Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles?

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Civil procedure is in a transitional phase in Europe. Under the influence of new technologies, mass litigation, budgetary constraints and the ever increasing judicialization of all sorts of societal problems, we are moving towards a new civil procedure paradigm, away from the classical model of conflict-solving, adversarial, contradictory two-party proceedings. It is in this environment that the Brussels Convention celebrates its 50th anniversary.

1.1. Collective Redress and the Jurisdiction Rules of the Brussels Ibis Regulation

One of these challenges is the incorporation of the collective litigation model in its rules on jurisdiction and *lis pendens*. More and more EU Member States are embracing the collectivisation of civil procedure, especially
through representative remedial\(^1\) collective redress procedures. This is a collective litigation model by which a qualified representative can apply on behalf of a group of persons confronted with the same and/or similar legal and/or factual issues, most likely consumers at present, for a remedy against a business on account of having caused harm, either contractual or extra-contractual, to that group of persons. The qualified representative acts without a legal mandate from the (other) interested persons and is not necessarily part of the group of persons for whom a remedy is being sought.\(^2\) The (positive) decision obtained by the qualified representative will, however, bind the group members, even though they are formally not a party to the procedure. This is a relatively new trend in European civil procedure\(^3\) that does not sit easily with the jurisdiction rules of the Brussels I\(^{bis}\) Regulation, which is based on a different litigation model. It also begs the question whether the Brussels Regime is flexible enough to accommodate this very recent evolution in European procedural culture.

It appears from the analysis in the previous chapter that cross-border representative remedial collective redress is possible in the European Union.\(^4\) However, not all possible configurations are attainable under the Brussels I\(^{bis}\) Regulation. It is generally not possible for parties domiciled in one Member State to join a representative remedial collective redress procedure in another Member State apart from the Member State in which

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1 Since the remedy in a representative collective redress procedure is not necessarily limited to compensation in the strict legal sense but can also encompass restitution, price reduction, a flat amount, exchange or other alternatives (rebates on future purchases or other reductions), I will use the term ‘representative remedial collective redress’ instead of ‘representative compensatory collective redress’ or ‘representative monetary collective redress’.


4 See, S. Law, p.349 in this volume.
the defendant is domiciled. True European-wide representative remedial collective redress, with the consolidation of all EU group members in a Member State that is not the domicile of the defendant, appears thus impossible.

This might seem somewhat contradictory in an integrated market where goods and services flow freely from one Member State to another and where consumers from multiple Member States can be exposed to the same harm. Various authors have therefore suggested amending the Brussels I bis Regulation in order to overcome jurisdictional problems in relation to cross-border collective redress in the European Union, especially for consumers. Such amendments would create additional fora having jurisdiction, other than the domicile of the defendant or the individual consumer, which would in turn increase the need to circulate decisions throughout the European Union. Therefore, the adaptation of rules on jurisdiction may not be considered separately from issues of recognition.


and enforcement, especially in light of public policy. It is to this point that this contribution will now turn.

1.2. Relevance of the Issue of Public Policy in the Reform Debate

The increased need for circulation may potentially lead to a higher number of refusals of recognition and enforcement of judgments. This is not only a logical consequence of an increase in cross-border situations but also because of the nature of the decisions circulating, namely judgments emanating from representative remedial collective redress proceedings. The increased potential for refusal of recognition or enforcement can be ascribed to the absence of a common collective redress culture in the Member States of the European Union. Currently, less than 20 Member States have provided in one way or another for remedial collective redress mechanisms. Almost a third of EU Member States have therefore not acted upon the 2013 Recommendation of the European Commission, despite its imperative language. Moreover, in more than half of the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final, 3 (‘European Commission 2018 report on collective redress’). See also BIICL, Civic Consulting and RPA, State of collective redress in the EU in the context of the implementation of the Commission Recommendation (JUST/2016/JCOO/FW/CIVI/0099), 2017, 10 (‘BIICL Study’). It should be pointed out that Luxembourg is in the process of adopting a law on collective redress. Moreover, I do not any longer count the United Kingdom as an EU Member State.

8 European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018) 40 final, 3 (‘European Commission 2018 report on collective redress’). See also BIICL, Civic Consulting and RPA, State of collective redress in the EU in the context of the implementation of the Commission Recommendation (JUST/2016/JCOO/FW/CIVI/0099), 2017, 10 (‘BIICL Study’). It should be pointed out that Luxembourg is in the process of adopting a law on collective redress. Moreover, I do not any longer count the United Kingdom as an EU Member State.


10 It remained in the end a non-binding instrument that Member States could ignore: A. Stadler, “The Commission’s Recommendation on Common Principles for Collective Redress and private international law issues” in E. Lein, D. Fairgrieve, M. Otero Crespo and V. Smith (Eds.), Collective redress in Europe – Why and how? (BIICL, 2015), (235) 248. See also BIICL Study, 9–41; inter alia J. Sorabji predicted rightly that the European Commission’s 2013 Recommendation would not result in any coherence between the Member States’ systems: J. Sorabji, Representative (Consumer) Collective Redress Decisions in the EU
ber States that have provided for remedial collective redress the mechanism is limited to a specific sector, mostly consumer law.\textsuperscript{11} Next to this, approaches to remedial collective redress differ considerably amongst those Member States, as highlighted by the comparative overview in the previous chapter of this volume.\textsuperscript{12} Even within a specific model, procedural design may vary strongly.\textsuperscript{13} The representative model we consider in this contribution is a very good example in that regard, as various procedural options may lead to procedures of a very different nature with different levels of protection. Likewise, between opt-out models or opt-in models rules may vary considerably and create very different outcomes depending on how they are designed.\textsuperscript{14}

It appears that all Member States concerned have developed their own model of collective redress, thereby striking a different balance between respecting the right to a fair trial and the efficiency of collective procedures.\textsuperscript{15} With such diversity it cannot be excluded that decisions given in a Member State with a very liberal approach to representative remedial col-

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\textsuperscript{11} European Commission 2018 report on collective redress, 3. A notable exception is the Portuguese popular action, which is of general application. Also in France, the ‘action de groupe’ is available in a number of other areas, such as discrimination, health and the environment. In 2018, Belgium extended its collective redress mechanism to SMEs. (Law of 30 March 2018 modifying the Economic Law Code by extending the scope of application of the action for collective redress to SMEs, \textit{Belgian State Gazette} 2018, 41950). More generally, after the enactment of the GDPR, various Member States have also provided for remedial collective redress in relation to data protection law.
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\textsuperscript{14} Many factors may contribute to this: judicial approach vs settlement approach, declaratory nature vs compensatory nature, standing requirements, admissibility requirements, notification requirements, moment of constitution of class, time to opt-in/opt-out, powers of the judge, impact on individual proceedings, and costs and financing rules. See infra.
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lective redress may be exposed to a risk of refusal of recognition or enforcement on account of public policy in a Member State with a very different or restrictive view on this matter. It is telling in this regard that in the course of the reform process of the Brussels I Regulation the European Commission proposed to exclude judgments given in collective procedures from the abolition of *exequatur* since the required level of mutual trust between the Member States was absent.\(^{16}\)

The directive on representative actions for the protection of the collective interests of consumers will not take away this lack of mutual trust. The agreed text of the directive allows for many models of remedial collective redress procedures, ranging from the very restrictive to very liberal. The legislative process has only highlighted the strongly different views of the Member States on remedial collective redress and its adoption is thus in no way a sign of a coming together of the Member States on this point. Quite to the contrary. Both Parliament and Council have amended the Commission’s proposal to make clear that the rules on recognition and enforcement of judgments will not be affected by the directive,\(^{17}\) keeping the option for refusals of recognition and enforcement open.

The idea that a lack of common understanding of proceedings may influence the application of Article 45(1) Brussels I\(^{bis}\) Regulation may also be inferred from the Opinion of Advocate General J. Kokott in *Trade Agency*. She states in relation to the enforcement of a default judgment that it cannot be refused on account of public policy purely for it being characterised as a default judgment, as all Member States accept the concept of a

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\(^{16}\) European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, recital 23. This exclusion was, however, not followed by the other institutions. See, for example, Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – Political guidelines for the future work, 29 November 2011, 17402/11, point 6.

default judgment, regarding which a balance must be struck between the rights of the claimant and the rights of the defendant. Conversely, it may be plausible that recognition and enforcement of a judgment given in a representative remedial collective redress procedure may be refused by the courts of a Member State that has struck a completely different balance between the efficiency of collective litigation and the right to individual litigation.

In light of this, it appears justified to explore whether the public policy exception will be applied more frequently to collective redress decisions. We will focus on decisions emanating from a non-mandate based representative remedial collective redress procedures, as this appears to be the model favoured by the European Commission and is becoming the preferred model amongst the EU Member States. It is also in regard of this model that issues of public policy are most likely to appear, especially since the discrepancy with individual litigation and the accompanying procedural rights is the widest.


19 These can be either judgments proper or settlements approved by a court after judicial scrutiny. Such settlements can also be considered as decisions within the meaning of the Brussels Ibis Regulation and are for the purposes of this contribution therefore not considered separately from judgments proper. What goes for judgments goes for these settlements as well, both in regard of the required procedural guarantees and the standard of public policy review. See also, D. Fairgrieve, “The impact of the Brussels I enforcement and recognition rules on collective actions” in D. Fairgrieve and E. Lein (Eds.), Extraterritoriality and collective redress (OUP, 2012), (171) 174–176.

20 For reasons of style, I will hereafter use the shorter notions of ‘representative collective redress procedures’, ‘representative collective redress’ or ‘collective redress’ to refer to ‘representative remedial collective redress procedures’.


1.3. Argument and Plan

The aim of this paper is to challenge the idea that a quick adaptation of the jurisdiction rules of the Brussels Ibis Regulation may solve the problem of representative collective redress procedures within the Brussels regime. It is argued that in the absence of a common standard of collective redress in Europe, an intensification of public policy review may emerge in relation to collective redress decisions, rendering the adaptation of jurisdiction rules rather ineffective. The plausibility of such stricter scrutiny should require us to weigh carefully the interest in facilitating EU-wide representative collective redress against the increased risk of refusals of recognition and enforcement and their impact on the Brussels regime.

In section 2, I will take stock of the current approach to public policy in the Brussels Ibis Regulation. This will be followed by presenting the two main arguments in favour of a different approach to public policy in relation to representative remedial collective redress decisions in section 3. Section 4 will address issues of public policy in relation to the choice for a representative remedial collective redress model as well as the choice for a model with an opt-out selection mechanism. Issues of public policy will be further considered in section 5 in relation to procedural design of collective redress models. Section 6 will briefly address the distinction between procedural design and concrete application and present a number of predictions in relation to the intensity of public policy review. This will be followed by section 7, in which we will evaluate our arguments and conjectures in light of national practice, considering a number of court decisions on the recognition and enforcement of collective redress decisions. The concluding section will then take a position regarding the plausibility of intensified public policy scrutiny and the opportunity of an adaptation of the jurisdiction rules of the Brussels Ibis Regulation in the near future.

2. The Approach to Public Policy in the Brussels Ibis Regulation

2.1. Standard of Review

The public policy exception of Article 45(1) Brussels Ibis Regulation allows a court of a Member State to refuse the recognition and enforcement of a judgment given in another Member State on account of that judgment being “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fun-
A mere infringement of a fundamental principle does not suffice, however. A “manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order” must exist. The high threshold corresponds to the idea that exceptions to the free circulation of judgments must be constructed in a restrictive manner, as a wide application would undermine the fundamental objectives of the Brussels Regime. Not every breach of every rule of law thus suffices to object to the recognition and enforcement of foreign judgments. It is within this framework that national courts have to apply Article 45(1) Brussels Ibis Regulation.

2.2. National Concept

The public policy concept is foremost a national concept, determined by the courts of the Member State in which recognition or enforcement is being sought. The Court of Justice has no definitional powers in relation to the public policy concept of a particular Member State. It only has a negative power, reviewing the limits within which the courts of a Member State may have recourse to the concept of public policy. It falls thus on the latter to determine whether a decision originating in another Member State has violated a fundamental rule in a manifestly disproportionate way.

2.3. Increasing Europeanisation of Public Policy Based on a Common Procedural Model

That being said, there is a trend towards the Europeanisation of the concept of public policy under the influence of the fundamental right to a fair
trial\textsuperscript{29}, as enshrined in Article 6 ECHR and Article 47 CFR, and which is common to all EU Member States.\textsuperscript{30} The fundamental right to a fair trial provides for a common benchmark to define public policy – it denationalises the concept of public policy to a large extent\textsuperscript{31} – and allows the Court of Justice to play a bigger role in this regard by defining the concept also in a positive way, as seen in \textit{Krombach}, in which it held that it is not permissible to achieve the aim promoted by the Brussels Regime by ‘undermining the right to a fair hearing’.\textsuperscript{32} This evidently requires a positive definition of what such a right should entail. The increased role of the Court has become even more visible since the CFR has received full normative status with the entry into force of the Treaty of Lisbon.\textsuperscript{33} It must thus be possible to have recourse to the public policy clause “where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR”,\textsuperscript{34} the rights of the defence as enshrined in Article 6 ECHR and Article 47 CFR constituting fundamental principles whose violation can give rise to the public policy exception.\textsuperscript{35}

In this light, it is important to point to the common constitutional traditions of the Member States. The right to a fair trial has been developed in line with a common understanding of civil procedure, namely an adversarial contradictory two-party procedure, for which appropriate safeguards for fair proceedings have been developed in the Member States and which


\textsuperscript{30} \textit{Trade Agency}, para. 52.

\textsuperscript{31} The influence of the ECHR on public policy also exists in the private international rules of the Member States. See, for example, Ghent Court of Appeal, 17 April 2008, www.dipr.be 2009 (2), 75.

\textsuperscript{32} \textit{Krombach}, para. 43.


\textsuperscript{34} \textit{Krombach}, para. 44.

\textsuperscript{35} \textit{Krombach}, para. 26.
have converged into a common standard over time. This allows for a high degree of mutual trust between the civil justice systems of the Member States and leaves very little latitude to refuse recognition or enforcement for violations of the right to a fair trial on account of procedural design. Public policy concerns are rather raised in relation to the concrete application of procedural rules. This appears also from the way national courts have to evaluate public policy grounds for refusal. The national court must take into account the proceedings as a whole in the light of all the circumstances, whether means of redress against the decision were available, and whether the right to be heard has been respected. This does not go as far as reviewing the substance of the case but requires the national court to identify the available legal remedies and verify whether these remedies allowed the possibility of being heard, “in compliance with the adversarial principle and the full exercise of the rights of defence”. Thus, apart from the very exceptional situation that a procedure in one Member State is problematic from the point of view of the right to a fair trial by way of its design, public policy review rather concerns the application of procedural rules in the concrete case.

As such, the system is geared to a very limited scope for refusal on grounds of public policy, thereby allowing for the maximal circulation of judgments in line with the fundamental objectives of the Brussels Regime. The question is whether a similar approach can be maintained in respect of the circulation of representative collective redress decisions. They are a recent phenomenon in European procedural culture and no common tradition has yet emerged across the Member States.

37 Gambazzi, para. 44. See also, Judgment of 16 July 2015, Diageo Brands, C-681/13, EU:C:2015:471, para. 68.
38 Gambazzi, para. 45.
39 Gambazzi, para. 46.
41 See supra, section 1, and infra, section 3.2.
3. A Different Approach to Public Policy in Relation to Representative Remedial Collective Redress?

There appear to be two main arguments that support a different approach towards public policy in relation to representative remedial collective redress within the framework of the Brussels regime, namely the radically different litigation model and the lack of a common conception of fair trial rights within collective litigation.

3.1. The Litigation Model of the Brussels Regime

The first argument relates to the procedural model on which the Brussels regime is built. The regime follows the principal procedural model of the Member States of the EU, which is that of an adversarial contradictory two-party procedure\textsuperscript{42}, with the potential for limited multiple party proceedings through joinder, inseparability of cases or representative injunctive relief. The general rule in this regard is that the defendant should be sued in their domicile.\textsuperscript{43} In certain instances, the defendant can also be sued in other jurisdictions on account of the special\textsuperscript{44}, protective\textsuperscript{45} and exclusive\textsuperscript{46} jurisdiction rules, choice of court agreements,\textsuperscript{47} or appearance.\textsuperscript{48} While procedural rules in these other jurisdictions may differ from those in the defendant’s Member State of domicile, the general idea underpinning the Brussels regime is that these procedures are not of a considerably different nature compared to the home state of the defendant and correspond to the right to a fair trial. A defendant may thus face some inconveniences when being sued in another jurisdiction; they will not be dragged into a completely alien model of litigation that compromises the right to a fair trial.

\textsuperscript{43} Article 4(1) Brussels I\textsuperscript{bis} Regulation.
\textsuperscript{44} Article 7 Brussels I\textsuperscript{bis} Regulation.
\textsuperscript{45} Articles 8–23 Brussels I\textsuperscript{bis} Regulation.
\textsuperscript{46} Article 24 Brussels I\textsuperscript{bis} Regulation.
\textsuperscript{47} Article 25 Brussels I\textsuperscript{bis} Regulation.
\textsuperscript{48} Article 26 Brussels I\textsuperscript{bis} Regulation.
A representative collective redress procedure deviates considerably from the procedural model on which the Brussels regime has been built. It is a new type of procedure that was not foreseen by the drafters of the Brussels Convention and was only marginally considered during the Recast process. This goes a long way to explaining the difficult relationship between collective redress decisions and the Brussels regime. It also means that the Brussels regime has not been developed in order to make decisions given in a representative collective redress procedure circulate throughout the European Union, especially decisions given in opt-out models. This may be an argument in favour of a wider application of the public policy exception to judgments given in such procedures.

3.2. Collective Redress, European Procedural Culture and Mutual Trust

A second argument relates to the contentious nature of the policy debate and the differences between the Member States on this point. There is currently no clear consensus on the necessity or desirability of representative collective redress. This can already be gathered from the failure of the 2013 Recommendation mentioned earlier and is further corroborated by data from various studies that have been undertaken in the past couple of years.

54 See supra, section 1.
on collective redress in the EU.\textsuperscript{55} Certain Member States appear to have principled objections to the introduction of collective redress.\textsuperscript{56} Other Member States agree to the principle but hide behind the need for empirical studies to establish the necessity of such mechanisms\textsuperscript{57}, these studies being difficult to conduct.\textsuperscript{58} Others still question the compatibility of representative collective redress with fundamental rules of civil procedure and constitutional law, especially under an opt-out model.\textsuperscript{59} Moreover, not all legal practitioners and judges seem to be convinced of the need to introduce consumer collective redress.\textsuperscript{60} The influence of the immediate stakeholders undoubtedly also plays an important role, with consumer associations and businesses finding themselves in opposite positions on the issue.\textsuperscript{61} The difficult legislative process of the draft directive on representative actions only provides further evidence of the strong differences that


\textsuperscript{56} E.g., Austria (see Heidelberg Study, Evaluation of the contributions to the public consultation and the hearing, 552), Hungary (see Heidelberg Study, Evaluation of the contributions to the public consultation and the hearing, 577).

\textsuperscript{57} E.g., Denmark (see Heidelberg Study, Evaluation of the contributions to the public consultation and the hearing, 561).


\textsuperscript{60} See, for example, MPI Study, 260.

\textsuperscript{61} See, for example, A. Stadler, “Wider die Mär von der europäischen class action”, Verbraucher u. Recht 2011, (79) 79; H. Willems, “Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverband der Deutschen Industrie (BDI)” in C. Brömmelmeyer (Eds.), Schriften des Frankfurter Instituts für das Recht
exist between the Member States, leaving scope for very different models of collective redress.

It is thus clear that representative collective redress is currently not part of the common procedural culture of the EU Member States. That conclusion is an important argument in favour of a wider application of the public policy exception; the strict approach being the product of a common understanding of how civil justice should be administered. It is important to underscore that this common understanding has been developed throughout decades and even centuries, culminating in constitutional and fundamental rights standards providing individual litigants with the necessary safeguards to ensure a fair trial. This has in turn laid a strong foundation for mutual trust between the justice systems and judicial decisions of the EU Member States, allowing for the free circulation of judgments and even the abolition of public policy as a ground for refusal, for example in the Payment Order Regulation\textsuperscript{62} and the Enforcement Order Regulation.\textsuperscript{63}

Applying the same standard of public policy to judgments emanating from representative collective redress procedures ignores that evolution and fails to recognise the importance of history and time in building mutual trust.

The importance of time in building mutual trust should indeed not be underestimated. This is clearly visible in the incremental approach of the


See also, for example, the opposition of the Austrian undertakings (WKO) against representative collective redress in its elaborate reaction to the 2018 Commission Proposal (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwiBtLG6l8LeAhVCpYsKHdUEAHEQFjABegQICRAC&url=https%3A%2F%2Fwww.wko.at%2Fservice%2Ft%2F732-Richtlinienentwurf-kollektiver-Rechtsschutz-STN-170518.pdf&usg=AOvVaw1zES5s-9pZi-bVwTV91HhW), which is strongly opposed to collective redress procedures and appears to have an important influence on the political decision-making process in this regard (https://diepresse.com/home/wirtschaft/economist/5284368/Abgassandal_VWKlagen_Merkels-Umschwung-bringt-die-OeVP-unter). This also resonates in the reasoned opinion of the Austrian Bundesrat on the 2018 Commission Proposal under the Subsidiarity Protocol: see infra, fn. 87.


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EU and its Member States towards the regulation of EU civil justice. The existence of a sufficient degree of mutual trust in each other’s systems has led Member States to begin with a gradual abolition of exequatur proceedings and grounds for refusal such as public policy, starting at the bottom of the justice system by focussing on low value and uncontested claims, in order to come finally to full equal treatment of foreign and domestic decisions. The Brussels Ibis Regulation also fits within this evolution, notwithstanding that progress has been less significant than initially anticipated by the European Commission. Still, the automatic exequatur procedure has been abolished, leaving it to the parties to raise grounds of refusal on account of public policy. It is in this context that judgments emanating from representative compensatory collective redress proceedings should be placed.

Mutual trust appears to be working bottom up in European civil justice. The availability of public policy safeguards against foreign judgments depends on the complexity of procedures and the value of the claim: the lower the value of a claim, the less complex the procedure, the lower the need for public policy exceptions. Conversely, there is a clear argument for a more intensive application of the public policy exception in relation to judgments given in a representative collective redress procedure, based on the complexity of such procedures and their high value.

3.3. Research Questions

A representative collective redress procedure thus does not concern a ‘mere difference’69 of procedural rules that another Member State should automatically accept. Rather, it concerns a fundamental shift in the civil litigation paradigm in Europe70, requiring Member States to reassess fundamental aspects of the right to a fair trial. This is not business as usual; the impact on the application of the public policy exception should therefore be considered. This leads us to two questions:

Q1: Can the recognition or enforcement of a decision be refused on account of public policy reasons because the Member State of recognition or enforcement is fundamentally opposed to a model of representative collective redress, especially with an opt-out selection mechanism?

Q2: Can the recognition or enforcement of a decision be refused on account of public policy reasons because the Member State of recognition or enforcement deems the procedural design71 of the representative collective redress procedure to be contrary to public policy?

4. Public Policy and the Model of Representative Remedial Collective Redress

4.1. No per se Refusal of Representative Remedial Collective Redress Decisions

Would a court of a Member State in which strong resistance exists against the introduction of representative collective redress, for example Austria,72 be able to hold that a decision given in such a kind of procedure in another Member State entails an appreciable deviation of the procedural

71 Give the central nature of the issue in the political and academic debate, I do not consider the group selection mechanism as a mere element of procedural design. It determines to such an extent the choice for a representative model that it cannot be separated from that choice. The group selection mechanism will also heavily influence all subsequent choices of procedural design, such as publicity, the role of the judge, and funding rules. Therefore, I consider the group selection mechanism to be an indissociable component of the representative model chosen, rather than a mere element of procedural design of a representative procedure.
72 See supra, fn. 56.
culture of that Member State to the extent that it constitutes a manifest breach of fundamental rules justifying the application of Article 45(1)(a) Brussels I bis Regulation.\textsuperscript{73}

While such a ground of refusal is (was) certainly conceivable, it is likely to be rejected by the Court of Justice, which polices the border of public policy. The ECtHR has held in \textit{Lithgow vs United Kingdom} that the right to an individual procedure can be limited or restricted for legitimate reasons, such as procedural efficiency in mass tort cases, and in a proportionate way.\textsuperscript{74} It would thus not be against the right to a fair trial to have a representative collective redress procedure, provided that the necessary safeguards are in place. Recognition and enforcement can therefore not be refused because a judgment is the outcome of a procedure for representative collective redress. The right to a fair trial is not about safeguarding two-party proceedings but about guaranteeing procedural rights. If such procedural rights would be safeguarded in a sufficient manner in the course of a representative collective redress procedure, there is very little reason to see why the recognition or enforcement of a judgment given in such a procedure would be refused on account of public policy.\textsuperscript{75} The standard laid down in Article 6 ECHR and Article 47 Charter can be complied with in collective proceedings. It does not impose a traditional model of two-party proceedings.\textsuperscript{76}

Moreover, from a comparative law perspective it would be difficult to maintain for any Member State that the individuality of civil proceedings is of such a fundamental nature that it would justify a ground for refusal on the basis of public policy.\textsuperscript{77} All Member States know the principle of

\textsuperscript{73} Cf. the example given in R. Fentiman, “Recognition, enforcement and collective judgments” in A. Nuys and H.E. Hatzimihail (Eds.), \textit{Cross-border class actions – The European way} (Selp, 2014), (85) 90.

\textsuperscript{74} ECHR, \textit{Lithgow v. United Kingdom}, 8 July 1986, paras 195–197 and 207.


\textsuperscript{76} Cf. R. Fentiman, “Recognition, enforcement and collective judgments” in A. Nuys and H.E. Hatzimihail (Eds.), \textit{Cross-border class actions – The European way} (Selp, 2014), (85) 93.

collectivisation of civil proceedings in one way or another. One could point to the assignment of claims, the joinder of proceedings, or the power for consumer associations to bring actions for injunctive relief, which implements the Injunctive Relief Directive.\(^7\) In spite of differences concerning the nature and the model of a collective procedure between the Member States, it is thus difficult to see how the recognition or enforcement of a collective redress decision could be refused because it is the result of a representative action.

Anno 2020, this point has now become moot, as an agreement has been reached by the EU legislator on the adoption of a directive on representative actions, requiring all Member States to introduce a form of representative collective redress.

4.2. No per se Refusal of Opt-Out Systems

4.2.1. Different opinions on the compatibility of an opt-out system with the right to a fair trial

A discussion on the introduction of a procedure for representative collective redress typically goes hand in hand with a discussion on the way in which group members should be selected. Most Member States go in the direction of a representative action whereby the representative is not necessarily part of the affected persons and has not received a specific mandate by such affected persons to act. We will thus focus on representative actions that work without a formal mandate, meaning that group selection is being done on an opt-in or opt-out basis. Moreover, the agreed text of the draft directive also obliges Member States to provide for representative procedures without a formal mandate. Further to this, it is also very unlikely that a mandate type of procedure will cause issues of public policy.\(^8\)

The majority of Member States that have introduced a mechanism of representative collective redress have chosen the opt-in model.\(^9\) This model was also preferred by the European Commission in its 2013 Recom-

\(^7\) European Commission 2018 report on collective redress, 3.
\(^8\) European Commission 2018 report on collective redress, 13.
A number of Member States have nevertheless maintained or introduced an opt-out model, either exclusively or together with an opt-in system. They have done so because an opt-out model would be more efficient for certain types of claims or damages.

The adoption of an opt-in model is in most instances the consequence of the rejection of an opt-out model because such model would violate the right to a fair trial provided for by Article 6 ECHR or other constitutional guarantees. Member States that have adopted an opt-out model see this differently and are of the opinion that the lack of individual notification can be sufficiently compensated for by accompanying measures safeguarding the right to a fair trial. It is interesting in this regard to compare the position of the Austrian legislator to the position of the Belgian legislator and the Dutch courts. In its opinion on the 2018 Commission Proposal given pursuant to the Subsidiarity Protocol the Austrian Bundesrat has stated that “[e]benso wie ein opt-out System würde ein solches System insb. gegen Art. 6 EMRK sowie Art. 47 der Grundrechtecharta der Europäischen Union verstoßen”. The Bundesrat is thus not only opposed to an opt-out model but also appears to have objections against any representative model of remedial collective redress that is not based on an individual mandate. The Belgian legislator on the other hand was of the opinion that an opt-

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82 These are Belgium, Bulgaria, Denmark, England and Wales, Portugal, and the Netherlands: European Commission 2018 report on collective redress, 13.
The Amsterdam Court of Appeal equally rejected the argument that the WCAM violated Article 6 ECHR, the law sufficiently guaranteeing the right to be heard and the right to be notified. How would an Austrian court act when the res judicata effect of a Dutch WCAM judgment is being invoked before it?

Imagine an Austrian small business owner seeking compensation in Austrian courts from Volkswagen for damages sustained as a consequence of the Diesel Gate. Volkswagen objects by referring to the res judicata effect of a judgment of the Amsterdam Court of Appeal, approving a settlement under an opt-out system for all Volkswagen customers in the European Union. The Austrian small business owner claims to be unaware of the existence of the Dutch judgment and can also no longer apply for compensation since the time-limit to submit claims to the claims foundation has elapsed. Would it then be possible for an Austrian court to refuse recognition of the Dutch judgment by relying on the public policy exception as the decision was given in an opt-out procedure?


89 This is the acronym for the Dutch collective settlements act, to which reference is made throughout this presentation. It is formed by the letters of its Dutch name: Wet Collectieve Afhandeling Massaschade.


91 Based on an example given in R. Fentiman, “Recognition, enforcement and collective judgments” in A. Nuyts and H.E. Hatzimihail (Eds.), Cross-border class actions – The European way (Selp, 2014), (85) 90. This situation may change when the exclusion of opt-out selection mechanisms for non-habitual residents, as provided for in the Council Common Position, will make it into law. Moreover, the new Dutch judicial collective redress procedure functions exclusively on an opt-in basis for non-habitual residents. This may also affect the evaluation by a foreign judge of a WCAM settlement obtained on an opt-out basis.
4.2.2. Service and defaulting defendants

It is instructive in this regard to look at the Court of Justice’s case law on knowledge about proceedings and the protection of defaulting defendants under Article 45(1)(b) Brussels Ibis Regulation. While group members are not in the same situation as defaulting defendants, it is a good point of departure to evaluate the approach of the Court of Justice to the absence of proper notification in light of the rights of the defence.

4.2.2.1. Full information about proceedings

We start with the case law of the Court of Justice on fictitious service, as this has a strong resemblance to notification by public summons, a method of notification typically associated with opt-out procedures. While the Court of Justice is not opposed to fictitious service per se, it considers that it should only be available as a means of last resort, after all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant. This is not the case for representative collective redress proceedings, where summons by public notice is not perceived as a means of last resort but rather as an ordinary means of service.

93 Cf. T. Bosters, Collective redress and private international in the EU (Springer, 2017), 206.
94 Judgment of 17 November 2011, Hypoteční banka, C-327/10, EU:C:2011:745, para. 52; Judgment of 15 March 2012, De Visser, C-292/10, EU:C:2012:142, para. 59. The requirement in civil law systems is that fictitious service is a means of last resort. It is therefore problematic to infer from the existence of the notion of fictitious service in a particular legal order the acceptance of notice by public summons in a collective redress procedure by that legal order. The same goes for inferring from the practice of public notices to inform the public of planning permissions or other events, thereby activating the time-limit for raising objections or bringing annulment proceedings, an acceptance of summons by public notice in opt-out collective redress procedures. The protection of an interest does not carry the same weight as the protection of a right and is thus deserving of less protection. One should thus refrain from comparing apples and oranges. See, however, A. Haflmeier, “Recognition of a WCAM settlement in Germany”, N.I.P.R. 2012, (176) 183.
next to individual notice. That being said, the standard in the case law of the Court is not that of personal service as such but of whether the goal of service has been realised, namely whether the person concerned has had an opportunity to take part in adversarial proceedings leading to a judgment affecting their legal situation. It is interesting to refer to the judgment in Denilauler in this regard, in which the Court was asked whether the referring court had to recognise and enforce a decision emanating from unilateral proceedings in which the defendant was not summoned to appear and which were intended to be enforced without prior service. The Court stated that the Brussels regime is “fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings”.

The lack of the service of a document instituting the proceedings and of the judgment on the defendant made such an inquiry impossible, leading the Court to conclude that a judgment given in such a procedure could not benefit from the regime established by the Brussels Convention.

We will not go into a discussion about whether judgments given in a representative collective redress procedure should be excluded from the scope of the Brussels Ibis Regulation. The EU legislator has indicated during the recast process that this should not be the case and also the agreed text of the directive on representative actions refers to the application of the Brussels Ibis Regulation. Nevertheless, the judgment remains relevant for our discussion as it clearly illustrates the Court’s standard, namely that service should be viewed as a means to facilitate the possibility for parties to take part in adversarial proceedings. This was not possible in the procedure in Denilauler because it concerned individual litigation of which the defendant was not notified by any means. The situation may thus be different in the case of representative collective redress proceedings, where public...

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95 It should be highlighted that, within reasonabel bounds, individual notice is a requirement in (many) representenative procedures based on an opt-out selection model. See, for example, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
98 Denilauler, para. 13.
99 Denilauler, para. 17.
100 Article 2(3) Draft Directive.
Public notice may thus achieve the goals of service. The question is which standard applies. Does it suffice that an interested party is made aware of the existence of proceedings or should more information be provided? The judgment in ASML\textsuperscript{101} may provide guidance in this regard. In that case the Court had to deal with the question whether the possibility of a defendant to challenge a default judgment in the Member State of origin depended on the due service of the default judgment or whether awareness of the default judgment obtained through other notifications, such as service of the order on the application for a declaration of enforceability, was sufficient. The Court answered that the defendant should be able to acquaint themself with the grounds of the default judgment\textsuperscript{102} and that the mere fact that the person concerned was aware of the existence of that judgment was insufficient in that regard.\textsuperscript{103} Service of the default judgment was thus required.\textsuperscript{104} The decision is relevant because the Court of Justice draws a parallel between the service of the default judgment and the document instituting proceedings.\textsuperscript{105} It appears that awareness of the commencement or existence of a procedure is thus not sufficient and that actual service of the document instituting proceedings is required in sufficient time and in such a way as to allow the defendant to prepare for their defence.\textsuperscript{106} That being said, one should again consider the goal pursued by service here. It is not about service as such but about giving the interested party the opportunity to acquaint themself with the particulars of the case in order to prepare a defence. A comprehensive public notice informing interested parties of a pending representative collective redress procedure and all its implications, given in a timely manner, may thus meet the Court’s standard. This would allow parties (not) to opt out of proceedings with full knowledge of the consequences.

\textsuperscript{101} Judgment of 14 December 2004, ASML, C-283/05, EU:C:2006:787.
\textsuperscript{102} ASML, para. 35.
\textsuperscript{103} ASML, para. 34.
\textsuperscript{104} ASML, para. 40.
\textsuperscript{105} ASML, paras 42–43.
\textsuperscript{106} ASML, para. 43.
4.2.2.2. Participation in adversarial proceedings

The Court of Justice has made a direct link between service and the opportunity to participate in adversarial proceedings in its judgment in *Denilauler*.\(^{107}\) The importance of that link has been further highlighted in various cases concerning the practice of substituted service, in which the Court held that service on a guardian *ad litem* may not be considered as an acceptance of jurisdiction by the absent defendant. According to the Court, an absent defendant must always have the possibility to challenge the jurisdiction of the court on the basis of Article 45(1)(b) Brussels I\(^{bis}\) Regulation.\(^{108}\) The Court did not consider the possibility for the guardian *ad litem* to challenge the jurisdiction of the court a sufficient guarantee for the absent defendant because they may not have the required information necessary to challenge international jurisdiction in an effective manner, which can only be provided by the absent defendant.\(^{109}\) The Court’s decision fits within the system of protection established by the Brussels Regime. Accepting substituted service as a valid method would have made the protection of the absent defendant by the Brussels I\(^{bis}\) Regulation redundant as they would be denied any opportunity to take part in adversarial proceedings. Should a similar level of protection be available to absent group members?

It may be tempting to argue that the situation of the absent group member mirrors the situation of the untraceable defendant. Jurisdiction to which the absent group member has not consented is established through an act of service by the party who represents them without having explicitly agreed to such representation. Even worse, the absent group member does not benefit from the protection of Article 45(1)(b) Brussels I\(^{bis}\) Regulation.\(^{110}\)

However, when we delve deeper into the underlying premises of the Court’s case law on substituted service, it appears that the similarity is false. In his opinion in *A v B*, Advocate General Y. Bot examines why ficti-

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107 *Denilauler*, para. 13.
109 *A v B*, para. 55.
110 Unless one would subscribe to the particular interpretation of the procedural position of a group member under the Dutch WCAM, namely as defendants who could make use of Article 45(1)(b) Brussels I\(^{bis}\) Regulation to resist recognition. For a discussion of this point, see H. van Lith, *The Dutch Collective Settlements Act and private international law* (Maklu, 2011), 42–45.
tious service on a representative in absentia is problematic from the point of view of the defaulting defendant. It immediately appears from this that these reasons do not apply to the situation of a group member represented in a collective redress procedure. First, contrary to a representative in absentia acting on behalf of a defaulting defendant\textsuperscript{111}, the representative in a collective procedure has in principle all the necessary information available to them to defend the interests of the group members sufficiently. Second, whereas a representative in absentia may not have sufficient facts to contest the jurisdiction of the court seised by the applicant, possibly leading it to accept jurisdiction through appearance\textsuperscript{112}, the group representative can only bring a case in line with the jurisdiction rules of the Brussels Ibis Regulation. There is thus no risk that the general scheme of the Brussels Ibis Regulation will be distorted: the jurisdictions in which a group representative can bring a collective procedure remain highly predictable and generally based on the defendant’s domicile.\textsuperscript{113} Third, the inability for a defaulting defendant to choose their own lawyer in the situation of a representative in absentia is less problematic for group members in a representative action since the group representative typically has to adhere to a number of qualitative criteria that have to be checked by the judge presiding over the action. In sum, while the case law on fictitious service on a representative in absentia or a guardian ad litem may appear not to allow public summons unreservedly, it is clear that the premises on which this case law is built do not apply to the situation of summons by public notice in the case of a representative collective redress procedure. The different situation of a group member compared to a defaulting defendant would thus justify a different balance of interests to be struck, with potentially a lower standard of service.\textsuperscript{114}

4.2.3. A need for appropriate safeguards

The case law on service of the Court of Justice allows for alternative means of service, provided that the defendant has a genuine opportunity to take

\begin{itemize}
  \item \textsuperscript{111} Opinion of Advocate General Y. Bot of 2 April 2014, A v B, C-112/13, EU:C:2014:207, para. 47.
  \item \textsuperscript{112} AG Opinion in A v B, para. 47.
  \item \textsuperscript{113} A v B, para. 57.
\end{itemize}
part in adversarial proceedings. That participation constitutes in turn a guarantee that the court hearing the case is properly informed about the facts of the case and that the arguments of the defendant are being taken into account by the court in deciding the case. Like service, participation in adversarial proceedings is thus not an end in itself but should be considered in a functional way. What is crucial is that the interests of the persons concerned are properly addressed in full knowledge of all relevant facts and circumstances.

In the course of two-party proceedings, the proper representation of the interests of a party in full knowledge of all relevant facts and circumstances is virtually impossible without the actual participation of the parties concerned. The situation is different, however, for representative collective redress proceedings. The nature of cases typically litigated by such proceedings allows for the interests of the group members to be sufficiently protected by way of a group representative. The representative can be sufficiently informed about the common problems of the group members, allowing them to present the court with a full picture of the case. Moreover, it can be expected, in principle, that a genuine group representative will sufficiently represent the interests of the group. A Member State may provide for a number of safeguards to guarantee the quality of the representation, inter alia by providing qualitative criteria before the status of group representative can be obtained or by giving interested parties or third parties the possibility to control the way in which a group representative performs their tasks. In addition to this, other safeguards may be provided, guaranteeing group members the right not to be bound against their will by the outcome of the collective redress procedure and their right to be heard in the procedure.

Coming back to our fictitious example, I believe that it would not be justified for the Austrian judge to refuse recognition of a judgment for the mere reason that it was given in an opt-out representative collective procedure. Such procedures are compatible with Article 6 ECHR and Article 47 Charter of Fundamental Rights, provided that the necessary safeguards are

115 Either in person, through a lawyer or through a representative who acts on the basis of an explicit mandate. This guarantees that personal contact exists between the actual party and their representative, who is then presumed to act with knowledge of all the relevant facts and in the interests of the represented party.

provided for. It is to these safeguards that we will turn now, as it appears from (limited) national practice that the existence of safeguards and/or their application will determine the fate of a judgment given in an opt-out procedure\textsuperscript{117}, rather than the opt-out nature of a collective procedure as such.\textsuperscript{118}

5. Public Policy and Safeguarding Individual Procedural Rights through Procedural Design

5.1. General

Money-Kyrle and Hodges have identified three types of safeguards to compensate for the collectivisation of individual litigious relationships: substantive controls, procedural controls, and financial and economic controls.\textsuperscript{119} Substantive controls concern the field of law in which representative actions are available or the type of rights for which they can be used.\textsuperscript{120} For example, various Member States have limited the introduction of compensatory collective redress mechanisms to consumer law or competition law.\textsuperscript{121} Moreover, certain types of collective redress mechanisms, such as opt-out compensatory collective redress, may not be available for specific types of claims, such as claims for personal injury\textsuperscript{122} or non-material damage.\textsuperscript{123} Financial and economic controls mainly deal with rules on the funding of collective procedures, e.g. whether third-party funding is possi-

\textsuperscript{117} Cf. Ghent Court of Appeal, 23 March 2017. See also infra, point 7.4.
\textsuperscript{121} European Commission 2018 report on collective redress, 3.
\textsuperscript{122} Cf. Belgium (Article XVII.43 § 2, 3° Economic Law Code).
ble, the award of costs and whether collective procedures may entail a speculative purpose.  

Procedural controls focus on preventing abusive litigation and guaranteeing the procedural rights of the parties and the group members by providing for procedural safeguards that mitigate the departure from the fundamental procedural rights that come with individual litigation.  

The focus hereafter is on these procedural controls, namely the safeguards incorporated in the procedural design of representative actions to guarantee the standard laid down by the right to a fair trial.

A comparative law analysis discloses that procedural safeguards in representative collective redress procedures vary considerably between EU Member States. This can be explained by the fact that many Member States have developed their model of representative collective redress in response to a particular national event. These ad hoc answers have led to unique procedural models, reconciling the national policy preferences for collective litigation with the fundamental right to a fair trial.

Starting from the premise that a representative collective redress mechanism has been developed by a rational legislator, it can be expected that each Member State has developed a model that maximises the efficiency of the collective procedure while keeping in line with the right to a fair trial. This implies that each Member State has made an individual determination about the maximum possible extent to which individual procedural rights can be limited for the purposes of facilitating collective proceedings. Given that national courts take their own model as a benchmark for determining whether a violation of public policy exists, a wider application of the public policy exception may then be expected in Member States that have adopted a higher procedural standard. This may manifest itself either

126 C. Hodges and S. Voet, Delivering collective redress (Hart/Beck/Nomos, 2018), 283.
through intensive scrutiny of judgments given in a foreign representative collective redress procedure with a lower procedural standard or more refusals of recognition and enforcement of such judgments. Consequently, the issue of public policy essentially comes down to the following question: has an appropriate balance been struck between individual litigation rights and the efficiency of collective redress proceedings?

5.2. Identification of Issues

Let us now take a look at a number of potential problems in relation to procedural design. We undertake this analysis from the perspective of the defendant and the individual group member, who may be a claimant in individual proceedings. The position of the group representative is as such less relevant as problems concerning the right to a fair trial mainly affect the defendant or the individual group members.

5.2.1. In relation to individual group members

The procedural safeguards for an individual group member should be determined by taking the procedural rights they would enjoy as an individual claimant as a starting point. This is in the first place the right to bring proceedings. That right is compromised by a representative collective redress procedure and thus safeguards protecting the individual’s right to bring proceedings should be put in place. First of all, there should be a good reason to depart from the individual litigation model in a specific case. Thus, before any other safeguards are activated to protect the right to bring proceedings, which would necessarily require activity of potential group members, a safeguard should allow for an independent evaluation of the justified nature of a collective procedure.\footnote{129} A requirement of appropriateness, to be evaluated by a judge or another party, may be envisaged here.\footnote{130}

The appropriateness of a collective procedure should, however, not automatically lead to an exclusion of the right to individual litigation – this would constitute a disproportionate restriction of that right. The owner of the right should be given an opportunity to give up or retain her

\footnote{129} Cf. Portugal (Article 13 Law on Popular Action). 
\footnote{130} Cf. Belgium (Article XVII.36, 2° Code of Economic Law).
or his right to bring individual proceedings. The main tool would be to provide the owner of such right with a choice, either by requiring a positive action of the individual person to take part in a collective procedure (opt-in) or by giving the individual person the option not to take part in the collective procedure (opt-out). This is a defining feature of every collective procedure because the choice will determine the additional safeguards and thus the outlook of the collective procedure. That being said, safeguards will not differ radically between an opt-in procedure and an opt-out procedure. It should not be forgotten that the outcome of an opt-in procedure may have an impact on subsequent individual litigation, which makes it necessary to give an individual person a genuine opportunity to decide whether to opt-in into a collective procedure, especially when individual litigation is not viable – just as an individual person must be given a genuine opportunity to opt-out of a collective procedure. Key procedural safeguards in this respect are rules allowing for a proper notification of potential group members and ample time to decide to opt-in or to opt-out. Depending on the nature of the procedure these safeguards may differ in their intensity: a failure to opt-out has a larger impact on the right to bring proceedings than a failure to opt-in. Opt-out procedures are thus likely to provide for more ambitious notification measures and longer time periods to decide on participation in the collective procedure.

The right to bring proceedings as an individual claimant may also per-vade the course of the proceedings after a decision to take part has been made, by giving the group members the ability to influence the proceed-ings. These types of safeguards will, however, mainly be developed in light of the protection of the right to a fair trial, which is the second right that is being compromised.

The right to a fair trial has a general meaning and is not only concerned with individual litigation. However, most guarantees attaching to the right to a fair trial have been developed in relation to the dominant litigation model of two-party proceedings. The result is a set of rights that is conditioned by the model of individual litigation, conferring upon an individual litigant certain prerogatives that are characterised by their individuality, such as personal notice and the right to be heard. It is impossible to guarantee the same level of individuality in the course of collective proceedings as this would largely undermine the reasons for their existence.

compromise must thus necessarily be struck. It is important in this regard to look at the function of the right to a fair trial. This right has been developed with a view to allowing an individual party to provide the court with all the necessary information, in law and in fact, in order for it to come to a decision taking into account the arguments of both sides, taken in independent and impartial fashion. What is key is that an individual party’s interests are properly addressed in the course of the proceedings and that a judge disposes over all necessary factual and legal elements – we leave the question of independence and impartiality of the judge aside.

The most important guarantee for a proper representation of the group members is a qualitative group representative. Legislative conditions regarding composition, statutory goals, experience, independence, administrative structure and financial soundness may provide for such a guarantee. Additionally, a requirement of representativeness may be included, requiring the group representative to attest to being representative for the group of potential individual claimants. This would also be in the interest of the defendant, for the outcome of a collective procedure conducted by a non-representative representative may not provide the defendant with the advantage of having the issue settled with all potential claimants. Further to this, requiring the presiding judge – or another body – to take an active stance during proceedings and to guard the interests of the represented group members would further contribute to the goal of proper representation of the individual group members.

These safeguards can vary in degree. Ideally, they reflect the degree of dependency of the individual group member on the group representative for conducting the procedure. This means that safeguards should be stronger in an opt-out procedure than an opt-in procedure. The selection mechanism is, however, not the only parameter to take into account. Dependency may also vary as a result of the moment in the procedure when the option to join or leave proceedings has to be exercised, i.e. before or after a decision on the existence of fault, liability and damage. (Potential) group members that are required to make a decision before the merits

133 Cf. The Netherlands (Article 907(3)(f) Civil Code).
134 Cf. Portugal (Article 16 Law on Popular Action: The Portuguese public prosecutor is tasked with overseeing the collective redress procedure and whether the group representative acts in line with the interest of the group members.).
135 E. Falla, The role of the court in collective redress litigation (Larcier, 2014), 156–170.
136 Or, in case of a collective settlement procedure, before or after a settlement has been reached.
phase has started\textsuperscript{137} or before the judge has taken a decision on the merits\textsuperscript{138}, will be much more dependent upon the group representative than (potential) group members in a procedure where the option only has to be exercised after the merits phase, and they can do so with full knowledge of the decision of the judge.\textsuperscript{139} Another feature that is relevant in this regard concerns the possibility of individual group members to take part in the collective procedure by submitting statements or to oppose certain actions of the group representative.\textsuperscript{140} Such an option injects a strong element of individuality in the collective procedure and not only safeguards the right to a fair trial but also the right to bring individual proceedings. That right can further be safeguarded at the end of the collective procedure by allowing individual group members to bring an appeal against the collective redress judgment.\textsuperscript{141}

5.2.2. In relation to the defendant

Safeguards should not only be available to individual group members.\textsuperscript{142} The defendant in a collective procedure may also lose a number of procedural rights, namely the right to defend themself against individual claims.\textsuperscript{143} This is not a trivial matter. It has been pointed out in the literature that not all individual group members in a successful collective redress procedure would receive the same amount of compensation – or any at all – when conducting individual litigation, for example because they would not be able to meet the burden of proof in their individual

\begin{thebibliography}{99}
\item 137 Cf. Belgium (Article XVII. 38 § 1 \textit{juncto} Article XVII. 43 § 2, 7° Code of Economic Law) and Germany (§ 608(1) ZPO).
\item 138 Cf. Portugal (Article 15(4) Law on Popular Action).
\item 139 Cf. France (Article L. 623–4 Code de la consommation) and The Netherlands (Article 908(2) Civil Code \textit{juncto} Article 1017(3) Code of Civil Procedure).
\item 140 Cf. The Netherlands (Article 1013(5) \textit{juncto} Article 282(1) Code of Civil Procedure).
\item 141 For a discussion on this point, see T.A. Duffy, “The appealability of class action settlements by unnamed parties”, (60) \textit{The University of Chicago Law Review} 1993, 933–956.
\item 143 See for a discussion in the US context on this point, M.K. Grimaldi, “Trying class actions: The complex task of managing and resolving individual issues in class trials”, (36) \textit{The Review of Litigation – The Brief} 2017, (90) 93–96.
\end{thebibliography}
There must thus exist a good justification to depart from the individual nature of litigation. This would be especially so for an opt-out procedure, as the defendant will not be able to assess in a precise manner the scope of the claim and the risks to which they are exposed. Additionally, a defendant should be protected against the abusive use of collective redress litigation, inspired by other motives than seeking redress for illegal behaviour. A requirement of appropriateness of collective litigation, assessed by the judge or an independent party, is thus equally important for a defendant as it is for an interested party. The same goes for the quality requirements imposed upon the group representative. It is important for the defendant that the group representative has the capacity to conduct the proceedings in an orderly manner and that they are sufficiently representative for potential individual claimants. Only a qualitative and representative group representative may justify a departure from individual litigation in favour of collective litigation.

Other potential safeguards for the defendant may conflict with potential safeguards for the interested parties. Take for example the function of service in light of the rights of the defence. A defendant is served with a claim form in order to inform them about the proceedings and to allow for a timely preparation of the defence. This implies that the object of the proceedings is clearly stated in the claim form that is served on the defendant, including the scope of the claim. That information is, however, not readily available from the outset in collective proceedings that operate under an option system, especially in an opt-out model. In order for the defendant to prepare their defence properly it may thus be preferred to structure a collective procedure in such a way that the group selection takes place at a very early stage, ideally before the merits phase. This may in turn conflict with potential guarantees for interested parties, as their right to bring proceedings on an individual basis may be better safeguarded by placing the selection mechanism at the end of the merits phase.

146 Cf. Belgium and Germany, see supra fn. 137.
147 Cf. France and The Netherlands, see supra fn. 139.
Another safeguard for the defendant would consist in providing for a procedure allowing for the exclusion of individual group members. This would mitigate the loss of chance to defend themselves on an individual basis. Group selection must therefore be done in a transparent manner, allowing the defendant to identify undeserving group members. An alternative option would be to split the procedure into a representative declaratory phase and an individual compensation phase. This would also allow overcoming problems associated with determining the total amount of damages in a collective procedure under an opt-out model.

Lastly, a choice for collective litigation implies that this type of litigation would appear to be more appropriate to deal with an issue than individual litigation. The appropriateness functions in this regard as a justification for the limitation of a purely individual approach to the rights of the defence. The credibility of that justification would be compromised, and thus the reason for a departure from the full application of the rights of the defence, if individual group members would be allowed to continue with individual litigation. Rules should therefore be put in place regulating the impact of a representative action on individual litigation. An automatic suspension of all pending cases between individual group members and the defendant is a possibility in this regard. The scope of the res judicata effect of the final decision would also be of relevance here. That being said, these rules must be balanced with safeguards protecting absent group members in an opt-out procedure, requiring decision-makers to strike a delicate balance between the procedural rights of individual group members, the defendant, and the efficiency of collective litigation. In


149 A. Zuckerman, Zuckerman on civil procedure, 3rd Ed. (Sweet & Maxwell, 2013), 664.

150 Cf. Germany.

151 In regard of the Netherlands, see E. De Baere, “De Nederlandse class settlement: Over de Wet Collectieve Afwikkeling Massaschade en haar internationale impact”, T.P.R. 2013, (2563) 2601–2605.


Brazil, for example, the preclusionary effects of a decision in a collective redress opt-out procedure are only extended to absent group members when favourable to them (*res judicata secundum eventum litis*).\(^{155}\)

### 5.3. A Few Examples

In the previous section we have set out in a general way the various possibilities for Member States to ensure that the right to a fair trial is safeguarded in representative collective redress proceedings; this both for individual group members and the defendant. In the following subsection we will look more closely at a number of those safeguards, highlighting certain differences between Member States that may be problematic in light of recognition and enforcement.

#### 5.3.1. Notification measures

We have already briefly touched upon the issue of notification in the section devoted to opt-out procedures. Notification rules are a key safeguard for the functioning of opt-out procedures. There may be various differences in design of these notification rules, some leading to a more comprehensive public notification of collective proceedings than others.

Under the Dutch WCAM procedure\(^{156}\), a system of double notification is provided for by the law. The first notification takes place upon the application to the court to have a settlement declared binding, allowing interested parties to intervene in the procedure.\(^{157}\) Notification of the application is effectuated through personal notice to interested persons known by the applicants, unless the judge decides otherwise, and through publica-

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156 I refer to the Dutch rules on the collective settlement procedure (WCAM) and not the newly introduced collective redress procedure, provided for by a Law of 29 January 2019 (Wet afwikkeling massaschade in collectieve actie or WAMCA) and which entered into force on 1 January 2020. This law allows for judicial representative collective redress and no longer depends on the willingness of the defendant to take part in settlement proceedings. Contrary to the WCAM, the WAMCA provides for both an opt-in and an opt-out selection mechanism, the latter not being available for persons not habitually resident in the Netherlands.

tion in one or more newspapers determined by the judge. A judge may also decide to disseminate information in a different way. The second notification takes place following the decision of the court to declare the settlement binding, allowing interested parties to opt-out of the settlement. Unless the judge decides otherwise, known interested parties receive personal notice of the court’s decision. The decision will also be published in one or more newspapers determined by the judge and the judge may order additional means of publication. The comprehensiveness of the Dutch model contrasts with the notification requirements under the Belgian and Portuguese models. Belgium requires the publication of the admissibility decision in the Belgian State Gazette and on the website of the Federal Ministry of Economy. Further to this, the judge may decide on additional notification measures, including individual notification, if the judge considers the measures prescribed by the law to be insufficient in the particular case. In Portugal notification is required in news media or through public notice, depending on whether the interest is general or geographically limited. In case of the latter, public notice can suffice. This may be done by placing a notice on the door of the court house and on the door of the municipal council.

The limited scope of notification has been criticized heavily by some Portuguese commentators, considering it an unconstitutional attack on the right to court. The rules do, however, not differ greatly from the Belgian rules, apart from the fact that Portuguese courts lack the powers to provide for additional notification measures. Yet, the notification require-
ments are not considered to be problematic by Belgian commentators. This is because in practice widespread notification of the action will be effected by the group representative, mostly the main Belgian consumer organisation, via their website, advertisements and the media. Such is not guaranteed in Portugal, as the popular action may also be brought by a natural person without a proper network to achieve meaningful notification – it may be argued that this point of criticism, which has been popular with some legal commentators in Portugal, might now be less relevant in light of the technical developments that have taken place in the past decade. Moreover, Belgian law allows a group member to submit a request to the court to leave the group at any point in time after the time-limit to exercise the opt-out has ceased and even after the court has issued its final judgment on account that they could reasonably not have been aware of the collective procedure.  

Group members in the Portuguese procedure can only opt-out until the moment evidence of the claim is being heard by the Portuguese court.

One may point out that this is an entirely internal debate because both Belgium and Portugal have excluded the application of opt-out procedures in relation to foreign group members. This does not make problems of notification less relevant in a cross-border setting, however. The ever increasing cross-border market for goods and services combined with the gradual generalisation of collective redress in the Member States of the European Union means that a consumer is likely to have at least two fora for collective litigation at their disposal, namely that of their place of residence and the place of residence of the defendant. Portuguese consumers may be willing to join a collective procedure in Germany or the Netherlands whereas at the same time a collective procedure is pending before the Portuguese courts of which they are not aware, and thus did not opt-out. The argument of *lis pendens* or *res judicata* raised by the defendant may then be defeated by taking recourse to the public policy exception, the consumers arguing that they were not aware of the earlier procedure and that the Portuguese notification measures were largely insufficient to notify the interested parties to a reasonable extent.

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166 Article XVII. 54, § 5 Code of Economic Law.
167 Article 15(4) Law on Popular Action.
5.3.2. The ability to influence proceedings

The ability for individual group members to influence representative collective redress proceedings appears to be an important safeguard from the perspective of the German legal order. This can be explained by the importance attached in Germany to the right to be heard, which is constitutionally protected by Article 103 Grundgesetz (‘GG’), as well as the centrality of the disposition principle in German civil procedure. These two features have been repeatedly highlighted in scholarship to argue in favour of a cautious approach towards representative collective redress in Germany.\textsuperscript{169} They are also considered to be potentially problematic for the purposes of recognition and enforcement of foreign collective redress judgments.

Article 103 GG requires that a party involved in litigation has the possibility to express themselves before the court because “\textit{was nicht geäussert wird, kann nicht gehört werden}”.\textsuperscript{170} From a legislative point of view, this implies that procedures must at least provide for the possibility of the parties to be heard.\textsuperscript{171} The right to be heard does not necessarily amount to an oral hearing and can be done in writing.\textsuperscript{172} The right is also respected when not the actual party but the party’s lawyer is heard by the court.\textsuperscript{173} There is thus room for interpretation and accommodation in the context of representative collective proceedings. The issue of Article 103 GG was also taken up by the German government in the project of law on the Musterfeststellungsklage (MFK).\textsuperscript{174} The government considered the right to be heard sufficiently protected because the MFK works under an opt-in model and registered consumers have the possibility to withdraw their participation in the procedure until just before the first hearing.\textsuperscript{175} No further safeguards were added to protect the right enshrined in Article 103 GG in the

\begin{footnotes}
\footnotetext[169]{See discussion and references in A. Halfmeier, “Recognition of a WCAM settlement in Germany”, \textit{NiPR} 2012, (176) 180–184.}
\footnotetext[170]{B. Remmert, “GG. 103 Abs. 1” in T. Maunz, G. Dürrig, R. Herzog, M. Herdegen, R. Scholz and H.H. Klein (Eds.), \textit{Grundgesetz – Kommentar} (Beck, September 2017 – 81\textsuperscript{st} delivery), Rn. 5–6: “What has not been expressed, cannot have been heard” (Authors’ own translation).}
\footnotetext[171]{Ibid., Rn. 5.}
\footnotetext[172]{Ibid., Rn. 65.}
\footnotetext[173]{Ibid., Rn. 65.}
\footnotetext[174]{\textit{Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage}, \textit{BgBl.} 17 July 2018, I, N\textsuperscript{o} 26, 1151.}
\footnotetext[175]{German Parliament, Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage, N\textsuperscript{o} 19/2439, 17.}
\end{footnotes}
course of the legislative process, for example, the possibility for participating consumers to submit written observations.

The opt-in model thus appears for the German legislator to be a necessary safeguard for the protection of the right to be heard as enshrined in Article 103 GG. Does this mean that an opt-out procedure will be automatically problematic from the German point of view? Such question is difficult to answer. We have argued that an outright rejection of an opt-out model would not be compatible with Article 45(1)(a) Brussels Ibis Regulation but that it would depend on the additional safeguards provided for. Hess stated that such additional guarantees may indeed be sufficient for an opt-out procedure to meet the standard of Article 103 GG.176 The German Federal Constitutional Court also seems to imply this in its case law on the service of US class action notices on German defendants.177 Further to this, Halfmeier and Wimalasena point out that summons by publication is a valid means of service in other areas of German law, such as insolvency, and argue that the right to be heard should be interpreted functionally.178 That being said, it is a relevant question whether the same standard can be applied for all types of litigation, e.g. whether the standard of diligence that applies to shareholders or creditors can be transposed unreservedly onto consumers. Moreover, the clear political choice by the German legislator for an opt-in model may lead German judges in the direction of a stricter approach to foreign opt-out procedures. It is interesting in this regard to consider the position paper of the Bundesrechtsanwaltskammer179 of September 2018 on the 2018 Commission Proposal, which seems to suggest that opt-out procedures are incompatible with Article 103 GG.180 It is at this moment thus uncertain how German judges will evaluate the additional safeguards provided for in foreign opt-out procedures,

179 The Bundesrechtsanwaltskammer is the German bar association.
such as the Dutch WCAM, now that a clear policy choice has been made by the German legislator for an opt-in model.\textsuperscript{181}

Moreover, the German preference for opt-in procedures does not mean that a foreign opt-in procedure would automatically receive a clean bill of health in Germany. It is important to understand that the MFK, just as the KapMuG\textsuperscript{182}, is only a declaratory procedure deciding on the common legal points for a group of interested parties represented by a qualified group representative. The actual compensation phase is still individual, requiring a consumer who participated in the MFK to initiate individual proceedings in order to obtain a decision on their individual claim. This duality secures as far as possible the rights enshrined in Article 103 GG while at the same time safeguarding the disposition principle.\textsuperscript{183} These principles are less strongly protected by an opt-in procedure that also encompasses the compensation phase and whereby an interested party is wholly dependent on the actions of the representative without the possibility to exercise any influence over the procedure or the representative. If an individual group member would be of the opinion that an unfavourable decision in a foreign collective redress procedure is the result of the mismanagement of the procedure by the group representative and that no possibilities existed to mitigate this, a public policy argument could certainly be made. It is interesting in this regard to point out the Belgian collective redress procedure, which does not allow for any involvement of the group members in the course of the proceedings: from the moment the time period to opt-in or opt-out\textsuperscript{184} has elapsed, they are completely dependent upon the group representative – even for information on the ongoing procedure.\textsuperscript{185} The supervisory powers of the Belgian judge over the group representative during the procedure only concern the formal requirements to be met as a group representative, which can only be checked during the admissibility

\textsuperscript{181} The same goes for the French legislator, who made a clear choice for an opt-in model on the basis of constitutional law considerations.

\textsuperscript{182} H.L. Buxbaum, “Defining the function and scope of group litigation: The role of class actions for monetary damages in the United States” in P. Gottwald (Ed.), Europäisches Insolvenzrecht – Kollektiver Rechtsschutz (Gieseking, 2008), (215) 224.


\textsuperscript{184} An opt-out procedure is not possible for persons residing outside of Belgium.

\textsuperscript{185} BIICL Study, 390.
Would a decision given under such circumstances be automatically recognised by a German judge because the collective procedure was of an opt-in nature? In light of the importance of Article 103 GG this is not absolutely certain. The case law of the German Federal Constitutional Court also suggests that its conditional acceptance of representative collective redress proceedings does not only concern opt-out procedures, leaving open the possibility that opt-in procedures may also not meet the required standard. It can thus not be assumed that a decision given in a Belgian representative collective redress procedure under an opt-in mechanism will be automatically recognised in Germany, the goals of Article 103 GG being safeguarded to a much lesser extent under the Belgian procedure than under the German procedure.

5.3.3. Judicial supervision

A recurring element in collective procedures is the active role for the court in overseeing the proceedings. This is in the first place a consequence of the nature of collective proceedings, which are complex to conduct and rely on intensive case management for their efficiency. Additionally, it appears that the increased role of the court is also a safeguard to protect the interests of the group members, especially of absent group members in opt-out procedures. A court may thus scrutinise the nature and amount of relief sought by the group representative, the description of the class as well as other elements of the proceedings. Such powers transgress the traditional boundaries of an individual dispute, inter alia the *nec ultra petita* rule, and give the court a fundamental role in the outcome of the proceedings. This sits uneasily with the classic model of litigation, in which courts are not required to guard the interests of litigating parties on account of being accused of partiality. Therefore, some Member States have given the role of guarding the interests of group members to other entities, such as

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186 Article XVII.36, 2° Economic Law Code and Article XVII.40, first alinea, Economic Law Code. This is different in, for example, Sweden or England and Wales, where the judge also maintains supervisory powers during the proceedings. See E. Falla, *The role of the court in collective redress litigation* (Larcier, 2014), 160–161.

187 See *infra*.

the public prosecutor\textsuperscript{189}, or have limited the power to bring collective redress proceedings to public bodies.\textsuperscript{190}

Other Member States have given wider powers to the court, going beyond mere case management powers and requiring it to protect the interests of absent group members. This is clearly the case in the Dutch WCAM procedure, where the court has extensive powers to determine whether the proposed settlement is in the interest of the group members.\textsuperscript{191} The court may even propose to change the settlement for which an application has been made if it considers this necessary to better protect the interests of the group members.\textsuperscript{192} Such wide powers are also available to the court in the Belgian procedure for the settlement that may be reached between the group representative and the defendant in the course of the collective redress procedure, which provides for a mandatory settlement phase before the merits phase.\textsuperscript{193} No provisions have been included, however, on the powers of the court when no settlement is reached and the case proceeds to the merits. It may be presumed that the court protects the interests of the group members in the merits phase in the same way as it is obliged to do in the settlement phase. However, in the absence of any specific rules on the matter the normal powers of the judge in Belgian civil procedure should apply. While the Belgian system is quite liberal in this regard\textsuperscript{194}, it is not clear how far a court may go in actively protecting the interests of the group members as this sits uneasily with the duty of impartiality. The task of actively protecting interests is something else than applying the law to the facts of the case, raising pleas in law warranted by the facts of the case, or collecting evidence.\textsuperscript{195} It concerns questions of opportunity, which are normally not within the remit of the courts.

\textsuperscript{189} Portugal (Article 16 Law on Popular Action (Lei 83/95 de Acção Popular)).
\textsuperscript{190} Finland (Article 4 Group Action Act (Ryhmäkannelaki)). See also, K. Viitanen, “Finland”, (622) \textit{The ANNALS of the American Academy of Political and Social Science} 2009, 209–219.
\textsuperscript{191} Article 907(3)(e) Civil Code.
\textsuperscript{192} Article 907(4) Civil Code.
\textsuperscript{195} Strengthening the judicial powers of the judge may, however, already be an additional safeguard in itself, making the parties less dependent on the actions of...
It appears thus that judicial supervision over the interests of the group members increases where group members depend more intensively on the actions of the group representative. Conversely, judicial supervision is less strong or even absent where dependency on the group representative is lesser and the role for individual group members is much stronger. This is for example the case in Germany, where the rules regarding the MFK do not provide any specific powers in this regard, apart from increased case management powers that come with a collective procedure.\textsuperscript{196} Of course, one should take into account the wide powers German judges already have in the course of ordinary civil litigation,\textsuperscript{197} and to which reference is made in the provisions on the MFK.\textsuperscript{198} Still, this amounts to the application of the law and does not imply safeguarding the interests of a specific party.

An increased role of the court may thus be a sufficient safeguard for the protection of the interests of the group members, especially for absent group members in opt-out procedures. It is therefore not a surprise that a liberal approach to notification and \textit{res judicata} effects goes hand in hand with increased powers for the court, such as in the Netherlands. Discretion or powers have to be exercised though. The availability of safeguards is therefore a necessary but not sufficient guarantee for the protection of the right to a fair trial. It is to this point that we turn in the next section.

6. Public Policy and the Application of Procedural Safeguards

What appears from the overview of potential safeguards is that many of them leave a large margin of manoeuvre, allowing the judge and the parties to maximise protection of the right to a fair trial but also to disregard it to a large extent. The Dutch provisions on notification measures look comprehensive but may be discarded by the court, the law giving it the freedom to do so.\textsuperscript{199} Much will also depend on the actual case. Notifica-

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\textsuperscript{196} The German court is, however, obliged to protect the interest of the group members in case of a settlement: § 611(3) ZPO.
\textsuperscript{197} § 139 ZPO. See also, R.W. Emerson, “Judges as guardian angels: The German practice of hints and feedback”, (48) Vanderbilt Journal of Transnational Law 2015, 709–754.
\textsuperscript{198} § 610(4) ZPO.
\textsuperscript{199} Article 1017(3) Code of Civil Procedure.
tion measures that are comprehensive in one case may be completely insufficient in another case. Further to this, private initiatives should also not be discarded. A group representative may go a long way in informing potential group members, beyond the legal requirements. This will be an important element in assessing whether a group member could have reasonably been aware of the proceedings. It is therefore necessary to also look at the application of the safeguards.

One could expect a level of scrutiny of the application of the safeguards commensurate with the standard of protection chosen in the receiving Member State. This will in particular be the case for courts of Member States that have adopted an opt-in procedure and are confronted with the recognition or enforcement of a foreign decision given in an opt-out procedure. Between Member States with the same type of selection mechanism much will depend on their approach to collective redress (permissive or reluctant) and the number of safeguards existing in their own legal order. It can also be expected that courts of Member States that have provided for an opt-out procedure will be less strict in scrutinising decisions originating in Member States with an opt-in procedure. The standard applied in such cases may be akin to the current standard under the Brussels Ibis Regulation for individual decisions, meaning that refusals of recognition and enforcement will be highly exceptional.

7. National Court Practice

7.1. Introduction

In this section we would like to present a number of cases corroborating our analysis. Admittedly, there is to our knowledge no case law available on the recognition or enforcement of collective redress decisions between EU Member States. Useful comparison might be done with collective action decisions originating in the US and for which recognition or enforcement has been sought in an EU Member State. Even here not many decisions exist or have been published. We limit ourselves to a Dutch case, a Belgian case and the approach taken by the Bundesverfassungsgericht. Interestingly, a judicial analysis of potential refusals of recognition of collective redress decisions by courts of EU Member States can be found in US class certification decisions, where potential refusals of recognition and enforcement of a final decision are determinative for class certification purposes. We include these in our analysis as they provide an interesting
insight into the practice of public policy analysis of foreign collective redress procedures.

7.2. US Courts

US class actions have for many years been a preferred instrument to conduct shareholder litigation. In the absence of an efficient multi-party procedure in their own jurisdiction or that of the foreign company, foreign shareholders have sought to establish the jurisdiction of US courts in order to benefit from the advantages of the US class action (settlement) procedure. Grounds for jurisdiction were often tenuous but foreign shareholders were helped by the conduct and effects test to establish jurisdiction of US courts. Having met the jurisdiction threshold, a next step in the procedure concerned the admissibility requirements of the class action, as laid down in Rule 23(b)(3) of the Federal Rules on Civil Procedure. These are numerosity, commonality, typicality, adequacy of representation, predominance and superiority. The last admissibility criterion is of particular importance for the certification of class actions with a foreign element, as it obliges the US courts to assess the desirability of the concentration of litigation in their jurisdiction. An important element in that analysis was the question whether the res judicata effect of the US judgment would be recognised in the relevant foreign jurisdiction. This in order to prevent class members from relitigating the case, since a defendant is “entitled to a victory no less broad than a defeat would have

200 T. Arons, “Recognition of US class actions or settlements in Europe”, ECFR 2015, (462) 467. See, however, infra fn 209, regarding recent developments that have limited this option, notably the Supreme Court decision in Morrison v. National Australia Bank, 561 U.S. 247 (2010).


been”. In case of a negative answer, a class action would not be desirable and certification refused for the class members residing in that foreign jurisdiction.

The test applied by US courts to determine whether the res judicata effect would be recognised has evolved over time, moving from ‘near certainty’ of non-recognition to the probability of non-recognition, it being ‘more likely than not’ for a foreign court to refuse recognition. It is interesting to compare the application of the test by the US Court of Appeals (2nd Circ.) in *Bersch* and the US District Court in *Vivendi*. Even though the test has become stricter over the years, class certification was much wider in the 2007 *Vivendi* case compared to the 1975 *Bersch* decision, even though they concerned putative class members from largely the same foreign states.

In *Bersch*, the court excluded all foreign class members because it appeared from expert opinions that courts in England, Germany, Switzerland, Italy and France would not recognise a decision given in an opt-out US class action procedure in favour of the defendant. In a number of other cases US courts also considered that the preclusive effect of a class action decision would not be recognised in Germany and the United King-

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208 US District Court, *Vivendi Universal*, 242 F.R.D. 76, 109 (S.D.N.Y. 2007). The decision can be found under the following link: http://securities.stanford.edu/filings-documents/1024/V02-01/2007523_r01o_02CV05571.pdf.
dom, and refused certification.\textsuperscript{211} In \textit{Vivendi} the court conducted a thorough analysis of the Netherlands, France, England and Wales, Germany and Austria, and concluded that it was more likely than not that the preclusive effects of the class action decision would be recognised in all but two of the foreign jurisdictions, namely Austria and Germany.\textsuperscript{212}

The \textit{Vivendi} decision is interesting on a number of points. First, the difference between the \textit{Bersch} decision and the \textit{Vivendi} decision illustrates the growing acceptance of class actions in Europe over time. While residents of England and Wales and France were excluded from certification in 1975, this was no longer so in 2008. This is particularly surprising in relation to France, as many legal commentators suggest that a French court would refuse to recognise US class action decisions on account of public policy.\textsuperscript{213} The US court deemed it however more likely than not that the decision would be recognised.\textsuperscript{214} Second, the US court acknowledges at the same time that differences continue to exist between EU Member States, deciding that it is more likely than not that recognition would be refused in Germany on account of public policy concerns. A third point of interest is the method adopted by the US court. In its analysis the US court compares the foreign systems of collective redress to the US system in order to determine whether recognition would be refused. The assumption is thus that foreign courts will compare US class actions to their own national procedures to decide the question of recognition. Key appears to be the existence of procedures in the foreign legal order in which ‘the interests of non-parties are pursued and non-parties are bound by the result’, even when limited in scope or not applicable in the area of law.

\textsuperscript{211} It should be noted that these class actions were also thin in respect of other admissibility requirements, such as commonality or numerosity.

\textsuperscript{212} This conflicts with the position taken by various German scholars, who have argued that there would be no problems of recognition of US class action settlement decisions in Germany: see discussion and references in A. Halfmeier, “Recognition of a WCAM settlement in Germany”, \textit{NiPR} 2012, (176) 180–184. See, however, C. Greiner, \textit{Die Class Action im amerikanischen Recht und deutscher Ordre Public} (Peter Lang, 1998), 217–222.

\textsuperscript{213} For an overview of the discussion, see M.-A. Frison-Roche, “Les résistances du système juridique français à accueillir la class action”, \textit{LPA} 10 June 2005, 22.

\textsuperscript{214} It should be pointed out, however, that competing declarations on this point were submitted to the court.
concerned, or the political will to introduce procedures. It is this that sets England and Wales, France and the Netherlands apart from Germany, which did at the time of the decision not have any form of collective procedure with such consequences. The court considered the, at that time, newly introduced KapMuG but decided that it did not meet the standard because non-party shareholders would not be bound by the result. This is equally so for the newly introduced MFK procedure, which requires individual consent. It is thus not certain whether a US court will rule in a different way *anno* 2020. The German approach to collective redress remains strongly influenced by the model of individual litigation. This confirms our view that one should not take it for granted that foreign collective redress decisions under an opt-out (or even an opt-in) would be recognised without any problems in Germany.

7.3. Amsterdam Court of First Instance – Ahold Class Settlement

In a 2010 decision, the Amsterdam Court of First Instance considered fair trial and public policy arguments raised by the applicant against the recognition of the preclusive effects of a US class settlement judgment. The US judgment confirmed a settlement reached between the Dutch company Ahold and its shareholders following a large accountancy scandal, in which the accountancy firm Deloitte was also involved. The procedure before the Amsterdam court concerned a claim by a foundation represent-

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215 The US court refers *inter alia* to the possibility for French labour unions to bring actions on behalf of employees without individual consent. Note that there might have been a misunderstanding of French law on this point, now the French parliament has adopted an opt-in model for the 2014 ‘action de groupe’ exactly because the Conseil constitutionnel held in relation to that law that it could only be in conformity with the constitution “à la condition que l’intéressé ait été mis à même de donner son assentiment en pleine connaissance de cause et qu’il puisse conserver la liberté de conduire personnellement la défense de ses intérêts et de mettre un terme à son action”. See, Conseil constitutionnel 25 July 1989, N° 89–257.

216 The US court refers to views on the matter expressed by the French president as well as the debate in French legal and business communities in support of the finding that an opt-out class action is not so contrary to French public policy that it would infringe the principle of universal justice or be contrary to international public policy. With the benefit of hindsight, it appears that the voices in the public debate have misread the sentiment of the French legislator.

217 This according to the expert on which the court relied the most, P. Mankowski.

218 Amsterdam Court of First Instance, 23 June 2010, NL:RBAMS:2010:BM9324.
ing several Ahold shareholders who had not opted-out of the settlement against Deloitte and a CFO of Ahold.

The court relied on the strong similarities between the US procedure and the Dutch WCAM to reject concerns of fair trial. It underlined that the procedural guarantees in both procedures safeguarded the right to be heard and the possibility not to be bound by the agreement.\textsuperscript{219} The court referred specifically to the fairness hearing and the period during which class members could comment orally and in writing on the settlement\textsuperscript{220}, the possibility to be excluded from the class or to withdraw from it\textsuperscript{221}, and the fulfillment of the notification requirements ordered by the US courts.\textsuperscript{222} These consisted \textit{inter alia} of individual notice for all known shareholders and repeated notifications in Dutch national and regional newspapers. The court concluded that all interested parties were timely and adequately convoked and also that other fair trial rights had been respected, in particular the right to be heard and the right not to be bound against their will by the decision.\textsuperscript{223}

The analysis of the points on which the US procedure differed from the Dutch WCAM was conducted on a public policy basis. The court did not take issue with the shorter time-limit to decide on the participation in the settlement because it had not been argued nor did it appear that it was too short to take adequate notice of the settlement agreement. The court also rejected the argument that the representative in the US procedure was not a foundation or an association, as it did not appear nor had been argued that this had an impact on the representation of the interests of the class members.\textsuperscript{224}

All this led the court to conclude that the class action settlement judgment could be recognised in the Netherlands and that the preclusive effects of the decision were binding upon the applicant. However, the court underlined the general nature of its analysis and acknowledged that the outcome could be different for certain individual group members. This either because specific circumstances could be advanced justifying the conclusion that the requirements for recognition have not been met in their concrete case or because the binding effect of the agreement would be

\textsuperscript{219} Amsterdam Court of First Instance, point 6.5.3.
\textsuperscript{220} Amsterdam Court of First Instance, point 6.5.3.a.
\textsuperscript{221} Amsterdam Court of First Instance, point 6.5.3.b.
\textsuperscript{222} Amsterdam Court of First Instance, point 6.5.3.c.
\textsuperscript{223} Amsterdam Court of First Instance, point 6.5.4.
\textsuperscript{224} Amsterdam Court of First Instance, point 6.5.5.
deemed unacceptable in light of the standards of reasonability and justice. Such arguments were not presented nor found by the court.

The decision is interesting because of the three-level analysis the court conducts. First, it makes a general comparison between the US procedure and the Dutch procedure, comparing the relevant procedural guarantees that have been provided for in both procedures. Second, it considers the application of these procedural guarantees from a general perspective to evaluate whether procedural standards and public policy requirements have been met. Third, and this is striking, it allows for a reconsideration of its fair trial and public policy analysis on the basis of individual considerations. Recognition may thus fail on three levels: at the level of procedural design, at the level of the application of procedural safeguards in the concrete procedure, and at the level of the individual group member.

7.4. Ghent Court of Appeal – Lernout and Hauspie Class Settlement

In a 2017 decision the Ghent Court of Appeal recognised a class action settlement that was approved by the District Court of Massachusetts. The case concerned shareholder litigation against KPMG in connection to the fraudulent bankruptcy of Lernout and Hauspie, a Belgian tech company that gained prominence at the end of the 1990s for their speech technology.

Plaintiffs in the Belgian procedure argued the non-recognition of the class action settlement for reasons of public policy. Their argument was divided into two parts. The first part focused on the argument that the US procedure did not provide for the same level of protection of group members as the Belgian procedure. The court rejected this argument by referring to the various safeguards provided for in the US procedure. It came to the conclusion that the rights of the class members are at least equally pro-

225 Amsterdam Court of First Instance, point 6.5.6.
228 For the case briefs, see http://securities.stanford.edu/filings-documents/1015/LHSP00/2001921_r01c_0011589.pdf For further background, see the complaint of the SEC against L&H: https://www.sec.gov/litigation/complaints/comp17782.htm.
ected – if not better – under US law, listing various safeguards that are not available in the Belgian procedure, such as the possibility for individual group members to be heard by the court and the right of individual group members to appeal\(^{229}\), and the higher standard of review provided for under the US procedure (honest, reasonable and adequate) compared to the Belgian procedure (manifestly unreasonable). The Belgian court then held that these safeguards had been applied in the case and rejected the argument.

The second part concerned the opt-out nature of the procedure. The Belgian court stated that the preference for an opt-in system does not necessarily mean that an opt-out system is contrary to public policy. Problems might, however, exist in relation to the rights of the defence, which is a separate ground for refusal under Belgian private international law. It spelled out the test to be applied in this regard: “It must rather be verified whether the possibility to have sufficient knowledge of the existence of the collective redress procedure, of its nature, of the procedure to decide whether to be a member of the group of persons bound by the decision and the consequences thereof, is sufficiently guaranteed in the concrete case”.\(^{230}\) It then went on to list the notification measures ordered (i.a. individual notification of known class members), the way in which these measures were executed (i.a. 82,819 notification packages, both to potential class members and more than 2000 banks and other financial intermediaries) as well as the conclusion of the US judge to the fairness of the proceedings under US law. Further to this, it referred to statements by the

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\(^{229}\) Such safeguard appears to be absent in almost every EU collective redress procedure. It may, however, provide the ultimate safeguard for a group member in an opt-out procedure that was initially unaware of the proceedings. It is interesting in this regard to refer to the Meroni judgment of the Court of Justice, dealing with procedural rights of third parties with an interest in a procedure (see supra, fn. 33). The Court of Justice held in this regard that “the recognition and enforcement of an order issued by a court of a Member State, without a prior hearing of a third person whose rights may be affected by that order, cannot be regarded as manifestly contrary to public policy in the Member State in which enforcement is sought or manifestly contrary to the right to a fair trial within the meaning of those provisions, in so far as that third person is entitled to assert his rights before that court” (para. 54). It may be far going to require a right of appeal for group members in a representative collective procedure, as this would undermine the representative nature of it. Furthermore, it would also impact on the effectiveness of such a procedure, especially since the thresholds for bringing an appeal are generally less demanding in EU Member States compared to the US.

\(^{230}\) Author’s translation.
plaintiffs about their knowledge of the proceedings, a number of voluntary notification measures undertaken by third parties, the press attention for the case in the Belgian media, an expert opinion underlining the adequacy of the notification measures, as well as the fact that around 600 persons had exercised the right to opt-out and that 2000 foreign shareholders, of which were 1400 Belgian, had been compensated in the meantime. It follows from all this, according to the Belgian court, that sufficient notification was ordered and realised, even though not all class members were individually notified; moreover, the principle of constructive notice was found not to violate Belgian public policy in the concrete case.

It appears from the analysis of the Belgian court that the availability of various safeguards allowing for the protection of individual interests in the collective procedure is already by itself sufficient to overcome a number of public policy concerns. The Belgian court does not assess in great detail whether these safeguards have been sufficiently implemented, i.e. whether and how the fairness hearing was conducted and what standard was applied. The approach is different, however, when considering the notification of potential class members. Here the Belgian court evaluates in detail how notification was made and whether potential class members were able to obtain knowledge about the pending class action. This is not entirely illogical, as notification measures and their effectiveness can be assessed more easily by the receiving court, which also has the benefit of hindsight.

7.5. **German Bundesverfassungsgericht – US Class Action Notices under the Hague Convention**

The compatibility of US class actions with public policy in Germany has been analysed in the context of the service of class action notices on German defendants under the Hague Convention. Article 13(1) Hague Convention allows for a state to refuse a request for service if it deems that compliance would infringe its sovereignty or security, i.e. public policy. A number of German defendants brought constitutional proceedings against decisions of designated German central authorities under the Hague Con-
vention, which are courts in a number of regions\textsuperscript{232}, accepting the service of a class action procedure upon the defendant. In several cases defendants invoked the incompatibility of US opt-out class actions with the German constitution. This allowed the German Constitutional Court to clarify its approach towards US class actions, which is also relevant for our study:

“Auch die von deutscher Seite grundsätzlich zu respektierende rechtspolitis-

tche Entscheidung, für deliktisches Handeln mit einer Vielzahl von Geschädigten Sammelklagen zuzulassen, an denen sich das einzelne Mit-
glied der class nicht aktiv beteiligen muss, begründet keinen Verstoß gegen unverzichtbare Grundsätze eines freiheitlichen Rechtsstaats, solange auch im class action-Verfahren unabdingbare Verteidigungsrechte gewahrt bleiben. Deshalb kann nicht jeder class action von vornherein die Zustellung versagt werden.”\textsuperscript{233}

It appears from this consideration that a representative collective redress procedure that does not require an active participation of class members is not automatically contrary to German public policy as long as ‘unabdingbare Verteidigungsrechte’ – rights of the defence that cannot be departed from – have been guaranteed in the actual procedure.

The Federal Constitutional Court limits itself to this general consideration and does not analyse the features of the US procedure in detail. This is because the judgment concerned the constitutionality of the notification of the case and not the recognition or enforcement of the final judgment. A few points can nevertheless be taken from this. First, it appears that Article 103 GG does not require that group members should be given an opportunity to participate actively in the procedure. Their right to be heard may thus be sufficiently guaranteed through representation, provided that such representation is of sufficient quality and that the necessary checks are in place. Second, the German Constitutional Court does not specify the nature of the class action to which this consideration applies, from which we deduct that it applies to both opt-in and opt-out proce-

\textsuperscript{232} For a list, see https://assets.hcch.net/docs/494216ab-d7f6-4f7b-9627-93270f8a64da .pdf.

\textsuperscript{233} Author’s translation: “The legal policy decision to allow class actions for tortious acts with a large number of victims, in which the individual member of the class does not have to participate actively, should in principle also be respected by Germany and does not constitute a violation of indispensable principles of a liberal state under the rule of law, as long as the essential rights of the defence are also respected in class action procedures. Therefore, service of a class action cannot be denied from the outset.”
dures. Opt-out class action procedures are thus not *per se* contrary to German public policy. Third, the German Constitutional Court does not specify which rights of defence are indispensable, which leaves room for uncertainty and further speculation. If one had to identify a right that may qualify as an indispensable right of defence under German law, however, it would probably be the right to individual notice. It is the ultimate guarantee of Article 103 GG as it allows parties to be informed of proceedings which require their participation and to act accordingly. An important reason for the German federal legislator not to choose an opt-out collective redress model was exactly to avoid situations in which consumers would be bound by a decision given in proceedings of which they were not aware. Therefore, contrary to the Belgian or the Dutch approach, it cannot be absolutely excluded that judgments given in an opt-out collective procedure will not be recognised when individual notice has not been given and the class member concerned claims not to have been aware of the procedure. A principle of ‘constructive notice’ may thus not be without problems from a German perspective.

7.6. A Number of Common Lines

It appears from the above-mentioned decisions that the existing national collective redress procedure will serve as a benchmark to evaluate whether there has been a violation of public policy. This means that standards will differ across Member States and that Member States who have adopted a conservative approach to collective redress are likely to adopt a different public policy standard compared to Member States with more liberal approaches. That may in turn lead to difficulties in the free circulation of


235 See German Parliament, Entwurf eines Gesetzes zur Einführung einer zivilprozessualen Musterfeststellungsklage, N° 19/2439, 17. While opt-out procedures do not exclude the possibility of individual notice, it would appear to be unworkable in the context of mass consumer law violations to give individual notice to every potential group member. Therefore, at the risk of the binding force of a decision in an opt-out procedure not being recognised vis-à-vis each consumer that has not received individual notice, it was preferred to have an opt-in procedure. It is indeed more rational to have an opt-in procedure if the constitutional standard of fair trial requires individual notice of proceedings.

236 See, however, F. Höffmann, *Class Action Settlements und ihre Anerkennung in Deutschland* (JWV, 2013), 364.
collective redress decisions between Member States that have adopted a liberal approach to collective redress and Member States that have retained a more conservative stance on this point. That being said, a strict similarity between the national procedure and the foreign procedure is not required for recognition or enforcement. Everything depends on how the right to a fair trial is protected in the foreign collective procedure, both in the abstract and in the concrete case. However, a dividing line appears to be the choice between opt-in and opt-out procedures. Such is not the result of an outright refusal of the principle of opt-out procedures but because of the fact that certain procedural rights can be less easily safeguarded in an opt-out procedure than in an opt-in procedure. It appears from the Belgian and Dutch decisions that particular attention will be paid in this regard to the scope and the content of the notification measures, thereby including informal notification measures undertaken by the representative or other interested parties, as well as spontaneous coverage in the news media. More than anything else, it appears thus that adequate notification is the most important safeguard to guarantee the right to a fair trial of putative group members.

8. Concluding Remarks

In this concluding section, we set out the answers to our research questions and take a position regarding whether it is opportune to amend the jurisdiction rules of the Brussels I\textsuperscript{bis} Regulation in the near future.

The overview has shown that it is unlikely that a Member State court will refuse recognition or enforcement of a representative collective redress decision on account of its collective or representative nature. The application of an opt-out mechanism to select group members can in principle also not justify in itself the application of the public policy clause of Article 45(1)(a) Brussels I\textsuperscript{bis} Regulation. What is relevant from the point of view of public policy, however, is the availability of sufficient safeguards to guarantee the right to a fair trial in the course of a collective procedure and the application of these safeguards in the specific case.

It appears that procedural safeguards protecting the right to a fair trial differ from one Member State to another. This is not a mere technicality but reflects a different balance struck between collective and individual litigation, and the protection of the rights of parties involved. For example, neighbouring countries like the Netherlands and Germany appear to attach a very different value to the right of individual litigation. This will inevitably impact on the recognition and enforcement of collective redress
decisions, as national courts will use their own model as a benchmark to evaluate the fairness of a foreign collective redress procedure. A more intense scrutiny of collective redress decisions on account of public policy concerns can thus not be excluded, also not after the adoption of the directive on representative actions.

Moreover, while not supported by this author, it cannot even be completely excluded that a collective redress decision will be refused on account of the mere fact that it was given in an opt-out procedure, regardless of the procedural safeguards. While transnational legal doctrine has been quite permissive of an opt-out model, national doctrine appears to be less so. Moreover, a number of Member States, such as Germany and France, have categorically rejected an opt-out model for their recently adopted collective redress mechanisms. A clear position of the national legislator may thus influence the approach taken by their courts when deciding on the recognition and enforcement of a foreign collective redress decision. Therefore, with reason, Muir Watt sees in the choice between opt-out models and consent-based models a new cultural divide in the European procedural landscape.\textsuperscript{237}

The likelihood of refusals of recognition or enforcement is thus not merely theoretical\textsuperscript{238}, and therefore an element that should be considered before amending the jurisdiction rules of the Brussels I\textsuperscript{bis} Regulation. Moreover, new jurisdiction rules will inevitably reflect the choice for one collective redress model over another and require a common understanding of procedural guarantees in collective redress procedures. In the absence of a consensus on both these elements, it is at present also difficult to see how a workable majority can be found amongst the Member States for a meaningful amendment of the Brussels I\textsuperscript{bis} Regulation. In light of this, it would be preferable to let the practice of collective redress mature within domestic systems first and postpone (the debate on) the adoption of new jurisdiction rules until a clear common ground emerges.
