CONSUMER COLLECTIVE REDRESS: WHAT CAN BE LEARNED FROM THE EXPERIENCE OF PORTUGAL?

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This article addresses the progress in consumer collective redress that has been achieved in Portugal, considering also parallel examples from the Netherlands and the United Kingdom. The article describes the status quo in these jurisdictions comparing it to the situation in Sweden. It then sets out the parameters which made progress possible, and suggests adopting some of them in countries that are considering reforms in their collective redress systems, or where, like in Sweden, collective redress mechanisms have been less successful.

1. INTRODUCTION

It seems fair to say that there is a generalized perception that the European Union (EU) and its Member States strive to ensure a high level of consumer protection. And, to a large extent, that is true. At the same time, however, European jurisdictions are drastically lagging behind other legal systems when it comes to ensuring that rights granted to consumers are not merely theoretical. Our old continent has, until recently, focused overwhelmingly on the public enforcement of consumer rights. This has created a systemic situation of under-enforcement, namely due to the limited resources of public institutions and inability to react to all infringements, and due to the focus of public enforcement on injunctions and fines, with rare cases of ensuring compensation for consumers.

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The Volkswagen Dieselgate scandal showed the stark contrast between the American, Canadian and Australian legal orders, on the one hand, and the European, on the other. In the former jurisdictions, there was swift compensation of harmed consumers. In the European legal orders, the company fought for many years (and is still fighting), and succeeded in getting away with compensating only a very small percentage of affected consumers.[1] This energized an old debate about the features of consumer collective redress mechanisms necessary to ensure the effectiveness of consumers' rights. But the broad gap between perspectives and political goals and priorities of the EU Member States made it impossible – as of yet – to put forward an EU-wide solution. The Representative Actions Directive[2] largely leaves it up to the Member States to decide on the details of the mechanisms for consumer collective redress. And Member States have widely diverging views about what is required, what is desirable, what is fair, and what is legal.

This article aims to contribute to a cross-jurisdictional debate focusing on the progress in consumer collective redress that has been achieved in Portugal, and in countries like the Netherlands and the United Kingdom, and contrasting these positive examples with the reality and experience in jurisdictions such as Sweden, where collective redress has been less successful. To narrow down the scope of the analysis to manageable parameters, the article looks at the compensatory dimension of consumer redress. Other redress mechanisms (e.g., declaratory and injunctive relief) shall not be covered in this analysis. My claim is that there is, currently, at least in some regards, a greater level of enforcement of consumer protection in Portugal (and in the Netherlands) than in jurisdictions relying chiefly on enforcement by public authorities, such as Sweden, particularly when it comes to compensation of damage caused by infringements of consumer rights.

To test this thesis, Section 2 will begin by describing the *status quo* in Portugal, with references to the Netherlands and England and Wales, taking these legal systems, as a basis for a comparison with Sweden. It will be shown that there are, indeed, enforcement gaps in Sweden that are not present in Portugal (or in the Netherlands). Section 3 will argue that there are specific, identifiable features of the collective redress systems of Portugal (and the Netherlands) that lead to a greater level of enforcement of consumer rights. The goal of this Section is to identify the key ingredients which, in combination, account for the positive development (to the extent it exists) in the jurisdictions in question. Finally, Section 4 shall conclude with recommendations of legislative or

1 For a comparative legal analysis of the Dieselgate scandal see Marco Frigessi di Rattalma, The Dieselgate: A Legal Perspective, Springer, 2017.

2 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1.

other types of initiatives which could be adopted in jurisdictions that wish to improve their systems of collective consumer redress, based on the Portuguese (and Dutch) experience.

To be clear from the outset, this paper does not argue that consumer rights are, overall, better protected in Portugal than in Sweden. Nor does it argue that there are no features of this protection in Sweden that could not be an inspiration for improvements in Portugal. The goal is simply to identify the lessons that could be drawn in one direction, while not excluding the existence of lessons to be drawn in the other direction.

2. COMPARING THE REALITY OF CONSUMER RIGHTS ENFORCEMENT

2.1 Portugal (plus the Netherlands and the UK)

Portugal has a long-standing opt-out representative regime anchored in Article 52(3) of the Portuguese Constitution. The general statutory framework is Law 83/95 (Popular Action Act (PAA)), which allows representative claims to protect diffuse interests, collective interests and homogeneous individual interests.[3] More recently, the Representative Actions Directive was transposed by Decree-Law 114-A/2023 (Representative Actions Act (RAA)), creating a parallel system specifically for consumer protection. The new system largely reproduces the existing one (from the PAA), with novelties limited to obligations set out in the Directive, primarily relating to cross-border representative actions and to third party funding.

From 1990 to 2024, over 700 civil popular/collective actions are reported as having been filed in Portugal. The number of actions filed has annually increased in recent years, driven largely by new consumer associations such as Ius Omnibus and Citizens' Voice. Beyond the increase in volume, a drastic change has occurred in the type and complexity of new actions, with many now dealing with particularly complex infringements and seeking large amounts of compensation for Portuguese consumers. The very large majority of these cases relate to consumer law (unfair commercial practices, misleading advertising, sales of defective goods and standard contractual terms), antitrust private enforcement and privacy/data protection rules.[4] The lack of complete public judicial databases (generally and specifically for class actions) makes it impossible to have a complete overview of all pending consumer representative actions in Portugal. That being said, at least 250 such actions are currently pending

3 On the Portuguese system for collective redress see Miguel Sousa Ferro, Class Actions in Portugal: The Little Regime That Could (2021) Mass Claims, 115.

4 For a list and references to the most important cases see Ferro Sousa (n. 3) 122.

before Portuguese Courts, wherein a minimum of 60 billion EUR in damages for consumers are being litigated. This is a very large sum for a country with 11.4 million residents, representing 19.5% of annual GDP.

This development, that can be described as a new wave of consumer representative actions relating to complex infringements and seeking large damages only started in December 2020. This is when the first two cases of consumer representative actions with third party funding were filed. Both were antitrust damages actions, sparked by the Portuguese transposition of the Private Enforcement Directive[5], which went beyond what EU Law required by including a provision on representative actions. This wave of cases includes: "national cases", mostly following-on from decisions of the National Competition Authority; and "international cases", seeking damages for Portuguese consumers in reaction to worldwide or EU-wide unlawful practices. This latter group includes cases such as the Dieselgate litigation against various car manufacturers, which is being litigated in various jurisdictions throughout the EU, and antitrust and GDPR cases which are being litigated, as collective proceedings, almost exclusively (within Europe) in the Netherlands, Portugal and United Kingdom. Examples of such cases are the antitrust claims against the Google Play Store, Apple App Store, Sony Playstation or Mastercard, and the privacy/GDPR claims against Google, Meta, TikTok, etc.[6]

The temporal length of proceedings of these first cases has been particularly long, due to practical factors and procedural developments such as the COVID pandemic, a strike of court clerks, a number of appeals, suspensions and referrals, and judicial inexperience and hesitations in dealing with novel legal issues. As a result, this new wave of cases has not led to a 1st instance judgment yet. The first trial in these cases is scheduled for October 2026.[7]

There have, however, been court-approved settlements in damages cases, reached in at least two cases with a small amount of global compensation.[8] In the first case, consumers who asked for their compensation within 3 months of the publication of the settlement notice would receive damages in the amount of 5% of what they paid for land surveying services (but no consumers came forward). In the second case, the foreseen difficulty in proving purchases led to a settlement where no attempt for distribution was made, skipping to the final

5 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, OJ L 349/1.

6 For references to the Portuguese cases see Ferro Sousa (n. 3) 122.

7 Portuguese Competition Court, Ius Omnibus v Mastercard (19/20.5YQSTR).

8 Portuguese Competition Court, Judgment of 20 September 2021, Ius Omnibus v Associação Nacional de Topógrafos (15/21.5YQSTR); and Lisbon Judicial Court, Judgment of 25 March 2026, Ius Omnibus v Estée Lauder (25069/22.3T8LSB). Global compensation is the term used in Portuguese law for a compensation, the payment of which can be ordered by the Court for all represented persons who have not yet been identified in the case file.

step foreseen in Portuguese law, handing over 100.000 EUR to the Government's Consumer Protection Fund.

The Portuguese class action system has, thus, not yet proven what it can do and deliver for consumers. Defendants seem to still be putting most of their time and effort in fighting the system itself, rather than the merits of the cases. This partly explains the absence of settlements in cases where one would expect economic rationality to lead to agreements (e.g., where litigation costs are higher than the damages sought).

This situation has not been helped by most Portuguese courts' tendency to leave controversial legal issues to be decided at the end of the trial. This means claimants and defendants must produce all evidence, discuss all issues and go through the entire trial before a ruling is obtained on whether the claimant has standing to pursue the claim, on whether the action is admissible, on whether the right to damages is time-barred, etc.

A recent referral to the CJEU from the Portuguese Competition Court has raised questions about funding and independence of claimants under the Representative Actions Directive and the principle of effectiveness of EU Law. The first instance court, exceptionally, held a separate trial hearing for evidence relating to the standing of the consumer association, after which it rejected all the defendants' arguments on lack of standing and lack of independence save for two doubts it was left with and referred to the CJEU[9]: (1) Under EU Law, is a qualified entity not independent if all its income is from (hands-off) third party funders? (2) Is it incompatible with EU Law for a national rule to remunerate third party funders exclusively from the undistributed part of a global compensation awarded to consumers? Following this submission, defendants in many other proceedings are asking for proceedings to be suspended to await the outcome of this referral (although no such request has been granted yet).

The duration of consumer representative actions is, so far, proving to be the greatest challenge for access to justice. Not only because justice delayed is justice denied. But also, because large complex cases can only be successfully litigated with adequate financial resources. As there is – as of yet – no public funding available in Portugal to pursue consumer class actions, and these cases require large budgets. Based on my experience, a complex consumer class action must in Portugal typically have a total budget, including all expenses and appeals, of at least 2 to 3 million EUR. Thus, the only way these actions can be brought to court is if private third-party funding can be secured. But, based again on my experience, funders typically expect returns within shorter timeframes (5 to 6 years) than those being delivered by the Portuguese justice system. This means there is risk that in the current climate, commercial funding will be less available and less infringements will see redress actions filed in court.

[9] CJEU Case C-431/26 Associação Ius Omnibus v ABanca.

As I am not a Dutch or English lawyer, I will refrain from attempting to describe their respective systems and the *status quo* for consumer collective redress in these jurisdictions. I will simply highlight that the Netherlands and England and Wales share with Portugal the adoption of opt-out representative actions, and also allow commercial third-party litigation funding (although, in the UK, this mechanism has been limited in scope to antitrust infringements before the Competition Appeal Tribunal). And they also share a noticeable increase in the filings of complex mass consumer harm litigation after the introduction of both these features. Indeed, it is now fairly common to find the same mass consumer infringements being pursued in these three countries, on an opt-out basis, and in no other EU country.[10]

2.2 Comparison with Sweden

How does this picture compare with redress for situations of mass damage to Swedish consumers? Sweden is in comparative studies often presented as a country offering high level of consumer protection and relatively effective system of consumer law enforcement.[11] At the conference that forms the background for this contribution, a number of Swedish scholars and practitioners confirmed this view and shared a perception that there is a high degree of legal compliance by companies in Sweden, either voluntarily or in reaction to nudges from public authorities, such as the Consumer Ombudsman. There is surely something to this perception, as an expression of a unique cultural context that must be taken into account when designing a collective redress framework. But it seems to me there is a degree of exaggeration of the real impact of this Swedish cultural specificity, to the extent that it could be obscuring the realization that mass consumer harm, particularly by multinationals, tends to go uncompensated in Sweden, much like in all of Europe.

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[10] On the Dutch system of collective redress see C. F. Van der Elst and W. C. T. Weterings, The Dutch Mechanisms for Collective Redress: Solid, and Excellent within Reach, in Brian T. Fitzpatrick and Randall S. Thomas, The Cambridge Handbook of Class Actions. An International Survey, Oxford University Press, 2021, 272–302. See also Ianika Tzankova and Xandra Kramer, From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands, in Uzelac and Stefaan Voet, Class Actions in Europe: Holy Grail or a Wrong Trail?, Springer, 2021. On the collective redress system in England and Wales, see Neil Andrews, English Systems of Multiparty Litigation, in Fitzpatrick and Thomas, The Cambridge Handbook of Class Actions, 153–172. See, with a focus on competition law enforcement, Grigoris Bacharis and John Kwan, Public redress in UK competition enforcement: a study of rationales and techniques (2025) 13(3) Journal of Antitrust Enforcement, 621–645.

[11] See among others Antonina Bakardjieva Engelbrekt, Effectiveness and Enforcement of Consumer Law in Sweden, in H.W. Micklitz and G. Saumier, Enforcement and Effectiveness of Consumer Law, Ius Comparatum, Springer, 2021.

How many legal proceedings are pending in Swedish courts that can lead to the compensation of consumers for mass harm? Maybe court proceedings are not the way things work in Sweden. But then how many large companies, and particularly multinationals, have compensated Swedish consumers for antitrust infringements, for GDPR infringements, etc.? To the best of my knowledge, as a rule, mass infringements of consumer rights that cause damage to large groups of consumers have gone uncompensated for the vast majority of those harmed. Cases where mass compensation does take place are statistically exceptional. Even in these cases, compensation tends to reach only a small percentage of those harmed and infringers get to keep the vast majority of the funds which they should be paying out as damages, if only the legal mechanisms existed and functioned to force them to.[12]

The difference is that a very significant change has already occurred in Portugal (and in the Netherlands), and there is hope that this change will lead to effective consumer redress in the future. On the one hand, that's all it is for now: hope. The Dutch and Portuguese consumer redress mechanisms are yet to prove that they can truly and systematically deliver on their promise. This will depend on a string of successful cases leading to payment of individual and global compensations, disgorgement of unlawful profits and, ultimately, strong dissuasion of unlawful behaviour targeting consumers.

On the other hand, the mere possibility of such an outcome has already had a noticeable impact. You can see this impact in the public statements by large companies and business lobbies, and in the public advice given by law firms to prospective clients. Portugal (and the Netherlands and UK) is shown in red on the maps of risks that companies face in the EU. Today, sophisticated companies' risk assessment already includes the knowledge that, if an unlawful behaviour is discovered which caused a large amount of harm globally, they will most likely face actions to compensate all harmed consumers in these 3 opt-out jurisdictions.

A good litmus test for the difference between the jurisdictions is to look at some examples of high-profile infringements by multinationals and see if/how they are being addressed in each country. Were Swedish consumers compensated for the VW Dieselgate case? As far as is known, there has not been any collective action against Volkswagen in Sweden. If some Swedish consumers have been compensated, this probably was by joining opt-in actions in another jurisdiction (e.g., Germany).[13] By contrast, a settlement has been reached in the

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12 For a detailed presentation and critical assessment of the Swedish system for collective redress, see the contribution of Johan Skog to this special issue.

13 On the German litigation in the Dieselgate scandal, see Astrid Stadler, Tort Liability of Volkswagen in the Emissions Scandal – Case Note: BGH VI ZR 252/19 – 25 May 2020 (2021) Mass Claims, 70; See also André Janssen, The Dieselgate Saga: the Next Round (2022) Journal of European Consumer and Market Law, 169.

Netherlands which means every harmed resident is entitled to compensation. In Portugal, a case is pending which aims to lead to the same outcome (plus payment of global compensation).[14]

The Google Play Store and the Apple App Store have been accused of anti-competitive practices (in part, in the case of the Apple App Store, already identified by an European Commission Decision[15]). There are cases pending in the UK, Netherlands and Portugal to make sure these companies are required to pay the total amount of damage caused to resident consumers. The Apple App Store case has already led to a first instance judgment by the UK Competition Appeal Tribunal confirming liability, the next stage being the quantification of the damage caused. Is anyone trying to compensate Swedish consumers? Is there a reason to hope that they will be compensated? Not that I know of.

3. FEATURES THAT ACCOUNT FOR THE *STATUS QUO* IN PORTUGAL (AND THE NETHERLANDS)

3.1 A familiar diagnosis

Perhaps one of the most surprising aspects of the *status quo* of consumer collective redress in Europe is that the reasons why some systems thrive and others wither away has been diagnosed repeatedly. It is not lack of studies identifying the root causes that prevents optimized solutions from being adopted, but rather cultural, ideological and political-economic considerations. The main factors which, in my view, have led to the boom in consumer collective redress in Portugal and the Netherlands are described below.

3.2 Opt-out representation

In both the Netherlands and Portugal, the claimant is entitled to represent in court all consumers resident in the country who were harmed by the practice. After notification ordered by the Court through notices (e.g., in the press), only those consumers who express their desire not to be represented (i.e., opt-out) will be excluded from the scope of representation.[16]

[14] For references to the relevant cases in Portugal see Ferro Sousa (n. 3) 122; see in particular Lisbon Appeal Court judgment of 27 April 2021, DECO v Volkswagen AG et al (case no. 26412/16.0T8LSB.L1-7).

[15] European Commission decision in case AT.40437, cf. Commission press release of 4 March 2024, see https://ec.europa.eu/commission/presscorner/detail/ga/ip_24_1161 (accessed on 22 July 2026).

[16] For detailed analysis with reference to the relevant legislation see, for Portugal, Ferro Sousa (n. 3) and for the Netherlands, Tzankova and Kramer (n. 10).

Opt-out systems mean that courts can provide a remedy (including damages) for everyone at once. They imply incredible economies of scale for claimants and for the courts. For defendants, they would also imply economies of scale, but only in cases where, in the absence of opt-out, they would in fact be faced with hundreds or thousands of separate legal proceedings, and this is rarely the case.

The main advantage of an opt-out system to address mass consumer harm is that it creates economic viability for claims that would otherwise suffer from what is known as consumers' rational apathy.[17] Most mass consumer infringements cause very small harm per consumer. It is irrational to go to court, or even just spending the time and energy required to use free alternative dispute resolution mechanisms, to obtain a few euros in compensation. The harder it is to prove your right, the more complex the litigation and the longer it takes, the higher the amount required to motivate one to act.

Any consumer protection system based on representation rests on the recognition that the vast majority of consumers are insufficiently informed, rationally unmotivated and/or do not have sufficient resources to fight for their rights. A choice is made to allow certain entities, such as public authorities or consumer associations, to fight for those rights on their behalf. This is crucial for the rule of law, which will be absent from consumer affairs if companies can get away with causing mass harm without someone well placed and equipped to do so having the right (and necessary conditions) to seek remedies in court.

Opt-out systems distinguish themselves from opt-in systems because the latter require an express statement of desire to be represented. In mass consumer harm situations, opt-in (which is still the preferred solution in the large majority of EU Member States) has been shown to lead to sign up rates of low single digits of percent of those affected. Getting someone to opt-in requires what is known as 'bookbuilding': finding injured persons, contacting them, getting them to spend time and attention to understand what is being communicated and be interested in it, reply to your contact, provide documentation proving their situation as an injured person, communicate with them to request missing documents or clarify other information, etc. All this takes a lot of effort and, crucially, money.

Even assuming funds are available to make this investment, and that such an investment can be recovered in the end by the person who invested it (should the case be successful), this means that opt-in cases only work where the amount of damages per person is sufficiently high so that the bookbuilding cost is a small percentage of the part of those damages that the person investing in the

17 See generally on the problems of collective action, Mancur Olson, The Logic of Collective Action, Harvard University Press, 1965.

bookbuilding hopes to get back (taking into account the risk of the success of the case and its expected duration).

Thus, opt-in only works in cases where the injury per consumer is, at least, of several hundred EUR. There simply aren't that many mass consumer harm cases which fit this requisite. And even when this threshold is reached, still the number of persons who can be reached and effectively signed-up tend to be (based on recent experiences throughout Europe) less than 10% of all those harmed.

Such numbers might be higher in late opt-in systems (as yet untested in practice). These are systems that allow consumers to opt-in only after a judgment has already recognized that they have a right to damages. But such systems carry with them profound uncertainty for representative claimants (and their funders), who must make the decision and the investment to pursue the case while only finding out at the end how many consumers will actually adhere to it. Which is why, even in such systems, claimants make efforts to bookbuild at the start and don't proceed unless a critical mass is achieved. This means that late opt-in systems do not, in practice, incentivize more representative actions than early opt-in systems.

The Dutch and Portuguese systems differ in a small but very impactful aspect. In principle, an opt-out system does not require bookbuilding at all (it's an option, but not a requisite). And so it is in Portugal: qualified entities can file the claim without having to invest in bookbuilding. But not so in the Netherlands. The Dutch Wet Collectieve Afwikkeling van Massaschades' (WAMCA's) requirement of representativeness has been interpreted by Dutch courts as requiring the claimant to show that it represents a significant number of those harmed. This is often demonstrated by bookbuilding. Indeed, the budgets for Dutch opt-out cases tend to include a large investment in bookbuilding to surpass this legal hurdle.[18] At the same time, Dutch courts have accepted representativeness based on evidence that a very small percentage of harmed consumers have expressed support. One might say that this is evidence precisely of the opposite: of absence of sufficient representativeness or support by consumers.

This legal requirement may make sense in the Netherlands, because any recently created *ad hoc* foundation (*stichtings*) can have standing to file opt-out representative actions.[19] Accordingly, some additional level of control of whether they truly speak for consumers may be appropriate. The same requirement is probably superfluous and needlessly burdensome in systems where only certain (pre-)qualified entities are given standing. More importantly, the requirement means that fewer cases will be brought. Only those cases where it

18 See Tzankova and Kramer (n. 10).

19 On the governance regime of such ad hoc foundations in the Netherlands, see Tzankova and Kramer (n. 10).

is economically viable to bookbuild a significant number of affected consumers will pass the test.

Opt-out systems must strike a difficult balance when it comes to the scope of *res judicata* effects. In Portuguese law, a final ruling in an opt-out consumer action might not be binding on the represented consumers, it depends on the reasons for the lack of success of the claim. On the one hand, it is important for defendants to get a conclusive resolution of the case and not to have to relitigate the same issue repeatedly in actions where all consumers are represented. A claimant should not be able to lose an opt out action and refile it to be tried again. On the other hand, this could lead to abuse of the system. Real life examples show that qualified entities sometimes withdraw their claims with extrajudicial agreements that are not revealed (at least in full) to the courts (see, e.g., the Euroconsumer v Facebook Cambridge Analytica cases filed in several jurisdictions, or the VW Dieselgate litigation in the Netherlands).[20] Under general procedural rules, withdrawal of claims after a certain procedural stage might mean that the represented persons lose the right that was being litigated. This could lead to extrajudicial settlements favouring the infringers and the qualified entities (and/or their funders), but not the represented consumers, entirely escaping the courts' control. Thus, a careful balance must be found to create the appropriate incentives and controls in the system.

The Representative Actions Directive does not express a preference between opt-in or opt-out systems, it leaves it up to Member States to choose (on its face, at least).[21] However, it did introduce a very important limitation, with particularly nefarious consequences for consumer protection in Europe. For representative actions based on causes of action listed in Annex I of this Directive, a Member State may only set up an opt-out system for the consumers residing in that Member State.[22] In other words, the Representative Actions Directive prohibited national solutions which could lead to a cross-border and EU-wide opt-out (assuming jurisdictional rules allowed the claim to be filed in that Member State). The Netherlands has such a system, both under Wet collectieve afwikkeling massaschade (WCAM) concerning settlements and WAMCA. It is a matter of vivid debate in the Netherlands to what extent the Dutch option of an EU-wide opt-out may still be used.

This limitation in the Representative Actions Directive is particularly grave because it creates partial *de facto* legal immunity for multinationals who cause EU-wide mass consumer harm of very small amounts per consumers. For small Member States, even if they were to allow opt-out, the small number of resident

[20] On the out-of-court settlement in the Volkswagen case in the Netherlands, see: https://www.dutchnews.nl/2025/09/volkswagen-settles-dieselgate-claims-in-the-netherlands/ (accessed 21 July 2026).

[21] See Recital 43, Directive (EU) 2020/1828.

[22] See Article 9(3) Directive (EU) 2020/1828.

consumers means that very few cases would cause total damages large enough to render the pursuit of complex and lengthy litigation economically viable. It is only by adding these consumers to those of other Member States that critical mass can be achieved.[23]

It is also a particularly strange position for the EU legislator (typically worried about level playing field, harmony in the internal market and uniform interpretation of EU Law) to take, as it means that, even if all Member States were to introduce an opt-out system, we would need 27 separate legal actions, one in each Member State, to obtain redress for all European consumers. Several Member States, albeit still a clear minority, have decided that their consumers can be represented via opt-out. Why should the EU legislator object to a case being filed in the Netherlands representing Dutch and Portuguese consumers via opt out, when both their national laws allow it (and following the notification mechanisms foreseen in the respective national law)?

This, of course, assumes jurisdictional rules would allow for this in the specific case, which will not always be so. The lack of adaptation of the Brussels I bis Regulation to consumer collective redress has already been flagged by the European Commission in its ongoing rethinking of those rules.[24] The anchor defendant rule allows multinationals to forum shop by placing their headquarters in Member States that make consumer collective redress particularly inaccessible.

Finally, an important legal debate which lies in our future is whether the principle of effectiveness of EU Law requires the availability of opt-out mechanisms for certain types of consumer protection cases. The CJEU's ruling in ASG 2[25] already opened the door to this discussion. It showed that the principle of effectiveness may indeed, under certain conditions, require collective redress mechanisms to be available (in this case, assignment). We may find out that Sweden, as well as other EU Member States, do not really have a choice in this matter, and that they need to have opt-out, at least for cases of very small damages per consumer (possibly with other requisites).

[23] See Beppe Micallef Moreno, 'Are small jurisdictions like Malta squeaking mice?: Opt-out collective redress as a necessary tool for effective enforcement of EU competition law in Malta' (2024) 54 *Revista de Concorrência e Regulação* 31.

[24] Commission Report on the application of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), COM(2025) 268 final, Brussels 2.6.2025; see also the accompanying Staff Working Document SWD(2025) 135 final.

[25] Case C-253/23 ASG 2 EU:C:2025:40.

3.3 Standing for private entities

Some Member States (e.g., Denmark, Hungary, Poland) allow opt-out representation of consumers for some cases, but only public authorities are given standing (Ombudsmen, Consumer Protection Authorities). Experience shows that the result of this option is that complex infringements are not pursued in court. None of the mass consumer infringements being litigated in the Netherlands, Portugal and the UK are being pursued in those other Member States who allow public-entity opt-out. There are surely many reasons for this, including limited financial and human resources that must be assigned to the pursuit of a wide range of public responsibilities, and cultural and human factors.

However, arguably the lack of cases by public bodies demonstrates that opt-out is not enough. It's the decentralization of the representative system and the provision of standing for private entities which opens the door for greater dynamics and more actions being filed. To whom can the boom of consumer class actions in the Netherlands and Portugal be ascribed? Not to public entities (although they are also entitled to bring such actions). Private entities are the ones who have been driving this trend.

One concern that is typically voiced about granting standing to private persons is that this can lead to abuse. But this can be and is dealt with through the legal requirements. In the Netherlands and Portugal, so far, there hasn't been a single court finding that a consumer mass damages action was filed by a private entity with a manifestly unmeritorious claim, or acting in bad faith. While it cannot be excluded that such situations could happen, the statistical reality is that they are, so far, rare.[26]

It's a matter of fine-tuning the system to ensure that the scope of standing leads to adequate representation and prevents abuses. Should standing be given to any citizen (as in the UK, for antitrust cases), to qualified entities who meet certain requirements (as in the Netherlands) or only to consumer associations (as in Portugal)? The balance to be struck depends on the interplay with other rules in the system, such as the existence of a certification stage and the depth of what is controlled or reviewed by the court within it.[27]

If the goal is to have a system where consumer opt-out representative actions are a relatively normal occurrence, granting standing to private entities carries the risk of very significant delays in court proceedings. The British, Dutch and Portuguese experience with such cases shows that a large amount of time, energy and money is spent, in every single case, discussing the qualification, representativeness, independence and adequacy of the representative. This is very burdensome for all involved. It is especially unjustifiable and undesirable when one qualified entity files several cases and the same discussion is repeated

[26] See Ferro Sousa (n. 3); cf. Tzankova and Kramer (n. 10).
[27] Ibid.

in every single one (because a finding of standing in one has no legal effects in the next proceedings).[28]

A solution for this is to pre-certify qualified entities, by some form of administrative proceeding, so that standing is legally established and cannot be challenged in each court case (unless it is based, e.g., on lack of independence arising from clauses in the litigation funding agreement or in some abuse of right specific to that case). Indeed, this is the solution of the Representative Action Directive for cross-border actions (actions filed in one Member State by a qualified entity designated in another country).[29] But some Member States – Portugal and the Netherlands included – did not extend this solution to the standing to file national representative actions.

3.4 Availability of third-party funding

Consumer collective redress has been around for quite some time in the Netherlands and Portugal. But cases tended to be limited to relatively simple litigation which could be pursued with the limited financial resources available to consumer associations or public entities. This changed dramatically with the introduction of (commercial) third-party funding. All of a sudden, complex cases could be pursued, where proving the infringement, causality and damage are particularly demanding, and where the defendant has vast financial resources at its disposal that it uses to the fullest extent allowed by law, requiring a corresponding investment from the claimant to ensure adequate representation of consumers' interests. Interestingly, in both jurisdictions, third-party funding arose in practice, without a set legal framework initially allowing it.

In Portugal, it was based on a constitutional law argument, that third-party funding is indispensable for access to justice in certain types of cases. Three years after the first funded cases were filed third-party funding in the transposition of the Representative Actions Directive, while imposing independence and conflict of interest safeguards. Despite this law, defendants continue to argue that third-party funding is unconstitutional, and the issue is likely to be discussed, sooner or later, at the Portuguese Constitutional Court.[30]

In the Netherlands, the story was very similar. Third-party funding emerged and was allowed because there was nothing prohibiting it. It continues not to be specifically regulated, except when it comes to independence and conflict of interest requirements, namely as a result of transposing the Representative Actions Directive. Generally, it has now become common place to hear judges from British, Dutch and Portuguese courts who are familiar with funded cases

28 See Ferro Sousa (n. 3).
29 Cf. Articles 2 and 6 Directive (EU) 2020/1828.
30 For more detail, see Ferro Sousa (n. 3).

coming before them saying that third-party funding is indispensable. Without it, complex mass consumer cases would simply not happen, as they had not happened in the past.

Prior to its recent revision of its collective redress provisions, Belgium had an opt-out system that did not allow third-party funding. The result was that the type of complex opt-out cases being filed across the border or in Portugal were never filed in Belgium, showing that one cannot function without the other. Crucially, however, neither jurisdiction has provided public funding for consumer representative actions. This leaves a massive gap in the types of infringement which can be pursued in court, even with an opt-out system. Commercial third-party funding requires the total damages (or the damages which are expected to be obtained) to be high enough so that the funder's remuneration does not exceed a limited percentage of the global compensation (e.g. 30%).

In the Netherlands, a funder is usually asked to invest at least 5 million EUR to make the pursuit of a complex consumer opt-out case viable, from beginning to end. If this funder is expecting a return of 5x its investment (i.e., 25 million), it won't invest in cases that caused damages lower than 75 million EUR. In reality, the estimated damages must be at least twice that (150 million EUR), because, according to my experience of consumer cases, funders typically halve the estimated damages when assessing the risk and wisdom of investing.

What happens to cases that caused damages to countless consumers but the total damages are less than 100 million? Typically, they are not attractive to commercial funders, and thus do not get pursued. This is one of the areas where public funding could and should come in. Which is not to say that public funding would be simple or deprived of problems and challenges.

In Portugal, by law, the undistributed part of the global compensation is assigned to two funds, one to pay for courts and the justice system, the other to pay for consumer protection. The law explicitly states this money is to be used (at least in part) to fund consumer class actions, but this has never happened so far. Indeed, the existing rules of the consumer protection fund actually prohibit any money being used for this end, unless it is to fund class actions by public authorities.[31]

The greater the legal clarity on funder remuneration, the cheaper funding will be given the lower risk, and thus the greater the number of cases which will be economically viable to pursue and where consumers will have their day in court. For the moment, neither Portugal nor the Netherlands have a large degree of clarity on how much a funder can expect to be remunerated.

[31] On these funds, see Ferro Sousa (n. 3) 121.

3.5 Specialized qualified entities and claimant law firms

Legal mechanisms only become “alive” when they are used. And they become effective when they are used well. To that end, it is in the best interest of consumers that representative actions be pursued, not by beginners or amateurs, but by experienced actors who have learned with trial and error and can implement those lessons in future cases. The greater the degree of specialization of those defending consumers, the greater their chances of success.

In both the Netherlands and Portugal, the new wave of consumer opt-out representative actions was accompanied by the emergence of specialized qualified entities, created specifically to promote this type of action. Their board members are chosen for their relevant knowledge and expertise to take decisions relating to such litigation, and they get to see and learn from the various cases which are at the core of the activity of these entities.[32]

In parallel, we also saw the appearance of specialized claimant law firms, who focus, if not exclusively, at least as a rule on the consumer side of such disputes. Especially in the initial years, when defendants are still challenging the system itself, it appears as if attorneys and law firms consider it impossible to represent both sides of the fence, from one case to another, without arguing contradictory views of how to interpret the law in the interest of your client. The law can create appropriate conditions for the emergence of specialized qualified entities, by not being so restrictive as to lead to only traditional consumer associations or public bodies to have the right to pursue this type of claim. Traditional actors have established structures and features that can hardly lead to novel results.

3.6 Economic viability of claims

For the most part, whether consumer protection claims are brought to court will depend on whether they can be adequately pursued in an economically viable manner. As noted above, the choice between opt-out and opt-in systems drastically impacts this assessment. As does the existence of public and private funding. But there are other ways in which the law can facilitate or deprive consumer representative actions of economic viability. The rules on court fees and adverse costs play a decisive role.

This is one of the aspects of the Portuguese class action regime which is most often highlighted as claimant-friendly. In Portugal, the class action claimant does not pay court filing fees, and is only required to pay any court fees at all if he is found to have pursued a manifestly unfounded claim or to have acted in bad faith. Case-law diverges on whether the claimant is required to pay adverse costs when he loses, but even if he is required to do so, these are set by

[32] For further details on Portugal, see Ferro Sousa (n. 3).

law at such a low amount that they are not a significant expense in the overall budget of the case.[33] A consumer representative who pursues an action seeking many hundreds of million EUR in Portugal, even if he loses after two stages of appeal, will be required to pay a defendant somewhere between hundreds and a few thousand EUR. Compare this to the customarily high adverse cost risk in the UK, where a claimant could be required to pay many million GBP to the defendant for legal fees.

This is another area where the Representative Actions Directive was not particularly helpful. By requiring applying the loser pays principle, the Directive failed to take into account the economic impact of this rule. On the upside, it does not require Member States to deviate from how the loser pays principle is interpreted in their jurisdictions, which is how outcomes such as the Portuguese ones are still possible, and will be possible in the many Member States where adverse costs are governed by standardized tables.

The flipside of such cost-restricting solutions is that the claimant can also not expect to be reimbursed by the defendant for its legal fees in pursuing the claim. Portuguese law deals with this reality (which is the result of the jurisdiction's general rules on adverse costs) by allowing the claimant's costs to be reimbursed from the undistributed part of the global compensation. In Italy, the defendant can be ordered to pay, on top of the damages, up to a maximum percentage thereof to the claimants' lawyers.

3.7 Payment of global compensation with undistributed portion going to the common good

An opt-out system is meant to lead to an order for the infringer to pay the total amount of the damages caused to the represented consumers. Whether one chooses opt-in or opt-out, consumers will continue to behave as economic actors, be ill informed and show 'rational apathy'. One does not choose opt-out because it is the best system to lead to actual compensation of consumers. It is typically chosen because it is the most economically attractive model that allows consumers to exercise their right to compensation after the case has been successful. But that's not its main selling point.

One chooses opt-out because one believes in the rule of law, and that infringers should not get to keep their unlawfully gained proceeds just because they secured them (and maybe hid the fact) and because it is difficult to establish the infringement, quantify the damage and distribute the funds to all those who were harmed. This would be to reward ingenuity in the structuring and hiding of illegal behaviour. Instead, as a society we can look at such behaviours and say

[33] For further details on costs with reference to the relevant legislative provisions, see Ferro Sousa (n. 3) 120.

that companies who behave in this way should be prosecuted, the damage they caused should be calculated, all efforts should be made to return that money to those harmed, and the part that the persons harmed do not collect becomes *res nullius* and goes to the State, to be put to use for the benefit of those harmed and of the entire community. This is what one would expect from the rule of law. He who breaks the law doesn't get to keep the money that has been identified as unlawfully obtained.

There are many options for what to do with the undistributed compensation. *Cy pres* solutions have been used abundantly in the USA. In Portugal, the undistributed amount will go (after paying the claimant's reasonable expenses, including funding costs) to the State, to support the functioning of the Court system and to a consumer protection fund.[34] In the UK, undistributed funds are, in principle, handed over to the Access to Justice Foundation. In the Netherlands, there is less clarity about what happens to the undistributed funds.

Some creative solutions may actually be used as a tool to incentivize a higher rate of distribution. There are those who argue that the entire global amount should be divided up between the consumers who ask for their individual compensation, although it seems like this could lead to rather disproportionate and unfair results. A milder version of the same approach would be a hybrid lottery system, under which every consumer who comes forward is entitled to receive his/her individual compensation plus the chance to win an extra amount in a lottery that will benefit a certain number or percentage of identified injured persons (e.g., 10 EUR per consumer plus a chance to win 1,000 EUR).

The possibility of being ordered to pay a global compensation for the total damages caused by the infringement is the feature of opt-out systems that creates higher risk of the proceedings for defendants. If one takes that away, there is very little reason for companies to fear such cases, much less any incentive to settle. In the Spanish draft transposition of the Representative Actions Directive, for example, it is currently foreseen that the undistributed global compensation reverts to the defendant. This is not an opt-out system, it's a late opt-in system. Defendants will only have to bear financial consequences for consumers who opt-in. This creates a massive incentive for defendants to drag out proceedings as much as possible, and do everything they can to avoid a high level of distribution (which will be harder the longer time passes).

3.8 Material scope of representative actions

Both Dutch and Portuguese law have a very broad material scope for representative actions. Basically, any infringement of consumer rights can be pursued with this mechanism. The same cannot be said of England and Wales, where

[34] See Article 22(5) Popular Action Act; see further Ferro Sousa (n. 3) 119.

opt-out proceedings are available only before the Competition Appeal Tribunal in antitrust proceedings. This limited scope has allowed for a fascinating case study of what happens, in reality, when you narrow down the material scope of representative actions. Consumers' rights not encompassed by the scope of these mechanisms remain unprotected and unpursued, while the antitrust class action is used (also) in innovative ways that try to cover types of situations which would best be dealt with via other causes of action (e.g., data protection cases framed as antitrust infringements).

The Representative Actions Directive created an additional problem by limiting the obligation of creation of the mechanisms foreseen therein to violations of the provisions mentioned in its Annex I. These, most famously, do not include infringements of EU Competition Law. This meant that some Member States transposed the Directive with the same limited material scope, while others have voluntarily enacted a broader scope for their system and apply it to all consumer infringements (of EU and national law), and others still – such as Portugal – chose to enact a wording on scope that leaves doubts as to the material scope of the new rules.

3.9 Willing courts

A final factor that has been shown by Dutch and Portuguese experience to be crucial is the willingness of courts to take on and decide large consumer actions for damages. Even if everything else is configured perfectly, all it takes is a court who is scared by the size or complexity of the case, or generally sceptical towards representative actions, to block access to justice. This is when cases get dismissed on procedural grounds with particularly strict interpretations of applicable rules, or when they take so long to be litigated that it dissuades repeat attempts and may even lead to the cases being withdrawn.

The existence of a specialized court is an ideal way of reducing the risk of unwilling judges. This does not have to be a court dedicated exclusively to consumer class actions, but the mere centralization of such cases before a few judges who are expected to be specialized in these topics is likely to accelerate case-law building and the development of legal foreseeability and transparency. A nation-wide specialized court for class actions has the added advantage of doing away, definitely, with the potential problems of jurisdiction that were raised in the Apple App Store case[35], and which the CJEU resolved based on the very specific characteristics of this case, leaving the problem open for future cases.

[35] Case C-34/24 Stichting Right to Consumer Justice v Apple Distribution International EU:C:2025:936.

4. RECOMMENDATIONS FOR AN EFFECTIVE AND SUSTAINABLE SYSTEM OF COLLECTIVE CONSUMER REDRESS

Based on all the above, if I were to boil down these considerations into a few recommendations for jurisdictions that are willing to introduce a workable and effective collective redress system that can bring real compensation to harmed consumers, they would be as follows:

- Allow opt-out representation, without requiring investment in initial book-building, with careful and effective notification of consumers and a publicly run, centralized database of representative actions, and with a *res judicata* regime carefully balanced to prevent abusive use.
- Allow consumer representative actions to be filed by private entities, ideally designated by an administrative body so that standing is already established.
- Allow private third-party funding of consumer representative actions, providing clarity on how and how much funders are to be remunerated, and establishing firm boundaries meant to ensure the claimant's independence and absence of conflict of interests in the funding.
- Foresee and provide public funding for representative actions, paid for (in full or in part) with undistributed part of global compensations awarded in prior representative actions.
- Allow for the emergence of specialized qualified entities.
- Ensure the economic viability of consumer representative actions, namely by adapting rules on court fees and adverse costs so they do not block access to justice.
- Foresee that a successful opt-out action leads to the payment of a global compensation (total amount of damage caused to represented consumers), provide mechanisms for effective best-effort distribution, and ensure that undistributed funds are put to one or more good causes determined by law or the court.
- Have a broad scope for the consumer representative actions, encompassing all consumer rights infringements.
- Appoint a court with national jurisdiction to hear any and all consumer representative actions, allowing for specialization by judges, and provide it with sufficient resources (or legal mechanisms to obtain them) to adjudicate large complex cases often requiring expert knowledge.