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MARIA JOSÉ AZAR-BAUD

GLOBAL PERSPECTIVES ON COLLECTIVE ACTIONS

A VIEW FROM THE FRONTLINES

Global Perspectives on Collective Actions:
A View from the Frontlines

Maria José Azar-Baud [1]

Recent changes in the collective redress world map are profound. Class actions are no longer exclusive to common law countries or mixed regimes. Under different names, they have landed in civil law jurisdictions within Latin America, Africa, the far East and even in the European Union – in 2020 with the Representative Action Directive.[2] In Europe, Portugal has become undoubtedly one of the most important hubs, sharing the podium with the Netherlands and the U.K. I could bear witness to such developments as president of Ius Omnibus, a consumer association based in Portugal designated as a qualified entity locally and at the European Union level, which has brought more than 60 popular actions in the last five years, and as one of the directors of a Dutch Foundation, a special purpose vehicle bringing Diesel-related actions at a European level.

The myth of Sisyphus, in which we had long believed, with proposals going back and forth, has now been dispelled. Further, class actions as a legal construct are neither in their infancy nor in their youth. Class actions are established institutions, mature, in the *force de l'âge*.

1. Maria José Azar-Baud is an Associate Professor at Paris-Saclay University and an international collective redress lawyer, qualified at the Bars of Paris and Buenos Aires. She is the president of IUS Omnibus and one of the Directors of the Diesel Emissions Justice Foundation. This weekend edition is based on a keynote speech given at the Global Class Actions Symposium 2024 in Lisbon, Portugal. The author thanks Lena Hornkohl for comments provided on an earlier draft.

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 2020 L 409, p. 1.

In this long read, I propose to bring to you a view from the frontlines. Firstly, I would like to walk with you through the *Mémoires* of class actions to underline the work in progress (I.). Then, I would like to share the lessons I have learnt with my different hats, as a researcher having founded the Observatory of Class Actions in 2017 and working with European institutions on different projects, and as an independent international practitioner, sitting on the Board of NGOs, advising colleagues in relation to various jurisdictions such as the U.S., Netherlands, France and Argentina, to name a few, and a major claimant administrator (II.). To conclude, I will canvass some global future perspectives in the collective redress world (III.).

I. Class Action Mémoires

The statement that class actions are globally established institutions assumes that we agree to consider the birth of their modern version to be in 1966, with the reform of Rule 23 of the Federal Rules of Civil Procedure in the U.S. That reform adopted the remarkable opt-out default rule, in addition to setting out and structuring categories of class actions – particularly in the form of both injunctions and redress.

At that time, behavioural insights had suggested that the low percentage of members of the class expressing interest in opting-in (due to the opt-in default rule by then) could turn into an equivalent percentage of members of the class expressing a will to opt-out under an opt-out default rule.[3] The reform of 1966 fell under the radar, being seen as arising out of scholars, and was adopted and fashioned into the 'American way of law', prioritising and encouraging private enforcement. This period also witnessed the growth of contingency fee arrangements in America, enabling access to justice for individuals who could not afford legal fees upfront. Thus, the U.S. saw a rise in class actions in consumer rights, securities fraud, and environmental law, setting a precedent for using class actions to address widespread harm allowing large groups of individuals to sue collectively, particularly in cases of mass harm or corporate misconduct, maximising participation and impact.[4]

Afterwards, other countries began formally incorporating class actions as well. In Canada, Quebec was the first province to adopt collective actions (in 1978), followed by Ontario (in 1992) and British Columbia (in 1995), making Canada one of the first countries outside the U.S. to permit such lawsuits. The Canadian approach retained similarities to the U.S. model but placed stronger emphasis on the social dimension of the device, ensuring strong judicial oversight to prevent so-called 'frivolous claims', sweetheart and blackmail settlements.[5]

Australia also introduced representative proceedings in its federal court system in 1992 through the Federal Court of Australia Act (Part IVA), providing an opt-out system like the U.S. model. Australia's framework is distinct, however, in its approach to litigation funding, having third-party funders from an early stage to support claims, which has been key in promoting access to class actions in high-cost cases.

3. Brian T. Fitzpatrick, 'The Ironic History of Class Actions' in *The Conservative Case for Class Actions*, The University of Chicago Press, 2019, p. 7 and seq.

4. Edward K. M. Bilich, Robert Klonoff, and Suzette M. Malveaux, *Class Actions and Other Multi-Party Litigation: Cases and Materials*, 3rd ed. West, 2012, p. 16 and seq.

5. See currently e.g. Part 5.1. Federal Court Rules for class actions in federal courts.

Loyal to their common law tradition (except for Quebec), and the principle *Ubi remedium ibi jus*, the three countries (U.S., Canada and Australia) granted a procedural remedy to acknowledge the substantive rights of consumers, passengers, and civil rights against discrimination amongst others. The said developments could suggest that the dynamics of case law, characteristic of common law countries, fostered the development of class actions. This statement would be confirmed by the leading role the U.K. has at present with its competition collective action, coupled with Group Litigation Orders and representative actions.

Nonetheless, at the same time, civil law countries, loyal to the principle *Ubi jus ibi remedium,* instead of working on proceedings, have been acknowledging substantive rights, for instance those of consumers, which led to important progress in adopting collective actions.

In the old European continent, the cradle of civil law traditions, the development of consumer law materialised through dozens of directives and regulations to enhance the single market, facilitating cross-border trade, and harmonising laws in order that consumers could purchase goods and services across borders with confidence, knowing they would be ensured a high standard of consumer protection across all Member States. As Professor Samuel Issacharoff exclaims every time he comes to Europe: 'Another European text? What for without private enforcement ?!'

So far , the only means for enforcement was the Injunctions Directive,[6] adopted in 1998 and amended in 2009, allowing so-called 'qualified entities' –consumer organisations or independent public bodies – to seek *injunctive relief* in case of breaches of EU consumer protection laws. However, the Injunctions Directive stayed true to its name and did not provide for compensatory redress …

Collective redress has been a hot topic in the EU for more than 20 years. Non-mandatory texts tried unsuccessfully to lead to their adoption: The *Green Paper* on Consumer Collective Redress[7] was the first exploratory document by the European Commission to address the lack of consistent collective redress mechanisms across EU Member States. Building on it, the 2008 *White Paper* on Damages Actions for Breach of EU Antitrust Rules[8] specifically targeted antitrust infringements, proposing mechanisms to facilitate the seeking of compensation by consumers and businesses harmed by antitrust violations. In 2009, a first version of the Draft Damages Directive was leaked to the public, which included a wide-ranging article on group and representative actions. Yet, in the final Damages

6. Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166, p. 51 amended by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009 L 110, p. 30.

7. Green Paper on Consumer Collective Redress, European Commission, 27 November 2008, COM(2008) 794 final.

8. White paper on damages actions for breach of the EC antitrust rules, European Commission, 2 April 2008, COM(2008) 165 final.

Directive, collective redress was abandoned in order to find a common solution beyond antitrust law.[9] In fact, recital 13 of the Damages Directive specifically states 'This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.' In its *2012 Resolution,*[10] the European Parliament then called for a coherent approach to collective redress across the EU, emphasising the need for both injunctive relief and compensation for consumers suffering collective harm. This resolution endorsed a 'horizontal approach' to collective redress, to be found in the *Commission's Recommendation of 2013*[11] on common principles for collective redress mechanisms in the EU, encouraging Member States to adopt consistent procedures that would make collective redress widely available and effective.

Moreover, a 'fitness check'[12] run by the European Commission in 2018 revealed, on the one hand, that following the non-binding Recommendation, nine Member States still lacked a compensatory collective redress mechanism. Likewise, with a few exceptions such as Portugal and the Netherlands, for most of the Member States that had frameworks on the shelves, these did not work in practice. On the other hand, the fitness check identified gaps and inconsistencies in enforcement and consumer access to justice, especially in cross-border cases, and highlighted the need for more robust collective redress mechanisms across the EU.

9. 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 2014 L 349, p. 1.

10. European Parliament resolution of 2 February 2012 'Towards a Coherent European Approach to Collective Redress', OJ 2013 C 239E, p. 32.

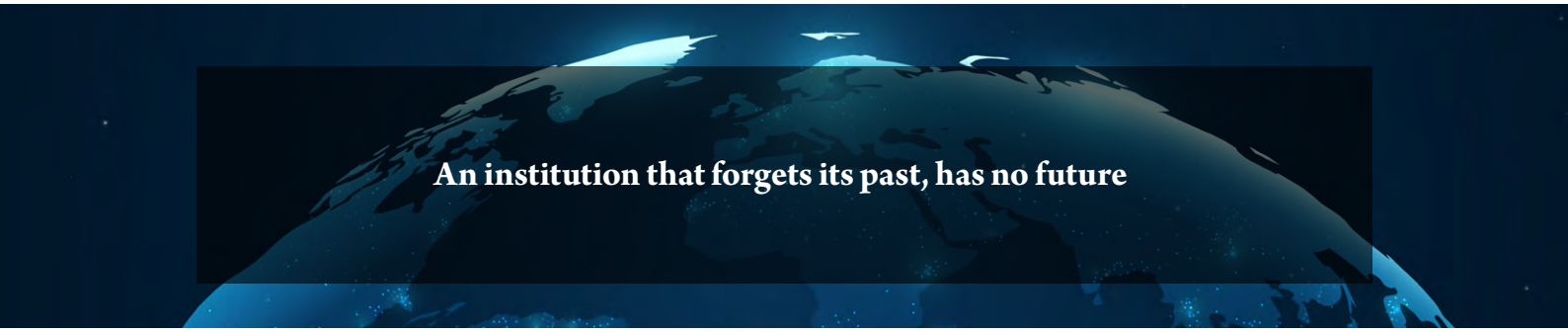
11. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, OJ 2013 L 201, p. 60.

12. See Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

That fitness check was instrumental in prompting the *New Deal for Consumers*[13] which led to two new Directives: 1) the Omnibus Directive[14] with the purpose of *strengthening public enforcement*: the power of national authorities to enforce consumer law should include penalties of up to 4% of a company's annual turnover for serious breaches and 2) the Representative Actions Directive (RAD),[15] imposing on all Member States the implementation of a *collective redress device* with both *injunctive and compensatory relief*. This was a landmark shift toward greater consumer empowerment and compensation.

Taking one last look around the globe to other civil law traditions, interesting developments have also happened in *Brazil*, with the adoption of the Consumer Protection Code in 1990 and in *Argentina*, which adopted the Consumer Protection Act in 1993 followed, in 1994, by a major reform of the Argentine Constitution acknowledging a 3rd generation of rights (consumers, sustainable environment, and 'rights of collective incidence') and a special mechanism to enforce those constitutional rights, known in many countries as '*amparo*', which can therefore be used to enforce constitutional rights, namely the collective ones throughout the so-called '*amparo colectivo*'. The latter entailed an implicit recognition of class actions that triggered important, though chaotic, developments that I experienced as the legal director of a national consumer association back in the early 2000s.

Mixed systems have also developed collective actions. One example is *South Africa*, with important case law following the granting of constitutional rights (like in Argentina). Another example is *Israel*, wherein class actions were adopted by law and their prominence in practice is often explained by the high rate of lawyers per capita (approximately 1:128 (lawyers: citizens)[16]), further facilitated by the receptive perception of class actions by the legislator and the judiciary, who regard these actions as an important tool for enhancing the enforcement of individual rights but also the broader public interest.



13. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 'A New Deal for Consumers', COM(2018) 183 final.

14. Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ 2019 L 328, p. 7.

15. 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 2020 L 409, p. 1.

16. Alon Klement and Robert Klonoff, 'Class Actions in the United States and Israel: A Comparative Approach', 19 *Theoretical Inquiries in Law* 151, 2018.

To date, more than 50 countries have adopted forms of class actions and others should follow.

It was necessary to highlight where we came from by telling the story of ***class actions around the world in a nutshell*** because, like nations, an institution that forgets its past, has no future. Having said that, let us browse some of the main lessons learnt.

II. Lessons Learnt (from Research and Practice)

Class action frameworks have developed uniquely around the world, influenced by local legal traditions and policy priorities. Hence, class actions unveil the well-known contrast between what, historically, was known as the 'American way of law', prioritising and encouraging private enforcement, and the 'European manner', with its established preference for public enforcement, especially in consumer-relevant areas.[17]

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The impact of class actions on citizens' enforcement of rights is huge, as witnessed by the fact that, in the U.S., they are often referred to as the 4th power. This also highlights the significance of political choices reflected in the provisions of the regime, for the expected outcomes. To give an example, whereas a class settlement involving Yahoo was announced by the media in Canada for loss of control of data, a company having committed the same type of infringement only apologised in France.

However, the two models – American and European – are currently tending to move much closer than they were or than they appear because of the profound changes we are experiencing. For instance, the role of the Environmental Protection Agency (a public enforcer) seems to have been crucial for the historic settlement with VW, in the Dieselgate class settlement in the U.S. In Europe, step by step, private enforcement, also through collective redress, is moving in the right direction, though slowly and through patchy developments that occur with a top-down approach (through directives and regulations). Elsewhere, in common law countries, in mixed systems and in Latin American countries, the approach appears to be bottom-up, since case law is making the rules.

17. Magdalena Tulibacka, 'Consumer Justice: Do Europeans Know Something We Do Not?', 38 *Emory International Law Review* 715, 2024.

From a comparative perspective, developments of collective redress mechanisms are heavily uneven. This is true both from a policy and from a practical standpoint. Here again, the compensations awarded through settlements after the Dieselgate litigation are a striking example of the disparities: compensations in the U.S. ranged from 12000 to 44000 $ in 2016 (less than one year after the scandal), followed by Canada, Israel, and Australia. In Europe, instead, whilst 8.5 million cars were sold and nine years have passed, compensation has been awarded in only a few Member States (Germany, the U.K., Italy, and very recently Austria). Likewise, the amounts are far lower in the European countries (ranging from 1000 to 6500 € according to the information available) than in common law jurisdictions.[18]

Furthermore, as class actions are widely recognised and well-established on a global scale, their effectiveness and limitations have already been demonstrated from a policy perspective. To name only some conclusive features, efficient systems are the ones whereby *standing* is granted broadly upon representatives of the plaintiff and the economic viability of the action is ensured. For the latter to function, the back-up may come either from public funds (e.g. Canada and Israel), or theoretically from legal aid, from private funds that function through contingency fees (U.S., Argentina), by force of the law (as in the new Italian regime that fixes incentive fees), or from a private agreement with third-party funders taking on the risk, and members of the class benefiting from it (Netherlands, Portugal).

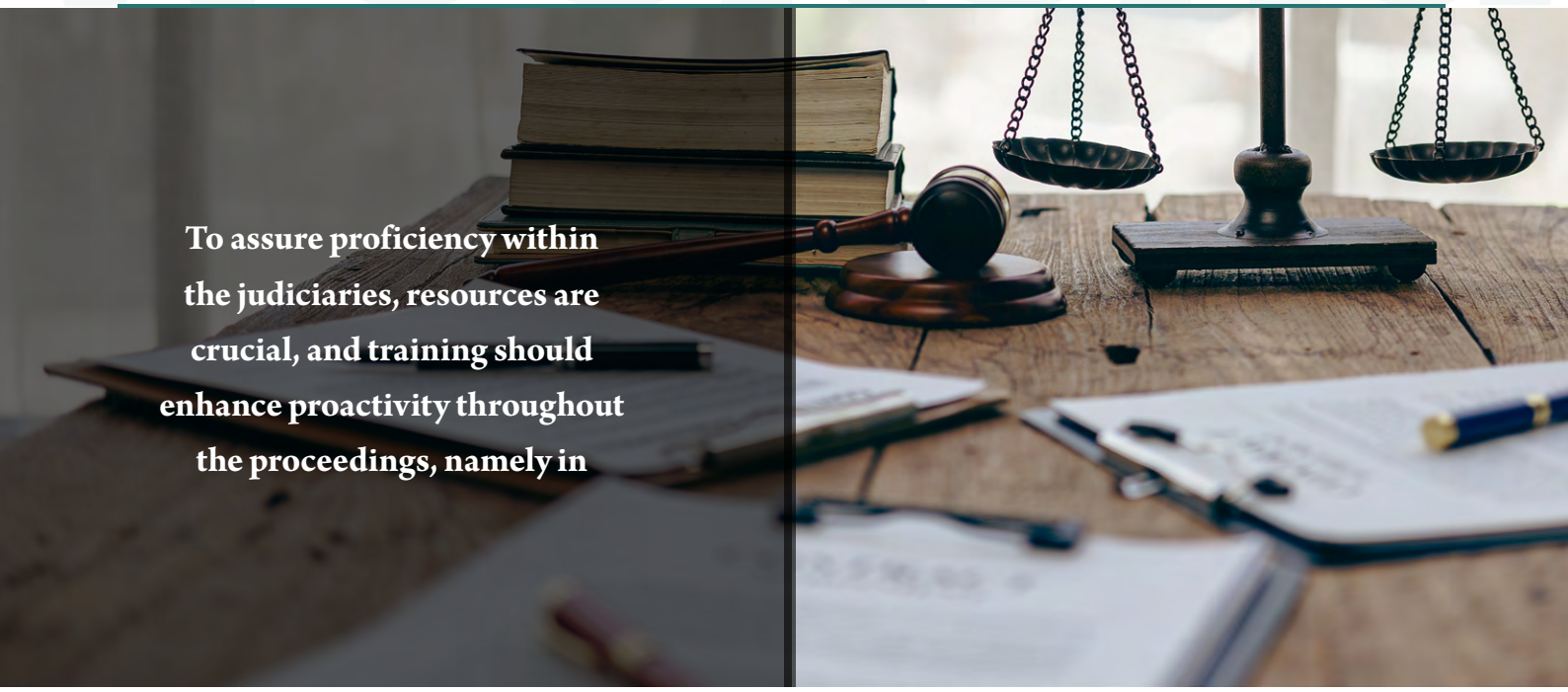
Efficient systems are those whereby the rules are *purpose* driven. Since the purpose of class actions is granting access to justice – that is, injunctive and compensatory relief –, deterrence and judicial efficiency, rules need to head in those directions.

For the system to grant access to justice through compensation, there is no other efficient option but the opt-out default rule (or the ibero-american *secundum eventum litis* – if the result is favourable to the representative, members of the group can claim their compensation). Let us recall that the RAD leaves the choice between opt-out and opt-in to Member States. Yet, the opt-in system has never worked; why should it now? The rational apathy of individuals with small and fragmented harms prevents the effort of opting-in. Further, notification mechanisms need to be effective and, more generally, the administration of claims needs to build on innovative technology, neuroscience and proven strategies to steer settlements through to final approval.

Likewise, three types of provisions are needed to ensure general and special deterrence: 1) the judge must be able to assess the damage on a global basis, 2) the non-recovered funds cannot be returned to the defendant (through reversion clauses) but to a cy-près solution or fluid recovery and 3) there needs to be publicity of the judgments or settlements.

Lastly, to assure proficiency within the judiciaries, resources are crucial, and training should enhance proactivity throughout the proceedings, namely in evidentiary matters, seeking the best notification order possible, and creativity in finding the best outcome for both the members of the class and society.

18. Maria José Azar-Baud, 'Comparative Reasoning in Court Rulings in the Aftermath of Dieselgate', 38 *Emory International Law Review* 837, 2024.



Undeniably, for this to happen, the strategy matters, and all the stakeholders are responsible for proposing the best options to the judges. The claimants –NGOs, class representatives, GOs–, their lawyers and service providers (claims administrators) must be creative as well, building on experiences in other contexts.

Nevertheless, positive law cannot be overlooked. What happens in countries where a collective action regime does not exist (like *Peru*), is inefficient (like *France*) or seems efficient on the shelves but is not in practice (like *Brazil*)? There is a tendency towards the extraterritorialisation of litigation. This is currently ongoing in environmental cases against supermajors with one lawsuit brought in the U.K. for the compensation of Indigenous people after the Brazilian Mariama dam disaster and another brought in the Netherlands regarding Peruvian populations after an oil spill in Ventanilla.

Nowadays it is very easy to know of the existence of decisions and settlements elsewhere in the world. Thus, the asymmetrical justice arising out of the acknowledgment of violations in one place and not elsewhere has become unbearable.

To challenge this status quo, the stakeholders of the collective redress world are no longer working in isolated compartments. Class representatives, class action lawyers and consultants are acting in networks and in a cooperative manner, steering their imagination towards equivalent solutions. The same is true for the European Commission or consumer associations, namely when sending an alert to the network that coordinates enforcement actions, and for some NGOs, composing umbrellas encompassing several associations. For instance, BEUC, a European federation of consumer associations, has alerted the EC many times (of violations by TikTok in 2021,[19]

19. See e.g. the Press Release of the Commission, 'EU Consumer protection : TikTok commits to align with EU rules to better protect consumers' 21 June 2022 and that of BEUC, 'BEUC files complaint against TikTok for multiple EU consumer law breaches' 15 February 2021.

of Meta in 2023[20] and, in September 2024, it alerted the EC and the CPC network of unfair practices behind leading video games such as Fortnite and Minecraft).[21] Those alerts led to enforcement actions at national level, for instance in Italy (changes were ordered by the Competition and Market Authority together with the Data Protection Authority), in Germany (TikTok signed a cease-and-desist declaration as requested by VZVB), and in the Netherlands (Consumentenbond and Take Back your Privacy brought a collective action).[22] There are also two pending popular actions in Portugal, brought by IUS Omnibus, the association I preside over, and there is an aggregative criminal action ongoing in France.

Judges are also using comparative reasoning, sometimes thanks to formal covenants or networks (as for environmental justice). A recent study of mine regarding comparative reasoning by judges in class actions[23] revealed that even if judges are interested in what happens elsewhere, especially for complex collective cases, most declare a lack of resources and time. It also showed that the higher the instance, the greater the probability that they have had the research department undertake research on comparative law. Some judges expressed having checked what is going on elsewhere but, in civil law traditions, there can be some reluctance to quote foreign law. Foreign decisions are influential on judges as they are, in practice, for third-party funding, as witnessed by the revolution caused by the *PACARR* decision in the U.K.[24] or *Airbus*[25] and *TikTok*[26] in the Netherlands. Consequently, class actions seem to be fostering a convergence between traditions.

III. Future of European (and Global) Collective Actions

Class actions are here, and they are here to stay. They are here to make the system, not to break it.

The boundaries that once defined local markets and design practices have dissolved. The interconnected nature of globalised design and production is a double-edged sword. It has led to the democratisation of access to goods and services across the globe. Yet the complex problems that arise are also often global in scope. Collective actions encourage compliance and sustainable practices, as well as environmental, social and governance accountability.

20. Press Release of the Commission, 'Commission coordinates action by national consumer protection authorities against Meta on 'pay or consent' model' 22 July 2024; BEUC, 'Choose to Lose with Meta' November 2023.

21. BEUC, 'Game over: Consumers fight for fairer in-game purchases' Report of September 2024.

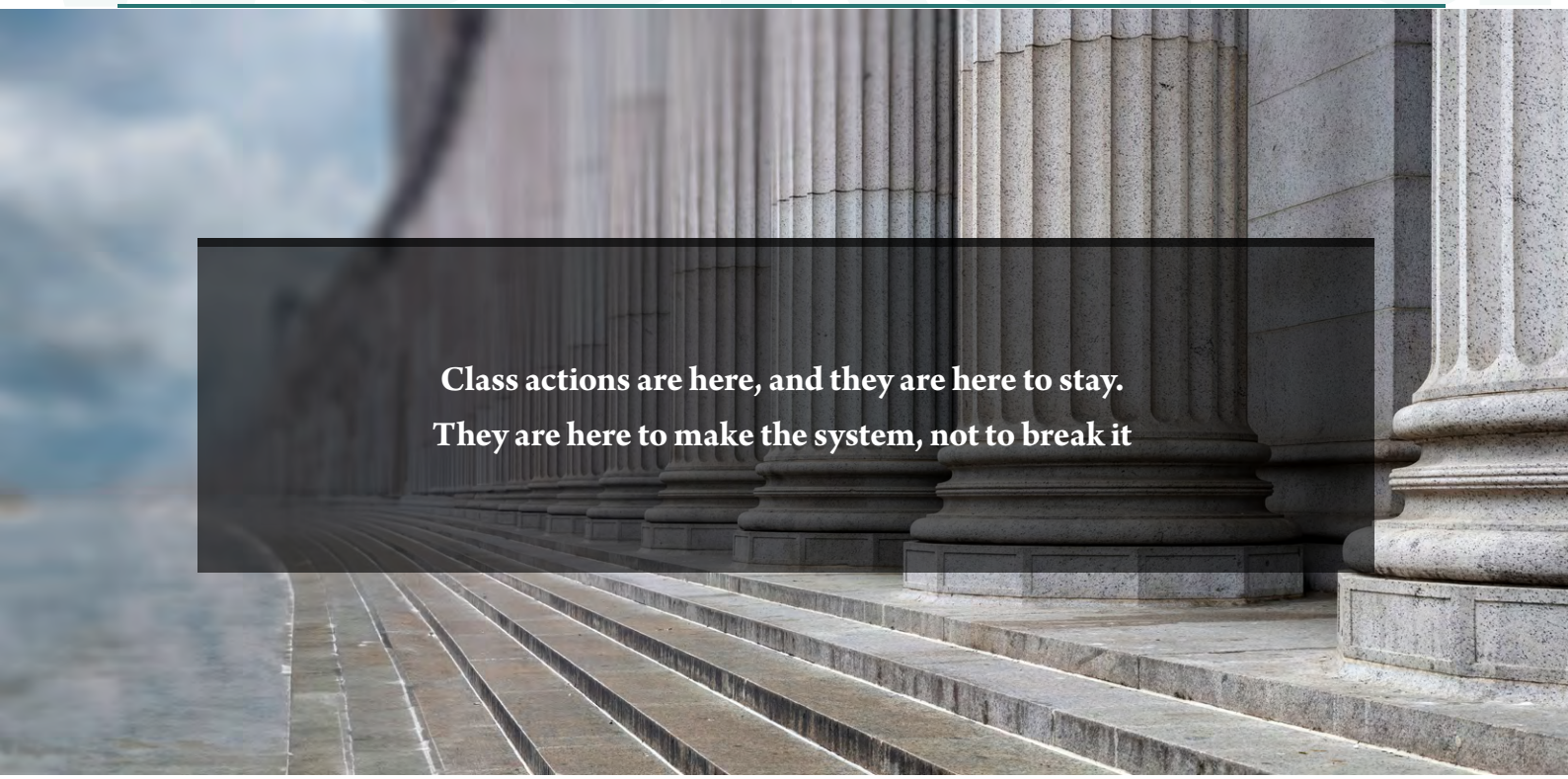
22. See Judgment of the Amsterdam District Court of 25 October 2023, *SOMI, STBYP and SMC v TikTok Ireland, TikTok UK, TikTok Inc, TikTok Pte, Bytedance, Beijing Bytedance and TikTok Ltd* (C/13/702849, C/13/706680 and C/13/706842) ECLI:NL:RBAMS:2023:6694.

23. Maria José Azar-Baud, 'Plaidoyer pour le raisonnement comparatif dans les décisions de justice' in *Mélanges en l'honneur de M le Pr Loïc Cadiet*, LexisNexis, 2023, pp. 67–82.

24. Judgment of the U.K. Supreme Court of 26 July 2023, *R (on the application of PACCAR Inc) v The Competition Appeal Tribunal and others* ([2023] UKSC 28).

25. Judgment of the District Court of the Hague of 20 September 2023, *Joined cases Stichting Investor Loss Compensation (SILC) v Hermann-Josef Michael Lamberti et al (Airbus)* (C/09/623288) and *Airbus Investors Recovery Stichting (AIRS) v Airbus SE* (C/09/627583) ECLI :NL :RBDHA :2023 :14036.

26. Judgment of the Amsterdam District Court of 25 October 2023, *SOMI, STBYP and SMC v TikTok Ireland, TikTok UK, TikTok Inc, TikTok Pte, Bytedance, Beijing Bytedance and TikTok Ltd* (C/13/702849, C/13/706680 and C/13/706842) ECLI:NL:RBAMS:2023:6694.



In Europe, since the process of implementation of the RAD was worryingly delayed, so far, little has changed in the European landscape: at the time of writing, 22 Member States have fully transposed it, three have done so partially and two Member States have not transposed it yet. Nevertheless, because of the existing and sometimes dramatic disparities, we should not expect a revolution. Discrepancies will remain because of procedural gaps in the Member States due to the soft law nature of many provisions of the RAD. Of note are the areas of opt-out, funding solutions, the absence of the assessment of damages on an aggregated basis and allocation of undistributed funds through fluid recovery mechanisms, whether those are cy-près, a public authority or a fund. The massive choice for opt-in and the absence of rules ensuring the economic viability of the representative actions could negatively influence the effectiveness and success of representative actions in Europe. Hence, practice in countries wherein collective redress was dormant remains rather undeveloped, whereas the European hubs for collective actions confirm their role as frontrunners.

Looking ahead, the fitness check announced in the RAD will play a central role in assessing the power of qualified entities and the potential need of an EU ombudsman to help enforce European provisions. On the review of the RAD, there should be an opportunity to advocate a pressing need to search for and find EU-wide solutions to EU-wide problems.

First and foremost, one should appraise the definition of a cross-border representative action. Defined as it is in the RAD, it only relates to an action of a plaintiff in a Member State against a defendant in another Member State. Conversely, a true cross-border representative action should target litigation whereby qualified entities seek to represent consumers of multiple Member States. They may even seek a truly pan-European initiative, encompassing de facto victims of all the European countries where the infringement occurred.

For a cross-border representative action to achieve its purpose, the coordination of European entities, enhancing European judges' networks, and the flow of litigation related to the same infringement is of the utmost importance and is already underway. A cross-border appraisal also requires addressing issues of applicable law to avoid the myriads of national substantive rules that may be relevant in the circumstances. To smooth out the mission of delivering justice, jurisdictional matters must be reconsidered, namely, to avoid forum shopping and the congested domestic tribunals of the handful of Member States currently adjudicating collective actions. In summary, cross-border infringements require cross-border solutions, as the consequences of global infringements require global justice considerations. Such a basic consideration should likely lead us to consider the need for a European jurisdictional body capable of effectively dealing with Europe-wide harms; probably drawing inspiration from panels in the American Multidistrict Litigation system.

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The global collective redress world we are living in requires a collaborative spirit and some sort of judicial cosmopolitanism. An absence of universal, international or European jurisdictions and the domino effect of class actions spreading from one country to another –simultaneously or consecutively– implies reterritorialising the global. Therefore, comparative reasoning in legal decisions not only appears to be the vehicle for dialogue between foreign judges for transnational judicial cooperation but also aims to avoid forum shopping and to organise effective coordination of state justice.

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