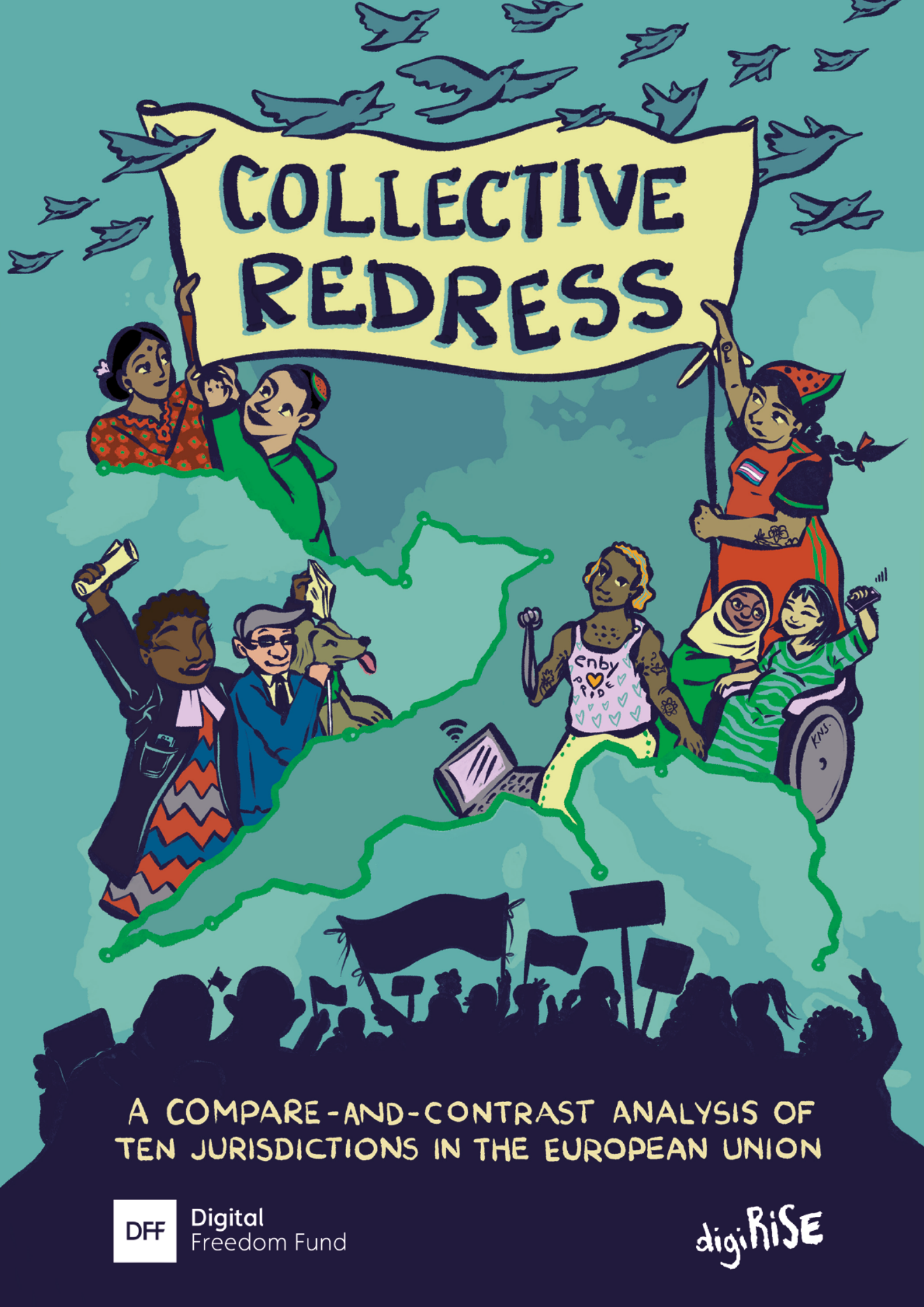

A COMPARE-AND-CONTRAST ANALYSIS OF TEN JURISDICTIONS IN THE EUROPEAN UNION

DFF Digital Freedom Fund

digiRiSE

Table of Contents

Introduction 05

Methodology 09

Setting in motion the collective redress regime across Member States 11

Deciding on collective and digital rights claims 21

Key Insights 27

I. Convergencies in the implementation of mandatory provisions 27

a. Scope and reach of the implementations 27

b. Standing and admissibility 28

c. Opt-in for non-residents 28

II. Divergencies in the implementation of non-mandatory provisions 29

a. Standing in domestic representative actions 29

b. Opt-in v. Opt-out 29

c. Communications 30

d. Third-party funding and cy-près 31

e. Courts handling representative actions 32

Concluding remarks 33

Credits 34

Introduction

Systemic and transformative change happens when impacted people take collective action and collaborate with others to build power to challenge the root of their oppression. With this research, we (co)create and share information, strategies, and best practices designed to protect the EU Charter of Fundamental Rights in the digital sphere through strategic collective action litigation.[1]

To be considered strategic, litigation must have the potential to have an impact beyond the parties directly involved in the case and to bring about legislative, policy, or social change.[2] Though a 'terminological forest'[3] surrounds the concept, we understand successful strategic litigation as entailing widespread benefits for both society in general and those involved in a case in particular. The outcome of strategic litigation cases can lead to changes in legislation and government policy, raise public awareness, and foster support for a particular issue.[4]

Technologically facilitated violations of fundamental rights are not the result of individual instances of data processing, nor are they byproducts of the technological infrastructure: rather, it is the infrastructures themselves that are producing the harm. Specifically, 'datafication is not an unintended consequence of unpredictable technological change',[5] but an inherent part of systems of exploitation. As such, we understand technology as not separate from existing systems of oppression and recognise that technology is a manifestation of the same power structures that underpin all systemic injustices. Vast amounts of data, and the technological means to leverage it, are often in the hands of already powerful actors[6]–whether private entities or public authorities–and generate new risks and harms at a speed and scale previously unseen.

For purposes of profit, control, or political propaganda, many tech companies and governments are expanding their resources and influence through digital technologies, leading to increased power inequalities,

[1] EU Charter of Fundamental Rights of the European Union [2010] Official Journal of the European Union C83 Vol 53 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

[2] See Nani Jansen Raventlow, 'Litigation as an instrument for social change – laying the foundations for DFF's litigation support' (Digital Freedom Fund Blog, 29 November 2017) <https://digitalfreedomfund.org/litigation-as-an-instrument-for-social-change-laying-the-foundations-for-dffs-litigation-support/> accessed 30 September 2024.

[3] Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38(4) Civil Justice Quarterly 407.

[4] Equinet, 'Strategic Litigation Handbook' (2017) <https://equineteurope.org/wp-content/uploads/2018/05/equinet-handbook_strategic-litigation_def_web-1.pdf> accessed 30 September 2024. See also, Public Law Project, 'Guide to Strategic Litigation (2014) < https://publiclawproject.org.uk/content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf> accessed 30 September 2024.

[5] Roderic Crooks, Catherine D'Ignazio, Arne Hintz, Fieke Jansen, Juliane Jarke, Anne Kaun, Stine Lomborg, Dan McQuillan, Jonathan A. Obar, Lucy Pei, and Ana Pop Stefanija, 'People's Practices in the Face of Data Power', in Juliane Jarke and Jo Bates (eds), Dialogues in Data Power (Bristol University Press 2024).

[6] Jathan Sadowski, 'When data is capital: Datafication, accumulation, and extraction' (2019) 6(1) Big Data & Society.

more human rights violations, and the tearing down of democratic controls and institutions. In the Netherlands, digital welfare systems are using assessment algorithms that have been proven to repeatedly wrongly flag racialised, disabled, and/or single mother beneficiaries as potential fraudsters or as undeserving of social protection.[7] In France, recent legislation allows for the use of algorithmic video-surveillance in one of the neighbourhoods with the highest proportion of racialised inhabitants.[8] In Spain, the first 'rider's law'[9] in the world has failed to protect many platform workers because of their status as undocumented. In Germany, the digitalisation of borders has amplified discriminatory treatment through the controversial use of speech software to help determine the origins of asylum seekers, and through data-sharing between health services and immigration authorities.[10] In countries like Poland and Hungary, LGTBQI+ and reproductive rights groups are having their websites shadow banned, while Access Now have called 2023 'the worst year of internet shutdowns ever recorded.'[11]

The expansion of large digitalisation and datafication processes exposes thousands or even millions of individuals to harmful practices that are leading to the violation of their digital rights. As the Commission highlighted, '[i]n light of increasing cross-border trade and EU-wide commercial strategies, these infringements increasingly also affect consumers in more than one Member State.'[12] Collective redress mechanisms can help to ensure the enforcement of digital risks at scale by enabling civil society organisations (CSOs) to develop efficient litigation strategies that allow them to represent groups or classes of claimants, both with and without a representative mandate. Such collective actions also create opportunities for cross-disciplinary and cross-jurisdictional collaborations between different CSOs and other institutional stakeholders.

However, while many Member States provide for collective redress mechanisms in their national laws, the Commission's 2018 Collective Redress Report[13] confirmed that this is not the case in all States. Since the adoption of the Injunctions Directive[14] in 1998, consecutive EU initiatives have sought to make it possible 'for qualified entities designated by the Member States, such as consumer organisations or independent public

[7] Nawal Mustafa, 'Article 47: The Age of Digital Inequalities', in Alexandra Giannopoulou (ed), Digital Rights are Charter Rights, (Digital Freedom Fund 2023) <https://digitalfreedomfund.org/digital-rights-are-charter-rights-essay-series/> accessed 30 September 2024, pp.38-41,

[8] Amnesty International, 'JO 2024: Pourquoi la vidéosurveillance algorithmique pose problème' (Press Release, last updated 26 July 2024) <https://www.amnesty.fr/liberte-d-expression/actualites/pourquoi-la-videosurveillance-algorithmique-pose-probleme-cameras-technologies> accessed 30 September 2024.

[9] The Real Law Decree N. 9/2021, 11 May 2021, <https://www.boe.es/boe/dias/2021/05/12/pdfs/BOE-A-2021-7840.pdf> accessed 30 September 2024, revises the Workers' Statute to 'guarantee labour rights to individuals working in distribution via digital platforms' available online:

[10] Josephone Lulamae, 'The BAMF's controversial dialect recognition software: new languages and an EU pilot project' (Algorithm Watch, 5 September 2022) <https://algorithmwatch.org/en/bamf-dialect-recognition/> accessed 30 September 2024.

[11] Zach Rosson, Felicia Anthonio, and Carolyn Tackett, 'The most violent year: internet shutdowns in 2023' (Access Now, updated 4 June 2024) <https://www.accessnow.org/internet-shutdowns-2023/> accessed 30 September 2024.

[12] Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2018] COM/2018/0184 final - 2018/089 (COD), p. 1.

[13] Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU6 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2018] COM(2018) 40 final.

[14] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L 166.

bodies, to bring representative actions for the protection of the collective interests of consumers with the primary aim of stopping both domestic and cross-border infringements of EU consumer law.'[15]

This effort culminated in the adoption of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC[16] (Representative Actions Directive), which 'sets out rules to ensure that a representative action mechanism for the protection of the collective interests of consumers is available in all Member States.'[17]

The Representative Actions Directive applies to 'representative actions brought against infringements by traders'[18] of provisions included in a long list of EU laws, including in the areas of product liability, consumer contracts, consumer protection and unfair commercial practices, e-commerce, universal service and users' rights relating to electronic communications networks and services, data protection, distance marketing, consumer credit agreements, and several others.[19] Among other things, the Directive includes provisions on the designation of qualified entities,[20] the types of representative actions covered,[21] the available injunctive[22] and redress[23] measures, and funding[24] of those measures. Member States were obliged to transpose the Directive into domestic law by 25 December 2022 and to apply these measures from 25 June 2023.[25]

The Directive's provisions promise to broaden the possibility to bring representative actions in many Member States, including actions that challenge, in these specific contexts, violations of digital EU Charter rights. Collective redress mechanisms to enforce the Charter in the digital sphere have historically been put in place across a range of Member State jurisdictions. They include national mechanisms as well as new mechanisms introduced through the Representative Actions Directive. The availability of information about the substantive and procedural requirements of different collective redress mechanisms can be key in strategic litigation, for example in developing cross-jurisdictional strategies.

Despite the EU Charter's considerable potential for protecting digital rights, and despite the CJEU's clear willingness to apply Charter rights in the digital sphere, there remains a tendency to default towards reliance on the less specific rights included in national constitutional or administrative laws or in the European Convention on Human Rights.[26] This reluctance results, at least partially, from a lack of knowledge about

[15] Commission Report of 25 January 2018 (n 13), p. 2.

[16] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409.

[17] Art. 1(1), Representative Actions Directive.

[18] Art. 2(1), Representative Actions Directive.

[19] Annex I, Representative Actions Directive.

[20] Art. 4, Representative Actions Directive.

[21] Art. 7, Representative Actions Directive.

[22] Art. 8, Representative Actions Directive.

[23] Art. 9, Representative Actions Directive.

[24] Art. 10, Representative Actions Directive.

[25] Art. 24(1), Representative Actions Directive.

[26] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended).

the judicial pathways that can be utilised for the Charter's enforcement. When rights are violated as a result of activities ostensibly regulated by legal instruments that don't contain judicial remedies for individuals, the enforcement of these rights will in many situations depend on the availability of alternative judicial pathways to bring a case before the courts. Challenging technologically created, imposed, and amplified systemic injustices

> requires knowledge and understanding of data systems, social capital, and political agency to claim rights, and resilience and courage to stand up. As such, (...) we need to move away from the notion of individual empowerment through data literacy to collective agency through the practice of resistance. Collective agency, which should be understood as a process that brings together different competencies needed to identify and uncover the problem and jointly work towards a solution.[27]

All of this points to a clear need for a mapping and reporting exercise with the following objective: to map collective redress mechanisms in order to reveal the similarities and divergencies between national collective redress systems vis-à-vis the Representative Actions Directive in a comprehensive Collective Redress Database. Ultimately, this will help us map, understand, and reveal judicial pathways to using the EU Charter more efficiently on a collective level in different jurisdictions.

In this report, we use the term **collective redress** to refer to all types of procedural mechanisms enabling groups of individuals to act collectively to counter the effects of harm collectively suffered, to stop a practice violating their rights, and to claim restitution (such as damages). Strategic litigation on digital rights is greatly strengthened by collaboration and coordination among stakeholders pushing for the protection and promotion of human rights in digital and networked environments. Not only can collaboration demonstrate a united front, strategic alignment, and a collective vision for how digital rights should be respected by the courts and those who hold power, it also helps ensure that strategic litigation is efficient and not subject to the duplication of efforts. We also recognise that collaboration and information sharing is vital to strengthening strategic litigation as it facilitates the sharing of litigation tactics, lessons learnt, and effective legal arguments. With this research, we hope to provide the foundational elements to build nourishing community inclusion and collaborations that will attempt to use legal tools such as collective redress actions to facilitate access to justice for everyone.

[27] Crooks, R., D'Ignazio, C., Hintz, A., Jansen, F., Jarke, J., Kaun, A., Lomborg, S., McQuillan, D., Obar, J. A., Pei, L., and Stefanija, A. P. (2024). 4: People's Practices in the Face of Data Power. In Dialogues in Data Power, Bristol, UK: Bristol University Press. DOI: 10.51952/9781529238327.ch004

Methodology

The methodology for this research needed to accommodate the inherent flexibility of comparative legal research, especially given that the body of laws to be researched remains in flux. The objective of the comparative methodology was to uncover, explore, and ultimately juxtapose 10 different EU collective redress normative frameworks implementing the Representative Actions Directive.

The field of collective redress cuts across traditional territorial legal boundaries and encourages the bringing together of research from different legal fields, such as consumer law, data protection, civil procedure, competition law, etc. The development of a sound methodological framework to better understand the role of the law in setting the conceptual categories and schema that help construct, compose, and interpret collectivisation, power, and social relations is foundational. *The objective in applying a comparative law methodology is to promote a measure of common understanding that can become an invaluable tool for access to justice and the respect and promotion of fundamental rights more broadly.*

This primary function of developing the common understandings cannot be achieved without the implementation of research goals, which are key elements in the comparative process. The goal of this research went beyond the aim of simply understanding of how different legal systems incorporate collective redress mechanisms in various EU Member States. Specifically, and before delving into the substantial and procedural similarities and differences between different normative frameworks in various Member States, we set out to outline and understand the way the law is structured and the legal order set up in the examined legal systems.

The linguistic barriers to accessing the source materials to perform the comparative research required us to develop a common research language. This common language formed the basis for defining terms, analysing responses, and ultimately understanding and contextualising results. The translation work needed to describe a legal arrangement is already a comparative work, as using certain words rather than others to translate certain concepts, arrangements, or ideas is work that incorporates decision-making from the legal expert and translator. Comparative work in a multi-language territory such as the EU presupposes the application of comparative law methods that, through translation, convey how a legal and normative framework is set up to operate.

This report is the result of a year-long research undertaking that included the creation of a multi-country network of legal experts, collective redress litigators, academics, and civil society. This research is a direct result of these collaborations, with country experts as well as formal and informal workshop exchanges. Early on, we identified the difficulty in assessing 10 different legal systems from 10 different jurisdictions, with various native languages. The selection of the countries is based on criteria of representativeness: the historical specificities of the collective redress legal traditions of the selected countries, the velocity and variety of their development, and the breadth of the perceived impact that these collective redress mechanisms are likely to have in the future. We treated each national legal system as an object

of study, and we designed our methodology based on the assumption that comparing both similar and diverse legal systems and countries is a useful approach, particularly to inform territorial or regional policies such as those being developed across the EU.

We designed the questionnaire in English, and we expected the authors to be able to convey their answers both in their native language and in English. Recognising the necessary (linguistic and technical) modularity that the questionnaire had to incorporate in order to properly convey the meaning of each question as it corresponds to the legal system of the Member State examined, we adopted a set of standard terms which lend themselves to technical flexible meanings. It must be acknowledged that the meaning of many key concepts changed when translated. In practice, we accepted the risk that this variation might bring (i.e. whether a concept means the same thing in different national legal systems) and made sure to incorporate the variability in our analysis.

For these reasons, and to cater to our objective and general goals, we chose to examine the following countries: 1) Germany, 2) France, 3) Belgium, 4) The Netherlands, 5) Italy, 6) Greece, 7) Croatia, 8) Spain, 9) Portugal, and 10) Ireland.

While not complete in terms of representing the totality of the Member States, the selected countries represent the breadth of EU territory, including Northern and Southern Europe, as well as the Balkans. We included both civil law and common law systems (see Germany and Ireland as examples). Finally, we ensured linguistic diversity (nine languages are represented in the country reports) along with a diversity in the traditions around collective redress across the EU (see the examples of Portugal with a longstanding opt-out tradition and the Netherlands with its prominent WAMCA class action database).

The challenge of creating a questionnaire that corresponds to, incorporates, and exposes the specificities of the different country regimes was not only a linguistic challenge.[28] We built a comprehensive questionnaire divided into different sections, with each section corresponding to a different aspect of collective redress litigation: from procedural and substantial elements, to funding, remedies, and finally, impact. To provide the flexibility for each section of the questionnaire to accommodate the specificities of the different legal regimes, our questions were intentionally not restrictive in their formulation. To ensure consistency across the reports, an introductory text was included to serve as a guideline for the country experts. This text described the research objective and questionnaire layout and provided necessary conceptual definitions.

As highlighted above, we understand the term **collective redress** to refer to all types of procedural mechanisms that enable groups of individuals to act collectively to counter the effects of harm collectively suffered, to stop a practice that is violating their rights, and to claim restitution (such as damages). We prefer to use the general term 'collective redress', rather than the more specific 'representative action' term that is used in Directive (EU) 2020/1828 (the Representative Action Directive or RAD). The term 'representative action' refers to a particular type of collective redress, one which all EU Member States must make available. Representative action is one tool among others whose objective is to achieve collective redress.

[28] For the questionnaire template, see the Annex.

Setting in motion the collective redress regime across Member States

The first three sections of the questionnaire outlined the perimeter of this analysis, clarifying the nuances and different means of accessing collective redress in the 10 selected Member States, with a focus on data protection and digital rights.

The national reporters described the essential points of each domestic regime, with particular regard to the scope of application, adhesion, competence, standing, and criteria for admissibility. These clarifications are valuable insofar as they allow a precise localisation and visualisation of the various collective models at hand. Even minor changes in the cogs composing each mechanism have the potential to significantly alter, in one sense or another, its use and, subsequently, its concrete effects within a given jurisdiction. Hence the importance of clearly identifying these minor differences and the associated divergences between the different Member States.

Section 1 of the questionnaire focused on the scope of application of the national collective redress tools. In particular, it aimed to place them within a precise historical context. In this section, the reporters provided crucial information on the development of collective redress within their jurisdictions, the areas of law covered, any traditional perceptions and hurdles, as well as relevant and up-to-date case law. The introduction of the RAD at EU level revolutionised the European legal landscape of collective proceedings. The consequences of the RAD's introduction were evaluated by asking if it had already been transposed at domestic level, if so in which way, with what preliminary results, and how it has influenced any previous mechanisms.

All 10 selected Member States had a collective litigation regime before the RAD. The scope and use of these regimes, however, was quite narrow. In four jurisdictions the pre-existing regime was limited to consumer protection only (Greece and Spain) or almost (Belgium and Croatia, which respectively also allowed collective suits in the field of data protection and non-discrimination). In two other jurisdictions–France and Germany–the scope of application was greater than only consumer law but was still deeply fragmented. In France, collective action was also available in relation to health and cosmetics, personal data, environmental protection, and non-discrimination (especially in the workplace); whereas in Germany, collective action was also available for matters concerning environmental protection, nature conservation, competition law, and equal treatment. The scope of collective action in Ireland was extremely narrow. Access to collective action was subject to the courts' discretion which used too strict criteria and imposed rather specific requirements which made the

potential impact of the actions quite limited to be properly accounted, despite the scope of the legal framework being trans-substantive in theory.

Three other jurisdictions (Italy, the Netherlands, and Portugal), offered more developed trans-substantive mechanisms with a general scope of application. This allowed, and continues to allow, for the enforcement through collective means within these jurisdictions of any right or interest. Whereas the Dutch and Italian general mechanisms are relatively recent (in force since 2020 and 2021, respectively), the Portuguese one, rather interestingly, finds its legal lodestar in the 1976 Constitution (amended in 1997, with the introduction of the general regime in 1995). This appears particularly relevant given the possible views in other Member States on the constitutional legitimacy of collective proceedings in areas of law other than consumer protection. On the one hand, some may argue against the constitutional legitimacy of collective redress due to the purportedly individualistic and civil law nature of the right to action. On the other hand, in certain jurisdictions, such as Belgium, appeals have already been brought before constitutional courts criticising the limited scope of application of the domestic collective action regimes.[29] Despite being unsuccessful to date, these appeals reveal that when collective enforcement is not applicable to certain areas of law, doubts arise regarding respect for the principles of equality and non-discrimination, both intra-state and intra-EU.[30]

Two additional elements are worthy of consideration

Firstly, before the RAD there was a deep lack of harmonisation within the EU concerning collective redress. As will be argued, differences between Member States persist. The Commission Recommendation from 2013 evidently did not achieve the objective of levelling the playing field, and instead widened the gap.[31] In fact, it most certainly contributed to the enactment of the new trans-substantive regimes in Italy and the Netherlands.[32] Recommendation 96/2013 was indeed proposed for

[29] See Stefan Voet, 'Class Actions in Belgium: Evaluation and the Way Forward', in Alan Uzelac and Stefan Voet (eds), Class Actions in Europe: Holy Grail or a Wrong Trail? (Springer 2021).

[30] A limited scope of application creates unreasonably different standards of protection both within the same jurisdiction–between those who qualify as consumers, on whose behalf representative actions can be brought, and those who do not qualify as consumers–and between jurisdictions with limited scope of application and jurisdictions with trans-substantive regimes. Citizens from the latter Member States will benefit from wider protection since their rights and interests can be enforced collectively via representative actions also outside of the consumer sphere, thus ensuring more effective access to justice. Furthermore, such differentiation incentivises defendant forum shopping.

[31] Commission Recommendation of 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] OJ L 201. In particular, Recital 4 highlighted the Recommendation's harmonization goal by stating: '[o]n 2 February 2012 the European Parliament adopted the resolution "Towards a Coherent European Approach to Collective Redress", in which it called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights'. See, inter alia, the critical assessments from Jonathan Goldsmith, 'European Collective Redress' (The Law Gazette, 17 June 2013) <https://www.lawgazette.co.uk/analysis/european-collective-redress/71359.article> accessed 30 September 2024 ('a squeaking mouse hurrying over the floor of the EU Commission, frightening no one') and Christopher Hodges, 'Collective Redress: A Breakthrough or a Damp Squib?' (2014) 37(1) Journal of Consumer Policy 67.

"violations of rights granted under Union law", rather than merely consumer ones, as the RAD later, in 2020, proposed, on the wake of the Dieselgate scandal. The implementation of the 2013 Recommendation by only a limited number of Member States, coupled with the subsequent limitation of the scope suggested at EU level, has generated confusion and different scopes of application of collective action. The result is different Member States providing different opportunities for redress, with obvious implications from the standpoints of equality and with incentives for forum shopping.

Secondly, all the national reports highlight a thus far limited case law. Only the three jurisdictions with a general scope of application for collective action–Italy, Portugal and, especially, the Netherlands–appear to be on an upward trend, although at different speeds.[33] The fact that these jurisdictions favour simpler, single regimes over complex, fragmented ones, might be the main driver behind their more successful experiences.

The goal of harmonisation was paramount in the RAD, which requires that both an injunctive and a compensatory representative action mechanism for the protection of the collective interests of consumers to be made available in all Member States.

More than a year after the 25 June 2023 deadline to bring the RAD into effect, out of the 10 Member States selected for the present analysis, eight have fully transposed the RAD (Belgium, Croatia, Germany, Greece, Ireland, Italy, the Netherlands, and Portugal), one only partially (France), and one has started the parliamentary process on drafts (Spain). Of the States that did not already have a collective action procedure, only France–where the process of transposition is still ongoing–has seized the opportunity to craft a new mechanism with a trans-substantive scope of application. The other implementations of the RAD appear rather literal and fail to explicitly mention the protection of rights and interests outside the consumer sphere, including data protection. Nonetheless, through the references within the Annex I of the RAD to other provisions of EU Law, such as the GDPR, all the national reporters still appear confident as to the possibility of expanding the scope of application of their new domestic regimes to data and digital rights. In order to make this link, a connection to a consumer interest will be needed, and it remains to be seen whether the application of the RAD to data and digital rights will be confirmed in the case law.

Of the three jurisdictions which already had a trans-substantive regime, only the Netherlands has amended it to transpose the RAD. Italy and Portugal have, instead, implemented the RAD through new legislation dedicated to consumer-only representative actions. For a number of rights and interests, this will create potential overlap with the previous trans-substantive regimes, for example for consumer rights and interests and interests indirectly protected through Annex I (including data protection and digital rights).

The Netherlands appears to be trailblazing not just because of its effective transposition of the RAD, but also because of its already-forming

[32] Ianika N. Tzankova and Xandra E. Kramer, 'From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands, in Alan Uzelac and Stefan Voet (eds), Class Actions in Europe: Holy Grail or a Wrong Trail? (Springer 2021).

[33] At the same time, it is worth highlighting that the number of collective actions under the new Dutch regime has not increased as compared to the old regime. See, in this regard, Xandra E. Kramer, Ianika N. Tzankova, Jos Hoevenaars, and Catharina van Doorn, Financing Collective Actions in the Netherlands: Towards a Litigation Fund? (Boom Uitgevers 2024)

jurisprudence in relation to collective enforcement of digital rights, with 10 pending cases and four already adjudicated. They all refer to the GDPR and concern unlawful commercial use of data (surveillance of users, advertising, predicting behaviour), violations of personal data rights, consent to one's image and one's recognition, and online blacklisting. The actions have been brought against big-tech companies, online management platforms, and anti-virus and security software providers. Of the four actions already adjudicated, one has been declared inadmissible, one has been rejected, and two have been successful.[34]

One of the main reasons for the limited case law in other jurisdictions is explained under **Section 2** of the questionnaire, dedicated to the participation regime.

Of the 10 selected Member States, only two (the Netherlands and Portugal) provide a default opt-out regime for compensatory suits. It should be noted that, in their implementations of the RAD, both jurisdictions have amended their collective redress regimes to limit the opt-in mechanism to consumer collective actions for non-resident members of the class. Spain, as per the current draft bill, is expected to join the Netherlands and Portugal in having a default opt-out regime, albeit with a scope limited to the consumer sphere, unlike the other two Member States. Two other jurisdictions (Belgium and France) provide a mixed system: in Belgium, opt-out applies upon request by the representative claimant and by decision of the court; in France, opt-out applies only for the simplified consumer group action. In the French system, in circumstances where the class members can be easily identified and the damages per capita are the same or very similar, there is no need to opt-in even though technically the system is not opt-out.

The other five Member States (Croatia, Germany, Greece, Ireland, and Italy) have instead adopted full opt-in regimes. This is not to say, however, that there are not substantial differences between these jurisdictions: each State has different deadlines and methods for opting into the collective action.

In Greece, for instance, there is the possibility of a so-called 'late opt-in', even after the judgment becomes final. Members of the class who did not join while the proceedings were pending can reap the benefits of a favourable decision at a later time by applying for enforcement. While the existence of this possibility mitigates the otherwise low adhesion rates typically seen in opt-in regimes–and therefore favours the effective delivery of justice–it is not devoid of possible drawbacks. A serious risk is, for example, that affected consumers are disincentivised from joining an action before the judgment is final. This not only facilitates free riding and jeopardises the funding opportunities for the action, but also undermines the chances of a settlement being reached. Another issue arises from the perspective of fair trial guarantees, specifically of equality of arms, enshrined, inter alia, in Article 6 ECHR, given the difference in treatment between (potential) claimants and the defendant. The same happens in France, where members can only join the group after the decision on the merits, within a period determined by the judge framed by the lawmaker.

A completely opposite type of opt-in regime can be found in Ireland, where adhesion is allowed only until the case is declared admissible. The

[34] For more details on these cases, see the country report on the Netherlands.

proposals of the Italian legislator constitute a middle ground between these extremes, in the form of a double window to join the class, one before the admissibility phase and one after a decision on the merits. Similarly, more mitigated reflections to the ones related to the Greek system can be herein proposed, too.

Naturally, considerations regarding adhesion only concern compensatory actions. The injunctive remedy intrinsically involves effects for the whole class. Any order to stop or refrain from a certain harmful activity inevitably effects all the members of the concerned group.

As a result, it is crucially important to ensure adequate publicity of the collective proceedings taking place, both for injunctive remedies and for compensation, in order to allow for opting-in or out.

For this purpose, several Member States have established an official registry where relevant information on past and pending collective actions can be found. Only four jurisdictions already have it in place (Belgium[35], Germany[36], Italy[37], and the Netherlands[38]), but four others (France, Ireland, Portugal, and Spain) have either included provision for a registry in the draft bills or have already approved it, pending concrete realisation of the website. The remaining two (Croatia[39] and Greece[40]) have other systems of publicity: the website of the Ministry of Economy and Sustainable Development, for Croatia, and the websites of the qualified entities for both States.

Besides the official registry, there are other interesting measures for ensuring publicity. For example, in Croatia, there is a clause according to which the defendant must notify all affected consumers of ongoing collective proceedings 'in a way that will ensure that the notification reaches all potentially injured consumers in a timely manner'. In France, judges have discretion to order necessary measures to inform all those affected by an action, with any cost to be borne by the defendant. In Portugal, the law provides for the possibility of using social media platforms, and in the Netherlands there is a requirement for the representative organisation to set up a website for each collective action once it is declared admissible.

In sum, it is evident how digitalisation has paved the way for less expensive and more direct means of communication in order to reach potential class members. Two elements, nonetheless, require careful attention.

[35] For Belgium, see here: https://economie.fgov.be/fr/themes/protection-des-consommateurs/action-en-reparation/decisions-rendues-dans-le
For more details, see the country report on Belgium.

[36] For Germany, see here the Verbandsklageregister (https://www.bundesjustizamt.de/DE/Themen/Verbraucherrechte/VerbandsklageregisterMusterfeststellungsklagenregister/Verbandsklagenregister/Verbandsklagen/Verbandsklagen_node.html).
For more details, see the country report on Germany.

[37] For Italy see: Class action- Azioni di classe | Portale dei servizi telematici del Ministero della Giustizia (https://servizipst.giustizia.it/PST/it/pst_2_16.wp)
For more details, see the country report on Italy.

[38] For The Netherlands see here: Centraal register voor collectieve vorderingen | Rechtspraak. (https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen)
For more details, see the country report on the Netherlands.

[39] https://mingo.gov.hr/

[40] The General Secretariat for Trade of the Ministry of Development is competent to designate consumer associations as qualified entities and maintains the public register of consumer associations.
For more details, see the country report on Greece.

First, it should be kept in mind that, apart from abstract provisions, all these official registers require technical expertise, transparency, and easy accessibility. They are, in a way, the 21st century concretisation of the procedural fair trial requirement of a public hearing, on the one hand, and of the right of access to a court for those wishing to join an action (or opt-out), on the other hand. Hence, they should be sufficiently clear for the general public and regularly updated.

This does not occur, for instance, in Italy, where the web-registry, while ideal in theory, is in practice rather confusing, presents documents in odd formats, that are difficult to download, and does not properly clarify how to join.[41] Furthermore, still in Italy, not all courts upload information on new injunctive class actions, due to a disputed interpretation of the rules.[42] All these technical details render the provisions on publicity ineffective and, thus, substantially decreases the effectiveness of the collective redress mechanism. Furthermore, attention should be directed towards those members of society, usually the elderly or the economically disadvantaged, who are less able to regularly access the digital environment. Given that collective redress is usually designed for less-advantaged groups, it is important to take their needs and specificities into account.

After technical efficiency, the second practical yet key element to stress is that of societal adjustment to the new, collective, dimension of redress. Trust in the judiciary has emerged as a crucial factor in some national reports contributing to the (until now) undeveloped case law. It seems, furthermore, that awareness of the new paths of redress may play a fundamental role, too. All legal players must become knowledgeable of and accustomed to collective redress as a judicial pathway. This includes lawyers, judges, and court clerks, as the actors expected to initiate and conduct proceedings, but more importantly civil society. Potential class members should be properly informed of the new available pathways to justice, and informed that they are not required to be formal parts of the proceedings. Better education for these key actors could help to remove the reported veil of mistrust, as better training for legal practitioners would probably result in more meritorious proceedings and, consequently, more trust from the general public.

The Netherlands (especially) and Portugal are both forerunners within the EU, not only because of their trans-substantive regimes, but also because of their innovative publicity methods (they have both created a dedicated website for each collective case and/or use of more informal yet far-reaching means of communication, such as social media platforms) and, above all, their opt-out regimes. Such mechanisms of participation, as shown also by the well-established common law experience with class actions, have the ability to exponentially boost the numbers of both actions filed and class adherents. Another relevant factor is the availability of third-party funding in these jurisdictions.

[41] See n37.
Class action – Azioni di classe – Portale dei servizi telematici del Ministero della Giustizia.

[42] Some courts (for instance, the Tribunal of Milan or the Tribunal of Turin) upload information only on compensatory class suits, whereas other courts (for instance, the Tribunal of Rome), upload information on both compensatory and injunctive class suits. This is due to a doubtful interpretation of the current norms by the former courts, see Ander Maglica and B. Randazzo, *'La nuova class action all'italiana ex c.p.c.: dubbi di costituzionalità e prime problematiche applicative' in A. Henke, B. Randazzo, and S. Voet (eds), L'azione di classe. Profili sostanziali e processuali* (Giappichelli, Turin, 2024).

Section 3 of the questionnaire, lastly, focused on procedural aspects of the collective redress regimes. The national reports go into detail regarding the rules on jurisdiction (who is competent to decide?), on standing (who can file a claim as representative of the class?), on admissibility of collective claims, on cross-border suits, and on measures to safeguard the defendants.

The last two issues are harmonised across the 10 selected Member States

When it comes to the recognition of foreign qualified entities for cross-border cases, Member States generally follow the RAD instructions, as per its Article 6. Brussels I bis is also mentioned in the reports as an instrument of coordination. The suitability of such a regulation to efficiently address cross-border collective actions is, nonetheless, doubtful. It is not always clear, for example, which court is competent in cases concerning transnational mass harm that encompass class members from different Member States or defendants from outside the EU. Using the claimant-friendly choice under Article 18 of the Brussels I bis Regulation in such cases would not be feasible, and, similarly, interpretative confusion would inevitably arise when attempting to applying notions such as that of the 'place where the harmful event occurred' under Article 7(2).

As to specific safeguards in favour of defendants, almost all national experts report the existence of an obligation for class representatives to undertake prior consultations with defendants, as per Article 8(4) of the RAD, in order to give them an opportunity to bring the infringement to an end. The time allocated for consultations before an action can be brought varies between the Member States, from two weeks (as per the RAD) to four months.

There is less harmonisation across the national legislators' choices when addressing the other procedural aspects highlighted above.

The court tasked with collective claims is a specialised one in six out of ten Member States (Belgium, Croatia, France, Germany, Italy, and Spain). Exclusive jurisdiction is given either to designated courts (e.g. in France, under the current draft bill) or to already-existing specialised sections within a competent court (with competence determined by where the defendant has their seat). In the latter case, these sections are allocated jurisdiction on the basis of subject matter, that is corporate and company ones. This makes partial sense for Member States such as Croatia, where the scope of application of the collective redress regime is limited to consumer issues. Even for these States, however, doubts arise as to the desirability of this approach given the possibility of bringing collective actions in other areas of law through the provisions in Annex I of the RAD. A section specialised in corporate matters may not always be best suited to addressing the merits of a class action on privacy, digital rights, or data protection, for instance. Such a choice is even more objectionable for Member States such as Italy, which have adopted a trans-substantive regime. The already numerous Italian collective actions in employment, environmental, tax, and health matters have highlighted the questionability of this approach to court competence.

Four out of ten Member States (Greece, Ireland, the Netherlands, and Portugal) have, instead, opted to fully integrate their collective regime into their civil procedural law, including the rules concerning jurisdiction. As a consequence, they do not formally have a specialised judge in collective redress cases, but rather such proceedings are treated as ordinary, individual, ones. This choice sacrifices a future specialisation in class proceedings within the national judiciary in favour of horizontal specialisation, allowing the judge best equipped to deal with the merits to handle the proceedings. Such an option, which avoids overburdening already-existing specialised sections by distributing collective cases, appears more reasonable for trans-substantive regimes. For this to work, there is a need to properly train all judicial bodies and actors, including the supporting clerks and administrative staff. The Netherlands offers a notable example, with the establishment of a 'working group' of experienced judges and support staff from all district courts that are expected to deal with or are dealing with collective redress.

As a point of note, it is worth highlighting that all Member States, even the six that have assigned jurisdiction in collective cases to a special court, generally apply their standard rules of civil procedure, save for minor exceptions. Examples of these exceptions include Germany, which refers to its administrative law provisions for anti-discrimination collective suits against public authorities, and France, which applies different rules when the group action is filed against a public institution. Other special rules, or at least particularly relevant in this context, are those related to the penalties required by Article 19 of the RAD for missteps in the submission of evidence or for delays in respecting the courts' orders in injunctive class actions. Illustrative examples are the German regime, which allows a sanction of up to 250,000€ if the requested evidence is not provided, or the Croatian, French, Italian, and (future) Spanish regimes, which permit, at the judges' discretion, high civil penalties (i.e. up to 100,000€, 60,000€ or 10,000€, depending on the jurisdiction) for each day of delay in adopting the required measures. Interestingly, the German regime even provides the possibility of detention for up to six months per violation, up to a total of two years, in case of repeated non-compliance. For legal entities, detention is imposed on their legal representative.

With respect to legal standing to sue, there are once again two trailblazing Member States: the Netherlands and Portugal. Both of them are the only ones, save for pending discussions on draft bills in France, that welcome the filing of class suits in domestic actions by ad hoc organisations. All the other Member States require, among other things, that representative organisations be in existence for at least three, two, or one (depending on the State) year(s) before bringing the action. Registration on a list of approved qualified entities and respect for all the other requirements–such as regular financial audits, non-profit nature, or related statutory objectives–is also expected. The flexibility in the Netherlands and Portugal allows for the creation of an organisation that is ideally suited to bringing the collective claim on behalf of the class. This, coupled with the other abovementioned positive choices taken in these jurisdictions, fosters collective litigation in those States. Furthermore, by avoiding that only pre-approved entities can bring claims, it makes it easier to avoid conflicts of interests and opens up the potential for collective action in smaller and local cases.

Remaining on the topic of which actors may file class actions, the provisions of some Member States allowing not only qualified entities, as required by the RAD, but also natural persons (e.g. Italy or Portugal) or public authorities, such as Ombudsmen (i.e. Belgium, but only at the negotiation stage), national or local consumer affairs offices (i.e. Spain), or public prosecutors (i.e. Spain), appear commendable. This flexibility decreases the possibility of conflicts of interest and increases the possibility that the collective action will be brought by the best-suited subject.

It will be important, should this pluralism be followed, to find the means to verify the adequacy of representation on the part of the various subjects. This is especially the case if several subjects present competing parallel class actions. One solution is that suggested by the Italian legislator, which proposes a temporal criterion: the first to file is the representative. Another, perhaps worthier, solution is that used in the Dutch system, which involves a sort of 'beauty contest' with a prescribed time period during which other candidate representatives can come forward. According to the Dutch system, the court selects one or more organisations as exclusive representatives for the class, or just for specific parts of the claim, based on the size of the class, the magnitude of the financial interest represented, and other activities previously undertaken by the representative on behalf of the group or previous collective claims brought. In theory, the best-suited subject should be appointed as class representative.

When it comes to the entities that a collective action can be filed against, only a few Member States currently allow collective suits to be brought against subjects other than private companies. This is the case, for example, in Germany and France, where collective actions can be brought against public authorities (but only in anti-discrimination suits), in Italy, where collectives actions can be brought against entities managing public services (e.g. hospitals), and in the Netherlands, where collective actions can be brought against the State itself.

Finally, a reflection on admissibility rules is necessary. All national reports tended to highlight the need for class representatives to be sufficiently capable, financially and statutorily, to fulfil their role. Representatives must also satisfy criteria of transparency with respect to publicity and the incentives driving them. Some Member States have additional, special rules. For instance, in the Netherlands, the so-called 'scope-rule' stipulates that claims must have a sufficiently close connection to the Dutch legal sphere–although this has been criticised by private international law experts for incompatibility with EU law. In Italy, Portugal, and Spain, there is a 'homogeneity' requirement, which is in some ways similar to the 'commonality' requirement from the US class action regime. In some Member States, such as Italy, the courts take a hard line when interpreting these special rules. The difference in admissibility criteria in different Member States appear to increase the risk of forum shopping, especially in cross-border cases.[43]

In this, like in other collective redress matters, further guidelines at EU level would have been, and would be, particularly valuable.

[35] Forum shopping is commonly intended as *'The practice of choosing the most favourable jurisdiction or court in which a claim may be heard'* (Bryan A. Garner (ed), *Black's Law Dictionary* (7th edition, West Group 1999)).

Deciding on collective and digital rights claims

The subsequent three sections of the questionnaire, after outlining the perimeter of the analysis, focused on the enforcement of collective and digital rights claims. The economic aspects–funding, contingency fees, liquidation, and distribution–were considered, as well as the different possible types of relief. The distinction between the injunctive and compensatory mechanisms was revealed to be crucial, as was a proper understanding of the role played by the various actors involved. Space was provided for discussion of relevant digital rights and data protection collective cases.

Section 4 dealt with redress, remedies, and funding. The RAD requires all Member States to provide at least one representative action that allows qualified entities to seek both injunctive and redress measures on behalf of consumers' collective interests. These measures can be sought either separately or through a common action, based on the discretion of each national legislator. Injunctive relief, per Article 8 of the RAD, involves a provisional or definitive measure ordering the cessation of or prohibiting a practice infringing the provisions of EU law referred to in Annex I, that harm or may harm the collective interests of consumers. The references in Annex I, as illustrated above and as commented on by different national reporters, serve as a safety net through which digital and other rights can be collectively enforced. The provisional or definitive injunctive measures may establish that the practice in question constitutes an infringement of EU law and should therefore be avoided. The measures may also require the defendant to publish the court's decision on the injunctive relief, or to issue a corrective statement. As discussed above, pursuant to Article 18 of the RAD, Member States can, and should, establish proportionate penalties–including, but not only, fines–in case of failure or refusal to comply with said measures.

The dissuasive nature of this provision on penalties substantially increases the effectiveness of the injunctive instrument and adds an important economic layer to it. The latter point is relevant given that injunctive measures, in contrast to redress ones, involve a lower evidentiary threshold to establish causality. Pursuant to Article 8 of the RAD, claimants are not required to prove actual loss or damage on the part of the individual members of the group on whose behalf the representative action is brought, nor negligence or intent on the part of the defendant. As a result, injunctive collective actions appear to be more streamlined procedures. This is demonstrated, for instance, by the Italian regime: within the Italian Code of Civil Procedure, 14 articles are dedicated to the compensatory mechanism, and only one to the injunctive mechanism. The more streamlined nature of injunctive actions is also supported, within the RAD, by Recital 67, according to which injunctive measures should be addressed with procedural expediency, especially if the infringement is ongoing. For ongoing infringements, it may be appropriate to provide summary procedures for provisional relief.

The lower evidentiary threshold for injunctive actions is relevant for potential claimants the most pressing and immediate goal of whom in bringing a collective claim is not compensation, such as in the case of data protection. The lower threshold is also relevant from a strategy point of view, as a successful injunctive class action could become a first step in a more complex damages class action. This first step is a signal to the judges deciding on admissibility in future damages actions, to civil society, to possible future adherents to the collective claim, and to third-party funders. It could also pave the way to future settlements.

Another element to consider, one not regulated by the RAD nor, in most cases, by domestic legislators, is the issue of who is entitled to receive any sums collected as penalties, and for which purpose. If the entitled entity is the claimant, doubts as to the constitutional legitimacy of the arrangement would emerge, given that said sums would not be awarded to the group of individuals on whose behalf the action is brought and who are holders of the rights enforced. This would be even more unsettling in the jurisdictions that allow natural persons to bring collective claims, and strong safeguards on the adequacy of representation would be needed. A possible solution would be to distribute the economic penalties through cy-près or fluid recovery mechanisms (further addressed in detail infra). An alternative could be that of establishing that all, or part, of the sums recovered through penalties are paid to a special fund tasked with financing particularly meritorious collective actions, such as the Class Proceedings Fund in Canada.

Article 9 of the RAD regulates redress measures, which includes remedies such as 'compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid'. Such actions are more procedurally complex, more evidentiarily burdensome, and present exponentially higher costs of litigation. As a result, the differences between Member States in their implementation of the RAD are greater. Relevant examples follow.

First, in relation to damages, not all Member States allow the use of collective actions for both material and non-material damage. For instance, France prohibits the latter in relation to consumer and health law. Several country reporters, even in jurisdictions where non-material damage can be claimed, stressed the complexity of compensating it. This is due to evidentiary issues and to the related challenges of collective quantification. Non-material, especially moral, damages usually require a personalised quantification. Other jurisdictions, such as the Netherlands, have experience with the categorisation of immaterial damages in the context of individual personal injury claims.

Another prohibition relates to punitive damages. The RAD states in its Recitals (nos. 10 and 42) that 'to prevent the misuse of representative actions, the awarding of punitive damages should be avoided' and that the 'Directive should not make it possible to impose punitive damages on the infringing trader, in accordance with national law.' Nonetheless, the provisions of the RAD fail to tackle this matter further. As a consequence, certain Member States seem to allow punitive damages. This, for example, is the case in Ireland. The relevant Irish legal provision states that the listed remedies are '[w]ithout prejudice to a discretionary power the Court may have in relation to redress'. From this, it appears that punitive damages, classified as aggravated or exemplary damages, appear to be a viable option. Other Member States, such as Italy, prohibit punitive damages under

national law, but allow them to be awarded under the application of foreign law, unless this would lead to a violation of the domestic public order.

Claims of unjust enrichment are permitted in jurisdictions that already recognised unjust enrichment as a ground for a legal claim. They are Croatia, Italy, the Netherlands, and Portugal. As argued in the Italian report,

> in theory, this could allow data subjects whose data have been unlawfully processed to claim unjust enrichment against the data controller. However, to succeed, they would need to prove that the use of their data constituted a profitable economic resource and that the unauthorized use caused them financial harm.

Unjust enrichment, at least in most jurisdictions, requires proof of the unjust loss suffered by the other party. Moreover, it often serves a residual role, applicable only when other legal remedies are not available.

Second, with regard to funding, two Member States–Greece (explicitly and fully) and Ireland (only in relation to for-profit situations)–prohibit third-party funding. In the other eight Member States selected for the present analysis it is permitted. The regulation, however, is not always explicit (e.g. in Italy), and even when it is, Member States mainly recall their general provisions on third-party funding or transpose the RAD. As a result, they tend to require that conflicts of interest be prevented and that when the third-party funder has a financial interest in the bringing or outcome of the collective action, this interest not divert the action away from the protection of the class interests. To ensure that undue influence is not exerted, most national regimes require the disclosure of any third-party funding and, possibly, at the court's discretion, of the funding agreements. The aim is to avoid a situation where the third-party funder is a competitor of the defendant or is in any other way economically dependent on the defendant.

Contingency fees are also mentioned in some reports as possible sources of funding, as well as incentives for filing collective actions, in line with the common law experience with class litigation. In France, for instance, contingency fees are acceptable but only part of the fees can be made conditional on the success of the action. Spain also provides for contingency fees in the current draft bill, although it is yet go into concrete details. Italy, despite having a general prohibition on contingency fees, allows them within its trans-substantive regime. The Italian regime sets contingency fees as a percentage of the total amount owed by the defendant to the class. The fee, to be paid as an additional sum by the defendant, changes depending on the total number of class members (from 9% in cases counting 1-500 members, to 0.5% in cases with over 1,000,000 members), reduceable by up to 50% at the court's discretion. It is interesting to note that the Italian regime provides the same percentage for the 'common representative of the adherents', a special subject named by the court and in charge of liquidation and distribution (see infra). Other Member States, such as Ireland, do not generally allow contingency fees, but do permit so-called 'no win/no fee' agreements, according to which lawyers agree to waive their professional fee if the case is ultimately unsuccessful in court.

Additional methods of funding reported in some Member States are pro bono work from lawyers or the collection of adhesion fees from the class members joining the class. Naturally, the latter would be possible only in

opt-in class actions and up to reasonable amounts (with reasonableness in most cases determined by the court on a case-by-case basis).

The general view, regarding funding, is that a body of case law still needs to be developed in order to properly fine-tune the different provisions and the necessary limits to safeguard against possible abuses. This is clearly illustrated in the Dutch report, which identifies the uncertainty that exists surrounding third-party funding and what percentages are acceptable in the circumstances of a given case, despite the existence of decisions discussing certain percentages (e.g. 25% was accepted in one case, whereas five times the investment made was declared the maximum in another).

Finally, **section 4** of the questionnaire focused on the main issues or challenges to bringing efficient collective redress actions related to digital rights. Despite the different paces and degrees of implementation of the RAD and of the domestic collective regimes, the answers provided in the national reports tended to concentrate on the same issues. They were practical, institutional, and legal obstacles.

In terms of practical issues, public awareness of both digital and collective rights, and the lack of financial resources, emerged as important practical barriers. Furthermore, some countries, like Croatia, suffer from 'extremely low trust' in the judiciary.

Among the institutional hurdles, the length of proceedings was repeatedly flagged as a major issue, which likely also has a negative influence on the practical issues and disincentivises lawyers and organisations from bringing more suits. The fact that courts lack first-hand experience with collective actions was stressed in certain reports (i.e. Croatia and Germany), as was the lack of cooperation among institutional actors, both at national (i.e. Greece and Ireland) and cross-border EU levels.

There are several legal obstacles and their impact can vary depending on the Member State. The legal obstacles include the need for qualified entities to prove a direct and concrete interest in bringing the action and the too-strict rules for the registration of qualified entities, evidence-gathering, and quantification of damages (especially in relation to non-material damage). Furthermore, some reporters (i.e. the Netherlands) questioned whether Article 80 of the GDPR presents an obstacle to the implementation of an opt-out collective action for damages.

The difficulty around quantification and distribution of damages presents itself as a particularly relevant issue, as most Member States appear to lack both the appropriate regulation and judicial experience to fulfil them concomitantly in the context of representative procedures. Several countries have interesting provisions in this regard. In Croatia, the regime establishes the possibility for courts to avoid awarding material damages within the collective action, leaving individuals with the option (and risk) of initiating further (lengthy and expensive) individual claims. In France, there is provision for both a simplified procedure, in the case of identical damage and compensation, and a more complex procedure, in cases where the different group members require different levels of compensation. In the Netherlands, courts can, if requested by the claimant, calculate the material damages with reference to the profits enjoyed by the defendant in connection with the failure to perform or the unlawful act at issue.

Section 5 of the questionnaire dealt with claims and their enforcement. The main finding of this section is that the implementation of collective actions in Europe is far from complete, as most cases are still pending and very few decisions have passed the admissibility phase or have actually been executed. This creates uncertainty, given the novelty of the collective redress instrument and the incompleteness, in several cases, of the regulations.

Despite this, there are a few relevant insights worth highlighting

For instance, some Member States have introduced special actors tasked with the process of liquidation and payment. They can be 'liquidators' (Belgium) or 'trustees' (Germany) and are usually experts in accounting (Spain) or bankruptcy matters (Italy). The special actors work under the judges' supervision and administer the pay-out to members who have provided them proof of their individual eligibility. The Italian regime, as noted above, is particular because its trans-substantive regime introduces a 'common representative of adherents' who, under the supervision of a designated judge, is in charge of the quantification of damages. The Italian report explains that, possibly with expert assistance, this common representative

> prepares a project detailing the adherents' individual rights, addressing any contradictory facts and adhering to the burden of proof principles. Both parties can submit written observations and documentary evidence. The common representative then finalizes the project and files it electronically. The delegated judge reviews the project and issues a decision to accept or reject it.

The pay-out is then usually administered by the common representative. In Member States that do not have a similar figure, the pay-out is directly handled by the defendant through the class lawyers (if authorised) or through public entities designated by the court.

The issue of 'excess amounts' has been solved differently by the different national legislators. The term 'excess amounts' refers to those sums which could not be distributed to the class members, for example because of statutes of limitations or the impossibility of identifying or reaching them. In some cases (i.e. Germany and Spain) excess amounts are refunded to the defendant. In other Member States (i.e. Greece), they are instead passed to the qualified entity which brought the claim. In most jurisdictions, however, this issue is not regulated, and the case law still needs to develop on the matter. An interesting option could be that of allocating excess amounts to special funds to support future meritorious class actions. This is the approach taken in Portugal, where excess amounts are paid to the Fund for the Promotion of Consumer Rights or the Institute for Financial Management and Justice Equipment (see also supra, in relation to penalties for non-compliance with injunctions or evidence-related orders).

Furthermore, it is worth noting again how, in compensatory actions, different criteria are set to determine who can join the class and in what way, apart from and on top of the relevant, and already-highlighted distinction between opt-in and opt-out regimes. Three Member States (Italy, Portugal, and Spain), specifically mention the need for the 'homogeneity' of the rights enforced, as a requirement for class admissibility and adhesion. Other Member States, like Germany and the Netherlands, merely require that the rights are of similar nature, whereas others, following the RAD, lack an express reference to a specific criterion. The interpretation of these provisions by the courts appears ever more relevant for the process of class formation and participation, concretely affecting the effective enforcement of individual rights. It is evident that a common, homogeneous, or similar nature may be hard to establish if a strict approach is applied. This could be particularly true for digital rights and data protection, where despite the common origin of the harm, the concrete effects may be various, especially in relation to any related non-material damage. The US class action case law on the requirements of commonality and predominance, and the varying interpretations of these concepts through the years, demonstrates the importance of how these concepts are understood.

Finally, some regulations (and specifically, the Dutch one) explicitly mention the possibility for courts to appoint independent monitors or technical experts to oversee the implementation of decisions, especially injunctions. This could be relevant with regard to digital rights and data protection. For instance, should a software modification be ordered, effective compliance could be verified through the appointment of such technical experts. Given the increasing technical complexity of the issues brought before the courts, it appears ever more essential to establish positive mechanisms of cooperation between the judiciary and third-party experts, for both evidentiary and monitoring purposes. Naturally, given the high stakes often involved in collective claims, adequate procedures for ensuring the independence of the experts will have to be implemented.

Lastly, **Section 6** of the questionnaire dealt specifically with 'Data protection and digital rights'. It inquired as to any past case law or pending litigation in this specific field of law, aiming to see whether upward trends or particularly obstructing factors could be identified in the evaluated jurisdictions. Some of the trends and challenges will be illustrated in the next section, however, we refer readers to the national reports for more insightful and thorough comments on each country's jurisprudence.

Key Insights

The transposition of the RAD has been a lengthy process and is still in progress. Only a few Member States implemented the RAD within the period indicated–most of them did so after the deadline, and some have not yet transposed the Directive. In the latter group, there are Member States that have not yet notified of any measures to the European Commission, as well as those that have notified of only partial transposition measures. Many Member States have made the choice to implement the RAD within their procedural codes, whilst others have done so in specific statutes.

It is relevant to recall from the outset the pre-existing discrepancies from one Member State to another in terms of the existence or not of a compensatory collective redress device. In this regard, the implementation of the RAD is certainly a very important step forward for harmonisation purposes.

Between the 10 jurisdictions analysed for this comparative report, there are convergencies – which relate exclusively to mandatory provisions of the RAD (I) – and divergencies – which are often related to non-mandatory rules of the RAD (II).

I. Convergencies in the implementation of mandatory provisions

The mandatory provisions of the RAD have ensured a minimum level of harmonisation between Member States. While the compared list is only a sample of the collective redress legal framework as implemented across the European Union, the trend appears to emerge unequivocally. Notwithstanding the different historical standpoints and legal traditions of the ten jurisdictions that have been examined and compared in this report, we recognise the following similarities in how the representative actions systems exist today within these legal realities: (A) the scope and reach of the implementations, (B) the standing and admissibility, and finally (C) the opt-in mechanism for non-residents.

a. Scope and reach of the implementations

The scope of representative actions, even though limited to consumer law, has been significantly enlarged by the Annex of the RAD. Of the 10 Member States studied, four have regimes with an extremely narrow scope, two limit representative action to the domain of the RAD, four have a scope that goes beyond consumer law and extends to some additional specific areas, and three have regimes with a general scope.

Thus, divergencies persist with respect to the scope of the collective redress regimes for domains which do not strictly belong to consumer law. The consequences are important not only in terms of forum shopping, but also in terms of the effectiveness of rights enacted at the EU level, which might remain unenforced. Infringements arising out of competition law, labour law, and fundamental rights, encompassing some digital rights of citizens not acting exclusively as consumers, remain excluded from the RAD. Therefore, enforcement is dependent on the regulatory provisions at the domestic Member State level. The remaining fields, for which a representative action is not yet in place, should be included in the collective redress regime expediently. The competition sector would be a good start, as follow-on actions are currently only able to be brought in those regimes in which a trans-substantive or horizontal scope has been implemented. This is detrimental to consumers and small and medium-sized enterprises (SMEs) of other Member States where the RAD has been transposed following the minimum standards. The only consolation for these consumers is that they could make use of the redress mechanisms available in other Member States if the respective courts have jurisdiction over the defendant. Alternatively, other mechanisms of aggregate litigation can continue to be used. Perhaps the regulatory future of representative actions lies in the need to adopt a trans-substantive or horizontal scope, as opposed to the sectoral one followed by the RAD.

The fact that representative action encompasses both injunctive and compensatory relief should also be highlighted. It makes it possible to bring a representative action for injunctive and compensatory purposes consecutively, which is something that was debated in some jurisdictions prior to the implementation of the RAD.

b. Standing and admissibility

The domestic implementations of the RAD have complied with the mandatory standing rules and recognise the standing of qualified entities designated and listed by other Member States and included in the list handled by the European Commission for cross-border representative actions. This can be expected to facilitate collaboration in cross-border actions or in actions with the same defendant(s).

c. Opt-in for non-residents

There is a mandatory provision of the RAD that imposes opt-in for non-residents of the Member State where the action is brought. This has led some Member States to take a step backwards. For instance, Member States which have had an opt-out by default rule, like the Netherlands or Portugal, now impose opt-in for ‘foreigners’ to the extent the action falls within the scope of the RAD. In the past, Dutch case law had approved opt-out settlements that included non-residents. Even though the expectation is that this will continue to be the case in settlement-only cases, the fact that there is a difference between the collective action and collective settlement contexts is noteworthy.

II. Divergencies in the implementation of non-mandatory provisions

For the provisions of the RAD that permit Member States discretion in how to implement them, there is no harmonisation across the Member States. On the contrary, players have taken the opportunity to adopt minimum standards which are somewhat disadvantageous to consumers. Most of minimum standards are of a procedural nature and are therefore subject to the autonomy of the Member State. This autonomy has led to divergencies in the implementation process.

a. Standing in domestic representative actions

There is no harmonisation with respect to entities other than the designated ones that have standing to act in collective redress actions. These other entities vary from public entities to private entities established ad hoc. Member States also deal very differently with parallel proceedings: solutions vary from 'first to file' to 'beauty contest', where the court has to decide which representative is most competent and suitable to represent the interests of the group.

Likewise, admissibility rules are sometimes quite extensive and resemble the certification tests common in more experienced jurisdictions. The rules are concerned, among other things, with the representativeness of the claimant, the so-called (territorial connection) scope rule, the composition of the group, or the similarity (homogeneity) of the claims.

b. Opt-in v. Opt-out

Divergent solutions are visible in the participation provisions across the Member States. Only six out of the 25 EU Member States that have already transposed the RAD, and two out of the 10 Member States analysed in this report, have implemented an opt-out system. The rest implemented an opt-in regime or a mixed system. For the mixed systems, one can distinguish between those where the judge decides on the regime, and those where the lawmaker has set the conditions determining the application of opt-out or opt-in, for reasons related to the amounts per capita at stake or the sound administration of justice.

The majority of Member States have followed an opt-in system. The stage of proceedings at which members can opt-in, as well as deadlines for participation, are different from one Member State to another. They range from early to late participation modes and vary according to the date until which individuals can express their interest in being part of the group. Opt-in may have to take place before the initial hearing or the admissibility decision, or may be possible until much later, including after a decision becomes final.

The effect on group size of opt-in timing is different than for opt-out. In general, it can be said that the earlier the opportunity to opt-in is offered in the proceedings, the smaller the group will be. This is because people are naturally inactive.[44] This rational apathy effect is amplified if it is highly unclear and/or uncertain what benefit injured parties will receive from 'the effort of taking an action'. This is more likely to be the case early in the proceedings than later in the proceedings.

In addition, the rational apathy effect may be reinforced if the individual advantage that the injured party can gain from the required action (registration) is known but relatively small, for example in situations of scattered damages. The extent to which this can be solved with late opt-in systems (as in France or Belgium) that allow people to decide to participate once a favourable judgment is issued, is unclear. The rational apathy effect can be further amplified if the opt-in is subject to conditions that are objectionable to the individual, such as filling out long or complicated forms and/or uploading documents. With opt-out, we see how the same dynamic has precisely the opposite effect: the earlier the opt-out occurs and the more effort injured parties have to put into it, the less likely it is that the individuals will be motivated to do so and the larger the group of injured parties will be.

Finally, the size of the group is influenced by the frequency with which the mechanisms of opt-in or opt-out are applied in a proceeding. The chance to opt in or out may be offered several times in a proceeding, for example first after the formal admissibility decision and again later after the material claim has been decided. It is also possible that an opt-in option in the formal admissibility phase is followed by an opt-out option in the settlement phase, and vice versa. Clearly, the different combinations of participation options and scenarios have a different effect on group size, and on the litigation and settlement dynamics. A good understanding of the implications of the different design options when implementing the RAD is necessary to understand and anticipate the funding, litigation, and settlement dynamics that are subsequently likely to occur.

c. Communications

Provisions on communication, which are absent from the RAD, are likewise lacking in the domestic collective redress systems. Concerns regarding who communicates with the class, and when, and who bears the costs of such communication, are highly relevant. Only a few Member States have included provisions about these issues and determine, for instance, that the costs are borne by the defendant or that the latter must communicate what the judge orders. This is understandable in view of the high costs and/or the fact that defendants quite often, and especially in cases of ongoing contractual relationships or data breaches, have the details of the class members. In our view, the question of costs needs to be separated from who communicates a message to the class and/or what the content of that message is.

[44] This is called the status quo bias in the literature.

In more experienced jurisdictions, after the admissibility period or certification, if there is one, or after the defendant is served with a collective action, the question of who, how, and what is communicated to the class is subject to judicial scrutiny and that defendants cannot act in this regard without permission from the court. Although a more traditional view could be that collective redress is no different than any other type of litigation, and defendants should act no differently than they would in an individual case, in reality the opposite is true. There is therefore much to be said for a hard and fast rule that once an action is certified, any communication with the class about the subject of the action should take place exclusively via the class representative. Such communication between the defendant and the class should, in any event, be subject to judicial scrutiny. Indeed, communication with class members has ethical, deontological, and strategic dimensions that should not be underestimated. The next generation of legal provisions should consider this solution to assist the case management and avoid the chaos and unintended consequences another solution might create.

Registries and other measures to publicise representative actions (carried out by agencies or ministries) are already in place, or are being set out, in various Member States. However, these measures often do not include the publication of relevant deadlines, specifically deadlines to opt-in; instead, they are limited to providing information about the action and the procedural stages.

Altogether, whether for opt-out or opt-in, timelines for adhesion and communication policies matter in terms of the ability of a case to be financed and settled. Timelines are capable of leading parties to settle, or not to settle, under considerations of finality and the outcome for the image of the defendant.

There is one non-mandatory provision of the RAD which has been transposed in a homogeneous way, and this relates to the formal notice to be addressed to the defendant prior to bringing a collective action for an injunction. The period of time that must pass between communicating the notice and the beginning of the action can differ.

d. Third-party funding and cy-près

While the regulation of third-party funding has often followed the principles set out in the RAD in terms of transparency, independence, and absence of conflict of interest, the non-mandatory character of the rule led to some exceptions whereby third-party funding is either not allowed or is heavily limited in terms of the remuneration of the funder. Where that is the case and there are no alternative viable funding options, it remains to be seen whether collective redress will take off at all. Our expectation is that it will not, at least not via the RAD instruments.

Provisions on the destination of non-recovered funds (cy-près) are rare, once again due to the soft-law style of the relevant RAD provision. This rule needs to go hand in hand with another one authorising the judge to carry out a global assessment of the damages, as opposed to evaluation on an individual basis.

e. Courts handling representative actions

Whether courts with competence to hear collective actions should be specialised or not has been dealt with differently by different Member States. There is no harmonisation across the types of courts dealing with representative actions. Theoretically speaking, there is no ideal solution, as the management of collective action cases requires skills and resources. In other words, specialised courts with no capacity are not better than non-specialised courts with competent and pro-active judges. The current comparative study has shown that while many Member States have granted jurisdiction to specialised courts, some have designated already existing courts as competent in collective actions. The EC-React initiative of the European Commission, which offers a community and expertise-building platform for the judiciaries in Member States dealing with collective redress,[45] will probably reduce the importance of whether specialised courts and judges are or should be dealing with collective redress. There are different roads that lead to Rome.

[45] On the importance of judicial training in relation to collective redress, see also Ianika N. Tzankova, 'Case management: the stepchild of mass claim dispute resolution' (2014) 19(3) Uniform Law Review 329.

Concluding remarks

The existence of a collective compensatory device for consumers in all the Member States of the EU should be welcomed. A comparative overview has shown that the RAD is, in its own way, a milestone in the EU–although the fact that implementation has taken a long time in most Member States may raise concerns as to the level of commitment to consumer protection. Divergencies in the implementation process suggests that there might be twenty-seven shades of representative actions and that disparities will remain. However, until collective actions begin to be brought under the new regimes, the effectiveness of the different transposition measures cannot be properly assessed, compared, and contrasted.[46] Our expectation is that the Member States that manage to tackle the issue of funding and length of proceedings best are going to be the frontrunners in European consumer collective redress.

The evaluation scheduled for 2025 should not be a missed opportunity to deal with the pressing need for harmonisation of international private law rules, to establish which implementation model has been most successful, and to determine which additional measures should be taken. We have high expectations of the EC-React initiative of the European Commission that promotes 'bottom up-harmonisation'. The combination of coordinated bottom-up and top-down initiatives would certainly bring harmonisation of collective redress and consumer protection in the EU to the next level.

[46] See Maria Jose Azar-Baud, 'The implementation of the RAD in the MS/State of play' 2024(3) European Journal of Consumer law (forthcoming).

Authored by*
Maria José Azar-Baud, University of Paris-Saclay
Alexandra Giannopoulou, Digital Freedom Fund
Ander Maglica, University of Milan
Ianika Tzankova, Tilburg University

* The article is the product of a collaborative effort of the authors, who are presented alphabetically. While the final work is the product of a collaborative and feedback process, we would like to highlight the division of labour in the initial write up: Ander Maglica authored Titre 1 and 2, while Ianika Tzankova and Maria José Azar-Baud wrote Titre 3. The Introduction and methodology were mainly written by Alexandra Giannopoulou, with the contribution of all authors.

Copyediting
Emma Irving

Creative Direction
Marea Zanlungo

Graphic Design
Justina Leston

Illustrations
Kruthika NS

digiRiSE

Developing Information, Guidance, and Interconnectedness
for (Charter) Rights Integration in Strategies for Enforcement

Funded by the
European Union

Funded by the European Union. Views and opinions expressed are however those of the authors only and do not necessarily reflect those of the European Union or the CERV Programme. Neither the European Union nor the granting authority can be held responsible for them.

Systemic and transformative change happens when impacted people take collective action and collaborate with others to build power to challenge the root of their oppression. With this research, we (co)create and share information, strategies, and best practices designed to protect the EU Charter of Fundamental Rights in the digital sphere through strategic collective action litigation.

We hope to provide the foundational elements to build nourishing community inclusion and collaborations that will attempt to use legal tools such as collective redress to facilitate access to justice for everyone.

DFF Digital Freedom Fund

digiRISE