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Erin Brockovich turns European: is there an interest for class actions?

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General Report

General Reporters

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INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous "Erin Brockovich" picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named "Towards a European Horizontal Framework for Collective Redress"[1], accompanying its "Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law"[2]:

"Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law."

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU "Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union"[3].

[1] COM(2013) 401/2
[2] C(2013) 3539/3
[3] COM(2013) 404 final

LIST OF COUNTRIES AND NATIONAL REPORTERS

This general report is based on the 14 national reports that have been drafted for the following jurisdictions by the following authors:

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1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

It arises from the national reports reviewed that the legislation regarding class actions can be very different depending on the country and whether such legislation on class actions has been applicable for several years now, or since more recently.

Some countries have a single act (United States, France, Poland, Spain, Argentina, Finland), while others have several acts, which define the rules dealing with class actions or collective redress actions (England & Wales, Germany, Japan, Italy).

For instance, Germany has two systems of class actions:

- The first is a procedure called "Streitgenossenschaft", which gives a possibility to parties concerned by individual proceedings to join the proceedings against the same defendant;

- The second system is based on the KapMuG (Capital Market Investors' Model Proceeding Act) and deals with mass claims in the area of capital markets.

Except in the United States and in Argentina, the legislation about collective redress action is quite recent. Indeed, Poland has adopted such a legislation in 2009, Japan in 2013, France in March 2014, and Belgium in May 2014.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law…)?

Except for Turkey, and to a lesser extent the United States, where class actions can be initiated in all fields of law, class actions generally have a scope limited to some fields of law.

Indeed, in Turkey, collective action is applicable to any legal action. In the United States, there is no provision that limits the application of class actions to certain legal subjects, but the class action requirements may in practice render the procedure unavailable for certain kinds of claims.

In the England & Wales, the CPR's rules are applicable to all types of civil proceedings and fields of law, except competition law that is governed by the specific statutes Competition Act.

Generally, collective redress actions have a scope limited to some fields of law such as:

- Consumer law and competition law (Spain, Italy, Belgium, France, Japan, Poland, Finland, Argentina);

- Securities litigation (Germany);

- Damages to the environment (Argentina).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

All countries examined in this report allow to bring a collective redress action on the ground of several statutes, subject to the specific competence of the Courts.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In several countries (United States, Argentina, Finland, Spain), initiating summary/emergency proceedings in a class action is allowed without any condition (except for conditions resulting from general procedural rules).

On the contrary, summary/emergency proceedings are not allowed in Poland, Finland or Germany.

It is interesting to point out the specific situation of Japan, where class action itself is a kind of summary proceedings in comparison with the ordinary civil proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

In the United States, Israel, Spain, Argentina, Japan, Finland and Poland, it is allowed to claim for the cessation of unlawful practices/behaviors, and to claim compensation for the damage suffered.

In the England & Wales and in Germany, both claims are also possible, but with different schemes:

- A compensatory scheme before civil courts and the CAT (Competition Appeal Tribunal) in the United Kingdom, and under the KapMuG in Germany.

- A cessation scheme with regards to competition rules, the Civil Procedure Rules and the CAT in the United Kingdom, and with other mechanisms in Germany.

The compensation of the damage suffered is the only purpose of class actions in Italy and in Belgium, while in Turkey, the purpose of collective redress actions is only the cessation of the damage.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Every type of damages is covered by collective redress actions in Israel, Spain, United Kingdom, Poland, Belgium and in the United States.

In Argentina, all damages are covered as regards consumer protection.

In France and Germany, only material damages are covered to the exclusion of any physical injury or moral harm.

In Italy and Finland, it depends on the legal ground of the class action.

The situation is especially unique in Japan, as it has adopted a different distinction between the kinds of damages. Indeed, it covers any damages to the exclusion of indirect damages, lost profits, pain and suffering damages.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

Except in the United States and in England & Wales, it is not possible to obtain a compensation that exceeds the compensation that would have been awarded if the claim had been pursued by means of individual actions.

Indeed, there is a principle of non-enrichment, and the compensation shall be evaluated on the individual damage actually suffered.

There is an exception to this principle in both the United States and in the United Kingdom, where punitive damages are allowed in class actions, leading to an over-compensation in favor of the claimant party of the damage suffered.

In the United States, punitive damages are not automatic, but may, as well as treble damages and attorney's fees, be pursued in class actions on the basis of the substantive law provisions regarding the recovery of damages.

In England & Wales, such punitive damages are only available in exceptional and limited circumstances, such as where the defendant is guilty of oppressive or unconstitutional action or where it has calculated that the money to be made from its wrongdoing will probably exceed the damages payable. Such punitive damages may be awarded in cases involving competition damage claims or deliberate torts – such as deceit and defamation –, but are not available in cases involving a breach of contract.

1.8 More particularly in the anti-trust field, how does the "passing on" defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

Up to now, the passing-on defence has only played a role by the courts in Argentina, Germany, England & Wales, Finland, the Netherlands and the United States. In almost all of these countries, the courts have recognized this defence one way or another, provided that it has been sufficiently proven in fact. In the Netherlands, the district court in the *Insulated switchgear cartel*-case refused to acknowledge the passing-on defence but the decision has been appealed and this is one of the main themes in the ongoing appellate procedure. In the United States, the passing-on defence was rejected by the Supreme Court in *The Hanover Shoe, Inc v. United Shoe Machinery Corp*., 88 S. Ct. 2224 (1968). On the other side of the coin, an indirect purchaser who paid the marked-up price charged by someone passing on the illegally high price has no claim against the anti-competitive manufacturer who sold to the middleman (Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977). In Belgium, Japan and Poland such a defence should be possible pursuant to law, general principles or literature.

2. <u>Standing and admissibility to bring class actions/collective redress actions</u>

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement ("collective actions"), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice ("representative actions")?

There are two types of class actions:

- "The collective actions" which are the actions brought by any group of individuals or legal persons claiming to have been harmed by the same defendant;

- "The representative actions" lodged by an authorized/certified or public representative entity on behalf and in the name of individuals or legal persons claiming to be victims of the relevant practice.

In some legal systems, these two kinds of class actions coexist (in the Netherlands, Germany, Spain and in the United Kingdom).

In the United States, anyone can bring a putative class action lawsuit if the requirements are satisfied. The American specificity is that class actions are usually brought as private actions.

On the contrary, in the remaining countries, only the representative class action is applied.

In some of them (Finland, Israel, and Poland), the Consumer Ombudsman, as a claimant, exercise the right of a party to be heard in Court.

Furthermore, several countries, as France, Belgium, Japan and Turkey, provide that the class actions can only be brought by duly registered associations. However, Turkey law is less strict as it admits associations or other legal entities to bring such actions provided that it is specified in their articles of association.

In Argentina, the action can be brought by the Consumer Ombudsman or by registered associations.

Italy is the only country to provide that the class action shall be brought by a single individual assisted by a lawyer and optionally by a consumers association. In practice, the class representative acts in his/her own name and on his/her own behalf by bearing all the relevant costs and expenses.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

In Turkey, Israel, France, Poland, Belgium and in the Netherlands, there are no specific rules for group actions.

On the contrary, in some countries (Finland, England & Wales) the case may be heard as a class action if several persons have claims against the same defendant, based on the same or similar circumstances.

In Spain, either the individuals or the representative entity shall inform each other of the filing of their respective actions in order for the non-claiming party to intervene in the procedure.

In the United States, Federal Rule 23 applies to class actions, whereas representative or mass actions, which are not qualified as class actions, will be governed by specific statutes under either state and/or federal law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements…), and can the representative entities been sanctioned if they do not comply with such requirements?

In most of the countries – except in Italy and in Germany – representative entities have to strictly respect some requirements.

As a general remark, in these countries, representative entities must always promote the interests of the victims involved.

Nevertheless, each country has its own features:

- In the Netherlands and in Belgium, the representative entity has to be a non-profit association or a non-profit foundation.

- In Argentina, Finland and in England & Wales, the entity shall be independent of any form of professional, commercial and productive activity and also to be impartial.

- Both French and Belgium law impose a condition of duration of existence of the consumers associations. Indeed, in Belgium, representative entities shall have got legal personality for 3 years on the day the collective redress action is filed whereas in France, they shall have been existing for at least 1 year.

- Moreover, French law distinguishes between national associations and local associations. The national associations have to gather at the date of the certification at least 10.000 members, whereas the local associations have to raise only a sufficient number of members.

- In the United States, the adequacy of a class representative is a question of fact that will depend on the circumstances of each case and typically involves inquiry into two issues: (i) whether any substantial conflicts of interest exist between the representatives and the class and (ii) whether the representative will adequately prosecute the action. Only fundamental or substantial conflicts can render a named representative inadequate.

- Moreover, the Private Securities Litigation Reform Act of 1995 ("PLSRA") requires the Court to identify and appoint a lead plaintiff determined by the Court as being the best representative for the other class members.

In all countries, the actions will be deemed inadmissible if the requirements are not complied by the representative entities.

On the other hand, if the representative entities do not comply with such requirements, they are not all financially sanctioned in the countries examined in this report. For example, while in Israel, they will be personally sanctioned with legal costs, in Spain no sanction is generally foreseen in the same case.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

The admissibility of a class action/collective redress action, known as class certification, is a process by which a judge determines by order whether to certify the action as a class action.

In most countries, the admissibility of a class action/collective redress action is examined by the Court at an early stage of the proceedings also called "preliminary examination".

However, in some countries as the Netherlands, Argentina and France, there is no certification stage in the procedure.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Generally speaking, a claimant has to have 'sufficient interest' in all reported countries when he wants to bring a claim. Anyone with sufficient interest has standing to bring an action, whether stand-alone or follow-on. In Belgium, France, Italy, Japan, Spain and Finland it is not possible for third parties to bring actions. The law differs between the reported countries with respect to indirect purchasers. Indirect purchasers are able to bring actions based on antitrust infringements in the Netherlands, Germany, England & Wales, Israel, Poland and Turkey. Nevertheless, it has to be recognized that up to now the standing of indirect purchasers has only been recognized explicitly by the courts in the Netherlands, Germany and England & Wales.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

In most of the countries examined in this report, there is no limit concerning the number of claims to be aggregated. The number of claims depends on the facts and circumstances of each case.

Given the structure of the Italian class action, multiple plaintiffs cannot jointly file a complaint in this jurisdiction. The action is brought by a single individual who becomes the class representative.

Nevertheless, in England & Wales, Germany and Poland, there is a minimum required number of claims to be aggregated:

- In England & Wales, it is commonly accepted that there must be at least 5 claims purely by reason of the resources required to conduct group litigation.

- German law requires at least 10 claims to be filed and registered in order to initiate proceedings based on it.

- Polish legal system requires also 10 claims that shall have the same factual basis or the same legal basis regarding judicial civil procedure.

In France, regarding the filing of complaints, there is no implementing provision yet. A decree should be enacted come to determine this point.

It is also interesting to underline the existence of features in the following countries:

- In Argentina, the Federal Civil and Commercial Code recognizes not only the joinder of actions but also the consolidation of claims.

- In Finland, in order to file an action with multiple plaintiffs, certain prerequisites shall have to be met: (i) the subject of the dispute has to be indivisible in a way that only claimants together can be entitled or bound and (ii) plaintiffs have to act as a unique claimant because the court only gives one judgment with the same content for all co-parties.

- In Poland, a class action concerning pecuniary claims is possible only if the amount of the claims of each member of the group has been made equal with the others.

- In Spain, in all actions initiated by qualified entities or consumer groups, the injured consumers shall be called to participate in the proceedings in order to defend their rights. This call is made through the media in the place the harm has occurred.

2.7 More generally, what procedural defenses are available for defendants short of trail and therefore before the national court decides on the merits of a collective action?

In most of the countries concerned by this report, the defendant has various defenses before the national court decides on the merits of a collection action.

- In the United States, there are also procedural opportunities for the defendant to defeat the class claim prior to the examination of the merits.

  Moreover, the defendant can use defenses at different stages of the procedure.

  1. At first, at the pleading stage, the defendant can:

     - lodge a motion often called a "so what" defense which consists in arguing the plaintiff has no claim, even if the plaintiff allegations are true;

     - challenge the court's jurisdiction and/or argue that another venue would be more appropriate to ending of the class claim.

     - dismiss the class actions on the basis of mandatory arbitration clauses.

  2. The defendant can also use procedural defenses at the certification stage, it being specified that class certification is a crucial step in the procedure. In fact, if the certification is denied, the case cannot continue.

  3. In the event the defendant loses at the motion to dismiss stage and fails at the class certification stage, he/she can request a summary judgment.

- In England & Wales and in Germany, there are general procedural defenses for the defendant as the lack of standing or the expiration of the statute of limitations.

- In Argentina, the defendant may lodge the following procedural defenses: statute of limitations, res judicata, lack of standing, insufficiency of service of process, a motion for more definitive statements. And, in practice, once the plaintiff replies to the defenses, the Court is entitled to postpone the consideration of these issues until entering final judgment, order the production of evidence or enter an interlocutory decision if there are no facts to be proven.

- In Spain, procedural defenses may refer to the right to stand in Court of the group or entity, but not to their relationship to the merits of the case.

- In Israel, the defendant may oppose three preliminary arguments:

  - the plaintiff does not comply with the requirements;

- the action does not raise substantive question of fact or of law in common to all members of the group and in that case, or the class action is not the efficient nor a fair way for a resolution of the conflict;

- In the case a petition for approval was brought against the State or any of its authorities, the defendant may claim that the class action is expected to cause severe harm to the public in comparison with the expected benefit to the members of the group.

- In Poland, the defendant has the opportunity to contest group membership of any group member during a period determined by the court and not shorter than one month.

- Dutch law provides that in case of a collective action, the defendant can argue that the entity does not have standing because of the given circumstances, or that the victims' interests are not sufficiently safeguarded by the representative entity. Furthermore, in group actions, the defendant can argue that the assignments are not valid.

In the remaining countries like France, Finland and Turkey, there are no pre-trial defenses.

3. "Opt-in" vs "Opt-out" systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed ("opt-in" principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group ("opt-out" principle)?

Several countries have adopted the principle of "opt-in", under which the claimant party or group is formed on the basis of express content of the natural or legal persons claiming to have been harmed (Finland, France, Italy, Japan, Poland, Spain).

In Germany, the legislator has refused to create an "opt-in" and an "opt-out" collective action, but the KapMuG (Capital Market Investors' Model Proceeding Act) is considered to have adopted an "opt-in" system, as individual claims have to be filed or registered with the court.

Argentina is the only country where "opt-out" is the only applicable system for collective actions related to consumer protection.

All other countries (Belgium, Israël, the Netherlands, Turkey, England & Wales and the United States of America) apply both the "opt-in" and "opt-out" principles in their jurisdictions.

However, in some of these countries, there is a predominant system. Indeed, in Turkey as well as in England & Wales, the principle of "opt-in" is predominant, but the "opt-out" principle applies in certain circumstances linked to consumer protection. On the contrary, the "opt-out" system mainly applies in Israel, but the court may order to include only claimants who inform the court in writing that they wish to join the action.

There are only 3 countries where "opt-in" and "opt-out" systems are equally applied (Belgium, the Netherlands, United States).

In Belgium, for example, the representative proposes one of the systems to the court, and the court decides on the applicable system in its admissibility decision (except for physical or moral harm where the "opt-in" system is mandatory).

In the United States, it varies according to the basis on which the mass action proceeds or the class representative seeks class certification. More importantly, there is a third option which is the mandatory class: such a class has no right for its members to opt-out, as the outcome of the litigation will benefit or burden everyone in the class regardless of a personal wish to not be so benefited or burdened.

3.2 What are the effects of the judgment on the victims in the "opt-in" or "opt-out" system chosen in your jurisdiction?

Depending on the applicable system, the effects of the judgment on the victims can be quite different.

As regards the United States where both systems apply, a judgment rendered in an "opt-in" class action shall directly bind only the victims who opted-in, whereas a judgment rendered in an "opt-out" class action shall only bind the members of the class who did not opt-out.

Moreover, the decision rendered shall also be used as a precedent judgment in future individual lawsuits that may be brought. Whether in an "opt-in" or an "opt-out" system, individuals who did not opted-in or opted-out may get an individual benefit from a successful class action.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

In the United States, as well as in Spain and Belgium, a member of the claimant party is not free to leave the claimant party at any time before the final judgment is rendered or the case is

otherwise settled, in order to avoid such members to back out of the class action and to bring a separate lawsuit against the defendant.

However, in several countries, it is possible for a member to leave the claimant party either at all stages of the proceedings (Germany, England & Wales) or under certain conditions.

Indeed, before the case goes to main hearing, a class member may resign from the class by notifying the court in writing or in person at the court registry. Once the case is in the main hearing, a class member may resign from the class as described above only with the consent of the defendant.

Also, once the case has been heard and is under deliberation by the court, a member of the claimant party shall no longer be free to leave the claimant party (Finland, Poland, Turkey).

Also, it is interesting to point out that in countries where a two-step system applies, victims can leave at any stage of the indemnification phase, as victims join the group of persons to be compensated after it has been ruled on the defendant's liability (France, Japan).

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

In the majority of the countries considered in this report, a natural or legal person claiming to have been harmed in the same mass harm situation is able to join the claimant party before the judgment is rendered or the case is otherwise settled.

Indeed, the "opt-in" must be filed by such a person within the time limit set either by the statutes or the court in its decision, at its discretion.

In the United States for example, the court is required to grant a timely motion for intervention if a statute allows it or if someone has an interest in the litigation. Moreover, the court has discretion to permit intervention upon showing that the applicant has a claim or defense that shares a common question or fact or law with the principal claims in the case.

In countries where a two-step system applies (France, Japan), a victim can join the group of persons to be compensated after the court has ruled on the defendant's liability.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

There are not always specific provisions regarding the information of the defendant about the composition of the claimant party. However, in all the countries examined in this report, there is always a possibility for the defendant to have access to this information.

Indeed, in several countries, once the class action has been filed, the defendant receives notice of the commencement of a class action, which contains a description of the class. It is indeed useful for the defendant to be able to determine the members of the class.

In the other countries, the defendant is informed about the composition of the claimant party by the court within its decision ruling on the defendant's liability (France, Israel, Japan), or by the litigation registry held by the court (Germany, England & Wales for competition matters).

Italy is the only country where the defendant has to take an active step to be informed about the class composition by asking the Clerk's office.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

In most countries, there are no specific provisions regulating the way victims of the practice are informed about a possible or actual class action. Therefore, the court can generally order publicity measures at its sole discretion.

In some countries however, the admissibility decision is published in the official gazette and/or on the website of public entities, such as the Ministry of Economical Affairs (Belgium) or the Consumer Protection Agency (Japan).

Regarding the protection of the reputation or company value of the defendant, the countries examined in this report have no specific safeguards for such a protection of the defendant before and after its responsibility for the alleged infringement is established by the final judgment.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

Most countries do not have any registry of class actions or collective redress actions in their jurisdiction (Argentina, Finland, France, Germany for joint actions, Italy, Japan, Poland, Spain, the Netherlands, Turkey, England & Wales for competition's matters, United States).

In some countries, the main decisions rendered are published by the Ministry of Economical Affairs on its website (Belgium, Italy), by the Consumer Protection Agency (Japan), or by some consumer organizations (Italy).

There are only three countries where an official registry exists:

- In England & Wales, there is a case register for Group Litigation Orders;
- In Israel, the director of courts shall keep a registry of class actions;
- In Germany, model cases are listed, and in the German Federal Gazette, the Higher Regional Court discloses the parties, the declaratory judgment proposals and any rendered orders.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law ("follow-on actions") or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In almost all of the reported countries there are no specific rules or regulations for class actions with respect tot competition law infringements. Furthermore, both follow-on and stand-alone actions are possible. In England & Wales, stand-alone actions can only be brought before the High Court. In Japan, the Japanese collective redress action is designed to work as a standalone system, but it is not prohibited to use this system for follow-on actions, if at all possible. In France, however, the Law on consumers' affairs provides for specific modalities for class actions based on the infringement of EU or national competition law. As a result, a class action in the competition law area must be started as a follow-on action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

In all of the reported countries stand-alone and/or follow-on actions are in principle available for both bilateral as well as unilateral antitrust infringements. Nevertheless, it has to be noted that in most countries there have been no cases yet based on unilateral antitrust infringements.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In all reported countries the general rules on evidence apply. Pre-trial discovery is only possible in England & Wales, Israel and the United States. In the Netherlands, there is a limited system of discovery in place. A plaintiff is able to claim pieces of evidence (such as documents, audio or digital evidence) under certain conditions. Secondly, plaintiffs are able to start pre-trail witnesses hearings before a judge of a district curt to obtain evidence.

Gaining access to the file of a competition authority is difficult for plaintiffs in almost all of the reported countries and will also depends whether or not an investigation is still on-going. In for example Finland, it is explicitly stipulated in the Competition Act that information provided by an immunity or leniency applicant in a leniency application cannot be used in a related private damage action. Nevertheless, in Japan a plaintiff may have access to the file as it is likely to be regarded as an interested party to the trail. In Germany, a plaintiff in a follow-on case may also have the right to gain access to the file of the competition authority provided that the legitimate interests of the plaintiff outweigh the legitimate interests of the wrongdoer or third party in non-disclosure, and the granted access does not jeopardize the competition authority's investigation. In Turkey, a claimant can also access the file because the investigation is executed by court and not a public authority. Therefore, interested parties may access all the documents obtained for the case.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

In most countries, there are no specific rules which extends the limitation rules so that a plaintiff can wait until the investigation of the public authority has ended. In Germany however, the limitation period is suspended if proceedings are initiated by the German Federal Cartel Office, a competition authority of one of the German Federal States, the European Commission or a competition authority of one of the EU member states. In Italy, the court may stay the class action until the competent authority issues its final decision. In the Netherlands, the courts have ruled that a plaintiff did have to be aware of its potential claim when an investigation is announced by the competition authority and can therefore wait until a decision is issued. However, this should not be regarded as a hard and fast rule. In France, the law sets a specific limitation period for class actions based on competition law: the claimant must initiate the class action before the expiration of a period of five years from the date the decision can not be challenged anymore.

In the United States, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again. Parties can, and often do, enter into private tolling agreements that toll the applicable limitations period for filing a claim in order to discuss settlement, investigate the underlying facts or law, or allow some other related process or event to occur. Courts also have broad powers in many instances to stay the proceedings in

the interest of efficiency and justice, particularly where parallel or related proceedings are underway.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

In all the non-EU countries, a decision would constitute an important factor to be considered but is not technically a presumption of proof. Pursuant to the *Masterfoods*-doctrine, an EC decision is binding for the courts of the EU member states but this is also the case with decisions of the national competition authorities pursuant to national law. In the Netherlands, the *Masterfoods*-doctrine have been discussed before the courts in the actions with regard to the *air cargo*-cartel and the *paraffin wax*-cartel. In these cases, defendants attempted to invoke *Masterfoods* in order to stay the proceedings. The Dutch High Court of Amsterdam has given the following rules for a potential stay based on the *Masterfoods*-doctrine:

1. defendants have to show that they have appealed the administrative decision within the applicable time limit.
2. defendants have to show that their administrative appeal has a certain degree of merit; i.e. a *pro forma* appeal or an appeal that is *prima facie* without any merit cannot result in a stay of the civil proceedings.
3. defendants have to give show which defences they are going to bring forward in order to allow a judge to decide to what extend these defences are dependent on the outcome of the administrative procedure.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

In Argentina, Finland, Japan and Spain it is not possible to have class actions financed by third parties and - generally speaking - due to the fact that in these countries class actions may only be started by certain public organizations. The specific regulations in these countries expressly prohibits these organizations receiving financial aid from third parties. In all other reported countries it is possible to have the class action financed by third parties.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

This is not the case in all of the reported countries. Nevertheless, the funding could play a role in the United States if the opposing party makes an adequacy issue out of the proposed class

representative's ability to prosecute the case of judgment (including by paying the costs of litigation).

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

In most of the reported countries this will not play role before the court (since class actions may only be started by certain public organizations) or the court is not able to stay the proceedings because of the funding. In Germany, the court could stay the proceeding if the litigation funding is void or if there is a risk that the court and lawyer fees cannot be paid. In Engeland & Wales, France and Israel the courts can also stay the proceedings for the above-mentioned reasons. In Turkey, a plaintiff has to pay the litigation fees while initiating a lawsuit. In case it is seen that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted a two-week term to realize the payment. In the United States, these issues would not typically result in a stay of the proceedings but rather a decision not to certify the class, or not to certify a given named plaintiff as class representative, on the grounds that the class representative is not adequate to the task of representing the interests of the absent class members.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

In some countries (like Germany, England & Wales and the Netherlands) financial aid is available if plaintiffs are unable to pay legal fees due to their financial and economic circumstances. In Israel, a fund is established in order to assist representative plaintiffs to finance class actions which have a public or social importance. Financial aid is available in Spain for consumers and users which are legally registered in the State register for Consumers' and Users' Associations. In the United States, the most ready source of financial support is the class action plaintiff's bar and to find a plaintiff's lawyer willing to take the matter on a contingency basis.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Such fees are allowed in Argentina (but only for individual claims), England & Wales (as from 1 April 2013), Finland, Italy (even though some limits are still to be observed), Japan

(but it may not be applied to the collective redress actions), Spain, Turkey and the United States.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

In most countries the losing party has to pay the legal costs of the winning party. Nevertheless, in most countries the amounts are rather limited due to statutory limitations or the mindset of the court. In Argentina, Italy and Finland however, the winning party may recover 100% of its costs. In England & Wales, the winning party may even recover costs against the third-party funder.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Since only specific public organizations can start class actions in a number of the reported countries, these countries have no specific rules and/or safeguards to prevent groundless actions. In the other countries rules and/or safeguards are limited and mainly aimed at managing the proceedings on a constructive and speedy manner (for example in England & Wales).

In Israel however, there are numerous rules and safeguards such as the requirement to conduct the class action in good faith, the obligation to subject a settlement agreement to the approval of the court, the rather high evidentiary standard determined by the courts at the stage of approval of an action as a class action (for example, the requirement to submit an economic opinion in the primary phase of approving a class action which is bases on antitrust laws), etc.

In France, the applicable law includes Many provisions aimed at avoiding abuses in class actions, among which the fact that the action can only be brought by a certified association and that only material damages may be compensated.

In the Netherlands, collective actions can be brought by a foundation or association with full legal capacity only if the action is intended to protect similar interests of different persons to the extent that the articles of association of the foundation or association promote such interests. In principle, it does not suffice if only the articles of association mention such interests, the foundation or association should, in most cases, actually employ activities related to the interest it promotes. Furthermore, before instituting proceedings, the plaintiff must make sufficient attempts to negotiate with the defendant in the Netherlands.

In the United States, Congress passed in 2005 the Class Action Fairness Act ("CAFA"). The objective of CAFA was to curb two forms of abuses: forum-shopping by plaintiffs and the class-action plaintiff's bar that was resulting in an unusual number of class action cases being

filed in certain forums considered more favorable to plaintiffs, and settlements engineered by named plaintiffs, class counsel, and defendants in a way to ensure handsome payouts to class counsel and paltry or valueless awards to absent class members. CAFA created additional grounds, unique to putative class actions, for removing lawsuits from state courts to federal courts. CAFA also required additional scrutiny of settlements, including by giving state attorney's general a right to receive notice of and an opportunity to object to a settlement affecting class members from their states. Settlements involving coupons for class members enjoy special judicial scrutiny, and CAFA requires attorney's fees awarded on the basis of coupons to consider the amount actually redeemed, not the value available.

5.8 Are the parties to an action able to insure against the cost risks?

This is, some way or another, possible in all of the reported countries. Nevertheless, it is not common in some of these countries (for example, Belgium, Germany and the Netherlands). In the United States, it is usually not done directly, but indirectly through indemnifications for directors and officers and with the use of directors- and officers insurances. Furthermore, professionals such as accountants and lawyers have errors-and-omissions coverage.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

This is possible in Germany, England & Wales, Israel, Japan, the Netherlands (but limited), Poland and Spain. In the United States, it is possible, but such orders are very rarely granted and usually not worthwhile to pursue due to the costs. Provisional measures can be requested in France before the Judge of Execution but they only apply to a debt.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

There are ethical or Bar rules with respect to class actions in England & Wales, France, Israel, the Netherlands and the United States.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific international private law rules applicable to class actions and/or collective redress actions in all reported countries.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

There are no specific rules prohibiting a single collective action to take place in a single forum in all reported countries.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

A foreign representative entity has legal standing in Belgium (has to be authorized by the Ministry), Germany, England & Wales, Israel, Italy, Japan (nevertheless it is only theoretically due to several Japanese rules), the Netherlands (only with respect to group actions but not collective actions), Poland, Spain (but it depends on local laws) and the United States.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

In most countries the general rules of civil or international private law would apply and therefore, it is or should be possible to bring a claim against a company and/or individual domiciled outside of the jurisdiction. Under circumstances, cases might be stayed pending the outcome of the case in another jurisdiction.

This is not the case in countries (such as Finland and Japan) where only public authorities or certified consumer organizations are able to bring cases to the court.

7 Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trail and are the implications for refusing?

Several countries have a specific mechanism that is very similar to what can take place outside of class actions, but without any specific mechanism of alternative dispute resolution allowing the settlement of class actions.

In France and Israel special provisions about this point exist, and a settlement agreement is possible but must be approved by the Court. In France, it is possible for the claimant association to participate in a mediation to obtain damages.

Spain has special provisions regulated by a royal decree since 1993. Under such a decree, all the professionals wishing to become a member of the consumer affairs arbitration system can join it by making a public offer of submission. The consumer affairs arbitration system

regarding future conflicts with consumers, therefore, is subject to arbitration. The party opposing to the submission can request an action for annulment of the award under specific conditions.

While in Poland mediation is available at any stage with the consent of the parties, in Belgium there is a compulsory mechanism of collective alternative dispute after the admissibility phase.

In Turkey, Japan or Germany, arbitration or mediation are possible, and both legislation and lawyers promote out-of-court agreements.

In the United States, the court may order parties to participate in alternative dispute resolution, but has no power to order parties to settle or to fashion a settlement.

In England & Wales, there are no special provisions, but the government has showed strong support for the use of alternative dispute resolution in competition cases.

7.2 Are the parties encourages to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Except in Israel and Japan, out-of-court settlements are promoted with more or less force.

In France, England & Wales, Belgium, Germany, Finland and in Poland, judges or courts have a mission to try and settle or promote a settlement.

These types of agreements are very developed in Spain, and also promoted in Turkey even if there are not very often used.

In the United States, this varies from court to court and even from judge to judge.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

In some countries (Israel, the Netherlands, Germany, Argentina, France), the limitation period is tolled during settlement negotiations or arbitration. In particular, in France, in the event of mediation during the proceedings, the case is not removed from the judge.

In Italy, although there is no formal suspension of the procedure, the parties may ask the Court to grant an adequate postponement of the hearings in order to slow down the proceedings and thus have enough time to conduct the negotiations.

On the contrary, in other countries (Japan, Belgium, Finland, Turkey), settlement discussions, mediation or other forms of alternative dispute resolution do not suspend limitation periods applicable to the claims.

In England & Wales, the principle is also that negotiations will not suspend the limitation period, unless there is a clear agreement to suspend the limitation period, and if this agreement is not in conflict with a relevant rule or practice direction which prohibits any variation of time limits.

In the case of negotiations between the parties before and after a limitation period has expired, it will not constitute waiver or estoppels, unless the defendant has made his intention unequivocally clear. The English legal system provides a discretionary exclusion of time limit for actions in respect of personal injury or death.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

In the majority of the countries examined in this report, consumers are widely protected. Therefore, a provision which prohibits a consumer from bringing a class action in court is deemed to be void.

Finnish law forbids arbitration clauses in consumer contracts, whereas Italian law provides that the existence of a valid arbitration clause in an agreement may prevent the District Court to examine the case.

The United Kingdom's report points out that an arbitration clause in a party's standard terms is not binding on the customer because it causes a significant imbalance in the parties' rights and obligations, to the detriment of the customer, by preventing the customer from taking legal action other than arbitration.

8 Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Provisions exist in several countries regarding the enforcement of the court decision, and more particularly the information of the victims of the practice.

- In Israel, the court may order some or all of the parties to be responsible for the publication of a notice.

- In England & Wales, the decision shall be delivered in public.

- In Spain, there are rules regulating publicity and intervention in proceedings for protection of rights, as well as collective and individual interests of consumers and users; when it concerns association the decision is published in the media.

- In France, it belongs to the judge to define the way the victims or consumers that could be included in the class action will be informed. The publicity costs are in charge of the professional. Moreover, the judge fixes the delay given to the consumer to adhere to the class action (between 2 and 6 months) and decides whether the consumer has to contact directly the professional or the association or any other person to obtain the damages.

- More generally, there are publicity measures in Belgium, Germany, Poland and in Japan.

Even in the case where there is no specific provision (Argentina, Finland, Italy) about this point, the general procedural rules allow the victims to be informed (copies of judgment, advertising activities, gazette).

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

Some countries are regulated by general rules regarding the enforcement of the court order and the possible compensation paid by the defendant (the United States, Germany, Finland, England & Wales).

In France, the Court that rendered the decision on the merits of the case is in charge of the enforcement of the decision. The association will represent all the claimants who have obtained the damages by the professional in a fixed delay.

In Finland, as well as in Japan, it is up to the claimant to initiate the enforcement proceedings.

Special provisions exist in several countries:

- In Spain, the orders are enforceable within 5 years from the final decision;

- In Italy, if the court's decision is favorable, it becomes enforceable solely after 180 days and during 6 legal months;

- In Israel, the court may issue orders concerning the supervision over the enforcement of its judgment;

- In Argentina, the law provides that any amount of money that a defendant must pay shall be done through the same means the initial amount paid by the consumer was perceived by the defendant.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Generally, there are no specific rules about the effective compliance of the injunctive orders, and the general procedural rules are applied.

However, some countries have specific provisions. In France and Argentina, it is possible to pronounce pecuniary sanctions in case of a refusal to execute a judicial decision.

A fine is also possible in Germany, where the plaintiff can also request by a motion a security for any damages that may arise as a result of a future violation.

In Spain, the defendant has to declare the assets the seizure of which is sufficient to cover the amount for which the enforcement was made. Regarding non monetary sanction, Spain law provides a fine for each day's delay or compensation for damages.

In Italy and in the United Kingdom, the issue is resolved by the court:

- If an injunctive order is disobeyed in England & Wales, the party against whom it is made would be in contempt of court, generally enforced by committal proceedings;

- In Italy there are no provisions about effective compliance. However, if there is an appeal, the court of appeals must take into consideration the amount of money to be paid. When the court of appeals suspends the decisions' effects, it may order the losing defendant to pay the corresponding sum as a deposit.

The strictest provisions apply in Turkey, where a defendant not complying with an injunctive order can be sentenced by a court to a penalty of imprisonment from 1 to 6 month(s).