courts or the fact that some courts are known to be claimant friendly (e.g., because they are more likely to accept jurisdiction).

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The concerns that may arise specifically in the European context include that the current rules create considerable uncertainty for defendants who, in cases of a large class, may not be able to foresee in what jurisdiction they will be sued. In addition, where the class consists of consumers, protection and compensation of such consumers may be limited. Each of these concerns is further explained in this report.

Increasing Uncertainty for Defendants

One issue with forum shopping is that it creates considerable uncertainty for defendants as to where they may be sued.²⁴ Uncertainty for defendants as a result of forum shopping has always been a concern and as a result, the Brussels Regulation along with the EU courts have provided additional guidance. The Brussels Regulation tried to strike a balance between providing defendants with sufficient legal certainty to foresee where they will be sued on the one hand, and claimant/consumer protection on the other by introducing provisions that allow the claimants, in specific cases, to choose a jurisdiction other than the defendant's domicile. However, the potential scale and frequency of collective actions suggest a need to reconsider—in the collective context—whether this guidance is sufficient and whether the balance is still appropriately struck. Collective actions that include large groups of claimants may make it impossible for a defendant to foresee with reasonable certainty where it will be sued.

The European Court of Justice has explicitly confirmed that the Brussels Regulation may be used by victims of cartel activity to sue multiple defendants jointly in an EU Member

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State where any one of the alleged cartelists is domiciled. Cartel victims may alternatively bring damages actions at the courts of the Member State where the cartel agreement was concluded, or in the Member State where any one of them has its registered office.²⁵

In a tort case, if claimants decide not to introduce their action in the domicile of the defendant but instead choose to sue in the jurisdictions where each of them has suffered harm, this may potentially lead to a large number of jurisdictions where a defendant could potentially be sued. Similarly, in cartel damages claims, the Court of Justice has held that a claimant may sue all the cartelists that have participated in a single and continuous infringement in one forum and may do so in the domicile of any one of them.²⁶

Alternatively, if claimants want to bring individual actions in “the place where the damage occurred”, the Court stated that this can be either the place in which the cartel was concluded, the place in which one agreement in particular was concluded, or the place where the victim has its own registered office.²⁷ This may work if there are only a few potential claimants. However, in cases involving a large number of potential claimants and where an action may be introduced in any place where any one claimant's “damage occurred”, it is nearly impossible for defendants to determine where they may be sued.

In its communication “Towards a European Horizontal Framework for Collective Redress”²⁸, the European Commission stated that litigation can be considered abusive “when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an

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undue financial burden on them”²⁹. One of the risks of aggregating large numbers of claims in collective actions (in addition to the risk of catastrophic loss from an award) is that the reputational risks and costs of defending the action can themselves cause pressure to settle even weak or meritless claims.³⁰ These risks may be exacerbated by collective claims being pursued by large, well-financed international plaintiff law firms and funders that have the resources to prolong weak cases to try to force settlement, and exacerbated further if these firms can in effect have a free choice between multiple EU jurisdictions, depending on which will present the least resistance in the circumstances at hand.

As a result, the balance between legal certainty and consumer protection that the Brussels Regulation tried to establish will likely tip towards the claimant side in a collective redress context with potentially detrimental effects for defendants.

In this context, it is also worth noting that the opportunities for ‘defensive forum shopping’ that were described above are usually not available in cases of collective redress. In the traditional setting of ‘one-on-one’ litigation, arguably prospective claimants and defendants have more or less equal opportunities to engage in forum shopping by initiating litigation in a jurisdiction of their choice. In cases of collective redress, this balance is lacking. In systems where an unlimited number of claims vehicles, ‘lead plaintiffs’, law firms or representative entities can seek a mandate to file litigation on behalf of an entire ‘class’ of purported victims, defendants have no realistic opportunity to preempt collective redress actions by filing a ‘torpedo-action’ in a jurisdiction of their choice. In practical terms, there are simply too many potential adversaries for defensive forum shopping in collective cases.

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Limited Consumer Protection

Another significant forum shopping concern is that collective actions may not lead to the adequate protection or defence of the rights of the class members who are consumers.

In opt-out collective actions in particular, citizens of one Member State could potentially have their rights determined by the courts of another Member State without their knowledge or consent. As a result, class members may have little or no control over whether their rights are adequately defended. Although most jurisdictions in the EU that have already implemented collective actions have opt-in mechanisms or at least hybrid opt-in/opt-out mechanisms³¹, which considerably reduce that risk, the Netherlands is an example of a jurisdiction where the courts

have claimed jurisdiction over a global class of claimants. The courts did so on the basis that some claimants were domiciled in the Netherlands and had chosen to introduce the claim there, even if the vast majority of the class was located outside of the Netherlands and outside of the EU.

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CASE LAW EXAMPLE

Converium: Amsterdam Court of Appeal, November 12, 2010, Case 200.070.039-01, ECLI:NL:GHAMS:2010:BO3908 (interim judgment), and Amsterdam Court of Appeals, January 17, 2012, ECLI:NL:GHAMS:2012:BV1026 (final judgment)

Under the Dutch Collective settlement rules (introduced by the Act on the Collective Settlement of Mass Damage, the 'WCAM'), parties may settle claims on a class-wide basis. If the Amsterdam Court of Appeal declares a settlement contract binding, it will be binding on all members of a class (whether or not they participated in the settlement directly).

Converium was a Swiss reinsurance company whose common shares were listed on the Swiss Exchange, and whose American Depository Shares were listed on the New York Stock Exchange. *Converium*'s share prices declined after the company announced increases to its loss reserves between 2002 and 2004. A shareholder claim was brought against *Converium*. The District Court for the Southern District of New York initially declined jurisdiction for the claims brought by any shareholder who had not bought *Converium* shares on the NYSE and who at the time of his or her investment was living or based outside the United States.

Fewer than 2% of the class members were Dutch residents (the majority of the claimants were Swiss residents and companies, and the remaining claimants were residents and companies from other EU Member States and third states). Nonetheless, a Dutch foundation, Stichting *Converium* Securities Compensation Foundation, was created to represent non-U.S. residents who had purchased *Converium* securities on any non-U.S. exchange in the relevant period. This foundation entered into a settlement agreement with *Converium*.

The Amsterdam Court of Appeal approved the settlement between the parties and upheld jurisdiction over the entire global class. It found jurisdiction because at least part of the class was domiciled in the Netherlands and because the Brussels Regulation allows a domiciliary of one Member State to be sued in another Member State if that other State is the place where the "contract will be performed". Instead of considering the activities in dispute in the case (i.e., whether *Converium* was liable, and to whom) the Court considered that the settlement agreement was in part to be performed in the Netherlands, because it would involve payment to the Dutch Foundation, thereby giving the Dutch court jurisdiction. The Court ultimately approved the settlement of USD \$58.4 million, of which 20% went to the U.S. plaintiffs' firms who initiated the proceedings against *Converium*.

In an earlier case (*Royal Dutch Shell*: Amsterdam Court of Appeal, May 29, 2009, Case 106.010.887, ECLI:NL:GHAMS:2009:BI5744), the settlement was made binding on all shareholders who purchased shares on any stock exchange (other than the NYSE). The Dutch court declared the settlement agreement binding and assumed jurisdiction, although only 800 shareholders out of more than 100,000 (or less than 1%) were domiciled in the Netherlands.

Choice of Lowest Common Denominator Jurisdiction

When multiple choices among venues exist, there is a risk that the jurisdiction with the lowest thresholds and fewest safeguards will impose the de facto standard for all others.

Indeed, claimants generally tend to choose one of the commonly preferred jurisdictions (currently the Netherlands³², the UK and Germany) even though the courts of several other Member States would also be competent and may be equally well placed to hear the case. The point is illustrated by the fact that ‘global’ shareholder collective actions are currently before the Dutch courts in relation to the BP oil spill in the Gulf of Mexico,³³ Volkswagen ‘dieseltgate’,³⁴ and the Petrobras corruption scandal;³⁵ in none of these cases is the connection with the Dutch jurisdiction immediately apparent. The stakeholders behind each of these actions include U.S. plaintiffs’ law firms and, more likely than not, litigation funders, though their participation is not always disclosed. These firms made a

calculated decision to bring these cases to the Dutch courts citing, among other things, the Dutch courts’ willingness to assume jurisdiction on a global basis.³⁶

One of the major risks of one jurisdiction becoming a particular draw for claimants in collective redress actions is that it may put a disproportionate strain on the civil justice system of that Member State and cause the publicly funded courts of that Member State to resolve disputes having only limited connection to that Member State.

Competition Between Jurisdictions

Although most Member States now have a collective redress mechanism in place, each Member State may decide on the specificities of its own system. There is a risk that some jurisdictions may adopt a mechanism specifically aimed at attracting claimants to avoid ‘losing out’ on the perceived economic opportunities presented by major litigation.

For example, the recent initiative by the Dutch legislature to introduce a ‘Netherlands Commercial Court’, which will offer English language proceedings in front of a specialised Amsterdam court³⁷, is a thinly disguised attempt to draw more international disputes to the Netherlands. Again, while there is nothing regrettable about competition between jurisdictions per se, in the context of collective redress there is a significant risk of creating a ‘race to the bottom’. The jurisdiction with the fewest safeguards against abusive mass damages litigation and the least supervision over law firms and third party funders is likely to attract the most abusive litigation.

This may result in a loosening of existing legal safeguards and/or the adoption of specific rules that typically attract claimants

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and their lawyers (such as certain procedural laws including disclosure rules, rules ensuring availability of third party litigation funding or alternative fee arrangements or allowing easy class certification).

Courts may also be inclined to resolve disputes and award damages without appropriate scrutiny and caution, given that claimants tend to favour jurisdictions where the possibility of a quick award will lower their costs and deliver the highest rate of return on their investment, while submitting claims to less rigorous scrutiny. Similarly, jurisdictions that have no reluctance to grant

very generous damages awards may become draw jurisdictions.

Disempowerment of National Courts and Governments

In general, Member States have an interest in their domestic courts hearing claims that involve their citizens.³⁸ Some Member States have implemented safeguards in their national legal systems that are specifically aimed at protecting their citizens, whether they are claimants or defendants. These safeguards help curb litigation abuse.

The fact that some jurisdictions become jurisdictions of choice to hear claims of an entire class, whether or not the class members are citizens of that Member State, prevents national courts of other jurisdictions from applying their national safeguards. This in particular is the result of the *lis pendens* rule, whereby the court first seized will be able to hear the entire case if it finds that it has jurisdiction over the claimant(s).

As a consequence, efforts by many Member States to protect their consumers, defendants and their economy by curbing litigation abuse could simply be defeated, especially when a collective action is brought in a jurisdiction where such safeguards will not apply, or will apply less stringently.

“ The fact that some jurisdictions become jurisdictions of choice to hear claims of an entire class, whether or not the class members are citizens of that Member State, prevents national courts of other jurisdictions from applying their national safeguards. ”

Proposed Solutions

Establishing Minimum Safeguards

In order to avoid litigation abuse in the context of collective redress actions, minimum safeguards are needed to reduce the overall incentives for claimants to forum shop and, in cases where forum shopping is possible, to ensure that the aforementioned concerns are adequately addressed.

The European Commission, in its 2013 Collective Redress Recommendation, tried to encourage the different EU Member States to introduce such safeguards in their national legal systems.³⁹

The Recommendation suggests systems of both injunctive and compensatory relief for breaches of EU law (including competition, consumer, environmental law, etc.) and proposes procedural safeguards regarding standing, admissibility, funding, lawyers' remuneration (placing severe restrictions on the use of contingency fees) and legal costs (choosing the 'loser pays' costs rule), opt-in for compensatory relief, collective alternative dispute resolution mechanisms and the scope of recoverable damages

(banning punitive damages). The Commission invited Member States to introduce collective redress mechanisms in accordance with the principles set out in the Collective Redress Recommendation by 26 July 2015 (Recital 38).

Despite the Commission's efforts, the Recommendation (being non-binding) has not led to the imposition of minimum safeguards in practice. Although the majority of EU Member States now have some form of collective redress mechanism in their national systems and have introduced changes to their existing mechanisms over the past years, these differ from those suggested by the Recommendation.⁴⁰

The Commission is currently assessing to what extent Member States have implemented the Recommendation and has indicated that it does intend to take action, possibly including legislative action. However, it remains to be seen whether the outcome will include a framework of safeguards that will be implemented across all Member States.

“ Although the majority of EU Member States now have some form of collective redress mechanism in their national systems and have introduced changes to their existing mechanisms over the past years, these differ from those suggested by the Recommendation. ”

THE DUTCH EXAMPLE

In the Netherlands, in addition to the new provisions on damages claims resulting from infringements of competition law, the Minister of Security and Justice submitted a draft bill to the Dutch Parliament in November 2016 for collective damages actions under Article 3:305a of the Dutch Civil Code. It is uncertain at this point whether the bill will be adopted in its current form, but it nevertheless provides an interesting example of national legislation adopted after the Collective Redress Recommendation.

If the bill were to be adopted as is, claimants would be able to claim collective damages (instead of only declaratory and injunctive relief) and the same requirements would apply to injunctive relief, declaratory relief and damages. The bill would also introduce stricter requirements for the legal entity claiming damages and an opt-out system whereby members of a class for whose benefit the action is brought can choose to opt-out at the beginning of the proceedings. Parties that opt-out would be required to proceed on an individual basis. Although the bill would introduce additional safeguards in line with the Collective Redress Recommendation, the opt-out system is not in line with the Commission recommended opt-in system for damages actions.

In terms of determining jurisdiction, as is stated in the Explanatory Memorandum, the rules of the Brussels Regulation would apply. The draft bill, however, adds a 'scope rule' to determine when a collective action has a sufficiently close connection to the Dutch jurisdiction. As such, clarification on the notion of 'closely connected' is a positive development. The Dutch provision is, however, overly broad and may still lead to claims being introduced in front of the Dutch courts that have little or nothing to do with the Netherlands. A close connection would be deemed to exist if: (1) the representative entity is able to show that the majority of the individuals on behalf of whom the collective claim is brought reside in the Netherlands; (2) the defendant is domiciled in the Netherlands; or (3) the event or events on which the collective action is based took place in the Netherlands. It is questionable whether such a 'scope rule' is the right approach to avoid abusive litigation. If the rule were to be maintained, a possible solution could be to make the criteria cumulative rather than alternative.⁴¹

In addition to specific measures to introduce safeguards, sector specific rules may have some dampening effect on forum shopping by reducing the differences between national litigation systems, and therefore the incentives to forum shop.

The Competition Damages Directive⁴², for example, may make it easier for claimants to seek redress in civil courts for harm resulting from EU competition law infringements, including through collective redress. Many Member States have either revised their existing mechanisms or have introduced new procedures in their national legislation on that basis.⁴³

The Directive allows anyone within the EU who has suffered loss as a result of anticompetitive conduct to take action in the national courts (Article 3.1). It includes different procedural rules and substantive principles relating, for example, to disclosure of documents, admission of evidence/pre-trial discovery, statutes of limitations, allocation of costs, and sources of funding for legal expenses. The Damages Directive, however, does not contain any specific provisions on jurisdiction and refers to the Brussels Regulation (Recital 44).

The Directive, once fully implemented into the different national systems, will level the playing field across EU Member States to some extent and create broadly similar litigation conditions. This may have the effect of reducing the incidence of forum shopping, as the incentives should be reduced where the systems are broadly similar.

Adjustments to the Brussels Regulation

Although the Brussels Regulation provides a mechanism aimed at selecting the most adequate jurisdiction, its provisions are not designed for collective litigation.

The Commission in its communication “Towards a European Horizontal Framework for Collective Redress” stated that: “[t]he general principles of European international private law require that a collective dispute with cross-border implications should be heard by a competent court on the basis of European rules on jurisdiction, including those providing for a choice of court, in order to avoid forum shopping. The rules on European civil procedural law and applicable

law should work efficiently in practice to ensure proper coordination of national collective redress procedures in cross-border cases”.⁴⁴ However, some of the provisions on jurisdiction as they currently stand may not be fully adapted to collective actions.

In an environment where claimants are increasingly backed by specialised plaintiff law firms and litigation funders, they are put in a much stronger position and defendants need to have sufficient legal certainty when facing such actions.⁴⁵ As shown above, consumers that are part of a class also need protection to ensure that their interests are adequately represented and that abusive situations, such as those that occur in the U.S. where the class members end up with no real compensation, are avoided.

It is therefore desirable that the Brussels Regulation be adapted specifically to address collective redress actions. Different groups of stakeholders made proposals to the European Commission prior to the adoption of the Collective Redress Recommendation on how to avoid forum shopping and what the necessary connecting factors should be between a court and a case. The suggestions included: (1) to introduce a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a collective claim; (2) to use the “jurisdiction at the place of the defendant’s domicile” since it is easily identifiable and ensures legal certainty; or (3) to create a special judicial panel for cross-border collective actions with the

Court of Justice of the European Union.⁴⁶ In particular, one of the first two proposals could increase legal certainty and help reduce the risk of potentially negative consequences resulting from forum shopping in the context of collective actions.

Indeed, few problems arise if the general rule is adhered to and suits proceed at the domicile of the defendant. While this rule provides legal certainty, it may in some cases be hard to reconcile with one of the other objectives of the Brussels Regulation, which is to provide necessary consumer protection by providing flexibility to the (perceived) weaker party.⁴⁷

One standard to be considered in situations where courts may be called upon to accept jurisdiction over claimants in distant jurisdictions is to adopt a rule similar to that followed by the Supreme Court of the United States in the context of foreign securities actions. In *Morrison v. National Australia Bank Ltd.*,⁴⁸ the Court held that Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 do not apply to transactions on foreign exchanges. The Court ruled that the “focus” of the statute is “upon purchases and sales of securities in the United States” and that the statute reaches only “the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States”.

The effect of this rule was to end the tendency to try to include the harm suffered by foreign (non-U.S.) plaintiffs in their U.S. claims. Such a rule, if adopted in the EU, would at least already prevent claimants from asking EU courts to assert jurisdiction over parties domiciled outside the EU. In addition, some of the provisions in the Brussels Regulation such as article

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8(1), which allows multiple defendants to be sued in the domicile of any one of them if the claims are closely connected, need to be clarified further. As shown by the examples provided in this report, it is currently relatively easy for claimants to find an ‘anchor defendant’ to establish jurisdiction, for example in the UK, where the case can have only a limited nexus to the UK. In its *Green Paper on the review of Regulation 44/2001*, the European Commission suggested “to provide for a limited extension of the rule in Article 6(1) [Article 8(1)], allowing for a consolidation if the court has jurisdiction over a certain quorum of defendants” (Section 5). Instead of using these criteria on an alternative basis, several of the criteria could also be used cumulatively to guarantee at least a certain nexus to the chosen jurisdiction in cases where article 8(1) is used.

Conclusion

A majority of EU Member States now have some form of collective redress within their national judicial system. As new procedures become available, and as the size of claims grows, so too does the financial opportunity for the claimant lawyers, third party funders and representative entities that increasingly arrange and pursue these claims.

As Member States adopt collective redress systems, they seek to put in place measures to achieve a balance between 'access to justice', and limits and restrictions designed to curb litigation abuse. However, Member States are adopting class action systems and safeguards which are vastly different from each other in scope and effectiveness. The result is that the systems in some Member States are more attractive for claimant lawyers and their funders than others. This provides claimants with incentives to forum shop and choose their preferred jurisdiction. As shown in this paper, the

current EU rules on jurisdiction were not meant to deal with multiparty disputes and certainly not with actions involving a large class of claimants. In addition, the safeguards that do exist are not binding and the majority of Member States have decided to implement a collective redress system that deviates from the recommended EU safeguards. As a result, concerns of possible litigation abuses similar to those experienced in the U.S. and other jurisdictions exist, and will be exacerbated by the possibility of claimants choosing the jurisdiction with the most favourable or lenient safeguards. This paper suggests consideration of some of the possible solutions that would help curb the freedom to choose between systems of safeguards, and also presents the potential advantages of creating a minimum platform of safeguards to reduce the incentives to make such choices in the first place.

“ [T]he current EU rules on jurisdiction were not meant to deal with multiparty disputes and certainly not with actions involving a large class of claimants. ”

Postscript

Potential Implications of Brexit

The UK is currently one of the preferred jurisdictions for collective redress actions in the EU. Brexit raises the question of whether the UK may lose that status (in particular in the competition field). The Great Repeal Bill, which was announced in October 2016, will repeal the 1972 European Communities Act (ECA). This Act gives EU law instant effect in the UK. One immediate consequence of Brexit will therefore be that the rules of the Brussels Regulation will no longer apply.

What the chosen alternative will be will largely depend on whether an agreement will be reached between the UK and the EU before the exit deadline expires and if so, what the content of such an agreement will be. One solution could be that European law rules will be transposed into domestic UK law via secondary legislation, to the extent that this is practical. It remains to be seen whether some of the provisions of the Brussels Regulation would be introduced into UK law through that route. Another possible option is for the UK to sign the Lugano Convention on jurisdiction and the recognition and enforcement of judgments

in civil and commercial matters (to which non-EU countries, including Switzerland and Norway, are currently parties and which contains rules similar to those of the Brussels Regulation, with some exceptions).

Although some claimants may choose another jurisdiction due to the current uncertainty, at least in the short to medium term, the UK will likely remain a preferred jurisdiction for collective claims. This is particularly the case because the Consumer Rights Act of 2015, which entered into force in 2016, introduced a number of features into national law that make the UK courts (and in particular the Competition Appeals Tribunal, or CAT) appealing for claimants (e.g., a fast-track procedure for small- and medium-sized enterprises, collective proceedings with an expanded opt-in/limited opt-out and the additional competences allocation to the CAT). Also, the litigation funding widely available in the UK will continue to attract potential litigants, and indeed the funders themselves may be the instigators of much litigation (whether openly or behind the scenes).

Endnotes

- 1 In its Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under European Union Law (“Collective Redress Recommendation”), the European Commission (“Commission”) defines collective redress as: “(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress);” see II, para. 3(a). The Collective Redress Recommendation is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>.
- 2 See Report on “The Growth of Collective Redress in the EU”, p. 6; See also J.S. Kortmann, “The Tort Law Industry”, *ERPL* 5-2009, p. 789-811.
- 3 *Ibid.*
- 4 See, “Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions”, available at http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf; see also Report on “The Growth of Collective Redress in the EU”, *Supra Note 2*, at p. 10.
- 5 See Report on “The Growth of Collective Redress in the EU”, *Supra Note 2*, at p. 11.
- 6 See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly) mentioned in the Report on “The Growth of Collective Redress in the EU” (endnote 14) together with *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013), reversing court approval of a settlement for consumers who bought HP printers between 2001 and 2010, which gave consumers e-credits of \$2.00–\$6.00 each, while awarding attorneys’ fees of \$1.5 million regardless of how many e-credits were actually used. This problem is not unique to the United States and can exist even in class action regimes that do not permit lawyers to recover contingency fees. See also *Kirby v. Centro Properties Ltd.* (No. 6) [2012] FCA 650, an Australian case involving a settlement of AUS\$200 million in which a litigation funders received AUS\$62 million, and legal fees awarded were AUS\$32 million. A leading Australian law firm estimated that claimants received only 10.6 cents on the dollar after these fees and costs.) King & Wood Mallesons, “Class Actions in Australia: The Year in Review 2012,” p. 10.
- 7 In the Glossary of the European Judicial Network in civil and commercial matters, forum shopping is defined as “a specific concept of private international law. A person who takes the initiative of bringing a court action may be tempted to choose his court on the basis of the law applied there. A person starting an action might be tempted to choose a forum not because it is the most appropriate forum but because the conflict of laws rules that it applies will prompt the application of the law that he or she prefers.” See also Directorate General for Internal Policies, Policy Department A, Economic and Scientific Policy, “Collective redress in antitrust”, p. 7, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf>.
- 8 Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>.
- 9 Recital 4 provides that “provisions to unify the rules of conflict of jurisdiction in civil and commercial matters [...] are essential”; for an overview of some of the national rules on

- jurisdiction, see Report on “The Growth of Collective Redress in the EU”, pp.44-46.
- 10 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6.
 - 11 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations OJ L 199.
 - 12 The main objective of the Regulation is to ensure legal certainty and that “the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile” (Recital 15).
 - 13 In accordance with Case 21/76 *Handelswekerij GJ Bier BV v Mines de Potasse d’Alsace SA* [1978].
 - 14 Note however, in *Cooper Tire & Rubber Company and others v Shell Chemicals UK Ltd and others* [2009] EWHC 2609 (Comm) and *Cooper Tire & Rubber Company Europe Limited and others v Dow Deutschland Inc and ors* [2010] EWCA Civ 864 the Court appeared reluctant to follow *Provimi* and cast doubt on whether companies with no apparent connection to the proceedings would be enough to confer jurisdiction. See also *Toshiba Carrier UK Ltd. & others v KME Yorkshire Ltd. & ors* [2011] E.W.H.C. 2665 (Ch); See also T. Woodgate, P. Boylan & C. Owen, “Jurisdiction revisited”, (2015) *CLI* 14(7), p. 16 and N. Boyle, L. Hannah, S. Gartagani, “Case comment: United Kingdom: Supreme Court clarifies time limits for damages claimants in the CAT”, (2014) *G.C.L.R.* 7(3).
 - 15 See N. Boyle, G. Chhokar & S. Gartagani, “Jurisdiction in follow-on damages claims: update on the judgement of the European Court of Justice in the hydrogen peroxide cartel claim”, (2015) *G.C.L.R.* 8(3); R. Pike & Y. Tosheva, “CDC v Evonik Degussa (C-352/13) and its potential implications for private enforcement of European competition law”, (2015) *G.C.L.R.* 8(2), p. 82.
 - 16 See also M.G. Bredenoord-Spoek, Ch.R.A. Swaak & J.S. Kortmann, “Netherlands: parent company can serve as anchor defendant in sodium chlorate damages litigation”, (2014) *G.C.L.R.* 7(3), p. 38.
 - 17 Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995], para. 33.
 - 18 Joined Cases 509/09 and 161/10 *e-Date Advertising GmbH v X and Martinez v MGN Ltd.* [2011].
 - 19 In para. 49, the notion of centre of interests is defined as follows: “[t]he place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State”
 - 20 Meaning that the courts in the jurisdiction in which an action was introduced first will rule first on whether or not they have jurisdiction.
 - 21 Case C-116/02 *Erich Gasser GmbH and MISAT Srl* [2003], paras. 41 and 71; see also C. Stothers, M. Gardner & S. Hinchliffe, “Forum shopping and ‘Italian torpedoes’ in competition law in the English courts”, (2011) *G.C.L.R.* 4(2), p. 67; see also Opinion of AG Jääskinen from 11 December 2014 in Case 352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Ors* [2014], para 51.
 - 22 E.G. Case C-406/92, *Tatry* [1994], para. 44 and Case C-133/11, *Folien Fisher/Ritrama* [2012], paras. 44 and 52.
 - 23 See S. Beeston & A. Rutten, “The Dutch Torpedo Case”, *CLI*, 2015 (available at https://www.vandoorne.com/en/knowledgesharing/publications/2016_q1/the-dutch-torpedo-case-a-new-dimension-to-forum-shopping-in-cartel-damages/).
 - 24 B. Añoveros Terradas, “Consumer collective redress under the Brussels I Regulation recast in the light of the Commission’s common principles”, (2015) *J.P.I.L.* 11(1), pp.143-162.
 - 25 Case 352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v AkzoNobel NV & others* [2015], in particular paras. 33 and 56; in an earlier Case 145/10 *Eva-Maria Painer v Standard Verlags GmbH*, [2012], para.84, the Court of Justice clarified, in the context of copyright infringements, that the close

- connection between the parallel claims does not presuppose that the claims are based on identical legal grounds.
- 26 Case 352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v AkzoNobel NV & others* [2015], para. 33.
- 27 Case 352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v AkzoNobel NV & others* [2015], para. 56.
- 28 Commission Communication, "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 13, available at http://ec.europa.eu/consumers/archive/redress_cons/docs/com_2013_401_en.pdf.
- 29 Commission Communication, "Towards a European Horizontal Framework for Collective Redress", p. 8.
- 30 *Ibid.*
- 31 For an overview of the systems in place different EU Members States, see Report on "The Growth of Collective Redress in the EU", *Supra Note 2*, at pp. 37-39 and pp. 64-67.
- 32 See J. S. Kortmann & M. Bredenoord-Spoek, "The Netherlands: a 'hotspot for class actions?'" (2011) *G.C.L.R.* 4(1), p. 13, available at <https://www.stibbe.com/~media/03%20news/publications/amsterdam/marieke%20bredenoord-spoek/marieke%20bredenoord-spoek%20-%20the%20netherlands%20a%20hotspot%20for%20class%20actions.pdf>.
- 33 District Court of Amsterdam. Case C/13/589073 / HA ZA 14-875, ECLI:NL:RBAMS:2016:6593. The Amsterdam court declined jurisdiction, but the case is currently before the Amsterdam Court of Appeal. Amsterdam Court of Appeal, Case 200.206.996.
- 34 District Court of Amsterdam, case C/13/606129, HA ZA 16/396.
- 35 District Court of Rotterdam, Case C/10/526115, HA ZA 17/440.
- 36 See for example <http://www.businesswire.com/news/home/20170123006220/en/International-Coalition-files-Lawsuit-District-Court-Rotterdam>. ; <http://www.dandodiary.com/2016/10/articles/international-d-o/dutch-court-dismisses-collective-investor-action-bp-jurisdictional-grounds/>; <https://www.ft.com/content/fff71726-d185-11e5-92a1-c5e23ef99c77>.
- 37 See <https://www.rechtspraak.nl/English/NCC>.
- 38 See for example M. A. Petsche, "What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice", p. 27 (stating that historically, some countries such as France even recognized specific "jurisdictional privileges" which afforded their nationals systematic access to their domestic courts).
- 39 See also R. Gamble, "Not a class (yet): Europe moves softly towards collective redress", (2016) *E.C.L.R.* 37(1) pp. 14, 21.
- 40 An example of a jurisdiction that has introduced changes to its legislation following the Recommendations is the UK. According to the UK Consumer Rights Act 2015, the Competition Appeal Tribunal will determine whether collective proceedings are suitable for an opt-in or opt-out. The UK previously had an opt-out representative action but opting for this type of action has shown to be difficult. In March 2014, Belgium enacted a law adding a new section on 'collective compensation actions' in Title 2 Book XVII of the Code of Economic Law and Belgian courts can choose among an opt-in or an opt-out system, based on the underlying facts and claims of the case. For a complete overview of the collective redress mechanisms that currently exist in a number of EU Member States and the differences between them, see Report on "The Growth of Collective Redress in the EU", *Supra Note 2*, at p. 64.
- 41 As suggested in the ILR paper "Response to Consultation on Draft Dutch Bill for Redress of Mass Damages in a Collective Action", 24 October 2014.
- 42 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

- 43 An overview of the legal instruments that have already been adopted is available at http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.
- 44 See Point 3.7.
- 45 This principle has also been recognized in other contexts, for example in insolvency proceedings: In his Opinion in C-1/04 *Staubitz-Schreiber*, the Advocate General discussed forum shopping as follows: "[w]here forum shopping leads to unjustified inequality between the parties to a dispute with regard to the defence of their respective interests, the practice must be considered and its eradication is a legitimate legislative objective." (para. 73.). See also Case C-133/11 *Folien Fischer AG, Fofitec AG v Ritrama SpA* [2012], para 45, where the court stated that "the objective [...] of ensuring that the court with jurisdiction is foreseeable and of preserving legal certainty are not connected either to the allocation of the respective roles of claimant and defendant or to the protection of either"; see M. A. Petsche, "What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice" referred to above in note 2.
- 46 Commission Communication "Towards a European Horizontal Framework for Collective Redress", p. 13.
- 47 B. Añoveros Terradas, "Consumer collective redress under the Brussels I Regulation recast in the light of the Commission's common principles", p. 156.
- 48 *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S. June 24, 2010), full judgment available at <https://www.supremecourt.gov/opinions/09pdf/08-1191.pdf>; for further information on the ruling, see S. Hirst, "U.S. Supreme Court Rejects "Foreign Cubed" Class Actions", HLS Forum on Corporate Governance and Financial Regulation, (2010), available at <https://corpgov.law.harvard.edu/2010/06/25/u-s-supreme-court-rejects-foreign-cubed-class-actions/>.



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