Chapter 3

Major European Objections and Fears Against the Opt-Out System: Superego, Ego and Id

This chapter presents and analyses the objections against class actions and inquires why the appearance and reception of collective actions, especially the notion of “representation without authorization”, have sparked furious opposition in Europe. It addresses and refutes the major arguments and fears against the opt-out system (unconstitutionality, European traditionalism, technical difficulties and abusive litigation), and inquires whether these are genuine scruples or pretexts veiling a deeper aversion against class actions. It is argued that the headspring of Europe’s instinctive resistance against American class actions and the subconscious reason why it is so difficult to reconcile the “Copernican turn” of class actions with European traditionalism are the taboo of party autonomy and the state’s entrenched prerogative to enforce the public interest. An inquiry into the deep layers reveals that the European reaction may be traced back to the peculiar European thinking about the relationship between the market (or private enterprise) and the public interest and the continental notion that the enforcement of the public interest is the inalienable prerogative of the state.¹

3.1 European Objections Against Class Actions: Scruples or Pretexts?

Class actions, and in particular the notion that group members may be represented without express authorization, have been criticized from four angles. First, “representation without authorization” is claimed to be unconstitutional due to its encroachment on private autonomy and, second, to be alien to continental legal traditions. Third, the practical feasibility of class actions has been impugned with reference to technical difficulties of identification and proof. Fourth, class actions have been claimed to inflict significant social damages due to their being prone to abusive litigation (litigation boom and blackmailing potential).

¹Concerning the repetitious European debate on collective actions, see Nagy (2015).

3.1.1 *Constitutional Concerns: Private Autonomy and Tacit Adherence*

The opt-out system may raise constitutional concerns, since “representation without authorization” may impair group members’ private autonomy, which consists, in this context, of the right to decide whether or not to enforce a claim and how to enforce it.² However, there are quite a few compelling arguments that suggest that the opt-out scheme, as far as small claims are concerned, should not be outright unconstitutional. Although the collective action may certainly be shaped in a manner that goes counter to constitutional requirements, the constitutional concerns relating to small claims are mainly an optical illusion.

European traditionalism is often wrapped up in constitutional parlance. In Germany, opt-out class actions appear to have been rejected, among others, for constitutional reasons: it has been argued that representation without authorization may raise serious constitutional concerns, e.g. it may impair the right to a hearing (*Recht zum rechtlichen Gehör*) and the right of disposition (*Dispositionsgrundsatz*).³ While it could be argued that silence should be regarded to imply acceptance, such a legal consequence may be entailed only by proper notice and it has been highly questionable whether constructive knowledge would suffice in this regard.⁴ The foregoing constitutional concerns have been taken so seriously that in 2005 the German Federal Cartel Office (*Bundeskartellamt*), notwithstanding the very strong policy for competition law’s private enforcement, discarded the idea of opt-out collective actions apparently because it was said to restrict the right to a hearing and to violate the principle that the party is the master of his own case (right of disposition).⁵

In the context of French law, it has been consistently referred to the principle of “*nul ne plaide par procureur*” (“no one pleads by proxy”).⁶ According to this entrenched principle of French civil procedural law, for having standing, the plaintiff has to have a legitimate interest in the case and, to be legitimate, the interest must be direct and personal; as a corollary, all the persons involved in the lawsuit must be identified and represented in the procedure.⁷

It is true that mandatory representation, that is, representation without authorization not supplemented by the right to opt-out, seems to be irreconcilable with constitutional requirements. For instance, in Spain, where the judgment’s *res judicata* effects may extend to non-litigant group members, it has been convincingly argued

²Commission Communication Towards a European Horizontal Framework for Collective Redress, COM (2013) 401 final, p. 11. See Strong (2013: 239–247) (Referring to these considerations as the plaintiff’s “individual participatory right”).

³See Greiner (1998: 189), Fiedler (2010: 237–245), Stadler (2011: 172–173), Lange (2011: 129–171), Geiger (2015: 245–255).

⁴Stadler (2015: 569–578). For arguments that public notice in collective actions does not violate the principle of disposition, see Halfmeier (2012: 183).

⁵Bundeskartellamt (2005: 30–31).

⁶Mazen (1987: 383–384).

⁷Poisson and Fléchet (2012: 166).

that absent a specific statutory provision, the right to opt out arises from the constitutional principles of due process and access to justice.⁸ However, representation without authorization supplemented with the right to opt out may merit a different treatment. It is noteworthy that this is in line with the US Supreme Court's stance that class actions based on representation without authorization meet the requirements of due process as long as members have the right to opt out.⁹

It has to be noted that a comparable set of constitutional arguments may be lined up for the introduction of collective actions.

First, in the absence of a collective litigation mechanism, numerous small claims would not get to court¹⁰ and, hence, the collective action confers solely benefits on group members (provided they do not run the risk of being liable for the defendant's legal costs in case the group representative fails to win the action). It would be perverse to refer to the impairment of private autonomy in a case characterized by obligee inertia,¹¹ where the law does not ensure the claim's practical enforceability.

Second, opt-out systems embed, by definition, the right to opt out. While mandatory representation (that is, when group members are compelled to be part of the group and cannot opt out) may obviously go counter to the right to private autonomy (that is, the right to decide whether or not to sue, and how to enforce the claim), there is no "forced membership" in case of an opt-out system. Group members can leave the group without any further. The opt-out scheme merely reverses the mechanism of adherence and infers assent from silence. In principle, a group member has to submit a declaration, if he envisages being part of the action. In the opt-out system, a group member has to submit a declaration, if he does not want to be part of the action. The group member makes the decision and since experience shows that the vast majority of group members does not opt out, arguably, it is reasonable to reverse the mechanism of adherence.¹²

It has to be noted that the opt-out system is much more constitutional and preserves private autonomy much better than the EU Injunction Directive¹³ covering 17 consumer protection Union acts.¹⁴ The Directive authorizes various entities to launch proceedings for a declaratory judgment or injunction on behalf of a class of

⁸For a comprehensive analysis on the Spanish class action mechanism, see Mieres (2000). See also Piñeiro (2009: 61–88), Jiménez (2008), López (2001), Estagnan (2004: 9–10).

⁹*Phillips Petroleum v Shutts* 472 US 797, 813–814 (1985).

¹⁰Udvarý (2015: 242–244).

¹¹See Eisenberg and Miller (2004: 1529, 1532), Issacharoff and Miller (2009: 179, 203–206), Issacharoff and Miller (2012: 37, 60).

¹²See Eisenberg and Miller (2004: 203–206), Issacharoff and Miller (2012: 60).

¹³Directive 2009/22/EC on injunctions for the protection of consumers' interests, [2009] OJ L 110/30. See Trstenjak (2015: 689–691).

¹⁴See Annex I of the Directive, last amended by Directive 2019/771 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28). The Annex currently lists the following 17 Union acts: Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31); Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48); Directive 89/552/EEC on the coordination of certain provisions

unidentified consumers without the need for any individual authorization or assent, and, theoretically, it does not even make it possible for group members to leave the group. This means that group members cannot opt-out even if they want to; they are stuck in the group. Still, the constitutionality of the Injunction Directive has never been questioned.

Third, it has to be noted that while the right of disposition is constitutionally protected, access to justice is equally a constitutional fundamental right. The purpose of collective litigation is to make practically unenforceable rights a reality.

Whatever the strength of these points may be, interestingly, the rigid unconstitutionality arguments have found no reflection in the constitutional case-law. This suggests that while certain limits do apply, opt-out mechanisms are not outright unconstitutional. While representation without authorization does call for a justification, it may be warranted in small-value cases, which would very likely not be brought to court anyway. The cases that can be raised from national constitutional laws, used as arguments that the opt-out scheme is irreconcilable with national constitutional requirements, can be distinguished from the enforcement of small pecuniary claims in an opt-out collective procedure. In fact, in 2014 the French Constitutional Council (Conseil constitutionnel) confirmed the recently introduced French regulatory regime, which, in certain points, has salient opt-out features.

The European Court of Human Rights (ECtHR) addressed the question of representation without authorization¹⁵ in *Lithgow v. United Kingdom*.¹⁶ The case emerged in the context of the UK's expropriation of a British company. To avoid the flood

laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23); Directive 90/314/EEC on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59); Directive 93/13/EEC on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29); Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19); Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12); Directive 2000/31/EC on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1); Directive 2001/83/EC on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67); Directive 2002/65/EC concerning the distance marketing of consumer financial services (OJ L 271, 9.10.2002, p. 16); Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22); Directive 2006/123/EC on services in the internal market (OJ L 376, 27.12.2006, p. 36); Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, p. 10); Directive 2013/11/EU on alternative dispute resolution for consumer disputes (OJ L 165, 18.6.2013, p. 63); Article 13; Regulation 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1); Article 14; Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations 2006/2004 and 2017/2394 and Directive 2009/22/EC (OJ L 60 I, 2.3.2018, p. 1); Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

¹⁵For an analysis on the ECtHR case-law, see Strong (2013: 243–245).

¹⁶Case no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 *Lithgow v. United Kingdom*, 8 July 1986, [1986] 8 ECHR 329.

of individual actions, the law on nationalization provided for the appointment of a “stockholders’ representative”, who was to be elected by the shareholders or appointed by the government and whose power of attorney to claim compensation precluded group members’ individual actions. In other words, the scheme established mandatory representation without authorization where group members were forced to join and could not opt out.

The ECtHR proceeded from the proposition, as established in *Ashingdane*,¹⁷ that the

right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals’.

The limitations may not impair the very essence of the right and need to “pursue a legitimate aim” and there needs to be “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹⁸ As to the scheme at stake, the ECtHR came to the conclusion that these conditions were met. The very essence of the right to a court was not impaired,¹⁹ because individual rights were (indirectly) safeguarded: the group representative was “appointed by and represented the interests of all” group members and individual group members could seek remedy in case the representative breached one of his duties. This conclusion was not undermined by the fact that the group members’ right to control the representative was very limited and it was not the individual shareholders but their community who was entitled to exercise these rights.²⁰ Furthermore, the Court held that the scheme “pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalization measure, a multiplicity of claims and proceedings brought by individual shareholders” and there was “a reasonable relationship of proportionality between the means employed and this aim.”²¹

The above jurisprudence was confirmed in *Wendenburg*.²² Here, in the context of a procedure before the German Federal Constitutional Court (Bundesverfassungsgericht), the ECtHR, referring to *Lithgow*, held that while “the applicants were barred from appearing individually before that court”, “in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court.”

National constitutional courts followed a very similar line of reasoning.

In the early ‘90s, due to the particular historical situation, the Hungarian Constitutional Court had the chance to adjudicate cases centering around representation without authorization. In 1989, the socialist regime collapsed in Hungary and the

¹⁷Case no. 8225/78 *Ashingdane v. United Kingdom*, 28 May 1985, [1985] ECHR 8, Series A no. 93, para 57.

¹⁸*Lithgow*, para 194.

¹⁹Para 196.

²⁰See Footnote 18.

²¹Para 197.

²²Case no. 71630/01 *Wendenburg and Others v. Germany*, 6 February 2003, [2003-II] ECHR 353.

country adopted a new constitution,²³ while the laws adopted beforehand persisted. Although the parliament tried to weed Hungarian law of the provisions that were not reconcilable with a constitutional democracy, some reminiscences remained and had to be quashed by the Constitutional Court itself. One of these was the rules of socialist law that conferred mandatory representation without authorization on the attorney general and trade unions. These entities could launch civil proceedings even against the obligee's will. These laws had a very peculiar feature: the right of representation of these entities was general and mandatory, that is, they not only lacked the party's authorization, but the represented person could not opt out and terminate his own action. These rules were struck down by the Constitutional Court. However, the court also established that, if justified, "representation without authorization" can be constitutional. Albeit that these cases involved no class actions, they provide clear guidance also as to the opt-out principle's constitutionality.

In *Case 8/1990 (IV.23.) AB*, the Hungarian Constitutional Court dealt with trade unions' right to represent an employee without authorization. The constitutional concerns were entailed by the trade union's "mandatory power of attorney" and not by a "presumed power of attorney." The legislation did not prevent trade unions from exercising the right of representation against the employee's will, which were authorized to intervene also in matters where the employee was not a member of the trade union. The Constitutional Court suggested that the legislator may maintain the trade union's right of representation in relation to its own members.

In *Case 1/1994. (I.7.) AB*, the Constitutional Court dealt with the attorney general's power to act on behalf of private parties. The Court held that party autonomy (right of disposition) embraces both the liberty to act and the liberty not to act; the attorney general's all-pervasive power to sue and appeal without the party's express assent restricts the party's constitutional rights and needs to be examined whether this restriction is necessary and proportionate. In this case, the Constitutional Court came to the conclusion that there were no constitutionally acceptable legitimate ends justifying the attorney general's blanket power to act on behalf of the party. Here again, the most important source of concern was the attorney general's "mandatory power of attorney", which—if warranted by an important national or economic interest—could be exercised also against the party's will. At the same time, the Constitutional Court did not question the attorney general's power to sue in cases where the obligee was not able to protect his rights. Quite the contrary, the Court held that in such cases representation without authorization is considered an inevitable restriction of party autonomy (right of disposition) and

the protection of the subjective rights of the party who is unable to enforce or protect his rights is the constitutional obligation of the state. Accordingly, the state has to ensure that in such cases one of its organs acts for the sake of protecting the rights of the individual.

²³Technically, it amended the old constitution comprehensively. However, in essence, the amendment, in fact, created a new constitution.

In sum, the case-law of the Hungarian Constitutional Court suggests that representation without authorization may meet the constitutional requirements, if it is justified by a legitimate end. Both the absence of a “mandatory power of attorney” and the party’s right to opt out point towards compliance with the constitutional requirements. While the above cases give no guidance as to whether public notice is sufficient or group members need to be informed individually about the collective action and the right to opt out, they indicate that if the party is unable to protect his rights, the state is even obliged to intervene.

The French Constitutional Council (Conseil Constitutionnel) examined the question of representation without authorization²⁴ first in 1989 in the context of trade unions’ right to launch proceedings on behalf of their members, and recently it scrutinized the *de facto* opt-out mechanism introduced by the French legislator in 2014.

The matter concerning group actions initiated by a trade union on behalf of its members became famous in the European scholarship on class actions and had been referred to as an authority to justify the unconstitutionality of the opt-out system. Not surprisingly, this case centered around the issue of proper notice, which was considered to be an essential requirement against representation without authorization.

Here, the French Constitutional Council held that the employee is to be “afforded the opportunity to give his assent with full knowledge of the facts and that he remained free to conduct personally the defense of his interests” and he shall have the opportunity to opt out from the procedure. Furthermore, “the employee concerned must be informed by registered letter with a form of acknowledgement of receipt in order that he may, if he desires so, object to the trade union’s initiative.” This ruling was interpreted by many as excluding the possibility of an opt-out system as such schemes secure no actual knowledge.²⁵

Although this question lost much of its significance, as the 1989 decision, whatever its proper construction may be, seems to have been jumped by the 2014 decision analyzed below, it has to be noted that, arguably, the fact pattern addressed by the 1989 decision can be distinguished from opt-out systems in small claim procedures. The former dealt with a law that authorized trade unions to launch any action (*toutes actions*) on behalf of the employee, including claims of unfair dismissal.²⁶ Pecuniary small claims can be clearly distinguished from employment law claims at large, especially unfair dismissal matters: the latter normally involve higher stakes, higher monetary value and may lead to the employee’s readmission (which entails personal consequences). Furthermore, the French Constitutional Council did not hold that representation without authorization or inference of the right of representation from the employee’s silence would be unconstitutional. Quite the contrary, it held

²⁴In relation to French constitutional considerations, see Poisson and Fléchet (2012: 65–166).

²⁵Dec. Cons. Const. N°89-257 DC, July 25th 1989. Reproduced in Magnier and Alleweldt (2008: 2).

²⁶*Id.* at para 25.

that if the employee fails to object to the trade union's procedure, he can be regarded as adhering to it.²⁷ The French Constitutional Council treated this case rather as an issue of notice: the employee has to be informed by registered mail and actual notice has to be ensured.²⁸ Accordingly, the requirement established by the French Constitutional Council concerning opt-out regimes was proper notice. It has to be taken into consideration that, as noted above, the French statute's opt-out scheme covered the whole spectrum of employment claims and the constitutional requirements concerning the means of notice may be less stringent in case of small-value pecuniary claims.

In 2014, France adopted collective action rules that remained within the limits set up by the decision of 1989. Although under the rules of 2014, the group representative may launch a collective action without the express authorization of group members, the final judgment, in essence, will extend only to those who expressly accept the award; at this stage, tacit adherence is not sufficient. This regime passed the test of constitutionality. It seems that it was decisive for the French Constitutional Council that the *res judicata* effects cover solely those group members who received compensation at the end of the procedure.²⁹ Apparently, the circumstance that only benefits accrue to group members and that the judgment's *res judicata* effects cover only those group members who assented to it (since compensation can be paid only if the group member accepts the final judgment), were sufficient to satisfy the constitutional concerns.

All in all, although opt-out collective actions do raise constitutional issues in some EU Member States, the above arguments and case-law suggest that they are far from irreconcilable with the constitutional traditions common to the European Union's Member States.

3.1.2 Opt-Out Collective Actions Are Alien to Continental Legal Traditions

This statement is, in fact, not true. It may have been true some decades ago, however, in the last couple of decades Europe has seen the appearance of collective action laws in a number of Member States that enable the enforcement of pecuniary claims in an opt-out system (as will be discussed below). Furthermore, EU law itself contains a very important and popular opt-out mechanism that permits representation without authorization (EU Injunction Directive).

²⁷Id. at paras 25–26.

²⁸Id. at para 26.

²⁹Decision 2014-690 of 13 March 2014 (Le 14 novembre 2014, JORF n°0065 du 18 mars 2014, Texte n°2, Décision n° 2014-690 DC du 13 mars 2014), paras 10 and 16.

The Injunction Directive covers 17 consumer protection Union acts³⁰ and empowers various entities to launch proceedings for a declaratory judgment or injunction on behalf of a class of unidentified consumers, without any need for individual authorization or assent. The proposition that judgments rendered in collective actions for an injunction may and shall have legal effects on all interested consumers was confirmed by the CJEU in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*³¹ The case dealt with Article 7 of the Unfair Terms Directive,³² which enshrines a similar collective action for injunction. The ruling may be extrapolated to all collective actions coming under the Injunction Directive.

“[T]he national courts are required (...) to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC [general business conditions] apply will not be bound by that term. (...) [The Directive] does not preclude the declaration of invalidity of an unfair term included in the GBC of consumer contracts in an action for an injunction (...) from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings; *where the unfair nature of a term in the GBC has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that consumers who have concluded a contract with the seller or supplier to which those GBC apply will not be bound by that term.*”³³

What is more, the procedure provided for by the Injunction Directive is, literally speaking, not an opt-out scheme (in fact, it is “worse”), since it does not make it possible for group members to leave the group. That is, group members cannot opt out even if they want to—they are stuck in the group. Although pecuniary claims cannot be enforced by means of this mechanism, from the perspective of legal tradition this should make no difference, since both pecuniary and non-pecuniary claims are, legally speaking, claims. It seems that there is no legitimate reason to accept the opt-out system for declaratory judgments and injunctions and to pronounce this an alien conception in relation to pecuniary claims.

Although the opt-out system does qualify as a minority position in Europe, it is far from being unknown. Currently, in the European Union there are 10 Member States where it is possible to enforce pecuniary claims in an opt-out system: Bulgaria,³⁴

³⁰See Annex I of the Directive, last amended by Directive 2019/771 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

³¹ECLI:EU:C:2012:242.

³²Directive 93/13/EEC on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

³³Paras 43–44 (emphasis added).

³⁴Chapter 33, Sections 379–388 of the Bulgarian Code of Civil Procedure, for an English version of the statutory text, see <https://kenarova.com/law/Code%20of%20Civil%20Procedure.pdf>. Accessed 20 April 2019. See Katzarsky and Georgiev (2012: 64).

Belgium,³⁵ Denmark,³⁶ France, Greece,³⁷ Hungary,³⁸ Portugal,³⁹ Slovenia,⁴⁰ Spain⁴¹ and the United Kingdom.⁴² As illustrated above, although French law adopted a unique pattern, which formally retained the requirement of opt-in, the French system can be characterized as a *de facto* opt-out system. This means that approximately one-third of the Member States has an opt-out system in place.⁴³

Finally, it appears to be perverse to use tradition as a blocking argument when drafting a new scheme. It hardly seems to be reasonable to reject a new regulatory solution simply on the basis that it is new. The opt-out scheme is, indeed, a novel regulatory solution in continental Europe, however, it can be judged only after a full-blown analysis, taking into account its merits and drawbacks. It would be truly perverse to say, in the course of searching for the regulatory solution to be adopted, that a new regulatory concept should not be adopted simply because it is new and not part of the law (the law which is considered for reform).

³⁵The Belgian system leaves it to the judge to decide whether the action should be conducted in the opt-in or the opt-out scheme. Law Inserting Title 2 on “Collective Compensation Action” in Book XVII “Special Jurisdictional Procedures” of the Code of Economic Law, 28 March 2014, *Moniteur Belge* (M.B.) (Official Gazette of Belgium (29 March 2014) (Loi portant insertion d’un titre 2 «De l’action en réparation collective» au livre XVII «Procédures juridictionnelles particulières» du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique).

³⁶In Denmark, it is up to the court to decide whether the action has to be conducted in the opt-in or the opt-out system. Sections 254a–254e of the Administration of Justice Act (*Lov om retstens pleje*). The rules on collective actions were inserted through Act no. 181 of 28 February 2007. This is very similar to the Norwegian system where it is up to the court to decide whether the proceedings have to be carried out in the opt-in or the opt-out system. Chapter 35 of Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act) (*Lov om meklung og rettergang i sivile tvister* (tvisteloven)). See Kiurunen and Lindström (2012: 234).

³⁷Articles 10(16)–(29) of Law 2251/1994 on Consumers’ Protection. For an English translation, see <https://www.eccgreece.gr/wp-content/uploads/2015/07/N2251-1994-enc2007-en1.pdf>.

³⁸Section 92 of Hungarian Competition Act (1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról); Sections 38–38/A of Hungarian Consumer Protection Act (Act CLV of 1997) (1997. évi CLV. törvény a fogyasztóvédelemről).

³⁹Act 83/95, of 31 August, on Procedural Participation and Popular Action (*Lei n.o 83/95, de 31 de Agosto, Direito de Participação Procedimental e de Acção Popular*), as revised by Decree-Law 214-G/2015, of 2 October.

⁴⁰Law on Collective Actions (*Zakon o kolektivnih tožbah—ZkolT*), Official Journal of the Republic of Slovenia No. 55/2017.

⁴¹Section 11 of Spanish Code on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*).

⁴²Part 19.6 (Representative parties with same interest) of Civil Procedure Rules (CPR). Andrews (2001: 251–252), Sherman (2002: 401–432). In the mechanism recently introduced in competition law, the Competition Appeal Tribunal decides, in a collective proceedings order, whether the procedure has to be carried out in the opt-in or the opt-out system, Sections 47A–49E of Competition Act 1998, inserted by Part 1 of Schedule 8 of the Consumer Rights Act 2015. See Waller (2015: 21–24).

⁴³Nagy (2010: 138–143).

The innovation of today is the tradition of tomorrow. Although its roots can be traced back to equity,⁴⁴ the institution of class action was inserted into US federal procedural law only in 1938. This regime was profoundly revised in 1966 and subjected to some minor changes in 2003.⁴⁵ It can be established that the US system of class action was finalized in 1966, since it was the 1966 reform that made the wide-spread use of class actions possible.⁴⁶ Today, this regulation is regarded as the “American tradition”, contrary to the continental tradition.

The classical litigation system proceeds from the assumption that the parties to the action are equal both in terms of money and capacity, have unlimited free time and resources to present their case. The reality of the 21st century is, however, not this. The age of masses is characterized by standardized contracts and standardized cases. The projection of the mass economy has already appeared in substantive law: the regime on unfair terms in standardized consumer contracts is based on the recognition of the fact that in the mass economy individual enterprises face masses. Collective actions recognize this in procedural law. “[I]ndividually tailored law-suits for consumers are often as much an anachronism as the concept that all cars that are put on the market should be handcrafted (...). [E]conomies of scale now dictate mass redress procedures for consumers prejudiced by a common legal wrong.”⁴⁷

3.1.3 It Is Very Difficult to Identify the Members of the Group and to Prove Group Membership

It is a frequent argument against class actions that in opt-out systems group members do not (or normally do not) get their money and the benefits of opt-out actions (that is, the moneys awarded) go to group representatives. The Commission’s Recommendation on Collective Redress contends that “an ‘opt-out’ system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and *so the award will not be distributed to them.*”⁴⁸

The above assertion is based on a fatal misunderstanding. Just as opt-in systems, opt-out collective action mechanisms aim to provide recovery to group members and, as a general rule, the award is normally distributed to group members and they really

⁴⁴*Montgomery Ward & Co. v Langer*, 168 F2d 182, 187 (1948); Yeazell (1987), Eizenga and Davis (2011: 8–9).

⁴⁵Dumain (2005: 221–248) and Edward (2002: 432–440).

⁴⁶See e.g. Pace (2008: 2), Eizenga and Davis (2011: 16), Coffee (2017: 1896), Hensler (2017: 966) (Referring to 1966 as the year of birth of the US class action.).

⁴⁷Trebilcock (1976: 270).

⁴⁸Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, p. 12. (emphasis added).

receive the money.⁴⁹ Although in certain systems “fluid recovery” or “*cy pres*” is available,⁵⁰ this does not have to be necessarily adopted along with the introduction of collective actions (though it is advisable).

Obviously, it is much simpler to allot the award in an opt-in system, since here group members are identified by coming forward to join the action. However, the award can be distributed to group members also in the opt-out system, if group members are identifiable. It is a regulatory choice whether the availability of collective actions should be limited to cases where group members are clearly identifiable and what degree of “identifiability” should be required. However, in numerous cases, the court judgment can define the group properly: by way of example, the subscribers of a dominant cable television company between 1 January and 31 December 2018; or those persons who had to pay a higher vehicle registration tax, which proved to be contrary to the rules of the internal market; or those EU citizens who had to pay a discriminatory tuition fee for the academic year of 2018–2019. Such a definition would make group members easily identifiable.

Although it is true that in certain cases it is difficult or even impossible to create a definition for identifying group members, this can be accomplished in numerous other cases. As a legislative option, identifiability could be made a pre-requisite of collective litigation. However, it would be perverse to argue that since the opt-out scheme would not work in certain cases, due to the lack of identifiability, it should be abandoned also in cases where it could work.

Contrary to the Recommendation’s assertion, in case of opt-out collective actions, the biggest trouble is not that group members are not identified—since, as noted, identifiability can be made a pre-requisite of the collective action. An important problem is that in certain cases group members are legally identifiable but proof of group membership may face serious practical hurdles. For instance, assume that taxi drivers fix prices, thus overcharging customers.⁵¹ Although the violation of antitrust law is proven and group members are legally identifiable, it is assumed that the vast majority of the victims would not be able to prove their membership, since they usually do not keep the receipts.

Nonetheless, even if group members cannot turn the award into cash, this does not necessarily entail that their share is paid out by the defendant (although it is easy

⁴⁹As regards claims administration, see Kinsella and Wheatman (2010: 273–274), Kinsella and Wheatman (2012: 338–348).

⁵⁰See Alexander (2000: 16), Foer (2012: 349–364) (“The normal remedies in a private antitrust case are a combination of injunctions and treble damages that are paid to the victim or victims of the anticompetitive activity. When an aggregate amount of damages is established, the primary objective is to distribute the damages to those who were injured. In antitrust class action litigation, however, it is often impossible or impracticable to compensate all victims. Administrative concerns may work against payments to individual plaintiffs, as in the case of an extremely large class where the fund is not sufficient to justify the transaction costs of distribution to individual claimants. Consequently, in some cases, there is money left over in the form of unclaimed funds. In such cases, courts sometimes employ the doctrine of ‘*cy pres*’ to put the unclaimed funds to ‘the next best use,’ which may include awarding funds to public interest organizations or charities for purposes related to the case.”).

⁵¹Alexander (2000: 16).

to argue that the wrongdoer should not keep the windfall of his mischief). Collective litigation does not necessarily imply collective enforcement. Although it is submitted that collective action mechanisms should encompass collective enforcement, there is no indication in the Recommendation that the proposed collective mechanism would extend to enforcement as well. In fact, it is a major shortcoming of most European schemes that they ignore that the purpose of the action, as far as pecuniary claims are concerned, is not a judgment but money.

Finally, it is submitted that while it is not inevitable that the share of non-identifiable group members is paid out to the group representative, it would be reasonable to oblige wrongdoers to pay compensation also for legally or practically non-identifiable group members. The law cannot leave the enrichment earned through an illegal conduct with the wrongdoer. From a social perspective, it appears to be more reasonable to give a windfall to the group representative than to leave an illegal enrichment with the wrongdoer (it is to be noted that this would not even amount to a windfall, taking into account that the group representative does invest a lot in the claim's enforcement). It is tempting to argue that this non-distributable money should be spent on a public interest purpose, like funding collective actions.

It is worthy of note that an effective collective action mechanism yields the highest benefits not when it is used but when it is not; collective actions may make practically unavailable civil recovery a reality. While in the absence of collective action several rules and rights established by the law are regarded as practically non-existent (and practically unenforceable), effective collective litigation makes the violation of these rules extremely risky and prompts enterprises to respect them.

3.1.4 Opt-Out Collective Actions Would Lead to a Litigation Boom and Would Create a Black-Mailing Potential for Group Representatives

Perhaps the most popular misunderstanding in respect of opt-out collective actions is that, similarly to US law, it would lead to a litigation boom and would enable group representatives, who aggregate a mass of claims, to blackmail defendants and to wring illegitimate settlements from them.⁵² These fears are completely unfounded.

There is no causality between the opt-out system and the alleged American litigation boom and blackmailing potential. In the US, the high number of class actions and the defendants' inclination to settle are not due to the opt-out rule but to the regulatory and social environment that surrounds this model.⁵³ Namely, US law contains a set of rules that are unrelated to class actions but catalyze their operation. By way of example, under US law, generous punitive damages are available and certain statutes

⁵²See e.g. Hodges (2008: 131–132).

⁵³For a detailed presentation of the statistical data, see Nagy (2013: 490–495).

provide for treble damages⁵⁴; the “American rule” on attorney’s fees does not follow the “loser pays” principle (that is, the parties pay their attorney irrespective of the action’s outcome); certain statutes (for example the Sherman Act, the Magnuson-Moss Warranty Act) provide for one-way cost-shifting: if the claimant wins, he is entitled to compensation for his reasonable attorney’s fees but this does not work the other way around; statistics demonstrate that the American society is much more litigious than the European⁵⁵; the operation of litigators is normally based on contingency fees and law firms work according to an entrepreneurial model,⁵⁶ where the law-firm invests money and working hours in the action, thus, in exchange for an appropriate risk premium, it takes over the risks of litigation from the parties; finally, jury trials and extensive pre-trial discovery smooth things down for the plaintiff and reinforce these factors. Taking this into account, it is easy to see that the alleged litigation boom and black-mailing potential (provided they exist) are as much peculiar to individual actions as to class actions. These are general features of the US system and not a specific characteristic of the class action.

The above is reinforced by practical experiments. The opt-out system is available in 10 EU Member States and none of these saw a “litigation boom” (not even a “litigation pop”).⁵⁷ In a continental legal and social environment, the opt-out system operates in a completely different manner than in the US. The experiences in Australia⁵⁸ and Canada⁵⁹ are also informative. In these countries, the opt-out class action was introduced (at federal and state level) and while it has provided effective remedy to group members,⁶⁰ no litigation boom occurred.⁶¹ Finally, it should not be disregarded that Europe is not the only region of the world where collective actions had to be accommodated to a civil-law environment: this happened in a number of Latin-American countries.⁶²

⁵⁴*BMW of North America, Inc. v. Gore*, 517 US 559, 116 S.Ct. 1589 (1996); *Cooper Indus. v. Leatherman Tool*, 532 US 424, 432, 121 S.Ct. 1678, 1683 (2001).

⁵⁵See Gryphon (2011: 567), Rodger (2011).

⁵⁶Alexander (2000: 12). Although attorney commercials are prohibited or restricted in several EU Member States, recently these prohibitions were eliminated or softened in quite of few legal systems. See Commission Report on Competition in Professional Services, COM/2004/83 final p. 14; Stephen and Love (2000: 987–1017).

⁵⁷Nagy (2013: 490–493).

⁵⁸In Australia, the institution of collective action was introduced into federal law in 1992. Federal Court of Australia Amendment Act 1991 (No. 181 of 1991). See Clark and Harris (2001: 289–320).

⁵⁹Several provinces of Canada introduced the institution of collective action, such as British Columbia, Class Proceeding Act 1995, S.B.C. ch 21 (1995); Ontario, Class Proceeding Act 1992, S.O. ch 6 (1992); Quebec, Quebec Civil Code, Book IX.; Newfoundland & Labrador, Class Actions Act, S.N.L., ch. C-18.1 (2001) (Newfoundland & Labrador); Saskatchewan, The Class Actions Act, S.S., ch. C-12.01 (2001) (Saskatchewan). The institution of class action is also part of the Federal Court Rules. Federal Court Rules, Part 5.1, Sections 334.1–39.

⁶⁰For an empirical analysis on the compensation forced out by class actions in Canada, see Piché (2018).

⁶¹For a detailed presentation of the statistical data, see Nagy (2013: 493–495). For a comparative analysis of Australia, Canada (Ontario and British Columbia) and the US, see Mulheron (2014).

⁶²See Gidi (2003: 311–408), Gidi (2012: 901–940).

According to European fears, the group representative can create an aggregate of claims through bunching a vast number of demands and can force out an unfair settlement with the defendant even in frivolous cases.⁶³ However, this blackmailing potential is an illusion. A group representative enforcing a €1 billion claim-aggregate has exactly the same blackmailing potential as the representative of a €1 billion individual claim. If European eyes see a black-mailing potential in the US system, this is not due to the US class action but to those principles and rules of general application which characterize the US system at large. For instance, because of the “American rule” on attorney’s fees, for the defendant, a settlement is a more attractive alternative, even if the plaintiff’s case is weak, since the defendant has to bear the attorney’s fees, even if he wins the case and the plaintiff’s claim proves to be frivolous. If the defendant enters a settlement, he can save the attorney’s fees. Furthermore, punitive damages and treble damages may multiply the action’s expected costs.

Assume that the legal costs attached to the action are € 200,000–200,000 for the plaintiff and the defendant, respectively; they have to bear these expenses irrespective of the outcome of the action. The claim’s value is € 1,000,000 and the plaintiff has a very weak case with a minuscule 10% chance to win. The claimant sues for the breach of antitrust rules, thus, under the Sherman Act, he is entitled to treble damages; furthermore, as an exception to the general “American rule”, he can claim reimbursement for his reasonable attorney’s fees in case he wins (that is, there is one-way cost-shifting).⁶⁴

Accordingly, (if disregarding court fees, inflation and the procedure’s length) a rational plaintiff would decide whether to sue on the basis of the following calculation. On the expected costs side, the expenses run to € 200,000. The expected income is the product of the claim’s value, the reimbursement for legal costs and the chance of success: $€ 320,000 = (€ 1,000,000 \times 3 + € 200,000) \times 10\%$. As a corollary, the balance of the law-suit is positive: $€ 320,000 - € 200,000 = € 120,000$, so it is rational for the plaintiff to sue.

The defendant, on the expenses side, also faces attorney’s fees in value of € 200,000 (which are not recoverable) and there is 10% chance that he will have to pay $3 \times € 1,000,000$ as damages and € 200,000 as reimbursement for the plaintiff’s reasonable attorney’s fees: $(€ 1,000,000 \times 3 + € 200,000) \times 10\% + € 200,000 = € 520,000$. At the same time, he cannot expect any income, since even if he wins, the only “return” is that he does not have to pay damages (the expected income is € 0). Accordingly, the defendant’s balance is negative $(€ -520,000 = € -200,000 + € -320,000)$. The defendant’s expected loss attached to the action is very significant in comparison to the claim’s value, although he has 90% chance to win.

Under such circumstances, the parties will endeavor to reach a settlement, where the plaintiff does not accept less than € 120,000 and the defendant is not willing to pay more than € 520,000. The precise amount will depend on the parties’ bargaining

⁶³Commission Communication Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, pp. 7–8.

⁶⁴15 USC. § 15.

skills. It is noteworthy that in the above case it is rational for the defendant to pay a sum that is higher than 50% of the claim's value, while the plaintiff has merely 10% chance to win.

If we put the above case in a continental legal environment, it would not be rational for the plaintiff to sue due to the low chance of success. For the plaintiff, the action's expected income is € 100,000 ($€ 1,000,000 \times 10\%$), while there is 90% chance that he will have to bear both his and the winning defendant's legal costs ($€ 400,000 \times 90\% = € 360,000$). Accordingly, the plaintiff's balance is negative ($€ 100,000 - € 360,000 = € -260,000$); this is due to the lack of treble damages and to the European approach on legal costs (two-way cost shifting).

3.2 The Headspring of European Taboos and Traditionalism: Party Autonomy and the State's Prerogative to Enforce the Public Interest

Interestingly, for the most part, the European resistance against class actions has been, ostensibly, rather dogmatic and, sadly, less based on public policy and "social engineering" considerations.⁶⁵ The opt-out principle puts the traditional European conception of civil procedure upside-down. While a civil procedure (in most parts of the world) centers around the claims pursued, the "Copernican turn" of class actions is that, so as to secure effective enforcement, they put the procedure in the center and organize the claims around it.⁶⁶ Nonetheless, this dogmatic rigidity is backed by the entrenched social concept that private litigation may have no public policy function, as this comes under the prerogative of the state. Class actions interfere with this ontological principle of civil procedure in Europe. Arguably, the public policy aversion against class actions got a specious constitutional label: party autonomy.

In the European tradition (as in most civil justice systems), civil procedure centers around the claims pursued and in the standard paradigm the procedure is a negligible inconvenience in comparison to the claim itself. This paradigm⁶⁷ proceeds from the sample situation where both parties are equal in rank and fortune and have unlimited time and resources to litigate and, either for this reason or because of the value of the claim, they do not grudge the money for financing the law-suit. On the other hand, in class actions, claims center around the procedure: the primary consideration is feasibility and effectiveness and individual claims are expected to adapt themselves

⁶⁵ Concerning the use of civil litigation to pursue public policy goals, see Karlsgodt (2012: 49).

⁶⁶ Cf. Azar-Baud (2012: 14) (In collective proceedings one needs to sacrifice certain procedural principles in order to enable access to justice.).

⁶⁷ Cf. Mazen (1987: 373) ("La procédure civile est en Europe largement imprégnée par un individualisme ancestral et se trouve, de ce fait, souvent inadaptée à une société de consommation marquée par l'ampleur des rapports de groupe et par la multiplication des contrats portant sur de faibles montants.").

to this (of course, without losing the right to individual litigation). The “Copernican turn” of class actions is that, instead of the claim, they focus on the procedure.

The European dogmatic criticism has veiled a very strong subconscious repulsion against opt-out class actions: it seems that European legal thinking feels aversion to private litigation’s having a public policy role (or even side-effect) and considers the latter to be the exclusive prerogative of the state, although collective actions are closely supervised and controlled by the court, from the opening of the procedure to the approval of a settlement and adoption of the final judgment.⁶⁸ This is in sharp contrast with the American conception of the relationship between public policy and civil litigation, which stands out markedly in case of class actions.⁶⁹ The 1966 introduction of opt-out collective actions was inspired by the idea that collective litigation on behalf of large groups of people could effectively supplement the government’s regulatory and enforcement efforts, especially in case of small claims which would not get to court anyway.⁷⁰ Furthermore, “[c]ivil rights cases and other suits seeking social change or to implement institutional reform were, in many ways, the quintessential type of class action envisioned at the time of the 1966 amendments.”⁷¹

It is very telling that the resistance of European dogmatism was less strong in cases where the opt-out principle’s social impact was limited or even insignificant. This may suggest that the apprehension about the privatization of a parcel of public policy was an unspoken argument against class actions. For instance, Directive 2009/22/EC, which consolidated Directive 98/27/EC and its amendments, empowers administrative agencies and consumer organizations to institute proceedings in an opt-out system for the infringement of the EU’s consumer protection rules. Currently, Directive 2009/22/EC lists 17 EU consumer protection Union acts that are strengthened by the possibility of collective action. However, the Directive is limited to claims for injunction and declaratory judgment⁷²; that is, this opt-out mechanism can be used to protect consumer rights short of monetary remedies.⁷³ Accordingly, the question emerges: if the opt-out system, notwithstanding the dogmatic aversion, may be acceptable as to non-monetary civil remedies, why should it not be acceptable as to monetary remedies? The answer might be that class actions are perceived to be a tool of privatizing public policy and this seems to be clearly alien to European civil-law. Absent the very special US regulatory environment (punitive damages, American rule on attorney’s fees, contingency fees, pre-trial discovery etc.), in Europe class

⁶⁸See Falla (2014).

⁶⁹Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 395 U. S. 130–131 (1969) (“[T]he purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”); Rathod and Vaheesan (2016: 308).

⁷⁰See Kalven and Rosenfield (1941: 684).

⁷¹Pace (2008).

⁷²Article 7 provides that Member States are free to give these organizations “more extensive rights to bring action at national level.”

⁷³See Koch (2001: 363).

actions are simply not susceptible of playing a policy role similar or even comparable to that played on the other side of the Atlantic. Still, it seems that the European reception has been impregnated by this fear.

The above traditionalist considerations emerged under various constitutional labels. These may be boiled down to the concept of party autonomy, which proved to be one of the most devastating arguments against opt-out class actions. Perversely, party autonomy is treated as a value in itself and is fiercely protected even against the right-holders' interests and presumed will: it is used as an argument against representation without authorization even in cases where it is empirically proven that virtually none of the group members would be inclined to make use of this autonomy and group members would only benefit from the class action. Obviously, it would be difficult to argue that party autonomy is more deeply rooted in Europe than in the United States. Instead, it seems that the stifling impact of this legal principle is not due to the comparatively higher significance attributed to it in Europe but to a strange blend of European dogmatism and the aversion against private litigation's public policy role.

According to the conservative thinking, party autonomy (the right of disposition) embraces the liberty to decide whether or not to enforce a claim, and implies that if someone decides to enforce it, he should be the master of his own case.⁷⁴ While citizens are free to waive some of their rights stemming from this liberty or to authorize others to exercise their rights, this has to be based on actual intent instead of constructive acceptance or presumed authorization. This argument is wrapped up in traditionalism (the opt-out principle is irreconcilable with the European legal tradition) and constitutionalism (representation without authorization is unconstitutional).

However, none of these arguments are sweeping (at least not as much as they were two decades ago). First, the European tradition has changed: currently there are 10 Member States which have an opt-out scheme; not to mention that as to non-monetary relief, due to Directive 2009/22/EC, Member States have a general obligation to provide for an opt-out mechanism in consumer matters. It would be difficult to argue that something that is practiced in 10 Member States and is demanded in respect of non-monetary claims is alien to the European tradition and thinking. Second, while the concept of representation without authorization has, at times, met fierce criticism, in fact, the constitutional requirements proved to be manageable when they were actually tested (see Sect. 3.1.1).

3.3 Summary

In the European scholarly discourse, resistance against US class actions has been predominantly dogmatic (constitutional doctrine of party autonomy) but, subconsciously, backed by the settled European thinking that the enforcement of public policy is the inalienable prerogative of the state and may not be privatized. Indeed,

⁷⁴Cf. Buxbaum (2014: 589–590).

the “Copernican turn” of opt-out collective litigation interferes with the ontological principles of European civil procedure: while a civil procedure traditionally centers around the claim, in the US class action claims center around the procedure.

European traditionalism has been often wrapped up in constitutional parlance, but the arguments against class actions’ constitutional conformity have found no reflection in the constitutional case-law. This suggests that while certain limits do apply, opt-out mechanisms are not outright unconstitutional and they may be constitutionally warranted in small value cases, which would very likely not be brought to court anyway.

The scholarship is replete with pieces supporting the introduction of the opt-out model in Europe and, disregarding the misconceived references to legal tradition and the phobia of foreign legal solutions, one can rarely find any analysis that would convincingly demonstrate that opt-out collective actions would lead to a litigation boom, settlements forced out by black-mailing and abuses.

The alleged repercussions of opt-out collective litigation in the US do not occur when this regulatory mechanism is transplanted to a European environment. Legal rules do not operate in a vacuum but are part of a legal, social, cultural and economic environment. US law contains a large set of institutions that catalyze the operation of the opt-out class action. In Europe, failing this catalyzing environment, the alleged excesses of the US practice are not to be expected. This conclusion is underpinned by the limited European empirical evidence on opt-out collective actions and by the examples of foreign legal systems that are comparable to the European regulatory environment and have adopted US-style class action schemes (Australia, Canada, Latin America).

As demonstrated above, in class action cases group representatives have the very same black-mailing potential (if any) as the plaintiff in an individual action. The US litigation landscape is shaped by legal institutions like punitive and treble damages, the “American rule” on attorney’s fees and one-way-cost shifting in certain cases, contingency fees, entrepreneurial law firms and litigious attitudes. This regulatory and social environment, which is responsible for what many Europeans attribute to class actions, is completely missing in Europe.

It seems that the European debate could not fully avoid the “ice-cream-shark-attacks” fallacy (also known as the “ice-cream-murder” fallacy). Studies show that the consumption of ice cream and shark attacks are positively correlated: the more ice cream is sold, the more shark attacks occur; and vice versa, the less ice cream is consumed, the less people are attacked by sharks. Is there correlation between the two? Yes, of course. Would it be reasonable to draw the conclusion that there is causation and advise people not to eat ice-cream to avoid shark attacks? Would abstention from ice-cream make our lives safer? No, of course, it would not. Both ice cream consumption and shark attacks increase in the summertime, when the number of people swimming in the seas and oceans is uncomparably higher than during winter, hence, the chances of shark attacks are obviously higher. Correlation does not mean causation. The alleged link between the US class action and certain abusive practices is nothing more but an optical illusion. A closer look at the perceived relationship confirms that there is not causation between the two, it is simple correlation.

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