Contribution to the Irish Law Reform Commission's Consultation Paper on Third-Party Litigation Funding

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European Justice Forum (EJF) is an organization deeply engaged in upholding and fostering civil justice systems in Europe which serve legal peace and equity in the various countries of the EU and within the whole of the EU (www.europeanjusticeforum.org). As such we would like to congratulate the Irish Law Commission for the thorough and thoughtful consultation paper issued to collect views from the public on future steps Ireland might take to reform its legal system.

At the same time, EJF is delighted and deeply impressed by the brilliant, circumspect, and comprehensive replies delivered to this consultation by the Irish Law Firm Kennedys with whom various exchanges on the subject had taken place in the past. **EJF fully endorses the replies given by Kennedys and thinks that by embracing this law firm's advice as given would put Ireland into an excellent position to take the lead on a meaningful and productive legislation on third party funding within the European Union** which would be conducive to a solution free of abuse potential for the benefit of all parties concerned with funded litigation: courts, lawyers, claimants, respondents as well as honourable funders and other intermediaries in this field of law enforcement.

The **minor additions** EJF would like to offer to the Commission on this occasion are the following:

- Given the high overall industry rejection rate of 90% (page 21 section 1.47 of the consultation paper), we suggest to take a closer look at the funding solution for **cases of public interest in the Canadian province of Québec** which we also describe in our position paper of 2022 (attached) and which might usefully complement the regulation of private third-party litigation funding (Q 6.15).
- It might be worthwhile to consider the cross-border dimension of potential future **funding** pouring into Ireland **from abroad**. In that vein, also the resolution of situations of **competition between various funders** (3.43 and 6.76), also from abroad, might merit particular attention. On that matter, the Commission might wish to consider further how the province of Québec in Canada resolved the concern to protect the interests of its inhabitants when various collective actions emerge for the same matter (see the attached contribution by Woopen to the Liber amicorum for Christopher HODGES, pages 126-127; page 120 refers to the Québec funding model and pages 136-138 cover the admission of cross-border claims which would have to be mindful of ensuring respect of a future Irish regulation of third-party funding – Q 3.5, Q 6.14, Q 6.15).

- Regarding the argument of rising **insurance costs and costs of doing business** (Q 3.5, sections 3.48 - 3.50 of the consultation) we recommend to the Commission's attention the study mentioned in footnotes 2 and 6 of our attached Position paper on litigation funding, done by the Swiss Re Institute on "US litigation funding and social inflation – The rising costs of legal liability", December 2021.
- With respect to the accepted "exceptions" to champerty and maintenance in Ireland by way of **"no foal, no fee" arrangements** with legal practitioners (sections 3.62, 3.66) it may be of interest to the Commission to consider that such arrangements with lawyers have long been fully against the rules of professional conduct for lawyers (deontological rules) in Germany and have only recently been relaxed to a minor extent. They have, however, been circumvented by funders and other service providers who enter into such conditional arrangements with potential beneficiaries, including the assignment of the claims in question, who then pay lawyers by hourly rates. This creates the first impression of not going against the deontological rules while it however does so in substance. We mention this here to confirm the views offered by Kennedys in their replies 7.1 to 7.4: **Assignment and similar approaches can be used to circumvent otherwise useful rules, both regarding lawyers' deontological rules as well as rules on litigation funding.** The assignment model has already been for years the way by which the absence of a general collective action in Germany and Austria has been substituted, against the original intentions of the legislators. Therefore, the view taken by Kennedys in their replies 7.1 to 7.4 would be the cautious approach to solving a perceived deficit in collective law enforcement in Ireland (Q 3.6).

Please find attached the position paper EJF issued in January 2022 during the drafting of the European Parliament's report about the need to regulate litigation funding. The somewhat heavy "dinosaur egg chart" (p. 5) tries to visualise the core dimensions of TPLF regulation (p. 2), while the two other charts on that page 5 show the **difference in compensation** achieved for beneficiaries between unregulated and **unsupervised private litigation funding on the one hand** and a **publicly organised (or at least publicly supervised and controlled) funding of litigation on the other hand**.

May we close in making you aware of the fact that from 24 until 27 September 2024 the German Jurists' Conference will treat in its division on civil law the topic "**Effective civil law enforcement: access to justice, litigation funding, legal tech - which legal framework is recommended?**" (link embedded). To prepare the conference, an extensive legal expertise will be drafted by Prof. Tanja DOMEJ, Zurich, and published early in summer of 2024. The German Jurists' Conference is the largest legal policy congress in Europe, at which 2,500 to 3,500 participants of the 7,000 members of all legal disciplines come together to tackle the major legal issues of their time. It takes place every two years in different cities, in 2024 in Stuttgart/Baden-Württemberg. The aim of the Jurists' Conference is the further development of the law by scientifically examining the need to change the legal system, making public proposals for changes to the law and pointing out shortcomings in the law. EJF will participate and would be happy to assist interested advisors of the Irish government who are fluent in German to be invited.

Best regards,

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EJF Position Paper
on Third Party Litigation Funding

The European Justice Forum (EJF) is supportive of the recently released legislative own-initiative report authored by Member of European Parliament (MEP) Axel Voss, and believes that this constitutes a solid basis for more effective regulation on third party litigation funding (TPLF) in the EU.

EJF would like to contribute to **building fair, balanced and effective Civil Justice Systems in Europe**. The goal is to ensure that consumers who have a legitimate grievance are compensated, while acknowledging that access to justice can also depend on financial resources.

We take note that the Directive on Representative Actions imposes restrictions on litigation funding and over the role litigation funders have in a dispute. But while collective redress mechanisms and TPLF are meant to have a positive impact for consumers in facilitating their access to justice, there is the risk – if no sufficient safeguards are put in place – that private funders' interests (especially in commercial profit) may be disconnected from – or even opposed to – consumers' interests. Concrete examples can be seen in the US and in Australia. Meanwhile in Europe, litigation funding is increasingly becoming part of mainstream litigation culture, and such cases are growing rapidly.

- The EU Directive on Representative Actions has already incited many litigation funders and US law firms to set up shop in the Netherlands which they expect to become the European hub for their business. This means that **commercial interest is driving expansion of EU collective actions** and is likely to lead to **exponential growth of collective actions**.[1]
- The **biggest issue is that intermediaries divert excessive amounts** from claimants'/beneficiaries' compensation into their own pockets. The **underlying problem** is the **disconnect between the profit-making interest** of the **funders**, and the right of **claimants/beneficiaries** to receive full compensation for their grievances which urges the call for an independent oversight function.
- There is a **propensity for conflicts of interests** to arise in the triangle between funders, lawyers and claimants/beneficiaries.
- **Specific problems** occur with regard to the **definition and supervision of funding business**, **transparency of funding agreements** and related **independent control** as well as to the **assessment of settlement** covering issues like distribution of proceeds and finality.
- For society as a whole, **TPLF – if not properly regulated – could also lead to excessive costs ("social inflation")**[2], in particular for consumers, be it in guise of increased prices for future customers of companies successfully targeted, be it in higher premia for e.g. general liability and commercial auto insurance,[3] up to and including opportunistic or "frivolous" claims **affecting innovation as well as the competitiveness of business**.

Therefore, additional effective safeguards against the abuse of TPLF are necessary. An adequate regulatory framework is needed that takes into account procedures, funding alternatives and the different roles of intermediaries. This can greatly improve legal certainty and effectiveness for all stakeholders potentially involved i.e. courts, lawyers, funding providers, qualified entities, ombuds entities/dispute resolution bodies, claimants and defendants.

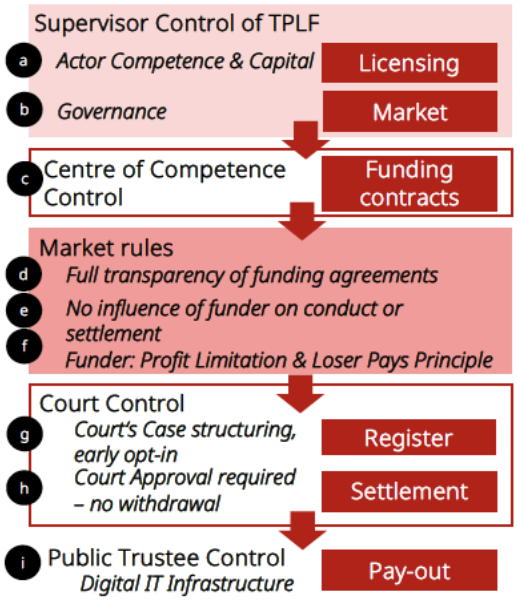
[1] An NGO (iusomnibus) with Pan-European ambition based in Portugal cooperates with Swiss TPL-Funder Nivalion at least on the MasterCard copy-cat case (Link).

[2] Swiss Re Institute, US litigation funding and social inflation – The rising costs of legal liability, December 2021 – (Link).

[3] Ibid., p. 4: seventh consecutive year of underwriting losses for general liability.

The following points are of crucial importance to achieving an effective and coherent legal architecture that safeguards against potential abuses of TPLF. With these points, EJF calls on the European Parliament to support and improve this report in plenary, and on the European Commission to take up the Parliament's proposal by submitting a proposal for a Directive to regulate third party litigation funding.

Core dimensions of TPLF regulation



(a) Financial markets regulation for market participants
(b) Independent public supervision of TPLF activity in representative actions
(c) Scrutiny of funding agreements by a centre of competence
(d) Full transparency of funding agreements
(e) No influence of funder on litigation conduct or settlement
(f) Stricter limitation of profit potential
(g) Full court control of collective settlements
(h) Direct responsibility of funder for adverse costs (including guarantee fund)
(i) Pay-out via public and not private infrastructure – settlements (see also above (g)) need to be channeled through public infrastructure even when no procedure has been undertaken in court or ombuds entities

a) Financial markets regulation for market participants

TPLF market actors should be subject to *institutional* supervision due to the risks their business model poses for the economy, the judicial system and the interests of consumers, just as banking is supervised due to its potential to create money, and insurance due to the importance of insurers' financial capacity towards their customers when the insurance event occurs. That is what Australia has just done with the *Corporations Amendment (Litigation Funding) Regulations 2020*, requiring entities that deal in class action litigation funding to hold an Australian Financial Service License.

b) Independent public supervision of TPLF activity in representative actions

In addition to an institutional supervision, there needs to be supervision of the *market activities* as they unfold. This requires taking a structured approach to the problem, i.e. by ensuring that this is done by experienced reviewers and not by judges or various, different public bodies who may well be seeing such contracts for the first time when they are asked to give an opinion about them.

c) Scrutiny of funding agreements by a centre of competence

In each Member State there needs to be one central unit, and ideally also a single one at Union level to perform this task, either upon request by a party to the proceedings, or at the own initiative of the court or administrative authority approached by the claimant. A very interesting, exemplary and apparently functioning solution can be found in the Canadian province of Québec which has a small, highly qualified and specialized team, supervised by the Québec Ministry of Justice. They have a public fund of their own from which they can initiate collective actions which in their perspective truly are in the public interest. As they fund initial actions without charging interest at all, they are the first body to learn about upcoming intentions to start new collective

actions. By this initial involvement they can screen many impending actions and advise interested parties. Public interest confirmed, they can then assist claimants in obtaining additional commercial TPLF and review the contracts to ensure that their terms are fair, players "fit and proper" and persons involved in funding and the action itself able to handle such case. In Australia, according to the government's 2021 draft legislation on litigation funding, "Litigation funders would not be able to enforce their litigation funding agreements until a Court has made an order to approve or vary the distribution"[4]. See also the generic model in the **annex**.

d) Full transparency of funding agreements

Transparency of funding agreements is of the essence and would be obviously a requirement as far as a court is concerned, but is likewise required for the other stakeholders within the procedure:

i) first, **for the *beneficiaries* opting-in**, because they need to know what share of their potential compensation or of the financial capacity of the defendant is being used to pay intermediaries. Same principle is proposed by the Australian government draft law 2021 on litigation funding as the amendments would *de facto* create an opt-in system for funded class actions by requiring the claimants to agree in writing to be a member of the "scheme" (a class action that is funded) and to be bound by the terms of the "scheme's constitution" (meaning the funding agreement);[5]

ii) second, also **for the *defendant***, because the Directive on Representative Actions requires "a financial overview listing sources of funds used to support the action". The decision-making powers of the funder regarding strategy including case settlement, all to be seen in the context of the profit expectations of the funder, can only be evaluated by reading and knowing the full text of the contracts including any side-letters, contractual framework agreements between lawyers and funder[6] or letters of understanding;

iii) third, **for the sake of full and immediate transparency**, third-party litigation funding agreements should only be permitted to be concluded with the person seeking legal advice (entrepreneur or consumer) and not with an intermediary company that provides legal advice, nor with a lawyer.

e) No influence of funder on litigation conduct or settlement

Any influence on the conduct of litigation and any restriction of instructions must be excluded. In other words, *applicants should have full control over the instructions to the lawyers***.** Moreover, a litigation funder is also prohibited from influencing the conclusion of a settlement or from making it subject to his consent/approval.

f) Stricter limitation of profit potential

Civil Justice systems exist to provide restitution to parties that have suffered a grievance. TPLF puts that fundamental purpose in jeopardy by allowing funders to siphon off large parts of the compensation. While the legislative own-initiative report suggests limiting funders' profit potential to 40% of the total proceeds and the Socialists and Democrats in the EP (S&D group) go further, limiting it to a maximum of 30%, EJF is of the opinion that not less than 75% of the total award – defined as including all granted damages amounts (including interest), all reimbursed costs, fees and other expenses – should be paid out to claimants and beneficiaries, and even then,

[4] Treasury Laws Amendment (Measures For Consultation) Bill 2021: Litigation Funding, Exposure Draft Explanatory Material, Outline of chapter 1.5, (Link) .

[5] Ibid., Outline of chapter 1.6, (Link) .

[6] Swiss Re Institute, US litigation funding and social inflation (fn. 2 above), p. 5: "Funders are dedicating increasing amounts of capital to law firm lending which typically provides a law firm with a full recourse loan for a fixed and/or performance-based return, for general business purposes (operating capital)."

so much *only in the most complex cases*. Typically, much more than 75% should remain for the beneficiaries in cases of medium difficulty and progressively more in straightforward cases.

g) Full court control of collective settlements

Judges should be endowed with strong case management powers to structure the case proceedings from a very early point in time, as they are the only ones truly able to safeguard the interests of the beneficiaries at court. An immensely helpful tool would be proper IT support for case management purposes. Courts must be able to structure the procedure and ensure the collection of relevant facts and details of beneficiaries including injuries/losses, so as to properly give effect to the Court's eventual judgment. Furthermore, once a collective action has been brought in front of the court, it must be resolved within the Court process. No termination and no withdrawal of the action shall be allowed without explicit Court decision. The Court must be able to scrutinize any proposed settlement for its legality and fairness, particularly with respect to the interests of the beneficiaries not actively involved in the procedure with a voice.

h) Direct responsibility of funder for adverse costs ("loser pays principle with teeth")

Under a scenario where the funded claimant is losing, the defendant might face a situation where the funded claimant is financially unable to reimburse the procedural costs. The winning defendant may in such a case have no legal path for recovering the costs from the funder (as the latter is not, from the legal point of view, a party to the proceedings). Accordingly, the EU regulatory framework for TPLF should introduce a "responsibility for adverse costs" rule for funders, giving courts and administrative bodies in EU Member States the power to require litigation funders to cover relevant adverse costs, including damages to be paid arising from counterclaims from the defendant. The Court should be able to require security for costs or proof of insurance backing.

i) Pay-out via public and not private infrastructure

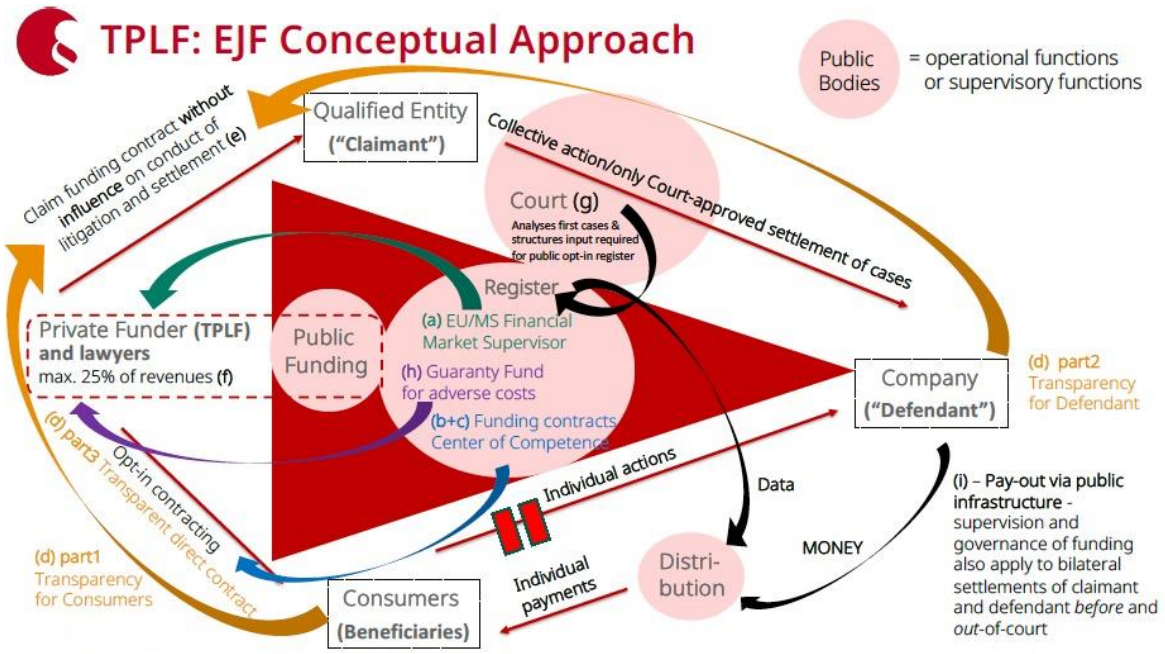
Settlements – see also above g) – need to be channeled through public infrastructure even when no procedure has been undertaken in court or ombuds entities in order to protect consumer interests in proper distribution also in such cases.

In General: Extension and clarification of the scope of application

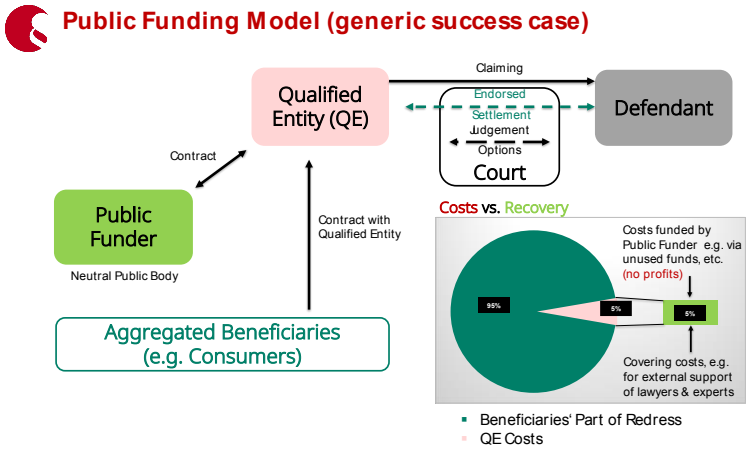
The general financing of legal disputes should be regulated ("assumption of costs of legal disputes") as opposed to litigation funding in the narrower sense. After all, many cases are already settled out of court, e.g. through settlement agreements, even before court proceedings or dispute resolution proceedings. It should be clarified that the Report also applies to companies which offer litigation financing as an ancillary service or only occasionally, i.e. that the regulation of funding of costs for legal disputes is independent of the actor doing it. This also concerns, for example, legal tech providers, especially debt collection service providers, as well as banks and insurance companies active in this business.

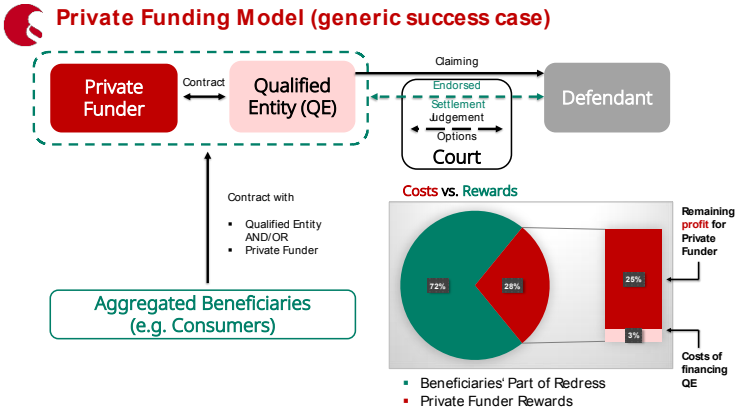
Annex

Graphical presentation of safeguards a) to i)



Private vs. Public Litigation Funding Model





11

Let's Redress European Redress the Hodges Way! *Redressons redress en Europe à l'Hodgienne!*

A Look at How Canada Resolves the Conflicting Collective Claims Cross-Border Conundrum and How May the Canadian Solution Help Us in the EU?

HERBERT WOOPEN

> Further, if the ability of the collective action to deliver mass compensation is not particularly impressive, and the mechanism is outperformed by other newer intermediaries and mechanisms, a serious question arises about the ongoing justification for the mechanism.
>
> (C Hodges and S Voet, *Delivering Collective Redress. New Technologies* (2018))

I. Introduction

A major challenge for collective redress to be effective in the EU will be how to ensure cross-border coordination of more than one national collective proceeding in related cases. This problem has likewise been experienced in Canada over the last few decades, and in order to resolve it all provinces adopted the 'Canadian Judicial Protocol for the Management of Multi-Jurisdictional Claims'[1] in 2011. The Canadian

[1] 'Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions' (*CBA*, 13 August 2011) available at www.cba.org/Our-Work/Resolutions/Resolutions/2011/Canadian-Judicial-Protocol-for-the-Management-of-M?lang=en-CA; www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2011/Canadian-Judicial-Protocol-for-the-Management-of-M/11-03-A-Annex01.pdf.

Bar Association supports such coordination by a voluntary platform for Pan-Canadian coordination (National Class Action Database),[2] which had been recommended by a Uniform Law Conference of Canada's Working Group on Multi-jurisdictional Class Actions.

The rules in Québec, the first[3] province to introduce collective actions in Canada in 1978, are of particular interest because each application for authorisation also needs to be served on the Fonds d'aide aux actions collectives.[4] This institution, which is apparently unique in the world, is of particular interest, because enforcing the Law in general is an integral task for a public body (*res publica*) that is associated with its monopoly on the use of force. Law enforcement and the public body's monopoly of power are two sides of the same coin. This monopoly should prohibit the placing of the infrastructure and funding that are needed for law enforcement in the hands of private entities. Conversely, when the creation of such private entities is observed, in a best-case scenario this may be indicative of systemic weaknesses in core areas of public infrastructure; and in a worst-case scenario it could lead to a culture where 'private mercenaries' provide services only for those cases where such gaps in the public infrastructure can be turned into maximum profits.

The Canadian model of cross-border coordination may assist in finding a shortcut to resolving the cross-border challenge in the European Union (EU); and taking a closer look at the model in Québec in particular may also serve to reduce the potential in the EU for financial exploitation of such frictions in the EU framework for collective redress. Taking inspiration from Christopher Hodges, a broad view that also covers the modus operandi of the Québec Fund may suggest using such a model, at both EU Member State and even EU level, for *non-court dispute resolution procedures* too, that is, to fund ombuds entities and infrastructure to ensure early access to ('capturing in a versatile infrastructure'), as well as swift and cheap resolution of, such disputes. Digitalisation is a megatrend in judicial systems worldwide; efforts to this effect in Germany are strongly increasing, and the new governing coalition has in particular agreed in their coalition agreement[5] to create citizen-friendly digital procedures for small claims in specialised courts to ensure simple enforcement of such claims. A German author[6] points to well-functioning systems in other countries, particularly to the leading role of Canada, specifically to the British Columbia Civil Resolution Tribunal (CRT), which is Canada's first online court.[7]

[2] 'Class Action Database' (*CBA*) available at www.cba.org/Publications-Resources/Class-Action-Database.

[3] C Pichet, 'Public Financiers as Overseers of Class Proceedings' (2016) 12(3) *New York University Journal of Law & Business* 777, 787.

[4] Art 58 sentence 2 of the Regulation of the Superior Court of Québec in civil matters available at http://legisquebec.gouv.qc.ca/en/pdf/cr/C-25.01,%20R.%200.2.1.pdf.

[5] 'Koalitionsvertrag' (Coalition Treaty 2021–2025) paras 3537–3540 available at www.bundesregierung.de/breg-de/service/gesetzesvorhaben/koalitionsvertrag-2021–1990800; www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1.

[6] Lawyer Prof Dr Wilfried Bernhardt, Staatssekretaer aD, 'Quo vadis Ampel? – Digitalisierung der Justiz' in juris (Beilage zum Anwaltsblatt) March 2022, 90, 91, fn 13.

[7] 'Civil Resolution Tribunal' available at https://civilresolutionbc.ca/.

II. Unresolved Issues in the EU Directive on Representative Actions

As the author has shown elsewhere,[8] neither the new EU Directive on Representative Actions[9] nor the existing Brussels I (Recast) Regulation[10] provides solutions to the challenges resulting from parallel domestic and cross-border collective actions in multiple Member States. The Directive instead requires Member States to resolve these issues individually.[11] This looks like a 'mission impossible' and has prompted the author to severely criticise the Directive for the irresponsible approach that it adopted of not legislating on issues that were perfectly predictable.[12]

In an attempt to assist in finding solutions as negotiations were underway in the EU's Council, the author proposed to create two distinct information technology (IT) solutions: one for the purposes of cross-border coordination among courts and other public entities, and the other for collection and storage of the data of contentious cases ('capturing') that merit further consideration, initially by alternative dispute resolution (ADR)/ombuds bodies even before any court is involved.[13] The first of these ideas has been retained, at least to a certain extent, in that the IT coordination tool under construction for National Contact Points (NCPs) is now planned to connect not only the NCPs but also courts and administrative authorities.[14] Moreover, it will go beyond the limited provisions of the Directive on identifying and checking national designation of qualified entities by allowing for communication among the various courts and administrative authorities that could be seised by collective actions. This progress had

[8] H Woopen, 'Kollektiver Rechtsschutz – Chancen der Umsetzung, Die Europäische Verbandsklage auf dem Weg ins deutsche Recht'['Collective Redress – Opportunities of the Directive's Transposition, The European Representative Action on its Way into German Law'] [2021] *Juristenzeitung* 601, 603–05.

[9] 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 L409/1.

[10] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) [2012] OJ L351/1.

[11] Art 9(4) reads 'Member States shall lay down rules to ensure that consumers who have explicitly or tacitly expressed their wish to be represented in a representative action can neither be represented in other representative actions with the same cause of action and against the same trader, nor be able to bring an action individually with the same cause of action and against the same trader. Member States shall also lay down rules to ensure that consumers do not receive compensation more than once for the same cause of action against the same trader.'

[12] Woopen (n 8): it seems to be the unanimous view that the rules of Brussels I (Recast) do not fit, one voice even deploring this in respect of the resulting impossibility of having competition in favour of a 'race to the bottom' of standards; B Rentsch, 'Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie' [2021] *Europäische Zeitschrift für Wirtschaftsrecht* 524 (524 introduction, 525, 533 section V, thesis 6). And yet no other proposals to resolve the issues could so far be found, except for those made by the author, supported by the European Justice Forum – www.europeanjusticeforum.org – Representative actions, Message no 5 – no domestic effects of procedures in other Member States (without separate exequatur procedure).

[13] Contribution by European Justice Forum to the EU Consultation on 'Consumer policy – the EU's new "consumer agenda"' (available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12464-A-New-Consumer-Agenda), 'Legal Tech for Justice, Not for Profit – A new Governance for Consumer Law Enforcement in the Union Should Rely on Electronic Registries and Communication as State-of-the-Art Response, namely to insufficient provisions in the recent Representative Actions Directive' at 4–9 for coordination (and beneficiary participation in representative actions) and at 9–12 for ADR/ODR.

[14] Art 14 para 4(b) adds 'if necessary under national law'.

been disclosed by the Commission at the end of the Workshop on the Implementation of the Representative Actions Directive (EU) 2020/1828 on 26 November 2021, and the tool's name will be 'REACT' – the Representative Actions Communication Tool.

The 'conflicting collective claims cross-border conundrum' has thus, albeit timidly, been addressed by the Commission for the first time. It had surfaced many years earlier in Canada, which does not have a comprehensive federal collective procedure. The federal procedure can only be used against the federal government or in matters over which the federal government has exclusive jurisdiction.[15] The regular class action procedures consist of different comprehensive opt-out models in Canada's provinces. These collective instruments can, based on a ruling by the Supreme Court of Canada, even be used for those parts of the country that do not have their own formal collective claims legislation (these being the province of Prince Edward Island and the three territories: Northwest Territories, Yukon and Nunavut).[16] In some provinces, such as British Columbia,[17] residents of other provinces may participate in a collective procedure across the provincial border only via opt-in, as had been recommended by the Uniform Law Conference of Canada in 1995, although Manitoba did not heed this advice and allowed extra-provincial opt-out classes. With the exception of Québec, all the provinces follow the model according to which the procedure starts as an individual claim and can later be 'certified' as a class action, thus opening it up to an opt-out collective action. In contrast, in Québec – based on Articles 53 to 62 (Chapter X) of the Québec Superior Court's Rules of Civil Procedure[18] – the courts must be asked to 'authorise' a class action that is introduced as such from the start, and this action is terminated if such authorisation is denied.[19]

The structural set-up in Canada thus looks largely comparable to that in the EU, which forms an umbrella for its 27 Member States with different judicial traditions and various collective action models, some already existing, some still to be created. It should therefore be legitimate and instructive to have a look at how Canada may have resolved the issues mentioned above, study of several practical and up-to-date cases from Canada being the best way to achieve these aims.

III. The Current Approach to the Conflicting Collective Claims Cross-Border Conundrum in Recent Canadian Judgments

The Canadian legal database 'CanLII' (Canadian Legal Information Institute) currently shows 150 hits for 'multijurisdictional class action' of which 83 are court decisions,

[15] GM Zakaib and J Saint-Onge, *A Summary of Canadian Class Action Procedure and Developments* (booklet edited by law firm Borden Ladner Gervais, 2018) 1.

[16] See, eg, US Chamber Institute for Legal Reform, *Perspective d'un horizon incertain – Recours collectifs au Canada 2011–2014* (2015) 5.

[17] ibid, 54, note 5.

[18] Chapter C-25.01, r 0.2.1 – Regulation of the Superior Court of Québec in civil matters, Code of Civil Procedure (chapter C-25.01, a 63) available at www.legisquebec.gouv.qc.ca/en/document/cr/C-25.01,%20r.%200.2.1%20/.

[19] Zakaib and Saint-Onge (n 15) 5–6.

22 legislation and 45 commentaries.[20] Among the court decisions, two judgments stand out as offering good advice on how to handle the same problem in an EU context: the first for an overview from a systemic perspective; and the second from an individual court's perspective regarding guidance on how to best anchor such a solution for multi-jurisdictional coordination into the respective national civil procedural laws while transposing the EU Directive on Representative Actions.

A. The Result: Systemic Disentanglement

In *Micron Technologies Inc c Hazan* of 2 September 2020 (date of hearing: 1 November 2019),[21] the Court of Appeal in the Canadian Province of Québec rejected the Appeal against a judgment rendered on 11 February 2019 that had dismissed an application for a stay of the class action. This case is extremely instructive because of its underlying appraisal of relevant facts and rules.

On 30 April 2018, the Respondent filed an Application for Authorisation to Institute a Class Action against the Appellants in Québec Superior Court for damages based on a price-fixing conspiracy among the Appellants that led to artificially inflated prices for dynamic random-access memories (DRAMs). The group, which claimed to be entitled to damages and, under provincial consumer protection law, to punitive damages as well, was described as:

> All persons or entities in Canada (subsidiarily in Quebec) who, between at least June 1, 2016 and February 1, 2018, acquired dynamic random-access memory ('DRAM') directly from one of the Defendants (the 'Direct Purchasers') or who acquired DRAM and/or products containing DRAM either from a Direct Purchaser or from another indirect purchaser at a different level in the distribution chain (the 'Indirect Purchasers'), or any other Group(s) to be determined by the Court.

Two days later, on 2 May 2018, a person by the name of Chelsea Jensen filed a Statement of Claim in the Federal Court for damages for price fixing against the same seven defendants, including a motion that the action be certified as a class action on behalf of largely the same group, defined as:

> All persons or entities in Canada who, from June 1, 2016 to February 1, 2018 (the 'Class Period'), purchased DRAM or products containing DRAM. Excluded from the Class are the defendants and their parent companies, subsidiaries, and affiliates.

A further proposed class action filed in the Federal Court was discontinued after the Jensen statement of claim was amended to include the second plaintiff and his lawyers.

Similar proceedings were also filed in the British Columbia and Ontario courts but not moved forward. The Ontario plaintiff, now a co-plaintiff in the Federal proceedings, declared to hold the Ontario proceedings while advancing the Federal proceedings.

[20] Available at www.canlii.org/en/#search/type=decision&text=Multijurisdictional%20class%20action.
[21] *Micron Technology Inc c Hazan*, 2020 QCCA 1104 (CanLII) available at https://canlii.ca/t/j9hhj.

i. Intra-Québec Cases

A second application for authorisation was also filed on 3 May 2018 at the Québec Superior Court and suspended on 14 June 2018 under the 'first to file' rule, which applies to 'intra-Québec cases' following the leading case of *Hotte c Servier Canada Inc*.[22] In this case, the general rule on *lis pendens* between two or more pending actions was made applicable to class actions under the following reasoning: *lis pendens* is fulfilled if the two claims meet the conditions for *res judicata*, that is, the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same (Article 2848 of the Civil Code of Québec (CCQ)). When there is *lis pendens*, the court will proceed with the first action filed and dismiss the second and any subsequent actions, under Article 168 of the Code of Civil Procedure of Québec (CCP) (former Article 165 CCP). Given that the general rules on *lis pendens* do not apply neatly to motions for authorisation to institute class actions due to different claimants taking the initiative, the Court found instead '*une apparence de litispendance*'. It concluded that, contrary to initial appearances, the ultimate identity of the parties in these different actions was the same even though there were three different petitioners, because the petitioners proposed representing the same group and 'the group was the real party'.[23] The Court held that the first motion filed should proceed by applying the 'first to file' rule. It did not, however, dismiss the other motions – which would have been the consequence if Article 168(1) CCP had been directly applied – but rather suspended them until the first motion for authorisation was decided, at which time it left open the possibility to seek the dismissal of the suspended motions under the principle of *res judicata*. This rule was confirmed, in principle, in *Schmidt c Johnson & Johnson Inc*,[24] on the grounds of its ease of application in contrast to the alternative of an expensive debate to determine which petitioner was better qualified, but was also modified with regard to the best interests of the members of the class:

> [52] Thus, it is admissible to show that the first motion filed with the Registry suffers from serious deficiencies, that the lawyers who are responsible for it are not hurrying to advance it, that they have filed similar proceedings elsewhere in Canada for the same putative members, etc, ie, indications that the lawyers behind the first proceeding are only trying to occupy the field and are not motivated by the best interests of the putative Quebec members.[25]

ii. Interprovincial and International Cases

The solution for a conflict between a Québec action and a *foreign* procedure or judgment is treated in Article 3137 CCQ,[26] which authorises the Québec court to stay its

[22] *Hotte c Servier Canada Inc*, 1999 CanLII 13363 (QC CA) available at https://canlii.ca/t/1mvw6.

[23] *Micron Technologies Inc c Hazan* (n 21) para 26.

[24] *Schmidt c Johnson & Johnson Inc* 2012 QCCA 2132.

[25] Original text in French: 'Ainsi, est admissible la démonstration que la première requête déposée au greffe souffre de graves lacunes, que les avocats qui en sont les responsables ne s'empressent pas de la faire progresser, qu'ils ont déposé des procédures similaires ailleurs au Canada, et ce, pour les mêmes membres putatifs, etc, c'est-à-dire des indices que les avocats derrières la première procédure tentent uniquement d'occuper le terrain et ne sont pas mus par le meilleur intérêt des membres putatifs québécois.'

[26] Art 3137 CCQ provides 'On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action between the same parties based on the same facts and having the same

proceedings, but only if the foreign action was filed first. If the Québec court is 'first seised of the dispute', Article 3155(4) CCQ[27] provides that a foreign judgment will not be recognised if there is *lis pendens* with the Québec action.

Before staying an application to authorise a class action or an already authorised class action when a motion to certify a class action or a class action is already under way outside of Québec, the court must, however, pursuant to Article 577 CCP, have regard to the protection of the rights and interests of the Québec members in the non-Québec court:

> **577.** The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.
>
> If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.
>
> If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

The relationship between the rule in Article 3137 CCQ and the 'first to file' rule was first defined in such a way that the Superior Court had no jurisdiction to stay the Québec proceedings if they were instituted first, and a discretion to do so if they were not instituted first.[28] But based on the general clause on judicial powers in Article 49 CCP,[29]

subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.'

[27] Art 3155 provides:

> A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:
>
> (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
> (2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
> (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
> (6) the decision enforces obligations arising from the taxation laws of a foreign State.

[28] *Micron Technology Inc c Hazan* (n 21) para 33; in the *FCA* case, three concurrent applications were filed in Québec, Ontario and British Columbia, and the Superior Court still held that the Québec application could not be stayed under international *lis pendens* and Art 3137 CCQ because it had been filed before the others: *Garage Poirier & Poirier Inc c FCA Canada inc*, 2018 QCCS 107, paras 37–39.

[29] Art 49 CCP provides:

> The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction.
>
> They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or orders to safeguard the parties' rights for the period and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.

the Superior Court is also allowed to suspend Québec class action proceedings if they were filed first, provided that the interests of the Québec members and the proper administration of justice militate in favour of such suspension.[30] As a result, the Superior Court can suspend Québec class action proceedings in favour of proceedings filed outside Québec, even if the Québec proceedings were filed first.

iii. Federal Court versus Superior Court

Considering the conflict between claims filed at the Québec Superior Court and the Federal Court, no precedent had existed as to whether the 'first to file' rule applies in these particular circumstances. The judicial rules so far quoted do not apply, as Article 3137 CCQ does not apply to proceedings in Federal Court, and the 'first to file' rule only applies in the Québec Superior Court on claims introduced at the same court. *Micron Technology Inc v Hazan* acknowledges this and develops 'other considerations' that will be relevant, without turning the conflict into a 'beauty contest'. Each court can suspend only its own proceedings and not the other's in another province or at the federal level. The fact that Canada is a federation where there is comity amongst the courts should therefore lead to their all applying similar tests and reaching similar outcomes on such issues.

The appropriate test for a suspension can be based on Article 49 CCP and on the mandatory language of the second paragraph of Article 577 CCP (emphasis added): 'If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, *the court is required to have regard for the protection of the rights and interests of Québec residents*.' While this provision did not appear to apply neatly, given that the first paragraph requires that there is a 'multi-jurisdictional class action already under way outside Québec', the Court suggested in *FCA* that the limitation in the first paragraph does not apply to the second paragraph, and that anyway the Superior Court would have the duty to ensure that the rights and interests of the members are adequately protected.[31]

Generally, it will not be in the interests of justice or of the parties to have two class actions proceed on the merits in parallel in front of different courts, due to the risk of conflicting judgments, costs to the parties and the waste of judicial resources. Each court should therefore assess whether either proposed class action includes issues, remedies or class members not included in the other, whether such differences be the result of a strategic decision by a party or of limits on the territorial or subject-matter jurisdiction of one of the courts. A difference in the scope of the proposed class actions may be relevant, because it suggests that additional proceedings may be necessary in the other forum to address all of the issues, remedies and class members.

The court must also ensure that the rights and interests of Québec residents are adequately protected and that the proposed representative is in a position to represent them properly. This would include, for example, that the Québec residents be treated

[30] *FCA Canada Inc c Garage Poirier & Poirier Inc*, 2019 QCCA 2213, paras 73, 78.
[31] *Micron Technology Inc c Hazan* (n 21) paras 46–50.

in the same way as residents of other jurisdictions, that they receive the benefits of any applicable Québec legislation, and that any notices and other communications be disseminated in Québec and in French.[32] Given that at the time of the court's required decision nobody knows how the other courts will decide, all of the parties can consent and present a litigation plan to the Superior Court showing how they will conduct the litigation and protect the rights and interests of the Québec members, that again may be sufficient for the judge to grant the suspension before either proceeding is authorised or certified. However, the lack of authorisation or certification may be problematic in cases where the application for a suspension is contested and the parties make representations as to what the Superior Court and the other court may or may not do with respect to authorisation or certification. While the Superior Court may suspend the Québec proceedings pending before it at any stage, the judge might, depending on the circumstances, dismiss such a request as premature if it was made before the other concurrent class action has been authorised or certified.[33]

The appellate court in *Micron Technology Inc c Hazan* thus confirmed that the court of first instance was right in not staying the Québec procedure but that it should continue for further clarification. The appellate ruling confirmed (obiter) as examples several points of interest that were unknown to the court of first instance at the time of its decision, and which provided justification for postponing its decision on the application to stay its own action as it awaited clarification of these unknowns:[34]

- Will the class actions be authorised in the Superior Court and certified in the Federal Court?
- What will be the classes? The two proposed definitions are essentially identical (national, same period, same activities and same defendants), but the Appellants urged the limitation of the class definition to residents of Québec in the Superior Court. This can only be decided at the authorisation stage.
- What issues will be litigated? Both courts have concurrent jurisdiction, but in the Québec Proceedings the Respondent also invoked provincial consumer protection legislation and advanced on that basis a claim for punitive damages – a claim that could not be included in the Federal Court Proceedings while counsel for the Respondent was unable to substantiate such claims.
- What timetables are to be expected? The Québec judge concluded without conclusive reasons that the case at the Superior Court would be less complex and dealt with more quickly.

The issues described above were still unresolved at the time of its decision; therefore, the court of first instance (Québec Superior Court) was right in not staying its own procedure at this point in time.

[32] ibid paras 51–53.
[33] ibid paras 55–57.
[34] ibid paras 68–69.

iv. Summarising the Result under an Inadequate Regulatory Framework – What Micron Technology Inc c Hazan *Teaches Us about Designing Coordination*

Ultimately, the main outcome of this judgment boils down to granting the courts involved the flexibility to adapt to the requirements of each individual case, to engage in a consensual procedure, to apply test criteria in a comparable way in order to achieve the best possible use of judicial resources, whilst minimising costs for the parties involved, in a spirit of mutual trust and cooperation ('comity').

This somewhat disappointing result becomes better understandable when looking back in time in the next subsection, which shows the size of the challenge ahead for the EU legislator to resolve the predictable problems with conflicting claims in the EU.

B. The Painful Journey to Reach Comity – How Did They Get There?

It must be in the EU's interest to take a shortcut towards resolving the predictable problems that have been mentioned so far. Therefore, it should be instructive for us to take a closer look at how the same challenges have been addressed in Canada.

i. First Phase of the Canadian Approach: The 'Subclass Deference Model'

Looking back at the years before 2009, courts in Canada had used an approach that looks like a kind of 'self defence' against illegitimate over-demand, an approach that could also be employed by European countries as an initial solution if they continue to be left out in the cold by the European Commission. Scott Maidment summarised this as follows:

> With the enactment of class action legislation throughout the Canadian provinces, the commencement of multiple duplicative or overlapping national class actions had become commonplace. In many cases, duplicative class actions had been commenced by a consortium of class counsel acting in concert across provincial borders. In other cases, duplicative class actions were commenced by class action law firms acting in competition with one another. In either circumstance, each firm of class counsel may seek to maximize its own participation in the same action and thereby maximise its share of associated fees.[35]

As a lawyer, he specifies that when the profit motive for individual law firms is combined with an absence of effective forum selection rules, this encourages the commencement of duplicative national class actions that offer no marginal benefit to class members and encourage practices that create unnecessary chaos, confusion and cost.[36]

The courts struck back by adopting a 'subclass deference model' in response to disputes regarding the choice of forum. Thus, any court in which a national class action

[35] S Maidment, 'Exclusive Forum Selection in National Class Actions: A Common Issues Approach' [2009] *The Canadian Class Action Review* 133, 133–34.

[36] ibid 134, fn 3.

was brought would generally refuse to engage in comprehensive forum selection for the whole procedure. Instead, the court would generally 'defer' that part of the action to the superior court of another province that consists of the sub-class of persons residing in that other province. This 'deferential approach' produced disorder and unfairness, inefficiency, confusion and uncertainty for defendants and class members alike.[37] Legislative reform was not to be expected, as Canada's Constitution confers exclusive jurisdiction over the administration of justice within the provinces upon the provincial legislatures, in a formula that is comparable in spirit to the EU's split of legislative competencies between the EU and Member States. Article 81 of the Treaty on the Functioning of the European Union (TFEU), the only article in Chapter 3 'Judicial Cooperation in Civil Matters', which in its German version is at the same time the unofficial title of Article 81 in German text editions, reads:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
   (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
   (b) the cross-border service of judicial and extrajudicial documents;
   (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
   (d) cooperation in the taking of evidence;
   (e) effective access to justice;
   (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
   (g) *the development of alternative methods of dispute settlement*;[38]
   (h) support for the training of the judiciary and judicial staff.

And yet the Representative Actions Directive does not even mention this explicit and limited legislative competence in *procedural* matters. The Directive is meant to be based on an 'annex competence' to the competence of the Union for the harmonisation of *substantive* consumer protection law. Nevertheless, the Directive includes provisions on cross-border issues;[39] therefore, it may have exceeded the legislative powers that were

[37] ibid 134, 135–43; also reported in Woopen (n 8) 611.

[38] Emphasis added with respect to the last bullet of the conclusion of this piece in section V.

[39] Cross-border impacts come with: suspension or interruption of limitation periods (Directive, Art 16 and recital 65); a prohibition on admitting a settlement for court approval or approval by an administrative authority if there is any other ongoing representative action in front of the court or administrative authority of the same Member State regarding the same trader and regarding the same practice (Directive, Art 11 and Art 9(4)); a rule on conflicting actions in Art 5b(3a) ('cannot be represented in other representative actions nor bring an individual action'); a possibility for individual consumers concerned to accept or to refuse to be bound by a settlement approved by a court or administrative authority (Directive, Art 11(4), sentence 2); effects of final national court or administrative authority decisions establishing an infringement harming collective interests of consumers (Directive, Art 15 'effect of final decisions'); rules regarding orders by courts

bestowed upon the EU legislative bodies by the Member States, because the EU cannot have legislative powers exceeding what has been delegated to it by the Member States (ultra vires).[40] Such concerns will have to be taken into consideration not only by the European Court of Justice but also by the legislators, including at the EU level, as they attempt to head off the predictable collisions.

The lesson from Canada in this respect is that administrative arrangements among provincial superior courts ultimately cannot deprive a determined litigant of the right to pursue litigation in the forum of his choice. Thus, without either coordinated legislative action taken by all provinces or a constitutional amendment to transfer necessary powers to the federal Parliament, it was not possible to address this problem meaningfully in Canada through legislative or administrative reform.

Maidment suggested resolving this problem through application of a proper *contextual* application of the common law principles of *forum non conveniens* in identifying the issues truly common to various actions, and having them decided in the one forum closest to the location of parties and witnesses, evidence, factual matters and experience in applying the relevant substantive law. Common issues would be evidence related to the conduct and knowledge or duties of care of the defendants. Any issue that turns on the conduct or evidence of any particular individual plaintiff would be an individual issue and not a common issue – up to the place of residence of class members – with individual issues having to be determined without trial through some form of reference, private arbitration, summary procedure or settlement grid.[41] The tool to stop conflicting claims in jurisdictions less suitable for the common issues would be anti-suit injunctions.[42] But this proposed approach has apparently not caught on.

ii. Second Phase of the Canadian Approach: The Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions – Cooperation and Comity

A more successful development was started by the Uniform Law Conference of Canada (ULCC) in 2004 with a 'National Class Actions Project', which published its first report at the ULCC's 2005 conference in Vancouver,[43] followed by a Supplementary Report by the Special Working Group on Multi-Jurisdictional Class Proceedings at the conference

and administrative authorities to defendants to submit evidence to support a representative action (Directive, Art 18); rules concerning the standing and authorisation of qualified entities to bring collective actions for redress in other Member States (Directive, Arts 6(1), 7(1), 4(6)) and the unresolved issue of which cross-border effects, ie res iudicata, lis pendens and international competence implications, 'domestic' actions, eg by a domestic ad hoc entity, may have against non-domestic defendants), and for several qualified entities to do so jointly in a single representative action, including if they are from different Member States (Directive, Art 6(2)–(3) and recital 31).

[40] 'Legal Tech for Justice, not for Profit' (n 13) 14–15.

[41] Maidment (n 35) 135, 143–53.

[42] ibid 150, 152.

[43] The Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations (Vancouver, BC, 9 March 2005) warned that the potential for chaos and confusion remains high unless the problem of duplicative class actions is resolved; available at https://ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2005/Interjurisdictional-Class-Actions.pdf.

in Edmonton, Alberta, in 2006.[44] Following terrible confusion with conflicting collective cross-provincial-border claims,[45] it suggested creation of an on-line Canadian Class Proceedings Registry of all class action filings in each Canadian jurisdiction, for use by the public, counsel and courts, and various options and duties for the courts and plaintiffs to make choices, liaise and coordinate. Specific Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases promulgated in the insolvency area by the American Law Institute were to be adopted by the courts hearing cases certified in relation to the same issues in multiple jurisdictions.

The coordination efforts between the provinces and the federal level proposed in those papers developed further slowly, resulting in the current respective rules to be followed and that meanwhile have been adopted by all Canadian provinces with slight variations, which can be found in Schedule A to the Judicial Protocol. From the Québec Superior Court Rules of Civil Procedure they can be partly paraphrased and summarised as follows:

> **Article 55 Documents accompanying the application**. The application [on the form published on the website of the Superior Court] is accompanied by a copy of all other applications for authorization to bring a class action dealing in whole or in part with the same subject matter and an attestation from the applicant or the applicant's lawyer indicating that the application will be entered in the national class action register. …
>
> [Failure to follow this rule or not to serve it on the adverse party at the same time gives the judge leeway to postpone the date of presentation of the application and order the application to remedy the failure.
>
> Within five days of filing, a copy of the application for authorisation to institute a class action must be registered in the registry of class actions (Article 56 and Article 573 of the Québec Code of Civil Procedure – chapter C-25-01). A settlement proposal ('Transaction' – Article 58) submitted for approval of the court needs to indicate the amounts that will be reimbursed to the *Fonds d'aide aux action collectives* if it contributed financial assistance to the representative, and every application of approval must be served on the *Fonds d'aide aux action collectives.*]
>
> **Article 59 Report on administration**. If a judgment orders the collective recovery of the claims made with individual payment of the members' claims, the special clerk or third person designated by the court must file with the court, after the time limit for members to file their claim has expired, a detailed report on its administration and give notice to the parties and the Fonds d'aide aux action collectives.
>
> **Article 60 Remaining balance**. If the report filed under section 59 mentions a remaining balance the representative, within 30 [days] after the report is filed, must present an application to the court to dispose of the amounts, giving notice of presentation to the special clerk or the third person designated by the court and to the Fonds d'aide aux action collectives, if applicable.[46]

[44] Available at https://classactionlitigation.com/Class_Actions_Supplementary_Report.pdf.

[45] See the impressive practical example of the Baycol litigation across the provinces of British Columbia, Saskatechwan, Manitoba, Ontario, Québec as well as Newfoundland and Labrador, laid out in the 2005 Report (n 41) in paras 10–12, and of the Vioxx litigation, ibid para 13.

[46] For an example of the reverse case where the lawyers of the claimant group had to pay back to the Fonds d'aide aux actions collectives the support they had received from it, see *Monique Charland c Hydro-Québec*, case no 27, Report 2020–2021 of the Fonds d'aide aux actions collectives, 17.

> **Article 61 Legal costs and fees**. When the Fonds d'aide aux action collectives has granted financial assistance, an application to determine the legal costs and the fees of the representative's lawyer, or to obtain the approval of a transaction [ie settlement] on fees, legal costs, or professional fees is served on the Fonds d'aide aux action collectives with notice of presentation.
>
> **Article 62 Multi-jurisdictional class action**. In the case of a prospective, authorized or certified class action having the same object as a prospective, authorized or certified class action instituted in 2 or more provinces, the court may, on application, direct the parties to apply the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions.

This framework offered to the courts involved for voluntary adoption in 'comity' is supported by the Canadian Bar Association (CBA), which has set up the National Class Action Database[47] for information about the existence and status of class actions across Canada, so that the public, counsel and courts need consult only one source for this information, and without cost to them. It comprises all class actions filed in Canada after 1 January 2007 and sent to the CBA. Once posted, a class action proceeding remains on the database unless and until it is dismissed as a class action by the court. Counsel who wish to have proceedings posted on the database must complete the Database Registration Form[48] and send it, along with the original pleadings and certification motion, to the CBA website Strictly speaking, however, this remains a primarily voluntary commitment on the part of class action counsel, thus the CBA cannot guarantee the exhaustiveness of the class actions listed or the accuracy of the information posted.

The Protocol also includes the possibility to terminate proceedings by means of a Multijurisdictional Class Settlement Approval to be granted by all the courts that are involved. The list of the formalities to be fulfilled for such a procedure extends over three pages (in two languages) of the Protocol (no 7, 8a–j, 9a–f, and 10–14), but an adequate means for holding a Settlement Hearing jointly is provided for by allowing for a video link or other means to permit all parties and all judges to participate in the hearings (no 10).

iii. Evaluation of the Procedure Under the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions

The Protocol with its coordination procedures and formalised steps, as well as the supporting infrastructure consisting of the CBA Registry and the tools for audiovisual conferencing between courts, appears to be working properly: counsel and courts agree which court will take the lead in establishing the evidence and the legal analysis, while being monitored in these efforts by the other courts that have been seised with the same matter and that have not terminated but only stayed their own proceedings while receiving regular updates on the progress in the leading court.[49]

[47] Available at www.cba.org/Publications-Resources/Class-Action-Database.

[48] Available at www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/ClassActionForm2019.docx.

[49] Recent example of a staying order: *Ibarra c Corporation Cadillac Fairview limitée*, 2021 QCCS 5092 (CanLII) available at https://canlii.ca/t/jl7dv.

What the Protocol does not describe further is the infrastructure for the distribution of the compensation either agreed on by settlement or decided by court judgment. The Protocol just mentions in its section 'Settlement Approval' (paragraph no 8 lit j) that the address and phone number of the appointed 'Claims Administrator' for settlements need to be communicated, and Articles 55–62 of the Québec Superior Court Rules of Civil Procedure (see section III.B.ii) outline in their Article 59 the reporting duties of a 'special clerk or third person designated by the court' regarding his filing of group members' individual claims after their 'opting-in' period has expired.

C. Taking the Courts' Perspective: How to Cooperate and Decide Best

In the recent judgment in *Benamor c Air Canada*,[50] the Québec Court of Appeal had reason to discuss the size of the class to be admitted – two judges voting for a limitation of the class to all residents of Canada, and the dissenting rapporteur of the case favouring admission of a worldwide group of class members. Joseph Benamor had objected to additional payments to be made for using flight credits – bought as several coupons called 'Air Canada Consumer Flight Pass' – either later than these coupons had been declared valid or for their use by different persons. His case has received funding from the *Fonds d'aide aux action collectives*.[51]

i. Possibility of Worldwide Actions

All three judges concur that it would in principle be possible to include non-residents of Canada in a class in a Québec class actions procedure,[52] even though this has never been done before in a consumer law case, and only parsimoniously in securities cases, and even this was primarily for the simple purpose of obtaining court approval for a settlement that had already been reached among the parties, and that with the exclusion of securities bought on US markets.[53]

Starting from the obiter considerations of Judge LeBel in a case decided in 2009,[54] the majority in *Benamor c Air Canada* deem it justified to use similar considerations with respect to the adequacy of setting up a worldwide class. Judge LeBel wrote in 2009:

> [56] In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to

[50] *Benamor c Air Canada*, 2020 QCCA 1597 (CanLII), available at https://canlii.ca/t/jbvm9.

[51] Case no 12 p 11 of the most recent report of the *Fonds d'aide aux actions collectives*, available at www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2020–2021.pdf.

[52] *Benamor c Air Canada* (n 50) paras 75, 116.

[53] ibid para 105.

[54] *Canada Post Corp v Lépine*, 2009 SCC 16 (CanLII), [2009] 1 SCR 549, available at https://canlii.ca/t/22zdq, paras 56–57.

> ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.
>
> [57] As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.

ii. Proportionality as a Requirement

Based on these thoughts for coordination at the national level, the majority in the *Benamor c Air Canada* judgment sum up the decisive points for consideration as

> the difficulties of relationships between the different courts involved, of the choice of suitable remedies and of enforcement, of the ability of the class representative to properly move the action forward and to communicate clearly with all involved, along with the 'complexification' of the file.[55]

In order to deal with this, they deem, as in any civil procedure, 'proportionality' to remain a key consideration for the authorising judge to make decisions, particularly on the group to be described as being bound by a future judgment:

> There is no doubt that an application for authorization is not immune from the principles that underlie the procedural system, so that such an application and the proceeding it gives rise to are subject to Article 18 CCP,[56] whether it concerns the description of the proposed group, the conditions for authorization, the notification of members, the replacement of the representative, the review of a common issue, the conduct of the trial on the merits, the approval of a settlement or any other step provided for in the Code of Civil Procedure. Consequently, proportionality, by the very nature of things, will be measured within the procedural edifice erected by the legislator.[57]

[55] *Benamor c Air Canada* (n 50) para 102; author's translation as this judgment is not available in English.
[56] Art 18 CCP provides:

> The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defense, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.
>
> Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

[57] *Benamor c Air Canada* (n 50) para 103; author's translation as this judgment is not available in English.

Catherine Piché, in her report for the Ministry of Justice of the Province of Québec on potential reforms of the régime for class actions in Québec, explicitly recommended the introduction of the principle of proportionality either as a general principle, into title III of book IV that deals with the Québec Code of Civil Procedure on class actions, or even as a fifth criterion for the authorisation of class actions.[58]

iii. Towards a Dynamic Interpretation of the Brussels I (Recast) Regulation

As long as the coordination mechanism proposed is not in place, the Canadian Phase I solution is the only viable alternative option that could be replicated in the EU. This means that recognition of foreign judgments will depend on the degree of judicial cooperation that is truly achieved within the EU. Canadian courts and legislators have recommended making the degree of consolidation of collective actions to be realised dependent on the effective support that exists for implementing such consolidation ('reality check'). This looks like a recipe for a way forward for the EU:

- As long as no cross-border coordination mechanism is in place nor properly defined, the Canadian Phase I solution must be maintained. This means that national courts are bound to limit the ambition of their decisions to beneficiaries domiciled in their own territory, excluding any effects on residents of other Member States.
- As soon as a well-defined coordination mechanism for collective actions similar to Canada's Phase II is in place, cross-border recognition could be decided upon, taking into account the proportionality criterion developed in the *Benamor c Air Canada* judgment. This should start no earlier, though, than when this procedure can be exercised via an IT infrastructure that relieves the courts of paper-based work and is capable of recording the essential key data of the individual beneficiaries at such an early stage that conflict resolution in ways other than resolution by the court – namely before ombuds offices or public authorities – is still possible, thus preventing lengthy and expensive court proceedings from being the only way forward.

iv. Following the Ontario Class Proceedings Act

An extremely helpful approach can be seen in the Ontario provincial law, which sets up a *superiority* requirement. It demands that the class action procedural vehicle be *preferable to all reasonably available means of resolving the class members' claims*, including, as applicable, a quasi-judicial or administrative proceeding, the case management of claims in a civil proceeding, or any remedial scheme or programme outside of legal proceedings.[59] This coincides with the reading we have already given to the criterion of proportionality, and is at the same time a smooth transition to the next subsection.

[58] C Piché, *Perspectives de réforme de l'action collective au Québec – Rapport préparé à l'attention du ministère de la Justice du Québec* (2019) 5, 'les coûts de l'instance (notamment les honoraires d'avocats souvent pharamineux) sont préoccupants toutefois'; and ibid 60, 71–76 (available at www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/RA_Piche_Ref_Action_coll_Qc.pdf).

[59] US Chamber Institute for Legal Reform, 'Response handed in to the call for public comment in relation to the Ministère de la Justice's review of the Québec class action regime' (consultation period 1 June to 31 July 2021) para 28.

IV. How to Do Better – Taking the Hodgian Perspective When Getting the Legislators on Board

Delivering redress is what Christopher Hodges has always strived to support and achieve.[60] His extensive research has shown that no class action in court can operate as quickly, effectively and at such low cost as regulatory redress and ombuds-based solutions. The often huge costs of the first instance in court, particularly those of the lawyers, have also been an important aspect in the reflections in Québec on potential reforms.[61]

Against the background of the Québec experience, putting collective court action into a subsidiary role should be an absolute 'must' for EU Member States as legislators when defining the requirements for admitting under their respective national laws of civil procedure the conduct of a representative action. Whether the criteria to do this will be called proportionality, preferability, desirability or superiority of a collective action does not matter – the important idea is that the collective court action as a very burdensome, slow, complicated and resource-intensive instrument will be used only as a last resort. And Member States can request this because defining the conditions for collective court action is their prerogative according to Article 7(3) of the Representative Actions Directive.

V. Conclusion for the EU and its Member States: What Should Be Done Now

The experience of Canada provides substantial evidence that can instruct us as we grapple in Europe with the issues that are the predictable result of badly thought-through legislation in Brussels. To attenuate the jurisdictional chaos and irresponsible delay in obtaining justice for the citizens concerned, urgent relief is required in national and finally EU legislative procedures. The individual Member States are hereby invited to make use of the transposition of the Representative Actions Directive in a forward-looking way, as follows:

- *Specialised courts* in all Member States need to be empowered to –
  - *authorise* representative actions *and coordinate* with the courts and administrative authorities of the same and other Member States on conflicting/overlapping representative actions, particularly on those with *cross-border* ambitions (see further below); and
  - coordinate on potential cross-border Settlement Approval hearings to permit all parties and all judges to participate in *joint hearings by video link* or other means. The 2018 reform in Québec instituted for the district of Montréal a group

[60] C Hodges and S Voet, *Delivering Collective Redress – New Technologies* (Hart Publishing, 2018) esp 281, 282, 301.

[61] Piché (n 58).

of 10 judges overseeing authorisation of class actions[62] – which looks like a sensible approach to follow.

- Clarification is needed in national Member State legislation that *no automatic recognition* will be granted to decisions in collective actions for redress from other Member States.
- Instead, recognition can only be granted against a defendant in the enforcement country if a specific kind of *exequatur* has been obtained, the Latin '*exequatur*' meaning 'it may be executed, enforced' – a decision in court to recognise the decision by a different (foreign) court.
- As a rule, such recognition should require that the foreign court procedure has previously been *declared acceptable by the NCP/Coordinating Court* in the enforcement country *under the future EU Protocol for the Management of Multi-Jurisdictional Representative Actions*. This Protocol should be created to coordinate within the EU along the lines of the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions, that is, organising the coordination between NCPs/Coordinating Courts about conflicting/overlapping representative actions.
  - Each NCP/Coordinating Court that has been seised with an application for a representative action with *intended cross-border effects* (defendant cross-border; intended cross-border opt-ins; intended recognition of declaratory judgments) needs to ensure that the foreign action will adequately protect the rights and interests of the NCP's country's residents, and that the foreign qualified entity offering a cross-border opt-in is in a position to properly represent the NCP's country's residents (following the example of Article 577 CCP).
  - A *proportionality test* should be a further criterion for the recognition of a foreign representative action as acceptable: the qualified entity wishing to offer cross-border opt-in should *demonstrate* to the NCP/Coordinating Court that there is no other means available to potential beneficiaries in that NCP's country to obtain an economically reasonable outcome. This proportionality test should explicitly be required to strike a balance between speed, amount, cost and ease of truly receiving compensation rather than just getting a procedure running. And here is the integration of Christopher Hodges' thinking that is so urgently required: this comparison should explicitly include regulatory redress and ombuds/ADR solutions, both of which are bound to be quicker, cheaper and easier for consumers to obtain effective redress. The Coordinating Court should take its time while awaiting the results of such procedures and simply stay for that relatively short time the procedure for the recognition of a foreign representative action intending to take residents of the Coordinating Court's country on board.
- Particular attention will be required in drafting the *EU Protocol for the Management of Multi-Jurisdictional Representative Actions* regarding the contents of the notice to all potential beneficiaries for an *EU-wide settlement*, which could look like the description of what is required for that purpose in the section 'Settlement Approval'

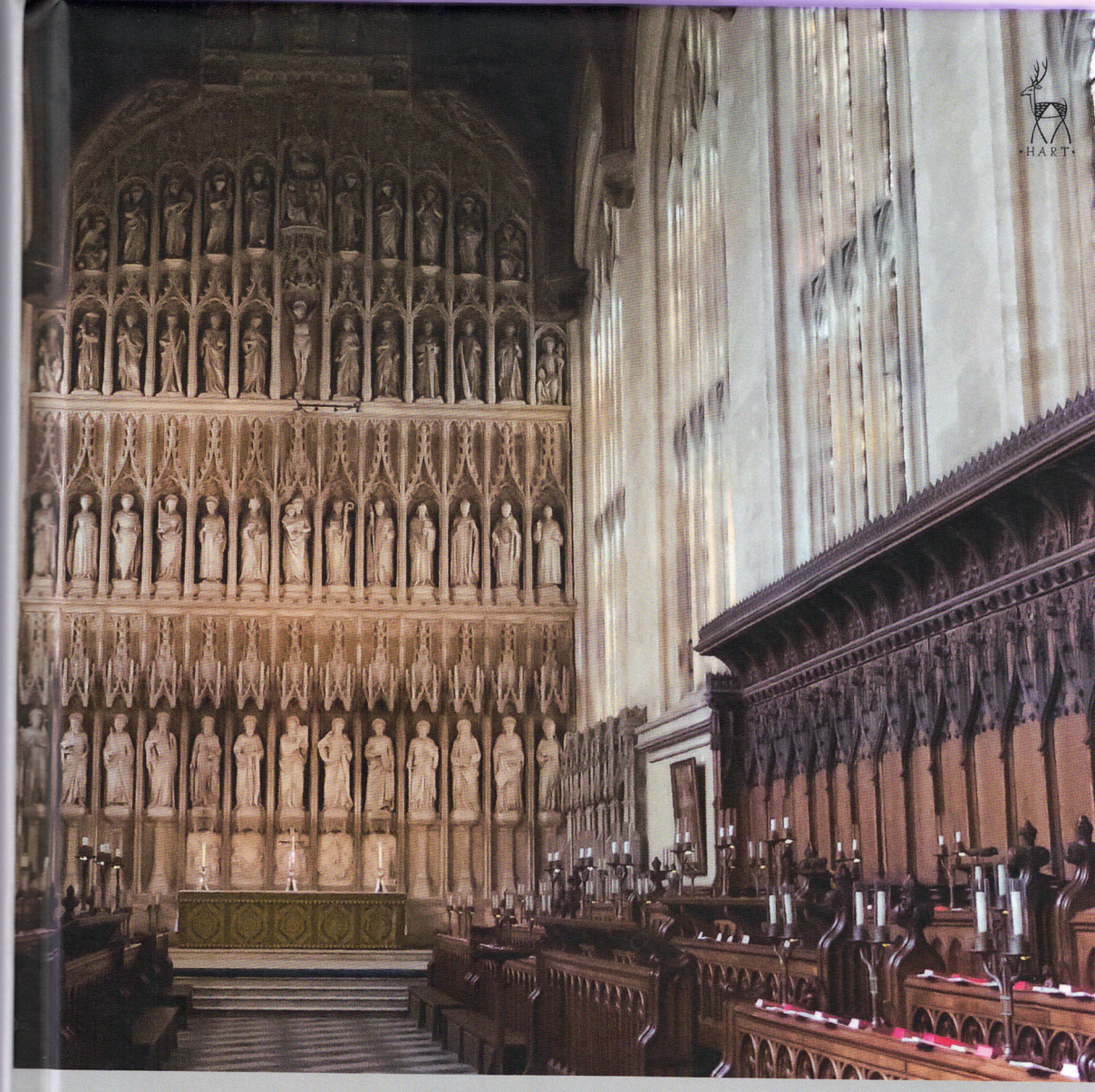
[62] Zakaib and Saint-Onge (n 15) 9; Piché (n 58) 61: 'Projet-pilote du Groupe des 10 juges de la Cour, au sein d'une Chambre des actions collectives restructurée'.

of the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (paragraph no 8 lit a–j).

- As already mentioned (section II), any kind of efficient procedure to coordinate overlapping or conflicting representative actions requires *IT support* that truly empowers the EU's NCPs to communicate with the courts and administrative units involved regarding the plethora of information to be captured and processed in cross-border mass claims. The tool meant to fulfil this task in the future has been announced by the Commission as currently being developed under the name 'REACT' (Representative Actions Communication Tool).
- A final proposal, the second part of proposals made earlier, is repeated as follows:[63] the EU and Member States should quickly create in unison state-of-the-art *IT tools* to capture the data of *potential beneficiaries, including addresses and bank account numbers*. The nucleus for such IT support exists in the form of the so-called 'Self-Test' on the Commission website[64] for Online Dispute Resolution (ODR). And looking back to section III.B.i and Article 81(2)(g) TFEU, the EU does have a *particular legislative competence on which it could convincingly base such efforts.* The particular charm of this approach is that it embraces for a second time the results of the research conducted by Christopher Hodges: resolving conflicts, with a clear priority on quick, easy and cheap redress, should best be promoted by a single access point on the Internet from which an escalation to a mass claim in court would be possible, but possible only as a last resort if less expensive and quicker ways to provide redress have failed.

[63] See section II, n 11: 'Legal Tech for Justice, Not for Profit' (n 13) 9–11 and 12 (graphical presentation).

[64] See at https://ec.europa.eu/consumers/odr/main/?event=main.home.selfTest – also quoted and described in 'Legal Tech for Justice, Not for Profit' (n 13) 11.



DELIVERING JUSTICE

A HOLISTIC AND MULTIDISCIPLINARY APPROACH

Liber Amicorum in Honour of Christopher Hodges

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