BEUC The European Consumer Organisation

Private International Law and Cross-Border Collective Redress

A Legal Analysis of Jurisdiction, Applicable Law, Pendency, Recognition and Enforcement under the Representative Actions Directive 1828/2020

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Disclaimer:

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PROJECT INFORMATION AND INTRODUCTION

Recent examples including the VW Dieselgate scandal, the Ryanair mass cancellation, the PIP breast implant scandal or Facebook Cambridge Analytica[1] show that mass infringements of consumer law are increasingly not confined to national borders but frequently have a cross-border or even unionwide dimension. Globalisation and digitalisation have increased the risk of a large number of consumers being harmed by the same unlawful practice. At the same time, infringements of consumer law necessarily affect consumers located in different member states, as products and services are distributed EU-wide.

The cross-border implications of collective redress mechanisms raise a number of fairly complex issues of private international law concerning determination of jurisdiction and of the law applicable, recognition and enforcement and lis pendens and the notion of related actions[2]. The existing rules on private international law, the Brussels I bis Regulation[3] and the Rome Regulations[4], were predicated on the "one-on-one" model of litigation involving two parties and arising between two jurisdictions and lack a proper framework for collective redress. Therefore, they are ill-suited to the peculiar situation of cross-border mass claims which are poly-centred and might involve thousands of consumers located in different countries and damages materializing all over Europe. As a result, the relationship between collective redress and the Brussels Regime in particular has been highlighted as highly problematic[5]. The difficulties of integrating collective redress models – the existence, scope and form of which diverge considerably across the member states, adding further complexity – into the existing PIL-rules raise many uncertainties. The inadequacy of those rules to accommodate collective redress has been concluded many times both in academic and policy debates.[6] Several voices have called for a revision of PIL-instruments aiming to facilitate collective redress. However, in light of the controversial nature of the topic the likelihood of changes remains uncertain today.

It is beyond doubt that by way of introducing a harmonised EU-wide regime for compensatory redress, the Representative Actions Directive 1828/2020 (hereafter "RAD")[7] is a milestone step for European collective redress and a central piece of European consumer law policy that is of utmost significance for European consumers. It brings compensation into the equation of a previously deterrence-only based representative action-model and will certainly help close the "justice gap" which has been identified across Europe with respect to both the current level of

1 See for example, BEUC, A New Deal for Consumers – Revision of the Injunctions Directive (January 2018).

2 See, among many, Fairgrieve/Lein (eds), Extraterritoriality and Collective Redress (2012); Nuyts/Hatzimihail (eds), Cross-Border Class Actions. The European Way (2014); Pato, Jurisdiction and cross-border collective redress. A European Private International Law perspective (2019); Peraro, Cross-border Collective Redress and the Jurisdictional Regime: Horizontal vs. Sectoral Approach, in Hess/Lenaerts (eds), The 50th Anniversary of the European Law of Civil Procedure (2020) 317; Law, Your Place? Mine? Or Theirs? A Legal and Policy-orientated Analysis of Jurisdiction in Cross-Border Collective Redress, in Hess/Lenaerts (eds), The 50th Anniversary of the European Law of Civil Procedure (2020) 371; Nowak, Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles? in Hess/Lenaerts (eds), The 50th Anniversary of the European Law of Civil Procedure (2020) 394; Inchausti, A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November, GPR 2021, 61; Biard, Collective Redress in the EU: A Rainbow Behind the Clouds? (2018) 19 ERA Forum 189. On cross-border settlements involving consumers from several countries under the Dutch WCAM see Kramer, Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries, 27 Pac. McGeorge Global Bus. & Dev. L.J. 2014, pp. 235-279; E. van Lith, the Dutch collective settlement act and private international law, 2012.

3 EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation).

4 EU Regulation 593/2008 on the law applicable to contractual obligations (Rome I); Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II).

5 See, among others, Law 371 who raises and subsequently negates the question whether any model of collective redress can be integrated into Brussels I bis.

6 See for example, the Resolution of the European Parliament, Resolution on Delivering a Single Market to Consumers and Citizens (2010/2011(INI)); Panizza et al, Collective Redress in the Member States of the European Union, Study commissioned by the European Parliament (2018) 96; B. Hess, Reforming the Brussels Ibis Regulation: Perspectives and Prospects (July 27, 2021). MPILux Research Paper 2021(4); Pato, Jurisdiction and Cross-Border Collective Redress (2019) 207 et seq; Tzakas, CMLR 2011, 1151; Rott/Halfmeier, VbR 2018, 136; Terradas, JPIL 2015, 143; Oberhammer, Mass Claims Journal 2021; Tang, JPIL 2011, 101; Law in Hess/Lenaerts (eds), The 50th Anniversary of the European Law of Civil Procedure (2020) 349; Lein in Pocar/Viarengo/Villata (eds), Recasting Brussels I (2012) 159; Hess in Nuyts/Hatzimihail (eds), Cross-Border Class Actions. The European Way (2014) 69 ff; Stadler, NIPR 2013, 483; Stadler, ZfPW 2015, 61; Biard/Kramer, ZEuP 2019, 249; 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, EuCML 2021, 189.

7 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.

consumer protection and the level of consumer law enforcement.

However, the RAD turns a blind eye on PIL-issues and does not introduce specific rules on cross-border collective redress, either as regards jurisdiction, applicable law or issues of recognition and enforcement. Instead, Article 2 (3) RAD refers to the Brussels Regime – for international jurisdiction, lis pendens and related actions, recognition and enforcement – and the Rome Regulations – regarding the law applicable. The Directive only provides for very limited rules concerning the mutual recognition of designated entities ("QEs") across the member states, gives to QEs from different member states the possibility to bring a joint action before one court in the event the harm affects (or is likely to affect) consumers located in several countries (Article 6 RAD), and highlights the eligibility of consumer organisations that represent members from different member states (Article 4 RAD). Finally, the Directive calls on the European Commission to carry out an evaluation of whether cross-border representative actions could be best addressed at Union level by establishing a 'European Ombudsman' for respresentative actions (Article 23 (3) RAD). However, a report accompanied – if appropriate – by a legislative proposal is foreseen only for the end of June 2028.

The absence of a coherent PIL framework for collective redress concerns a major shortcoming of the Directive, given the fact that the existing rules are not adequately adapted to collective redress. Against the background of an extensive academic and policy debate surrounding the problematic relationship between collective redress and PIL-rules, this lack of attention devoted to cross-border collective redress by the EU lawmaker clearly indicates certain political restraints and might reflect the limitations of the Union's legislative competences in the field of civil procedure. Nevertheless, the policy of avoiding as regards key PIL-issues comes at the price of increased complexity, many uncertainties and an overall diminished likelihood of cross-border enforcement which – at least to some extent – thwarts the underlying idea of representative actions as a means to collectively enforce consumer rights deriving from Union law across the member states.

Consumer organisations that qualify as QEs under the RAD for the purpose of bringing cross-border representative actions as well as QEs designated for the purpose of bringing domestic representative actions face considerable challenges when it comes to handling cases involving cross-border elements. In addition to typical resource-based constraints relating to high costs and a lack of knowledge which tend to be disproportionately accentuated in cross-border cases[8], the uncertainties concerning the interaction of PIL-rules with the representative action model adopted by the RAD pose significant risks for consumer organisations, which might cause them to seriously reconsider whether to engage in cross-border enforcement in the first place. Recent litigation experiences as well as the decisions rendered in the VW case and in Schrems II are indeed a reflection of how PIL-issues can hinder enforcement and considerably slow down proceedings.

Therefore, this study aims to provide consumer organisations with a roadmap on how to navigate the existing rules on private international law in order to optimize their use in the context of representative actions. The overall aim of the study is to identify the main legal issues related to jurisdiction, law applicable, cross-border enforcement and parallel proceedings and to provide a solid analysis of the options that are available to consumer organisations in different sectors. Given the complexity, additional costs and experiences made under the Injunctions Directive, the study starts from the assumption that consumer organisations typically seek to avoid litigating abroad, and will try to keep representative actions within their own national boundaries as much as possible.

The primary focus of this study is on the practical needs of consumer organisations. It seeks to address challenges and specific difficulties likely to be encountered in practice when bringing representative actions in cross-border settings. The study does not intend to provide recommendations for a coherent policy framework concerning cross-border collective redress or propose legislative changes of the current rules, nor does it pursue to add a purely academic-orientated contribution to the discussion.

The study is divided into four sections:

Section I clarifies the options available to consumer organisations when it comes to identifying the competent jurisdiction(s), explores different possibilities depending on whether the claim is based on tort law or contract law

8 See for cross border litigation in data protection law for example Rott, Data protection law as consumer law – How consumer organisations can contribute to the enforcement of data protection law [2017] Journal of European Consumer and Market Law 113; Leupold, Enforcing Consumer Law in Austria, in: Gsell/Möllers (eds), Enforcing Consumer and Capital Markets Law – The Diesel Emissions Scandal (2020), 13-29.

and addresses whether it is possible to concentrate jurisdiction in one forum for all claims resulting from the same infringement.

Section II clarifies the options available to consumer organisations when it comes to identifying the law applicable and explores different possibilities depending on whether the claim is based on tort law, contract law, the GDPR or competition law.

Both sections consider several plaintiff-scenarios, including scenarios where not one, but two or more consumer organisations jointly bring a representative action or where a supranational consumer organisation with members from different countries such as BEUC brings an action. For the purpose of practical guidance, **appendices** to each Section depict decision trees on jurisdiction and applicable law which focus on the particular challenges of multi-state and unionwide actions and seek to outline the most common options and possible choices of QEs.

Section III clarifies possible obstacles faced by consumer organisations when seeking cross-border recognition and enforcement as regards both representative actions for injunctive and redress measures as well as collective settlements.

Section IV clarifies the consequences of parallel proceedings against the same defendant.

EXECUTIVE SUMMARY

It is beyond doubt that by way of introducing a harmonised EU-wide regime for compensatory redress, the Representative Actions Directive 1828/2020 is a milestone step for European collective redress and will certainly help close the "justice gap" which has been identified across Europe with respect to the current level of consumer law enforcement.

However, the RAD turns a blind eye on PIL-issues and does not introduce specific rules on cross-border collective redress, either as regards jurisdiction, applicable law or issues of recognition and enforcement. Instead, Article 2 (3) RAD refers to the Brussels Regime and the Rome Regulations. The absence of a coherent PIL framework for collective redress concerns a major shortcoming of the Directive, given the fact that the existing rules are not adequately adapted to collective redress. As a result, the integration of the representative actions model into the existing PIL-rules raises many uncertainties.

JURISDICTION

1. SCOPE OF THE BRUSSELS I BIS REGULATION

The Brussels I bis Regulation applies to representative actions **brought by any qualified entity** within the meaning of Article 3 (4) RAD, which includes organisations constituted under private law as well as public bodies which have been designated by a member state. Its scope covers **all types of representative actions**, seeking injunctive measures, redress measures and declaratory judgments as well as representative actions to skim off profits, if available and implemented by national law.

The Brussels I bis Regulation only applies with respect to defendants who are domiciled in a member state. If a trader is **domiciled in a third state**, both the determination of jurisdiction and the rules concerning the recognition and enforcement of judgments are governed by the national law of the forum State (Article 6 Brussels I bis Regulation). Nevertheless, Union law may obligate the member states to grant jurisdiction against third state traders in certain cases, if it were otherwise impossible or excessively difficult to exercise rights conferred by EU law. Such an obligation extends to representative actions seeking to enforce those consumer remedies collectively.

2. ARTICLE 7 (2) BRUSSELS I BIS REGULATION – SCOPE OF THE HENKEL-FORUM

Representative actions seeking injunctive or declaratory measures **always concern a matter "relating to tort, delict or quasi-delict"** within the meaning of Article 7 (2) Brussels I bis Regulation. The same applies to representative redress actions, regardless whether they seek to provide consumers with remedies based on tort law or on contract law. Therefore, **QEs may bring all types of representative actions against foreign traders in their own member state**. They are also entitled to **pursue consumer claims in their entirety** before the same court and include different contractual and non-contractual alternative bases for those claims within a single representative action. Furthermore, **jurisdiction clauses** in consumer contracts, which confer jurisdiction to the place of domicile of the trader, have no impact on the determination of jurisdiction for representative actions and cannot be enforced against the QE, regardless whether they are deemed unfair and therefore void under Articles 3, 6 UCTD. If they are deemed unfair, the QE is capable of invoking the invalidity under the UCTD, yet may not invoke Article 19 Brussels I bis Regulation.

The determination of jurisdiction under Article 7 (2) Brussels I bis Regulation with respect to the place where the damage occurred follows the place, **where the collective interests of consumers are (likely to be) harmed** as a result of the infringement. This typically refers to the market affected by the infringement and provides for the

representation of consumers who are habitually resident in the forum state.

Redress actions seeking to include all consumers concerned across Europe may not be brought in each member state affected at the QE's choice under Article 7 (2) Brussels I bis Regulation. A **unionwide consolidation of consumer claims** is only possible in the Article 4 forum of the trader's domicile and in the Article 7 (2) forum as regards the place where the infringement took place. Similarly, representative injunctive or declaratory actions seeking measures to protect consumers beyond those resident in the forum state can be brought only in the Article 4 forum of the trader's domicile and in the Article 7 (2) forum as regards the place where the infringement took place.

These limitations for multistate unionwide redress on the grounds of jurisdiction follow from the principles underlying the Brussels regime, which do not adapt to the goals of collective redress. Therefore, they are not limited to domestic actions brought by a single QE, but apply **equally to each plaintiff-scenario**, including several QEs from different member states bringing a joint action as well as supranational QEs like BEUC taking action.

Local territorial jurisdiction over injunctive and redress actions under Article 7 (2) Brussels I bis Regulation can be founded either at the place where the QE has its registered office or at the QE's choice at any place within the forum state where (individual) damage occurred. Procedural rules which determine a specific court having exclusive local jurisdiction over representative (redress) or other collective proceedings can be adopted by the member states, yet are not necessary in order to ensure uniform local jurisdiction for redress actions within the forum state under Article 7 (2) Brussels I bis Regulation.

3. ALTERNATIVE HEADS OF JURISDICTION

The protective jurisdiction established under **Article 18 Brussels I bis Regulation** is limited to individual proceedings and cannot be engaged for representative actions seeking redress or injunctive measures. The same applies to the special protective jurisdiction in insurance matters established under Section III (**Articles 10-16) Brussels I bis Regulation**.

Article 7 (5) Brussels I bis Regulation provides for jurisdiction at the place where "the branch, agency or other establishment is situated", and if applicable, as regards a dispute arising out of the operations of said branch, agency or other establishment allows for "universal" injunctive measures and redress actions that seek to represent consumers from different member states.

Article 7 (2) Brussels I bis Regulation may provide for an additional forum at the place of the event giving rise to the damage in cases where domicile of the trader and place of violation differ, which also allows for a unionwide consolidation of cases.

Article 25 Brussels I bis Regulation allows QEs and traders to agree on a forum best adapted for the purpose of collective redress. They may also agree on expanding the scope of a forum to include consumer claims, the court would otherwise lack jurisdiction to hear. As regards consumers not habitually resident in the chosen forum, the opt-in-requirement under Article 9 (3) RAD still must to be observed.

Article 26 Brussels I bis Regulation, according to which jurisdiction is attributed to a court before which a defendant enters an appearance without contesting its jurisdiction, applies to representative actions and may have relevance for a forum assuming jurisdiction to hear claims of consumers it would otherwise lack, provided that the mandatory opt in under Article 9 (3) RAD is observed. „Entering an appearance" with respect to individual consumer claims will arguably preclude the trader from contesting jurisdiction at the earliest time possible, taking into account the time limit for consumers to opt in, subject to national law (Article 9 (2) RAD).

4. SECTOR-SPECIFIC JURISDICTION: GDPR

The special jurisdiction at the place of establishment of a controller or processor under Article 79 (2) GDPR **applies to representative actions under the RAD**, and may provide for alternative heads of jurisdiction which allow for unionwide injunctive measures and redress measures providing consumers from different member states with remedies available under the GDPR in addition to those under Article 4, Article 7 (2) Brussels I bis Regulation.

The special jurisdiction at the data subject's habitual residence under Article 79 (2) GDPR can be invoked by QEs, if GDPR-violations concern a processor or controller who is **domiciled outside the EU and has no establishment in a member state**. However, jurisdiction at this forum may be limited to consumers who are resident in the forum state, thus not allowing for unionwide injunctive and redress measures.

APPLICABLE LAW

1. ISSUES RELATING TO CROSS-BORDER REPRESENTATIVE ACTIONS

The **legal standing of QEs is determined conclusively by the designating state** and has to be recognised by any other member state. The court seised is prohibited from independently examining whether the QE (still) complies with the designation criteria and from revoking its designation. Conversely, the court seised may reject the action on the grounds of a lack of legal standing only upon revocation of its designation by the designating member state.

Subject to the procedural law of the forum state, the court seised (only) has the right to examine whether the QE's **statutory purpose** justifies the action. Therefore, the admissibility of unionwide injunctive and redress actions might require the statutory purpose to reflect a legitimate interest in the protection of consumers beyond the QE's own member state.

(Other) Matters relating to the proceeding are governed by the law of the forum state. This concerns the admissibility of representative actions, including possible requirements regarding a certain degree of similarity of individual claims or a possible threshold-number of consumers concerned by a redress action, evidence and disclosure rules, the means of appeal, the design of the proceeding, the constitution of the class as to opt-in or opt-out and at which stage of the proceedings consumers have to express their wish to opt in or out. The law of the forum state also determines which courses of action are available for QEs, whether QEs are limited to seeking injunctive and redress measures or may also seek declaratory judgments, whether they may seek injunctive and redress measures within a single action or separately, whether they have a right to seek an obligation to publish the decision or a corrective statement. It is also up to the lex fori to determine whether a "consulation-process" prior to bringing an injunctive action is mandatory and whether third party-funding of redress actions is permitted.

Limitation periods of individual consumer claims as well as the suspension or interruption of those limitation periods by means of a pending injunctive or redress representative action (Article 16 RAD) are **governed by the lex causae**, i.e. the law applicable to individual consumer claims. Limitation periods or other time limits to exercise rights to benefit from redress measures as well as any rules on the destination of outstanding redress funds not recovered within established time limits (Article 9 (7) RAD) are governed by the lex fori.

2. LEGAL STANDING

Whether the notion of legal standing concerns a matter of procedural law or substantive law, is not determined by the RAD and therefore continues to be governed by national law. If member states – like currently Germany and Austria as regards representative injunctive actions under §§ 1, 3 of the German UKlaG, §§ 28, 28a of the Austrian KSchG – follow a **substantive law-doctrine**, the Amazon-distinction applies: The law applicable to the action as such must be determined in accordance with Article 6 (1) of the Rome II-Regulation, whereas the law applicable as to assessing infringement and individual consumer claims must be determined pursuant to the Rome I-Regulation or the Rome II-Regulation, depending on the matter at stake.

As a consequence, *domestic* representative actions in these fora would be limited to the protection of consumers in the forum state. However, such limited legal standing is not in accordance with the RAD, whenever the forum has jurisdiction to include consumers from other member states. The issue may only arise with respect to domestic actions, because the recognition of the legal standing of „foreign" QEs is ensured by the RAD.

3. INJUNCTIVE ACTIONS

The law applicable as to **assessing the infringement** sought to be prohibited must be determined pursuant to the Rome I-Regulation or the Rome II-Regulation, depending on the matter at stake. Both, the Rome I and the Rome II-Regulation **typically designate the law of the consumer member state to apply**. As a consequence, multistate or unionwide injunctive (or declaratory) actions involve multiple laws as regards the substance of the measures sought.

However, **unionwide injunctive and declaratory measures** do not necessarily involve examining multiple laws, but may be issued upon merely establishing that a practice violates the minimum standard of protection provided for by Union law.

The multiplicity of applicable laws alone should not render representative actions "unsuitable" to be heard as a single representative action under national law.

Conversely, QEs are not obliged to include similarly affected consumers from other member states when seeking injunctive measures but may **choose to limit the effects of injunctive actions** to consumers of their own member state.

4. REDRESS ACTIONS

The law applicable to the individual claims of consumers represented in redress actions has to be determined according to the Rome I or Rome II Regulation, depending on the matter at stake. Therefore, claims of consumers who are domiciled in different states or have suffered damage in different states, are almost always **governed by different laws**. Concerning redress measures, the application of uniform Union law – i.e. by virtue of settling for the bare minimum with respect to individual remedies provided for by Union law – cannot be explored.

The claims of consumers from different Member States can be **consolidated in a single representative action**. For consumers who are not habitually resident in the forum state, a mandatory opt in-mechanism must be observed. Multistate measures do **not depend on several QEs from different member states taking joint action**.

The multiplicity of applicable laws alone should not render redress actions "unsuitable" to be heard as a single representative action.

Conversely, QEs are not obliged to include similarly affected consumers from other member states when seeking redress measures, but **may choose to limit their actions** to representing consumers of their own member state by way of determining the subject matter of the dispute.

If several remedies available to consumers based on different Union or national law are claimed collectively in redress actions, the law applicable to these remedies needs to be **determined independently for each claim** according to the Rome I or Rome II Regulation, depending on the basis of the claim at stake.

Choice of law-clauses in individual consumer contracts have no adverse effect on redress actions seeking to enforce contractual remedies of consumers. As to the legal standing of QEs, they may be disregarded entirely (arg Article 6 Rome II-Regulation). With respect to the law applicable they can be disregarded if unfair and void under the UCTD. QEs then have a choice to either have the court disapply the unfair clauses, resulting in the application of the law of the member state of the consumer, or to oppose the non-application of the unfair term. Furthermore, in light of the protective objective of Article 6 Rome I Regulation and with a view to case law on similar matters pertaining to the UCTD, it can be argued that QEs may choose not to invoke the Article 6 (2) Rome I Regulation-protection. The latter, by way of bypassing otherwise overriding mandatory provisions of national consumer law provides for the application of a uniform law (i.e. the chosen law), which may facilitate and fast-track proceedings in certain cases and ensures that consumers from different member states have the same remedies. However, this course of action requires that the consumer has an option to decide whether to opt in or not opt out after having been informed accordingly.

Similarly, concerning **contractual consumer claims** in general, that is to say in the absence of (un-)enforceable

individual choice of law-agreements, QEs might – for the sake of uniformity – choose not to invoke the special protection under Article 6 (1) Rome I Regulation in favor of having the **trader's law** applied (Article 4). Still, whether this is a viable course of action in collective settings depends entirely on whether Article 6 is open to a (sufficiently informed) waiver of protection on behalf of consumers at all, which requires further clarification by the Court. Also, this option is limited to contractual remedies and does not extend to non-contractual remedies to be determined under the rules of Rome II.

Remedies can be pursued by redress actions regardless whether they derive from union law (including transpositions into national law) or national law, as long as they **follow an infringement of Union law** referred to in Annex I.

The **UCPD** might operate as a gateway as regards the (indirect) enforcement of provisions of union law not included in Annex I RAD. Also, the UCPD by means of introducing consumer redress in its Article 11a, including both contractual and non-contractual remedies, is highly important for the purpose of representative actions. This especially concerns the UCPD's **interplay with Union law** that does not expressly provide for individual remedies and addresses situations such as the Dieselgate case, where consumers of some member states encountered difficulties to establish liability under national tort law.

RECOGNITION AND ENFORCEMENT

1. JUDGMENTS

Judgments rendered in representative proceedings are **enforceable in other member states** without any special procedure or declaration of enforceability being required. They may be invoked and enforced by **either the QE and/or the consumers represented** in the action, subject to the concept adopted by the national law of the forum state of origin.

The QE and/or the consumer who seeks to invoke or enforce the judgment in another member state, must provide the court or competent enforcement authority with a **copy of the judgment** which satisfies the conditions necessary to establish its authenticity and a **certificate issued** by the court of origin at the request of any interested party using the form set out in Annex I Brussels I bis Regulation.

The procedure for enforcement of judgments given in another member state is governed by the **law of the member state addressed**. The judgment is to be enforced in the member state addressed under the same conditions as a judgment given in the member state addressed.

For the purpose of enforcing **unionwide injunctive measures**, it may be worth for QEs to bring a joint representative action to be able to adequately monitor and if necessary enforce compliance with the injunctive order within their own member state and secure their right to apply for a decision declaring that there are no grounds for refusal of recognition.

Recognition and enforcement of judgments can be (suspended and) refused by the competent court or authority in the member state addressed only on the grounds of irreconcilable judgments under Article 45 Brussels I bis Regulation. A **violation of the rules on international jurisdiction** is no grounds to refuse recognition and enforcement.

Generally, the same applies with respect to **reasons of public policy**: Article 9 (3) RAD submits the representation of consumers who are not habitually resident in the forum state to a mandatory opt in-mechanism, the RAD establishes a close-knit system of information requirements addressed to both traders and QEs and the RAD prevents awarding punitive damages. Thus, the RAD ensures that any potential for the refusal of recognition and enforcement on the basis of ordre public concerns is avoided.

Rules under national law, which provide the court with the power and/or discretion to determine damages as regards their existence and/or their amount not by ascertainment of facts but on the basis of a free or approximate estimate (such as § 273 of the Austrian Civil Procedure Act as to the quantum, § 287 of the German Civil Procedure Act

as to existence and quantum), do not qualify to deny recognition and enforcement under the public policy-clause, regardless whether those rules apply to individual and collective proceedings without distinction or are provided specifically for the purpose of facilitating representative redress actions and regardless whether they may be construed as a matter of procedural law or substantive law. The same applies to certain rules providing for a reversal of the burden of proof as regards elements such as the occurrence and quantum of damage, proximate causation, joint and several or vicarious liability as well as further requirements to establish liability subject to the applicable Union or national law such as fault and unconscionableness.

Similarly, third **party-funding of redress actions**, insofar as allowed in accordance with the national law of the forum, can not be considered as „manifestly" violating fundamental principles of any member state addressed and therefore do not touch upon public policy grounds.

As regards **redress measures**, recognition and enforcement can be denied if the lis pendens-rules under Article 29 ff Brussels I bis Regulation fail to prevent **irreconcilable judgments**. Consistent with the lis pendens-rule, the concept of a judgment between „the same parties" refers to (the trader and) the consumers represented and bound by the decision in question and is independent of the QEs involved. It applies both in relation to judgments rendered in other representative actions concerning the same consumer as well as judgments rendered in connection with individual actions brought by a consumer.

As regards the irreconcilability of judgments to be recognised or enforced in relation to **judgments given in the member state addressed**, the latter takes precedence independent of the temporal sequence in which the judgments were rendered. Therefore, the recognition and enforcement of earlier judgments given in another member state may be refused, even if the „domestic" judgment in the member state addressed was given at a later date and in disregard of the rules of Article 29 ff Brussels I bis Regulation.

As regards **judgments given both in (third states or) member states other than the member state addressed** (i.e. in scenarios involving three instead of two member states), a principle of priority applies according to which the earlier judgment prevails for the purpose of recognition and enforcement.

A **court approved redress settlement** (Article 11 RAD) may not provide for grounds to refuse the recognition of a judgment.

Irreconcilable judgments issuing **injunctive measures** obtained by different QEs does not provide grounds to refuse recognition and enforcement.

The scope of Article 45 Brussels I bis Regulation only applies to judgments rendered in different member states. With respect to **irreconcilable judgments issued within the same member state**, the RAD refers to the national law of the forum.

2. SETTLEMENTS

Court approved-settlements concluded in the course of proceedings (Article 11 RAD) as well as court approved out of court- and pre-court collective settlements or settlements taking the form of "authentic instruments" **can be enforced in other member states** without any declaration of enforceability being required.

Any interested party may request the competent authority or court of the member state of origin to **issue the certificate** using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

The enforcement of settlements which have been approved in violation of Article 11 (2) RAD, according to which settlements **contrary to mandatory provisions of the lex causae** must be denied by the court, as a rule cannot be refused on the grounds of public policy, provided that the procedural design of the forum state complies with Article 11 RAD.

The Brussels I bis Regime **does not provide for a preclusive effect** of redress settlements because it lacks to provide for a mutual recognition of court settlements. Therefore, individual consumers bound by a court settlement

may bring individual actions in order to seek a larger award of damages against the defendant in another member state.

PARALLEL PROCEEDINGS

As regards the **relationship between redress actions and injunctive or declaratory actions**, lis pendens-issues do not arise.

Multiple injunctive actions brought by *several* QEs against the same defendant involving the same cause of action may concern „related actions" under Article 30 Brussels I bis Regulation. Therefore, any court second seized *may* stay its proceedings. Where the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

Multiple injunctive actions brought by the *same* QE against the same trader in different member states are governed by the lis pendens-rules under Article 29 Brussels I bis Regulation, if the proceedings concern the protection of the same group of consumers and the same cause of action.

As regards **multiple redress actions**, the concepts of the same cause of action and lis pendens only apply to the individual consumer. Therefore, multiple redress actions brought in the same or in different member states, by the same QE or by different QEs against the same trader involving the same cause of action are admissible, if and as long as they concern different consumers.

The RAD precludes consumers from pursuing any individual action and from seeking representation in another collective action directed against the same trader and involving the same cause of action. Also, consumers must not receive compensation more than once for the same cause of action against the same trader.

As regards **double representation in cross-border scenarios** Art 29 Brussels I bis Regulation gives preference to the courts where proceedings have been initiated first. In order to enable the courts to assess which of them is deemed to be "first seised", they may request information from any other court seised as to when it was seised. The time of lis pendens in relation to representative actions needs to be determined in connection with each individual consumer, i.e. in accordance with him/her "explicitly or tacitly" expressing the wish to be represented in the representative action in question.

With respect to **parallel individual actions**, it should be considered that consumers may wish to be represented and/or may later opt out from a representative action, subject to the law of the forum state. Therefore, the national law should provide for a means to stay or suspend – instead of dismiss – individual proceedings upon joining a representative action until the relevant time limit for opting out has expired.

SECTION I – JURISDICTION

I. INTRODUCTION: THE BRUSSELS REGIME, ITS INTERPLAY WITH COLLECTIVE REDRESS AND WHY JURISDICTION MATTERS

The question which forum(s) is (are) available traditionally has been **at the heart of cross-border collective redress** and remains fundamentally important for the effectiveness of representative actions as regards both deterrence and compensation, trumping even the issue of which law applies, for several reasons:

First, consumer organisations typically seek to **keep litigation in their home-jurisdiction** due to several mostly resource-based constraints and particular difficulties pertaining to litigating in a foreign legal system. Since the Injunctions Directive, which is the basis of the collective redress-model chosen by the RAD, notoriously failed to accomplish its goal to enable consumer organisations to take on cross-border cases and initiate actions abroad, one may a fortiori assume they are even less likely to do so as regards compensatory redress actions which involve a large number of consumers, a considerably higher procedural risk and are therefore much more difficult to litigate. Consequently, consumer organisations need to know about the options available to them as regards **identifying the competent jurisdiction(s)** and, if at all, to what extent these jurisdictions allow them to litigate in their own forum and include consumers of member states other than their own.

Second, the **landscape of collective redress in Europe** will remain highly inhomogeneous. The member states have adopted different models and mechanisms of collective redress which diverge significantly. The RAD does not replace these national models but operates alongside such existing mechanisms. The member states are not prevented from introducing or retaining in force any alternative collective instruments, provided that at least one procedural mechanism complies with the minimum standard of the RAD (Article 1 (2), Recital 11). If there are several instruments available to QEs under Union or national law, they may choose which one to use (Article 1 (3) RAD).

Moreover, the RAD **generates further diversity** by providing for a mere "torso" of procedural rules, which determines certain key-features and provisions pertaining to the representative action-model chosen by the EU lawmaker for the purpose of collective redress, yet – in line with the principle of procedural autonomy and taking into account the member states' different legal traditions (Recitals 11, 12) – leaves a considerable proportion concerning the procedural design and structure for the member states to decide on. Since procedural rules, as a principle, are governed by the law of the forum state, jurisdiction is highly relevant for the purpose of identifying **which forums offer effective instruments for collective redress**. In this regard it is worth pointing out, that while the absence of a (truly) uniform set of collective redress mechanisms clearly adds complexity and raises significant challenges from the perspective of consumer organisations – but really for any party involved, that is to say, especially the defendant –, the diversity of instruments and procedural rules across the EU might also open opportunities for consumer organisations. Acknowledging that forum shopping, in particular with respect to representing consumers from different member states in a single proceeding, can only be entertained to a certain extent under the Brussels Regime, consumer organisations may still choose to take advantage of a particular forum by way of teaming up and forming close cooperations, depending on the matter at stake (see Article 6 (2) RAD).

The RAD does not introduce any specific rules on jurisdiction, but instead adopts a "without prejudice" approach and refers to the existing instruments of Union law (Article 2 (3) RAD). Recital 21 specifies, the Directive should neither "affect the application" of those rules nor "should it establish such rules". As a result, jurisdiction for representative actions (as well as recognition and enforcement of judgments) is governed by the Brussels Regime. As pointed out above, the **relationship between collective redress and the Brussels Regime** has been highlighted as highly problematic because the latter, following a concept of individual litigation, is tailored to a two party proceeding which makes it particularly difficult to integrate models of collective redress.

To date, the ECJ has handed down opinions on **two different models of collective redress** with respect to their interaction with the Brussels I bis Regulation, respectively: These decisions concern representative actions for injunctive measures under the Injunctions Directive on the one hand (cases Henkel and Amazon), and assignment-based models, which operate on claims being assigned to a consumer organisation and bundled in a single collective

action, on the other (cases CDC, Schrems II and VKI/VW). While the integration of the first model into the Brussels I bis Regulation did not give rise to particular challenges, the latter clearly reflects the inadequacy and the limitations of the current framework as a means to facilitate cross-border collective redress, and gives ample reference as to the need for comprehensive legislation in particular with respect to compensatory redress[9].

In its Henkel-ruling[10], the ECJ held that an **injunctive action** brought by a consumer organisation for the purpose of preventing a trader from using unfair terms in consumer contracts is a matter relating to tort, delict or quasi-delict within the meaning of Article 7 (2) of the Brussels I bis Regulation (previously, Article 5 (3) of the Brussels Convention). The Court acknowledged that the consumer organisation and the trader are not linked by any contractual relationship, and that the legal basis for its action is a right conferred by statute, thus concluding that such an action cannot be regarded as a matter relating to a contract within the meaning of Article 7 (1). The relevant place "where the harmful event occurred or may occur" within the meaning of Article 7 (2) Brussels I bis Regulation has been identified as the member state in which consumers have suffered or may suffer harm from an unlawful practice, i.e. the member state where the QE is domiciled. As a consequence, (at least) with regard to deterrence-orientated representative injunctive actions against foreign traders, the opportunity to litigate in the member state where the consumer organisation is domiciled, as a rule, has been intact.

As regards collective redress models **seeking compensation based on assignments** the ECJ held in the case of Schrems II that an assignee may not bundle claims assigned to him by other consumers in the protective forum established under Article 18 Brussels I bis Regulation[11]. This applies regardless whether the assignee in question is a consumer or not. The Court referred to previous case law, according to which the special system established in Articles 17 et seq of Brussels I bis (previously, Articles 15 et seq of Regulation No 44/2001) is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, thus protects the consumer only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings (see to that effect the Shearson case[12]).

While this position is in line with the Henkel-ruling which also precludes consumer organisations from invoking jurisdiction under Article 18 Brussels I bis Regulation for the purpose of representative actions, it has a far more negative impact on cross-border collective redress when one additionally takes into account the fundamental differences between the assignment based collective redress model and the representative action model with regard to the determination of **jurisdiction under Article 7 Brussels I bis Regulation**:

Contrary to the considerations in Henkel concerning the latter, assignments as a rule do not change the contractual or non-contractual nature of assigned claims for the purpose of determining jurisdiction under Article 7 (1)[13] and (2) of the Regulation. This means, the special jurisdiction under Article 7 Brussels I bis Regulation remains unaffected by assignments as regards both contractual and non-contractual matters[14]. This sharp distinction in relation to jurisdiction over consumer contracts under Article 18 Brussels I bis Regulation is a reflection of the different objectives pertaining to those two heads of jurisdiction. Jurisdiction under Article 7 is not justified by the protection of a supposedly weaker party, but is based on the notion of proximity, i.e. on the existence of particularly close connecting factors within a specific set of circumstances between the dispute and the court in which jurisdiction is to be founded. Since the attribution of jurisdiction is justified for reasons relating to the sound administration of justice and the notion of proximity, it is consistent within the logic and the characteristics of the Brussels I bis Regulation to establish jurisdiction independent of the parties of the proceeding.

9 See to that end the Opinion of Advocate General Bobek re Schrems II who emphasised that the need for an EU-wide instrument and comprehensive legislation „belongs to the de lege ferenda sphere" and cannot be provided for by an „isolated judicial intervention". See, among many Law 381 et seq.

10 Case C-167/00 VKI/Henkel.

11 Case C-498/16 Schrems/Facebook Ireland: The jurisdiction of courts other than those expressly referred to by the Brussels I bis Regulation cannot be established through the concentration of several claims in the person of a single applicant.

12 Case C-89/91 Shearson Lehman Hutton, paragraphs 18, 23 and 24.

13 Notably, to date the ECJ did not deliver an opinion on the question of whether a contractual relationship may arise from the assignment of rights.

14 Case C-498/16, Schrems/Facebook Ireland: referring to case law, according to which the assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction: C-147/12 ÖFAB/Koot; C-352/13 CDC Hydrogen Peroxide/Akzo Nobel. See also Case C-343/19 VKI/VW; C-133/11, Folien Fischer; for Article 7 (1) Brussels I bis Regulation see Joined Cases C-274/16, 447/16, C-448/16 flightright; C-249/16 Kareda.

However, the possibility to engage Article 7 for the purpose of assignment based models of collective redress is considerably limited. For the very reasons stated above, that is to say the assignment not having an impact on the determination of jurisdiction, it does not provide for a means to concentrate jurisdiction in one forum for all assigned claims in so far as the places of performance or the places where the harmful event occurred differ. As a result and as demonstrated in Schrems II and the VW case, the two parties-based ratio of Article 7 concerns one of the major manifestations of the problematic relationship between collective redress and the Brussels I regime as it clashes with the idea of collective redress.

The question whether the case law of Henkel or the case law of VW/VKI and Schrems II applies to representative actions seeking redress measures under the RAD will be examined below (Chapter III Point (2)). Still at this point, it should be highlighted that the determination of jurisdiction over redress actions as either in accordance with the representative action-model or according to the assignment-model is of utmost importance for the effectiveness of cross-border enforcement.

II. A NOTE ON TERMINOLOGY: DIFFERENTIATING BETWEEN CROSS-BORDER CASES AND CROSS-BORDER ACTIONS

Before examining the scope and interplay of the Brussels I regime and the RAD, it is worth to provide a brief overview on terminology for reasons of clarity.

Per Article 3 (5) RAD a „**representative action**" is defined as „an action for the protection of the collective interests of consumers that is brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both" (also see Article 7 (4) RAD). „**Cross-border representative actions**" under the RAD refer to representative actions brought by a qualified entity in a Member State other than that in which the qualified entity was designated (Article 3 (7) RAD), whereas „**domestic representative actions**" cover all representative actions a QE brings in the member state of its own designation (Article 3 (6) RAD). The only criterion of relevance in order to distinguish between domestic und cross-border representative actions is whether forum state and member state of designation match. Consequently, representative actions are "domestic" for the purpose of the RAD, even if the defendant is domiciled in another member state and regardless if consumers from several member states are represented within that action (Recital 23).

Against this background, many if not not most of the key PIL-issues encountered in practice and examined in this study reach beyond cross-border representative actions within the meaning of Article 3 (7) RAD and concern in fact "domestic" representative actions. Namely, representative actions brought against a "foreign" trader, which is domiciled in a member state other than the QE or outside the EU, and actions which seek to represent consumers from different member states will often concern the main focus of interest and acitivity from the perspective of QEs. Therefore, the "cross-border" term for the purposes of this analysis is understood in the broader sense of including cases with cross-border elements regardless where the action is brought.

III. ANALYSING THE SCOPE OF THE BRUSSELS I BIS REGULATION

1. The "Civil and Commercial Matters"-Element and its Relevance for QEs, Representative Actions and the Type of Proceeding

The scope of the Brussels I bis Regulation refers to "civil and commercial matters whatever the nature of the court or tribunal" (Article 1 (1)). It does not extend to administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii). While the Regulation as noted above is designed with a view to the one on one-model of litigation and turns a blind eye on the specific challenges of collective litigation, it nevertheless applies to civil and commercial matters which include collective elements[15].

Consequently, the Brussels I bis Regulation applies to representative actions brought by any qualified entity within the meaning of Article 3 (4) RAD, i.e. organisations constituted under private law **regardless of their legal form** as

15 Among many: Stürner, Cross-border issues, in Stadler/Jeuland/Smith (eds), Collective and Mass Litigation in Europe (2020) 297.

provided for by the designating state[16] as well as **public bodies** which have been designated by a member state as qualified to bring such actions (see as regards the latter Article 4 (7) RAD). Notably, representative actions initiated by public bodies are not excluded from the scope of the Regulation if the public body does not base its action on and act in the exercise of public authority[17]. This is in line with settled case law and the Henkel-case in particular, which prompted the ECJ to clarify that a representative injunctive action seeking to prohibit the use of unfair contract terms is to be qualified as a "civil matter". Furthermore, the Court (obiter) held, that "the subject-matter of the proceeding is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals", but that on the contrary the action "seeks to make relationships governed by private law subject to review by the courts". This ruling extends to representative actions for redress measures under the RAD.

The Brussels I bis Regulation applies without distinction to all types of **representative actions** provided for under the RAD within the meaning of its Article 3 (5), namely actions seeking injunctive measures (Article 8 RAD) and those seeking redress measures (Article 9 RAD). This extends to representative actions seeking a declaratory judgment (see the option in Article 8 RAD) and representative actions seeking to skim off profits, if available and implemented by national law respectively. As regards the latter it should be pointed out, that the qualification as a "civil matter" within the meaning of Article 1 Brussels I bis Regulation is not dependant on the beneficiary of the proceeding. Therefore, representative actions for skimming off profits which allocate the amount skimmed off to the treasury of the state – such as under Article 10 of the German Act against Unfair Competition and Article 34a of the German Competition Act – fall within the scope of the Brussels I bis Regulation[18]. Arg a minori ad maius, redress actions operating under an opt out-mechanism adopted in accordance with Article 9 RAD, which provides for a default-representation of consumers in the absence of a declaration to the contrary and might establish a (quicker) forfeiture of redress funds if not recovered within a certain time limit (see to that effect Article 9 (7) RAD), are not excluded from the scope of Brussels I bis as well.

Since "both judicial proceedings and administrative proceedings could effectively and efficiently serve to protect the collective interests of consumers", the RAD leaves it to the discretion of the member states whether a representative action can be brought in judicial proceedings, **administrative proceedings**, or both (Recital 19[19]). However, with regard to the member states' decision to adopt such administrative proceedings in their national law in order to comply with the RAD, it should be noted that – as pointed out by Recital 22 – the Brussels I bis Regulation "does not cover the competence of administrative authorities or the recognition or enforcement of decisions by such authorities". Accordingly, such questions concerning jurisdiction, recognition and enforcement are governed by national law (Recital 22 RAD). Needless to say, as a result administrative proceedings cannot be considered to provide a practical course of action for the purpose of cross-border collective redress.

2. The "Thorny Issues"[20] raised by Third State Traders

As a basic principle, the Brussels I bis Regulation only applies with respect to defendants who are domiciled in a

16 Notably, the RAD does not provide any rules on the legal form of eligible QEs; for the purpose of bringing cross-border representative actions paragraph (3) lit a of Article 4 only requires the entity to be a „legal person that is constituted in accordance with the national law of the Member State of its designation". The term „legal person" apparently is referred to as a means to exclude natural persons, yet has no implications for the legal forms available under the national law of the designating state. Still, one may assume that the QE – as a minimum – must have legal capacity as well as the capacity to be a subject of proceedings under the national law of the designating state. Further limitations with regard to certain legal forms might follow from the not for profit-criterion under Article 4 (3) lit d RAD. See Leupold, Qualifizierte Einrichtungen zur Erhebung von Verbandsklagen, in: Anzenberger/Klauser/Nunner-Krautgasser (eds), Kollektiver Rechtsschutz im Europäischen Rechtsraum (2022) 79 (85 f). Regarding the „State of Origin-"Approach the RAD adopts see Section II Chapter II point (1).

17 See, to that effect, Case C-167/00 VKI/Henkel; Case C-29/76 LTU v Eurocontrol; Case C-814/79 Rüffer; Case C-172/91 Sonntag v Waidmann; C-343/04, Land Oberösterreich v CEZ; C-292/05, Lechouritou v Dimosio; C-406/09, Realchemie Nederland BV v Bayer CropScience AG; Case C-265/02 Frahuil concerning a public authority seeking a 'legal remedy which is open to it through a legal subrogation provided for in a civil law provision'.

18 Stürner in Stadler et al, Collective and Mass Litigation in Europe 298 et seq.

19 Recital 19 clarifies that regardless of their choice, the member states still have to ensure that consumers and traders have the right to an effective remedy before a court or tribunal against any administrative decision pursuant to Article 47 of the Charter of Fundamental Rights of the European Union.

20 As referred to by Law 351.

member state[21]. For the purposes of the Regulation, a legal person or association of natural or legal persons is deemed to be domiciled at the place where it has either its statutory seat, its central administration or its principal place of business (Article 63 (1) Brussels I bis).

If a trader is domiciled in a third state within the meaning of Article 63 Brussels I bis Regulation, both the determination of jurisdiction and the rules concerning the recognition and enforcement of third states' judgments are governed by the national law of the forum State respectively (Article 6 Brussels I bis Regulation)[22]. Notably, this extends to the operation of the special heads of jurisdiction under Article 7, including its paragraph (5) which grants jurisdiction at the place where "the branch, agency or other establishment is situated" in relation to disputes arising out of its operations, but may not be engaged with respect to non-EU traders (see Chapter IV Point (3)). While the special jurisdiction over consumer contracts under Article 17 et seq Brussels I bis Regulation, as an exception, applies to traders who are not domiciled in a member state but have a "branch, agency or other establishment in one of the member states" (Article 17 (2) Brussels I bis Regulation), QEs will most likely not be entitled to invoke these protective rules for the purpose of representative actions in light of settled case law (see cases Henkel, Shearson, Schrems II). See Chapter IV Point (1).

According to **Article 25 Brussels I bis Regulation** the parties – i.e. the QE and the third state trader – may enter into an agreement which determines a forum within the EU. Similarly, the Hague Choice of Court Convention[23], to which all Union States are members, operates on exclusive choice of court agreements. However, apparently one may not anticipate such agreements to be reached as a rule. Consequently, representative actions against third state traders currently pose significant problems of jurisdiction in so far as they might not be possible before the courts of a member state at all, yet in any case lack a comprehensive EU-wide framework which would allow for determining jurisdiction with sufficient certainty. As regards the law applicable see Section II.

Nevertheless, it should be noted that Union law may obligate the member states to grant jurisdiction against third state traders in certain cases, despite the fact that Article 6 Brussels I bis Regulation refers to the rules of jurisdiction as provided for by national law without any reservations:

According to settled case-law, in accordance with the **principle of effectiveness**, rules under national law must not make it impossible or excessively difficult to exercise the rights conferred by EU law[24]. Thus, **consumer remedies conferred by EU law** – if applicable in relation to third state traders (see Section II) – might still require the member states to grant jurisdiction, especially as regards third countries which – due to their legal systems or mere circumstances of fact – qualify as to make obtaining redress unduly burdensome or impossible for consumers. In light of the underlying ratio as regards both the RAD and the ECJ rulings it is beyond doubt, that such an obligation indeed **extends to representative actions** seeking to enforce those consumer remedies collectively.

For a prime example in this regard one may refer to the **minimum rights of air passengers** conferred by the Air Passengers' Rights Regulation No 261/2004, i.a. and most prominently the right to compensation according to Articles 4 (3) and 7 leg cit. The scope of the Air Passengers' Rights Regulation covers flights operated by airlines which are domiciled outside the EU and do not have an establishment or branch in a member state[25], if they initially depart

21 This limited approach of the Brussels regime as regards third state-scenarios as well as possible needs for an extension of the rules to non-EU defendants are bound to be reviewed by the 2022 report: Article 79 Brussels I bis Regulation.

22 Concerning Brexit, the Brussels regime remains fully applicable with respect to litigation initiated before December 31, 2020; as to litigation initiated thereafter the national law of the forum state applies: See Hess, Reforming the Brussels I bis Regulation: Perspectives and Prospects (2021) MPILux Research Paper Series 2021 (4) page 5 [www.mpi.lu]; Dickinson, IPRax 2021, 213 et seq.

23 The Hague Convention of 30 June 2005 on Choice of Court Agreements, concluded within the Hague Conference on Private International Law, entered into force on 1 October 2015. In addition to the Member States of the EU, the UK (post Brexit presumably as of January 1, 2021), Mexico, Singapore and Montenegro have ratified the convention to date, the US and China have not. Courts not chosen in the agreement are obligated to suspend all proceedings, judgments delivered by the chosen court must be recognised in all member states. Notably, the Hague Judgments Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, concluded within the Hague Conference on Private International Law, has not entered into force yet. See Schack, Das neue Anerkennungs- und Vollstreckungsübereinkommen, IPRax 2020, 1; Bonomi/Mariottini, A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention, Yearbook of Private International Law, Volume 20, 2018-2019, pages 537 ff. For recognition and enforcement under the Brussels Regime see Section III.

24 To that effect, Joined Cases C-274/16, 447/16 and C-448/16 flightright et al, paragraph 54, referencing Case C54/16 Vinyls Italia, paragraph 26.

25 See Joined Cases C-274/16, 447/16 and C-448/16 flightright et al; Case C-464/18 Ryanair DAC.

from an airport located in the territory of a member state (Article 3 (1) lit a of the Regulation[26]).

In the United Airlines-case[27] the ECJ only recently clarified that Article 3 (1) lit a, read in conjunction with Articles 6 and 7 of the Regulation, must be interpreted as meaning that a passenger of a delayed flight, departing from an airport located in the territory of a Member State and arriving at an airport located in a third country via another airport in that third country, is entitled to compensation from the third-country air carrier which operated the entirety of that flight acting on behalf of a Community carrier[28]. Notably, the Court also confirmed the Union's competence as to imposing obligations on third state airlines and held that the applicability of the Regulation does not undermine the principle of customary international law according to which each State has complete and exclusive sovereignty over its airspace.

While the second indent of Article 7 (1) lit b of the Brussels I bis Regulation (i.e. place of performance), as discussed above, does not apply to a defendant such as an airline domiciled in a third State and the special head of jurisdiction under Article 18 cannot be relied on – that is to say: for the purposes of representative actions and individual litigation alike – because contracts of carriage (as opposed to package travel scenarios) are excluded from its scope (Article 17 (3) Brussels I bis Regulation)[29], jurisdiction has to be determined in accordance with national law under Article 6 Brussels I bis Regulation, accordingly. However, the latter is subject to Union law and its principle of effectiveness according to which member states must ensure that exercising the rights conferred to consumers by the Air Passengers' Rights Regulation is not „impossible or excessively difficult" in practice[30]. As pointed out above, ECJ case law strongly suggests this means that member states are precluded from denying jurisdiction in relation to third state traders.

Another example concerns the **rights conferred to data subjects** by the GDPR. Similarly, the territorial scope of the GDPR extends to the processing of personal data of data subjects in the Union by a third state-controller or processor who is not established in a member state, where the processing activities are related to either the offering of goods or services to such data subjects in the Union, or to the monitoring of their behaviour as far as it takes place within the Union (Article 3 (2) GDPR). Consequently, as regards consumer remedies against controllers or processors who are neither domiciled nor established in a member state, the same considerations on jurisdiction with regard to the effectiveness of consumer remedies as stated above apply. However, on jurisdiction under Article 79 (2) GDPR see Chapter IV Point (8).

For example, if a flight from Brussels to Beijing which is operated by a Chinese Airline under a code-sharing agreement with Brussels Airlines arrives in Beijing with a five hours-delay without any proof as to the delay being caused by extraordinary circumstances, each passenger on this flight has a right to compensation amounting to € 600 against the Chinese Airline being the operating air carrier according to Articles 6 and 7 read in conjunction with Article 3 of the Air Passengers' Rights Regulation.

All passengers concerned can bring individual actions before a Belgian court, have an assignee bring an action before a Belgian court or choose to be represented in a representative action seeking compensation for all passengers collectively before a Belgian court. With respect to each enforcement-scenario, the applicable Belgian law has to ensure that courts in Belgium have jurisdiction over this matter.

26 Conversely, Article 3 (1) lit b of the Regulation requires the operating air carrier to be a „Community carrier" within the meaning of Article 2 lit c, if the flight initially departs from an airport in a third country to an airport in the territory of a Member State. Notably, the Regulation does not apply to a flight (regardless if both flights are operated by a Community air carrier or a third state air carrier), if both departure and arrival airport are in the territory of a third country with only a stopover in a Member State: see to that effect Judgment of 24 February 2022, Case C-451/20 Airhelp Limited v Austrian Airlines AG.

27 Judgment of 7 April 2022, Case C-561/20 United Airlines: In the main proceedings the air passengers made a single reservation with Lufthansa, via a travel agency, for a flight from Brussels (Belgium) to San José (United States), with a stopover in Newark (United States).

28 The passengers reached their final destination with a delay of more than three hours caused in the second leg of the flight from Newark to San José (both US). It is worth pointing out that the Court emphasises that the operating air carrier (United Airlines) which is obliged to compensate passengers, retains the right to seek compensation from any person, including third parties, in accordance with the applicable national law (see to that effect Article 13 of the Regulation).

29 See for instance Joined Cases C-274/16, 447/16 and C-448/16 Flightright et al with respect to Hainan Airlines which is domiciled in China and does not have an establishment in a member state.

30 As regards the rights of air passengers against third country-airlines, the Austrian legislation only recently introduced a special head of jurisdiction attributing local territorial jurisdiction to a specific court if the departure or arrival aiport is located in Austria (Article 101a of the Austrian JN). The rule entered into force on May 1, 2022 and makes corresponding „ordination-"decisions unnecessary, which had to be issued by the Austrian Supreme Court in each case, previously.

III. TOWARDS A QE FRIENDLY-RULE ON JURISDICTION UNDER THE BRUSSELS REGIME? SCOPE AND RELEVANCE OF ARTICLE 7 (2) FOR REPRESENTATIVE ACTIONS

As noted above, the Henkel-ruling has been and certainly continues to be of significant importance for the purpose of determining jurisdiction with respect to representative actions against foreign traders. In fact, it is the only case law delivered as yet which directly concerns the relationship between the Brussels Regime and the representative action-model, ultimately adopted by the RAD as a procedural means of collective compensatory redress.

The ECJ qualified preventive representative actions as a matter relating to tort, delict or quasi-delict within the meaning of Article 7 (2) of the Brussels I bis Regulation (previously, Article 5 (3) of the Brussels Convention), an opinion which the Court subsequently upheld and extended to the realm of the law applicable in the Amazon case[31]. See Section II.

Given the ongoing validity of this case law for the purposes of injunctive actions as regards both the status quo and the status quo post RAD and its obvious implications for redress actions, it is a natural starting point to examine how Article 7 (2) Brussels I bis Regulation relates to the RAD regime. Focussing on this special rule of jurisdiction quite possibly also ties in with the RAD, which does not include any rules on jurisdiction in its enacting terms, yet apparently hints at Article 7 (2) Brussels I bis Regulation per Recital 34 explicitly referring to the "place where the harmful event affecting the consumers occurred or may occur" in connection with the information obligations of QEs for the purpose of determining jurisdiction and the applicable law[32].

While this Chapter, for the sake of clarity, will firstly address injunctive actions, the key issues as regards Article 7 (2) Brussels I bis Regulation clearly concern its interplay with representative actions seeking redress measures.

1. Representative Injunctive and Declaratory Actions

As regards injunctive actions it is beyond doubt that – now as before – the Henkel-ruling[33] applies. This can be inferred conclusively from the mere fact that Article 8 RAD is essentially consistent with the provisions on injunctive actions set out under Articles 2 et seq of the Injunctions Directive. Consequently, the RAD has no impact on the question of jurisdiction with respect to representative actions seeking injunctive measures. This means, an injunctive action is necessarily non-contractual in nature within the meaning of Article 7 (2) Brussels I bis Regulation, regardless whether it seeks to prevent a trader from infringing contractual or non-contractual obligations. Beyond the Henkel case, which concerned the use of unfair contract terms, i.e. contractual obligations, Article 7 (2) Brussels I bis Regulation now extends to all infringements of Union law as referred to in Annex I RAD[34]. Notably, while the Court i.a. referred to the legal basis for the action as a right conferred to the QE by statute in the Henkel case, the underlying doctrinal concept of legal standing as a matter of procedural v. substantive law as adopted under national law has no impact on the determination of jurisdiction under the Brussels Regime[35].

31 Case C-191/15, VKI v Amazon.

32 Recital 34 refers to a „case related to tort" in this regard, which at first sight suggests that the referral only relates to the determination of the law applicable; however, this understanding is inconsistent with the wording of Recital 34, which conforms with Article 7 (2) Brussels I bis Regulation word-for-word while deviating from the semantics (although according to settled case law: mostly not the content) of the general rule in Article 4 Rome II-Regulation („the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred").

33 Case C-167/00 VKI v Henkel, 1 October 2002 which concerned an injunctive action brought by VKI to prohibit the use of unlawful contract terms under Articles 28 et seq of the Austrian KSchG in accordance with Article 7 (2) UCTD 93/13/EEC.

34 Annex I RAD includes 66 provisions of Union law which extends the scope considerably in comparison to the Injunctions Directive which only included 13 acts of Union law. According to Recital 17 RAD, amendments of Annex I will be considered with respect to new Union acts relevant to the protection of the collective interests of consumers. However, see i.a. regarding the AIA-Proposal COM(2021) 206, Wendehorst, The Proposal for an Artificial Intelligence Act COM(2021) 206 from a Consumer Policy Perspective (2021) 165, who advocates for an amendment for the sake of clarification, yet considers the AIA to possibly be included by way of its close integration with the GPSD which is referred to in Annex I (8) RAD. See the criticism as to the absence of (individual or collective) redress mechanisms voiced for instance by vzbv, Artificial Intelligence needs real-world regulation, August 5 2021, p 27; BEUC, Regulating AI to Protect the Consumer (2021) p 23 et seq.

35 Domej, Internationale Zuständigkeit für Abhilfeklagen nach der EU-Verbandsklagen-Richtlinie, in FS Schack (2022, forthcoming). On the relevance of this concept in relation to the law applicable see Section II.

According to the ratio of Henkel, the same applies to representative actions seeking a declaratory judgment, if provided for by the member states (see Article 8 RAD)[36]. Equally, such an action cannot be regarded as a matter relating to a contract within the meaning of Article 7 (1) Brussels I bis Regulation – regardless whether the infringement were to be assessed pursuant to the Rome I or the Rome II Regulation – because – and this is entirely in line with Henkel – the QE and the trader are not linked by any contractual relationship and the action primarily seeks to deter the trader from undermining "legal stability"[37].

Jurisdiction under Article 7 (2) Brussels I bis Regulation refers to the place "where the harmful event occurred or may occur", which is the member state in which consumers have suffered or may suffer harm from an unlawful practice. As a result, with respect to both **injunctive and declaratory measures**, according to the Henkel decision QEs may bring representative actions against foreign traders **in their own member state**.

Notably, as regards the **scope of injunctive or declaratory measures** it is highly questionable whether the special jurisdiction under Article 7 (2) Brussels I bis Regulation supports actions seeking **multistate or unionwide measures** beyond the forum state which aim to prohibit the defendant from infringements in all member states concerned. According to settled case law referred to as the "Shevill"-doctrine, jurisdiction under Article 7 (2) Brussels I bis Regulation, as a rule, is limited to damage (likely to be) sustained in the forum state.[38] In light of Article 2 (3) RAD and the corresponding referrals in Recitals 23, 31, according to which the Brussels regime remains unaffected by the RAD, one may assume that this case law – if indeed upheld by the ECJ – will not be reconsidered for the purpose of representative actions.

Given the principles and the ratio underlying the Brussels I bis Regulation which – as pointed out before – do not adapt to the goals of collective redress at all, these limitations of the special jurisdiction under Article 7 (2) Brussels I bis Regulation apply **regardless of the QE(s) involved**. Namely, it has no impact on the determination of jurisdiction under Brussels I bis if the QE bringing the action represents members from more than one member state as referred to in Article 4 (2) RAD or if several QEs from different member states bring a joint action before a court as referred to in Article 6 (2) RAD.

As a consequence, EU-wide injunctive (and declaratory) actions can be brought only in a forum provided for by either the general jurisdictional rule of Article 4 Brussels I bis Regulation (i.e. the place of domicile of the defendant, see Chapter IV Point (2)) or the special rule of jurisdiction under Article 7 (2) with respect to the place where the infringement – as in: the event giving rise to the damage – takes place[39]. Again, as regards the determination of jurisdiction with respect to multistate or unionwide measures under these rules, the plaintiff-QE(s) scenario in question – i.e. several QEs from different member states, a single QE, a "supranational" QE bringing the action – is not of relevance.

Notably, the scope of jurisdiction over injunctive and declaratory actions has tangible implications for subsequent redress actions as well because it directly relates to – and in fact determines – the range of a possible suspension or interruption of limitation periods applicable to claims for redress under Article 16 (1) RAD. The latter provides that pending representative actions for injunctive measures have the effect of suspending or interrupting limitation

36 Notably, recent case law concerning the UCTD suggests, that the principle of effectiveness might require national law to provide for a right to obtain a declaratory judgment establishing the unfairness of a term apart from and in addition to remedies of restitution: see Joined Cases C-224/19 and C-259/19 Caixabank and Banco Bilbao; Case C-19/20 RW/Bank BPH S.A; Joined Cases C-776/19–C-882/19 BNP Paribas Personal Finance. As regards representative actions, it might be advisable to grant QEs a corresponding right to bring declaratory actions under national law. Concerning the principle of equal treatment irrespective of racial or ethnic origin see Case C-30/19 Braathens Regional Aviation, according to which Articles 7, 15 of Directive 2000/43/EC read in conjunction with Art 47 GRC afford the right to obtain a declaratory judgment as the existence of the alleged discrimination where the defendant agrees to pay the compensation claimed.

37 This also ties in with settled case law in so far, as Article 7 (2) Brussels I bis Regulation applies equally to actions seeking an injunction, a performance order or a declaratory decision: See i.a. Czernich in Czernich/Kodek/Mayr (eds), Europäisches Gerichtsstands- und Vollstreckungsrecht, 4th ed (2015) Article 7 notes 122; see for corresponding case law of the Austrian Supreme Court, e.g. Case 4 Ob 122/03z; Case 4 Ob 137/16z or Case 4 Ob 181/18y.

38 See Thönissen, Die EU-Verbandsklagenrichtlinie als Bewährungsprobe für das Internationale Privat- und Verfahrensrecht, ZZP 2021 (134) 273 (281 et seq); in favor of limiting jurisdiction to the forum which has jurisdiction to hear all claims concerning unionwide damages Stadler in Leible/Terhechte (eds), Europäisches Rechtsschutz- und Verfahrensrecht2 (2021) § 30 Rz 30; critical Domej in FS Schack (2022).

39 See for example Stadler in Musielak/Voit (eds), ZPO, 17th ed (2020) Article 7 EuGVVO Rz 20; Thönissen, ZZP 2021, 280; Leupold, Die neue Verbandsklagen-Richtlinie – ausgewählte Auslegungs- und Umsetzungsfragen, in: Reiffenstein/Blaschek (eds), Konsumentenpolitisches Jahrbuch 2021 (2021) 71 et seq; Domej in FS Schack (2022).

periods "in respect of the consumers concerned by that representative action". Accordingly, Recital 34 RAD links the obligation of QEs to provide "sufficient information about the group of consumers concerned by the representative action" to both determining jurisdiction and determining the scope of the effects under Article 16 RAD.

> For example, if a French trader uses unfair terms in contracts concerning consumers in France, Germany and the Netherlands, QEs from France, Germany and the Netherlands may bring a joint action before a French court seeking to prohibit this practice in France, Germany and the Netherlands. The French QE could also choose to bring the action alone while still seeking to protect the interests of French, German and Dutch consumers. The same is true for the German QE and the Dutch QE (if designated for the purpose of bringing cross-border representative actions according to Article 4 RAD). In either scenario, the French court has jurisdiction as regards the protection of French, German and Dutch consumers under Article 4 Brussels I bis Regulation. Any of these actions pending in France also ensures that applicable limitation periods are suspended or interrupted in respect of French, German and Dutch consumers.
>
> Conversely, an action brought jointly by the French, German and Dutch QEs before a German court may only seek to prohibit this practice in Germany, because the German courts lack jurisdiction as regards the protection of French and Dutch consumers. Consequently, a pending action in Germany may only have the effect of suspending or interrupting applicable limitation periods in respect of German consumers.

On additional requirements for unionwide injunctive actions and on aspects relating to the law applicable see Section II.

2. Representative Redress Actions

(a) The Key-Question: (Non-)Applicability of Henkel?

The question whether the case law of Henkel (relating to representative injunctive actions) or the case law of VW/VKI and Schrems II (relating to assignment-based collective redress) applies to representative redress actions for the purpose of determining jurisdiction, concerns one of the most significant – yet unfortunately debatable – points for the effectiveness of cross-border enforcement. The question essentially comes down to the core nature of the representative action model as adopted by the EU lawmaker for the purpose of collective redress and how the choice to extend this model as a means for compensatory redress under the RAD interacts with the Brussels regime in light of the Henkel-ruling.

If representative redress actions were deemed to compare with assignment-based models of collective redress, the determination of jurisdiction concerning the representative action would be a mere reflection of individual litigation, assuming and combining jurisdiction over the claims of individual consumers represented in the action. Depending on the legal basis and contractual or non-contractual nature of these individual claims (contract law v. tort law), jurisdiction would either be established under Article 7 (1) or under Article 7 (2) Brussels I bis Regulation, accordingly attributing jurisdiction to the place of performance regarding contractual obligations[40] or to the place where the harmful event occurred in matters relating to "tort, delict or quasi delict".

As pointed out above with regard to the status quo of assignment-based models, this "one-on-one"-approach if indeed applied to representative actions is likely to significantly diminish their effectiveness and is therefore problematic for several reasons:

Firstly, Article 7 (1) Brussels I bis Regulation – especially as regards service contracts – may not provide for jurisdiction in the member state of the individual consumers concerned, which as regards representative actions strikingly involves cases where consumers themselves, if pursuing their claims individually, could invoke the protective rules under Article 18 Brussels I bis Regulation to ensure that the courts for the place where they are domiciled have ju-

40 Depending on the nature of the contract, the place of performance under Article 7 (1) Brussels I bis Regulation is either the place of delivery of the goods, the place where the services were provided, or the place of performance of the obligation in question. As regards all of these contractual obligations, the relevant place of performance has to be determined in accordance with the contract.

risdiction[41].

Moreover and more severely, the special heads of jurisdiction under Article 7 (1) and (2) Brussels I bis Regulation govern jurisdiction not only with regard to its international manifestation, but also operate on local territorial jurisdiction, determining specifically which court within the forum state has (local) jurisdiction. While this finding in itself is not problematic provided that the Henkel-ruling applies (see Chapter III Point 2 lit (d)), it clashes with the idea of collective redress if it does not, in so far as – absent special rules of the lex fori providing for specific courts having exclusive jurisdiction over matters of collective enforcement[42] – it might prevent a consolidation of claims in a single proceeding even with respect to consumers harmed within the same member state.

For example, with respect to the assignment-based collective redress model currently provided for under Austrian law a consolidation of litigation before a single court is not possible under the locus damni-rule of Article 7 (2) Brussels I bis Regulation. Accordingly, in the Volkswagen-case the Austrian VKI – seeking redress for 10.000 Austrian car buyers – had to bring 16 collective actions against VW (i.e. a German manufacturer) before 16 different Austrian district courts, because the relevant places where the damages occurred (i.e. where the cars have been turned over or where the consumers have entered into the contracts, respectively) are scattered across Austria.

Assuming the Henkel-ruling does not apply to representative redress actions under the RAD, all else being equal, VKI would be required to bring 16 redress actions before 16 different courts exactly like in the current situation. Apparently, this essentially thwarts the idea of cross-border collective redress as intended by the RAD.

At first sight, in favor of determining jurisdiction in accordance with the nature of individual consumer claims one might argue that redress actions bear a strong resemblance to the assignment-based model. To that end one may point to the fact that redress actions, too seek compensation, provide a mere procedural mechanism yet are limited to enforce remedies available to consumers under Union or national law (Articles 9 (1), 3 (10) RAD, also see Recital 42) and entitle consumers to benefit from those remedies without the need to bring a separate action (Article 9 (6) RAD)[43].

However, this position ultimately contradicts the reasoning of the Henkel-decision and would ignore the common core, shared objectives and complementary nature of injunctive and redress actions[44]:

The RAD adopts the representative action-model as a procedural mechanism for the purpose of both deterring violations and promoting redress (see Recital 5). Without distinction between injunctive and redress actions, the scope of the RAD calls for infringements that "harm or may harm the collective interests of consumers" (Article 2 (1), specified for the purposes of redress measures only per Article 3 (3) as "the interests of a group of consumers"). Consequently, representative actions are commonly defined in Article 3 (5) RAD as actions "for the protection of the collective interests of consumers ... brought by a qualified entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both". Also, the RAD limits the litigating parties to the trader and the QE representing the interests of consumers who are not a party to the proceeding (Article 7 (6) RAD, Recital 36). The QE and the defendant are not linked by any contractual relationship. Moreover, the policy-argument of Henkel applies to injunctive and redress actions alike: The efficacy of the latter would be considerably impaired if jurisdiction for representative actions were not to be determined uniformly under the system of Article 7 Brussels I bis Regulation. Furthermore, a uniform qualification of representative actions as per se relating to non-contractual matters for the purpose of jurisdiction is consistent with the Amazon ruling as regards the distinction established by the Court for the purpose of designating the law applicable to assess legal standing and infringement (on the

41 Domej in FS Schack (2022).

42 On the lawfulness of such national measures on local territorial jurisdiction see Chapter III point 2 lit (d).

43 Thönissen, ZZP 2021, 284 et seq, 288 who argues in favor of jurisdiction for redress actions to correspond with jurisdiction for individual actions, thus applying Article 7 (1) or (2) Brussels I bis Regulation depending on the claims of consumers; leaning towards a determination of jurisdiction in accordance with the individual consumer claims for example also Arons in Mankowski (ed), Research Handbook on the Brussels Ibis Regulation, 2020, 1 (19 et seq); Oberhammer, Mass Claims Journal 2021.

44 For the application of Henkel for instance Domej in FS Schack (2022); Leupold in Reiffenstein/Blaschek (eds), Konsumentenpolitisches Jahrbuch 2021, 89 et seq; regarding the 2018 Proposal Leupold, Enforcing Consumer Richts: Collective Redress in Austria and the European Union, EuCML 2019, 121 et seq.

consistency requirement see Recitals 7 Rome I and Rome II-Regulation, respectively).

Notably, in terms of legal doctrine one may also recognise that representative redress actions are fundamentally different from assignment-based models of collective redress in so far as they are based on a right conferred by law for the purpose of protecting the collective interests of consumers (Article 1 (1) RAD), which is independent of member states adopting an opt in-mechanism that requires for explicit registration on the part of consumers. The fact that redress actions do not operate by means of assignment means they lack the very element which might be engaged to justify attributing a contractual character to the relationship between the QE and the trader.[45]

In conclusion, it can be assumed that the Henkel ruling applies to redress actions under the RAD accordingly. This means, representative actions seeking redress measures – alongside those seeking injunctive or declaratory measures – always concern a matter "relating to tort, delict or quasi-delict" within the meaning of Article 7 (2) Brussels I bis Regulation, regardless whether they seek to provide consumers with remedies based on tort law or on contract law. It is worth pointing out, that this entitles QEs to include different – contractual and non-contractual – alternative bases for consumer claims within a single representative action, thus pursuing consumer claims in their entirety before the same court, which is particularly important in order to avoid uncertainties and issues otherwise pertaining to the scope of paragraphs (1) and (2) of Article 7 Brussels I bis Regulation and an exact understanding of the notion of matters relating to a contract as opposed to a tort, delict or quasi-delict[46]. Furthermore, the uniform application of Article 7 (2) Brussels I bis Regulation in line with Henkel ensures that QEs may seek injunctive and redress measures in a single representative action (see Article 7 (5) RAD).

(b) Determining the place where the damage occurred

The conclusion reached above, as a rule, enables QEs to bring redress actions before the courts of their home member state under Article 7 (2) Brussels I bis Regulation. Still, the scope of jurisdiction under Article 7 (2) with respect to redress actions raises several issues. As regards the question of whether the Article 7 (2) forum will have jurisdiction to hear all claims of consumers concerned, thus enabling QEs to bring multistate or unionwide redress actions, these issues are at the very heart of cross-border collective redress (see below lit c)).

Locating the place, where the damage materializes within the meaning of Article 7 (2) Brussels I bis Regulation generally has proven to generate certain difficulties. With respect to redress actions, determining the place where the damage materializes seems particularly unclear at first sight: Simply pooling the places where the consumers represented in the action sustained individual damage respectively, is obviously unfeasible as remedies based on contract law are not covered by the concept of Article 7 (2) at all. Similarly, a mere combination of all places where consumers could sue individually[47] (i.e. to be determined according to Article 7 (2) regarding non-contractual claims, in line with Article 7 (1) regarding contractual claims[48]), would essentially render the policy-oriented core reasoning of the Henkel-ruling moot and runs counter to the representative action-model as a means to collective enforcement.

Arguably more in line with the objective of the RAD as well as Article 7 (2) Brussels I bis Regulation and most consistent with the Henkel-reasoning is a determination of jurisdiction according to the place, where the collective interests of consumers are (likely to be) harmed as a result of the infringement. This position will often refer to the

45 Engaging this argument Law 362; also see Domej in FS Schack (2022).

46 See Case C-189/87 Kalfelis/Schröder, according to which a court which has jurisdiction under Article 5 (3) of the Brussels Convention (now: Article 7 (2) Brussels I bis Regulation) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. Aware of the disadvantages arising from different aspects of the same dispute being adjudicated upon by different courts, the court points out, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant. According to Case C-548/12 Brogsitter, liability claims based on national tort law must be considered as concerning 'matters relating to a contract', where the conduct complained of may be considered a breach of the terms of the contract by taking into account the purpose of the contract. Less restrictive concerning consumer actions Case C-500/18 Reliantco Investments, according to which an action in tort brought by a consumer comes under the protective jurisdiction of Articles 17 et seq if it is „indissociably linked to a contract actually concluded between that consumer and the seller or supplier"; the Court refers to the fact that a multiplicity of courts having jurisdiction risks placing at a particular disadvantage a party deemed to be weak (the consumer), and argues that it is in the interest of the proper administration of justice that the consumer should be able to bring before one and the same court all of the difficulties that are likely to arise from a contract.

47 See Thönissen ZZP 2021, 288 et seq, who reaches this conclusion.

48 This position, if adopted, would refer to the places of performance, because Article 18 Brussels I bis Regulation could presumably not be engaged for this purpose. On the non-relationship between Articles 17 et seq and collective redress see Chapter IV point (1).

notion of the market affected by the infringement. Similarly market-orientated points of reference can already be found in the VKI/VW-ruling[49] as regards the assignment-based model of collective redress, where the Court ascertained jurisdiction at the place where the consumers purchased the cars, referencing Article 6 Rome II-Regulation[50]. Notably, this stance is also consistent with the Amazon-ruling on the applicable law regarding injunctive representative actions (on the objective of consistency see Recital 7 Rome I- and Rome II-Regulation), where the Court held, that the country in which the collective interests of consumers are affected within the meaning of Article 6 (1) of the Rome II Regulation refers to the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the QE by means of that action[51].

As a result, jurisdiction under Article 7 (2) with respect to the place where the damage occurred will often (though not necessarily) provide for the representation of consumers who are habitually resident in the forum state which is mostly consistent with the law applicable under Articles 4, 6 Rome II-Regulation, Article 6 Rome I-Regulation (also see Article 9 (3) RAD)[52].

Again, it should be noted that the place where the collective interests of consumers are harmed, under the current concept of Article 7 (2) Brussels I bis Regulation must be construed in accordance with the objectives of proximity and sound administration of justice and ensure certainty and predictability for all parties, namely the defendant.

Consequently, a market-orientated approach to determine jurisdiction will certainly apply with respect to cases involving restitution and reimbursement remedies under the UCTD or remedies for lack of conformity of goods / digital content or services under the SGD 2019/771 and DCD 2019/770 (as regards contractual claims). It will also be appropriate for most product liability- and unfair commercial practices-cases (as regards non-contractual consumer claims)[53]. However, with regard to so-called single event mass accidents[54], where all consumers are harmed in a single event (for instance the fire disaster in Kaprun in 2000, a train accident or a plane crash), the Article 7 (2) forum does not provide for jurisdiction in the home-country of each harmed consumer (and therefore: respective QE), but only provides for jurisdiction of the courts of the member state at the site of the accident.

Notably, another caveat concerns investment fraud and prospectus liability cases, which involve mere financial losses without a tangible reference point such as in the Volkswagen-case[55]. According to settled case law the domicile of the investor as such (as the centre of his financial assets) does not suffice to establish international jurisdiction under Article 7 (2).[56]

Moreover, in its recent judgment re Vereniging van Effectenbezitters/BP[57], the court adopted a more restrictive approach than in the VW-ruling with regard to jurisdiction for a collective action based on issuer liability for inaccurate capital markets information and ruled that, under Article 7 (2) such actions should be brought at the place where the issuer is subject to statutory reporting obligations and not at the place of domicile of the investors. This

49 Case C-343/19 VKI/VW; see also Case C-30/20 Volvo et al regarding cartel damages claims; Domej in FS Schack (2022).

50 Academia was split on the issue: see Oberhammer, Deliktsgerichtsstand am Erfolgsort reiner Vermögensschäden [2018] JBl 750 who argued that only German courts have jurisdiction. Taking the opposite view Schacherreiter, Internationale Zuständigkeit, VbR 96; Klicka, Die Anwendung des Deliktsgerichtsstands nach Article 7 Nr 2 EuGVVO (2018) JBl 337; Leupold, Enforcing Consumer Rights [2019] Journal of European Consumer and Market Law 121.

51 Case C-191/15 VKI/Amazon.

52 In favor of limiting jurisdiction over representative actions under Article 7 (2) Brussels I bis Regulation to the courts of the place where the event giving rise to the damage occurred Law 385 et seq; Stadler, The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues (2013) NIPR 4; also see Bosters, Collective Redress and Private International Law in the EU (2018) 225 et seq.

53 Article 11a UCPD as amended by the Modernisation-Directive 2019/2161 provides for individual remedies, including compensation, price reduction or termination of the contract. However, Member States may determine the „conditions for the application and effects of those remedies". See in relation to the applicable law Section II Chapter IV Point (2) lit (c).

54 See Stadler in van Boom/Wagner (eds), Mass Torts in Europe, p 197 (211), who differentiates between single cause (e.g. product liability) and single event mass accidents.

55 Notably, according to Austrian civil law doctrine the VW-case concerns mere financial losses as well (i.e. entering into the contract, the inflated purchase price); however, this does not translate into a relevant, much less conclusive argument for the purpose of international jurisdiction. See Leupold in Gsell/Möllers (eds), Enforcing Consumer and Capital Markets Law – The Diesel Emissions Scandal (2020) 13 et seq.

56 Case C-168/02 Kronhofer v Maier.

57 Case C-709/19.

judgment could apply in the context of representative redress actions by way of determining the place where the collective interests of consumers were harmed.

For example, if 200 consumers who are resident in Portugal, Italy, Austria and Poland are harmed in a train accident between Vienna and Graz (both in Austria) which is caused by defective tracks manufactured by a Dutch trader, QEs can bring a representative redress action against the Dutch trader in Austria under Article 7 (2) Brussels I bis Regulation or in the Netherlands under Article 4 Brussels I bis Regulation. Both forums have jurisdiction to hear the claims of all 200 consumers harmed. However, a Polish QE cannot bring an action in Poland seeking redress for Polish consumers, because Polish courts lack jurisdiction to hear those claims. The same applies with respect to the Portuguese and Italian consumers harmed.

If those 200 consumers purchase defective washing machines from local sellers, which have been deliberately designed with a limited lifespan causing them to prematurely become non-functional after three years (planned obsolescence) by an Austrian manufacturer, the Polish QE can bring a redress action against the Austrian manufacturer in Poland seeking redress for Polish consumers under Article 7 (2) Brussels I bis Regulation. Alternatively, it may choose to bring an action in Austria under Article 4 Brussels I bis Regulation in order to seek redress for all (i.e. Portuguese, Italian, Austrian and Polish) consumers concerned.

On multistate representation see the following example in Point (c).

(c) Multistate and Unionwide Representation

The Article 7 (2) forum operates on the existence of particularly close connecting factors between the dispute and the member state in which jurisdiction is to be founded. For the purpose of redress actions one may assume that this forum will have limited jurisdiction to hear claims only if they concern damages pertaining to the market / collective interests of the forum state (so-called Shevill doctrine, mosaic principle)[58]. Consequently, the current rules on jurisdiction within the Brussels I bis Regulation will not allow for unionwide redress actions in any member state at the QE's choice, which seek to represent consumers concerned from different member states[59].

At first sight, these limitations for unionwide redress by way of jurisdiction may seem paradoxical, since they (at least partly) contradict the objectives of the RAD and clash with the idea of collective redress. Indeed, the RAD foresees that several QEs from different member states join forces and bring a representative action before one court in the event the alleged infringement affects or is likely to affect consumers in different Member states (Article 6 (2)). Article 4 (2) explicitly references "consumer organisations that represent members from more than one Member State" as being particularly suited to be designated as QEs. Recital 23 refers to a scenario, where consumers from several member states are represented within the same representative action. Finally, Article 9 (3) RAD submits the representation of consumers who are not habitually resident in the forum state to a mandatory opt in-mechanism[60] – notably to the (side) effect of avoiding possibly sensitive issues of cross-border recognition and enforcement by scaling down the extraterritorial scope of judgments (and settlements)[61]. On recognition and enforcement see Section III.

However, Article 2 (3) RAD refers to the Brussels I bis Regulation without any reservation, Recital 21 reinforces that

58 Case C-68/93 Shevill/Presse Alliance. In this decision the Court held in relation to actions seeking compensation for non-material damage allegedly caused by a defamatory Article published in the printed press, that the victim may bring an action against the publisher before the courts of each Member State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the Member State of the court seised (paragraph 33).

59 Arguing for unionwide redress measures Röthemeyer, VuR 2021, 43 (47); on the scope of jurisdiction for the German Musterfeststellungsklage under §§ 606 et seq of the German ZPO see Stadler, NJW 2020, 265, 267; Thönissen ZZP, 2021, 289, according to whom the reasoning relating to the Musterfeststellungsklage which is limited to declaratory relief, does not apply to redress actions, which feature compensatory relief.

60 Under Article 9 (3) RAD these consumers have to „explicitly express their wish to be represented in that representative action in order to be bound by the outcome of that representative action"; according to Recital 45 this serves to ensure „the sound administration of justice and to avoid irreconcilable judgments". Apart from consumers who are not resident in the forum state, member states are free to adopt an opt in or opt out-mechanism („tacitly expressing") (Article 9 (2) RAD).

61 See Inchausti, A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November, GPR 2021, 61 (66 et seq); Mulheron in Fairgrieve/Lein, Extraterritoriality and Collective Redress (2012) Notes 14.01 et seq; Stadler, JZ 2009, 121 (128).

the RAD does not „affect its application nor establishes any rules regarding jurisdiction". As a consequence, the traditional rules on jurisdiction under the Brussels Regime prevail. The Article 7 (2) forum as regards representative actions has to be integrated into the system of Brussels I bis, which – according to the case law to date – precludes unionwide redress actions.

Still, it remains to be seen whether the ECJ will expand the scope of jurisdiction under Article 7 (2) following case law which specifically concerns online personality rights' violations and to that end allows for seeking compensation for the entirety of damage at the claimant's centre of interests, which typically refers to his residence[62]. Also, if applied to representative redress actions accordingly, it might be unclear whether the "centre of interests" with regard to the (entirety of) collective interests of consumers actually allows for a concentration of jurisdiction in any (affected) member state at the QE's choice, or rather refers to the market which is affected the most (arg closest link, center of gravity-approach)[63].

To sum up, redress actions seeking to include all consumers concerned across Europe may not be brought in each member state affected under Article 7 (2) Brussels I bis Regulation. A unionwide consolidation of consumer claims is only possible in the Article 4 forum of the trader's domicile and in the Article 7 (2) forum as regards the place where the infringement took place. On these heads of jurisdiction see Chapter IV Points (2) and (5).

Since these limitations for unionwide redress measures on the grounds of jurisdiction follow from the principles underlying the Brussels regime, they are not limited to domestic actions brought by a single QE, but equally apply to all plaintiff-scenarios, including "supranational" QEs like BEUC taking action (Article 4 (2) RAD) as well as several QEs from different member states bringing a joint action (Article 6 (2) RAD).

Resuming the previous example of 200 consumers from Portugal, Italy, Austria and Poland, who purchase defective washing machines from local sellers, subject to built-in obsolescence at the hands of an Austrian manufacturer. The Polish QE can bring a redress action against the Austrian manufacturer in Poland seeking redress for Polish consumers under Article 7 (2) Brussels I bis Regulation. It may also choose to bring an action in Austria under Article 4 Brussels I bis Regulation seeking redress for all Portuguese, Italian, Austrian and Polish consumers concerned. However, it may not seek redress for Portuguese, Italian and Austrian (i.e. non-Polish) consumers in Poland. Likewise, if the Polish QE and the Italian QE bring a joint action seeking redress for Polish and Italian consumers in Poland, the Polish forum lacks jurisdiction to hear the redress claims of Italian consumers.

(d) Local Territorial Jurisdiction

Article 7 (2) Brussels I bis Regulation not only concerns international jurisdiction, but also operates on local territorial jurisdiction, determining which court within the forum state has jurisdiction. As discussed above with respect to assignment-based models of collective redress, jurisdiction at "the place where the damage occurred" therefore might be attributed to different courts within the forum state, which defeats the very purpose of collective redress. Evidently, applying this approach to representative redress actions would force QEs to bring multiple actions before different courts, hereby rendering the instrument ineffective at least, if not useless.

However, the very same reasons that justify to consider representative redress actions as inherently non-contractual for the purpose of (international) jurisdiction (see lit a)), equally apply with respect to local territorial jurisdiction. Accordingly, the relevant local jurisdiction within each member state must be determined in line with Henkel too, which means the concept of "the place where the damage occurred" as regards both injunctive and redress actions re-aligns with a market-orientated understanding for the most part.

62 For natural persons see Joined Cases C-509/09 and C-161/10 eDate Advertising: the criterion of the 'victim's centre of interests' reflects the place where, in principle, the damage caused by online material occurs most significantly, which is the habitual residence, unless other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link. The Court also considers the centre of interests to accord with the aim of predictability. As regards a legal person see Case C-194/16 Bolagsupplysningen/Svensk Handel: according to which the centre of interests must reflect the place where its commercial reputation is most firmly established and therefore, be determined by reference to the place where it carries out the main part of its economic activities. While this may coincide with the place of its registered office, the latter is not considered to be conclusive according to the Court.

63 See Domej in FS Schack (2022); Nuyts in Nuyts/Hatzimihail (eds), Cross-Border Class Actions. The European Way 79; Law in Hess/Lenaerts 385 et seq.

Since the relevant connecting factors for the purpose of representative actions relate to the collective interests of consumers being harmed, one may conclude that Article 7 (2) Brussels I bis Regulation per se is rather indifferent as regards local jurisdiction within this forum. Plausibly, one may assume local jurisdiction to be found either at the place where the QE has its registered office or really at any place where (individual) damage occurred, the latter of which provides the QE with a choice where to bring the action[64]. Points of reference corroborating this position can be found in recent case law regarding a follow-on cartel damages claim, where the Court when confronted with several places where cartelized products have been purchased within the member state, ascertains jurisdiction of the court at the place of the victim's registered office[65]. According to the ECJ, in essence, the defendants cannot be unaware of the fact that the purchasers of the goods in question are established within the market affected by the cartel.

Furthermore, it is worth pointing out that in the Volvo case[66] the ECJ clarified that even though Article 7 (2) of Brussels I bis determines which specific court within a Member State has jurisdiction, a Member State may nonetheless decide to confer exclusive jurisdiction to one specific specialized court, irrespective of where the damage occurred within that Member State. The Court considers this as being consistent with the interests of sound administration of justice. Notably, one may also argue that conferring exclusive jurisdiction to specific courts concerns a matter for the organisational competence of the member state, which is not governed by the Brussels I bis Regulation in the first place[67].

In conclusion, the cogent nature and universal applicability of the Brussels I bis Regulation does not preclude member states to determine a specific court having exclusive jurisdiction over representative (redress) or other collective proceedings according to national law. Still, while such procedural rules certainly can be adopted by the member states, according to the reasoning of Henkel they are not required by Article 7 (2) Brussels I bis Regulation in order to ensure uniform local jurisdiction for representative actions seeking redress for consumers concerned within the forum state.

Resuming the Volkswagen-example as previously referred to in Chapter II, point (a):

With respect to the assignment-based model currently available for collective redress in Austria (commonly referred to as "Austrian style-class action"), the Austrian VKI had to bring 16 collective actions against VW before 16 different Austrian district courts seeking compensation for 10.000 Austrian consumers, because the locus damni-rule of Article 7 (2) Brussels I bis Regulation, operating on local territorial jurisdiction too, prevents a consolidation of assigned claims in a single proceeding before one Austrian court. Absent national legislation to the contrary, this continues to apply to „Austrian style-class actions" which might be launched in the future.

All else being equal, if VKI claims compensation for 10.000 Austrian consumers through a representative action against VW, Article 7 (2) Brussels I bis Regulation does not preclude VKI from bringing a single redress action before one Austrian court, which – absent national legislation on this point – can be either the court at the place where VKI has its registered office (namely the Commercial Court in Vienna) or any Austrian court at VKI's option.

(e) Claims based on Contract Law and the (Ir-)Relevance of Jurisdiction Clauses

Consumer contracts often include jurisdiction clauses that intend to confer jurisdiction to the place of domicile of the trader. Jurisdiction conferred by such clauses – if enforceable –is deemed to be exclusive if not otherwise agreed according to Article 25 Brussels I bis Regulation.

64 See Leupold, Die neue Verbandsklagen-Richtlinie – ausgewählte Auslegungs- und Umsetzungsfragen, in: Reiffenstein/Blaschek (eds), Konsumentenpolitisches Jahrbuch 2021, 92 f; Domej in FS Schack (2022); see also Austrian Supreme Court Case 4 Ob 181/18y VbR 2019/47.

65 Case C-30/20 Volvo et al VbR 2021/68.

66 Case C-30/20 Volvo et al VbR 2021/68.

67 Kodek, Möglichkeiten zur gesetzlichen Regelung von Massenverfahren, in Gabriel/Pirker-Hörmann (eds), Massenverfahren – Reformbedarf für die ZPO? (2005) 311 (361 et seq); Hess, WM 2004, 2329; Leupold in: Reiffenstein/Blaschek (eds), Konsumentenpolitisches Jahrbuch 2021, 92 et seq.

With respect to consumer contracts, such forum selection clauses are essentially not enforceable: Any prorogation of jurisdiction which deviates from the provisions that grant special jurisdiction over consumer contracts (Article 17 f), is permitted only if the forum is agreed on after the dispute has arisen, if it allows the consumer to additionally bring proceedings in courts other than those competent under Article 17 et seq, or if the agreement is entered into by parties habitually resident or domiciled in the same member state at the time the contract was concluded (Article 19 Brussels I bis Regulation).

Notably, the special jurisdiction under Section 4 Brussels I bis Regulation as a procedural means to protect the weaker party does not apply in collective redress settings, which includes representative redress actions (see Chapter IV Point (1)). One may assume, that this extends to Article 19 Brussels I bis Regulation. Consequently, QEs seeking redress for individual consumers cannot invoke Article 19 Brussels I bis Regulation. Nevertheless, jurisdiction agreements will not pose a problem for redress actions seeking to enforce contractual remedies for several reasons:

First and foremost, it follows from the non-contractual nature and market-orientated approach of representative actions under the RAD (see lit a)) that such agreements cannot interfere with and are necessarily deemed insignificant for the purpose of determining jurisdiction in the context of redress actions. Moreover, in the DelayFix-ruling[68] concerning an action brought against an airline by a collection agency to which passengers assigned their claims for compensation under the Air Passengers' Rights Regulation No 261/2004[69], the ECJ held that jurisdiction clauses cannot be enforced by the airline against the collection agency as a third party, unless, under the legislation of the Member State whose courts are designated in that clause, that collection agency is the successor to all the initial contracting party's rights and obligations. Since the ECJ considers jurisdiction clauses as not enforceable against a third party in assignment-based redress models under Article 25 Brussels I bis Regulation, one may a fortiori assume that they most certainly can be disregarded for the purpose of representative actions which do not even involve any assignment of claims.

Additionally, the ECJ considers jurisdiction clauses which have not been individually negotiated and which confer exclusive jurisdiction on the courts of the trader as being unfair within the meaning of Article 3 (1) UCTD since they „have the object or effect of excluding or hindering the consumer's right to take legal action" as referred to in paragraph 1 (q) of Annex UCTD[70]. As a result, such terms are void according to Article 6 UCTD. Contrary to Article 19 Brussels I bis Regulation, the QE is capable of invoking[71] the invalidity under Article 6 UCTD, as the scope of the UCTD is not dependent on the identity of the parties to the proceeding, but on the capacity of the parties to the agreement[72], namely at the time the contract was concluded.

On jurisdiction agreements between the QE and the trader see Chapter IV Point (6).

For example, if an Italian online trader sells defective products to Portuguese consumers, jurisdiction clauses incorporated in these contracts, which confer jurisdiction to Italian courts, cannot be enforced by the trader against a Portuguese QE seeking price reduction for lack of conformity under the SGD on behalf of those consumers. Portugal, i.e. the Article 7 (2) forum, has jurisdiction over the representative action with respect to the contractual remedies of all Portuguese consumers concerned.

68 See Case C-519/19 Ryanair DAC/DelayFix.

69 Section 4 of the Brussels I bis Regulation does not apply to contracts of transport according to Article 17 (3) leg cit.

70 Case C-519/19 Ryanair DAC/DelayFix; referring to judgments Océano Grupo Editorial and Salvat Editores, C240/98 to C244/98, paragraph 22; Pannon GSM, C243/08, paragraph 41; and VB Pénzügyi Lízing, C137/08; concerning representative injunctive actions see to that effect the final decision against Ryanair issued by the Austrian Superior Court of Vienna (OLG Vienna), Case 1 R 131/20x, 30.11.2021.

71 See to that effect with respect to representative injunctive actions Superior Court of Vienna, Case 1 R 131/20x. According to settled case-law the national courts are bound to assess the unfairness of terms and disapply them ex officio, therefore the QE will probably not need to invoke the unfairness in the redress proceeding. See to that effect OGH Case 6 Ob 105/21s, 14.9.2021 VbR 2022/20 with respect to a test case-model of collective redress (assignment-based, § 502 Abs 5 Z 3 of the Austrian ZPO).

72 See, to that effect, Case C-519/19 Ryanair DAC/DelayFix; Case C383/18 Lexitor.

IV. ALTERNATIVE HEADS OF JURISDICTION AND THEIR SIGNIFICANCE FOR REPRESENTATIVE ACTIONS

As the focus of this study is on identifying all options available to consumer organisations with respect to cross-border redress, it is necessary to examine additional heads of jurisdiction under the Brussels I bis Regulation, which might be engaged for the purposes of representative actions.

While these alternatives do not compare to the special jurisdiction under Article 7 (2) Brussels I bis Regulation as they will not necessarily provide consumer organisations with an opportunity to litigate in their home-forum, they might have some advantages relevant to the scope of representative actions. In particular, they may present an opportunity to bring unionwide actions, which include affected consumers from different member states within one single proceeding and – from a QE's perspective – may certainly prove useful as a means to entertain "forum shopping"-strategies.

1. Protective Jurisdiction over Consumer Contracts – Article 17 et seq

In matters relating to a contract, a consumer "may bring proceedings against the other party ... in the courts for the place where the consumer is domiciled" regardless of the domicile of the other party (Article 18 (1) Brussels I bis Regulation[73]). According to settled case law, only the individual consumer – deemed to be economically weaker and less experienced in legal matters than the other party – is entitled to invoke protection under Section 4 Brussels I bis Regulation:

The ECJ held in the Shearson case[74], that a legal person who is not a party to the contract, but acts as assignee of consumer claims cannot invoke the special protective forum established under Article 18. In Henkel, the Court applied its reasoning to injunctive representative actions brought by a consumer organisation. The Court subsequently clarified in Schrems II[75] that this extends to assignment-based collective redress models, regardless whether the plaintiff (assignee) is a trader, a consumer organisation or a consumer who bundles claims of other consumers assigned to him with his own.

As a result, the protective jurisdiction established under Article 18 Brussels I bis Regulation is limited to individual proceedings and cannot be engaged for any model of collective redress[76], including representative actions seeking redress or injunctive measures[77].

The same applies to the special protective jurisdiction in insurance matters established under Section III (Articles 10-16) Brussels I bis Regulation. See Point (7). On Article 79 GDPR see Point (8).

2. The Default Rule: Domicile of the defendant – Article 4

Following the default-principle of actor sequitur forum rei, Article 4 (1) Brussels I bis Regulation establishes as a general rule, that "persons domiciled in a Member State shall, whatever their nationality be sued in the courts of that Member State".

73 Notably, jurisdiction under Article 18 Brussels I bis Regulation is limited to contractual claims. However, it has been advanced repeatedly both in academia and policy debates, that its scope might be extended to provide for a protective forum for consumer claims relating to tort, delict or quasi-delict, pointing to the comparable power imbalance. It remains to be seen whether the broader „consumer"-understanding adopted by the RAD gives momentum to this concern.

74 Case C-89/91 Shearson Lehman Hutton.

75 Case C-498/16 Schrems v Facebook. See i.a. Leupold, Facebook-Klage: Verbrauchergerichtsstand bei Zession [2015] Zeitschrift für Verbraucherrecht 166.

76 See, among many Stadler, NJW 2020, 267; Vollkommer, MDR 2021, 129, 130; Rentsch, EuZW 2021, 524, 532; Dauses/Ludwigs/Micklitz/Rott, Handbuch des EU-Wirtschaftsrechts, Verbraucherschutz, Note 811; Domej in FS Schack (2022); Leupold in Reiffenstein/Blaschek (eds), Konsumentenpolitisches Jahrbuch 2021, 89 et seq. See in detail on the underlying considerations regarding power balancing between the parties Law 380 et seq.

77 Domej in FS Schack (2022) points to the fact that Articles 17 et seq still might be of relevance to the very limited extent as the issue whether individual consumers may or may not be included in collective proceedings by way of an opt out-model is concerned, which however – due to Article 9 (3) RAD – only concerns cases where the „domicile" of a consumer within the meaning of Articles 18, 62 Brussels I bis Regulation and his „habitual residence" within the meaning of Article 9 (3) RAD differ.

Jurisdiction under Article 4 is not limited to certain (civil) matters or types of actions, and therefore applies to representative actions seeking injunctive measures as well as redress measures, covering claims available under Union or national law regardless if they are based on contract law or tort law and regardless of the existence of a specific connection between the claim and the member state of the defendant's domicile.

The place where a company or other **legal person is domiciled** is the place where it has either its statutory seat[78], central administration or principal place of business[79] under Article 63 Brussels I bis Regulation[80], the latter of which potentially being of particular relevance as regards shell corporations or letterbox companies registered in a non-EU country, yet entertaining business or headquarters in a member state. Each of these places establish jurisdiction over injunctive or redress actions; if located in different member states, the QE has a choice where to bring the action.

Irrelevant for the purpose of Article 4 is the place **where the QE (plaintiff) is domiciled**. The same applies with respect to the domicile, residence or nationality of the consumers represented within the action.

Consequently, QEs may always resort to bringing a representative action before the courts at the domicile of the defendant, provided that he is domiciled in a Member State. Notably, this is not limited to QEs designated by the member state where the trader is domiciled, but applies to **QEs designated by any other member state** for the purpose of bringing cross-border representative actions in accordance with Article 4 RAD. As regards third state traders see Chapter III Point (2).

The Article 4 forum has jurisdiction to hear all claims against the same defendant. Therefore, Article 4 allows for **"universal" redress actions** that seek to represent consumers from different member states.

However, it should be acknowledged that the chance to actually achieve a horizontal consolidation is de facto limited in several ways, most prominently by means of the mandatory opt-in mechanism concerning consumers who are not habitually resident in the forum state under Article 9 (3) RAD and the possibility for (other) QEs to bring parallel (if in scope somewhat limited) redress actions in their home-member state under Article 7 (2) Brussels I bis Regulation. Regarding parallel proceedings see Section IV. It should also be noted, that the admissibility of union-wide redress actions open to a representation of consumers from different member states, might require the QE in question to substantiate a correspondingly broad statutory purpose, subject to the procedural law of the forum state (Article 6 (3) RAD). See Section II Chapter III Point (3) and Chapter IV Point (3).

With regard to **representative injunctive actions**, Article 4 accordingly allows for actions to seek unionwide measures aiming to prevent infringements in all member states. For possible restrictions relating to the applicable law see Section II.

3. The Default Rule II: Place where a branch, agency or other establishment is situated – Article 7 (5)

Article 7 (5) Brussels I bis Regulation grants jurisdiction at the place where "the branch, agency or other establishment is situated" as regards a dispute arising out of the operations of said branch, agency or other establishment. As noted above, for the operation of this special head of jurisdiction the trader has to be domiciled in the territory of another member state; the Article 7 (5) forum is not available against non-EU traders.

Jurisdiction under Article 7 (5) is based on the existence of a **particularly close linking factor between the dispute and the courts** that may be called upon to hear and determine the case, which justifies the attribution of jurisdiction to those courts for proximity-reasons relating to the sound administration of justice and the efficacious

78 For the purposes of Ireland, Cyprus and the UK, „statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place: Article 63 (2) Brussels I bis Regulation.

79 If the defendant is not a company or legal person according to Article 62 the lex fori applies: „In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law". That holds true also for trusts (Article 63 (3)).

80 A company or other legal person or association requires the capacity to be a party to a proceeding. Determining whether that is the case is a matter of the national law that applies to the company. Regarding the State-of-Origin-Approach under the RAD see Section II Chapter II Point (1).

conduct of proceedings. Therefore, Article 7 (5) does not apply in cases, where the trader just has a branch within the territorial jurisdiction of the court seised, without that branch having been involved in the legal relationship between the trader and the consumers concerned[81].

To determine whether a dispute relates to the operations of a branch, agency or other establishment within the meaning of Article 7 (5), according to settled case law two criteria must be observed[82]:

First, the concept of 'branch', 'agency' or 'other establishment' within the meaning of that provision, implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body. Secondly, the dispute must concern either acts relating to the management of a branch, or commitments entered into by such a branch on behalf of the parent body, if those commitments are to be performed in the State in which the entities are situated.

If these requirements are met, Article 7 (5) provides QEs with an option equivalent in scope to Article 4 Brussels I bis Regulation, ensuring that the courts at the place where the relevant branch, agency or other establishment is situated have jurisdiction over all (contractual and non-contractual) **claims across member states**. If applicable, Article 7 (5) therefore allows for **"universal" injunctive measures and redress actions** that seek to represent affected consumers from different member states. On jurisdiction where the defendant has an establishment under Article 79 (2) GDPR see below Point (8).

4. Multiple defendants – Article 8 (1)

Article 8 (1) Brussels I bis Regulation allows for a concentration of jurisdiction in cases, where multiple co-defendants are involved (so-called "passive joinder of parties"[83]). According to Article 8 (1) a claimant may sue several co-defendants in the Member State where only one of them (the so-called "anchor defendant") is domiciled, provided the claims are "so closely connected that it is expedient to determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"[84].

Jurisdiction under Article 8 is frequently invoked when suing several members of a multinational group (mother company and subsidiaries with legal capacity of their own) and in cartel damages cases[85]. Another recent example concerns the Volkswagen case, where consumers were able to secure jurisdiction of the courts in their (non-German) home-country over tort claims against VW under Article 8 (1) Brussels I bis Regulation by way of bringing an action not just against VW, but jointly against the local seller of the purchased car (i.e. the "anchor-"defendant) at his place of domicile[86].

However, Article 8 does not apply, if one of the defendants is domiciled in a third country[87]. Also, the forum choice of QEs under Article 8 is limited to one of the defendants' respective member states of domicile (the Article 4 forum), but does not allow for the use of a forum based on grounds other than Article 4 Brussels I bis Regulation, such as for instance the place where the damage occurred according to Article 7 (2) Brussels I bis Regulation, if neither

81 See Case C-464/18 Ryanair, concerning a claim for compensation brought under Article 7 of Regulation No 261/2004 against an airline established in the territory of another Member State, on the ground that it has a branch within the territorial jurisdiction of the court seised, without that branch having been involved in the legal relationship between the airline and the passenger concerned.

82 See, to that effect, Case C-913/19 CNP with respect to insurance undertakings; Case C-154/11 Mahamdia; Case C-27/17 flyLAL-Lithuanian Airlines; C-464/18 Ryanair.

83 Notably, Article 8 (1) does not provide for special jurisdiction if multiple plaintiffs are involved.

84 Jurisdiction for the other parties does not require the „anchor defendant" to remain a party of the proceeding. Jurisdiction is perpetuated even if the anchor claim is settled or expires during the course of the proceeding.

85 See Case C-352/13 CDC Hydrogen Peroxide; IPOL Study 99. Also see the recent decision re C-882/19 Sumal: The victim of an anticompetitive practice by an undertaking may bring an action for damages either against a parent company who has been punished by the Commission for that practice or against a subsidiary which is not referred to in that decision, where those companies together constitute a single economic unit. According to the Court, Article 101 (1) TFEU precludes a national law which provides for liability for one company's conduct to another company only in circumstances where the second company controls the first company.

86 See to that effect Austrian Supreme Court Case 8 Ob 126/19s. Ultimately, this strategy turned out to be uncalled for, since jurisdiction of the courts at the place where the cars were purchased under Article 7 (2) Brussels I bis Regulation, was clarified in the VKI/VW-ruling.

87 Case C-645/11 Land Berlin/Ellen Mirjam Sapir; Case C-51/97, Reunion europeenne/Spliethoff's Bevrachtungskantoor.

defendant is domiciled in this member state.

Still, it is worth highlighting that Article 8 in certain constellations might be used by QEs as a means to open up jurisdiction in their home-country against a foreign trader as to allow for a representation beyond "domestic" consumers (Article 7 (2)), which may include all consumers concerned, provided that a suitable anchor-defendant can be found.

5. Place of the Event Giving Rise to the Damage – Article 7 (2) II

The notion of "the place where the harmful event occurred" within the meaning of Article 7(2) Brussels I bis Regulation under the so-called "**doctrine of ubiquity**" covers both the place where the actual damage occurred and the place where the harmful event giving rise to that damage occurred, i.e. where the infringement was committed[88]. The trader may be sued, at the option of the QE, in the courts for either of those places.

With respect to the place of the event giving rise to the damage, Article 7 (2) Brussels I bis Regulation might not establish an additional forum beyond Article 4, since the place where the infringing act was committed **often corresponds to the domicile of the defendant**. However, it does give QEs an additional option in cases where domicile of the trader and place of violation differ[89] and to that end, has been used routinely in the past for cartel damages claims pursued via assignment-based collective redress models[90].

Indeed, *if* Article 7 (2) provides for an alternative forum at the place of the event giving rise to the damage, this forum might be of particular value for QEs since it has jurisdiction to hear all claims and thus, allows for a **unionwide consolidation of cases**. Consequently, QEs may bring **"universal" redress actions** that seek to represent consumers from different member states and **"universal" injunctive actions** that seek unionwide measures aiming to prevent the trader from infringements in all member states. Regarding possible restrictions see Section II.

Whether the concept of the "place of the event giving rise to the damage" within the meaning of Article 7 (2) applies to redress actions concerning individual claims that are not **based on** tort law, but on **contract law**, seems questionable at first sight. One may argue as far as the possibility for bringing *unionwide* redress actions in a member state apart from the defendant's Article 4 forum is concerned, the place where the infringement took place – while certainly locateable in the context of contractual claims – lacks the necessary connection to the dispute which justifies the attribution of jurisdiction under Article 7 Brussels I bis Regulation. However, it is consistent to apply Article 7 (2) in light of the non-contractual nature of redress actions (see Chapter III Point (2)), moreover ties in with the objectives of proximity, sound administration of justice and is in line also with the principle of predictability for the defendant.

Again, in practice this issue will likely be of negligible importance since its relevance is limited to cases where the relevant place under Article 7 (2) differs from the domicile of the defendant.

6. Prorogation of Jurisdiction – Articles 25, 26

It is worth highlighting that Article 25 Brussels I bis Regulation provides QEs and defendants alike with an opportunity to agree on a forum best adapted for the challenges of collective redress: **Agreements concluded between a QE and a trader** may determine jurisdiction at the place agreed.

Notably, QE and trader are not bound to merely choose an additional forum other than provided for by Articles 4 and 7 Brussels I bis Regulation. They may also agree on expanding the scope of the additional forum to include con-

88 Case 21-76, Bier/Mines de potasse d'Alsace (the pollution of the Rhine River by the French defendant inflicted damage to Dutch horticulturists); Case C-189/87 Kalfelis; Case C-220/88 Dumez France; Case C-68/93 Shevill; Case C-364/93.

89 See regarding the Dieselgate case Stadler in Reiffenstein/Zinner (eds), Hindernisse bei der kollektiven Verbraucherrechtsdurchsetzung (2019) 1 (3 et seq), who in relation to Austrian car buyers locates the place where the harmful event occurred in Austria and not in Germany.

90 In antitrust cases the notion „place where the harmful event occurred" may mean either the place of conclusion of an anticompetitive agreement (as violation of Article 101 TFEU) or the place in which the cartelized prices were offered and applied (as violation of Article 102 TFEU); see Case C-352/13 CDC, Hydrogen Peroxide SA; Case C-27/17, Lithunian Airlines. With respect to product liability see Case C-45/13 Kainz v Pantherwerke (place where the product was manufactured).

sumer claims, the court would otherwise lack jurisdiction to hear. Consequently, by way of prorogation unionwide redress actions are possible even in forums other than the domicile of the defendant or the place of the event giving rise to the damage. As regards consumers not habitually resident in the chosen forum, the opt-in-requirement under Article 9 (3) RAD needs to be observed, still. Finally, obviously, establishing jurisdiction by way of prorogation requires consent on behalf of the defendant and therefore might remain largely hypothetical.

According to Article 26 Brussels I bis Regulation, a court before which a defendant „enters an appearance" (i.e. joins the proceeding as in making a statement about the proceeding) **without contesting its jurisdiction**, has jurisdiction. The rule applies to representative actions, accordingly and may have relevance in particular as regards a forum assuming jurisdiction to hear claims of consumers it would otherwise lack under the Brussels Regime, provided that the mandatory opt in under Article 9 (3) RAD is observed. With respect to those individual consumer claims, „entering an appearance without contesting jurisdiction" will possibly be understood mutatis mutandis as precluding the trader from contesting jurisdiction at the earliest time possible, which still might be considerably after the proceeding started, taking into account the time limit for consumers to opt in, subject to national law (Article 9 (2) RAD).

On jurisdiction agreements incorporated in individual consumer contracts see Chapter III Point (2) lit (e).

7. Jurisdiction in Matters Relating to Insurance – Articles 10 et seq

Section 3 of Chapter II Brussels I bis Regulation determines jurisdiction "in matters relating to insurance" by way of establishing an autonomous system for the allocation of jurisdiction in insurance matters[91]. According to the ECJ, actions in insurance matters are characterised by a certain imbalance between the parties, which the provisions of Articles 10 et seq are intended to correct by giving the weaker party the benefit of rules of jurisdiction more favourable to his or her interests than the general rules (Recital 18)[92]. According to settled case-law, Article 13 (2) read in conjunction with Article 10, must be interpreted as not applying in the case of a dispute between, on the one hand, a business which has acquired a claim originally held by an injured party against a civil liability insurance undertaking and, on the other hand, that same civil liability insurance undertaking. Therefore, jurisdiction may be founded on paragraphs (2) or (5) of Article 7[93].

As a result, the special heads of protective jurisdiction established under Articles 10-16 Brussels I bis will not be available to bring representative actions seeking redress and injunctive measures.

8. Jurisdiction and Data Protection Rights – Article 79 (2) GDPR

The RAD by **referral in Annex I (56)** includes infringements of the GDPR in order to satisfy an "increased need for more efficient enforcement of consumer law as regards data protection" (Recital 13 RAD). This puts an end to discussions as to whether the remedies and collective redress mechanisms provided for by Article 80 (2) GDPR preclude national legislation from adding others such as representative injunctive actions on the basis of preventing unfair contract terms, unfair commercial practices or other consumer law breaches. Accordingly, the ECJ in its recent **vzbv/Meta Platforms Ireland Limited-ruling**[94] deliberately referred to the RAD as yet not applicable, but confirming that Article 80 (2) of the GDPR "does not preclude the bringing of additional representative actions in the field of consumer protection" (paragraph 81).

Conversely, the RAD – as clarified in Recital 15 – is **without prejudice to** the enforcement mechanisms provided for and based on **Article 80 GDPR** (to this end see also Article 1 (2) and (3) RAD).

Article 79 (2) GDPR provides for **specific rules on jurisdiction** concerning the infringements of rights and remedies under the GDPR including the right to compensation for material or non-material damage suffered as a result of an infringement (Article 82 leg cit), according to which the plaintiff has a choice to bring the action either

91 See, to that effect Case C-340/16 MMA IARD, paragraph 27.

92 Case C-340/16 MMA IARD, paragraph 28; Case C-803/18 Balta, paragraphs 27 and 44.

93 Case C-913/19 CNP; Case C-106/17 Hofsoe; Case C-347/08 Vorarlberger GKK; Case C-708/20 Seguros Catalana Occidente.

94 Case C-319/20 vzbv/Facebook Ireland, 28.4.2022.

before the courts of the Member State where the controller or processor has an establishment[95], or before the courts where the data subject has his or her habitual residence (see Recital 145 GDPR). Both alternatives provide for **"plaintiff-friendlier" heads of jurisdiction in comparison to the general rules under Article 4 and Article 7 (5) Brussels I bis Regulation**[96]. That is to say, this not just applies in relation to the plaintiff-based head of jurisdiction but also in relation to the establishment-based head of jurisdiction, which – unlike Article 7 (5) Brussels I bis Regulation – neither requires the dispute in question to arise out of the operations of said establishment, i.e. the existence of a particularly close or any connecting factor between the dispute and the place of establishment is no prerequisite, nor for the processor or controller to be domiciled in the territory of a member state[97], provided that the dispute falls within the territorial scope of the GDPR under its Article 3 (see Chapter III Point (2)).

As regards the RAD the key question concerns whether the special heads of jurisdiction under Article 79 (2) GDPR may be **invoked by QEs for the purpose of representative actions** seeking to prohibit infringements of the GDPR and to enforce the rights (especially, yet not limited to compensation, Article 82[98]) of (consumer-) data subjects. This depends on the objectives of Article 79 (2) GDPR and on how the characteristics of the representative action-model under the RAD might be integrated into this regime.

The head of jurisdiction **where the data subject resides** clearly aims at protecting the data subject perceived as the "weaker party" in terms of litigating power, and therefore closely resembles the special head of jurisdiction over consumer contracts established under Article 18 Brussels I bis Regulation in order to protect the consumer. Still, one might argue that the wording of Article 79 (2) and Recital 145 GDPR, by not expressly referring to the data subject but to a "plaintiff" possibly suggests indifference as to whether the data subject or a QE acts as said plaintiff. One may also point to Article 80 (2) GDPR which for the purpose of representative actions "independently of a data subject's mandate"[99] blanketly refers to Article 79 GDPR without distinguishing between its paragraphs (1) and (2), thus formally including the rule on jurisdiction. However, in light of the settled case-law of the ECJ concerning the scope of Articles 17 et seq Brussels I bis Regulation, one may easily come to the conclusion that the underlying ratio of these judgments extends to Article 79 (2) GDPR as regards representative actions both under Article 80 (2) GDPR and the RAD, to the effect that QEs are prohibited from invoking jurisdiction under Article 79 (2) GDPR at the place of their domicile or the residence of data subjects concerned and represented in the action.

Conversely, this reasoning does not apply to the second head of Article 79 (2) GDPR providing for alternative jurisdiction **where the controller or processor has an establishment**. Since the attribution of jurisdiction in this case is neither justified by the existence of a close connecting factor to this specific establishment nor based on the notion to protect the "weaker party", one may conclude it rather seeks to ensure jurisdiction beyond the scope of the Brussels I bis Regulation, namely against third country-defendants, in particular as regards enforcing the GDPR in line with its territorial scope which notably adopts a combined approach based on the principles of territoriality, establishment and effects, and therefore extends beyond controllers and processors domiciled in the EU (Article 3

95 See Recital 22 GDPR: Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor. See Case C-131/12 Google Spain; Case C-617/15 Hummel Holding; Case C-230/14 Weltimmo.

96 Article 79 (2) GDPR prevails over the general rules on jurisdiction laid down in the Brussels I bis Regulation (see Recital 147 GDPR; also see to that effect the general rule of Article 67 Brussels I bis Regulation on the preference of sectorial pieces of EU-legislation). On the interaction between Article 79 (2) GDPR and jurisdiction according to the Brussels I bis Regulation see Hess, Europäisches Zivilprozessrecht (2nd ed, 2021) § 11 I, paras 11.4 et seq: „disruptive effects to the Brussels system", and Leupold/Schrems in Knyrim (ed), DSGVO Article 79 Note 39, who argue for an additional applicability of the Brussels I bis Regulation, provided that it serves to complement and not counter the objectives of Article 79 (2) GDPR. However, as regards third-country-processors and controllers, data subjects as well as QEs will likely seek to invoke Article 79 (2) GDPR.

97 See e.g. Leupold/Schrems in Knyrim (ed), DSGVO Article 79 Note 36; Kerschbaumer-Gugu, Schadenersatz bei Datenschutzverletzungen 191; pointing to forum-shopping as regards the existence of several establishments in different member states Feiler/Forgo, EU-DSGVO Article 79 Note 5.

98 It is yet unclear to which extent Article 82 GDPR harmonizes the right to compensation and whether national law is at all applicable to assess and determine the damage suffered as a result of the GDPR-infringement. See to that end the questions referred for a preliminary ruling by the Austrian Supreme Court, pending Case C-300/21, Österreichische Post AG. The significance of the question which law applies to remedies available to data subjects will considerably depend on the position the ECJ adopts for its ruling in this case. See as regards the applicable law Chapter IV Point (2) lit (d).

99 Notably, Article 80 (2) GDPR – contrary to Article 80 (1) GDPR – provides a mere option for the member states as regards the implementation of a right of not-for-profit bodies, organisations or associations to take action independently of a data subject's mandate, yet does not require the member states to do so. Austria for instance chose to not provide for such representative actions, Germany does to a certain extent. Also, contrary to the RAD Article 80 (2) GDPR does not allow for that body, organisation or association to claim compensation on a data subject's behalf independently of the data subject's mandate (Recital 142 GDPR).

GDPR). Apparently this purpose, contrary to the objective of Articles 17 et seq Brussels I bis Regulation, is not justified by a structural power imbalance between the parties as regards litigation and not limited to provide protection for an individual data subject as party to a proceeding but similarly applies to representative enforcement of the GDPR by QEs.

As a result, **Article 79 (2) GDPR** with respect to jurisdiction at the place of establishment of a controller or processor **applies to representative actions under the RAD**, and may provide for alternative heads of jurisdiction available to QEs that – provided a defendant is domiciled in a member state – in addition to those under Article 4, Article 7 (2) Brussels I bis Regulation **allow for unionwide injunctive measures and redress measures** providing consumers from different member states with remedies available under the GDPR.

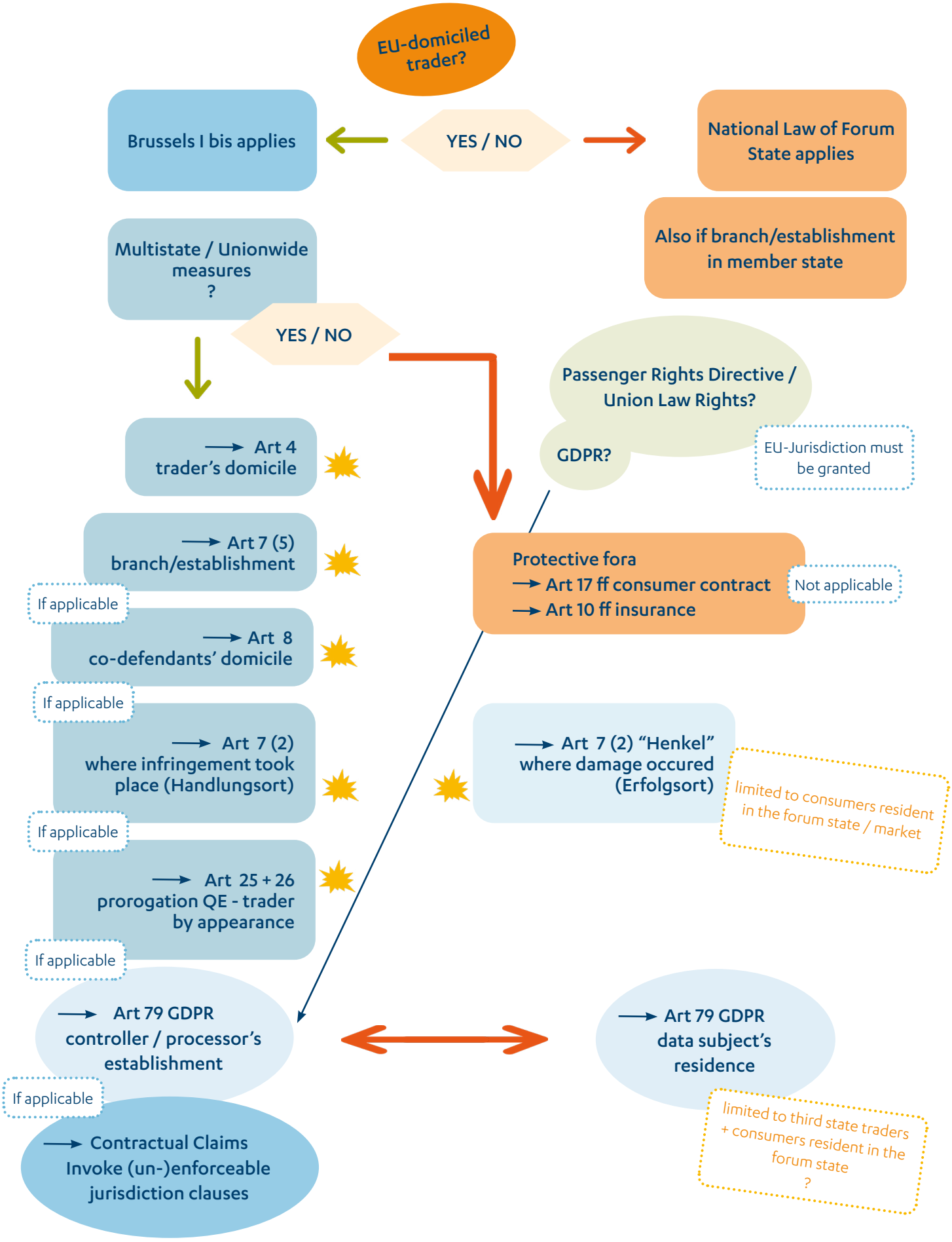
Moreover, in view of the **territorial scope of the GDPR** which extends to the processing of personal data of data subjects in the Union by a third country-controller or processor not even having an establishment in a member state[100], one may reasonably argue for a **default-application of the special jurisdiction of habitual residence** under Article 79 (2) GDPR as well, that is to say if jurisdiction over GDPR-infringements can not be established otherwise, i.e. whenever GDPR-violations concern a processor or controller who is domiciled outside the EU (arg Article 6 Brussels I bis Regulation) and has no establishment in a member state (arg Article 79 (2) GDPR). However, in accordance with the general principles of the Brussels I bis Regulation aiming to achieve a coherent interpretation of Union law, one may assume that under this head of jurisdiction (contrary to jurisdiction at the place of establishment) QEs can only seek injunctive and redress measures for consumers who are resident in the forum state.

100 I.e. where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union: Article 3 (2) GDPR.

ANNEX I

Guidance on Multistate / Unionwide Cases – A Decision Tree on Jurisdiction

Illustration 1: Jurisdictional Options



Fora apply equally to contractual and non-contractual claims

CONTRACTUAL CLAIMS

QE has additional choice to

- disregard (un-)enforceable jurisdiction clauses or
- use them for consolidation purposes by not invoking their unenforceability under UCTD / DelayFix

PLAINTIFF-SCENARIO?

- single QE / several QEs / supranational QE
- Jurisdictional limitations on multistate / unionwide consolidation apply equally

LACK OF JURISDICTION?

- No grounds for refusal of recognition + enforcement of judgments
- Lack of opt-in concerning “foreign” consumers might concern public policy grounds

Illustration 2: Jurisdictional Options

ART 4 FORUM TRADER'S DOMICILE

- Art 63: statutory seat, central administration or principal place of business

Art 8 (1) Forum - anchor-defendant?

- multiple defendants + close connection required

ART 7 (2) FORUM HANDLUNGSORT

- no additional option if also trader's domicile

ART 7 (5) FORUM BRANCH / AGENCY / ESTABLISHMENT

- close link between dispute and operation of branch required
- domicile in another member state required, not available against state-traders

ART 79 GDPR FORA

Establishment:

- applicable to third state traders within territorial scope of GDPR
- no close link between dispute und establishment required

Consumer residence

- possibly default option, i.e.
- absent EU-establishment
- possibly jurisdiction limited to forum state

SECTION II – APPLICABLE LAW

I. INTRODUCTION: FIFTY SHADES OF ROME AND WHY THE APPLICABLE LAW MATTERS

The RAD does not provide for any special rules of private international law regarding the applicable law, but instead refers to the Rome I- and Rome II-Regulations which should "not be affected by the Directive" (Article 1 (2), Recital 21). Both regulations do not address the particular challenges of collective redress.

Concerning the representative action model, the notion of the applicable law is particularly multilayered. Adding further complexity, the issues raised partly depend on the transposition of the RAD and the doctrinal approaches adopted under national law. They concern the legal standing of QEs, the need to differentiate between matters concerning the proceeding, which are governed by the law of the forum state, and matters concerning the QE, which are governed by the law of the designating state, and the applicable law as regards the substance of the claim(s). With regard to injunctive actions the latter concerns identifying the relevant law to determine whether a practice constitutes an infringement as referred to in Article 2 (1) RAD, for instance whether certain contract terms or commercial practices are deemed unfair according to UCTD and UCPD. With regard to redress actions, the remedies of individual consumers represented in the action need to be assessed.

Evidently, these issues play a crucial role in whether EU-wide infringements of consumer law are possibly dealt with by way of EU-wide representative actions protecting the interests of consumers from different member states in one single forum. However, as discussed in Section I, preceding the question of whether multiple laws need to be applied in representative multi-state proceedings, cross-border actions as a conditio sine qua non afford jurisdiction to include consumers from different member states.

II. ISSUES RELATING TO THE CONCEPT OF LEGAL STANDING

1. The State of Origin-Approach adopted for Cross-Border Actions

As a general principle of private international law, procedural issues are always governed by the law of the forum state. Therefore, representative redress proceedings are conducted uniformly for all consumers represented in the action regardless whether they are resident in the forum state or not (see Article 9 (3) RAD), according to the procedural law of the forum state. For the law applicable to the substance of the remedies sought see Chapters III and IV.

However, the legal standing of QEs is determined comprehensively by the law of the designating state. Only the Member State, according to whose national law the entity is constituted as a legal person, is competent to designate it as a QE for the purpose of bringing cross-border representative actions[101] under the RAD, to assess whether the QE continues to satisfy the criteria listed in Article 4 (3) and, if necessary, to revoke its QE-status if it no longer complies with one or more of those criteria (Article 5 (3), (4), Recitals 29, 30).

In the context of cross-border representative actions, mutual recognition of the legal standing of QEs designated by another member state is ensured by Article 6 (1), (3) RAD[102], and therefore independent of the doctrinal approach to the notion of legal standing adopted by the forum state (see Chapters III and IV). The list referred to in Article 5 (1) RAD, including information about the name and purpose of the QE, publicly available and compiled by the European Commission, constitutes proof of the legal standing of the QE (Article 6 (3), Recital 32).

101 For the definition of cross-border representative actions see Article 3 (7) RAD. On terminology see Section I Chapter II.

102 See Recital 12 of the Injunctions Directive 2009/22/EC, which already provided for mutual recognition „for the purposes of intra-Community infringements". The Member States, at the request of their national entities, should communicate to the Commission the name and purpose of their national entities which are qualified to bring an action in their own country „according to the provisions of this Directive". See Law 366 FN 62.

For example, a QE constituted in accordance with Spanish law has standing to bring an action in Germany, if designated as QE for the purpose of bringing cross-border representative actions by Spain. Whether the notion of legal standing to bring representative actions is deemed a matter of procedural or substantive law, is determined by the law of the forum state, but according to Article 6 (1), (3) RAD the legal standing cannot be denied on these grounds alone.

The court seised may still have the right to examine whether the statutory purpose of the QE justifies its taking action in a specific case (Article 6 (3), Recital 32)[103], provided that the procedural law of the forum state limits the legal standing accordingly. However, the court is prohibited from independently examining whether the QE (still) complies with the designation criteria and from revoking its designation. Conversely, the court seised may reject the action on the grounds of a lack of legal standing only upon revocation of its designation by the designating member state.

For example, if the representative action seeks price reduction for consumers that purchased defective washing machines from a German manufacturer and wholesaler, the German court could reject the action under the RAD, if the QE's objective according to its statutory purpose is to promote and enforce data protection and privacy rights across Europe.

If a Spanish court decides to open insolvency proceedings with respect to the QE (Article 4 (3) lit d) or the defendant produces hard evidence on the profit-making character of the QE (Article 4 (3) lit c), the German court may still not reject the action until the QE-status has been formally revoked by Spain as the designating state.

In summary, the RAD essentially assumes a "state of origin"-approach as far as the legal standing of QEs in cross border-actions is concerned, the deciding criterion being whether the QE is validly designated by the member state of its constitution (arg Article 4 (3) lit a RAD[104]). This also means that the legal capacity of a QE as well as the capacity to be a party to a proceeding (i.e. as a claimant party as is required for by the RAD, see Article 7 (6)) is determined exclusively by the designating member state. The court seised is prevented from refusing to acknowledge the QE as having legal capacity by applying its own national law[105].

It is worthwile highlighting, that in the absence of a union-term of insolvency, the capacity to be a **subject of insolvency proceedings**[106] as well as the requirements for the opening of insolvency proceedings (see the criterion under Article 4 (3) lit d), are governed by the **lex fori concursus** according to Article 3 and Article 7 of the Regulation (EU) 2015/848 on insolvency proceedings. Notably, the law of the "state of the opening of proceedings" applicable under Article 7 of the Regulation refers to the QE's COMI[107], being the Member State within the territory of which the centre of the debtor's main interests is situated, and therefore may deviate from the law of the designating member state.

103 The statutory purpose and name of the designated QEs have to be communicated to the Commission by the member states: Article 5 (1) RAD.

104 Notably, the RAD does not provide any rules on the legal form of eligible QEs; for the purpose of bringing cross-border representative actions paragraph (3) lit a of Article 4 only requires the entity to be a „legal person that is constituted in accordance with the national law of the Member State of its designation". The term „legal person" apparently is referred to as a means to exclude natural persons, yet has no implications for the legal forms available under the national law of the designating state. Still, one may assume that the QE – as a minimum – must have legal personality as well as the capacity to be a subject of proceedings under the national law of the designating state. Further limitations with regard to certain legal forms might follow from the not for profit-criterion under Article 4 (3) lit d RAD. See Leupold, Qualifizierte Einrichtungen zur Erhebung von Verbandsklagen, in: Anzenberger/Klauser/Nunner-Krautgasser (eds), Kollektiver Rechtsschutz im Europäischen Rechtsraum (2022) 85 ff.

105 See on corresponding corporate law issues with respect to the principle of freedom of establishment Case C-208/00 Überseering.

106 For instance, under Austrian law the capacity to be a debtor against which insolvency proceedings may be brought, flows from having legal personality.

107 The COMI is presumed to be at the place of the registered office, in the absence of proof to the contrary: Article 3 (1) Insolvency Regulation.

2. The Fracturing of a Representative Mind: Lex Fori v. Lex QE v. Lex Causae

Cross-border cases require to determine whether rules concern a matter of procedural law, relate to the legal standing of QEs or whether the issue pertains to the substance of individual consumer claims. Classification issues matter since the legal standing is determined exclusively by the designating state and has to be recognized within the bounds of statutory purpose (Article 6 RAD), whereas the proceeding and procedural rules are governed by the lex fori. As regards individual consumer remedies the lex causae applies (see Chapter IV Point (2)).

Matters relating to the proceeding for instance concern: the admissibility of representative actions (Article 7 (3) RAD), including possible requirements regarding a certain degree of similarity of individual claims (see Recital 31) or a possible minimum number of consumers concerned by a redress action; evidence and disclosure rules (see Article 18); the means of appeal; the structuring and course of events regarding representative proceedings; the constitution of the class (whether opt-in or opt-out, or a combination of both: Recital 43) and at which stage of the proceedings consumers have to express their wish to opt in or out.

The law of the forum state also determines which courses of action are available for QEs, whether QEs are limited to seeking injunctive and redress measures or may also seek declaratory judgments in order to establish that a certain practice constitutes an infringement (see Article 7 (4): "at least"; in the context of injunctive measures see the option under Article 8 (2) lit a, Recital 40); whether they may seek injunctive and redress measures within a single action or separately (Article 7 (5), Recital 35); whether they have a right to seek an obligation to publish the decision or a corrective statement (Article 8 (2) lit b); or whether a representative action can be brought in judicial proceedings and/or administrative proceedings in the first place (Recital 19). It is also up to the lex fori to determine whether a "consulation-process" prior to bringing an injunctive action is mandatory for the purposes of admissibility (Article 8 Abs 4).

Which law applies to determine whether **third party-funding of representative actions** is permissible, remains unclear. The issue closely relates to the general ambiguity of the rules on third party funding as such, the uncertainty of how the independence-criterion under Article 4 (3) lit e RAD compares to Article 10 RAD and the all but clear interaction of those rules[108]:

Article 10 RAD intends to introduce safeguards against abusive litigation by providing for certain conditions on third party funding of redress actions in order to prevent conflicts of interests to the detriment of the collective interests of consumers. The RAD, however, does not determine whether third party funding of representative actions is permitted at all, but leaves this decision to the member states: According to Article 10 (1) RAD member states shall ensure that, where a representative action for redress measures is funded by a third party, "insofar as allowed in accordance with national law", conflicts of interests are prevented (see Recital 52). Which "national law" the provision refers to – the law of the designating state or the law of the forum state – seems disputable:

Both, Article 4 (3) RAD as well as Article 10 RAD aim to prevent conflicts of interests and abusive litigation. Third party funding of redress actions is closely connected to the criteria for a potential "QE to be" laid down in Article 4 (3) RAD, and moreover is explicitly referred to in Article 4 (3) lit e RAD, which also requires the entity to establish procedures "to prevent such influence as well as to prevent conflicts of interests between itself, its funding providers and the interests of consumers". Consequently, beyond designating QEs for the purpose of bringing cross-border representative actions, one could argue for also having the law of the designating state decide whether these actions are eligible for third party funding, subject to compliance with the provisions set out in Article 10 RAD.

Conversely, third party funding of redress actions – as opposed to funding QEs as such – though referenced in Article 4 (3) RAD, might be governed exclusively by Article 10 RAD. The connection to the forum state seems prevailing because the court seised is empowered to independently examine, take appropriate measures and reject the legal standing of QEs in a specific representative action, if the relevant funding does not comply with Article 10 RAD. This could indicate that the court is meant to apply its own law regarding the availability of third party funding of litigation. Consequently, the application of the lex fori may provide QEs designated to bring cross-border representative actions with an opportunity to choose a forum that allows for third party funding, in the event that under its "home

108 See Scholz-Berger, Finanzierung von Verbandsklagen, in: Anzenberger/Klauser/Nunner-Krautgasser (eds), Kollektiver Rechtsschutz im Europäischen Rechtsraum (2022) 139 (147); Leupold, Qualifizierte Einrichtungen zur Erhebung von Verbandsklagen, in: Anzenberger/Klauser/Nunner-Krautgasser (eds), Kollektiver Rechtsschutz im Europäischen Rechtsraum (2022) 85 ff.

law" of designation / constitution third party funding is prohibited.

Rules on **limitation periods of individual consumer** claims traditionally qualify as a matter of substantive law and are therefore governed by the lex causae, i.e. the law applicable to the individual remedy as such (see Article 15 lit h Rome II-Regulation, Article 12 (1) lit d Rome I-Regulation). The lex causae also applies to determine the effect of suspending or interrupting applicable limitation periods pertaining to pending (both: injunctive and redress) representative actions in respect of consumers concerned by that representative actions (see Article 16)[109].

It remains unclear whether the same is true with regard to limitation periods and other time limits, e.g. to exercise rights to benefit from redress measures under Article 9 (7) RAD (see Recital 51). These aspects may be viewed as a matter of proceeding rather, governed by the lex fori. Also, it figures that these time limits apply at a stage of proceeding when redress measures have already been decided on, concerning the enforcement of the judgment and the distribution and recovering of redress funds. Conclusively, any rules on the destination of outstanding redress funds not recovered within established time limits, as provided for by Article 9 (7) RAD, need to be determined by the law of the forum state as well.

III. INJUNCTIVE ACTIONS: LEGAL STANDING AND APPLICABLE LAW

1. General Observations

While the RAD – like the Injunctions Directive before – recognizably assumes an understanding of the notion of legal standing as a matter of procedural law (see Article 6 (3), Recital 32), it does not call for the member states to integrate this means of operation into their legal traditions[110]. The underlying concept of the legal standing of QEs, construed as a matter of procedural law (admissibility) or of substantive law (standing to sue as in having a substantive claim by law), therefore continues to be governed by national law. Ultimately and as a basic rule though, national rules and concepts must not hamper the effective functioning of the procedural mechanism for representative actions under the RAD (Recital 12). If the notion of legal standing is construed as pertaining to procedural law, the lex fori applies, whereas matters of substantive law are determined by the lex causae and therefore governed by the rules of international private law (Rome Regulations).

In the first scenario, legal standing for injunctive actions (as well as for redress actions) directly flows from Article 7 (1), Article 6 (1) RAD[111] and does not require any considerations on the applicable law. Still, with regard to which law applies to determine whether a practice constitutes an infringement "of provisions of Union law referred to in Annex I" (Article 2 (1), Article 8 (1) and (2) RAD), one may refer to the provisions of the Rome Regulations[112] by way of analogy according to the Amazon-ruling. See Point (2).

Germany[113] and Austria[114] on the other hand, traditionally follow a substantive law-understanding of legal standing with regard to representative injunctive actions under §§ 1, 3 of the German UKlaG and §§ 28, 28a of the Austrian KSchG; the legal standing is based on a claim respectively, attributed to certain QEs by (substantive) law in the collective interest of consumers. While the recognition of the legal standing of "foreign QEs" designated by another member state is ensured by Article 6 (1), (3) RAD, the legal standing of QEs to bring *domestic* actions against a for-

109 With respect to the German Musterfeststellungsklage see Klicka/Leupold, Deutsche Musterfeststellungsklage und grenzüberschreitende Rechtsdurchsetzung, VbR 2018/115.

110 See Recital 12 which explicitly refers to the principle of procedural autonomy.

111 See A. Stadler, VuR 2010, 83, 85; Thönissen, ZZP 2021, 277 FN 21.

112 A. Stadler, VuR 2010, 83, 85, 90 et seq.

113 See BGH NJW 2009, 3371 (Air Baltic) (§§ 1, 2, 4a UKlaG) with regard to unfair contract terms used by a foreign airline; Stadler, VuR 2010, 83, 84 et seq.

114 Jelinek, Verbandsklage, in Krejci (ed), Handbuch zum KSchG (1981) 828 et seq; Fasching, Lehrbuch des österreichischen Zivilprozeßrechts² (1996) Note 338; Kodek/Mayr, Zivilprozessrecht⁵ (2021) Note 300; Kühnberg, Die konsumentenschutzrechtliche Verbandsklage (2006) 174; disagreeing Rechberger, Verbandsklagen, Musterprozesse und „Sammelklagen". Möglichkeiten kollektiven Rechtsschutzes im österreichischen Zivilprozess, in FS Welser (2004) 871 (875 et seq); Buchegger/Deixler-Hübner/Holzhammer, PraktZPR I6 (1998) 248; Kunz, Die Prozessstandschaft (2019) 70 et seq.

eign trader[115] depends on whether the QE has a corresponding claim under the applicable law[116]. As a result, in these forum states the legal standing requires for the law of the designating state to apply.

2. On the Distinction between Legal Standing and Infringement of Union Law – re Amazon

According to the Amazon-ruling[117], the law applicable to an injunctive representative action within the meaning of the Injunctions Directive 2009/22/EC (in this particular case: § 28 of the Austrian KSchG) must be determined in accordance with Article 6 (1) of the Rome II-Regulation[118], whereas the law applicable to the assessment of a particular contract term must be determined pursuant to the Rome I-Regulation, whether that assessment is made in an individual action or in a collective action.

For the purpose of legal standing, the court considers injunctive actions – in line with the Henkel-ruling[119] – as non-contractual in nature and refers to the law of the country „where competitive relations or the collective interests of consumers are, or are likely to be, affected" (lex loci damni-principle, so-called market-effects doctrine). In the case of an injunctive action, the court determines this to be the law of „the country of residence of the consumers" whose interests are defended by the QE by means of that action.

3. Multistate and Unionwide Injunctive Measures

(a) Applicable Law and Legal Standing

The Amazon-ruling seamlessly applies to representative injunctive actions under Article 8 RAD. Therefore, a distinction must be drawn for the purposes of determining the applicable law, between the assessment of the practice concerned, on the one hand, and the action for an injunction to prohibit the practice, on the other.

Notably, this approach essentially secures that QEs have the legal standing to bring domestic actions against foreign traders, that is to say in their home member state.

At the same time, the notion of legal standing construed as a matter of substantive law inherently limits injunctive actions to the relevant market of the designating state, and thus may only serve to protect the interests of consumers who are resident in the forum state. With regard to infringements affecting consumer interests in other member states, QEs would lack the legal standing to seek injunctive measures beyond the application of their own law of the designating state, i.e. the forum state according to Article 6 Rome II-Regulation[120].

However, such a result may contradict the RAD, provided that the domestic action is brought before the courts of a member state with "universal" international jurisdiction under the Brussels I Regime (i.e. Article 4 and Article 7 (2) with respect to the place where the harmful event took place, see Section I Chapters III and IV), and given that the statutory purpose of the QE in question extends to taking action in the interest of consumers both "national" and

115 This probably extends to domestic actions against a "domestic" trader, domiciled in the forum state, in so far as the injunctive action seeks injunctive measures on behalf of "foreign" consumers, i.e. when multistate or unionwide measures are being pursued.

116 See Stadler, Von den Tücken der grenzüberschreitenden Verbands-Unterlassungsklage, VuR 2010, 83 (84 et seq); Rott, IPR der Verbandsklage, in Micklitz/Rott/Docekal/Kolba (eds) Verbraucherschutz durch Unterlassungsklagen (2007) 265 et seq.

117 Case C-191/15 VKI/Amazon, VbR 2016/97. See Stadler, VbR 2016, 169.

118 Article 6 (1) Rome II-Regulation provides for a special rule relating to non-contractual obligations arising out of an act of unfair competition. Previously, the German BGH had referred to the general rule in Article 4 Rome II-Regulation to determine the law applicable with regard to the concept of legal standing: BGH NJW 2009, 3371 (Air Baltic); NJW 2010, 1958 (British Airways); Stadler, VuR 2010, 83 et seq.

119 Case C-167/00 VKI/Henkel.

120 However, from the perspective of forums that follow a substantive-law approach to the notion of legal standing, one might try to achieve consistency with the RAD by way of interpreting the applicable foreign substantive law to inherently include the legal standing of foreign QEs, by integrating the procedural mechanism of mutual recognition afforded by Article 6 RAD, since the QE of the forum state, were it to bring action in the foreign state which' law applies, would have the legal standing to do so. In addition, the limited standing unter the rules regarding applicable law, might be circumvented by means of bringing joint (injunctive or redress) actions with at least one other QE designated by another member state for the purpose of bringing cross-border actions (Article 6 (2) RAD). See for recognition of legal standing with respect to cross-border actions Article 6 (1), (3) RAD.

"foreign" (see Article 4 Abs 2, see Chapter II).

Under the RAD member states are not only obliged to recognize the legal standing of QEs designated by another member state (Article 6), but also have to ensure that *domestic* representative actions can be brought (Article 4, Article 7 (1)). Moreover, the RAD assumes that consumers from different member states can be represented in a single (domestic) representative action (Recital 23) and – albeit hesitantly – gave up on the idea of protecting consumer interests along member state borders in favor of pursuing a more cross border-orientated agenda (see Articles 4 (2), 6 (2), 9 (3)[121]). This, in line with the general principles of effectiveness and equivalence, strongly suggests that domestic representative actions must not per se be precluded from seeking injunctive (or redress) measures beyond the forum state.

(b) Applicable Law and Infringement

The law applicable to assess whether Union law referred to in Annex I RAD is (about to be) infringed (re Amazon: the unfairness of contract terms) according to the ECJ in Amazon must be determined in accordance with the nature of the underlying practice the action aims to prevent as concerning contractual (Rome I-Regulation) or non-contractual obligations (Rome II-Regulation). According to the ECJ this independent attachment is necessary to ensure the uniform application of the Rome I and Rome II Regulations and to ensure that the applicable law does not vary regardless the kind of action chosen, i.e. concerning a collective or individual proceeding.

For example, the law applicable to the examination of the unfairness of contract terms must be determined in accordance with the Rome I-Regulation due to their contractual nature. The same applies to the assessment of whether practices infringe the Consumer Credit Directive, the Sale of Goods Directive or the Consumer Rights Directive, for instance concerning the information requirements for distance contracts under Article 6 CRD. The law applicable to assess the unfairness of a commercial practice according to the UCPD or in cases of product liability on the other hand, must be determined in accordance with the Rome II-Regulation.

Both, the Rome I and the Rome II-Regulation typically designate the law of the respective consumer member state to apply. See Chapter IV Point (2). As a consequence, multistate or unionwide injunctive (or declaratory) actions involve multiple laws as regards the substance of the measures sought.

Realistically, one may assume that if the infringement were to be assessed following a comprehensive comparative analysis of all laws applicable according to the Rome Regulations, it would render multistate actions more or less unfeasible – for QEs as well as for the court seised. However, for the purposes of injunctive actions[122] one may argue that a practice can be found to "constitute an infringement of Union law referred to in Annex I" within the meaning of Article 8 RAD on the basis of examining and applying said Union law alone, without having to additionally engage in in-depth examinations of the applicable national laws[123].

This follows from the fact that the scope of the RAD concerns infringements of Union law, that is to say harmonized law. While these Union laws referred to in Annex I like the general consumer acquis to date still lack an overarching horizontal and uniform approach to consumer protection due to their patchwork-nature, both regarding the sub-

121 Without prejudice to the rules regarding jurisdiction, the RAD assumes that consumers from different member states can be represented in a single (domestic) representative action: see Article 9 (3): mandatory opt-in-model for consumers who are not habitually resident in the forum state; Recital 23 clarifies that representative actions are considered domestic actions even if consumers from several member states are represented within that action; Article 4 (2): provides explicitly for consumer organisations that represent members from more than one member state to be eligible to be designated as QE for domestic and cross-border representative actions; Article 6 (2): action brought by several qualified entities from different member states in order to protect the collective interests of consumers in different member states; see Recital 31, according to which QEs from different member states should be able to join forces within a single representative action in a single forum, without prejudice to the right of the court seised to examine whether the representative action is suitable to be heard as a single representative action.

122 This approach does not extend to representative actions seeking redress measures, because remedies of individual consumers concerned necessarily involve the application of the law designated by the Rome Regulations.

123 See Halfmeier/Rott, VuR 2018, 243, 250. Skeptical Thönissen ZZP 2021, 279 et seq, who recognises that a determination of the infringement under EU-law would constitute a substantial harmonization which contradicts the PIL-rules under the Rome Regulations.

ject matter as well as underlying concepts and principles of general contract and tort law, they nonetheless ensure a certain minimum level of protection of consumers across the EU. Whenever a practice concerns an infringement pertaining to this core level of protection there is no risk that the assessment of said practice would lead to a different result under any national law, provided that the national laws meet or exceed the minimum standard set by Union law. As a result, even though the level of consumer protection still varies considerably from one member state to another, both QEs and the national courts will not necessarily have to engage in the burdensome task of actually applying multiple national laws. Instead, unionwide injunctive measures may be issued by merely establishing that the "floor" of protection provided for by Union law is not complied with.

This considerably facilitates multistate actions against infringements of fully harmonized Union law (Regulations such as the GDPR or the Air Passenger Rights Regulation 261/2004, Directives like the Consumer Rights Directive 2011/83/EU, the Consumer Credit Directive or the UCPD), but also applies to Directives that pursue a minimum harmonization of law (like the UCTD), insofar as an infringement concerns the minimum threshold of protection. However, if a practice cannot be found to violate the minimum standard, but rather concerns national "goldplating", that exceeds the minimum standard adopted by member states in order to guarantee a higher level of consumer protection, the assessment of a practice and whether injunctive measures will be issued by the court, can still vary across member states according to the applicable law. In this case, QEs and the courts are still required to substantially examine national laws in injunctive proceedings.

It is worth noting that EU-Directives – unlike Regulations – lack direct applicability and horizontal direct effect (Article 288 TFEU) and according to settled case-law, as a rule can be enforced by individuals in court only as an exception under certain (narrow) circumstances[124]. Concerning EU-Directives, the above suggested approach therefore obviously operates on the assumption that national law actually complies with the provisions set out in the Directive in question or at least could achieve consistency by way of conforming interpretation. However, the RAD can neither be construed as a means to promote the harmonization of (private) law (Article 2 RAD) nor to bypass the rules of private international law or to undermine the EU-principle according to which Directives lack horizontal direct effect. Consequently, one may argue for the additional need to establish that the applicable national laws at the very least are not (one may add: irretrievably by means of conforming interpretation, subject to the methodological limits of national law doctrine) in violation with Union law.

As discussed above, it is worthwile highlighting, that the rules regarding jurisdiction under the Brussels I bis Regime only allow for unionwide injunctive measures in the member state where the defendant is domiciled or at the place where the event giving rise to the damage occurred (Article 4, Article 7 (2) Brussels I bis Regulation, see Section I).

Also, the legal standing to seek multistate or unionwide injunctive measures, might require the QE to justify its taking action on behalf of consumers across the EU by displaying a correspondingly broad statutory purpose, subject to the lex fori (see Article 6 (3)).

However, if these requirements are met, unionwide measures do not depend on several QEs from different member states taking joint action. While teaming up in the face of different applicable laws may certainly prove itself to be a valuable strategy for QEs from different member states in order to join ressources and expertise, it is no prerequiste for multistate measures. Article 6 (2) RAD prima vista seems to indicate otherwise[125], but cannot be construed conclusively as a means to limit QEs to represent (the collective interests of) consumers resident in their own member state of designation, but rather intends to ensure admissibility and standing when it comes to foreign QEs. Hereby, the provision shows the concerns of the EU-lawmaker with respect to the member states' willingness to allow these actions.

Article 6 (2) gives a strong reference point that the claims of consumers from different Member States may be consolidated in a single representative action, avoiding a multiplicity of representative actions before the courts of different Member States and also a multiplicity of proceedings in the same forum (see Recitals 23, 31). Recital 31, according to which this is „without prejudice to the right of the court seised to examine whether the representative action is suitable to be heard as a single representative action", refers to possible rules on admissibility, provided for by the procedural law of the forum state, that might require a certain degree of similarity (in fact and in law) for

124 I.e. a provision of EU law may be capable of direct effect if it is clear and precise, unconditional and does not give the member states substantial discretion in its application.

125 Regarding Article 16 of the 2018 Proposal see Law 365 f: undermining clarity.

the representative action in order to be admitted to be heard as a single action (see Article 7 (3) RAD, referring to admissibility in accordance with the RAD as well as national law). However, according to Recital 12 such national rules must not hamper the effective functioning of the mechanism for representative actions; also, the principle of effectiveness applies. In view of the substantially harmonized character of the Union law provisions referred to in Annex I, the multiplicity of applicable laws alone should not *per se* render representative actions "unsuitable" to be heard as a single representative action, precluding QEs from seeking multistate injunctive measures. For injunctive actions in particular this applies all the more, considering that the different laws might not even need to be examined in order to establish unionwide infringements within the meaning of Article 8 RAD, as noted above.

Conversely, it is equally important pointing out, that no QE is obliged to include similarly affected consumers from other member states when seeking injunctive (or redress) measures. Article 7 (2) RAD requires the QE to „provide the court ... with sufficient information about the consumers concerned by the representative action" for the very purpose of „allowing the court to determine jurisdiction and applicable law" (Recital 34[126]). Specifically as regards injunctive actions, providing sufficient information about the „group of consumers concerned by the representative action" is also required in reference to the „possible suspension or interruption of limitation periods applicable to subsequent claims for redress" (see Article 16 (1) RAD)[127]. This – in line with general principles of civil procedural law – strongly suggests that the QE may choose to limit its representation to certain affected markets, in order to prioritize the protection of consumers in its own designating member state over „foreign" consumers and to avoid the complexity of several applicable laws. This means the RAD still allows for QEs to *limit* the effects of injunctive actions to consumers of their own member state (typically though not necessarily this will be the forum state) by way of determining the subject matter of the dispute, seeking correspondingly limited injunctive measures[128].

For example, if a French trader advertises and sells her products in France, Germany and the Netherlands, falsely claiming the product is a means to cure cancer, a French QE could bring a representative action in France seeking to prohibit this practice in France, Germany and the Netherlands on the basis that it constitutes an infringement of No 17 Annex I UCPD, thus violating French, German and Dutch law, respectively. The same is true for a German or a Dutch QE. However, a German QE suing in Germany could only seek to prohibit this practice in Germany, because the German courts lack jurisdiction as regards the protection of French and Dutch consumers.

If an Italian trader, distributing his products unionwide, uses boilerplate choice of law-terms in consumer contracts, designating Italian law to apply without informing consumers that they are also protected by the mandatory provisions of their home member state under Article 6 (2) Rome I Regulation, an Italian QE could bring an action in Italy seeking to prohibit this practice in all member states by way of establishing that these terms are unfair according to the minimum standard provided for by the UCTD. However, the Italian QE could choose to seek to prohibit this practice only as far as Italian consumers are concerned.

IV. REDRESS ACTIONS: LEGAL STANDING AND APPLICABLE LAW

1. Legal Standing

The reasoning of the ECJ in the Amazon case extends to redress actions under Article 9 RAD. For the purpose of legal standing – if it were to be construed as a matter of substantive law according to the national law of the forum state – redress actions just like injunctive actions may be considered as non-contractual in nature and are always determined according to Article 4, Article 6 Rome II-Regulation, which basically designates the law of the country

126 According to Recital 34, providing sufficient information about the group of consumers concerned by the representative action (for injunctive measures) is also required in reference to the „possible suspension or interruption of limitation periods applicable to subsequent claims for redress" (Article 16 (1) RAD).

127 Notably, the scope of a this effect of suspension or interruption of limitation periods applicable as regards redress actions is unclear. The referral to „consumers concerned by that representative action" might be understood as all consumers (potentially) concerned regardless whether they register (opt in or not opt out) to be represented or may only refer to the consumers who expressed their wish to be represented in that action. For the latter one may point to Recital 34 and the objective of Article 16 which aims at suspending limitation periods in order to ensure redress. On the other hand the wording of paragraphs (1) and (2) of Article 16 is identical. See Meller-Hannich, VbR 2021, 43; Leupold in Reiffenstein/Blaschek (Hrsg), Konsumentenpolitisches Jahrbuch 2021, 123 et seq.

128 See Case C-511/17 Lintner acknowledging the limits to examine the unfairness of contract terms under the UCTD due to the subject matter of the dispute, understood as being the result that a party pursues by its claims.

of residence of the protected consumers. Prima vista one might argue for applying the Rome I-Regulation as far as contractual claims of individual consumers[129] are concerned. However, for the reasons discussed above applying the Rome II-Regulation in line with the Amazon-ruling seems more consistent with respect to the nature and objectives of representative actions[130].

As discussed above in relation to injunctive actions, the construction of legal standing as a matter of substantive law would limit redress actions to representing consumers who have their habitual residence in the forum state. With regard to the representation of consumers from other member states, whose claims are typically not governed by the law of the forum state, but by the law of their home member state (see Point (2)), the QE would lack legal standing.

For example, if a German QE brings a representative action against a French manufacturer in Germany, seeking redress for consumers in Germany and France, the German court would apply German law (the lex fori) as regards the conception of legal standing. If it were to be construed as a matter of substantive law under German law (like concerning injunctive actions de lege lata), the court would apply German law regarding the legal standing to seek redress measures for German consumers and French law regarding the legal standing to seek redress for French consumers according to Article 6 Rome II-Regulation. The legal standing of the QE requires German law to apply since French substantive law does not provide for the legal standing of QEs. As a result, the court would reject the action with regard to redress measures for French consumers. If instead of a German QE it were a French QE seeking redress for German and French consumers against a German manufacturer in Germany, the legal standing of the French QE concerning German consumers would equally follow from the application of Article 6 Rome II-Regulation, concerning French consumers it would follow from Article 6 RAD, imposing the mutual recognition of legal standing for the purpose of cross-border actions.

However, just like as regards injunctive actions, such limited legal standing concerning domestic actions most likely violates the RAD, whenever the Brussels I bis Regime provides for jurisdiction to include consumers from other member states. Moreover, without prejudice to the rules regarding jurisdiction, the RAD explicitly assumes that consumers from different member states can be represented in a single (domestic) representative action (Recital 23, 31; see Article 9 (3), Article 6 (2), Article 4 (2)). Finally, subjecting the scope of domestic actions to these limitations yet not cross-border actions might cause concern not just in light of the principle of effectiveness, but also from a member states' constitutional law perspective[131].

2. Applicable Law Regarding Consumer Remedies: More Fracturing

According to Article 2 (2) RAD the (contractual and non-contractual) remedies available to consumers under Union or national law for the infringements of provisions referred to in Annex I RAD are not affected by the RAD. Article 9 (1) RAD stipulates that redress measures require traders to provide consumers concerned with remedies „as available under Union or national law". Therefore, in line with the Amazon-ruling and Article 2 (3) RAD, the law applicable to the individual claims of consumers represented in the action has to be determined independently according to the Rome I or Rome II Regulation, depending on the matter at stake. This independent attachment provides for a uniform application of the Rome I and Rome II Regulations, ensuring that the applicable law concerning consumer remedies does not vary regardless whether they are adjudicated on in individual or representative proceedings.

The VKI/VW-decision prima vista could suggest, one might argue for a „universal" application of Article 6 Rome II-Regulation as a special rule when it comes to infringements that likely affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market. However, the case concerns claims based on tort law/delict, i.e. the attachment in question „only" concerned the application of Article 6 vs Article 4 Rome II-Regulation, while the Amazon-ruling, referencing Article 6 Rome II-Regulation as well, conclusively clari-

129 Article 6 Rome I Regulation refers to the residence of the consumer under certain circumstances and therefore will often concur with the applicable law according to Article 6 Rome II-Regulation.

130 Baetge, ZEuP 2011, 930, 939; Thönissen, ZZP 2021, 283.

131 The constitutional principle of equality requires that equal treatment be applied to equal situations; see e.g. in Germany Article 3 GG, in Austria Article 7 B-VG, see also Article 20 of the Charter of Fundamental Rights.

fied the contractual nature of remedies concerning unfair contract terms which leads to the application of Article 6 Rome I-Regulation. Also, the opposing position would essentially provide for particular PIL-rules governing representative actions, since infringements of most if not all of the provisions referred to in Annex I RAD are „likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market", which is neither consistent with the ratio of Amazon nor with Article 2 (3) RAD.

That is to say, according to the current rules, claims of consumers who are domiciled in different states or have suffered damage in different states, will almost always be governed by different laws.

With respect to non-EU-traders it is worth noting that according to Article 2 Rome I and Article 3 Rome II Regulation „any law specified by this Regulation shall be applied whether or not it is the law of a Member State". The Rome Regulations as „lois uniformes" follow the principle of universal application and designate the applicable law in both contractual and non-contractual matters whenever a claim is brought before the court of a Member State, regardless where the defendant is domiciled. See for jurisdiction under the Brussels Regime Section I Chapter III Point (2).

(a) Claims based on Contract Law

(aa) General Rule

Article 6 (1) of the Rome I Regulation designates the law of the **member state where the consumer has his/her habitual residence** to apply to contractual obligations, if the trader pursues his commercial or professional activities in this country (lit a), or by any means, directs such activities to (or several countries including) that country (lit b), provided that the contract falls within the scope of such activities[132].

Under Article 6 (2) Rome I-Regulation **choice of law-agreements** (typically designating the law of the member state in which the trader is established) may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of his home member state which in the absence of choice would have been applicable.

As a result, contractual remedies of consumers domiciled in different Member States are governed by different laws even if the contracts provide for a (enforceable) choice of law clause, unless the chosen law provides the same level of protection as the law of the consumer's habitual residence. Moreover, choice of law-terms which have not been individually negotiated, rarely comply with the standards set out in the Unfair Contracts Terms Directive. See below lit (cc).

Examples of possible redress measures regarding contractual matters within the meaning of the Rome I-Regulation concern claims for reimbursement of payments based on (non-binding) unfair contract terms[133], the remedies for lack of conformity – i.e. repair, replacement, price reduction or contract termination – under Article 13 ff Sale of Goods-Directive (EU) 2019/771[134] or price reduction and compensation under Article 14 Package Travel Directive (EU) 2015/2302. However, the distinction between contractual and non-contractual obligations within the meaning of the Rome Regulations may not always be as conclusive and prove trickier in certain cases. Notably, uniform jurisdiction over representative actions including all of these claims regardless of their (contractual or non-contractual) basis follows from the non-contractual nature of redress actions (see above Section I Chapter III). A uniform determination of the applicable law on the other hand may be achieved by way of „escape clauses" provided for by

132 If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional is determined pursuant to Articles 3 and 4 Rome I-Regulation (Article 6 (3)), i.e. typically the law of the country where the trader has his habitual residence (the country of the closest connection) applies.

133 The law applicable to a contract by virtue of the Rome I-Regulation also governs the consequences of nullity of the contract according to Article 12 (1) lit e Rome I-Regulation; to that effect see also Article 10 (1) Rome II-Regulation regarding non-contractual obligations arising out of unjust enrichment if they concern a contract between the parties. For claims of restitution under the UCTD see Joined Cases C-154/15, C-307/15 and C-308/15 Gutierrez Naranjo, paragraphs 62 and 63; Case C-483/16 Sziber, paragraph 53.

134 According to the ECJ, Article 7 (1) Brussels I bis Regulation does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose; Case C-26/91 Handte. On the other hand: According to Article 12 (1) Rome II-Regulation, the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract (culpa in contrahendo), regardless of whether the contract was actually concluded or not, is the law that applies to the contract or that would have been applicable to it had it been entered into.

the Rome II-Regulation. Furthermore, it is worth noting that the possible effects of different attachments for representative actions are typically of limited relevance, because both the Rome I and Rome II-Regulation designate the same law to apply. See concerning insurance contracts below in the text.

Article 6 (3) Rome I-Regulation sets out certain **exceptions** to the protection provided for by Article 6 (1) and (2). According to the case law to date these exceptions are to be construed restrictively; they primarily concern:

(a) a **contract for the supply of services** where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

According to the ECJ[135], this exclusion is justified by the fact that, in the case of contracts for the supply of services to be supplied exclusively outside of the consumer's country of residence, the consumer cannot reasonably expect that the law of his home State be applied in derogation to the general rules of Articles 3 and 4. The words „are to be supplied", within the meaning of Article 6 (4) (a), do not refer to a contractually stipulated obligation to supply services in a particular place, but require it follows from the very nature of the contracted services that they can be supplied, as a whole, only outside the Consumer's State of residence. For the services to be supplied „exclusively" outside of the consumer's member state of residence, the consumer must have no possibility of receiving them in his State of residence and must travel abroad in order to do so. Consequently, the ECJ ruled that a trust agreement pursuant to which services (in this particular case: administering the trust property in return for remuneration) are provided in the country of the consumer's residence at a distance, from another country, is not excluded under Article 6 (4) (a).[136]

(b) a **contract of carriage** other than a contract relating to package travel (Directive (EU) 2015/2302).

The law applicable to contracts of carriage of passengers is excluded from Article 6 Rome I-Regulation[137]. According to Article 5 Rome I-Regulation the law of the country where the passenger has his habitual residence applies, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence applies.

Article 5 (2) Rome I-Regulation provides for limitations on choice of law-agreements which differ from Article 6 (2) leg cit: The parties may choose as the law applicable only the law of the country where: (a) the passenger has his habitual residence; (b) the carrier has his habitual residence; (c) the carrier has his place of central administration; (d) the place of departure is situated; or (e) the place of destination is situated. If and under what circumstances choice of law-terms by way of analogy to the Amazon-ruling may (additionally) considered unfair under the UCTD, remains unclear.

(c) a contract relating to a right in rem in **immovable property** or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC.

Recently, the ECJ[138] held that a contract of sale, including a lease agreement and a service agreement, relating to trees planted on leased land for the sole purpose of being harvested for profit, does not constitute a 'contract re-

135 Case C-272/18 VKI/TVP, also with regard to the per se-exclusion from the scope of the Rome I-Regulation concerning company law-issues in Article 1 (2) lit f. According to the ECJ, the mere fact that there is a link between a contract and such 'questions governed by the law of companies' does not have the effect of excluding from the scope of the Rome I Regulation the obligations arising from that contract (here: contractual obligations, which are based on a trust agreement for the purposes of administering shares in a limited partnership). Regarding obligations arising from a loan agreement concluded by a company before its cross-border acquisition see Case C483/14 KA Finanz.

136 Case C-272/18 VKI/TVP: The fact that the amounts required for subscription to the partnership were paid into fiduciary accounts held by TVP in Austria, that it paid dividends to Austrian consumers into Austrian accounts, that it fulfils its information obligations arising from the trust agreement by sending reports on its fiduciary management to Austrian consumers in Austria and that it has a website for Austrian consumers on which they may consult information and exercise their voting rights, according to the ECJ, tend to show, that those services are supplied at a distance in the country in which the consumer is resident.

137 Concerning the special jurisdiction over consumer contracts see the similar exclusion in Article 17 (3) Brussels I bis Regulation („contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation").

138 Case C-595/20 ShareWood Switzerland AG: In the main proceedings an Austrian consumer entered into a framework agreement and four purchase contracts for the purchase of teak and balsa trees in Brazil with ShareWood, a company established in Switzerland. The investment model was supposed to constitute profits by harvesting and selling the trees.

lating to a right *in rem* in immovable property or a tenancy of immovable property' within the meaning of Article 6 (4) lit c Rome I-Regulation.

(bb) Insurance Contracts

Another important exception concerns insurance contracts[139], which are governed exclusively by Article 7 Rome I-Regulation, by way of preempting Article 6 Rome I-Regulation (see Recital 32)[140]. Article 7 Rome I-Regulation as a rule designates the law of the country in which the risk is situated at the time of conclusion of the contract, which typically refers to the law of the country of habitual residence of the policy holder (Article 13 (13) lit d and (14) lit a Solvency II). Regarding infringements of the (pre-contractual) information requirements under Article 183-186 Solvency II (referred to in Annex I (28) RAD), including the right to cancellation of policy holders concerning life insurance-contracts (referred to in Annex I (28) RAD), the question whether potential remedies of the policyholders under national law may be considered as concerning contractual or non-contractual obligations within the meaning of the Rome Regulations ultimately is not of relevance: If they were deemed to constitute obligations arising out of culpa in contrahendo, Article 12 Rome II-Regulation determines the law „that applies to the contract or that would have been applicable to it had it been entered into", hence referring to Article 7 Rome I-Regulation. Also, specifically concerning „the legal effects and the conditions of cancellation", the lex specialis-rule in Article 186 (1) Solvency II determines the law applicable to the contract.

Notably, Article 7 (3) Rome I-Regulation allows for member states to „grant greater freedom of choice of the law applicable to the insurance contract" than choosing the law of the Member State where the risk is situated (lit a) or the law of the country where the policy holder has his/her habitual residence (lit b) (see e.g. § 35a of the Austrian IPRG implementing this option[141]). However, it remains unclear if choice of law-terms in analogy to the Amazon-ruling may (still) be deemed unfair and therefore void under the UCTD. Also, it is not entirely certain to what extent Article 7 Rome I-Regulation preempts Article 6 Rome I-Regulation when it comes to the effect of choice of law-clauses. The fact that contracts of carriage (Article 5) are explicitely excluded from the scope of Article 6 Rome I-Regulation under its paragraph (4) lit b, while insurance contracts are not, may suggest that insurance *consumer* contracts are still (in addition to the increased freedom granted in Article 7 (3)) subject to the limitations set out in Article 6 (2) Rome I-Regulation (however, pointing to the contrary Recital 32 Rome I-Regulation: „Article 6 should not apply in the context of those particular contracts").

Concerning similar questions arising in relation to infringements of the information requirements and conduct of business rules for **insurance distribution** set out in Article 17-24, 28-30 IDD (referred to in Annex I (55) RAD), it is worth highlighting that according to Article 22 (2) IDD stricter national provisions regarding mandatory advice for the sales of insurance products under Article 20(1) have to be complied with by insurance distributors, when concluding insurance contracts with customers having their habitual residence or establishment in that Member State. This indicates that individual remedies of customers may be determined according to the law of the country of their residence as well. Additionally, depending on the insurance distributor in question (see Article 2 (1) (8) IDD: any insurance intermediary, ancillary insurance intermediary or insurance undertaking) and the respective underlying

139 For jurisdiction in matters relating to insurance see Section I Chapter IV Point (7).

140 See Article 6 (1) Rome I-Regulation: „Without prejudice to Article 5 and 7..."; Recital 32 Rome I-Regulation: „Article 6 should not apply in the context of those particular contracts". On possible limitations regarding the application of Article 6 (2) Rome I-Regulation see below in the text.

141 Paragraph (2) of the Austrian IPRG however, adopts certain limitations to choice of law-agreements equivalent to the ones provided for by Article 6 (2) Rome I Regulation, stipulating that such a choice may not have the result of depriving the policy holder of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable according to Article 7 Rome I-Regulation. As a result, one may argue for the Amazon-ruling to apply by way of analogy for the purpose of legal coherence, rendering choice of law-clauses in consumer contracts void if they mislead the consumer by not informing him about the applicability of the protective provisions of his home member state. See to that effect in the context of infringements of the information requirements regarding the right to cancellation the Austrian Supreme Court 16. 9. 2020, 7 Ob 117/20m and 24. 2. 2021, 7 Ob 19/21a, according to which choice of law-terms in contracts concluded between German insurers and Austrian policy holders, designating German law to apply, are void. However, the court argues that the option granted to the member states with regard to expanding the legitimacy of choice of law-agreements does not extend to life insurance-contracts governed by Article 7 (3) lit c Rome I-Regulation, because the option only refers to „cases set out in points (a), (b) or (e)". The court therefore concludes, that § 35a of the Austrian IPRG does not apply in this case. See on the one hand, approving of this reasoning Heindler, Kollisionsrechtliche Fragen der Personenversicherung, ZVers 2021, 205 (211), on the other objecting to it Gruber/Konwitschka, Die Rechtswahl nach § 35a IPRG bei Lebensversicherungsverträgen, ZVers 2022, 65. According to the position taken here, the referral to the Amazon-ruling und the standards set out in the UCTD, renders this controversy over how to construe Article 7 (3) Rome I-Regulation moot.

contractual relationship between the parties, the law applicable to remedies available to consumers for infringements of the relevant IDD-provisions stated above, is determined in accordance with Article 6 or Article 7 Rome I-Regulation (see Article 12 (1) Rome II-Regulation referring to the law that applies to the contract for the purpose of culpa in contrahendo-obligations).

(cc) Choice of Law Clauses and Waivers of Protection for the sake of Uniformity

Choice of law-clauses traditionally give rise to a vast number of highly complex issues. Based on experience, QEs seek to avoid having to engage with foreign law, since it is tedious, time-consuming and costly. However, for the purpose of representative actions concerning contractual matters within the meaning of Article 6 Rome I-Regulation[142], choice of law-clauses are not likely to pose a significant challenge to effective enforcement:

With respect to the **legal standing of QEs**, the ECJ ensured re Amazon that choice of law-agreements in individual consumer contracts may be disregarded entirely by way of referring to Article 6 Rome II-Regulation instead of applying the general rule under Article 4 Rome II-Regulation[143] which in its paragraph (3) provides for an escape clause according to the notion of a „manifestly closer connection" with another country. As a result, a trader has no means of preventing representative actions by way of choice of law-clauses. The ECJ explicitly refers to Article 6 Rome II-Regulation as being better and specifically suited for the purpose of representative actions in the collective interests of consumers[144]. This reasoning applies to injunctive actions regardless whether they concern unfair contract terms (like in Amazon) or other practices infringing Union law such as the Sale of Goods-Directive or the Consumer Rights Directive. All of these practices, regarding contractual matters within the meaning of the Rome I-Regulation, are covered by „unfair competition" within the meaning of Article 6 (1) Rome II-Regulation, as – just like the ECJ pointed out with respect to the use of unfair contract terms – they are „likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market". This – with respect to the legal standing of QEs – extends to representative redress actions.

With respect to the **law applicable** one needs to distinguish:

For **injunctive actions**, choice of law-clauses are not of any relevance, if the practice in question can be shown to constitute an infringement of harmonized Union law, that is to say where the minimum standard of consumer protection is concerned. This aspect, again, may promote seeking unionwide or multistate measures. See Chapter III Point (3).

Moreover, it must be observed that according to Article 6 (2) Rome I-Regulation choice of law-agreements may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of his home member state which in the absence of choice would have been applicable. This might considerably facilitate representative proceedings, because it means that QEs and the courts seised, when confronted with choice of law-agreements designating the law of another member state, may bypass an assessment of the practice in question according to the law chosen, but instead resort to assessing the practice according to the (mandatory) provisions of the consumer member state at first. Since most provisions concerning the protection of consumers – even if exceeding the minimum standard provided for by Union law – will be deemed compulsory in nature under national law, as a result, engaging in an examination of the chosen (foreign) law will frequently prove unnecessary because the injunctive measure as regards the protection of consumers in the forum state may already be issued on the basis of an infringement of the national law of the forum state[145].

Conversely, in the (typically less likely) event that the chosen law provides for a higher level of consumer protection than the member state of the consumer, the chosen law prevails.

142 With respect to infringements of Union law that concern non-contractual matters the issue of choice of law agreements apparently does not arise.

143 Previously, the German BGH had referred to the general rule in Article 4 Rome II-Regulation to determine the law applicable with regard to the concept of legal standing: BGH NJW 2009, 3371 (Air Baltic); NJW 2010, 1958 (British Airways); see Drexl in MüKo BGB, Article 6 Rom II-VO Notes 138, 141; Stadler, VuR 2010, 83 et seq.

144 See Stadler, VbR 2016, 169: no means of manipulating the applicable law.

145 See to that effect OGH 25.2.2021, 3 Ob 179/20z VbR 2021/50; obiter 2 Ob 155/16g VbR 2018/7.

For example, assuming the existence of (enforceable) choice of law-agreements choosing Dutch law to govern contracts between a Dutch trader and Austrian consumers: If an Austrian QE sues the Dutch trader in Austria, seeking to prevent unfair contract terms from being included in contracts with Austrian consumers, the Austrian court may issue an injunction solely based on the finding that these terms are deemed unfair under Austrian law. This applies even if the level of consumer protection under Austrian law exceeds the one provided for by the UCTD and regardless whether the contract terms would be deemed unfair according to the chosen Dutch law, too. Conversely, if Dutch law provided a higher level of consumer protection than Austrian law, i.e. if the terms were deemed unfair under Dutch law but not under Austrian law, the Austrian court would issue an injunction based on Dutch law.

Notably, if a QE – for instance a Dutch QE or a „supranational" QE like BEUC – sued in the Netherlands seeking to prevent the Dutch trader from including terms deemed unfair according to the UCTD in any contract with consumers EU-wide, the Dutch court could limit its examination regarding the unfairness of the terms to apply the chosen (Dutch) law with respect to all affected consumers.

For **redress actions** on the other hand, there is no such „shortcut" to redress. The (contractual) remedies of represented consumers need to be determined according to the applicable (national) law, subject to choice of law agreements pursuant to Article 6 Rome I-Regulation.

However, with respect to both injunctive as well as redress actions it is worthwhile highlighting that choice of law-clauses which have not been individually negotiated will often be **unenforceable according to the Amazon-ruling**[146]: The ECJ held that a choice of law-term is unfair within the meaning of Article 3 (1) UCTD, if it does not inform the consumer that he/she still enjoys the protection of the mandatory provisions of the law of his/her home member state under Article 6 (2) of the Rome I Regulation. Without this information, according to the ECJ, the term may mislead the consumer by giving him/her the wrong impression that only the chosen law applies to the contract[147].

Choice of law-clauses declared unfair and void are not binding on consumers under Article 6 (1) UCTD and may – as a rule – be disregarded entirely according to settled case-law[148]. This applies in representative proceedings as well; the consumer protection under the UCTD does not require the individual consumer to pursue remedies, but for instance also applies in the event the claim was assigned to a third party[149].

Consequently, QEs have a choice[150]: On the one hand they may have the court disapply the unfair clauses, resulting in the application of the law of the member state of the consumer pursuant to Article 6 (1) Rome I-Regulation. On the other, they may decide to oppose the non-application of the unfair term[151]. In light of the protective objective of Article 6 Rome I Regulation and with a view to case law on similar issues pertaining to the UCTD, one may argue that QEs may also choose not to invoke the protection provided for by Article 6 (2) Rome I Regulation. Thus, by way of bypassing the application of otherwise overriding mandatory provisions of national consumer law provides for the application of a uniform law (i.e. the chosen law), which may facilitate and fast-track proceedings in certain cases and ensures that consumers from different member states have the same remedies. This may be advisable especial-

146 Confirmed in Case C272/18 VKI/TVP.

147 According to the UCTD-Guidance page 14, the same logic applies where the law of a non-EU Member State is chosen by way of a contract term within the meaning of Article 3 (1) UCTD.

148 The remainder of the contract continues to bind the parties in this case since it is capable of continuing in existence without the unfair choice of law-clause. Joined Cases C-96/16 and C-94/17 Banco Santander Escobedo Cortés. See the leading Case C-618/10 Banco Español de Crédito; confirmed in e.g. Case C-488/11 Asbeek Brusse; Case C-26/13 Kásler and Káslerné Rábai; Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 Unicaja Banco y Caixabank; Case C-421/14 Banco Primus; Joined Cases C-154/15, C-307/15 and C-308/15 Gutierrez Naranjo.

149 Rott, Cross Border Collective Damage Actions in the EU, in Micklitz/Cafaggi (eds), New Frontiers of Consumer Protection – The Interplay between Private and Public Enforcement (2009) 379 (392); Stadler in Extraterritoriality and Collective Redress 204 et seq.

150 In light of the case law, one may assume that the ECJ will extend his rulings on the ex officio control of the unfairness of contract terms to representative proceedings, arg mandatory rules of public policy which apply ex iure and which do not depend on any party invoking it.

151 See with regard to individual consumers Case C-243/08 Pannon GSM; joined Cases C-70/17 and C-179/17 Abanca Corporación Bancaria and Bankia; Case C-488/11 Asbeek Brusse.

ly in cases where the chosen law by comparison has no or only negligible adverse affects on consumers. However, under settled case-law, such declaration requires that the consumer has been informed of the unfair nature and non-binding character of the choice of law-clause and of his/her rights. In the context of representative actions seeking remedies according to the chosen law only, this requirement likely translates into granting the consumer an option to decide whether to opt in or not opt out after having been informed accordingly.

See for choice of law-clauses concerning insurance and carrier contracts that are excluded from the scope of Article 6 Rome II-Regulation above lit (aa).

Similarly, concerning **contractual consumer claims** in general, that is to say in the absence of (un-)enforceable choice of law-agreements, QEs might – for the sake of uniformity – choose not to invoke the special protection under Article 6 (1) Rome I Regulation in favor of having the **trader's law** applied (Article 4)[152]. The viability of such an option for the purpose of collective redress depends entirely on whether Article 6 may be construed as being open to a (sufficiently informed) waiver of protection on behalf of consumers at all. At first sight, the issues raised by a possible default-applicability of Article 4 Rome I Regulation seem to resemble those in relation to unfair contract terms. As to the latter, the Court already ruled in favor of a consumer's right to choose and not have unfair terms disapplied[153], and thus acknowledged that the protection provided for by the UCTD may be waived despite its mandatory nature. In particular since the Court's ruling in the Amazon Case, according to which both Union instruments apply in a complementary manner, a similar approach in relation to Article 6 Rome I-Regulation stands to reason. Still, the issue requires further clarification[154].

Also, it is worth highlighting that this means of circumvention as regards issues raised by the applicability of multiple laws is confined to contractual remedies and does not concern non-contractual remedies to be determined under the rules of Rome II[155].

(b) Claims based on Tort / Delict Law

(aa) General Rule

For non-contractual obligations arising out of a tort/delict, Article 4 (1) of the Rome II Regulation follows the lex loci damni-principle and, as a general rule, designates the law of the country as applicable in which the damage occurs, irrespective of the country/countries in which the indirect consequences occur[156]. Unlike under Article 7 (2) Brussels I bis Regulation (see Section I Chapter IV Point (5)), the country in which the event giving rise to the damage occurred, is not relevant for the purpose of determining the applicable law and does not provide QEs with a choice on the applicable law.

Apart from that difference, one may assume that the case law relating to Article 7 (2) Brussels I by analogy largely applies to determining the applicable law under Article 4 Rome II-Regulation, since the ECJ frequently refers to the requirement of consistency laid down in Recital 7 Rome II-Regulation for the purpose of interpretation of the Rome

152 See the request for a preliminary ruling by the Austrian Superior Court of Vienna (OLG Vienna) from 22.6.2022, 33 R 4/22h. The case referred concerns an Austrian consumer who seeks to collect casino winnings from an online trader domiciled in Malta; while Article 1271 of the Austrian Civil Code (Art 6 Rome I) renders gambling debts unenforceable, Maltese law does not provide for such a rule. Of course, for the purpose of collective redress the significance of the „waiver-issue" raised in this case reaches far beyond scenarios where the trader's law is more favourable.

153 Case C-243/08 Pannon GSM. See subsequent confirmation, for instance, in Case C-488/11 Asbeek Brusse, paragraph 49; Case C-618/10 Banco Español de Crédito, paragraph 63; Case C-472/11 Banif Plus Bank, paragraph 27; Joined Cases C-70/17 and C-179/17 Abanca Corporación Bancaria and Bankia, paragraph 63.

154 See the request for a preliminary ruling by the Austrian Superior Court of Vienna (OLG Vienna) from 22.6.2022, 33 R 4/22h.

155 See in relation to a pending collective action against VW OLG Braunschweig, decision from 6.5.2022: the plaintiff (Verbraucherzentrale Südtirol e.V.) requested the application of German delictual law, the court decided that Italian law applies.

156 According to paragraph 2, if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Paragraph 3 provides for an exception to the general rule established in paragraph 1 in cases „where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected" with another country and specifies, that a manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Regulations[157].

Therefore, it is worth pointing out, that the ECJ, concerning Article 7 (2) Brussels Regulation, differentiates between cases of financial investments with no connection to a tangible asset on the one hand, and cases like **Dieselgate** on the other, that concern „material damage" resulting from a loss in value of each vehicle, i.e. a tangible asset. Consequently, concerning the latter, the damage suffered by the final purchaser (that is to say having purchased a vehicle for a price higher than its actual value) according to the ECJ[158] – referencing Article 6 Rome II-Regulation – is neither indirect nor purely financial and occurs when such a vehicle is purchased from a third party.

Concerning claims of investors on **financial markets** (e.g. prospectus liability cases[159]), who – not just under doctrines of national law, but actually – suffer losses of a purely financial nature, locating the place where the damage occurred is particularly controversial and has been subject to numerous decisions in relation to Article 7 Brussels I bis Regulation, which however, to date did not succeed in establishing legal certainty. According to said case law the place where the damage occurred is not to be construed so extensively as to encompass any place where the adverse consequences can be felt (Case Löber[160]) and does not per se refer to the place where the claimant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets (Cases Kronhofer[161], Universal Music). In its latest decision re Vereniging van Effectenbezitters[162] the court held, that the direct occurrence in an investment account of purely financial loss resulting from investment decisions taken as a result of information which is easily accessible worldwide but inaccurate, incomplete or misleading from an international listed company does not allow the attribution of international jurisdiction, on the basis of the place of the occurrence of the damage, to a court of the Member State in which the bank or investment firm in which the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State. Conversely, in the case of a listed company, only the jurisdiction of the courts of the Member States in which that company has complied, for the purposes of its listing on the stock exchange, with the statutory reporting obligations can be established on the basis of the place where the damage occurred. The decision prominently argues that the company could not reasonably foresee the existence of an investment market and incur liability otherwise.

(bb) Product Liability

Similarly, in product liability cases – i.e. non-contractual obligations arising out of damage caused by a product – Article 5 of the Rome II Regulation refers to the habitual residence of the alleged victim when the damage occurred, failing that the place where the victim had acquired the product, or – failing that – the place where the damage occurred; all of these references additionally afford that the product was marketed in the respective country. However, if the person claimed to be liable could not reasonably foresee the marketing of the product, or a product of the same type, in these countries, Article 5 refers to the law of the country in which the allegedly liable person is habitually resident[163].

Notably, the Product Liability Directive 85/374/EWG, referred to in Annex I (1) RAD, only applies to damage caused by a defective product to „any item of property other than the defective product itself" according to its Article 9 (b) in conjunction with its Article 1. Consequently, (non-contractual) compensation claims against the producer concerning damage to the defective product itself – like in the Dieselgate case[164] –, are not governed by Article 5 Rome

157 See Case C-343/19 VKI/VW.

158 See Case C-343/19, VKI/VW; see on the other hand with respect to cases of financial investments with no connection to a tangible asset: Case C168/02 Kronhofer; Case C375/13 Kolassa; Case C304/17 Löber.

159 Prospectus liability cases are not excluded from the scope of the Rome II-Regulation under Article 1 (2) lit c leg cit.

160 Case C304/17 Löber.

161 Case C168/02 Kronhofer; Case C-375/13 Kolassa.

162 Case C-709/19.

163 Article 5 (3) Rome II-Regulation also provides for an escape clause referring to the principle of the closer connection: Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

164 See Halfmeier, Schadensersatzansprüche gegen Fahrzeughersteller im Abgasskandal, in: Leupold (ed), Forum Verbraucherrecht 2018, 2019, p 13, 18 et seq; Thomale, ZVglRWiss 119 (2020) 59, 70.

II-Regulation, but by Article 6 Rome II-Regulation. See to the ECJ-ruling in the VKI/VW-case below lit (c).

(cc) Environmental Damage

Concerning environmental damage cases (including damage sustained by persons or property as a result) Article 7 of the Rome II Regulation, as an exception, follows the principle of ubiquity and designates either the law pursuant to Article 4 (1), or – depending on the choice of "the person seeking compensation for damage" – the law of the country in which the event giving rise to the damage occurred. This may considerably facilitate collective redress and provides QEs with a (rare) opportunity to pursue a representative action seeking multistate or unionwide redress measures exclusively and uniformly based on the law of the country in which the event giving rise to the damage occurred. While the redress action by way of determining its subject matter may certainly be limited to represent consumers who choose to have their claims determined under said law, it is worth noting that the choice provided for by Article 4 (1) is still not the QE's but the consumers'; the consumers still have the choice, exercising it by way of opting in or deciding not to opt out[165].

(dd) Antitrust Damage

Regarding non-contractual claims in antitrust-cases, Article 6 (3) of the Rome II Regulation designates the law of the country where the relevant market is affected. However, if the markets in more than one country are affected, Article 6 (3) lit b) allows the claimant to choose the law of the forum state, provided that the forum is the member state where the defendant is domiciled, and that the market in that Member State is amongst those directly and substantially affected by the restriction of competition.

However, it is worth highlighting, that infringements of antitrust law governed by Article 101, Article 102 TFEU, are not subject to representative actions under the RAD according to Article 2 (1), Annex I RAD, which is particularly unsatisfying considering that – contrary to initial anticipations – the scope of the Directive 2014/104/EU on Antitrust Damages ultimately was limited to include private enforcement of Article 101, 102 TFEU, leaving aside collective redress mechanisms (Recital 13 of the Directive 2014/104/EU)[166].

(c) Unfair Competition: A Silver Lining?

According to Article 6 (1) Rome II-Regulation the law applicable to non-contractual obligations arising out of an act of unfair competition is the law of the country „where competitive relations or the collective interests of consumers" are, or are likely to be, affected. The so-called effects-principle results in the application of the law of the country where affected consumers are domiciled. Article 6 (1) therefore expresses, in the specific field of unfair competition, the *lex loci damni* principle laid down in Article 4 (1) (see Recital 21). See above lit (aa).

In its VKI/VW-ruling, the ECJ explicitly refers to Article 6 (1) Rome II-Regulation, reasoning with the requirement of consistency laid down in Recital 7 of the Rome II Regulation for the purpose of determining jurisdiction: The ECJ considers an act, such as that at issue in the Dieselgate case, by being likely to affect the collective interests of consumers as a group, as constituting an act of unfair competition[167], which may affect those interests in any Member State within the territory of which the defective product is purchased by consumers.

While applying Article 4 Rome II-Regulation in the main proceedings would have lead to the same result concerning the applicable law, the referral to Article 6 (1) Rome II-Regulation by the ECJ is worth noting, because the plaintiff consumer organisation based the claims of consumers represented in this action primarily on general (in this par-

165 For consumers, being represented in the redress action will certainly prove to be a favorable course of action if the law of the country in which the event giving rise to the damage occurred turns out to be at least as or more favorable than the law of their home country. Otherwise, consumers might be reluctant to choose a different law, balancing the benefits of taking part in a collective action against the less favorable law applied.

166 Rightly critical e.g. Dangl, RdW 2020, 818.

167 The ECJ is referring to the Amazon ruling in Case C 191/15, where the court used the same wording for the purpose of establishing the legal standing of the Austrian consumer organisation to bring an injunctive action against the use of unfair contract terms. Also see judgment of 29 July 2019, Tibor-Trans, C 451/18.

ticular case: Austrian) tort law[168], arguing for liability resulting from malicious intent (section 1295 paragraph 2 ABGB, section 874 of the ABGB) and fraudulent behaviour (section 146 of the StGB, section 1311 of the ABGB)[169].

As the Dieselgate case notoriously touches upon several key issues concerning tort/delict cases, two general points should be addressed as regards the interaction of the Rome II-Regulation with the RAD and in particular the scope and significance of Article 6 Rome II-Regulation for the purpose of representative redress actions:

First, compared to contractual remedies which – as a baseline model – are available to consumers from various member states for infringements of Union law, it might be more difficult to establish non-contractual remedies as required under Article 2, Article 9 RAD. While contract law, for instance concerning the sale of goods or restitution remedies stemming from unfair contract terms, at least to a certain extent, is harmonized throughout Europe, the law of tort and delict, especially as regards remedies of consumers, is not.

Several provisions of Union law included in Annex I do not provide for individual remedies of consumers, especially – yet not limited to – those considered to pertain to regulatory law rather than having a private law-nature[170]. In the absence of Union legislation on the point, i.e. expressly conferring rights on consumers, according to settled-case law it is for the national law of each Member State to determine whether it provides for individual remedies or not and what the contractual consequences of infringements might be, provided that the principles of effectiveness and equivalence are observed. This applies for instance to the Regulation (EU) 2017/745 on medical devices[171] (Annex I (57) RAD), the MiFID[172] (Directive 2014/65/EU, referred to in Annex I (48) RAD) and the IDD[173] (Annex I (55) RAD), just to name a view.

Infringements in these cases may raise controversy over whether the applicable national tort and delict law entitles consumers to compensation. For instance, in the Dieselgate case it was highly controversial at the time, whether consumers harmed by unfair commercial practices may base their claims on the Austrian Unfair Commercial Practices Act[174], which the Austrian Supreme Court only recently clarified in the affirmative[175]. Similar doubts con-

168 See on the Austrian law: Maderbacher, 'Käuferrechte im Fall der Manipulation von Kfz-Emissionswerten (NOx)' [2019] Zeitschrift für Verbraucherrecht 51; regarding similar considerations under German law Halfmeier, 'Schadensersatzansprüche gegen Fahrzeughersteller im Abgasskandal' in Leupold (ed), Forum Verbraucherrecht 2018 (2019) 13 et seq.

169 A similar position was taken by the German BGH, Case VI ZR 252/19; the court held that VW acted unconscionably and granted claims of affected car buyers based on Article 826 BGB, which compares to § 1295 (2) of the Austrian ABGB.

170 This concerns for instance the MiFID, the IDD and Solvency II. Notably, this distinction between regulatory and private law, constituting different categories of law, however pervasive under traditional German and Austrian legal doctrine, is not reflected by Union law.

171 See to that extent Case C-219/15 Schmitt, concerning a possible liability of TÜV Rheinland in the PIP-scandal (defective breast implants) under the Directive 93/42/EEC on medical devices: According to the ECJ it does not necessarily follow from the fact that a directive imposes surveillance obligations on certain bodies or the fact that one of the objectives of the directive is to protect injured parties that the directive seeks to confer rights on such parties in the event that those bodies fail to fulfil their obligations, and that is the case especially if the directive does not contain any express rule granting such rights. The mere fact that Section 6 of Annex XI to Directive 93/42 requires notified bodies to take out civil liability insurance is not sufficient for it to be concluded that the directive requires Member States to confer on the end users of medical devices who have suffered injury as a result of culpable failure on the part of notified bodies to fulfil their obligations a right to look to those bodies for compensation.

172 See Case C-604/11 Genil/Bankinter SA: It is for the internal legal order of each Member State to determine the contractual consequences where an investment firm offering an investment service fails to comply with the assessment requirements laid down in Article 19 (4) and (5) of Directive 2004/39, subject to observance of the principles of equivalence and effectiveness. It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19 (4) and (5) of Directive 2004/39, or what those consequences might be.

173 See on the other hand the PRIIPs Regulation (EU) No 1286/2014 (Annex I (50) RAD) which harmonizes rules regarding the civil liability of the PRIIP manufacturers and provides for rights of redress available to retail investors; they may seek compensation for damage suffered as a result of reliance on a key information document that is inconsistent with pre-contractual or contractual documents under the PRIIP manufacturer's control or is misleading or ina curate (Recital 22).

174 The UCPD aims at protecting individual consumers, yet until recently did not provide for individual remedies, but left the member states a „margin of discretion as to the choice of national measures intended, in accordance with Article 11 and 13, to combat unfair commercial practices": see Case C-388/13 UPC. In this particular case the court held that communication of erroneous information must be classified as a 'misleading commercial practice' within the meaning of the UCPD, even though that information concerned only one single consumer. The Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules introduced individual remedies for victims of breaches of the provisions of the UCPD in a new Article 11a of the UCPD, applicable as from 28 May 2022. See below in the text.

175 OGH 16.12.2021, 4 Ob 49/21s. The case did not concern the Volkswagen-case. See with respect to Article 11a of the UCPD below in the text. On the Austrian law see: Leupold, 'Schadenersatzansprüche der Marktgegenseite nach UWG' [2010] Österreichische Blätter

cern whether individual claims under Austrian law may be based on the violation of the EU regulation concerning type-approval requirements (EG) No 715/2007. With regard to both laws, the violation as such was – if not quite beyond controversy, at least – fairly notorious, yet it was debatable whether the infringed Union laws may qualify as „protective statutes" with respect to the damage of consumers resulting from the infringement (according to § 1311 of the Austrian ABGB, § 823 of the German BGB).

For the purpose of redress actions, it is important pointing out that the lack of individual remedies under Union law included in Annex I RAD is insignificant. The only requirement for the RAD to apply is an „infringement ... of the provisions of Union law referred to in Annex I, including such provisions as transposed into national law, that harm or may harm the collective interests of consumers" (Article 2 (1) RAD); a redress measure according to Article 9 (1), Article 3 (10) RAD requires a trader to provide consumers concerned „with remedies ... as available under Union or national law". Therefore, remedies may be the subject of redress actions regardless whether they derive from union law (including transpositions into national law) or national law.[176] Still, the latter means similarly harmed consumers from different member states might not necessarily have any remedies at all or they may vary considerably, depending on the law applicable. While this certainly adds complexity and will generate challenges in particular as regards multistate redress actions, it should be noted that the UCPD, which is included in Annex I RAD, might prove to be a silver bullet with regard to some of the problems pertaining to non-contractual redress, as regards both the limited scope of the RAD and remedies of consumers:

The UCPD is horizontal in nature and, due to its general scope, can be applied to commercial practices which are also regulated by other (general or sector-specific) Union legislation (see Article 3 (4), Recital 10 UCPD)[177]. Therefore the UCPD complements other EU rules: Infringements of the provisions referred to in Annex I such as the UCTD, the SGD or the GDPR[178] just to name a view will not necessarily, but frequently constitute an unfair commercial practice under the UCPD[179], because they are likely to be „contrary to the requirements of professional diligence" under Article 5 UCPD. Article 7(5) UCPD expressly considers information requirements established by „Community law" in relation to commercial communication as „material"[180]. Failing to comply with such requirements (as set out for instance by the CRD, CCD, MiFID, Ecodesign Directive, the Tyre Labelling Regulation[181]) constitutes a misleading commercial practice if it is likely to materially distort the economic behaviour of the average consumer.

Moreover, the UCPD might operate as a gateway as regards the (indirect) enforcement of provisions of union law not included in Annex I RAD. If infringements of pieces of EU legislation other than those included in Annex I qualify as unfair commercial practice, this infringement of the UCPD provided that it harms the collective interests of consumers falls under the scope of the RAD. Accordingly, the UCPD ensures that possible remedies can be claimed collectively through representative actions in these cases, too.

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für gewerblichen Rechtsschutz 164; Duursma-Kepplinger, 'Verbraucherschutz durch Wettbewerbsrecht' [2015] Zeitschrift für Verbraucherrecht 107; Kodek/Leupold in Wiebe/Kodek (eds), UWG (2021) § 16 notes 8 et seq.

176 Conversely, in light of the clear provisions in Article 2 (1), Article 9 (1) RAD, the mere fact that Union law is included in the Annex of the RAD, may not promote an understanding in favor of establishing individual remedies under said Union law by way of pointing to infringements possibly being subjected to redress actions.

177 Joined Cases C 544/13 and C-545/13 Abcur: Directive 2005/29 is characterised by a particularly wide scope which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. According to Article 3 (4) the UCPD complements other „Community rules" that regulate specific aspects of unfair commercial practices. See Guidance UCPD page 8, according to which the UCPD „works as a 'safety net' ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law".

178 See Annex I (22) and (20) UCPD. Regarding the interplay with the GDPR see UCPD Guidance page 19: Personal data, consumer preferences and other user-generated content have economic value and are often being made available to third parties. Consequently, under Article 7 (2) and No 22 of Annex I UCPD, if the trader does not inform a consumer that the data provided will be used for commercial purposes, this could be considered a misleading omission of material information, as well as a breach of transparency and other requirements under Articles 12 to 14 of the GDPR.

179 To a certain extent this applies to the SGD, the DCG and the UCTD as well (e.g. if information requirements are not complied with in contract terms which are not individually negotiated).

180 See regarding the interplay with sector-specific rules Case C-632/16 Dyson concerning the labelling of vacuum cleaners and a the lack of specific information about testing conditions; Case C-363/19 Mezina concerning health claims that were made in relation to natural food supplements.

181 That applies to a number of Union laws which contain such information requirements, for instance the MiFID, the CRD, the CCD, the PRIIPs Regulation, the Ecodesign Directive, the Tyre Labelling Regulation, the General Food Law Regulation, the Payment Accounts Directive, Energy Labelling Framework Regulation or the European Electronic Communications Code, the GDPR and e-Privacy Directive, which are all included in Annex I RAD.

For example, concerning the Dieselgate case, the RAD does not apply as regards infringements of the EU regulation concerning type-approval requirements (EG) No 715/2007, because this Regulation is not referred to in Annex I. However, if the infringement qualifies as unfair commercial practice, a QE can bring a representative action[182] seeking redress for consumers, regardless whether the consumer claims – under the applicable national law – are based on the unfair commercial practice at all or on the violation of the type-approval Regulation (e.g. § 826 BGB in Germany, § 1295 Abs 2, § 1311 ABGB in Austria).

Concerning infringements of provisions both referred to in Annex I and not referred to in Annex I RAD, the UCPD per amendment by Directive (EU) 2019/2161[183] ensures that affected consumers have remedies, applicable as from 28 May 2022. According to the new Article 11a UCPD consumers harmed by unfair commercial practices must have proportionate and effective remedies, „including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract", subject to the conditions established at national level. Even though the conditions for the application and effects of those remedies may vary considerably across Member States[184], the mere fact that the UCPD introduces consumer redress including both contractual and non-contractual remedies, safeguarded respectively by the effet utile of the UCPD, is highly important for the purpose of representative actions. This especially concerns the UCPD's interplay with Union law that does not expressly provide for individual remedies and addresses situations such as the Dieselgate case, where consumers of some member states encountered difficulties to establish liability under national tort law, as described above.

Second, it is worth highlighting that the remedies provided for by Article 11a UCPD are without prejudice to the application of other remedies available to consumers under Union or national law, such as those in the Digital Content Directive (EU) 2019/770 and Sale of Goods Directive (EU) 2019/771 (Article 11a (2) UCPD). Accordingly, if several remedies available to consumers based on different Union or national law (e.g. both on contract law and Article 11a UCPD) are claimed collectively in the redress action, the law applicable to these remedies needs to be determined independently for each claim according to the Rome I or Rome II Regulation, depending on the basis of the claim at stake.

However, as pointed out above remedies under Article 11a UCPD may concern both contractual and non-contractual remedies. For the purpose of private international law, this raises the question how Article 6 Rome II-Regulation interacts with Article 11a UCPD, in so far as the characteristics of individual remedies hereby introduced seem to clash with the very idea of the effects-approach taken by Article 6 (1) Rome II-Regulation, which apparently has the potential to cause frictions and inconsistencies within the system of the Rome Regulations at least to a certain extent. Notably, Article 6 Rome II-Regulation does not provide for an „escape rule" such as set out in Articles 4(3), 5 (2), 10 (4), 11 (4), 12 (2) Rome II-Regulation, which for the purpose of determining the applicable law would allow to consider specific circumstances of the case and as an exception apply another law „manifestly more closely connected" with the dispute, i.e. the lex causae applicable to the contractual relationship between the parties.

One may ask whether determining the law applicable to remedies based on Article 11a UCPD – claimed collectively in a representative action or individually – exclusively falls within the scope of Article 6 (1) Rome II-Regulation, or whether other provisions of the Rome Regulations may be applied consistent with the underlying (especially: contractual or non-contractual) relationship between the trader and the consumers.

In light of the broad scope of the UCPD which has the potential to interact with any other Union law provision, the addition of the new Article 11a UCPD introducing individual remedies[185], might act as a „universal" reserve remedy

182 Doubting whether the RAD would apply in the Dieselgate case Thönissen, ZZP 2021, 285 f; Vollkommer, MDR 2021, 129, 136.

183 Article 3 (5) Modernisation Directive (EU) 2019/2161 amended the UCPD by inserting Article 11a.

184 According to Guidance UCPD page 25 the conditions for the application of the remedies could include factors such as the gravity and nature of the unfair commercial practice, the damage suffered and other relevant circumstances, where appropriate. The detailed effects of the remedies may concern whether the contract termination remedy results in the nullity of the contract from its conclusion (with the obligation for both parties to return to the state prior to the contract) or only in removing its future effects, provided that the principles of adequacy and effectiveness are respected and the effet utile of the directive is safeguarded. Indeed, concerning Austrian law one may ask whether the remedies available to consumers comply with those standards: Under § 16 of the Austrian Unfair Competition Act consumers bear the full burden of proof as regards causation and assessment of damages, which will most likely render those remedies unfeasible.

185 Also, the addition of Article 11a UCPD may entail an extension of the ex officio control to unfair commercial practices under the UCPD, which was rejected by the ECJ so far, contrary to its case law concerning the UCTD. See Guidance UCPD page 15 pointing out that this interpretation has been justified by the fact that the UCPD does not provide for contractual consequences, unlike Article 6 (1) UCTD

available for the infringement of basically any Union law provision. Consequently, one may argue that a mechanical application of Article 6 (1) Rome II-Regulation considered as the overriding lex specialis for the purpose of unfair competition law would not be adequate since it would systematically undermine the fundamental principles of the Rome-Regulations. One may argue the infringements in question inherently and necessarily at the same time constitute a breach of contractual obligations, possible remedies need to be determined according to Article 5-7 Rome I-Regulation, also see for cic Article 12 Rome II-Regulation, referring to the lex causae under the Rome I-Regulation.

For example, if a trader uses unfair contract terms in consumer contracts obligating the consumers to pay excessive fees, affected consumers have restitution remedies under the UCTD which for the purpose of determining the applicable law are governed by Article 6 Rome I-Regulation. See above lit (aa). The use of unfair contract terms typically qualifies as an unfair commercial practice under the UCPD, which may establish individual remedies for reimbursement of the fees paid as well. It is unclear whether the law applicable to assess these remedies is governed by Article 6 (1) Rome II-Regulation or the contractual elements prevail.

It remains to be seen how the ECJ will solve these issues. However, it should be pointed out that the practical impact of these issues for the purpose of representative actions may not be overrated, because the law designated under the Rome II-Regulation for the most part is consistent with a designation according to Article 6 Rome I-Regulation.

(d) Rights (to Compensation) under the GDPR

Annex I (56) RAD does not limit the scope of representative actions to infringements of certain provisions of the GDPR or to certain rights conferred on consumer-data subjects by the GDPR (see Articles 15 et seq). However, it is reasonable to assume that injunctive actions might be primarily used by QEs to prohibit controllers or processors from infringements of the information requirements under Articles 12 et seq GDPR or as a means to force traders to comply with core principles of the GDPR such as the requirements for data minimisation, data protection by design and data protection by default (Article 5, Article 25). Redress actions, on the other hand will probably for the most part be used to seek compensation for material and in particular non-material damage suffered as a result of GDPR infringements (Article 82 GDPR).

It is yet unclear to which extent Article 82 GDPR harmonizes the right to compensation and whether national law is at all applicable to assess and determine the damage suffered as a result of the infringement[186]. The significance of the question which law applies to the right to compensation available to data subjects considerably depends on the position the ECJ will adopt for its ruling in this case. In any event, the GDPR does not provide for a fully harmonized uniform law, but sets out several „may-"provisions the transposition and statutory design of which remain at the discretion of the member states, leading to fragmentation within the national rules on data protection. As a result, the notion of private international law continues to be of relevance at least to a certain extent and needs to be addressed for the purpose of representative actions.

However, it remains uncertain how the applicable law may be determined. Article 3 GDPR adopts a combination of the territoriality and the effects-principle as regards the territorial scope of its provisions, yet does not provide for a rule on the applicable law as regards different national laws within the member states. One may argue for applying Article 6 Rome II-Regulation or Article 6 Rome I-Regulation (see concerning culpa in contrahendo Article 12 Rome II-Regulation, Article 1 (2) lit i Rome I-Regulation) in certain cases where GDPR-violations constitute unfair commercial practices, a lack of conformity of goods with digital elements, digital content or digital services with

and that Article 11 unlike Article 7 (1) UCTD did not require interim relief in enforcement procedures.

186 See the pending Case C-300/21 Österreichische Post AG, which concerns the conditions for compensation of non-material damage. In the main proceedings the claimant seeks compensation amounting to € 1.000 due to „great inner turmoil" caused by the defendant unlawfully processing data on his „affinity for political parties" and wrongfully asserting that the claimant has a high propensity for supporting the far-right Austrian Freedom Party (FPÖ). The questions referred by the Austrian Supreme Court (6 Ob 35/21x) concern: (1) whether the award of compensation requires that an applicant must have suffered harm, or whether the infringement of GDPR-provisions in itself suffices; (2) whether the assessment of the compensation depends on further EU-law requirements in addition to the principles of effectiveness and equivalence; (3) whether it is consistent with EU law that the award of compensation for non-material damage presupposes the existence of a consequence of the infringement of at least some weight that goes beyond the upset caused by that infringement.

the (especially objective) requirements for conformity provided for under SGD and DCD (see to that end referring to compliance with any existing Union law: Recital 48, Article 8 DCD, Article 7 SGD) or breaches of pre-contractual information requirements under the CRD. As regards remedies and infringements based solely on the GDPR, it is debatable whether they are excluded from the scope of the Rome Regulations (see Article 1 (2) lit g Rome II-Regulation concerning „non-contractual obligations arising out of violations of privacy and rights relating to personality"). As a consequence, this means the applicable law would be governed by the national rules on private international law of the forum state.

See on jurisdiction Section I Chapter IV Point (8).

3. Multistate and Unionwide Redress Measures

(a) Multiple Laws and Admissibility

As discussed above, it is worthwhile highlighting that – as a rule – the rules regarding jurisdiction under the Brussels I bis Regime only allow for unionwide redress measures in the member state where the defendant is domiciled or at the place where the event giving rise to the damage occurred (Article 4, Article 7 (2) Brussels I bis Regulation, see Section I Chapter III). However, as regards jurisdiction under Article 79 (2) GDPR Section I Chapter IV Point (8).

Also, the legal standing to seek multistate or unionwide injunctive measures, might require the QE to justify its taking action on behalf of consumers across the EU by displaying a correspondingly broad statutory purpose, subject to the lex fori (see Article 6 (3) RAD).

However, if these requirements are met, unionwide measures do not depend on several QEs from different member states taking joint action. While teaming up in the face of different applicable laws may certainly prove itself to be a valuable strategy for QEs from different member states, it is no prerequiste for multistate measures. Article 6 (2) RAD prima vista seems to indicate otherwise[187], but cannot be construed conclusively as a means to limit QEs to represent consumers resident in their own member state of designation, but rather intends to ensure admissibility and standing when it comes to foreign QEs, hereby showing the concerns of the EU-lawmaker with respect to the member states' willingness to allow these actions.

Article 6 (2) gives a strong reference point that the claims of consumers from different Member States may be consolidated in a single representative action, avoiding a multiplicity of representative actions before the courts of different Member States and also a multiplicity of proceedings in the same forum (see Recitals 23, 31). This is corroborated by Article 9 (3) RAD, according to which consumers who are not habitually resident in the forum state, may only be represented in that action upon „explicitly" opting in, which insinuates the possibility to multistate redress measures.

Recital 31, according to which this is „without prejudice to the right of the court seised to examine whether the representative action is suitable to be heard as a single representative action", refers to possible rules on admissibility, provided for by the procedural law of the forum state, which might require a certain degree of similarity (in fact and in law) for the representative action in order to be admitted to be heard as a single action (see Article 7 (3) RAD, referring to admissibility in accordance with the RAD as well as national law). However, according to Recital 12 such national rules must not hamper the effective functioning of the mechanism for representative actions; also, the principle of effectiveness must be observed. The consideration of consumers not habitually resident in the forum state in Article 9 (3) RAD despite the fact that the law applicable to the remedies available to them nearly always differs (see above Point (2)), strongly indicates that QEs may not be precluded from seeking multistate redress measures based on the mere fact, that the proceeding involves the application of multiple laws. In view of the substantially harmonized character of the Union law provisions referred to in Annex I, the multiplicity of applicable laws alone therefore should not *per se* render redress actions "unsuitable" to be heard as a single representative action.

Solutions suggested to accommodate increased difficulties pertinent to a multiplicity of applicable laws, subject to the procedural law of the forum state, may concern the formation of subgroups of claims along the applicable law, which may be resorted to at a stage of the proceeding, when issues (especially those of fact) common to all claims

187 Regarding Article 16 of the 2018 Proposal see Law 365 f: undermining clarity.

have been established[188]. Also, depending on the circumstances of the matter at stake and strictly limited to an assessment on a case-by-case basis, the procedural law of the forum state in light of Recitals 12, 31 may still provide for the court to reject the representation of consumers from different member states on the grounds of admissibility if their inclusion into the proceeding would hamper the effective functioning of the mechanism for representative actions.

Whether it is a reasonable course of action for QEs to (single-handedly or jointly) pursue redress measures that require to examine and apply different (foreign) laws in a single uniform proceeding, remains to be seen. "Joining forces" for the purpose of redress actions may be accomplished either in the form of several QEs from different member formally assuming the role of joint plaintiffs (as referred to in Article 6 (2) RAD) or in a "single plaintiff-QE"-scenario by several QEs closely cooperating and sharing responsibilities such as informing concerned consumers in their own member state, collecting claims and organizing (mandatory: Article 9 (3) RAD) opt in-registrations. Both scenarios might have positive effects as regards an overall increased level of enforcement in relation to unionwide infringements and may certainly help to level the playing field by levelling up the bargaining and litigating power of QEs vis-à-vis the defendant. Possible obstacles obviously relate to the application of different laws which might result in a significant delay of the proceeding and a certain reluctance on behalf of the court seised.

Inter alia, this will depend heavily on the procedural law of the forum(s) available for unionwide redress under the Brussels Regime, as regards both general rules of civil procedure and special rules on representative proceedings as implemented according to the RAD. Notably, the challenges as regards the complexity of multistate redress actions will also vary considerably depending on the degree of harmonization provided for by the Union law in question. A representative action seeking compensation for passengers whose flight was cancelled or delayed for at least two hours beyond its scheduled arrival time under Article 7 Regulation No 261/2004 or – though subject to and depending on the interpretation of Article 82 to be adopted by the ECJ – a redress action seeking compensation for non-material damage suffered as a result of the infringement of GDPR-provisions will apparently raise less issues than a representative action seeking compensation for investors harmed by systematic violations of the conflicts of interest-rules laid down in IDD and MiFID.

For injunctive actions see above Chapter III Point (3).

(b) Limitation by Choice

Conversely, it is equally important pointing out, that no QE is obliged to include similarly affected consumers from other member states when seeking redress measures. Article 7 (2) RAD requires the QE to „provide the court ... with sufficient information about the consumers concerned by the representative action" for the very purpose of „allowing the court to determine jurisdiction and applicable law" (Recital 34)[189]. This – in line with general principles of civil procedural law – strongly suggests that the QE may choose to limit its representation to certain affected markets, leaving the decision whether to prioritize the protection of consumers in its own designating member state over „foreign" consumers to its discretion. This means the RAD, while precluding the member states from denying admissibility for representative actions seeking redress beyond the forum state, still allows for QEs to limit their actions to representing consumers of their own member state (typically though not necessarily this will be the forum state), hereby avoiding the complexity of several applicable laws by way of determining the subject matter of the dispute, seeking correspondingly limited injunctive measures[190].

188 See e.g. Stadler, Are Class Actions Finally (Re)conquering Europe? Juridica International 30/2021, 14.

189 Specifically as regards injunctive actions, providing sufficient information about the „group of consumers concerned by the representative action" is also required in reference to the „possible suspension or interruption of limitation periods applicable to subsequent claims for redress" (see Article 16 (1) RAD). Concerning redress actions, the scope of the effect of suspension or interruption of limitation periods applicable is unclear. The referral to „consumers concerned by that representative action" might be understood as all consumers (potentially) concerned regardless whether they register (opt in or not opt out) to be represented or may only refer to the consumers who expressed their wish to be represented in that action. For the latter one may point to Recital 34 and the objective of Article 16 which aims at suspending limitation periods in order to ensure redress. On the other hand the wording of paragraphs (1) and (2) of Article 16 is identical. See Meller-Hannich, VbR 2021, 43; Leupold in Reiffenstein/Blaschek (Hrsg), Konsumentenpolitisches Jahrbuch 2021, 123 et seq.

190 See Case C-511/17 Lintner acknowledging the limits to examine the unfairness of contract terms under the UCTD due to the subject matter of the dispute, understood as being the result that a party pursues by its claims.

ANNEX II

Guidance on Multistate / Unionwide Cases – A Decision Tree on Applicable Law

Illustration 1: Applicable Law – Table of Scenarios

Consumer Claim/ Nature of Infringement	REDRESS measures	INJUNCTIVE measures	DECLARATORY measures
CONTRACTUAL			
Scenario I **B2C no choice of law-clauses**	Art 6 (1) Rome I: → no uniform law → consumer's habitual residence if trader (a) pursues commercial activities in this state or (b) directs such activities to that state → QE can choose not to invoke Art 6 (1)-protection → Art 4 = trader's law applies uniformly Caveat: no case law-precedent, Austrian case pending Note: Requires consumers' approval via opt in or not opt out after having been informed re waiver of Art 6-protection	Art 6 (1) Rome I: → no uniform law → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions

Scenario II **B2C choice of law-clauses unenforceable** See re UCTD Amazon case	QE can choose → to invoke UCTD-unenforceability → scenario I applies or → not to invoke UCTD-unenforceability → chosen law applies → re overriding mandatory consumer provisions: QE can choose not to invoke Art 6 (2)-protection → chosen law applies uniformly Caveat: no case law, but precedent re UCTD Note: Requires consumers' approval via opt in or not opt out after having been informed re waiver of Art 6-protection	QE can choose → to invoke UCTD-unenforceability → scenario I applies or → not to invoke UCTD-unenforceability → chosen law applies → unionwide measures can be issued upon establishing that the practice violates either (a) Union law-minimum standards or (b) the chosen law	Same as for injunctive actions
Scenario III **B2C choice of law-clauses enforceable**	Chosen law applies Overriding mandatory consumer provisions: → QE can choose not to invoke Art 6 (2)-protection → chosen law applies uniformly (see above scenario II)	Chosen law applies → unionwide measures can be issued upon establishing that the practice violates either (a) union law-minimum standards or (b) the chosen law	Same as for injunctive actions

Contracts of Carriage insofar as not fully harmonized	Art 5 Rome I: → no uniform law → habitual residence of consumer if place of departure or destination Note: unenforceability of choice of law-terms under UCTD unclear (see Art 5 (2)) → QE can choose to waive Art 5-protection → trader's law applies uniformly	Art 5 Rome I: → no uniform law → unionwide measures can be issued upon establishing that the practice violates (chosen law and / or) Union law- minimum standards	Same as for injunctive actions
NON-CONTRACTUAL			
Tort / Delict General Rule	Art 4 (1), Art 6 Rome II: → typically no uniform law except for mass accident-constellations → lex loci damni = where damage occurs → escape clause only under Art 4 (3): possibly inapplicable (see VKI/VW Case: obiter Art 6-reference vs Amazon-reasoning) → uniform law only by choice of law-agreement between QE and trader	Art 4 (1), Art 6 Rome II: → typically no uniform law except for mass accident-constellations → lex loci damni = where damage occurs → escape clause only under Art 4 (3): possibly inapplicable → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions

Investors' Claims	As above, but localisation of „purely economic" damages needs further clarification, see VEB Case	As above, but localisation of „purely economic" damages needs further clarification, see VEB Case	Same as for injunctive actions
Product Liability Applicable to damages caused by defective products For compensation for defective products see Art 4, 6 Rome II	Art 5 Rome II: → typically no uniform law → victim's habitual residence when damage occurred, failing that place of purchase, failing that where the damage occurred → escape clause concerning foreseeability for trader	Art 5 Rome II: → typically no uniform law → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions
Environmental damage	Art 7 Rome II: QE can choose → Art 4 (1): typically no uniform law or → Handlungsort: uniform law Note: Requires consumers' approval via opt in or not opt out after having been informed	Art 7 Rome II: QE can choose → Art 4 (1): typically no uniform law or → Handlungsort: uniform law → unionwide measures can be issued upon establishing that the practice violates either (a) Union law-minimum standards or (b) Handlungsort-law	Same as for injunctive actions

Antitrust Not included in Annex I RAD	Art 6 (3) Rome II: → market affected: no uniform law → multistate effects: QE can choose → market affected or → lex fori if forum = domicile of defendant + affected market: uniform law	Art 6 (3) Rome II: → market affected: no uniform law → multistate effects: QE can choose → market affected or → lex fori if forum = domicile of defendant + affected market: uniform law → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions
Unfair Competition Art 11a UCPD: possible universal reserve remedy May subject infringements of Union or national law not included in Annex I RAD to representative actions	Art 6 (1) Rome II: → no uniform law, no escape clause → lex loci damni: where collective interests of consumers are affected = consumer residence	Art 6 (1) Rome II: → no uniform law, no escape clause → lex loci damni: where collective interests of consumers are affected = consumer residence → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions

194 According to Article 2 lit (e) Brussels I bis Regulation „member state addressed" refers to the member state in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought. According to Article 2 lit (d) „member state of origin" means the member state in which the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered.

GDPR insofar as not fully harmonized	Art 6 Rome II or Art 6 Rome I: → typically no uniform law, see above → possibly excluded under Article 1 (2) lit g Rome II: national IPL-rules apply	Art 6 Rome II or Art 6 Rome I: → typically no uniform law, see above → possibly excluded under Article 1 (2) lit g Rome II: national IPL-rules apply → unionwide measures can be issued upon establishing that the practice violates Union law-minimum standards	Same as for injunctive actions

Illustration 2: Applicable Law

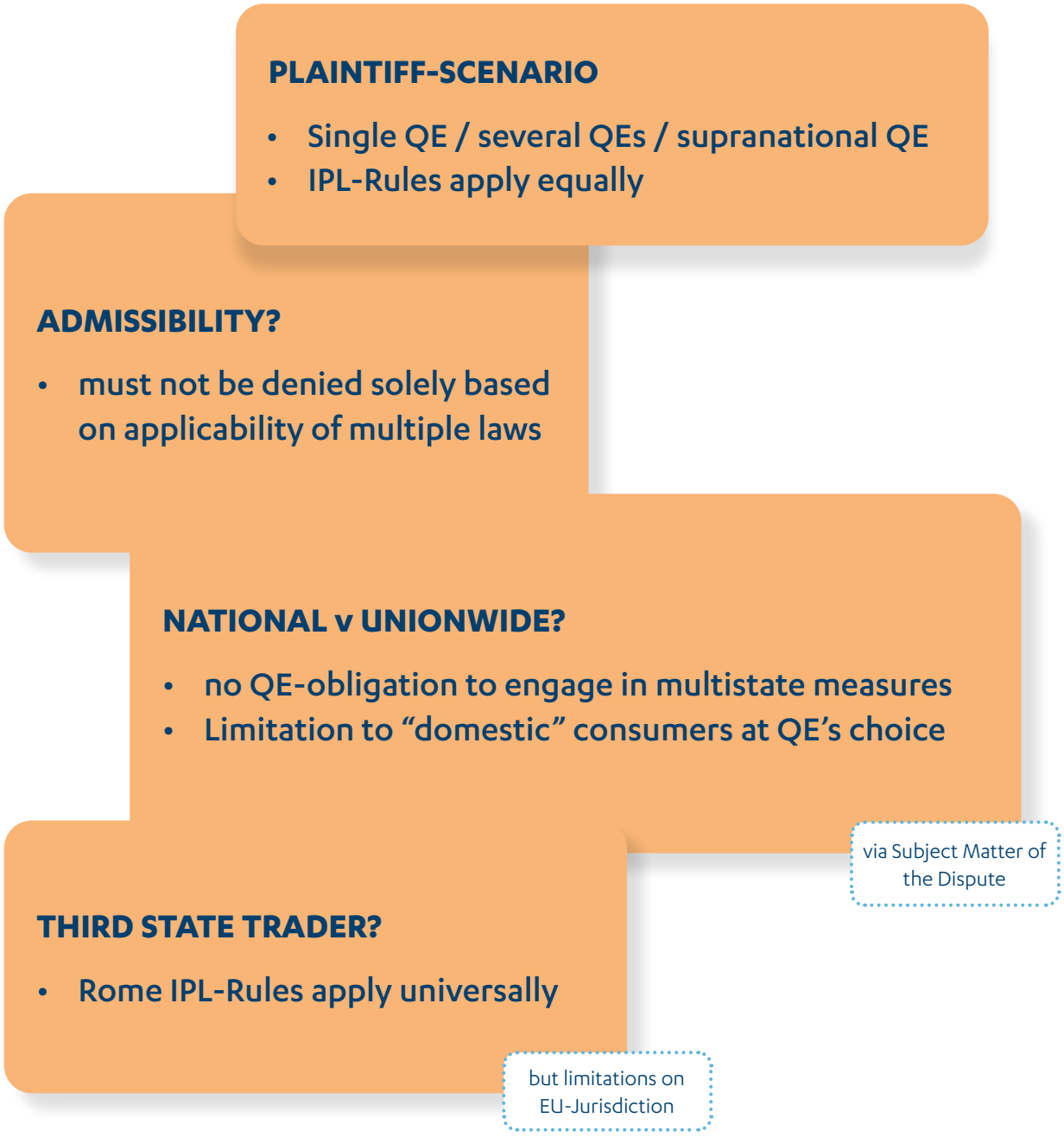


Illustration 3: Availability of Uniform Law

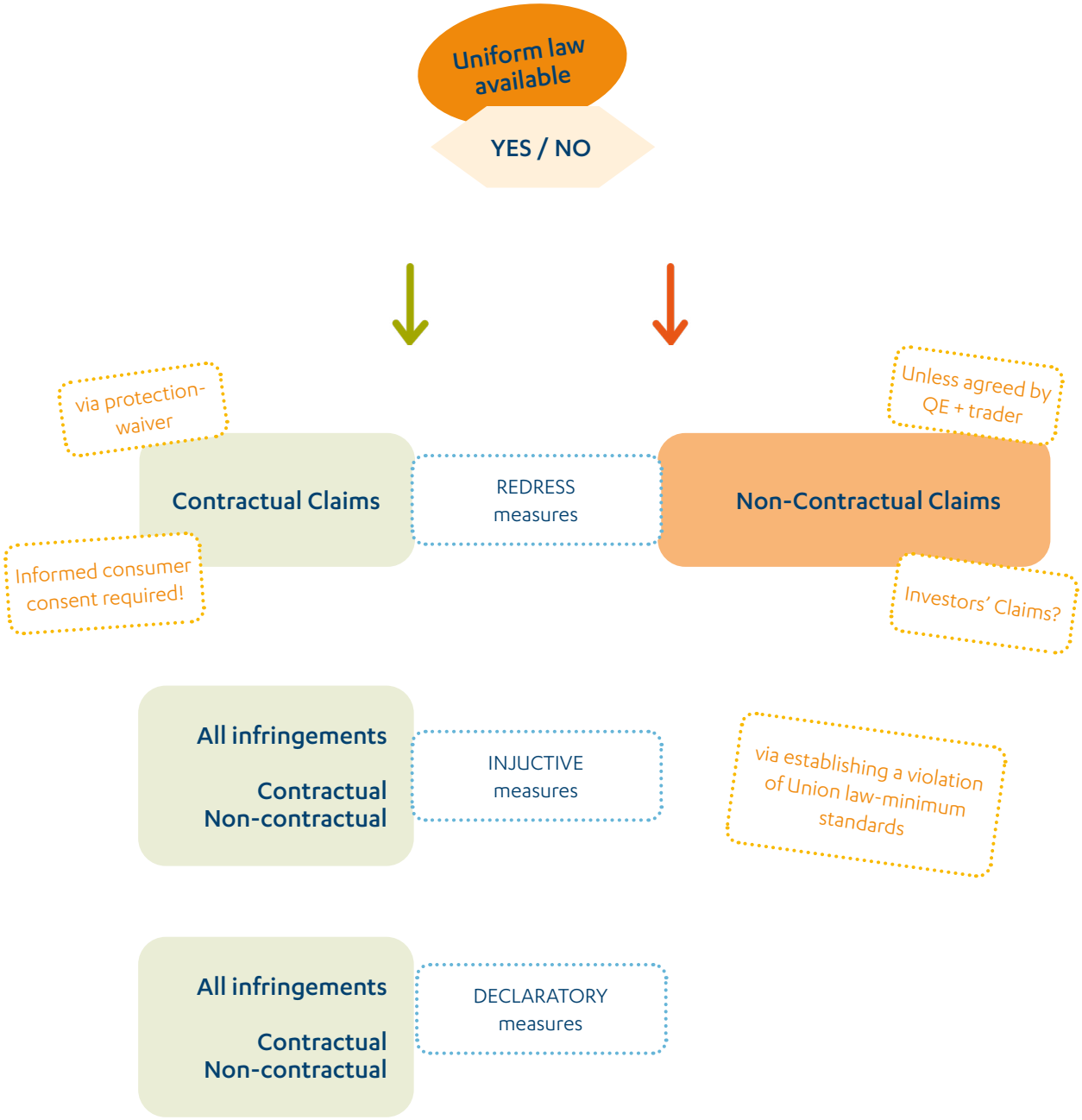
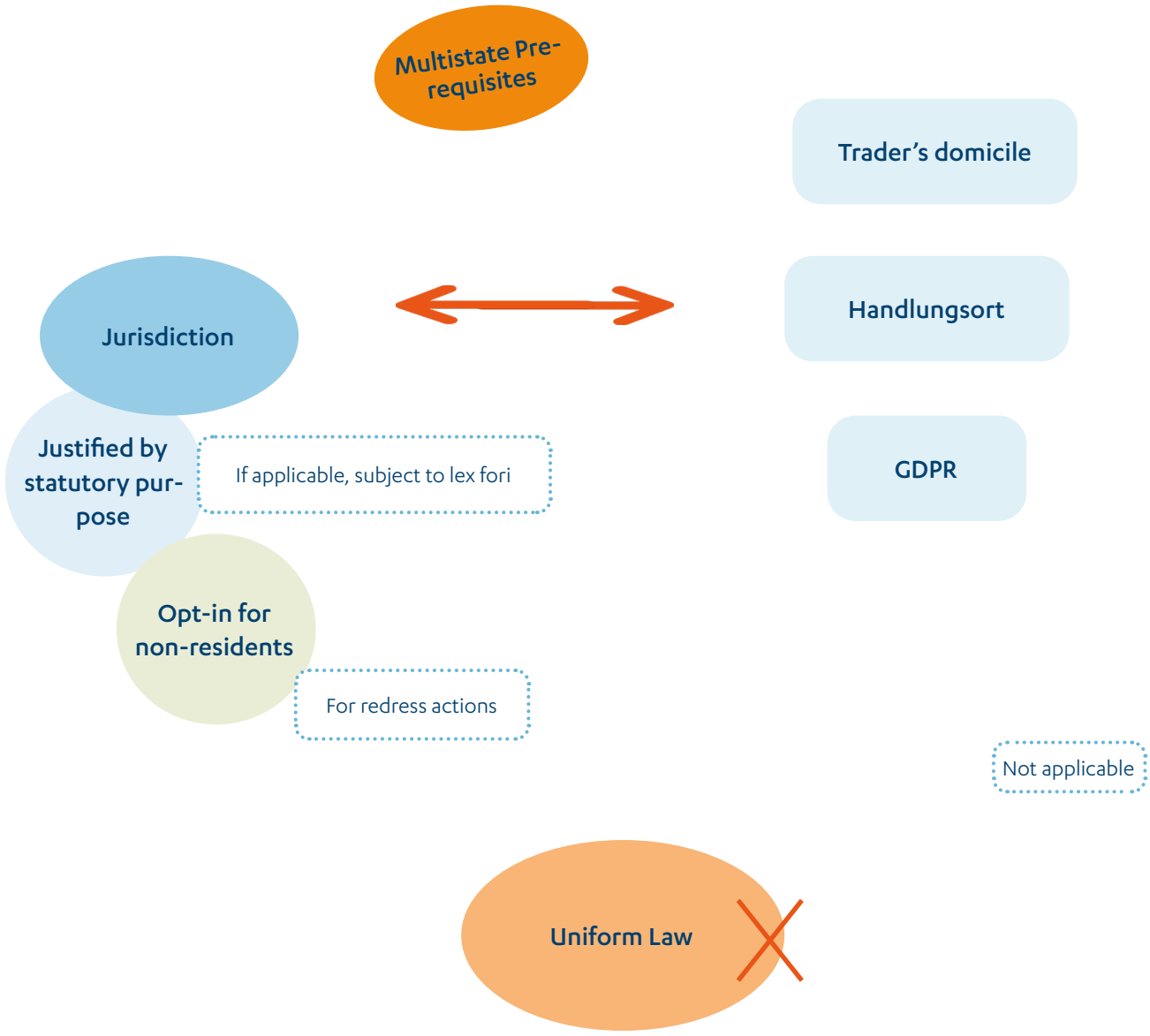


Illustration 4: Multistate Prerequisites



judgment given in the member state addressed (Article 41 (1) Brussels I bis Regulation).

2. Refusal of Recognition and Enforcement

Recognition and enforcement of judgments can be (suspended and) refused by the competent court or authority in the member state addressed only on certain grounds as stipulated in Article 45 Brussels I bis Regulation which according to the ECJ are to be construed restrictively[195]. Article 52 leg cit reinforces the exceptional nature of those reasons by strictly precluding a "revision au fond", providing that "under no circumstances may a judgment given in a member state be reviewed as to its substance in the member state addressed". However, though the foreign judgment is presumed to satisfy all requirements necessary in order to be recognised, the recognition can be refused on the grounds referred to in Article 45 on the application of "any interested party" and (probably) also ex officio, subject to the national law of the member state addressed. Enforcement can be refused on the application of the person against whom enforcement is sought (Articles 45, 46 Brussels I bis Regulation).

Following the presumption set out in Article 36 leg cit and the exceptional nature of the reasons to refuse under Article 45, the **burden of proof** as regards the existence of those reasons lies with the party claiming that recognition should be refused (i.e. typically the defendant in the representative proceeding, the debtor in the execution proceeding). Still, in certain cases it might be advisable for QEs to preemptively apply for a ("negative" declaratory) decision that there are no grounds for refusal of recognition (see Article 36 (2), Article 38 lit b Brussels I bis Regulation), in particular with respect to defendants that can be expected to try to stall enforcement proceedings of individual consumers entitled to redress by means of contesting recognition in each case. Article 36 (2) Brussels I bis Regulation, which grants the possibility to apply for such a declaratory decision to "every interested party" (French: "toute partie interessee", German: "jeder Berechtigte"), seems likely to cover QEs having a right to bring this application for the purpose of ensuring recognition and enforcement of judgments rendered in the redress proceeding. This most certainly applies to the QE that acted as plaintiff in the proceeding which resulted in the judgment now to be enforced in another member state than the state of origin (therefore virtually deemed a "party of origin"). In fact, prima vista one may even consider assuming a "legitimate interest" within the meaning of and for the purpose of Article 36 (2) Brussels I bis Regulation of any QE designated by a member state according to Articles 4 et seq RAD the statutory purpose of which demonstrates a legitimate interest in protecting the interests of consumers entitled to redress according to the judgment rendered in the representative proceeding even if it was initiated by another QE. However, at least in the absence of any (formal or informal) mandate constituting approval or consent given by either the QE originally bringing the action or the individual consumers entitled to and seeking to enforce the judgment, this fairly far-reaching interpretation of an "interested party" within the meaning of Article 36 Brussels I bis Regulation may overly push the boundaries of if not outright contradict the representative action-model adopted by the RAD for the purpose of collective redress which still operates under the notion of a particular QE representing consumers and assuming the procedural rights and obligations of a (formal) party in the proceedings. Also, one should point out that it might not reflect the interests of consumers at all to have their individual (enforcement) proceedings potentially suspended as a result of an application for a respective (possibly: collective) decision submitted by just any QE (Article 38 Brussels I bis Regulation).

Conversely, it may be worth for QEs to consider bringing a joint representative action at least as regards **unionwide injunctive measures** even if teaming up is neither required for the admissibility of multistate injunctive measures nor jurisdiction-wise (see Section I and II), in order to ensure that adequate steps of enforcement are taken in all member states affected by infringements. By way of „sharing" the plaintiff-role in the representative proceeding, QEs from different member states might put themselves in a better position to more adequately monitor and if necessary enforce compliance with the injunctive measure within their own member state as well as in this scenario beyond any doubt by means of qualifying as an „interested party" within the meaning of Article 36 (2) Brussels I bis Regulation secure their right to apply for a decision declaring that there are no grounds for refusal of recognition.[196]

(a) Public Policy Clause

As regards the **grounds to refuse recognition and/or enforcement** under Article 45 Brussels I bis Regulation, the

195 See Case C-7/98, Krombach/Bamberski; Kodek in Czernich/Kodek/Mayr (eds), Europäisches Gerichtsstands- und Vollstreckungsrecht[4] (2014) Article 45 Brussels I bis Regulation Note 1.

196 Also, see for penalties as regards injunctive measures Article 19 (1) RAD.

key question pertinent to collective redress traditionally concerns whether recognition and enforcement may be denied on the grounds of public policy (ordre public) in the member state addressed, according to Article 45 (1) lit a leg cit[197]. This so-called public policy clause requires a judgment to be „**manifestly contrary to public policy**" in the member state addressed, which may hardly be assumed as regards judgments issued by member states' courts in proceedings consistent with the RAD, which provides for a minimum standard of harmonization each member state (i.e. both „of origin" or „addressed" within the meaning of the Brussels I bis Regulation) has to comply with. Moreover, the requirements and conditions for redress actions and remedies sought as imposed by the RAD allow to bypass the most sensitive issues typically pertinent to collective redress and widely discussed as regards the idea of ordre public and its possible interaction with different models of collective redress.

As regards the **procedural manifestation of ordre public**, it is worth pointing out that the Brussels I bis Regulation operates on the assumption that the judicial systems of legal protection established in the member states in principle count as equal. Thus, only violations of principles fundamental to a fair trial based on Article 6 EHRC such as a manifest and disproportionate infringement of the defendant's right to be heard or striking violations of the equality of arms-principle might qualify for the purpose of refusing recognition under Article 45 (1) lit a, provided that the procedural rules of the state of origin did not provide for procedural remedies as regards those violations[198].

Conversely, an **overly lengthy duration of proceedings** will typically not qualify, especially since a refusal of enforcement would apparently be ill-suited if not contra-indicated to address this particular violation of fundamental procedural rights[199]. The same – as regards representative actions – applies if only the **rules on international jurisdiction** were violated yet the right of the defendant to be heard was not: According to Article 45 (3) Brussels I bis Regulation, „the jurisdiction of the court of origin may not be reviewed. The test of public policy ... may not be applied to the rules relating to jurisdiction"[200]. The grounds for refusal pertaining to jurisdiction under point (e) of paragraph 1, which are not prejudiced by Article 45 (3), only concern violations of exclusive jurisdiction under Article 24 and violations of the special heads of protective jurisdiction under Sections 3, 4 or 5 of Chapter II where – unlike as in possible RAD-scenarios – the weaker party (i.e. the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee) was the defendant. As a result Article 45 (1) lit e Brussels I bis Regulation as well as a lack of jurisdiction as a whole does not apply as regards representative actions.

For example, it would not constitute grounds for refusal of recognition or enforcement in any member state addressed if the court of the member state of origin, for instance where the QE (though not the defendant) is domiciled, handed down a judgment sentencing the defendant to cease a certain practice in all member states even though the court lacks jurisdiction to issue such a measure beyond its territory (see Section I Chapters III and IV). All else being equal, this extends to judgments sentencing a trader to reimburse consumers from different member states, regardless whether the court additionally – contrary to the rules of the Rome Regulations – examined and awarded those reimbursement claims on the basis of the contract law of the forum state (see as regards the applicable law Section II Chapter IV).

As regards possible concerns in relation to the protection of the **consumers' procedural rights**, it should be pointed out that Article 9 (3) RAD submits the representation of consumers who are not habitually resident in the forum state to a mandatory opt in-mechanism[201], which avoids sensitive issues of recognition and enforcement typical-

197 This provision provides that the recognition of a judgment „shall be refused if such recognition is manifestly contrary to public policy...".

198 See Case C-7/98 Krombach/Bamberski; Case C-394/07 Gambazzi/Daimler Chrysler Canada, according to which it may be taken into account that the court of the State of origin „ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard".

199 See Kodek in Czernich/Kodek/Mayr (eds), Europäisches Gerichtsstands- und Vollstreckungsrecht[4] (2014) Article 45 Brussels I bis Regulation Note 13.

200 Also see the Court's holding in Case C-386/17 Liberato, according to which the disregard of the rules on pendency is no grounds for the application of the public policy-exception in recognition proceedings.

201 Under Article 9 (3) RAD these consumers have to „explicitly express their wish to be represented in that representative action in order to be bound by the outcome of that representative action"; according to Recital 45 this serves to ensure „the sound administration of justice and to avoid irreconcilable judgments". Apart from consumers who are not residents of the forum state, member states are free

ly associated with opt out-models and will considerably scale down any extraterritorial scope of judgments (and settlements)[202]. Also, the RAD identifies that informing consumers about a representative action is "crucial to its success" (Recital 58) and therefore establishes a close-knit system of information requirements addressed to both traders and QEs (Article 13 RAD), which avoids any potential for the refusal of recognition and enforcement on the basis of notification issues.

With respect to common concerns in relation to **substantive variants of ordre public**, one may point out that the RAD provides for redress actions seeking compensation yet prevents awarding **punitive damages** (expressly to that end Recitals 10, 42; also see Article 9 (1), Article 3 (10) referring to remedies „as appropriate" and Article 9 (4) according to which consumers may not receive compensation more than once for the same cause of action against the same trader).

A fortiori, rules under national law, often located at the intersection of procedural and substantive law, which provide the court with the power and/or discretion to determine damages as regards their existence and/or their amount not by ascertainment of facts but on the basis of a **free or approximate estimate** (such as § 273 of the Austrian Civil Procedure Act as to the quantum, § 287 of the German Civil Procedure Act as to existence and quantum), will not suffice to deny recognition and enforcement under the public policy-clause, regardless whether those rules apply to individual and collective proceedings without distinction or are provided specifically for the purpose of facilitating representative redress actions and regardless whether they may be construed as a matter of procedural law or substantive law. The same applies to certain rules providing for a reversal of the **burden of proof** as regards elements such as the occurrence and quantum of damage, proximate causation, joint and several or vicarious liability as well as further requirements to establish liability subject to the applicable Union or national law such as fault and unconscionableness.

Also, **third party-funding** of redress actions, insofar as allowed in accordance with the national law (that is to say, probably the law of the forum state, see above Section II Chapter II), might not be considered as „manifestly" violating fundamental principles of any member state addressed, especially with a view to Article 10 RAD which explicitly allows third party-funding, subject only to certain conditions safeguarding the collective interest of consumers; therefore, it is not qualified to touch upon public policy grounds within the meaning of Article 45 Brussels I bis Regulation.

By way of conclusion, it is worth highlighting again that the ECJ according to settled case law since the Krombach ruling adopts a very high threshold for the refusal of recognition and enforcement on the grounds of public policy. This position is fully consistent with the very **idea of a political Union** consisting of member states which are supposed to share values and laws consistent enough to basically preclude any objection pertaining to ordre public-concerns either way[203]. Consequently, applying the ordre public-exception to (certain elements of) the collective redress model provided for by the RAD, that is to say harmonized Union law as transposed into national law, would contradict the very idea the Brussels I bis Regulation is founded on and therefore may hardly be anticipated even with regard to national law which – in accordance with and subject to the limits provided for by Article 9 RAD – adopts rules such as an opt out-mechanism or post opting-in prevents represented consumers from dropping out or provides for redress actions independent from a mandate given by consumers (see to that effect Article 9 (5-7) RAD) or for a means of „representative enforcement" channelling the legal standing to follow up on a judgment with collective enforcement to QEs as well.

to adopt an opt in or opt out („tacitly expressing") mechanism (Article 9 (2) RAD). This follows national examples in Belgium and the UK, and is also suggested in Rule 215 of the ELI/UNIDROIT Model Rules for European Civil Procedure. See A. Stadler, Are Class Actions Finally (Re)conquering Europe? Some Remarks on Directive 2020/1828, JURIDICA INTERNATIONAL 30/2021, 14, page 17.

202 See Inchausti, A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November, GPR 2021, 61 (66 f); Mulheron in Fairgrieve/Lein, Extraterritoriality and Collective Redress, 2012, Note 14.01 ff; Stadler, JZ 2009, 121, 128 f; Nowak, Representative (Consumer) Collective Redress Decisions in the EU: Free Movement or Public Policy Obstacles? in Hess/Lenaerts (eds), The 50th Anniversary of the European Law of Civil Procedure (2020) 393 (410 ff).

203 See e.g. Kodek in Czernich/Kodek/Mayr, Europäisches Gerichtsstands- und Vollstreckungsrecht[4] Article 45 Notes 6 ff, 19.

(b) Irreconcilable Judgments

Article 45 (1) Brussels I bis Regulation establishes two additional grounds for refusing recognition and enforcement which may concern representative actions, that is to say: as regards cases where the judgment is „**irreconcilable with a judgment given between the same parties** in the member state addressed" (lit c) and if the judgment is „**irreconcilable with an earlier judgment** given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state addressed" (lit d).

Both provisions aim at safeguarding a certain level of consistency in relation to judgments across Europe and provide for an emergency brake concerning recognition and enforcement, should the lis pendens-rules under Articles 29 et seq Brussels I bis Regulation fail to prevent irreconcilable judgments. Therefore, they do not apply to a conflict of multiple judgments issuing **injunctive measures** in any constellation conceivable with one exception as to the – presumably negligible – scenario of a QE obtaining not one but two or more judgments against the same trader as regards the same practice (in law and fact) which additionally are „irreconcilable". Other than that injunctive measures do not provide grounds to refuse recognition and enforcement because they do not involve „the same parties", e.g. as regards judgments obtained by different QEs regardless whether irreconcilable or not, whether in the same member state or in different member states and regardless whether these judgments involve the same cause of action such as prohibiting a certain practice unionwide or limited to the territory of certain jurisdictions concerning consumers from different member states.

Concerning **redress actions** however those grounds for refusal may engage. They closely interact with issues pertaining to parallel proceedings ahead of judgments which are specifically addressed by corresponding rules on lis pendens under Article 9 (4) RAD as regards the representative action-model which seek to prevent irreconcilable judgments in the first place (see the rules on lis pendens and related actions provided for by Articles 29 and 30 Brussels I bis Regulation). According to Article 9 (4) RAD „consumers who have explicitly or tacitly expressed their wish to be represented in a representative action can neither be represented in other representative actions with the same cause of action and against the same trader, nor be able to bring an action individually with the same cause of action and against the same trader"[204]. Furthermore, Article 9 (3) RAD aims to avoid irreconcilable judgments by providing for a mandatory opt in-mechanism as regards consumers not habitually resident in the forum state (see Recital 45).

Nevertheless, irreconcilable judgments may occur because courts might not be aware of a second proceeding pending in another member state. Even though the RAD requires information on representative actions planned and launched to be made publicly available by QEs, in particular on their website (Article 13 RAD) and provides for electronic databases including general information on ongoing and concluded representative actions which are publicly accessible through websites, as well as a database set up by the Commission i.a. for the means of cooperation between the QEs (Article 14, Article 20 (4) RAD), the fact that a consumer is represented in a(nother) representative action, is not publicly available and might be difficult to establish even within member states let alone as regards proceedings in different member states.

On the other hand, Article 45 (1) Brussels I bis Regulation also allows to refuse recognition as regards judgments that do not fall within the scope of the Regulation (Article 1); conversely a redress settlement under Article 11 RAD even though court approved may not provide for grounds to refuse the recognition of a judgment[205]. See Chapter II.

Notably, the scope of the lis pendens-rules under Article 9 (4) RAD extends to parallel proceedings regardless whether they involve different member states or not, thus preceding Articles 29 et seq Brussels I bis Regulation insofar as those provisions naturally apply to cross-border settings only. Moreover, the rules laid down by Article

204 See Recital 46 RAD which clarifies that this rule of lis pendens does not apply if a consumer later opts out from that representative action in accordance with national law, e.g. by later refusing to be bound by a settlement.

205 Case C-414/92 Solo Kleinmotoren/Boch. According to Article 2 lit a Brussels I bis Regulation „judgment" means „any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decition or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court". For the purposes of recognition and enforcement (Chapter III) judgment also includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter; it does not include a provisional (including protective) measure which is ordered without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

9 (4) RAD interact with the rules under Articles 29 et seq Brussels I bis Regulation in a complementary manner; as concerns a conflict between the provisions of the Brussels I bis Regime and the RAD, the latter will take precedence in relation to parallel representative proceedings. See Section IV. Prima vista, in light of the interrelation and complementary nature of the concepts and rules on lis pendens and refusal of recognition and enforcement under the Brussels I bis Regime one may argue that the RAD prevails over Article 45 (1) lit c and lit d Brussels I bis Regulation as well. However, this conclusion is not justified. Concerning judgments issuing redress measures rendered in different member states, i.e. a scenario within the scope of Article 45 Brussels I bis Regulation, one may point to Article 2 (3) RAD which expressly refers to the Brussels I bis Regime beyond its rules on jurisdiction, but also in relation to the recognition and enforcement of judgments.

Conversely, the scope of Article 45 Brussels I bis Regulation concerning enforcement obviously only applies to judgments rendered in different member states[206]. With respect to irreconcilable judgments issued within the same member state, the RAD does not provide for any specific rules, but refers to the national procedural law of the forum state. However, Article 9 (4) RAD obligates the member states to ensure that consumers do not receive compensation more than once for the same cause of action against the same trader.

For the purpose of redress actions, the concept of a judgment between „**the same parties**" under Article 45 (1) lit c and d Brussels I bis Regulation in light of the representative action-model adopted by the RAD refers to (the trader and) the consumers represented and bound by said decision (i.e. regardless of the respective QE in its role as a party to the proceeding). It applies both in relation to judgments rendered in other representative actions concerning the same consumer as well as judgments rendered in connection with individual actions brought by said consumer. This position is consistent with the corresponding lis pendens-rule under Article 9 (4) RAD and in line with the objective underlying Article 45 (1) lit c and d Brussels I bis Regulation. Accordingly, it ties into scholarly considerations generally arguing for the „same parties"-concept within the meaning of Article 45 (1) lit c and lit d Brussels I bis Regulation not necessarily referring to a formal role as a party to the proceeding but rather relating to persons subjected and bound by the legal force of judgments[207].

Article 45 (1) lit c Brussels I bis Regulation concerns the irreconcilability of judgments to be recognised or enforced in relation to judgments given in the member state addressed and establishes that the latter takes precedence independent of the temporal sequence in which the judgments were rendered. Therefore, the recognition and enforcement of earlier judgments given in another member state may be refused, even if the „domestic" judgment in the member state addressed was given at a later date and in disregard of the pendency rules of Articles 29 ff Brussels I bis Regulation[208]. Whether the domestic judgment needs to become final for the purpose of denying recognition and enforcement under lit c is not determined by the Regulation and therefore – in line with Article 36 (1) – most likely depends on the concept of legal force and enforceability according to the procedural law of the member state of origin[209].

As regards the irreconcilability of judgments given both in (third states or) member states other than the member state addressed (i.e. in scenarios involving three instead of two member states), **Article 45 (1) lit d Brussels I bis Regulation** adopts a principle of priority according to which the earlier judgment prevails for the purpose of recognition and enforcement[210]. Contrary to the grounds for refusal concerning conflicts with a domestic judgment, lit d additionally requires the judgments to involve the same cause of action (also see Article 9 (4) RAD). However it should be noted, that the ECJ takes a fairly broad position on the concept of the same cause of action within the meaning of the Brussels I bis Regime, construing it extensively, which reduces the relevance of the criterion included in Article 45 (1) lit d Brussels I bis Regulation yet not in lit c for the purpose of denying recognition and consider-

206 See Case C-157/12 Salzgitter.

207 See i.a. Rassi in Fasching/Konecny[3] V/2 Article 45 EuGVVO Note 100; Hess in Schlosser/Hess, EU-ZPR[4] Article 45 EuGVVO Note 32; Kropholler/von Hein, Zivilprozessrecht[9] Article 34 EuGVO Note 52.

208 Also see Case C-386/17 Liberato, where the Court held that the disregard of the rules on pendency is no grounds for the application of the public policy-exception in recognition proceedings. This privilege of domestic judgments still provided for under the Brussels I bis Regime has not been adopted in more recent Regulations such as the European Payment Order Regulation and the European Small Claims Order Regulation (see Articles 22, respectively).

209 See for example the concept of „autorite de la chose jugee" under Belgian law which falls within the scope of Article 45 (1) lit c Brussels I bis Regulation, whereas with respect to judgments not yet final under Austrian law the lis pendens-rules under Articles 29 et seq Brussels I bis Regulation apply: Kodek in Czernich/Kodek/Mayr, Article 45 Note 45.

210 Contrary to Article 29 and Article 32 Brussels I bis Regulation, which refer to the „court first seised", for the purpose of Article 45 (1) lit d it is not relevant which action was filed earlier with a court.

ably narrows the gap between the scope of the two grounds for refusal.

According to settled case law[211] concerning the interpretation of lis pendens under Article 29 Brussels I bis Regulation, the „same cause of action" consists of a combination of the elements „same cause of action" and „same object of the action" („le meme objet et la meme cause"). The first comprises the facts and the rule of law relied on as the basis of the action, the latter means the end the action has in view. In order to ascertain whether two judgments are irreconcilable within the meaning of the Brussels I bis Regime, the ECJ examines whether they entail legal consequences that are mutually exclusive.[212] For the purpose of determining irreconcilability the effects of each decision have to be assessed according to the law of the member state of origin (see Article 36 (1) Brussels I bis Regulation) and put in comparison.

For example, a redress measure issued by a foreign court in a representative proceeding which entitles the consumer to have a purchased product brought into conformity by repair (Article 13 SGD), would be irreconcilable with a judgment issued in another member state which renders the contract void[213]; a judgment which entitles the consumer to receive compensation from the controller for the damage suffered as a result of an infringement of the GDPR is irreconcilable with a judgment denying the controller's liability because the processing of data has complied with the GDPR. Notably, as stated above Article 45 (1) lit d only applies if the consumer is represented in both proceedings (see Article 9 (3) RAD with regard to opting in) and therefore actually bound by the outcome of both judgments.

Conversely, a judgment which entitles the consumer to have a purchased product brought into conformity by repair would not be considered irreconcilable in relation to a judgment which grants additional compensation for damage suffered as a consequence of a lack of conformity.

II. RECOGNITION AND ENFORCEMENT OF REDRESS SETTLEMENTS

The RAD aims to encourage collective settlements providing redress to consumers within the context of a representative action for redress measures (Recital 53). Article 11 RAD provides for certain rules on court approved-settlements concluded in the course of proceedings[214]. Out-of-court-collective settlements, entered into in advance of initiating a proceeding, are not addressed by the RAD, but may still be provided for under national law. If such a pre-court collective settlement meets the criteria of a "court settlement" within the meaning of Article 2 lit b Brussels I bis Regulation by being approved by a court of a member state even if not concluded before a court in the course of proceedings, the Brussels I bis Regime equally applies, regardless that the settlement was entered into while a representative action is not yet pending. This extends to settlements taking the form of "authentic instruments" within the meaning of Article 2 lit c Brussels I bis Regulation[215].

211 See Case C-144/86 Gubisch/Palumbo: The concept of lis pendens covers a case where a party brings an action for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending in another State. It is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. See Case C-406/92 Tatry/Maciej Rataj; Case C-133/11 Folien Fischer/Ritrama: An action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action as an action brought by that defendant seeking a declaration that he is not liable for that loss; Case C-452/12 Nipponkoa Insurance Co/Inter-Zuid Transport; Case 145/86 Hoffmann/Krieg.

212 Case 145/86 Hoffmann/Krieg, paragraph 22.

213 See Jenard-Report in relation to Article 27 of the Brussels Convention.

214 See Recital 55. The court shall refuse to approve a settlement that is contrary to mandatory provisions of national law (that is to say: the lex causae, see Recital 55: „applicable to the cause of the action"), or includes conditions which cannot be enforced, taking into consideration the rights and interests of all parties, in particular those of the consumers concerned (Article 11 (2) RAD); member states additionally have the option to lay down rules to allow the court to refuse to approve a settlement on the grounds that the settlement is unfair. If the court does not approve the settlement, the representative proceeding continues (Article 11 (3) RAD). Approved settlements are binding upon the QE, the trader and the individual consumers concerned; however, member states may law down rules that give the individual consumers the possibility of accepting or refusing to be bound by the settlement (Article 11 (4) RAD, Recital 57).

215 „Authentic instrument" according to Article 2 lit c Brussels I bis Regulation means a document which has been formally drawn up or registered as an authentic instrument in the member state of origin and the authenticity of which relates to the signature and the content of the instrument and has been established by a public authority or other authority empowered for that purpose. This for instance applies to documents drawn up by public notaries under Austrian law or by huissiers under French law, which are both enforceable according to the law of the member state of origin.

According to Article 59 read in conjunction with Article 58 Brussels I bis Regulation court settlements as well as authentic instruments[216] which are enforceable in the member state of origin, may be enforced in the other member states without any declaration of enforceability being required. Thus, the **free movement of court settlements** as regards enforceability compares to the rules ensuring mutual enforceability of judgments, an exequatur procedure is not required. The rules and principles as discussed above in relation to cross-border enforcement of judgments apply in the same way. Any interested party may request the competent authority or court of the member state of origin to issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement (Article 60 Brussels I bis Regulation).

Contrary to Article 45 Brussels I bis Regulation (see Chapter I), a refusal of enforcement as regards court settlements and authentic instruments may only be based on **ordre public concerns**, i.e. if such enforcement is manifestly contrary to public policy in the member state addressed (Article 58 (1) Brussels I bis Regulation). The public policy clause provides for the only grounds to deny enforcement. As discussed above, the exclusion of opt-out-mechanisms with respect to consumers not habitually resident in the state in which the court settlement has been approved or concluded, will likely render most concerns futile.

The enforcement of settlements which have been approved by the court in violation of Article 11 (2) RAD, according to which settlements "**contrary to mandatory provisions" of the lex causae**[217] must be denied, as a rule cannot be refused on the grounds of public policy, provided that the procedural design of the forum state complies with Article 11 RAD. This follows from the restrictive construction of the public policy exception adopted by the Court and is in line with Article 52 Brussels I bis Regulation according to which any „revision au fond" – i.e. a substantial review of court approved settlements by the courts of the member state addressed – is precluded.

Notably, Article 58 and Article 59 only provide for cross-border enforcement of authentic instruments and court settlements (both out-of-court and settlements entered into while a representative action is already pending) which are enforceable in the Member States of origin. Mutual recognition of court settlements is not included, Article 36 Brussels I bis Regulation only refers to judgments.[218] As a result, the Brussels I bis Regime does not provide for a **preclusive effect of redress settlements**. Individual consumers bound by a court settlement might nevertheless bring individual actions in order to seek a larger award of damages against the defendant in another member state.

Additionally, as regards redress settlements providing consumers with claims for payment of a specific sum of money[219], Article 24 and Article 25 of the Regulation on a **European Enforcement Order**[220] regarding uncontested claims within the meaning of Article 3 (1) (a) and (d) of the Regulation allow for the enforcement (though again, not including recognition) of foreign court settlements and authentic instruments without the need for a declaration of enforceability. Upon application in the member state of origin, the settlement may be certified as a European Enforcement Order using the standard form in Annex II / Annex III of the Regulation. However, since the exequatur procedure was abolished by the Brussels I bis Regime, the European Enforcement Order-Regulation lost its major advantage compared to the enforcement rules under the Brussels I bis Regulation[221]. In contrast to the Brussels I bis Regime, the European Enforcement Order-Regulation does not include a public policy clause and therefore does not provide for any grounds of opposing the enforceability of a settlement which has been certified accordingly.

216 The authentic instrument must satisfy the conditions necessary to establish its authenticity in the member state of origin: Article 58 (2) Brussels I bis Regulation.

217 As clarified by Recital 55, „national law" refers to the lex causae (arg „applicable to the cause of action"), „mandatory provisions" concern provisions which cannot be derogated from to the detriment of consumers by way of contract. Recital 55 as an example refers to a settlement which would explicitly leave unchanged a contractual term that gives the trader an exclusive right to interpret any other term of that contract. See the similar wording in Article 11 (1) lit b and c, Recital 44 ADR-Directive which refer to the law of the Member State in which the consumer is habitually resident.

218 In light of the definition provided for by Article 2 lit b Brussels I bis Regulation, one may hardly argue that a court-approved settlement is not a settlement but a judgment: See Stadler, Are Class Actions Finally (Re)conquering Europe? Juridica International 30/2021, 14.

219 See Höllwerth in Geroldinger/Neumayr, IZVR II Article 3 EuVTVO Note 9.

220 Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European Enforcement Order for uncontested claims.

221 Mäsch in Kindl/Meller-Hannich, Zwangsvollstreckung[4] Article 58 Brüssel Ia-VO Note 17.

SECTION IV – PARALLEL PROCEEDINGS

I. GENERAL CONSIDERATIONS

The avoidance of parallel proceedings and irreconcilable judgments is traditionally referred to as one of the hallmarks when assessing the effectiveness of compensatory collective redress models and is closely related to the question of whether collective redress operates by means of adopting an opt-in or an opt-out mechanism[222]. Accordingly, the RAD seeks to ensure the sound administration of justice and places emphasis on preventing parallel proceedings, avoiding irreconcilable judgments and plural compensation (see Article 9 (3) and (4) RAD, Recitals 45 et seq). However, the RAD lacks to provide for any specific rules on how to consolidate parallel proceedings and facilitate cooperation between different courts, but rather refers to the Brussels I bis Regime as regards cross-border proceedings and, apart from that, tasks the member states with laying down „rules for the coordination of representative actions, individual actions brought by consumers and any other actions for the protection of the individual and collective interests of consumers" (Article 9 (4), Recital 48).

According to Article 9 (4) RAD member states have to ensure that consumers who have explicitly or tacitly expressed their wish to be represented in a representative action can neither be represented in other representative actions with the same cause of action and against the same trader, nor be able to bring an action individually with the same cause of action and against the same trader. Also, consumers must not receive compensation more than once for the same cause of action against the same trader (see Recital 46). Consequently, the RAD bars consumers from pursuing any individual action and from seeking representation in another collective action directed against the same trader and involving the same cause of action. Notably, this does not apply if a consumer later opts out from the representative action in accordance with national law, e.g. where a consumer later refuses to be bound by a settlement (Recital 46).

The notion of parallel proceedings as addressed in Article 9 (4) RAD raises several questions, in particular concerning the concept of the „same cause of action" in relation to injunctive and redress proceedings and the relationship between multiple proceedings both within the same member state and in a cross-border context.

II. REPRESENTATIVE ACTION V. REPRESENTATIVE ACTION

As regards the **relationship between redress actions and injunctive or declaratory actions**, lis pendens-issues do not arise. Article 9 (8) RAD clarifies that QEs must be able to bring redress actions without it being necessary for a court or administrative authority to have previously established an infringement in separate proceedings. According to Recital 35, member states may allow QEs to seek injunctive and redress measures within a single representative action or within separate representative actions as well as to first seek relevant injunctive measures and to subsequently seek redress measures.

Notably, the RAD does not provide for any rules on parallel proceedings concerning injunctive measures. This is consistent with Article 9 RAD, which concerning redress measures only seeks to avoid parallel proceedings and irreconcilable judgments in connection with the individual consumer, but does not refer to parallel representative actions as such. Conversely, Article 9 (4) RAD and Recital 46 anticipate the existence of multiple proceedings involving the same cause of action against the same defendant, aiming to benefit the same group of consumers.

Consequently, the RAD does not preclude **multiple injunctive actions** brought by **several QEs** against the same defendant. The same applies to **multiple redress actions** involving the same cause of action brought by several QEs on behalf of the same group of consumers. Both scenarios, as regards proceedings in different member states, are not governed by the lis pendens-rules under Article 29 Brussels I bis Regulation, which only apply to proceedings involving the same cause of action between the same parties. If proceedings involve different QEs taking ac-

222 Oberhammer in 19. ÖJT II/1, 131 f.

tion, they per se concern „related actions" at the most and therefore may fall within the scope of Article 30 Brussels I bis Regulation. For the purpose of Article 30 actions are deemed to be related „where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (Article 30 (3) Brussels I bis Regulation)[223]. Under Article 30, any court second seized may stay its proceedings. Where the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof (Article 30 (2) Brussels I bis Regulation). Notably, a suspension of proceedings under these rules is not mandatory, but at the discretion of the courts second seized. Also, as regards declining jurisdiction in favor of the court first seized which is required to have jurisdiction over the action, it is worth pointing out that the rules on related actions do not confer such jurisdiction.

As regards representative actions **brought by the same QE** against the same trader in different member states, the lis pendens-rules under Article 29 Brussels I bis Regulation only apply if the proceedings involve the same cause of action. **Injunctive actions** involve the same cause of action if they concern the same group of consumers.

For example if a QE seeks to prohibit a certain practice which has been found to infringe the interests of French consumers, bringing another action seeking to prohibit the same practice protecting the interests of Polish consumers, would not be considered as involving the same cause of action within the meaning of Article 29 Brussels I bis Regulation. Accordingly, Article 30 Brussels I bis Regulation would apply.

Similarly, several **redress actions** brought by the same QE are admissible and not deemed to involve the same cause of action within the meaning of Article 29 Brussels I bis Regulation if they concern different (groups of) consumers[224]. Moreover, the solution adopted by Article 9 (4) RAD as regards issues pertaining to parallel proceedings is solely focused on the individual consumers concerned by the redress action. They are precluded from being represented in multiple redress actions, regardless whether those are brought by the same QE or by different QEs and regardless whether they are brought within the same member state or in different member states. Also, as pointed out above the RAD assumes the existence of several representative actions with the same cause of action and against the same trader (Article 9 (4), Recital 46). As a result, one may argue that under the representative action model the concepts of the same cause of action and lis pendens exclusively concern the individual consumer and do not engage with representative actions as such at all, i.e. they do not apply to and preclude multiple proceedings as regards the relationship between the QE and the trader.

III. REDRESS MEASURES AND THE SAME CAUSE OF ACTION

The question if proceedings concern the same cause of action, is crucial in order to determine the scope of lis pendens and res iudicata, but may raise uncertainties. Notably, remedies provided by redress measures within a representative action are „without prejudice to any additional remedies available to consumers under Union or national law which were not the subject of that representative action" (Article 9 (9) RAD), thus the concept of the „same cause of action" must not be construed as to have a preclusive effect on other remedies as referred to in Article 9 (9) RAD. Conversely, according to settled case law[225] concerning Article 29 Brussels I bis Regulation the concept of proceedings having the „same cause of action" is not limited to claims which are entirely identical. It consists of a combination of the elements „same cause of action" and „same object of the action" („le meme objet et la meme cause"). The first comprises the facts and the rule of law relied on as the basis of the action, the latter means the end the action has in view. In order to ascertain if two proceedings concern the „same cause of action", the ECJ examines whether they entail legal consequences that are mutually exclusive and whether they involve the same issue

223 Article 81 of the GDPR provides for rules on a suspension of proceedings equivalent to Article 30 Brussels I bis Regulation.

224 See Gsell/Meller-Hannich, Die Umsetzung der neuen EU-Verbandsklagenrichtlinie, Gutachten über die Umsetzung der europäischen Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher (RL (EU) 2020/1828) ins deutsche Recht (2020) 41.

225 See Case C-144/86 Gubisch/Palumbo; Case C-406/92 Tatry/Maciej Rataj; Case C-133/11 Folien Fischer/Ritrama; Case C-452/12 Nipponkoa Insurance Co/Inter-Zuid Transport; Case 145/86 Hoffmann/Krieg.

lying at the heart of both proceedings.[226] The mere fact that redress measures differ in terms of the amount sought will probably not suffice to provide for another cause of action as regards the difference.

For example if one redress action seeks compensation for non-material damage suffered as a result of an infringement of the GDPR amounting to € 500 for each consumer concerned, while another redress action seeks compensation in the amount of € 1.000 all else being equal, consumers who have expressed their wish to be represented in redress action 1 may not additionally seek to join redress action 2, neither as regards the total amount of € 1.000 nor as regards the difference to the amount of € 500. The same applies to individual actions, seeking to be awarded compensation to a larger amount yet based on the same cause of action.

If the QE brings a representative action seeking reimbursement to the amount of € 1.000 for each consumer who paid a fee in this amount in accordance with unfair terms included in consumer credit contracts on the basis of restitution and unjust enrichment, the consumers are not precluded from bringing individual actions claiming compensation for their material damage suffered as a result of the unfair contract term to the amount of € 1.000 on the basis of national law awarding damage as a result of unfair commercial practices. However, consumers may not receive compensation more than once, i.e. they would not be entitled to collect on this debt twice, thus ending up with being awarded € 2.000.

IV. "DOUBLE REPRESENTATION"

It is worth pointing out that despite the likelihood of multiple proceedings being initiated in different member states the practical relevance of issues concerning parallel representation might be considerably diminished and should not be overrated. On the one hand, this follows from the fact that Article 9 (3) RAD provides for a mandatory opt in-mechanism concerning consumers who are not habitually resident in the forum state. On the other, it should be noted that as a prerequisite for any parallel representation to occur the redress actions in question need to allow for a representation of consumers from different member states in the first place. Factoring in limitations following from the rules on jurisdiction (see Section I), certain challenges pertaining to the application of multiple laws (see Section II) and a likely reluctance on the part of QEs to include (groups of) consumers from other member states, one may assume that the majority of redress actions will not seek to permit „foreign" consumers to opt in. As discussed above, QEs are free to limit the subject matter of their action accordingly to remedies available to consumers under a certain applicable law, which prevents „foreign" consumers from being „concerned by that representative action" within the meaning of Article 9 RAD and thus precludes them from being represented. Against this background, issues of double representation and irreconcilable judgments might primarily concern parallel domestic actions and arise less frequently in cross-border settings. The first scenario is subject to the national law of the forum state which must observe the provisions laid down in Article 9 (4) RAD, the latter is governed by Article 29 Brussels I bis-Regulation.

As regards double representation in cross-border scenarios – for instance concerning a consumer who chooses to not opt out from a redress action brought in his home member state and opts in to be represented in a redress action brought in another member state, or concerning a consumer who expresses his wish to be represented in two redress actions brought in different member states – the Brussels I bis Regime adopts a **principle of priority on lis pendens**, giving preference to the courts where proceedings have been initiated first. According to Article 29 "any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established". Once the jurisdiction of the court first seised is established, other courts "shall decline jurisdiction" in favour of the court first seised (Article 29 (3) Brussels I bis Regulation). In order to enable the courts to assess which of them is deemed to be "first seised", they may request information from any other court seised as to when it was seised (Article 29 (2) Brussels I bis Regulation). Article 32 defines the particular time relevant for the purpose of determining lis pendens, thus determining which proceeding has priority and prevails over other proceedings pending. Essentially, according to Article 32 a court is deemed to be seised at the time when the document instituting the proceedings (or an equivalent document) is lodged with the court[227], or if

226 Case 145/86 Hoffmann/Krieg, paragraph 22.

227 Article 32 (1) lit a Brussels I bis Regulation: provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant.

it has to be served before being lodged with the court, at the time when the document is received by the authority responsible for service[228].

However, it should be noted, that the time of lis pendens with respect to the representative action as such is not relevant for the purpose of Article 29 Brussels I bis Regulation. In line with Article 9 (4) RAD the **time of lis pendens** needs to be determined in connection with each individual consumer, i.e. in accordance with him/her "explicitly or tacitly" expressing the wish to be represented in the representative action in question. Therefore, it is to a certain extent subject to the mechanism and means of operation concerning the procedure of opting in or opting out adopted by the national law of the forum state, respectively.

Notably, neither the RAD nor the Brussels I bis Regulation provide for a register or database, established and maintained at the national or European level in order to collect and make accessible data concerning individual consumers represented in redress proceedings[229]. Therefore, Article 29 Brussels I bis Regulation may fail to prevent consumers from being represented in different proceedings and to avoid irreconcilable judgments. In this case, that is to say as soon as a final decision is rendered, Article 29 is not applicable anymore. Subsequently, Article 45 Brussels I bis Regulation may provide for grounds of refusal as regards recognition and enforcement.[230] See Section III Chapter I.

V. REPRESENTATION V. INDIVIDUAL ACTION

Similar to the „double representation"-scenario addressed above, consumers are precluded from bringing parallel individual actions with the same cause of action (Article 9 (4) RAD). Under the lis pendens rule according to Article 29 Brussels I bis Regulation priority as determined by Article 32 leg cit decides which proceeding takes precedence. Consequently, where the individual action has already been brought prior to launching a representative action, the individual action would prevail, virtually by means of constituting a „preemptive" opt out on the part of the consumer concerned as regards member states which operate on an opt out-mechanism.

However, considering the fact that consumers may wish to be represented despite an individual action already pending and may later opt out from a representative action (see Recital 46), subject to the law of the forum state, it seems preferable to allow for opt in-solutions as regards representative actions on the one hand, and on the other, to provide for a means to stay or suspend individual proceedings upon joining a representative action until the relevant time limit for opting out has expired rather than have the case dismissed right away.

228 Article 32 (1) lit b Brussels I bis Regulation: provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court. According to Article 32 (2) Brussels I bis Regulation the court or the authority responsible for service shall note, respectively, the date of the lodging of the document instituting the proceedings or the date of receipt of the documents to be served.

229 The electronic database, to be set up and maintained by the Commission under Article 14 (3) RAD serves a different purpose. It aims at facilitating cooperation between QEs as referred to in Article 20 (4) RAD and facilitating communications between member states and the Commission relating to the status and monitoring of QEs in accordance with Article 5 RAD. Conversely, national electronic databases as referred to in Article 14 (1) RAD are optional, limited to provide information on QEs designated for the purpose of bringing representative actions and „general information on ongoing and concluded representative actions" and „publicly accessible" through websites, they are thus not equipped to provide courts with information on individual consumers either.

230 However, according to recent case law the disregard of the rules on pendency does not justify the application of public policy in the recognition proceeding: See to that effect Case C-386/17 Liberato.

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