DIGITAL RIGHTS PRIVATE ENFORCEMENT AND COLLECTIVE SETTLEMENTS: THE REPRESENTATIVE ACTIONS DIRECTIVE ASSESSED

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Digital rights violations increasingly take a systemic character, from large-scale breaches of personal data to harms caused by autonomous AI systems. In private enforcement they are typically addressed through collective redress mechanisms, which often end in amicable settlements instead of judicial adjudication. While such settlements offer efficiency and reduced transaction costs, their governance in cases involving fundamental rights has received insufficient scholarly attention. This article examines the procedural design and judicial oversight of collective court settlements in digital rights disputes, with particular focus on the tension between efficiency and the normative force of fundamental rights. It argues that robust procedural safeguards are essential to prevent settlements from degenerating into unprincipled bargaining detached from considerations of justice and accountability. Drawing on comparative analysis of United States (US) class action settlement practice—in particular fairness review mechanisms—this article identifies key principles and design features that could inform the governance of collective digital rights settlements in European Union (EU) law. Its contribution lies in transposing lessons from a mature collective redress system to the emerging EU framework, offering concrete criteria for balancing procedural efficiency with substantive legitimacy in the adjudication of fundamental digital rights.

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1. INTRODUCTION

The Representative Actions Directive[1] (RAD) marks a significant milestone in the development of collective redress mechanisms and, more broadly, in the advancement of consumer redress and enforcement[2] within the European Union. An important field of application is the private enforcement of digital rights,[3] both for compensatory purposes and for strategic litigation pursued by actors such as Max Schrems and his affiliated NGO, None of Your Business (NOYB).[4] As the US experience demonstrates, *collective settlements* play a pivotal role in mass litigation. In such collective settlements, lawsuits are not adjudicated on the merits; rather, the parties agree on the disputed rights, terminate the legal dispute, and, upon court approval, the represented individuals automatically become bound by the settlement agreement.[5] Empirical evidence demonstrates that the vast majority of collective disputes are resolved through such amicable settlements.[6] Despite this reality, the Directive offers only rudimentary procedural safeguards to ensure fair and balanced outcomes for represented consumers. This constitutes a gap which is particularly acute in the context of digital rights violations, where systemic harms and fundamental

1 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.

2 Elisabetta Silvestri, Group Actions À La Mode Européenne: A Kinder, Gentler Class Action for Europe? in Colin B Picker and Guy Seidman (eds), The Dynamism of Civil Procedure – Global Trends and Developments, vol 48 (Springer International Publishing 2016) 207 [hereafter Silvestri]; for Swedish consumer protection, see generally Antonina Bakardjieva Engelbrekt, Effectiveness and Enforcement of Consumer Law in Sweden in Hans-W Micklitz and Geneviève Saumier (eds), Enforcement and Effectiveness of Consumer Law, vol 27 (Springer International Publishing 2018).

3 See generally Magnus Strand, Private Enforcement under the Digital Markets Act: Rights and Remedies Revisited (2024) 7 Nordic Journal of European Law 120; Paddy Leerssen, Anna Van Duin and Joris Van Hoboken, Private Enforcement of the Digital Services Act (DSA) (2026) 34 European Review of Private Law 229.

4 Elaine Fahey, Strategic Litigation and EU Law on Cross-Border Data Transfers: On the Place of EU Law in the Work of Schrems and NOYB (2025) 7 Nordic Journal of European Law 130; Maria Tzanou and Plixavra Vogiatzoglou, Mapping Data Protection Legal Mobilization Before the CJEU: The Need to Rethink a Success Story? (2025) 7 Nordic Journal of European Law 96; Fabien Terpan and Sabine Saurugger, Explaining the Success of Litigation Strategies in the Schrems Cases: A Framework for Analysis (2025) 7 Nordic Journal of European Law 28; Valentina Golunova and Sarah Tas, Guardians of Digital Rights: Exploring Strategic Litigation on Data Protection and Content Moderation in the EU (2025) 7 Nordic Journal of European Law 49.

5 Art 11 RAD; cf. Philipp Anzenberger, Der gerichtliche Vergleich (LexisNexis 2020) 439–440.

6 Burkhard Heß, Die Anerkennung Eines Class Action Settlement in Deutschland [2000] JZ 373; Georg Kodek and Matthias Dangl, Unterlassungs- und Abhilfeentscheidungen und Abhilfevergleiche in Philipp Anzenberger, Alexander Klauser and Bettina Nunner-Krautgasser (eds), Kollektiver Rechtsschutz im Europäischen Rechtsraum: Tagungsband (Verlag Österreich 2022) 117 [hereafter Kodek and Dangl].

rights require more robust procedural guarantees, for instance to protect the essence of rights such as privacy or non-discrimination.

In contrast, the US class action system—rooted in a strong tradition of private dispute resolution—has developed a sophisticated fairness review regime, providing valuable insights for Europe. The Netherlands, through the Collective Settlement of Mass Damage Act (*Wet collectieve afwikkeling massaschade*, WCAM) and its successor framework, the Resolution of Mass Damage in Collective Actions Act (*Wet afwikkeling massaschade in collectieve actie*, WAMCA), has already absorbed many of these transatlantic lessons. This paper aims to critically assess how Austria, Germany, and the Netherlands have implemented collective settlement mechanisms under the RAD, focusing on the voluntary settlement process, judicial scrutiny, and the drafting and validation of settlement agreements. Methodologically, the paper adopts a comparative doctrinal approach complemented by law and economics reasoning. It draws on jurisprudential insights from landmark cases and the US class action experience, exploring how collective settlements can promote efficiency and fairness while mitigating enforcement deficits in the digital age.

It further analyses how these frameworks perform in the specific context of the private enforcement of digital rights (as used in this paper, referring collectively to data protection rights and rights associated with the deployment and regulation of AI systems[7]). High-value settlements are increasingly observed in digital-rights litigation, as illustrated by the notable USD 1.5 billion *Anthropic* AI piracy settlement[8]—the largest known copyright settlement in US history—in which the company allegedly downloaded books from piracy websites to train its AI models.

2. THE LAW AND ECONOMICS OF DIGITAL RIGHTS LITIGATIONS AND COLLECTIVE SETTLEMENTS

If damages arise from an infringement of digital rights, in particular data protection violations, individual claims are typically small, leading to scattered

7 Data protection and AI show similarities, but also significant differences. See generally Sophie Salziger, Between Data Protection and AI: Civil Liability for Non-Material Damage in Article 82 GDPR (2024) 4 EDPL 324 [hereafter Salziger]; Craig S Wright, Training on the Tightrope: AI Copyright and Data Privacy as Colliding Regulatory Regimes (2026) 61 Computer Law & Security Review 106343.

8 Bartz, et al. v. Anthropic PBC (preliminary approval of class action settlement) [2025] ND Cal Case No. 24-cv-05417-AMO, Case No. 24-cv-05417-AMO; the approval is not yet final as the judge asked for more detail on issues including lawyers fees and payments to lead plaintiffs in a hearing on May 14, 2026, see Blake Brittain, US Judge Considers Anthropic's $1.5 Billion Settlement of Authors Lawsuit Reuters (14 May 2026) <https://www.reuters.com/legal/government/us-judge-considers-anthropics-15-billion-settlement-authors-lawsuit-2026-05-14/> accessed 1 June 2026.

damages.[9] The harm that subjects suffer frequently remains abstract at the outset, as it is not clear if, by whom, and for which ends the breached data will be used or sold to. They have little interest to enforce such complex claims individually, even more so as they are confronted with prohibitive litigation cost.[10] One can imagine that claiming compensation from internet giants such as Meta (Facebook) or Alphabet (Google) also leads to a David v. Goliath-constellation with asymmetrical power relationships.[11]

Another economic problem when enforcing infringements in the digital sphere is to measure the value of the harm. Breaches of intellectual property rights in AI training cases might already be complex to assess, but it is particularly difficult to attach a monetary value to harm suffered in cases where personal data is being misused for phishing attacks, identity theft, or to merge it with other datasets to create more accurate personal profiles. This is being described as the *valuation dilemma*.[12] In such cases, courts are frequently concerned with complex quantification questions relating to the compensation of *non-material* damages.[13]

Those peculiarities of digital rights litigations can be remedied best by collective redress mechanisms, but in many cases even better by collective settlements. Compared to lengthy and costly litigation, whose outcome can feel like *rolling the dice*, such amicable solutions are more economical, faster, and more efficient. In addition, they also make the result more predictable for the litigants, as they can negotiate the settlement terms and decide whether to accept

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9 Karl Wörle and Oskar Josef Gstrein, Collective Data Protection Litigation: A Comparative Analysis of EU Representative Actions and US Class Actions Enforcing Data Protection Rights [2024] European Journal of Comparative Law and Governance 275, 289 [hereafter Wörle and Gstrein].

10 Ibid. 290–291; RAD Recital 9.

11 Andreas Geroldinger, Gutachten II: Rechtsdurchsetzung im Verbraucherrecht – prozessuale Aspekte (Österreichischer Juristentag ed, MANZsche Verlags- und Universitätsbuchhandlung 2022) 103 [hereafter Geroldinger].

12 Stephen Mulders, Collective Damages for GDPR Breaches: A Feasible Solution for the GDPR Enforcement Deficit? (2022) 8 European Data Protection Law Review 493, 496; Jonas Knetsch, The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases [2020] European Journal of Privacy Law & Technologies 132; Hans-Bernd Schäfer and Claus Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts (6., Springer Gabler 2021) 374; Sabine Quaas, Art. 82 para 32; Alessandro Acquisti, Leslie K John and George Loewenstein, What Is Privacy Worth? (2013) 42 The Journal of Legal Studies 249, 249. A similar dilemma arises when trying to quantify harm in competition law private enforcement, see Lena Hornkohl, The Presumption of Harm in EU Private Enforcement of Competition Law: Effectiveness vs Overcompensation (2021) 5 EU and comparative law issues and challenges series (ECLIC) 29, 29.

13 Alessandro Acquisti, C Taylor and L Wagman, The Economics of Privacy (2016) 54 Journal of Economic Literature 442, 480; Tobias Lühmann, Lea Stegemann and Pascal Schumacher, Gegenwart Und Zukunft Kollektiver Rechtsdurchsetzung Im Datenschutzrecht [2023] ZD 131, 133 [hereafter Lühmann, Stegemann and Schumacher].

a settlement offer. Finally, collective settlements can remedy the dilemmas of scattered damages, and the valuation dilemma.[14]

On the flip side, with their flat-rate and pragmatic solutions, collective settlements may result in rough justice when complex legal disputes are resolved in a summary fashion. The outcome of settlement negotiations is heavily influenced by the procedural design of collective redress mechanisms and the powers conferred upon the parties. Drawing on the famous metaphor of Robert Mnookin and Lewis Kornhauser, settlements are negotiated "in the shadow of the law".[15] A fair reconciliation of interests therefore requires a balance of power and equality of arms between the representatives of the group and the defendant trader.[16] A further risk in the European context is that many judges have only limited experience with collective proceedings and lack guidance on how to assess and approve such settlements agreements.[17] Complex legal and factual disputes should not be reduced to a "bazaar-like" exchange; rather, appropriate procedural safeguards and effective judicial scrutiny must ensure the adequate protection of the collective interests of the represented parties.[18]

3. COMPENSATION FOR DIGITAL RIGHTS VIOLATIONS – FUNDAMENTAL RIGHTS PERSPECTIVE

While most of its enforcement hinges on public sector oversight, the GDPR[19] also establishes a civil law basis for compensating both material and non-material damages resulting from infringements of the Regulation (Article 82). This aligns with the ex-post, individualist, harm-based fundamental rights logic underlying European data protection law.[20] This approach is in sharp contrast

14 Karl Wörle, Der Kollektive Prozessvergleich Aus Rechtsvergleichender Perspektive [2025] Zeitschrift für Vergleichende Rechtswissenschaft 269, 274–276 [hereafter Wörle].

15 Robert H Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce (1979) 88 The Yale Law Journal 950.

16 Eirik Grundtvig Furubotn and Rudolf Richter, Institutions and Economic Theory: The Contribution of the New Institutional Economics (2nd ed., University of Michigan Press 2005) 16.

17 Astrid Stadler, Collective Settlements in Astrid Stadler, Emmanuel Jeuland and Vincent Smith (eds), Collective and mass litigation in Europe: model rules for effective dispute resolution (Edward Elgar Publishing 2020) 235 [hereafter Stadler].

18 Wörle 278.

19 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119.

20 Oskar J Gstrein and Anne Beaulieu, How to Protect Privacy in a Datafied Society? A Presentation of Multiple Legal and Conceptual Approaches (2022) 35 Philosophy & Technology 3; Thomas Streinz, The Evolution of European Data Law in Paul Craig and Gráinne De Búrca (eds), The Evolution of EU Law (3rd edn, Oxford University PressOxford 2021); Anna Capellà I Ricart, Fundamental Rights Protection in the Digital Environment: Collec-

to the ex-ante standardization approach in the field of artificial intelligence (see below).

Despite the unified civil law basis for data protection violations in the GDPR—and guidance provided by rulings of the Court of Justice of the European Union (CJEU) as *Österreichische Post*[21] and *Scalable Capital GmbH*[22]—the determination of the sum of damages is partly still governed by the national laws of the respective Member States.[23] The resulting fragmentation of national standards, particularly regarding non-material damages, constitutes a significant hurdle due to the cross-border nature of digital rights violations. Hence, a harmonized approach would be desirable.[24]

In the current and highly debated context of AI regulation,[25] liability questions have also come to the forefront. When harm occurs because of an automated action taken by—or enabled through—an AI system, the key question arises: who should be held liable? Unlike the GDPR, the EU Artificial Intelligence Act (2024)[26] does not establish an autonomous civil law basis for

tive Actions Defending Diffuse Interests and Public Interest [2025] Journal of Consumer Policy; in Germany: fundamental right to informational self-determination (informationelle Selbstbestimmung), see Jürgen Kühling and Johannes Raab, Datenschutz-Grundverordnung, BDSG: Kommentar para. 26; see further, with policy considerations relating to harm-based privacy liability Ignacio Cofone, The Privacy Fallacy: Harm and Power in the Information Economy (Cambridge University Press 2023) 139–146.

21 Case C-300/21, UI v Österreichische Post AG, EU:C:2023:370.

22 Case CJEU C-182/22 and C-189/22, JU and SO v Scalable Capital GmbH, EU:C:2024:531.

23 Salziger 332; Stefan F Thönissen, DS-GVO-Schadensersatz Durch Kollektiven Rechtsschutz? Zur Grenzüberschreitenden Kollektiven Geltendmachung von Ansprüchen Aus Art. 82 DS-GVO [2024] ZD 253, 256 [hereafter Thönissen]; Case C-300/21, UI v Österreichische Post AG, Preliminary Ruling, EU:C:2023:370 [54]: "in the absence of rules of EU law governing the matter, it is for the legal system of each Member State to prescribe the detailed rules governing actions for safeguarding rights which individuals derive from Article 82 and, in particular, the criteria for determining the extent of the compensation payable in that context, subject to compliance with those principles of equivalence and effectiveness" (emphasis added). See further Václav Janeček and Cristiana Teixeira Santos, The Autonomous Concept of "Damage" According to the GDPR and Its Unfortunate Implications: Österreichische Post (2024) 61 Common Market Law Review.

24 Axel Halfmeier and others, Comparative Legal Study on Procedural Rules and Their Impact on Collective Redress Actions in Europe (BEUC) (2025) 145.

25 Oleksandr M Kostenko and others, "Legal Personality" of Artificial Intelligence: Methodological Problems of Scientific Reasoning by Ukrainian and EU Experts (2024) 39 AI & SOCIETY 1683; Joshua C Gellers and David J Gunkel, Artificial Intelligence and International Human Rights Law: Implications for Humans and Technology in the 21st Century and Beyond in Andrej Zwitter and Oskar Gstrein (eds), Handbook on the Politics and Governance of Big Data and Artificial Intelligence (Edward Elgar Publishing 2023); Simon Chesterman, ARTIFICIAL INTELLIGENCE AND THE LIMITS OF LEGAL PERSONALITY (2020) 69 International and Comparative Law Quarterly 819.

26 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828, OJ L 2024/1689.

AI-related liability.[27] This omission can be explained by the regulatory concept of the AI Act, which follows a horizontal, risk-based, ex-ante standardization approach, focusing primarily on product safety (additionally of course the protection of fundamental rights such as privacy and non-discrimination, especially in the context of banned practices mentioned in Article 5 Artificial Intelligence Act).[28]

The nonetheless crucial issue of AI liability was intended to be addressed in a complementary legislative instrument, the proposed AI Liability Directive,[29] which covers non-contractual civil liability. However, the proposal was ultimately not adopted. Certain liability aspects have nevertheless been incorporated into the amended Product Liability Directive (2024/2853), which explicitly takes software-related and AI-specific features into account.[30] Beyond these sector-specific instruments, general tort law remains available as a civil law basis for AI-related damages.[31] In the context of AI regulation and individual remedies this is crucial, as the Artificial Intelligence Act only contains a limited number of provisions to file a complaint with a supervision authority, or receive an explanation of meaningful decisions taking by AI systems (Articles 85–87 Artificial Intelligence Act).

The fundamental rights dimension of digital rights remains relevant even at the remedy stage, when harmed right holders bring actions against technology companies and settlements are negotiated. This phase implicates—from a procedural perspective—the right to a fair trial and access to justice. When drafting settlement agreements, the parties effectively negotiate over mandatory fundamental rights and data protection entitlements.[32] As reflected in the jurisprudence of German administrative courts,[33] such rights may—in most instances—be waived, if consent is given freely and informedly.[34] This raises the question of how far consent to a collective settlement must be aligned with the consent standards of Article 7 GDPR—an illustration of the difficulty of bridging individual and collective harms in the digital sphere which might eventually

27 Oskar J Gstrein, Artificial Intelligence and European Union Law (forthcoming).

28 Ibid.; Philipp Hacker, The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future (2023) 51 Computer Law & Security Review 105871.

29 European Commission, Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) (2022) <https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf> accessed 1 May 2023.

30 Axel Halfmeier and Nils Lilienthal, Verbandsklagen gegen die rechtswidrige Verwendung künstlicher Intelligenz (2025) 40 Verbraucher und Recht 123, 128–129.

31 Ibid 129–130.

32 Susanne Lilian Gössl, Parteidispositionen und EU-Verbrauchervertragsrecht (Mohr Siebeck 2021) 301–314.

33 [13. 5. 2025] Oberverwaltungsgericht Saarlouis 2 A 165/24, ECLI:DE:OVGSL:2025:05132A1652400.

34 Christina Knoepffler, Der Datenschutzrechtliche Auskunftsanspruch – Unantastbar? Verzicht Und Abdingbarkeit – Geht Das? [2025] DSB 243.

require a conceptual rethinking of the fundamental rights framework (e.g. in the context of data autonomy).[35] Moreover, certain individual data protection rights must persist even after a collective settlement has been concluded—for example, the right of access under Article 15 GDPR, even if compensation for a GDPR violation has already been paid. The RAD appears to take such constellations into account, as it explicitly prohibits collective settlement clauses that contravene mandatory provisions (Article 11 (2) RAD).[36] Yet, negotiants are well advised to carefully consider the balance between collective settlements and implications for individual rights when drafting collective settlement agreements relating to digital rights violations.

4. COMPARATIVE LAW PERSPECTIVE ON SETTLEMENT PROCEDURES

The US class action is a global forerunner in mass litigation, and mass settlements in particular. Class members are automatically bound by US class action settlements due to the opt-out mechanism (unless of course they *opt out*), which is favourable in the frequent scattered damage cases in digital rights infringements. There are two types of collective settlements: the (litigation-) class action settlement and the settlement-only class action (or settlement class). In the former, the parties agree on a settlement after an adversary proceeding and submit the settlement proposal to the court. In the second form, the frequent[37] settlement-only class action, the parties have already settled out of court, before filing the class action and only a rubber stamp is required. In contrast, the class action settlement provides for a strict court control (fairness test). To approve a settlement, courts must carry out an in-depth review, where the judges need to "drill" into the settlement proposals to safeguard their fairness.[38] Additionally, there are procedural tools in place to enrich the court's decision-making basis (e.g. fairness hearing, group members right of complaint).

The Netherlands adopted the concept of the settlement-only class action in 2005, namely through establishment of a consensual group settlement procedure WCAM (*see supra* Section 1).[39] Mirroring the US model, the WCAM

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35 Oskar J. Gstrein, Data Autonomy: Recalibrating Strategic Autonomy and Digital Sovereignty (2023) 28 European Foreign Affairs Review 379.

36 Karl Wörle, Die Neue Verbandsklage – Verbessertes Private Enforcement Im Datenschutzrecht (2025) 33 Dako 78, 80 [hereafter Wörle].

37 Brian T Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards (2010) 7 Journal of Empirical Legal Studies 811, 811, 819.

38 See, for example, In re Pet Food Prods Liab Litig, 629 F3d 333 (3rd Cir 2010).

39 Andreas Mom, Kollektiver Rechtsschutz in den Niederlanden (Mohr Siebeck GmbH & Co KG 2025) 332–335; Ianika N Tzankova and Xandra E Kramer, From Injunction and Settlement to Action: Collective Redress and Funding in the Netherlands in Alan Uzelac and Stefaan Voet (eds), Class Actions in Europe, vol 89 (Springer International Publishing

employs an opt-out mechanism. The regime has proven remarkably successful, facilitating compensation on a scale largely unmatched elsewhere in Europe and establishing the Netherlands as an attractive forum for the resolution of domestic and international mass claims.[40] In 2016 the WCAM was amended by an adversary collective redress procedure (WAMCA), which was subsequently adapted to comply with the requirements of the RAD.[41] Despite the WAMCA's adversarial nature, it remains true to the WCAM's underlying idea that mass claims are often most effectively resolved through settlement, and judges accordingly encourage the parties to reach an agreement.

The settlement class concept and the WCAM has also inspired the scientific proposal of the ELI UNIDROIT Model European Rules of Civil Procedure (MERCP), published in 2021.[42] It comprehensively regulates collective settlements (settlements in commenced collective proceedings, Rule 221 et seq. and collective settlements outside collective proceedings, Rule 229 et seq.).[43]

The RAD—aiming to avoid the vices of US-style class action and its approach of *entrepreneurial litigation*[44], where slick attorneys might pursue own financial interests under the guise of consumer advocates—puts mass claims in the hands of "altruistic" representative entities.[45] The so-called qualified entities (QEs)—typically consumer organizations—must meet strict "accreditation" criteria including non-profit making character (Article 4 RAD) and funding restrictions to avoid conflicts of interest (Article 10 RAD), as safeguards to impede abusive litigation. The RAD, according to its recitals, aims to promote collective court settlements[46] and governs them in its Article 11. The settlement can be initiated either by the parties (ie the QE), the defendant company or the court (Article 11(1)). It is mandatory for the settlement to be scrutinised and confirmed by the court (Article 11(2)). With respect to judicial scrutiny of settlements, the RAD grants Member States a choice. The minimum scru-

2021) 97–100 [hereafter Tzankova and Kramer]; Matthis Peter, Zivilprozessuale Gruppenvergleichsverfahren: einvernehmliche Streitbeilegung im kollektiven Rechtsschutz (Mohr Siebeck 2018) 215; Paul Oberhammer, Anlegeransprüche – kapitalmarktrechtliche und prozessuale Fragen (Österreichischer Juristentag ed, Manzsche Verlags- und Universitätsbuchhandlung 2015) 147; MvT, TK 2003-04, 29 414, No. 4, p. 8 f.

40 Paulien van der Grinten, A Dutch Perspective on Civil Litigation and Its Harmonisation in Xandra Ellen Kramer and CH van Rhee (eds), Civil litigation in a globalising world (TMC Asser Press; Springer 2012) 287.

41 Willem H van Boom and Charlotte MDS Pavillon, The Netherlands Takes Collective Redress to a next Level – An Introduction to the Collective Redress of Mass Damages Act 2019 (2019) 79 VbR 133, 133; Tzankova and Kramer 97, 105–108.

42 MERCP Rule 209 Comment 2; MERCP Rule 207 Comment 4.

43 MERCP Rule 229 et seqq.; cf. Georg Kodek, Kollektiver Rechtsschutz Als Herausforderung Für Das Nationale Und Internationale Verfahrensrecht (2022) 37 ÖJZ 305, 313.

44 John C Coffee, Entrepreneurial Litigation: Its Rise, Fall, and Future (Harvard University Press 2015) 18–26 [hereafter Coffee].

45 Silvestri 208–209.

46 Recital 53 RAD.

tiny standard requires courts to examine whether the settlement "is contrary to mandatory provisions of national law, or includes conditions which cannot be enforced… ". This "legality review" is generally understood to correspond to the level of scrutiny applied by courts when approving ordinary individual settlements.[47] Beyond this mandatory minimum, Member States may extend the standard of scrutiny to a fairness test, an established international benchmark applied in US class actions, the WCAM, and the MERCP.[48] Against this background, the RAD's mandatory minimum control for collective settlements appears comparatively weak, as it permits a standard below the international norm of fairness review.[49]

The German implementation of the RAD (*Verbandsklagenrichtlinienumsetzungsgesetz*, VRUG) entered into force on 13 October 2023, its core element is the Consumer Rights Enforcement Act (Verbraucherrechtedurchsetzungsgesetz, VDuG). It provides for an opt-in mechanism. The provisions on the collective settlement (§§ 9, 10 VDuG) borrow from those of the German model declaratory proceedings (§ 611 German ZPO old version) and the Capital Investor Model Proceedings Act (Kapitalanleger-Musterverfahrensgesetz, KapMuG).[50] In the VDuG, the settlement approval works in a similar way, the approval standard is only slightly modified[51]:

> The court approves the settlement by order if it considers it to be an appropriate amicable settlement of the legal dispute, taking into account the state of the facts and the state of the dispute, in particular the interests of the consumers concerned.[52]

A peculiarity of the German VDuG is the multiphased structure with a basic redress judgment, a settlement phase, a remedial judgment and the implementation procedure, which appears cumbersome.[53] Another stumbling block is the

47 Wörle 293; Florian Scholz-Berger, § 631 ZPO (Georg Kodek and Paul Oberhammer eds, MANZ Verlag Wien, 29 August 2025) para. 3; contra Elisabeth Lovrek, § 631 ZPO (Thomas Klicka and Christian Koller eds, Verlag Österreich, 2026) para. 2.

48 Geroldinger 159–161; Recital 55 et seq.

49 Wolfgang Hau, Gerichtliche und außergerichtliche Kollektivvergleiche im Lichte der Verbandsklagen-Richtlinie und der Model European Rules of Civil Procedure in Christian Berger and others (eds), Prozessrecht, Zwangsvollstreckungsrecht, Insolvenzrecht: Festschrift für Ekkehard Becker-Eberhard (CH Beck 2022) 179, 185 [hereafter Hau].

50 BT-Drs. 20/6520, p. 74; Dirk Diehm, § 611 ZPO (Berliner Kommentare, Christoph Kern and Dirk Diehm eds, Erich Schmidt Verlag, 2020) para. 2.

51 Cf. BT-Drs. 20/6520, p. 74.

52 § 9 (2) sentence 2 VDuG.

53 Peter Rott, Umsetzung in Deutschland in Alexander Klauser, Peter Kolba and Katharina Huber (eds), Handbuch Sammelklagen: neue Verbandsklagen, Sammelklage österreichischer Prägung, Klima-, Kartell- und Datenschutzklagen, Situation in Deutschland, der Schweiz und den Niederlanden (facultas 2025) para. 2.203; Florian Scholz-Berger and Antonia Hotter, Umsetzung Der VerbandsklagenRL: Status Quo in Den Mitgliedstaaten [2023] ecolex 40, 42 [hereafter Scholz-Berger and Hotter]; Lühmann, Stegemann and Schumacher 132–134; Daniel Ashkar and Christian Schröder, Aktuelle Entwicklungen Im Bereich Der Data Privacy Litigation [2023] BB 451, 454.

last-minute financing cap, according to which litigation financiers may not be promised a profit share exceeding 10 percent (§ 4(2)(3) VDuG).[54]

The most minimalistic implementation of the settlement procedure among the jurisdictions covered in this article is the Austrian, which entered into force—after a considerable delay—on 18 July 2024 (Verbandsklagen-Richtlinie-Umsetzungs-Novelle, VRUN).[55] The Austrian legislator has chosen the opt-in mechanism (as in Germany). The provisions on collective settlements (§ 631 Austrian Code of Civil Procedure) are rudimentary and strongly oriented towards Article 11 of the RAD. The Member State option of introducing the fairness test was waived.[56] At the very least, however, third-party financing on terms freely agreed by the parties is permissible – without a cap as in Germany.[57]

5. COURT SCRUTINY OF DIGITAL RIGHTS SETTLEMENTS

The Austrian legislator did not implement the optional fairness test (*see supra* section 4), as it assumes that the QE and the trader will "regularly arrive at a "fair" result on their own".[58] The settlement court review was therefore confined to a mere legality review, disregarding the optional fairness standard. Inherent to the approach of the Austrian legislator is the idea that settlement negotiations through highly regulated QEs would always lead to fair settlement terms. There is obviously a lack of awareness of the dangers of collective settlements (*see supra* section 2).

What distinguishes the fairness test—going beyond a mere review of lawfulness[59] and, arguably, something that should have been mandatorily incorporated into the RAD from the outset[60]—is that it accounts for the specific requirements of collective proceedings.[61]

54 Beate Gsell, Finanzierungshürden Für Verbandsklagen [27.7.2023] NJW Editorial [hereafter Gsell]; Ann-Kristin Mayrhofer, Kollektiver Rechtsschutz Und Abgasskandal in Israel [2024] ZVglRWiss 371 [hereafter Mayrhofer].

55 Federal Law Gazette I 2024/85; RV 2602 BlgNR 27. GP.

56 ErlRV 2602 BlgNR 27. GP 19.

57 ErlRV 2602 BlgNR 27. GP 2, 9.

58 ErlRV 2602 BlgNR 27. GP 19.

59 Astrid Stadler, § 9 VDuG (Hans-Joachim Musielak and Wolfgang Voit eds, Verlag Franz Vahlen, 2026) para. 5.

60 See also Matthias Dangl, Die Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher: Inhalte und Optionen zur Umsetzung in das österreichische Recht (Jan Sramek Verlag 2023) 200 [hereafter Dangl]; Hau 185.

61 Wörle 293–297; see also Geroldinger, 21. ÖJT Band II/1, 159 f.; Manual for Complex Litigation, p. 308 et seqq.

Drawing on international model provisions, the fairness test should ideally comprise both a substantive and a procedural component. The substantive examination essentially involves two levels of review:[62] on the one hand, the appropriateness of the compensation, taking into account the hypothetical prospects of success of an action (expected value of the claim), and on the other hand, the terms of the agreement.[63]

To safeguard the preservation of objective law (*Bewährung des objektiven Rechts*), it is crucial to examine the substantive value of a claim. One option is to compare the settlement offer with the hypothetical result of a court judgment.[64] For calculating the "fair" settlement value, the net expected value method—derived from stochastic analysis[65]—can be used. Yet, US courts have also employed benchmarking—comparing proposed settlements to those in similar class actions—to assess the fairness of settlement values. In the notable litigation *Lopez* v. *Apple Inc* (Siri privacy lawsuit)[66] a $95 million settlement[67] was approved by a court,[68] arguing "the Settlement will resolve Plaintiffs' and Settlement Class Members' claims in a range comparable to other actions involving similar data privacy claims [e.g. *In re Facebook, Inc. Consumer Privacy User Profile Litig.*[69], *Rivera v. Google LLC*[70] or *Katz-Lacabe et al v. Oracle America, Inc.*[71]]". The court further argued that "it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial."

However, the benchmarking approach presupposes a thorough examination of the extent to which other settlements are genuinely comparable. In addition, previous judgments should not be relied upon uncritically; courts ought to use supplementary methods to determine whether the settlement offer is substan-

62 Stadler pp. 233, 243 et seqq.
63 Wörle 293.
64 Dangl 201; Alfred Siwy, Die Verbandsklage Zum Schutz von Kollektivinteressen von Verbrauchern [2020] ecolex 890, 893.
65 Peter Hoffman, Valuation of Cases for Settlement: Theory and Practice (1991) 1991 Journal of Dispute Resolution 31; Richard A Posner, Economic Analysis of Law (9th edn, Wolters Kluwer Law & Business 2014) 779; JR Macey and GP Miller, Judicial Review of Class Action Settlements (2009) 1 Journal of Legal Analysis 167, 174–176.
66 Lopez v Apple Inc – Second Amended Final Approval Order – Class Action Settlement [2025] ND Cal, San Jose Div 4:19-cv-04577-JSW.
67 BEUC – The European Consumer Organisation, From Collective Harm to Redress: Whats New? [28.08.2025] BEUC Newsletter.
68 Carly Nairn, Judge Approves $95 Million Apple Settlement over Siri Privacy Case (Courthouse News Service, 9 April 2025) <https://www.courthousenews.com/judge-approves-95-million-apple-settlement-over-siri-privacy-case> accessed 30 October 2025.
69 In re Facebook, Inc, Consumer Privacy User Profile Litigation, No 3:18-md-02843-VC (ND Cal, final approval 10 October 2023).
70 Rivera et al. v Google LLC, Case No 2019-CH-00990 (Circuit Court of Cook County, Illinois, final approval 28 September 2022).
71 Katz-Lacabe et al. v Oracle America, Inc, No 3:22-cv-04792-RS (ND Cal, final approval 15 November 2024).

tively fair. Due to the longstanding WCAM, Dutch courts are well experienced to thoroughly review settlement proposals (e.g. in *Dexia*, *Vie d'Or*, *Shell*, *Vedior*, *Converium* or *Fortis*).[72] In contrast, in Germany—under the KapMuG regime already mentioned above—courts sometimes gave settlement approvals short shrift, and granted the approval in a cursory manner, as demonstrated by the *Constantin Medien* case.[73]

6. DESIGN OF SETTLEMENTS

6.1 Introduction and Structure of the Analysis

In the following sections, key questions relating to collective court settlements in digital rights litigation will be examined in a comparative legal analysis, against the backdrop of the law and economics perspective (*see supra* section 2) and the fundamental rights angle (*see supra* section 3). The detailed analysis of settlement design will cover standalone and out-of-court settlements (*see infra* section 6.2), injunctive / cease-and-desist settlements (*see infra* section 6.3), the quantification of damages and non-material damages (*see infra* section 6.4), in-kind and cy-près settlements (*see infra* section 6.5), as well as attorney's fees and third-party litigation funding (*see infra* section 6.6).

6.2 Standalone and Out-of-court Settlements

In national mass litigation regimes across Europe, out-of-court settlements in notable legal disputes are increasingly common. The *Dieselgate* cases in both Germany and Austria, for instance, were concluded outside judicial oversight. Similarly, the *Österreichische Post* case—involving Austria's state-owned postal and logistics provider—was resolved through an out-of-court agreement.[74] The latter arose when *Österreichische Post* collected and used data on the political affiliations of Austrian citizens on an aggregate level to facilitate the generation of targeted marketing addresses.

Out-of-court settlements, however, reveal several shortcomings. Most importantly, they lack the watchful scrutiny of judges who would otherwise

[72] Dennis Horeman and Machteld de Monchy (eds), Unlocking the WAMCA – A Practical Guide to the New Collective Action Regime in the Netherlands (3rd edn, 2024) 72–73 <https://www.debrauw.com/articles/third-edition-of-unlocking-the-wamca> accessed 4 November 2025; Stadler 248–249.

[73] Constantin Medien AG, vormals EMTV Vermögensverwaltungs AG [18.09.2014] Higher Regional Court Munich 5 Kap 2/09, 5 Kap 2/09.

[74] Post zahlt im Datenskandal bis zu 2,7 Millionen Euro an 2.000 Betroffene (DER STANDARD, 2 September 2023) <https://www.derstandard.at/story/2000143376489/post-zahlt-im-datenskandal-bis-zu-2-7-mio-euro> accessed 30 October 2025.

assess the fairness and adequacy of the agreement. While affected data subjects may choose whether to opt-in to such settlements, it remains unclear how they can meaningfully evaluate the fairness of the offer. In cases involving scattered or low-value harms, the potential recovery is too small to make legal advice economically viable.[75]

Moreover, the confidentiality of out-of-court settlement terms undermines transparency and democratic legitimacy. To address these concerns, procedural regimes should encourage settlements under judicial supervision, such as the Dutch WCAM. In this respect, the Austrian and German implementations of the RAD should be amended. As they currently do not allow standalone collective court-settlements, litigants who wish to reach an amicable resolution are forced to initiate a litigation, despite their common wish to settle. Or conversely, they may find out-of-court solutions more convenient—even though this comes at the cost of fairness control. Arguably, the opposite should be the case: procedural frameworks ought to make judicially supervised settlements the easier and more natural path to dispute resolution, to guarantee the essence of the fundamental rights concerned.

6.3 Injunctive / Cease-and-Desist Settlements

The RAD provides for *redress settlements* (Article 11), but not for injunctive settlements (where traders agree to cease or refrain from a specific conduct, compare Article 8 RAD). This suggests that the European legislator primarily had settlements in the course of *redress actions* in mind (seeking a positive act from the defendant, in particular payment of damages, see Article 9 RAD), and national legislators have followed the same line when implementing the Directive. The *Cease and Desist* letter from NOYB addressed to Facebook/Meta, however, illustrates the practical relevance of injunctive settlements.[76] As claims for injunctive relief are generally regarded as belonging to QEs, and as settlements constitute merely a *lesser form* (*minus*) of collective actions for performance, their omission should not be interpreted as a prohibition.[77] From a practical standpoint, injunctive measures have the considerable advantage that they can be pursued without the participation of harmed consumers, in mandate-free actions (as already the ancient Roman actio popularis provided for).[78] Conse-

75 See further Wörle 274–275.
76 Noyb Sends Meta "Cease and Desist" Letter over AI Training. European Class Action as Potential next Step <https://noyb.eu/en/noyb-sends-meta-cease-and-desist-letter-over-ai-training-european-class-action-potential-next-step> accessed 7 November 2025.
77 Hau 181–183.
78 Axel Halfmeier, Popularklagen Im Privatrecht: Zugleich Ein Beitrag Zur Theorie Der Verbandsklage (Mohr Siebeck 2006) 5–7.

quently, injunctive settlements can be concluded by QEs, on their own behalf (but of course the collective interests of consumers need to be affected).

6.4 Quantification of Damages & Non-Material Damages

A common enforcement obstacle in privacy litigation are non-material damages. While material damages (e.g. direct financial loss, as in the Equifax data breach settlement[79]) are easily quantifiable, immaterial damages—such as loss of control over personal data, reputational harm, or emotional distress—are far more legally complex. In practice, claimants are often unable to prove non-material damages.[80] Those difficulties go hand in hand with the valuation dilemma (*see supra* section 2.). This problem is exacerbated by the procedural difficulty of bundling claims for non-material damages in mass litigation.[81] Those difficulties were illustrated in the Dutch TikTok-representative action—brought by three Dutch-based representative organisations. According to the Amsterdam District Court, non-material damages cannot be bundled[82], however the Amsterdam Court of Appeal has recently confirmed standing.[83]

As we showed in section 5., there are several methods for the courts to scrutinise, if a settlement is fair and if the agreed redress is appropriate. Besides benchmarking and the net expected value method, also the case law emerging from individual redress cases, valuating data protection infringements, should be taken into account. E.g. the German Federal Supreme Court ruled in 2024 in the Facebook data leak/scraping litigation, that non-material damage for loss of control over one's own personal data "in the range of 100 euros" was

79 In re: Equifax Inc Customer Data Security Breach Litigation [13.1.2020] United States District Court Northern District Of Georgia Atlanta Division 1:17-md-02800-TWT.

80 J. Black, "Developments in Data Security Breach Liability", The Business Lawyer (2013) 200. Plaintiffs need to show an injury in fact, in order to establish a so-called legal standing under US Constitution Art. III (the constitutional right to bring lawsuits in federal court); J. Yenouskas and L. Swank, "Emerging Legal Issues in Data Breach Class Actions", The Business Lawyer (2018) 475–86.; S. Boyne, "Data Protection in the United States", The American Journal of Comparative Law (2018) 336; Lena Hornkohl, Up- and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects (2021) 10 Journal of European Consumer and Market Law 189, 194.

81 Thönissen 255–258; P. Hacker, Datenprivatrecht. Neue Technologien im Spannungsfeld von Datenschutzrecht und BGB (Tübingen: Mohr Siebeck, 2020) 68 f.; P. Hacker, "Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive". in: S. Lohsse, R. Schulze and D. Staudenmayer (eds.), Data as Counter-Performance: Contract Law 2.0? (Baden-Baden: Nomos, 2020); M. Leszczyńska and D. Baltag, "Can I have it non-personalized? An Empirical Investigation of Consumer Attitudes Towards Personalized Services and Ads", SSRN Electronic Journal (2023) 19.

82 Amsterdam District Court, 25 October 2023, ECLI:NL:RBAMS:2023:6694.

83 Tiktok ltd v Take Back Your Privacy Foundation et al. [7.10.2025] Amsterdam Court of Appeal ECLI:NL:GHAMS:2025:2666, ECLI:NL:GHAMS:2025:2666.

appropriate. The court added that it could even be much higher in more serious cases.[84] The recent CJEU judgment *Quirin Privatbank AG*[85] provides further guidance on the quantification of non-pecuniary damages. The Court clarified that negative feelings may, in principle, constitute non-material damage, but the data subject bears the burden of proving that such feelings were experienced. The judgment also indicates that a mere "loss of control" over personal data, without any adverse consequences, is insufficient to establish a claim for damages.

In compensating victims, not all harmed individuals are alike. There might be minors or vulnerable groups, who are entitled to higher compensation.[86] For those victims, *subclasses* (or *subgroups*) should be established,[87] which allow for a differentiation of the entire group according to substantive criteria. In the EU, there is currently not much experience with the establishment of such subclasses. However, in the United States there is a wealth of experience, which could serve as inspiration to develop this aspect of collective settlements further.

Compared to data privacy litigation, where courts have already developed extensive case law, guidance on AI-related damages remains scarce. Recent developments in the United States may, however, offer a useful benchmark—at least with regard to AI-related copyright infringements. In the $ 1.5 billion *Anthropic* AI Piracy Settlement[88] for example, the company has allegedly illegally downloaded books from piracy websites to train its AI models.[89] Awarding about $3,000 for each of an estimated 500,000 books covered, a US judge has preliminarily approved the copyright settlement.[90]

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84 Facebook (Meta) scraping case [18.11.2024] Bundesgerichtshof [BGH] [Federal Court of Justice] VI ZR 10/24, ECLI:DE:BGH:2024:181124UVIZR10240.

85 Case C-655/23, Quirin Privatbank AG, ECLI:EU:C:2025:655.

86 See generally Liubomir Nikiforov, EU Collective Redress for Inferred Groups: Standing and Compensation under the GDPR, the Representative Actions Directive and the AI Act [2026] European Journal of Risk Regulation 1.

87 Ignacio Cofone, Certifying Privacy Class Actions 37 Harvard Journal of Law & Technology 1171–1173; Federal Judicial Center, Manual for Complex Litigation (Fourth) (2004) 21.23.

88 See supra section 1; see also Cade Metz, Anthropic Agrees to Pay $1.5 Billion to Settle Lawsuit With Book Authors The New York Times (6 September 2025) <https://www.nytimes.com/2025/09/05/technology/anthropic-settlement-copyright-ai.html> accessed 27 October 2025; Associated Press, AI Startup Anthropic Agrees to Pay $1.5bn to Settle Book Piracy Lawsuit The Guardian (9 May 2025) <https://www.theguardian.com/technology/2025/sep/05/anthropic-settlement-ai-book-lawsuit> accessed 27 October 2025.

89 Legal Monitor Worldwide, Anthropic Agrees to $1.5B Settlement in AI Piracy Lawsuit <https://www.wiso-net.de/document/LMW__25875d9b9840c8a07447eae12871f9e9ed7924e0> accessed 27 October 2025.

90 Blake Brittain, US Judge Preliminarily Approves $1.5 Billion Anthropic Copyright Settlement Reuters (25 September 2025) <https://www.reuters.com/sustainability/boards-policy-regulation/us-judge-approves-15-billion-anthropic-copyright-settlement-with-authors-2025-09-25/> accessed 27 October 2025.

6.5 In-Kind and Cy-Près-Settlements

Settlements for monetary relief can also be combined with claims for performance in kind ("in-kind settlements"). In US data breach cases, such settlements frequently include identity theft protection—which tracks credit reports for suspicious activity—and credit monitoring services that monitor personal information such as social security numbers or bank account details for misuse following data breaches.

With regard to in-kind settlements in EU collective redress, Article 9(1) RAD merits further consideration. The provision sets out a list of redress measures—compensation, repair, replacement, price reduction, contract termination, and reimbursement of the price paid—but does not expressly refer to data-related (in-kind) remedies such as the right of access (Article 15 GDPR), the right to rectification (Article 16 GDPR), or the right to erasure (Article 17 GDPR). It has been argued in the literature that the RAD's catalogue of redress measures is exhaustive.[91] This view is, however, unconvincing. As Recitals 8, 37, and 42 RAD make clear, the list—apparently modelled on Directive (EU) 2019/771 on the sale of goods[92]—is merely illustrative rather than exhaustive.[93] Moreover, from the perspective of systematic interpretation, the acts listed in Annex I to the RAD—such as the GDPR—could not be effectively enforced if the catalogue of redress measures in Article 9(1) RAD were regarded as exhaustive.[94] Consequently, data-related remedies are arguably not excluded from the scope of the RAD and may therefore also form part of collective settlements.

In US class action, very "creative" in-kind arrangements can be found in the *Clearview AI* settlement, where billions of facial images from the web were scraped and sold without consent. The victims were offered an equity stake, or alternatively a cash payment equal to 17% of its revenue since the settlement approval date.[95] Turning harmed data subjects into shareholders of the very company that infringed their rights—or inviting them to participate in its profits—raises ethical concerns and thus represents a paradigmatic case demonstrating the necessity of robust judicial oversight of collective settlements.

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[91] Verena Strasser, Das Qualifizierte-Einrichtungen-Gesetz: Eine Erste Bestandsaufnahme [2024] VbR 124, 128.

[92] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28.

[93] Kodek and Dangl 111–112; David Paulus, § 14 VDuG (Dominik Skauradszun ed, CH Beck, 2024) para. 16 [hereafter Paulus].

[94] Cf. Paulus para. 16.

[95] In re Clearview AI, Inc Consumer Privacy Litigation (preliminary approval of class action settlement) [2021] ND Ill E Div Case: 1:21-cv-00135; Mike Scarcella, US Judge Approves "novel" Clearview AI Class Action Settlement Reuters (21 March 2025) <https://www.reuters.com/legal/litigation/us-judge-approves-novel-clearview-ai-class-action-settlement-2025-03-21/> accessed 27 October 2025.

Another distinctive feature of US data privacy class actions are cy-près settlements. In such cases, either residual or unclaimed funds—or in some instances, the entire compensation—are allocated to charitable organizations or public-interest groups whose work serves the objectives of the litigation.[96] Cy-près settlements are particularly suited to cases involving dispersed harm and opt-out class actions, where individualized compensation would be impracticable or economically insignificant—accordingly, the US experience offers valuable insights.[97] Despite their practical advantages, such in-kind settlements are not beyond reproach, particularly as they might undermine the compensatory function of tort law.

Cy-près settlements can be well illustrated with the *Google Buzz* privacy litigation,[98] which concerned privacy violations arising from Google's former social network. Google agreed to pay USD 8.5 million to fourteen data protection organizations, as distributing compensation to millions of affected users would have resulted in payouts of only a few cents per person (similarly see *Google Assistant* Privacy Litigation[99]).

In EU collective redress, the courts of the Member States will need to clarify the admissibility and limits of both in-kind and cy-près settlements, ideally taking account of transatlantic experience. One lesson from US class action practice is that settlement provisions requiring unclaimed portions of the settlement fund to be returned to the defendant should require courts to critically scrutinise the fairness of the agreement[100] (by contrast, with respect to the collective aggregate amount, § 37 VDuG expressly provides for unclaimed funds to revert to the trader).

6.6 Attorney's Fees and Third-Party Litigation Funding

One major reason for the stringent judicial control of settlements in the United States lies in the concept of entrepreneurial litigation, which entails the inherent risk that settlements may primarily serve the financial self-interest of class counsel rather than those of the group members. In so-called "sweetheart settlements," class representatives may collude with the defendant, agreeing to com-

96 Keith N Hylton, The Economics of Class Actions and Class Action Waivers (2015) 23 Supreme Court Economic Review 305, 330–331.

97 Rechtsdurchsetzung im Verbraucherrecht – Referate und Diskussionsbeiträge, Rechtsdurchsetzung im Verbraucherrecht: Referate und Diskussionsbeiträge (MANZ 2023) 51; cf. Scholz-Berger and Hotter 42.

98 In Re Google Buzz Privacy Litigation (approval of class action settlement) [2011] ND Cal, San Jose Div 5:11-CV-00379 EJD.

99 In re Google Assistant Privacy Litigation (preliminary approval of class action settlement) [2026] ND Cal, San Jose Div 5:19-cv-04286-BLF.

100 Stadler 251; Federal Judicial Center 311, 456.

pensation that falls well below fair value—while counsel nonetheless receive substantial attorneys' fees.[101]

In the EU, the altruistic representative action model is intended to prevent such abuses. Since an equally high standard of protection, with strong regulation of QEs, is already provided for under the RAD, frivolous lawsuits as well as sweetheart and blackmail settlements will hardly be encountered.[102] Nevertheless, the US experience with attorneys' fee arrangements is instructive for European collective redress. The *lodestar method* is broadly comparable to Continental European remuneration standards, as it calculates fees on the basis of reasonable hours multiplied by a reasonable per hour fee.[103] More frequently in US class actions we encounter the common fund approach, where a common pool of money is shared by counsel and class members (plaintiffs' attorneys' fees and expenses are deducted).[104]

The common fund approach is intertwined with contingency fee agreements, which are largely prohibited in the EU. Yet, as third-party funders typically receive a success fee, the common fund approach seems to be transferable to the EU.[105] Courts will need to find standards, which fees for attorneys respectively third-party funders are reasonable. Particularly restrictive, and at odds with market standards, is the German financing cap, under which litigation financiers may not be promised a share of the proceeds exceeding 10 percent (§ 4(2)(3) VDuG).[106]

7. CONCLUSION

Collective court settlements under the RAD represent a crucial junction between procedural innovation and substantive justice in the enforcement of digital rights. As empirical evidence shows, most collective redress cases end not in judgment but in settlement—making the architecture of settlement control a determinant of real-world protection for consumers and data subjects. The law and economics perspective underscores the efficiency of collective settlements: they lower transaction costs, mitigate the valuation dilemma, and facilitate rapid compensation. Yet, these advantages come at a potential cost regarding the essence of fundamental rights. Without adequate judicial fairness

101 Bruce Hay and David Rosenberg, Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy (2000) 75 Notre Dame Law Review 1377, 1390–1392.
102 Tobias Pollmann, A Comparative Law and Economics Analysis of the Proposed German "Model Declaratory Action" (Masters thesis, Hamburg / Rotterdam 11.8.2018) 27–30; Geroldinger 160–165; Federal Judicial Center 310–320; Stadler 241–244.
103 Federal Judicial Center 187–188.
104 Theodore Eisenberg and Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study (2004) 1 Journal of Empirical Legal Studies 27, 27; Coffee 26–28.
105 Stadler 241–242.
106 Gsell; Mayrhofer; Halfmeier and others 148–149.

review, settlement risks devolving into rough justice, trading accuracy for expedience and potentially undermining the normative force of fundamental (digital) rights. Robust procedural safeguards are essential to prevent settlements from degenerating into unprincipled bargaining detached from considerations of justice and accountability.

US class action settlements have developed effective—and occasionally innovative—mechanisms to govern digital rights violations, and to allocate compensation funds efficiently. This experience offers valuable guidance for EU Member States. However, comparative analysis reveals a heterogeneous European landscape. The Dutch WCAM and WAMCA provide an advanced, opt-out model combining flexibility with judicial scrutiny, well suited for digital rights violations. By contrast, the Austrian and German implementations remain cautious. Their opt-in mechanisms, limited scrutiny standards, and lack of procedural incentives for court settlements, leave significant gaps in consumer protection, transparency and democratic legitimacy. Accordingly, legislative refinement of the existing RAD-implementations appears warranted.

Finally, this paper shows that collective settlements must adapt to the specificities of digital rights, especially when it comes to the complexity of combining the individual and collective nature of harm. Infringements involving personal data or algorithmic harm often implicate systemic and structural weaknesses, which must not be freely bargained away. Ultimately, collective settlements are not merely procedural devices, but instruments of digital justice. By reconciling efficiency with fairness, and individual rights with collective enforcement, they hold the potential to make digital markets more accountable, rights more enforceable, and European private law more responsive to the realities of the digital age.