SHAPING MODEL RULES FOR COLLECTIVE REDRESS

Astrid Stadler*

This article examines the development of the Model Rules of Civil Procedure Law within the ELI/UNIDROIT project and explains its international significance. The Model Rules were adopted in 2020 and include specific proposals for collective redress instruments. The article outlines the organisation of the project, the methodology of the working groups, the comparative law background in general, and discusses key provisions of the proposal regarding collective redress such as legal standing, opt-in v. opt-out mechanisms and third-party funding of collective actions. The article also explores the objectives and the political background of the whole project and of collective redress in particular. It also attempts to answer the question of whether the Model Rules can be considered a successful instrument today.

1. THE EUROPEAN MODEL RULES OF CIVIL PROCEDURE

This article builds on the contribution to the conference on the Representative Actions Directive held in Stockholm in October 2025 and subtitled 'emerging practices and remaining dilemmas'. In this context, discussions on harmonization of the respective legal rules are essential. With the Representative Actions Directive, the European legislature has established only a loose framework for collective actions. Consequently, implementation across the Member States presents a highly heterogeneous picture. The European Model Rules of Civil Procedure (ERCP or Model Rules), which will be the focus of this article, may serve as a useful model for national legislators. It is a set of rules developed by academics and practitioners, and adopted by the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT) in 2020. The author of this paper had the privilege to be a co-reporter

* Prof. Dr. Dr. h.c. Astrid Stadler holds the Chair of Private Law, Civil Procedure Law, Private International Law & Comparative Law at the University of Konstanz.

in two of the ELI/UNIDROIT working groups: in the working group on service of documents together with *Eva Storskrubb* (Uppsala University) and in the working group on parties and collective redress – together with *Emmanuel Jeuland* (Paris I Panthéon-Sorbonne).

This article will give a very brief introduction to the entire project and the idea of harmonisation in general. It will then focus on the work of the working group on collective redress and finally, highlight some particular issues addressed in the Model Rules.

The joint project of UNIDROIT and the ELI on Model European Rules of Civil Procedure started in 2013/2014 and all in all, the project took seven years before the final version of the Model Rules was presented for adoption to the ELI Council, ELI Membership, and UNIDROIT's Governing Council in the summer of 2020.

The whole idea of shaping harmonized rules for civil proceedings is of course much older and dates back to the 1980s when a privately organised group of European academics, the so-called *Strome* Commission, started to work on this topic. The group was formally mandated by the European Commission in 1990 and presented a draft in 1993/94. It is easy to imagine that a controversial debate started more or less immediately, not only on the presented rules, but also on the idea of the whole project. Ten years later, in 2004, UNIDROIT and the American Law Institute (ALI) launched another project with a different and less ambitious idea, but a clear practical background – the huge problems of judicial co-operation between Europe and the USA in transnational cases.

Since the 1980s, European companies had become defendants, particularly in product liability cases, before US courts. The Europeans were not only astonished about long-arm statutes on US jurisdiction. These cases also led to conflicts at the international level regarding the cross-border taking of evidence, with decisions by several US courts[1], the US Supreme Court[2] and interventions by European governments[3], particularly against what were perceived as overly broad requests for pretrial discovery by US attorneys on European territory without the use of the Hague Evidence Convention.[4] It was about nothing less

1 Laker Airways v Sabena, Belgian World Airlines, 731 F2d 909, (DC Cir 1984; Philadelphia Gear Corp v American Pfauter Corp, 100 FRD 58, 60 (ED Pa 1983); Volkswagenwerk Aktiengesellschaft v Superior Ct, 123 CalApp 3d 840 (Cal Ct App 1981); In re Asbestos Insurance Coverage Cases [1985] 1 WLR. 331; Rio Tinto Zinc Corp, v Westinghouse Electric Corp [1978] App Cas 547.

2 Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa, 482 US 522 (1987).

3 For example, amicus curiae by the German government in Aerospatiale, 25 International Legal Materials (ILM) 1986, 1539; amicus curiae in In Re Anschuetz Co, GmbH, 754 F2d 602 (5th Cir 1985), 25 ILM 1986, 827; amicus curiae in Aérospatiale, 25 ILM. 1986, 1539.

4 James Chalmers, The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale (2000) 8 Tul J Int'l & Comp L, 189; Mark A. Cotter, The Hague Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates

than the national sovereignty of European states and the scope of US pretrial discovery and the excesses of an adversarial system which were alien to the European perspective. Against this background the ALI/UNIDROIT project was an attempt to identify fundamental common principles for civil proceedings in civil and commercial matters in a transatlantic setting[5] – an attempt to bridge the gap between continental and US civil procedure. And, to the surprise of many observers, it was successful and resulted in a set of 35 'Transnational Principles of Civil Procedure' adopted by both institutions.[6]

Against the backdrop of many fundamental differences the project was a huge challenge. Some issues should be mentioned explicitly: Case management powers of the court had been extended on the Continent, even in England, over the years and had led to a completely different system compared to the adversarial proceedings in the US, where the judge was still more or less only an umpire taking care that the lawyers abide by the rules. Litigation strategy in the US was and still is strongly influenced by pretrial discovery, jury trials, and the American rule of costs. Despite these different approaches, the ALI/UNIDROIT project was successful in balancing different legal families.

One may wonder why US civil procedure law and the ALI/UNIDROIT Principles are important in the context of the Model Rules? The answer is simple: the latter would not exist without the other. The 2013 ELI/UNDROIT project on the Model Rules, specifically for Europe, was very much encouraged by the ALI/UNIDROIT Principles. The idea took shape that if even for such considerably different procedural systems as the US and European civil proceedings converging trends could be identified, it seemed worthwhile to start a similar academic project for European civil procedure. The initial idea was therefore: Can the ALI/UNIDROIT Principles be transferred to Europe and perhaps even expanded and made more specific? Therefore, all working groups

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Changes to Federal Discovery Rules (1991) 6 Fla J Int'l L, 233; Oxman, 37 U Miami L Rev 1983, 733; David Joseph Sales, The Hague Evidence Convention: A Matter of Comity? An Unthinkable Cession of Jurisidiction? (1986) 11 U Chi L Rev, 253; Samuel Baumgartner, Is Transnational Litigation Different? (2004) 25 U Pa J Int'l Econ L, 1297, 1313; Abbo Junker, Der Justizkonflikt mit den USA (1987) Betriebsberater, 1752; Peter Schlosser, Jurisdiction and International Judicial and Administrative Cooperation (2000) 284 Recueil des Cours de l'Académie de Droit International; Rolf Stürner, Der Justizkonflikt zwischen USA und Europa, in: Habscheid, Walther J (ed), Der Justizkonflikt mit den Vereinigten Staaten von Amerika, 1986; Rolf Stürner, Rechtshilfe nach dem Haager Beweisübereinkommen für Common Law-Länder (1981) Juristenzeitung (JZ), 521.

5 The project was prepared by a feasibility study for the UNIDROIT General Council written by Rolf Stürner (Freiburg).

6 The Principles are available at: https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/ (accessed 1 April 2026). Its history, background and essential features are described by Rolf Stürner, The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions (2005) Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ), 201.

in the project took the ALI/UNIDROIT Principles as starting point for their discussions. This will be explained in more detail below.

2. OBJECTIVES OF THE PROJECT: HARMONIZATION OF CIVIL PROCEDURE RULES IN THE EU?

First of all, the objectives of the project should be addressed which were far from clear in the beginning. Even the question whether the working groups should draft only 'principles' or much more detailed 'rules' was very controversial when the project started.

Against the political backdrop of the European Union (EU) being very cautious with large-scale harmonization projects, it quickly became clear that the Model Rules should not prepare a blueprint for a binding EU instrument such as a Directive or Regulation. The lessons learned from the failure of the Draft Common Frame of Reference – a project for the harmonization of civil law[7] that met with so much criticism in the Member States that it ultimately fizzled out[8] – suggested caution in this respect, let alone the fact that the EU legislature does not have the legislative power to harmonize civil procedural rules for domestic cases.

Therefore, the objectives of the ELI/UNIDROIT project were less ambitious and closer to the idea of model rules in the tradition of the American Law Institute. In the US, model rules are intended to mitigate the differences arising from the wide-ranging legislative powers of individual states and the Federal government. Model rules can hence serve as a template for state legislatures. The idea was that this approach could be applied to Europe as well – and

7 The Draft Common Frame of Reference (DCFR) project started with the EU Commission's idea to compile a 'tool box' on principles of European contract law and the establishment of a Study Group (among other groups) in 2004. It was an academic project supported and partially financed by the EU Commission which over the years grew beyond the initial idea of a mere 'tool box'. A preliminary version of the DCFR was published in 2008, the final version in 2009. From the many publications on the project see for example the contributions in [2009] 17 European Law Review, issue 4; Peter Giliker, The Draft Common Frame of Reference and European Contract Law: Moving from the 'Academic' to the 'Political' in James Devenney/Mel Kenny (eds), The Transformation of European Private Law (CUP 2013); very impressive in its critique eg Pierre Legrand, 'Antivonbar' (2006) 1 Journal of Comparative Law, 13, 27.

8 The 2009 final version of the Draft Common Frame of Reference (DCFR) which presented more or less a complete 'civil code' (except family law, inheritance law, and real property law) immediately raised a lot of criticism in the Member States and triggered the fear that the European legislature might actually take the DCFR as a first step to a European Civil Code – an idea probably not far from what the Study group had in mind. Due to the political pressure imposed by the Member States, the EU Commission reduced the project to a draft for a 'Common European Sales Law' which was also not met with enthusiasm across Europe and which was finally abandoned by the Commission in favor of two directives on distance selling (2015) and contracts for the supply of digital content and digital services (2019).

thus not only to the EU – which explains why the participation of English colleagues in the working groups despite Brexit was completely natural. Thus, the Model Rules are primarily intended as guidance for national legislators in Europe, presenting a conceivable overall concept based on converging trends in civil procedural law. Cooperating with UNIDROIT and taking the ALI/UNIDROIT Principles of Transnational Procedure as a basis for the project were considered to enhance the prospects of acceptance of the Model Rules for Europe, as they would be seen in a global context and to reflect worldwide procedural developments.[9]

3. ORGANIZATIONAL STRUCTURE AND WORKING METHODS

3.1 Organisation of the Project

The working groups of the project were established step-by-step with each working group having two co-reporters organising the meetings of the group and 6–10 members from academia and legal practice from all over Europe.[10] In 2013, five working groups started to work: the working groups on access to evidence and information, service of documents, provisional measures, *lis pendens* and *res judicata*, and obligations of parties and lawyers. The working groups were expected to prepare draft rules in English and French and supporting comments. The drafts were presented and discussed during annual so-called 'Plenary Meetings' which took place in Vienna or Rome. In order to ensure the coordination of the working groups, a structure group organized the plenary meetings.[11]

In a second stage of the project working groups on judgments, parties and collective redress, cost and appeals were added. At that stage of the project in 2016/17 there was considerable resistance to adding collective redress to the project. The EU Commission which did not only offer some financial support for the whole project, but also accompanied its ongoing work by sending observers to the plenary meetings, strongly opposed the idea. The Commission was preparing the Directive on collective redress, and there was already a sufficiently controversial debate all over Europe. Obviously, no one wanted a com-

[9] Rolf Stürner, The ELI/UNIDROIT Model European Rules of Civil Procedure, An Introduction to Their Basic Conceptions (fn 6) 429.

[10] Co-reporters and members of the Working Groups are listed in the official publication of the Model Rules: ELI/UNIDROIT Model European Rules of Civil Procedure European Law Institute and International Institute for the Unification of Private Law (eds), ELI/UNIDROIT Model European Rules of Civil Procedure, Participants in the project.

[11] In a final stage of the project, a 'Final Drafting Team', completed the drafts prepared by the ten working groups by filling remaining gaps, eg on general principles, consolidated the drafts and ensured coherence of the entire set of rules, not only with respect to terminology.

peting project on the harmonization of collective redress rules. Nevertheless, UNIDROIT and ELI maintained their independence and assigned collective redress to be dealt with by the working group on 'parties'. Although detailed rules on collective proceedings have not traditionally been part of European civil procedure codes, and – if at all – only considered special instruments in areas like antitrust law or consumer law, it had become clear that the expansion of collective proceedings was unavoidable in Europe. The financial crisis of 2008 and *Dieselgate* starting in 2015 had highlighted the failure of the traditional European approach of preventing mass damage through preventive administrative measures. Therefore, Model Rules on modern civil proceedings for Europe would not have been complete without provisions on collective proceedings.

3.2 Working Methodology in the Working Groups

Against the backdrop of all working groups including academics and practitioners from 25 different states, it was not possible to find a strict common methodology for all teams. In order to minimize the influence from particular jurisdictions it was common ground that all working groups start with the ALI/UNDROIT Principles and by making an assessment of the 'acquis communautaire' as well as converging tendencies in European civil procedure or even on a global scale.

For the working group on collective redress the situation was different. The ALI/UNIDROIT Principles were completely silent on collective redress or class actions. When they were adopted in 2004, there were almost no procedural instruments in Europe to be compared to the US class action.[12] Thus, this part was not on the agenda for the Principles. At that time, the EU Commission had only started to think about private enforcement in competition law and a Green Paper was not published before 2005.[13] There was also no 'acquis communautaire' in the field of collective redress – a terminology which had not even clearly appeared at that time. On the contrary, when the working group started with its draft in 2017, it could take into account the different attempts of the EU in Green and White Papers,[14] and the Commission's 'Recommendation on common principles for injunctive and compensatory collective redress mech-

12 One of the first collective redress mechanisms in Europe going beyond the possibility to obtain an injunction, was the Swedish Group Actions Act of 2002. Its implementation was strongly influenced by the private enforcement debate coming from the US, but the mechanism finally enacted does not have much in common with the traditional US class action. It is based on an opt-in scheme. At the time the work on the ALI/UNIDROIT Principles was completed, there was no practical experience with the new instrument.

13 Green Paper, Damages actions for the breach of the EC antitrust rules' COM (2005) 672 final.

14 White Paper, Damages actions for the breach of the EC antitrust rules' COM (2008) 165 final.

anisms in the Member States concerning violations of rights granted under Union law'.[15] The most promising resources were however, the reform projects which had started at the national level from 2002 on in the Nordic countries, followed by a wave of new instruments established in 2005–2009, particularly in the Netherlands (2005), France and Belgium (2014–2016), and 2015 in England and Wales.[16]

Therefore, the co-reporters from Germany and France – Member States with a history of strong resistance to collective actions, but a recent political turnaround in France – decided to invite group members from Belgium, the Netherlands, the UK and Hungary, all countries with a recent success story of collective redress or on-going reform in case of Hungary and the working group started by a comparative review of the existing mechanisms in Europe.

A side note at this point: most of the working groups had in their early drafts numerous references to national procedural rules in the comments to the rules. This was also the case in the drafts on collective redress. Unfortunately, UNIDROIT insisted in the last stage of the whole project to delete all these references in the official comments based on the argument that these references can easily become out-dated and be of no further value in the future. The real reason was probably one that we had heard many years ago from the Study Group working on the Draft Common Frame of Reference. It should be avoided that the official comments might reveal which rules were adopted from which national law. This could lead to political irritation. Many of those working on the project did regret that decision made by UNIDROIT.[17] In a harmonization project such as this, it is only natural to compare legal systems and to draw more or less extensively on national rules that have proven to work well in practice. This should be disclosed honestly and discussed openly. The comments to Part XI Rules 204-236 – the Collective Proceedings part of the Model Rules – include only some references. A commentary on the Model Rules published in 2023 which provides rule-by-rule explanations and background is more informative in this respect.[18]

15 Recommendation, 11 June 2013, 2013/396/EU, OJ vol. 56, 26 July 2013, 60.

16 For more details, Astrid Stadler, Stand und Perspektiven der kollektiven Rechtsdurchsetzung in Deutschland und Europa, Tagungsband der Tagung der Gesellschaft für Rechtsvergleichung, Basel 2017, Tübingen 2018, 129–152; Astrid Stadler, Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz (2015) Zeitschrift für die gesamte Privatrechtswissenschaft (ZfPW), 61–84. A complete study on the state of collective redress in the EU in the context of the implementation of the Commission Recommendation 2013 is available at: https://www.biicl.org/projects/study-on-collective-redress-for-the-european-commission?cookiesset=1&ts=1774949070 (accessed 1 April 2026).

17 See for example, Burkhard Hess, Europäisches Zivilprozessrecht, 2nd ed 2021, § 14 II 4 mn 14.15 et seq.

18 Astrid Stadler/Vincent Smith/Fernando Gascon Inchausti, European Rules of Civil Procedure, A Commentary on the ELI/UNDROIT Model Rules, Edward Elgar 2023.

Based on its comparative approach the working group was able to identify some strong common trends in collective redress resulting from the previous years of intensive debate on private enforcement and the class action model. However, the group also identified many open questions such as the issue of legal standing, the opt-in versus opt-out question which was ultimately left open also by the Representative Actions Directive, ultimately leaving the choice to the Member States. It was, therefore, inevitable that the working group had to make some legal policy decisions, mostly based on comparative research.[19] One has to admit, however, that the group was not able to cover all countries due to limited capacities, time restraints, and languages unrepresented in the group. At the end of the day, the draft ended up with a mixture of key decisions. To some extent the group relied on national solutions, eg the Dutch way of identifying the lead plaintiff or the Dutch rules on stand-alone settlements in the Dutch Wet Collectieve Afwikkeling van Massaschades (WCAM).[20] With respect to other problems the group was inclined to strike compromises, very often after long discussions.

4. THE MODEL RULES ON COLLECTIVE REDRESS: RULES 204-236

4.1 Success of the Model Rules?

The conference in Stockholm was organized to discuss among others the optimal design of representative actions. So maybe we have to ask the question whether the Model Rules are such an optimal design.

The Representative Actions Directive came into force at the very last stage of the ELI/UNIDROIT project and the rules on collective proceedings did not change because of the Directive. The working group had hoped that the Member States might take into account the Model Rules when implementing the Representative Actions Directive into national law. That was actually quite possible, because the Directive and the Model Rules do not fundamentally contradict each other in any way, and the Directive is known to leave space for considerable diversity in national regimes.

As far as can be determined today, no Member State simply copied the Model Rules. In some Member States they were actually discussed in the legis-

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19 See also Rolf Stürner, The ELI/UNIDROIT Model European Rules of Civil Procedure', RabelsZ 86 (2022), 422 at 436.

20 It is an instrument that allows representative organisations to enter into out-of-court settlement negotiations with those who have allegedly caused a mass harm event. The organization represents the victims of the mass tort without their prior consent. If a settlement is reached, the parties of the settlement can apply for court approval of the settlement and for a court decision to declare it binding for all group members based on an opt-out mechanism.

lative process, but more by some academics[21] and less by the legislators themselves. One has to keep in mind that collective instruments more than any other procedural rules or ideas are still a highly political issue. There are very different reasons for not copying the Model Rules or for not even taking them into account in the transposition of the Representative Actions Directive.

First of all, Member States which had already put in place their own collective redress instruments when the Directive came into force had no reason to change their system fundamentally. Most of them considered their existing rules quite successful. The Directive takes a minimum harmonization approach and for Member States like the Netherlands, Belgium, France, Italy, Sweden, Denmark and Finland there was no real need for fundamental changes. Secondly, in Member States that had not yet succeeded in introducing their own representative action by the time the Directive came into force, such as Germany and Austria and many others, a lengthy political process requiring many compromises lay ahead. As a result, many missed the deadline for the transposition of the Directive. In Member States where there was still significant political resistance to collective instruments, such as Germany, it was almost unthinkable to consider or adopt rules close to the Model Rules. These rules take a consumer-friendly approach, they have broad rules on legal standing that are not restricted to consumer associations, they give the court broad discretion to manage the case, and are designed to encourage the defendant to settle the dispute, if possible. This approach did not fit into the political landscape everywhere.

One of the clear advantages of working on the Model Rules was that the working group was able to concentrate entirely on factual arguments free from political arguments. Unlike national legislators, the group was not influenced by lobbyists or the need to find political majorities – a significant distinction between an academic project and real life.

One may come to the conclusion that the Model Rules were not successful as a blueprint for national reform. That would probably be a hasty judgment. Rules that have not been developed under real political conditions always have a hard time gaining acceptance in a legislative process. In the future there will, however, be amendments to the transposition of the Directive into national rules, and the Model Rules may need time to enter the consciousness of legislators. So step-by-step parts of them might be considered in the future.

21 Eg Alexander Bruns, Umsetzung der EU-Verbandsklagerichtlinie in deutsches Recht, Tübingen 2022, p 12, 33 et seq, 41 et seq, 47, 48, 50, 55, 62, 73, 76.

4.2 The Design of the Model Rules on Collective Redress and their Gaps

The Model Rules on collective redress combine well-known elements from national rules with new elements that have not found general acceptance so far. They represent a consistent regulatory framework that, in theory, could be adopted one-to-one by national legislators.

The ERCP collective redress rules are designed for actions for the recovery of damages or any other monetary or non-monetary claims based on an opt-in mechanism.[22] They also offer provisions for a stand-alone settlement mechanism.[23] The rules are based on a comprehensive system of representation by a qualified claimant; the aggrieved group members do not become parties to the proceedings. The structure of the proceedings includes a preparatory stage, a certification stage, and thereafter regular court proceedings which may result in a court-approved settlement or a court decision.[24] A preparatory stage is rarely addressed in national rules.[25] Its main focus in the Model Rules version is the qualified claimant's obligation to make an attempt to settle the case before filing an action in court. Registration of the proceedings in a publicly accessible electronic register is also part of the preparatory stage. One important effect of registration is to bar any other collective redress action against the same defendant arising from the same mass harm event.

The working group also decided in favour of a formal certification stage of the collective proceedings resulting in a court order, if the conditions for admissibility are met.[26] At this stage the court seized will not review the case on the merits, not even summarily.[27] The court will, however, allow other potential qualified claimants to apply and select the lead plaintiff.[28] This follows the example of the Netherlands where the court tries to identify the best-qualified representative in a 'beauty contest'.[29] If several qualified entities are eligible, there should be no race to the courtroom; lawsuits must be prepared as thoroughly as possible. Therefore, the working group considered the Dutch model,

22 There is also a rule on collective injunctions in Rule 204 Model Rules.

23 Rules 229–232 Model Rules.

24 See Rules 221–226 Model Rules for proceedings resulting in an approved settlement. See Rules 227–228 Model Rules regarding proceedings resulting in a court decision. For further details, see Astrid Stadler, Types of claim, structure and certification of collective proceedings, Astrid Stadler/Emmanuel Jeuland/Vincent Smith (eds), Collective and mass litigation in Europe, Edward Elgar 2020, p 103 et seq.

25 For exceptions see France Law 2016-1547 (but the requirement to make an attempt to settle the case before filing a collective action was abolished when the RAD was implemented, apparently in order to avoid the dismissal of redress actions); Article 305a (3) lit c Dutch Civil Code.

26 Rules 212, 213 Model Rules.

27 See Astrid Stadler (n 24) p 103 at 110–113.

28 Rule 213 (2), (3) Model Rules.

29 Article 1018d, 1018e Dutch Civil Procedure Code. Similar rules apply in the UK (CAT rule 78) and the US (Rule 23(g) Federal Rules of Civil Procedure).

in which the court can select the lead plaintiff from among several competing institutions, to be the best. This provides an incentive for the relevant institutions and entities to bring as many injured parties as possible behind them and to offer attractive financing. Of course, too many entities competing for a case can make it difficult for victims to decide. But if the courts apply strict admission criteria, abuse should be preventable.

4.3 Enforcement of Collective Judgments

Before we take a closer look at some particular issues such as legal standing, third-party funding of collective litigation and the flexible approach to the opt-in versus opt-out question, some real gaps in the Model Rules must be mentioned.

There are no detailed rules on the enforcement of a collective court decision. Enforcement was not part of the ELI/UNIDROIT project, but the working group assumed that special rules would be needed to ensure the success of a collective action. The Model Rules have a strong focus on mass settlements (WCAM 2005). The Working Group adopted the Dutch model of a procedure for declaring settlements concluded outside of court proceedings binding. Such a stand-alone mechanism can prevent litigation if the party responsible for the damage is generally willing to settle. Moreover, before filing a lawsuit, such an attempt at settlement should always be made, and during proceedings, a settlement can be submitted to the court for approval at any time. In such cases, a fund is established which is distributed to the victims of the mass harm event according to rules set by the parties themselves in the settlement. Even in the event of a court ruling against the defendant, the working group assumed that such a fund would have to be established and be the best way to effectively enforce the judgment. Rule 228 is limited to the court specifying the funds for distribution in its decision. Details have been omitted in the interest of maximum flexibility in each case.

4.4 Key Decisions to Set the Course – Legal Standing

With regard to standing to sue, the long-lasting debate at the European level has revealed a certain shift away from the US class action model – which grants individual victims (and their lawyers) the right to initiate legal action – toward granting that right to 'idealistic' (consumer) organizations.[30] This approach seemed more in line with European traditions and appeared to reassure many

[30] For the legislative options and the various pros and cons cf. Ianika Tzankova, Legal standing in collective redress, in Astrid Stadler/Emmanuel Jeuland/Vincent Smith (eds), Collective and mass litigation in Europe, Edward Elgar 2020, p 127–152.

sceptics in the business community that it would attract only those plaintiffs who are committed not only to their own profit-seeking but also to a higher public interest. However, this also offers a means of controlling the effectiveness of the entire instrument that should not be underestimated. If the right to sue is granted solely to consumer organizations without addressing the question of how they will finance the proceedings, there will be very few lawsuits. If consumer associations depend on public funding, this will offer many ways of influencing their activities.

For the reasons mentioned above – namely, freedom from political constraints – the Model Rules were able to deviate from the Directive's approach. For reasons of jurisdiction and because the Representative Actions Directive continues the tradition of the Directive on Injunctions, the European legislator primarily envisions consumer organizations as plaintiffs. However, the approach of minimum harmonization leaves Member States free to adopt the US class action model in this regard. From the outset, the Model Rules have adopted a broader approach – fully aware that this is closely linked to the issue of funding.

Rule 208 defines claimants qualified to bring collective proceedings as any organization authorized in accordance with national law to bring such actions and whose purpose has a direct relationship with the mass harm event (Rule 208 [a] Model Rules). This refers to institutional qualified claimants.[31] Moreover, any *ad hoc* founded entity established solely for the purpose of enforcing the claims of the victims of a particular mass harm event, is qualified (Rule 208 [b] Model Rules). Finally, Rule 208 (c) Model Rules includes persons who are a group member and who meet the requirements of Rule 209 (no conflict of interest with any other group member, sufficient capability to conduct the proceedings, being legally represented and not being a lawyer themselves). The intentionally broad scope of standing to sue is intended to increase the likelihood that someone will actually take on the case.

In most cases, the decision to file a collective action will depend on financial resources. Contingency fees for lawyers are still not sufficiently available in Europe. All three types of potential claimants, individuals or organizations, that qualify to bring collective proceedings have only limited financial resources that they can and are willing to use to litigate on behalf of the group members. Third-party funding will therefore be dealt with below.

The possibility for individual group members to act as representatives and plaintiffs exists in Europe only in a few Member States and in the UK proceedings before the Competition Appel Tribunal. The restraint in this regard may be explained in part by legislatures' intention to avoid a collective redress

31 Jorg Sladic, n 19.035 in: Astrid Stadler/Vincent Smith/Fernando Gascon Inchausti, European Rules of Civil Procedure, 2023.

model that is too close to the US class action and may be criticized to open the door to misuse.[32] The risk of a 'litigation industry', as the stakeholders in some Member States have warned, is closely linked to the fact that individual group members can only file collective redress actions with the help of commercial funders. This profit-driven approach by funders is a concern in Europe. The combination of individual group members having legal standing to bring a collective action and third-party funding being available as a matter of course could significantly increase the use of collective instruments and is therefore not politically desirable everywhere due to the strong resistance from the business sector. Against this background, only few European legislatures give legal standing to individual group members. So far, this has been successful only in the UK, where access to financing from commercial third-party funders is also available for these proceedings in principle.[33]

4.5 Key Decision to Set the Course – Third-Party Funding (TPF)

The question of the admissibility of TPF and its limits was discussed intensely in the plenary meetings of the Model Rules project and as a consequence of its controversial nature, was not regulated in detail. However, given that the financial resources of many consumer associations in Europe (let alone individual plaintiffs), are limited, they would in practice have no access to the courts without TPF.[34] Therefore, the rules on costs and TPF in the Model Rules are a

[32] The US class action model has been often criticized for its blackmailing effects (eg one of the first scholars to point this out was *Milton Handler* 71 Columbia Law Rev. 1, 9 [1971]; it is also addressed by the US Supreme Court in Bell Atlantic Corp. v. Twombly 550 U.S. 544 [2007]) resulting from low thresholds to file a class action, extremely high litigation costs and the American rule of costs according to which each party must bear its own costs regardless of the outcome of the litigation. Moreover, the system is well-known for being lawyer-driven and providing many incentives for lawyers to bring class actions once they have found an individual victim who is willing to become a class action plaintiff. In 2005, the US legislature attempted to fight abusive litigation practices by the Class Action Fairness Act. Despite the fact that the legal framework for collective redress in Europe is completely different with the loser-pays principle and strict rules on lawyer's contingency fees, the business sector was quite successful in raising concerns about potential misuse of a collective redress instrument in Europe. For more details see John Coffee, The regulation of entrepreneurial litigation: balancing fairness and efficiency in the large class action (1987) 54 University of Chicago Law Review, 988.

[33] The restrictions imposed by the UK Supreme Court's decision in R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal [2023] UKSC 28 cannot be discussed here. Based on a report of the Civil Justice Council (https://www.judiciary.uk/wp-content/uploads/2025/06/CJC-Review-of-Litigation-Funding-Final-Report.pdf) the Government is apparently willing to reverse the Supreme Court's decision (for more information: https://www.whitecase.com/insight-alert/uk-moves-reverse-paccar-decision-and-regulate-third-party-litigation-funding, accessed 5 July 2026).

[34] The fact that TPF is often the only way to get access to court is one of the key arguments in the debate. An often proposed alternative are public funds following the example of Access-to-

kind of a compromise. The general rule on TPF in Rule 245 contains provisions similar to those we are familiar with today from the Representative Actions Directive. Within the collective redress part, there is only one provision on TPF in Rule 237 (1) according to which a qualified claimant may use third-party funding.[35] Paragraph (2) specifies – contrary to Rule 245 (1)[36] – that the funding agreement at the request of the court must be submitted in its entirety at least to the court, though not necessarily to the other party. In the general part on 'costs', Rule 245 also mentions transparency of TPF and the need that funding agreements are in accordance with the applicable law and must not provide for inadequate compensation of the funder.

One could certainly discuss whether, for example, the amount of the funder's remuneration is something that should be determined by a court within the financed litigation. It concerns only the financier and the financed party and should therefore be assessed separately. For reasons of legal certainty, the financed lawsuit should remain unaffected by this.

The Model Rules have also left open the highly contentious question of the extent to which a funder may influence the relevant litigation process. The discussion on regulating TPF has since the Model Rules were published progressed further in the EU. A very strict regulatory proposal by the European Parliament from 2023[37] regarding general rules on TPF was not taken on by the Commission. Member States therefore retain the freedom to regulate TPF as they see fit or to consider the existing general rules to be sufficient. In addition

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Justice-Funds in Quebec ('Fonds d'aide aux recours collectifs') and Ontario 'Access to Justice Funds', https://lawfoundation.on.ca/apply/access-to-justice-fund/ (accessed 1 April 2026). For more details cf. (among others) Xandra Kramer, The Quest for Funding under the Dutch WAMCA: Third Party Funding and the Viability of a Procedural Fund, 2024 Emory International Law Review, 38(4), 101118; Xandra Kramer/Ilja Tilema, The Funding of Collective Redress by Entrepreneurial Parties: the EU and Dutch Context (2020) Revista Italo-Espanola de Derecho Procesal, 165181; Stefaan Voet, The Crux of the Matter: Funding and Financing Collective Redress Mechanisms, in Xandra Kramer, EU Civil Justice: Current Issues and Future Outlook, 2015 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514521, accessed 1 April 2026); Stefaan Voet, Costs and Funding of Collective Redress Proceedings, in Astrid Stadler/Emmanuel Jeuland/Vincent Smith (eds), Collective and mass litigation in Europe, Edward Elgar 2020, 264295.

35 It follows from the common fund doctrine set out in Rule 238 (3) that the common fund might be used to pay the litigation funder, Vincent Smith, n 21.111 in: Astrid Stadler/Vincent Smith/Fernando Gascon Inchausti, European Rules of Civil Procedure, 2023.

36 The differences in Rules 237 and Rule 245 are critically assessed by Vincent Smith, n 21.123 et seqq (footnote 32).

37 Resolution of the European Parliament, 13 September 2023, 'Responsible third-party funding of civil litigation, document 2020/2130(INL) was based on a report of the Committee on Legal Affairs (Rapporteur: Axel Voss) of 25 July 2022. The European Parliament called upon the EU Commission to provide EU-wide rules on commercial third-party funding. Based on a study of the BIICL 'Mapping Third Party Litigation Funding in the European Union', published 27 March 2025, the EU Commission announced that no further action is required at this time.

to the Model Rules, the ELI Principles on Third Party Funding can be another source of inspiration.[38]

4.6 Key Decisions to Set the Course – Opt-in v. Opt-out

Rule 215 Model Rules operates on an opt-in scheme as the regular way for participating in a collective action.[39] However, paragraph 2 leaves it to the court to decide in individual cases whether an opt-out mechanism is more appropriate. Criteria for such a decision are the small size of individual claims which makes individual actions unlikely and the likelihood of an opt-in by a significant number of group members. For a non-resident group member opt-in is the mandatory system as it is in the Representative Actions Directive.[40] Most Member States consider the opt-in system to be more compliant with the individual group members party autonomy.[41] However, it is also rarely disputed that an opt-out system is more effective because it includes more victims and can therefore have a greater deterrent effect. It will also increase the pressure on defendants to settle the case. A mixed opt-in/opt-out system has been available already in Denmark, Belgium and Slovenia. There has been a long-lasting debate in Europe on the pros and cons of opt-out and opt-in. In addition to the amount of the claim, a key factor is whether group members can be informed about the pending action and their options to participate in a way that best ensures that they actually learn about their rights. In this respect the situation may differ from case to case and therefore courts and qualified entities need flexibility to find the best way to handle the case. The Model Rules are in this respect very much influenced by English law where courts traditionally have broad discre-

[38] ELI (ed), Principles Governing the Third Party Funding of Litigation, Vienna 2024.

[39] This is in line with the EU Recommendation of 2013. Principle 21 strongly recommended an opt-in mechanism and allowed an exception, by law or court order, which should be justified by 'reasons of sound administration of justice'.

[40] Rule 235 Model Rules.

[41] The opt-out system in collective redress is for example used in the Netherlands, but also in Portuguese consumer law (Decree-Law no. 114-A/2023; for details cf Miguel Sousa Ferro, Class Actions in Portugal: the little regime that could, available at: https://observatoireactionsdegroupe.com/wp-content/uploads/2022/03/Miguel-Sousa-Ferro-Class-actions-in-Portugal.pdf – accessed 1 April 2026) and in the UK in competition law cases before the Competition Appeal Tribunal (see eg Deni Vitkovic, Collective Redress: The Rise of Collective Proceedings in UK Competition Law, In honorem Van L. Padjen, Contemporary challenges of legal theory and legal practice, 2024, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6028895 (accessed 1 April 2026). The UK Government, however, in 2025 started call for evidence asking for views on key aspects of the opt-out regime and whether the system strikes a right balance between the need for an effective system for collective action claims and protecting of defendants from having to settle unmeritorious claims (https://www.gov.uk/government/calls-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence – accessed 1 April 2026).

tion. In some jurisdictions, such as Germany, such an approach is generally not appreciated and the legislature tends to leave little leeway for courts.

A completely different, fundamental question is whether, instead of opt-out redress actions – which entail significant organisational efforts and costs – one should not rather favour actions such as profit-skimming actions by qualified entities for minor damages. For small or even trivial damages suffered by consumers amounting to only a few euros, it is not worth pursuing a complex collective action in which consumers participate through opt-in or opt-out declarations. Even if these proceedings are based on an opt-out mechanism and are successful, the consumers must take active steps in the distribution process and claim their share of the compensation. Consumers often have trouble proving that they belong to the relevant group – for example, if they no longer have their receipts of a relevant purchase – and sometimes even a small effort to register doesn't seem worth it to them. Experience in the US and the UK shows that only a small percentage of those entitled to claim compensation from a fund actually come forward. The effort required of the plaintiff organization and the judiciary therefore results in only very limited compensation. In the US and the UK, highly controversial so-called cy près solutions have been developed in order to use unclaimed funds for charity or for consumer protection in general.[42] It must therefore be considered whether to replace the representative action for damages in such cases with an instrument allowing a consumer organization or other institution, to compel the defendant to surrender the profits generated by the breach of law.

Whilst these mechanism for skimming-off illegally gained profit do not provide compensation to consumers, they do not require complicated participation rights or distribution mechanisms. They can therefore be faster and more effective than the redress actions we currently see in Europe, where only small amounts of damages are claimed for consumers at great expense and lengthy proceedings. It remains to be seen whether they really have a deterrent effect and have the potential to influence economic behaviour. However, the Model Rules have not adopted this approach any more than the Representative Actions Directive has.

5. CONCLUSION

While the Model Rules on collective proceedings certainly enrich the academic discussion, they offer a set of rules that have not been proven to work in practice

[42] For a detailed analysis of US cy près solutions in class action settlements Karl Rinck, Streuschadensbekämpfung in Anwendung der Cy-Pres Doktrin, Tübingen 2023 with further references. For the situation in the UK: Rachael Mulheron, The modern cy-près doctrine: applications & implications, London 2006.

in this specific form. From a comparative law perspective, however, they combine the best elements of many procedural systems. The freedom afforded by an academic project allows for different considerations and decisions than those involved in national legislative processes. The Model Rules – and this applies not only to the collective redress part – offer national legislators a wide range of options. They may adopt the entire text, entire sections, or individual provisions. Like model rules in the United States, they offer a toolbox for national legislation and may thus contribute to the harmonization of law in fields where there is no uniform legislative power to implement binding rules for all Member States. In the United States, there was immense economic pressure to adopt model laws such as the Uniform Commercial Code. The situation in European procedural law is entirely different. The pressure within the European Union to actually establish harmonized rules for collective redress is not very strong since some (former) Member States have decided to take the lead at a national level. The UK as a former member of the EU, but also the Netherlands and Portugal have implemented quite successful instruments of collective redress in their own national law and are not interested in a new and fully harmonized mechanism. The EU's legislative authority does not generally extend to civil procedure law in purely domestic cases. Jurisdiction can be established only in the areas of consumer law and competition law. Of course, collective redress instruments of varying attractiveness invite to forum shopping by plaintiffs in mass harm cases. Those jurisdictions who already attract large-scale litigation, such as the Netherlands that are competing with UK courts for these "big cases" have little incentive to adapt their instruments. This is especially true if, given remaining resistance, doing so would also result in a lower level of access to justice for the victims of mass harm events. Harmonizing collective redress would once again become more urgent if, for example, a reform of the Brussels Ia Regulation were to introduce an exclusive jurisdiction rule that would no longer allow parties to seek out favourable jurisdictions and procedural rules. Although this would not resolve the competition with courts in the UK, within the EU uniform rules such as the Model Rules can ensure consistent access to justice in the Member States, strengthen confidence in law enforcement, and, not least, lead to greater preventive effects.