

Judges and Mass Litigation

A (Behavioural) Law & Economics Perspective



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Rechters en collectieve acties
Een (gedrags)rechtseconomisch perspectief

Proefschrift ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam op gezag van
de rector magnificus
Prof.dr. H.A.P. Pols
en volgens besluit van het College voor Promoties

De openbare verdediging zal plaatsvinden op
maandag 15 december 2014 om 11.00 uur
door

Alexandre Pierre Gilbert Claude François Biard
geboren te Parijs, Frankrijk



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This thesis was written as part of the European
Doctorate in Law and Economics programme



A collaboration between



ALMA MATER STUDIORUM
UNIVERSITA DI BOLOGNA



Universität Hamburg



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Acknowledgements

Far from being a solitary endeavor, I learned that writing a thesis is fundamentally an exercise in teamwork, and to that end, I would like to sincerely thank everyone who took part in this project.

First and foremost, I owe to my supervisors Prof. Michael Faure and Prof. Louis Visscher. Michael, Louis, I remember very well our first meeting in Rotterdam in January 2012. We discussed together my research for the first time and, at that time I must say that I was the sceptic guy that I depict in my introduction. However, you did not lose patience and trusted me more than I trusted myself. Throughout these past few years, I learnt a lot thanks to you two. One more time, thanks for everything, I feel very lucky to have been your PhD candidate.

I am also indebted to Pieter Desmet for his help and support throughout this research. Pieter, without you, the empirical part would not have been possible. I really enjoyed working with you in Rotterdam and chasing replies from judges and lawyers in Antwerp and The Hague.

I am grateful to all the Professors who gave me insights on this project, and notably to Prof. W. Van Boom, Prof. C. Hodges, and the members of the Committee. Also, many thanks to Prof. L. Franzoni and the Professors of Bologna and Hamburg Universities, as well as the Ius Commune Research School whose help contributed to improve this work. I am also grateful to all the persons who accepted to be interviewed for the needs of this research, notably the judges in the Netherlands and France, who helped me better understand the judicial blackbox. Thanks especially to Thierry Fossier who, for several years now, has always supported my work, and to Jeroen Chorus who took a long time to share his experience with me.

It goes without saying that this work would not have been the same without the Rotterdam Institute of Law & Economics, and notably Roger, Ann-Sophie, Sharon, Alessio, Wicher and Klaus. A special thanks to Marianne and Lisa who greatly contributed to make my experience in Rotterdam and Bologna so much easier. Of course, a big thanks to all my friends in France and everywhere who supported me during this adventure: and notably all my EDLE colleagues and friends, Tobias (with whom I discovered Bologna and its surroundings from a new perspective), Sarah with whom I shared the office for two years, Tristan, Aureore, Charles, Thibault, Vincent, Bea, and many others who showed me that friendship has no boundary and does not suffer from distance.

A special thanks to Zander and Julian for their watchful eyes. This work would not have been the same without your assistance.

To conclude, a few words in French...

Un grand merci à mon père et ma mère pour leur indéfectible soutien, et ce depuis maintenant plus de 28 ans. A ma sœur, Isabelle, je me souviens très bien de notre premier voyage ensemble à Bologne et de notre expédition pour tenter de trouver un appartement à la dernière minute. Un grand merci pour l'aide que tu m'as apportée tout au long de ce projet, et pour tout ce que nous partageons. A mes frères, Olivier et Frédéric, merci pour votre soutien et vos visites à Rotterdam, j'ai beaucoup de chance de vous avoir tous les trois pour frères et sœur.

Ce livre est pour Myriam, grâce à qui cette aventure a commencé. Je sais que nous en avons beaucoup d'autres à vivre ensemble, et que, partout où nous irons, nous saurons retrouver - ou mieux, réinventer! – notre kookelac à nous... *'We made a promise we swore we'd always remember/no retreat, baby no surrender'!* (Springsteen, 'No Surrender').

This research has been concluded on 22 October 2014. Later developments in case law and policy initiatives have occasionally been taken into account. Even though I was not able to make direct references to these two books, I would like to mention W. Van Boom and G. Wagner (Eds)'s book entitled *Mass Tort in Europe – Cases and Reflections* (Berlin, De Gruyter, 2014), and D.Hensler, C.Hodges and I.Tzankova (Eds)'s book entitled *Class Actions in Contexts: How Economics, Politics and Culture Shape Collective Litigation* (Edward Elgar, Forthcoming, 2014) which will bring key building blocks to the current debates on mass litigation.

Finally, since mass litigation is a burning issue debated in several countries, I have also used non-english references. Translations in English (and possible mistakes) are entirely my own. The novels which I occasionally refer to and quote used to be on my bedside table during these past few years. They followed me throughout my PhD writing period...

Bruxelles, Octobre 2014

Glossary

AEAJ	Association of European Administrative Judges
AMF	Autorité des Marchés Financiers (France)
Ca (Paris)	Court of appeal (Paris)
CAFA	Class Action Fairness Act
Cass. (1ere) civ.	Court of cassation, (First) Civil chamber (France)
CE	Conseil d'Etat (State Council, France)
CPR	Civil Procedure Rules (England and Wales)
DG	Directorate General (EU Commission)
DG SANCO	DG Health and Consumer of the European Commission
DG JUST	DG Justice of the European Commission
ECHR	European Court of Human Rights
EU	European Union
FRCP	Federal Rules of Civil Procedure (United States)
GLO	Group Litigation Order (England and Wales)
IHEJ	Institut des Hautes Etudes sur la Justice (France)
KpMug	Kapitalanleger-Musterverfahrensgesetz (Germany)
L&E	Law & Economics
MEDEF	Mouvement des Entreprises de France
Member State	Member State of the European Union
MP	Member of Parliament
RIN	Règlement Intérieur National des avocats français
SCA	Securities Class Action
TI	Tribunal d'instance (Court of First Instance, France)
TGI	Tribunal de Grande Instance (High Court of First Instance, France)
US	United States of America
WCAM	Wet collectieve afhandeling massaschade (Netherlands)

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“The only real journey, the only Fountain of Youth, would be to travel not towards new landscapes, but with new eyes, to see the universe through the eyes of another, of a hundred of others, to see the hundred universes that each of them can see, or can be”.

Marcel Proust, *In Search of Lost Time: The Prisoner and the Fugitive*

“It is the mark of an educated man to be able to entertain a thought without accepting it.”

Aristotle, *Metaphysics*

GENERAL INTRODUCTION

‘Is the mission that we have assigned to judges too heavy? While the mission is certainly difficult, one must ensure the knowledge and the independence of those who perform it. We are however led by necessity to accord judges this responsibility’. With these words, written as early as 1911, DEMOGUE depicted the rise of judges and their increasing roles in modern societies.¹ For decades, judicial duties have extended far beyond the scope of traditional adjudication, judges being progressively called upon to occupy the role of social engineers.² Meanwhile, contexts in which judges evolve have transformed. A few decades ago, CAPELLETTI predicted that the rise of ‘big businesses’ as by-products of ‘a massification of societies’ characterized by ever-increasing production and consumption and changes in social relations would, sooner or later, require the implementation of ‘big judiciaries’.³ Mass damage caused by corporate misbehaviour (e.g. anticompetitive practices, misleading market information), defective products, harmful pharmaceuticals, accidents or environmental disasters nowadays tend to multiply and create new challenges not only for legal actors but also for society at large. In spring 2011, the replies received by the European Commission to its public consultation on collective redress indicated European stakeholders’ strong interest in seeing judiciaries play ‘prominent’ and ‘leading’ roles in the supervision and monitoring of procedures which enable groups of claimants to seek together compensation for damage caused by

¹ R. DEMOGUE, *Les notions fondamentales du Droit privé : essai critique pour servir d’introduction à l’étude des obligations*, 1911, Librairie Nouvelle de Droit et de Jurisprudence Arthur Rousseau, at p.534 (translation from the author. In French : ‘cette mission, donnée par nous au juge, est-elle trop lourde ? Quelle soit difficile à remplir, je ne le nie pas, et il est certain qu’on ne saurait trop s’occuper de garantir le savoir et l’indépendance de ceux qui la remplissent. Mais on est amené par la force même des choses à donner aux juges ce mandat’).

² Institut des Hautes Etudes sur la Justice (IHEJ), *La prudence et l’autorité – L’office du juge au XXI^e siècle*, report for the Ministry of Justice, May 2013, 219 p. (available on www.ihej.org/wp-content/uploads/2013/07/rapport_office_du_juge_mai_2013.pdf, accessed May 2014) ; Sénat, *L’office du juge*, Symposium, September 2006 (report available on www.senat.fr/colloques/office_du_juge/office_du_juge.pdf, accessed May 2014) ; S.ROZES, ‘Un nouveau profil pour les juges’, in : *Mélange en l’honneur de R.PERROT – Nouveaux juges nouveaux pouvoirs*, Dalloz, 1995, pp.435-441 ; P. GERARD, F. OST and M. VAN DE KERCHOVE (Eds.), *Fonction de juge et pouvoir judiciaire : transformation et déplacement*, Publication des facultés universitaires de Saint Louis, 1983.

³ M. CAPELLETTI, *Le pouvoir des juges*, Economica, Paris, 1999, at p.61 ; from the same author, ‘Vindicating the Public Interest through the Courts: a Comparativist’s Contribution’, (25) *Buffalo Law Review*, 1975, pp.643-690.

mass events.⁴ In its 2013 Recommendations, the EU Commission further highlighted that ‘a key role should be given to courts in protecting the rights and interests of all the parties involved in a collective redress actions as well as in managing the collective redress actions effectively’.⁵ Judges are thus expected to be neutral and robust agents while assuming heavy responsibilities under a considerable burden.

Contrary to DEMOGUE’s time at which judges remained an overlooked area of research, the study of judicial behaviour and judicial decision-making has recently pervaded social sciences and successively been embraced by lawyers, economists and psychologists. These different branches of study have shed light on the way judges manage and decide cases beyond a so-called ‘mythology of legal decision-making’, which traditionally posits that judges are neutral decision-makers simply applying law to facts.⁶ Legal scholars have in turn progressively perceived the mutual benefits brought by these alternative viewpoints which contribute to renew the role of the judiciary by discussing judges’ strengths and weaknesses. As POSNER suggests, ‘achieving a sound understanding of judicial behaviour is thus of more than merely academic interest; it is a key to legal reform’.⁷

1.1 Research Question

The research question addressed in this thesis is the following:

What do policymakers expect from judges when managing and resolving mass disputes, and based on social sciences, are these expectations ultimately realistic?

1.2. Problem Definition

➤ What Does ‘Mass Litigation’ Stand For?

The concept of *mass litigation* is broad and, in recent years, many competing terms such as ‘aggregate litigation’, ‘mass disputes’, ‘group litigation’, ‘class litigation’ or ‘mass claims’ have multiplied

⁴ Public Consultation (EC), ‘Towards a Coherent European Approach to Collective Redress’, 2011, www.ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html (accessed May 2014, see specifically Question 23: ‘What role should be given to the judge in collective redress proceedings’).

⁵ Recommendation (EC) on Common Principles for Injunctive and Compensatory Collective Redress Mechanism in the Member States Concerning Violations of Rights Granted under Union Law, (21), 2013/396/EU, 11 June 2013; see also: EU Parliament, Resolution ‘Towards a Coherent Approach to Collective Redress’, 2 February 2012.

⁶ V. J. KONECNI and E. B. EBBESEN, ‘The Mythology of Legal Decision-Making’ (7) *International Journal of Law and Psychiatry*, 1984, pp.5-18.

⁷ R.A. POSNER, *How Judges Think*, Harvard University Press, London/Cambridge, 2008, at p.5.

throughout the literature.⁸ In this research, mass litigation will be used as a generic term referring to cases that involve many claimants and large-scale damage.⁹ In other words, *mass litigation* follows *mass damage* provoked by *mass accidents* or *mass torts*.¹⁰ From a procedural point of view, tools to handle mass litigation are numerous. They encompass class action, representative action, group action, mass action and other collective devices. Terminology varies across countries and differences between these procedures will timely be addressed. In an effort to propose a common definition, the European Commission emphasized in its 2011 public consultation that these notions refer to ‘any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants, or the compensation for the harm caused by such practices’.¹¹ The role of judges in mass procedures will be the red thread of this research.

➤ *Judges and Mass Litigation: Investigating a Double-Sided Relationship*

Policymakers have a view of the relationship between judges and mass claims that is mostly one-sided: judges have a key role to play for the management and resolution of mass disputes. Insights from social sciences however suggest that this relationship might actually be double-sided: judges do not only have an important role in mass litigation, but mass claims might also have a great impact on judicial attitudes and decision-making. The personality of judges might therefore significantly contribute to shaping the outcomes of mass disputes. This thesis aims to clarify how and why judges may influence mass disputes.

Mass litigation can concern various fields and different branches of substantive law, including tort, financial law and securities, consumer law, health or environmental law. This research is however not limited to a specific and delimited area, but instead remains transdisciplinary.

⁸ For a reference to the term ‘mass litigation’, see notably: D.HENSLER, ‘Justice for the Masses? Aggregate Litigation & its Alternatives’, (143) *Daedalus*, summer 2014, n°3, pp. 73-82.

⁹ See: S.C. YEAZELL, ‘Misunderstood Consequences of Modern Civil Process’, *Wisconsin Law Review*, 1994, pp. 631-678 (highlighting that the term *litigation* refers to *the whole judicial process*, i.e. in the American context, ‘discovery, summary, judgment, settlement, negotiations, alternatives to judicial process, sanctions for lawyers misbehavior, and similar pretrial matters’, at p. 666).

¹⁰ P.H. GLENN, ‘Une justice de masse? Réflexions sur la responsabilité civile en Amérique du nord’, (26) *Victoria University of Wellington Law Review*, 1996, pp.316.

¹¹ 2011 Public Consultation (EC), *supra* note 4. In the 2013 Recommendations (*supra* note 5), the European Commission further highlighted that ‘collective redress means: (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more national or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)’.

1.3. Law & Economics Relevance

This research is related to two different branches of Law & Economics (L&E) literature. The first one deals with the L&E of mass litigation. The fact that the Law & Economics movement has principally emerged in the United States – a country where class actions have been for decades a topic of primary concerns among scholars and policymakers – partly explains the traditional interest of Law and Economics researchers for this new form of litigation. Since mass devices currently stand at the forefront of the political agenda of the European Union and many European countries, and since the Law and Economics movement has also progressively expanded in Europe, it is not surprising to observe that this topic has recently become of great interest for European Law & Economics scholars. By describing its economic rationale and identifying its associated risks, this literature aims to understand the conditions under which these proceedings may be viewed as optimal. This research will contribute to this branch of literature by addressing several European mass proceedings from a legal and economic perspective.

The second body of literature relates to judges. Under the impulse of authors such as POSNER or COOTER, judicial behaviour has become an extensive object of investigation. This literature is nevertheless still prominently Common-law judges centred. The status of Common Law judges remains different from their Civil law counterparts.¹² ‘Accepting the American legal process as an undisputed background’ would therefore constitute a mistake that one should be careful to avoid.¹³ This research consequently aims to contribute to the existing literature by extending these insights to Continental judiciaries and discussing their relevance when applied to the mass litigation framework.

1.4. Social Relevance – the Targeted Audience

Insights from social sciences offer complementary views that are worth considering in times where judges have been assigned increased responsibilities in our society. Expecting too much from judges who might not be able to live up to these expectations could be detrimental for the judiciary’s functioning and reputation, and ultimately for the whole treatment of mass litigation. Therefore, the first audience that this research seeks to target is policymakers at both EU and Member States levels who have recently implemented -or are currently discussing - the implementation of mass devices. The research notably

¹² J.H. MERRYMAN and R. PEREZ-PERDOMO, *The Civil Law Tradition*, 3rd Ed., 2007 ; R.A POSNER, ‘The Role of the Judge in the Twenty-First Century’, (86) *Boston University Law Review*, 2006, pp.1049-1068 ; A. GARAPON and I. PAPADOPOULOS, *Juger en Amérique et en France*, Odile Jacob, Paris, 2010, 322 p.

¹³ U. MATTEI, *Comparative Law and Economics*, The University of Michigan Press, 1997, pp.69-101 (specifically Chapter 3: ‘the distinction between Common Law and Civil Law: doing away with legal positivism’).

argues that the viewpoints of judges should be better taken into account and an enhanced consideration should be given to judges' strengths and weaknesses. The second audience targets judges themselves. It contributes to shed some light on their new roles in the treatment of mass claims. It highlights the pitfalls that they may face, and errors that they may be prone to make on such circumstances. It also draws their attention to the consequences of their attitudes in mass disputes. When considering the prominent roles played by judges in this field, these findings will finally be of interest for all parties likely to be involved in mass claims.

1.5. A Note for the Sceptics

The analysis of judicial behaviour might possibly be regarded with suspicion from the viewpoint of legal scholars unfamiliar with the economic analysis of the Law. When starting this research, I must admit that I tended to side with the sceptics. Coming not only from a country where the Law & Economics movement has in recent years only slowly emerged¹⁴ and is still contested in the legal literature,¹⁵ my views on the judiciary remained also essentially legalistic by nature. I was therefore reluctant *vis-à-vis* such new approaches inherited from the North-American tradition, and still regarded judges principally through the lens of the *mouths of the law* traditionally expounded by MONTESQUIEU.¹⁶ Yet, as GARAPON has pertinently observed: 'why shouldn't the judge be subjective, sentimental, or feeling positive or negative with respect to those subjects involved in the case at hand; why shouldn't he feel attracted to or repelled by certain cases?'¹⁷ Analysing the human component underlying the Law and the function of judging turned out to be for me a veritable challenge, and, finally, a highly-valuable undertaking.

Likewise, readers (and specifically if they have a legal background) may tackle this research with a similar initial reluctance. This, I believe, is mainly due to misunderstandings.¹⁸ In order to continue to bridge the

¹⁴ A. OGUS and M.FAURE, *L'analyse économique du droit: le cas français*, Ed.Panthéon-Assas, Paris, 2002, 176 p.

¹⁵ R.E.DE MUNAGORRI, 'L'analyse économique est-elle une source du droit ?', *Revue trimestrielle de droit civil*, 2006, p.505 ; A.BERNARD, 'Law and Economics, une science idiote ?', *Recueil Dalloz*, 2008, p.2806.

¹⁶ MONTESQUIEU, *De l'esprit des Lois*, 1st ed. 1748 (writing, in French : 'le juge est la bouche qui prononce les paroles de la loi').

¹⁷ A. GARAPON, J. ALLARD and F. GROS, *Les vertus du juge*, Dalloz, Paris, 2008 (translation from the author. In French: 'pourquoi le juge n'aurait-il pas de subjectivité, de sentiments, positifs ou négatifs, face à de tels justiciables, pourquoi n'éprouverait-il pas de l'attraction ou de la repulsion pour certaines affaires ?', at p.7).

¹⁸ Dialogues between legal scholars and Law & Economics researchers are often clouded by misunderstandings, the first usually considering that the second are keen to sacrifice *justice* to *efficiency*. Contra see: A. OGUS and M.FAURE, *supra note 14* (claiming: 'nous ne prétendons pas que l'efficacité soit le but exclusive du droit, ni que les objectifs économiques doivent toujours l'emporter sur les autres valeurs. Mais même si l'on est en droit de préférer une solution juste à une solution efficiente, il n'est pas inutile de connaître le prix du sacrifice !', at p.26);

gap between legal researchers and the Law and Economics literature, this research has sought to understand the doctrinal roots of this branch of literature and to clarify the reasons of its disaffection among Continental legal scholars. In addition, particular attention was devoted to highlight and question the methods and terminology used by economists and behavioural scholars. The goal is ultimately to facilitate dialogues between lawyers and economists. Lawyers may indeed take benefit from economic insights inasmuch as economists can find in the concerns expressed by legal scholars a way to enrich their analysis.¹⁹

1.6. Structure

As a way to set the background, **Chapter 2** investigates the economics of mass litigation and shows that its rationale is dependent on a third-party monitoring. Recent European claims tend to assign these cornerstone duties to judges. **Chapter 3** scrutinizes in greater details the roles of judges in the treatment and resolution of mass disputes. The comparative analysis of five different mass litigation procedures highlights convergences in judicial intervention, and helps clarify the type of judges that policymakers nowadays expect to monitor and resolve mass disputes. Referring then to rational choice theory, **Chapter 4** proposes a view ‘from the inside’ of judges dealing with mass litigation. It discusses the issue of judicial incentives and points out the influence of judicial attitudes on the outcomes of mass claims. Going then a step further, **Chapter 5** assumes that individuals do not behave as rational utility maximizing agents but have a bounded rationality and may be prone to biases. Insights from behavioural law & economics show how contexts – here, the ‘mass’ context – can influence judicial decision-making, and question whether decision-makers tend to behave differently when facing groups or numerous individuals. Consequences for the treatment of mass claims are subsequently discussed. Since the analysis would not be complete without empirical testing, **Chapter 6** proposes two reality checks in order to test the theoretical developments previously set forth. The first check consists of an online questionnaire conducted with French judges aiming at collecting judicial viewpoints on the French group action. The second is an experiment intended to discuss the impact of multiple claimants on legal decision-making. **Chapter 7**

see also B. DEFFAINS, 'Pour une theorie economique de l'imprevision en droit des contrats', *Revue Trimestrielle de Droit Civil*, 2010, p.719 (highlighting: 'the long-lasting incomprehension between economists and jurists regarding their object of study and their methodologies', translation from the author).

¹⁹ A. OGUS, 'What Legal Scholars Can Learn from Law and Economics', (79) *Chicago-Kent Law Review*, 2004, pp.383-401 (observing: 'because Law and Economics cuts across traditional legal conceptual structures as well as legal systems and cultures, it provides a valuable tool for understanding the relationship between different parts of the legal system and between systems', at p.385); see also: R. COOTER and T. ULEN, *Introduction to Law & Economics*, AddisonWesley Longman, 3rd ed., 2000, pp. 4-7.

analyses the learnings brought by social sciences and proposes policy recommendations to facilitate and enhance judicial intervention in mass litigation. Finally, **Chapter 8** concludes by highlighting possible paths for future research.

THE ECONOMICS OF MASS LITIGATION

A Need for Third-Party Monitoring: A Role for Judges?

2.1. INTRODUCTION

When observing the idiosyncrasies of mass litigation devices in Europe, MILLER and ISSACHAROFF have noted that ‘analysing European class actions is like shooting at a moving target’.²⁰ Regardless of their divergences in terms of procedural design,²¹ the Law and Economics literature has pointed out the common economic objectives pursued by mass proceedings which are ultimately perceived as a ‘legal machinery’²² aimed at correcting market failures and filling the gaps that individual litigation and regulation have left uncovered. Yet, their associated benefits tend to remain highly dependent on a third-party monitoring and supervision.

2.1.1 Methodology and Objectives

A few preliminary observations must be addressed regarding the methodology used in this chapter. First, the economics of mass litigation devices is a topic which for decades has been extensively commented upon by American scholars, and more recently, also tackled in the European legal and Law & Economics literature. This chapter could therefore possibly be regarded as a redundant exercise from the viewpoint of informed readers. This step however constitutes here a first and necessary move to analyse the roles assigned to the judiciary in this field, to highlight the strong expectations nowadays placed on judges’ shoulders, and to sketch the particularities of the contexts in which judges make their decisions. In simple

²⁰ S. ISSACHAROFF and G.P. MILLER, ‘Will Aggregated Litigation Come to Europe?’, (62) *Vanderbilt Law Review*, 2009, n°1, p.177.

²¹ D. FAIRGRIEVE and G. HOWELLS, ‘Collective Redress Procedures-European Debates’, (58) *International and Comparative Law Quarterly*, 2009, pp. 379-409.

²² A. CASSONE and G. RAMELLO, ‘The Simple Economics of Class Actions: Private Provision of Club and Public Goods’, (32) *European Journal of Law & Economics*, 2011, pp. 205-224.

words, this chapter is aimed at setting the scene and judges will lead the analysis. Second, the benefits associated with mass litigation devices are numerous. Although the goal is here to clarify the economic rationale of mass litigation, this section is not intended to be exhaustive. Instead, the objective is to provide a clear overview. Therefore, some issues related to mass litigation, such as the optimal combination of public and private enforcement, or the use of punitive damages which is peculiar to the American experience and which *per se* could require lengthy developments, will only briefly be evoked. The primary focus of this dissertation is indeed the judge and facets of judicial behaviour. Third and finally, Law and Economics scholars addressing mass procedures have to this day principally referred to the model of the American class action as main object of investigation.²³ At this stage, a higher level of abstraction is deliberately retained: the focus is on the common denominator shared by all mass litigation procedures.

2.1.2. The Chapter in a Nutshell

The underlying objectives of this chapter are twofold. The first is to clarify the benefits **(2.2)** and costs **(2.3)** associated with mass litigation devices. The second is to highlight the importance of a third-party monitoring aimed at ensuring that such costs do not ultimately outweigh the benefits. In this respect, judicial monitoring and supervision is a solution nowadays spearheaded by a majority of stakeholders **(2.4)**.

*

²³ See notably: J. BACKHAUS, A. CASSONE and G.B. RAMELLO (Eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, 2012, 400 p.

2.2 THE BENEFITS ASSOCIATED WITH MASS LITIGATION DEVICES

When wrongdoings occur, plaintiffs are theoretically incentivized to file for damages and wrongdoers should face the consequences of their misconduct. In practice however, meritorious lawsuits are not necessarily filed due to a lack of plaintiffs' incentives to sue. As a consequence, infringers do not entirely internalize the costs of their action. In this context, mass devices are tools aimed at bridging such gaps: they cure judicial market failures and provide cost-effective solutions for the enforcement of rights (2.2.1). Furthermore, they contribute to the goal of deterrence by curing the shortcomings of regulation and individual litigation, potentially leading to behavioural changes (2.2.2).

2.2.1. A Remedy for Market Failures and a Cost-Effective Solution for the Enforcement of Rights

Mass proceedings are organizational devices aimed at facilitating the coordination of similar claims. Their benefits are multiple and can be analysed from claimants' (a), defendants' (b) and judges' (c) perspectives. In economic terms, mass proceedings therefore contribute to enhancing the demand for legal services as well as structuring its supply.

a) Benefits of Mass Litigation Devices from the Viewpoint of Claimants

An analysis of the benefits associated with mass litigation first requires a consideration of the problems that individuals encounter when such proceedings are not available. For this purpose, the Law & Economics literature usually classifies claimants involved in mass litigation into two categories: negative-expected value claimants and positive-expected value claimants²⁴. Admittedly, further segmentations within this broad framework can be drawn since claimants often remain unaware of the real value of their claims. As a consequence, mass claims are in practice more likely to mix indifferently these two groups of claimants. For a matter of both simplicity and clarity, these two types of plaintiffs will here be considered successively.

²⁴ T. ULEN, 'An Introduction to the Law and Economics of Class Action Litigation', (32) *European Journal of Law & Economics*, 2011, pp. 185-203.

➤ *Negative and Positive-Expected Value Claimants*

A negative-expected value claimant is described as a ‘small claim plaintiff’: his expected costs of filing will exceed the expected value of his claim. Small claims are commonplace in securities and competition law where wrongdoers can spread the losses caused by their misconducts over an atomistic demand.²⁵ In such circumstances, claimants taken individually only bear a small portion of a larger harm. As pointed out by the 1982 Commission on the reform of French consumer Law at that time conducted by CALAIS-AULOY, ‘consumer disputes are small only if taken separately one from another; globally considered they represent considerable interests. The dispersion of those small injuries allows some traders to realize, without great risks, important illegal profit’.²⁶

Conversely, positive-expected value claimants have high-merit claims: their expected benefits from prevailing at trial are higher than their expected litigation costs. As suggested by SCHAEFER, in such circumstances ‘the issue of bundling rights does not serve to enable compensation by surmounting rational apathy, but also to find a cost-effective and procedurally efficient method to enforce rights that will be claimed in any event’.²⁷

➤ *Overcoming Rational Apathy, Reducing Administrative Costs, Achieving Economies of Scale*

According to the Law and Economics literature, a rational plaintiff decides to sue if he anticipates that his expected benefits (his chance of prevailing at trial multiplied by the benefits that he may receive) will exceed the expected costs of his action. Conversely, he remains passive in situations where the expected costs of filing exceed the expected benefits associated with the lawsuit. This situation known as rational apathy and rational disinterest and their importance in mass litigation was initially described by KALVEN and ROSENFELD in 1941.²⁸

From an economic point of view, procedures enabling the bundling of similar claims can be viewed as a solution for overcoming an anti-commons problem resulting from high transaction costs among

²⁵ H.-B. SCHAEFER, ‘The Bundling of Similar Interests in Litigation- The Incentives for Class Action and Legal Actions Taken by Associations’, (9) *European Journal of Law & Economics*, 2000, pp. 183-212.

²⁶ N. LHEUREUX, ‘Effective consumer access to justice: Class actions’, (15) *Journal of Consumer Policy*, 1992, pp. 445-462 (citing the CALAIS-AULOY report, at p.71).

²⁷ H.-B SCHAEFER, *supra* note 25.

²⁸ H. KALVEN and M. ROSENFELD, ‘The Contemporary Function of the Class Suit’, (8) *University of Chicago Law Review*, 1941, n°4, pp. 684-721.

plaintiffs.²⁹ As a mirror image of the so-called commons problem first identified by HARDIN in his 1968 seminal paper,³⁰ an anti-commons problem arises when a fragmentation of rights over a same thing leads to an under-utilization of resources. CASSONE and RAMELLO have compared plaintiffs involved in mass claims as ‘owners of property rights over a specific litigation’ whose action is ultimately precluded by high transactions costs.³¹ Plaintiffs are rarely eager to initiate disputes that many compare to a fight of David against Goliath. Uncertain, risky and lengthy trials, high litigation costs, expensive scientific expertise, as well as a perspective of facing powerful companies usually deter claimants from bringing their claims. As an illustration, a 2009 Euro-barometer study pointed out a general reticence shared by a vast majority of European consumers about filing complaints.³² Similarly, the EU 2013 Consumer Conditions Scoreboard revealed that limited sums at stake and length of the proceedings were generally the two main cited reasons for not complaining.³³ Finally, high costs of legal procedures are also often cited as one of the major explanations for not going to courts.³⁴ Even though surveys on consumer behaviour must be considered carefully since they are constructed from samples which may not adequately be representative from their parent population, they nonetheless convey interesting indications on a general tendency.³⁵ It ultimately turns out that the costs of filing a lawsuit make it harder for smaller claims to be brought without aggregation.

Mass proceedings are a solution to cure plaintiffs’ rational apathy: they allow a pooling of resources and restore claimants’ incentives to sue. Going a step further, CASSONE and RAMELLO have described these procedures as ‘local public goods’ – or ‘club goods’ – whose main task is to provide the claimant group with a set of common specific services that would not have been created otherwise.³⁶ Economies of

²⁹ Mass proceedings can be viewed as tools aiming at aggregating similar but fragmented claims. See also: T.RAVE, ‘Governing the Anticommons in Aggregate Litigation’, (66) *Vanderbilt Law Review*, 2013, pp.1183-1258.

³⁰ G.HARDIN, ‘The Tragedy of the Commons’, (162) *Sciences*, 1968, pp. 1243-1248.

³¹ A. CASSONE and G. RAMELLO, *supra* note 22.

³² EU Commission, ‘Consumers Redress in the European Union: Consumers experiences, Perceptions and Choices’, *Euro-barometer*, August 2009; see also: report from Civic Consulting commissioned by DG SANCO, ‘Study Regarding the Problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems’, August 2008.

³³ EU Commission, *Consumer Conditions Scoreboard*, July 2013, 9th ed. (pointing out that respectively 37.4% of respondents cited the limited sums and 36.6% cited the length of the procedure, at p.47).

³⁴ EU Commission, ‘European Union Citizens and Access to Justice’, *Euro-barometer*, 2004.

³⁵ A. TVERSKY and D. KAHNEMAN, ‘Belief in the Law of Small Numbers’, (76) *Psychological Bulletin*, 1971, n°2, pp. 105-110; M.RABIN, ‘Inference by Believers in the Law of Small Numbers’, (117) *The Quarterly Journal of Economics*, 2002, n°3, pp.775-816.

³⁶ A. CASSONE and G. RAMELLO, *supra* note 22.

scale, risk- and cost- sharing³⁷ and common investments are part of the benefits rendered possible by mass devices which ultimately strengthen the plaintiff's litigation toolbox.³⁸

➤ *A Remedy for Informational Asymmetries*

Mass proceedings are also a remedy for curing the informational asymmetries which plague the litigation process when large-scale damage occurs. Such informational asymmetries can be found at different stages.

First, asymmetries plague the relationships between plaintiffs themselves. They are particularly salient in small claims where many plaintiffs remain unaware of the occurrence of an infringement, of the magnitude of the damage, or of the identity of others victims. DEFFAINS and LANGLAIS have for instance pointed out that class action procedures can be regarded as tools enabling a pooling of knowledge: They facilitate a better transmission of information among group members, and enable plaintiffs to better assess their chances of prevailing at trial.³⁹ The same authors also view these procedures as mechanisms for internalizing the informational externalities that are inherent in any litigation process⁴⁰. Indeed, in situations where suits are filed individually and repeatedly, the first mover must bear a degree of uncertainty regarding the merits of his case and his chances of success. This grey area is nonetheless likely to progressively be clarified when subsequent plaintiffs decide to file. The positive informational externalities created by the litigation process are thus likely to benefit later plaintiffs while deterring the first mover from stepping forward. When group devices are available, the first mover can retain parts of the benefits that subsequent plaintiffs will draw from such informational externalities.

Second, informational asymmetries moreover concern the relationship between defendants and claimants. According to ROSENBERG, the civil procedure is affected by a 'systemic bias' which favours defendants over plaintiffs when large claims are at stake.⁴¹ When anticipating that his conduct has caused harm to

³⁷ T. EISENBERG and G. MILLER, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', (57) *Vanderbilt Law Review*, 2004, p.1529 (showing that legal costs tend to decrease when a high number of claimants takes part in the procedure).

³⁸ S. KESKE, A. RENDA and R. VAN DEN BERGH, 'Financing and Group Litigation', in: L.T.VISSCHER and M.TUIL (Eds.), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis*, Edward Elgar Publishing, 2010, pp.57-90.

³⁹ B. DEFFAINS and E. LANGLAIS, 'Informational Externalities and Settlements in Mass Tort Litigation', (32) *European Journal of Law & Economics*, 2011, pp.241-262.

⁴⁰ *Idem*.

⁴¹ D. ROSENBERG, 'Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't', (37) *Harvard Journal on Legislation*, 2000, n°2, p.393.

multiple victims, a defendant is incentivized to invest immediately and to a larger extent into costly scientific evidences and expertise which will help him support his line of defence and prevail in early cases which later will constitute a basis for case law on similar issues.⁴² Thereby, by taking advantage of the information in his possession - and hence by treating independent claims as ‘a de facto class’⁴³ - the defendant spreads the cost of his large initial investment over the number of plaintiffs. Obviously, a single plaintiff is unlikely to support alone such an investment⁴⁴. By increasing the plaintiffs’ confidence and - symmetrically - decreasing the defendants’ beliefs in their chance of prevailing at trial⁴⁵, these proceedings therefore lead to a levelling of the playing field between litigants.

➤ *Facilitating Access to Justice and Contributing to a Victims’ Empowerment*

Mass procedures are a cornerstone contribution to a broader ‘victims’ empowerment’⁴⁶ nowadays spearheaded by the European Union.⁴⁷ It also reflects the current interest for a ‘victims’ time’, a general tendency observable in several European countries which tend to place weak individuals at the core of policy agenda.⁴⁸ European institutions have furthermore been interested in the positive externalities that mass procedures can have on consumers’ confidence *vis-à-vis* economic integration. Indeed, the current lack of adequate protection tends to exacerbate European citizens’ mistrust *vis-à-vis* the European institutions and the Single Market,⁴⁹ which ultimately jeopardizes the overall functioning of the

⁴² I. TZANKOVA and J. KORTMANN, ‘Remedies for Consumers of Financial Services: Collective Redress and Improvement of Class Representation’, *European Journal of Consumer Law*, 2012, n°1.

⁴³ B. HAY and D. ROSENBERG, ‘Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy’, (75) *Notre Dame Law Review*, 2000, p.1377.

⁴⁴ D. ROSENBERG, *supra* note 41 (observing: ‘the unequal investment incentive for defendants and plaintiffs in mass tort cases translates into a much greater chance than the defendant, who aggregates all classable claims automatically, will prevail on the common questions over the plaintiff’s attorney who acquires fewer than all claims’).

⁴⁵ M. SARACENO, ‘Group Litigation, Access to Justice and Deterrence’, *Amsterdam Centre for Law and Economics Working Paper*, 2008, n°2008-04.

⁴⁶ *Idem*.

⁴⁷ EU Commission White (COM 2008-165, 2.4.2008) and Green (COM 2005- 672, 19.12.2005) Papers on Antitrust Private Damages Action (www.ec.europa.eu/competition/antitrust/actionsdamages/documents.htm, accessed 15 October 2012).

⁴⁸ C. ELIACHEFF and D. SOULEZ-LARIVIERE, *Le Temps des Victimes*, Albin Michel, Paris, 2006, 293 p. (for a view in the field of competition law, see notably J.STUYCK, ‘EC Competition Law after Modernization: More Than Ever in the Interest of Consumers’, (28) *Journal of Consumer Policy*, 2005, pp.1-30).

⁴⁹ I. BENOHR, ‘Consumer Dispute Resolution After the Lisbon Treaty: Collective Actions and Alternative Procedures’, *Journal of Consumer Policy*, 2012; G.CANIVET, ‘Réflexions sur la place du citoyen dans le marché unique européen’, *Revue Trimestrielle de Droit Européen*, 2008, p. 119.

economy.⁵⁰ Additionally, attempts of European citizens to seek compensation outside Europe have highlighted a lack of adequate protection of consumers and shareholders in Member-States. This situation was notably evidenced in the *Vivendi* case where French shareholders attempted to join the US class action lawsuit filed by American shareholders against the company which was suspected of disclosing erroneous and misleading information. In its 2010 *Morrison* decision,⁵¹ the US Supreme Court however dismissed the claims from French parties and limited the participation of foreign litigants to US class actions. This decision left many claimants uncompensated, and thus called for European interventions.⁵²

Mass proceedings contribute to renovate and strengthen the role of plaintiffs within the civil justice scheme. The pooling of services is likely to overcome the plaintiffs' rational apathy problem by making small claims economically viable. In addition, a reallocation of wealth among litigants permits a balance of litigation powers between defendants and claimants, which theoretically should lead to a more efficient enforcement of plaintiffs' rights.

b) Benefits of Mass Litigation Devices from the Viewpoint of Defendants

Although they are more rarely recalled and remain often overlooked, mass litigation devices have also positive implications for defendants.⁵³ As NAGAREDA observed, 'even in the United States, where defence-side criticism of class actions is commonplace, defendants in a settlement posture routinely prefer a class definition that is as broad as possible in order to maximize the preclusive effect of the desired deal'.⁵⁴ From an economic perspective, the benefits for defendants are twofold. First, mass proceedings are organizational devices aimed at coordinating and rationalizing companies' strategies when they face a large number of similar plaintiffs. Second and relatedly, they are tools lowering companies' transaction

⁵⁰ Y. ALGAN and P. CAHUC, *La société de défiance – Comment le modèle français s'autodétruit*, ed. Rue d'Ulm, 2007 (highlighting how mistrust of French citizens can impair market functioning).

⁵¹ *Morrison v. National Australia Bank*, USSC, 29 March 2010.

⁵² V. MAGNIER, 'Rapport spécial en droit financier et boursier' in : C.PRIETO (Ed), *Cohérence des recours collectifs – Réponse à la consultation Publique de la Commission européenne*, Coll. Trans Europe Experts, Société de législation comparée, 2011, pp.173-219.

⁵³ F.X. SHEN, 'The Overlooked Utility of the Defendant Class Action', (88) *Denver University Law Review*, 2010, pp.73-181. The EU Parliament also highlighted the possible added-value of mass litigation tools for defendants by pointing out in its 2012 resolution 'the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims' (EU Parliament, *supra* note 5, emphasis added).

⁵⁴ R. NAGAREDA, 'Aggregate Litigation across the Atlantic and the Future of American Exceptionalism', (62) *Vanderbilt Law Review*, 2009, n°1, p.1.

and reputational costs that arise from successive and independent litigation. However, as later discussed, this second argument remains controversial and an opposite view could also be defended.

Here again, the analysis of the benefit associated with mass proceedings from the companies' viewpoint first requires spending time considering the situation where mass proceedings are not available. When a defective product has caused harm to a large number of individuals, a company faces a zone of uncertainty regarding the extent of its liability, the number of potential plaintiffs and, as a consequence, the amount of financial reserves to be kept aside to ensure plaintiffs' compensation.⁵⁵ The company may also be forced to hire numerous counsels to deal with scattered lawsuits. Finally, its management may be interested in clarifying a litigious situation through a pooling of claims in order to meet the legal duties imposed notably by company law (such as, for example, the information to shareholders) and to avoid further coordination costs.⁵⁶ In other words, a company may want to clarify the boundaries of the dispute so as to avoid additional and later costs. In this view, mass proceedings enable companies to settle and clear a dispute, providing thus certainty for the future. Through a global 'bill of peace',⁵⁷ companies lower transaction costs associated with future litigations and their subsequent reputational costs, 'improving [on this occasion] the financial posture of the business itself'.⁵⁸ In this respect, NAGAREDA highlighted that 'making peace in mass torts literally means creating new wealth'.⁵⁹ As shown at later stage in this research, the implementation of the Dutch Act on Collective Settlement was for instance a salient illustration of a mass procedure enhancing the interest of companies. As a scholar has indeed pointed out, the Dutch proceeding was in practice an 'idea [coming] from the industry'⁶⁰ itself.

⁵⁵ *Idem.*

⁵⁶ C. HODGES, *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford, 2008, 319 p.

⁵⁷ R. NAGAREDA, 'Autonomy, Peace, and Put Options in Mass Tort Class Actions', *Harvard Law Review*, January 2002, pp.115-747.

⁵⁸ *Idem.*

⁵⁹ R.NAGAREDA, 'Mass Resolution of Mass Torts: Emerging issues in the United States and the Global Future', in: J.STEEL and W.V.BOOM (Ed.), *Mass Justice: Challenges of Representation and Distribution*, Edward Elgar Publishing, 2011, at p.26.

⁶⁰ I.N.TZANKOVA, 'Class Actions, Group Litigation and Other Forms of Collective Litigation', in: Global Class Actions Project – Country report Netherlands, 2007, at p.5.

c) Benefits of Mass Litigation Devices from the Viewpoint of Judges

From the judiciary's viewpoint, mass devices aim at coordinating judges' intervention so as to avoid the costs arising from duplicate lawsuits⁶¹. They thus contribute to an efficient justice and reduce the costs of the judicial system.

➤ *Claims for Efficient Justice*

Current European discussions about mass proceedings must be understood in a broader context in which courts are required to 'deliver justice' while in the same time 'operat[ing] efficiently', meaning faster and at lower costs.⁶² This quest for judicial economy is not novel. MARCUS for instance regards the process of consolidation as a mere 'sleeping giant' whose origins can be traced back to the nineteenth-century England where similar concerns *vis-à-vis* judicial expenses and delays were already addressed.⁶³ In current days, the multiplication of similar claims has drastically endangered the functioning of judiciaries. In Germany, the Deutsche Telekom case involved more than 15,000 individual claimants who filed against the company for alleged misleading and erroneous information, and more than 700 counsels. This affair drastically over-burdened the Frankfurt Trial Court.⁶⁴ Similarly, while presiding over the Bendectin class action, Judge RUBIN calculated that adjudicating separately and individually all pending Bendectin cases would approximately require approximately 182 years of the judge's time.⁶⁵ These situations are contrary to actual concerns where minimizing judicial expenses and reducing delays have become objectives that modern systems of justice seek to achieve.⁶⁶

⁶¹ D. ROSENBERG, 'Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Actions vs. Collateral Estoppel vs. Standard Claims Market', *Harvard Law School Public Law Research Paper*, 2002, n°044.

⁶² C. HODGES, *supra* note 56, at pp.246-249.

⁶³ R.L. MARCUS, 'Confronting the Consolidation Conundrum', *Brigham Young University Law Review*, 1995, pp.879-924 (quoting Lord Mansfield who already in 1892 saw this practice introduced in England a way to 'avoid the expense and delay attending the trial of a multiplicity of actions upon the same question').

⁶⁴ E. FEES and A. HALFMEIER, 'The German Capital Markets Model Case Act (Kapmug) – A European Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reforms', January 2012, available on www.ssrn.com/abstract=1684528.

⁶⁵ *In Re Richardson-Merrell, Inc.*, 624 F, Supp.1212, 17 September 1985 (Judge C.B. RUBIN highlighted that 'it takes little mathematical calculation to determine that if each of over 1100 cases were tried separately for 38 trial days a substantial number of the District Judges in this country could do nothing for a year but try Bendectin cases').

⁶⁶ European Court of Human Rights, *Vernillo v. France*, case n° 11889/85, 20 February 1991, §38 (highlighting that important delays must be regarded as a denial of justice. the Court ruled that 'in requiring cases to be heard within a 'reasonable time', the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility').

➤ *Reducing Organisational Costs*

From the perspective of courts, cases in which plaintiffs file independently similar suits are an example of a commons problem where the uncoordinated actions of numerous claimants lead to an over-utilization – and a subsequent depletion - of the judiciary's limited resources. In an attempt to shed light on the difficulties arising from the judicial treatment of multiple similar claims, the French consumers' organization UFC-Que Choisir supported in 2006 the filing of 12,521 independent lawsuits from individual plaintiffs seeking damages for an anti-competitive cartel agreement in the French mobile communication market.⁶⁷ Detrimental consequences associated with the treatment of similar lawsuits generally focus on courts' congestion and waste of human, material and financial resources in already-tight budgets. Obviously, such situations are likely to produce negative externalities on the judiciary's own functioning. More specifically, delays of procedures may deter future claimants from bringing their suits.

In cases involving standardized large damages where plaintiffs' claims are considered as homogenous enough, mass litigation devices tend to be useful management tools for lowering judiciary's high coordination costs.⁶⁸ They enable judges to exploit economies of scales by adjudicating common issues *once-for-all*, and hence contribute to enhance courts' administrative efficiency⁶⁹. An empirical study conducted by BERNSTEIN in 1978 with the American class action tends to substantiate this assumption,⁷⁰ even though - as it will be addressed below- it might be difficult to draw clear-cut conclusions on this point.

➤ *Encouraging a Better Coherence of Legal and Judicial System*

The pooling of claims can lead to a better coherence and convergence of the entire legal system and helps minimizing the risks of adjudicating multiple similar claims in divergent ways. Consider for instance the divergent decisions issued by French tribunals regarding the vaccine against hepatitis suspected of causing multiple sclerosis. From similar factual proofs, judges ruled differently and decided that, in some cases, scientific evidence was not sufficient to hold pharmaceutical companies liable, while in others, that this

⁶⁷ UFC Que Choisir, press release: www.quechoisir.org/telecom-multimedia/telephonie/communiqu-e-entente-telephonie-mobile-une-condamnation-historique-et-definitive (accessed 21 October 2012).

⁶⁸ A. CASSONE and G. RAMELLO, *supra* note 22.

⁶⁹ K.W. DAM, 'Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest', (4) *Journal of Legal Studies*, 1975, n°1, pp.47-73.

⁷⁰ R. BERNSTEIN, 'Judicial Economy and Class Actions', (7) *Journal of Legal Studies*, 1978, pp.349-370 (observing that 'class actions for damages do make a clear contribution to judicial efficiency').

causal link could be established. Plaintiffs put in similar factual situations were therefore suffering from a lack of legal coherence. Depending on the decision taken by judges, some plaintiffs were ultimately compensated while others were not. A collective proceeding may therefore enable an equal treatment of claimants placed in identical or similar situations.⁷¹

2.2.2. The Added Value of Mass Litigation Devices from a Deterrence Perspective

Mass devices are aimed at restoring the full effect of the liability system. Among the multiple objectives associated with tort law, two of them are here particularly noteworthy: ensuring compensation of plaintiffs and enhancing deterrence.⁷² In this section, particular attention is given to this second objective, namely the issue of deterrence. Group devices are remedies for the shortcomings of individual litigation from a behavioural perspective (a) and for a failure of regulation (b). They can contribute to enhancing behavioural changes among infringers and promoting a higher degree of compliance with legal rules (c).

a) A Remedy for the Shortcomings of Individual Litigation – a Behavioural Account

As earlier explained, the Law and Economics literature explains the sub-optimal deterrence of individual litigation in terms of plaintiffs' rational apathy, rational disinterest and informational asymmetries: plaintiffs' incentives to sue are diluted and defendants' misbehaviour remains unpunished.⁷³ In addition, behavioural research tends to provide complementary insights to explain the reasons of this failure of individual litigation. LUTH has for instance discussed consumers' bounded rationality and highlighted some of the biases that may affect their decision-making. Her research points out the vagaries of consumers' decisions which lead them to take sub-optimal decisions, although their own welfare may be at stake⁷⁴. In the same vein, a 2012 report from the French Prime Minister's Economic Analysis Council has also reported the principal biases affecting consumers' behaviour.⁷⁵ A status quo bias leading

⁷¹ M. BACACHE, 'Domaine de l'action de groupe quant aux préjudices subis', *Gazette du Palais*, 16 May 2013, n°136, p.19.

⁷² B. STARCK, *Essai d'une théorie générale de la responsabilité civile, considérée en sa double fonction de garantie et de peine privée*, Paris, Ed. L. Rodstein, 1947 (doctoral dissertation).

⁷³ R. VAN DEN BERGH and L.T. VISSCHER, 'The Preventive Function of Collective Actions for Damages in Consumer Law', (01) *Erasmus Law Review*, 2008.

⁷⁴ H. LUTH, *Behavioural Economics in Consumer Policy – The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, Intersentia, 2010, 321 p. (doctoral dissertation).

⁷⁵ X. GABAIX, A. LANDIER and J. TIROLE, 'Consumer Protection: Bounded Rationality and Regulation', Report for the French Economic Council ('La protection du consommateur: rationalité limitée et régulation', Rapport au

individuals to stick to previous situations⁷⁶, or an aversion to decision-taking (a so-called ‘choice avoidance’) are – among many others – biases plaguing consumers’ behaviours. It can be concluded from these behavioural insights that the deterrence effect of individual litigation appears *per se* limited since it strongly relies on the behaviour of fragile protagonists. This vacancy is a source of impunity enabling wrongdoers to take advantage of plaintiffs and lead them to not fully internalize the costs of their actions. These costs are ultimately transferred to a third party. Thereby, by considering that the main objective associated with aggregate litigation was to confront the violator with the costs of his misconduct⁷⁷, the academic analysis one more time substantiates the idea that mass proceedings can be a response to market failures.

b) Relationships Between Regulation and Litigation

It is not here the objective of these developments to extensively address the details of the complex relationship between litigation and regulation. Readers may refer to specialised literature to obtain comprehensive views on this important topic.⁷⁸ Yet, a brief overview is nonetheless necessary to understand the role assigned to mass litigation devices *vis-à-vis* deterrence.

➤ *Litigation as a Complement to Regulation*

The Law & Economics literature addresses the relationship between regulation and litigation in terms of *substitutability* and *complementarity*.⁷⁹ A perfectly informed regulator is able to determine *ex ante* the right set of incentives which leads individuals to take the optimal level of precaution. When harm occurs, victims seek *ex post* full compensation through the liability system. In both cases, regulation and litigation are viewed as substitutes, and both should theoretically incentivize wrongdoers to take the optimal level of

Conseil d'Analyse Economique, La Documentation Française, 2012, 92 p. (www.cae.gouv.fr/La-protection-du-consommateur-rationalite-limitee-et-regulation.html?lang=fr, accessed 26 June 2013).

⁷⁶ W. SAMUELSON and R. ZECKHAUSER, ‘Status Quo Bias in Decision Making’, (1) *Journal of Risk and Uncertainty*, 1988, pp.7-59.

⁷⁷ R.A. POSNER, *Economic Analysis of the Law*, 1992, 4th ed, pp. 567-572; M. GILLES and G.B. FRIEDMAN, ‘Exploding the Class Action Agency Costs Myth: the Social Utility of Entrepreneurial Lawyers’, (155) *University of Pennsylvania Law Review*, 2006, pp.103-164 (arguing that ‘the deterrence of corporate wrongdoing is what we can and should expect from class action’).

⁷⁸ See for instance: F.WEBER, *Towards an Optimal Mix of Public and Private Enforcement in Consumer Law*, 2012, 519 p. (doctoral dissertation).

⁷⁹ G.RAMELLO, ‘Aggregate Litigation and Regulatory Innovation: Another View of Judicial Efficiency’, (32) *International Review of Law and Economics*, 2012, pp. 63-71.

care.⁸⁰ In a 1984 seminal work, SHAVELL however highlighted that neither regulation nor litigation alone enables an efficient control of risks, because neither can alone force parties to take the desirable level of precaution. Rather, he observed that a joint and complementary use of both regulation and litigation could be socially beneficial.⁸¹ This idea is nowadays particularly salient in competition law where private enforcement is presented as a useful complement to the public enforcement conducted by competition agencies.⁸² Additionally, as pointed out by the French Economic Council, in simple and static situations where contracts and products remain unmodified throughout long periods, detailed regulation could theoretically allow better consumers' protection. However, in practice, it appears that regulation at the time when it is implemented is already one-step behind when compared to the evolutions of products. Therefore, 'it is while facing ex post litigation that ex ante regulation may adapt'.⁸³

➤ *Mass Devices: a Catalyst for Regulatory Changes?*

Literature proposes a third path of analysis which focuses on the dynamic interactions between mass litigation and regulation. In this view, mass devices are considered as both a catalyst for regulatory changes and a tool for circumventing legislative inertia. HARNAY and MARCIANO for instance argue that mass procedures are rent-seeking technologies which enable groups to enhance their own political agenda.⁸⁴ Similarly to traditional rent-seeking models where litigants' legal expenditures are compared to a private investment aimed at influencing the court's final decision, mass procedures are employed by large groups to target and achieve identified policy outcomes. These devices may thus force potential infringers to comply with specific rules in a way that would be similar to lobbying in the political arena.

⁸⁰ J. KLICK and E. HELLAND, 'The Trade-offs between Regulation and Litigation: Evidence from Insurance Class Action', *Journal of Tort Law*, 2007 (showing, from an analysis of 130 class action lawsuits brought against insurance companies, a lack of clear substitutability between regulation and litigation. Conversely, the authors found evidence that both tend to piggy back on each other).

⁸¹ S. SHAVELL, 'A Model of the Optimal Use of Liability and Safety Regulation', (15) *Rand Journal of Economics*, 1984, n°2.

⁸² In its White Paper on Damages Actions for Breach of the EC Antitrust Rules, the EC Commission highlights 'that "effective remedies for private parties also increases the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable" (at p.3). On this issue, see for further details: S. KESKE, *Group Litigation in European Competition Law: A Law and Economics Perspective*, 2009, 340 p. (doctoral dissertation); D.-P. TZAKAS, 'Collective Redress in the Field of EU Competition Law: the Need for an EU Remedy and the Impact of the Recent Commission Recommendation', (41) *Legal Issues of Economic Integration*, 2014, pp.225-242

⁸³ X. GABAIX, A. LANDIER and J. TIROLE, *supra note 75* (translation from the author).

⁸⁴ S. HARNAY and A. MARCIANO, 'Seeking Rents through Class Actions and Legislative Lobbying: A Comparison', (32) *European Journal of Law & Economics*, 2011, pp.293-304.

On a broader scale, RAMELLO also considers that aggregate litigation can play a cornerstone role in fostering regulatory innovation.⁸⁵ It produces a set of inputs - such as knowledge and information on a particular event or product - that are necessary to the implementation of any further regulation. Group procedures are therefore viewed as ‘incubators’ or as an ‘R&D laboratory in which plaintiffs act as a proxy for society and the judicial solution serves as a prototype for regulatory change’. Whether this role of catalyst is actually due to mass litigation or more broadly to litigation itself remains nonetheless an open question. Indeed, in countries where mass litigation devices were until very recently not available, simple (individual) litigation has already driven important regulatory evolutions.⁸⁶ In any case, both in the form of individual or mass disputes, litigation may enhance regulatory evolutions. The high number of persons involved in mass disputes may strongly incentivize policy-makers to adapt their legislation.

c) Changes in Behaviour: Contrasted Evidence

An increase in the likelihood of being sued should incentivize wrongdoers to internalize the costs of their misconduct. This may *a fortiori* lead to changes in defendants’ behaviour.⁸⁷ Additionally, legal scholars have pointed out that group procedures can have positive externalities, for instance, on contractual terms or on companies’ information obligation to consumers.⁸⁸ To this day, it remains however difficult to draw clear-cut conclusions regarding Europe since most of the existing European mechanisms have only been

⁸⁵ G.RAMELLO, *supra* note 79.

⁸⁶ The dynamic dialogue between litigation and regulation - in other words, between judges and the legislature - is often pointed out in the legal literature (see for example in the French legal literature: R.FRAISSE, ‘Le législateur et les juges en matière de responsabilité: duo ou duel?’, *Actualité Juridique du Droit Administratif*, 2005, p.2215). A well-known example drawn from French law is the 1982 *Desmares* decision from the Second Civil Chamber of the Court of cassation (Cass.2e civ., 21 July 1982, pourvoi n°81-12850) in which judges ruled that negligence from the victim is source of exoneration of defendant’s liability *only* in cases where victims’ negligence can be assimilated to a situation of *force majeure*. This strict and stringent interpretation of liability rules denying any forms of liability-sharing between litigants was unsurprisingly fiercely criticized by insurers. This decision called for an intervention of the Legislature. The 1985 reform of the civil liability regime on traffic accident formally enshrined the possibility of partial compensation of victims when they are themselves negligent (Loi n° 85-677, 5 July 1985, tendant à l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation, see Article 5). While noticing the evolution of the legislation, judges finally came back to the traditional rule of liability-sharing in case of victim’s negligence. This decision has been extensively debated by French legal scholars, see among many J. – L. AUBERT., ‘L’arrêt Desmares, une provocation... à d’autres réformes’, *Recueil Dalloz*, 1983.chron. 1; For a broader overview on this issue, see P. JOURDAIN, ‘Faute de la victime. Exceptions à l’exonération partielle. Cause exclusive. Faute de provocation’, *Revue Trimestrielle de Droit Civil*, 1993, p.140 ; F. ROME, ‘Retour à la case ‘Desmares’?’, *Recueil Dalloz*, 2008, p.905.

⁸⁷ EU Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 Final, 2 April 2008, p.3 (considering that ‘improving compensatory justice would therefore inherently also provide beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules’).

⁸⁸ Symposium ‘Shall we implement a French Class Action?’ (*Faut-il ou non une class action à la française*), *Petites Affiches*, 13 Septembre 2005, n°182, p.3.

recently implemented.⁸⁹ To avoid the analysis being blocked at its threshold, the American experiment can here be used as a laboratory. Insights from empirical research conducted on Securities Class Actions (hereafter 'SCA') - albeit drawn from a specific context which may ultimately depart from other mass torts - have revealed contrasted evidence on the effectiveness of mass devices for changing behaviour.

On the one hand, while analysing the banking sector, DALLA PELLEGRINA and SARACENO found evidence that SCAs tended to incentivize bank managers to reduce their excessive risk positions.⁹⁰ Moreover - and contrary to previous researches which claimed that shareholders' litigation was an inefficient instrument for corporate governance⁹¹ - HUMPHERY-JENNER used the analysis of 416 SCAs over a period covering 1996-2007 to shed light on its disciplinary effect on companies' chief executive officers and chief financial officers.⁹²

On the other hand, other empirical research has suggested that the degree of behavioural changes may be in practice more limited than foreseen. HELLAND for example found that, on average, there is little evidence of SCAs' negative effect on board members' reputation⁹³. Furthermore, in their investigation of 827 SCAs filed between 1996 and 2005, ROGERS and VAN BUSKIRK found no evidence showing that companies responded to litigation by increasing disclosure to investors.⁹⁴ Instead, when comparing pre- and post- litigation companies' behaviour, they reported a significant decrease in the post-litigation

⁸⁹ EU Commission – DG SANCO, *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union*, Final Report, Civic Consulting and Oxford Economics (www.ec.europa.eu/consumers/redress_cons/collective_redress_en.htm, 2008, p.9 , accessed 21 October 2012 (highlighting that 'most of the current collective redress mechanisms in the EU do not seem to constitute a significant deterrent to potential defendants unless collective actions receive particular media coverage in the respective Member-State. The preventive or deterrent effect of the available collective redress mechanisms appear to be closely related to the business climate in a particular Member State and to the public awareness that collective actions receive among consumers'). Relatedly, regarding the British Group Litigation Order see: C.HODGES, *Global Class Actions Project*, Country Report – England and Wales, p.35 (observing: mass litigation has for the moment resulted in no perceptible change in defendants' behaviours'. The author concludes that 'no argument could be made out for there having been any deterrent effect imposed by the liability or litigation system on corporate or authorities' behaviours').

⁹⁰ L. DALLA PELLEGRINA and M. SARACENO, 'Securities Class Actions in the US Banking Sector: Between Investor Protection and Bank Stability', (7) *Journal of Financial Stability*, 2011, pp.215-227.

⁹¹ R. ROMANO, 'The Shareholder Suit: Litigation without Foundation?', (7) *Journal of Law, Economics & Organization*, 1991, n°1, pp.55-87.

⁹² M.L. HUMPHERY-JENNER, 'Internal and External Discipline Following Securities Class Actions', (21) *Journal of Finance and Intermediation*, 2012, pp.151-179 (observing that some detrimental consequences on companies' management that were reported were notably pay-cuts and a decreased likelihood for CEO's future job prospect).

⁹³ E. HELLAND, 'Reputational Penalties and the Merits of Class Action Securities Litigation', (49) *Journal of Law & Economics*, October 2006, n°2, pp. 365-395.

⁹⁴ J.L. ROGERS and A.V. BUSKIRK, 'Shareholder Litigation and Changes in Disclosure Behaviour', (47) *Journal of Accounting and Economics*, 2009, pp.136-156.

disclosure, showing a companies' willingness to reduce the probabilities of being later held accountable for the information issued.

Finally, on an intermediate level, BAI, COX and THOMAS found empirical evidence revealing the dubious effect of SCAs. Even though SCAs resulted in no significant decline in sales opportunities for defendant companies, the authors nonetheless shed some light on the negative consequences associated with class lawsuits, such as notably liquidity problems or a reduced efficiency when the lawsuit is pending.⁹⁵ As a matter of fact, additional empirical research is needed to clarify this matter.

2.2.3. Preliminary Conclusion

This first section was aimed at shedding light on mass devices viewed as a remedy for market failures. Among the many benefits that have been discussed, mass proceedings are likely to decrease plaintiffs' rational apathy and rational disinterest; enhancing compensation; enabling a better coordination through a pooling of resources and knowledge; altering the balance of powers and levelling the playing field between litigants; promoting judicial economy; filling the gaps left uncovered by individual litigation and regulation; increasing deterrence; enhancing behavioural changes and fostering regulatory evolution. As it will be discussed in this research, a prioritization of these objectives is still often lacking and this may importantly influence the behaviour of those who are in charge of the monitoring of mass disputes. Yet, as the Roman two-faced god Janus, benefits and costs of mass litigation are the two sides of the same coin.⁹⁶ A clear understanding of those costs is therefore necessary.

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⁹⁵ L. BAI, J.D. COX and R.S. THOMAS, 'Lying and Getting Caught: An empirical Study of the Effects of Securities Class Action Settlement on Targeted Firms', *Vanderbilt University Law School Law & Economics*, Working Paper n°10-09, 2010.

⁹⁶ R.A. EPSTEIN, 'Class Actions: Aggregation, Amplification and Distortion', *Olin Law & Economics Working Paper*, April 2003, n°182 (noticing that class actions' 'omnipresence lies in their versatility').

2.3. THE COSTS ASSOCIATED WITH MASS LITIGATION DEVICES

European discussions about the undesirable effects of mass proceedings have extensively been clouded by the American experience with class actions. Their alleged detrimental consequences have been overstated in the literature: the spectre of a ‘Frankenstein Monster’, which came to life for good reasons but ultimately turned out to have unexpected and disastrous effects for business and companies, is often referred to by those who fiercely oppose the implementation of similar tools in Europe.⁹⁷ Conversely, others have viewed the abuses of the American class action as mere by-products of the American legal system and of its ‘toxic cocktail’ mixing punitive damages, contingency fees, pre-trial discovery and opt-out system.⁹⁸ Between these two extremes, a more balanced and nuanced approach lies in the middle: While pointing out that ‘abuses [can be found] everywhere’, HODGES argues that the main issue that any mass proceeding fundamentally faces is ‘the role that is played by money, who gains it at whose expense’,⁹⁹ or, in economic jargon how wealth and risks are ultimately distributed among participants in such circumstances. A sound understanding of the costs induced by mass procedures is therefore an important step.¹⁰⁰ Such costs can be assessed from the viewpoints of claimants (2.3.1), defendants (2.3.3), and judges (2.3.3).

⁹⁷ A.H. MILLER, ‘Of Frankenstein Monsters and Shining Knights: Myths, Reality and the Class Action Problem’, (92) *Harvard Law Review*, 1979, n°3, pp.664-694 (observing ‘much of the controversy has been highly emotional and individual cases have been transmogrified over the years into cosmic anecdotes’); D.R.HENSLER, ‘Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation’, (11) *Duke Journal of Comparative and International Law*, 2001, pp.179-213; I. VEILLARD and B. VOLDERS, ‘La consécration des actions de groupe en Europe – La traversée de l’Atlantique aurait-elle adouci le Monstre à la Frankenstein ?’, *Revue de jurisprudence commerciale*, March-April, 2008, n°2, pp.67-80.

⁹⁸ EU Commission, Green Paper on Consumer Collective Redress – Questions and Answers, Memo/08/741, 27 November 2008, available on http://europa.eu/rapid/press-release_MEMO-08-741_en.htm (accessed 26 June 2013).

⁹⁹ C.HODGES, *supra* note 56.

¹⁰⁰ Unsigned note, ‘Risk-Preference Asymmetries in Class Action Litigation’, (119) *Harvard Law Review*, 2005, pp.587-608 (observing that ‘class action is even riskier for litigants than the paradigmatic two-party case: the stakes are higher, the issues are more complex, and more people stand to lose’).

2.3.1. Costs from the Viewpoint of Claimants

Costs and abuses may result from the group structure (a) and/or from its monitoring (b).

a) Costs and Abuses associated with the Group Structure

Two main points can be a source of costs and abuses regarding the group's structure: The first concerns the potential high transaction costs to which plaintiffs are exposed when they want to proceed as a group; the second focuses on the lack of homogeneity within the group which may ultimately undermine the efficiency of the whole proceeding.

➤ *Coordination Costs*

When compared to a succession of individual lawsuits, mass proceedings enable plaintiffs to benefit from economies of scale. Yet, at the same time, they also create new transaction and coordination costs within the group which can have detrimental effects for plaintiffs. Noticing such ambivalence, CASSONE and RAMELLO have compared aggregate litigation to 'congestible goods'¹⁰¹ where an increase in the number of plaintiffs may at some point negatively affect the benefits that are drawn by its members. Obviously, the nature of such costs depends on the design of the procedures: they may be pecuniary and refer to the participation fees that plaintiffs can have to pay when they want to take part in the action; or, as stressed by SARACENO, can also be non-pecuniary, such as the time that plaintiffs have to wait before the prerequisites allowing plaintiffs to proceed as a group are met.¹⁰² Crucially, the question is therefore whether the costs arising from the structure of the group ultimately outweigh the economies of scale that have previously been identified. In this respect, SARACENO has observed that even though mass proceedings may enable economies of scale from defendants' viewpoint, they also tend to increase plaintiffs' transaction costs. In such circumstances, she concludes, mass litigation does not necessarily improve deterrence but rather produces new asymmetrical relationships between litigants.¹⁰³ Obviously, one of the main objectives that had initially been attached to mass proceedings – i.e. levelling the playing field between defendants and plaintiffs – may not be reached. Far from being suppressed, the systemic

¹⁰¹ A. CASSONE and G. RAMELLO, *supra* note 22.

¹⁰² For instance, reference may be made to a threshold of claimants that has to be met as it is the case for instance with the German Capital Market Model Case (Kapitalanlegermusterverfahren – 'KapMug'), or a necessity for the judge to distinguish between groups and sub-groups).

¹⁰³ M. SARACENO, 'Group Litigation, Access to Justice and Deterrence', *Amsterdam Centre for Law and Economics Working Paper*, n°2008-04, 2008

disequilibrium between litigants previously identified by ROSENBERG¹⁰⁴ is here simply transposed to a higher stage.

➤ *Heterogeneity of Claimants*

The legal and economic literature on mass litigation posits that a degree of homogeneity among claimants is a prerequisite for the success of the proceeding.¹⁰⁵ Conversely, heterogeneity among claimants may make more difficult standardized judicial intervention. Interestingly, in his historical outlook, YEAZELL has shown that the question of group's heterogeneity was initially not an issue in the infancy of mass litigation. During the sixteenth and seventeenth century, group litigation in England took place in stratified and hierarchical feudal societies where groups already existed as social entities independently of the lawsuit.¹⁰⁶ They were composed of peasants working under the authority of same tenants, parishioners belonging to the same parish or neighbours living in the same village. Group lawsuits focused on issues of status rather than on individual claims. They were also strongly associated with pre-existent and well-structured social bodies. A comparable analysis has been conducted in other countries, such as for instance Japan.¹⁰⁷ During the eighteenth and nineteenth century, the social link in modern and industrial societies however weakened. Two doctrines then competed to become the rationale of the class action theory. The first one, known as 'the community of interest theory', posited that claimants shared a common legal right. The second, known as 'the consent theory', focused on the sharing among parties of common questions of

¹⁰⁴ D. ROSENBERG, *supra* note 41.

¹⁰⁵ See for instance: R.POSNER, 'An Economic Approach to Legal Procedure and Judicial Administration', (2) *Journal of Legal Studies*, 1973, n°2, pp.399-458 (observing, with regards to the US class action, 'the more numerous the claimants, the greater the amount of duplication that the class action would eliminate; the more homogenous the claims, the more likely that if the claims were litigated separately the efforts of the lawyers in the case would involve substantial duplication').

¹⁰⁶ S.C.YEAZELL 'Group Litigation and Social Context: Toward a History of the Class Action', *Columbia Law Review*, 1977, p.866; S.C.YEAZELL, 'From Group Litigation to Class Action – Part I: The Industrialization of Group Action', (27) *University of Chicago Law Review*, 1980, pp.514-564 (observing: 'group litigation had been born in the arms of custom, but that custom was the custom of a cohesive social and political unit, the manor or parish').

¹⁰⁷ S.Mc GINTY, 'From Peasant to Shareholder – Divergent Paths of Group Litigation in Tokugawa Japan in England', in: S.WRBKA, S.VAN UYTSEL and M.SIEMS (Ed.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press, 2012, pp.119-142 (when investigating comparisons between feudal England and Japan, the author observes a common starting appoint between the English and the Japanese approaches to group litigation. Japanese villages were also 'a defined unit within the feudal hierarchy with a defined membership and strict rules prohibiting movement into or out of the group. Population registers which recorded the details of every resident were kept up to date. The headman, who often served as a representative of the village in litigation, also had a predefined role in the village that included a quasi-judicial function in resolving disputes among villagers', at p.127).

fact and laws.¹⁰⁸ Under the impulse of social and economic developments, former structured social groups which stood at the core of seventeenth century's group litigation were progressively replaced by atomized individuals sharing fewer similarities. Modern group litigation artificially recreated a form of group cohesion via the notion of shared harm and shared interest which progressively became the main link between group members.¹⁰⁹ This evolution is nowadays visible in the terminology that has progressively been employed to refer to collective litigation: *aggregate* litigation ('aggregate' referring to a mere collection of single items)¹¹⁰ has progressively challenged the use of the holistic concept of *group* litigation.

While being aware that the question of homogeneity among plaintiffs was pivotal, American policymakers were initially reluctant to extend the use of class actions to mass tort and mass accidents. As the 1966 Advisory Committee note on the amendment of Rule 23 of the US Federal Rules of Civil Procedure highlighted, 'a mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defences of liability, would be present, affecting the individual in different ways, as a class action would degenerate in practice in multiple lawsuits separately tried'.¹¹¹

From an economic perspective, the problem of heterogeneity is also cornerstone since group devices may potentially act as a magnet for weak and frivolous claimants tempted to use the procedure to obtain more than their lawsuits are worth. A lawsuit is deemed 'frivolous' if a plaintiff is aware of the weakness of his claim, which is for instance due to a lack of evidence supporting the claim.¹¹² Economic models of frivolous lawsuits usually consider that such opportunistic behaviours result from cost and informational asymmetries. In their model of frivolous litigation focusing on asymmetric costs, SHAVELL and ROSENBERG have for instance shown that even in situations where both plaintiff and defendant are fully

¹⁰⁸ J.B. WEINSTEIN and E.B. HERSHENOV, 'The Effect of Equity on Mass Tort Law', *University of Illinois Law Review*, 1991, issue 2, pp.269-327 (highlighting: 'story had favoured the latter, more liberal theory, but it was the community of interest approach that, until recently, was the more generally accepted', at p.286).

¹⁰⁹ S.C.YEAZELL, *supra* note 106 (observing: 'instead of ratifying a prospective and almost inevitable effect of litigation that a pre-existing group would attempt on its own, group litigation here facilitates relief for an assortment of persons who, because they have no contact with each other, could do nothing without a litigative aggregation device', at p.520-521).

¹¹⁰ S. ISSACHAROFF and G.P. MILLER, *supra* note 20; R. NAGAREDA, *supra* note 54; G. RAMELLO, *supra* note 79.

¹¹¹ US Federal Rules of Civil Procedures 23 Advisory Committee's note (1966).

¹¹² R.G.BONE, 'Modelling Frivolous Suits', (145) *University of Pennsylvania Law Review*, 1997, pp.519 (observing that frivolous suits are situations in which 'plaintiffs file knowing facts that establish complete -or virtually complete- absence of merit as an objective matter on the legal theories alleged, or when a plaintiffs files without conducting a reasonable investigation which – if conducted – would place the suit in prong').

informed about the merits of the claim, frivolous lawsuits may subsist because of the cost that the defendant still has to bear to defend itself (costs of responding).¹¹³ In such a situation, the claimant files a frivolous lawsuit while assuming that the defendant will be tempted to propose a settlement offer for an amount less than or equal to the company's costs of responding.¹¹⁴ Other economic models have focused on situations of informational asymmetries between litigants. In such circumstances, plaintiffs or defendants are likely to take advantage of the private information that they have in their possession. For instance, a plaintiff may be willing to file because he anticipates that the defendant knows nothing or only little about the merits of his claim.¹¹⁵

Importantly, the presence of weak plaintiffs can have detrimental effects on the claimant group. First, weak plaintiffs may be tempted to free ride on high-value claimants and to take benefit from the presence of outliers (stronger claimants) in the group. This point will be further discussed in the behavioural developments of this research (Chapter 5). Second, ULEN has argued that a company anticipating that weak claims are likely to predominate within the group may theoretically be tempted to offer lower settlement amounts. This situation leads to 'a transfer of wealth from those with strong claims to those with weak claims'.¹¹⁶ Therefore, the pressure of weak claimants acts as 'a death spiral' where strong plaintiffs are incentivized to opt out in order to file individually. Put simply, the group may adversely attract weak and low-value claims, while deterring high-value claimants.¹¹⁷ In this race-to-the-bottom, defendants are incentivized to offer lower and lower amounts since they anticipate that the overall value of the group is continuously decreasing in the absence of strong claimants. Even though such a situation might in practice be unlikely since strong claimants are neither necessarily aware of the value attached to their claims nor of the weaknesses of others, this argument highlights the risks associated with the group's heterogeneity. Third, psychological insights have revealed that heterogeneity within the group can exacerbate plaintiffs' asymmetric attitudes towards risk. When referring to the Prospect Theory's fourfold pattern of risk attitudes aimed at depicting individuals' decision-making under risky conditions, it appears that high-merits claimants are more likely to be risk-averse whereas low-merits claimants are more likely

¹¹³ S. SHAVELL and D. ROSENBERG, 'A Model in which Suits are Brought for their Nuisance Value', (5) *International Review of Law & Economics*, 1985, pp.3-13.

¹¹⁴ H.-B. SCHAEFER, *supra* note 25 (stressing that the costs borne by a meritless plaintiff and those borne by the company are asymmetrical since the latter must not only bear the lawyers' fees but also reputational costs in case of highly-mediatized issue).

¹¹⁵ C. GUTHRIE, 'Framing Frivolous Litigation: a Psychological Theory', (67) *University of Chicago Law Review*, 2000, n°1, pp.163-216 (observing that frivolous litigation from the viewpoint of the informed plaintiff occurs when this latter 'is able to capitalize on the private information she possesses about the merit of her suits').

¹¹⁶ T. ULEN, *supra* note 24.

¹¹⁷ R.G. BONE, 'Class Action', in: C.W. SANCHIRICO (Ed.), *Procedural Law and Economics*, (8) Encyclopaedia of Law and Economics, 2nd ed., p.67-83.

to be risk-seeker.¹¹⁸ Therefore, an increase in the group's heterogeneity leads to an increase in plaintiffs' risk-preferences asymmetries. This point may be a source of concern since 'litigation risk preferences (...) create perverse results: plaintiffs with shoddy claims have a negotiation advantage, and plaintiffs with strong claims face a negotiation disadvantage'.¹¹⁹ As a matter of fact, heterogeneity within the group of claimants may jeopardize settlement negotiations, leading ultimately to suboptimal deterrence.

For these reasons, the group structure is a key issue upon which the whole efficiency of the procedure can ultimately depend. Therefore, an external supervision aimed at filtering weak from stronger claims so as to ensure a degree of homogeneity within the group appears necessary.

b) Costs and Abuses *vis-à-vis* Group Monitoring

In the context of mass disputes, specificities of individual cases tend to be diluted in order to allow plaintiffs to proceed *as a group*. From a strict legal point of view, this is as a revolution since the traditional paradigm of civil justice usually focuses on the individual and his autonomy as reference point.¹²⁰ From an economic point of view, the disappearance of individual claimants behind the group poses several problems. The first regards their apathy with regards to the group monitoring and their incentives to free-ride on the costs borne by other group members. The second concerns the risk of seeing class counsels, either lawyers or associations, acting as an agent departing from the interests of his principals.

➤ *Free-riding*

OLSON has pointed out a key issue which has important implications for the understanding of mass proceedings: group's latency tends to increase with the number of participants.¹²¹ Individuals are not

¹¹⁸ According to the fourfold pattern of risk attitudes developed by KAHNEMAN and TVERSKY, individuals tend to be (1) risk-adverse in case of moderate to high probability gains; (2) risk-seekers in case of moderate to high probability losses; (3) risk-seekers in case of low probability gains; (4) risk-adverse in case of low probability losses.

¹¹⁹ (Unsigned note), 'Risk-Preference Asymmetries in Class Action Litigation', (119) *Harvard Law Review*, 2005, pp.587-608

¹²⁰ W.H VAN BOOM., 'Collective Settlement of Mass Claims in the Netherlands', in: M.CASPER, A. JANSSEN, M. POHLMANN, R. SCHULZE (Eds.), *Auf dem Weg zu einer Europäischen Sammelklage?*, Munich, Sellier, 2009, pp. 171-192 (stressing that the traditional concept of individual autonomy stands at 'the nucleus of civil law and procedure').

¹²¹ M. OLSON, *The Logic of Collective Action*, Harvard University Press, 1965 (noticing: 'when the number of participants is large, the typical participant will know that his own efforts will probably not make much difference to the outcome, and that he will be affected by the meeting's decision in much the same way no matter how much or how little effort he puts into studying the issues. Accordingly, the typical participant may not take the trouble to study the issues as carefully as he would have if he had been able to make the decision by himself. The decisions of

incentivized to take the lead because they anticipate that their sole intervention has only a small impact on the final decision. Facing the risk of apathy from its members, the group suffers from a lack of monitoring and no plaintiff is alone willing to bear monitoring costs. Instead, each participant has a strong incentive to free-ride on the costs borne by the others.¹²² The role played by the group counsel, or by the association if this latter is in charge of the group's coordination, appears then pivotal to reducing this apathy.

➤ *Principal-Agent Problems with Lawyers*

From a legal perspective, concerns have been expressed regarding the prominent role assigned to class counsels, specifically in the framework of the American class action. As an observer pointed out, 'in a dispute where the lawyer has one hundred clients, he has in reality none. He is his own client and the master of the dispute since he is the one who has the greatest economic interest in the dispute'.¹²³ Interestingly, this remark finds an echo in the Law and Economics literature: SCHAEFER considers indeed that in such circumstances 'the client takes a backstage position and ceases to be the determining factor in the litigation'. In this situation, he adds, 'the behaviour of the lawyer will almost entirely be influenced by the incentives of the fee system'.¹²⁴ Points of view however diverge on whether entrepreneurial lawyers seeking their own financial profit through mass proceedings adversely affect or, conversely, enhance the efficiency of mass procedures.¹²⁵

the meeting are thus public goods to the participants (and perhaps others) and the contribution that each participant will make toward achieving or improving these public goods will become smaller as the meeting becomes larger', at p.54).

¹²² S. HARNAY and A. MARCIANO, 'Seeking Rents through Class Actions and Legislative Lobbying: A Comparison', (32) *European Journal of Law & Economics*, 2011, pp. 293-304 (observing: 'despite their common interest to the production of the collective good, class members may lack the incentives to volunteer the collective good and to incur the corresponding costs of production, and they may prefer to free ride on the provision of the good by other class members').

¹²³ 'Symposium organised by Droit & Démocratie, *La Gazette du Palais*, 2001, p.147, 'Pour mieux réparer les préjudices collectifs : une class action à la française ?', (translation from the author. In French : 'dans un contentieux où un avocat à 100 clients, à vrai dire, il n'a aucun client : il est son propre client et il est le maître du litige. C'est l'avocat qui a vraiment l'intérêt économique le plus important dans le contentieux').

¹²⁴ H.-B.SCHAEFER, *supra* note 25.

¹²⁵ D.HENSLER, 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation', (11) *Duke Journal of Comparative and International Law*, 2001, pp.179-213 (pointing that 'aggregation exacerbates the agency problems that are inherent in litigation'), J.C.ALEXANDER, 'Do the Merits Matter? A Study of Settlements in Securities Class Action', (43) *Stanford Law Review*, 1991, pp.497-598 (stressing: 'class actions are characterized by high agency costs: that is, a significant possibility that litigation decisions will be made in accordance with the lawyer's economic interests rather than those of the class'). Contra see: A. CASSONE and G. RAMELLO, *supra* note 22 (observing: 'the role of class action is to reconcile the conjoined individual interests of victims with the collective interest of society, by passing through the private interest of the class counsel'); M. GILLES and G.B. FRIEDMAN, 'Exploding the Class Action Agency Costs Myth: the Social Utility of

Agency costs between counsels and clients already exist in individual litigation: informational asymmetries usually make sound assessment of lawyers' performance hardly feasible.¹²⁶ In the framework of mass litigation, the Law and Economics literature also considers this topic as a cornerstone question upon which the benefits associated with the proceeding may depend.¹²⁷ The principal-agent problem will be more extensively addressed in the coming developments of this thesis (Chapter 4). At this point, one should nonetheless already note that principal-agent problems occur when the incentives of a principal (here, the plaintiffs) and their agent (the counsel) are not fully aligned. The lack of monitoring allows rational group counsels to seek their own financial interest at the expense of the plaintiffs' one. Represented claimants indeed cannot be certain that their lawyers fully dedicate the necessary amounts of time and effort to defend their claim.¹²⁸ Furthermore, just as few, if any, of the individual plaintiffs would have incentives to file the lawsuit, few, if any, would have any incentive to monitor the lawyers who represent the class. As previously suggested by SCHAEFER, the counsel's system of remuneration is decisive and will be one of the driving force leading counsels to eventually digress from their clients' interest.¹²⁹ More specifically, fees are likely to have an impact on lawyers' incentives to drive the group, to speed up or slow down the proceeding¹³⁰.

Principal-agent problems can have detrimental effects on settlement agreements and on compensation amounts awarded to plaintiffs. It is indeed a commonplace in the American literature to highlight the controversies arising from the so-called *sweetheart settlements* where the group counsel tends to maximize his fees while settling the dispute for amounts that are inferior to the aggregated value of the plaintiffs'

Entrepreneurial Lawyers', (155) *University of Pennsylvania Law Review*, 2006, pp.103-164 (arguing that 'the so-called agency cost is mostly a mirage').

¹²⁶ H.-B. SCHAEFER, *supra* note 25.

¹²⁷ J. BACKHAUS, 'The Law Firm as an Investment Bank in Class Actions', (32) *European Journal of Law & Economics*, 2011, pp.225-228 (noticing that increase in agency costs between claimants and lawyers limits the use of mass litigation as a tool for correcting market failures).

¹²⁸ I. TZANKOVA and J. KORTMANN, *supra* note 42.

¹²⁹ With regards to the American class action, two methods are usually used to calculate the amounts awarded as lawyers fees. The first method is referred to as the 'lodestar method'. Lawyers report the number of hours devoted to the case and the court multiplies this number by 'a reasonable hourly fees'. The amount may be afterwards increased or decreased depending on the case's specificities. The second method is called the '*percentage of the recovery*' method. The judge attributes to the lawyer a part of the final award. However, regarding this last method, it is important to note that several European countries prohibit the use of the '*quota litis pact*' between a lawyer and his client. In other words, the counsel's remuneration cannot *ex ante* be only based on the success of the case.

¹³⁰ T.ULEN, *supra* note 24 (pointing out that the incentives drawn by the two previously identified methods of remuneration are 'straightforward': in the first case (*i.e.* the lodestar method), lawyers are incentivized to extend the length of the litigation so as to bill the maximum hours; in the second case (*i.e.* percentage of recovery), the counsel has an incentive to speed up the proceedings so as to settle early for an amount lower than the one that plaintiffs could expect).

claims.¹³¹ Another well-known example regards the use of *coupons* where the compensation of plaintiffs takes the form of discounts on future purchase of services or goods, while representative lawyers in turn benefit from large monetary fees.¹³² As a general rule, economists have been opposed to the use of this compensation technique because it enables defendants to escape the financial burden of the settlement, mostly through an *ex post* increase in the prices paid by other consumers who are alien to the dispute.¹³³

➤ *Principal/Agents Problems with Associations*

Finally, since mass proceedings in Europe may ask for an enhanced intervention of associations, one may wonder whether principal-agent problems are reduced, or conversely increased, due to the intervention of associations.¹³⁴ On the one hand, one may argue that litigation in which a representative organization litigates on behalf of its members may suffer less from agency problems than the American style class action where a lawyer litigates on behalf of a few named plaintiffs, especially if the members can impact the way in which the organization acts, and if the organization is truly representing the interest of its members.¹³⁵ Representative organizations have also reputational reasons to act in the interest of their clients (the members of the organization), more so than lawyers in class actions, where the individual plaintiffs are rationally apathetic and hence will not monitor the lawyer adequately. Third, one could reserve standing for organizations which have already proven to be truly representative for their members. In practice however, many *ad hoc* organizations are created in order to represent the interests of victims. It is thus difficult or impossible for victims to assess the quality of these organizations.¹³⁶ Finally, in settlement negotiations with the defendant(s), a representative organization has a better bargaining position as compared to the plaintiffs in class actions (because the association as a repeat player has an information advantage over the one-shot individual victims and because the association will be less risk averse than individual plaintiffs), so that the settlement result will likely be better for the represented victims. However, notwithstanding these issues, one cannot rule out the possibility that a representative

¹³¹ B. HAY and D. ROSENBERG, *supra* note 43; A. ROSENFELD, 'An Empirical Test of Class Action Settlement', (5) *Journal of Legal Studies*, 1976, n°1, pp.113-120 (his model points out that the counsel's maximizing behaviour tend to create 'a bias toward settlements in which the attorney for the class agrees to trade off a smaller total award payment by the defendant for a larger fee').

¹³² I. TZANKOVA and J. KORTMANN, *supra* note 42.

¹³³ S. BORENSTEIN, 'Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits', *National Bureau of Economic Research*, Working Paper n°5085, April 1995.

¹³⁴ L.T. VISSCHER and A.P. BIARD, 'Dutch Mass Litigation from a Legal and Economic Perspective and its Relevance for France', *RILE Working Paper Series*, 2014/02, April 2014.

¹³⁵ R. VAN DEN BERGH and L.T. Visscher, *supra* note 73, at pp. 27-28.

¹³⁶ I. TZANKOVA and J. KORTMANN, *supra* note 42 (at p. 119).

organization will not always act in the best interest of its members, for example because of publicity reasons or simply because the costs and benefits of the organization are not perfectly aligned with those of the members. As SCHAEFER has observed, the agency chain may be extended with associations: opportunistic behaviour may emerge not only from the group's counsel but also from the association whose behaviour can also be driven by its own interest.¹³⁷

From the point of view of deterrence, the latitude given to lawyers and/or associations may thus undermine the overall efficiency of the proceedings and render necessary a sound supervision of the group's monitor.

➤ *The Funding of Mass Litigation*

Abuses associated with mass litigation devices strongly depend on the way mass disputes are funded. This issue however seems nowadays still overlooked by many European policymakers.¹³⁸ Funding has turned out to be a significant barrier to the functioning of mass procedures. These procedures are indeed usually long and highly costly for those who have initiated them and for defendants targeted by mass claims.¹³⁹ It is unlikely that plaintiffs' associations will alone be able to support such costs. Associations may thus refuse to support or file mass claims – and mass proceedings will therefore remain inefficient - as long as appropriate funding is not provided. However, uncontrolled funding may lead to problems too. This dilemma has been pertinently stressed by HODGES who writes that 'concerns over excesses and abuses all arise from the consequences of unbalanced funding mechanisms when coupled with powerful mass procedures'.¹⁴⁰ Put simply, funding has therefore progressively become the *alpha* and *omega* of mass litigation: without funding, proceedings will be doomed to failure, but too much funding will create wrong incentives for parties, and abuses may therefore multiply.

¹³⁷ H.-B. SCHAEFER, *supra* note 25 (considering therefore that the most efficient structure is the one where a small group of plaintiffs closely control the association, whose managers in turn closely monitor the lawyers).

¹³⁸ L.T.VISSCHER and A.P. BIARD, *supra* note 134 (highlighting the actual absence of debates in France regarding the funding of mass litigation).

¹³⁹ See F.X.SHEN, *supra* note 53.

¹⁴⁰ C. HODGES, 'What are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where are We Headed?', (622) *Annals of the American Academy of Political and Social Sciences*, The Globalization of Class Actions, 2009, p. 330-345.

2.3.2 Costs from the Viewpoint of Defendants and Society at Large

It is commonplace for companies and their representatives to denounce the considerable financial burden associated with mass devices.¹⁴¹ Racketeering and legalised blackmail, decrease in competitiveness, excessive reputational costs are among concerns that are usually set forth. On a broader scale, society at large can also be impaired by such abuses.

Legal and Law and Economics scholars have extensively relied on the opinion of judge POSNER in *In Re Rhône-Poulenc Rorer Inc.* to illustrate the risks of legalised blackmail. In his decision, Judge POSNER argued that the certification of class action lawsuits could expose defendants to ‘an irresistible pressure to settle on disadvantageous terms’ regardless of the merits of plaintiffs’ claims¹⁴². This point of view has been completed by PRIEST who similarly suggested that enabling plaintiffs to proceed as a group provides them with ‘an extraordinary power even where the underlying claim is meritless’.¹⁴³ This situation can be explained in terms of asymmetric relationship between plaintiffs and defendants: asymmetries of costs, asymmetries of information and risk-preferences asymmetries. It is also explained by the considerable reputational costs that defendants have to bear as soon as mass claims are filed. As a consequence, the idea previously stated which argued that mass litigation tends to cap companies’ exposure to reputational costs now appears more ambiguous when viewed from this new perspective. Empirical research conducted by KOKU on the American class action suggested that market’s reactions to class action litigation are, on average, twice as much as the market’s reactions to individual lawsuits. Indeed, the effects associated with class action lawsuits are likely to be spread over a longer period of time and, crucially, can be a source of extensive media coverage.¹⁴⁴ Therefore, even when a claim appears meritless, defendants may be tempted to settle rapidly in order to minimize their reputational costs and circumvent the adverse effects of the dispute.

The perspective of claimants extracting unjustified settlements from a potential non-wrongdoer is a source of concern among stakeholders. From an economic point of view, such abuses may indeed adversely

¹⁴¹ Mouvement des Entreprises de France (MEDEF), response to the implementation of a collective action in France (www.archive.medef.com/main/core.php?pag_id=55014, accessed 25 September 2012).

¹⁴² R.A. POSNER in *In Re Rhone-Poulenc Rorer Incorporated*, 138 F.3d 695, 11 March 1998.

¹⁴³ G.L. PRIEST, ‘Procedural versus Substantive Controls of Mass Tort Class Actions’, *Journal of Legal Studies* (J.M. OLIN Program in Law and Economics Conference on Tort Reform), June 1997. The Literature dealing with the risks of blackmail associated with American class action lawsuits is extensive. For further details see notably: B. HAY and D. ROSENBERG, *supra note 43*; C. SILVER, ‘We were scared to death’: Class Certification and Blackmail’, (78) *New York University Law Review*, October 2003, p.1357.

¹⁴⁴ P.S. KOKU, ‘An Analysis and the Effects of Class-Action Lawsuits’, (59) *Journal of Business Research*, 2006, pp. 508-515.

affect the entire rationale of mass devices and possibly lead to situations of over-deterrence. In response to these threats, companies may be incentivized to adopt strategic behaviour so as to reduce their exposure to risks. Companies may for instance rationally adapt their behaviour by increasing their prices or shifting from high-risk to lower-risk activities.¹⁴⁵ As pointed out by DEFFAINS, DORIAT-DUBAN and LANGLAIS, companies may also be incentivized to seek liability evasion strategies by structuring their activities in such way that they will be less exposed to potential lawsuits.¹⁴⁶ The social costs of deficient mass proceedings appear then considerable. External supervision is thus here again necessary to lower such costs.

2.3.3. Costs from the Viewpoint of Judges

As previously shown, from the judiciary's viewpoint, mass proceedings enable economies of scale and avoid a depletion of judicial resources. Yet, as MARCUS has observed, this argument remains 'an ambivalent justification'.¹⁴⁷ A nuanced approach should therefore prevail for several reasons.

First, easing the vindication of small claims forces the judiciary to deal with lawsuits that would not have been filed previously. As a direct consequence, it may increase judicial caseload. In economic terms, this concern can be better understood as a fear of seeing small claims causing a new commons problem from the judiciary's viewpoint. This issue appears thus closely connected to another which goes beyond the scope of this research, namely the socially optimal amount of civil litigation. A few empirical studies conducted so far tend nonetheless to suggest that the implementation of mass proceedings in European countries has neither been followed by a 'plaintiffs' rush to the courts' nor by the emergence of a so-called 'litigation culture'.¹⁴⁸

¹⁴⁵ This point was already highlighted in the legal literature with regards to the increasing risks faced by specialised doctors and the associated increases in insurance premium (see M.BACACHE, 'La réparation des accidents médicaux : une conciliation délicate entre les intérêts des patients et ceux des médecins', *Recueil Dalloz*, 2008, p.816.; S.S. ENTMAN, B.A. REILLY, C.A. GLASS, A. SLOAN, G.B. HICKSON, H.H. ZHANG, 'Tort Liability and Obstetricians' Care Levels', (17) *International Review of Law & Economics*, 1997, pp.245-260.

¹⁴⁶ B. DEFFAINS, M. DORIAT-DUBAN and E. LANGLAIS, *Economie des Actions Collectives*, PUF Droit & Justice, Paris, 2008, 64 p. (referring notably to HANSMANN and KRAAKMAN who already stressed that "small firms might replace large drug companies in the development and initial marketing of pharmaceuticals. These small firms would then sell a product line to a large company for mass production and marketing only when it proven safe", see H.HANSMANN and R.KRAAKMAN, 'Toward Unlimited Shareholder Liability for Corporate Torts', (100) *Yale Law Journal*, May 1991, pp.1879-1934).

¹⁴⁷ R.L. MARCUS, 'Confronting the Consolidation Conundrum', (880) *Brigham Young University Law Review*, 1995 pp.879-924

¹⁴⁸ I. TZANKOVA, *supra note 60* (observing that there is no clear sign of an increase in the number of lawsuits filed in the Netherlands); B. DEFFAINS, M. DORIAT-DUBAN, E. LANGLAIS, *supra note 146*, at pp.16-17.

Second, the assumption stating that mass proceedings can facilitate judicial economies of scale tends to consider all mass claims as fungible or similar. It does not take into account their obvious idiosyncrasies in terms of complexity. Yet, many mass disputes are likely to be burdensome for judiciaries and may consequently require more time and resources than individual lawsuits.¹⁴⁹ Empirical research on this question provides no clear indication. The added-value of mass proceedings from the judiciary's angle will ultimately depend on the judge's ability to monitor the procedure, on its efforts to drive litigants' behaviours, and ultimately, on the nature of the legal issues that they will have to tackle. Further developments of this research will shed light on these important issues.

2.3.4. Preliminary Conclusion

Depending on the peculiarities of the procedure, the costs attached to mass litigation devices may differ.¹⁵⁰ Mass procedures' design can be regarded as a trade-off between several and legitimate objectives that Legislature may want to achieve. More specifically, CALABRESI notes that 'the choices about the shape (...) hence reflect foundational judgments about the proper allocation of costs'.¹⁵¹ This section was intended to shed light on the fact that costs and abuses may emerge at different stages of the procedure (namely, before, during and at the end) and between different stakeholders (within the group, between the group and its counsel/association, between the group and the defendants and *vis-à-vis* the judiciary).

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¹⁴⁹ It took eleven years to the Frankfurt Court of appeal (*Oberlandesgericht*) to finally issue its model decision in the Deutsche Telekom case (May 2012) which finally dismissed plaintiffs' claims (the press release from the Court can be consulted here: www.olg-frankfurt.justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?rid=HMdJ_15/OLG_Frankfurt_am_Main_Internet/nav/d44/d4471596-ad85-e21d-0648-71e2389e4818,b16651b6-4d15-731f-012f-312b417c0cf4,,,11111111-2222-3333-4444-100000005004%26_ic_uCon_zentral=b16651b6-4d15-731f-012f-312b417c0cf4%26overview=true.htm&uid=d4471596-ad85-e21d-0648-71e2389e4818 (accessed: 9 October 2012).

¹⁵⁰ D. HENSLER, *supra* note 125.

¹⁵¹ G. CALABRESI and K. SCHWARTZ, 'The Costs of Class Actions: Allocation and Collective Redress in the US Experience', (32) *European Journal of Law & Economics*, 2011, pp.169-183.

2.4. CONCLUSION - A NEED FOR THIRD-PARTY MONITORING: A ROLE FOR JUDGES?

This chapter was aimed at discussing the benefits and costs attached to mass proceedings in order to finally highlight the need for a sound third-party monitoring. Filtering weak claims, gate-keeping, setting the bargaining process between litigants and between litigants and their counsels, supervising settlement agreements and the distribution stage are among the key steps necessary to ensure that mass proceedings meet their social objectives at lower social costs. Selecting the right supervisor and the right set of monitoring tools is therefore as a second key step.

Several safeguards can be envisaged.¹⁵² While arguing that ‘class action litigation may have net social benefit but only under relatively narrow circumstances that requires relatively close court supervision’, ULEN has suggested that judges could be an interesting option.¹⁵³ COOTER shares a similar opinion and supports judicial intervention in cases ‘whose effects are diffuse’. He observes, in this respect, that public judges are more likely to take into account the interests of a dispersed class of individuals, than private judges who often will merely focus on the two parties standing in front of them with little consideration for third parties.¹⁵⁴ Relying on judges is the choice made in the United States where, as shown in coming developments, judges usually play active roles for the conduct and management of class action lawsuits. Interestingly, current discussions in Europe tend to follow a similar approach. A strong judicial monitoring is indeed an option discussed and spearheaded by many European stakeholders. Despite the wide diversity of replies that the EU Commission received to its 2011 public consultation on collective redress, a majority of participants ‘unanimously agree that the judge should have a central role as a case manager and gatekeeper’.¹⁵⁵ Furthermore and as already highlighted, the EU Commission also indicated in its 2013 Recommendations the essential role that should fall on courts in this domain.¹⁵⁶

¹⁵² R. MONEY-KYRLE and C. HODGES, ‘European Collective Action: Towards Coherence?’, *Maastricht Journal of European and Comparative Law*, 2012, n°4; I.TZANKOVA and J.KORTMANN, *supra* note 42.

¹⁵³ T.ULEN, *supra* note 24.

¹⁵⁴ R.COOTER, ‘The Objectives of Private and Public Judges’, (41) *Public Choice*, 1983, pp.107-132.

¹⁵⁵ The replies to the Public Consultation have been compiled by the the Institut für Ausländisches und Internationales Privat- und -Wirtschaftsrecht of the University of Heidelberg (Study ‘*Evaluation of Contributions to the Public Consultation and Hearing: Towards a Coherent European Approach to Collective Redress*’, ref. Just/2010/JCIV/CT/0027A4, 2 October 2012, p.12, www.ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html).

¹⁵⁶ EU Commission, *supra* note 5.

One may however wonder why policymakers do ultimately rely on judges. This question is an important one because referring to judges seems to be nowadays paradoxical.¹⁵⁷ In recent times, a strong emphasis has indeed been placed on out-of-court dispute resolution mechanisms in order to disengage courtrooms and lower judicial workload.¹⁵⁸ One may however find in judges' neutrality and independence a first possible explanation. As judge WEINSTEIN - who was personally involved in several class action lawsuits - has observed, 'when so many discordant voices are heard and so much money is at stake, a hand with no financial interest in the outcome is necessary to impose order and discipline and avoid chaos'.¹⁵⁹ Moreover, claims for judicial intervention tend to be strongly supported by politicians who believe that 'courts can [ultimately] do it better'.¹⁶⁰ SCHUCK has pertinently noticed such a legislative inertia, and argued that legislatures might 'refuse to confront so controversial an issue as mass tort policy, involving as it does powerful political interests, enormous sums of money, serious human sufferings, conflicting values and so forth (...)'.¹⁶¹ The author furthermore stressed that 'the scientific, legal, economic, political and social conditions relevant to mass injuries are too complex and fluid to permit an adequate legislative response'.¹⁶² The subsequent chapters of this research will investigate the different roles assigned to judges for the conduct of mass proceedings and, later on, referring to economic theories, question their abilities to fulfil such tasks.

¹⁵⁷ S. AMRANI-MEKKI, 'Inciter les Actions en Dommages et Intérêts en Droit de la Concurrence – Le Point de Vue d'un Processualiste', (4) *Concurrences*, 2008 (observing that the efficiency of the civil trial nowadays legitimates the movement towards extra-judicial solutions and the inclination towards alternative dispute resolution. All reforms aimed at inciting lawsuits tend therefore to contradict the objectives pursued under civil procedure (translation from the author. In French : 'A l'heure de la concurrence des droits, l'efficacité du procès civil légitime aujourd'hui le mouvement de déjudiciarisation et l'incitation aux modes alternatifs de règlements de conflits. Toute politique d'incitation à l'action est donc en contradiction avec l'objectif poursuivi en procédure civile').

¹⁵⁸ See for instance in France, new articles 2062-2068 Civil Code about the 'convention de procédure participative' by which parties can decide to settle their dispute out-of-court; see also S. GUINCHARD (Ed.), 'L'ambition raisonnée d'une justice apaisée', official report to the Ministry of Justice, 2008 (available on www.ladocumentationfrancaise.fr/rapports-publics/084000392/ (accessed May 2014); M.-J. ODY, 'Le juge du 21^e siècle: un soufflé qui n'évitera pas l'asphyxie – à propos du rapport Delmas-Goyon', *Gazette du Palais*, 11 March 2014, n°70, p.21.

¹⁵⁹ J.B. WEINSTEIN, *Individual Justice in Mass Tort Litigation – The Effects of Class Actions, Consolidations, and Other Multi-Party Devices*, Northwestern University Press, 1995, at p.102.

¹⁶⁰ P.H. SCHUCK, 'Mass Torts: an Institutional Evolutionist Perspective', (80) *Cornell Law Review*, 1995, p.941-988.

¹⁶¹ *Idem*, at p.970; see also J.B. WEINSTEIN and E.B. HERSHENOV, *supra note 108* (highlighting : 'despite their sympathy for individual Vietnam veterans or asbestos widows, Americans and their representatives have not made compensation of these tort victims a legislative or executive priority. But they do seem to want the courts to do something'. at p.306, emphasis added).

¹⁶² *Idem*, at p.972.

JUDICIAL INTERVENTION IN MASS LITIGATION

What Kind of Judges Do Policymakers Expect to Resolve Mass Disputes?

‘What the courts should be doing, how they should act in these cases, and how they should cooperate present very difficult problems. I hope in the future more academics will come into the field to see how we are operating’.

J.B.WEINSTEIN*

‘Clarity of an idea is more a need of the mind yearning for security than a representation of the complex realities of life.’

R.DEMOGUE **

3.1 INTRODUCTION

When writing that ‘the judiciary (...) has no influence over the sword or the purse, no direction of either of the strength or of the wealth of a society and can take no active resolution whatever’,¹⁶³ HAMILTON could not have anticipated the increasing role assigned to the judiciary in modern societies, and still less in the particular framework of mass litigation. As ROTHSTEIN and WILLGING have commented on the American experience, class actions have progressively required judges ‘to play a unique role: the high stakes of the litigation heighten [their] responsibilities’.¹⁶⁴ A similar observation also applies to European judiciaries when monitoring mass proceedings.¹⁶⁵

* J.B. WEINSTEIN, ‘An Introduction to Who’s Who in Mass Toxic Torts’, (80) *Cornell Law Review*, 1994, at p.845

** R.DEMOGUE, *supra* note 1, at p.11.

¹⁶³ A.HAMILTON, Federalist Papers n°78, *The Judiciary Department*.

¹⁶⁴ B.J. ROTHSTEIN and T.E. WILLGING, *Managing Class Action Litigation: A Pocket Guide For Judges*, 3e ed, Federal Judicial Centre, 2010 ; P.-C. LAFOND, ‘Le Recours Collectif et le Juge Québécois : de l’Inquiétude à la Sérénité’, *Petites Affiches*, 10 June 2005, p.11 (for an insight from Québec).

¹⁶⁵ S. AMRANI-MEKKI, ‘Rapport spécial dans le domaine de la justice’, in: C. PRIETO (Ed.), *Cohérence Européenne des recours collectifs – Réponse à la Consultation publique de la Commission Européenne*, Trans Europe Experts, Société de législation comparée, vol.2, 2011, p.269 (highlighting : ‘the role of the judge is undeniably strengthened in the realm of collective redress proceedings’. Translation from the author. In French: ‘il est indéniable que le rôle du juge se voit renforcé dans l’instauration d’un mécanisme de recours collectif’).

3.1.1. Where Are We?

The preceding chapter stressed the underlying economic rationale of mass litigation requiring a strong monitor in order to ensure that its associated costs do not outweigh its associated benefits. On this occasion, it was highlighted that a majority of European stakeholders nowadays wants to give to judges this key role.

Going a step further, this chapter focuses on the anatomy of mass proceedings as a way to clarify the roles that are expected from judges by the law. The admissibility of the claim, the case management, the settlement and distribution stages are among the most critical duties that judges must endorse when monitoring mass cases. For matters of clarity, a choice is made to refer to a pastoral allegory featuring a *watchdog*, a *cattle driver* and a *good shepherd* as an attempt to canvass the different dimensions of the expected judicial intervention. Like the watchdog protecting the herd against external threats, the judiciary is asked to behave as a filter ensuring the group's viability and scrutinizing the overall admissibility of the proceeding. Like the cattle driver who actively leads the herd to its final destination, judges should ensure that cases make orderly progress and avoid the pitfalls associated with these complex and lengthy procedures. Finally, just as a good shepherd keeps track of his stray sheep, judges must take care of the parties' different interests and supervise a final outcome deemed fair and equitable to all participants, and specifically to those who are absent or represented throughout the proceeding. Portraying judges as watchdogs, cattle drivers and good shepherds is obviously a simplification. This classification is motivated by a desire to propose to readers an alternative to a lengthy list cataloguing all judicial tasks which, without any red thread, could be perceived as piecemeal. As suggested by DEMOGUE's words introducing this chapter, proceeding this way may help better understand complex realities.

A clarification must be addressed regarding the parameters employed to construct these three categories. The *judge-watchdog* mostly intervenes at the initial steps of the procedure. Under the heading 'watchdog' are encompassed all tasks by which judges control and screen the admissibility of the group claim and filter weaker or frivolous parties. The *judge-cattle driver* principally concerns the judicial case management. The category 'cattle driver' encompasses cases management techniques as well as all tasks by which judges ensure that cases make orderly progresses towards their final resolution. Finally, the *judge-shepherd* mostly refers to the denouement of the procedure. This category encompasses all tasks by which judges ensure that the interests of absent or represented parties are respected. In this view, judges will scrutinize possible opportunistic behaviour which could ultimately deprive parties from the benefits of the procedure. For matters of clarity, these three roles are hereafter successively addressed, even though they remain closely intertwined in practice.

3.1.2..Methodology and Objectives

There are many procedural ways to handle mass disputes. The choice is made to narrow down the analysis by specifically focusing on five selected mass proceedings. They are drawn from three European countries - namely France, the Netherlands and England - and from the United States. They are namely the French Group Action, the Dutch Collective Settlement of Mass Claim (WCAM), the English Group Litigation Order (GLO) and the US Federal Class Action. The British Draft on Court Rules for Collective Proceeding is also retained, even though this proceeding has not been formally implemented into the English legal system. Among many others, these five procedures are different examples of a so-called ‘procedural collectivization’.¹⁶⁶ Their respective procedural designs importantly diverge.¹⁶⁷ Yet, despite their particularities, they tend to share more similarities than divergences when viewed from the perspective of judicial intervention. Indeed, as shown in Chapter 2, mass litigation tends to raise the same type of concerns across jurisdictions.

Inevitably, every choice induces opportunity costs. Readers might therefore object that other procedures could have been included into these developments. Several reasons can nevertheless be set forth to justify and defend this choice. First, these proceedings have been implemented or discussed in countries with different legal cultures and traditions. Even though significant divergences may exist between legal systems, France and the Netherlands can be regarded as Civil Law countries, whereas England and the United States are representatives of the Common Law tradition. Traditionally, judges do not play the same roles nor have an identical status in both legal systems.¹⁶⁸ Second, these proceedings greatly differ in terms of design. As later explained, some of them may be viewed as collective actions, other as representative proceedings or finally as consolidation tools. Despite their respective particularities, cornerstone roles have each time been assigned to the judiciary for the conduct and supervision of the proceeding. Third, under the impulse of different European actors, comparative studies have recently mushroomed in order to clarify the scope of judges’ powers in European mass proceedings.¹⁶⁹ These

¹⁶⁶ S.C. YEAZELL, ‘Collective Litigation as Collective Action’, *University of Illinois Law Review*, 1989, n°1, pp.43-68.

¹⁶⁷ EU Commission, Green Paper on Consumer Collective Redress, COM (2008) 794 Final, 27 November 2008.

¹⁶⁸ J. MERRYMAN and R. PEREZ-PERDOMO, *supra note 12* (observing that Civil Law judges are ‘not culture heroes or parental figures (...). Their image is that of civil servant who performs important but essentially uncreative function, at p.34); A.GARAPON and I.PAPADOPOULOS, *supra note 12*. Differences between Civil and Common Law judges regarding status within the judiciary will be more extensively discussed in Chapter 4.

¹⁶⁹ E. FALLA, A. PUTTEMANS and H. BOULARBAH, ‘Powers of the Judge in Collective Redress Proceedings’, Research Paper submitted to the European Consumers’ Organization -BEUC, February 2012, hereafter referred to as ‘Report –Powers of Judges’ (their analysis focuses on collective proceedings available in Italy, Portugal, Germany, England & Wales, Sweden and Spain).

studies constitute a key starting point. Yet, they have omitted some national proceedings that are of great interest. This is for instance the case of the Dutch WCAM which is unique and unprecedented in Europe. Importantly, the Dutch proceeding has also recently shown long-lasting cross-borders implications. This is also the case of the French group action recently adopted by the French Legislature after decades of hesitations. When selecting these different procedures, this chapter is ultimately intended to enlarge the scope of the existing comparative research in this field. Fourth and finally, the American class action has been a source of a considerable attention from academics and policymakers. As further highlighted, judicial intervention in mass claims in both Europe and the United States shares interesting similarities. Insights about its functioning may thus provide valuable lessons for its understanding in the European context.¹⁷⁰

3.1.3. The Chapter in a Nutshell

The objectives of this chapter are twofold. The various missions assigned to judges in the monitoring of mass claims are first clarified. As a way to preliminary set the background, the design of mass proceedings – first, on a broader stage; then, narrowed down to the particular proceedings here retained– is presented (3.2). Then, based on the comparative analysis of procedural rules and – if applicable - case law, the roles of judges as watchdogs (3.3), cattle drivers (3.4) and good shepherds (3.5) are presented. In doing so, the goal is to encapsulate the main elements constituting the backbone of the judicial intervention in mass claims, and to show that, from the perspective of the judicial intervention at least, there are in this field more similarities than divergences (3.6). Then, extrapolating from this initial analysis, the chapter ultimately attempts to identify the kind of ‘mass litigation judges’ that policymakers ultimately expect on such circumstances (3.7).

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¹⁷⁰ R. MARCUS, ‘America’s Dynamic and Extensive Experience with Collective Litigation’, in: C. HODGES and A. STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edwar Elgar Publishing, 2013 (observing : ‘the US experience is both a target for criticism and a source of ideas that might be usefully adopted or adapted’, at p.148).

3.2. THE DESIGN OF MASS PROCEEDINGS: AN OVERVIEW

In order to preliminary set the background, the theoretical classifications usually made to address mass proceedings' design are first clarified on a general level (3.2.1). The contextual and procedural characteristics of the specific mass proceedings retained as red threads are then presented (3.2.2).

3.2.1. Theoretical Classification

a) Collective Action, Representative Proceeding and Consolidation Tool

Different categorizations may be retained to define mass litigation devices. Noteworthy is a willingness among European policymakers to exclude the term *class action* from their vocabulary since this terminology appears too closely associated with the controversial American experience.¹⁷¹ Following the path taken by several Law and Economics scholars,¹⁷² the concepts of *collective action* led by private individual(s), *representative proceeding* brought by associations or specified bodies, and *consolidations tool*¹⁷³ are hereafter clarified.¹⁷⁴

➤ *Collective action*

A collective action is brought by one or several harmed individuals (named 'leading plaintiffs') on behalf of a group of people with related or similar claims. All group members are bound by the final judgment or the approved settlement. They are ultimately entitled to enforce their rights in accordance with the judge's

¹⁷¹ E. KODEK, 'Collective Redress in Austria' in: D. HENSLER, C. HODGES, M. TULIBACKA (Eds.), 'The Globalization of Class Actions', (622) *The Annals of the American Academy of Political and Social Science*, March 2009, p.86-94 (observing that, in Austria, drafters purposely avoided the term *class action* and preferred the term *group litigation*).

¹⁷² R. VAN DEN BERGH and L.T. VISSCHER, *supra* note 73; S.KESKE, *supra* note 82.

¹⁷³ C. HODGES, *supra* note 56, at pp.2-3 (from a legal perspective, the distinction between *collective action* and *representative action* is blurred since both types of actions may *per se* be regarded as representational lawsuits. Following a different classification, the author considers for example that there is mainly two broad models of court-based aggregated procedures: 'one in which a single claim represents a group of others, and a second in which a number of individual claims are brought and grouped together because of their similarities').

¹⁷⁴ For an alternative classification, see for instance: J. STUYCK, 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question', (20) *European Business Law Review*, 2009, pp.483-505 (distinguishing 'joint actions' where individual claims are merely bundled in a single trial; 'representative actions' where rights are assigned to one entity that acts on behalf of the individual plaintiffs; 'test cases' where a judgement on one individual claim serves as a model for similar cases; 'real group actions' where a plaintiff acts on behalf of a group of individuals who will be bound by the outcome of the procedure if they have 'opted-in' or 'opted-out').

decision. A well-known example of collective action brought by private individuals is the American class action. This type of action is nowadays rare in Europe.¹⁷⁵ The term *collective redress* – notably employed by the European institutions¹⁷⁶ – is sometimes referred to as a substitute for the notion of *collective action*. As pointed out by HODGES, a distinction should nonetheless be drawn between these two notions. The term *collective action* emphasizes the procedural aspect of the proceeding, whereas the notion of *collective redress* more specifically targets the substantive objectives that policy-makers seek to achieve through such tools.¹⁷⁷

➤ *Representative proceeding*

Representative proceeding refer to claims filed by ‘a representative’ – associations such as consumer or shareholders associations for instance, or others specified bodies- on behalf of their members or of a wider audience. According to FAIRGRIEVE and LOWELLS, association-based actions tend to be currently a salient characteristic of European-style collective proceedings.¹⁷⁸

➤ *Consolidation tool*

Consolidation tools enable judiciaries to combine independent but similar claims principally for managerial purposes. This notion encompasses a wide range of mechanisms such as joinder or the use of test and model cases by which judges deliver a unique judgment which ultimately serves as reference for the treatment of similar cases.

¹⁷⁵ For instance, Section 1 of the Swedish Group Proceeding enacted in 2002 states that ‘a group action means an action that a plaintiff brings as the representative of several persons with legal effects for them, although they are not parties to the case. A group action may be instituted as a private group action, an organization action or a public group action’. In 2009, Italy also implemented a collective action (Article 140-bis Consumer Code, *Azione di Classe*).

¹⁷⁶ See for instance the 2011 European Commission’s Public Consultation on Collective Redress (*supra* note 4).

¹⁷⁷ C.HODGES, Lecture on ‘Collective Redress in Europe’, Leuven (Belgium), 26 February 2012

¹⁷⁸ D.FAIRGRIEVE and G. LOWELLS, *supra* note 21.

b) Opt-in and opt-out systems

An essential procedural clarification regards the mechanisms employed to establish group membership. Even though other mechanisms – albeit rare in Europe – may also be used, the traditional distinction principally distinguishes the *opt-in* from the *opt-out* systems.¹⁷⁹

According to the *opt-in* system, only plaintiffs who have individually stepped forward and expressed their desire to be part of the group are entitled to obtain compensation once the final judgment is delivered. Conversely, according to the *opt-out* procedure, all similar plaintiffs are regarded as being part of the group regardless of their formal approval. Only those who specifically express their wish to leave the proceeding are not bound by the final decision. Put differently, the *opt-in* system requires plaintiffs to express their wish to be *included* into the group, whereas the *opt-out* system requires them to express their desire to be *excluded* from it.

Experts have extensively debated the benefits and drawbacks associated with the *opt-out* and the *opt-in* systems. A 2008 comparative empirical research from the Civil Justice Council of England and Wales has showed that claimant groups are usually larger in *opt-out* than in *opt-in* systems.¹⁸⁰ A 2004 study indicated that the rate of *opt-outs* depends on the type of case: more plaintiffs *opt out* in mass tort cases than in consumer class actions. However, the authors of the study observed that, as a general rule, ‘*opt out* (...)’, despite their fundamental place in the structure of class action practice, in fact are exceedingly uncommon’.¹⁸¹ Going a step further, a set of empirical studies has investigated the underlying reasons of *opting out*. It notably pointed out that an increase in the loss suffered lead plaintiffs to consider individual claims. In addition, class members are more likely to file individually if they know the outcome of the settlement rather than if the outcome is still uncertain when they take their decision.¹⁸² On the basis of these findings, policymakers aiming to encourage the deterrent function of class action should preferably adopt the *opt-out* system. Indeed, *opt-out* systems make use of rational apathy since rationally apathic claimants will not leave the group.¹⁸³ Importantly, the choice between *opt-in* and *opt-out* appears to

¹⁷⁹ A third mechanism – called ‘mandatory representation’ – also exists. In this, all plaintiffs who are described as group members are included within the group and have no possibility for *opting-out* (for further details, see notably S. KESKE, *supra* note 82).

¹⁸⁰ Civil Justice Council of England and Wales, ‘Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions’, *Recommendations to the Lord Chancellor – Final Report*, November 2008.

¹⁸¹ T. EISENBERG and G. MILLER, *supra* note 37.

¹⁸² G. VAN DIJCK, ‘When Do Individuals Participate in Class Actions?’, *Tilburg Law School Legal Studies Research Paper*, n°03/2011, December 2010 (also extensively reviewing the literature).

¹⁸³ R. VAN DEN BERGH, A. RENDA and S. KESKE, *supra* note 38.

principally be a political trade-off. It consists of identifying which interests, - between the one of victims and the one of companies - will *by default* be protected. For instance, when favouring the opt-in system, the current French *action de groupe* appears to be more protective of companies' interests. This point was indeed clearly indicated in a 2010 Group Action report which stated:

'[The working group] retains the principle of voluntarily membership to the group, which shows the commitment of the victim, rather than an alleged membership maximizing on an uncertain basis, the risk to which the company is exposed'.¹⁸⁴

The opt-out system is also sometimes depicted as being contrary to procedural rules - such as for example in France the rule forbidding legal standing for absent and unknown plaintiffs, known as '*nul ne plaide par procureur*' - and to constitutional principles.¹⁸⁵ These legal obstacles may however not be as insurmountable as they have been presented. Views expressed by several French legal scholars have indeed substantiated the idea that the actual opposition *vis-a-vis* the opt-out mechanism is, once again, more a political issue than strictly a legal one.¹⁸⁶ For this research, differences between the opt-in and the opt-out systems will matter: they will importantly influence the roles and duties expected from judges and alter the scope of their intervention.

3.2.2 Presentation of the Selected Mass Proceedings

This section is intended to give readers clear -albeit non extensive- views about the functioning of the mass litigation devices retained for this analysis, as well as the contexts in which they have been implemented (or are discussed). These proceedings are respectively the French group action (*a*), the Dutch

¹⁸⁴Sénat, Rapport d'information n°499, L'action de groupe à la française - Parachever la protection du consommateur, 2009-2010, at p.72 (Translation from the author. In French : '[Le groupe de travail] retient par ailleurs le principe d'une adhésion volontaire au groupe, qui manifeste l'implication de la victime, plutôt que celui d'une adhésion présumée qui maximise, sur une base incertaine, le risque auquel l'entreprise est exposée').

¹⁸⁵Critics against the opt out mechanism, in France refer to the decision of the Constitutional Council (decision n°89-257 DC, 25 July 1989 sur la loi modifiant le code du travail et relative à la prévention du licenciement économique et au droit à la conversion) where the Council decided that 's'il est loisible au législateur de permettre à des organisations syndicales représentatives d'introduire une action en justice à l'effet non seulement d'intervenir spontanément dans la défense d'un salarié mais aussi de promouvoir à travers un cas individuel, une action collective, c'est à la condition que l'intéressé ait été mis à même de donner son assentiment en pleine connaissance de cause et qu'il puisse conserver la liberté de conduire personnellement la défense de ses intérêts et de mettre un terme à cette action').

¹⁸⁶M. VERPEAUX, 'L'action de groupe est-elle soluble dans la Constitution', *Recueil Dalloz*, 2007, p.258 ; D. COHEN, 'Introduire des actions de groupe en droit français ? Reactions à l'analyse du Professor Demougin', in : D. COHEN (Ed.), *Droit & Economie du Procès Civil*, LGDJ, 2010, pp.105-117.

Collective Settlement of Mass Claims (b), the English Group Litigation Order (c), the English Draft Court Rules for Collective Proceeding (d) and the American federal class action (e).

a) The Thorny Emergence of a French Group Action

➤ Context

Since the mid-eighties and the reforms of consumer law at that time conducted by CALAIS-AULOY,¹⁸⁷ the implementation of a group action has been a controversial and extensively debated issue in France. For decades, the topic has fuelled political statements of public officials,¹⁸⁸ was supported by successive governments, has been defended by regulatory bodies, and addressed many times by Parliament. Until 2014 all these attempts were made in vain,¹⁸⁹ partly because of the fierce opposition of lobbies. Noticing these repetitive failures, French scholars compared the thorny emergence of the group action to the myth of Sisyphus who was sentenced by gods to push an immense boulder on the top of a hill before seeing it rolling down, and ultimately being forced to restart endlessly the same task all over again.¹⁹⁰

Yet, France has a long-standing history with representative actions, more specifically known as the action in the interest of consumers (*action dans l'intérêt des consommateurs*) and the representative action (*action en représentation conjointe*), respectively enshrined in Article L.421-7 and L.422-1 of Consumer Code (*Code de la consommation*). Practice has however revealed the paucity of these mechanisms and highlighted their procedural pitfalls.¹⁹¹ As an illustration, since 1992, less than 10 representative actions have been filed and a 2006 report from the Senate has pointed out the 'extreme heaviness attached to the management of individual mandates which leads to the paralysis of the action'.¹⁹² In 2010 a case brought

¹⁸⁷ CALAIS-AULOIS, Rapport de la Commission pour la codification du droit de la consommation, Proposition pour un code de la consommation, 1985.

¹⁸⁸ Discours aux forces vives de la Nation, January 2005, available on www.actiondegroupe.com/chirac-class-action/.

¹⁸⁹ S. AMRANI-MEKKI, 'La rengaine de l'action de groupe', *Gazette du Palais*, 8 September 2012, n°252, p.3.

¹⁹⁰ A. DU CHASTEL, 'L'action de groupe ou le mythe de Sisyphe', *Petites Affiches*, 23 June 2008, n°125, p.6 ; L. MARTINET and A. DU CHASTEL, 'Du retour de l'action de groupe et du mythe de Sisyphe', *Petites Affiches*, 10 March 2009, n°49, p. 6.

¹⁹¹ According to Article L.422-1 Consumer Code, representative associations can neither solicit mandate from consumers by means of public appeals through radio or television, nor by means of posting of information, by tract or personalised letter. Furthermore, every single consumer must give its written consent.

¹⁹² Sénat, Rapport d'information fait au nom de la Commission des Lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale *sur le Class Actions*, sous la présidence de M. J.-J.HYEST, 14 March 2006, n°249, spéc. p.16 et 17 ('l'extrême lourdeur de la gestion des mandats individuels reçus conduisant à une paralysie de l'action').

by the consumer association *UFC-Que Choisir* in the aftermath of an anticompetitive cartel agreement on the French mobile phone market significantly contributed to highlight the shortcomings of these tools.¹⁹³ Although dismissed for procedural matters by a decision of the Paris Court of Appeal afterwards confirmed by the Court of Cassation,¹⁹⁴ this case stressed the lack of adequate mechanisms for compensating large numbers of claimants. As a French scholar pointed out, the representative action tends to be traditionally not particularly appreciated among judges (*l'action mal-aimée des juges*).¹⁹⁵ Meanwhile, recent scandals about large-scale damage such as the one associated with the drug Benfluorex (also known under its brand name Mediator) or the defective breast implants world-widely commercialised by the company PIP have caused long-lasting public emotional arousals.¹⁹⁶ The slowness and failures of compensation funds have exacerbated the need for alternative tools to compensate plaintiffs and deter wrongdoers.¹⁹⁷ Recent impetus at the European level has finally contributed to renew discussions.¹⁹⁸

In 2010, a step was made with the report conducted by senators BETEILLE and YUNG and their renewed proposal for the implementation of a group action *à la française*.¹⁹⁹ In 2013, the group action was included into the bill proposal reforming consumer law (*loi relative à la consommation*). After successive readings by the National Assembly and the Senate, the text was finally adopted on 13 February 2014.²⁰⁰ In March 2014, the Constitutional Council gave its green light to the implementation of the group action into the

¹⁹³ Conseil de la concurrence, Décision n°05-D-65 relative à des pratiques constatées dans le secteur de la téléphonie mobile, 30 November 2005.

¹⁹⁴ Paris Court of Appeal, 11e ch., pôle 5, 22 January 2010, n°08/09844; Cass. 1ere Civ., 26 May 2011, pourvoi n°10-15.676, obs.X.DELPECH, *Recueil Dalloz* 2011, p.1884.

¹⁹⁵ N. DUPONT, 'L'Action en Représentation Conjointe des Associations de Consommateurs ou l'Action Mal-Aimée des Juges', *Recueil Dalloz*, 2011, p.1884.

¹⁹⁶ See for example: *La Tribune*, 'Et si le scandale du Mediator relançait le projet des class actions en Europe?', 24 January 2011.

¹⁹⁷ C. LIENHARD, 'Médiateur, Loi Fourcade : Regrettables Régressions du Droit des Victimes', *Gazette du Palais*, 16 Juillet 2011, n°197, p.3.

¹⁹⁸ See the 2013 recommendations and consultation of the European Commission on collective redress, *supra* note 4 and 5.

¹⁹⁹ Sénat, 'L'action de groupe à la française: Parachever la protection des consommateurs', report conducted by L.BETEILLE and R.YUNG, n° 499, 2009-2010 (hereafter *2010 Group Action Report*). In 2011, this two-step procedure was also the approach retained by the French Financial Market Authority (AMF – Autorité des Marchés Financiers) in the report 'Rapport relatif à l'indemnisation des préjudices subis par les épargnants et les investisseurs', 25 January 2011, see notably at pp.28-33.

²⁰⁰ *Le Monde*, 'Consommation : le Parlement adopte les « class actions » à la française', www.lemonde.fr/vous/article/2014/02/13/consommation-l-action-de-groupe-votee-au-parlement_4365812_3238.html (accessed 14 February 2014).

French legal system.²⁰¹ The enforcement decree was finally adopted in September 2014.²⁰² The group action is thus effective in France since 1 October 2014, and the very first day a group lawsuit was filed by the Consumer association UFC Que Choisir against the company Foncia Groupe for undue fees paid by 318 000 tenants.²⁰³

Regarding its scope of application, the proceeding has been restricted to consumer and competition law, and can exclusively be used to claim compensation for material damages.²⁰⁴ Such a restriction was mainly justified by a desire to exclude personal damages, which, in the mind of French policy-makers, may call for more individualised approaches. This choice has however been criticized by French legal scholars.²⁰⁵ In addition, extension of the group action to others fields of substantive law is nowadays discussed: in April 2013, a bill proposal unsuccessfully suggested to include public health within the scope of the group action.²⁰⁶ Relatedly, during the summer 2013, the French Health Ministry also restated its deep commitment to extend the action to resolve public health issues. Another bill proposal on this topic is expected in 2014.²⁰⁷ In parallel, the Ministry in charge of environmental matters also expressed her wish to extend the proceeding to environmental issues.²⁰⁸ Finally, besides environment and public health, an

²⁰¹ Constitutional Council, Decision n°2014-690 DC of 13 March 2014 *sur la loi relative à la consommation* (see also: S.AMRANI-MEKKI, 'Action de groupe: saisine du conseil constitutionnel', *Gazette du palais*, 11 March 2014, n°70, p.3).

²⁰² Décret n°2014-1081 of 24 September 2014 relatif à l'action de groupe en matière de consommation.

²⁰³ See : UFC Que Choisir ?, press release, 'L'UFC Que Choisir lance la première action de groupe... contre Foncia Groupe', available on <http://www.quechoisir.org/droits-justice/systeme-judiciaire/action-en-justice/communiquel-ufc-que-choisir-lance-la-premiere-action-de-groupe-contre-foncia-groupe-44-millions-d-euros-doivent-etre-reverses-aux-locataires> (accessed 15 October 2014).

²⁰⁴ Sénat, Proposition de loi n°484 portant création d'une action de groupe en matière de consommation, de concurrence et de santé, 5 April 2013 ; Assemblée Nationale, Projet de loi relatif à la consommation présenté par le Ministre de l'économie et des finances Moscovici, n°1015, 2 May 2013 (available on www.assemblee-nationale.fr/14/projets/pl1015.asp, accessed 1 October 2013).

²⁰⁵ See notably: M. BACACHE, 'Action de groupe et responsabilité civile', *Revue Trimestrielle de Droit Civil*, 2014, p.450 (pointing out that the current group action tends to encourage a hierarchy of damage. An inclination for material damage is viewed as going against recent evolutions of civil liability law which nowadays tends rather to focus on personal damage).

²⁰⁶ Proposition de loi n°484 portant création d'une action de groupe en matière de consommation, de concurrence et de santé .

²⁰⁷ *Le Point*, 'Action de Groupe et Santé : Vers un Projet de Loi Spécifique pour 2014', 24 June 2013, available on www.lepoint.fr/sante/actions-de-groupe-et-sante-vers-un-projet-de-loi-specifique-pour-2014-24-06-2013-1685207_40.php (accessed October 2013).

²⁰⁸ *Le Point*, 'L'Extension de l'action de groupe à l'environnement à l'étude', 26 June 2013, available on www.lepoint.fr/culture/l-extension-de-l-action-de-groupe-a-l-environnement-a-l-etude-26-06-2013-1686278_3.php (accessed October 2013).

extension of the group action to others fields such as securities or employment law tends to be also envisaged.²⁰⁹

In subsequent developments, the referent documents used to describe the French group action will principally be the 2014 bill reforming consumer law. The 2010 report on group action (hereafter referred to as the ‘2010 group action report’) will be used as a complementary source of information. To summarize, the thorny emergence of the group action until 2014 can be described as follows:

²⁰⁹ J. SIMON, C. FOULON and A. FERRER, ‘Faut-il introduire l’action de groupe en droit du travail ?’, *Revue de droit du travail*, 2012, p.603.

The Thorny Emergence of the French Group Action in a Nutshell (2005-2014)*

Bill proposal	Date
Loi n°2014-344 relative à la consommation	17 March 2014
<i>Proposition de loi n°1692 visant à instaurer une action de groupe étendue aux questions environnementales et de santé (by M.Bonneton & al., National Assembly)</i>	14 January 2014
<i>Proposition de loi n°811 visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités (by E.Benbassa & al., Senate)</i>	25 July 2013
<i>Projet de loi n°1015 relatif à la consommation (by P. Moscovici, Government)</i>	2 May 2013
<i>Proposition de loi n° 484 portant création d'une action de groupe en matière de consommation, de concurrence et de santé (by J.P.Placade & al., Senate)</i>	5 April 2013
<i>Proposition de loi n°110 visant à instaurer les recours collectifs de consommateurs (by J.P.Giran, National Assembly)</i>	24 July 2012
<i>Proposition de loi n° 277 sur le recours collectif (by N.Bricq & R.Yung., Senate)</i>	9 February 2010
<i>Proposition de loi n° 1897, relative à la suppression du crédit revolving, à l'encadrement des crédits à la consommation et à la protection des consommateurs par l'action de groupe (by J.M.Ayrault & al., National Assembly)</i>	2 September 2009
<i>Loi n° 2008-776 de modernisation de l'économie (amendment rejected)</i>	4 August 2008
<i>Loi n°2008-3 pour le développement de la concurrence au service des consommateurs (amendment rejected)</i>	3 January 2008
<i>Proposition n° 324 relative à l'action de groupe en France (by A.Montebourg & al., National Assembly)</i>	24 October 2007
<i>Proposition de loi n° 118 tendant à créer une action de groupe (by O.Terrade & al., Senate)</i>	7 December 2007
<i>Proposition de loi n°3775 tendant à créer une action de groupe (by J.Desallangre & al., National Assembly)</i>	13 March 2007
<i>Proposition de loi n° 3729 relative à l'introduction de l'action de groupe en France (by A.Montebourg & al., National Assembly)</i>	15 February 2007
<i>Projet de loi n° 3430 en faveur des consommateurs (by T.Breton, Government)</i>	8 November 2006
<i>Proposition de loi n°3055 visant à instaurer le recours collectif de consommateurs (by L.Chatel & al., National Assembly)</i>	26 April 2006
<i>Proposition de loi n° 322 sur le recours collectif, (by N.Bricq et al., Senate)</i>	25 April 2006
Reports	Date
<i>Rapport relatif à l'indemnisation des préjudices subis par les épargnants et les investisseurs' (Financial Market Authority - AMF)</i>	25 January 2011
<i>Rapport d'information sur l'action de groupe (by L. Beteille & R. Yung)</i>	26 mai 2010
<i>Rapport 'l'action collective en droit administratif' (by P.Belaval & al.)</i>	5 May 2009
<i>Rapport Coulon sur la depenalisation de la vie des affaires</i>	February 2008
<i>Rapport Attali pour la Libération de la croissance française (décision n°191)</i>	2008
<i>Avis relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles (Competition Council)</i>	21 September 2006
<i>Rapport 'Les actions de groupes, Étude de législation comparée', n° 206 (Senate)</i>	6 May 2006
<i>Rapport d'information n° 249 sur les class actions (by M. J.J. Hyest, Senate)</i>	14 March 2006
<i>Rapport sur l'action de groupe (by MM. G. Cerutti, M. Guillaume & al.)</i>	December 2005

*Texts and reports before 2005 are not included in this list.

➤ *Functioning*

The French group action has been portrayed by legal scholars as a procedural monster.²¹⁰ In simple words, it can be described as a representative action built on a three-step approach conducted by two main actors: the court and the association. The proceeding follows a line of reasoning which has been presented as being contrary to the American class action: the constitution of the claimant group must only occur after a judicial decision establishing liability.²¹¹ This choice was motivated by the wish to find an alternative to the US class action model and to postpone to later stages the administrative burden associated with a ‘massification of the dispute’.²¹²

In a first phase, a group claim is filed by an association.²¹³ Associations have been given monopoly for legal standing. Such a measure - which at first sight tends to limit the roles of lawyers - has been viewed as side-effects of a growing suspicion *vis-à-vis* lawyers, and thus unsurprisingly vividly criticized by the Bar.²¹⁴ Substantiating this idea, previous drafts dealing with the group action went as far as simply entirely excluding lawyers from the conduct of the proceeding.²¹⁵ Conversely, the prominent role assigned to associations is viewed as a result of their growing importance and recognition in the French legal system.²¹⁶ However, it would be erroneous to argue that lawyers are fully absent from the actual French group action. Indeed, since group lawsuits are filed in High Courts of First Instance (*Tribunal de Grande Instance*, also referred to as *TGI* in French), representation of claimants by lawyers will necessarily remain mandatory. Furthermore, new Article R.423-5 Consumer Code, as resulting from the enforcement decree of September 2014, explicitly states that lawyers and bailiffs will help and assist associations, notably

²¹⁰ N. MOLFESSIS, ‘L’exorbitance de l’action de groupe à la française’, *Recueil Dalloz*, 2014, p.947 ; E. CLAUDEL, ‘Action de groupe et autres dispositions concurrence de la loi consommation : un dispositif singulier’, *Revue trimestrielle de droit commercial*, 2014, p.339; L. BORE, ‘Le projet d’action de groupe: action mort-née ou premier pas?’, *Gazette du Palais*, 16 May 2013, p.29.

²¹¹ 2010 Group Action Report, *supra note 199*, recommendation n°9, at p.63.

²¹² *Idem*, at p.66.

²¹³ New Article L.423-1 Consumer Code (16 associations are currently entitled to file group actions).

²¹⁴ J.D. BRETZNER, ‘Ombres et Lumières autour de la Qualité pour Agir dans l’Action de Groupe’, *Gazette du Palais*, 16 May 2013, n°136, p.31 ; A. PORTMANN, ‘Il est inacceptable de réserver l’action de groupe à 17 personnes morales’, *Dalloz actualité*, 29 avril 2013 ; See also an article from the former President of the National Bar Council (Conseil National des Barreaux) C. CHARRIERE-BOURNAZEL, ‘L’action de groupe à la française: un leurre’, 2 May 2013, available on www.cnb.avocat.fr/L-action-de-groupe-a-la-francaise-un-leurre--Editorial-du-President-Charriere-Bournazel--2-mai-2013_a1589.html (accessed 26 May 2013).

²¹⁵ Projet de loi en faveur des consommateurs presented by T.BRETON, n°3430, 14 November 2006 (see proposed Article L.423-6 al.2).

²¹⁶ M.-A. FRISON-ROCHE, ‘Le Pouvoir Processuel des Associations et la Perspective de la Class Action’, *Petites affiches*, 24 April 1996, n°50, p.28 (observing that associations had initially only limited roles in French procedural law).

when representing claimants.²¹⁷ The distribution of roles between lawyers (and/or bailiffs) and associations however remains to be clarified in practice.

During a second phase, the High Court of First Instance delivers a *declaratory ruling on liability* in which judges establish liability on the basis of the model cases brought by the filing association(s).²¹⁸ Judges circumscribe the scope of defendant's liability, and ensure the publicity of the case in the media at the expenses of defendants.²¹⁹ Finally, in a third phase, the group of plaintiffs is constituted under judicial supervision via an opt-in mechanism: individuals must step forward to be included into the claimant group.²²⁰ Judges ultimately determine the amount of damages awarded to each individual plaintiff.²²¹ The particularity of the opt-in system in the French model is that its design appears significantly attractive for claimants since the claimant group is constituted only after the judicial declaratory ruling on liability. In other words, potential claimants may have clearer views on the success of their claims, and thus will be incentivized to step forward.²²²

Whenever a compromise is found between litigants, judges must review the terms of the proposed settlement agreement. Interestingly and as discussed in the coming sections, new Article L.423-16 Consumer Code which clarifies judicial intervention in this respect closely resembles the Dutch WCAM proceeding: French judges are here also required to carefully scrutinize that the interests of represented members are ultimately taken into account in the final settlement agreement.²²³ Finally, an amendment to the initial legislative text has created a 'simplified group action', a sort of fast-track proceeding applicable to situations where plaintiffs can easily be identified and suffer from identical harms.²²⁴

From a Law and Economics perspective, two observations regarding the procedural design of the French group action can be formulated. The desire to postpone the constitution of the group once the decision on

²¹⁷ See new Article L.423-9 Consumer Code.

²¹⁸ New Article L.423-3 Consumer Code (in French : *Jugement déclaratoire de responsabilité*, sometimes also referred to as *déclaration de responsabilité* or *action déclaratoire de responsabilité*). Claims supporting the implementation of a declaratory judgment on liability are by no means recent. This idea was already discussed in the work of CALAIS-AULOY. The same procedural architecture was followed in the successive proposals.

²¹⁹ New Article L.423-4 and R.423-6 Consumer Code.

²²⁰ New Article L.423-5 Consumer Code.

²²¹ New Article L.423-3, al.2 Consumer Code.

²²² Noticing this ambivalence, the French legal literature has stressed the existence of a 'hybridization' between opt in and opt out systems in the current French group action (see E.CLAUDEL, *supra* note 210).

²²³ New Article L.423-16 reads as follows: 'tout accord négocié au nom du groupe est soumis à l'homologation du juge, qui vérifie s'il est conforme aux intérêts de ceux auxquels il a vocation à s'appliquer et lui donne force exécutoire. Cet accord précise les mesures de publicité nécessaires pour informer les consommateurs concernés de la possibilité d'y adhérer, ainsi que des délais et modalités de cette adhésion'.

²²⁴ New Article L.423-10 and R.423-8 Consumer Code (in French : procédure d'action de groupe simplifiée).

liability is delivered could first be contested. According to the Learned Hand Formula used in tort Law & Economics,²²⁵ a breach of duty of care is constituted when the marginal costs of taking precautions borne by the alleged defendant (B) are lower than the decrease in expected losses (i.e. the probability of loss P multiplied by the gravity of loss L).²²⁶ When the group of plaintiffs is constituted *after* the decision on liability, judges do not have a clear view on the magnitude of the total losses when they decide on the issue of negligence. Assuming that judges follow the Hand formula, they may try to assess the number of plaintiffs anyway in an attempt to figure out the size of the total loss. It would therefore be more appropriate to define the group *before* the ruling on liability. Supporting this viewpoint, a 2011 report from the Financial Market Authority (*Autorité des Marchés Financiers*) has suggested that the group should be constituted before the decision fixing the defendant's liability.²²⁷ Second, this two-step approach is an interesting example of sequential trial and bifurcation technique applied to the field of mass litigation. As discussed later in this chapter, bifurcation enables tackling separately two or more dispositional issues, such as liability and then damages. In the field of mass litigation, bifurcation is viewed as a tool for segmenting aggregate litigation.²²⁸ One of its principal advantages is to encourage settlement between parties at different stages: the defendant held liable in the declaratory ruling on liability is strongly incentivized to make a settlement offer.²²⁹ Additionally, informational asymmetries between litigants tend to be reduced. As emphasized by DEFFAINS, LANGLAIS and DORIAT-DUBAN, the information disclosed during the liability stage enable claimants to strengthen their bargaining powers during the compensation stage.²³⁰ In his economic analysis of sequential v. unitary trial, LANDES adds that sequential trial lowers the expected costs of litigation since the costs of litigating damages will be saved if the defendant prevails on the decision about liability.²³¹ Other experimental evidence has nonetheless revealed that the use of bifurcation could lower the chances of plaintiffs to prevail when compared to unitary trials.

²²⁵ *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2nd Circ., 1947).

²²⁶ According to the so-called *Hand Formula*, there is breach of duty of care when $B < PL$.

²²⁷ AMF report, *supra* note 199, at p.32; see also: Y.BALENSI, 'Modalités de mise en œuvre de l'action de groupe : des corrections à apporter au projet du gouvernement', *Gazette du Palais*, 16 May 2013, n°136, p.50.

²²⁸ E.F. SHERMAN, 'Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process', (25) *Review of Litigation*, 2006, pp. 691-718.

²²⁹ See on this point: M.BACACHE, *supra* note 205 (highlighting: 'l'action de groupe nous place ici a mi-chemin entre la responsabilite individuelle et l'indemnité transactionnelle').

²³⁰ B. DEFFAINS, M. DORIAT-DUBAN, E. LANGLAIS, *supra* note 146.

²³¹ W.M. LANDES, Sequential Versus Unitary Trials: An Economic Analysis, (22) *Journal of Legal Studies*, 1993, n°1, pp.99-134.

b) The Dutch Collective Settlement of Mass Claim (WCAM): an Unique Proceeding in Europe

➤ *Context*

In the Netherlands, two distinctive - but related - procedures for the resolution of mass disputes exist.²³² Article 3:305a of the Civil Code states that a foundation or association with full legal capacity that, according to its articles of association, has the objective to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons. Such claim can however not be filed to obtain compensatory damages. Therefore, whenever claimants want to have their losses compensated, they have to find other ways, which (notably due to the abovementioned problems of rational apathy) might turn out to be problematic. Even if the collective claim would result in a declaration that the tortfeasor(s) acted wrongfully, it would still take a separate procedure to claim damages. This being said, a draft reform to remove this prohibition is currently in its consultation phase.²³³ The second procedure is known as the Collective Settlement of Mass Damage (*Wet Collectieve Afhandeling Massaschade*, hereafter abbreviated to WCAM). This latter will stand as main object of investigation in subsequent developments.

The WCAM was implemented in 2005 as a practical and emergency solution to the diethylstilbestrol (DES) affair. After a 1992 landmark decision in which the Dutch Supreme Court (*Hoge Raad*) held pharmaceutical manufacturers jointly and severally liable,²³⁴ the Dutch civil system revealed its paucity by rejecting any pooling of claims. Plaintiffs had therefore to individually step forward to obtain compensation while companies had to deal with cases on a one-to-one basis.²³⁵ Given the thousands of victims involved in the dispute, transaction costs were high and encouraged the Ministry of Justice and the industry to urge for the implementation of a new procedural tool.²³⁶ The WCAM was thus imagined as a mechanism combining justice and efficiency: it enabled claimants and defendants to settle all claims in one single venue, decreased litigation and administrative costs and facilitated a global ‘bill of peace’ between parties.²³⁷

²³² L.T. VISSCHER and A.P. BIARD, *supra* note 134.

²³³ See <https://www.internetconsultatie.nl/motiedijksma/document/1177> (visited 11 July 2014).

²³⁴ Hoge Raad, 9 October 1992, NJ 1994,535 (DES Daughters).

²³⁵ W.H. VAN BOOM, *supra* note 120.

²³⁶ I.N.TZANKOVA, *supra* note 60, at p.5.

²³⁷ Referring to a concept used by R.NAGAREDA, *supra* note 57.

In 2006, the DES case was the first judicially approved mass settlement.²³⁸ Several observers at that time nonetheless considered that the proceeding was a ‘one day fly’ with no further implication for the future.²³⁹ Contrary to initial expectations, the WCAM has progressively been extended to various fields of substantive law, such as financial products in the 2007 *Dexia* case²⁴⁰, securities in the 2009 *Shell*²⁴¹, *Vedior* and 2012 *Converium*²⁴² cases, or to deal with the bankruptcy of an insurer in the 2009 *Vie d’Or* case.²⁴³ In July 2013, the proceeding was also extended to handle insolvency issues in the *DSB* case (currently under judicial review). A detailed list of WCAMs is hereafter provided:

²³⁸ *Stichting DES Centrum v X*, 2006, LJN 6440.

²³⁹ I.TZANKOVA and D.HENSLER, ‘Collective Settlements in the Netherlands: Some Empirical Observations’, in: C.HODGES and A.STADLER (Eds.), *Resolving Mass Disputes – ADR and Settlements of Mass Claims*, Edward Elgar Publishing, 2013, pp.91-105.

²⁴⁰ *Dexia Bank Nederland v Stichting Platform Aandelenlease*, 2007, LJN AZ7033 (hereafter *Dexia* case).

²⁴¹ *Shell Petroleum v Dexia Nederland*, 2009, LJN BI5744 (hereafter *Shell* case), see the sworn translation from Dutch to English by A.J.B Burrough, 15 June 2009.

²⁴² *Stichting Converium Securities Compensation v Liechtensteinsche Landesbank*, 2012, LJN BV1026 (hereafter *Converium* case), see the sworn translation from Dutch to English by A.J.B Burrough, 12 November 2012.

²⁴³ *Stichting Vie d’or*, 2009, LJN BI2717.

*List of WCAMs (2006 – March 2014)*²⁴⁴

<i>Case</i>	<i>Date</i>	<i>Areas</i>	<i>Number of claimants</i>	<i>Amounts</i>	<i>Particularities</i>
DES	2006	Personal injuries caused by the DES molecule	approximately 34,000	35 million euros	1 st WCAM
DEXIA	2007	Financial losses associated with Investment products	approximately 300,000	1 billion euros	Around 25 000 opt outs (97% participation rate)
VIE D'OR	2009	Financial losses associated with the bankruptcy of an insurance company	approximately 11,000	45 million euros	
SHELL	2009	Financial losses associated with misleading market information	More than 500,000	352 million euros	Extensive cross-borders implications (numerous parties located outside the Netherlands)
VEDIOR	2009	Financial losses associated with the late disclosure of takeover discussions	2000	4.25 million euros	
CONVERIUM	2012	Financial losses associated with misleading market statements	Approximately 12,000	Around 58 millions USD (in total)	Extensive cross-border implication (numerous parties located outside the Netherlands)
DSB	2013-2014	Insolvency		Currently under judicial review	

Importantly, the WCAM has progressively shown long-lasting cross-borders implications, even though such evolutions were not initially foreseen by policymakers.²⁴⁵ In the *Shell* and *Converium* cases, settlement agreements were declared binding upon parties who were in their majority located outside the Netherlands (mostly in the United Kingdom and in Switzerland). National and European media have reported the rampant extra-territoriality of the proceeding: the Dutch newspaper *Het Financieele Dagblad*

²⁴⁴Information was collected directly from the *Shell* and *Converium* agreements, in the newsletter issued by the lawfirm Nauta Dutilh ‘global settlement approved by Dutch court’ (available on: www.newsletter-nautadutilh.com/NL/xzine/class_actions/global_settlement_approved_by_dutch_court.html?cid=4&xzine_id=4286 (accessed March 2014), and in G. VAN DIJCK, *supra* note 182.

²⁴⁵ H.VAN LITH, *The Dutch Collective Settlement Act and Private International Law/Aspecten van Internationaal Privaatrecht in de WCAM*, 2010.

for instance wrote in 2011 that the ‘Netherlands [was becoming] a paradise for mass claims’.²⁴⁶ As an echo coming from France, an article from the French newspaper *Le Monde* highlighted in the spring of 2013 that ‘the Dutch law on class action threatens French companies’ (*‘le droit néerlandais sur les class action menace les entreprises françaises’*).²⁴⁷ WCAM’s cross-border implications are among the most debated issues currently discussed by Dutch and European experts working in this field.

➤ *Functioning*

The proceeding is enshrined in articles 7:907-910 of the Dutch Civil Code (*Burgerlijk Wetboek*) and articles 1013-1018 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). It has been described as an ‘intricate mechanism that operates on the crossroads of tort law, substantive contract law and civil procedure’.²⁴⁸ Formally, there is no *litigation* since the proceeding is based on a contractual agreement. There are consequently neither *plaintiffs* nor *defendants*, but merely *parties*.²⁴⁹

In simple words, the proceeding can be described as follows. First, representative associations or foundations (in Dutch, *stichting* or *vereniging*) and the alleged wrongdoer(s) must reach an out-of-court settlement on a voluntarily basis. There is no possibility to force a company unwilling to settle. Rationally, an alleged-wrongdoer may nonetheless be willing to do so after assessing the strengths of the claims, his chance of prevailing or being defeated and his expected costs, weighed both in terms money and reputation.²⁵⁰ Other factors such as political pressure may also weigh in his final decision.²⁵¹ In practice, this assessment may turn out to be uneasy. Informational asymmetries and/or differing perceptions between parties about the final outcome may block or slow down the bargaining process.²⁵² By no means,

²⁴⁶ *Financieele Dagblad*, ‘Nederland wordt straks paradijs voor massaclaims’, 29 December 2011 (also cited in I.TZANKOVA and D.HENSLER, *supra* note 239).

²⁴⁷ *Le Monde*, ‘Le droit néerlandais sur les class actions menace les entreprises françaises’, 19 April 2013.

²⁴⁸ W.VAN BOOM, *supra* note 120.

²⁴⁹ X.E.KRAMER, ‘Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)’, in: C.HODGES and A.STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013, pp. 63-90.

²⁵⁰ T.MICELI, *The Economic Approach to Law*, Stanford University Press, 2004, 379 p., (specifically Chapter 8: *The Economics of Dispute Resolution*). See also R.COOTER and T.ULEN, *supra* note 19. In the Netherlands, A relatively small-size country where stakeholders are likely to frequently interact, reputation concerns are likely to be particularly salient.

²⁵¹ W.VAN BOOM, *supra* note 120.

²⁵² T.MICELI, *supra* note 250; B.DEFFAINS, M.DORIAT-DUBAN, E.LANGLAIS, *supra* note 146. W.VAN BOOM, *supra* note 120 (highlighting: ‘actual practice shows that it is quite difficult for all parties concerned to assess beforehand the pros and cons of settling’. The author notably refers to the DEXIA case where the bank, at the initial stage, ‘[denied] any request for leniency and [insisted] on the payment of [its clients’] debts’. DEXIA finally

defendants acknowledge their liability when settling. As for instance stated in the DSB WCAM, the settlement agreement is indeed closed ‘sans prejudice and without acknowledging liability’.²⁵³

Once the agreement is concluded, parties must petition the Amsterdam Court of Appeal which has exclusive jurisdiction for a ‘judicial trust mark’ sealing their agreement.²⁵⁴ The fairness and reasonability of the proposed settlement agreement are then scrutinized by the Amsterdam Court. Practice has revealed that this judicial review has been ‘less marginal’ than what was expected when the proceeding was implemented in 2005.²⁵⁵ If approved, the settlement agreement becomes binding upon all potential claimants on an opt-out basis. Claimants have at least three months to express their wish to be excluded from the agreement. After the expiry of this period, funds are distributed among claimants. If there is a remaining sum after the end of the distribution process, the paying party may petition the Court to recover the remaining sum.²⁵⁶ As a general rule, VAN BOOM observes that ‘the position of the Amsterdam Court is unmistakably crucial for the credibility of the WCAM as an instrument for the efficient and fair settlement of mass claims’.²⁵⁷ Interestingly, the WCAM is the European proceeding that is to this day the closest to the US class action. Both proceedings indeed usually terminate with opt-out mass settlements placed under judicial scrutiny.²⁵⁸

c) The English Group Litigation Order (GLO): A Management Tool by Essence

➤ Context

Starting in the 1980’s, English judges faced a multiplication of cases on related or similar issues involving numerous plaintiffs against the same defendants. To avoid being overburdened, judges created management techniques to efficiently deal with such claims.²⁵⁹ Further developed by Lord WOOLF in his

changed its strategy after a growing external pressure and the multiplication of lower courts’ rulings favouring consumers.

²⁵³ At p. 3 of the ‘Akkoord op hoofdlijnen’.

²⁵⁴ W. VAN BOOM, *supra* note 120. See also: F.WEBER and W.VAN BOOM, ‘Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)’, (1) *Contratto e Impresa – Europa*, 2011.

²⁵⁵ I.TZANKOVA, *supra* note 70.

²⁵⁶ Dutch Civil Code, article 7:910; see also: M.V.HOOIJDONK and P.EIJSVOOGEL, *Litigation in the Netherlands – Civil Procedure, Arbitration and Administrative Litigation*, Wolters Kluwer Law & Business, 2012, pp.104-110.

²⁵⁷ W. VAN BOOM, *supra* note 120; A.P.BIARD and L.T.VISSCHER, ‘Judges and Mass Litigation: Revisiting the Judicial Cathedral through Rational Choice Theory and Behavioural Economics’, *Aansprakelijkheid, Verzekering & Schade*, 2014/7, pp.39-48.

²⁵⁸ E. FEES and A. HALFMEIER, *supra* note 64.

²⁵⁹ C.HODGES, *supra* note 56, at p.53.

two seminal reports on *Access to Justice*,²⁶⁰ this practice was named Group Litigation Order (abbreviated to GLO) and enshrined in 2000 in the English rules of civil procedure ('CPR') at part 19, section III and further completed with Practice Directions.

GLOs have been used to handle employment cases, environmental disputes, children home abuses, health issues or defective products.²⁶¹ As an illustration, a GLO was conducted in the landmark *Corby* case depicted as an 'Erin Brockovich-style multi party action'.²⁶² The factual background of this affair was a decontamination and rehabilitation campaign of former steelworks sites in the city of Corby. 18 claimants whose mothers had been exposed to harmful dust grew up with birth defects.²⁶³ They filed against the District Council for breach of duty of care, public nuisance and breach of statutory duty. In 2009, the court in charge of this GLO held the council liable and a settlement was agreed between parties in 2010.²⁶⁴

➤ *Functioning*

GLO is not a representative action,²⁶⁵ but rather the paramount example of a consolidation tool enabling judges to manage together similar or related claims.²⁶⁶ As ANDREWS expresses it, the GLO is 'a compact form of macro-justice because it allows common issues to be decided efficiently, with finality, with an equitable allocation of responsibility for costs and with due speed'.²⁶⁷

²⁶⁰ WOOLF, *Interim Report on Access to Civil Justice*, 1995, Chapter 4 'Major Reforms', available on www.webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/interim/woolf.htm, (accessed 18.12.12); and *Final Report on Access to Civil Justice*, 1996, chapter 17 'Multi-Party Actions', available on www.webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/final/contents.htm, accessed 18.12.12 (in 1994, Lord Chancellor MACKAY appointed the Master of the Rolls Lord WOOLF to review the English civil procedure which at time was regarded as plagued by delays and expenses. The reform notably called for an enhanced judicial case management).

²⁶¹ A list of GLOs is available on www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders (accessed 18 December 2013).

²⁶² *Mondaq Business Briefing*, 'Environmental Toxic Tort Actions Lurk in the UK', 10 December 2009.

²⁶³ J. BLENNERBASSET, 'Environmental Enforcement in Ireland – The Need to Get a Piece of the Multi-Party Action', in: S. KINGSTON (Ed.), *European Perspectives on Environmental Law and Governance*, Routledge, London, 2013, pp.215-235.

²⁶⁴ *Corby Group Litigation v. Corby District Council*, [2009] EWCH 1944 (TC), 29 July 2009.

²⁶⁵ Civil Justice Council, 'Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions', *Recommendations to the Lord Chancellor – Final Report*, November 2008, p.18.

²⁶⁶ See C.HODGES, *supra* note 56.

²⁶⁷ N. ANDREWS, 'Multi-Party Proceeding in England: Representative and Group Actions', (11) *Duke Journal of Comparative and International Law*, 2001, pp. 249-267.

In simple words, the process can be described as follows. GLOs can be initiated ‘at any time’ by an application submitted by plaintiffs, defendants,²⁶⁸ or by the court of its own initiative.²⁶⁹ Higher judges must prior give their consents.²⁷⁰ The GLO application must contain a summary of the nature of the litigation, the number and nature of claims already issued, the number of parties likely to be involved, the common questions of fact or law (referred to as ‘GLO issues’) and possible distinction of smaller groups within the broader claimant group.²⁷¹ Claimants may join the proceeding via an opt-in mechanism. A single judge (a so-called ‘managing judge’) is appointed to monitor the case. He may be assisted with a master or a district judge to deal with specific issues or procedural matters.²⁷² The briefness and flexibility that characterize GLO rules give the judiciary a considerable leeway and discretionary powers to conduct and manage the dispute.

d) The English Draft on Court Rules for Collective Proceeding: A Path for Future Reforms?

➤ *Context*

As a complement to GLOs, particular attention is here given to the 2009 proposal known as the Draft Court Rules for Collective Proceedings (hereafter, ‘English Draft Court Rules’).²⁷³ It arose from a desire to implement a generic collective action in England as a way to enhance plaintiffs’ access to justice. This proposal was a direct consequence of criticisms made *vis-à-vis* the GLO regime. In a 2007 report addressed to the Civil Justice Council of England and Wales (*CJC*), MULHERON urged for the implementation of a generic, opt-out style, collective proceeding by pointing out a lack of claimants participation in opt-in systems. The report further stressed some procedural flaws affecting the efficiency of the GLO regime and impacting on courts’ resources and time.²⁷⁴ Furthermore, on a broader scale, the

²⁶⁸ Practice Direction 19B – Group Litigation 3.1

²⁶⁹ Practice Direction 19B – Group Litigation 4

²⁷⁰ Practice Direction 19B – Group Litigation 3.3 (stating: ‘a GLO may not be made (1) in the Queen’s Bench Division, without the consent of the President of the Queen’s Bench Division, (2) in the Chancery Division, without the consent of the Chancellor of the High Court, or (3) in a county court, without the consent of the Head of Civil Justice’).

²⁷¹ Practice Direction 19B- Group Litigation 3.2

²⁷² Practice Direction 19B- Group Litigation 8

²⁷³ Civil Justice Council of England and Wales, Draft Court Rules for Collective Proceedings (2009) available on www.ec.europa.eu/competition/consultations/2011_collective_redress/herbert_smith_llp_cjc_en.pdf (accessed January 2014).

²⁷⁴ R. MULHERON, ‘Reform of Collective Redress in England and Wales: A Perspective of Need’, *Research paper for submission to the Civil Justice Council of England and Wales*, 2007, available on www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FOther+papers%2Freform-of-collective-

collapse of two complex cases after lengthy and tremendously costly proceedings monitored by the Commercial Court also shed light on a need for greater judicial case management at earlier stages of the procedure.²⁷⁵

➤ *Functioning*

The proceeding blurs the distinction previously made between collective action and representative proceeding. It can ultimately be brought by a wide range of parties, including individuals with a direct interest, collective interest bodies or other specified bodies. The draft establishes a claim certification process supervised by the court. Drafters have explicitly pointed out that ‘the court is the most appropriate body to ensure that any new collective procedure is fairly balanced as between claimants and defendants (...)’.²⁷⁶ Importantly, the draft also leaves to judicial discretion the decision to follow an *opt-in* or an *opt-out* approach considering the needs of the case at stake.

The proposal was included into the 2010 Financial Services Act. However, as MULHERON observes, the bill ‘was a casualty of the legislative “wash-up” which followed the calling of the general election on 6 April 2010 and the final version of the Bill omitted any reference to the proposed collective actions regime’.²⁷⁷ To this day, the proposal remains thus unimplemented. It may however revive at later stages, notably regarding infringements of competition rules.²⁷⁸

redress.pdf (accessed 26 June 2013); R. MULHERON, ‘The Case for an Opt-Out Class Action for European Member States: a Legal and Empirical Analysis’, (15) *Columbia Journal of European Law*, 2009, pp.409-453 (pointing out: ‘the reality is that opt-in regimes inevitably entail ‘individualized’ litigation en masse. Under the GLO, each class member must issue initiating proceedings (...). The individual claims are then manage under the one GLO ‘umbrella’. Courts have remarked that a huge amount of unitary litigation may be on foot, filed across many courts, before a GLO is even sought’, at p.428).

²⁷⁵ Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007 available on www.judiciary.gov.uk/publications-and-reports/reports/civil/commercial-court/long-trials-working-party-report (accessed 6 December 2012).

²⁷⁶ Civil Justice Council, *supra* note 265.

²⁷⁷ R. MULHERON, ‘The Impetus for Class Actions Reform in England Arising From the Competition Law Sector’, in: S.WRBKA, S.VAN UYTSEL and M.SIEMS (Ed.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests*, Cambridge University Press, 2012, pp.385-412.

²⁷⁸ *Idem* (noticing: ‘to date, no GLO arising from alleged or proven competition law infringements has been ordered for a competition law case’ and further claiming that ‘the GLO is of practically no utility for competition law infringement allegation’, at p.396-397); see also: J.GRAHAM, ‘Collective Redress in the European Union: Reflections from a National Judge’, (41) *Legal Issues of Economic Integration*, 2014, pp.289-304.

e) The American Federal Class Action: The Influential Proceeding

➤ *Context*

Enshrined in 1938 in Rule 23 of the US Federal Rules of Civil Procedure (*FRCP*), the class action remained mostly unnoticed and rarely applied until the 1966 amendments which, according to the doctrine, was a turning point inaugurating the ‘modern US class action’.²⁷⁹ The procedure was progressively employed to deal with the flood of civil rights cases which followed the enactments of the 1964 Civil Rights Act and the 1965 Voting Rights Act,²⁸⁰ to handle mass securities litigation,²⁸¹ to tackle mass toxic tort like asbestos, or to deal with infringements of consumer law. As MILLER observed in 1979, ‘the current density of these cases is a function of forces set in motion by Congress, the Supreme Court, the courts of appeal, societal changes, and the evolving structure of the legal profession’.²⁸²

Rules regulating class action procedures have progressively emerged from practice. Initially, as the reporter of the 1966 Advisory Committee pointed out, ‘neither the earlier federal equity rules nor state code provisions had paid any attention to the details of the procedural management of class actions’.²⁸³ Successive reforms each time partially contributed to fill in this blank. As MARCUS has noticed, even though it requested judges to supervise class action settlements, the 1966 committee ‘said nothing more about how the judge was to make his decision’.²⁸⁴ Noticing that class actions had led to abuses, the proceeding was amended in 2003 and in 2005 with the Class Action Fairness Act (*CAFA*).²⁸⁵ These

²⁷⁹ US Federal Rules of Civil Procedures 23 Advisory Committee's note (1966); R.MARCUS, *supra note 170* (at p.149).

²⁸⁰ A.H. MILLER, *supra note 97*; N.M. PACE, ‘Class Actions in the United States of America: An Overview of the Process and the Empirical Literature’, *Country report*, available on http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf (observing that in the 1970s, class lawsuits enhancing social changes and the rise civil rights litigation were ‘the quintessential type of class action in the 1966 amendments’, at p.39).

²⁸¹ A.H.MILLER, *idem* (observing ‘a major determinant of the volume of securities litigation is the condition of the economies; many of the recent lawsuits are attributable to the debacles in the securities market during the past decade, which seemingly have created an army of investors seeking redress.Bad time, after all, breed litigation’, at p. 674).

²⁸² *Idem*, at p.676.

²⁸³ B. KAPLAN, ‘Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, (81) *Harvard Law Review*, 1967, n°2, pp.356-416, at p.379.

²⁸⁴ R. MARCUS, *supra note 170*.

²⁸⁵ Class Action Fairness Act, Public Law 109-2, 119 Stat.4 (2005).

reforms encouraged higher judicial vigilance *vis-à-vis* settlements and greater scrutiny, notably over class action lawyers' fees.²⁸⁶

➤ *Functioning*

In practice, there is not a single and unique model of US class actions.²⁸⁷ For matters of clarity, a broader level of analysis will here be retained. The proceeding can schematically be described as follows. A limited number of plaintiffs who are individually named seek remedies on behalf of themselves and of all absent and unknown individuals who have suffered similar harm. Plaintiffs' attorneys file a motion for certification requesting the court to certify the class, that is, to examine the admissibility of the class claim. As at length developed in the coming section, Rule 23 FRCP states that at least 4 requirements must be fulfilled for the class action to be certified. These criteria are known as numerosity,²⁸⁸ commonality,²⁸⁹ typicality²⁹⁰ and adequacy of representation.²⁹¹ Other requirements may apply depending on to the type of the class action.²⁹² Once certified, the case proceeds in a manner that is comparable to individual litigation. A crucial difference consists nevertheless in the number of plaintiffs and the considerable financial stakes which often strongly incentivize defendants to settle.²⁹³ The settlement agreement negotiated between litigants is supervised by the court which assesses its fairness, ensures its

²⁸⁶ Several affairs have revealed that class members had received coupons as substitute to monetary relief, whereas lawyers had perceived high fees. Another important purpose sought by the CAFA was to limit forum shopping. Observing that some state courts and class-action friendly judges had become 'magnets', the CAFA aimed at facilitating a shift of class action lawsuits from state to federal courts (see W.C. ROEDDER, 'An Introduction to the Class Action Fairness Act of 2005', (56) *FDCC Quarterly*, 2006, pp.443-464; L. NELSON, 'Is Alabama a Jurisdiction out of Control? – That Depends', (27) *Cumberland Law Review*, 1996, p.987-991). Even though counsels may still today be willing to have their cases heard by state courts (The American Tort Reform Association for instance identifies 'judicial hellholes' where, it is argued, the law is applied in a biased way. In December 2013, ATRA identified 'some troubling attempts by plaintiffs' lawyers to circumvent the federal Class Action Fairness Act, by keeping massive, multi-state lawsuits in biased states court, rather than having them heard in neutral federal courts' (see the report on judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf, at p.55, accessed 18 december 2013); see also Washington Times, 'Magnet Courts Attracts Class Action Corruption; Trial Lawyers Engineer Jackpot Justice, 26 November 2012) empirical data has shown that the CAFA has increased the number of Federal class actions (E.G. LEE and T. WILLGING, 'Impact of CAFA on Federal Courts - Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules', *Federal Judicial Center*, April 2008).

²⁸⁷ C. HODGES, *supra note 140* (pointing out that some class actions procedures can be non-opt out or that judges have sometimes approved opt-in procedures, at p.331).

²⁸⁸ FRCP rule 23(a)(1)

²⁸⁹ FRCP rule 23(a)(2)

²⁹⁰ FRCP rule 23(a)(3)

²⁹¹ FRCP rule 23(a)(4)

²⁹² FRCP rule 23(b)

²⁹³ N.M. PACE, *supra note 280* (observing that 'as in the situation for [American] civil litigation generally, trials on a class basis are an extremely rare event').

publicity to give plaintiffs a chance to opt out, and determine the amounts awarded as lawyers' fees. Finally, the judge plays essential roles when monitoring class actions. HENSLER has clearly encapsulated their functions in a passage that is worth stating here in its entirety:

‘Without the judge’s decision to grant certification, a class lawsuit does not exist. Without the judge’s approval, a lawsuit cannot be settled. Without a judge’s decision to award fees, the class action attorneys cannot be paid. Moreover, judges have special responsibilities while the litigation is ongoing: they approve the form and content of notice to class members that a class action has been certified or settled; they determine when and where fairness hearings will be held, how long they will be, and who can participate; they decide whether non-class members can intervene in the litigation, and whether lawyers representing objectors will receive any compensation. Even after a case is resolved, judges may continue to play a role by overseeing the disbursement of settlements funds’. Importantly, she adds, ‘how judges exercise their responsibilities determines the outcomes of the class actions that come before them, but even more important (...) the shape of class actions to come’.²⁹⁴

From the analysis of these five proceedings, it is possible to highlight clear convergences regarding judicial monitoring and supervision.

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3.3. JUDGES AS MASS CLAIMS’ WATCHDOGS

The role of watchdogs is a function already falling upon judges in individual litigation. As MARCUS has pertinently observed, ‘judges have always been gatekeepers but their gatekeeping tasks have changed a good deal over time’.²⁹⁵ In the framework of mass litigation, judges are expected to behave as watchdogs when verifying the admissibility of mass claims (3.3.1) and when determining the shape and suitability of the claimant group (3.3.2).

²⁹⁴ D.R.HENSLER (Ed.), *Class Action Dilemmas – Pursuing Public Goals for Private Gains*, Rand Institute for Civil Justice, 2000, at p.445.

²⁹⁵ R. MARCUS, ‘Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits of Class Certification’, (79) *George Washington Law Review*, 2011, pp.324-373 (at p.324).

3.3.1. Watchdogs regarding the Admissibility of Mass Claims

As the European Commission pointed out in its 2013 recommendations, ‘in order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met’.²⁹⁶ Several certification criteria indeed regulate the admissibility of mass proceeding and, as a general rule, judge must verify the existence of common issues between claimants (*a*), sometimes review the merits of the claim (*b*), ensure that the proceeding is appropriate given the particularities of the case at stake (*c*), ascertain that parties are numerous enough (*d*), verify the representativeness of lead plaintiffs or associations (*e*). For matters of clarity, these criteria are successively addressed concerning the French group action, the Dutch WCAM, the English GLO, the English Draft Court Rules, and finally the US Federal class action.

a) Judicial Control over Common Issues

➤ *Rationale*

Judges should verify that claims are all legally or factually related. This step is aimed at highlighting the factual and/or legal elements which constitutes the denominator common to all plaintiffs. In other words, the principal objective pursued is here to determine the *spine* of the claimant group. From an economic point of view, the identification of common issues can be assimilated to a specialization of the case around a limited number of key questions. The economic literature has for decades stressed that specialization could facilitate economies of scale and, as CASSONE and RAMELLO have indeed suggested, such economies of scale are only possible in ‘the presence of significant indivisibilities in production (...)’.²⁹⁷ In the selected proceedings, the judiciary benefits in this respect from a certain degree of flexibility.

²⁹⁶ (20) Recommendations (EC), *supra* note 5

²⁹⁷ A. CASSONE and G. RAMELLO, *supra* note 22 (referring to B.K. EDWARDS and R.M.STARR, ‘A Note on Indivisibilities, Specialization and Economies of Scale’, (77) *American Economic Review*, n°1, March 1987).

➤ *In the Selected Mass Proceedings*

○ *The French Group Action*

When reviewing the admissibility of the group action, the court must verify that plaintiffs are in ‘similar or identical situations’. The difference made in the text between ‘similar’ and ‘identical’ situations tends to create uncertainty and possible room for judicial interpretation and appreciation. Importantly, the alleged harm must have been caused by a breach of duty regarding sales of goods or provision of services, or by an infringement to competition rules.²⁹⁸ The 2010 report actually had proposed to go a step further and required judges to verify whether the group action is not used to compensate heterogeneous individual damage.²⁹⁹

○ *The Dutch WCAM*

Article 7:907 of the Civil Code provides that the settlement agreement presented by parties must be concluded for the purpose of ‘compensating damages caused by an event or by similar events’. As an illustration, in the *Shell* case, the Amsterdam Court of Appeal controlled the commonality of claims by considering that ‘the possible incorrectness of the information disclosed by Shell concerning the categorization of oil and gas reserves (...) can be regarded as events which cause damage to third parties’.³⁰⁰

○ *The English GLO*

Rules governing GLOs require judges to identify common issues of fact and law. This step is more commonly known as the determination of *GLO issues*. The 2006 *GLO Ashton Morton Slack Solicitors* is an interesting example of judicial supervision in this field.³⁰¹ In this affair, miners and ex-miners had been required to make payments to trade-unions from compensation received for respiratory injuries. They filed against their trade-union and several firms of solicitors. In their GLO application, claimants specified that all claims were (i) brought by miners or ex-miners, (ii) who had entered into an agreement with a trade

²⁹⁸ New Article L.423-1 and new Article L.423-3 Consumer Code

²⁹⁹ 2010 Group action report, *supra note 199*, at p.70 (in French : ‘il appartient au juge de vérifier que l’action de groupe vise bien un préjudice matériel identique ou analogue entre plusieurs victimes et non des préjudices individuels non homogènes’).

³⁰⁰ *Shell case*, point 6.2

³⁰¹ EWCH 1134 (QB), *Ashton Morton Slack Solicitors*, 2006 (hereafter referred to as ‘*Ashton GLO*’), case also cited in E.FALLA, A.PUTTEMANS and H.BOULARBAH, report powers of the judge, *supra note 169*.

union or claims handler, (iii) who has been required to make a payment from the received compensation.³⁰² While assessing whether these points indeed could constitute a common ground between all plaintiffs, the managing judge finally rejected the application, arguing notably that ‘the only unifying feature [was] that all respondents are solicitors and all claimants are ex miners or miners, [which is] plainly insufficient to a GLO support’. By contrast, he further noticed that disparities tended here to prevail since ‘the agreements made between individual claimants and the unions were in different form, being, as they were, made between different parties occupying different positions with regard to each other’.³⁰³

- *The English Draft on Court Rules*

The draft established a commonality requirement and further precises that common issues meant ‘the same, similar or related issue of fact or law’.³⁰⁴

- *The American Class Action*

US FRCP Rule 23(a)(2) requires judge to verify the existence of ‘questions of law or fact common to the class’. This criterion is known as the *commonality* requirement. The 2011 class action *Wal-Mart stores Inc. v. Dukes* filed by one and half million of current and former women employees against Wal-Mart company for gender discrimination is here instructive about the possible controversies arising from the commonality criterion. Unlike the 9th Circuit Court of Appeal which, on the basis of experts’ opinions and factual/statistical evidence, decided to confirm the class certification,³⁰⁵ the Supreme Court ultimately denied class certification by following a strict interpretation of the commonality criterion.³⁰⁶ Supreme Court judges indeed highlighted that ‘commonality requires the plaintiffs to demonstrate that the class members “have suffered the same injury”’ and further noticed that ‘the common contention (...) must be of such nature that it is capable of a class-wide resolution’. After having discarded statistical proofs and noticed the absence of established discriminatory policies, the court ruled that a ‘*glue*’ – the word *glue* is here particularly revealing - which must necessarily hold all plaintiffs’ claims together was insufficient in

³⁰² *Ashton* GLO point 20. ‘Group Litigation Issues’

³⁰³ *Ashton* GLO, point 71-3

³⁰⁴ Proposed CPR 19.16 (e).

³⁰⁵ *Dukes v. Wal-Mart Stores Inc.*, 222, F.R.D, 137, 145-66, 26 April 2010 (Appeals from the Northern District Court California, March 2004, at p.6210); available on www.walmartclass.com/staticdata/En%20Banc%20Opinion.pdf (accessed January 2014).

³⁰⁶ *Wal-Mart Stores Inc. v. Dukes*, 564 US (2011) (available on www.walmartclass.com/staticdata/WalMart%20Decision.pdf, accessed January 2014)

this case.³⁰⁷ The simple fact that Wal-Mart employment policy had given managers large discretion which could have facilitated discrimination was not sufficient to prove commonality.³⁰⁸ Interestingly, Supreme Court judges however disagreed within the panel itself. In her dissenting opinion, Justice GINSBURG for instance observed that ‘the dissimilarities approach [led] the Court to train its attention on what distinguishes individual class members, rather than on what unites them’.³⁰⁹

b) Judicial Review of the Merits of the Claim

➤ *Rationale*

From a legal perspective, a preliminary judicial assessment on the merits of the claim is aimed at screening out and discarding unmeritorious cases. Arguably, reputational costs for companies and risks of blackmail arising from weak claimants will thus be minimized. As HENSLER and ROWE have pointed out, such a filter is intended to reduce the ‘in terrorem effect’ that companies usually associate with mass proceedings.³¹⁰ This test can also be regarded as an early-warning signal addressed to the judiciary and to litigants: it lowers the uncertainty associated with the case’s final outcome, since the fundamental objective is to identify at earlier stages cases that are not worth proceeding.³¹¹ Interestingly, despite its justification, control on the merits remains a controversial issue. On the one hand, scholars have highlighted a risk of proliferation of ‘mini-trials’³¹² or ‘satellite litigation’³¹³ which could be burdensome, lengthy and costly for both judiciaries and litigants.³¹⁴ On the other hand, other voices have defended the

³⁰⁷ *Idem* (the Supreme court observing that ‘without some *glue* holding together the alleged reasons for those decisions, it will impossible to say that examination of all class member’s claims will produce a common answer to the crucial discrimination question’).

³⁰⁸ *Idem*, at p.17

³⁰⁹ J. GINSBURG, Dissenting opinion in *Wal-Mart Stores Inc. v. Dukes & al*, 20 June 2011, at p.11.

³¹⁰ D.R. HENSLER and T.D. ROWE, ‘Beyond it Just Ain’t Worth It: Alternative Strategies For Damages Class Action Reform’, (64) *Law & Contemporary Problems*, n°2-3, Complex Litigation at the Millennium (Spring-Summer 2001), pp.137-161.

³¹¹ The European Commission also pointed out in its 2013 recommendations on collective redress that ‘Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued. To this end, the court should carry out the necessary examination of their own motion’, (8) and (9), *supra* note 5.

³¹² English Draft Court Rules, *supra* note 273 (highlighting: ‘after lengthy deliberation, a majority of the working group concluded that a threshold merit test should not be included as a condition for certification, automatically applicable in every case (...). The working group did not want to impose this expense in every case, even where a merits argument at this early stage may not be relevant’, at p.6-7).

³¹³ C.HODGES, *supra* note 56.

³¹⁴ The WOOLF reports (*supra* note 260) note that ‘there is no need for the court to take a view of the merits at the certification stage’. Going a step further, the report follows a suggestion issued by the Scottish Law Commission

preliminary test as being a strong safeguard against frivolous litigation.³¹⁵ Debates seem nowadays polarized between, on the one hand, a need for flexibility and, on the other hand, a request for security.

➤ *In the Selected Mass Proceedings*

○ *The French Group Action*

Lying at the outer extremes of the spectrum, the French group action is built on a strong preliminary ruling on the merits: judges must establish liability and define the scope of defendant(s)' liability at the very first stages of the proceeding.³¹⁶ This judicial control was strongly advocated by business representatives who were afraid of frivolous lawsuits and their associated reputation costs.³¹⁷

○ *The Dutch WCAM*

A preliminary ruling is not requested in the actual WCAM regime. Current discussions however tend to encourage a preliminary intervention of the Dutch Supreme Court (*Hoge Raad*) in order to clarify the merits of the case at earlier stages, and thus to facilitate negotiations.³¹⁸ Recent developments appear to pave the way in this direction. The 2012 Preliminary Question to the Supreme Court Act (*Wet Prejudiciële Vragen Aan de Hoge Raad*) already allows lower courts to ask the Supreme Court for a preliminary decision as long as the claim at stake is relevant for a significant number of similar cases.³¹⁹ As VAN BOOM has nonetheless expressed it, 'the road to a final verdict of the Supreme Court on points of law as

Paper on Multi-Party Action which stressed that, while doing so, 'the procedure would be elaborate and expensive, and the judge's task might be insuperably difficult, even with the assistance of counsel: he would have to try to digest the materials lodged and the submissions made (...)' (see Scottish Law Commission Research Paper n°98, p.184, available on www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/1990-1999/, accessed 27.11.2012).

³¹⁵ English Draft for Court Rules, *supra* note 273, pp.6-7.

³¹⁶ New Article L.423-3 Consumer Code.

³¹⁷ 2010 Group action Report, *supra* note 199, at p.69 (in French : 'les représentants des entreprises ont exprimé la crainte qu'en l'absence de contrôle préalable de la recevabilité de la demande, les actions puissent se multiplier sans que le juge puisse écarter celles qui seraient manifestement abusives ou infondées, alors que, pendant toute la durée de l'instance, une exploitation médiatique qui nuirait aux intérêts du professionnel injustement mis en cause pourrait se développer').

³¹⁸ F.WEBER and W.VAN BOOM, *supra* note 254.

³¹⁹ Wet van 9 februari 2012 tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet op de rechterlijke organisatie in verband met de invoering van de mogelijkheid tot het stellen van prejudiciële vragen aan de civiele kamer van de Hoge Raad - Wet prejudiciële vragen aan de Hoge Raad). On the use of the preliminary ruling in the framework of the WCAM, see: M.V. HOOIJDONK and P. EIJSVOOGEL, *supra* note 256 (considering that this mechanism 'will likely act as an instrument to get parties at the negotiating table').

a precursor for a settlement is [still] a long and slippery one'.³²⁰ Finally, the WCAM can also be combined with the collective action of article 3:305a Civil Code. The judgement pronounced on this occasion will serve as a starting point for future negotiations between parties.

- *The English GLO*

There is formally no preliminary review on the merits of the case. However, some scholars have considered the fact that GLOs needed to proceed an approval from higher judges could be viewed as 'a kind of' test on the merits.³²¹

- *The English Draft on Court rules*

When the draft was discussed, vivid debates took place on the opportunity to establish a control of merits.³²² The draft provides a preliminary test on merits and states that 'a claim that was weak, but not so weak that it could be struck out, could fail certification because, 'in all the circumstances', it should not be certified.³²³ In addition, the representative claimant is required to state in its application that 'it is believed that the claim has real prospects of success'.³²⁴

- *The American Class Action*

Theoretically, there is formally no test on the merits of the case. To illustrate this point, the 1974 decision *Eisen v. Carlisle and Jacquelin* from the Supreme Court is usually set forth. In this affair, judges pointed out that there is 'nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action'.³²⁵ Here again, this point has been a source a vivid debate among American legal scholars.³²⁶ In practice, it appears that issues about merits are sometimes addressed before or during the

³²⁰ W. VAN BOOM, *supra* note 120.

³²¹ Practice Direction 19B-Group Litigation, point 3.3 (stating: 'GLO may not be made in the Queen's Bench Division, without the consent of the Lord Chief Justice, in the Chancery Division, without the consent of the Vice-Chancellor, or in a county court, without the consent of the Head of Civil Justice.Report'). See also Report 'Powers of the Judge', *supra* note 169, at p.49.

³²² English Draft Court Rules, *supra* note 273, at pp.6-7.

³²³ Proposed CPR 19.20(2)(c)

³²⁴ Proposed CPR 19.18 (3)(c)

³²⁵ *Eisen v Carlisle and Jacquelin* 417 US 156, 177-78, 94 S Ct 2140 – 1974)

³²⁶ R. MULHERON, *The Class Action in Common Law Legal Systems – A Comparative Perspective*, Hart Publishing, Oxford, 2004 , pp.131-136.

certification stage simply because factual questions are intertwined with issues about merits. If not formally enshrined in the law, this preliminary control is in practice often performed to assess the criteria contained in Rule 23 FRCP.³²⁷ While reviewing the commonality criteria in *Wal-Mart v. Dukes*, the Supreme Court for instance pointed out that ‘proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a pattern or practice of discrimination’.³²⁸ Interestingly, in the 2007 antitrust class action *Bell Atlantic v. Twombly*,³²⁹ the Supreme Court heightened the pleading requirements for federal civil cases by rejecting a claim which was grounded on mere allegations and failed to provide sufficient evidence which could make it *plausible* that companies had indeed engaged in anticompetitive practices. This rule was restated in the 2009 case *Ashcroft v. Iqbal*.³³⁰ All lawsuits filed in federal courts must therefore now be screened for ‘plausibility’.

c) Judicial Control over the Superiority of the Group Procedure

➤ *Rationale*

Some collective proceedings require judges to perform a sort of cost/benefits analysis to ensure that suing as a group is indeed the most suitable solution – or is ‘superior’ - when compared to individual litigation or other solutions. HODGES and MONEY-KYRLE have in this respect observed that, in the European context, such a superiority principle tends to be a ‘pathway prioritization’ where judges and parties are urged to consider the use of ADR, third-party or regulatory intervention.³³¹ The main objective is ensuring that collective procedures remain exceptional, and that the costs associated with such proceedings remain justified given the needs of the case at stake.

➤ *In the Selected Mass Proceedings*

○ *The French Group Action*

Formally, there is no mention of a superiority criterion in the French group action. This absence should however in practice be nuanced. Even though not explicitly stated, the declaratory judgment on liability

³²⁷ R.MARCUS, *supra* note 170 (referring to a 1978 decision from The US Supreme Court – i.e *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) which highlighted that ‘the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiffs’ cause of action’, at p.341).

³²⁸ Wal-Mart decision, *supra* note 306, at p.11.

³²⁹ *Bell Atlantic v. Twombly*, 550 US, 544, 566 (2007).

³³⁰ *Ashcroft v. Iqbal*, 556 US, 662 (2009).

³³¹ R.MONEY-KYRLE and C.HODGES, ‘European Collective Action: Towards Coherence’, (4) *Maastricht Journal of European and Comparative Law*, 2012.

can implicitly encourage a judicial control over the superiority of the group procedure. On this occasion, judges might for instance channel the proceeding towards ADR if they deem it appropriate. On a broader scale, recent reports about the reform of the French Civil procedure have clearly encouraged the use and development of alternative dispute resolution.³³²

- *The Dutch WCAM*

The superiority criterion is here irrelevant since the settlement agreement is brought forward to the court by parties themselves.

- *The English GLO*

According to the *overriding principle* which irradiates English Civil procedures in its entirety,³³³ judges are already required to deal with cases in a fair, proportional and cost efficient way.³³⁴ This should notably lead them to consider the use of alternative disputes resolution whenever they deemed it appropriate.³³⁵ In this view, the *GLO Ashton Morton Slack Solicitors* is again illustrative. In this affair, the judge decided to dismiss the GLO application on the basis that ‘any serious thought [had not been] given to alternative means of adjudication of the underlying claims’.³³⁶

- *The English Draft on Court Rules*

Also strongly influenced by the overriding principle, the draft requires judges to verify that proceeding as a group ‘is the most appropriate means for the fair and efficient resolution of the common issues’.³³⁷ The draft also provides a cost/benefit principle stating that courts should take into account ‘the costs and benefits of the proposed collective proceeding when deciding whether it remains the most appropriate tool for a fair and efficient resolution of common issues’.³³⁸

³³² S.GUINCHARD (Ed.), *L’ambition raisonnée d’une justice apaisée*, report, July 2008, 344 p., and notably Title 3, Chapter 1 ‘Le développement des modes alternatifs de règlement des conflits’ (available on www.ladocumentationfrancaise.fr/rapports-publics/084000392/index.shtml, accessed 27 February 2012).

³³³ CPR 1.1.

³³⁴ CPR 1.2

³³⁵ CPR 1.4(e)

³³⁶ *Ashton GLO*, at point 71.

³³⁷ Proposed CPR 19.20 (2) (b)

³³⁸ Proposed CPR 19.20 (3) (a)

○ *The American Federal Class action*

In 1966, the Advisory Committee clarified the superiority criterion's rationale by pointing out that its objective was to determine 'whether the probable relief to individual class members justifies the costs and burdens of class litigation'.³³⁹ According to MULHERON, the control over the superiority principle is a key step which gives American judges extensive discretionary powers in order to weigh competing interests.³⁴⁰ According to Rule 23(b) FRCP, the fulfillment of the superiority principle is required only for certain type of class actions. Article 23(b)(3) provides a non-exhaustive list of indicators helping judges when applying this criteria.³⁴¹

d) Judicial Control on the Number of Claimants Involved

➤ *Rationale*

Control on the number of participants who are involved in the proceeding is justified by a willingness to ensure that mass claims will concern a body of people that is large enough to justify its monitoring costs. In addition, the number of plaintiffs will also justify 'the anomalous form of representation' performed by the representative body or leading plaintiff which contrasts with individual litigation.³⁴² Even though this remark does not apply to the proceeding retained in this analysis, it is interesting to notice that some European proceedings have established a threshold of plaintiffs that has to be met *at minima* to declare the proceeding admissible. The Austrian *Gruppenverfahren* for example can be initiated only when 'at least three persons raise large number of claims'.³⁴³

³³⁹ On this occasion, the Committee proposed several amendments to Rule 23(b) (3) requiring judges to verify 'whether the probable relief to individual class members justifies the costs and burden of class litigation'. See also on this point D.R.HENSLER and T.D.ROWE, *supra* note 310.

³⁴⁰ R. MULHERON, *supra* note 326, at p .220.

³⁴¹ Article 23(b) (3) FRCP mentions the following indicators: (1) the class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members,(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action.

³⁴² J. BRONSTEEN and O. FISS, The Class Action Rule, (78) *Notre-Dame Law Review*, pp.1419-1454 (at p.1423).

³⁴³ E.KODEK, *supra* note 171. Similarly the German capital market model case requires from claimants 'to substantiate that the decision on the application for the establishment of a model case may have significance for other similar cases beyond the individual dispute concerned' (section 1(2). Then, German judges must verify that 'at least nine other proceedings related applications' have been submitted (Section 4(1)2)).

➤ *In the Selected Mass Proceedings*

○ *The French Group Action*

The current framework of the group action does not explicitly mention any control on the number of plaintiffs. Previous drafts nonetheless required judges to verify that associations filing a group claim brought evidence that the damage was in practice ‘a mass damage’ affecting a wide range of plaintiffs.³⁴⁴

○ *The Dutch WCAM*

Article 7:907(3)(g) provides that the Court shall reject the settlement agreement if ‘the group of persons on whose behalf the agreement was concluded is not *large enough* to justify a declaration by the Court that the agreement is binding’.³⁴⁵ As an illustration, in the *Converium* case the court ultimately observed that the group ‘could be asserted to be well-over 3,000 individuals’, and hence considered its size as being sufficient.³⁴⁶

○ *The English GLO*

CPR 19.11(1) provides that GLO application can be submitted only when a *number of claims* are, or are likely to be made.

○ *The English Draft Court Rules*

Proposed CPR 19.20(2)(a) provides that judges must ensure that claims are brought ‘on behalf of an identifiable class of persons’.

○ *The American Class Action*

FRCP rule 23(a) (1) identifies a *numerosity* principle and provides that judges must verify that filing parties are indeed so numerous that joinder remains in practice impracticable. As recalled by

³⁴⁴ 2010 Group Action Report, *supra* note 199, at p.72.

³⁴⁵ Article 7:907 (3)(g) Dutch Civil Code.

³⁴⁶ *Converium* case, at point 9.

MULHERON, the analysis of the US class action suggests that several methodologies may be employed to assess the numerosity principle.³⁴⁷

e) Judicial Control On Lead Plaintiffs' or Associations' Representativeness

➤ *Rationale*

Judicial control on the representativeness of lead plaintiffs or associations is aimed at protecting the interests of represented claimants. As MULHERON observes, 'the representative plaintiff, or applicant, is "the face" of the action being brought on behalf of all class members'.³⁴⁸ Judicial control first ensures that the representative entity has the knowledge, financial and human resources to conduct the litigation on behalf of the claimant group. Second, it is aimed at reducing the risks of opportunistic behaviour of non- or partially representative entities. Third and relatedly, it reduces the risks of principal-agent problems potentially arising between the representative body and represented claimants whose interests might not fully be aligned. Unlike traditional litigation, the personal link between counsels and represented claimants does not exist. The scope of the judicial control on this issue tends to diverge in the proceedings here retained.

➤ *In the Selected Mass Proceedings*

○ *The French Group Action*

In the 2010 Group Action report, associations which wanted to file a group lawsuit had to be entitled with a 'strengthened accreditation'³⁴⁹ (*accréditation renforcée*) which completed the existing legal requirements that already regulated the legal standing of associations. This accreditation could eventually be given by judges during the procedure. However, the final text of the 2014 bill reforming Consumer Law does not make any reference to such strengthened accreditation. In January 2014, while asked by MPs whether the introduction of a group action procedure will be followed by modifications of the prerequisites for legal standing of associations which have not been modified since 1988,³⁵⁰ Government

³⁴⁷ R. MULHERON, *supra* note 326, at p.116.

³⁴⁸ *Idem*, at p.275.

³⁴⁹ 2010 Group Action Report, *supra* note 199, recommendation n°6.

³⁵⁰ Réponse ministérielle n° 32648 to L. Tardy, Journal Officiel de l'Assemblée Nationale (question), 21 January 2014, p. 703.

claimed that changes were currently not on the agenda.³⁵¹ One may therefore today still refer to the existing prerequisites listed in Articles L. 411-1 and R. 411-1 to R. 411-7 Consumer Code.³⁵²

○ *The Dutch WCAM*

The WCAM procedure relies on a strong representativeness test enshrined in Articles 7:907 (1) and 7:907 (3) Dutch Civil Code.³⁵³ This test is of particular importance since the settlement agreement – according to the *opt-out* system - will not only bind the representative associations and/or foundations, but also unknown and absent group claimants. Closely scrutinized by the Amsterdam court, judges must verify the statutory object of the association. This test has been given a considerable weight during the review of settlement agreements.³⁵⁴ To this day, despite a few exceptions, this test has however not been seen as a source of major concern for the Dutch judiciary.³⁵⁵ Noteworthy, a 2013 amendment to article 3:305a(2) of the Dutch Civil Code has reinforced the control over representative associations by stating that representative associations will not obtain standing if the interests of individuals are not sufficiently guaranteed and preserved. As recalled in the *Converium* agreement, indicators that can be used to assess the representativity of associations/foundations were notably further mentioned during parliamentary discussions about the WCAM.³⁵⁶

³⁵¹ Dépêche Lexis Nexis Juris-Classeur Actualités, 28 January 2014 ('associations de consommateurs agréées et actions de groupe').

³⁵² See Article R.411-1 French Consumer Code (stating that 'the approval of consumer associations (...) may be granted to any association: which can prove on the date of request that its has been in existence for one year; which, during this period of existence, provides evidence of effective and public activity with a view to the protection of consumer interests, evaluated, in particular, in line with the circulation of publications relating to the holding of regular and information meetings; which brings together, on the date of the application for approval, a number of individually paid-up members: at least 10,000 for national associations (...). Article R.411-2 Consumer Code further provides that Approval of national organisations is granted by joint order of the minister for consumer affairs and the Keeper of the Seals (*Garde des Sceaux*). It is published in the *Journal officiel de la République française*'.

³⁵³ According to Article 7:907 (3) (f) Dutch Civil Code, the court must reject the agreement seeking judicial approval whenever the association is 'not sufficiently representative' with regards to the interests of claimants. In the *Shell* agreement, the Amsterdam Court of Appeal ruled that 'the law does not require them to be [representative] separately with regard to all these persons, as long as each of them is sufficiently representative for a sufficiently large portion of said persons' (see point 6.22).

³⁵⁴ H.V. LITH, 'Cultural Dimensions of Group Litigation – Netherlands', *International Association of Procedural Law, Moscow conference*, 2012.

³⁵⁵ In the *Shell* decision, the Court considered that two of the four associations/foundations were not representative enough. Remarkably, the Court noted that 'even when interpreted in the widest sense of the word, [the object statement of these two entities could] not be understood to include the representation of the interests of persons to whom damage has been caused by the events (point 6.4).

³⁵⁶ Explanatory Memorandum, Parliamentary Papers II, 2003-2004, 29414, n°3, p.16; also recalled in the *Converium* settlement agreement at point 6.2 (observing: 'the representativeness of the interest group may be inferred, for

- *The English Group Litigation Order*

The rules regulating GLOs provide that the court may appoint ‘lead solicitors’ for claimants and defendants.³⁵⁷ In practice, this rule is however rarely applied and lawyers often by themselves reach an agreement on the identity of the lead counsel.³⁵⁸

- *The English Draft on Court Rules*

The draft leaves to judicial discretion the assessment of the ‘most appropriate person’ likely to adequately represent the group. English judges are asked to verify whether the representative ‘fairly and adequately represents the interest of the class’, has ‘no conflict of interest’ and can provide a ‘security for costs’.³⁵⁹ Going a step further, the Draft also explicitly requires from judges to ensure that the full representativeness of the group’s representative remains ensured during the entire litigation process.³⁶⁰

- *The American Federal Class Action*

The FRCP rule 23(g) provides that when certifying a class, judges must appoint class counsel. In doing so, they may notably consider any matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.³⁶¹ As highlighted by the American Supreme Court, the class action must remain ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only’.³⁶²

example, from other activities which the group has performed in order to serve the interests of aggrieved parties, from the number of aggrieved parties who have joined or are member of the group or from the extent to which the aggrieved parties themselves accept the group as representative. The representativeness may also be inferred from the fact that the group has acted as a negotiating partner in relation to the damage causing event(s), not only in relation to the party or parties causing the damage but also, for example, in relation to the government authorities. Acting as spokesperson in the media may also be an important indication’).

³⁵⁷ CPR 19 II, Rule 19.13 (b) See also *Practice Direction 19B 2.2* (‘the lead solicitor’s role and relationship with the other members of the Solicitors’ Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.13(c)’).

³⁵⁸ C.HODGES, *supra* note 89.

³⁵⁹ Proposed CPR 19.21(1), (2) and (3) ‘Approval of the Applicant to Act as Class Representative’.

³⁶⁰ Proposed CPR 19.28 (stating: ‘it at any time after a collective proceeding is made it appears to the court that the class representative is fairly and adequately representing the interest of the represented parties (...)’).

³⁶¹ See also FRCP 23 (a) (4) (stating: ‘the representative parties will fairly and adequately protect the interests of the class’).

³⁶² US Supreme Court, *Wal-Mart Inc v. Dukes*, *supra* note 306, at p.8.

3.3.2. Watchdogs Regarding the Shape of the Group

Judges must behave as watchdog *vis-à-vis* the shape of the group. In this view, they are asked to control the size of the group (a), as well as to manage information and to regulate cut-off dates to join or leave the group (b).

a) Judicial Control over the Size and the Shape of the Group

➤ *Rationale*

Shaping the group is a decisive moment. Judges must ensure homogeneity within the claimant group. Whenever deemed necessary, they may define sub-groups in order to take into account related claims brought by plaintiffs with different interests, status or harm. From a legal point of view, defining the group of plaintiffs is aimed at determining and circumscribing those who will be bound by the final judgment and entitled to compensation. From an economic point of view, it was previously shown that homogeneity within the claimant group has long-lasting consequences: it facilitates economies of scale, reduces the risks of opportunistic behaviours such as free-riding, and enhances the group's bargaining power by notably reducing the risk of adverse selection.³⁶³ Further developments of this research will also reveal that homogeneity is a prerequisite for the use of case management techniques such as bellwether trials, statistics or samples, and that heterogeneity within the claimant group can in turn exacerbate outlier effects.³⁶⁴ Remarkably, in all the proceedings here analysed, the judiciary is required to perform a central role.

➤ *In The Selected Mass Proceedings*

○ *The French Group Action*

In line with previous proposals, group actions give to judges and associations a prominent role for determining the shape of the claimant group.³⁶⁵ New article L.423-3 Consumer Code states that the court defines the claimant group and clarifies the criteria and conditions of its membership. Furthermore, judges must establish a time-planning determining the period during which plaintiffs can adhere to the group. This delay cannot be less than 2 months, and cannot exceed six months after the case has been advertised

³⁶³ See Chapter 2 'Costs and Abuses associated with the Structure of the Group'.

³⁶⁴ See Chapter 5, 'Outlier Effect'.

³⁶⁵ 2010 Group Action Report, *supra note 199*, recommendation n°15, at p.72.

in the media.³⁶⁶ Based on an opt-in system, plaintiffs must then voluntarily step forward to be included into the claimant group. Even though the technique of sub-grouping is not explicitly mentioned, this possibility remains implicitly contained in new Article L.423-3 al.2 Consumer Code which makes a direct reference to the existence of different ‘categories of consumers that constitute the group’.³⁶⁷

- *The Dutch WCAM*

According to Rule 7:907 (2) (d) Civil Code, parties seeking for a judicial clearance of their settlement agreement must clearly identify ‘the conditions which these persons must meet to qualify for compensation’. In the *Shell* case, judges for instance referred a specific timeframe to control and limit the scope of claimants concerned by the settlement agreement.³⁶⁸

- *The English Group Litigation Order*

GLO applications must similarly establish the boundaries of the claimant group. CPR 19.13(f) provides that the managing judge ‘gives directions for the entry of any particular claim which meets one or more of the GLO issues’ previously identified. As observed by HODGES, this definition is essentially a ‘generalised description’ where the judge can take for example the occurrence of a particular event as point of reference.³⁶⁹ GLOs may also further distinguish subgroups if this strategy helps the case to proceed.³⁷⁰ Since GLOs are based on the opt-in system, plaintiffs who want to join the claimant group must step in. Their files are reported on a group register kept under judicial control.³⁷¹

- *The English Draft Court Rules*

The draft provides that judges must ‘describ[e] or otherwise identif[y] the class’. Yet, when doing so, the draft precises that judges will not have to specify all members in details.³⁷² Importantly, while noticing

³⁶⁶ New Article L.423-.5 Consumer Code.

³⁶⁷ New Article L.423-3 al.2 Consumer Code (in French : ‘le juge détermine le montant des préjudices pour chaque consommateur ou chacune des catégories de consommateur constituant le groupe qu’il a défini, ainsi que leur montant ou tous les éléments permettant l’évaluation des préjudices’, emphasis added).

³⁶⁸ *Shell* case, at 6.1 and 6.2 (the agreement targeted ‘persons who acquired Shell shares in the period from the period 8 April 1999 up to and including March 2004 may have suffered losses, as they purchased the securities for the share price which did not correspond with the real volum of the reserve held by Shell’).

³⁶⁹ C. HODGES, *supra* note 56, at p.56 (for example: ‘any claims AB Limited in relation to [alleged effects of autism arising from] use of the drug X’).

³⁷⁰ Practice Direction 19B – Group Litigation, 3.2.5

³⁷¹ Practice Direction 19B- Group Litigation 6.1

³⁷² Proposed CPR 19.22 (3)

that ‘the size and composition of any potential class could vary broadly’, the draft drastically increases the power of judges with regards to the group definition. Judges may notably decide that the group can be constituted via the opt-in or via the opt-out system depending on the needs of the case at stake.³⁷³

- *The American class action:*

According to FRCP Rule 23(c) (1) (b), the judicial certification order ‘must define the class and the class claims, issues or defences (...)’. If ever deemed appropriate, the class may also be divided into sub-classes to take into account particularities of plaintiffs’ claims.³⁷⁴ In the asbestos class action *Cimino v. Raymark Industries* which concerned 2,298 plaintiffs, the court for example decided to sub-group plaintiffs into five categories depending on the characteristics and severity of their respective illnesses. These five categories were respectively mesothelioma, lung cancer, other cancer, asbestosis and pleural disease.³⁷⁵

- b) Judicial control over Information, Notification & Cut-Off Dates to Join or Leave the Group

- *Rationale*

Judges must ensure that the case is widely and adequately publicized in the media. This step is aimed at ensuring what has been sometimes referred to as a ‘democratisation of mass litigation’.³⁷⁶ Judicial management of information has here a double function.

The first concerns the ‘external democratisation’ of mass disputes: all potential claimants should have a possibility to leave the proceeding (in case of *opt-out* system) or to step in (in case of *opt-in*). A recent study conducted by VAN DIJCK interestingly found that plaintiffs who have been informed that a majority of other plaintiffs have decided to start individual procedures tend themselves to leave the collective procedure to start an individual procedure of their own.³⁷⁷

³⁷³ Proposed CPR 19.22 (1) (f) (the working group ultimately observed that ‘the matter was best left to the court to decide at large. It is intended that the rules could be applied to a broad range of collective proceedings which may cover many different types of claims.’, at p.10).

³⁷⁴ FRCP Rule 23 (c)(3)(5) (‘subclasses’).

³⁷⁵ *Cimino v. Raymark Industries Inc.*, 751 f. 649 (1990)

³⁷⁶ K.R.FEINBERG, ‘Democratization of Mass Litigation: Empowering the Beneficiaries’, (45) *Columbia Journal of Law and Social Problems*, 2012, pp.481-497.

³⁷⁷ G.VAN DIJCK, ,*supra note 182*.

The second regards the ‘internal democratization’ of mass disputes: all potential claimants should be informed of their possibility to be heard and to present objections during hearings.³⁷⁸ Judicial control on information is essential to ensure that the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights (ECHR) is respected. While doing so, judges help bridge the gap between the ‘inevitable anonymity that goes with the aggregation of claims’ and the individualised situations of claimants.³⁷⁹ Furthermore, spreading information is not only necessary to respect the rights of involved parties, but more generally it also contribute to the overall credibility and legitimacy of the resolution of mass disputes *vis-a-vis* society at large. As FEINBERG observes, ‘if the litigation itself, and the accompanying settlement reached behind closed doors, are not viewed as credible or “just”, we citizens lose faith in the ability of the courts to dispense and deliver “justice”’.³⁸⁰ Judges therefore are given large discretionary powers to fulfil this important task.

➤ In the Selected Mass Proceedings

○ *The French Group Action*

The 2010 Group Action report already stated that judges must select the most appropriate venues for advertising the case, depending on the circumstances at stake.³⁸¹ In the same vein, new Article L.423-4 Consumer Code provides that judges must take all ‘adapted measures’ to inform potential plaintiffs about the content of the declaratory ruling on liability. Such a mediatisation must occur only after the decision on liability is not subject to appeal or cassation anymore. The advertising costs are borne by defendant(s) who have previously been held liable in the declaratory ruling on liability. Furthermore, whenever a settlement agreement is found between litigants, venues for informing claimants about the content of the agreement must also be clearly indicated.³⁸²

○ *The Dutch WCAM*

The mediatisation of the proposed settlement agreement must occur two times: first when the agreement is brought to the court by parties so as to give to all potential claimants a possibility to present objections

³⁷⁸ K.R.FEINBERG, *supra* note 376.

³⁷⁹ J.B. WEINSTEIN, ‘The Democratization of Mass Actions in The Internet Age’, (45) *Columbia Journal of Law and Social Problems*, 2012, pp.451-471.

³⁸⁰ *Idem*.

³⁸¹ 2010 Group Action Report, *supra* note 199, recommendation n°16.

³⁸² New Article L.423-16 Consumer Code.

or modifications; second when the agreement is approved by the court so as to give all potential plaintiffs a possibility to leave the proceeding.³⁸³ As pointed out by TZANKOVA, the court may choose between different ‘case-tailored approaches’.³⁸⁴ The notification process may turn out to be costly when parties are located outside the Netherlands. In the *Converium* case, the agreement indicated a list of French, Swiss, English and Dutch newspapers along with a list of websites where the case had to be notified.³⁸⁵ As KRAMER more generally points it out, judges presiding over the Shell and Converium cases ‘gave strict instruction in relations to the notification [:] advertisements were placed in dozens of newspapers, special websites were established, and banners were placed on websites’.³⁸⁶

○ *The English GLO*

CPR 19.13(e) provides that the managing judge must [specify] a date after which no additional claim may be added to the group register (...). Practice Directions 19(B) give further information on the way judges must establish cut off dates to join the group depending on the type of case at stake.³⁸⁷ As observed by HODGES, fixing cut-off dates can indeed turn out to be a tricky and uneasy exercise. As he further highlights:

[The Court] ‘tries to avoid setting cut-off dates that give claimants too short a time to investigate their claims, since this can produce a rush of bad claims that have to be weeded out later and give a false impression of the viability of the group as a whole. There can sometimes be good reasons for not imposing a cut-off date, such as where there are difficulties over bringing the case to the attention of people who may be affected’.

³⁸³ H.VAN LITH, *supra* note 245.

³⁸⁴ I. TZANKOVA, *supra* note 60.

³⁸⁵ *Converium* case, at point 11.13

³⁸⁶ X. KRAMER, *supra* note 249, at p.89.

³⁸⁷ Practice Directions 19(B), (Point 13 stating that ‘the management court may specify a date after which no claim may be added to the Group Register unless the court gives permission. An early cut-off date may be appropriate in the case of ‘instant disasters’ (such as transport accidents. In the case of consumer claims, and particularly pharmaceutical claims, it may be necessary to delay the ordering of a cut-off date’).

- *The English Draft Court Rules*

Judges must ensure the publicity of the case and specify cut-off dates for the opting-in or opting-out of potential claimants.³⁸⁸ Here again, judges must behave as key interface in charge of verifying the adequate circulation of information across all potential claimants.

- *The American Class Action:*

In its 1974 decision *Eisen v. Carlisle & Jacquelin*, the US Supreme Court ruled that notification should be conducted ‘through reasonable effort’.³⁸⁹ Interestingly, WEINSTEIN in the *Agent Orange* class action also pointed out that ‘particular emphasis should be placed to communicate with class members who are outside the mainstream of society’.

3.3.3. Preliminary Conclusion

In the framework of mass litigation, judges must go through a kind of certification process where they will notably verify the number of involved claimants, the existence of common issues, the representativeness of the lead entities, the adequacy of the proceeding given the needs and particularities of the case at stake. In some cases, they may also be required to conduct a preliminary assessment of the merits of the claim. These different steps exist in every mass proceeding regardless of the idiosyncrasies of their procedural design. A difference however remains regarding the way judges will formally fulfil their duties. Their intervention may go from a strict control over established criteria as the one conducted by American judges when certifying class actions to a more flexible approach as the one adopted by English judges when reviewing the admissibility of Group Litigation Orders.³⁹⁰

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³⁸⁸ Proposed CPR 19.23 and 19.24

³⁸⁹ *Eisen v. Carlisle & Jacquelin* - 417 U.S. 156 (1974)

³⁹⁰ C. HODGES, *supra* note 56 (noticing: ‘the absence of formal criteria in the English GLO system contrasts with a number of other jurisdictions which have defined criteria’ and that ‘since the GLO is a broadly conceived managerial tool, the certification requirements are deliberately relaxed and the court has wide discretion over how to handle the cases in the group’, at pp.55-56).

3.4. JUDGES AS MASS CLAIMS' CATTLE DRIVERS

As the cattle driver whose assigned duty is to lead the herd safely and promptly to its final destination, judges must assist parties and ensure that cases make orderly progresses. As OST observes on a more general level: 'the social game [has become] essentially a game of performance [where] the judge is asked to leave his role of passive arbitrator to adopt the one, [more] active of a coach who, by his advice and his decisions, pushes the competition towards a collective and shared victory'.³⁹¹ The case management philosophy is known in Continental systems where judges must already take active steps for the resolution of civil disputes. Interestingly, a similar tendency is also noticeable in Common Law systems even though judges are there portrayed as being traditionally more passive. As indeed pointed out by ZUCKERMAN, 'Common Law countries and Civil Law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation'.³⁹² Remarkably, this tendency takes its full and comprehensive meaning in the realm of mass litigation (3.4.1). Innovative but controversial case management techniques have progressively emerged as an attempt to deal efficiently with mass claims (3.4.2).

3.4.1. A Case Management Philosophy in Individual Litigation Reinforced in Mass Litigation

Case management practices in individual and mass litigation are hereafter clarified with respect to France (a), the Netherlands (b), England and Wales (c) and the United States (d).

³⁹¹ F.OST, 'Le Juge Pacificateur, Juge-arbitre et Juge entraîneur. Trois modèles de justice' in : P.GERARD, F.OST and M.VAN DE KERCHOVE, *Fonction du Juge et Pouvoir Judiciaire : Transformation et déplacement*, Publication des facultés universitaires de Saint Louis, 1983 (translation from the author).

³⁹² A.S. ZUCKERMAN, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999.

a) Case Management Practices in France

➤ *Case management philosophy in individual litigation*

The role of the French civil judge in the 1806 Code of Civil Procedure was traditionally limited. The proceeding was mostly left to parties' control.³⁹³ Further legislative developments have however progressively departed from this model, and enshrined into the law an active judicial intervention in the conduct of civil litigation.³⁹⁴ An essential step was made in the 1975 Code of Civil Procedure which inaugurated a new judicial era with the creation of the so-called *juge de la mise en état* (judge in charge of monitoring civil proceedings) seating in High Courts of First Instance (*tribunal de grande instance*).³⁹⁵ Viewed as 'the manager of civil proceedings',³⁹⁶ his core function is to promote 'an effective relationship between the judges and the parties' and to supervise 'the loyal conduct of the the procedure'.³⁹⁷ He ensures a timely exchange of pleadings and transmission of documents'.³⁹⁸ he fixes a calendar with time-limits for the examination of particular issues,³⁹⁹ can require from parties to issue factual information on points that remain shadowy,⁴⁰⁰ may require the intervention of third parties whose intervention are deemed necessary for the resolution of the dispute.⁴⁰¹ Importantly, he has also the authority to order production and transmission of documents and evidence.⁴⁰²

³⁹³ C.H. VAN RHEE, (Ed.), *European Traditions in Civil Procedure, Ius Commune: European and Comparative Law Series, Intersentia*, vol.54, 2005.

³⁹⁴ See notably the 1935 and 1965 Legislative Decrees creating a judge whose main task is to 'follow the civil procedure' (decree n°65-872 of 13 October 1965 modifiant certaines dispositions du code de procédure civile et relative à la mise en état des causes).

³⁹⁵ V. MAGNIER, 'Report on France', (622) *Annals of the American Academy of Political and Social Sciences (The Globalization of Class Actions)*, 2009, pp.114-124.

³⁹⁶ J.C. MAGENDIE, Rapport au garde des sceaux 'Célérité et qualité de la justice – La gestion du temps dans le proces', 15 juin 2004 (citing R.PERROT who described the juge de la mise en état as the 'gestionnaire de l'instruction civile').

³⁹⁷ A. WIJFFELS, 'Powers of the Judge – France', in: C.H. VAN RHEE, (Ed.), *European Traditions in Civil Procedure, Ius Commune: European and Comparative Law Series, Intersentia*, vol.54, 2005, pp.269-280.

³⁹⁸ Article 763 French Code of Civil Procedure

³⁹⁹ Article 764 French Code of Civil Procedure

⁴⁰⁰ *Idem*

⁴⁰¹ Article 768-1 Code of Civil Procedure

⁴⁰² Article 770 Code of Civil Procedure

➤ *Case Management Philosophy in Mass Claims*

The French group action does not provide specific powers to judges for the treatment of mass cases. Yet, new Article L.423-3 al.3 Consumer Code may rapidly become the key textual references grounding and justifying an enhanced judicial intervention in mass claims. This Article provides that at any stage of the proceedings the court can take any orders which are legally admissible or deemed necessary for the preservation of evidence and the production of documents, including those held by professional.⁴⁰³ In addition, particular attention has been given to the use of model and test cases which may help judges when resolving mass disputes.⁴⁰⁴ Finally, the powers of French judges are determined by the traditional rules of civil procedure. All the powers of the *juge de la mise en état* previously mentioned will also be used for the monitoring of mass disputes.

b) Case Management Practices in the Netherlands

➤ *Case Management Philosophy in Individual litigation*

Dutch legal scholars have pointed out that ‘case management [was] a more recent phenomenon in the practice of civil procedure.’⁴⁰⁵ Even though the intervention of the Dutch civil judge was initially restricted by the principles of judge’s passivity (*lijdelijkheid van de rechter*) and party autonomy (*partijautonomie*),⁴⁰⁶ reforms have successively - albeit slowly -⁴⁰⁷ encouraged an enhanced judicial intervention.⁴⁰⁸ Judicial case management techniques have moreover progressively emerged from judicial

⁴⁰³ New Article L.423-3 al.3 Consumer Code (In French: ‘à tout moment de la procédure le juge peut ordonner toute mesure d’instruction légalement admissible nécessaire à la conservation des preuves et de production des pièces, y compris celles détenues par le professionnel’).

⁴⁰⁴ 2010 Group Action Report, *supra* note 199, recommendation n°11 ‘Presentation of model cases’: ‘the recourse to this technique of model cases would permit judges to define the group of potential victims with the help of the determinant characteristics of cases that would be transmitted to them’ - in French : ‘le recours à cette technique des cas exemplaires permettra au juge de définir le groupe possible des victimes à partir des caractéristiques déterminantes des cas qui lui auront été transmis’).

⁴⁰⁵ I.TZANKOVA, *supra* note 60.

⁴⁰⁶ R.VERKERK, ‘Powers of the Judge- the Netherlands’, in: C.H. VAN RHEE (ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.281-293.

⁴⁰⁷ C.H.VAN RHEE, *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.281-293 (highlighting that the Netherlands is with England ‘one of the countries that have been extremely slow in adopting a more modern, efficient approach to civil litigation’).

⁴⁰⁸ See notably the 1920 GRATAMA proposal which supported a more active judge, see A.W.JONGBLOED, ‘The Netherlands’, in: C.H. VAN RHEE (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.64-96; R. VERKIJK, ‘Beyond Winning: Case Management

practice itself. An interesting example is the use of the Personal Appearance after Statement of Defence (*Comparatie na Antwoord*) developed by the Rotterdam Court of First Instance (*rechtbank*) in the 1960s.⁴⁰⁹ Codified in 1989 in Article 131 Code of Civil Procedure, this technique enables judges to order parties to appear in court at early stages so as to investigate whether the case should be settled, or whether further information or documents are necessary for a prompt resolution of the case. An important step was also made in 2001 with the creation of a working group aimed at renovating the Dutch civil procedure.⁴¹⁰ Among the many propositions that were formulated in the 2006 report, a clear willingness to re-evaluate and rebalance the role of judges and parties during the litigation process was presented as a cornerstone topic.⁴¹¹

➤ *Case Management Philosophy in Mass Claims*

The monitoring of WCAMs requires important case management skills.⁴¹² Some case management techniques have progressively emerged from judicial practice.⁴¹³ LOS, vice-president of the Amsterdam Court of Appeals and involved in several WCAM rulings, pointed out that, even though the WCAM is in principle an individual procedure where the parties set the stage, the fact that *third parties* are affected by the ruling as well justifies that judges take a more active role in which they do not restrict themselves to the mere information brought by parties, but rather ensure that third parties have a possibility to take part in the debates since their own interests are in play.⁴¹⁴ Even though judges cannot unilaterally modify the content of the agreement jointly presented by parties, in practice they may do so by signalling to parties that some changes regarding the content of the agreement are necessary if they want it to be ultimately

and The Roles of Lawyers in the Principles, in: C.H. VAN RHEE (Ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerpen/Oxford, Intersentia, 2007, pp.57-65.

⁴⁰⁹ The *comparatie Na antwoord* is a request from the judge ordering a parties' appearance at early stage (namely, once the submission of the statement of defence has been made).

⁴¹⁰ W.D.H. ASSER, H.A. GROEN, I.N. TZANKOVA and J.B.M. VRANKEN, *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, 2006.

⁴¹¹ C.H. VAN RHEE, 'Dutch Civil Procedural Law in an International Context', in: M. DEGUCHI and M. STORME (Eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society – Legislative and Legal Educational Assistance to other countries in Procedural Law*, Antwerpen/Apeldoorn, 2008, p.191-212 (stressing that the idea spearheaded by the working group was that 'civil litigation serves goals to go beyond the private interests of litigants (...). Consequently, parties involved in a civil action before state courts not only have certain responsibilities and obligations toward each other, but also toward society at large').

⁴¹² W. VAN BOOM, *supra* note 120.

⁴¹³ I. TZANKOVA, *supra* note 58 (observing that 'the court can exercise certain discretionary powers').

⁴¹⁴ W.J.J. LOS, 'Toepassing Van De WCAM – Bespiegelingen Over De Rol En Taak Van De Rechter', in W.J.J.LOS, *Collective Acties in Het Algemeen en de WCAM in Het Bijzonder*, NVvp, n°28, Den Haag, BJU, 2013, p.26.

judicially approved.⁴¹⁵ Judges may send a list of detailed questions to parties so as to clarify the points of the settlement that remain shadowy (used notably in the *Dexia* and *Converium* cases) or may refer to experts to clarify factual elements deemed crucial for the resolution of the case (used in the *Dexia* case with the intervention of the Financial Market Authority - *Authorities Financiële Markten*).⁴¹⁶ On a broader scale, this judicial activism is necessary so as to give judges enough information to perform their control over the terms of the final settlement agreement. Official records of case management conferences held in the *Converium* case are in this respect illustrative: judges have showed on this occasion a readiness and willingness to clarify the terms of the settlement, to provide more information on the identities of petitioners and interested parties, to scrutinize the scope of attorney fees or to discuss the appropriate venues for notification.⁴¹⁷

c) Case Management Practices in England and Wales

➤ *Case Management Philosophy in Individual Litigation*

The paradigm shift encouraging a more active judicial case management was one of the key features of the reform of civil procedure initiated by Lord WOOLF in 1995-1996. Even though some techniques of judicial case management already existed before this period,⁴¹⁸ Lord WOOLF's reports were explicitly driven by the consideration that 'there is now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts'.⁴¹⁹ When supporting an active judiciary, WOOLF drastically challenged the traditional paradigm of the English adversarial trial and its associated judicial passivity.⁴²⁰ These reforms tremendously contributed to bridge the gap between English judges and their Continental counterparts.⁴²¹ On a broader scale, HODGES has also pointed out

⁴¹⁵ W.VAN BOOM, *supra* note 120.

⁴¹⁶ In the *Dexia* case, the Court asked for the opinion of the Dutch Financial Market Authority (*Authorities Financiële Markten*).

⁴¹⁷ Amsterdam Court of appeal, Official Record of the Public Hearing in the *Converium* case of the Second Three-Judge Chamber for Civil Matters (on Tuesday 24 August 2010 (English Translation from Dutch)).

⁴¹⁸ C.H. VAN RHEE, 'English Civil Procedure Until the Civil Procedure Rules (1998)', in: C.H. VAN RHEE (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.129-159 (in the Court of Chancery, a court official named 'Master' was in charge of conducting early factual investigations).

⁴¹⁹ WOOLF, *supra* note 260 (see Chapter 4 'The Major Reforms').

⁴²⁰ C.H. VAN RHEE, 'Civil Litigation in Twentieth Century Europe', (75) *The Legal History Review*, 2007, n°3, pp.307-319 (English judges' main duty was traditionally to 'oversee the case as an umpire').

⁴²¹ *Idem* (observing that these 'new rules bring English civil procedural law closer to its continental counterparts that it has been in centuries').

the actual activist role of the English judge who must nowadays be viewed as being interventionist *by essence*.⁴²² English judges have notably key roles concerning the administration of evidence. Disclosure gives judges active and cornerstones roles concerning the control of evidence. Disclosure technique contained in CPR Part 31 is reserved to certain types of cases that notably encompass multi-track litigation. This category – which involves ‘court claims and claimants that seek award that value more than 15,000£ or court cases that will result in a lengthy trial with considerable documentation’ - ⁴²³ encompasses GLOs.

➤ *Case Management Philosophy in Mass Claims*

As Lord WOOLF observed it, ‘multi-party actions, of whatever description, will almost invariably merit the full hands-on judicial control’.⁴²⁴ The GLO regime and the English Draft on Court Rules are remarkable for the considerable flexibility that they give to judges in the conduct of the proceeding. The draft provides that judges can give case management directions ‘at any time’ and can ‘dispense any procedural step that [they] consider unnecessary’.⁴²⁵ Similarly, GLO ‘empowers the managing judge to exercise his or her powers with considerable flexibility depending on the need of a specific case’.⁴²⁶ Among many techniques, judges can schedule case conferences and hearings, order test cases⁴²⁷ formulate non-binding indications so as to let litigants know about the content of future meetings and the elements that, from the judge’s viewpoint, will require further clarifications,⁴²⁸ or keep a case register accessible to all potential parties.⁴²⁹ Crucially, judges may use test cases or lead cases whenever they consider that their resolution can help the case to proceed.⁴³⁰ As a matter of fact, this global evolution tends to substantiate

⁴²² C. HODGES and N. CREUTZFELD-BANDA, ‘Parallels Tracks in Mass Litigation: Public and Private Responses to the Buncefield Explosion in England’, in: D. HENSLER, C. HODGES, and I. TZANKOVA (Eds), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation*, Edward Elgar Publishing, *Forthcoming*, 2014. (according to the authors, the 2005 *Buncefield* litigation is a striking illustration of the way judges of the commercial Court followed an ‘interventionist style of management’ by using their large case management prerogatives, while – and it is an interesting precision - not referring to the GLO mechanism).

⁴²³ <http://www.sfla.co.uk/litigation/multi-track.htm>

⁴²⁴ WOOLF, *supra* note 260.

⁴²⁵ Proposed CPR 19.31 (‘Case Management of the Collective Proceedings’)

⁴²⁶ C.HODGES, *supra* note 56.

⁴²⁷ Practice Direction 12.3 and CPR 19.15

⁴²⁸ C. HODGES, *supra* note 56, at p.57.

⁴²⁹ GLO – Practice Direction 19B, point 6.1

⁴³⁰ C. HODGES, *supra* note 56, at p.58 (observing an extensive use of test claims in GLOs in product liability cases. As the author highlights, ‘the court [ordered] some individual cases to be pleaded fully so that a view could be taken of the issues that are common to most cases and resolved on the basis that that would be the most effective way of resolving the greatest number of individual cases in the group’).

Lord WOOLF's suggestion that 'in multi-party actions there is a need for the court to exercise control at a much earlier stage'.⁴³¹

d) Case Management Practices in the United States

➤ *Case Management Philosophy in Individual Litigation*

Traditionally, American judges are said to be more passive in the adversarial system than their Continental counterparts.⁴³² The concept of managerial judging has however progressively expanded in the American legal literature. It refers to judges' abilities to channel parties' behaviours in an attempt to reduce litigation costs, court delays and judicial workload.⁴³³ As observed by RESNIK, 'managerial judging's proponents, blurring organizational theories and utilitarianism, believe that their new system of management will permit improved allocation of judicial resources'.⁴³⁴ When commenting on American judging, HELLERSTEIN, HENDERSON and TWERSKI have observed that judges now 'routinely exercise managerial control over evidentiary and procedural aspects of the cases brought before them'.⁴³⁵ The development of mass litigation in the United States has indeed drastically favoured active judges. As SCHUCK expresses it, 'the movement of courts toward managerial judging spurred by mass tort litigation has entailed some of the most far-reaching innovations in judicial history'.⁴³⁶

➤ *Case Management Philosophy in Mass Claims*

FRCP Rule 23(d) lists some of the steps that judges may undertake to manage class actions. Examples of judicial case management can for instance be found in the practice of Judge WEINSTEIN in the *Agent*

⁴³¹ WOOLF, *supra* note 260.

⁴³² C. HODGES and A. STADLER, 'Introduction', in: C.HODGES and A.STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013, at p.10.

⁴³³ J. RESNIK, 'Managerial Judges', (96) *Harvard Law Review*, 1982, n°374; see also S.C. YEAZELL, 'The Misunderstood Consequences of Modern Civil Process', *Wisconsin Law Review*, 1994, pp.631-678 (noticing that 'seen from a more distant historical perspective, virtually all of modern litigation is more managerial than was litigation in earlier periods', at p.674).

⁴³⁴ J. RESNIK, *Idem*. See also E.E. DONALD, 'Managerial Judging and the Evolution of the Procedure', 1986, *Faculty Scholarship Series*. Paper 2197 (observing that asking judges to behave as manager 'implies that they must take into account the hard economic reality that procedural resources are limited and that decisions must be made on a sound, business-like basis as to which opportunities to pursue and which to pass by').

⁴³⁵ A.K. HELLERSTEIN, J.A. HENDERSON, A.D. TWERSKI, 'Managerial Judging: The 9/11 Responders' Tort Litigation', *Brooklyn Law School Legal Studies Research Papers*, n°298, October 2012.

⁴³⁶ P.H SCHUCK., *supra* note 160.

Orange class action litigation extensively analysed by SCHUCK.⁴³⁷ In this affair, American veterans who had been exposed to a harmful herbicide used to defoliate forested land during the Vietnam War suffered from various health problems. A wide range of innovative - formal and informal - case management techniques were handled by Judge WEINSTEIN whose primary objective was to keep the work of parties under time-pressure and closed scrutiny. As anecdotal evidence, SCHUCK for instance reports that the judge 'placed a huge calendar, with the trial date circled, on a large blackboard that he kept in prominent view of the lawyers and to which he often pointed for emphasis'.⁴³⁸ Other mass cases have required judges dealing with massive amounts of evidence and supervising extensive data collection. For the needs of the Asbestos class action *Jenkins v. Raymar*, Justice PARKER appointed Mc GOVERN as Special Master who prepared a list of 109 questions addressed to litigants in which he also requested the communication of several hundreds of documents and evidence so as to have a clear view on the different facets of the litigation (among others, plaintiffs' age, sex, time of exposure to asbestos, or previous medical background). Mc GOVERN reports that 'approximately 2.3 million items of information were gathered'.⁴³⁹ Recently, the lawsuits filed by more than 10,000 plaintiffs seeking compensation for diseases and health problems due to their work and exposure at New York City's World Trade Centre disaster site ('Ground Zero') was also a remarkable example of managerial judging. However, in this case, plaintiffs were ultimately not certified as a class since the court considered that individual issues here prevailed over common issues. Despite the formal absence of a class procedure, this example is nevertheless worth taking into account as an illustration of the concrete steps that judges can undertake to deal with mass disputes of considerable scope and unprecedented complexity.⁴⁴⁰ In an attempt to obtain a clear and precise overview of the situations of all involved parties, judge HELLERSTEIN urged for the creation of a comprehensive database including 368 questions in which plaintiffs were asked on various and numerous issues such as – among many - the symptoms of their disease, the identity of their medical providers or the identity of their insurers.⁴⁴¹

⁴³⁷ *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985 *part*, 818 F.2d 179 (2d Cir. 1987); Reviewed and discussed in: P.H. SCHUCK, *Agent Orange on Trial – Mass Toxic Disasters in the Courts*, The Belknap Press of Harvard University Press, Cambridge and London, 1986 (here at p.119).

⁴³⁸ *Idem* (highlighting that '[the judge] also conspicuously ordered carpenters to expand the jury box to accommodate extra alternate jurors. In these and other ways, he constantly reminded the lawyers that he meant business').

⁴³⁹ F. Mc GOVERN, 'Resolving Mature Mass Tort Litigation', (69) *Boston University Law Review*, 1989, pp.659.

⁴⁴⁰ A.K. HELLERSTEIN, J.A. HENDERSON, A.D. TWERSKI, *supra* note 435 (pointing out: 'no other tort litigation, whether based on widespread environmental contaminants or on mass-marketed prescription drugs, has ever presented so many different injuries caused by such varying degrees of exposure to such indeterminate toxins').

⁴⁴¹ *Idem*

3.4.2. The Use of Innovative and Controversial Case Management Techniques

Judges dealing with mass litigation have progressively used innovative case management techniques to cope with the massive amounts of evidence and the number of involved parties.⁴⁴² The main justification for this is obviously economic efficiency: in a context of scarce judicial resources, these mechanisms are intended to reduce the costs associated with a systematic and individualized analysis of each single claimant and scattered data (*a*). They remain however sources of extensive debates and controversies (*b*). Ultimately, they renew the visionary observation of HOLMES who, as early as 1896, already posited that ‘for the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics’.⁴⁴³

a) Innovative Case Management Techniques – a Short List

➤ *Test and Model Cases*

In many jurisdictions, test cases (also referred to as ‘bellwether trials’) are already used as case management techniques. They consist of selecting and adjudicating a limited number of cases deemed representatives. The resulting verdicts are not binding upon the rest of the group, but they provide parties with information about the weaknesses and strengths of their claims, and inform on the way judges are ultimately likely to decide similar cases.⁴⁴⁴ Test cases therefore encourage settlements. Representative cases may be chosen by the parties themselves (who in this case will present their stronger cases) or selected by judges who may be willing to diversify their point of view about the litigation.

➤ *Samples & Extrapolation*

In his report on *Access to Justice*, Lord WOOLF highlighted that dealing with mass claims requires the use of ‘statistically valid samples of the wider group [to establish] criteria which individuals must meet to join the action’. In the previously mentioned *Cimino v. Raymark Industries* class action lawsuit in which the 2,298 plaintiffs were divided into five categories depending on the characteristics of their respective

⁴⁴² E.F. SHERMAN, ‘Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process’, (25) *The Review of Litigation*, 2006, pp.691-718.

⁴⁴³ O.W. HOLMES, *The Path of the Law*, 1896.

⁴⁴⁴ A.D. LAHAV, ‘Bellwether Trials’, (76) *George Washington Law Review*, 2008, pp.576 (observing: ‘the results of bellwether trials represent the likely outcome of their cases as well’).

illness, the court selected random samples of plaintiffs to have their cases tried by juries. The court then established an average verdict for each category and extrapolated these amounts to the remaining cases that had not been heard. This sampling technique was however rejected by the 5th Circuit.⁴⁴⁵ Another illustration can be found in the 1996 class action lawsuit *Hilao v. Estate of Marcos* which involved 9,541 plaintiffs suing the State of former President Ferdinand Marcos for torture and disappearances. The court retained a sample of 137 claimants chosen randomly and then extrapolated the averaged amount of damages to individual non-sample class members.⁴⁴⁶ The main rationale was that this technique ‘would achieve a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of the claims filed’.⁴⁴⁷

➤ *Trial bifurcation*

Bifurcation technique is notably enshrined in US FRCP Rule 42 which provides that ‘the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim’. This method consists of addressing separately several dispositional issues, such as for instance the questions of liability and damages. It is employed to ‘segment’ aggregate litigation.⁴⁴⁸ As noted before, the French group action is built on the model of a bifurcated trial where the issue of liability and damages are tackled successively and separately. Contradictory evidence tends to reveal that decisions to bifurcate may impact on verdicts. It is however unclear whether they tend to benefit more to defendants or to plaintiffs.⁴⁴⁹

➤ *Statistical evidence*

While facing extensive amounts of data issued by large number of parties, judges have been more and more prone to use statistical evidence to deal with and manage mass litigation. Statistical tools have

⁴⁴⁵ *Cimino v. Raymark Industries Inc.*, 1998 WL 480147, 5th Circuit, 17 August 1998

⁴⁴⁶ *Hilao v. Estate of Marcos*, 103 F., 3d 767, 9th circ., 1996

⁴⁴⁷ *Idem*

⁴⁴⁸ E.F.SHERMAN, *supra* note 442 (this method is named ‘trifurcation’ when three issues are separately addressed, such as for instance liability, causation and damages).

⁴⁴⁹ H. ZEISEL and T. CALLAHAN, ‘Split Trials and Time Savings: A Statistical Analysis’, (76) *Harvard Law Review*, 1963, n°8, pp.1606-1625 (finding evidence that defendants win in 79% of trials when liability is bifurcated and only in 42% in unitary trials). On the contrary, see: I.A. HOROWITZ and K.S. BORDENS, ‘An Experimental Investigation of Procedural Issues in Complex Tort Trials’, (14) *Law & Human Behaviour*, 1990, pp.269-285 (finding evidence that mock jurors were more likely to hold the defendant liable in an unitary trial than mock jurors in bifurcated trials). For a broader analysis see: D.A. SHOEMAKE, ‘Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation’, (59) *South Carolina Law Review*, 2008, pp.433-453.

notably been used as a way to prove causation. As Judge WEINSTEIN has expressed it, statistics in such circumstances ‘are often the major proof offered to establish causation’.⁴⁵⁰ In the class action lawsuit *In re Simon II Litigation* filed against Tobacco companies, WEINSTEIN authorized statistical sampling to prove causation and further argued that ‘sampling and survey techniques are a well-accepted alternative for the trial judge’.⁴⁵¹ The probative weight given to statistical evidence may however differ depending on cases. In the previously mentioned class action *Agent Orange*, the court for instance decided that statistical evidence was insufficient to establish a clear causal link between the herbicide and American veterans’ diseases. More recently, judges similarly discarded statistical evidence in the class action *Wal-Mart Stores Inc. v. Dukes* and considered it insufficient to prove the existence of gender discrimination practices at workplaces.⁴⁵² Interestingly, in his proposal for a class action code for Civil Law countries, GIDI proposed to enshrine this practice in his Article 23 entitled ‘statistical proof’ which provides that the use of statistical proof is permitted ‘as a complement to direct evidence, or when the production of direct evidence is costly, difficult, or impossible’.⁴⁵³

b) Innovative Case Management Techniques: Controversies

Legal scholars have expressed concerns *vis-à-vis* such innovative techniques.⁴⁵⁴ An underlying tension exists between a need to preserve parties’ rights and autonomy on the one hand, and a desire to promote a group’s efficiency on the other.⁴⁵⁵ The Debate ‘rights v. efficiency’ is cornerstone in mass litigation, where, as HENSLER points out, plaintiffs tend to be treated ‘more as object than as subjects’.⁴⁵⁶ When commenting on GLOs, Lord WOOLF already observed that ‘the effective and economic handling of group actions requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole’.⁴⁵⁷ Concerns have notably been expressed regarding the risks of

⁴⁵⁰ J.B. WEINSTEIN, ‘Litigation and Statistics’, (3) *Statistical Science*, 1988, n°3, pp.286-297.

⁴⁵¹ *In re Simon II Litigation*, No.00-CV-5332, 2002 U.S. Dist. LEXIS 19773 (E.D.N.Y. Oct. 15,2002), cited in D.M. DUZINSKY, ‘Tobacco Litigation: Statistics Permitted for Proof of Causation and Damages in Class Action’, (31) *Journal of Law, Medicine and Ethics*, 2003, pp.161-163.

⁴⁵² *Wal-Mart Stores Inc. v. Dukes*, Supreme Court, 2011

⁴⁵³ A. GIDI, ‘The Class Action Code: a Model for Civil Law Countries’, in: J.BACKHAUS, A. CASSONE and G. RAMELLO (Eds.), *supra note 23*, pp. 351-370 (here at p.359).

⁴⁵⁴ J. GIESEN, ‘De rol van de rechter in massaschade: aangepaste of partijautonomie? Een nota van een scepticus’, *Nederlands Juristenblad*, 2128, 2007.

⁴⁵⁵ C. HODGES, *supra note 56*, p. 88-89.

⁴⁵⁶ D. HENSLER, *supra note 8*.

⁴⁵⁷ WOOLF, *supra note 260*; see also S.C.YEAZELL, ‘Collective Litigation as Collective Action’, *University of Illinois Law Review*, 1989, n.1, pp.43-68 (observing: ‘collective litigation (...) involves some compromise of the

encouraging a ‘rough’ and inaccurate justice. The key interrogation consists of determining whether samples indeed reflect an accurate image of the parent population from which they are drawn, and consequently, deciding whether their use increases – or conversely decreases – the risks of errors. Points of view on this issue still diverge. SAKS and BLANCK consider for instance that an average of samples is likely to be more accurate than a sequence of individual trials.⁴⁵⁸ Their opinion was recently substantiated by CHENG who observed that the choice to proceed either by sampling or by the handling of individual cases ultimately depends on the homogeneity of the group.⁴⁵⁹ According to the author, the use of samples would ‘borrow strength’ from several individual cases. Despite plausible extrapolation errors, this technique would lead to a reduced variability between individual cases. On the other hand, BONE casts some doubt on the sampling’s contribution to accuracy and observes that, in many mass disputes, rulings based on individual cases better contribute to accurate outcomes.⁴⁶⁰

3.4.3. Preliminary Conclusion

As STADLER and MICKLITZ have observed, in all jurisdictions where group proceedings are made available judges must ultimately perform a role that is different from the one that they usually play in individual litigation. They must indeed behave as active ‘managing judge’.⁴⁶¹ The use of economic tools and statistic reasoning (such as samplings) tend to become useful tools to deal with extensive data and numerous parties.

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autonomy of the individual litigant, some reduction in the freedom of choice she would have if separately represented’, at p.45).

⁴⁵⁸ M.J. SAKS and P.D. BLANCK, ‘Justice Improved: the Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts’, (44) *Stanford Law Review*, pp.815, 1992.

⁴⁵⁹ E.K. CHENG, ‘When 10 Trials are better than 1000: An Evidentiary Perspective on Trial Sampling’, (160) *University of Pennsylvania Law Review*, 2012, pp.955-966,.

⁴⁶⁰ R.G. BONE, ‘Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity’, (46) *Vanderbilt Law Review*, 1993, pp.561-662.

⁴⁶¹ H.-W. MICKLITZ and A. STADLER (with H. BEUCHLER and A. MOM), ‘Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & Den Vereinigten Staaten von Amerika’, *Gutachten im Auftrag des Vereins für Konsumenteninformation Wien*, 12 August 2005, p.110 (noticing: ‘in allen Rechtsordnungen mit Gruppenklagen besteht Einigkeit, dass dem Richter in diesen Verfahren eine andere Rolle zu kommt als in Individualverfahren, er stärker als *managing judge* agieren, insbesondere aber sich in gewisser Weise aus seiner sonst neutralen Position lösen muss’).

3.5. JUDGES AS MASS CLAIMS' GOOD SHEPHERDS

The compensation and distribution stages have been a source of multiple concerns. They notably encompass a risk of seeing individuals' interests being diluted into the group; a risk of neglecting the interest of represented claimants; a risk of fixing under-compensation amounts that would undermine the overall deterrent effect of the proceeding,⁴⁶² or - on the contrary- of establishing over-compensation amounts that would be detrimental for business and companies; or the risk of seeing compensation amounts kept by opportunistic intermediaries. In each mass proceedings here retained, parties are incentivized to settle.⁴⁶³ Hence, the roles of judges concerning final settlements are first addressed (3.4.1). Closely associated with this point, the judicial control over intermediaries' fees is then clarified (3.4.2).

3.5.1. Judicial Supervision of the Fairness of Mass Settlements

From both an economic and a legal perspective, judicial intrusion within the content of an agreement freely agreed by parties might at first sight not be justified. This remark however neglects the nature of mass settlements which importantly differs from private settlements (a). The scope of judicial intervention is then analysed in the five mass proceedings here selected (b).

a) Justifying Judicial Intervention: Mass Settlements Are Not Private Settlements

➤ *A Limited Judicial Intervention in Private Settlements*

Insights from the Law & Economics literature suggest that settlement occur when discussions between plaintiffs and defendants have reached a *common ground*. Specifically, an agreement is concluded when

⁴⁶² See Chapter 2. In the United States, These concerns and potential abuses justified the adoption of the 2005 Class Action Fairness Act. The Act highlighted that 'class members often receive little or no benefits from class actions, and are sometimes harmed, such as where – (a) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value; (b) unjustified awards are made to certain plaintiffs at the expense of other class members; and (c) confusing notices are published that prevent class members, from being able to fully understand and effectively exercise their rights'.

⁴⁶³ On a broader scale, the settlement of mass claims has gained increase attention in Continental Europe. At the European level, a 2011 Communication from the EU Commission recommended the implementation of 'collective alternative dispute resolutions'(EU Commission, 'Alternative Dispute Resolution for Consumers Dispute in the Single Market', COM(2011)791 final); In countries like in France, the legal literature has also started to question the relevance of mass settlements to resolve mass claims (see for instance: L.ASCENSI and S. BERNHEIM-DESVAUX, 'La médiation collective, solution amiable pour résoudre les litiges de masse ?', *Contrats, concurrence, consommation*, n°8, 2012).

the offer lies *above* the minimum amount that plaintiffs are willing to accept (that is, the minimal amount of plaintiffs' claim expected value) but *below* the maximum amount that defendants are willing to propose (the maximum value of defendants' expected liability).⁴⁶⁴ When ultimately agreed by both sides, the settlement agreement is theoretically regarded as benefiting to both parties. Therefore, if ever the agreement has to be subject to judicial review, this latter should remain merely marginal to avoid judges interfering with the terms of the agreement. From a legal perspective also, such a judicial intervention could *a priori* be contested. As highlighted by the Association of European Administrative Judges (AEAJ) in its reply to the EU Public consultation on collective redress, 'a fairness control of a free bargained agreement by a court sounds contradictory'.⁴⁶⁵ The principle of contractual freedom deeply enrooted in most modern legal system traditionally forbids judges to modify in-depth contractual terms.⁴⁶⁶ The very peculiar nature of mass settlements however justifies an enhanced and careful judicial intervention.

➤ *Towards an Enhanced Judicial Intervention in Mass Settlements*

Mass settlements have first an important political dimension (in the Greek sense of *polis*, i.e. concerning the interests of society). Defective products, large-scale events or corporate misbehaviour with long-lasting implications on the society are likely to be highly-mediatized social issues with considerable public attention. In this view, the American literature has notably pointed out the 'quasi-public components' of mass litigation that go beyond the mere private interests of the parties who agreed the settlement agreement.⁴⁶⁷ Following the terminology used by Professor CHAYES, mass cases are therefore not 'bipolar' but 'multipolar' cases by essence.⁴⁶⁸ Going a step further, other authors have suggested that the key debate concerned the identity of the party (private parties or society as a whole) who ultimately has 'property' of a particular dispute, and is therefore entitled to decide how it should be resolved.⁴⁶⁹ The

⁴⁶⁴ R.COOTER and T.ULEN, *supra* note 19.

⁴⁶⁵ Replies available on www.ec.europa.eu/competition/consultations/2011_collective_redress/aeaj_en.pdf, accessed 28 January 2012).

⁴⁶⁶ In French civil law, the 1876 landmark decision of the Civil Chamber of the Court of Cassation known as the *Canal de Craponne* affair remarkably rejected any form of judicial intervention aimed at reviewing unfair contractual terms.. Instead, the Court reaffirmed the predominance of Article 1134 Civil Code which provides that agreements lawfully entered into take the place of the law for those who have made them (Cass.civ., 6 March 1876, *Commune de Pelissanne c./Marquis de Galiffet* - affaire dite du 'Canal de Craponne').

⁴⁶⁷ E.C. BURCH, 'Procedural Justice in Non-class Aggregation', (36) *Wake Forest Law Review*, 2009; J.T. GRABILL, 'Judicial Review of Private Mass Tort Settlements', (42) *Seton Hall Law Review*, 2012, pp.123-183.

⁴⁶⁸ A. CHAYES, 'The Role of the Judge in Public Law Litigation', (89) *Harvard Law Review*, 1976, p.1281.

⁴⁶⁹ C. MENKEL-MEADOW, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)', (83) *Georgetown Law Review*, 1995, pp.2663-2696 (also cited in J.T.GRABILL, *supra* note 26).

long-standing consequences, sometimes at both national and international levels of mass settlements justify the intervention of a neutral third-actor. Additionally, and as further addressed below, judicial intervention is particularly cornerstone in mass proceedings using the *opt-out* system in which the agreement is negotiated on behalf of absent and represented claimants. By endorsing the role of spokespersons for the absentees, judges ensure that their interests are properly taken into consideration. These insights on the particular nature of mass settlements justify the actual interest of the European Commission for a judicial scrutiny on the fairness of mass settlements.⁴⁷⁰

b) Judicial Control over Settlements in the Selected Mass Proceedings

○ *The French Group Action*

New article L.423-16 Consumer Code provides that any agreement negotiated on behalf of the group must be judicially approved. When doing so, judges must verify and ensure that the interests of represented claimants are correctly protected.⁴⁷¹ Importantly, one should notice that such a ‘settlement philosophy’ is often closely associated with the Common Law tradition and remains nowadays a relatively recent idea in France. This tendency has nonetheless progressively pervaded the French legal system through, for instance, the new Articles 2062-2068 of Civil Code about the ‘convention de procédure participative’ by which parties can decide to settle their dispute out-of-court. A similar tendency is also observable with regulators. Since 2011, the Financial Markets Authority (AMF) can for example propose a settlement agreement (named ‘composition administrative’) to financial intermediaries who infringe their professional duties. The settlement of mass claims appears therefore in line with such evolutions.

○ *The Dutch WCAM*

Judicial control on the settlement agreement is cornerstone in the WCAM procedure. According to Article 7:907(3) (b) and (e) Civil Code, the Amsterdam Court must reject the proposed settlement agreement ‘if the amount of the compensation awarded is not reasonable having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage’. It further requires the court to verify that the interests of those on whose behalf the agreement

⁴⁷⁰ EU Public Consultation on Collective Redress (see specifically question n°17 ‘how can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the court exercise such fairness control?’).

⁴⁷¹ 2010 Group Action Report, *supra* note 199, at p.79 (in French : ‘le juge doit s’assurer que la réparation proposée à l’issue de la médiation est bien conforme aux intérêts de toutes les personnes lésées’).

was concluded are correctly safeguarded. As highlighted by VAN BOOM, this mission ultimately requires the Court to behave as the ‘negotiorum gestor’ for the absent and represented parties.⁴⁷² This task undeniably constitutes an important responsibility falling on the Amsterdam Court.⁴⁷³ It was previously said that, because of a comparable judicial supervision over the settlement agreement, class action and WCAM shared similarities. Yet, the wording of the reasonability test conducted by Dutch and American judges differs. On the one hand, Article 7:907(3) (b) Civil Code states that the Amsterdam Court must reject the settlement if the amount is *not reasonable*. On the other hand, US FRCP rule 23(e) (2) provides that American judges may approve a settlement on finding that is inter alia *reasonable*. At first sight, this difference could appear simply rhetoric. This may however matter in practice. In the WCAM context, judges are not required to define what reasonability is. The American experience had indeed shown that this may constitute a very difficult exercise.⁴⁷⁴ Indeed, on a broader scale, judges usually ‘[know] what is excessive or derisory, but cannot determine accurately where the equilibrium is’.⁴⁷⁵

The scope of the judicial review is also be subject to controversies. LOS was recently asked whether WCAM judges should execute a *full* evaluation of the settlement agreement (which requires, among others, information on the relevant circumstances of the case), or ‘merely’ a *marginal* evaluation (assessing if there are reasons to reject the settlement agreement).⁴⁷⁶ In his view the WCAM evaluation in practise tends towards a marginal evaluation, which is strongly based on what the parties present. According to KLAASSEN however, the *goal* of the WCAM in principle would justify and require a more independent research of the judge.⁴⁷⁷ She stated in this respect that ‘the (desirable) task of the judge regarding the WCAM-procedure is not fully clear and can be debated’.⁴⁷⁸ The choice between both types of evaluation clearly affects what exactly is expected from the judge.

⁴⁷² W. VAN BOOM, *supra* note 120.

⁴⁷³ C. HODGES, *supra* note 56, at p.73 (observing: ‘ensuring the fairness of the final agreement is undoubtedly a ‘heavy responsibility placed on the court’).

⁴⁷⁴ As the American judges highlighted in *Reynolds*, ‘we do not know whether the \$25 million settlement that the district judge approved is a reasonable amount given the risk and likely return to the class of continued litigation’.

⁴⁷⁵ F.J. PANSIER, ‘Transaction et rôle du juge’, *Cahiers Sociaux du Barreau de Paris*, 01 may 2004, n°160, p.223 (‘comme dans d’autres domaines du droit, une logique floue permet de parvenir à des résultats satisfaisants : le juge sait dire ce qui est excessif ou dérisoire, mais ne peut mesurer avec précision où se situe le point d’équilibre’).

⁴⁷⁶ W.J.J. LOS, *supra* note 414, at pp. 25-29.

⁴⁷⁷ C.J.M. KLAASSEN, ‘De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade ‘en nog wat van die dingen’, *Ars Aequi* 2013, p. 633. LOS agrees on this, see: W.J.J. LOS, 2013, *supra* note 414, at p. 25.

⁴⁷⁸ *Idem*, p. 634 (translation from the author)

- *The English GLO*

The GLO regime does not indicate that settlement agreements must ultimately be judicially approved. As HODGES observes, ‘in stark contrast to the rules of class actions in the most active jurisdictions, the English and Welsh GLO rules and practice is that there is no requirement for the court to approve a settlement or to scrutinise its fairness’. This, as the author interestingly further points out, ‘is a striking omission, difficult to justify, and should be remedied’.⁴⁷⁹

- *The English Draft Court Rules*

The draft corrects such an omission and provides that settlement agreements must be judicially approved. After hearings during which all potential claimants have a chance to formulate and present their observations, the judge must decide whether the agreement is indeed fair and appropriate.⁴⁸⁰

- *The American Class Action*

Initially, the 1966 Advisory Note on FRCP Rule 23 did not provide any clear indication or guidance concerning the scope of judicial review. Judicial control on the ‘fairness’, ‘adequacy’ and ‘reasonableness’ of settlement agreements -nowadays enshrined in FRCP Rule 23(e) (2) – emerged from practice.⁴⁸¹ Importantly, American judges have progressively extended the scope of their intervention by suggesting that judges should endorse ‘fiduciary duties’ to protect the interests of absentees.⁴⁸² As POSNER expressed it in *Re Reynolds v. Beneficial National Bank*, judges should perform a ‘high duty of care’ with regards to absent parties who will ultimately be bound by the final agreement.⁴⁸³ Judges must notably be particularly alert *vis-a-vis* so-called ‘blackmail settlements’ where defendants are forced to settle for amounts that are far greater than the value of plaintiffs’ claims, or alternatively, ‘sweetheart settlements’ where class counsels ‘sold out’ the class and settle the case for amounts that are far less than what

⁴⁷⁹ C. HODGES, ‘Settlement and Its Pitfalls in England and Wales’, in: C.HODGES and A.STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013, at p.129.

⁴⁸⁰ Proposed CPR 19.37 (compromise or discontinuance) and CPR 19.38 (a)(2) (hearing to determine approval of compromise or discontinuance).

⁴⁸¹ R. MARCUS, *supra* note 170 in: C.HODGES and A.STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013 at p.155.

⁴⁸² P.H. SCHUCK, *supra* note 437 (observing ‘for the judge in a class action is in a sense the trustee for the class, obligated to ensure that they receive adequate legal representation and to otherwise protect their interests’, at p.127).

⁴⁸³ *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279-80 - 7th Cir. 2002 (stating ‘we and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries’).

plaintiffs' claims are worth.⁴⁸⁴ Experience has shown that such a task usually constitutes one of the greatest challenges that judges face when dealing with class actions.⁴⁸⁵ The vagueness of the terms contained in Rule 23(e) (2) has been a source of uncertainty.⁴⁸⁶ MACEY and MILLER consider that this rule could be understood as establishing three criteria which each time lead to consider the proposed settlement agreements from a different perspectives: the reasonability test requires judges to verify that the settlement is 'the product of a considered judgment and not arbitrary'; the adequacy test is aimed at ensuring that the negotiated agreement provides sufficient compensation to claimants; the fairness test finally intends to verify that there is no 'discrimination between similar claimants'.⁴⁸⁷ As an attempt to guide judicial intervention, American courts have developed a series of points requiring judicial vigilance.⁴⁸⁸ In the same vein, WILLGING and ROTHSTEIN have listed some 'hot button indicators' - such as for example the use of coupons - whose presence is likely to indicate the possible unfairness of the settlement.⁴⁸⁹

3.5.2. Judicial Control over Intermediaries' Fees

a) Rationale

The American literature has extensively discussed the need for a judicial supervision of intermediaries' fees as a way to prevent opportunistic behaviours such as conflicts of interest and others principal/agent problems.⁴⁹⁰ This control is also necessary to ensure that gains are not ultimately kept by intermediaries at the expenses of plaintiffs.⁴⁹¹ The intervention of judges is therefore essential. As judge WEINSTEIN

⁴⁸⁴ B.HAY and D.ROSENBERG, *supra* note 41.

⁴⁸⁵ B. ROTHSTEIN and T. WILLGING, *supra* note 164.

⁴⁸⁶ J.R. MACEY and G.P. MILLER, 'Judicial Review of Class Action Settlement', (1) *Journal of Legal Analysis*, 2009, n°1, p.167.(observing: 'the review of settlement takes the form of a list of factors uncertain in scope, ambiguous in meaning and undefined in weight').

⁴⁸⁷ *Idem*.

⁴⁸⁸ *Idem* (referring to a 'laundry lists of items that the trial courts should evaluate').

⁴⁸⁹ B. ROTHSTEIN and T. WILLGING, *supra* note 164 (suggesting that judges should give a particular attention to the use to coupons whose cash value may be difficult to estimate).

⁴⁹⁰ J.MACEY and G.P MILLER, *supra* note 486 (claiming that 'enhanced judicial scrutiny of conflict of interest considerations, specifically attorney fees proposals, where there is a direct conflict of interest between class counsel and the class members' is needed).

⁴⁹¹ S.AMRANI-MEKKI, 'Inciter les actions en dommages et intérêt, le point de vue d'un processualiste', *Concurrences*, 2008, n°4, at p.9 (citing a study revealing that for each dollar perceived only 46 cents are ultimately given to claimants).

indeed observes, ‘concept of fair fees, settlement negotiations, and other aspects of representation are not clear to most laypeople’.⁴⁹²

b) In the Selected Mass Proceedings

○ *The French Group Action*

There is no indication concerning a possible judicial review of intermediaries’ fees. The rules regulating French lawyers’ professional ethics and their code of conduct apply on such occasions.⁴⁹³ Regarding fees, success fees (also called *pact of quota litis* in which lawyers’ remuneration is exclusively dependent on the final success of the case) remain prohibited. Lawyers can only perceive result-based fees as a complement to hourly-based fees.⁴⁹⁴

○ *The Dutch WCAM*

In the Dutch context, WEBER and VAN BOOM have observed that ‘as far as attorney remuneration is concerned, the Dutch model is a far cry from the USA type class action [since] Dutch attorneys do not gain excessively from the mass settlement’.⁴⁹⁵ Lawyers’ deontological principles should here again be a safeguard against the rise of entrepreneurial lawyering. Abuses may however remain.⁴⁹⁶ On certain occasions, the court may be asked to review the amounts awarded as lawyers’ fees. This is notably the case when fees are directly taken out from the settlement fund. As highlighted in the *Converium* case, ‘if the agreements are declared binding, a portion of the total settlement payment will also be used to remunerate principal counsel for the legal services provided in litigating, negotiating and achieving the agreements’. In the *Converium* WCAM, counsel’s fees which corresponded to 20% of the total settlement amounts were ultimately judicially approved.⁴⁹⁷ Parties may however exclude such judicial control if they do not mention the conditions of payment of counsels’ fees within the content of their settlement

⁴⁹² J.B. WEINSTEIN, *supra* note 379.

⁴⁹³ These rules are contained in the National Internal Regulations (RIN), in the Act n°90-1259 of 31 December 1990, in the Act n°71-1130 of 31 December 1971 and the implementing decree n°91-1197 of 27 November 1991 (see also http://cnb.avocat.fr/Being-a-Lawyer-in-France-Professional-Regulations-the-Texts_a1739.html, accessed May 2014).

⁴⁹⁴ Article 11.3 RIN

⁴⁹⁵ F.WEBER and W.VAN BOOM, *supra* note 254.

⁴⁹⁶ I.TZANKOVA and J.KORTMANN, *supra* note 42 (mentioning a scandal involving a Dutch law firm where numerous plaintiffs were asked to pay a contribution of between 750 and 1500 Euros for the conduct of an hypothetical collective action).

⁴⁹⁷ *Converium* case, at point 7.45

agreements. This freedom left to parties to escape judicial scrutiny has been criticized by legal scholars. TZANKOVA and VAN LITH have argued that ‘on a more general level the question remains whether an explicit statutory provision with regard to the oversight of funding issues in mass disputes can be omitted and whether a legal system can afford to be entirely dependent on the competence and discretionary powers of individual judges deciding on a case whether or not pay attention to funding dynamics in mass claim disputes’.⁴⁹⁸

- *The English GLO and the Draft on Court Rules*

For matters of coherence, the two procedures are here jointly analysed because they do belong to the same legal system. English judges may intervene to avoid possible conflicts of interest and other opportunistic behaviours.⁴⁹⁹ Interestingly, proposed CPR 19.42 expressly indicates that judges may be in charge of controlling the amounts awarded as counsel’s fees.

- *The American Federal class action*

According to FRCP Rule 23 (h), the court must award ‘reasonable attorney’s fees’. To do so, judges can apply the so-called ‘lodestar method’ where awarded fees correspond to the number of hours that class counsels have spent on the case multiplied by a reasonable hourly rate taking, for example, into consideration the quality of the work performed. This technique has however been contested since the longer the case the more counsels are paid. Another technique is known as the ‘percentage-of-the-recovery method’ in which counsels’ fees depend on the amounts awarded as class’s recovery.⁵⁰⁰ A study conducted by FITZPATRICK has revealed that in 2006-2007 federal judges used the percentage-of-the-recovery method in nearly 70% of class actions lawsuits.⁵⁰¹

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⁴⁹⁸ I.TZANKOVA and H.VAN LITH, ‘Class Actions and Class Settlements Going Global: The Netherlands’, in: D.FAIRGRIEVE and E.LEIN (Eds.), *Extraterritoriality and Collective Redress*, 2012, Oxford University Press, p. 67-91

⁴⁹⁹ N.ANDREWS, ‘The New English Civil Procedure Rules (1998), in: C.H.VAN RHEE, *supra* note 120, pp. 161-181 (highlighting among patterns of opportunistic behaviours, a risk of settling meritorious cases for low amount in order to ensure lawyer ‘return on his investments’.

⁵⁰⁰ B.T.FITZPATRICK, ‘Do Class Action Lawyers Make Too Little?’, (158) *University of Pennsylvania Law Review*, 2010, pp. 2043-2083.

⁵⁰¹ B.T.FITZPATRICK, ‘An Empirical Study of Class Action Settlements and their Fees Awards’, (12) *Journal of Empirical Legal Studies*, 2010, pp.811-846.

3.6. RECAPITULATIVE TABLE- JUDICIAL INTERVENTION: MORE CONVERGENCES THAN DIVERGENCES

Once again, the underlying philosophy and the procedural design of these five proceedings differ. The French group action is based on a three-stage approach, the WCAM is a contractual agreement between parties, the English GLO is mainly a management tool left to judicial hands, and the US federal class action is built upon a key certification stage. Yet, *e pluribus unum*, there are similarities and convergences with regards to the scope of the required judicial intervention. The following table may be helpful to capture these convergences in a glimpse:

		France Group Action	Netherlands WCAM	UK (1) GLO	UK (2) Court draft	US Federal Class Action
	Texts	2014 Bill Reforming Consumer Law(Articles L.423-1 to L.423-19 Consumer Code)	Articles 7:907-910 Civil Code and Articles 1013-1018 Code of Civil Procedure	CPR 19 and Practice Directions 19B	Proposed CPR 19-16 to 19.18	US FRCP 23
	Specificities	three-step approach (group constituted after the declaration on liability)	Settlement agreement requesting a judicial approval	Flexible certification criteria	Strict certification stage	Strict certification stage
	THE COURT MUST ...					
WATCHDOG	Control the commonality of claims	Y	Y	Y	Y	Y
	Control the merits	Y	NB	NB	Y	NB
	Control the superiority of the proceeding	NB	N	Y	Y	Y
	Control the number of claimants	N	Y	Y	Y	Y
	Control the adequate representativeness of the representative entity	Y	Y	Y	Y	Y
	Control/establish the group's criteria	Y	Y	Y	Y	Y
	Can (if necessary) determine subgroups	Y	Y	Y	Y	Y
	Control/ensure the case good mediatization	Y	Y	Y	Y	Y
CATTLE DRIVER	Actively manage the case (with hearings, test cases or case management conferences)	Y	Y	Y	Y	Y
GOOD SHEPHERD	Approve final Mass Settlements	Y	Y	N	Y	Y
	Control intermediaries' fees	N	Y	Y	Y	Y

Y: Yes N: No NB: No But (flexibility in practice or issue currently debated)

Since convergences across these proceedings have been addressed at length, concluding remarks must be made regarding their divergences. Once again, important divergences remain between these proceedings. Even though the role of judges as watchdogs, cattle drivers and good shepherd appears significant in each of the five mass proceedings here analysed, each of them assigns to one of these functions a particular importance. Put simply, between the roles of watchdogs, cattle drivers and good shepherds, differences can remain concerning prioritization. The French group action focuses particularly on the role of judge-watchdog. The declaratory ruling on liability is viewed as a safeguard against potential abuses. GLOs emphasizes the role of judge-cattle driver. This mechanism indeed mostly remains a managerial tool. The Dutch WCAM focuses on the role of judge-good shepherd. Here again, the particular design of the proceeding – a contractual agreement reviewed by the court – is here the key explanation. Finally, the English Draft Court Rules and the American class action tend to address the three facets of the judicial intervention in a comparable manner. This first descriptive part now enables us to draw some general remarks about the key features of judging that are deemed necessary to efficiently deal with mass claims.

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3.7. CONCLUSION - WHAT KIND OF JUDGES DO POLICYMAKERS EXPECT TO RESOLVE MASS DISPUTES?

These developments have shown that the monitoring of mass disputes require judges to leave their comfort zone so as to perform tasks which may differ from their traditional practice. Among others, they must manage and spread information, ensure group's efficiency while respecting individuals' rights, channeling flows of money, monitoring long and complex cases, preserving companies reputation, ensuring that representative entities can be trusted, endorsing active roles, performing fiduciaries duties *vis-à-vis* absent or represented parties (specifically in opt-out mass proceedings), taming parties incentives, reviewing principal-agent problems or ensuring the fairness of mass settlements. As a matter of fact, it seems therefore that 'the implementation of any collective redress regime will impose greater

responsibility on the courts compared with traditional civil proceedings'.⁵⁰² In her inaugural lecture, professor STADLER raised an important question: what type of judges do we ultimately need to deal with mass litigation?⁵⁰³ These developments aim at proposing a possible response by sketching 'the mass litigation judge' (3.7.1). It ultimately appears that policymakers nowadays tend to expect *Herculean judges* to resolve mass disputes (3.7.2).

3.7.1. Sketching the Mass Litigation Judge

Mass litigation judges should be active and connected managers (*a*), pragmatic and innovative decision-makers (*b*) and be able to handle mass claims' variable geometry (*c*).

a) Judges Should Be Active and Connected Managers

The need for robust judges-manager is a salient characteristic of mass litigation judging common to all mass proceedings. This evolution was already carefully noticed by CHAYES in the 1970s when highlighting that 'the trial judge has increasingly become the creator and manager of complex forms of on-going relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation'.⁵⁰⁴ Reference to the term 'manager' is noteworthy. Associated with organization theory, this term usually describes the functioning and monitoring of companies. This notion is however not uncommon to the public sphere. The so-called new public management theories have indeed already deeply influenced the reform of administration in general and of Justice in particular.⁵⁰⁵ A brief outlook to the definitions that other disciplines give to the word *manager* inform us that a manager is a person able to *assist* and *cooperate* with parties, to *control* and

⁵⁰² C.HODGES and A.STADLER (Eds.), 'Introduction', in: C.HODGES and A.STADLER (Eds.), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013, pp.1-37.

⁵⁰³ A.STADLER, 'Collective Redress Litigation – A New Challenge for Courts in Europe', in: A.BRUNS (Ed.), *Festschrift für Rolf Stürner zum, 70. Geburtstag*, Mohr Siebeck, Tübingen, 2013, Teilband 2, pp.1801-1816.

⁵⁰⁴ A.CHAYES, *supra* note 468 (discussing the rise 'public law litigation' that he defines as 'lawsuit(s) [that do] not merely clarify the meaning of the law, remitting the parties to private ordering of their affairs, but (...) establishes a regime ordering the future interaction of the private parties and absentees as well') requires a new model of judging that ultimately departs from the traditional paradigm of adjudication').

⁵⁰⁵ The so-called *new public management* theories have deeply influenced the reform of the administration in general and of the justice in particular (see on this issue: G.PETERS, 'Nouveau Management Public (New Public Management)', in: L.BOUSSAGUET (Ed.), *Dictionnaire des Politiques Publiques*, Presses de Sciences Po – Références, 2010, pp. 398-404; For a point of view against the rise of 'managerial justice', see for instance G.SAINATI, 'Vers une Justice managériale?', in: W.PELLETIER and L.BONELLI (Ed.), *L'Etat démantelé*, La Découverte – Cahiers Libres, 2010, pp.129-138.

supervise their behaviour, and also – importantly – to *assume his leadership*.⁵⁰⁶ The judge-manager acts simultaneously as guide, support and arbiter. As said before, the active judge should also become ‘a connected judge’ able to use hardware and software and other new communication tools such as the internet to communicate efficiently with all parties involved.⁵⁰⁷ This point will further be discussed in the coming developments of this research.⁵⁰⁸ Such judicial activeness however raises two sets of questions.

The first regards its compatibility with the tradition of Civil Law judging. As previously observed, Civil Law judges are already prone to endorse active case management decisions *vis-à-vis* parties who are actually taking part to the proceeding. However, as CAPPELLETTI noticed, ‘Civil Law judges, typically bureaucratic ‘career judges’ are less suited than their American counterparts to handle a type of adjudication that reaches far beyond the parties present in the proceeding (...). The education and training of Civil Law judges, rooted in many layers of Civil Law history and in a rigid conception of separation of powers, makes them even more wary of too evident manifestations of law-making through the court’.⁵⁰⁹ Adding to this debate, others authors have also suggested that Common Law judges who are not bound by Codes would remain more innovative than their Civil Law counterparts who are principally trained to follow statutes.⁵¹⁰ Later in this research, the questionnaire conducted with French judges will be an interesting occasion to substantiate or to nuance such views.⁵¹¹

The second concerns the scope of such judicial activism. Active judging may indeed turn out to be problematic and require from judges enhanced vigilance. Active judges should notably avoid becoming activist judges. As pointed out by FALLA, PUTTEMANS and BOULARBAH, a conflict can arise between the need for active judging and ‘the risk that the judges perform an investigating role, shifting

⁵⁰⁶ In the field of human resources, HENRY and NOON note that a (staff) manager is ‘someone who assists and advises (...) in attaining (...) objectives’. Second, referring this time to sports, KENT stresses that a manager is ‘a person who is responsible for the leadership, coordination and control of a (...) team’ (M.KENT, *Oxford Dictionary of Sport, Sciences and Medicine*, 3rd ed., 2012). In the financial domain, MOLE and TERRY define the manager as the ‘senior participant in a transaction’ (P.MOLES and N.TERRY, *Handbook of International Terms*, Oxford University Press, 1999). Other definitions also portray managers as individuals ‘responsible for the control or direction of people, a department, or an organization’ (J.M.ROSENBERG, *Dictionary of Business & Management*, John Wiley & Sons Inc., 1995).

⁵⁰⁷ J.B. WEINSTEIN, ‘The Democratization of Mass Actions in The Internet Age’, (45) *Columbia Journal of Law and Social Problems*, 2012, pp. 451-471.

⁵⁰⁸ See Chapter 7.

⁵⁰⁹ M. CAPPELLETTI, *supra* note 3 (at p.676).

⁵¹⁰ P.H. SCHUCK, *supra* note 160, at p.975; J. G. FLEMING, ‘Mass Torts’, (42) *American Journal of Comparative Law*, 1994, n°3, pp.507-529.

⁵¹¹ See Chapter 6.

from being adjudicators to being investigating judges'.⁵¹² If active judging is necessary, judicial activism may however impair judicial impartiality. In practice, differences between active and activist judging may be difficult to draw. Active judging requires a high degree of trust in the judiciary from claimants and society at large.⁵¹³ In Central Europe and former socialist countries – notably Poland where the judiciary, for historical reasons, still suffers from a lack of trust and credibility among citizens,⁵¹⁴ notions like 'active judges' or 'enhanced judicial case management' may turn out to be problematic. Active judges should consequently be careful to remain accessible, prone to communicate with all claimants and subject to public scrutiny.

b) Judges Should be Pragmatic and Innovative Decision-Makers

Judges should behave as pragmatic decision-makers, and avoid being numbed by the number of people or the magnitude of mass claims. They must also find appropriate ways to deal with numerous claimants. While commenting on GLOs, Lord WOOLF highlighted that 'the need for imagination and creativity in dealing with such litigation is attested to by every judge who has tried such a case'.⁵¹⁵ POSNER defines as *pragmatic* a person who is fully aware of the practical consequences of his decisions,⁵¹⁶ or - in economic jargon - who weighs the costs and benefits of his choices. As the author interestingly further notices, 'the economist, like the pragmatist, is interested in ferreting out practical consequences rather than engaging in a logical or semantic analysis of legal doctrines'. In the framework of mass disputes, judges should remain fully conscious of the immediate effects of their decisions. Their choices may first have considerable financial implications. European and American scholars have therefore urged judges to 'no longer ignore the economic implications of their rulings'.⁵¹⁷ They may also considerably impact on case management. As HODGES observes about GLOs, 'in some types of case some [judicial] management issues can make

⁵¹² Report Powers of the judge, *supra* note 169.

⁵¹³ C.H. ODGES, *supra* note 56, at p.86 (observing that models which adopt 'a less prescriptive and rights-based approach (...) can only operate within the background of a legal system that has a high degree of confidence in its judges and ability to deliver fair and just outcomes').

⁵¹⁴ *Idem*, at p.85 (highlighting, about Poland, that there 'the debate was influenced by a desire to avoid giving judges increased discretion in view of the experiences of the previous Communist system in which judges were mistrusted and sometimes corrupt, and a current desire to prescribe procedure as fully as possible').

⁵¹⁵ WOOLF, *supra* note 260.

⁵¹⁶ R.A. POSNER, *Overcoming the Law*, Harvard University Press, 1995, 597 p. (see notably p.287-298); R.A. POSNER, *supra* note 7, specifically chapter 9 *Is Pragmatic Adjudication Inescapable?* pp.230-265.

⁵¹⁷ J. RESNIK, 'Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation', (48) *University of Pennsylvania Law Review*, 2000, pp.2119. From an European perspective, See S.AMRANI-MEKKI, 'La rengaine de l'action de groupe', *Gazette du Palais*, 8 September 2012, n°252, p.3.

the difference between the success and the failure of a case or a defence'.⁵¹⁸ Judges should thus be able to handle case management techniques, and importantly, should know how and when use them.

Two examples highlight the need for judicial pragmatism regarding case management. The first regards the definition of the group. A too-widely defined group may turn out to be unmanageable, can jeopardize the judiciary's efficiency and increase the risk of heterogeneity among claimants. Alternatively, a too-restricted group will undermine plaintiffs' access to justice and limit the deterrent effect of the proceeding.⁵¹⁹ In the United States, this last point has been highly discussed with regards to the participation of foreign claimants to American class action lawsuits.⁵²⁰ As BUSCHKIN summarizes, 'in order to protect the deterrent function of the class action device, the court must allow the maximum number of potential claimants', [but] 'those judges who prioritize deterrence (...) are permitting foreign claimants access to class action lawsuits despite the increased enforcement and procedural risks that foreign claimants may introduce'.⁵²¹

The second illustration regards the communication with potential claimants. As Judge WEINSTEIN already pointed it out, 'judges presiding over mass tort cases must carefully consider the utility and wisdom of communicating with the public'.⁵²² Similarly, in its 2013 recommendations on collective redress, the European Commission also highlighted that dissemination of information to claimants may turn out to be a challenging exercise.⁵²³ As already pointed out, judicial mediatization of mass disputes has an external function (informing all potential claimants of their rights to take part/to leave the proceeding) and an internal function (informing all potential claimants of their rights to be heard and to make objections). External democratization may however impair internal democratization of mass disputes. As WEINSTEIN observes, 'greater contact with large numbers adds complexity to the litigation'.⁵²⁴ An

⁵¹⁸ C. HODGES, *supra* note 56.

⁵¹⁹ R. VAN DEN BERGH, S. KESKE, A. RENDA, *supra* note 38.

⁵²⁰ Even though American courts tend to maintain a restrictive view on the participation of foreigners to US class actions (see for example the recent *Vivendi* case where European shareholders' claims against Vivendi were finally dismissed), some law and economics scholars have nonetheless considered that this generalized point of view as 'flawed' and argued for a more flexible approach (see notably L.S. SIMARD and J. TIDMARSH, *Foreign Citizens in Transnational Class Actions*, (97) *Cornell Law Review*, 2011, pp. 87-129).

⁵²¹ I.T.BUSCHKIN, 'The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, (1990) *Cornell Law Review*, 2005, pp. 1564-1599

⁵²² J.B. WEINSTEIN, *supra* note 159, at p.101.

⁵²³ Recommendations (EC), *supra* note 5 (pointing out: 'the dissemination methods [of information] should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court').

⁵²⁴ J.B.WEINSTEIN, *supra* note 159, at p.460.

example can be found with the Gulf Coast Claims Facilities created in the aftermath of BP's Deep Water Horizon explosion in 2010. As FEINBERG points out, 'as the magnitude of the claims increased, individual hearing become impractical [,] the ability to provide individual hearing and tailored one-to-one, face-to-face meetings with claimants was undercut by claims volume'.⁵²⁵

c) Judges Should be Able to Handle Mass Disputes' Variable Geometry

At a macro level, judges should be able to categorize and homogenise claimants fairly.⁵²⁶ At a micro level, they should also be able to scrutinise and take into account individualised claims. Mass justice in mass litigation should thus remain multi-layered. Depending on the particularities of the case at stake, judges should favour the collective *or* the individualized dimension of mass litigation. Put simply, judges should be able to balance the group's efficiency with a need to preserve claimants' individual rights. As an illustration, KRAMER highlights that in the *Dexia* case the Amsterdam court 'found it sufficient that the group *as a whole* had been served properly', whereas in subsequent WCAM cases, the court made 'extensive effort' to serve parties with unknown domiciles.⁵²⁷ Finding equilibrium between macro and micro levels will be a subtle exercise. As ALLEMEERSCH observes, 'the larger the class and the more dispersed it is, the higher the chances that that interests of minority groups will not be sufficiently preserved'.⁵²⁸ To fulfil this task, judges may not be helped by parties who rather will set forth polarised arguments. On the one hand, claimants will actively support the existence of a claimant group to benefit from economies of scale. Internally, claimants may however disagree with the parameters retained to shape the group. High-value plaintiffs may encourage restricted criteria in order to avoid their claims being mixed and averaged with low-value claimants. Conversely, low-value claimants may ask for more flexible and lower criteria in order to take benefit from the presence of high-value claimants.⁵²⁹ On the

⁵²⁵ FEINBERG, *supra* note 361 (the GCCF was established by the Obama administration and BP. The company agreed to pay 20 billion to compensate victims

⁵²⁶ W. VAN BOOM, *supra* note 120 (observing 'categorizing [plaintiffs] fairly and then deciding the case' turns out to be the key steps that judges must perform in the realm of mass litigation'. He further argues that 'the law tries to categorize individuals into groups in order to deal with the need for mass justice effectively and swiftly whilst providing an adequate level of individual'; see also I.GIESEN, 'De rol van de rechter in massaschade: aangepaste of partijautonomie? Een nota van een scepticus', *Nederlands Juristenblad*, 2128, 2007 (pointing out a 'customization at macro level' (translation from the author. In Dutch: 'maatwerk op macroniveau).

⁵²⁷ X. KRAMER, *supra* note 249, at pp.88-89 (emphasis added).

⁵²⁸ B. ALLEMEERSCH, 'Transnational Class Settlements – Lessons from Converium', in S.WRBKA, S.Van UYTSEL and M.SIEMS (Eds), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests*, Cambridge University Press, 2012 pp.364-384, at p.381.

⁵²⁹ *Idem* (observing: 'plaintiffs' attorneys with large number of cases will likely to increase the size of the group and diminish the distinguishing variables to obtain the benefits of the economy of scale achieved by the procedure').

other hand, defendants have an interest in a ‘balkanization of the group and the diminishment of group typicality’.⁵³⁰ They will therefore argue that individual issues tend to prevail over common one.⁵³¹ Since the size of the group is obviously cornerstone for the management and the resolution of mass cases, some scholars have been a step forward and proposed to let judges defining in each case an ‘optimal class size’ . In this view, they have suggested to make the optimality of class size a relevant consideration that should guide the judicial certification of class action lawsuits.⁵³²

3.7.2 Mass Litigation Judge or Revisiting the *Herculean Judge* Model

Legal doctrine is often prone to borrow tools and concepts from mythology to canvass the different facets of legal decision-makers.⁵³³ Hercules is known for his incredible strength and intelligence used to fulfil his legendary labours. In the seventies, DWORKIN used the image of the Herculean judge to describe the way judges should ideally behave and to depict the great expectations falling on their shoulders. The Herculean judge, OST further highlighted, is everywhere, carries out his missions efficiently and behaves as a ‘social engineer’.⁵³⁴ Adding to this edifice, OST suggested the model of the judge-Hermes. In Ancient mythology, Hermes was the god of transitions, an intercessor, a messenger and a platform between other gods and humans, two worlds between which he could freely navigate so as to facilitate a mutual communication.⁵³⁵ These two mythological figures are today instructive to understand the missions

⁵³⁰ A.D.LAHAV, *supra* note 444.

⁵³¹ See: WOOLF, *supra* note 260 (pointing out: ‘the positions of claimants and defendants appear inevitably to become polarized over strategy: the claimants’ wish to broadly focus on the common or generic issues, the defendants’ wish to identify and investigate each individual case’).

⁵³² D.BETSON and J.TIDMARSH, ‘Optimal Class Size, Opt-Out Rights, and “Invisible” Remedies’, (79) *George Washington Law Review*, 2011, pp.542-576 (proposing ‘in deciding whether to certify a particular class, and in deciding which among numerous competing classes to certify, a court should make optimal class size a relevant consideration’, at p.568).

⁵³³ R.DWORKIN, *Law’s Empire*, Belknap Press, 1986; P.MALAUZIE, ‘La Mythologie et le Droit’, *Deffrénois*, 15 August 2003, n°15, p.951.

⁵³⁴ F.OST, ‘Jupiter, Hercule, Hermès : Trois Modèles du Juge’, in : P.BOURETZ (Ed.), *La Force du Droit*, Ed.Esprit, 1991, pp.241-272 (in French : ‘on retiendra ici l’appellation d’Hercule, particulièrement bienvenue pour designer ce juge demi-dieu qui s’astreint à d’épuisants travaux de justicier et finit par porter le monde sur ses bras tendus, p.243 ; ‘Hercule est présent sur tous les fronts : il tranche et adjuge encore, comme le faisait son prédécesseur qui s’abritait derrière l’ombre du code ; mais il s’acquitte aussi bien d’autres travaux/ Au pré-contentieux il conseille, il orient, il prévient ; au post contentieux il suit l’évolution du dossier, il adapte ses décisions au gré des circonstances et des besoins ; il contrôle l’application des peines. Le juge jupitérien était homme de loi, Hercule quant à lui se dédouble en ingénieur social (p.250).

⁵³⁵ *Idem* (claiming – in French - : ‘le juge HERMES toujours en mouvement, (...) est à la fois au ciel, sur la terre, et aux enfers. Il occupe résolument l’entre-deux des choses ; il assure le passage des unes aux autres. dieu des

falling on judges in mass litigation. As the judge-Hercules, judges have been assigned great responsibilities when monitoring mass disputes. Expectations from all stakeholders are high. As the judge-Hermes, judges should facilitate communication between all parties and ensures a dialogue between the private interests of interested parties and the public interest of society. As Justice PARKER has expressed it, 'litigants and the public rightfully expect the courts to be problem solvers'. The problem is that judges are neither gods nor half-gods, but merely simple human beings.⁵³⁶ There may thus be limits to what judges can effectively do.⁵³⁷ Using economic theories - namely rational choice theory and behavioural economics - the coming chapters will be dedicated to understand how judges, as human beings, may in practice deal with mass claims.

marchands, il préside aux échanges psychopompes, il relie les vivants, et les morts, dieu des navigateurs il force des passages inconnus. Hermes est le médiateur universel, le grand communicateur', at p.244).

⁵³⁶ Also cited in R.G.BONE, *supra* note 460.

⁵³⁷ *Idem*

WHAT DO JUDGES WANT? JUDICIAL INCENTIVES IN MASS LITIGATION

Questioning Judicial Attitudes from a Rational Choice Theory Perspective

‘All those who deceive themselves into the belief that they put anything but their own personalities into their work are dupes of the most fallacious of illusions. The truth is that we can never get outside ourselves’.

A. FRANCE*

4.1 INTRODUCTION

While commenting on the considerable burdens falling upon American judges when they deal with mass claims, PETERSON and SELVIN have observed that judges cannot on such circumstances simply be seen as ‘disinterested administrators of justice’, but should rather be viewed as ‘deeply interested participants’.⁵³⁸ In the same vein, MC GOVERN further argues that judges monitoring class action lawsuits leave their role of external and neutral managers to ultimately act as restless ‘players’.⁵³⁹ KONIAK and COHEN finally add that ‘although the court has no monetary interest in the [class action] settlement, its interests are not perfectly aligned with the interests of class members’.⁵⁴⁰ Interestingly, these different insights challenge the traditional views of judges behaving as mere neutral umpires, and conversely point out the likelihood of strategic judicial behaviour.⁵⁴¹ They invite us to further investigate

*A. FRANCE, *On Life & Letters: 1st Serie*, 1922, at p.9.

⁵³⁸ M. SELVIN and M.A. PETERSON, ‘Mass Justice: The Limited and Unlimited Powers of Courts’, (54) *Law & Contemporary Problems*, 1991, n°3, pp.227-247.

⁵³⁹ F. MC GOVERN, ‘An Analysis of Mass Tort for Judges’, (73) *Texas Law Review*, 1995, pp.1821-1845 (at p.1839).

⁵⁴⁰ S.P. KONIAK and G.M. COHEN, ‘Under Cloak of Settlement’, (82) *Virginia Law Review*, 1996, n°7, pp.1051-1280.

⁵⁴¹ A.GARAPON and I.PAPADOPOULOS, *supra note 12*, at p.231.

the complex issue of judicial incentives in order to better understand what judges may want to achieve in the context of mass disputes.

4.1.1 Where Are We?

The preceding chapter shed light on the expectations that different legislatures have placed on judges' shoulders for the conduct of socially efficient mass proceedings. Theoretically, judges should behave as active and pragmatic watchdogs, cattle drivers and good shepherds helping minimize mass litigation's costs while ensuring its benefits. Judges dealing with mass litigation were ultimately compared to the figure of the 'Herculean judge' who has been assigned titanic tasks by society. Yet, as suggested by Judge EASTERBROOK, 'much of the judge- centred scholarship in contemporary law schools assumes that judges have the leisure to examine subjects deeply and resolve debates wisely'.⁵⁴² Less consideration has been given to judges' incentives to efficiently fulfil their tasks. From a Law and Economics perspective, the analysis therefore remains incomplete, and specific attention must be given to judges' incentive structure.⁵⁴³

4.1.2. Methodology & Objectives – The Rational Choice Theory

The methodology used in this chapter is based on the rational choice theory. Rational approaches to judges and court organization and their associated attempts to clarify judges' incentives have been extensively used by Law and Economics scholars since the 1990s. Following POSNER's assumptions aimed at understanding *what judges want*, the critical starting hypothesis is that judges act as rational and interested individuals. Responding to incentives as all other human beings do,⁵⁴⁴ they have a utility function which includes a set of preferences (referred to as 'arguments') that they seek to maximize under constraints. Considering the judiciary in this light presents two advantages. First, it allows the observer to lift a bit the legalistic curtain which traditionally shadows judicial behaviour. Second, it helps formulating hypotheses

⁵⁴² F. EASTERBROOK, 'What's so special about judges?', (61) *University of Colorado Law Review*, 1990, pp.773-782.

⁵⁴³ K. ZAJCZ and M. KOVAC, 'What Do the European Judge Strive For – An Empirical Assessment', *International Journal for Court Administration*, April 2011 (deploring the lack of consideration of policy-makers for the incentives of its agents).

⁵⁴⁴ E. MACKAAY, *Law and Economics for Civil Law Systems*, Edward Elgar Publishing, Cheltenham, 2013 (see notably pp.35-50).

and predictions about judicial intervention.⁵⁴⁵ From a methodological perspective, a key issue remains to decide whether it is possible to apply economic theories – such as rational choice theory – to non-market behaviour, such as that of judges. On the one hand, the market is undeniably the basic and natural analytical framework of economics and transplanting its assumptions beyond its original scope could at first sight be questionable. On the other hand, economics have nowadays also been portrayed as an ‘imperialist science’⁵⁴⁶ whose methodologies have progressively extended far beyond their initial areas of study. They are applied to various fields and topics, including politics, sociology and – more crucially for this research - Law. Law and Economics scholars are therefore reluctant to draw a formal barrier which separate market from non-market behaviour.⁵⁴⁷ Defending the view that elements of rationality may exist in every human decision,⁵⁴⁸ they follow the assumption of the Nobel Prize Laureate BECKER who argued that ‘the economic approach is a comprehensive one that is applicable to all human behaviours’.⁵⁴⁹ What ultimately distinguishes economics from other social sciences is not the object of study but the method. Even though there may be possible limitations to the use of rational choice theory when applied to judicial behaviour,⁵⁵⁰ the use of the *homo economicus* is not intended to depict – or to describe - how individuals will always behave, but rather to predict how they *could* rationally behave in a given set of circumstances. In simple words, rational choice is not about correct or real descriptions or explanations, but about predictions.⁵⁵¹ Thereby, the *homo economicus* echoes WEBER’s ideal-type whose main added-value

⁵⁴⁵ S.D.R. STRAS, ‘Incentives Approach to Retirement’, (90) *Minnesota Law Review*, 2006, n°5, p.1417 (observing: ‘one of the major advantage of the rational choice approach is that it does not rule out the possibility that judges are motivated by goals other than policy’).

⁵⁴⁶ G. STIGLER, ‘Economics: The Imperial Science’, (86) *Scandinavia Journal of Economics*, 1984, pp.301-313.

⁵⁴⁷ R.A. POSNER, *The Economics of Justice*, Harvard University Press, 1981, at p.2 (claiming: [it is] ‘implausible and counterintuitive the view that the individual’s decisional processes are so rigidly compartmentalized that he will act rationally in making some trivial purchase but irrationally when deciding to go to law school or get married or evade income taxes or have three children rather than two or prosecute a lawsuit’).

⁵⁴⁸ K. POPPER, *The Poverty of Historicism*, Routledge & Kegan Paul, London, 1972, 6^e Ed., at p.140 (considering that ‘in most social situations, if not all, there is an element of rationality; (...) human beings hardly ever act quite rationally’). See also A.SMITH, *Theory of Moral Sentiments*, 1759, p.304 (suggesting already that human beings tend to behave as self-interested individual, noticing notably that ‘we are not ready to suspect any persons of being defective in selfishness’).

⁵⁴⁹ G.S. BECKER, *The Economic Approach to Human Behaviour*, University of Chicago Press, 1976 (at p.8).

⁵⁵⁰ R. SMYTH, ‘Do Judges Behave as Homo Economicus, and if so, Can We Measure their Performance? An Antipodean Perspective on Tournament of Judges’, (32) *Florida State University Law Review*, 2005, pp.1299-1330 (questioning whether the Homo Economicus could possibly be ‘a distorted lens through which to view judicial behaviour’); see also L. MONTADA, ‘Justice: Just a Rational Choice?’, (11) *Social Justice Research*, 1998, n°2, pp.81-101.

⁵⁵¹ L.T.VISSCHER, ‘The Duty of Lawyers to Serve Their Clients’Interests – An Economic and Psychological Account’, *RILE Working Paper Series*, 2014/03 (echoing FRIEDMAN’s seminal paper ‘The Methodology of Positive Economics’ -in: *Essays in Positive Economics*, University of Chicago Press, 1966, pp.3-16- who, as early as 1966, observed that ‘the relevant question to ask about the "assumptions" of a theory is not whether they are

remains to help formulate hypotheses, even though, ‘in its conceptual purity’, this model of man cannot obviously be found anywhere.⁵⁵² Importantly, its use has conducted scholars to make throughout last decades key findings with respect to judicial behaviour which are worth here investigating.⁵⁵³

From an historical perspective, the Law & Economics literature on judicial behaviour has been strongly influenced by the early works of US Legal Realists who, at the beginning of the twentieth century, proposed alternative views for looking at judicial behaviour. In those days, the economic approach to the judiciary is still often considered as a controversial issue.⁵⁵⁴ Legal scholars are indeed usually sceptical *vis-à-vis* attempts aimed at desacralizing a legal institution such as the judiciary,⁵⁵⁵ or at highlighting the extra-legal factors influencing judicial decision-making.⁵⁵⁶ By no mean is this chapter intended to seek any form of reconciliation between economists and lawyers on this point. However - and as restlessly

descriptively "realistic," for they never are, but whether they are sufficiently good approximations for the purpose in hand’); see also: A.M. PACCES and L.T. VISSCHER, ‘Law & Economics – Methodology’, in: B. VAN KLINK and S. TAEKEMA, *Interdisciplinary Research into Law*, 2011, Berlin: Mohr, pp.85-107; H. KERKMEESTER, ‘Methodology: General’, *Encyclopedia of Law & Economics*, 1999.

⁵⁵² M. WEBER, ‘The Area of Economics, Economic Theory and the Ideal Type’, in: M. WEBER, *Essays in Economic Sociology* (Ed. by R. SWEDBERG, Princeton University Press, 1998, pp.242-248); see also N. GIOCOLI, *Modeling Rational Agents*, Edward Elgar Publishing, 2003 (observing that the ideal-type is aimed at ‘offer[ing] guidance to the construction of hypotheses [even though] in its conceptual purity, this mental construct cannot be found empirically anywhere’, at p.58).

⁵⁵³ S.D.R. STRAS, *supra* note 545; R. EPSTEIN, ‘Independence of Judges, the Use and Limitations of Public Choice Theory’, (1990) *Brigham Young University Law Review*, 1990, n°3 (observing that ‘self-interest may not be the whole truth, but it is a large part of the truth nonetheless, too big for any theory to ignore’).

⁵⁵⁴ G.S. BECKER, *supra* note 549, at p.169 (remembering in the 1970s that ‘the application of the economic approach to fertility, marriage, employment, and other interaction among family members continues to encounter open hostility. When [the paper suggesting] at a conference on population that children could be treated as durable consumer goods, it was greeted with derision by many participants’, before observing that afterwards many papers followed a similar approach’).

⁵⁵⁵ G. CALVES, ‘Mieux connaître les contentieux de masse: l’apport des travaux sociologiques’, *Revue Française de Droit Administratif*, 2011, p.477 (while commenting on the insights drawn from sociological works on the functioning of judiciaries, the author observes that judges are envisioned as mere normal workers. Therefore, she adds, ‘from the point of view of lawyers, this conclusion is fundamentally embarrassing (...), it contributes to objectivize, desacralize and to modify the perceptions that are traditionally held (translation from the author. In French: ‘pour nous autres juristes, cette conclusion est fondamentalement désagréable (...) elle objectivise, désacralise, relativise’), also on this point: H.-B. SCHAEFER and C. OTT, *The Economic Analysis of Civil Law*, Edward Elgar Publishing, 2005 (particularly Chapter 4: ‘Rationality and Economic Behaviour’).

⁵⁵⁶ M. DEMERGUE, ‘Des influences sur les jugements des juges’, Symposium organised by the French Senate *L’office du juge*, 29 Septembre 2006, p.371, available on www.senat.fr/notice-rapport/2005/office_du_juge-notice.html, accessed 15 May 2013 (pointing out that ‘envisager l’existence d’influences peut signifier que l’objectivité de leur jugement en droit est remise en cause et que leur subjectivité peut l’emporter sur l’application des règles de droit. De ce fait, l’étude des influences est un sujet qui dérange : oser évoquer la raison d’Etat, la défense de certaines valeurs, l’utilité économique et sociale, voire la pression des groupes d’intérêts n’est pas de bon aloi’).

ascertained by Law and Economics scholars - lawyers can take benefit from economic insights, as well as economists can find in the expressed legal concerns a way to enrich their analysis.⁵⁵⁷

4.1.3. The Chapter in a Nutshell

In essence, the objectives of this chapter are twofold. The first is to introduce readers to the economics of the judiciary on a broader scale, taking notably into account differences between the American judiciary—upon which most of the Law and Economics literature is built— and Continental judiciaries. Importantly, the category ‘Continental judiciaries’ encompasses different types of European judiciaries whose structures and organizations may each time strongly diverge. Without denying their own particularities, this chapter deliberately maintains a higher level of analysis. When focusing on their convergences while leaving aside their divergences, it is assumed that judiciaries belonging to a same legal tradition may share a common ground of principles and values.⁵⁵⁸ Hence, for matters of clarity, the American judiciary is viewed as representative of the Common Law tradition and Continental judiciaries as representative of the Civil Law tradition. Further distinctions within these two categories will timely be addressed. From this broad initial picture (4.2), the analysis is then narrowed down to the economics of the judiciary involved in mass litigation which remains to this day an angle still overlooked in the literature (4.3). The principal objective of this chapter will be to shed light on the incentives structure of judges when dealing with mass claims, and to show that judges’ rational attitudes may ultimately depart from policymakers’ expectations and importantly influence the outcomes of mass disputes. In doing so, the chapter is aimed at shedding alternative lights on the work performed by judges when monitoring mass claims. Final remarks conclude this chapter (4.4).

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⁵⁵⁷ R. COOTER and T. ULEN, *Introduction to Law & Economics*, AddisonWesley Longman, 3rd ed., 2000, pp.4-7

⁵⁵⁸ A. GARAPON and I. PAPADOPOULOS, *supra* note 12, p.49.

4.2. ECONOMICS OF THE JUDICIARY – ANOTHER WAY OF LOOKING AT JUDGES

Since the topic could be unknown to (Continental) legal scholars, and is still relatively under-developed in the work of (European) economists, this first part is intended to introduce and familiarize readers to the economic approach of the judiciary. This step turns out to be necessary before narrowing down the analysis to the behaviour of judges involved in mass litigation.

The rest of this section is divided as follows: the preliminary remarks describe the shift of paradigm operated by the economic approach which – as opposed to the legal tradition – considers individuals involved in the litigation process as interested participants. These introductory comments are an opportunity to introduce readers to basic notions of economics such as *rationality*, *self-interest*, and *maximization* which lie at the core of this chapter (4.2.1); the analysis then goes a step further by considering the peculiarities of judicial incentives. Particular attention is given to the doctrinal roots of the economic approach to judges and to challenges faced by economists. The arguments composing the judges' utility functions – notably in the European context - are ultimately discussed (4.2.2). Preliminary conclusions follow (4.2.3).

4.2.1. Preliminary Remarks - Alternative Views on the Litigation Process:

Disinterested v. Interested Protagonists

Legal and economic approaches suggest two different views on the behaviour of actors involved in the litigation process, namely judges and lawyers. Whereas legal scholars traditionally consider these protagonists as being immune to self-interest (*a*), the economic approach conversely suggests that - like every human being - they may behave in rational and interested ways (*b*). The example of lawyers is used as a first ice-breaking example (*c*). Unsurprisingly, this shift of assumptions from disinterested to interested participants has important economic implications (*d*).

a) Legalism or 'The Legal Candour' - a Focus on Disinterested Participants

The traditional legal approach (hereafter referred to as *legalism*)⁵⁵⁹ is rooted in the well-known assumption that the litigation process is conducted and monitored by disinterested individuals. Judges are docile

⁵⁵⁹ Literature sometimes refers to the term 'formalism' (see R.A.POSNER, *supra* note 7, pointing out: 'formalism is the conventional, one might say, the official conception of the judicial role', at p.1051).

agents of the Law and of their legislatures. Lawyers in turn behave as faithful representatives of their clients. Both have no preferences and take no decision other than the one dictated by their principals.

➤ *Denying judges' Personality*

In the Federalist Paper n°78, HAMILTON asserted in 1788 that judges have neither preference nor 'force [or] will, but merely judgement, and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgement'. At the same period, a similar viewpoint was spearheaded in Continental Europe where –under the impulse of the French Revolution – the question of the judges' personality was simply 'denied',⁵⁶⁰ their role being confined to the one of automatons applying the rule of law previously voted upon by the sovereign people through the voice of its representatives (the so-called *bouche de la loi*). Any attempt to tackle the issue of judge's personality and preferences was viewed as a threat likely to overthrow and challenge the will of the People, and therefore fiercely rejected.⁵⁶¹ As importantly pointed out by EHRLICH in 1903, 'the very peculiarity of the judicial office is the assumption that the judge's utterance represents, not his personal opinion but the law [which can be found primarily] in the legal records of the past, in statutes, in decisions of courts, in legal literature'.⁵⁶² Such a denial of judicial personality has remained particularly striking in Continental Europe where judges are usually viewed as anonymous civil servants who are part of a broader administration.⁵⁶³ The judge - as an individual - simply does not exist and fully disappears behind the institution to which he belongs. The situation is different in Common Law countries where judges are nominally identified in their judgments, and may express their personal views through, for example, the use of dissenting opinions. As further explained, these institutional differences will also matter from an economic point of view.

⁵⁶⁰ A. GARAPON and I. PAPADOPOULOS, *supra* note 12.

⁵⁶¹ J. KRYNEN, *L'Etat de Justice en France, XIIIe-XXe siècle – L'Emprise Contemporaine des Juges*, Bibliothèque des Histoires, NRF – Gallimard, 2012, p.3 (reporting the words attributed to BOUCHOTTE and pronounced during the French Revolutionary period: 'on ne saurait trop répéter aux juges qu'ils ne sont que des organes de la loi et qu'ils doivent se taire quand elle n'a pas parlé').

⁵⁶² E. EHRLICH, 'Judicial Freedom of Decision: Its Principles and Objects', in: E. BRUNCKEN and L.B. REGISTER (Eds.), *Science of Legal Method: Selected Essays by Various Authors*, Boston, The Boston Book Company, 1917, Chapter 2.

⁵⁶³ A. GARAPON and I. PAPADOPOULOS, *supra* note 12 (see in particular : Chapter 6 'Le Juge Arbitre ou Enquêteur').

➤ *Lawyers as Candid Legal Advisers*

When shifting from judges to lawyers, the candour required from attorneys when representing their clients is also noteworthy.⁵⁶⁴ Ethics and rules of professional conduct strongly emphasize a duty to ‘render candid advice’, to behave as disinterested agents,⁵⁶⁵ fully devoted to their clients⁵⁶⁶ and ultimately carrying work ‘that [they] would not [have performed] for [themselves].’⁵⁶⁷ Anecdotal evidence from the French lawyering tradition is illustrative. For example, French lawyers were traditionally not paid for the work performed. Their fees depending on client’s satisfaction were compared to ‘a spontaneous donation in recognition of their work’.⁵⁶⁸ The notions of devotion and impartial judgement underlying the work of lawyers and judges have interestingly led several authors to draw parallels between the legal profession and religion.⁵⁶⁹ Both legal and religious oaths require from their agents a full commitment and sacerdotal vocations which would distinguish them from their fellow counterparts. Yet, the legal standpoint which

⁵⁶⁴ L.G. LERMAN, ‘Lying to Clients’, (138) *University of Pennsylvania Law Review*, 1990, n°3, pp.659-760; J. LADINSKI, ‘The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients’, (11) *Law & Society Review*, n°2, 1976, pp.207-223.

⁵⁶⁵ A.G. CAMUS, *Lettres sur la profession d’avocat*, 5^E Ed, Bruxelles Librairie de Jurisprudence de H.Tarlier, 1833 (notably chapter 18 : ‘Le désintéressement embrassé par les avocats s’étend jusqu’à interdire toute action pour le paiement de leurs honoraires, jusqu’à refuser même de reconnaître pour confrères ceux qui retiendront sous ce prétexte des pièces ou des titres’).

⁵⁶⁶ According to the Code of Conduct of the French Bar Association: ‘L’avocat exerce ses fonctions avec dignité, conscience, indépendance, probité et humanité, dans le respect des termes de son serment. Il respecte en outre, dans cet exercice, les principes d’honneur, de loyauté, de désintéressement, de confraternité, de délicatesse, de modération et de courtoisie. Il fait preuve, à l’égard de ses clients, de compétence, de dévouement, de diligence et de prudence (règle 1.3- www.cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN_a281.html#1 (accessed 5 March 2013) ; Similarly, see also Rule 5 Code of Conduct of the Dutch Bar Association.

⁵⁶⁷ C. FRIED, ‘The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation’, (85) *Yale Law Journal*, 1976, n°8, pp.1060-1089.

⁵⁶⁸ A.G. CAMUS, *supra* note 565 (L’honoraire est alors vu comme ‘un don spontané de la reconnaissance du client’; see also A. STEFF, ‘Les Contestations en Matière d’Honoraires d’Avocats’, Report for the French Court of Cassation, 1999, available www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/antoine_steff_5799.html (accessed 7 April 2013).

⁵⁶⁹ A. GARAPON, J. ALLARD and F. GROS, *supra* note 17 (observing that historically the act of judging was viewed as ‘a judicial miracle’); Relatedly, A.LUCIEN, ‘Staging and the Imaginary Institutions of the Judge’, (23) *International Journal for the Semiotics of Law*, 2010, pp.185-206 (highlighting that ‘according to the classical paradigm of the judicial act, the Courthouse is a temple and the hearing is a ceremony’); W.F.MURPHY, *Elements of Judicial Strategy*, University of Chicago Press, Chicago & London, 1965, p.13 (emphasizing that ‘the cult of the robe, the concept of the judge as a high priest of justice with special talents for elucidation of the law, that sacred and mysterious text which is inscrutable even to the educated layman, forms a sort of institutional charisma which is bestowed on judges with their oath of office’).

simply considers judges and lawyers as altruistic agents has been challenged, and is often nowadays regarded as misleading.⁵⁷⁰

b) The Economic Approach- a Focus on Rational and Self-Interested Protagonists

While adopting an approach diametrically different, the economic analysis has tried to provide some insights through the legal smokescreen. To do so, economists have posited that participants are *rational* individuals pursuing their *individual interest*. For matters of clarity, these two basic terms are hereafter briefly clarified.

➤ Defining ‘Rationality’

In common language, individuals are said to *behave rationally* whenever their actions and decisions are ‘based on or [are] in accordance with reason or logic’.⁵⁷¹ Rational behaviour can principally be envisaged as being goal-oriented.⁵⁷² In this view, one may envisaged different ways for looking at rational behaviours.⁵⁷³ An act can first be regarded as rational if it serves to achieve the person’s immediate goal(s). It may also be considered as rational if it serves the individual’s long-term objective(s) or value(s). As a consequence, a course of action might be regarded as irrational from the point of view of an external observer who does not necessarily share the same values or the same objectives. As a matter of fact, this induces a second key question concerning the criteria through which rationality should ultimately be weighed.⁵⁷⁴ However, in order to avoid the meanders induced by an in-depth definition of rationality,⁵⁷⁵

⁵⁷⁰ A.GARAPON, J.ALLARD and F.GROS, *supra note 17* (in French : ‘on imagine aisément que ce mythe ne correspond pas à la réalité de la pratique judiciaire. On peut même se demander si, par une ruse de la raison, ce déni positiviste n’est pas devenu une cachette du pouvoir réel qu’exerce le juge. Ce dernier doit prendre un ton modeste même quand il innove. Pour régler – ou du moins apurer considérablement – les rapports entre le pouvoir exécutif et la justice, il faut prendre nos distances à l’égard du positivisme juridique qui est devenu plus un problème qu’une solution’, at p.2).

⁵⁷¹ *Oxford Dictionary*, entry: ‘rational’.

⁵⁷² H.-B. SCHAEFER and C. OTT, *supra note 555* (suggesting that ‘the most elementary definition would be the one that defines rationality in terms of purposeful choices’).

⁵⁷³ H. KHATCHADOURIAN, ‘What is Rationality?’, (24) *Theoria*, 1958, n°3, p. 172

⁵⁷⁴ H.A. SIMON, *Administrative Behavior - A Study of Decision-Making Processes in Administrative Organizations*, The Free Press, 1997, 4th Ed., see notably pp.84-85 ‘Definitions of Rationality’.

⁵⁷⁵ *Idem* (observing: ‘in terms of what objectives, whose values, shall rationality be judges? Is behavior of an individual in an organization rational when it serves his personal objectives, or when its serves the organizational objectives? Two soldiers sit in a trench opposite a machine-gun nest. One of them stays under cover. The other, at the cost of his life, destroys the machine-gun nest with a grenade. Which is rational?’).

the solution here retained is to maintain a higher level of analysis by considering an attitude as rational whenever individuals ultimately seek to achieve their goals in a coherent manner,⁵⁷⁶ meaning that they ultimately '[employ] the available means to achieve [their aims] in such a way that the means are used with the least possible waste'.⁵⁷⁷

➤ *The Self-Interested Man Model and its Controversies*

The *interested individual* assumption which traditionally characterizes the *homo economicus* has been a source of numerous misunderstandings. The notions of *interest* or *self-interest* have often been confused with moral or value judgments. Seen as avatars of egoism or selfishness - both attributes to which no one is unsurprisingly eager to be associated with - this assumption has been fiercely rejected,⁵⁷⁸ notably by non-economists.⁵⁷⁹ Yet, when defending the *homo economicus*, KIRCHGAESSNER suggests that this latter 'might [nonetheless] not be so unpleasant'.⁵⁸⁰ Modifying our perception of the *homo economicus* nevertheless requires two preliminary steps. First, it is essential to disentangle *the homo economicus* - and its associated individual interest- from any moral connotation. The assumption of interested individuals should rather be considered as being essentially neutral. Arguing therefore that individuals pursue their individual interest simply means that they seek to achieve their own goals. The assumption does not prejudge what these objectives are.⁵⁸¹ Second, the fact that individuals seek their personal advantages is presumably a trait of human nature. A possibility is then to simply ignore this reality; another is to avoid blaming this behaviour and to incorporate it into the analysis.

⁵⁷⁶ I. GILBOA, *Rational Choice*, MIT Press, 2010, 176 p

⁵⁷⁷ H.-B. SCHAEFER and C. OTT, *supra note 555*, at p. 52

⁵⁷⁸ G. KIRCHGAESSNER, *Homo Oeconomicus: The Economic Model of Behaviour and Its Applications in Economics and Other Social Sciences*, Springer, 2008, pp.11-58 (pointing out that 'self-interest and especially selfishness is generally not considered to be a positive character quality, which makes understandable that many people refuse to accept this quality as a general behavioural assumption. After all, we should be able to recognize ourselves in such an economic model of behavior, and we do not like to see ourselves too unpleasantly').

⁵⁷⁹ H.-B. SCHAEFER and C. OTT, *supra note 555*, at p.55 (stressing that 'this model of man is obviously one that can create a stir among non-economists who are unaware of the reason for this particular set-up, finding strong egoism to be either morally repugnant or blatantly unrealistic').

⁵⁸⁰ C. KIRCHGAESSNER, *supra note 578*.

⁵⁸¹ H.-B. SCHAEFER and C. OTT, *supra note 555*, at p.54.

c) The Economic Approach of Lawyering as *Ice-Breaking* Example

The choice is here made to briefly address the case of lawyers as *ice-breaking* example and as a way to familiarize readers with the methodology employed in this chapter.⁵⁸² The following developments shed some light on the arguments that rational and interested lawyers may seek to maximize.⁵⁸³ They are principally twofold: financial and non-financial incentives.

➤ *Lawyers' financial incentives*

The first argument of lawyers' utility function is financial. Lawyers seek to maximize the financial return of their caseload while working under the pressure of many and potentially conflicting deadlines. Since monetary incentives are usually considered to play a key role in lawyers' behaviour, the structure of their fee arrangements has a significant impact on their work, and more specifically on their level of exerted effort, on their incentives to sue or to early settle cases, or on their effort to filter and screen weak and low-quality claims. Empirical works discussing divergences between hourly-paid lawyers and contingency fees lawyers are on this point illustrative.

KRITZER, FELSTINER, SARAT and TRUBEK found evidence that civil lawyers paid on a contingency fees basis put in less effort for the conduct of small cases (i.e. cases whose amount at stake is below US\$6,000) than hourly-paid lawyers. Conversely, they observed that the amounts of time and effort devoted by contingency fees lawyers tended to increase for the conduct of big cases.⁵⁸⁴ These findings substantiate the theoretical predictions: contingency fees lawyers who are paid only if the lawsuit is successful exert more effort as long as the expected benefits associated with an additional hour of work outweigh the expected costs that they ultimately have to bear. In other words, contingency lawyers tend to work harder as long as *the game is worth the candle*, i.e. for the conduct of cases where higher amounts are at stake. Additionally, an empirical research conducted by STEPHEN, FAZIO and TATA focusing this time on behaviours of criminal defence lawyers involved in plea bargaining procedures sheds some light on lawyers' responses to economic incentives. Taking as starting point changes that occurred in the

⁵⁸² L.T. VISSCHER, 'The Duty of Lawyers to Serve Their Clients' Interests – An Economic and Psychological Account', *RILE Working Paper Series*, 2014/03, January 2014.

⁵⁸³ The term *maximization* here means that, from a set of different alternatives, lawyers ultimately choose the one(s) that brings them the highest satisfaction at the lowest costs.

⁵⁸⁴ H.M.KRITZER, W.L.F.FELSTINER, A.SARAT, D.M.TRUBEK, , 'The Impact of Fee Arrangement on Lawyer Effort', (19) *Law & Society Review*, n°2, 1985, pp.251-278

Scottish Legal system with regards to legal aid payment for defence lawyers⁵⁸⁵, the authors notice that attorneys tend to behave as rational utility maximizers by notably increasing the number of legally-aided cases.⁵⁸⁶

While fuelling the debate concerning the benefits and drawbacks associated with contingency fees, HELLAND and TABARROK found empirical evidence revealing that hourly-fees lawyers have higher incentives to support the filing of low-quality claims and to delay settlement.⁵⁸⁷ By referring to the fact that certain jurisdictions have limited the use of contingency fees in certain types of litigation, the authors highlight that hourly-paid lawyers exert lower monitoring, mostly by advising their clients to file without a prior in-depth assessment of their initial chances of prevailing at trial. Additionally, lawyers paid on an hourly basis who have a financial interest in extending the number of billable hours unsurprisingly tend to postpone settlement.

➤ *Lawyers' non-financial incentives*

Even though some may certainly behave this way in practice, portraying lawyers as greedy individuals merely driven by financial incentives remains an oversimplification. Considering the non-financial arguments which, beside the financial one, may also affect the way lawyers behave is therefore a second necessary step. Career concerns, reputation within the legal profession, duty to clients or professional standards are traditionally on the list of the non-pecuniary lawyer's incentives,⁵⁸⁸ and they may indeed influence their daily work. As for instance reported by SCHUCK when commenting on the *Agent Orange* class action litigation, 'some of the lawyers (...) saw [the case] as a high-visibility, high-stakes contest in which they could seek fame and fortune'.⁵⁸⁹ Scholars such as FERRER have interestingly examined the impact of lawyers' reputational concerns on litigation,⁵⁹⁰ and unsurprisingly found that lawyers with higher reputation concerns tended to put in more effort than their counterparts with lower reputation

⁵⁸⁵ Scottish criminal system of payment for work actually done to the introduction of a system of fixed payments introduced in 1999

⁵⁸⁶ F.H. STEPHEN, G. FAZIO and C. TATA, 'Incentives, Criminal Defence Lawyers and Plea Bargaining', (28) *International Review of Law & Economics*, 2008, pp.212-219.

⁵⁸⁷ E.HELLAND and A.TABARROK, 'Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets', (19) *Journal of Law, Economics and Organization*, 2003, n°2, pp.517-542.

⁵⁸⁸ M.DEWATRIPONT and J.TIROLE, 'Advocates', (107) *Journal of Political Economy*, 1999, n°1, pp.1-39

⁵⁸⁹ P.H. SCHUCK, *supra* note 437, at p.256

⁵⁹⁰ R.FERRER, 'The Effects of Lawyers' Career Concerns in Litigation', *American Law & Economics Association Annual Meetings*, 2008, paper n°68

concerns. The author additionally noticed that lawyers' behaviour appears to be influenced not only by their own career concerns, but also by those of the opposing counsel.⁵⁹¹

As a matter of fact, it remains impossible to define in advance and with accuracy which arguments will prevail in lawyers' decisions. The respective weights given to each argument depend on lawyers' decisions to favour their interests upon the one of their clients.⁵⁹² Yet, once again, economics is not essentially about its object, but about its method. By shedding light on lawyers' internal motivations, the economic analysis has contributed to renew and challenged the traditional legal view. Crucially, this change of paradigm from *disinterested* to *interested* individuals has economic implications.

d) Shifting from Disinterested to Interested Protagonists – Economic Implications

From an economic point of view, shifting the analysis from the angle of disinterested to interested participants raises questions about the possible vagaries potentially affecting the relationship between the principal and his agent (known in the literature as 'principal-agent problems'). Principal-agent problems arise in situations of imperfect information where principals cannot perfectly observe – and therefore fully and correctly monitor - the behaviour of their agents.⁵⁹³ This zone of uncertainty characterized by asymmetric information creates a leeway for potential conflicts of interest and opportunistic behaviour where agents seek to maximize their own utility function possibly to the detriment of their principals.⁵⁹⁴ As pointed out by ANDERSON, conflicts of interest can be regarded as by-product of the multiplication of specialised exchanges in which principals tend to heavily rely on the skills of their agents to perform specific tasks. An increase in the difficulty - or degree of specialization - of the service rendered leads to an increase in the difficulty to detect opportunistic behaviour.⁵⁹⁵ Conflicts of interest between principals and agents plague numerous relationships, such as those existing between managers and shareholders, employers and employees, or landlord and tenants. In the litigation framework, principal-agent problems

⁵⁹¹ R.FERRER, *idem* (noticing that lawyers with high reputation concerns has a higher probability of winning the case in court. However, lawyer B with weaker reputation concerns may also ultimately increase his level of effort. This situation implies an higher equilibrium effort at the settlements stage, leading ultimately to an increase in trial costs).

⁵⁹² H.GRAVELLE and M.WATERSON, 'No Win, No Fee: Some Economics of Contingent Legal Fees', (103) *Economic Journal*, pp.1205-1220.

⁵⁹³ J.STIGLITZ, 'Principal and Agent', in: S.N.DURLAUF and L.E.BLUME (Eds.), *The New Palgrave Dictionary of Economics*, 2nd Ed., 2008.

⁵⁹⁴ Y.KOTOWITZ, 'Moral Hazard', in: S.N.DURLAUF and L.E.BLUME (Eds.), *idem*

⁵⁹⁵ A.G.ANDERSON, 'Conflict of Interest: Efficiency, Fairness & Corporate Structure', (738) *University of Chicago Law Review*, pp.738-795.

between lawyers and their clients are well-known.⁵⁹⁶ Extensive billing or unnecessary works conducted by lawyers for their own profit are for instance illustrative. From interviews conducted with twenty American lawyers, LERMAN reported that ‘lawyers most frequently deceived clients in an attempt to increase earnings, expand business, or cover up error or neglect – in short to protect profits and professional reputation’.⁵⁹⁷ Designing a compensation scheme to ensure that the interests of principals are faithfully defended by their agents has therefore become a cornerstone issue in the Law & Economics literature.⁵⁹⁸ Importantly, in the field of mass litigation, and as shown in coming developments, the widespread use of standards to regulate judicial behaviour in mass cases creates leeway where judges can express their own preferences and pursue their own interest, potentially at the expenses of their principals.⁵⁹⁹

4.2.2. Targeting the Incentives of Rational Utility Maximizing Judges

Preliminary remarks suggested that the economic approach envisages participants involved in the litigation process as rational maximizing agents pursuing their own agenda. The example of lawyers was briefly introduced as ice-breaking illustration. The analysis now focuses on judges who are the key protagonists of this research. The issue of judges’ interest is cornerstone. As emphasized by KOCKESEN and USMAN, ‘even a small degree of self-interest on the part of judges (...) can have an enormous impact’.⁶⁰⁰

First of all, the economic approach to the judiciary must be regarded as being closely associated with the American reaction against Legalism which took place during the twentieth century. This brief detour is principally aimed at explaining the original assumptions formulated by Law and Economics researchers that may potentially puzzle Continental legal scholars (a). A basic understanding of US Legal Realism is indeed essential to clarify the methodology and assumptions of economists but also, as later shown, also of behavioural economists working on judicial behaviour.⁶⁰¹ Then, justifications on why economists

⁵⁹⁶ A.LEMPEREUR and M.SCODELLARO, ‘Conflits d’Intérêts Economiques entre Avocats et Clients : La Question des Honoraires’, *Recueil Dalloz* 2003, p.1380

⁵⁹⁷ L.G.LERMAN, ‘Lying to Clients’, (138) *University of Pennsylvania Law Review*, 1990, n°3, pp.659-760

⁵⁹⁸ R.COOTER and D.L.RUBINFELD, ‘Economic Analysis of Legal Disputes and Their Resolution’, (27) *Journal of Economic Literature*, 1989, , n°3, pp.1067-1091; for an analysis of Pareto-optimal fees arrangements enabling principal to monitor agents’ behaviour, see notably S.SHAVELL, ‘Risk Sharing and Incentives in the Principal Agent Relationship’, (10) *The Bell Journal of Economics*, 1979, n°1, pp.55-73.

⁵⁹⁹ See Chapter 3

⁶⁰⁰ L.KOCKESEN and M.USMAN, ‘Litigation and Settlement under Judicial Agency’, (32) *International Review of Law & Economics*, 2012, pp. 300-308.

⁶⁰¹ See Chapter 5: ‘Judges and Emotion: the Sensitive Judge’.

usually tend to view judges as *UFOS* (Unidentified and Fuzzy Object of Study) will be set forth (b). Finally, the arguments that rational judges may seek to maximize are presented. The analysis will notably take into account the particularities of European judiciaries (c).

a) An Historical Detour - Another Way of Looking at the Judiciary: American Reactions to Legalism

➤ *Bringing Judges Back to Earth: Judging as Perceived by Legal Realists*

The roots of the economic approach to the judiciary can be traced back to the American doctrinal reactions to Legalism, and more specifically to the *Legal Realism* movement which emerged in the US during the first half of the twentieth-century.⁶⁰² The movement blossomed in the 1920-1930's but failed to fully structure itself. It notably remained without clear research agenda or manifesto.⁶⁰³ As TUMONIS observes, 'realists were a sundry group: there were more differences between some realists than between some realists and formalists'.⁶⁰⁴

As opposed to the traditional legal doctrine which principally treated Law as a science – that is an autonomous discipline governed by a set of abstract principles -⁶⁰⁵ Realists viewed it as being strongly embedded in social, economic and political contexts. Some Realists such as FRANK, HUTCHESON (who were themselves two famous judges) or RADIN asserted that legal rules may not be the principal

⁶⁰² R.N.M. GRAHAM, 'What Judges Want: Judicial Self-Interest and Statutory Interpretation', (30) *Statute Law Review*, 2009, pp. 38-72 (observing: 'the realist vision of statutory construction is perfectly aligned with the economic notion of self-interested utility maximization. According to the realist vision, judges interpret text in ways that give effects to their own preferences. According to microeconomics, people choose to perform these actions which they think will promote their own interest').

⁶⁰³ L. FULLER, 'American Legal Realism', (82) *University of Pennsylvania Law Review*, 1934, p.429 (highlighting: there is no 'realist school' and therefore 'we lack yet a comprehensive work which will both describe and apply the methods of legal realism, which can serve both as an exposition of the approach and as an exemplification of it').

⁶⁰⁴ V. TUMONIS, 'Legal Realism & Judicial Decision-Making', (19) *Jurisprudencija*, 2012, n°4, pp.1361-1382 (for an overview on Legal Realism); B.E. HARCOURT, 'Une généalogie de la rationalité actuarielle aux Etats-Unis aux XIXe and XXe siècle', *Revue de Sciences Criminelle*, 2010, p.31 (notably discussing the impact of Legal Realism on criminal law).

⁶⁰⁵ C.K. ROWLEY, 'An Intellectual History of Law and Economics: 1739-2003', in: F.PARISI and C.K. ROWLEY, *The Origins of Law & Economics – Essays by the Founding Fathers*, The Locke Institute, 2005, pp.3-32 (In the American legal history, the paradigm of legalism is usually associated with LANGDELL who was the Dean of the Harvard Law Faculty. He defended the view that the tasks of jurists should be to isolate and classify relevant legal issues in order to draw connections with previous relevant cases. This view had long-lasting effects on American legal teaching. As noted by ROWLEY, 'this revolution in legal instruction swept through the American academy and provided the basis for a legal formalism that dominated American legal education for at least a half century').

motivation influencing the way judges take their decision.⁶⁰⁶ The main explanation, they argued, should rather be found in extra-legal factors such as the judge's personality, his preferences, his 'hunches' or his social and economic views.⁶⁰⁷ If legal rules may still matter, they are often depicted as a manner to legally justify judges' preferred outcomes.⁶⁰⁸

By challenging the traditional judicial ideal, Legal Realists asked a critical question which turned out to be a source of extensive literature for several decades: if legal rules do not entirely determine the content of judicial decisions, what are then the other determinants influencing judicial decision-making?⁶⁰⁹ As a consequence, they crucially asserted the need for empirical research in order to shed light on this important issue.⁶¹⁰

➤ *Legal Realism Facing Criticisms*

Unsurprisingly, Legal Realism faced harsh criticisms. The movement was rejected as promoting unethical assumptions, 'threatening the maintenance of the American democracy'⁶¹¹ and discrediting the

⁶⁰⁶ V. TUMONIS, *supra* note 604 (portraying J. FRANK as representative of the 'radical version of legal realism', at p.1370)

⁶⁰⁷ J. FRANK, *Law and the Modern Mind*, Anchor Book, 6th ed., 1963 (1st ed.: 1931) see notably Chapter 12 'The Judging Process and the Judge's Personality', pp.108-126); J. FRANK, 'Are Judges Human? Part Two: As Through a Class Darkly', (80) *University of Pennsylvania Law Review and American Law Register*, 1931, n°2, pp.233-267 (suggesting that 'the judge's knowledge of the rules combines with his reactions to the conflicting testimony, with his sense of fairness, with his background of social and economic views, and with that complicated compound loosely named his personality, to form an incalculable mixture out of which comes the court order we call his decision'); J.C.Jr. HUTCHESON, 'The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision', (14) *Cornell Law Review*, 1929, pp. 274-288 (defining the hunch as 'that intuitive flash of understanding which makes the jump-spark connection between question and decision, and the point where the path is darkest for judicial feet, shed its light along the way, at p.278); M.RADIN, 'The Theory of Judicial Decisions: Or How Judges Think', (11) *American Bar Association Journal*, 1925, pp.357-362.

⁶⁰⁸ K.N. LLEWELLYN, *The Bramble Bush: On our Law and its Study*, 1930, at. p.14 (considering that legal rules are ultimately important 'so far as they help you see or predict what judges will do or so far as they help you get judges to do something' (...), they remain otherwise 'pretty plaything').

⁶⁰⁹ F. SCHAUER, *Thinking like a Lawyer – a New Introduction to Legal Reasoning*, Harvard University Press, 2012, at p.13.

⁶¹⁰ U. MOORE and C.C. CALLAHAN, 'Law and Learning Theory: A Study in Legal Control', (43) *Yale Law Journal*, 1943 (cited in F. SCHAUER, *supra* note 591, at p.133. MOORE was among the first one to empirically test legal realist's assumption and investigated whether parking enforcement in a city of Connecticut was primarily driven by legal rules or by extra legal factors such the day, type of car, street *et cetera*.) see also J.H. SCHLEGEL, 'American Legal Realism and Empirical Social Sciences: The Singular Case of Underhill Moore', (29) *Buffalo Law Review*, 1980, pp.264-303).

⁶¹¹ N. DUXBURY, 'The Reinvention of American Legal Realism', (12) *Journal of Legal Studies*, 1992, n°2, pp.137-177.

core foundations of the American system,⁶¹² specifically in the 1930s during a period of tense international troubles.⁶¹³ The movement was also sometimes caricatured by its opponents as an attempt to reduce the Law and the function of judging to what judges had for breakfast.⁶¹⁴ These criticisms however failed to fully understand the core idea of Legal Realism. Indeed, Legal Realists' principal objective was to uncover the driving factors influencing legal decision-making as a way to increase the predictability of the Law.⁶¹⁵ Importantly, the movement must also be understood in the context of the Common Law tradition where judges, unlike their civil law counterparts, traditionally play prominent roles in law-making.⁶¹⁶ Investigating the human component underlying judicial decisions was therefore aimed at better understanding the way law was ultimately made.⁶¹⁷ As original and innovative Legal Realists' assumptions may appear, scholars have however considered that the novelty of their findings should not be overstated: similar ideas on the reality of judging had already been formulated at the end of the nineteenth century, simply because 'they are plainly evident aspects of judging in Common Law systems' where judges are required to be pragmatic and possess a 'substantial degree of freedom when working with legal materials'.⁶¹⁸ Furthermore, the vision of the Law as defended by Legal Realists can be viewed

⁶¹² J.L. GIBSON and G.A. CALDEIRA, 'Has Legal Realism Damaged the Legitimacy of the US Supreme Court?', (45) *Law & Society Review*, 2011, n°1, pp.195-219 (their study revealed that alleged fears brought by Legal Realism had been overstated. The movement failed to profoundly impair American citizens' faith in their judiciary).

⁶¹³ W. DE BEEN, 'Legal Realism Regained – Saving Realism from Critical Acclaim', *Stanford Law Books*, 2008, pp.2-3 (noticing: 'as international tensions heightened, the realist critique came to be seen as a subversive influence, sapping the very foundations of free and democratic governments with its alleged relativism and its scepticism about the fundamental principles of the American Republic. With the totalitarian threat looming large in Germany, Italy and Russia, casting doubt on time-honoured foundation of the American political and legal system seemed like an act of gratuitous irresponsibility').

⁶¹⁴ A. KOZINSKI, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision-Making', in: D.M.O'BRIEN (Ed.), *Judges on Judging – Views from the Bench*, 3rd Ed., CQ Press, 2009, 372, pp.96-102.

⁶¹⁵ V. TUMONIS, *supra note 604*.

⁶¹⁶ F. SCHAUER, *supra note 609*, at p.108 (observing that 'judges remain substantially more central legal figures in common-law countries than in their civil-law counterparts, and treating the code rather than the case as the touchstone for legal argumentation remains the pervasive feature of the civil-law consciousness. Although there is much overlap and considerable convergence between Common and Civil Law, there is still more than a touch of reality in the observation that the Civil Law is substantially code-centered while the Common Law continues to be substantially judge-centered'); on a broader scale, see J.CARBONNIER, *Sociologie judiciaire*, Quadrigue Manuel PUF, 1978 (pointing out that it is not surprising to notice that judicial sociology developed in the United States given the key roles given to judges in the American society and in the Common Law ([la sociologie judiciaire] a rencontré aux Etats Unis un terrain de predilection, si l'on réfléchit à l'importance du juge dans la société américaine et droits les droits de Common Law', at p.41).

⁶¹⁷ J. FRANK, *supra note 607* (highlighting: 'the peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides by the law', at p.119, and further pointing out that 'if the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case', at p.1200).

⁶¹⁸ B.Z. TAMANAHA, 'Understanding Legal Realism', (87) *Texas Law Review*, 2009, p.731.(observing that 'the standard portrait of the Legal Realists as a band of pioneering jurists shining a realistic light on judging to illuminate a previously darkened age advances a gross misunderstanding of our legal history').

as by-product of the crisis that the American society faced in the early decades of the twentieth century.⁶¹⁹ At the same time, voices against the ‘established order’ had indeed started to mushroom in others fields of art and sciences.⁶²⁰ Like American muckraking journalists who investigated ‘the harsh, hidden realities of the American life’ by trying to reveal scandals behind official speeches,⁶²¹ Legal Realists likewise challenged the traditional legalist approach.⁶²²

➤ *Legal Realism and its Legacy*

Legal Realism had long-lasting consequences on the manner Law and the judiciary were perceived. They notably encouraged the use of social sciences in the legal sphere.⁶²³ The so-called attitudinal theory defended by political scientists who view judges as *politicians in robes* deciding cases according to their own political views⁶²⁴ can for example be traced back to the Legal Realist movement. More crucially for the present research, scholars from both Europe and the United States tend to agree that the economic analysis has been – partly, at least - influenced by the legacy of Legal Realism.⁶²⁵ Therefore, as an echo to

⁶¹⁹ G. GILMORE, ‘Legal Realism: Its Causes and Cures’, (70) *Yale Law Journal*, 1961, n°7, pp.1037-1048 (noticing that the crisis of the American society was a mixture of several elements, such as drastic economic and social changes faced by the United States at the beginning of the century, as well as a reaction against the way law was taught at this period in American universities. The author observes that a multiplication of cases in the first decades of the 20th century had made the American system based on precedents extremely complex. As suggested, ‘the theory of precedent relies on the existence of a comfortable number of precedents but not too many (...). When the store of raw materials becomes too great, too varied, too confused, the bridge building process turns out into a random operation’); see also: B.A. ACKERMAN, ‘Law and the Modern Mind’ by Jerome Frank’, (103) *Deadelus*, 1974, n°1 pp.119-130 (pointing out the ‘wide-spread bankruptcy in American social philosophy during the 1930’s. The depression had discredited laissez-faire individualism but no alternative social theory had emerged which provided an acceptable account of the law’s role in achieving a just society’).

⁶²⁰ B.A. ACKERMAN, *idem*, the author notably draws a comparison between legal thought and others fields and ultimately considers that ‘it would be a mistake to limit one’s vision arbitrarily to the closely related areas of political action and social thoughts. (...) One can discern parallels to the thought of FRANK and his fellow Realists in twentieth century art and science. Stravinsky, Picasso, Joyce, Einstein and Freud each radically challenged the effort to structure objective reality into a single determinate rationalizable order’, at p.125).

⁶²¹ W.DE BEEN, *supra note 613* (drawing a parallel between the rise of Realism in the legal field and the rise of ‘muckraking’ investigating journalism).

⁶²² C.K. ROWLEY, *supra note 605* (noticing that ‘the mood of the realist was one of dissatisfaction with the notion that twentieth century legal thought should be dominated by a nineteenth century legal world view’).

⁶²³ C.K. ROWLEY, *idem*; see also: F. SCHAUER, *supra note 609*, at p.144 (describing it as a Legal Realism in ‘modern dress’).

⁶²⁴ R.A. POSNER, *supra note 7* (specifically Chapter 1: ‘Nine Theories of Judicial Behaviour’, pp.29-56).

⁶²⁵ C. JAMIN, ‘Le rendez-vous manqué des civilistes français avec le réalisme juridique: Un exercice de lecture comparée’, *Droits – Puf*, 2010, n°51; similarly, ROWLEY observes that ‘the path towards law and economics undoubtedly was smoothed by the legal realist challenge to formalism that opened up American legal education to the study of the social sciences’, noticing however that ‘yet the relationship should not be exaggerated’ (C.K. ROWLEY, *supra note 605*, at p.12).

FRANK, who as early as 1931 considered that judges are human beings first and foremost,⁶²⁶ and to RADIN, who already in 1925 questioned the way judges think,⁶²⁷ POSNER goes a step further in 1993 and suggests that judges seek to maximize ‘the same thing everybody else does’.⁶²⁸

➤ *Legal Realism's Limited Impact Outside the United States and Consequences for the Economic Analysis of the Judiciary in Europe (The French Example)*

Legal Realists did not manage to blossom outside the United States during the twentieth century.⁶²⁹ This doctrinal shift partly explains the scepticism that Continental legal scholars have maintained against movements further built on the legacy of Legal Realism such as the economic analysis of the Law,⁶³⁰ and *a fortiori vis-a-vis* the economics of the judiciary. Several reasons can be set forth to explain the permanence of the legalistic myth in Civil Law countries which traditionally defends the model of the dispassionate judge. Even though these insights may be transplanted to other European countries as well,⁶³¹ the example of France during the 19th and 20th centuries is here considered in greater details because of the pregnancy of the legalistic myth in this country.

Legal Realists considered that judge's human components were decisive to understand legal decisions. Interestingly, thirty years before the rise of US Legal Realism, the so-called *phénomène Magnaud* had

⁶²⁶ J. FRANK, ‘Are Judges Humans? Part one: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Being’, *University of Pennsylvania Law Review and American Law Register*, 1931, n°1, pp.17-53

⁶²⁷ M. RADIN, *supra* note 607.

⁶²⁸ R.A. POSNER, ‘What Do Judges and Justices Maximize?: The Same Thing Everybody Else Does’, (3) *Supreme Court Economic Review*, 1994, pp.1-41.

⁶²⁹ Noteworthy however, in Scandinavia (Denmark, Sweden, Norway), a movement sharing some similarities with the American Legal Realism expanded in the 1940's under the impulse of legal scholars and philosophers such as HAGERSTROM, LUNDSTEDT or OLIVECRONA. Among the differences that distinguished these two movements, SPAAK observes that Scandinavian writers were above all concerned with a renewed analysis of traditional legal concepts, whereas American legal realists suggested a new manner to analyze the process of adjudication (T. SPAAK, ‘Naturalism in Scandinavian and American Realism: Similarities and Differences’, in M. DAHLBERG (Ed.), *De Lege, Uppsala-Minnesota Colloquium: Law, Cultures and Values*, pp. 33-83, Uppsala, March 2009).

⁶³⁰ C. JAMIN, *supra* note 625 (observing ‘si les civilistes français s'étaient heurtés au réalisme, l'analyse économique du droit ne serait pas fustiger à longueur de colonnes. Au lieu de s'étendre encore et encore sur sa pertinence, nous en serions à débattre des diverses manières de penser le droit le droit et l'économie’).

⁶³¹ C. KIRCHNER, ‘The Difficult Reception of Law and Economics in Germany’, (11) *International Review of Law & Economics*, 1991, pp.277-292. At the beginning of the twentieth century, the Free Law School (*Freirechtsschule*) briefly tried to free judicial behaviour from its legal constraints by questioning the role of law in guiding judicial behaviour (D. GOGOS, ‘Nouvelles Tendances d'Interprétation du Droit Privé Allemand’, (9) *Revue Internationale de Droit Comparé*, July-September 1957, n°3, pp.528-536).

already revived the issue of judicial subjectivity among French legal practitioners and scholars.⁶³² The issue of judge's subjectivity which could possibly lead to judicial arbitrariness had also been critical for several decades. As exemplified by the famous dictum still pregnant at the eve of the 1789 Revolution 'God save us from the equity of courts' (*Dieu nous garde de l'équité des parlements*), equity was viewed as a venue for judicial arbitrariness, ultimately placing judges above the Law and leaving individuals 'at the mercy of the courts'.⁶³³ Reintroducing judge's human component in judicial decisions, as Legal Realists did, actually reactivated historical fears *vis-a-vis* a subjective administration of justice.

Legal Realism was in addition perceived as a source of instability.⁶³⁴ Discussion among French legal scholars which took place in France at the beginning of the 20th century appears symptomatic of a tension between a willingness to encourage a new way of looking at the law and at judges on the one hand, and, a fear to open a Pandora's Box creating chaos, weakening legal structures, reducing security and enhancing social disorder on the other.⁶³⁵ When refusing to depart from tradition, French authors were willing to preserve social order and concerned with a necessity of keeping the rise of judicial subjectivity under

⁶³² In 1898, Judge MAGNAUD sitting in the tribunal of Chateau-Thierry became famous for refusing to sentence a widow who had stolen bread for her starving child (see the ruling: Trib.corr. de Château-Thierry, 4 March 1898). The content of his decision was highly debated. Some commentators viewed in MAGNAUD the figure of the 'good judge' (in French, *le bon juge Magnaud* or *le bon juge de Chateau-Thierry*) using his sense of humanity and good feelings. Others conversely fiercely denounced such judicial sentimentalism which was regarded as contrary to the ideal of legalism.. See on this topic: R. MAJETTI, 'Le phénomène Magnaud', (37) *La Revue Socialiste*, 1903, pp. 651-662 (Defining the *phénomène Magnaud* as 'un juge qui motive l'application de la loi par des attendus humains et sociaux, en dehors de tout esprit professionnel, de toute tradition de caste. Hardiesse redoutable, qui fit s'insurger la magistrature imbue de vieilles routines et qui souleva les délires de joie du peuple ; car, se préoccupant des « conséquences bonnes ou mauvaises que peut produire sa sentence dans un intérêt plus général », il sent la douleur sociale et compte les larmes des choses dans ses propres larmes' – at p.657) ; M.A. FRISON-ROCHE, 'Le Modèle du Bon Juge Magnaud', in : *Mélange en l'honneur du doyen G.WIEDERKEHR, De Code en Code*, Dalloz-Sirey, Paris, 2009, pp.335-342 ; GENY considered for instance that MAGNAUD's decision was a mere 'floating humanism' ('humanisme flottant'), cited in : J. KRYNEN, *supra note 561*, at p.346 ; N. DION, 'Le Juge et le Désir du Juste', *Recueil Dalloz* 1999, p.195.

⁶³³ A. TUNC, 'Grand Outlines of the Code of Napoleon', (29) *Tulane Law Review*, 1955, pp.431-452

⁶³⁴ J. FRANK, *supra note 607* (considering that the permanence of this myth among lawyers was comparable to a 'childish need for an authoritative father [who] unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in the childhood to the father', at p.22). He therefore suggested that 'the myth that the judges have no power to change existing or make new law: it is a direct outgrowth of a subjective need for believing in a stable, approximately unalterable legal world-in effect, a child's world' (at p.38).

⁶³⁵ M. GARCIA VILLEGAS, 'Champ Juridique et Sciences Sociales en France et aux Etats-Unis, (59) *L'Année Sociologique*, 2009/1, pp. 29-62 (considering that 'l'enthousiasme des auteurs classiques pour la question sociale et la pensée antiformaliste était donc manifeste mais pas débordante. C'était des hommes d'ordre, ouverts aux changements, mais à un type de changement destiné à la préservation du passé'). As reported by JAMIN, the different viewpoints on the function of the law and the role of the judge defended by three famous legal scholars - SALEILLES, DEMOGUE and RIPERT – in the early twenty century have deeply influenced the French position to Legal Realism (see C.JAMIN, *supra note 625*).

close scrutiny, notably at a period time where society was experiencing drastic social evolutions such as the emergence of working classes.

Furthermore, the structure of French Academia, the way law was taught, the role played by law professors also importantly kept the influence of social sciences away from legal reasoning.⁶³⁶ A similar conclusion can be made concerning Germany where the legal education system prevented the extensive use of social sciences in the realm of Law.⁶³⁷ Legal scholars were thus comparable to rent-seekers trying to protect the benefits associated with their initial investment. The progressive isolation of French law faculties from others departments of social sciences – notably sociology or economics - during the second half of the twentieth century is noteworthy. This situation limited any attempts to consider the judiciary from different and renewed perspectives⁶³⁸, but privileged approaches that were mostly dictated by legal scholars. On a broader scale, GAROUPA considers this point as being a key explanation of the limited impact of the Law and Economics movement in Europe. The author compares the findings drawn from the economic analysis to ‘legal innovations’ and assimilates legal scholars to members of a cartel striving to restrict access to the ‘market for legal ideas’ to external and potentially intrusive competitors. The consequences of this ‘legal parochialism’, notes GAROUPA, are comparable to those traditionally associated with protectionist measures, and most specifically ‘an underdevelopment of new legal innovations [as well as] significant opportunity costs disseminated across society’.⁶³⁹

Finally, KIRCHNER also suggests another explanation for the difficult reception of social sciences in German legal reasoning which is also of relevance when transplanted into the French context. As the author highlights, civil law judges - unlike their Common Law counterparts - have a secondary role in law-making. Since this task falls primarily on legislatures, judges principally ground their legitimacy on a

⁶³⁶ J.H. MERRYMAN and R. PEREZ-PERDOMO, *supra* note 12 (observing: ‘Although old-fashioned, one reason why a new model has not appeared may be the implied threat it imposes to the continued domination of the legal process among scholars. The fact is that this model has been happily perpetrated by scholars’, at p.84). The authors add that ‘attempts in the civil law world to introduce the jurisprudence of interests, legal realism, the law and society approach, law and economics, a law and policy analysis – to mention several coherent attack on the traditional model – have encountered resistance. They have not been ignored but they have not penetrated deeply into the legal consciousness. All these approaches would call for more interdisciplinary analysis, for a reevaluation of the role of judge in society, for questioning many assumptions of the Civil Law tradition’, at p.85).

⁶³⁷ C. KIRCHNER, *supra* note 631 (noticing that ‘Despite the fact that in those times it was evident that the traditional codex of interpretation rules was not sufficient for a systemic and logical development of the legal system, the power of law courts and the legal education system, which in Germany is under the eminent influence of the judiciary, prevented the sociological approach from becoming a part of legal reasoning. *It was banned to the periphery of the law*, and in the legal education system, to the sociology of law’ (at p.284, emphasis added).

⁶³⁸ M. GARCIA VILLEGAS, *supra* note 635. See similarly A. LEJEUNE, ‘Les Professionnels du Droit comme Acteurs du Politique : Revue Critique de la Littérature Nord-Américaine et Enjeux pour une Importation en Europe Continentale’, *Sociologie du Travail*, 2011, n°53, pp. 216-233.

⁶³⁹ N. GAROUPA, ‘The Law & Economics of Legal Parochialism’, (10) *Illinois Law Review*, 2011, n°5, p.1517

strict application of the law. To avoid impairing their legitimacy and social status, courts have an interest in '[staying] within the boundaries of traditional legal reasoning [and] to keep their factual autonomy *vis-à-vis* the legislature'. This point seems of importance to explain the behaviour of French courts since the judiciary is not officially recognised by the Constitution as a *power*, but as a mere *authority*.⁶⁴⁰ Including or emphasizing extra-legal arguments in judges' decision-making would revivify criticisms and fears against the rise of the so-called *gouvernement des juges*. It may thus be in the judiciary's self-interest to perpetuate the traditional legal approach which maintains its margin of manoeuvre *vis-à-vis* other political actors.

Nowadays, renewed claims defending and urging for cross-disciplinary research on legal issues,⁶⁴¹ globalization of legal teaching and education,⁶⁴² the increased role of the judiciary within the society – notably in civil law countries, – as well as a quest for transparency associated with a palpable desire to better explain the way judges effectively take their decisions have contributed to renew the terms and the scope of the debate.⁶⁴³ In other words, current research tends nowadays to go *beyond* the legalist vision as a way to promote what FRANK used to call a 'modern mind', that is a vision of the law freed from its myths.⁶⁴⁴ Among the alternative approaches to the judiciary, the economic perspective is a one likely to offer valuable insights that are worth further considering.

b) From an Economic Standpoint: Judges as *UFOS* (Unidentified and Fuzzy Object of Study)

From the standpoint of the economist, understanding judicial behaviours is a puzzle which requires overcoming several difficulties. The first problem concerns the heterogeneity existing *between* (horizontal

⁶⁴⁰ French 1958 Constitution, Title VIII

⁶⁴¹ See the point of view defended by several French academics on this issue: 'Pour une recherche juridique critique, engage et ouverte', *Recueil Dalloz*, 2010, p.1505.

⁶⁴² N. GAROUPA, *supra* note 639.

⁶⁴³ P. DRAI, 'Le Délibéré et l'Imagination du Juge'. In *Mélanges en l'honneur de R. PERROT, Nouveaux Juges, Nouveaux Pouvoirs*, (date), Dalloz, pp.107-120 (observing : 'le droit civil de cette fin du XXe siècle fait une place de plus en plus large aux appréciations du juge'). See also A. LUCIEN, *supra* note 551 (arguing that 'because of its desacralization, the abandonment of rites and decorum resulting from functionalists ambitions the search for more transparency and proximity, the voyeuristic eye of the media which projects the reality of the judge's daily life and its weaknesses, the imaginary aspect of the institution has been mortally wounded').

⁶⁴⁴ J. FRANK, *supra* note 607 (highlighting: a 'modern civilisation demands a mind free of father-governance. To remain father-governed in adult years is peculiarly the modern sin. *The modern mind is a mind free of childish emotional drags, a mature mind*. And law, if it is to meet the needs of modern civilisation must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change', at p.269, emphasis added).

heterogeneity) and *within* (vertical heterogeneity) judiciaries. The second regards the institutional *insulation* characterizing judges which tend to distinguish them from other categories of workers. Finally, the third is associated with a palpable *silence* with regards to the reality of the judges' work which may admittedly render the work of economists more complicated. These three difficulties (heterogeneity, insulation and silence) are hereafter successively discussed.

➤ *Vertical and Horizontal Heterogeneity*

The heterogeneity existing between and within judiciaries is the first challenge that economists dealing with the analysis of judicial behaviour must face. Undeniably, it would be erroneous to consider that the generic term 'judges' refers to a homogeneous class of individuals. Using a scalpel for the understanding of judicial behaviour is therefore certainly more appropriate than misleading oversimplifications.

A first distinction can be made between American judges and their Continental counterparts. A majority of Law and Economics scholars have taken the analysis of the American judiciary as focal point. Yet, one should remain highly cautious when extrapolating or transplanting these findings to other systems where legal traditions as well as constraints on judiciaries may strongly diverge.⁶⁴⁵ It is indeed commonly acknowledged that the idiosyncrasies and the structure of institutions strongly model and influence the incentives of their participants.⁶⁴⁶ While taking into account the inherent limits of such US-oriented studies, scholars have recently broadened the scope of their research by addressing the functioning of non-American⁶⁴⁷ – and notably European⁶⁴⁸ – judiciaries. Crucially, unlike their American counterpart, Continental judiciaries are mainly composed of careerist judges who act as a part of broader bureaucracies. As hereafter discussed, envisioning Continental judges as career civil servants may have long-lasting consequences to predict judicial incentives.

⁶⁴⁵ A.TSAOUSSI and E.ZERVOGIANNI, 'Judges as Satisficers: a Law & Economics Perspective on Judicial Liability', (29) *European Journal of Law & Economics*, 2010, pp.333-357 (observing: 'ultimately the legal cultures that have grown up out of the different legal evolution processes make it quite difficult, if not impossible to propose a unifying model that will apply for both sides of the Atlantic').

⁶⁴⁶ See for instance H.A. SIMON, *supra* note 574; G. LEVIT, 'Careerist Judges and The Appeal Process', (36) *Rand Journal of Economics*, 2005, n°2, pp.275-297.

⁶⁴⁷ J.M. RAMSEYER, 'Talent Matters: Judicial Productivity and Speed in Japan', (32) *International Review of Law & Economics*, 2012, pp.38-48.

⁶⁴⁸ M.R. SCHNEIDER, 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal', (20) *European Journal of Law & Economics*, 2005, pp.127-144; C. BOURREAU-DUBOIS, M. DORIAT-DUBAN and J.-C. RAY, 'Child Support Order: How Do Judges Decide Without Guidelines? Evidence from France', *European Journal of Law & Economics*, 2012; A.TSAOUSSI and E.ZERVOGIANNI, *supra* note 645.

Differences *within* judiciaries also matter. The American literature has abundantly focused on appellate and Supreme Court judges.⁶⁴⁹ Research has additionally addressed the idiosyncrasies of peculiar groups within the judiciary, such as for instance the case of federal judges with a senior status whose responsibilities and duties differ from the ones endorsed by their younger active colleagues.⁶⁵⁰ In the European framework where judges are usually considered as being more specialised than their American counterparts,⁶⁵¹ research has focused on specialised areas of adjudication, such as for instance labour or family law. Furthermore, divergences in terms of workload are likely to be highly significant between First Instance, Appellate and Supreme Courts judges.⁶⁵² The perspective of being reversed by a court of appeal is important to understanding the behaviour of First Instance judges, but remains secondary concerning Appellate judges, and is simply inexistent with regards to Supreme Court (Court of Cassation) judges⁶⁵³ who – when dealing with cases that are likely to arise greater public emotion - may rather be willing to ‘promote a coherent judicial philosophy’.⁶⁵⁴ Attempts to consider the different range of constraints influencing judges’ behaviour have led scholars to apply the principal-agent structure to the judicial hierarchy, and consequently to view the Supreme Court as a principal dictating policies to lower courts which are, in turn, agents in charge of their implementation.⁶⁵⁵

In brief, judges face different constraints depending on their position on the judicial ladder.⁶⁵⁶ Hence, as suggested by BAUM, ‘models built on the assumption that all judges want the same thing are highly questionable’.⁶⁵⁷

⁶⁴⁹ R.A. POSNER, *The Federal Courts - Challenge and Reforms*, Harvard University Press, 1999, 430 p.

⁶⁵⁰ A. YOON, ‘Senior Federal Judges and The Political Economy of Judicial Tenure’, (501) *Journal of Empirical Legal Studies*, 2005.

⁶⁵¹ R.A. POSNER, *supra* note 7.

⁶⁵² R.A. POSNER, *Idem* (noticing that Supreme Court justices have a lighter workload than lower court judges); C. FILLON, M. BONINCHI, A. LECOMPTE, *Devenir Juge – Mode de Recrutement et Crise des Vocations de 1830 à nos jours*, Droit & Justice PUF, Paris, 2008, p.230 (reporting that in France judicial workload varies considerably across judges: ‘très forte dans beaucoup de tribunaux et notamment dans les fonctions du Parquet, elle s’amenuise fortement dans la plupart des juridictions du second degré, et se révèle extrêmement faible à la Cour d’appel de Paris où les magistrats sont fortement sous-employés et parfois proche de la pré-retraite’).

⁶⁵³ R.A. POSNER, *supra* note 628.

⁶⁵⁴ R.A. POSNER, *supra* note 7, at p.51.

⁶⁵⁵ D.R. SONGER, J.A. SEGAL, C.M. CAMERON, ‘The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions’, (38) *American Journal of Political Sciences*, 1994, pp. 673-696; for a critical point of view concerning the use of the principal-agent theory applied to the judicial hierarchy see: P.T.KIM, ‘Beyond Principal-Agent Theories: Law and the Judicial Hierarchy’, (105) *Northwestern University Law Review*, , n°2, 2011, pp.505-535; L.EPSTEIN and T.JACOBI, ‘The Strategic Analysis of Judicial Decisions’, (6) *Annual Review of Law and Social Science*, 2010, pp.341-358.

⁶⁵⁶ S.J. CHOI, M. GULATI and E.A. POSNER, ‘What do Federal District Judges Want? An Analysis of Publications, Citations and Reversals’, (28) *Journal of Law, Economics & Organization*, 2012, n°3.

➤ *Insulation*

The insulation which characterizes judicial work is the second difficulty that economists must overcome. As a general rule, economists assume that individuals respond to incentives. Behaviour can therefore usually be influenced through the use of sticks and carrots. Concerning judges however, the situation is different since these latter are institutionally insulated from any source of incentives.⁶⁵⁷ Insights from Law and Economics in developing countries have indeed highlighted the value of insulated judiciaries from a social welfare perspective.⁶⁵⁸ Like Ulysses who - tied to the mast – did not succumb to the Sirens' voices which diverted his vessel towards rocky coasts, insulated and independent judges should be less likely to be concerned by corruption, favouritism or any forms of conflict of interest. An independent judiciary is therefore a priceless 'social and economic good' for society.⁶⁵⁹ Obviously, from the standpoint of economists, the flipside of this situation remains a remarkable difficulty to explain judicial behaviour in economic terms,⁶⁶⁰ and, as pointed out by POSNER, a subsequent risk of seeing the analysis *a priori* 'blocked at [its] threshold'.⁶⁶¹ The desire to shed some light on the judicial black box has led Law and Economics scholars to assume that judges are 'all-too-human workers, responding as other workers do to the conditions of the labour markets in which they work'.⁶⁶² Yet, if they are indeed regarded as simple

⁶⁵⁷ L. BAUM, 'Motivation and Judicial Behaviour: Expanding the Scope of Inquiry', in: D. KLEIN and G. MITCHELL (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.3-25.

⁶⁵⁸ T.J. MICELI and M.M. COSGEL, 'Reputation and Judicial Decision-Making', (23) *Journal of Economic Behaviour and Organization*, 1994, pp.31-51 (observing 'the difficulty that economists have had in developing satisfactory models of judicial behaviour apparently stems from the absence of a well-defined objectives function that self-interested can be viewed as maximizing').

⁶⁵⁹ E. BUSCAGLIA and W.E. RATLIFF, *Law and Economics in Developing Countries*, Hoover Institution Press, 2000, 126 p., See also: E. GLAESER, 'The Rise of the Regulatory State', (41) *American Journal of Economic Literature*, 2003, pp.401-425 (focusing on the situation in 19th century United States and observing that 'it is often argued that the distortion of justice through legal and illegal forms of influence decided many cases and had a broad influence on the nineteenth-century economy. Courts often failed to address the grievances of the parties damaged in the new economy, such as workers suffering from accidents, producers suffering from abusive tactics by the railroads, or consumers poisoned by bad food, and ruled in favour of large corporations').

⁶⁶⁰ R.A. POSNER, *supra* note 7, at p.580 (observing: 'not only is an independent judiciary a considerable social and economic good (...), but it is recognized as such by the dominant groups in our society. And it is not merely a diffuse social and economic value').

⁶⁶¹ R.A. POSNER, *supra* note 628 (highlighting: 'the whole thrust of the rules governing the compensation (...) and conditions of judicial employment is to divorce judicial action from incentives, to take away the carrots and the sticks, the different benefit and costs associated with different behaviours, that [usually] determines human action in an economic model').

⁶⁶² R.A. POSNER, *supra* note 7, at p.38.

⁶⁶³ *Idem* (see Chapter 2 'The Judge as Labor-Market Participant').

workers, they obviously remain workers of a different kind,⁶⁶⁴ rendering thus necessary the use of the wide range of available self-interested variables to explain judicial behaviour.

➤ *Silence*

Silence within the legal profession on the reality of the judge's daily work is potentially another challenge that researchers could face when dealing with judicial behaviour. As SCHAUER humorously indicated, '[raising] the topic of judicial self-interest in the company of judges is something like raising the topic of steak tartare at a convention of vegetarians'.⁶⁶⁵ Undeniably, judges – as every human being – are reluctant to publicly address issues such as judges' concerns for their reputation.⁶⁶⁶ Additionally and at that time suggested by Legal Realists, the flexibility of the law and the use of legal standards offer judges easy way-out for dissimulating their own preferences behind virtually any legal decisions.⁶⁶⁷ Since the law is polymorphic – in the sense that it can indeed justify everything as long as it respects a given methodology –, it remains highly difficult to know what, in the judge's decision, is effectively due to his own preferences. As FRANK expressed it, rules and principles 'may be the formal clothes in which [the judge] dresses up his thoughts'.⁶⁶⁸ From the viewpoint of economists, the facts that judges may not be willing to talk freely about their incentives or that the law may virtually justify any decision are not *per se* insurmountable obstacles. Indeed, as BECKER indicated, the economic approach to human behaviour does neither necessarily imply that individuals *consciously* seek to maximize the arguments of their utility functions, nor that they have to justify the underlying reasons of their behaviour.⁶⁶⁹ As suggested by

⁶⁶⁴ R.A. POSNER, *supra* note 7 (observing: 'the judicial utility function is missing many arguments of usual workers').

⁶⁶⁵ F. SCHAUER, 'Incentives, Reputation and the Inglorious Determinants of Judicial Behaviour', (68) *University of Cincinnati Law Review*, 2000, n°3, p.615.

⁶⁶⁶ R.A. POSNER, *supra* note 7 (reporting that 'judges, like other refined people in our society, are reticent (...) about talking about judging, especially talking frankly about it, whether to their colleagues or to a larger professional audience', at p.6); see also D.R. STRAS, *supra* note 545 (arguing: 'justices have an incentive to make the process appear as impartial as possible to bolster the court's legitimacy and their own standing in the legal community'); J. FRANK, *supra* note 607 (highlighting that the opinions of the courts are 'worded as if correct decisions were arrived at by logical deduction from a precise and pre-existing body of legal rules. Seldom do judges disclose any contingent elements in their reasoning, any doubts or lack or whole-hearted conviction. The judicial vocabulary contains few phrases expressive of uncertainty', at p.90).

⁶⁶⁷ F. SCHAUER, *supra* note 609 (claiming: 'for the Realist challenge to be a genuine challenge, it needed to insist that legal doctrine was not nearly as constraining as the traditionalists believed, and that doctrinal justifications for virtually any outcome that a judge wanted to reach for virtually any reason could be supported by traditional legal sources', at p.135).

⁶⁶⁸ J. FRANK, *supra* note 607, at p. 141.

⁶⁶⁹ G.S. BECKER *supra* note 549 (highlighting: 'the economic approach does not assume that decision units are necessarily conscious of their efforts to maximize or can verbalize or otherwise describe in an informative way reasons for the systematic patterns in their behaviour', at p.7).

DEMERGUE on a broader scale, ‘influences may be suffered or desired, declared or unspoken, assumed or denied’.⁶⁷⁰ From a methodological perspective, focusing solely on the elements that individuals are eager to acknowledge is consequently insufficient.

c) Utility Maximizing Judges and Arguments of the Judicial Utility Function

In a recent novel, a French writer portrayed the motivations of one of his key protagonist – a French first instance judge – in the following terms: ‘when explaining his profession, [he] mentions three topics. Although he likes the idea of defending widows and orphans, he was also drawn to saying what was true in rendering justice. He wanted to change society, but also to arrive at a more comfortable place for himself; without having to worry about making his fortune, being able to maintain an upper class lifestyle; finally, when judging, he exerted a power. Even though he had not quite a taste of power, he showed at least an appetite for power’.⁶⁷¹ Interestingly, while reflecting concerns for power, pecuniary income or respect toward the judiciary as an institution, these words echo some of the arguments of the judicial utility function as notably set out by COOTER in 1983,⁶⁷² and then by POSNER in his 1993 seminal and provocative paper.⁶⁷³

POSNER claimed that the American federal appellate judges’ utility was a function of – notably - leisure (understood as a desire to decrease workload), pecuniary income, reputation, popularity and prestige. These arguments are hereafter discussed since they may importantly matter when transplanted to the field of mass litigation. A key assumption induced by the model of utility maximizing judges is that the judicial decisions may ultimately be influenced by determinants that are likely to affect the judge’s own utility⁶⁷⁴. Obviously – as it was also said for lawyers - different judges may weigh these arguments in different ways.

⁶⁷⁰ M. DEMERGUE, *supra* note 556 (in French : ‘l’influence peut être aussi consciente ou inconsciente, subie ou voulue, avouée ou inavouée, assumée ou reniée’ at p.372).

⁶⁷¹ E.CARRERE, *D’autres vies que la mienne*, Pol éditeur, 2009, at p.129 (Translation from the author. In French : ‘pour expliquer sa vocation, [...] dit trois choses. Qu’il aimait l’idée, non pas de défendre la veuve et l’orphelin, mais de dire ce qui est juste et de rendre la justice. Qu’il souhaitait changer la société, mais aussi y occuper une place confortable : sans se soucier de faire fortune, mener une vie bourgeoise. Qu’enfin on exerce en jugeant un pouvoir et qu’il a, sinon le goût du pouvoir, du goût pour le pouvoir’).

⁶⁷² R. COOTER, *supra* note 154.

⁶⁷³ R.A.POSNER, *supra* note 628.

⁶⁷⁴ D.R.STRAS, *supra* note 545.

➤ *Pecuniary Income*

Admittedly, a first argument of the judicial utility function could be the financial incentive. There are however reasons to believe that money is not the key determinant of judicial behaviour. First, Common Law judges are often former lawyers who have decided to quit the Bar to join the Bench. This decision entails opportunity costs in the form of salary decreases since they could have earned more from private practice.⁶⁷⁵ Similarly, in Civil Law countries where judges are – for a vast majority – appointed after a public competition occurring at the end of their legal education, financial reward is not the principal motivation. As suggested by Justice TRUCHE, ‘In France, those who choose this professional path (...) can know with accuracy what will be their financial resources for the coming years. These resources are enough to cover their needs. Money is not the reason for their choices’.⁶⁷⁶ Furthermore, they are forbidden from taking financial profit from judging and are not allowed to decide cases in which they have possible monetary interests. Leaving thus aside financial compensation, Law and Economics scholars usually consider that judges are less likely to work as hard as other legal practitioners.⁶⁷⁷

A relevant question therefore turns out to be whether an increase in judicial wages can indeed motivate judges to exert harder efforts. Interestingly, recent research has cast some doubts on the positive effect associated with higher judicial salaries. Contrary to a common belief, CHOI, GULATI and POSNER have argued that an increase in judicial salaries would probably not induce judges to exert greater effort and, consequently, may not contribute to an increase in the quality of courts’ outputs. This situation can be explained by an adverse selection problem: higher salaries will attract people who would be both good and bad judges. Moreover, because of a lack of third-party monitoring, independent judges cannot be punished if they failed to exert the required level of effort.⁶⁷⁸ Going a step further, the idea of motivating judges with pecuniary incentives appears nowadays particularly interesting at a time when many European countries have implemented (or have discussed the implementation) of mechanisms inspired from private management as a manner to enhance the efficiency of their court system.⁶⁷⁹ For instance, a system of

⁶⁷⁵ R.COOTER, *supra* note 154 (observing: ‘becoming a federal judge usually involves an economic sacrifice, so the usual economic assumptions about maximizing income do not apply’).

⁶⁷⁶ P.TRUCHE, *Juger et être jugé – Le magistrat face aux autres et à lui-même*, Fayard, 2001, 191 p. (here at p.126).

⁶⁷⁷ R.A.POSNER, *supra* note 628 (with regards to Appellate judges, he argues that ‘because the judiciary has been placed on a non-profit basis, we should expect that judges on average do not work as hard as lawyers of comparative age and ability’).

⁶⁷⁸ S.J. CHOI, G.M. GULATI and E.A .POSNER, ‘Are Judges Overpaid? A Sceptical Response to the Judicial Salary Debate’, (1) *Journal of Legal Analysis*, 2009, n°1, pp.47-117.

⁶⁷⁹ F. CONTINI and R. MOHR, ‘Reconciling Independence and Accountability in Judicial Systems’, (26) *Utrecht Law Review*, 2007, n°2.

bonuses and premiums aimed at rewarding judges for ‘their contribution to the good functioning of the judiciary’ has been implemented in France in 2003.⁶⁸⁰ Viewed as a performance bonus, this initiative is widely and harshly criticized within the French judiciary. Judges indeed tend to consider that judicial quality is sacrificed upon the altar of quantity and efficiency.⁶⁸¹ Interestingly, the Law and Economics literature is similarly reluctant to the use of performance criteria since many aspects of the judge’s decision can neither be quantified nor easily observable. POSNER considers for instance that ‘it would be premature to embrace performance measures as a method of incentivizing or constraining judges. It would be downright absurd to suggest (...) that they should be used as the basis for awarding bonuses to judges who score well on them’.⁶⁸² Additionally, GAROUPA and GINSBURG have suggested that – even though ideally it could be desirable to reward judges on the basis of their individual contribution to the functioning of justice - initiatives aimed at valorising judges’ individual marginal output might nonetheless contribute to impair the collective output of courts. Rational maximizing and rent-seeking judges may indeed be tempted to invest more time and effort to pursue their individual interests by – for instance – expediting and privileging easier cases and spending less time on harder cases.⁶⁸³ Relatedly, an attempt to evaluate judges’ work on a basis of a list of fixed criteria may induce a risk of seeing judges trying to score high on those criteria while potentially neglecting other criteria which may not appear on the list. As a matter of fact, no unanimity has been found on this question yet. As a reply to the Spanish Supreme Court which – in its decision on a mechanism linking judges’ salaries to their individual productivity – ruled that the use of output measures may have a negative effect on the economic independence of the judiciary,⁶⁸⁴ a 2013 ruling of the French State Council (*Conseil d’Etat*) on the

⁶⁸⁰ Article 3, décret n.2003-1284, 26 December 2003, *relative au regime indemnitaire de certains magistrats de l’ordre judiciaire*, JO 30 Decembre, p.22405. In 2011, the amount of premium and bonus was revised (see décret n° 2011- 913 du 29 juillet 2011 *modifiant le décret n° 2003-1284 du 26 decembre 2003*). Criteria taken into account for the fixation of these bonus can include : la gestion des flux, respect des délais, participation a des taches non juridictionnelles non rémunérées, charge de travail généré par des dossiers d’une particulière complexité, capacité à représenter l’institution judiciaire, capacité a mettre en œuvre des reformes’ (see Circulaire du 9 aout 2011 *relative a la mise en œuvre de la revalorisation du régime indemnitaire des magistrats de l’ordre judiciaire*, Bulletin Officiel du Ministère de la Justice et des Libertés, n° 2011-08, 31 August 2011).

⁶⁸¹ C. CASTAING, ‘Les procédures civiles et administratives confrontées aux mêmes exigences du management de la justice’, *AJDA*, 2009, p.913 ; C. VIGOUR, *Temps judiciaire et logique gestionnaire, tensions autour des instruments d’action et de mesure*, GIP Droit & Justice, December 2011 ; See also in the French Newspaper *Liberation*, ‘Des primes chez les juges’, D. SIMONNOT, 25 September 2003, (available on <http://www.liberation.fr/societe/0101455377-des-primes-chez-les-juges>). See also *Devenir Juge*, p.231

⁶⁸² R.A. POSNER, *supra* note 7, pp.150-151.

⁶⁸³ N. GAROUPA and T. GINSBURG, ‘Reputation, Information and the Organization of the Judiciary’, (4) *Journal of Comparative Law*, 2010, pp.226-254.

⁶⁸⁴ Tribunal Supremo, Sala de lo contencioso administrativo, 2004 (cited by F. CONTINI and R. MOHR, *supra* note 679).

contrary held that the mechanism of premium and bonuses does not adversely impact the independence of the judiciary⁶⁸⁵.

➤ *Reducing Workload: the Controversial Argument*

A second argument usually included into the judicial utility function is the judge's concern for decreasing his workload.⁶⁸⁶ More specifically, the literature here often refers to the term 'leisure'.⁶⁸⁷ The use of this term is however misleading and somehow problematic. Given the potential heavy workload that judges must face daily, there are reasons to believe that they have not chosen this professional path to become individuals solely maximizing their free-time.⁶⁸⁸ The literature however suggests that judges are likely to use a wide range of tools 'for ducking issues presented by the parties to appeal' and to ultimately avoid 'the hassles involved in arduous and political issues'.⁶⁸⁹

In their empirical research conducted with Israeli courts, BEENSTOCK and HAITOVSKY observe for instance that an increase in the appointment of new judges induces incumbent judges who benefit from less case pressure to lower their level of exerted effort.⁶⁹⁰ Going a step further and building his theory on the assumption that judges may ultimately seek to reduce their workload, MACEY suggests that American procedural rules are shaped by judges' self-interest and are principally aimed at increasing judges' control over their agenda.⁶⁹¹ The author therefore considers that judges are more likely to maximize the use of their generic procedural skills - for which they already have a high level of expertise - rather than to bear the costs of acquiring specific substantial skills when dealing with sophisticated issues of law. The growing *proceduralization* of substantive areas of law - such as notably securities or company law - would thus reflect judges' preferences for the use of generic skills that they can more easily master with lower efforts. As suggested by the author, this focus *on the form* rather than *on the substance* would

⁶⁸⁵ Conseil d'Etat, 6e sous-section, Decision n° 353035, Inédit Recueil Lebon, 1 March 2013

⁶⁸⁶ M. RADIN, *supra note 607* (positing, already in 1925, that 'judges are people and the economizing of mental effort is a characteristic of people, even if censorious persons call it by a less fine name', at p.362).

⁶⁸⁷ R.A. POSNER, *supra note 7*.

⁶⁸⁸ J.C. ALEXANDER, 'Judge's Self-Interest and Procedural Rules – Comment on Macey', (23) *Journal of Legal Studies*, 1994, n°1, pp.647-665 (observing that 'these people did not become federal judges in order to get a soft job with a good pension. We are not going to explain their judicial decisions by postulating that they are lazy (...). It is not credible to suppose that they did so to avoid work').

⁶⁸⁹ J. R. MACEY, 'Judicial Preferences, Public Choice, and the Rules of Procedure', (23) *Journal of Legal Studies*, 1994, n°1, pp.627-646.

⁶⁹⁰ M. BEENSTOCK and Y. HAITOVSKY, 'Does the Appointment of Judges Increase the Output of the Judiciary', (24) *International Review of Law & Economics*, 2004, pp.351-369

⁶⁹¹ J.R. MACEY, *supra note 689*.

unsurprisingly be problematic since – following this path of reasoning – judges could easily be misled by stakeholders’ strategies or decisions which merely have ‘an appearance of fairness’.⁶⁹²

➤ *Career Concerns*

A third argument of the judicial utility function concerns the perspectives of promotion and advancement within the judiciary, hereafter referred to as career concerns. Remarkably, promotion is likely to be a significant incentive for Continental judges, as opposed to their Common Law counterparts most of the time recruited after a first and significant professional experience.⁶⁹³ Civil Law judges indeed usually start their career at the bottom of the hierarchical ladder. GUARNIERI and PEDERZOLI compare European judiciaries to pyramid-like organizational structure where judges’ promotion is mostly a function of two variables, seniority and performance.⁶⁹⁴ In the same vein, SCHNEIDER observes that the structure of Civil Law judiciaries could usefully be envisaged as ‘internal labour market’ where judges compete to reach higher positions.⁶⁹⁵ This being said, the perspective of promotion is also relevant for Common Law judiciaries where advancement remains mostly the result of the political process⁶⁹⁶. Interestingly, this approach tends ultimately to assimilate continental judges to employees hired by big companies⁶⁹⁷ or to civil servants working in administrations.⁶⁹⁸ Crucially, an agent with career concerns will actively seek to signal to his hierarchy his high ability to perform his tasks efficiently.⁶⁹⁹ Concerning the judiciary however, signalling remains an uneasy task. First, the final judicial output cannot *per se* be assessed as

⁶⁹² *Idem* (observing: ‘corporate directors can engage in virtually any transaction they wish, without fear of challenge, simply by creating the appearance of fairness by ensuring that the corporate minutes reflect lengthy and thorough discussions of the proposed transactions and by providing the decision makers with all relevant documents. Of course, these procedures, while costly, do not provide any reliable guarantees that the transactions will benefit shareholders. What these transactions do accomplish is to allow judges to focus their decision making on issues with which they are more comfortable’).

⁶⁹³ R.A. POSNER, *supra* note 7, at p.129.

⁶⁹⁴ C. GUARNIERI and P. PEDERZOLI, *The Power of Judges- A Comparative Study of Courts and Democracy*, Oxford University Press, 2002, at p.49.

⁶⁹⁵ M.R. SCHNEIDER, *supra* note 648.

⁶⁹⁶ C. GUARNIERI and P. PEDERZOLI, *supra* note 694 (highlighting that ‘historically, the English judiciary did not have a hierarchical structure and the notion of judicial career was virtually unknown’. They however notices that currently some types of career pattern seems to emerge in the English system).

⁶⁹⁷ R.A. POSNER, *supra* note 7, at p.130.

⁶⁹⁸ H.A. SIMON, *supra* note 574, pp. 145-147.

⁶⁹⁹ C. GUARNIERI and P. PEDERZOLI, *supra* note 694 (highlighting: ‘hierarchical superiors play a fundamentally important role in determining judicial status in most continental countries. Even when the final decision lies with the minister of Justice or other institutions, promotions rely heavily on information recorded in personal reports compiled by superiors’, at p.50).

being simply ‘true’ or ‘false’ from the standpoint of an external observer.⁷⁰⁰ POSNER hence considers that European career judges are likely to be more legalists – or in other words, may more frequently *stick to the law* - than their American counterparts since a strict interpretation of statutes can be used as a possible indicator to evaluate the correctness of their decisions.⁷⁰¹ Second, since judges may eventually sit in panels, it is difficult to distinguish the marginal contribution of each single judge. The signal sent by a careerist judge is therefore likely to be diluted within the final decision ultimately taken in accordance with the opinion of other judges who do not necessarily share the same career concerns. This last point is amplified by the non-existence of dissents in European judiciaries in which judges can expose their diverging points of view. In order to overcome these difficulties, researchers have regarded the appeal process as a manner to ultimately evaluate the way judges have reached their decisions.⁷⁰² The perspective of being overturned by a higher court can therefore be seen as a disutility from the judges’ perspective since a reversal may ultimately contribute to slow down judge’s advancement. Finally, others have suggested the organization of a ‘tournament of judges’ as an objective way to appoint justices at upper levels of the judicial hierarchy, while ultimately inducing them to exert higher effort.⁷⁰³

Empirical research tends to support judges’ concerns for their career and promotion and substantiate the idea that this peculiar incentive can usefully be manipulated by public officials to enhance courts’ performance. From the analysis of US Federal Antitrust sentencing between 1955 and 1980, COHEN for instance observes that the variance of the collected results can ultimately be explained by judges’ career concerns. Noticing indeed the continuous complaints formulated by politicians against the low amount of fines sentenced by judges, COHEN assumes that it is politically coherent for a judge seeking career advancement to impose harsher sentences.⁷⁰⁴ Focusing on Japan, a Civil Law country, RASMEYER and RASMUSSEN notably report Japanese judges’ strong preferences for posts based in big cities such as Tokyo and suggest that politicians tend to manipulate judges’ career concerns by mostly favouring to upper position those judges who are the most productive.⁷⁰⁵ Ultimately, SCHNEIDER observes from the

⁷⁰⁰ R.A. POSNER, *supra* note 628.

⁷⁰¹ R.A. POSNER, *supra* note 7, at p.198.

⁷⁰² G.LEVIT, ‘Career Judges and the Appeals Process’, (36) *Rand Journal of Economics*, 2005, n°2, pp. 275-297; M.R. SCHNEIDER, *supra* note 648 (observing that ‘judges who are repeatedly reversed by the Federal Labour Court will be less likely than other judges to be promoted’).

⁷⁰³ S. CHOI and M. GULATI, ‘A Tournament of Judges?’, (92) *California Law Review*, 2004, n°1, pp.299-322

⁷⁰⁴ M.A. COHEN, ‘The Motives of Judges: Empirical Evidence from Antitrust Sentencing’, (12) *International Review of Law & Economics*, 1992, pp.13-30

⁷⁰⁵ J.M. RAMSEYER and E.B. RASMUSSEN, ‘Judicial Independence in a Civil Law Regime: The Evidence from Japan’, (13) *Journal of Law, Economics & Organization*, 1997, n°2, pp.259-286.

analysis of data drawn from nine German Labour courts of appeal that judges' career concerns and qualifications are likely to influence the court productivity.⁷⁰⁶

➤ *Reputation and Prestige*

While facing the puzzle of judges' incentives, COOTER already suggested in 1983 that, 'in the absence of a compelling alternative', a quest for prestige and good reputation could be envisaged as a strong determinant of judicial behaviours.⁷⁰⁷ Going then a step further, GAROUPA and GINSBURG have suggested that the issue of reputation should be perceived from two different perspectives.⁷⁰⁸ The first focuses on the reputation of judges taken individually. Prestige is here envisaged as an instrumental mechanism by which individuals can express their high professional skills and performance. Prestige and good reputation are therefore primarily sources of non-monetary payoffs including personal satisfaction, self-esteem, deference from their peers, notoriety and/or influence on other judges or policy-makers. As in every occupation, individuals usually prefer to be recognized and praised for the quality of their work. As SMITH already pointed out in the *Theory of Moral Sentiments*, 'we desire both to be respectable and to be respected [,] we dread both to be contemptible and to be contemned' and, as a logic consequence, 'to deserve, to acquire and to enjoy the respect and admiration of mankind are the great objects of ambition and emulation'.⁷⁰⁹ This non-monetary payoff may also turn out to be financial, notably at a time where – as previously explained – bonus or premium tend to be awarded on the basis of the judge's own performance. The second perspective regards the collective dimension of reputation, understood as a manner to convey information about the quality of the judiciary, this time envisaged as a whole. Depending on the subsequent structure of the judiciary, individual and/or collective reputation may be accentuated.

In Common Law countries – and specifically in the American system - where judges notably sign their opinion and personally express their own views, individual reputation and opinion matter greatly and become a hallmark or signature for each individual judge. This observation has led some American scholars to propose methods aimed at measuring and evaluating the degree of prestige of individual

⁷⁰⁶ M.R. SCHNEIDER, *supra* note 648.

⁷⁰⁷ R. COOTER, *supra* note 154.

⁷⁰⁸ N. GAROUPA and T. GINSBURG *supra* note 683.

⁷⁰⁹ A. SMITH, *supra* note 348 (specifically Part 1, Section 2, Chapter III 'Of the Corruption of Our Moral Sentiments Which is Occasioned by this Disposition to Admire the Rich and the Great, and to Despise or Neglect Persons of Poor and Mean Conditions).

judges.⁷¹⁰ On the contrary, in Civil Law systems, judge's personal performance appears secondary and steps back in front of the performance of the court as a whole. From the public's standpoint, a prestigious judge is therefore more likely to be recognized as such in Common Law countries than it is the case for their Civil Law counterparts. This being said, the dichotomy between careerists and bureaucratic Civil Law judiciaries mainly focusing on collective reputation, and Common Law judiciaries mainly focusing on individual reputation is misleading. Individual reputation is also a strong incentive within civil law judiciaries. A major difference remains however the reference group from which the judge's reputation and prestige are ultimately assessed. As pointed out by GUARNIERI and PEDERZOLI, in Civil Law countries, this reference group is mostly located within the judiciary itself.⁷¹¹ Even though Civil Law judges often remain relatively unknown to the public's eye, they may however be strongly incentivized to seek prestige among their peers, which means within their judiciary and the legal profession. Ultimately, if prestige and reputation are indeed arguments of the judicial utility function, one can rather safely predict that – as previously suggested regarding careerist judges – the perspective of being reversed by a higher court is a source of disutility since it cast some doubt on the judge's performance to interpret and apply the law correctly.

➤ *'Playing the Judicial Game' (Enjoying the Art of Judging)*

A fifth argument of the judicial utility function regards what POSNER refers to as judges' taste for the 'judicial game'.⁷¹² The act of judging is indeed 'bound up with compliance with certain self-limiting rules that define the game of judging'. These rules encompass for instance efforts to consider litigants' claims from an external and detached standpoint or to challenge the decisions that judges may *a priori* hold on a particular matter or issue. Interestingly, considering the act of judging as a game has also been used by GARAPON who – while describing the 'judicial ritual' - suggests that 'unlike a doctor or a CEO, a judge only adjudicates in peculiar and well-determined circumstances, within a courtroom and after a confrontation of arguments regulated by the rules of procedure (...)', [he] decides the 'rules of the game, fixes the objectives and names the protagonists'.⁷¹³ The act of judging takes place in a highly codified

⁷¹⁰ D. KLEIN and D. MORRISROE, 'The Prestige and Influence of Individual Judges on the US Courts of Appeals', (28) *Journal of Legal Studies*, 1999, n°2, pp.371-391.

⁷¹¹ C. GUARNIERI and P. PEDERZOLI, *supra* note 694, at p. 35 and at p.68.

⁷¹² R.A. POSNER, *supra* note 628.

⁷¹³ A. GARAPON, *Bien Juger, Essai sur le Rituel Judiciaire*, Odile Jacob, Paris, coll. Opus, 1997, p.17 (translation from the author. In French: 'le juge à la différence du médecin ou du chef d'entreprise ne peut exercer son jugement que dans des circonstances bien déterminées, celle de la salle d'audience et au terme d'un échange d'argument réglés par la procédure (...). Le premier geste de justice (...) [est de] délimiter un espace sensible qui tienne à distance

environment which notably contributes to the prestige and the particularities of the institution. One can therefore assume that attempts to disregard or to cheat with these rules is likely to be a source of disutility for judges, exactly – following POSNERS’s image - as cheating at chess ultimately reduces the pleasure of the chess amateur.⁷¹⁴

➤ *The Challenging Question of Altruistic Incentives*

Altruistic motivations are problematic from the standpoint of rational choice theory. While questioning whether public interest should for instance be included in the judicial utility function, POSNER finally decides to discard this argument by considering it as ‘inconsistent’ with the view of judges behaving as ordinary human beings.⁷¹⁵ There is indeed a palpable discomfort among rational choice theorists with regards to blurry notions such as fairness, justice or altruism which do not seem to perfectly fit the canonical assumption of the self-interested man.⁷¹⁶ A possible – and often-used – way-out to this problem is to consider that judges behave altruistically as long as doing so contributes to maximizing the arguments of their own utility function, such as career concerns, reputation, self-esteem or prestige. Altruism would thus be nothing more than a mere disguised self-interest. This being said, one cannot ignore well-known evidence from experimental economics which has highlighted that individuals may effectively depart from the self-interested assumption – although at personal cost - in order to potentially act in the interest of others.⁷¹⁷ Criticizing the individualistic approach of the judiciary defended by POSNER, some scholars have shifted from the posnerian approach, and propose different models where the emphasis is less on the personal motives of judges but rather on their interdependence and conformity with their peers and within the profession.⁷¹⁸

l’indignation morale et la colère publique, dégager un tems pour cela, arrêter une règle du jeu, convenir d’un objectif, et instituer des acteurs’.

⁷¹⁴ R.A. POSNER, *supra* note 628.

⁷¹⁵ *Idem* (arguing: ‘changing the world plays no role in the judicial utility function’).

⁷¹⁶ L.A. STOUT, ‘Judges As Altruistic Hierarchs’, *Wm & Mary Law Review*, 2001-2002, pp.1605-1627

⁷¹⁷ J.HENRICH, R.BOYD, S.BOWLES, C.CAMERER, E.FEHR, H.GINTIS and R.MCELREATH, ‘In Search of Homo Economicus: Behavioural Experiments in 15 Small-Scale Societies’, (91) *The American Economic Review*, 2001, n°2, pp.73 (from evidence drawn from experimental economics conducted in fifteen small-scale societies they observed that ‘the canonical model of the self-interested material payoff-maximizing actor is systematically violated’). As a consequence, other scholars have developed other patterns of behaviour. one of them is for instance the *homo reciprocans* whose course of action is mainly dictated by interactions with other human beings (see notably H.GINTIS, ‘The Human Actor in Ecological-Economic Models – Beyond Homo Economicus: Evidence from Experimental Economics’, (35) *Ecological Economics*, 2000, pp.311-322)

⁷¹⁸ S.HARNAY and A.MARCIANO, ‘Judicial Conformity versus Dissidence: An Economic Analysis of Judicial Precedent’, (23) *International Review of Law & Economics*, 2004, pp.405-420.

➤ *Judicial Taste for Public Service*

Finally, even though subject to possible controversies, it is here firmly believed that taste for public service is also an argument that should be included in the judicial utility function. Insights from organization theory help support this claim. Public service is envisioned as a crucial organizational objective pursued by the judiciary and it can be assumed that judges – as agents of the judiciary – are eager to contribute to its good functioning. As importantly highlighted by SIMON, ‘all of us who are employees of organizations are governed in our actions not only by our immediate personal gain but (to an important extent) by an intent to contribute to the accomplishment of the goals of the organization’.⁷¹⁹ The organization’s objective (in this case, public service) is therefore also an indirect personal objective that judges may want to achieve. The judges’ taste for public service does not appear to be contradictory with the Homo Economicus’ self-interested assumption. Conversely however, denying the existence of such an argument within the judicial utility function is likely to undermine judiciaries’ rationale. Indeed, as again pertinently suggested by SIMON, ‘it is only possible for organizations to operate successfully if, for much of the time, most of their employees, when dealing with problems and making decisions, are thinking not just of their own personal goals but of the goals of the organization. Whatever their ultimate motivations, organizational goals must bulk large in employees’ and managers’ thinking about what is to be done’.⁷²⁰ To conclude – and again without denying that views may differ on this issue - it is here believed and assumed that a taste for public service is an argument of the judicial utility function that cannot and should not be neglected for a sound understanding of judicial incentives.

4.3.3. Preliminary Conclusion

These first developments were aimed at picturing, on a larger scale, the arguments of the judicial utility function by taking into account the idiosyncrasies specific to Continental and American judiciaries. On this occasion, it was pointed out that many arguments of the utility function of insulated judges (reputation, prestige, workload or career concerns) are likely to be mostly non-pecuniary and may diverge according to the status of judges within the judicial hierarchy. Furthermore, unlike the traditional posnerian approach, judges’ taste for public service was also perceived as being fully part of the judicial utility function. Finally, this first part suggested that differences between American and Continental judiciaries also have economic implications. Agency costs or free-riding are likely to be higher in

⁷¹⁹ H. A. SIMON, *supra* note 574, at p.21.

⁷²⁰ *Idem*, at p.15 and at p.21.

Continental judiciaries where anonymous rational utility maximizing judges sit in panels, and may ultimately remain unconstrained behind their formalist legal decisions.⁷²¹

The analysis is now narrowed down to the peculiar field of mass litigation. In doing so, it is assumed that judges' preferences remain constant:⁷²² judges dealing with mass claims are fully part of the judiciary. Their incentives can therefore be viewed as similar to those of their colleagues handling individual litigation. However, a crucial variable is the *mass* context which may potentially exacerbate –or on the contrary depreciate – some of the judges' incentives that have been previously identified.

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4.3. ECONOMICS OF JUDGES INVOLVED IN MASS LITIGATION

In many situations, decisions taken by insulated judges can be regarded as 'low-cost decisions': while having an effect on litigants, they induce neither direct nor personal costs on judges.⁷²³ In the field of mass disputes, this assumption is however questionable: choices that judges make on such circumstances have direct and long-lasting consequences on their well-being. The decision to define a group broadly, to control the adequate and effective communication between class representatives and plaintiffs, to convey information to parties or to spend time scrutinizing individual claims rather than to focus on the group as a whole drastically increase their workload and their administrative burden. In other words, when managing mass claims, judges are nothing other than agents dealing with competing costly alternatives.⁷²⁴ Assuming that they behave as rational actors maximizing their individual utility, they reach their decisions after a cost-benefit analysis, and ultimately choose the option that yields them the highest personal reward at the lowest cost. The economic literature suggests that such situations can lead to agency problems where the

⁷²¹ M. De S.-O.-L'E.LASSER, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, Oxford, 2004, p.28.

⁷²² G.S.BECKER, *supra* note 532 (observing: 'preferences are assumed to not change substantially overtime, nor to be very different between wealthy and poor people, or even in different societies and culture', at p.5).

⁷²³ KIRCHGAESSNER, *supra* note 578.

⁷²⁴ For a comparable approach but focusing on statutory interpretation, see: R.GRAHAM, 'What Judges Want: Judicial Self-Interest and Statutory Interpretation', (30) *Statute Law Review*, 2009, pp. 38-72.

interests of rational judges pursuing their own agenda are ultimately not fully aligned with the interests of policymakers or with the one of parties.⁷²⁵

Costs and benefits of mass disputes from the judges' perspective are first discussed. Mass claims can indeed negatively or positively affect judicial well-being (4.3.1). Interestingly, the use of standards to regulate judicial monitoring of mass claims gives them leeway to express their own preferences (4.3.2). Judges may therefore be rationally tempted to follow three patterns of behaviour, namely behaving as *gurus*, as *followers* and/or as *opportunistic managers*. These different attitudes have important consequences on the outcomes of mass disputes (4.3.3). Empirical evidence drawn from the American experience tends to substantiate these views (4.3.4).

4.3.1. Costs and Benefits of Mass Litigation from the Judges' Perspective

One may *a priori* wonder whether, from a judicial perspective, mass litigation is truly different from individual litigation. As an American judge involved in several mass claims has highlighted, 'what renders a mass tort case different is the degree to which all participants – judges, lawyers, and litigants – must deal with the case as an institutional problem with sociological implications extending far beyond the narrow confines of the courtroom'.⁷²⁶ In this view, managing mass disputes induces costs (*a*) and benefits (*b*) which may alter judicial incentives.

a) Costs Associated with the Management of Mass Disputes

➤ *The Number of Parties*

The number of parties is an amplifying factor which has long-lasting implications on judges' workloads and administrative burden.⁷²⁷ The larger the number of plaintiffs is, the lengthier and harder the lawyers' detailed background of facts.⁷²⁸ Difficulties may also be stressed with regards to the process of

⁷²⁵ P. AGHION, O. HART and J. MOORE, 'The Economics of Bankruptcy Reform', (8) *Journal of Law, Economics & Organization*, 1992, pp.523-546 (observing in a different field –bankruptcy – that 'judges too can use their supervisory powers to pursue their own agenda, which may be in conflict with the claimants' narrow objective of value maximization', at p.519).

⁷²⁶ J.B. WEINSTEIN, *supra* note 159, at p.45.

⁷²⁷ *Supra* note 263 (the report observing that 'in large scale litigation, the administrative burden and therefore cost of disclosure has grown disproportionally to its benefits', at p.7).

⁷²⁸ *Idem* (mentioning 'a tendency of parties (through their lawyers) failing to plead only material facts and, instead, setting out detailed background facts and evidence, as well as law and argument', at p.7).

identification and notification when targeting many plaintiffs. As experienced by judge WEINSTEIN, ‘when the courts deal with so many people, the expense of one-to-one contact can be substantial. Even a single direct mailing, putting aside the cost of production of document is great’.⁷²⁹ As suggested in the preceding chapter, judges dealing with mass claims should adopt pragmatic approaches to deal with numerous claimants. The previously-mentioned international WCAMs which involved parties outside the Netherlands have shown that the process of notification to plaintiffs located in different countries could be cost-intensive and burdensome.

➤ *The Complexity of Legal Issues*

The complexity of legal issues and legal matters that are in play in mass disputes can also be costly from a judicial perspective. As SELVIN and PETERSON have expressed it, ‘in the context of mass litigation, issues such as choice of law, statutes of limitation, defences, punitive damages or causation can be exceptionally difficult. Court’s attempts to decide these complicated issues entail risks of criticisms and a risk of reversal’.⁷³⁰ As evidenced by the Dutch experience in the *Converium* WCAM, mass claims can also imply many transnational difficulties, and thus challenging questions of private international law.⁷³¹ Moreover, in complicated tort settings (e.g. toxic torts or defective products) questions regarding negligence, defect or causation will demand hard intellectual work. As illustrated by judge WEINSTEIN, on such occasions, ‘[judges] do not deal with pure economic reasonable person models. [They] deal with complex sociological, scientific, and psychological problems as well as economics’.⁷³² Obviously, this substantial complexity ultimately depends on the intrinsic nature of the case that judges will have to manage. It is therefore difficult to draw a general statement on this point. However, even though it remains unclear whether mass disputes tend to induce more complex questions of law when compared to individual litigation, empirical evidence has nonetheless already pointed out the judges’ difficulties and limits when dealing with highly technical issues.⁷³³ By extension, it can be assumed that judges may for instance lack competences and erroneously assess the terms of a final settlement concluded between the parties, and consequently behave as ‘bulls in porcelain shops’.⁷³⁴ On a broader level, a difficulty for judges

⁷²⁹ J.B. WEINSTEIN, *supra* note 159, at p.95.

⁷³⁰ M. SELVIN and M.A. PETERSON, *supra* note 538.

⁷³¹ H.VAN LITH, *supra* note 234 (stressing that the WCAM has ‘definitely entered the international arena’, at p.19).

⁷³² J.B. WEINSTEIN, *supra* note 159, at p.92

⁷³³ K.A.MOORE, ‘Are District Court Judges Equipped to Resolve Patent Cases’, (15) *Harvard Journal of Law & Technology*, n°1, 2001.

⁷³⁴ J.R. MACEY and G.P. MILLER, *supra* note 486.

indeed consists in correctly channelling large flows of money. As suggested by RESNIK, ‘by authorizing or presiding over aggregate litigation, judges [indeed] become allocators and purchasers of legal services’.⁷³⁵

➤ *Public exposure*

Public exposure can induce reputational costs. On the one hand, mass claims are likely to greatly attract media and public attention. An increase in judges’ public exposure may increase their risk-aversion. Their errors or lack of control can indeed have considerable consequences for litigants. As highlighted by RESNIK, ‘given the high degree of visibility of mass torts (...), judges should be particularly careful that their own image not be tarnished, either by criticisms that judges have not paid attention to how money has been distributed under their aegis or that through such distributions judges have created patronages systems’.⁷³⁶ Undeniably, potential costs induced by a higher public exposure may conversely turn out to be a benefit from the viewpoint of judges eager to develop their prestige or their reputation among their peers or *vis-à-vis* the legal profession. This issue ultimately hinges on the personality of the judge. Yet, a possible weakness of this observation is that it assumes that media and public are perfectly able to detect *ex post* judges’ errors. In many ways, this assumption appears questionable. As pointing out by KONIAK and COHEN while commenting on the American class action, ‘individual judges have little reason to expect negative reputational effect from approving bad class deals’.⁷³⁷ First, the authors observe that the complexity and length of documents render a comprehensive understanding of the case details highly difficult to laymen. A possible objection to this argument is to consider that laymen – regardless of the complexity of the case – may nonetheless have an opinion. Albeit possibly incorrect or incomplete, judges’ views may have long-lasting reputation effects. Second, the authors highlight that lawyers – and more rarely judges – are more likely to be viewed as scapegoats or to be held responsible for bad mass settlements.⁷³⁸ Third and relatedly, they also observe that attempts aimed at ‘criticizing judges for self-interested behaviours (...) [are most of the time] considered by many to be as profane as accusing the Pope of a lecherous eye, a charge well-nigh outside the bounds of civilized discourse’.⁷³⁹ The authors

⁷³⁵ J. RESNIK, ‘Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation’, (148) *University of Pennsylvania Law Review*, 2000, p.2119

⁷³⁶ J. RESNIK, *idem*.

⁷³⁷ S.P. KONIAK and G.M. COHEN, *supra* note 540.

⁷³⁸ *Idem* (‘to the extent the general public, media or academics blame anyone for the abuse they perceive, albeit find difficult to document, that blame tends to land on the doorstep of lawyers, not the judiciary’).

⁷³⁹ *Idem*.

conclude that judges aware of such an information gap are ultimately incentivized to take advantage of this situation at only low personal risks.⁷⁴⁰

➤ *Lack of Information*

Access to information may also be costly from judges' standpoint. To illustrate this point, one may go back to FULLER and WINSTON's contribution which, in the seventies, highlighted the limits of adjudication in polycentric cases.⁷⁴¹ They defined polycentric cases as 'many centered' situations where there are 'interacting points of influence'. Mass claims nowadays fit in the category of polycentric cases.⁷⁴² A key problem associated with polycentric cases, the authors argued, is that all affected parties cannot take part to discussions to express their opinions and ultimately be heard. The adjudicator therefore lacks information and has no clear views about the repercussions of his decisions.⁷⁴³ Furthermore, unlike lawyers or representative association which may have direct contact with several plaintiffs, the judge's role is plagued by informational asymmetries.⁷⁴⁴ This situation is problematic since, as judge WEINSTEIN draws from his own experience, 'in mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately'.⁷⁴⁵ Obviously, this situation does not preclude judges from seeking the needed information directly among plaintiffs. However behaving this way requires from

⁷⁴⁰ *Idem* ('we believe that judges understand all of this, which means that they would see little risk of negative reputational effects from approving a class settlement that looks amazingly like a collusive deal, or a settlement that suggests questionable conduct under the antitrust laws').

⁷⁴¹ L.L. FULLER and K.I. WINSTON, 'The Forms and Limits of Adjudication', (92) *Harvard Law Review*, 1978, pp.353-409.

⁷⁴² *Idem* (highlighting: 'in practice polycentric problems of possible concerns to adjudication will normally involve many affected parties and a somewhat fluid state of affairs', at p.397).

⁷⁴³ J.W.F. ALLISON, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication', (53) *Cambridge Law Journal*, 1994, n°2, pp.367-383.

⁷⁴⁴ J.R.MACEY and G.P.MILLER, *supra* note 486 (when commenting on the roles of counsels and judges in American class action lawsuits, they argue that 'counsel will have negotiated the settlement and therefore will have a basis on which to assess the value of injunctive relief. Counsel will have been in contact with the representative plaintiff and possibly other class members whose input can provide information about class preferences. Counsels may also have retained experts to assist in structuring the non-pecuniary aspects of the settlement; the advice of such experts, provided candidly during settlement negotiations may be useful in teasing out value for the class. Some of this information can be presented to the court at the fairness hearing, but the court's ability to understand, evaluate and process this information is limited').

⁷⁴⁵ J.B.WEINSTEIN, *supra* note 159, at p.92.; see also: J.T. MOLOT, 'An Old Judicial Role for a New Litigation Era', (113) *Yale Law Journal*, 2003, p.27-118 (highlighting: 'instead of evaluating arguments advanced by litigants, judges must often frame arguments themselves as plaintiffs' attorney (who stand to receive large fees) and defendants (who stand to achieve "global peace") have little incentive to argue on behalf of absent class members whose rights might be undermined by a proposed settlement', and adding: 'when judges review class settlement in mass tort suits, they lack not only the litigant input which they are accustomed, but also legal criteria').

rational maximizing judges greater efforts and these latter may – theoretically at least - be reluctant to do so.

b) Potential Benefits

➤ *Powers*

As a flipside of a same coin, mass claims have also benefits from a judicial perspective. The mass context gives notably judges a unique central authority. Commenting on the American experience, judge WEINSTEIN for instance argued that judges' great powers are essential so as to 'impose scheduling decisions and procedural rulings on the parties'.⁷⁴⁶

➤ *Public Exposure (again) and Prestige*

Judges can find in mass claims a venue for promoting their prestige and reputation among their peers, but also within the larger legal profession. A judge able to deal efficiently with a mass claim may take benefit from career advancement. As an illustration, while actively managing and presiding over the Agent Orange lawsuit, judge WEINSTEIN received an extraordinary attention and prestige,⁷⁴⁷ his work being welcomed as a 'virtuoso performance of judicial management'.⁷⁴⁸ In terms of visibility, public exposure and prestige, a useful comparison can be drawn between the situation of judges dealing with highly-advertised public cases and those involved in mass cases: both types of disputes may attract considerable media attention or deal with burning societal issues. Interviews conducted by ROUSSEL with several French judges involved in various high-profile political scandals shed light on their overall satisfaction, higher degree of self-esteem, shared feelings of doing something crucial and becoming 'someone important' within and for the society, while in the meanwhile reaching the 'peak of the judiciary'.⁷⁴⁹ As the author observed, these judges experienced great transformations regarding their social and professional status which were visible 'not only through the judge's personal lens, but more largely within and beyond

⁷⁴⁶ *Idem*, at p.102.

⁷⁴⁷ S.P. KONIAK and G.M. COHEN, *supra* note 540 (on a broader scale, the authors highlight that 'while presiding over a major class action settlement may entail a significant amount of work, a judge seeking power, and even prestige, could hardly do better than to preside over the settlement of such a suit'. Similarly, notes that the Agent Orange massive consolidation and class action were in part designed to become – and did become - a focus of national attention. Judge WEINSTEIN's series of hearings around the country and the settlement itself served to alert the nation to how unfairly Vietnam veterans have been treated'.

⁷⁴⁸ L.B. NOVEY, 'Collective Judicial Management of Mass Toxic Tort Controversies: Lessons and Issues From the Agent Orange Litigation', (27) *Social Science & Medicine*, 1988, n°10, pp.1071-1084.

⁷⁴⁹ V. ROUSSEL, 'Les Magistrats dans Les Scandales Politiques', *Revue Française de Science Politique*, n°2, 1998, pp.245-273.

the judiciary'.⁷⁵⁰ The author finally concluded that dealing with such affairs contributed to renew 'the judge's social dimension'.⁷⁵¹ As emphasized by one of the interviewees, he saw this experience as 'a manner to say: 'I am not [solely] a public servant of the judiciary; I am not only in charge of small cases (...); I am not a machine in charge of treating files; as a judge, I have [the duty] to ask questions that may go far beyond the scope of what I am actually doing'.⁷⁵² There are reasons to believe that similar remarks may be made by judges when managing mass claims. The great notoriety that they withdraw from the treatment of cases covered by media leads many of them to write books and articles where they compile, synthesise and convey their past experience to target larger audience.⁷⁵³

4.3.2 How do Judges Express their preferences? The Use of Rules v. Standards

Law and Economics scholars have extensively debated the conditions under which the use of standards or rules⁷⁵⁴ – in other words, the degree of precision that should be associated with the law – is more desirable to monitor behaviour (a). In the framework of mass disputes, preference is given to standards to monitor judicial behaviour (b).

a) Regulating Behaviour via *Rules* or *Standards*: Law & Economics Discussions

As POSNER observes, 'rules and standards are addressed not only to the persons out there in the society whose behaviour the legal system wants to constrain but also within the legal system – the society's agents.'⁷⁵⁵ Costs and benefits of rules and standards are actually the two sides of the same coin.

⁷⁵⁰ *Idem* (in French : 'c'est avant tout en tant qu'effets – largement non maîtrisés, du moins initialement – engendrées par les pratiques des magistrats dans les 'affaires' que se manifestent des transformations de l'identité sociale et professionnelle des magistrats. [Ces transformations] se réalisent non seulement à leur propres yeux, mais aussi beaucoup plus largement dans le corps et en dehors de celui-ci').

⁷⁵¹ *Idem*

⁷⁵² *Idem* (in French : 'c'était une façon de dire: « je ne suis pas un fonctionnaire de la justice. Je ne me contente pas de traiter de petits dossiers que l'on m'envoie (...). Je ne suis pas une machine à sortir des dossiers. J'ai un rôle en tant que magistrat de poser des problèmes qui peuvent dépasser le cadre même de ce que je fais').

⁷⁵³ See for instance: L. GREILSAMER and D. SCHNEIDERMAN, *Les Juges Parlent*, Fayard, 1992, 574 p. (compiling the experience of judges involved in big and highly publicized cases); see also in other European countries: E. VAN FRAECHEM, *Een Rechter Sprekt*, Davidsfonds, Leuven, 2004, 191 p.

⁷⁵⁴ L. KAPLOW, 'Rules Versus Standards: an Economic Analysis', (42) *Duke Law Journal*, 1992, pp.557-627; H.-B. SCHAEFER, 'Legal Rules and Standards', in: C.K. ROWLEY and F SCHNEIDER. (Eds.), *Encyclopaedia of Public Choice*, Kluwer Academic Publisher, 2004, pp.671-674; R.A.POSNER, *supra* note 77, specifically 20.3: 'Statutory Production, Rules versus Standards'.

⁷⁵⁵ R.A. POSNER, *supra* note 77, at p.544.

When compared to rules, standards avoid the costs of particularizing *ex ante* situations, and make it easier for judges to adapt *ex post* their behaviour to the peculiarities of the case that they have to manage. POSNER further points out such flexibility and argues that standards are ‘more apt to invite explicit balancing of competing interests’.⁷⁵⁶ In turn, standards induce several costs. First, they delegate a large extent of the work to the Judiciary. This situation can be desirable if the Legislature has *ex post* a limited knowledge and relies strongly on the interpretation of its judges. In doing so, standards nonetheless increase agency costs.⁷⁵⁷ Additionally, from a judicial perspective, broad standards increase uncertainty with regards to scope of the appropriate monitoring, and drastically increase discretionary decisions which – in the Law and Economics literature – are envisioned as a leeway for the expressions of personal preferences and biases.⁷⁵⁸ Even though renewed in the Law & Economics literature, this argument is by no means novel: in a famous quote attributed to Lord CAMDEN, judicial discretion was already said to be ‘the law of tyrants; it is always unknown; it is different in different men; it is casual and depends on constitution, temper and passion. At best it is often caprice. In the worst it is every vice, folly, and passion to which human nature can be liable’.⁷⁵⁹

b) A Preference for Standards to Regulate Judicial Behaviour in Mass Claims

In the framework of mass litigation, preference is given to standards for guiding and regulating judicial behaviour. This choice can be explained in two different ways.

First, standards facilitate judicial case-tailored approaches to mass disputes. Taking into account *ex ante* all the contingencies of judicial monitoring is highly costly and can be viewed as waste.⁷⁶⁰ It is indeed not possible to draw *ex ante* general conclusions on the way judges should deal with mass disputes. How and how many test cases should be ordered, how and how many subgroups should be defined, on which criteria the group should be defined, how the case should be advertised in the media, how the merits of individual claim should be assessed or to what extent individual issues should prevail are – among many others – questions that will extensively depend on the nature of the dispute. Supporting this view, Mc

⁷⁵⁶ *Idem*

⁷⁵⁷ *Idem*

⁷⁵⁸ N. GENNAIOLI, ‘Judicial Fact Discretion’, in: A. SCHLEIFER, *The Failure of Judges and the Rise of Regulators*, Walras-Pareto Lecture, 2012, pp.23-52.

⁷⁵⁹ Cited in: J. FRANK, *supra note 607*, at p.147.

⁷⁶⁰ H.B. SCHAEFER, *supra note 754* (observing: ‘determining the appropriate content of the law for all such contingencies would be very expensive and, in many cases, simply a waste. It can therefore be concluded that in those areas of the law in which economic and social conditions change frequently and with them the optimal set of legal decisions standards are more efficient than rules’).

GOVERN warned against the risks of considering all mass disputes as ‘fungible’.⁷⁶¹ Defining a *one size fits all* judicial mass case management is not feasible. As HODGES further observes, ‘there are some situations in which a mass of individual claims may appear similar at first sight, but on closer inspection it appears that each contains individual issues that cannot effectively be resolved by deciding a generic question’.⁷⁶² Since detailing judicial management is not feasible *ex ante*, legislatures have left discretion and flexibility to their judges in order to let them adapt their intervention to the peculiarities of the dispute in front of them. This discretion is visible in the French Draft which leaves to judges the decision to distribute damages on an individual basis or through a broader scheduling approach. This discretion is also noticeable in other proceedings – such as in the English Court Rules on Collective Proceedings – where judges can decide to proceed through an *opt-in* or an *opt-out* mechanism following the specificities and needs of the case at stake.⁷⁶³

Second and more implicitly, standards tend to reveal the lack of policymakers’ clear views and opinions about what should be the role of judges in mass disputes. As an illustration, during an interview conducted in December 2012, Justice J.CHORUS who presided over two Dutch WCAMs was asked the following question: *do you think that the legislature has realistic expectations regarding the tasks that the judiciary should or must perform in mass disputes?* His reply was straightforward: *If you understand the legislature as those who work there, I’m not sure that they have a correct view about what judges must or should do. [However], if you consider the legislature in its broad meaning ('la loi'), yes it must have great expectations. These expectations are high, but they are justified.*⁷⁶⁴

Importantly, the use of standards gives leeway to rational and utility maximizing judges to express their preferences and follow their own agenda when monitoring mass claims.

⁷⁶¹ F. Mc GOVERN, *supra* note 539 (observing that differences can be made between cases where (1) plaintiffs are known or unknown, (2) defendant(s) is (are) known or unknown, (3) the harmful event is single or multiple, (4) causation is known or unknown, (5) the value of the case is known or unknown, (6) there is or there is not access to funding opportunities).

⁷⁶² C. HODGES, *supra* note 56, at p.88.

⁷⁶³ See Chapter 3.

⁷⁶⁴ Interview conducted in Leiden on 11 December 2012 (cited with permission of the interviewee).

4.3.3 Rational Attitudes of Utility Maximizing Judges in Mass Disputes: *Gurus*, *Followers* and *Opportunistic Managers*

When predicting rational attitudes of utility maximizing judges dealing with mass disputes a cornerstone issue consists in determining whether judges will ultimately consider mass litigation as an *opportunity*, or conversely as a *misfortune*. Differences between these two points of view matter. In the first scenario (mass dispute as an opportunity), rational judges behave as *gurus* maximizing the benefits previously set forth (a). In the second scenario (mass dispute as a misfortune), they behave as *followers*, mainly motivated by a desire to minimize their costs (b). As a complement to these two attitudes, the prediction of rational judges behaving as *opportunistic managers* seems to be a compromise that is also worth considering (c). The objectives of the following developments are twofold: the first is to predict how rational judges weighing differently the arguments of their utility function may behave when involved in mass disputes. The second is to identify the benefits and problems ultimately associated with each attitude so as to understand the one(s) that more likely to favour or to impair parties' interests.

a) Rational Judges Behaving as Gurus

➤ *Definition*

The term 'guru' is borrowed from by Mc GOVERN who observed that 'the incentives of judges to be viewed as gurus of mass torts have become strong'.⁷⁶⁵ A guru is commonly defined as 'a teacher and especially intellectual guide in matters of fundamental concern'. Alternatively, he is a person 'with knowledge and expertise'.⁷⁶⁶ Remarkably, Judge WEINSTEIN clearly highlighted the moral authority associated with the figure of the judge by observing that 'when so many discordant voices are heard and so much money is at stake, a hand with no financial interest in the outcome is necessary to impose order and discipline and avoid chaos'.⁷⁶⁷ In his words, the figure of the judge is presented as the last shield against the threats of anarchy and disorder.

⁷⁶⁵ F. Mc GOVERN, *supra* note 539 (at p.1841).

⁷⁶⁶ Oxford Dictionary, entry: 'guru'.

⁷⁶⁷ J.B. WEINSTEIN, *supra* note 159, at p.102.

➤ *What Does the Judge-Guru Want to Maximise?*

A judge-guru is likely to maximize arguments of his utility function such as reputation, prestige, power, career concerns and his taste for public service. Conversely, his desire to decrease his workload or to maximize leisure will be secondary. A judge-guru may therefore be highly active in developing a comprehensive case management approach. Policymakers seeking to develop this facet of judicial behaviour may notably be tempted to clearly identify the judge(s) in charge of the group proceeding. It is indeed assumed that the judge-guru will exert a higher level of effort if he knows (or can anticipate) that his efforts will be recognized and ultimately rewarded as such.

➤ *Is the Judge-Guru Adapted to Mass Litigation?*

The attitude of the judge-guru seems at first sight particularly appropriate and compatible with the monitoring of mass litigation which, as discussed previously, requires and expects active managing judging. Yet, the behaviour of the judge-guru can turn out to be costly for litigants and society. First, (already introducing an insight from behavioural economics, an approach to which I will return in Chapter 5), a judge-guru may be subject to the egocentric bias defined as a tendency to consider oneself has being above-average, immunized against the mistakes usually made by fellow human beings. Substantiating this assumption, Judge WEINSTEIN for instance observes that ‘one danger that every judge must guard against is ego [since] the sense of power and prestige in supervising a mass tort or public interest case can be heady’. Against this potential threat, he asserted the need for the court to ‘control its own sense of importance’, while acknowledging that this may be ‘sometimes a very difficult chore’.⁷⁶⁸ Second, attempts to control all the facets of the dispute may lead the judge-guru to leave his role of *active* judge to fully endorse the one of *activist* judge which may ultimately jeopardize his impartiality and independence.⁷⁶⁹ A judge can for instance be tempted to harshly defend or to impose his own opinions even though these latter may not perfectly be aligned with the expectations of parties.

⁷⁶⁸ J.B. WEINSTEIN, *supra* note 159, at p.93

⁷⁶⁹ *Idem*, at p.94 (observing: ‘the core sense of being a judge, dispassionate, aloof and apart from it all, and only secondarily a participant in the litigation, is needed to preserve the continuing impartial judicial role in long-term institutional reform and mass torts’).

➤ *Illustrations*

The example of judge WEINSTEIN monitoring the Agent Orange class action is here again illustrative. In this case, WEINSTEIN faced two intertwined problems. On the one hand, the issue of causation between the Agent Orange herbicide and plaintiffs' reported illness was not clearly established. On the other hand, Judge WEINSTEIN was nonetheless intimately convinced that the United States had a debt toward its Vietnam veterans. Therefore, he was perceived as using his powers in 'an aggressive way' by taking decisions that a majority of plaintiffs was not necessarily eager to adopt.⁷⁷⁰ In his comprehensive analysis of the Agent Orange litigation, SCHUCK furthermore highlighted that judge WEINSTEIN 'made highly questionable decisions while working for a settlement that would render them invulnerable to appeal'.⁷⁷¹ In other studies, scholars similarly suggested that 'the Agent Orange case is one in which the judge candidly sacrificed the quest for truth (...) for a partial resolution of a national problem'.⁷⁷²

b) Rational Judges Behaving as Followers

➤ *Definition*

In a second scenario, the judge behaves as a follower when he primarily relies on litigants to frame and manage the dispute. He rationally adopts an attitude that can be qualified as being more passive. From the standpoint of the judge-follower, the management of mass cases induces great costs that he seeks to avoid or to minimize. Albeit still present in his utility function, a judge-follower is less influenced by arguments such as prestige, reputation or career concerns and he seeks primarily to decrease his workload. Facing great informational asymmetries, he strongly relies on the work performed by the class counsel or the representative association in charge of the claimant group.

⁷⁷⁰ K. O'NEILL, 'Agent Orange on Trial: Mass Toxic Disasters in the Courts – Book Review', (15) *Review of Law and Social Change*, 1986-1987, pp. 415-428). Judge WEINSTEIN for instance insisted in keeping the government as a party to the litigation even though it had been dismissed by the preceding judge and even though a majority of litigants did not want to sue the government. As suggested by O'NEILL, judge WEINSTEIN fiercely 'believed that the government had neglected the veterans and was determined to force it to participate in a benefit program for them'. Additionally, NOVEY observes that judge's WEINSTEIN great involvement in the lawsuit was fiercely criticized by many US veterans who considered that the final settlement was '*almost entirely his own construction*' (see L.B. NOVEY, *supra* note 748, citing the petition to the Supreme Court for Writ of Certiorari, *Krupkin v. Down Chemical Co.*, n°87-620, 1987).

⁷⁷¹ P.H. SCHUCK, *supra* note 437, at p.249 (also quoted by K. O'NEILL, *supra* note 770).

⁷⁷² L. WRIGHTSMAN, M.T. NIETZEL, W.H. FORTUNE, *Psychology and the Legal System*, Brooks Cole Publishing, 3rd Ed, 1987.

➤ *What Does the Judge-Follower Want to Maximize?*

The course of action of the judge-follower can be twofold. First, assuming that he is not eager to exert a high level of effort, he may essentially refer to focal points to drive the behaviours of litigants toward the final outcome.⁷⁷³ As PETERSON and SELVIN have observed, such a technique which consists in channelling parties' behaviour turns out to be particularly useful in situations of uncertainty where the costs of investigating for judges are high. Parties lead the procedure and judges only intervene for the most serious or unresolved issues. Second, following the assumptions formulated by MACEY,⁷⁷⁴ a judge-follower may spend time overviewing the procedural fairness of the litigation where he can use his general skills, rather than to spend time scrutinizing in-depth the substance of the case for which more technical and specific skills are required. Scholars have argued that judges, in an attempt to decrease their workload and reduce their dockets, may be tempted to clear or to facilitate settlements by simply agreeing to the work performed by litigants.⁷⁷⁵ Behaving differently are burdensome alternatives any of which could possibly impair judicial resources.⁷⁷⁶ As GARAPON and PAPADOPOULOS have observed while commenting on the American experience, judges are indeed strongly incentivized to clear without any contestation the class action settlement set forth by litigants.⁷⁷⁷

➤ *Is the Judge-Follower Adapted to Mass Litigation?*

Behaving as a follower has long-lasting consequences. Interestingly, KOCKESEN and USMAN have pointed out the negative impact associated with low-effort judging. In their model, the authors showed that low-effort judges tend to favour settlements at unequal terms which lead defendants to overinvest in prevention.⁷⁷⁸ Furthermore, even though passive attitudes may a priori be perceived as a solution from the viewpoint of rational judges seeking to decrease their workload, this strategy may in the long-run become greatly detrimental to judges' well-being. As pointed out in the preceding chapter, litigants are likely to pursue diametrically opposed strategies which, as by-products, may increase delays and impair judicial

⁷⁷³ T. SCHELLING, *The Strategy of Conflict*, 1960, p.57 (defining a focal point as 'the person's expectation of what the other expects him to expect to be expected to do').

⁷⁷⁴ J.R. MACEY, *supra note 689*.

⁷⁷⁵ S.P. KONIAK and G.M. COHEN, *supra note 540*.

⁷⁷⁶ *Idem*

⁷⁷⁷ A. GARAPON and I. PAPADOPOULOS, *supra note 12* (In French: 'on présentera [au juge] une convention bien ficelée sur son bureau, qu'il sera ensuite fortement incité à homologuer, étant donné la congestion de ses rôles d'audience' (p.248).

⁷⁷⁸ L. KOCKESEN and M. USMAN, *supra note 600*.

resources⁷⁷⁹. On a broader level, the vision of the judge-follower can ultimately be viewed as a serious ‘abdication of judicial responsibility’⁷⁸⁰ misunderstood by the legal profession and the public. As MARCUS expresses it, (...) judges’ substantive preferences in mass tort litigation may tempt them to be less rigorous at the very time when they should be most demanding’.⁷⁸¹

➤ *Illustration*

As anecdotal evidence, a defendant’s lawyer depicted the attitude of Justice PRATT who was first in charge of the Agent Orange class action litigation as the one of an ‘absentee landlord’.⁷⁸² Furthermore, authors analysing the behaviour of Judge WEINSTEIN in the Agent Orange case pointed out that ‘throughout the litigation, [the judge] avoided issuing final decisions on potentially dispositive issues. Instead, he issues statements of preliminary decisions or indications of how he might rule on those issues’.⁷⁸³ While refusing to commit himself in a given and specific case management direction which would have precluded any possible way-out in case of unexpected obstacles or difficulties, SCHUCK reports the suggestion that Judge WEINSTEIN made to lawyers to ultimately ‘ask [him] anything [they] like and [he]’ll tell [them] how [he] will probably rule’.⁷⁸⁴ Interestingly, this practice seems to echo the practice of English judges who may give broad ‘indications’ so as to channel the conduct of litigants involved in GLOs.

c) Rational Judges Behaving as Opportunistic Managers

➤ *Definition*

Improving and enhancing efficient and cost-effective judicial case management of similar and multiple lawsuits is one of the many objectives that mass litigation proceedings seek to achieve. In the European context, this objective may be one of the most important, when compared to the United States where the

⁷⁷⁹ M. SELVIN and M.A. PETERSON, *supra* note 538.

⁷⁸⁰ J.B. WEINSTEIN, *supra* note 159 (claiming: ‘a judge’s refusal to become involved in details of settlement or insistence that only considerations of docket management guide his or her conducts represent, I believe, an abdication of judicial responsibility’, at p.111).

⁷⁸¹ R.L. MARCUS, ‘They Can’t Do That, Can They? Tort Reform Via Rule 23’, (80) *Cornell Law Review*, 1995, pp. 858-908 (at P.901).

⁷⁸² Cited in: P.H. SCHUCK, *supra* note 437, at p.117.

⁷⁸³ M. SELVIN and M.A. PETERSON, *supra* note 538 (observing: ‘this practice enabled the parties to get some indication of what to expect in the litigation, but maintained uncertainties about the final treatment of these issues).

⁷⁸⁴ P.H. SCHUCK, *supra* note 437, p.125.

emphasis is essentially put on deterrence.⁷⁸⁵ Rational judges may therefore be incentivized to view mass proceedings principally through the lens of their own interest, *i.e* as a way to first and foremost save judicial resources. Contrary to an idealistic image, judges would consequently not behave as mere neutral arbiters since they have a personal interest in the litigation and they may be prone to defend it. However, previous developments discussing the judicial utility function have also shown that taste for public service as well as desire to respect the rules of the judicial game are arguments that judges may also seek to maximize. The model of the *judge-opportunistic manager* combines these alternative viewpoints. It here refers to a situation where judges attempt to reconcile their own interest with parties' expectations. Despite the negative connotation associated with the term 'opportunistic', the notion is here employed in its neutral meaning. In a similar logic, recent research conducted on lawyers' behaviours have developed the concept of 'ethical indeterminacy' to propose a dynamic view about lawyers' behaviours where these latter attempt to align their own individual interests with the one of their clients.⁷⁸⁶ As for instance pointed out by TATA and his team, ethical indeterminacy arises in situations where 'the choice is between two courses of actions, both of which have advantages and disadvantages, and where ethical practitioners genuinely differ about which is the better'. The authors further consider that 'in making difficult and evenly balanced judgements, greater weight is placed on the advantages that flow from a course of action that is in one's own interests, [while] less weight is placed on those that flow from actions that run contrary to one's interests'.⁷⁸⁷ In other words, while facing such a grey area characterized by a doubt on the superiority of a given course of action compared to another, individuals may first enhance their own interest. Alternatively, they endorse the interest of others as long as doing so also enhances their own interest. In the framework of mass disputes, judges are similarly likely to face similar grey decisional areas where different courses of action are possible. They may therefore behave as opportunistic managers by finding a compromise between their own interest – the group proceeding as a management tool - and the one pursued by litigants.

⁷⁸⁵ see Chapter 2.

⁷⁸⁶ See notably: C. TATA, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work', (34) *Journal of Law & Society*, n°4, 2007, pp.489-519; C.TATA, T. GORIELY and al., 'Does Mode of Delivery Make a Difference to Criminal Cases Outcomes and Client Satisfaction?', (50) *Criminal Law Review*, 2004, n2.

⁷⁸⁷ *Idem*.

➤ *Illustration*

An illustration of judges behaving as opportunistic manager can be found in the class action lawsuit *In Re Rhone-Poulenc Rorer Inc.*, which concerned a group of haemophiliacs suing manufacturers for HIV-contaminated blood products.⁷⁸⁸ The seventh circuit court denied certification notably on the basis of a lack of homogeneity between claimants and of a lack of adequate manageability of the case. Yet, despite the rejection, claimants and defendants later on settled, and asked judges to clear their agreement. In contrast to their initial reaction, judges this time agreed with parties' agreement. Such a change in judges' attitudes – from an initial denial of certification to a judicial approval of the settlement agreement – was perceived as puzzling. As LAHAV for instance observes, 'why would a court be disinclined to permit litigation of a mass production claim as a single case yet approve a settlement of that same series of claims?' She further wonders whether 'the heterogeneity of claims that was the basis for denial of certification [would not] require rejection of a settlement based on homogeneous awards (...)'.⁷⁸⁹ Arguably, this change of attitude can be better understood through the concept of judge behaving as opportunistic managers. It was indeed not in judges' own interest to face considerable amounts of claims. However, they felt more at their ease when reviewing the settlement agreement. In a same logic, LAHAV claims that '[a] plausible explanation is that the court rejected the class as a result of resistance to overseeing the administration of masses of claims, whereas the court felt comfortable with private resolution that did not require it to do the administrating'. As a matter of fact, 'the court preferred that the difficult trade-offs be made by someone else'.⁷⁹⁰

4.3.4 Multi-Faceted Judges - Evidence from the United States

The attitudes of judges behaving as gurus, followers or opportunistic managers shed some light on judges' 'existential crises of role' when facing with mass disputes.⁷⁹¹ As MENKEL-MEADOW has pertinently observed, 'judges must decide whether to take an activist role such as judges Jack.B.Weinstein (...), Robert R. Merhige (...), S.Arthur Spiegel (...), and others who actively engage in the settlement or case

⁷⁸⁸ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), Cert. Denied, 116 S. Ct. 184 (1995).

⁷⁸⁹ A.D. LAHAV, 'The Law and Large Numbers: Preserving Adjudication in Complex Litigation', (59) *Florida Law Review*, pp.383-436 (at p.420).

⁷⁹⁰ *Idem*, at p. 421.

⁷⁹¹ C. MENKEL-MEADOW, 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road', (90) *Cornell Law Review*, 1995, pp.1159-1221 (at p.1183).

management process, or whether to remain more passive and disinterested from settlements'.⁷⁹² Empirical evidence has furthermore substantiated the existence of judge-followers. HELLAND and KLICK have for instance investigated the judicial control over attorneys' fees in class action lawsuits.⁷⁹³ From the judge's viewpoint, simply approving attorney's fees decreases his workload and facilitates the termination of the case. Conversely, rejecting the request requires judges to exert a higher level of effort and delays the termination of the case. In other words, the trade-off that judges face is simple: on the one hand, approving fees serves the judges' desire to clear his docket and to enhance case expediency; on the other hand, it may impair his role of good shepherd in charge of maintaining the interest of absent members who are unlikely to monitor the behaviour of their counsel. The authors interestingly observe a strong correlation between attorney fees and court congestion. In simple words, judges facing heavy caseloads are more likely to authorize higher amount of lawyers' fees. These results sheds some light on the behaviour of rational utility maximizing judges incentivized to decrease their workload in order to increase their well-being. CHOI, GULATI and POSNER have also investigated the behaviour of American district judges in securities class action lawsuits.⁷⁹⁴ Hypothesizing that more competent judges are more likely to produce superior judicial output, the authors defined a set of indicators employed to assess judicial performance in the conduct of securities class actions⁷⁹⁵. They predicted that judges with higher ability will be more likely than lower-ability judges to handle class action lawsuits more easily, to reject lead plaintiff's selection of attorney, to grant more frequent motions to dismiss since it creates more work and risks from the judges' standpoint, and to reject attorney's fees requests since they cannot expect the other party to do so. Their results - drawn from a securities class action dataset and a judge dataset - reveal interesting findings. In particular, it shows that judges with senior status (who are finishing their careers) do not shirk from effort when they deal with securities class actions. Even though senior judges are less likely than their active colleagues to preside over a class action, those of them who do preside over these cases appear more willing to reject the lead plaintiff motion.

⁷⁹² *Idem*

⁷⁹³ E. HELLAND and J. KLICK, 'The Effect of Judicial Expense on Attorney Fees in Class Actions', (36) *Journal of Legal Studies*, January 2007, pp. 171-187.

⁷⁹⁴ S.J. CHOI, M. GULATI and E.A. POSNER, 'How Well Do Measures of Judicial Ability Predict Judicial Performance? A Case Study Using Securities Class Actions', (33) *International Review of Law & Economics*, 2013, pp.37-53.

⁷⁹⁵ The nine measures of judicial ability selected by CHOI, GULATI and POSNER are the following: publication per filings, positive citations, affirmance rate, top law school, judicial experience, prior judges, prior private practice, business caseload, senior status.

4.3.5. Preliminary Conclusion: *Case Maturity* and Judicial Attitudes

This section was aimed at analysing different attitudes that rational and utility maximizing judges may adopt when they are involved in mass disputes. Readers may however object that such judicial attitudes will disappear when judges sit in panel. Later developments of this research (Chapter 7) will address this point by showing that the effects of panels remain dubious in practice, and that they do not necessarily cancel out judicial interested attitudes.⁷⁹⁶ Attitudes portrayed in this Chapter may thus remain valid. Furthermore and importantly, the attitudes described in this Chapter will be in practice complementary depending on the needs of the case at stake. The reader may have for instance noticed that the attitude of Judge WEINSTEIN in the Agent Orange class action was successively employed to illustrate the attitude of the judge-gure and the one of the judge-follower. As ascertained by scholars studying judicial behaviour, ‘models of decision-making that portray judges as pursuing single objectives and that do not account for these intricacies are likely to miss important facets of the process’, since judges are more likely ‘to balance numerous, potentially inconsistent goals’.⁷⁹⁷

To conclude, the articulation between these different judicial attitudes can be better understood in the light of the concept of case’s ‘maturity’ developed by Mc GOVERN in the 1980s. The author indeed defended a dynamic vision of mass disputes by describing the difficulties associated with each different stages of a mass dispute.⁷⁹⁸ In its infancy, mass cases are plagued by numerous uncertainties regarding notably the number of litigants, the proof of causation or the scope of damage. SCHUCK has compared this early situation to the one of the ‘erratic adolescent’ struggling with parental authority.⁷⁹⁹ Judges may thus develop comprehensive case management techniques to solve such difficulties, and – as a way to extend the comparison - restore their full authority over the case. When maturity is reached, the range of uncertainties and vagaries affecting the case is reduced. In this new context, the role of judges is likely to evolve.⁸⁰⁰ To refer to the terminology used in this chapter, the idiosyncrasies of mass cases may lead judges to behave as gurus to deal with the difficulties of early stages, and then to pursue a backseat

⁷⁹⁶ See Chapter 7.

⁷⁹⁷ J.K. ROBBENNOLT, R.J. MACCOUN and J.M. DARLEY, ‘Multiple Constraints Satisfaction in Judging’, in: D. KLEIN and G. MITCHELL (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.27-39.

⁷⁹⁸ F. Mc GOVERN, *supra note 439*.

⁷⁹⁹ P.H. SCHUCK, *supra note 160*.

⁸⁰⁰ F.Mc GOVERN, *supra note 439* (arguing that maturity is reached when, in the American context, there has been ‘full and complete discovery, multiple jury verdicts, (...) a persistent vitality in the plaintiffs’ contentions’ and when ‘little or no new evidence [have been] developed’).

approach – or to behave as follower – once these difficulties are overcome. As WILLGING ultimately observes, ‘different judicial strategies should be used at different stage of the life cycle’.⁸⁰¹

In any case, when commenting on the American experience, MC GOVERN suggested that there might be ‘no way for a court to avoid being a player in an elastic mass tort. By accommodating cases, a judge increases the elasticity of the mass tort. By being more rigid, the court decrease elasticity. In either event the judge is a player’.⁸⁰² Most of the costs and benefits faced by American judges are similarly faced by any judges dealing with mass cases. Built on the assumption that judges tend to behave as players, this second part was aimed at shedding some light on the trump cards that judges will play in such circumstances.

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4.4. CONCLUSION

The preceding chapter has shed light on the heavy tasks falling upon judges in mass litigation. Adopting a new angle based on rational choice theory, this chapter has explored some rational attitudes that judges may endorse in such circumstances. This appears to be an important element that policymakers have until now omitted. As a response to the vision of judges acting as watchdogs, cattle drivers and good shepherds, it was shown that rational utility maximizing judges may in reality be incentivized to behave as gurus, followers and/or opportunistic managers.

⁸⁰¹ T.E. WILLGING, ‘Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation’, (148) *University of Pennsylvania Law Review*, 2000, pp.2225-2261.

⁸⁰² F. Mc GOVERN, *supra* note 439.

IUDEX NON CALCULAT?

Judges & the Magnitude of Mass Litigation from a Behavioural Perspective

‘While one may find strength in the law, the strength of number will always be superior.’

P. MICHAUD*

Is it not absurd to keep alive the artificial, orthodox tradition of the “ideal judge”? The rational alternative is to recognize that judges are fallible human beings (...). Our law schools must become, in part, schools of psychology applied to law in all its phases’.

J. FRANK**

5.1. INTRODUCTION

In an interview given to the Newspaper *Le Monde* in October 2012, the President of the German Constitutional Court was asked whether a lawsuit filed by 37,000 individuals weighs more than a lawsuit filed by a single plaintiff. His reply was blatantly negative: ‘we do not count but we ask ourselves whether the claim is meritless or not’.⁸⁰³ His response demonstrates the predominance of the legalist tradition which, in the western tradition at least, personifies Justice under the traits of a blindfolded goddess, omniscient, unbiased and insensitive to the identities of the parties and to the context in which decisions are taken. As the Latin maxim says: *iudex non calculat*.⁸⁰⁴ From the viewpoint of judges trying to protect their social prestige and impartiality, no other response could have been expected. Yet, as KONECNI and EBBESEN observe, ‘it is certain that what these decision-makers claim they do has very little

* P. MICHAUD, *Quelques Arpents de Neige*, 1961 (translation from the author. In French : ‘on a beau trouver la force dans le droit, celle du nombre restera toujours supérieure’).

** J. FRANK, *Law & the Modern Mind*, 1931 at p.156

⁸⁰³ *Le Monde*, ‘L’Europe à l’épreuve des tribunaux’, interview with A.VOSSKUHL, 1 October 2012 (his remark was made in a context different than the one described hereafter).

⁸⁰⁴ ‘Judges do not count’.

resemblance to what they actually do'.⁸⁰⁵ Insights from behavioural sciences may therefore offer an alternative view on this pivotal question.

5.1.1 Where Are We?

While referring to the rational choice theory, the preceding chapter challenged the legalist ideal of judges acting as mere neutral arbiters in the realm of mass litigation. Conversely, it suggested that, on such circumstances, they can be regarded as players trying to maximize their utility function, and that their courses of action have ultimately long-lasting implications on the monitoring of mass disputes. The chapter highlighted the lack of consideration that has so far been given to the judges' incentive structure. In an attempt to further identify the vagaries and possible vulnerabilities of judicial decision-making - and therefore to nuance again the vision of Herculean judges spearheaded by legislatures – the present chapter adopts an alternative methodology based on behavioural law & economics.

5.1.2. Methodology and Objectives – Behavioural Law & Economics

Departing from the neoclassical paradigm grounded upon the model of the rational expected utility maximizer, this chapter aims at incorporating insights from psychology and cognitive sciences into the analysis. This literature indeed proposes a more realistic picture of human behaviour⁸⁰⁶ and may also help identify the strengths and weaknesses of institutions, such as courts.⁸⁰⁷

Past behavioural research has showed that decision-making is influenced by the idiosyncrasies of the decision-maker, by the characteristics of the tasks performed, but also importantly, by contexts.⁸⁰⁸ Hence, two reasons here justify the use of behavioural economics. The first regards its relevance to the subjects of this research, namely judges. Judicial decision-making constitutes a promising field of investigation for psychologists and behavioural economists seeking to identify the mental process and the cognitive

⁸⁰⁵ V.J. KONECNI and E.B. EBBESEN, *supra* note 6.

⁸⁰⁶ C. JOLLS, C.R. SUNSTEIN and R. THALER, 'A Behavioural Approach to Law & Economics', (50) *Stanford Law Review*, 1998, n°5, pp.1471-1550.

⁸⁰⁷ J.J. RACHLINSKI, 'The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters', (85) *Cornell Law Review*, 2000, pp.739-766.

⁸⁰⁸ E. FANTINO and S. STOLARZ-FANTINO, 'Decision-Making: Context Matters', (69) *Behavioural Processes*, May 2005, n°2, pp.165-171.

limitations of legal decision-makers, and particularly of judicial brains.⁸⁰⁹ The second regards its relevance with the context of this research, namely the *mass* litigation framework. Even though mass claims are brought to courts by representative associations or leading lawyers, judges take their decisions *in the shadow* of numerous represented and absent parties. Furthermore, mass cases are likely to be emotionally charged since they often deal with controversial societal issues such as large-scale accidents, diseases or defective products. They represent a psychological burden not only for parties, but also for judges.⁸¹⁰

This chapter therefore investigates the effect of the case *magnitude* on judicial decision-making. In doing so, it tries to shed some light on an issue that seems to be to this day still under-explored in the literature. The term *magnitude* which is commonly defined as ‘the great size or extent of something’⁸¹¹ here more specifically encompasses the large number of litigants, the scope of the dispute, or the perspective of dealing with groups. Behavioural studies have shed important light on ways groups are perceived by external observers, or on the impact of number and size on information processing. These issues are worth considering since they allow an alternative and dynamic perspective of judges dealing with mass claims.

5.1.3. The Chapter in a Nutshell

The objectives pursued in this chapter are twofold. The first part targets the decision-maker himself and discusses the features of the judicial brain as an attempt to ultimately nuance the myth of legalism. Behavioural economists and psychologists indeed consider that, like all human beings, judges are boundedly rational individuals influenced positively or negatively by biases and emotions (5.2). Going then a step further, the second part places the decision-maker into the peculiar context of mass litigation, and questions the effects associated with the magnitude of mass claim on the decision making-process of judges who, as shown before, tend to be receptive to bias and emotion (5.3). Final remarks conclude (5.4).

Importantly, such insights are informative and relevant to all stakeholders. *Vis-à-vis* policymakers, they question and challenge the roles of watchdogs, cattle drivers and good shepherds that have been assigned

⁸⁰⁹ L. BAUM, ‘Motivations and Judicial Behaviour: Expanding the Scope of Inquiry, in: D.KLEIN and G.MITCHELL (Eds.), *The Psychology of Judicial Decision-Making*, American Psychology-Law Series, Oxford University Press, 2010, pp.3-26 (observing: ‘students of judicial behaviour have taken only limited steps to incorporate psychological theory into research on judicial decision-making. (...) This represents a missed opportunity’).

⁸¹⁰ J.B. WEINSTEIN, *supra* note 159 (highlighting: in the US ‘mass tort cases and public litigations both implicate serious political and sociological issues. Both are restrained by economic imperatives. Both have strong psychological underpinnings. And both affect larger communities than those encompassed by the litigants before the court’, at p. 41).

⁸¹¹ Oxford Dictionary, entry: ‘magnitude’.

to judiciaries. *Vis-à-vis* litigants, they point out matters where judges are likely to make erroneous or misleading decisions, and possible ways for influencing judges. Finally, and crucially, *vis-à-vis* judges, they play the role of alarm bells highlighting points which require from them an enhanced vigilance.

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5.2 A BEHAVIOURAL APPROACH TO THE JUDICIAL MIND: BOUNDS, BIAS & EMOTION

The theoretical background detailing the figure of the bounded, biased and sensitive judge which underlies the whole chapter is set forth (5.2.1). Empirical evidence is then presented as a way to discuss these assumptions (5.2.2). Finally, preliminary conclusions deal with possible criticisms, and ultimately defend its relevance when applied to the field of mass litigation (5.2.3).

5.2.1. The Theoretical Background – The Bounded, Biased and Sensitive Judge

Subsequent developments bring together three streams of literature in an attempt to propose a unified behavioural approach of judges and judicial decision-making. For matters of clarity, the image of a triangle is instructive. Its three sides are respectively the figures of the *bounded* (**a**), *biased* (**b**) and *sensitive* (**c**) judge. The bounded judge is developed from SIMON's seminal concept of bounded rationality; the biased judge is employed as an allusion to KAHNEMAN and TVERSKY's research agenda which identified some of the key biases affecting the decision-making of human beings; the sensitive judge refers to recent developments focusing on the weight of emotions into judicial behaviour. Like the three sides of a triangle, these three facets are closely connected and interdependent. For matters of clarity, they will be addressed successively.

The decision to tackle these three issues in such order is not taken at random, but is clearly intentional. For reasons that are hereafter presented, the path-breaking concept of bounded rationality set forth by the 1978 Nobel Prize laureate SIMON has been highly influential in the works of behavioural Law & Economics scholars, and, consequently, in the behavioural approach of judges. SIMON lies therefore at the base of the triangle. His work has paved the way to further research, such as the one conducted by KAHNEMAN

- also Nobel Prize laureate in 2002 - and TVERSKY. The issue of judges and emotion is addressed at the end since it constitutes a still recent, albeit promising, path of research.

a) Judge and Bounded Rationality: *The Bounded Judge*

The seminal concept of bounded rationality coined by SIMON in the nineteen fifties turns out to be pivotal for behavioural economists and psychologists. This revolution – in the sense of a paradigm shift - deeply influenced the manner judges were perceived. The legalist image of the omniscient judge was progressively challenged by the figure of the constrained bounded judge acting as a *satisficer*.

➤ *The Bounded Rationality Revolution*

SIMON was concerned with the weight given to the neoclassical rationality when analysing human decision-making. ‘In its actual development, he emphasized during his Nobel Prize Lecture, economics has focused on just one aspect of Man’s character, his reason, and particularly on the application of his reason to problems of allocation in the face of scarcity’.⁸¹² As a reaction to the classical paradigm focusing on rational optimizing behaviour which, as GIGERENZER and TODD point out, traditionally assumes that individuals have ‘demonic powers of reason, boundless knowledge, and all of eternity with which to make decisions’,⁸¹³ he set forth the concept of *bounded rationality* which importantly contributed to a convergence of economics and psychology as a way to propose a more realistic approach to human behaviour.⁸¹⁴

In essence, SIMON considered that rationality is bounded ‘when it falls short of omniscience’.⁸¹⁵ Two justifications explain such a failure. The first is located *inside* the human mind. Individuals are not machines but have finite computational skills and capacities. In simple words, there is a limit to the

⁸¹² H.A. SIMON, Rational Decision-Making in Business Organizations, *Nobel Memorial Lecture*, 8 December 1978 (hereafter ‘H.SIMON, Nobel Prize Lecture’).

⁸¹³ G. GIGERENZER and P. TODD, ‘Fast and Frugal Heuristics – The Adaptive Toolbox’, in: G. GIGERENZER, P. TODD and The Centre for Adaptive Behaviour and Cognition (ABC Research Group), *Simple Heuristics That Make Us Smart*, 1999, Oxford University Press, 415 p. (here at p.5).

⁸¹⁴ The two seminal articles standing at the core of SIMON’s theory – ‘A Behavioural Model of Rational Choice’ (published in 1955 in (69) *The Quarterly Journal of Economics*, n°1, pp.99-118) and ‘Rational Choice and the Structure of the Environment’ (published in 1956, see *Models of Man: Social and Rational – Mathematical Essays on Rational Human Behaviour on a Social Setting*, 1957, John Wiley & Sons, New York, pp. 241-257) were respectively published in an economic and in a psychological journal. See also on this issue H. SCHWARTZ, ‘Herbert Simon & Behavioural Economics’, (31) *Journal of Socio-Economics*, 2002, pp.181-189.

⁸¹⁵ H.A.SIMON, Nobel Prize Lecture, *supra note 812*.

number of options that human brains can effectively handle and assimilate.⁸¹⁶ This approach departs from the neoclassical theory which traditionally assumes that individuals can assess all possible alternatives and will choose the one that best fits their preferences and ultimately yields them the highest reward.⁸¹⁷ The second is in turn located *outside* the human mind. Contexts and environments in which individuals evolve and take their decisions are in reality highly uncertain and unpredictable. The amount of information and knowledge that is available to individuals when they take their decision remains therefore limited.

The assumption that individuals display a bounded rationality has two important consequences. First, people do not behave as *optimizers* seeking the best available solution, but rather as *satisficers* looking for a solution that is merely good enough or sufficient, acceptable and reflecting the best outcome that they can achieve given the limited amount of knowledge and the unpredictability of the world in which they evolve.⁸¹⁸ Second, the concept of bounded rationality renews the question of search which had been neglected under the unbounded rationality paradigm.⁸¹⁹ SIMON called therefore for ‘a theory of search’ and for an enhanced analysis of information-gathering and information-processing.⁸²⁰ This turned out to have long-lasting implications on the research agenda of cognitive psychologists and behavioural economists.

➤ *Bounded Rationality and Bounded Judges Acting as ‘Satisficers’*

The concept of *satisfying* was initially developed in the realm of administrative theory⁸²¹ as a manner to describe the behaviour of administrators.⁸²² Recently, the notions of *bounded rationality* and *satisficing*

⁸¹⁶ K.J.ARROW, ‘Is Bounded Rationality Unboundedly Rational? Some Ruminations’, in: M.AUGIER and J.G.MARCH (Eds.), *Models of a Man – Essays in Memory of Herbert A. Simon*, 2004, MIT Press, Cambridge & London, pp.47-56 (pointing out that the limits of human computational abilities in economics were already suggested in the works of VEBLEN in 1908).

⁸¹⁷ H.A. SIMON, Nobel Prize Lecture, *supra* note 812. Building upon the notion of bounded rationality, JOLLS, SUNSTEIN and THALER have extended the field of analysis by including two related concepts: ‘bounded willpower’ and ‘bounded self-interest’. The first refers to the tendency of individuals to undertake activities or actions that they know to be in conflict with their long-term interests. The second refers to the tendency of individuals to care about other individuals in certain circumstances. This toolbox, according to the authors, is aimed at proposing ‘a more complicated and unruly picture of human behaviour’ - see C. JOLLS, C.R. SUNSTEIN and R. THALER, *supra* note 806).

⁸¹⁸ G. GIGERENZER and P. TODD, *supra* note 813 (observing: ‘satisficing is a method for making a choice from a set of alternatives encountered sequentially when one does not know much about the possibilities ahead of time’, at p.13).

⁸¹⁹ *Idem* (highlighting: ‘unbounded rationality is not concerned with the costs of search, while bounded rationality explicitly limits search through stopping rules’, at p.15).

⁸²⁰ H.A. SIMON, *Nobel Prize Lecture*, *supra* note 812.

⁸²¹ R. BROWN, ‘Consideration of the Origin of Herbert Simon’s Theory of ‘Satisficing (1933-1947)’, (42) *Management Decision*, n°10, pp.1240-1256.

have been extended to depict judicial behaviour. Mimicking POSNER who considered that judges maximize the same thing that everybody else does,⁸²³ GULATI and BAINBRIDGE go a step further and suggest that judges are boundedly rational individuals prone to the same cognitive limitations as the rest of us.⁸²⁴ Following this view, ZERVOGIANNI and TSAOUSSI consider that judges make decisions within real-world constraints. They are therefore more likely to behave as satisficers seeking outcomes that are merely good enough.⁸²⁵ In addition to the inherent limits of their mental capacities, their environments also limit the scope of their knowledge. Like in other administrations, they are subject to budget-constraints and have limited resources, both human and financial. They may struggle with heavy case-load and work under the time-pressure of several deadlines. Studies and experiments conducted on the effect of time pressure on decision-making tend to reveal that time-pressure leads to greater filtering during the information-gathering process or to a shift to less complex decision strategies.⁸²⁶ Moreover, in complex matters dealing for instance with scientific issues, judges may lack knowledge and heavily rely on the opinions of experts.⁸²⁷ As SUNSTEIN has indeed expressed it, ‘if one person has authority or seems expert, he is likely to have a big influence on what other people think and do’.⁸²⁸ In situations of uncertainty where judges face a lack of evidence, they may not have clear views about all possible alternatives, make errors or be short-sighted regarding the concrete consequences and implications of their decisions. Importantly, judges may however not be aware of their own limitations. In the field of securities class action, GULATI and BAINBRIDGE observe for instance that judges are ‘claiming – at least implicitly – a level of expertise about workings of markets and organizations that, in some areas, not even

⁸²² H.A. SIMON, *supra* note 574, at p.119 (observing: ‘whereas economic man supposedly maximizes – selects the best alternative from among all those available to him – his cousin, the administrator, satisfices – looks for a course of action that is satisfactory or ‘good enough’); SIMON notably suggested that one of the primary objectives sought by organizational structures is thus to remediate to individuals’ bounded rationality by creating conditions which allow individuals to reach results that are good enough, that is, to satisfice; H.A.SIMON, Nobel Prize lecture, *supra* note 812 (highlighting that ‘it is now clear that the elaborate organizations that human beings have constructed in the modern world to carry out the work of production and government can only be understood as machinery coping with the limits of man’s abilities to comprehend and compute in the face of complexity and uncertainty’). M.E. WICKERSMAN, ‘You Make the Call: Tips for Making Public Decisions’, *The Public Manager*, 2011.

⁸²³ R.A. POSNER, *supra* note 7.

⁸²⁴ G.M. GULATI and S.M. BAINBRIDGE, ‘How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions’, (51) *Emory Law Journal*, 2002, pp.51, pp.83-151.

⁸²⁵ A. TSAOUSSI and E. ZERVOGIANNI, *supra* note 645.

⁸²⁶ B. VERPLANKEN, ‘Need for Cognition and External Information Search: Responses to Time Pressure During Decision-Making’, (27) *Journal of Research in Personality*, 1993, pp.238-252 (notably reviewing the literature on this issue).

⁸²⁷ M. FAURE and L. VISSCHER, ‘The Role of Experts in Assessing Damages – A Law & Economics Account’, (3) *European Journal of Risk Regulation*, 2011, pp.376-396.

⁸²⁸ C.R. SUNSTEIN, *Why Societies Need Dissent*, Harvard University Press, 2003, 246 p. (at p.17).

the most sophisticated researchers in financial economics and organizational theory have reached'.⁸²⁹ They are thus more likely to behave as satisficers, but not as maximizers. In others words, they will seek solutions that are not optimal, but rather good enough, and ultimately use heuristics to achieve their aims.

b) Judges, Heuristics and Biases: The Biased Judge

SIMON's concept of bounded rationality made studies questioning the information-gathering process necessary. More specifically, it paved the way to further research investigating the roles of heuristics and their associated effects on decision-making. Importantly, these insights have shed new light on judicial decision-making and progressively help sketch the figure of the *biased judge*. Noteworthy, the notion of biased judge is here not negatively tainted. As hereafter pointed out, the relationship between judges and heuristics is indeed more ambiguous: heuristics facilitate judicial work and help them deal with complex matters, but also may lead them to make systematic errors.

➤ *The Use of Heuristics in Decision-Making: a Double-Sided Issue*

The term *heuristic* is cornerstone in this chapter and thus needs to be clarified.⁸³⁰ Deriving from the Greek verb *Heuriskein*, heuristic originally meant *serving to find out* or *to discover*. Its signification has nonetheless evolved in the successive writings of economists and psychologists.⁸³¹ A simple definition proposed by KAHNEMAN posits that heuristics are 'a simple procedure that helps find adequate, though often imperfect, answers to difficult questions'.⁸³² This definition triggers two important precisions which have respectively been the red threads of different research agenda. Like Janus, the issue of heuristics is indeed double-sided: they represent solutions, but also problems for decision-makers.

First, heuristics are simple procedures intended to provide solutions to difficult questions. In other words, they consist in mental conscious or unconscious simplifications or short-cuts aimed at coping with the limited cognitive capacities of the human brain, as well as with the complexity and uncertainty of

⁸²⁹ G.M. GULATI and S.M. BAINBRIDGE, *supra* note 824.

⁸³⁰ G. GIGERENZER and P. TODD, *supra* note 813, at pp.25-27 (for a useful description of the terms *heuristic* and its evolution over time).

⁸³¹ C. ENGEL and G. GIGERENZER, 'Law & Heuristics – An Interdisciplinary Venture', in: G. GIGERENZER and C. ENGEL (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp.1-16 (for an evolutionist approach to the term heuristic and its associated meanings).

⁸³² D. KAHNEMAN, *Thinking Fast and Slow*, Farrar, Straus and Giroux, New York, 2011, 500 p. (here at p.98).

environments in which individuals evolved.⁸³³ Heuristics ‘cut down’⁸³⁴ or ignore⁸³⁵ the considerable amount of information in order to only focus on a set of key factors that are relevant for decision-making.⁸³⁶ Referring to the words set forth by GIGERENZER and TODD, they constitute ‘fast’, ‘frugal’ and ‘adaptive’ ways to solve problems.⁸³⁷ They are *fast* because they do not require a lengthy period of time, they are *frugal* because they demand only limited knowledge or computational skills, and they are *adaptive* because they evolve according to the specificities of the context and environment in which individuals take their decision.⁸³⁸ A first line of research notably investigated by GIGERENZER and the Adaptive Behaviour and Cognition Group (‘ABC Group’) has focused on the usefulness of heuristics viewed as a ‘toolbox’ enabling decision-makers to find solutions to complex situations.⁸³⁹ For example, doctors and physicians dealing with considerable amounts of knowledge commonly use heuristics in their everyday practice when diagnosing patients.⁸⁴⁰ Their use turns out to be pivotal in cases of emergency and can ultimately save lives in situations where decisions must be taken on a short notice and under heavy pressure.⁸⁴¹

⁸³³ D.C. GEARY, *The Origin of Mind: Evolution of Brain, Cognition and General Intelligence*, American Psychological Association, 2005 (noting that psychology, economics and cognitive sciences refer to heuristics as a ‘combination of mechanisms that enable information to be identified and processed quickly’, and viewing heuristics as ‘links between organisms’ sensory, perceptual, cognitive, affective and behavioural systems and the ecological conditions in which these systems evolved’, at p.171).

⁸³⁴ A. NEWELL, J.C. SHAW and H.A. SIMON, ‘The Processes of Creative Thinking’, 16 September 1958, presented before a symposium at the University of Colorado, May 1958; D.C.GEARY, *supra* note 833.

⁸³⁵ G. GIGERENZER and W. GAISSMAIER, ‘Heuristic Decision-Making’, (62) *Annual Review of Psychology*, 2011, pp.451-482.

⁸³⁶ R.B. KOROBKIN and T.S. ULEN, ‘Law & Behavioural Science: Removing the Rationality Assumption from Law & Economics’, (88) *California Law Review*, 2000, n°4, pp. 1051-1144 (highlighting: ‘the widespread use of heuristics, at least in many cases, is no doubt a quite useful evolutionary adaptation: without such mental shortcuts, the tasks of making even relatively simple decisions would become so complex that daily life would almost certainly grid to a halt’, at p. 1076).

⁸³⁷ G. GIGERENZER and P. TODD, *supra* note 813 (observing: ‘the function of heuristics is not to be coherent. Rather, their function is to make reasonable, adaptive inferences about the real social and physical world given limited time and knowledge’, at p.22).

⁸³⁸ *Idem*, at p.14.

⁸³⁹ *Idem*.

⁸⁴⁰ C.B. TRAVIS, R.H. PHILLIPPI and B.E. TONN, ‘Judgment Heuristics and Medical Decisions’, (13) *Patient Education and Counselling*, 1989, pp.211-220; J.N. MAREWSKI and G. GIGERENZER, ‘Heuristic Decision-Making in Medicine’, (14) *Dialogues in Clinical Neuroscience*, 2012, n°1, available on www.ncbi.nlm.nih.gov/pmc/articles/PMC3341653/pdf/DialoguesClinNeurosci-14-77.pdf (accessed July 2013).

⁸⁴¹ J. GROOPMAN, *How Doctors Think*, 2008, Mariner Book, 320 p. (reporting the words of a doctor who claimed that ‘heuristics flourish when a physician assesses unfamiliar patterns, or when he must work quickly, or when his technological resources are limited. shortcuts are the doctor’s response to the uncertainty and demands of the situation’; and then arguing himself that ‘heuristics serve as the foundation of all mature medical thinking, (...) can save lives, and (...) but also can lead to grave errors in clinical decision-making’, at pp.35-36).

Second, heuristics may also lead to imperfect and biased outcomes. In other words, they are a distorting lens through which individuals perceive reality. In such circumstances, their use becomes misleading and induces systematic judgemental errors.⁸⁴² One of the lines of research pioneered by KAHNEMAN and TVERSKY was precisely aimed at identifying biases in decision-making induced by the use of heuristics. Their analysis is based on the assumption – generally acknowledged in the literature – that the architecture of the cognitive process roughly distinguishes a *System 1* and a *System 2*. The first is mostly intuitive, operates quickly, demands less effort, and is ultimately employed for simple decisions. The second is in turn slower, less emotional, more neutral, rule-governed and used for effortful mental activities. On the top of this dual architecture, every human being has a ‘limited budget of attention’ that he can allocate to mental activities.⁸⁴³ Both systems are highly interdependent. System 1 leads behaviour when System 2 is depleted or becomes busy. System 2 corrects the intuitive decisions made by System 1 and their associated potential errors. Importantly, System 2 remains however reluctant to ‘invest more effort than is strictly necessary’, and thus often follows ‘the path of least effort [by endorsing] a heuristic answer without much scrutiny of whether it is truly appropriate’.⁸⁴⁴ In other words, both the quick and intuitive System 1 and the lazy System 2 are prone to cognitive limitations and erroneous mental shortcuts. Arguably, System 2 which is rule-governed, neutral and less impulsive is at first sight more likely to guide an intellectual exercise such as judicial reasoning. This being said, System 1 is nevertheless not wiped out from judicial decision-making. As developed elsewhere, Legal Realists indeed posited that intuition may also play a prominent role in judicial decision-making.⁸⁴⁵ Their assumptions received a considerable attention and, as discussed below, numerous experiments later conducted with judges sought to substantiate or challenge their claims.

➤ *Heuristics and Cognitive Illusions: A Short List*

In an attempt to ‘map the bounded mind’,⁸⁴⁶ KAHNEMAN and TVERSKY listed some key cognitive illusions associated with the use of heuristics that individuals commonly apply when assessing probabilities or predicting values. As a matter of fact, this list is not comprehensive and future research

⁸⁴² D. KAHNEMAN, A. TVERSKY and P. SLOVIC (Eds.), *Judgment under Uncertainty: Heuristics and Biases*, Cambridge University Press, 1982, 555 p.

⁸⁴³ D. KAHNEMAN, *supra* note 832, at p.23.

⁸⁴⁴ *Idem*, at p.99.

⁸⁴⁵ See Chapter 4 (discussing the impact of Legal Realism and its reception in Civil Law countries).

⁸⁴⁶ D. KAHNEMAN, ‘Maps of Bounded Rationality: Psychology for Behavioural Economics’ (Nobel Prize Lecture), (93) *The American Economic Review*, n°5, 2003, pp.1449-1475.

will importantly contribute to shed light on the unexplored territories of the bounded mind. A decision is taken hereafter to introduce readers to some selected cognitive errors. This selection is justified by the fact that the presence of such errors in judges' decision-making has empirically been tested, and in some cases, attested. Other key misleading heuristics which are of relevance and importance in the field of mass litigation will timely be set forth in further developments of this chapter.

First, the *availability heuristic* refers to the tendency to assess the frequency or likelihood of an event by the number of occurrences that easily come to mind and that can be remembered or recalled without great effort.⁸⁴⁷ Albeit sometimes useful, SUNSTEIN and KURAN have shown that such a bias may be opportunistically manipulated by 'availability entrepreneurs' using the flows of information addressed to the public as a way to influence opinions.⁸⁴⁸ This point is of importance in the framework of mass claims and therefore will be further investigated in the coming developments of this chapter.

Second, the *anchoring heuristic* refers to the tendency of individuals to rely on external information, value or data to anchor - that is, to ground - their own decision. The anchor - which can even be an irrelevant information - modifies the standard of reference by setting a starting point which ultimately influences decision-making. Situations in which anchors are wrongly assess or intentionally manipulated may lead to erratic judgements.

Third, the *hindsight bias* refers to the tendency to overstate the predictability of past events in the light of new information. Individuals view past events in the light of their recent developments and ignore the limited amount of information that was available when the decision was taken. As FISCHHOFF points out, people influenced by the hindsight bias 'not only tend to view what has happened as having been inevitable, but also to view it as having appeared "relatively stable" before it happened [and] (...) other should have been able to anticipate events much better than was actually the case'.⁸⁴⁹

Fourth, the *representativeness heuristic* refers to the tendency to neglect relevant background statistical information - such as the number of occurrences or the size of the parent population - in order to rely on intuitive reaction to the representativeness of the information. A well-known example is the belief in the

⁸⁴⁷ D. KAHNEMAN, A. TVERSKY and P. SLOVIC (Eds.), *supra* note 842, at p.11.

⁸⁴⁸ C.R. SUNSTEIN and T. KURAN, 'Availability Cascades and Risk Regulation', (51) *Stanford Law Review*, 1999, pp.683-768.

⁸⁴⁹ B. FISCHHOFF, 'Hindsight v. Foresight: The Effect of Outcome Knowledge on Judgement under Uncertainty', (104) *Journal of Experimental Psychology: Human Perception & Performance.*, 1975, pp.288-299.

law of small numbers by which individuals view samples as being highly – and potentially mistakenly – representative of the parent population from which they are drawn.⁸⁵⁰

Fifth, the *optimism* or *egocentric bias* refer to the tendency of individuals to view themselves as being *above* the average, immunized against the mistakes usually made by their fellow human beings and protected against the difficulties that others commonly face. This illusion is widely shared among individuals when, for example, weighing their risks of getting ill or evaluating the success rate of their marriage.⁸⁵¹ This bias ultimately precludes individuals to be fully aware of their own limitations and to correctly assess their skills and abilities.

Sixth, *framing effect* refers to the tendency to process information differently depending on the manner the issue is designed. When confronted to risky situations, individuals tend to be risk-averse when the issue is worded in terms of gains, but conversely risk-seeker when the issue is presented as a source of potential loss.⁸⁵²

➤ *Sketching the Biased Judge*

As KAHNEMAN and TVERSKY pointed out, ‘the reliance on heuristics and the prevalence of biases are not restricted to laymen’.⁸⁵³ Although considered as legal experts, judges are human beings who use heuristics and are subject to cognitive illusions. Going a step further, and reflecting thus heuristics’ versatility, judges have an ambiguous relationship with heuristics which turns out to be alternatively positive and negative.

From the positive side, judges use heuristics daily as a way to facilitate their work. According to TSAOUSSI and ZERVOGIANNI, judicial reasoning based on the analysis of precedents extensively relies on heuristics which help alleviating judicial burden.⁸⁵⁴ Their remark echoes CARDOZO who already in 1921 observed that ‘the labour of judges would be increased to the breaking point if every past

⁸⁵⁰ A. TVERSKY and D. KAHNEMAN, ‘Belief in the Law of Small Numbers’, (76) *Psychological Bulletin*, 1971, n°2, pp. 105-110.

⁸⁵¹ R.H. THALER and C.R. SUNSTEIN, *Nudge – Improving Decisions about Health, Wealth and Happiness*, Penguin Books, London, 2009, 305 p. (here at p.34-35).

⁸⁵² J.N. DRUCKMAN and R. MCDERMOTT, ‘Emotion and the Framing of Risky Choice’, (30) *Political Behaviour*, n°3, pp.297-321.

⁸⁵³ D. KAHNEMAN, A. TVERSKY and P.SLOVIC (Eds.), *supra note 842*.

⁸⁵⁴ A. TSAOUSSI and E. ZERVOGIANNI, *supra note 645*.

decision could be reopened in every case'.⁸⁵⁵ Furthermore, procedural rules and doctrinal developments can also instructively be regarded from the perspective of heuristics. As WAGNER observes, 'since the aim of a civil trial is not to establish the objective truth, the court is able to apply heuristics as context-specific parameters to allow decisions to be made on the basis of incomplete information and under serious time constraints'.⁸⁵⁶ Courts with constrained budget and limited abilities have thus progressively used simple rules to deal with complex cases. SCHULZ argues more specifically that heuristics in evidence law are 'a means to prepare actions or decisions by enabling individuals to find ideas when logical are lacking, to know how to solve problems without knowing why it works, and to justify actions or decisions when there is no proof'.⁸⁵⁷ As an illustration, the standard of proof used by French courts – but also employed in many other jurisdictions – requiring a body of sufficiently reliable and consistent evidence (*un faisceau d'indices suffisamment graves, précis et concordant*) is employed to demonstrate and substantiate the existence of complex frauds, such as anticompetitive cartel agreement, insider trading practices,⁸⁵⁸ but also to deal with highly-debated or uncertain scientific issues, such as for instance the controversial link between sclerosis and the vaccine against hepatitis.⁸⁵⁹ For matters of simplicity, consider specifically this last issue: in such an area, judges have a restricted access to information and a limited knowledge on a highly controversial issue: no scientific consensus has yet been found which clearly proves that the vaccine is the cause of the disease. Facing contradictory evidence, judges could simply remain paralyzed and infringe their duty of delivering justice.⁸⁶⁰ Since the search of scientific and unanimously-approved evidence would require thorough investigation and a waste of time and resources for judges and litigants, the use of a set of presumptions enable them to achieve a sufficient solution given

⁸⁵⁵ B.N. CARDOZO, *The Nature of The Judicial Process*, 1921, 149 (also cited in: F. SCHAUER, *supra* note 609, at p.43).

⁸⁵⁶ G. WAGNER, 'Heuristics in Procedural Law', in: G. GIGERENZER and C. ENGEL (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, at p.301.

⁸⁵⁷ J. SCHULZ, 'Rules of Evidence as Heuristics', in: G. GIGERENZER and C. ENGEL (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp. 327-341 (here at p.329).

⁸⁵⁸ For a reference to this standard of proof (in the field of insider trading), see notably Court of Appeal of Paris, 1^{re} ch. H, 1^{er} avr. 2003 (cited by E. DEZEUZE, 'Preuve du manquement d'initié et recours à la méthode du faisceau d'indice', *Revue des sociétés*, 2010, p.587) ; Court of Appeal of Paris, 1^{re} ch. Section H, 8 April 2009, *B. c/ AMF* (cited by F. STASIAK, 'Preuves par faisceau d'indices', *Revue de Sciences Criminelles*, 2010, p.162; Court of cassation, 1^{er} June 2010, pourvoi n° 09-14.684 (cited by N. RONTCHEVSKY, 'La Cour de cassation admet la méthode du faisceau d'indice en matière de preuve du manquement d'initié', *Revue Trimestrielle de Droit Commercial*, 2010, p.578).

⁸⁵⁹ See Chapter 2; Court of appeal of Versailles, CT0196, 17 March 2006; C. RADE, 'Causalité juridique et causalité scientifique: de la distinction à la dialectique', *Recueil Dalloz*, 2012, p.112.

⁸⁶⁰ Article 4 of French Civil Code (stating : 'a judge who refuses to give judgement on the pretext of legislation being silent, obscure or insufficient, maybe prosecuted for being guilty of a denial of justice').

the actual uncertainty of research.⁸⁶¹ Put differently, the use of heuristics enables judges to decide in a world of scarce cognitive and informational resources. Similarly, GULATI and BAINBRIDGE have pointed out the existence of judicial decision-making heuristics in the field of securities class action. Again, their use simplifies the reasoning process and enables judges to dispose cases quickly without facing the meanders of complex and potentially equivocal expertise. Relatedly, and as lengthier developed in the second part of this chapter, numerous heuristics are also used in the judicial management of mass litigation as a manner to help judges monitor complex cases.

From the negative side, judges may however be misled by heuristics and therefore make systemic errors. For instance, judges, like historians, examine past events and are thus likely to be subject to the hindsight bias. As FAURE points out, they may wrongly assess risky situations and fix a too high standard of care in accident law which would turn out to have detrimental consequences for business activities.⁸⁶² The hindsight bias may also have key economic and legal consequences since it tends to weaken the distinction traditionally drawn in tort law between the system of negligence and the system of strict liability. As RACHLINSKI observes, ‘the bias causes courts to hold defendants who took reasonable care liable, much as they would under a strict liability rule’.⁸⁶³ Additionally, judges may be influenced by availability heuristics making them potentially sensitive to cases highly advertised in the media.⁸⁶⁴ From an alternative view, these misleading heuristics are also likely to be used by litigants and their lawyers as a way to influence judicial decisions. Anchors may alter judicial decision-making,⁸⁶⁵ concerning for instance the assessment of damages award.⁸⁶⁶ Since civil litigation produces ‘a natural frame’ where the judge’s decision involves gains for plaintiffs and losses for defendant, judges are prone to framing effects

⁸⁶¹ C. PIPERIDES, ‘Group Report: What is the Role of Heuristics in Litigation’, in: G. GIGERENZER and C. ENGEL (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp. 343-377 (noticing that ‘in both Anglo-American and Continental Systems, heuristics also exist in form of presumptions. Presumptions, like exclusionary rules, *have heuristics at their core*’ – at p.358, emphasis added).

⁸⁶² M.G. FAURE, *The Impact of Behavioural Law and Economics on Accident Law*, Erasmus Law Lectures, Boom Juridische Uitgevers, 2009, n°19, 84 p. (at pp.38-41). On several occasions, judges seemed nonetheless particularly aware of the risk induced by hindsight bias that they sometimes explicitly point out in their decision. See for instance The French Cour de cassation, 23 May 2007 (stating ‘l’effet rétroactif d’une décision ultérieure puisse venir créer de toute pièce, au mépris de la réalité tant matérielle que psychologique, une erreur qui, de toute évidence, n’existait pas dans l’esprit de l’intéressé à l’époque où il a forgé son consentement’, cited in: G. CHANTEPIE, ‘Moment d’appréciation de la lésion et effet d’une décision rétroactive’, *Recueil Dalloz*, 2009, p.2588).

⁸⁶³ J.J. RACHLINSKI, ‘A Positive Psychological Theory of Judging in Hindsight’, (65) *University of Chicago Law Review*, 1998, pp.571-625.

⁸⁶⁴ M.G. FAURE, *supra* note 862.

⁸⁶⁵ B. ENGLISH, ‘Blind or Biased? Justitia’s Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations’, *Law & Policy*, 2006, pp.497-514.

⁸⁶⁶ C. GUTHRIE, J.J. RACHLINSKI and A.J. WISTRICH, ‘Blinking on the Bench: How Judges Decide Cases’, (93) *Cornell Law Review*, 2007, p.1.

and thus influenced by the manner a settlement offer is formulated by the proposing party.⁸⁶⁷ Recently, empirical research investigating the role of cognitive illusions and heuristics in judicial decision-making has shed new light on these assumptions. Crucially, these surveys have also suggested that judges tend themselves to be sometimes unaware of their heavy reliance on heuristics, but conversely still continue to believe that their decisions are ultimately taken without bias.⁸⁶⁸ These empirics are hereafter presented and further discussed.

c) Judge and Emotions: *The Sensitive Judge*

The relationship between judges and emotion is the last point that must be tackled to complete the behavioural model of judges. As EPSTEIN emphasizes, ‘often the cognitive and emotional sides of human beings work in tandem (...)’.⁸⁶⁹ For long denied and neglected, this aspect is nowadays a source of growing interest among behavioural economists and psychologists working on judicial behaviour.

➤ *Rejecting Emotion from Judicial Behaviour*

In a famous 1871 letter known as ‘la lettre du voyant’, the French poet RIMBAUD wrote ‘I is another’.⁸⁷⁰ This assumption transposed to the legal area particularly fits the legalist tradition which distinguishes the judge *as a lawyer* from the judge *as a man*. The first is immunized against the emotional or personal influences which usually characterize the second.

The term *emotion* requires some clarifications. Although often taken for granted in common language, there is no unique definition of emotion.⁸⁷¹ Despite its numerous meanings, various causes and different

⁸⁶⁷ J.J. RACHLINSKI, *supra* note 863.

⁸⁶⁸ G. GIGERENZER, ‘Heuristics’, in: C.ENGEL and G.GIGERENZER (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp.17-44 (at p.28).

⁸⁶⁹ R.A. EPSTEIN, ‘The Optimal Complexity of Legal Rules’, in: G. GIGERENZER and C. ENGEL (Eds.), *Heuristics & the Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, at p.141.

⁸⁷⁰ A.RIMBAUD, *Lettre dite du voyant*, 13 May 1871 (In French : ‘Je est un autre’).

⁸⁷¹ M. CABANAC, ‘What is Emotion?’, (60) *Behavioural Processes*, 2002, pp.69-83; J.R. AVERILL, ‘What Are Emotions Really?’, (12) *Cognition & Emotion*, 1998, n°6, pp.849-855 (highlighting: ‘in the realm of emotions, it is not easy to distinguish myth from reality’); D. WECHSLER, ‘What Constitutes an Emotion?’, (1932) *Psychological Review*, 1925, pp.235-240 (observing: ‘there is, in fact, no generally accepted definition of emotion such that a reader may feel sure that the phenomenon intended to be included by one author are exactly those intended by another’).

structures,⁸⁷² it is generally assumed that emotion is a mental state ‘highly interpersonal in nature’⁸⁷³ initiated by stimuli of a particular significance or intensity ‘occurring either in the subject’s environment, within the subject’s body or purely mental’.⁸⁷⁴ When applied to judges –who, according to a traditional view, are required to perform a task previously attributed to god(s) - namely judging their human fellows⁸⁷⁵ - the issue of emotion is unsurprisingly criticized for being erratic and disturbing. Regarded as unreliable, biased, inconstant and depending on highly contingent factors,⁸⁷⁶ arbitrary and uncontrollable,⁸⁷⁷ emotions impair the correctness and impartiality of judicial decisions.

Throughout centuries, external justifications have therefore been employed to avoid tackling and questioning the issue of judges’ personal emotions. During the Middle-Age, ordeals were employed in criminal matters as a sign of the intervention of God aimed at revealing the innocence or the guilt of the accused. The judgment was not a result of the judge’s personal emotion or inclination, but rather a manifestation of a divine choice. After the prohibition of ordeals ordered by the Church during the twelfth century, agency-denying procedures developed as a way to enable judges to ‘disclaim meaningful personal agency while entering a capital verdict’.⁸⁷⁸ The climax of this ‘judicial dispassion’ - which still influences the way judges are today perceived - is certainly to be found in the Eighteenth century Enlightenment ideals and their associated Cult of Reason.⁸⁷⁹ Following this logic, the ideal judge does not

⁸⁷² B. PARKINSON, *Ideas and Realities of Emotion*, 1995, Routledge, London (noticing: ‘there may not be a single type of emotion episode with a common deep structure, but rather a range of real-life phenomena, which share only family resemblance with each other’ – at p.165), also cited in: J.R.AVERILL, *supra* note 871.

⁸⁷³ *Idem*

⁸⁷⁴ M.CABANAC, *supra* note 871.

⁸⁷⁵ A. GARAPON, J. ALLARD and F. GROS, *supra* note 17 (at pp. 12-21).

⁸⁷⁶ A. SMITH, *supra* note 348 (specifically Part 2, Section 3, Chapter III of *the Final Cause of This Irregularity of Sentiments*).

⁸⁷⁷ J. HAMER, ‘Sensitive Judges – How to Resolve the Tangle of Legal Decision-Making and Emotion’, (8) *Utrecht Law Review*, 2012, pp.189-199

⁸⁷⁸ J.Q. WHITMAN, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, Yale, 2008, 276 p. (at p.17); T.P. GALLANIS, ‘Reasonable Doubt and the History of the Criminal Trial’, (76) *University of Chicago Law Review*, 2009, p.941-963; T. SCHELLING, ‘The Life You Save May Be Your Own’, in: S.B. CHASE (Ed.), *Problems in Public Expenditure Analysis*, Brooking Institution, Washington D.C., 1968, pp.127-176 (noticing: ‘one of the reasons for having a book of rules about when to run the risk and when not to (...) is to relieve the man who gives the order, the man in the control tower, of personal guilt for the instruction he gives’, at p.130).

⁸⁷⁹ T.A. MARONEY, ‘The Persistent Cultural Script of Judicial Dispassion’, (99) *California Law Review*, 2011, p.629-682; See also J. FRANK, *supra* note 607 (highlighting that ‘lawyers adopted this eighteen-century scientific world-outlook. In physics, astronomy and chemistry, men were making significant use of mathematics. It became the mode that law should be made scientific. Very well then, mathematical reason would be employed in the law, and law would become as scientific as physics and astronomy’, at p.102).

solely ground his decision on Reason – which, in turn, guides him and dictates him the appropriate course of action - but also behaves as the guardian of Reason taming the emotions of parties and society.⁸⁸⁰

➤ *Including Emotion into Judicial Behaviour*

The vision of emotion as solely disruptive to rationality has however evolved. Psychological works have progressively set forth the role of emotions on the way information is processed and pointed out their positive and constructive effects which lead individuals to better face and solve problems.⁸⁸¹ Emotions are a fertile ground for heuristics. As ascertained by HANOCH and MURAMATSU, they act as ‘a toolbox of specialised cognitive shortcuts [which give] direction to search, stopping and decision rules that produce choice behaviour’.⁸⁸² While supporting an enhanced use of emotion in theoretical models, economists have additionally pointed out its relevance and importance to better predict behaviour.⁸⁸³

Similarly, the study of emotions has also pervaded the legal sphere.⁸⁸⁴ Cross-disciplinary perspectives on the impact of emotion on the law have blossomed and tend to constitute nowadays a ‘field whose time has to come’.⁸⁸⁵ When applied to judicial behaviour, it seems that the initial schizophrenia which disentangled the judge as a lawyer from the judge as a man (or a woman) has diminished. As previously said, a turning point in the United States was the Legal Realism movement which placed much emphasis on the human component potentially altering judicial decision-making.⁸⁸⁶ Meanwhile, judges themselves have

⁸⁸⁰ T.A. MARONEY, *idem* (observing: ‘the judge came to be seen as the primary figure guarding this realm of rationality, by taming the emotions of litigants, ignoring the emotions of the public, and divesting herself of her own’).

⁸⁸¹ Y. HANOCH, ‘Neither an Angel nor an Ant: Emotion as an Aid to Bounded Rationality’, (23) *Journal of Economic Psychology*, 2002, pp.1-25. See also H.A.SIMON, *supra* note 574 (already pointing out: ‘there is no intrinsic opposition between emotion and reason: emotion is a principal source of motivation, focusing us toward particular goals; and it can direct great powers of thought on the goal it evokes’, at p.91).

⁸⁸² R. MURAMATSU and Y. HANOCH, ‘Emotion as a Mechanism for Boundedly Rational Agents: the Fast and Frugal Way’, (26) *Journal of Economic Psychology*, 2005, pp. 201-221.

⁸⁸³ G. LOEWENSTEIN, ‘Emotions in Economic Theory and Economic Behaviour’, (90) *The American Economic Review*, May 2000, pp.426-431 (the authors addresses specifically the case of ‘visceral factors’ which are negative emotions likely to strongly influence individuals’ behaviours. He writes that ‘visceral factors have important, but often underappreciated consequence for behaviour (...). To predict or make sense of viscerally driven behaviour, it is necessary to incorporate visceral factors into models of economic behaviours’.

⁸⁸⁴ K. ABRAMS and H. KEREN, ‘Who’s Afraid of Law and the Emotions?’, (94) *Minnesota Law Review*, 2010, pp.1998-2072.

⁸⁸⁵ B.H. BORNSTEIN and R.L. WIENER, ‘Emotion and the Law : A Field whose Time Has to Come’, in: B.H. BORNSTEIN and R.L. WIENER (Eds), *Emotion and the Law*, Nebraska Symposium on Motivation, 2010.

⁸⁸⁶ See Chapter 4 (discussing US Legal Realism).

progressively acknowledged the role played by emotion in courtrooms.⁸⁸⁷ In a highly controversial speech given in the 1970s, the French General Attorney BAUDOT urged his colleagues to ‘not close neither [their] hearts nor [their] ears’ to human sufferings and to ‘assess imprisonment not from an annual or monthly perspective, but rather by taking into accounts minutes and seconds, as if [they] were [themselves] imprisoned.’⁸⁸⁸ From the initial theoretical controversy questioning whether judges are indeed subject to emotion, discussions have nowadays evolved to more pragmatic issues, such as *how* emotion concretely affects judicial decision-making,⁸⁸⁹ to normative debates, such as how these insights should be incorporated into the analysis of judicial behaviour,⁸⁹⁰ or on how emotion should be regulated and used in a positive way within courtrooms.⁸⁹¹ The initial stigmatisation and denial of emotion in the legal area has consequently progressively –albeit still slowly-⁸⁹² been challenged by an enhanced acceptance of its importance in judicial practice. Among the still few scholars addressing the link between judges and emotions, the work of MARONEY who notably discussed the relationship between judges and anger can be mentioned as example.⁸⁹³ On the one hand, the author argues that anger helps judges focusing their attention, encourages responsive action, and therefore conveys power and authority *vis-à-vis* parties. On the other hand, anger may encourage stereotyped patterns of decision-making, misleading heuristics or premature, severe and disproportionate decisions. The author ultimately encourages a judicial

⁸⁸⁷ For instance, Judge CHIN observing that ‘sentencing are almost always emotional, and often highly so’ (D.CHIN, ‘Sentencing: A Role for Empathy’, (160) *University of Pennsylvania Law Review*, 2012, pp.1561-1584); A.GARAPON, J.ALLARD and F.GROS, *supra* note 17 (asking: ‘why would judges not express subjectivity, feelings, positive or negative when confronting to litigants?, translation from the author’); M. BERNARD-REQUIN, ‘La recherche de la vérité en psychologie et psychiatrie judiciaire. La psychologie dans la décision judiciaire’, (170) *Annales médico-psychologiques revue psychiatrique*, 2012, n°2, pp.124-126.

⁸⁸⁸ O. BAUDOT, ‘Harangue à des magistrats qui débutent’, 1974 (translation from the author. In French: ‘ne comptez pas la prison par années ni par mois, mais par minutes et par secondes, tout comme si vous deviez la subir vous-même’ (...). ‘Ne fermez pas vos cœurs à la souffrance ni vos oreilles aux cris’).

⁸⁸⁹ M.K. MILLER, E. GREENE, H. DIETRICH, J. CHAMBERLAIN and J.A. SINGER, ‘How Emotion Affects the Trial Process’, (92) *Judicature*, September-October 2008, n°2; P.G. JAFFE, C.V. CROOKS, B. LEE DUNFORD-JACKSON and M. TOWN, ‘Vicarious Trauma in Judges – The Personal Challenge of Dispensing Justice’, (45) *Judges Journal*, 2006, pp.12-18 (identifying trauma experienced by judges during their work); from the viewpoint of neurosciences, see H. BENNETT and G.A. BROE, ‘Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning’, (42) *Australian Journal of Forensic Sciences*, March 2010, n°1, pp.11-18.

⁸⁹⁰ R.A. POSNER, ‘*Frontiers of Legal Theory*’, (also cited in: T.A. MARONEY, *supra* note 73 ; J.CHAMBERLAIN and M.K.MILLER, ‘Stress in the Courtroom: Call for Research’, (15) *Psychiatry, Psychology and Law*, 2008, n°2, pp.237-250

⁸⁹¹ T.A. MARONEY, ‘Emotional Regulation and Judicial Behaviour’, (99) *California Law Review*, 2011, pp.1485-1555.

⁸⁹² D. KLEIN, ‘Psychology in Judicial Decision-Making’, in: D.KLEIN and G.MITCHELL (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, also cited in: T.A.MARONEY, *supra* note 879 (highlighting a lack of consideration for the role of emotion in judicial decision-making).

⁸⁹³ T.A.MARONEY, ‘Angry Judges’, (65) *Vanderbilt Law Review*, 2012, pp.1205-1284.

management of anger and calls for solutions aimed at ‘regulating judicial anger to maximize [its] benefits and minimize [its] dangers.’

With regards to the current research, considering the role played by emotions on judicial behaviour will also turn out to be essential when discussing the impact of the magnitude of mass claims on judges’ decision-making.

➤ *Squaring the Circle: Emotion and Bounded rationality – The Sensitive Judge*

Economists and psychologists have discussed the relationship existing between bounded rationality and emotions. Some of them have considered that SIMON, in his analysis of the bounded rationality, particularly focused on the cognitive limitations of individuals but failed to further investigate the peculiar role played by emotions. As observed by KAUFMAN, ‘the bounded rationality is located in the limited processing capabilities of the human brain, but largely ignores the role of passion’.⁸⁹⁴ Even though this viewpoint could be nuanced since emotion appears to be also mentioned in SIMON’s works,⁸⁹⁵ scholars have sought to clarify the link existing between bounded rationality and emotion.

On a general level, consensus exists on the reality of this link, even if disagreements still remain on its nature. The disagreement between KAUFMAN and HANOCH is on this point illustrative. Both of them have acknowledged the impact of emotion on decision-making. The first views emotion as an additional source of bounded rationality. The second similarly considers that emotions contribute to bounded rationality by restricting the range of options envisaged by decision-makers and by leading them to focus their attention on specific points or details.⁸⁹⁶ Disagreements subsist however on the impact of emotion on decision-making. KAUFMAN suggests that increases in emotional arousal progressively decrease the quality of decision-making up to the point where highly emotional situations may ultimately preclude any logical or reasoned behaviour.⁸⁹⁷ While criticizing this approach as being too simplistic, HANOCH ascertains a nuanced relationship between emotional arousal and decision-making by referring to the

⁸⁹⁴ B.E. KAUFMAN, ‘Emotional Arousal as a Source of Bounded Rationality’, (38) *Journal of Economic Behaviour & Organization*, 1999, pp.135-144.

⁸⁹⁵ See for instance: H.A. SIMON, *supra* note 574 (observing: ‘when emotion is strong, the focus of attention may be narrowed to a very specific, and perhaps transient, goal, and we may ignore important matters that we would otherwise take into account before acting’, at p.91).

⁸⁹⁶ Y.HANOCH, *supra* note 881.

⁸⁹⁷ B.E. KAUFMAN, Discussion on Emotion & Bounded Rationality: Reply to Hanoch’, (49) *Journal of Economic Behaviour & Organization*, 2002, pp.137-141 (the author afterwards clarified his point of view in a following paper where he pointed out that ‘the central proposition that my model of bounded rationality rests is on that extremes in emotional arousal at some point lead to a deterioration in human performance, such as in decision-making’).

complexity of human behaviour. Even though this debate is still open, these insights are instructive. They help constructing a better image of the judicial mind which does not appear to be solely subject to a cognitive bounded rationality, but also importantly to an emotional bounded rationality.⁸⁹⁸

5.2.2. Mapping the Judicial Mind: Empirical Insights

Previous theoretical developments have posited that judges can be regarded as bounded, biased and sensitive decision-makers. Such an approach depicts judicial behaviour from a perspective that seems more realistic than the one traditionally spearheaded by the legalist tradition. Empirical studies conducted with judges tend to substantiate these assumptions (*a*), even though their inherent limits invite us to remain prudent when interpreting and generalizing these results (*b*).

a) Empirics and Judicial Decision-Making

Empirical studies have pointed out that judges who are misled by heuristics tend to make systematic cognitive errors as human beings usually do. In addition, they have set forth the impact of emotional arousal on judicial decision-making.

➤ *Heuristics, Cognitive Illusions & Effects on Judicial Reasoning*

Following the path paved by TVERSKY and KAHNEMAN, behavioural economists and psychologists have investigated whether judges are likely to be prone to the same cognitive limitations and misleading heuristics as others human beings.⁸⁹⁹ In an experiment conducted in 1994, RAKOS and LANDSMAN already challenged the ideal of judicial self-control and questioned the view of judges acting as ‘masters of their biases’, able to control their intuitive reactions and emotions.⁹⁰⁰ While comparing jurors and judges – in other words, decision of specialists v. laymen - and their respective reactions when confronted with biasing information in a product liability case, the authors found that judges and jurors may actually

⁸⁹⁸ *Idem*.

⁸⁹⁹ N. VIDMAR, ‘The Psychology of Trial Judging’, (20) *Current Directions in Psychological Science*, 2011, pp.58-62, (reviewing the literature). The analysis of cognitive illusion and heuristics has also been extended to the field of arbitral decision-making as an attempt to propose an understanding of arbitrators’ behaviour (see also: C.R. DRAHOZAL, ‘A Behavioural Analysis of Private Judging’, (67) *Law & Contemporary Problems*, 2004, pp.105-132).

⁹⁰⁰ S. LANDSMAN and R. F.RAKOS, ‘A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation’, (12) *Behavioural Sciences & The Law*, 1994, pp.113-126.

‘not be very different in their reactions to potentially biasing materials’. RACHLINKSI, GUTHRIE and WISTRICH similarly analysed whether judges were more able than jurors to dismiss inadmissible information when taking their decisions.⁹⁰¹ In theory, judges should be able to ‘compartmentalize their knowledge’ so as to leave aside inadmissible proof. As the authors pointed out, one may naturally think that educated judges have ‘superior abilities to perform this difficult cognitive task’. Interestingly, their study again casts some doubt on the ability of judges to perform better than laymen. Based on questionnaires presenting different civil and criminal scenarios which were distributed to more than 200 judges attending different judicial workshops and conferences,⁹⁰² they found evidence that judges do not systematically dismiss inadmissible information when taking decisions.⁹⁰³ In one of the scenarios, they for instance notice that most of judges were ultimately influenced by information protected by the attorney-client privilege, even though such evidence should normally have been considered inadmissible. As jurors or other laymen, judges are human and, as SPELLMAN expresses it, ‘it is difficult to envision how a mere desire, or an admonition, to stop thinking like a human being could be effective’.⁹⁰⁴

Going a step further, in an innovative set of studies conducted with American judges, RACHLINSKI, GUTHRIE and WISTRICH also tested the presence of cognitive errors in samples generally varying from 100 to 200 judges.⁹⁰⁵ Their results reveal that judges rely on anchors to estimate damage awards and are influenced by framing effects. They may therefore consider differently a settlement offer when alternatively assessed from the plaintiff’s or from the defendant’s perspective, even though both offers

⁹⁰¹ C. GUTHRIE, J.J. RACHLINSKI and A.WISTRICH, ‘Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Discarding’, (153) *University of Pennsylvania Law Review*, 2005, n°4, pp.1251-1345 (information can be deemed inadmissible when it violates the principle of due process and fair trial - by for instance infringing the principle of loyalty in establishing proof -see on this point in French civil law, Court of cassation, Ass.plen., 7 January 2011, pourvoi n°09-14316 , bull. concerning the unnoticed records of private discussions between two persons involved in a cartel agreement; B. FARGES, ‘Le principe de loyauté dans l’administration de la preuve’, *Revue trimestrielle de droit civil*, 2011, p.127) - or when the risk of prejudice associated with the evidence outweighs its probative force (See notably Rule 403 of the US Federal Rules of Evidence stating: ‘the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence’).

⁹⁰² The experimental design of the studies conducted by GUTHRIE, RACHLINSKI and WISTRICH follow each time a similar pattern. It consists in attending a meeting, a conference or judicial workshops, to distribute a questionnaire and to ask judges to read it carefully and to reply individually. Responding generally required 10 to fifteen minutes and generally, as the authors generally observes, judge tend to take surveys seriously.

⁹⁰³ M. CHORTEK, ‘The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials’, (32) *Review of Litigation*, 2013, pp.117-143 (For a recent comparison between juries and judges on the issue of inadmissible information).

⁹⁰⁴ B.A. SPELLMAN, ‘On The Supposed Expertise of Judges in Evaluating Evidence’, (157) *University of Pennsylvania Law Review*, 2007.

⁹⁰⁵ C. GUTHRIE, J.J. RACHLINSKI, A.WISTRICH, ‘Inside the Judicial Mind’, (86) *Cornell Law Review*, May 2001, n°4; C. GUTHRIE, J.J. RACHLINSKI and A.WISTRICH, ‘Blinking On the Bench: How Judges Decide Cases’, *Vanderbilt Law & Economics Research Paper*, 2007, n°07-32.

lead economically to identical results. Judges were also potentially subject to the representativeness heuristic,⁹⁰⁶ or prone to egocentric bias. Indeed, a vast majority of them (almost 90%) considered that their colleagues had higher chances than themselves to see their decisions being reversed on appeal. Finally, their reasoning is also influenced by the hindsight bias, even though other experiments have conversely nuanced its importance on judicial decision-making.⁹⁰⁷ Importantly, the presence of such biases in judicial reasoning is apparently not solely confined to American judges, but seems also concern their European counterparts. In a recent and similar experiment conducted with Dutch judges, RACHLINSKI and VAN BOOM found evidence that Dutch judges tended to be prone to the same cognitive errors.⁹⁰⁸

Finally, and it is certainly a crucial point, judges may not be aware of the weight of heuristics in their decisions. For most of them, they are comparable to MOLIERE's famous character Monsieur Jourdain in his play *The Bourgeois Gentleman* who, for forty years, has been speaking in prose, and not in verse, without knowing it.⁹⁰⁹ Two studies conducted on bail decisions delivered by British judges are on this point illustrative. In a first field study, DHAMI found that judges dealing with bail decisions heavily relied on previous decisions made by the police, the prosecution or other judges instead of fully investigating all the characteristics of the case in front of them.⁹¹⁰ While noticing that judges were 'either intentionally or unintentionally passing the buck', the author was ultimately concerned by the fact that judges were manifestly behaving 'contrary to the ideals of due process'. In another study, DHAMI and AYTON also found that judges relied on heuristics while deciding about bails.⁹¹¹ However, interestingly, the authors also pointing out the high degree of confidence of judges who, in their majority, were convinced that they had taken a fair and bias-free decision. As one of the judges emphasized, 'we are trained to question and to assess carefully the evidence we are given'.⁹¹²

⁹⁰⁶ *Idem* (influence of the representativeness heuristics is not clear-cut. In one of their study, the authors observe for instance that more than 40% of them gave the correct answer).

⁹⁰⁷ K. VISCUSI, 'How Do Judges Think about Risk?' (1) *American Law and Economics Review*, 1999, n°1/2, pp.26-62 (noticing: 'the influence of hindsight bias on the retrospective assessment of an accident situation is also directly pertinent, but most judges were not prone to the hindsight biases').

⁹⁰⁸ J.J. RACHLINSKI and W. VAN BOOM, 'Inside the Civil Judge's Mind', presented during the 6th topics workshop of the International Max Planck Research School (IMPRS) on Adapting Behavior in a Fundamentally Uncertain World, Erasmus University Rotterdam, 15-19 October 2012.

⁹⁰⁹ MOLIERE, *The Bourgeois Gentleman*, Act 2, Scene 4.

⁹¹⁰ M.K. DHAMI, 'Psychological Models of Professional Decision Making', (14) *Psychological Science*, 2003, n°2, pp.175-180.

⁹¹¹ M.K. DHAMI, 'Bailing and Jailing the Fast and Frugal Way, (14) *Journal of Behavioural Decision-Making*, 2001, pp.141-168.

⁹¹² *Idem*, at p.163.

➤ *Emotions, Mood & Effects on Judicial Reasoning*

Although often addressed indifferently and viewed as interchangeable, the concepts of *mood* and *emotion* are distinguished in the psychological literature. The distinction specifically refers to the degree of intensity which differentiates emotion from mood. The first is described as being of high intensity, of short or long duration and of high specificity. Conversely, the second remains of lower intensity, limited in time and less specific. For an illustration, fear is generally considered as an emotion, but boredom as a mood.⁹¹³ Empirical research illustrating the impact of mood and emotion within courtrooms has notably been conducted with jurors and mock-jurors. Studies have for instance revealed that sad mood tends to enhance the quality of information processing and that sad mood jurors seem to perform better and to be more accurate when reporting testimonial inconsistencies.⁹¹⁴

A few empirical studies have nonetheless attempted to assess the influence of judges' mood on their decisions. Insights on this matter remain nowadays often indirect. In a recent and controversial field study, DANZIGER, LEVAV and AVNAIM-PESSO sought to discuss a common caricature associated with the Legal Realism movement stating that law is simply 'what judges have had for breakfast'.⁹¹⁵ They consequently investigated the effect of food breaks on judges' decisions to grant or deny prisoners' requests. The survey consisted in the analysis of 1112 rulings delivered by 8 experienced Israeli judges. Each judge daily repeatedly dealt with 14 to 35 requests and spent on average about 6 minutes on each case. Remarkably, the likelihood of favourable rulings was higher at the beginning of the day or after food breaks.⁹¹⁶ Conversely, the authors found that judges making repeated rulings were progressively favouring status quo decisions before a break by choosing the simplest solution, which was here to merely deny prisoner's request and to maintain the previous decision. Since their results highlighting the weight of extraneous factors in judges' decisions were potentially disturbing, the authors were highly cautionary when interpreting their findings.⁹¹⁷ They suggested that judges might over time suffer from cognitive fatigue. When mentally depleted, they would thus progressively heavily favour status quo rulings and thus behave like other lay individuals who are similarly prone to status quo bias when making repeated

⁹¹³ Y.HANOCH, 'The Effects of Emotions on Bounded Rationality: A Comment on Kaufman', (49) *Journal of Economic Behavior & Organization*, 2002, n°1, pp.131-135.

⁹¹⁴ C. SEMMLER and N. BREWER, 'Effects of Mood and Emotion on Juror Processing and Judgements', (20) *Behavioural Sciences and the Law*, 2002, pp.423-436.

⁹¹⁵ S. DANZIGER, J. LEVAV and L. AVNAIM-PESSO, 'Extraneous Factors in Judicial Decisions', (108) *Proceedings of the National Academy of Sciences*, 2011, pp.6889-6892.

⁹¹⁶ *Idem* (observing : 'the percentage of favourable rulings drops gradually from about 65% to nearly zero within each decision session and returns abruptly to about 65% after a break').

⁹¹⁷ Judges reacted to these findings, and set forth alternative explanations to the ones brought by the experiment.

decisions.⁹¹⁸ Experiments have indeed shown that people tend to stick to previous situations in order to notably avoid transition costs or costs of search. Breaks would consequently help restore the mental capacities of the judicial brain. Importantly, the authors nonetheless refused to draw clear connection between their findings and judges' mood.⁹¹⁹ Yet – and even though such extrapolation must obviously be taken very carefully –, short rests have potentially a potential impact on the positive mood of tired judges and might limit their deficit of attention or their potential boredom.

In turn, the influence of emotions on judges' decision-making has been given higher attention. A stream of research has notably investigated the effect of terror management on judicial rulings. Built upon the work of BECKER, terror management theory posits that fear of death (the so-called 'mortality salience') and reminders of personal vulnerability and mortality exert a powerful influence on behaviour and decision-making.⁹²⁰ Scholars studying the effects of terror management have found extensive empirical evidence stressing that reminding people of their own mortality motivate them to defend their beliefs, and eventually to be harsher *vis-à-vis* those who do not share or ultimately threaten their cultural worldviews.⁹²¹ In an experiment conducted with American municipal court judges, ROSENBLATT, GREENBERG, SOLOMON, LYON and PYSZCZYNSKI highlighted the effect of terror management on judicial reasoning.⁹²² Their experimental design required judges to assess the bond for a prostitute. Within the group of judges, some of them were previously given a questionnaire in which they were required to think about the circumstances of their own death, such as for example imagining what they think will occur when they die, or what their emotions and feelings are likely to be on this peculiar occasion. The study reveals that judges exposed to terror management tended to be significantly harsher than their colleagues who did not previously contemplate their own death. Judges who replied to the questionnaire

⁹¹⁸ W. SAMUELSON and R. ZECKHAUSER, 'Status Quo Bias in Decision-Making', (1) *Journal of Risk and Uncertainty*, 1988, pp.7-59 (illustrating the statu quo bias through 2 experiments conducted with university employees asked to choose between different health plans and retirement investments).

⁹¹⁹ S.DANZIGER, J. LEVAV and L. AVNAIM-PESSO, *supra* note 915 (warning that the study 'cannot unequivocally determine whether simply resting or eating restores the judges' mental resources because each of the breaks was taken for the purpose of eating a meal', and similarly that they also cannot 'ascertain whether taking a break improved the judges' mood because mood was not measured in [the] study').

⁹²⁰ E. BECKER, *The Denial of Death*, Free Press, 1973, 336 p.

⁹²¹ J. ARNDT, J.D. LIEBERMAN, A. COOK and S. SOLOMON, 'Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision-Making', (11) *Psychology, Public Policy and Law*, 2005, n°3, pp.407-438; see also: M.B. JONES and R.L. WIENER, 'Effects of Mortality Salience on Capital Punishment Sentencing Decisions', (33) *Basic and Applied Social Psychology*, 2011, pp. 167-181 (noticing that, according to the terror management theory, 'punishing those who violate our own worldviews protects us against the terror of our own deaths by bolstering connections to the worldview, which lives beyond our own deaths').

⁹²² A. ROSENBLATT, J. GREENBERG, S. SOLOMON, D. LYON and T. PYSZCZYNSKI, 'Evidence for Terror Management Theory: The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values', (57) *Journal of Personality and Social Psychology*, 1989, n°4, pp.681-690.

indeed assigned on average a \$455 bond whereas the amount set by judges who were part of the control group was only on average of \$50. Noteworthy, a subsequent experiment conducted by RACHLINSKI, GUTHRIE and WISTRICH aimed at assessing the impact of terror management on bankruptcy judges failed to replicate the same findings. The authors found indeed no effect of terror management on judicial reasoning.⁹²³ Remarkably however, their experimental design somehow importantly differed from the one previously followed by ROSENBLATT and his team. In this second experiment, references to mortality and death were indeed made far more subtle and did not explicitly target judges personally. Judges were in reality invited to think about death in general, but not to envisage their own vulnerability. It is thus uncertain whether general thoughts about death ultimately led judges to think about their own personal death.⁹²⁴

As a matter of fact, empirical insights show that traits of judicial behaviour tend to be far more complicated than the one traditionally spearheaded in the legal literature. The identities of the parties, the context in which judges take their decision, ways problems are framed and presented have long-lasting implication on judicial decision-making.

b) Methodological Issues and Need for a Precautionary Approach

The weight associated with empirics should not be overstated, but be considered carefully. Inherent limits regarding notably the use of questionnaires, the external validity of laboratory results and the existence of contradictory findings on same topics invite us to prudent interpretations. Obviously, the remarks listed in these developments do not solely concern judges, but more generally target any empirical work. Empirics provide thus key insights and are appealing, but have still to be regarded as clues, and not as irrefutable truths.

➤ *Empirics on Judicial Behaviour and the Use of Questionnaire*

Aside field surveys which ground their findings on datasets of judicial rulings, most empirical works on judicial behaviour are built on questionnaires distributed to judges during conference and workshops. The

⁹²³ C. GUTHRIE, J.J. RACHLINSKI, A.WISTRICH, *supra* note 901.

⁹²⁴ However, in an experiment conducted with mock jurors on a capital punishment trial, the authors manipulated mortality salience by exposing jurors to the death of plaintiffs, defendants and to their own death. Interestingly, they also found no clear evidence supporting the effect of terror management on jurors when they think about their own mortality (M.B. JONES and R.L.WIENER, *supra* note 921).

manipulation of questionnaires induces two sets of questions. The first regards their content and the manner questions are framed. The second concerns their relevance when compared to real-life situations.

Arguably, experimental economists and psychologists may - consciously or unconsciously - influence their respondents by suggesting or highlighting particular responses. Research tends indeed to show that only modest alteration or changes in wording are often enough to influence the replies ultimately obtained.⁹²⁵ Even though experimental scholars may themselves be prone to framing effects when behaving as *subjects* of experiments,⁹²⁶ it is believed that they are largely aware of this now well-documented bias when they behave as *authors* of studies, and consequently remain prudent when constructing their own surveys.

The second issue regards the relevance of questionnaires to understand real-life situations. The question of experiments' external validity - in other words, the question of whether experimental results can safely be translated outside laboratories to understand real-life situations - is well-known and remains a source of controversies and heated debates, notably between lawyers and economists.⁹²⁷ As opposed to real complex situations where facts are complex and intertwined, experimental scenarios are constructed on simplified issues which allow experimenters isolating and manipulating one or several independent variables. Moreover, even though judges may take questionnaires seriously, it may be objected that they will not exert the same level of attention and precision in their judgments, or feel ultimately less involved in the experimental design than in real-life situations in which real persons and real amounts of money are at stake. Finally, as opposed to experiments, deciding on real legal cases - specifically for hard ones - is usually a long process and judges may have ample time to discuss issues with colleagues to collect different views.

Recent research has nonetheless mitigated this debate and suggested that experiments' internal and external validities are not necessarily irreconcilable. Conversely, a correspondence between them does exist. As ANDERSON, LINDSAY and BUSHMAN observed through a meta-analysis comparing the results of field and laboratory experiments, 'the psychological laboratory has generally produced

⁹²⁵ A. TVERSKY and D. KAHNEMAN, 'The framing of decisions and the psychology of choice', (211) *Science*, 1981, pp.453-458 (for an extensive overview): W. BRUINE DE BRUIN, 'Framing Effects in Surveys: How Respondents Make Sense of the Questions We Ask', in: G. KEREN (Ed.), *Perspectives on Framing*, London, Taylor & Francis.

⁹²⁶ S. GAECHTER, H. ORZEN, E. RENNER and C. STARMER, 'Are Experimental Economists Prone to Framing Effects? A Natural Field Experiment', (70) *Journal of Economic Behaviour & Organization*, 2009, pp.443-446 (observing that junior experimental economists are also influenced by framing effects, while their senior colleagues are not).

⁹²⁷ C. ENGEL, *Legal Experiments: Mission Impossible?*, Erasmus Law Lecture, Eleven International Publishing 2013, n.28 (noticing that lawyers may regard legal experiments as being too scientific, individualistic, narrow, anxious and small).

psychological truths, rather than trivialities'.⁹²⁸ Another recent experiment conducted by MITCHELL also substantiates - but nuances – these findings by noticing that the correspondence between external and internal validities differs across topics and subfields and is dependent on sample sizes.⁹²⁹

➤ *Problems Associated with Equivocal and Contradictory Empirics*

In a lecture given at Erasmus University Rotterdam in March 2013, Professor RACHLINSKI questioned whether empirical legal studies tend to show 'more heat than light' by proposing scattered, equivocal and sometimes contradictory results on same topics.⁹³⁰ A similar remark can be formulated concerning some of the experiments previously presented. For example, some studies revealed the presence of hindsight bias in judicial decision-making, while others did not. Some found evidence of the effect of terror management on judicial behaviour, but others ultimately failed to do so. The idiosyncrasies of experimental design, the choice of variables and the use of different datasets may explain these divergences. As a matter of facts, it may thus not be safe to generalize the results obtained. Further empirical research is currently needed. These divergences invite us to remain prudent when dealing with these results.

➤ *Empirical Findings and Need for Prudent Interpretation*

In many aspects, scholars dealing with judicial behaviour are similar to sailors trying to navigate between Scylla and Charybdis. Unsatisfied with the traditional legal views on judges, they propose new theoretical frameworks to explain judicial behaviour. As soon as theories are formulated, empirical evidence is logically urged as a way to substantiate their assumptions. Yet, when empirical insights are found, controversies and criticisms then arise regarding their relevance and possible generalization. It is here firmly believed that empirical evidence helps renew the vision of judicial behaviour by proposing alternatives to the legalist myth. When dealing with empirical findings, one should however keep in mind some key principles drawn from the Aristotelian ethics.

First, as Aristotle observed, 'a swallow does not make the summer'. Empirics may signal and draw attention on potential pitfalls or shortcomings of judicial decision-making that should not be neglected by

⁹²⁸ C.A. ANDERSON, J.J. LINDSAY and B.J. BUSHMAN, 'Research in the Psychological Laboratory: Truths or Triviality?', (8) *Current Directions in Psychological Science*, 1999, n°1, pp.3-9.

⁹²⁹ G.MITCHELL, 'Revisiting Truth or Triviality: The External Validity of Research in the Psychological Laboratory', (7) *Perspectives on Psychological Science*, 2012, p.109.

⁹³⁰ J.J. RACHLINSKI, 'Does Empirical Legal Studies Shed more Light than Heat', Lecture at Erasmus University, 20 March 2013.

policymakers. However, these studies remain clues or insights and are not aimed at formulating irrefutable assumptions on what is systematically going on within courtrooms or within judges' minds.⁹³¹ They rather shed light on the likelihood of possible inclinations, biases and misrepresentations that might alter their reasoning. Given the considerable human and financial stakes in the realm of mass litigation, even small mistakes may have dramatic consequences. It appears therefore preferable to prevent rather than to cure.

Second, even though relying too heavily on empirics conducted with judges may turn out to be problematic, discarding them totally is also not a suitable option. Between over-scepticism and over-reliance, an intermediate approach should be inspired by Aristotle's Golden Mean. Departing from defect and excess,⁹³² prudence should thus lead the interpretations of empirical research.

5.2.3. Preliminary Conclusions and Criticisms: What about the Specificities of Legal Reasoning?

Departing from the legalist edifice largely built on the figure of the cold-blooded judge, this first part was aimed at highlighting that judges can be regarded as biased, sensitive and boundedly rational individuals taking their decisions in the heat of litigation, influenced by heuristics and prone to emotions. This first step was necessary before placing judges into the context of mass litigation.

Most legal scholars might however reject this assumption and conversely defend the view that legal practitioners do think differently, or in other words, that it may exist a specific 'psychology of judging' that judges have progressively acquired throughout their education and practice.⁹³³ Its specificity would rest on the authority of precedents, analogical reasoning or on a 'second-order' type of reasoning by which judges, unlike lay individuals merely interested in the direct and immediate consequences of their

⁹³¹ T. ROSTAIN, 'Educating Homo Economicus: Cautionary Notes on the New Behavioural Law & Economics Movement', (34) *Law & Society Review*, 2000, n°4, pp.973-1006 (noticing: 'if there is one lesson to be drawn from empirical social science research, though, it is that no all-encompassing account of human conduct is likely to be forthcoming. The factors involved in individual decision-making and social interactions are too numerous and irreducibly complex', at p.976).

⁹³² ARISTOTLE, *Nicomachean Ethics*, Book II (pointing out: 'a master of any art avoids excess and defect, but seeks the intermediate and chooses this', and further precisising that 'for in everything it is not easy task to find the middle').

⁹³³ F. SCHAUER, 'Is There a Psychology of Judging', in: D.KLEIN and G.MITCHELL (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.103-120; see also: F.SCHAUER, *supra note 609*, at p.1 (observing: 'even though law schools do teach some legal rules and some practical professional skills, the law schools also maintain that their most important mission is to train student in the arts of legal argument, legal decision-making, and legal reasoning – in thinking like a lawyer').

decisions, also take into consideration the consequences of their decisions on later cases.⁹³⁴ As SCHAUER expresses it, they might ultimately decide that ‘the best legal rule may be one which produces an unjust result in the present case, but which will produce better results in a larger number of cases’.⁹³⁵ On the contrary, psychologists and behavioural economists often influenced by previous works of Legal Realists⁹³⁶ have contested the fact that ‘thinking like a lawyer’ was a specific exercise, and rather argued that there is not much difference between judicial and non-judicial decision-making.⁹³⁷ Other studies referring to the MYERS-BRIGGS Type Indicator (MBTI) used to investigate facets of lawyers’ personalities have suggested that personality traits of lawyers are different from the ones of laymen.⁹³⁸ Lawyers are more likely to prefer introversion⁹³⁹, intuiting⁹⁴⁰, thinking⁹⁴¹ and judging,⁹⁴² or tend to be ‘more logical, unemotional, rational and objective in making decisions and perhaps less interpersonally oriented than the general population (...)’.⁹⁴³ Such tests have nonetheless not been conducted with judges, even though one could expect similarities between both categories. To this day, the issue remains thus an open question. The debate can be simplified as a continuum delimited to each of its two extremes by two categories, namely *the judge as man* and *the judge as a lawyer*. Deciding where, between these two

⁹³⁴ *Idem*

⁹³⁵ *Idem*, at p.108

⁹³⁶ J. FRANK, *supra* note 607 (observing: ‘it has been said that (...) others and I underestimated the judicial uniformities resulting from the pressure of (1) the likeness in the legal education and in the professional experiences of lawyers who become judges plus (2) the common judicial tradition. But these pressures do not penetrate deep enough to produce similarities in those unique, idiosyncratic, sub-threshold biases and predilections, of the divers individual trial judges, which affect their reactions to witnesses, parties, and lawyers, and which terminates in fact-findings (...), at p.xxvi-xxvii)

⁹³⁷ E. SHERWIN, ‘Features of Judicial Reasoning’, in: D. KLEIN and G. MITCHELL (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.121-130.

⁹³⁸ L. RICHARD, ‘The Lawyer Types – How Your Personality Affect Your Practice’, (79) *A.B.A Journal*, 1993, p.74; S. DAICOFF, ‘Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism’, (46) *The American University Law Review*, 1997, pp.1337-1427 (reviewing the literature, see specifically at p.1393); L.T. VISSCHER, ‘Gedrag van Advocaten’, in: W.H.VAN BOOM, I.GIESEN and A.J.VERHEIJ (Eds.), *Capita Civilologie – Handboek Empirie en Privaatrecht* (Civilologie/Civilology, deel 6), Den Haag, Boom Juridische Uitgevers, 2013, pp.1123-1157. The Myers-Briggs Type Indicator is a psychological test aimed at understanding how individuals perceive their environment and make decisions. The test was developed in the 1940s by Katharine Cook BRIGGS and her daughter Isabel BRIGGS-MYERS and inspired by previous research conducted by JUNG. The test investigates individuals’ preferences with regards to four categories: introversion/extraversion, sensing/intuition, Thinking/Feeling, judging/perceiving.

⁹³⁹ L. RICHARD, *supra* note 938. *Introverts* ‘prefer more intimate one-on-one relationships, are typically more reserved, prefer to think through ideas alone, and usually shy away from excitement’.

⁹⁴⁰ *Idem*, *intuitives* are ‘more comfortable paying attention to the abstract impressions they perceive, to the meanings behind the data, and to the relationships among the various facts’.

⁹⁴¹ *Idem*, *Thinkers* ‘make decisions in a detached, objective and logical manner. They employ syllogistic thinking, and make a conscious effort not to let their personal preferences get in the way of making a ‘right’ decisions’.

⁹⁴² *Idem*, *Judges* ‘like to have a sense of control over their environment and so tend to be methodical.

⁹⁴³ S.DAICOFF, *supra* note 938, at p.1393.

extremes, the cursor should fall ultimately depends on scholars' personal views, the legal tradition of his (or her) country, and certainly also, on his (or her) degree of inclination with the claims of Legal Realists. Previous chapters have shown that Civil Law countries are less prone to entertain assumptions defended by Legal Realists.

Alternatively, there might be another manner to envisage this issue. The key would be to not focus on the confrontation, but rather on the complementarity between both decision-making processes. In other words, judges do not think like lawyer *or* like laymen, but think like both because they are lawyer *and* laymen depending on the tasks that they have to perform. For example, concerning tasks that are deeply embedded in judges' education, such as adjudicating or applying law to facts, they are more likely to think like lawyers and thus to be less influenced by emotional arousals. Concerning other tasks which differ from their traditional practice or education, they may in turn more easily think like other laymen. Regarding specifically the field of mass litigation, previous developments have highlighted that the tasks assigned to judges in this particular context tend to be peculiar and diverge from the ones that they are usually required to perform. They may therefore be more likely to exhibit features of decision-making that are comparable to the one of their fellow laymen.

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5.3. IN THE SHADOW OF NUMBER: THE EFFECTS OF GROUPS, NUMBER AND SCOPE ON DECISION-MAKING

The first part of this chapter targeted judges as decision-makers. It is now time to take into account the context in which bounded, biased and sensitive judges take their decisions. The second part of this chapter is therefore intended to discuss the impact associated with the magnitude of mass claims on the decision-making process of boundedly rational judges who, as shown previously, are receptive to emotion and biases. Behavioural economists and psychologists have stressed the importance of contexts in decision-making and problem-solving.⁹⁴⁴ Importantly, contexts do also influence the way judges take their decisions.⁹⁴⁵ In the realm of mass litigation, cases involve and consolidate in one lawsuit potentially

⁹⁴⁴ E. FANTINO and S. STOLARZ-FANTINO, *supra* note 792; E. FANTINO, 'Context: A Central Concept', (54) *Behavioural Processes*, 2001, pp.95-110

⁹⁴⁵ C. GUTHRIE, J.J. RACHLINSKI and A.WISTRICH, 'Context Effects in Judicial Decision Making', Paper presented at the annual meeting of the American Psychology-Law Society, 2010; K.VISCUSI, 'How Do Judges

hundreds of represented claimants who have suffered a similar harm. The magnitude of the case, that is the number of people involved and/or the size of the loss at stake, may consequently be considerable. Even though judges discuss and exchange with a limited number of protagonists during hearings - and notably among them, with representative bodies such as associations or leading counsels – fiduciary judges nonetheless take their decisions in the shadow of numerous represented or absent plaintiffs, that is in other words, *in the shadow of number*.⁹⁴⁶ Furthermore, groups do not only concern plaintiffs but also defendants: judges may indeed also deal with several defendants for instance suspected of having commercialised a same harmful product. Mass claims have thus an important psychological impact on parties and judges: issues at stake are usually highly sensitive societal concerns extensively relayed in the media. The fact that numerous individuals, consumers or shareholders are victims of a same misbehaviour often induce large emotional arousals, specifically at a period that has been pictured as a ‘victims’ time’.⁹⁴⁷

Two related issues underlie these developments. The first questions whether the magnitude of mass cases is likely to act as a stimulus influencing the brain and behaviour of judges potentially sensitive to number and scope. Needless to say that such a starting hypothesis is erratic from a traditional legal point of view since the identity or the number of parties should theoretically have no effect on judicial decision-making focusing only on legal arguments. The second investigates ways by which judges may cope with the complexity associated with the magnitude of mass cases. One of the key points here set forth is that boundedly rational judges tend to refer to a set of heuristics to deal with complex mass claims involving numerous parties, as they often do in individual cases. Yet, it will be shown that, even though helpful in some situations, heuristics and their associated cognitive errors may also be exploited by others protagonists to influence judge’s decision-making.

How do judges may process information when dealing with groups? What are the plausible cognitive errors that they might make when controlling the shape and size of groups? How other actors may exploit their errors in their own interest? Do situations involving many participants lead decision-makers to exert more effort than in situations involving one participant? Is the number of litigants likely to influence

Think About Risk?’, (1) *American Law and Economics Review*, n°1/2, 1999, pp.26-62 (showing that judges may also be sensitive to risky contexts. The author found notably evidence showing that judges tend to be risk-averse. They may overestimate small risks but underestimate larger risks. They may therefore consider risky drugs more favourably when the risks are higher but known and well-identified, and to be harsher when risks are lower but more uncertain).

⁹⁴⁶ On a broader scale, recent research has started to investigate the impact of numerosity on individuals' decision-making and perception. See for instance: R. ADAVAL, 'Numerosity and Consumer Behavior', (39) *Journal of Consumer Research*, 2013, n°5, pp.11-14.

⁹⁴⁷ C. ELIACHEFF and D. SOULEZ-LARIVIERE, *Le Temps des Victimes*, Albin Michel, 2006, Paris, 293 p.

judgments on liability, causation and damages awards in mass litigation? Responses to these questions appear pivotal. They will shed a new light on the roles of neutral watchdog, cattle driver and good shepherd assigned to judges in this field.

Built on generic insights drawn from behavioural economics and psychology, this section proposes a theoretical framework aimed at discussing the impact of mass claims' magnitude on decision-making. Occasionally, there might not be empirical proof available to support all these claims. Sceptical readers may consequently find these assumptions rather speculative. As an attempt to remedy this problem, the next chapter will undertake some reality checks. For the time being, it would be a mistake to discard these insights built on a body of informative and well-established literature. As expressed previously, doubts also remain on the fact that judges always perform better than lay people. Furthermore, even areas which could *a priori* appear to be highly specialised and require peculiar expertise are nowadays more and more prone to take into account insights of generic behavioural economics. The example of medicine is for instance instructive. It appears essential to be eclectic in our judgments since 'the reliance on generic psychological research in this highly specialised field manifests a belief that any type of valid psychological research ought to be brought to bear to better understand how (...) decisions are made and how they can be made better'.⁹⁴⁸ (...) the prioritization of the usefulness of the research over its uniqueness could likewise benefit the study of judicial decision-making'.⁹⁴⁹

The rest of this chapter is divided as follows. The first section discusses the idiosyncrasies of information processing when decision-makers deal with groups v. when they deal with individuals and ultimately attempts to draw some conclusions on the way judges may perceive and handle groups in the realm of mass litigation (5.3.1). The second section questions the weight and usefulness of heuristics when managing complex mass cases as well as their associated risks of cognitive errors (5.3.2). The third section investigates the impact of number and scope on decision-making and draws some conclusions, notably concerning the assessment of causality and damages in mass disputes (5.3.3). Preliminary conclusions then conclude this second part (5.3.4).

⁹⁴⁸ D. SIMON, 'In Praise of Pedantic Eclecticism', in: D. KLEIN and G. MITCHEL (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.131-148.

⁹⁴⁹ *Idem*

5.3.1. Perceiving Groups v. Perceiving Single Individuals: Effects on Information-Processing

Social Psychological literature considers that observers perceive and process information about groups and individuals differently (*a*). Empirical evidence has also shown that decision-makers tend to decide differently when dealing with a group v. a single person (*b*). These insights shed new light on the functioning of mass litigation and on the manner judges may perceive and handle groups of plaintiffs and defendants (*c*).

a) Perceiving Groups as Structured Entities

➤ *Perceiving Groups and Perceiving Individuals*

Facing a group or facing a single individual has an impact on the way information about the target is processed and on the manner such information is ultimately used to infer judgements.⁹⁵⁰ On the one hand, individual targets are assumed to be coherent and structured entities. Observers expect such unity and try to capture this coherence. They will be particularly alert and sensitive to the presence of inconsistencies in the behaviour of the individual target.⁹⁵¹ On the other hand, groups are assumed to be less unified. Perceivers do not expect the same degree of coherence among group members as they usually do for single individuals. They are also less sensitive to inconsistencies across group members' behaviour. Consequently, perceivers may be able to better recall, organize and process information when dealing with an individual than when dealing with group members.⁹⁵²

Extensive research has been conducted to understand the conditions under which an aggregate of individuals can *per se* be considered as a meaningful group. HAMILTON and SHEARMAN have suggested that a key factor lies in the degree of *entitativity* that perceivers seek to associate with the target. In other words, the level of entitativity is an important component of the cognitive construction that perceivers have about groups.

⁹⁵⁰ D.L. HAMILTON and S.J. SHERMAN, 'Perceiving Persons & Groups', (103) *Psychological Review*, 1996, n°2, pp. 336-355; J. SUSSKIND, K. MAURER, J.W. SHERMAN, V. THAKKAR and D.L. HAMILTON, 'Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions', (76) *Journal of Personality and Social Psychology*, 1999, n°2, pp.181-191.

⁹⁵¹ D.L. HAMILTON and S.J. SHERMAN, *supra note 950*.

⁹⁵² *Idem*.

➤ *The Concept of Entitativity*

The term *entitativity* was initially coined by CAMPBELL in 1958 to define the manner social groups are evaluated and assessed.⁹⁵³ The key tenet lies in the extent to which groups can be envisaged as being *entitative*, that is as ‘having the nature of an entity’. The concept of entitativity is aimed at capturing the degree of coherence and unity that a perceiver may associate with a collection of people. As HAMILTON expresses it, ‘entitativity is the glue that holds (or is perceived as holding) a group together’.⁹⁵⁴ CAMPBELL suggested that among useful clues for assessing the group’s entitativity stand proximity and similarity between group members, or the existence of common goals or a common fate which leads participants to ‘move together in the same direction’. He therefore observed that ‘a band of gypsies is empirically harder, more solid, more sharply bound than the ladies aid society, and the high-school basketball team (...) falls somewhere in-between (...)’.⁹⁵⁵

Building on this notion, HAMILTON and SHEARMAN have argued that the cognitive process that is engaged when perceivers deal with groups is dependent on the degree of the target’s perceived entitativity. Information about groups that are highly entitative is more likely to be processed in the same way as information about individuals. Perceivers expect the same unity and coherence across the behaviour of members of highly entitative groups as they usually do for individuals. Put simply, perceived unity and coherence of the group make the group resembles an individual.⁹⁵⁶ Conversely, information about lower-entitativity group is less likely to be processed in the same way as information about individuals: perceivers will therefore expect less unity and coherence in the behaviour of group members.

b) Empirical Evidence

In a study, TVERSKY and REDELMEIER investigated whether physicians ‘make different judgements in evaluating an individual patient as compared with considering a group of similar patients’.⁹⁵⁷ Interestingly,

⁹⁵³ D.T. CAMPBELL, ‘Common Fate, Similarity and Other Indices of the Status of Aggregates of Persons as Social Entities’, (3) *Behavioural Sciences*, 1958, pp.14-35.

⁹⁵⁴ D.L. HAMILTON, ‘Understanding the Complexities of Group Perception: Broadening the Domain’, (37) *European Journal of Social Psychology*, 2007, pp.1077-1101 (here at p.1087).

⁹⁵⁵ D.T. CAMPBELL, *supra* note 953, at p.17.

⁹⁵⁶ S.J. SHERMAN and E.J. PERCY, ‘The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members’, (137) *Journal of Law and Policy*, 2011, pp. 137-170 (stressing that ‘the difference between perceptions of individuals and groups virtually disappears when a group is high in perceived entitativity’, at p.149).

⁹⁵⁷ A. TVERSKY and R.A. REDELMEIER, ‘Discrepancy between Medical Decisions for Individuals Patients and for Groups’, (322) *The New England Journal of Medicine*, 1990, pp.1162-1165.

they found that their decisions did indeed diverge. Physicians dealing with one patient were more likely to order additional tests, expend time directly assessing a patient, avoid raising some troubling issues, and recommend a therapy with a high probability of success but the chance of an adverse outcome. The authors therefore noticed that ‘physicians give more weight to the personal concerns of patients when considering them as individuals and more weight to general criteria of effectiveness when considering them as a group’. Noteworthy, later similar experiments conducted by DEKAY and his team failed to replicate these findings and found no significant differences in treatment advice given to individuals and to groups.⁹⁵⁸

A research conducted by TENBRUNSEL, DIEKMANN and NAQUIN similarly seems to show that negotiators are more likely to engage in unethical behaviour when dealing with groups than when dealing with individuals.⁹⁵⁹ In one of their experiments, NORDGREN and MCDONNELL similarly observed that subjects are less prone to make ‘a difficult but ethical decision when more victims were involved’.⁹⁶⁰ SAH and LOEWENSTEIN found evidence that advisors with financial conflict of interest are more likely to give biased advice to multiple and unidentified recipients than to single identified individuals.⁹⁶¹ Importantly, the authors report that ‘only advisors with single identified recipients demonstrated both awareness of the bias in their advice and a motivation to undo it’.

c) Dealing with Groups, Entitativity and Mass Litigation

➤ *Entitativity and Groups of Plaintiffs*

How much entitative is a group of plaintiffs? Response to this question depends on the nature and peculiarities of the case at stake. Do plaintiffs constitute a mere loosely bounded aggregate where members share little similarities, or do they form a group that can be perceived as being highly entitative, that is which constitutes a single and coherent unit? In a study conducted jointly in the United States and in Poland, LICKEL and his team investigated the degree of entitativity that perceivers associate with

⁹⁵⁸ M.L. DEKAY, C.A.E. NICKERSON, P.A. UBEL, J.C. HERSHEY, M.D. SPRANCA and D.A. ASCH, ‘Further Explorations of Medical Decisions for Individuals and For Groups’, (20) *Medical Decision-Making*, 2000, pp.39-44.

⁹⁵⁹ A.E. TENBRUNSEL, K.A. DIEKMANN and C.E. NAQUIN, ‘Unethical behaviour directed toward group versus individuals: The Role of Target Type In Promoting Misrepresentation’, *unpublished manuscript* (cited in: T.KOGUT and I.RITOV, ‘The Singularity Effect of Identified Victims in Separate and Joint Evaluations’, (97) *Organizational Behaviour and Human Decision Processes*, 200, pp.106-116.

⁹⁶⁰ L.F. NORDGREN and M.-H. Mc DONNELL, ‘The Scope-Severity Paradox: Why Doing More Harm is Judged to Be Less Harmful’, (2) *Social Psychological and Personality Science*, 2011, pp.97-102 (at p.100).

⁹⁶¹ S. SAH and G. LOEWENSTEIN, ‘More Affected = More Neglected: Amplification Bias in Advice to the Unidentified and Many’, (3) *Social Psychological and Personality Science*, 2012, pp.365-372.

different types of groups.⁹⁶² 40 groups were clustered into several categories including notably ‘intimacy groups’ (encompassing among others: members of a family, of a rock band...), groups with an explicit objective – also named ‘task groups’ - (members of a jury, of a labour union...) or without (people in a romantic relationship...) or loose associations (people standing in line at the bank, people in the audience at a movie...). The author found that higher entitativity was more likely to be associated with intimacy groups, while, by contrast, lower entitativity characterized loose associations. The group’s perceived entitativity mainly depended on the perceived interactions between group members, on the existence of common goals and common outcomes, and on similarities between group members. Conversely, others variables such as the group’s size or its permanence were ultimately perceived as being of less relevance.

Groups of claimants stand in a continuum delimited at its two extremes by intimacy groups and loose associations.⁹⁶³ Consider two simple scenarios. For matters of clarity, these two examples are simplified. Between these two extremes groups of plaintiffs can obviously vary in their unity and consistency. In the first scenario, 1000 consumers have bought a same product which, after a while, turns out to have an identical technical problem which makes it of no further use. The group sues the manufacturer and asks for reimbursement. In such circumstances, the group of plaintiffs is likely to be viewed as being highly entitative from the judge’s point of view: group members share important similarities: they all have bought a same product, manufactured by the same manufacturer and the problem is each time identical. The situation of one single claimant can therefore safely be extended to the group as a whole. In a second scenario, 1000 individuals have over a long period of time been exposed to chemicals and developed various chronic diseases. From the judge’s perspective, the entitativity of the group will here be perceived as being lower: the length of exposure and the magnitude of the harm may for instance drastically vary across group members. The only similarities tend to remain the presence of chemicals that caused the harm. As YEAZELL points out, on several occasions, courts have thus ‘[viewed] the class less as an entity than as a collection of individuals, (...) not [as] a collectivity but [as] many individuals’.⁹⁶⁴ The difference in groups’ entitativity is also visible in the terminology employed to depict mass litigation. Some authors refer to the terminology ‘group litigation’ while others prefer the concept of ‘aggregate litigation’. These

⁹⁶² B. LICKEL, D. HAMILTON, A. UHLES, A. NEVILLE, G. WIECZORKOWSKA, A. LEWIS and S. SHERMAN, ‘Varieties of Groups and the Perception of Group Entitativity’, (78) *Journal of Personality and Social Psychology*, 2000, pp.223-246.

⁹⁶³ S.J. SHERMAN and E.J. PERCY, *supra note 956* (observing on a broader level that ‘all groups can be characterized as having some degree of entitativity, on a continuum from very low -heterogeneous, little connection between group members- to very high - strong group level impression, high cohesiveness among group members’).

⁹⁶⁴ S.C.YEAZELL, ‘Collective Litigation as Collective Action’, *University of Illinois Law Review*, 1989, pp.43-68.

two notions can nonetheless be distinguished. *Group* litigation focus on a holistic approach (the group *as a whole*), while *aggregate* emphasises on the mere collection of single individuals.⁹⁶⁵

Which lessons can ultimately be drawn from the notion of entitativity when applied to the group of claimants? Two points are here of interest. First, the psychological aim of the certification process during which judges play the role of watchdog filtering claims and supervising the shape and size of the group tends to be now clearer. From a legal point of view, it was shown that filtering ensures the group viability and helps determining the scope of claimants that are entitled to compensation. Going a step further, psychological insights suggest that the certification process also facilitates the way information about the group is cognitively processed by the judicial mind. When reviewing the numerosity of plaintiffs or the commonality of claims, judges assess the extent to which the group of plaintiffs can be viewed as being of lower or higher entitativity, or in others words, its likelihood to constitute a single and coherent unit.⁹⁶⁶ This procedural step is likely to have long-lasting implications for the judicial management of mass claims.

Groups that are likely to be perceived as single and structured units are more likely to trigger emotion, feelings of concern and enhance reactions. From an analysis of the influence of entitativity on charity donations, SMITH, FARO and BURSON found for instance that higher level of perceived entitativity of recipients increases the amount of donations.⁹⁶⁷ The authors theorized hence that ‘presenting a large number of victims in a way that makes them seem unified may be another way to increase support’.⁹⁶⁸ From the judge’s viewpoint, a high perceived-entitativity may lead them to exert greater concerns and attention *vis-à-vis* the group. High-entitativity groups will also facilitate higher levels of confidence among judges when taking their decisions, as well as greater emotional concerns.⁹⁶⁹ On the contrary, their attention tends to lose focus when targeting lower-entitativity groups. Experiments manipulating groups’ perceived entitativity reveal that group stereotypes are also more likely to be generalized to all members in highly entitative groups.⁹⁷⁰ WILDER found for instance evidence showing that perceivers generalize the characteristics of a single group member to the whole group in highly entitative group: subjects expect

⁹⁶⁵ Aggregate is defined as a ‘composite’, ‘a collection of items that are gathered together to form a total quantity’.

⁹⁶⁶ Interestingly, in *Wal-Mart*, judges deplored the lack of ‘glue’ between plaintiffs.

⁹⁶⁷ R.W. SMITH, D. FARO and K.A. BURSON, ‘More for the Many : The Influence of Entitativity on Charitable Giving’, (39) *Journal of Consumer Research*, 2013, pp.961-976.

⁹⁶⁸ *Idem*.

⁹⁶⁹ *Idem*.

⁹⁷⁰ M. CRAWFORD, T. MATTHEW, S.J. SHERMAN and D.L. HAMILTON, ‘Perceived Entitativity, Stereotype Formation, and the Interchangeability of Group Members’, (83) *Journal of Personality and Social Psychology*, 2002, n°5, pp.1076-1094.

members of a same group to share similar beliefs and behaviour even though, and it is an interesting point, they had previously been told that the group had been arbitrarily constituted.⁹⁷¹ Others studies have revealed that greater implicit comparison is engaged between group members of highly entitative group,⁹⁷² or that membership of highly entitative groups ultimately makes the process of comparison between its members easier and faster.⁹⁷³

Second, differences in the degree of entitativity associated with the group of plaintiffs (from intimate plaintiffs to loose associations) calls for higher flexibility in the use of group procedures. Instead of one unique group procedure, one may therefore be more inclined to support a flexible tool so as to take into account the different possible degrees of group's entitativity. In this view, one could for instance mention the 'simplified' French group action which may be useful to deal with cases where victims are easily identified and can without great doubt be perceived as being part of a closed and intimacy group.⁹⁷⁴ In others words, this simple procedure would be reserved to highly entitative groups of plaintiffs where the situations of all group members can safely be compared to the one of a single individual.

➤ *Entitativity and Groups of Defendants*

The issue of groups' perceived entitativity does not only apply to claimants, but also concerns defendants who may well be collectively targeted by a group procedure. One example among many is the class action lawsuit *Sindell v. Abbott Laboratories* brought against eleven companies manufacturing and selling diethylstilbestrol (DES), a drug used to prevent miscarriages which turn out to have detrimental effects on health.⁹⁷⁵ Experimental evidence has revealed that the degree of perceived entitativity impacts on the view of the group as a causal agent responsible for its action and behaviour.⁹⁷⁶ NEWHEISER, SAWAOKA and DOVIDIO found clues showing that groups with higher perceived entitativity are punished more harshly than lower-entitativity groups 'because they are perceived to be more morally accountable for their

⁹⁷¹ D.A. WILDER, 'Perceiving Persons as a Group: Effects on Attributions of Causality and Beliefs', (41) *Social Psychology*, 1978, n°1, pp.13-23.

⁹⁷² C.L. PICKETT, 'The Effects of Entitativity Beliefs on Implicit Comparisons between Group Members', (27) *Personality and Social Psychology Bulletin*, 2001, pp.515-525.

⁹⁷³ C.L. PICKETT and D.A. PERROTT, 'Shall I Compare Thee? Perceived Entitativity and Ease of Comparison', (40) *Journal of Experimental Social Psychology*, 2004, pp.283-289.

⁹⁷⁴ Assemblée Nationale, amendement n° CE 654, 10 Juin 2013, available on www.assemblee-nationale.fr/14/amendements/1015/CION-ECO/CE654.asp (accessed 1 October 2013).

⁹⁷⁵ *Sindell v. Abbot Laboratories*, 26 Cal 3d 588 (1980) 607 P. 2d 924 (hereafter '*Sindell*').

⁹⁷⁶ M.J. O' LAUGHLIN and B.F. MALLE, 'How Do Explain Actions Performed by Groups and Individuals', (82) *Journal of Personality and Social Psychology*, 2002, pp.33-48.

actions'.⁹⁷⁷ Lower entitativity groups are in turn more likely to benefit from the existence of mitigating circumstances.⁹⁷⁸ Additionally, the work of LICKEL and his team(s) has shown that judgements on collective responsibility tend to be highly dependent on the degree of perceived entitativity: the more entitative the group is perceived, the more likely its members will bear responsibility collectively.⁹⁷⁹ Members of highly entitative groups are thus viewed as interchangeable regardless of their personal implications into the wrongdoing. They are collectively responsible for the offence perpetrated simply because of their shared characteristics with the offender.⁹⁸⁰

Groups of defendants perceived as highly entitative may therefore impact on the assessment of pivotal legal issues of mass claims targeting multiple defendants. Let for instance consider the *Sindell* affair previously mentioned. One of the main difficulties that plaintiffs faced consisted in the impossibility to distinguish, within the group of defendants, the particular manufacturer that had produced the ingested drug. In a landmark decision, the court ruled that every defendant had to contribute to plaintiffs' damages according to the percentage of their shares on the DES market.⁹⁸¹ This solution, more commonly known as market share liability, has been extensively commented and debated in the legal literature.⁹⁸² From a psychological and behavioural perspective, does this decision also make sense? Answering this question first requires assessing the degree of entitativity associated with the group of defendants. From the point of view of the court, the group of defendants was here likely to be perceived as highly entitative. Even though defendants objected that 'there [was] little likelihood that all manufacturers who made DES at the time in question [were] still in business or that they [were] subject to the jurisdiction of California courts', Justice MOCK emphasised that 'all defendants [had] produced a drug from an identical formula'.⁹⁸³ Moreover, the negative effects of DES on health were at that time known. In 1971, The US Food and

⁹⁷⁷ A.-K. NEWHEISER, T.S. AWAOKA and J.F. DOVIDIO, 'Why Do We Punish Groups ? High Entitativity Promotes Moral Suspicion', (48) *Journal of Experimental Social Psychology*, 2012, pp.931-936.

⁹⁷⁸ *Idem*.

⁹⁷⁹ B. LICKEL, T.F. DENSON, M. CURTIS and D.M. STENSTROM, 'The Roles of Entitativity and Essentiality in Judgements of Collective Responsibility', (9) *Group Processes & Intergroup Relations*, 2006, pp.43-61 (As the authors express it, the term collective responsibility more precisely refers to situations where perceivers 'assign blame to individuals who were not direct causal agent of negative events, but do share a social association with the wrongdoer').

⁹⁸⁰ B. LICKEL, N. MILLER, D.M. STENSTROM, T.F. DENSON and T. SCHMADER, 'Vicarious Retributions: The Role of Collective Blame in Intergroup Aggression', (10) *Personality and Social Psychology Review*, 2006, pp.372-390; S.J. SHERMAN and E.J. PERCY, *supra note 956*, at p.153.

⁹⁸¹ *Sindell*, *supra note 975*.

⁹⁸² The literature on market share liability is extensive. From an example in the American literature, see R.P. MURRAY, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, (69) *California Law Review*, 1981, pp.1079-1203. For an example in the French legal literature, see J.-S. BORGHETTI, 'Responsabilité du fait du DES: En route vers la Market Share Liability', *Revue des Contrats*, January 2010, n.1, p.90.

⁹⁸³ *Sindell*, *supra note 975*.

Drug Administration (FDA) had already alerted the public opinion and physicians against the toxic effects associated with the drug.⁹⁸⁴ A second step consists of connecting the degree of perceived entitativity with the view of the group as a causal agent. Empirical evidence previously presented has revealed that members of highly entitative groups tend to be seen as interchangeable and collectively responsible for wrongdoings committed by one of their peers, regardless of their personal implication. The decision that judges took in *Sindell* seems therefore to be explainable from a psychological perspective. As YEAZELL highlighted about this case, courts ‘treated defendants as a group’ by defending ‘group causation’.⁹⁸⁵ When facing a highly-entitative group of defendants, judges may be more eager to consider defendants as interchangeable, and thus to retain a collective and shared responsibility even in situations where one or several defendants did not take – or take at a lesser extent - an active part to the wrongdoing.

To go a step further, consider a recent ruling from the French Court of Cassation - also concerning DES – and its successive developments which are also illustrative of the effect of defendants’ entitativity on the assignment of liability. Two companies who had manufactured DES in the 1960-1970's were targeted by a lawsuit brought by a plaintiff who had ingested the drug. Like in the American case, it was extremely difficult for the plaintiff to identify which manufacturer had produced the drug ingested. However, unlike the American case, the DES market was at that time *strongly unequally divided* between two companies only: UCB Pharma on the one hand, and Borne (today, Novartis Santé Familiale) on the other.⁹⁸⁶ UCB Pharma had the largest market share on the DES market during this period (around 97%) when compared to its competitor (around 3%).⁹⁸⁷ From the court’s viewpoint, the defendants were here again perceived as being highly entitative: they were only two, had produced a same drug with the same formula, whose harmful effects were known, and at the same period of time. In its decision, the Court of cassation held the two companies jointly liable.⁹⁸⁸ In the aftermath of this decision, scholars heavily discussed whether companies should be required to pay equal amount of damages, or if these amounts should be compounded on the basis of their respective liability or market shares. The market share theory was however contested.⁹⁸⁹ Interestingly, in a ruling delivered in October 2012, the Paris Court of Appeal decided that the two companies had to pay *equal amounts* of damages (50/50), even though the position of

⁹⁸⁴ ‘Selected Item from the FDA Bulletin : Diethylstilboestrol contraindicated in pregnancy: Drug’s Use Linked to Adenocarcinoma in the Offspring, *California Medicine – The Western Journal of Medicine*, November 1971, p.85

⁹⁸⁵ S.C.YEAZELL, *supra note 166*.

⁹⁸⁶ J.-S. BORGHETTI, *supra note 982*.

⁹⁸⁷ G’SSELL-MACREZ F., ‘La Preuve du lien de causalité : comparaisons franco-américaines à propos des arrêts Distilbène’, *Les Petites Affiches*, 29 Octobre 2010, p.6.

⁹⁸⁸ Cass.civ. 1e, 24 September 2009, pourvois n°08-10081 and n°08-16305.

⁹⁸⁹ H.LECUYER, ‘En Route Vers la Market Share Liability ? Quelles suites à la Jurisprudence relative à la responsabilité du fait du DES ?’, *Petites Affiches*, 22 mai 2012, p.3.

the two companies on the market was at that time strongly uneven.⁹⁹⁰ This decision may be explained in many different ways. One may however not exclude that judges – while perceiving the companies UCB Pharma and Novartis as members of a highly entitative group - considered them as being interchangeable and thus collectively responsible, *regardless of* their respective implication which, in this case, was significantly asymmetric.⁹⁹¹

5.3.2. Shaping the Group: Versatile Heuristics, Opportunistic Actors and Judicial Management

As said previously, judges overview the group and define its shape and size. They must notably fix the criteria that plaintiffs must meet to be included into it.⁹⁹² Given the complexity of mass cases, judges might rely on a set of heuristics to facilitate their work. Previous developments have nonetheless shown that heuristics are versatile: their use helps decision-makers when facing complex matters, but they also lead to systematic cognitive errors and misleading mental shortcuts. Such versatility can also be found in the realm of mass litigation. Some heuristics may be useful and help judges coping with considerable amount of information (*a*), but others turn out to be misleading and give a biased image of the group or of the mass claim (*b*). They may also be used by opportunistic actors (*c*). Implications for judicial management are finally set forth.

a) Useful Heuristics

As continuously pointed out, mass claims are complex: numerous parties are involved, a voluminous body of evidence and large quantities of information are required, and a considerable amount of search is needed. Mass disputes are thus likely to constitute fertile grounds for procedural heuristics used to alleviate their complexity. Put simply, heuristics are aimed at facilitating the work of boundedly rational

⁹⁹⁰ Paris Court of Appeal, 26 October 2012, n°10/18297; F. G'SELL, 'DES Daughters Cases: Cour de Cassation 24 September 2009 and 24 January 2010 and CA Paris 26 October 2012', (2) *European Review of Private Law*, 2013, pp. 587-590.

⁹⁹¹ Following a similar logic, the proposed reform of French tort law conducted by Professor TERRE suggests that when damage is caused by an unknown member of a group of people acting together, *each member can be held responsible* for the whole damage, except in situations where they can prove that they have not taken part to it (see: rapport Terré Sur la réforme de la responsabilité civile, Article 12, in French: 'lorsqu'un dommage est causé par un membre indéterminé d'un groupe de personnes agissant en concert chacune en répond pour le tout, sauf à démontrer qu'elle ne peut l'avoir causé' (http://www.demos.fr/fr/chaines-thematiques/banque-assurance/docresources/formation%20banque_rapport%20terr%C3%A9%20-%20proposition%20de%20textes.pdf, accessed 20 October 2013, *emphasis added*).

⁹⁹² See Chapter 3.

judges who, like every human being, have limited cognitive capacities. As ULEN and KOROBKIN have emphasized, ‘complexity beyond human cognitive capacity is a sufficient condition for an actor to substitute a simplified decision strategy for a complete expected utility calculation’.⁹⁹³ Two heuristics are further highlighted. Importantly, their use appears strongly contingent on the degree of entitativity associated with the group. As research has indeed indicated, the group’s entitativity can affect infra-group perceptions.

A first heuristic concerns for instance model or test cases. As discussed elsewhere, this technique is aimed at helping judges infer group characteristics from the analysis of a limited number of representative cases, and thus circumvent the boundaries of mass claims.⁹⁹⁴ Their use avoids thorough investigation across group members and save parties’ and judges’ scarce resources both in terms of times and money. The degree of entitativity attached to the group importantly impacts on the process of stereotyping.⁹⁹⁵ The use of model cases is particularly well-fitted to higher-entitativity groups where the behaviour of one or several group members can more easily be generalized.⁹⁹⁶ As PICKETT points out, ‘the degree to which one person is used as a comparison standard for another should depend not only on whether the two people belong to the same group, but also on the nature of that group (and specifically its entitativity)’.

The second regards the technique of subgrouping. This tool is aimed at distinguishing within the group those who have related claims but different status or interest. The use of subgroups is also a heuristic device which helps judges cope with the group complexity by promoting an organizational structure within the claimant group. Again, subgrouping may particularly fit higher-entitativity groups. As previously suggested, perceivers dealing with a high-entitativity group are sensitive to inconsistencies of a group member, and thus more likely to leave aside divergent or idiosyncratic elements. Conversely, perceivers dealing with lower-entitative group will be less alert to possible inconsistencies among group members. As suggested also by PICKETT, ‘a disconfirming group member may [thus] be less likely to take place in lower entitative groups’.

It seems therefore safe to assume that higher-entitative groups encourage judges to concentrate on the group *as a whole*, thus facilitates the use of heuristics and ultimately makes judicial work easier and faster. Their use may however induce systematic errors.

⁹⁹³ T.S ULEN and R.B.KOROBKIN, *supra* note 836, at p.1077.

⁹⁹⁴ See Chapter 3

⁹⁹⁵ D.L.HAMILTON, *supra* note 954.

⁹⁹⁶ *Idem* (highlighting: ‘stereotyping consists of assigning psychological attributes to group members on the basis of their group membership alone’, at p.1078).

b) Misleading Heuristics, Biases and Risks of Misperception

Simplification strategies lead to systemic errors which can have considerable impact on the resolution of mass disputes. Four biases, namely the *outlier effect*, the *representativeness heuristics*, the *halo bias* and the *affect heuristic* are further discussed. Some of them might be known among judges, while others have still received less consideration. This short list should ultimately be seen as an alarm bell that judges should keep in mind when monitoring mass claims.

➤ *The Outlier Effect*

A first error specifically relevant for mass litigation concerns the outlier effect. An outlier is commonly defined as ‘an observation in a set of data that is inconsistent with the majority of the data [because] it is substantially lower or higher than most of the observations’.⁹⁹⁷ This effect is well-known in descriptive statistics since the presence of outliers is likely to alter the mean and variance of a distribution, and ultimately bias results. The main psychological tenets of the outlier effect are first that members of a group are not assigned the same weight within the group, and second that decision-makers are often blinded by the presence of a stronger claimant. The outlier effect is thus comparable to the previously-mentioned anchoring effect: the impression of the group *as a whole* is influenced and sketched from its most extreme and most idiosyncratic single members. Among the reasons explaining the existence of the outlier effect, one is associated with the complexity of dealing with groups. This complexity increases when the number of group members increases. In an experiment conducted with mock jurors, HOROWITZ, BROLLY and FORSTER LEE found evidence that jurors facing complex cases and high information-load are less and less able to distinguish between plaintiffs.⁹⁹⁸ Information about a group member that stands above the average is thus more likely to be easily recalled. Relatedly, ROTHBART and his team suggested that availability heuristics make group members who can more easily be retrieved to be disproportionately represented when assessing the group.⁹⁹⁹ The presence of outliers may be used for the management of mass litigation. The 1995 Private Securities Litigation Reform Act for instance states that the court can appoint as lead plaintiff the claimant ‘who has the largest financial interest in the relief

⁹⁹⁷ D.J. SHESKIN, ‘Outlier’, in: N.J.SALKIND (Ed.), *Encyclopaedia of Research Design*, 2010.

⁹⁹⁸ I.A. HOROWITZ, I. BROLLY and L. FORSTER LEE, ‘Effects of Trial Complexity on Decision-Making’, (81) *Journal of Applied Psychology*, 1996, n°6, pp. 757-768.

⁹⁹⁹ M. ROTHBART, F. SOLOMON, C. JENSEN, J. HOWARD and P. BIRRELL, ‘From Individual to Group Impressions: Availability Heuristics in Stereotype Formation’, (14) *Journal of Experimental Social Psychology*, 1978, n°3, pp.237-255.

sought by the class'.¹⁰⁰⁰ The behavioural impact associated with the outlier seems however to have been underestimated.

Outliers can influence the way the group is perceived from different manners. On the one hand, the presence of an outlier may lead to the assimilation of all cases – even the weakest ones – to the situation of the outlier. On the other hand, the presence of the outlier may reinforce a contrast effect between plaintiffs which make weak claimants appear much weaker than they are in reality.¹⁰⁰¹ A study conducted by LEON, ODEN and ANDERSON points out a tendency to assess a group from the attributes of its extremes components.¹⁰⁰² Subjects principally focused on the most serious offenses, but ultimately ignored the less serious ones. In an experiment replicating the pattern of mass litigation, HOROWITZ and BORDENS similarly found evidence highlighting the influence of outliers in the decisions of simulated civil juries dealing with aggregated plaintiffs. As the author expresses it, juries seemed to use the judgement of the outlier 'as a threshold test [:] if they decided that the company was indeed liable for the outlier's injuries than all plaintiffs benefitted. If not, then all suffered.'¹⁰⁰³ Following the same logic, judges might be receptive to contrast effects where their attention is ultimately distracted when worthless or weaker arguments are added to a brief of several arguments. By contrast, weaker arguments make other arguments appear stronger. Consequently, there is reason to believe that stronger claims mixed with weaker aggregated plaintiffs will also appear stronger than they actually are. Alternatively, weaker aggregated plaintiffs will suffer from the presence of outliers since their claims, when compared to the one of stronger claimants, will be perceived as being weaker than they actually are. There is thus a chance that weaker aggregated plaintiffs receive less than if their cases were brought individually and separately.¹⁰⁰⁴ The presence of an outlier is therefore likely to have important implications on verdicts on liability or on assessments of damages.

The previously cited asbestos class action lawsuit *Cimino v. Raymark Industries Inc.* is on this point illustrative.¹⁰⁰⁵ As previously explained, plaintiffs who had been exposed to asbestos at workplaces were divided into five clusters depending on the severity of their disease. These five groups were respectively

¹⁰⁰⁰ *Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737*

¹⁰⁰¹ I.A.HOROWITZ and K.S. BORDENS, 'The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?', (22) *Law & Psychology Review*, 1998, p.43-66.

¹⁰⁰² M. LEON, G.C. ODEN and N.H. ANDERSON, 'Functional Measurement of Social Values', (27) *Journal of Personality and Social Psychology*, 1973, n°3, pp. 301-310.

¹⁰⁰³ I.A. HOROWITZ and K.S. BORDENS, 'The Effects of Outlier Presence, Plaintiff Population Size, & Aggregation of Plaintiffs on Simulated Civil Jury Decisions', (12) *Law & Human Behaviour*, 1988, n°3, pp.209-229.

¹⁰⁰⁴ *Idem*

¹⁰⁰⁵ See Chapter 3.

mesothelioma, lung cancer, asbestosis, pleural disease and other cancer. In his report, the Special Master first recommended to exclude from the group mesothelioma plaintiffs because they only represented a small percentage of the claims (32 persons suffered from mesothelioma and 1,050 from asbestosis) but this disease was far more severe than pleural or asbestosis plaintiffs.¹⁰⁰⁶ Interestingly, it was thus feared that ‘the jury may be *unduly influenced* by dramatic illness which make up a small percentage of the plaintiffs’ class’.¹⁰⁰⁷ Finally deciding to nuance his point of view, the Special Master finally suggested educating jurors as a manner to mitigate the outlier effect. Jurors were thus asked to ‘not judge all cases in the class as the same as the most or least serious of the class representative and perhaps by pointing out (...) the relatively small percentage of mesothelioma cases in the class as a whole’.¹⁰⁰⁸ In other words, information provision was in this case used for debiasing jurors.

➤ *Representativeness Heuristics*

Representativeness heuristics is a pivotal issue in the realm of mass litigation since mass disputes are strongly enrooted in the notion of representation:¹⁰⁰⁹ claims are brought *on behalf* of known or unknown plaintiffs; cases of representative plaintiffs are generalised and used to circumvent the boundaries of the dispute; judges facing limited financial and cognitive resources finally use a set of case management techniques (bellwether trials, statistics, sampling)¹⁰¹⁰ which also strongly rely on the notion of representativeness. Regarding the commencement, the monitoring and the denouement of mass disputes, this concept remains central. A key issue is however the extent to which decision-makers - and more particularly in this case, judges - should rely on representative tools when monitoring mass cases. They should for instance be aware of the common mistake which consists of overestimating common points between samples (or model cases) and the parent population from which they are drawn. This error set forth by KAHNEMAN and TVERSKY is commonly known as the belief in the law of small number.¹⁰¹¹ The authors indeed found that decision-makers tend to exaggerate their confidence in the conclusions drawn from the analysis of samples or representative cases.

¹⁰⁰⁶ J. RATLIFF, ‘Special Master’s Report in Cimino v. Raymark Industries Inc.’, (10) *The Review of Litigation*, 1991, pp.521-546 (Mesothelioma is an untreatable cancer).

¹⁰⁰⁷ *Idem* (emphasis added)

¹⁰⁰⁸ *Idem*, at p.537

¹⁰⁰⁹ S.C.YEAZELL, ‘From Group to Class Action – Part II: Interest, Class and Representation’, (27) *University of Chicago Law Review*, 1980, pp.1067-1121

¹⁰¹⁰ See Chapter 3 (at: Innovative Case management Techniques)

¹⁰¹¹ A. TVERSKY and D. KAHNEMAN, ‘Belief in the Law of Small Numbers’, in: D. KAHNEMAN, P. SLOVIC and A. TVERSKY, *Judgement under Uncertainty: Heuristics and Biases*, Cambridge University Press, 1982, pp.23-31.

➤ *Halo Bias*

Decision-makers dealing with mass claims may also be prone to the *halo bias* when evaluating groups of plaintiffs or defendants. This cognitive error can notably occur when general conclusions or assumptions are inferred from representative or model cases. Defined as the ‘tendency to make inferences about specific traits on the basis of a general impression’,¹⁰¹² the halo effect was named and investigated in the twenties by THORNDIKE through the ratings of soldiers by their superiors.¹⁰¹³ The human mind, disturbed by risks of cognitive dissonance, seeks to cope with heterogeneity by encouraging a coherent and structured framework. As ROSENZWEIG observes, it is ‘difficult for most people to independently measure separate features [...] there is [thus] a common tendency to blend them together.’¹⁰¹⁴ Many experiments have substantiated the existence of this bias. Recently, MALOUF, EMMERTON and SCHUTTE found for instance evidence revealing halo bias in the decision-making of teachers when grading their students.¹⁰¹⁵ In their experimental design, subjects were invited to grade the written work of a student who had previously given an oral presentation. The quality of the oral presentation (classified as good or bad) was manipulated, whereas the written work remains constant to all graders. The authors found that the evaluation of written works was significantly biased by the performance to the oral exercise. Another recent experiment conducted by SCHULDT, MULLER and SCHWARZ revealed that products presented as fair trade products are more likely to be perceived as containing lower calories than non-fair trade ones, and thus warned against the risks that ethical food lead to unwarranted healthy inferences.¹⁰¹⁶ Finally, several studies have concluded that ‘what is beautiful is good’: attractive people are therefore more likely to be perceived as skilful and talented persons than their less attractive counterparts.¹⁰¹⁷

¹⁰¹² P. ROSENZWEIG, *The Halo Effect...and the Eight Other Business Delusions That Deceive Managers*, Free Press, United States, 2007, pp.50-51

¹⁰¹³ E.L.THORNDIKE, ‘A Constant Error in Psychological Ratings’, (3) *Journal of Applied Psychology*, 1920, pp.25-29 (observing ‘this same constant error toward suffusing ratings of special features with a halo belonging to the individual as a whole appeared in the ratings of officers made by their superior in the army’, at p.25)

¹⁰¹⁴ *Idem*

¹⁰¹⁵ J.M. MALOUFF, A.J. EMMERTON and N.S. SCHUTTE, ‘The Risk of Halo Bias as a Reason to Keep Students Anonymous During Grading’, (40) *Teaching of Psychology*, 2013, pp.233-240

¹⁰¹⁶ J.P. SCHULDT, D. MULLER and N. SCHWARZ, ‘The Fair Trade Effect: Health Halos from Social Ethics Claims’, (3) *Social Psychological and Personality Science*, 2012, pp.581-589.

¹⁰¹⁷ K. DION, E. BERSCHIED and E. WALSTER, ‘What is Beautiful is Good’, (24) *Journal of Personality and Social Psychology*, 1972, pp.285-290; W. GOLDMAN and P. LEWIS, ‘Beautiful is Good: Evidence that the Physically Attractive are more Socially Skillful’, (13) *Journal of Experimental Social Psychology*, 1977, issue 2, pp.125-130; H.LAROSE and L.STANDING, ‘Does the Halo Effect Occur in the Elderly?’, (26) *Social Behaviour & Personality: an International Journal*, 1998, n°2, pp.147-150.

Halo effects also exist within courtrooms in individual litigation. For two cases of equivalent strengths, judges are more likely to be seduced by the performance of good lawyers, and conversely bored by bad pleadings.¹⁰¹⁸ Since litigating is also the art of convincing, lawyers' performance acts as a halo tainting positively or negatively the perception that judges hold about the case. In an experiment conducted with simulated juries, EFRAN found that the decision-making of jurors was also biased by a halo: physically attractive defendants were more likely to be punished with less certainty of guilt or with less severity than their less attractive counterparts.¹⁰¹⁹ Transplanted into the realm of mass litigation, the main question regards the existence of a halo potentially associated with model or representative claimants which may ultimately jeopardize the assessment of the whole group.

➤ *Affect Heuristic and Availability Heuristic*

SLOVIC and his colleagues have identified the *affect heuristic* to refer to situations wherein people 'consult their affective feelings when making judgements and decisions'.¹⁰²⁰ Put differently, feelings and affects act as shortcuts channelling decision-making and subsequent judgements on risks and benefits.¹⁰²¹ Mass claims are often emotionally charged and deal with highly debated societal issues such as, for example, asbestos, DES, breast implants and other large-scale damage. As stressed in the previous chapter, judges dealing with mass disputes and seeking prestige, power, reputation or who are deeply concerned with the fate of plaintiffs may be tempted to behave as gurus dictating their own views about the case.¹⁰²² On this occasion, the behaviour of Justice WEINSTEIN when managing the Agent Orange

¹⁰¹⁸ *New York Times*, 12 July 1883, 'Judges and Lawyers: How Long Pleadings Exhaust the Patience and Health of the Court' (highlighting that 'judges are often as greatly puzzled as juries by the elaboration, verbosity, and confused and complicated statements and argumentation of lawyers').

¹⁰¹⁹ M.G. EFRAN, 'The Effect of Physical Appearance on the Judgement of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task', (8) *Journal of Research in Personality*, 1974, pp.45-54; see also recently N.A. SCHVEI, R.M. PUHL, K.A. LEVANDOSKI and K.D. BROWNELL, 'The Influence of a Defendants' body weight on perceptions of guilt', (37) *International Journal of Obesity*, 2013, pp.1275-1281.

¹⁰²⁰ P. SLOVIC, M.L. FINUCANE, E. PETERS and D.G. MCGREGOR, 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics', (31) *Journal of Socio-Economics*, 2002, pp.329-342; P. SLOVIC, M.L. FINUCANE, E. PETERS and D.G. MCGREGOR, 'The Affect Heuristic', (177) *European Journal of Operational Research*, 2007, pp.1333-1352.

¹⁰²¹ A.S. ALHAKAMI and P. SLOVIC, 'A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit', (14) *Risk Analysis*, 1994, pp.1085-1096 (observing that 'items toward which people had positive attitudes were viewed as having high benefit and low risks, whereas items toward which people had negative attitudes were viewed as having low benefits and high risks', at p. 1095); see also P. SLOVIC, M.L. FINUCANE, E. PETERS, D.G. MCGREGOR, *supra* note 1020 (highlighting that 'people base their judgements of an activity or a technology not only on what they *think* about it but also on what they *feel* about it', at p.333).

¹⁰²² See Chapter 4.

class action litigation was mentioned as an illustration. Judge WEINSTEIN was indeed convinced that the United States had a debt towards its Vietnam veterans and thus heavily and actively contributed to an active resolution of the case.¹⁰²³ As O'NEILL notices, judge WEINSTEIN ultimately channelled the lawsuit through 'his [own] concept of the best solution'.¹⁰²⁴ His behaviour in Agent Orange seems therefore symptomatic of a decision influenced by the affect heuristic. His feelings and his own sense of what was good and right in this case strongly influenced his views of the case.

Relatedly, the availability heuristic can also trigger the affect heuristic. Research has indeed shown that these two cognitive mechanisms may interact.¹⁰²⁵ As said earlier, the availability heuristics posits that decision-making is influenced by the number of occurrences that can easily come to mind. Media very often play a key role in this respect.¹⁰²⁶ The quality of the information provided is thus essential. Interestingly, a study conducted by BAILIS and McCOUN has reported that media may provide a distorted image of tort litigation by over representing the most controversial cases, exaggerating the number of cases decided by a jury, over representing plaintiffs' success or providing a distorted picture of the award distributed.¹⁰²⁷ The authors concluded that media reports 'provide dubious basis for sound decision making by potential claimants, manufacturers, health-care providers, lawyers and government officials'.¹⁰²⁸ Arguably, one could argue that insulated judges are less likely to be influenced by such media coverage. Yet, judges, as other human beings, read newspapers too. They may therefore consciously or unconsciously be influenced by the magnitude of mass cases extensively relayed in the media.

c) Judges' Cognitive Errors Used By Opportunistic Agents

Judges can be prone to cognitive errors and some of them seem particularly likely to occur when they handle mass claims. A key issue then turns out to be: what happens if these cognitive errors and misleading heuristics are opportunistically used against them by others protagonists also involved in the

¹⁰²³ As previously mentioned in Chapter 4, Judge WEINSTEIN's monitoring was perceived as a 'virtuoso performance of judicial management' (L.B.NOVEY, *supra note 734*).

¹⁰²⁴ K. O'NEILL, *supra note 770*.

¹⁰²⁵ T.PACHUR, F.STEINMANN and R.HERTWIG, 'How Do People Judge Risks: Availability Heuristic, Affect Heuristic or Both?', (18) *Journal of Experimental Psychology: Applied*, 2012, pp.314-330.

¹⁰²⁶ C.R.SUNSTEIN and T.KURAN, *supra note 832* (taking as example the Love Canal Affair where the starting point appeared to be 'frightening stories in the Niagara Falls Gazette', at p.692).

¹⁰²⁷ D.S.BAILIS and R.J.McCOUN, 'Estimating Liability Risks With the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation', (20) *Law and Human Behaviour*, 1996, n°4, pp.419-429

¹⁰²⁸ *Idem*, at p.427

management of mass claims, and who have clearly understood the dynamics and added-value of such tools? KURAN and SUNSTEIN have for instance pointed out the existence of ‘availability entrepreneurs’ exploiting ‘availability cascades’.¹⁰²⁹ As the authors highlight, ‘located anywhere in the social systems, including the government, the media, non-profit organizations, the business sector and even households, these entrepreneurs attempt to trigger availability cascades, likely to advance their own agenda. *They do so by fixing people’s attention on specific problems, interpreting phenomena in particular ways and attempting to raise the salience of certain information*’.¹⁰³⁰

More specifically, consider here the role performed by plaintiffs’ associations in mass litigation (but the same reasoning also holds for defendants). As previously explained, these entities play cornerstone functions. In the French group action or the Dutch WCAM, they help filter and organise the claimant group. In some proceedings, they may also set forth model cases to help judges circumvent the boundaries of mass claims.¹⁰³¹ In line with previous developments, it is strategically judicious and relevant for associations to amplify the presence of outliers since they may influence decision-making; associations may also use the representativeness heuristics by presenting samples as being representative of the parent population; they may choose their model cases in such a way to trigger the halo bias or affect heuristic in judicial minds. And the other way around, defendants may similarly be eager to use judges’ behavioural flaws in their own interest. Prior behavioural research has indeed revealed that decision-making could be altered by the presentation of evidence.¹⁰³²

5.3.3. On the Ambiguous Effects of Numbers on Decision-Making: Illustrations with the Issues of Causation and Damages in Mass Claims

It was previously suggested that decision-makers process differently information about individual and group targets. Adding to this edifice, they also behave differently when facing individual *and* identified targets and when facing numerous *and* unidentified ones. From a utilitarian perspective, one could

¹⁰²⁹ C.R. SUNSTEIN and T. KURAN, *supra* note 833 (the availability cascade is ‘a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its raising availability in public discourse’).

¹⁰³⁰ *Idem*, at p.687 (emphasis added).

¹⁰³¹ 2010 Group Action Report, *supra* note 199, at p.68 (observing that representative organization must bring forward model cases whose characteristics can be generalized to all similar cases).

¹⁰³² J.H.KERSTHOLT and J.L.JACKSON, ‘Judicial Decision Making: Order of Evidence Presentation and Availability of Background Information’, (12) *Applied Cognitive Psychology*, 1998, pp.445-454 (finding clues showing that the order of presentation of evidence – either step by step or at the end of the sequence after having heard all witness statements – had an impact on assessment of guilt).

theoretically expect that extra attention and extra care will be dedicated to decisions that impact on the welfare of a large number of people, no matter if the targets are clearly identified or not.¹⁰³³ This issue is essential in the realm of mass litigation. In procedures based on the opt-out system, numerous plaintiffs are indeed not identified but nonetheless included into the claimant group. Some authors have then pointed out a process of ‘depersonalization’ since plaintiffs are not identified but simply viewed *en masse*.¹⁰³⁴ Others have further observed that one of the ‘tragic aspect of mass torts is that individual harm becomes routinized’.¹⁰³⁵ From the viewpoints of judges expected to behave as good shepherds taking care of the interests of represented parties who are absent during hearings, this issue appears pivotal.¹⁰³⁶

Psychological and behavioural literature is on this point scattered. A branch suggests that judges can be numbed by number and under-estimate the numerous plaintiffs who are not physically present in the courtrooms **(a)**. Another branch suggests a power by numbers leading judges to overestimate the presence of multiple plaintiffs when compared to other relevant legal factors **(b)**. The implications of these insights are discussed with regards to the issue of causation and damages in mass claims **(c)**.

a) Numbed by Numbers

Numbing by numbers refers to the inability of the human brain to fully entertain the idea of multiple parties and large scope, and to the tendency to rather choose outstanding elements of a group as anchors. In this view, the outliet effect previously presented was an example of such a numbing by numbers. Similarly, the identifiable victim effect is a second illustration of this behavioural bias.

➤ *The Identified Victim Effect and Vividness Heuristic*

In a seminal article on the economic analysis of the worth of human lives, SCHELLING claimed that people tend to assign different weights to an individual identified life when compared to statistical

¹⁰³³ S. SAH and G. LOEWENSTEIN, ‘More Affected=More Neglected: Amplification Bias in Advice to the Unidentified and Many’, (3) *Social Psychological and Personality Science*, 2012, pp.365-372.

¹⁰³⁴ E.J. CABRASER, ‘The Essentials of Democratic Mass Litigation’, (45) *Columbia Journal of Law & Society*, 2012, pp.499-523.

¹⁰³⁵ A.D. LAHAV, *supra note 789* (at p.384).

¹⁰³⁶ See Chapter 3 and E.J.CABRASER, *supra note 1034* (highlighting: ‘the function of the court as a fiduciary is a hallmark of formal class action litigation and mass litigation deemed quasi class actions are treated as if they are class actions, from the standpoint of protecting the rights and dignity of an otherwise *depersonalized mass of plaintiffs/claimants*’, at p.521, *emphasis added*).

lives.¹⁰³⁷ While the first is seen as a ‘unique event’, the second fails to ‘evoke these personal, mysterious, superstitious, emotional or religious qualities of life and death’. He therefore theorized that ‘the more we know the more we care’. Put simply, people tend to be more sensitive to the condition of identified individuals, but feel ultimately less concerned by the one of unidentified victims. This decrease in sensitivity *vis-à-vis* unidentified victims is known as the identifiable victim effect. In a very similar logic, NISBETT and ROSS pointed out a so-called ‘vividness heuristic’ which lead people to overestimate information that is vivid and imagery-provoking as compared to highly probative but pallid statistics.¹⁰³⁸

The causes underlying the identifiable victim effects and the vividness heuristic are multiple.¹⁰³⁹ Personalized information associated with an identified individual or event notably induces greater emotions, empathic response, greater concerns or higher concreteness. They thus lead to a higher level of commitment and involvement among decision-makers. On the contrary, larger number, larger scope or broad data often fail to do so. As SLOVIC pertinently highlights, ‘the number fails to spark emotion or feeling and thus fail to motivate action’.¹⁰⁴⁰ Numbers and scope are, in others words, realities that the human mind does not fully entertain. Based on these arguments, commentators have thus pointed out that the decision-making process seems primarily to be driven by emotional response and affective evaluation rather than by strict rational economic calculation.¹⁰⁴¹

➤ *Empirical Evidence*

Abundant empirical evidence has shown that people are more willing to exert a higher degree of attention and effort when their actions or decisions are directed toward identified people, suggesting therefore that this bias is actually a well-established pattern of human behaviour. Such insensitivity to scope was for instance highlighted in a study conducted by DESVOUSGES and his team in the aftermath of several oil

¹⁰³⁷ T.C.SCHELLING, *supra* note 878.

¹⁰³⁸ R. NISBETT and L. ROSS, *Human Inferences: Strategies and Shortcomings of Social Judgement*, Prentice Hall, 1980, 334 p. (here p.43-620, ‘assigning weights to data: the “vividness criterion”’).

¹⁰³⁹ K.E. JENNI and G. LOEWENSTEIN, ‘Explaining the Identifiable Victim Effect’, (14) *Journal of Risk and Uncertainty*, 1997, pp.235-257.

¹⁰⁴⁰ P. SLOVIC, ‘If I Look at the Mass I Will Never Act: Psychic Numbing and Genocide’, (2) *Judgement and Decision-Making*, 2007, n°2, pp.79-95 (highlighting that such a tendency explains the lack of sensitivity associated with mass murders like genocide).

¹⁰⁴¹ D. KAHNEMAN, I. RITOV and D. SCHKADE, ‘Economic Preferences or Attitudes Expressions? An Analysis of Dollar Responses to Public Issues’, (1) *Journal of Risk and Uncertainty*, 1999, pp.203-235.

spills.¹⁰⁴² In their experiments, subjects were told that each year some migrating birds drown in uncovered oil ponds, and were questioned about their willingness to pay to help covering the ponds with nets which could prevent 2,000, 20,000 or 200,000 birds from drowning. The experiment was thus principally aimed at investigating whether an increase in the number of protected birds triggered a higher willingness to contribute. Their study revealed that participants' willingness to pay to protect birds only slightly varies: the mean amounts were \$80, \$78 and \$88 to help saving respectively 2,000, 20,000 and 200,000 birds. Adding to the debate, the work of SLOVIC and his colleagues has shown that people are often more sensitive to minor changes in their environments (from 0 to 1 death), but conversely less sensitive to greater changes (such as, for instance, from 500 to 600 deaths).¹⁰⁴³ SMALL and LOEWENSTEIN found that even a very weak change in the identification of the victim is often enough to increase caring.¹⁰⁴⁴ KOGUT and RITOV found that one individual is more likely to raise the amount of charity donations than groups of victims, even though group members are identified.¹⁰⁴⁵ Extending the literature, SMALL and LOEWENSTEIN have shown that the identifiable victim effect could also be applied to wrongdoers, and consequently become an identifiable wrongdoer effect. The authors found indeed evidence that people are more punitive toward identified wrongdoers than toward equivalent but non-identified ones.¹⁰⁴⁶

Similarly, empirical research has been conducted to test the vividness heuristic. They have shown that 'aggregated, statistical, data-summary information is often particularly probative, but it is also likely to lack concreteness and emotional interest'.¹⁰⁴⁷ To illustrate this point, experiment conducted by HAMILL,

¹⁰⁴² W.H. DESVOUSGES, F.R. JOHNSON, R.W. DUNFORD, S.P. HUDSON and K.N. WILSON, 'Measuring Natural Resource Damages with Contingent Valuation: Tests of Validity and Reliability', in: J.A. HAUSMAN, *Contingent Evaluation: A Critical Assessment*, pp.91-164.

¹⁰⁴³ P. SLOVIC, M. FUNUCANE, E. PETERS and D.Mc GREGOR, 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics', (31) *Journal of Socio-Economics*, 2002, pp.329-342 (at p.337).

¹⁰⁴⁴ D.A. SMALL and G. LOEWENSTEIN, 'Helping a Victim or Helping the Victim: Altruism and Identifiability', (26) *Journal of Risk and Uncertainty*, 2003, pp.5-16 (in their experimental design, the main difference between identified and unidentified individuals was indeed that in one scenario recipients were already determined when subjects were asked to take their decision, whereas in the other scenario recipients had still to be identified. The authors finally observed that 'if such a weak form of identifiability can produce such a dramatic difference in altruistic behaviour it seems likely that variations of identifiability will produce *even more dramatic effects* in naturalistic situations in which, for example, one usually does obtain at least some information about identifiable victims' – emphasis added, at p.11).

¹⁰⁴⁵ T. KOGUT and I. RITOV, 'The Identified Victim Effect: An Identified Group or Just a Single Individual?', (18) *Journal of Behavioural Decision-Making*, 2005, pp.157-167.

¹⁰⁴⁶ D.A. SMALL and G. LOEWENSTEIN, 'The Devil You Know: The Effects of Identifiability on Punishments', (18) *Journal of Behavioural Decision-Making*, 2005, pp.311-318.

¹⁰⁴⁷ R.NISBETT and L.ROSS, *supra* note 1038, at p.56.

WILSON and NISBETT found for example that an individualised and vivid example is more likely to influence decision-making than pallid statistical information of greater evidential value.¹⁰⁴⁸

b) Power in Numbers

The cognitive mechanisms earlier pointed out (the representativeness heuristic, the affect heuristic and the availability heuristic) suggest that the number of plaintiffs or the magnitude of large-scale damage may also outweigh others relevant parameters in the mind of legal decision-makers. As it will be shown in Chapter 6, empirical evidence of a 'power in number' was found through an experiment conducted with professional lawyers.

c) Applying These Insights - On the Effects of Number on Causation and Damages in Mass Claims

The magnitude of mass claim and the number of claimants can impact on the behaviour of legal decision-makers. As shown previously,¹⁰⁴⁹ even professionals that one could imagine to be better immunized than laymen behave differently when facing an individual or a group. In order to go a step further, consider more specifically the issues of causation and damages in a mass product liability case. This framework is retained because widely commercialised defective products are a prototypical example of large-scale damage potentially affecting many people. Already challenging in individual litigation, the legal dilemmas associated with causation and damages tend to be magnified in mass claims. Behavioural research has interestingly shed scattered light on the impact of numbers on such pivotal issues.

➤ *Multiple Plaintiffs and Causation – Legal Dilemmas*

Already in individual litigation, establishing causation in a product liability case is a sensitive issue upon which the whole success or failure of a claim may ultimately depend.¹⁰⁵⁰ Indeed, 'for many novel risks it is hard to establish affirmatively the link between products and damage where there is scientific dispute. It

¹⁰⁴⁸ R. HAMILL, T.D. WILSON and R.E. NISBETT, *Ignoring Sample Bias: Inferences about collectivities from Atypical cases*, unpublished manuscript, university of Michigan, 1979 (the content and conclusions of this experiment was reported in NISBETT and ROSS, *supra* note 1038, at p. 57-58).

¹⁰⁴⁹ A. TVERSKY and R.A. REDELMEIER, *supra* note 957.

¹⁰⁵⁰ C.J. MILLER and R.S. GOLDBERG, *Product Liability*, Oxford University Press, 2004, 2nd ed. (highlighting: the 'proof of causation will often lead to either a settlement or a successful claim (...). Conversely, a failure to establish a causal link between a product, and, for example, the alleged medical conditions of claimants, may lead such claims being struck out as an abuse of the process of the court on the basis that each claim has no real prospect of success', at pp.695-696).

may be difficult to determine whether an illness was caused by a product or other biological or environmental factors'.¹⁰⁵¹ The assessment of the causal link is thus often 'inherently difficult, requiring time-consuming and detailed examination by the court of complex and often conflicting, scientific evidence'.¹⁰⁵²

When transposed to mass contexts, the problem of causation appears magnified. As SILICIANO observes, 'the only thing unique about causation issues in mass tort cases is that the sheer number of claims makes more visible to the naked eye the common – and commonplace – weakness such cases share with respect to the issues of causation'.¹⁰⁵³ Noticing the multiplication of large-scale damage, the legal doctrine has progressively questioned the role potentially played by the number of involved plaintiffs on the assessment of causality.¹⁰⁵⁴ GUEGAN-LECUYER has pertinently encapsulated this problem in the following terms:

'Confronted with a case involving potentially a large pool of plaintiffs, whose debt resulting from civil liability might reach considerable amounts, the judge might be willing to exercise a higher degree of scrutiny when examining the causal link. Given that the effect of establishing such a link might have a bearing on the activity of the one in breach, one should remain vigilant. And the other way around, the effect might be also opposite when, in the presence of a big pool of potential victims, the judge might show a rather liberal approach to the establishment of the causal link'.¹⁰⁵⁵

In absence of clear-cut evidence, the mere fact that numerous plaintiffs are involved can easily become *per se* a sufficient proof which would enable courts to 'escape [the] causation conundrums by easing or ignoring wholesale the traditional requirements of proof'.¹⁰⁵⁶ As the old saying states it, 'where there is smoke, there is fire'. Two cases of equal merits may consequently reach two different outcomes on the mere basis that they concern a single or numerous claimants. As SILICIANO further observes, 'weak

¹⁰⁵¹ G. HOWELLS, *The Law of Product Liability*, Butterworth Common Law Series, 2nd ed., at p.382

¹⁰⁵² *Idem*, at p.444

¹⁰⁵³ J.A. SILICIANO, 'Mass Torts and the Rhetoric of Crisis', (80) *Cornell Law Review*, 1995, pp.990-1013.

¹⁰⁵⁴ D. ROSENBERG, 'The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System, (97) *Harvard Law Review*, 1984, pp.849-929.

¹⁰⁵⁵ A. GUEGAN-LECUYER, 'Incertitude et Causalité dans la Perspective des Dommages de Masse', Symposium *Risque, Assurance, Responsabilité: Le Traitement Juridique et Judiciaire de l'Incertitude*, Court of Cassation, 2008, (available on : http://www.courdecassation.fr/IMG/File/intervention_mme_lecuyer.pdf) (translation from the author. In French : 'saisi d'une affaire dans laquelle le grand nombre potentiel de victimes indique que la dette d'indemnisation sera énorme en cas de responsabilité civile établie, le juge pourrait être enclin à se montrer exigeant dans l'appréciation de la causalité. L'impact de sa reconnaissance pouvant remettre en cause l'activité du responsable, il convient de se montrer prudent. Mais l'effet du grand nombre potentiel de victimes peut également être inverse et conduire le juge à un certain libéralisme dans l'appréciation de la causalité').

¹⁰⁵⁶ J.A.SILICIANO, *supra* note 1053.

evidence on causation is invariably fatal even though we know as a statistical matter that some such causation hypotheses must in fact be true. In the mass tort context, the same failure of proof problem can occur at the level of individual claims, but at the aggregate level one may observe statistically significant proof of generic causation *by virtue of the large numbers involved*'.¹⁰⁵⁷ In simple words, identical weak evidence could lead the individual case to a failure, but the multi-plaintiffs case to a success.

➤ *Multiple Claimants and Damages – Legal Dilemmas*

Once liability is established, the compensation amounts awarded to plaintiffs must be calculated following the traditional *restitutio in integrum* rule. These amounts should correspond to claimants' respective losses in order to replace the injured parties to the situation in which they would have been if no injury had occurred. The mass context is however specific and might invite to depart from this rule.

First, amounts awarded to multiple claimants can arguably be reduced to avoid impairing defendants' financial stability. As ROE points out, 'the tort system normally creates simple financial liability to an individual or a class after a single trial or settlement. But under circumstances of massive enterprise liability after multiple trials and settlements, that financial clarity and simplicity is quickly obliterated'.¹⁰⁵⁸ The example of the asbestos litigation in the United States which, at the end of 2002, involved more than 700 000 individuals is illustrative: 85 liable companies filed for bankruptcy and many insurers became financially fragile.¹⁰⁵⁹ Such situations led scholars to argue in favour of a limitation of the scope of liability and of the amounts of damages awarded in high-profile accidents.¹⁰⁶⁰ Second, if as said previously, large number of claimants might facilitate the proof of causation, a manner to however express the weakness of their claim might be in the amounts of compensation awarded to plaintiffs. In other words, a *discount effect* may lead to a decrease in the amounts awarded to numerous plaintiffs which ultimately reflects the weakness of their claim, weakness which, in an individual case, would have been fatal for the single plaintiff.

Regarding the assessments of causality as well as the amount of damages awarded, legal decision-makers may face dilemmas. Mass claim's merit might therefore not be the only parameter taken into account. Insights from behavioural research have contributed to this discussion in a scattered way.

¹⁰⁵⁷ *Idem* (emphasis added).

¹⁰⁵⁸ M.J. ROE, 'Bankruptcy and Mass Tort', (84) *Columbia Law Review*, 1984, pp.846-922.

¹⁰⁵⁹ M.J. WHITE, 'Asbestos and the Future of Mass Tort', (18) *Journal of Economic Perspectives*, 2004, pp.183-204.

¹⁰⁶⁰ S. SHAVELL, 'An Analysis of Causation and the Scope of Liability in the Law of Torts', (9) *Journal of Legal Studies*, 1980, pp.463-516.

➤ *On the Effect of Number on Causation and Damages – Scattered Behavioural Insights*

In an experiment conducted with mock jurors, HOROWITZ and BORDENS found that a defendant was more likely to be found liable when the number of plaintiff increased.¹⁰⁶¹ Participants saw a trial where the unique variable was the number of plaintiffs consolidated for trial (10,6,4,2 or 1 plaintiffs). The strength of evidence remained constant for all plaintiffs. The experimenters found that ‘1 or 2 plaintiffs were less likely to prevail than when the plaintiffs were aggregated in a 4-, 6- or 10-plaintiffs group’, and ultimately concluded that ‘jurors were not judging the evidence pertaining to these plaintiffs on merits alone’. Regarding compensatory damages, the authors found that lower awards were given to the 1 and 2 plaintiff conditions, that the amounts reached their peak in the 4-plaintiffs conditions before ultimately decreasing in the 6- and 10-plaintiffs conditions. In another experiment, the same authors found that the amount of punitive damages and compensatory damages (but the second one was not statistically significant) tended to increase when mock jurors had been informed that plaintiffs were ‘numbered in the hundreds’.¹⁰⁶²

Alternatively, several laboratory and field studies conducted NORDGREN and Mc DONNELL have pointed out a counter-intuitive ‘scope-severity paradox’ where harms affecting a larger number of people are ultimately perceived with less severity than harms affecting a smaller number of individuals.¹⁰⁶³ In one experiment, the authors specifically focused on the behaviour of real jurors in toxic tort litigation (asbestos, lead poisoning and toxic mold cases). Drawn from the analysis of a dataset of awards granted by juries in 136 toxic tort cases between 2000 and 2009, the authors found an interesting negative relation between the number of plaintiffs and the amounts of punitive damages and damages per plaintiffs awarded. As they expressed it, ‘juries have historically punished defendants less harshly when their offense harmed more people’, and furthermore ‘have historically compensated each victim less in tort cases when there are more victims’.¹⁰⁶⁴ The authors ultimately explained their findings through ‘the diminishing identifiability’ associated with a large pool of claimants.¹⁰⁶⁵

¹⁰⁶¹ I.A. HOROWITZ and K.S. BORDENS, ‘The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors’ Liability Decisions, Damages Awards, and Cognitive Processing of Evidence’, (85) *Journal of Applied Psychology*, 2000, n° 6, pp.909-918.

¹⁰⁶² I.A. HOROWITZ and K.S. BORDENS, *supra* note 1003.

¹⁰⁶³ L.F. NORDGREN and M.-H. Mc DONNELL, *supra* note 960.

¹⁰⁶⁴ *Idem*, at p.101.

¹⁰⁶⁵ *Idem*.

5.3.4. Preliminary Conclusion

The magnitude of mass claims, the number of involved claimants, the fact of facing groups can alter decision-making. Judges may thus for instance neglect differences between members of highly-entitative groups; be biased by outlier effects, representativeness heuristic, affect heuristic or identifiable victim effect. Put simply, their decisions may be unduly affected by the number of claimants involved. Chapter 6 will report an experiment conducted with legal professionals as an attempt to contribute to these discussions.

*

5.4. CONCLUSION

The blindfolded allegory of Justice – named *Iusticia* in Latin – does neither take into consideration the idiosyncrasies of the decision-maker nor the peculiarities of the contexts in which he takes his decision. Proposing alternative perspective, this chapter intended to show that these elements may matter in practice, and at highlighting how they may impact on decision-making. Interestingly, others representations portray Justice under the traits of a mature and open-eyed woman, careful and attentive to the world in which she evolved. The specificities of the mass litigation context, the number of individuals involved, the financial amount and the societal issues at stake make nowadays necessary a Justice with open eyes on the process of its decision-making and on the failures that may plague its deliberations. Empirical works are now needed and will be the ‘reality checks’ substantiating or nuancing the claims that have been formulated so far.

REALITY CHECKS

6.1. INTRODUCTION

Preceding chapters have identified different attitudes that judges may be eager to endorse when monitoring mass claims. These developments have also highlighted some pitfalls associated with the management of mass litigation, and suggested that numerous claimants and extensive damage may impact on the way judges resolve mass disputes. In absence of empirical evidence, such claims remain nonetheless theoretical. In order to bridge this gap and as an attempt to provide a small part of the answer, two reality checks were conducted.¹⁰⁶⁶ The first one is an online questionnaire conducted with French judges during May-June 2013 aimed at collecting their viewpoints, opinions and comments on the highly-debated French group action (6.2). The second is an experiment conducted with Dutch professional lawyers in January 2014 aimed at investigating the effects of multiple claimants on legal decision-making (6.3). A general conclusion on these two reality checks follows (6.4).

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¹⁰⁶⁶ Both studies were conducted with Dr. Pieter Desmet, Associate Professor at Erasmus School of Law.

6.2. CHECK N°1: ‘Judges, Floor is yours!’– THE ATTITUDES OF FRENCH JUDGES VIS-À-VIS GROUP ACTIONS : AN ONLINE QUESTIONNAIRE

‘At the current time, we can measure the distance between our legal system and this mechanism (...). It is, without doubt, on this point that imagination is needed, and that intensive reflection must be conducted on the role and the powers of the judge in a procedural configuration that one could think as being unique to group actions.’

Speech of the First President of the Court of Cassation, November 2005

Like in other jurisdictions, French policymakers expect a lot and heavily rely on their judges for the conduct of mass litigation.¹⁰⁶⁷ While witnessing this evolution, French legal scholars recently expressed concerns *vis-à-vis* judges becoming ‘over-powerful’ when dealing with mass proceedings (in French: ‘*la surpuissance du juge*’).¹⁰⁶⁸ During the spring and summer 2013, extensive debates about group actions took place in French media,¹⁰⁶⁹ as well as in the academic literature.¹⁰⁷⁰ We¹⁰⁷¹ used this opportunity to conduct an online-questionnaire aimed at collecting viewpoints of French judges regarding the (at that time) forthcoming group action. Importantly, by no means the replies that we received shall be considered as being representative of the opinion of the French judiciary at large. Given the inherent limitations of

*Speech given at the symposium ‘Pour de véritables actions de groupe : un accès efficace et démocratique la justice’, 10 November 2005, available on www.courdecassation.fr/cour_cassation_1/autres_publications_discours_2039/publications_2201/obstacles_juridiques_action_groupe_8449.html, accessed 18 December (translation from the author. In French : ‘pour l’heure, l’on ne peut que mesurer combien notre droit est éloigné de ce système (...). C’est sans doute sur ce point que l’imagination doit être à l’œuvre, et qu’une réflexion approfondie doit être conduite sur le rôle et les pouvoirs du juge dans une configuration procédurale que l’on pourrait envisager comme spécifique à l’action de groupe’).

¹⁰⁶⁷ See Chapter 3.

¹⁰⁶⁸ S.AMRANI-MEKKI, ‘Action de Groupe : L’intendance suivra...’, *Gazette du Palais*, 25 May 2013, n°145, p.3.

¹⁰⁶⁹ See for instance, *Le Monde*, ‘La France s’ouvre à l’action de groupe’, 2 May 2013 (available on www.lemonde.fr/economie/article/2013/05/02/la-france-s-ouvre-a-l-action-de-groupe_3169429_3234.html (accessed 10 December 2013)); *Le Point*, ‘Les consommateurs pourront bientôt utiliser l’action de groupe’, 12 June 2013 (available on www.lepoint.fr/societe/les-consommateurs-pourront-bientot-utiliser-l-action-de-groupe-12-06-2013-1680212_23.php, accessed 10 December 2013).

¹⁰⁷⁰ M.J. AZAR-BAUD, ‘L’entrée triomphale (?) de l’action de groupe en droit français’, *Recueil Dalloz* 2013, p.1487 ; O. DUFOUR, ‘L’action de groupe à la française, c’est pour bientôt !’, *Petites Affiches*, 25 April 2013, n°83, p.3 See also symposium ‘Sur la voie de l’action de groupe’, April 2013, Paris (papers collected in *Gazette du Palais*, May 2013).

¹⁰⁷¹ The survey was conducted in cooperation with Pieter DESMET.

this survey which are hereafter highlighted, this data must obviously be handled carefully (6.2.1). This study rather presents some clues and anecdotal evidence. The added-value of our approach may however be twofold. First, a research devoted to the understanding of judicial behaviour in the realm of mass litigation would not have been complete without some views coming from the protagonists themselves. The chapter therefore fills in this blank. The questionnaire also sheds new light on earlier developments of this thesis: French judges were indeed questioned about the tasks assigned to the judge-watchdog, cattle driver and good shepherd, asked about the potential effect associated with number of claimants and about their overall perceptions and expectations concerning mass litigation (6.2.2). Second, we hope that this survey will attract the attention of policymakers, and be the first step towards future similar studies aimed at more closely associating the work of legislators who decide with the viewpoints of judges who enforce. Last but not least, the responses collected via the questionnaire are also analysed in the light of earlier semi-structured interviews conducted with a first instance judge and Court of Cassation judges which took place in May and June 2012 in Paris, as well as with the representative of a consumer association in March 2013 in Brussels. These insights further nourish and complete the results that we obtained in the survey.¹⁰⁷²

6.2.1. The Online Survey: Methodology and Limitations

The methodology followed to conduct this survey is first detailed (a). The limitations associated with this questionnaire are then clarified (b).

a) Methodology

➤ Overview of the Survey Administration

From May to beginning of July 2013, registries (*greffe*) and presidents of Courts of First Instance (*tribunaux d'instance*) and High Courts of First Instance (*tribunaux de grande instance*), of the Courts of Appeal and individual judges seating in the Court of Cassation were contacted by emails.¹⁰⁷³ The Ministry of Justice (more specifically, the *Direction des Affaires Civiles et du Sceau*)¹⁰⁷⁴ was also contacted but did

¹⁰⁷² For an overview about the questions asked during the interviews, refer to Appendix 5.

¹⁰⁷³ The emails were sent to the courts' email box services (for instance *ca-xxxx@justice.fr*, *ti-xxxx@justice.fr*, *tgi-xxxx@justice.fr*...). The list of tribunals was found online on www.annuaire.justice.gouv.fr.

¹⁰⁷⁴ www.justice.gouv.fr/le-ministere-de-la-justice-10017/direction-des-affaires-civiles-et-du-sceau-10023/

not reply to our request. The use of the internet was due to cost-efficiency considerations: it enabled us to widen the scope of the research and to facilitate contacts with courts at lower expenses. In the email, judges were proposed to participate to a survey entitled ‘French Judges and the Group Action: Roles, Expectations and Attitudes’ (in French: *Les juges français et l’action de groupe: rôles, attentes et attitudes*). An explicative letter was attached where we detailed the objectives of the research and emphasized the importance of their cooperation. Judges were told that their individual answers were kept anonymous. Three weeks after our initial email - that is, around mid-June - follow-ups were sent as reminders.¹⁰⁷⁵

Once contacted, presidents and/or registries could decide to forward our request to the judges sitting in their respective courts. In other words, our survey had to face one or two consecutive screenings. In the first case, presidents of tribunals were the unique filter. They could decide to forward - and as it has been the case on several occasions – to actively support our questionnaire *vis-à-vis* their colleagues, or, alternatively, to ignore or reject our request. In the second case, our survey first needed the approval of registries to proceed. If accepted, the questionnaire was then forwarded to the president of the tribunal for a second approval. Similarly, presidents could accept or deny our request.¹⁰⁷⁶

➤ *The Questionnaire: Content and Structure*

Accessing the online questionnaire was possible via a link indicated in the explicative letter. Once judges had clicked on the link, they were redirected to a secured website.¹⁰⁷⁷ The welcome page thanked respondents for their participation, briefly recapitulated the objectives of the survey and provided a general overview of the questionnaire. Respondents were informed that the survey was divided into two parts. In the first part, judges were questioned about a hypothetical scenario aimed at highlighting the impact associated with the number of claimants on judicial decision-making. Unfortunately, the lack of replies to this first part did not allow us to draw any significant or meaningful conclusion. It was therefore decided to keep this part aside for a future experiment (see check n°2). This first check exclusively deals with the replies that we received to the second part of the questionnaire which focused more specifically on group actions.

¹⁰⁷⁵ Sent only one time to avoid irritating respondents or being assimilated to spams (see: E. DEUTSKENS, K.D. RUYTER, M. WETZELS and P. OOSTERVELD, ‘Response Rate and Response Quality of Internet-Based Surveys: An Experimental Study’, (15) *Marketing Letters*, 2004, n°1, pp.21-36).

¹⁰⁷⁶ We sincerely thank registries and judges who accepted to collaborate and crucially helped this research proceed.

¹⁰⁷⁷ We used the software *qualtrics* to run the survey (www.qualtrics.com).

In this second part, judges were asked 14 questions concerning group actions and the scope of judicial intervention. The format of these questions varied. It included open-ended questions, closed multiple-choice questions and matrix questions condensing several issues into one unique list. The questionnaire required respondents to scroll down to answer all the 14 questions. By doing so, we wanted to avoid discouraging or disturbing respondents with too much clicking. Appendix 1 shows how the questionnaire looked like on the screen of respondents.

➤ *Profile of the Judges-Respondents*

40 judges return the questionnaire (20 men, 20 women). The average age of the respondents was 46,18 years old. In its large majority, the sample consisted of first instance judges (number=33), followed by judges of courts of appeal (n=5), and finally by judges of the Court of cassation (n=2). Targeting first instance judges was for us a priority since this is the category of judges which will be in charge of group actions. Their fields of specialisation included civil law, civil litigation, civil procedure, consumer law and consumer credits, tort law, contract law, labour law, criminal law, criminal economic law, insurance law, environmental law, financial law and commercial law.

b) Limitations

➤ *Designing a Questionnaire: An Obstacle Course*

The ‘art of asking questions’ is a tricky exercise and problems encountered by researchers are plethora.¹⁰⁷⁸ Such challenges tend to be comparable in paper-based and internet-based questionnaires, even though this second category has its own specificities, notably in terms of design or mode of responding.¹⁰⁷⁹ Although well-known among social scientists, some methodological issues are here worth briefly recapitulating. First, the *order* of questions matters since the responses given to early questions can influence the responses brought to later ones. Second, the *format* of the questions can also influence answers. As FODDY points out, ‘respondents are more likely to endorse a particular option if it has been explicitly

¹⁰⁷⁸ S.L. PAYNE, *The Art of Asking Questions*, Princeton University Press, 1951, 250 p.

¹⁰⁷⁹ E. DEUTSKENS, K.D. RUYTER, M. WETZELS and P. OOSTERVELD, *supra* note 1075; see also L.A. RITTER and V.M. SUE, ‘The Survey Questionnaire’, *New Directions for Evaluation – Special Issue: Using Online Surveys in Evaluation*, Autumn 2007, issue n115, pp.37-45, (observing on a broader level that ‘with respect to questions and how they are presented in an online questionnaire, we can rely on generally accepted standards for paper-based questionnaire’).

listed than they are if they have to spontaneously think of it for themselves'.¹⁰⁸⁰ Third, the *framing* of questions may have an impact on answers.¹⁰⁸¹ The framing effect is indeed a well-documented bias notably uncovered in numerous consumer surveys, business or social psychological studies.¹⁰⁸² Fourth and relatedly, the *wording* may also be problematic: general or ambiguous formulations can indeed induce misunderstandings among respondents.¹⁰⁸³ Fifth and finally, respondents may be tempted to answer questions even when it appears that they have no particular - or very little - knowledge about the topic.¹⁰⁸⁴ Aware of these issues, we tried to mitigate these problems by constructing precise, clear and simple questions in the most unbiased way possible. We however admit that attempts to eradicate all forms of subjectivity might be a vain exercise. An unavoidable degree of subjectivity in the construction of the questionnaire, albeit reduced to its minimum, may thus remain.

We assumed that neither all respondents were necessary frequent internet users, nor that they had all high-speed internet access.¹⁰⁸⁵ Importantly, we also assumed that judges facing heavy caseload had only a limited amount of time to devote to our questionnaire. Therefore, we chose to limit its length following the general idea that 'a shorter questionnaire elicits greater response and results in less abandonment than a longer one'.¹⁰⁸⁶ Furthermore, we decided to use both closed and open-ended questions in order to leave respondents leeway to express their personal views. We started the questionnaire with broader general questions dealing with the goals and the scope of group actions, and progressively incorporating more sensitive issues in the middle of the survey, such as judicial attitudes *vis-a-vis* associations or potential effects of numerous plaintiffs on decision-making.

¹⁰⁸⁰ W. FODDY, *Constructing Questions for Interviews and Questionnaires – Theory and Practice in Social Research*, Cambridge University Press, 1993, 228 p. (at p.8).

¹⁰⁸¹ D. KAHNEMAN and A. TVERSKY, 'Framing Decisions and the Psychology of Choice', (211) *Science*, 1981, n°4481, pp.453- 458 (highlighting that individuals tend to decide differently in risky situations when the object of their choice is presented as a gain or as a loss).

¹⁰⁸² I.P. LEVIN, S.L. SCHNEIDER and G.J. GAETH, 'All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects', (76) *Organisational Behaviour and Human Decision Processes*, 1998, n°2, pp.149-188; W. BRUINE DE BRUIN, 'Framing Effects in Surveys: How Respondents Make Sense of the Questions We Ask', in: G. KEREN (Ed.), *Perspectives on Framing*, London, Taylor & Francis.

¹⁰⁸³ S.L. PAYNE, *supra* note 1060 (specifically Chapter 10 'What's wrong with 'you'; pp.158-176 (showing that the use of generic and everyday words such as 'usually', 'you', 'anyone', 'generally' are likely to be understood in different ways by different respondents).

¹⁰⁸⁴ W. FODDY, *supra* note 1080, at p.9.

¹⁰⁸⁵ M.C. MONROE and D.C. ADAMS, 'Increasing Responses Rate to Web-Based Surveys', (50) *Journal of Extension*, 2012, n°6

¹⁰⁸⁶ L.A. RITTER and V.M. SUE, *supra* note 1079.

➤ *Trusting People for What They Do and Not for What They Say?*

This objection commonly highlighted about survey questionnaires is well-known among social scientists. As SCHELLING points out, ‘it is sometimes argued that asking people is a poor way to find out, because they have no incentive to tell the truth (...). It is also argued, and validly, that people are poor at answering hypothetical questions, especially about important events – that the mood and motive of actual choice are hard to stimulate’.¹⁰⁸⁷ Based on this observation, individuals should preferably be trusted on their actions, rather than on their personal statements. When applied to judges, this statement appears indeed relevant. Judges may be particularly prone to dissimulate their personal concerns or opinions behind a legalistic discourse, earlier described as the ‘mythology of judicial decision-making’.¹⁰⁸⁸ In addition, previous developments have suggested the existence of optimistic and other self-serving biases which lead individuals to have distorting views and opinions about their own skills and competences.¹⁰⁸⁹ Undoubtedly, the legalistic speech and other optimistic biases may have tainted some answers that we collected.

➤ *Problematic Participation Rates*

Online surveys usually face problematic low-response rates, which sometimes can turn out to be even lower than the participation to paper-based surveys.¹⁰⁹⁰ Each of us is indeed daily bombarded with requests to complete questionnaires or satisfaction surveys to which we often do not grant much attention.¹⁰⁹¹ We knew from the beginning that the response-rate could be an issue. As an attempt to cope with this difficulty, we decided to send the questionnaire during the interval May-July 2013 which is the period during which the bill proposal containing the group action was presented to Parliament. The issue was therefore highly mediatised and experienced a renewed energy and consideration among legal practitioners and within the doctrine. We thought that interviewing judges on such a burning topic was a possible solution to facilitate and encourage their participation. In spite of our efforts, we admit that our

¹⁰⁸⁷ T.C. SCHELLING, *supra* note 878, at p.143

¹⁰⁸⁸ See Chapter 5.

¹⁰⁸⁹ *Idem*

¹⁰⁹⁰ K. SHEEHAN and S.MC MILLAN, ‘Response Variation in E-mail Surveys: An Exploration’, (39) *Journal of Advertising Research*, 1999, pp.45-54; C. COOK, F. HEATH and R.L. THOMPSON, ‘A Meta-Analysis of Responses Rates in Web- or Internet-Based Surveys’, (60) *Educational and Psychological Measurement*, 2000, pp.821-836.

¹⁰⁹¹ J. PETCHENIK and D.J. WATERMOLEN, ‘A Cautionary Note on Using the Internet to Survey Recent Hunter Education Graduates’, (16) *Human Dimensions of Wildlife: An International Journal*, 2011, n3, pp.216-218 (reporting the example of an online survey conducted with students in Wisconsin, United States, where, out of the 16,560 students who were contacted to fill in the survey, only 348 – that is roughly 2% - return the questionnaire).

sample is small. One more time, the responses that we collected cannot be regarded as representative of the French judiciary.¹⁰⁹²

➤ *French Judges' Lack of Experience with Group Actions*

This limitation is important and must be highlighted: at the time when the survey was administrated, no French judges had in practice dealt with group actions yet. If this obstacle is undeniable, it is nevertheless not unsurmountable. First, and as evidenced by other surveys,¹⁰⁹³ judges who took time to respond were those who were interested in the topic. Their viewpoints are thus worth considering. Second, the questionnaire was aimed at pointing out the expectations, views and possible concerns of French judges regarding the implementation of group actions, *not* at investigating how the proceeding is enforced in practice. Third, on several occasions, we inserted a category *without opinion* which enabled judges to avoid responding whenever they considered that the visibility on the issue was not sufficient. Fourth, and crucially, this questionnaire must not be regarded as an assessment of judicial intervention, but rather as a document highlighting possible judicial concerns and preferences that policymakers might have neglected. As a complement to this research, it will therefore be interesting to conduct a similar survey in several years from now in order to observe whether concerns that judges have expressed in this 2013 questionnaire ultimately materialised, or whether they have faced unexpected challenges further arising from their practice. In others words, this questionnaire should be seen as a modest first step investigating the relationship between judges and mass litigation in France. We make the wish that other similar studies will be conducted in the future to determine in greater details the practical pitfalls faced by French judges when resolving mass disputes.

¹⁰⁹² It is difficult to assess with precision the response-rate that we ultimately obtained. Indeed, we do not have clear views on the number of judges who effectively received our questionnaire and subsequently decided to not reply. As highlighted, the surveys were first sent to registries and presidents of tribunals. They were afterwards free to forward the questionnaire to their colleagues seating in their tribunals. The number of judges per courts may however drastically vary.

¹⁰⁹³ E.A. SUCHMAN and B.MC CANDLESS, 'Who Answers Questionnaires?', (24) *Journal of Applied Psychology*, 1940, issue 6, pp.758-769 (observing that among the main factors affecting the returns of mail questionnaires was notably 'the interest or familiarity with the topic under investigation – the more interest, the greater the returns').

6.2.2. Results

Results are hereafter grouped into five categories. They are respectively: judicial perceptions on the objectives and the scope of application of group actions (*a*), judicial perceptions on the extent and particularities of their intervention (*b*), judicial apprehensions, feelings and potential concerns regarding group actions (*c*), judicial perceptions on another protagonist, namely the claimants' association (*d*), and finally, judicial perceptions on possible solutions aimed at regulating and improving judicial work in the framework of mass litigation (*e*).

Four clarifications must preliminary be addressed concerning the way responses are hereafter presented. First, the questions contained in this survey targeted a French speaking-audience, and were thus initially worded in French. They are herein translated into English. Readers wanting to compare the wording in French and in English may refer to Appendix 2. Second, the present report does not follow the order of questions as initially presented in the online questionnaire. For matters of clarity, questions tackling similar or related topics are grouped. Readers may nonetheless also refer to Appendix 3 for further details regarding the initial order of questions. Third, on several occasions, matrix questions required judges nuancing their choice by selecting on a five-point scale the answer(s) that best fitted their opinion. To simplify the presentation of the data and to avoid a proliferation of numbers, graphs summarise the replies that we obtained. They are constructed from the mean (*m*) of the responses, going from 1 to 5. For matters of clarity, the scale is constructed as follows:

5. Very important (*or strongly agree*)
4. Rather important (*or rather agree*)
3. Without opinion (*neutral*)
2. Rather not important (*or rather disagree*)
1. Not important at all (*or strongly disagree*)

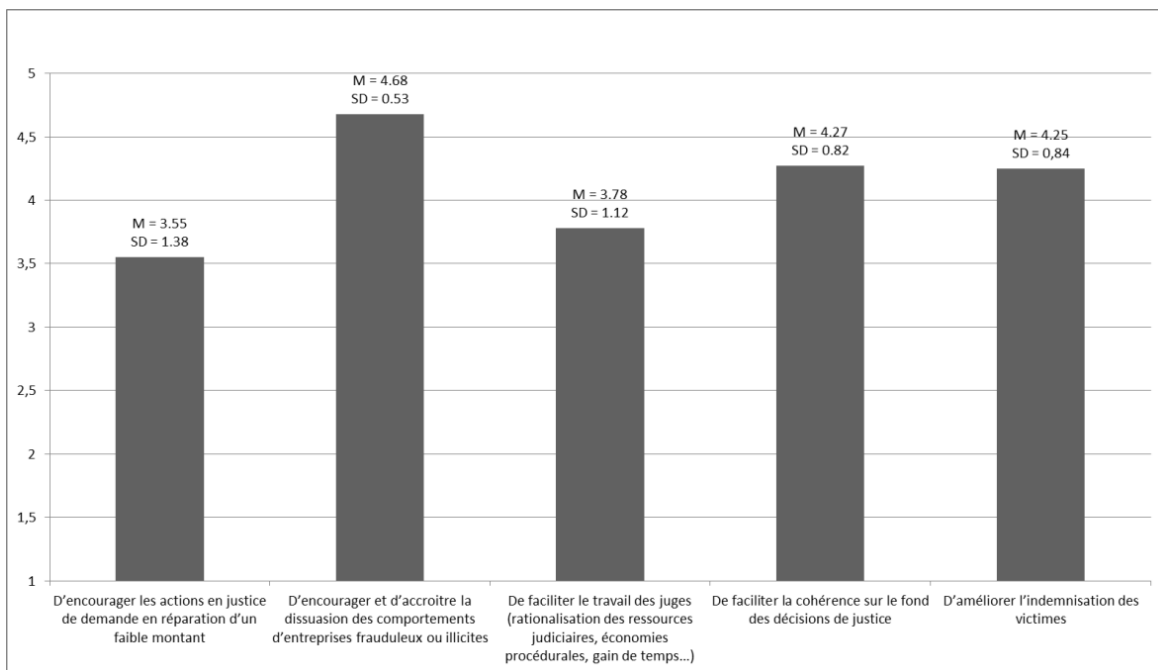
Standard deviation (*sd*) is directly reported onto the graphs. Occasionally, information is provided regarding the exact number of judges (i.e. frequencies, hereafter 'f') who – out of the 40 respondents – selected a specific answer. Readers can refer to Appendix 3 to have a detailed overview of frequencies per question. Fourth, a brief account regarding the contextual background in which questions are embedded is each time provided. Finally and as earlier pointed out, viewpoints expressed by French judges and by the representative of a consumer association collected during semi-structured interviews conducted during the

Spring 2012 and Winter 2013 are used as complements to illustrate these results. An overview of the questions asked during these interviews can be found in Appendix 5.

a) Objectives Pursued by Group Actions

In this first question, judges were asked about the goals that, in their views, mass proceedings should be aimed to achieve. the question was worded as follows: *many objectives have been associated with group proceedings. To what extent do you consider that group proceedings should indeed be aimed at....* Five objectives were proposed (from the left to the right on the graph below): enhancing compensation of small claims (i); enhancing and increasing deterrence of corporate misbehaviour (ii); helping the judicial management of mass litigation (saving judges' time and resources) (iii); facilitating a better coherence of judicial decisions (iv); enhancing claimants' compensation (v).

To what extent do you consider that a group proceeding should indeed be aimed at...



Respondents tended to agree that these five objectives were indeed closely associated with group actions. Closer examination however revealed that judges viewed the deterrence of corporate misbehaviour as

being the main objective pursued.¹⁰⁹⁴ In comparison, compensation of small claim plaintiffs tended to be regarded as being of lower importance.¹⁰⁹⁵

During an interview, a judge of first instance Court also pointed out the need for an increased coherence of judicial rulings when rendered on similar or related topics.¹⁰⁹⁶ In our questionnaire, this objective was however not significant when compared to others goals. Suggesting an alternative perspective, the representative of the consumer association conversely pointed out - also during an interview - that compensation should obviously be the first objective that group proceeding should seek to achieve.

As an attempt to understand the reason why judges tended to view deterrence of corporate misbehaviour as main objective, it is insightful to remember that this survey was conducted in the aftermath of the PIP breast implants and Mediator scandals which might have triggered availability heuristics among respondents. Furthermore, another survey conducted in December 2012 with French judges by two economists also addressed the relationship between judges, markets and economics.¹⁰⁹⁷ It showed that French judges were remarkably strongly sceptical *vis-à-vis* market structures. This mistrust, the authors argued, could be explained by many factors such as judges' education or the Civil Law tradition. Importantly, the study also argued that this mistrust had influenced the development of case law on economic matters such as redundancy. Interestingly, the authors however observed that judges who received education or trainings in economics had however softer views and perceptions about markets and companies. As a possible – albeit very speculative – conclusion, one may question whether this preference for the deterrent function of the group action is not somehow connected with the reported judicial mistrust *vis-a-vis* market functioning.

¹⁰⁹⁴ 28 judges chose 'very important', 11 judges selected 'rather important'. No judges chose the boxes 'rather secondary' or 'very secondary'.

¹⁰⁹⁵ 10 respondents chose the box 'rather secondary'.

¹⁰⁹⁶ See on this point Chapter 2 and case law on vaccine against hepatitis and sclerosis which has recently led to many divergent rulings.

¹⁰⁹⁷ P. CAHUC and S. CARCILLO, *Les juges et l'économie: une défiance française*, Institut Montaigne, December 2012, available on www.institutmontaigne.org/fr/publications/les-juges-et-leconomie-une-defiance-francaise (accessed 16 December 2013).

b) The Scope of Application of Group Actions

Like in other European jurisdictions, a burning policy issue regards the scope of application of group actions.¹⁰⁹⁸ Should the proceeding be limited to a unique area? Should its use be extended to all fields of substantive law where disputes are likely to involve many individuals? Between these two extremes, should the proceeding be restricted to several but specific and limited domains? In 2010, Senators BETEILLE and YUNG already pointed out that ‘there is no consensus regarding the scope that should be given to group actions’.¹⁰⁹⁹ In their proposal, they suggested to restrict the action to consumer, competition and securities/financial law. Remarkably, this topic has been a source of intense lobbying from the industry and private sector represented by the French business confederation MEDEF (*Mouvement des Entreprises de France*)¹¹⁰⁰ and from claimants’ representatives.

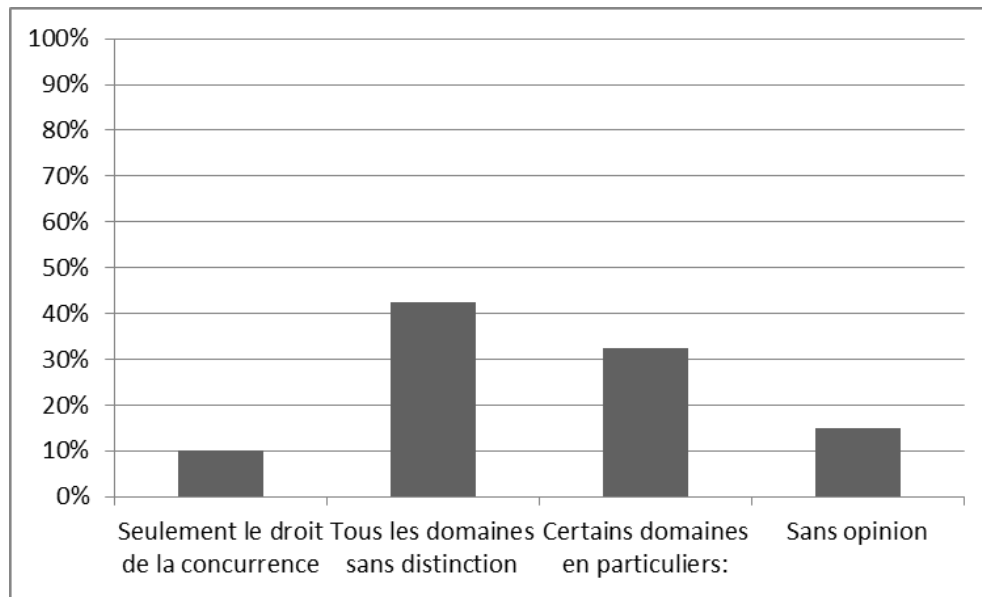
As an attempt to contribute to these discussions, respondents were invited to reply to the following question: *According to you, should the scope of application of group proceedings be restricted to specific fields (only competition law), or should it be applicable more widely?* Four possible answers were then proposed (from the left to the right on the graph below) ‘only competition law’ (i); ‘all fields without distinction’ (ii); ‘some specific areas’ (iii), ‘without opinion’ (iv). Judges who selected the box ‘some specific areas’ were further asked to detail their answers by indicating which fields.

¹⁰⁹⁸ M. VALIMAKI, ‘Introducing Class Actions in Finland: An Example of Law-Making Without Economic Analysis’, in: J. BACKHAUS, A. CASSONE and G. RAMELLO (Eds.), *supra note 23*, pp. 327-341 (highlighting that the law on class action which came into force in 2007 finally restricted the use of the procedure to consumer law, even though earlier drafts of the proposal had much broader scope of application).

¹⁰⁹⁹ 2010 French Report on Group action, *supra note 199*, p.15 (in French : ‘il n’existe pas de consensus sur le périmètre qui doit être donné à l’action de groupe’).

¹¹⁰⁰ MEDEF (Commission Droit de l’entreprise), *Positions du MEDEF sur le Projet de loi visant à introduire l’action de groupe en droit français*, November 2012

According to you, the scope of application of the group proceeding should be....



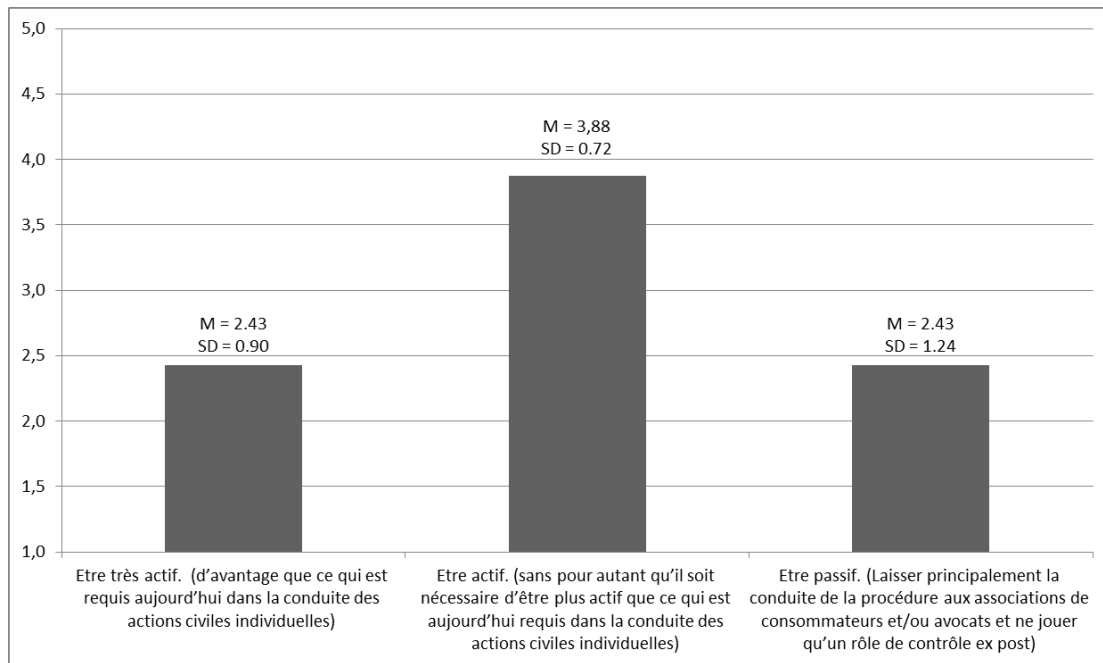
Following the findings of Senators BETEILLE and YUNG who, already in 2010, pointed out a preference of the French Council for the Judiciary (*Conseil supérieur de la magistrature*) and of the National Association of First Instance Judges (*Association nationale des juges d'instance*) for broadly applicable group actions, in their vast majority respondents were also reluctant to a too-narrow application of group actions. Only 10% considered that the proceeding should be limited to competition law. A majority supported its use in all fields of law, or to several but restricted domains. Judges who ultimately selected the box 'some specific areas' further indicated the following combinations: 'economic and industrial activities-public health'; 'public health-ecology-competition law'; 'consumer law-property law'; 'employment cases', 'public health'; 'competition law-consumer protection'; 'health-environment-adhesion contracts' and 'health-environment'. These results were also substantiated by other comments collected during interviews where judges similarly were reluctant to a too-restricted application of group actions. As one of them expressed it, once the group action is introduced, it will be in practice very difficult to limit its scope of application.

c) Judicial Perceptions on the Scope of Judicial Intervention

During an interview, the representative of a consumer association suggested that the work of judges in the mass litigation framework is ultimately not very different from the tasks that they are already used to perform in their everyday practice. We actually wanted to test this claim. The question was therefore worded as follows: *According to you, how should the judge behave when he is in charge of group actions?*

Three possible answers were proposed (from the left to the right on the graph below): ‘be very active (more than what is today required for the monitoring of individual lawsuits)’ (i); ‘be active (but not more than what is today required for the monitoring of individual lawsuits)’ (ii); ‘be passive (leaving the monitoring of the proceeding primarily to associations and/or lawyers, and performing an ex post control)’ (iii).

According to you, how should the judge behave when he is in charge of group actions?



Noteworthy, a majority of respondents considered that the monitoring of group proceedings does not require a more active role than the one that they are nowadays already expected to perform.¹¹⁰¹ Put differently, respondents did not seem to believe that managing group proceedings will revolutionize their practice. However, these responses must be handled carefully since French judges have not been confronted to the proceeding in practice yet.

d) Judicial Perceptions on Specific Tasks

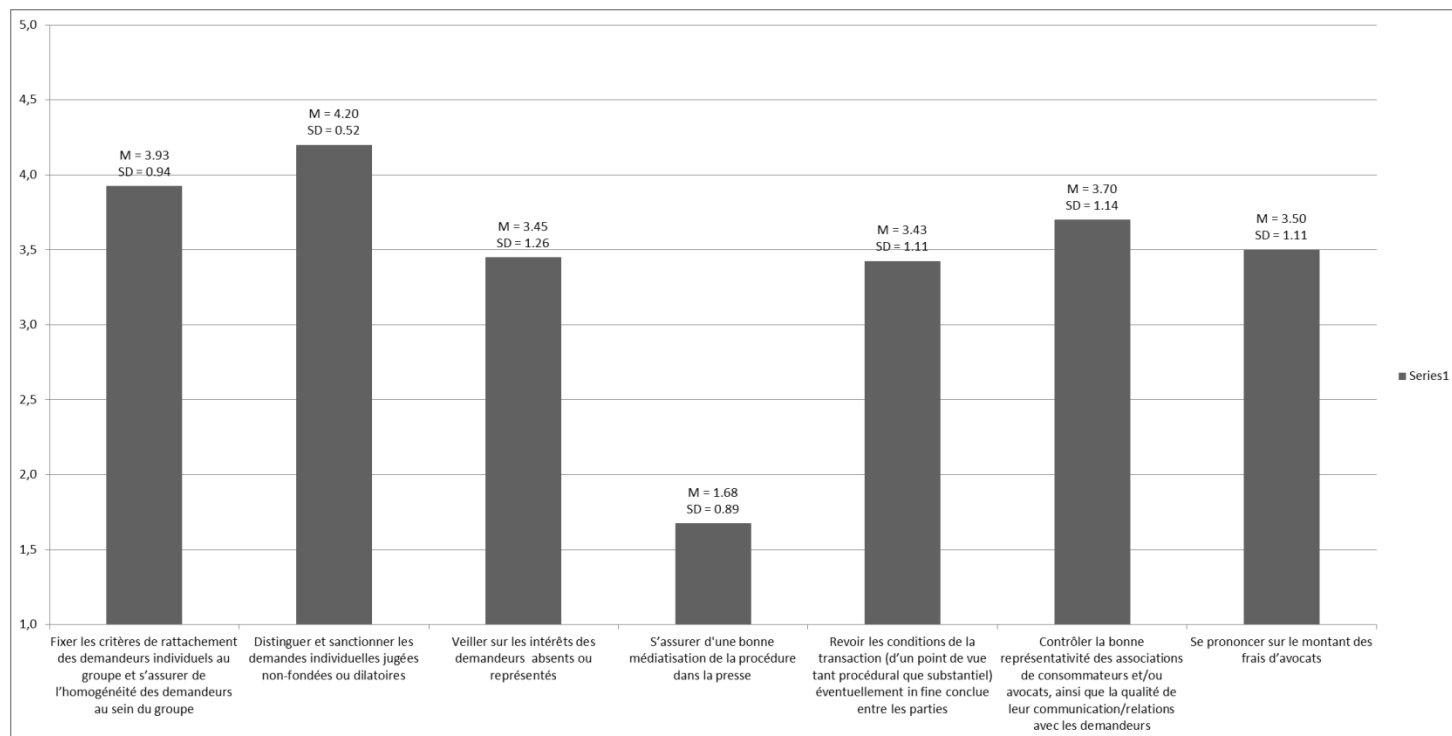
Monitoring group proceedings gives judges extensive powers to perform tasks which potentially may differ from their daily practice. In these two matrix questions, judges were asked about the duties that judges should indeed be required to do. Specifically, our interest was here to understand whether judges

¹¹⁰¹ 25 respondents chose the box ‘rather agree’, 6 chose the box ‘strongly agree’.

seem willing - and ready - to execute some tasks which, for some of them, can potentially differ from their everyday practice. The tasks herein listed correspond to the ones usually required from judges when monitoring mass litigation: some of them refer to the work of the judge-watchdog and the judge-cattle driver (for example, filtering weaker or frivolous claimants; publicizing the case in the media; assuring the adequate communication between lawyers/associations and plaintiffs...), others are associated with the work of the judge-good shepherd (taking care of the interests of absentees; reviewing the settlement agreement; reviewing lawyers' fees *et cetera*).

The first question was worded as follows: *to what extent do you consider that the following tasks should be endorsed by the judge(s) in charge of monitoring a group action?* Seven tasks were listed (from the left to the right on the graph below): determining the criteria to be met to be part of the group and ensuring the homogeneity of plaintiffs within the group (i); 'distinguishing, and if necessary, punishing frivolous claimants (ii); taking care of the interest of absent or represented parties (iv); ensuring the publicity of the proceeding in the media (v); supervising and reviewing the terms of a final settlement concluded between the parties (both from a procedural and a substantial perspectives) (vi); controlling the adequate representativeness of consumer associations and/or lawyers, as well as their adequate communications with their members/clients (vii); and finally, reviewing lawyers' fees (viii). Judges were required to nuance their opinion on a five-point scale going from *strongly disagree*, *rather disagree*, *without opinion*, *rather agree*, and *strongly agree*.

To what extent do you consider that the following tasks should indeed be endorsed by the judge(s) in charge of monitoring the group action?



A majority of respondents considered that distinguishing and punishing frivolous claimants (task 2 on the graph) was a role that judges should endorse. This result is significant when compared to all other tasks listed, except task 1 which is ‘determining the criteria to be met to be part of the group’. Strikingly, on the contrary, judges did not regard the adequate advertising of the case in the media (task 4) as being a duty that should fall upon them. This result is significant when compared to all others tasks presented. This insight is noteworthy given that the actual group action gives judges the mission to ensure and supervise the right mediatisation of mass claims,¹¹⁰² or when a settlement agreement is reached by parties.¹¹⁰³

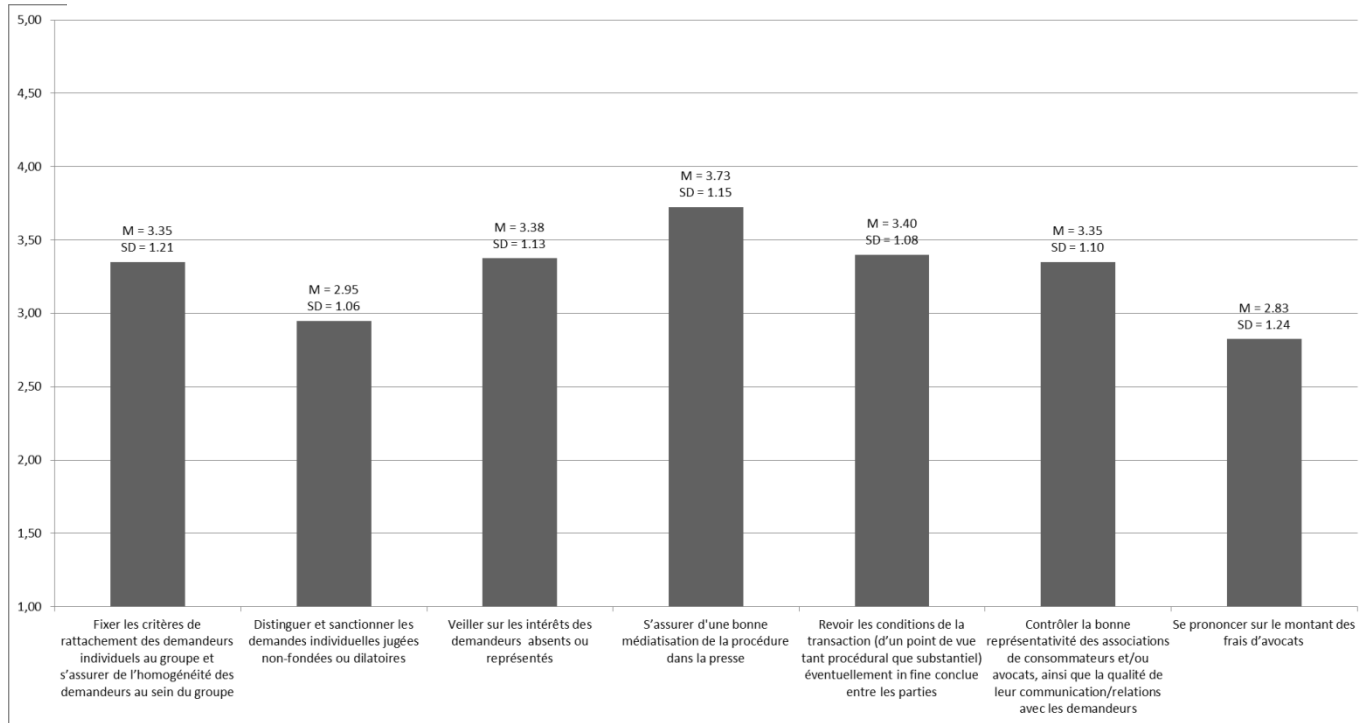
In another question judges were asked to evaluate on the same five-point scale the degree of difficulty that they would assign to each of these tasks. The question was worded as follows: *Do you think that the following tasks will be difficult to fulfill for the judge in a charge of the group action?* The list of tasks remained unchanged. We deliberately chose the term ‘difficult’ in our question to investigate a possible judicial optimism in this domain. Finally, since these two questions were quite similar in their wordings -

¹¹⁰² New article L.423-3 al.3 Consumer Code (in French : ‘le juge ordonne, aux frais du professionnel, les mesures nécessaires pour informer, par tous moyens appropriés, les consommateurs susceptibles d'appartenir au groupe, de la décision rendue’).

¹¹⁰³ New article L.423-9 al.2 Consumer Code (in French : ‘le juge peut prévoir les mesures de publicité nécessaires pour informer les consommateurs de l'existence de l'accord ainsi homologué’).

and may have led respondents to mechanically repeat the replies that they had given to the question coming first - we decided to avoid presenting these two questions successively. These questions were therefore respectively presented as question n°4 and question n°6. This strategy enabled us to compare the responses obtained with greater confidence.

Do you think that the following tasks will be difficult to fulfill for the judge in charge of the group action?

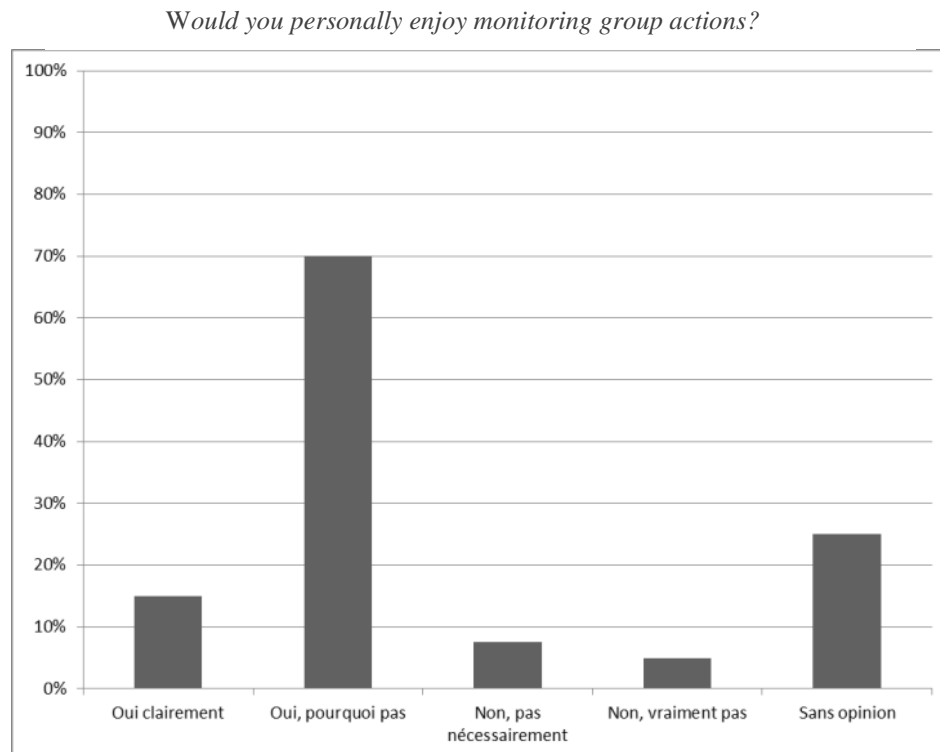


Results are consistent with the responses obtained to the preceding question. Supervising the adequate mediatisation of the case is perceived as the most difficult task to perform. This result is significant when compared to task n°2 (distinguishing and punishing frivolous claimant) and task n°7 (reviewing the amount of lawyers' fees). Going into the details, responses that judges have given regarding the degree of difficulty associated with case mediatisation are strongly polarized: 16 respondents 'strongly agreed' that this task will be difficult to achieve, while 18 of them were neutral on this issue. It seems therefore that case mediatisation is a task which casts doubts in the minds of respondents. Unsurprisingly, judges tend to be more at their ease with tasks which best corresponds to their judicial practice, such as punishing frivolous claimants or reviewing lawyers' fees.

e) Judicial Apprehensions

The goal pursued in this question was to understand whether judges have positive or negative apprehension concerning group actions. Previous development of this research suggested that monitoring mass litigation could be seen as a *misfortune* from the perspective of judges seeking to maximize their leisure time or to avoid public attention, or alternatively, as an *opportunity* for those seeking prestige, good reputation, recognition or increased powers.¹¹⁰⁴

The question was worded as follows: *would you personally enjoy monitoring group actions?* Judges were asked to nuance their answer on a five-point scale from *yes really*; *yes, why not*; *without opinion*; *rather no*; and *really no*.



A few respondents expressed enthusiasm *vis-à-vis* the possibility of being personally involved in the conduct of group proceedings.¹¹⁰⁵ However, a vast majority of judges (70%) would ‘rather enjoy’ being personally involved in group actions. As one judge further expressed it during an interview, group proceedings tend to ‘upgrade’ the roles of judges considerably.

¹¹⁰⁴ See Chapter 4.

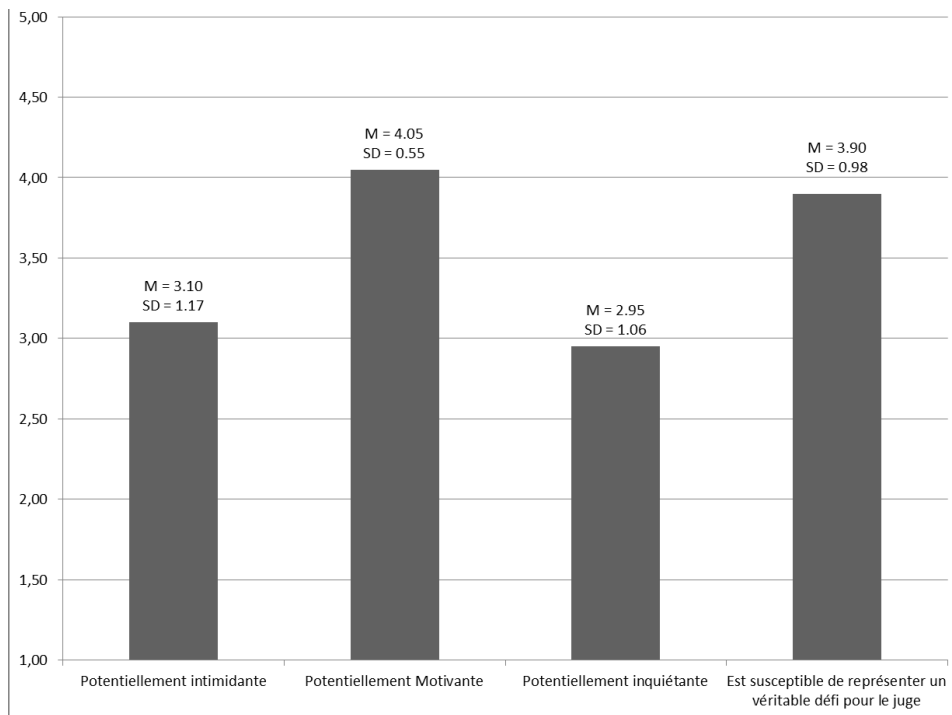
¹¹⁰⁵ f=6 for ‘yes, really’, see Appendix 3.

f) Judicial Feelings

The research has shown that the conduct of mass litigation importantly depends on judicial attitudes. In this view, previous developments have pointed out the impact of emotions and feelings on judicial behaviour.¹¹⁰⁶ The following question was specifically intended to understand feelings that judges may potentially have when managing mass disputes.

The question was worded as follow: *would consider the perspective of monitoring group actions as being an experience....* Four possible answers were proposed (from the left to the right on the graph below): ‘potentially intimidating’ (i); ‘potentially motivating’ (ii); ‘potentially worrying’ (iii). In order to take into account the fact that judges might not have clear views on this issue, we added a last category entitled ‘may constitute a real challenge for judges’ (iv). This category was aimed at letting judges a leeway to signal that group proceedings might have an emotional impact on judges, without having to clearly translate it in terms of negative or positive feelings. Respondents were required to nuance their answers on a five-point scale: from *strongly agree*; *rather agree*; *without opinion*; *rather disagree*; *strongly disagree*.

Would you consider the perspective of monitoring group actions as being an experience...



¹¹⁰⁶ See Chapter 5.

Respondents did not seem to have clear negative feelings or negative anticipations concerning group actions. A closer attention reveals that responses in the categories ‘potentially intimidating’ and ‘potentially worrying’ are polarized between ‘rather agree’ and ‘rather disagree’.¹¹⁰⁷ On the contrary, a large part viewed this experience as being positive and potentially motivating. Apparent fluctuations and differences in these responses tend to support the idea that the monitoring of group actions is likely to arouse emotions, even though it is nowadays still too early to further expand on this point.

g) Judicial Concerns

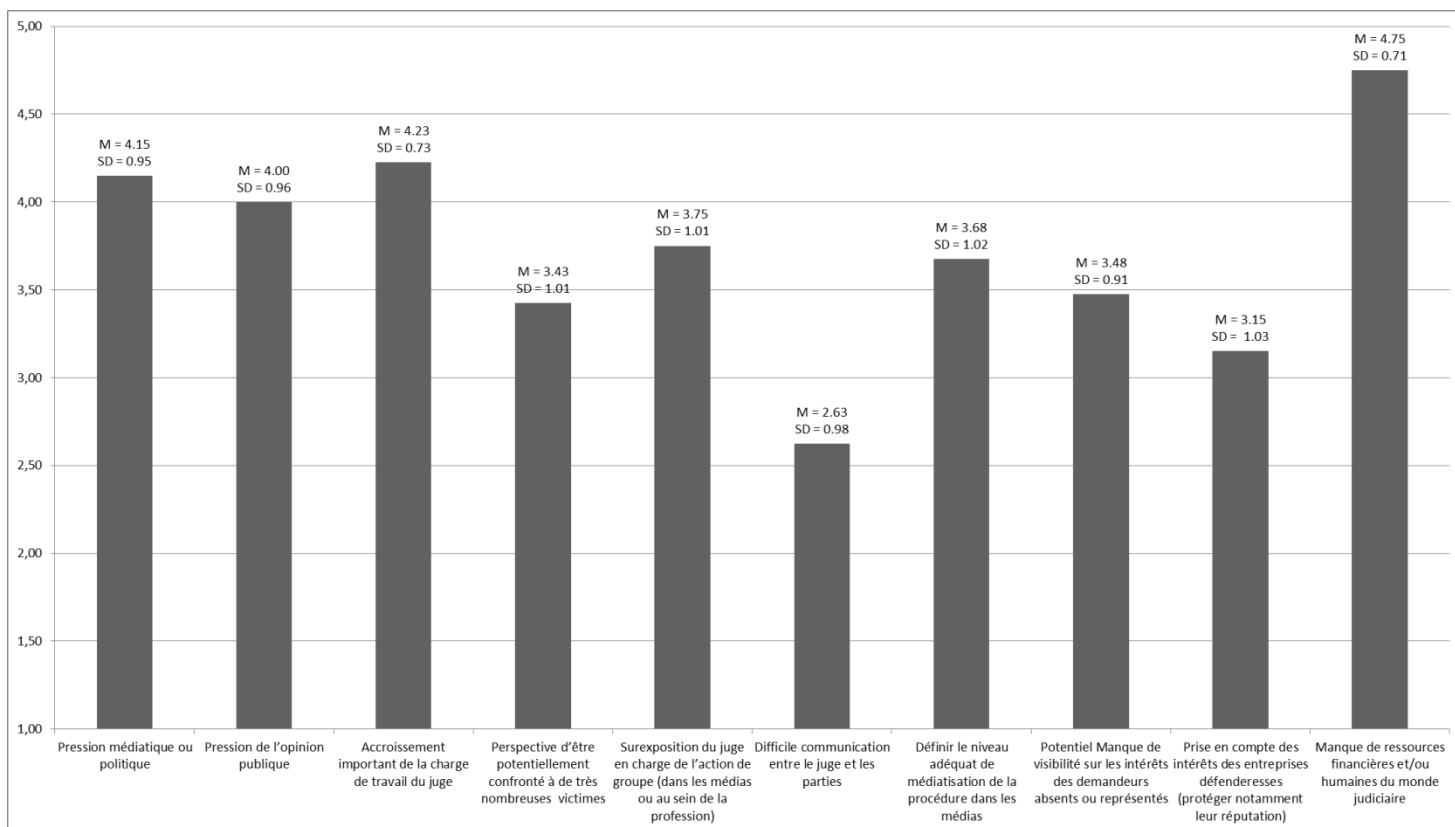
We asked judges two questions in order to investigate possible judicial concerns. The first required them to assess whether some listed obstacles were likely to be perceived as potentially problematic. These obstacles - judge’s increased public exposure, time pressure, asymmetric information *et cetera* - have been further discussed in previous developments of this research.¹¹⁰⁸

The first question was worded as follows: *to what extent do you consider that the following issues are likely to be problematic from the perspective of the judge in charge of group proceedings?* Ten different obstacles were listed (from the left to the right on the graph): ‘media or political pressure’(i); ‘pressure from public opinion’ (ii); ‘tasks highly time-consuming or burdensome from the judges’ point of view’(iii); ‘perspective of facing numerous litigants’ (iv); ‘judicial overexposure (in the media and within the legal profession)’ (v); ‘difficult communication between the judge and parties’(vi); ‘defining the adequate level of mediatisation of the proceeding (vii); ‘lack of information about the interest of absent or represented parties’ (viii); ‘taking into account the interest of companies (notably in terms of reputation)’ (ix); ‘lack of financial or human resources to deal with mass cases’ (x). Respondents were asked to nuance their replies on a five-point scale going from *strongly agree; rather agree; without opinion; rather disagree; to strongly disagree*.

¹¹⁰⁷ Regarding the category *rather intimidating*, f=12 for ‘rather agree’ & f=14 for ‘rather disagree’. Regarding the category *rather worrying*, f= 13 for ‘rather agree’ & f=15 for ‘rather disagree’.

¹¹⁰⁸ See Chapter 4 and Chapter 5.

To what extent do you consider that the following matters are likely to be an issue from the perspective of the judge in charge of group proceedings?



A vast majority of respondents did not consider the difficult communication between the judge and parties to be a problematic issue when monitoring group lawsuits. This result is significant with all others listed issues, except n°9 ('taking into account the interest of companies'). On the other extreme, judges almost unanimously agreed that the lack of financial and human resources to deal with mass cases is problematic. Importantly, respondents also considered that monitoring group actions may drastically increase judicial workload. Noteworthy, external pressures coming notably from either media or public opinion also obtained high scores.

To complete our investigation on this point, we also asked an open-ended question and gave respondents freedom to express their personal opinions. The question was worded as follows: *do you have any other concerns that you would like to share?* To avoid respondents skipping too quickly this question, we asked them to explicitly write *no* in the box if they had no particular concern to express. Many respondents highlighted an actual lack visibility about the group action. Remaining viewpoints can be grouped into the three following categories.

The first category concerns the lack of human and financial resources to deal with mass disputes. Even though this issue was already stressed in the preceding question, many respondents decided to mention

this concern a second time. One respondent claimed for example that ‘judicial personnel and logistics are still insufficient to deal with this kind of cases’, another stressed that resources given to the judge (or to the panel) in charge of the proceeding may not be sufficient when compared to the stakes of the lawsuit; a third one argued that ‘there are not enough judges’, and another finally pointed out a need for ‘more assistants to deal with the administrative aspects of mass cases’.

The second category of comments targeted the procedural pitfalls and the risks of lengthy and burdensome proceedings. A respondent for example highlighted the ‘risks of lengthy and complex proceedings from the viewpoints of both litigants and judges’. Others warned against ‘the complexity of the proceeding’, ‘lengthier proceedings’ or a ‘multiplication of lawsuits’. Another judge rang the alarm bell against an increase in the burden and workload of registries (*greffe*) which already today must deal with heavy caseload. The same respondent further pointed out that this situation may ultimately lead to higher risks of errors.

Finally, a third category of comments had a broader scope. A judge for instance mentioned the dilemmas of mass justice and stressed the difficulties of evaluating the amounts of damages individually awarded to claimants. Another respondent pointed out the risk associated with an increase in low-merits disputes and a risk of seeing claimants eventually becoming ‘consumers of justice’ (in French: ‘*une déresponsabilisation du consommateur qui devient aussi consommateur de justice*’). Finally, another judge highlighted that the status of judges in France prohibits them to endorse any judicial or political responsibilities to a greater extent. The risks of disciplinary measures, he adds, are such that ‘only simple individual cases can today truly be managed by judges’.

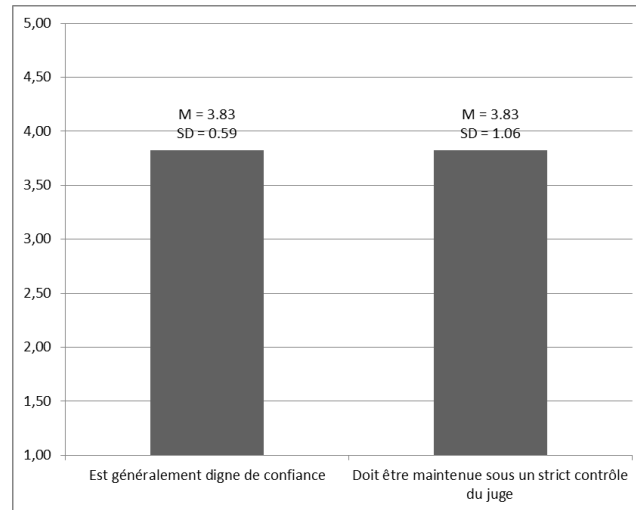
h) Judicial Perceptions on Another Key Protagonist: The Claimants’ Association

Under the current design of group actions, associations have a monopoly for legal standing.¹¹⁰⁹ These two questions investigated the overall perception of judges about associations, their *a priori* positive or negative opinions about the role of this actor, and the quality/trustworthiness of their work.

The first question was worded as follows: *do you think that the work performed by plaintiffs’ associations is generally trustworthy?* The second further asked judges: *do you think that their work should be kept under close judicial supervision?* Respondents could nuance their answer on a five-point scale going from strongly agree; rather agree; without opinion; rather disagree; to strongly disagree.

¹¹⁰⁹ See Chapter 3.

Left: *Do you think that the work performed by plaintiffs' association is generally trustworthy?*
 Right: *Do you think that their work should be kept under close judicial supervision?*



In their majority, respondents had positive views on associations. Only two judges out of forty rather disagree that their work is usually trustworthy, and none indicated 'strongly disagree'. This being said, interestingly, a majority considered that the work of associations should be kept under close judicial scrutiny. Noteworthy, ten judges out of forty 'strongly agreed' and twenty-one 'rather agreed' with the need for judicial supervision. These results are also interested when analysed in the light of the EU 2013 Consumer condition scoreboard which showed that consumers' perceptions and trust vis-à-vis associations tend to significantly vary across Member-States. Trust in independent associations to protect their rights was particularly higher in the Netherlands (90%), France (88%) and the United Kingdom (86%), than in Bulgaria (54%) or Greece (57%).¹¹¹⁰

i) Improving Judicial Intervention: Single Judge or Panels?

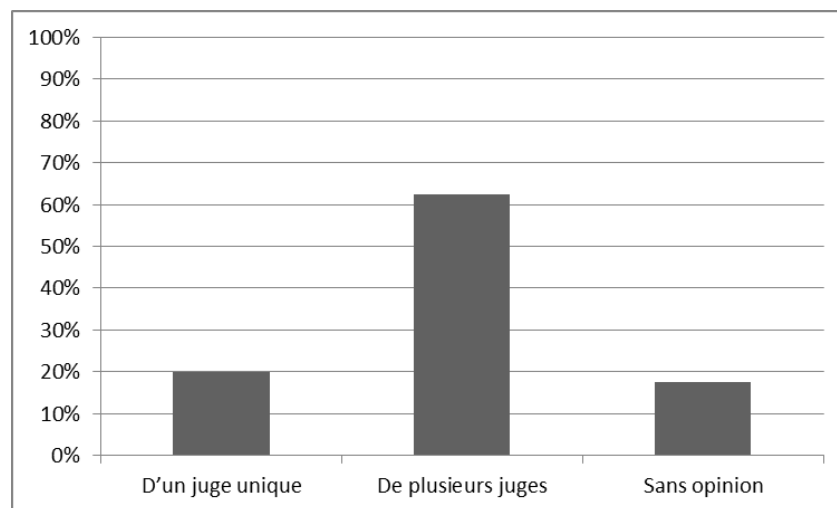
In France, civil judges sit alone in courts of first instance (tribunaux d'instance) when dealing with minor offences or when the amounts at stake do not exceed 10,000 Euros.¹¹¹¹ In High Courts of First Instance (tribunaux de grande instance), judges usually sit in panels.¹¹¹² In a context of scarce judicial resources

¹¹¹⁰ European Commission, *Consumers Conditions Scoreboard*, 9th ed., July 2013, p.50-51.

¹¹¹¹ Article L.222-1 Code de l'organisation judiciaire.

¹¹¹² Some specialised functions may however also be endorsed by a single judge, such as for example family-law judges (*juge aux affaires familiales*), judge in charge of enforcing (*juge de l'exécution*), or judge empowered to issue temporary orders in case of urgency (*juge des référés*). Under certain conditions and whenever the president of the tribunal deems it necessary and if parties agree, it can be decided that a single judge will preside over a case usually assigned to a panel (Loi n.70-13 du 10 juillet 1970 modifiant et complétant l'ordonnance n.58-1273 du 22 décembre 1958 relative à l'organisation judiciaire (enshrined in Article R.212-9 Code de l'organisation judiciaire), regarding the conditions regulating the decisions of the President of the tribunal, refer to articles L.212-2 and R.213-7 Code de

and of a lack of court personnel, single judges are regarded as eliciting quicker and more flexible judicial response.¹¹¹³ In the framework of mass litigation, some mass proceedings leave the monitoring of the proceeding to single judges, whereas others rely on panels. The following question was aimed at collecting judicial views on this issue. It was worded as follow: *Do you think that group proceedings should be monitored by...*. Respondents could select three possible responses (from the left to the right on the graph below): ‘by a single judge’ (i); by several judges (ii), ‘without opinion’ (iii).



A vast majority of respondents considered that the monitoring of group actions should be assigned to panels. Possible explanations to this result may be multiple: judges may view the panel as a way to reduce their individual workload through a division of labour. Judges may also be reluctant to remain isolated when monitoring group actions, or may not be prone to endorse and assume alone decisions which have long-lasting social implications. Additional clarifications on the pro and cons of panels v. single judges in the mass litigation context will be discussed in Chapter 7.

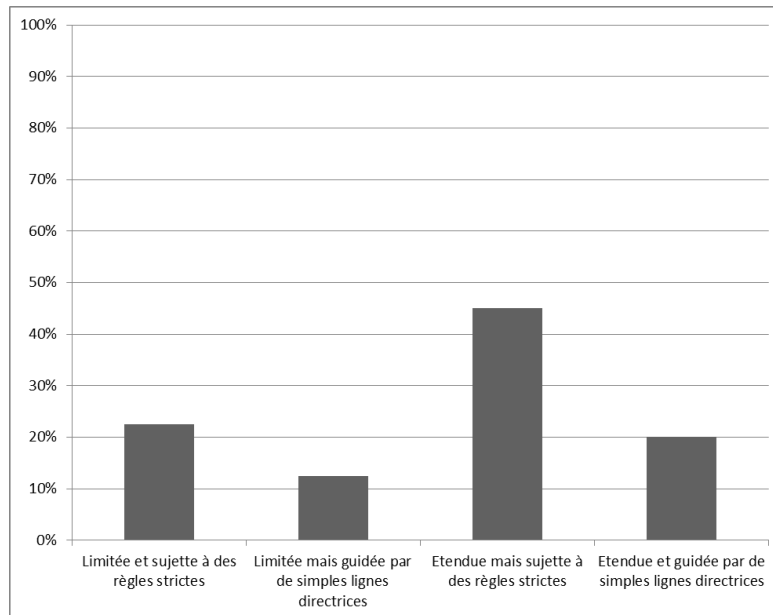
l'organisation judiciaire. See also on this point N. CAYROL, ‘Procédure devant le tribunal de grande instance’, in : *Répertoire de procédure civile*, updates 2010, at ‘attributions du juge unique’.

¹¹¹³ R. PERROT, ‘Le juge unique en droit français’, (29) *Revue internationale de droit comparé*, 1977, n°4, pp.659-674 ; J.P. LACROIX-ANDRIVET, ‘Procédure devant le tribunal de grande instance’, in: S.GUINCHARD (Ed.), *Dalloz action droit et pratique de la procédure civile*, 2012, chap.331, at 331.311; L. CADIET, ‘Efficience v. Equité’, in *Mélanges Jacques van Compernelle*, Bruxelles, Bruylant, 2004, pp.25.

j) Regulating Judicial Attitudes: Rules or Guidelines?

Earlier developments have discussed the cost and benefits associated with the use of rules vs. standards and their effects on judicial attitudes. In order to contribute to this debate, the question was aimed at questioning the degree of flexibility and assistance that judges deem necessary when handling mass litigation. The question was worded as follow: *according to you, the judicial monitoring of a group action should be...*. Respondents could then choose between four alternatives answers (from the left to the right on the graph below): ‘limited and regulated by strict rules’ (i), ‘limited but guided by broad guidelines’ (ii), ‘wide but regulated by strict rules’ (iii) and ‘wide and guided by broad guidelines’ (iv)

According to you, the judicial monitoring of a group action should be...

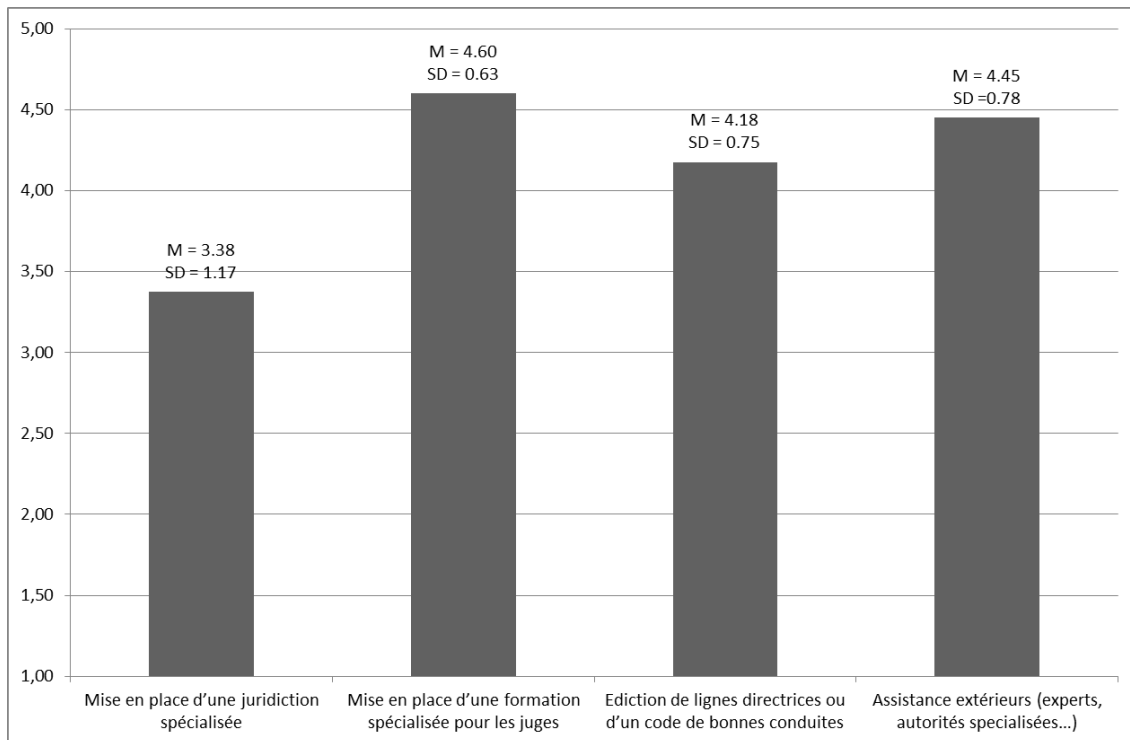


A majority of respondents considered that judicial intervention should preferably be wide, but also regulated by strict rules. In others words, judges asked for extensive powers for the treatment of mass disputes, but also wanted clear indications on the scope and extent of their work. They seemed to be more attracted by the need for certainty brought by strict rules, than by the need for flexibility permitted by broad standards.

k) Facilitating Judicial Intervention: Specialisation, External Assistance, Education

This last question investigated possible venues for facilitating and improving judicial intervention in the context of mass litigation. The question was worded as follow: *According to you, what are the tools that could be used to facilitate the judicial monitoring of group actions?* Respondents were then asked about four successive options (from the left to the right on the graph below): a specialised court (i), specialised judicial education/training (ii), implementation of guidelines or best practices (iii), external assistance (experts, specialised agencies...). These options corresponded to different alternatives intended to help judges when dealing with mass litigation.

According to you, what are the tools that could be used to facilitate judicial monitoring of group actions?



Most of judges did not consider the creation of specialised courts as a suitable solution. These results are coherent with the work conducted by other scholars which already pointed out a judges' overall reluctance for over-specialisation.¹¹¹⁴ Most of them however considered that special education/training were

¹¹¹⁴ L. BAUM, *Specializing the Courts*, University of Chicago Press, 2011, 282 p.

necessary. In addition, they stressed the importance of external help and tend to welcome assistance from experts and/or specialised agencies.

6.2.3. Discussion

One more time, the results that were collected should be handled carefully given the inherent limitations of this survey. This being said, the questionnaire provides interesting clues on the views of (French) judges about mass litigation and the monitoring of mass procedures. First, respondents seemed quite optimistic regarding group actions, but feared drastic increases in their workload. Even though they did not expect important changes in their judicial practice (this, we believe, is principally due to the fact that no judge has been confronted to group actions yet), they pointed out the current lack of adaptation of the whole judicial system in terms of human and financial resources to deal with this new types of lawsuits. Meanwhile, they also expressed concerns *vis-à-vis* new tasks such as ensuring the publicity and mediatization of mass claims. As discussed in Chapter 3, this mission is nonetheless cornerstone in mass litigation. Judges asked for increased powers, but also claimed for more clarity and indications on the scope of their work. In addition, judges regarded group actions principally as deterrence-enhancing mechanisms. One may therefore wonder whether such a view will now influence their practice: they may for instance retain extensive group membership in order to maximize the number of claimants, and thus increase the deterrent effect of group actions. Again, judicial practice in the coming months will turn out to be highly instructive.

This survey was conducted in May-July 2013. At almost the same time, a report for the Ministry of Justice (*Garde des sceaux*) entitled ‘l’office du juge au 21^e siècle’ pointed out a need for renewed views on the roles and functions of French judges. The authors notably pointed out that even though French judges have usually high ideas about their roles in society, confusion still tend to remain regarding the content, meaning and scope of judicial tasks.¹¹¹⁵ This online survey tends to confirm this observation.

*

¹¹¹⁵Institut des Hautes Etudes sur la Justice (IHEJ), *La prudence et l’autorité – l’office du juge au XXI^e siècle*, Rapport de la mission de réflexion confiée par la Garde des Sceaux C.TAUBIRA, May 2013 (observing, in French, ‘ce qu’enseigne l’observation des juges, c’est qu’ils ont à la fois une grande conscience de leur office mais que règne une confusion quant à son contenu et à son périmètre’, at p. 17)

6.3. CHECK N°2: *Does the Number Matter?* INVESTIGATING THE EFFECTS OF MULTIPLE CLAIMANTS ON LEGAL DECISION-MAKING: AN EXPERIMENT

As stressed in preceding chapters, legal scholars consider that the number of claimants involved in a dispute might have an effect on the assignment of liability and on the amounts of damages awarded. Behavioural researchers have also highlighted that the number may influence decision-makers. Empirical evidence on this issue remains nonetheless scarce and inconclusive: the few studies that did address the effect of number on decision-making have revealed scattered results. Moreover, these studies all used laymen as participants and did not consider whether - and to what extent - legal professionals (lawyers or judges) are affected by this potential bias. In response to this call, we¹¹¹⁶ conducted an experiment with professional lawyers to see whether the number of claimants can have an influence on their assessment of liability assignment and compensation size.¹¹¹⁷ In addition, we manipulated the case's strength in order to assess the generalizability of any potential effect of number of claimants to both weaker and stronger cases.¹¹¹⁸

We designed an experiment based on a product liability case. We chose this framework because widely commercialised defective products are a prototypical source of large-scale damage potentially affecting many people. In this setting, we looked at the influence of two factors, namely the number of filing claimants (one v. multiple claimants) and the case's strength (weaker v. stronger claim). The design of the experiment and its results are hereafter presented (6.3.1). Its implications and limitations are then clarified (6.3.2).

¹¹¹⁶ This experiment was conducted in cooperation with P.DESMET.

¹¹¹⁷ We are sincerely grateful to Professors M.FAURE, W.VAN BOOM and L.VISSCHER for their precious help and advice. We also thank the professors at Erasmus School of Law (and elsewhere) who gave us comments on this experiment and helped us improve its design.

¹¹¹⁸ Despite our efforts to conduct a similar experiment with judges, our request has to this day (October 2014) not been accepted.

6.3.1. The Experiment – Methodology and Results

a) Methodology

➤ *Participants and Design*

139 Dutch personal injury lawyers (50.4% male; average age 46.18 years, $SD = 11.68$) were recruited at the annual conference for Dutch Personal Injury Lawyers. Respondents had worked on average 16.9 years as personal injury lawyer, expert, or insurers ($SD = 9.09$) and were randomly assigned to one of the four conditions of our 2 (Case Strength: Strong vs. Weak) x 2 (Number of plaintiffs: Single vs. Multiple) between-subjects design.

➤ *Materials and Procedure*

Respondents were approached during the conference and given a questionnaire. At later time during the conference responses were collected. All respondents were provided with a scenario consisting of a hypothetical court case. The background of the case was based on real-life cases concerning vaccination. For a long time, vaccines and their possible side effects have been a source of extensive controversies.¹¹¹⁹ Given that for some of these vaccines more negative side effects have been reported than for others, constructing the case around a hypothetical vaccination campaign provided us with a suitable context for our study. We placed a short text at the beginning of each scenario informing respondents that we were well-aware of the case's simplification, and requiring them to solely respond on the basis of the information provided.

In our scenario, participants were told that a (unspecified) vaccination campaign had taken place in the Netherlands. After a period of time, X individuals started to suffer from illnesses potentially due to the vaccine. The plaintiff(s) had decided to sue the manufacturer for damages and asked for 30,000 Euros as pain and sufferings damages (per person). Participants were also told that in comparable cases awards had reached between 17,000 and 43,000 Euros. We decided to focus on pain and suffering damages because in contrast to other losses, which may be set upon objective criteria such as for instance hospital and doctors'

¹¹¹⁹ See for instance: the vaccine against hepatitis suspected (without clear established evidence) of causing sclerosis. For more than a decade, this product has been a source of controversies and contradictory rulings in France (L. NEYRET, 'L'imputabilité de la sclérose en plaques au vaccin contre l'hépatite B', *Recueil Dalloz*, 2007, p.2204 ; B. DEFOORT, 'Incertitude Scientifique et causalité : la preuve par présomption', *Revue Française de Droit Administratif*, 2008, p.549).

bills or lost wages, pain and suffering damages gives decision-makers more leeway and discretion to decide on the amounts awarded.¹¹²⁰

The two manipulated variables in the scenario were the strength of the claim (weaker v. stronger) and the number of claimants (single v. multiple). As a result, the following four unique versions of the scenario were constructed:

Version 1 – Single Claimant / Weaker Claim	Version 2 – Multiple Claimants / Weaker Claim
Version 3 – Single Claimant / Stronger Claim	Version 4 – Multiple Claimants / Stronger Claim

➤ *Number: Single v. Multiple Claimants*

In order to manipulate the number of claimants while at the same time preventing this number to become indicative of the case's strength, we did not just manipulate the number of claimants but also varied along the total number of vaccinees in the population. This allowed us to manipulate the number, while keeping constant the percentage of vaccinees who became ill. This percentage was fixed at 0,059%, which is around the usual rate of people with serious complications due to vaccines (0.07%).¹¹²¹ The single- and multiple plaintiffs- versions were worded as follows:¹¹²²

¹¹²⁰ W.K.VISCUSI, 'Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?' (8) *International Review of Law and Economics*, 1988, pp.203-220 (observing that in product liability cases, 'the subsequent calculation of medical costs and lost wages losses is straightforward, as the losses are directly measurable and readily quantifiable. Although future growth rates of wages and medical costs are uncertain, there is a substantial body of empirical evidence and economic theory to assist in making such judgements. Thus the criteria for compensation and calculation of the appropriate level of compensation are reasonably well-defined. Matters are quite different in the case of pain and suffering awards (...). There is no scale by which the detriment caused by suffering can be measured and hence there can be only a rough correspondence between the amount awarded as damages and the extent of the compensation'). Law & Economics scholars have proposed framework to better assess the amounts of pain and suffering damages awarded (see V.KARAPANOU and L.VISSCHER, 'Towards a Better Assessment of Pain and Suffering Damages', (1) *Journal of European Tort Law*, 2010, pp.48-74.

¹¹²¹ <http://nl.wikipedia.org/wiki/Vaccinatieprogramma> (visited: January 2014).

¹¹²² The text was initially worded in Dutch (see appendix).

<i>Single</i>	<i>Multiple</i>
Number of claimant: 1	Number of claimants: 68
Vaccinated Population: 1700	Vaccinated population: 115 600
<i>In the text:</i>	<i>In the text:</i>
“1700 individuals were vaccinated to prevent disease X. The vaccine is produced by company Alpha. Among the individuals whom the vaccine was administered to is Jansen.	“115 600 individuals were vaccinated to prevent disease X. The vaccine is produced by company Alpha. Among the individuals whom the vaccine was administered to are Jansen, Vervink, Pasternaak, Van de Werf, Te Haar, Habili, Emerald, Eijkestein and 60 other individuals.”

➤ *Case Strength: Weaker v. Stronger Claim*

In addition, we manipulated the case’s strength in order to assess the generalizability of any potential effect of number of claimants to both weaker and stronger cases. Therefore, we created scenarios in which scientific evidence for a causal link between the symptoms and vaccination was more (or less) ambiguous. Depending on the condition, the case read as follows:

<i>Weaker Claim</i>	<i>Stronger Claim</i>
“There is no clear-cut evidence regarding the causal link between the vaccine and the reported symptoms. The latest developments of epidemiological research cannot establish a causal link with certainty.	“There is no clear-cut evidence regarding the causal link between the vaccine and the reported symptoms. The latest developments of epidemiological research cannot establish a causal link with certainty.
The lawyer of Jansen (or <i>of the 68 claimants</i>) investigated similar court cases in which exactly the same product and the same health symptoms were involved.	The lawyer of Jansen (or <i>of the 68 claimants</i>) investigated similar court cases in which exactly the same product and the same health symptoms were involved.
<i>In these cases, experts were called to testify and on the basis of their conclusions, in 46% of the cases the claim of the litigants was denied and in 54% of the cases the claim prevailed.</i>	<i>In these cases, experts were called to testify and on the basis of their conclusions, in 36% of the cases the claim of the litigants was denied and in 64% of the cases the claim prevailed.</i>
The lawyer of the other party, company Alpha, argues that the symptoms should have developed sooner to be caused by	The lawyer of the other party, company Alpha, argues that the symptoms should

the product. In this case, the symptoms presented themselves only after a year. It is also argued that the symptoms were due to predispositions of the claimant(s) and that a lot of other individuals who received the vaccination did not develop symptoms.”

have developed sooner to be caused by the product. In this case, the symptoms presented themselves only after a year. It is also argued that the symptoms were due to predispositions of the claimant(s) and that a lot of other individuals who received the vaccination did not develop symptoms.”

➤ *Measures*

○ *Manipulation Check.*

To test the effectiveness of the merit manipulation, we asked participants to report the extent to which they considered the evidence as strong on a 5-point Likert scale (1 = not strong at all, 5 = very strong).

○ *Liability Assessment.*

The assessment of liability was measured by a dichotomous item, asking the participants to what extent they would rule the vaccine manufacturer to be liable (1 = liable, 2 = not liable).

○ *Assessment of damages for pain and suffering*

If respondents assigned liability, they were subsequently asked what compensation they would award to the individual plaintiff for pain and suffering and could indicate any amount in euros.

b) Results

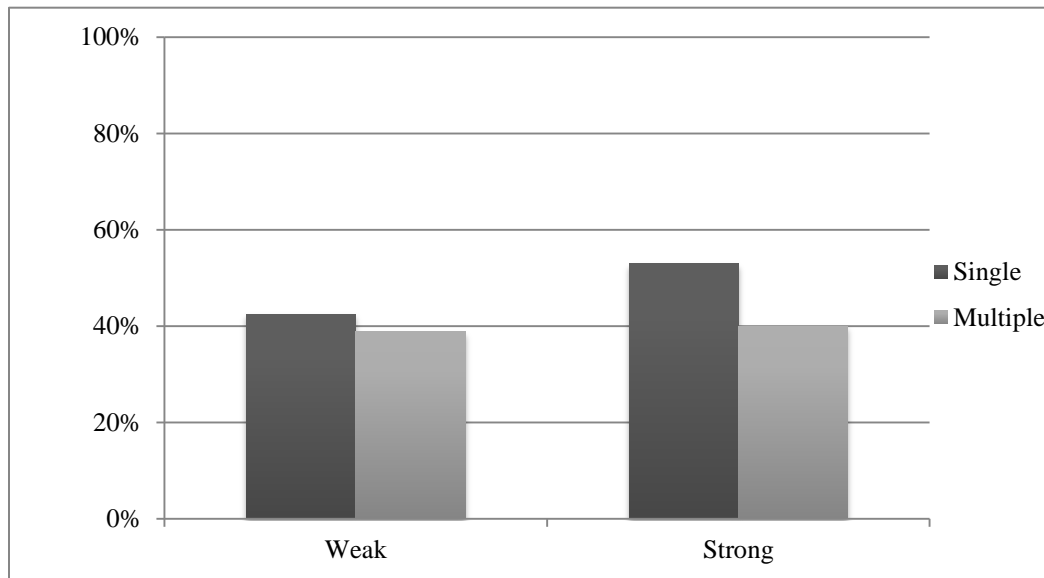
➤ *Manipulation check*

A 2 (Number) x 2 (Case Strength) ANOVA on the competition manipulation check for case strength only revealed a marginally significant main effect of Case Strength, $F(1,135) = 2.25$, $p = .07$, $\eta^2 = .02$ (one-sided). Respondents in the strong case considered the strong case to be stronger ($M = 2.65$, $SD = 0.94$) than respondents who received the weak case ($M = 2.44$, $SD = 0.85$). We further elaborate on this issue in the discussion.

➤ *Liability*

A binary logistic regression analysis with Number, Case Strength and their interaction as the predictor variables and the liability question as the dependent variable yielded no significant main or interaction effects (see Figure 1 below). Number, nor Case Strength or their interaction affected respondents' judgment of liability. Participants assigned liability in 40,82 % of the cases.

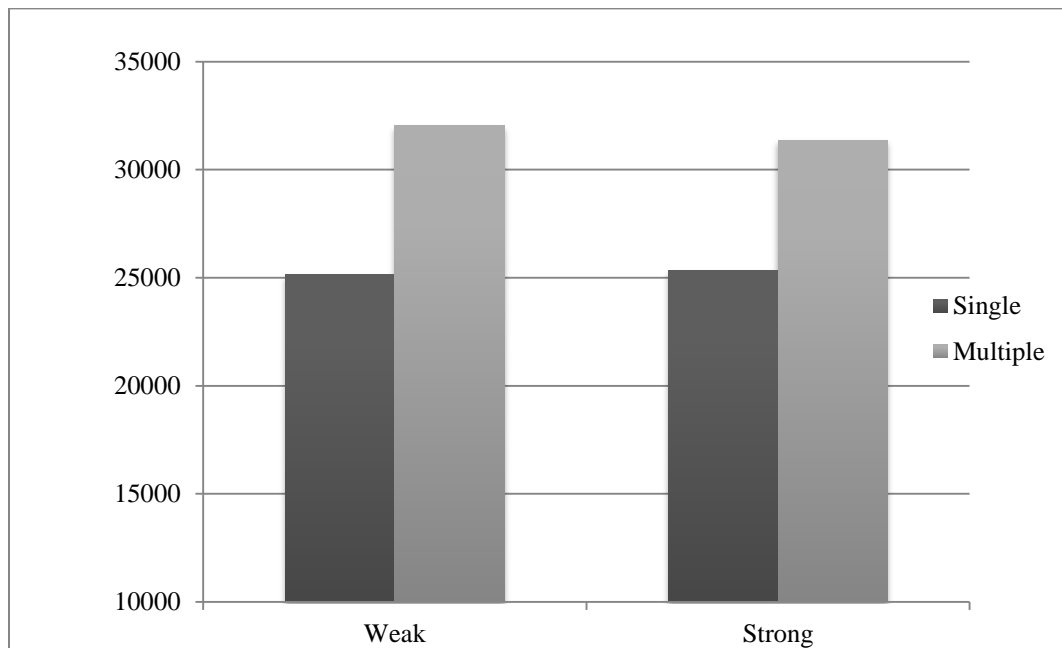
Figure 1



➤ *Damages awarded*

A 2 (Number) x 2 (Case Strength) ANOVA on the amount of damages awarded for pain and suffering revealed a main effect of Number, $F(1,65) = 5.06$, $p < .05$, $\eta^2 = .08$. Lawyers awarded significantly more damages to individual claimants in the multiple case ($M = 31730.78$, $SD = 12529.35$) than to claimants in the single case ($M = 25250$, $SD = 9291.78$). No other effects were significant. The mean damages awarded in each condition are displayed in Figure 2.

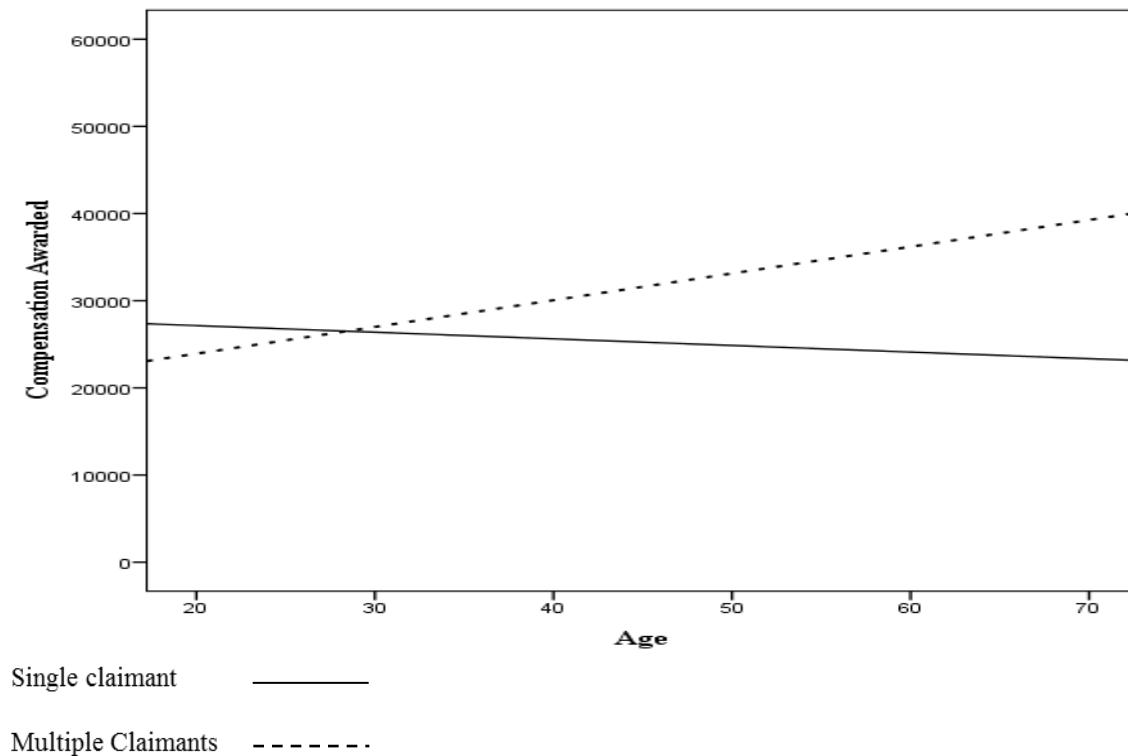
Figure 2



➤ *Effect of respondents' age on the amounts of damages awarded*

We proceeded with exploring whether this effect of number was more pronounced for particular groups of legal professionals and therefore explored potential interactions with our demographical variables. These analyses revealed that age in fact moderated the effect of Number on compensation awarded: particularly older lawyers were more influenced by the number of plaintiffs involved, as can be seen in Figure 3.

Figure 3



6.3.2. Discussion and Limitations

a) Discussion: Contribution to the Existing Literature

Taken together, our findings provide support for the idea that the number of plaintiffs can have an influence on how legal professionals evaluate a court case. We indeed found that whereas the number of claimants had no influence on lawyers' judgment about whether or not liability should be assigned, the number of claimants did have an effect on the amount of compensation they judged to be appropriate for pain and suffering damages. Moreover, the direction of this effect provides corroborating evidence for a 'power in numbers' effect, where multiple claimants are awarded more compensation individually than a sole individual. Furthermore, our findings also indicate that this effect of larger numbers exists independent of the strength of the case: for both strong and weak cases, multiple litigants were awarded more damages than single individuals. These findings contribute to the literature in several ways.

A first contribution is that we studied the effects of numbers on decision-making by focusing on legal professionals judging a prototypical court case. Prior research into the effects of number in legal decision

making has only looked at its influence on laymen's judgments (i.e. potential or actual jurors) and these studies provided contradictory evidence.¹¹²³ Using professional lawyers, specialised in personal injury litigation, we observed that the number of litigants does have an influence on the amount of damages that is considered appropriate in a personal injury case.

A second contribution is that we did not only look at the effects of number on the assignment of liability, but also at its effect on the amount of damages awarded for pain and suffering. In contrast with the calculation of other losses which are more contingent on objective criteria,¹¹²⁴ the assessment of pain and suffering damages is a judicial appraisal that leaves more leeway and discretion to the decision maker. Whereas the number of litigants may therefore not have a direct influence on the assignment of liability or material damages, it may exert its influence in decisions that lack these objective criteria. Our findings indeed seem to confirm this: whereas legal professionals were not affected by the number of litigants in their assignment of liability, they were influenced by this number when they decided on the amount of pain and suffering damages.

Finally, a third contribution is that we also investigated whether the effect of number occurs when controlling for the strength of the case. First, by keeping the percentage of injured constant across conditions, we provide a more accurate picture of the isolated effect of number of litigants. This departs from previous experimental or field studies where only absolute numbers were manipulated or measured, leaving the possibility open that the number of litigants also becomes part of the evidence. When following this approach, we observed that whereas the number itself did not affect the case's perceived strength or the assignment of liability, it did affect the amount awarded as pain and suffering damages, suggesting that the effect of number does not occur for decisions that rely more on hard evidence, but rather surfaces in decisions for which less objective criteria are available. Furthermore, we manipulated case strength directly in the scenario as well, allowing us to see whether an effect of number can be observed for both weak and strong cases.

¹¹²³ I.A. HOROWITZ and K.S. BORDENS, *supra* note 1061; L.F. NORDGREN and M.-H. Mc DONNELL, *supra* note 960.

¹¹²⁴ See W. K. VISCUSI, *supra* note 1120.

b) Limitations

Our findings have nevertheless important limitations. First of all, even though we specifically manipulated case strength in order to assess the generalizability of our findings to both weak and strong cases, one could argue that both our weak and strong case were in fact relatively weak (around 41% assigned liability in the weak case compared to 46% in the strong case). Moreover, both strong and weak cases were very much similar in their level of perceived case strength as well, as witnessed by the only marginally significant effect of case strength on our manipulation check and the absence of any main effect of case strength on the assignment of liability. While we deliberately opted for this approach to make our case not too strong nor too weak in order to observe enough variation on the liability measure, this strategy also poses a limitation to our findings in the sense that the observed effect of number of plaintiffs on compensation size may be limited to ambiguous cases and therefore cannot be generalized to cases that are extremely strong or weak. Further research may therefore shed light on this issue by looking at the effects of number on assigned liability and awarded compensation in cases that are truly weak and strong.

Second, our participants only represent one of the parties involved in mass litigation cases (lawyers) and not other influential actors like victims or judges. Indeed, whereas judges are the primary decision makers that ultimately decide on the question of liability and compensation size, plaintiffs too may behave differently when they know that they are not the only victim involved in litigation. They too may, for example, become overconfident and inflate their perceived chances of liability assignment and estimates of compensation. Future research would therefore find an interesting challenge in investigating how these and other parties involved are affected by the number of litigants in terms of their expectations (plaintiffs) and judgment (judges).

Finally, we cannot fully exclude the fact that external elements in link with the conference (for instance interventions of speakers, the time dedicated to respond to the survey et cetera...) might also have somehow influence the results. Despite these limitations, we hope that our findings will spark further research into how specific characteristics of the mass litigation context can influence the different actors involved in actual court cases.

*

6.4. CONCLUSION

The goal of these two distinctive reality checks was to shed empirical light on the theoretical developments discussed throughout this research. The online questionnaire investigated judges' attitudes, concerns and expectations *vis-à-vis* mass litigation in France. The experiment more specifically questioned the effect of multiple claimants on judgments of liability and compensation. As explained, these two studies only provide a first and imperfect step towards a better understanding of the impact of mass litigation on decision-making. Much more research is now needed to draw definite conclusions. Mass litigation is however, a judicial tool that has experienced expanding prevalence over the last few years, particularly in Europe. Any future research that furthers these two studies will therefore be - without doubt - a valuable undertaking.

INVESTIGATING SOLUTIONS FOR ENHANCING JUDICIAL INTERVENTION IN MASS LITIGATION: POLICY RECOMMENDATIONS

7.1. INTRODUCTION

In *Law and the Modern Mind* FRANK argued that ‘the honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice’. He also believed that ‘efforts to eliminate the personality of the judge are doomed to failure [,] the correct course is to recognize the necessary existence of this personal element and to act accordingly.’¹¹²⁵ Even though eradicating judges’ personality indeed turn out to be impossible, solutions however may exist for *debiasing* and assisting judges when managing mass claims.

7.1.1. Where Are We?

The research started with two straightforward questions: what do policymakers expect from judges when managing and resolving mass disputes, and are these expectations ultimately realistic? Throughout preceding chapters, the role of judges in mass claims was analysed through the perspectives of social sciences. These insights have shed new light on the judicial cathedral and pointed out judges’ strengths and weaknesses.¹¹²⁶ They importantly show that the relationship between judges and mass litigation should not be viewed as one-sided, but as clearly double-sided: judges not only have essential roles to play in mass claims, but mass claims also have a great impact on judicial attitudes and decision-making. The personality of judges therefore significantly contributes to shaping the outcomes of mass disputes. Furthermore, these insights have highlighted a *Herculean judge syndrome* currently biasing the vision of policymakers: legislatures tend to rely a lot on judge’s expertise and discretion, and therefore may ask more than what judges might actually be able to do. Given the high stakes in play in mass claims, it seems

¹¹²⁵ J. FRANK, *supra* note 607, at p.148.

¹¹²⁶ A. P. BIARD and L.T.VISSCHER, *supra* note 257.

to be hazardous to put too much emphasis on judge's performance and attitudes. Policy measures can however be undertaken to support and facilitate judicial intervention.

7.1.2. Methodology and Objectives

Identifying judicial weaknesses and debunking the Herculean judge myth was a first important step. Yet, as a French old saying expresses it, *la critique est aisée et l'art est difficile*.¹¹²⁷ Since European policymakers are nowadays prone to let judges play an active role in the conduct of mass claims, a second step must be made and policy recommendations should be formulated in order to address the issues raised in previous chapters.

Yet, some apparent remedies tend to be restrictive and do not solve - or solve only partially - the problems identified throughout this research (7.2). Conversely, other solutions are more innovative and forward-looking (7.3). Based on these findings, policy recommendations can be proposed (7.4). This chapter does not intend to discuss each option exhaustively. The goal is here to look at the future in order to pave the way for future research in this field. These suggestions may importantly become food for thought for policymakers in the coming years.

7.1.3. The Chapter in a Nutshell

The chapter sheds some light on possible mechanisms for debiasing judges and facilitating the judicial management of mass claims. It highlights the limits of some apparent remedies which fail to be fully satisfactory in practice. It is ultimately argued that enhancing judicial intervention in mass claims importantly needs a broader approach where a strategy is first clarified and tactics are then defined.

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¹¹²⁷ Meaning: *criticizing* is often an easy exercise, while *doing* remains in practice the most difficult challenge.

7.2. RESTRICTIVE SOLUTIONS: A NEED FOR NUANCED APPROACHES

Discarding judges (7.2.1), limiting the scope of application of mass proceedings (7.2.2) or relying on judicial panels (7.2.3) are possible remedies which nevertheless do not solve the previously-identified problems. They indeed require nuanced approaches. Their remedies will invite us to investigate possible alternatives.

7.2.1. Discarding Judges?

Discarding judges is a radical solution which, understandably, could arise in the minds of readers while noticing the vagaries of judges' attitudes and decision-making throughout preceding chapters. As highlighted in Chapter 2, the monitoring of mass claims requires the intervention of a third-party. One may argue that such tasks could alternatively be endorsed by regulators. Let consider briefly consider this argument (a), before highlighting the reasons why it ultimately fails to be a convincing and satisfactory solution (b). A compromise may rather lie in a shared intervention between judges and regulators (c).

a) Replacing Judges by Regulators

The limits of judicial intervention have conducted some Law & Economics scholars to urge for more regulation and for a replacement of judges by regulators. As SCHLEIFER writes, 'regulators rise when judges fail'.¹¹²⁸ Such arguments which principally focus on the failures of the judicial process and the inabilities of judges to correctly perform their roles are by no means recent.¹¹²⁹ They generally consider that regulators are experts who can more easily be provided with incentives to work harder¹¹³⁰; that in situations 'where the costs of verifying the circumstances of specific cases and interpreting statutes are high, judges may not be sufficiently motivated to enforce legal rules'¹¹³¹; that 'regulation would also be more common in situations where facts are complex and fact finding requires expertise and incentive';¹¹³² or that 'the rise of regulation might be intimately tied to a specialisation and the rise of large corporations

¹¹²⁸ A. SCHLEIFER (Ed.), *The Failure of Judges and the Rise of Regulators*, The Walras-Pareto Lectures, MIT Press, 2012 (see notably: chapter 1 - 'The Enforcement Theory of Regulation', at p. 21).

¹¹²⁹ J.M. LANDIS, *The Administrative Process*, Yale University Press, 1938, 160 p. (observing that the rise of administrative agencies can be explained 'from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods', at p.30).

¹¹³⁰ *Idem*, at p.178.

¹¹³¹ E.L. GLAESER and S. JOHNSON, 'Coase versus the Coasians', in: A. SCHLEIFER (Ed.), *The Failure of Judges and the Rise of Regulators*, The Walras-Pareto Lectures, MIT Press, 2012 pp.177-208 (at p.208).

¹¹³² A. SCHLEIFER (Ed.), *supra note 1128*, at p.19.

as organisational forms'.¹¹³³ At first sight, these situations seem to correspond to the mass litigation framework where judges must deal with extensive fact-finding issues, face well-structured corporations but may lack the incentives to work hard.

b) Limits

Despite such benefits, one may however object that regulators may fail too. They may lack transparency, be subject to capture and prone to biases. Substituting regulators to judges may therefore merely consist of passing the buck from one protagonist to another without providing suitable long-term solutions. Furthermore, discarding judges will importantly fail to adapt the judiciary to the new challenges of the 21st century. In the nineties, CAPPELLETTI already highlighted what can be described as an 'adapt or perish' dilemma. He wrote in this respect:

'Judges may adopt an attitude of a simple rejection and refuse to get involved in the area of class and group conflicts. By doing so and despite the fact that these have become crucial to modern societies, they will give up influence and control over these types of conflict. If this is the case and the judicial system sticks to its image of the 19th century, it will end up as a respected but outdated relict, stripped out of its importance. Since it won't be able to adapt to the demand of today's world that has radically transformed, it will remain more or less distanced from other „quasi-judicial“ institutions and procedures which will end up being instituted or gradually revisited in order to meet the new and urgent societal needs' .¹¹³⁴

Adapting to the challenges of mass litigation is therefore cornerstone for judges. As also stressed by HENSLER, "by confronting the realities of mass litigation and thinking creatively about how to balance efficiency and fairness in aggregate litigation, the judiciary can help maintain the relevance and legitimacy of courts in the twenty-first century."¹¹³⁵

¹¹³³ *Idem*, at p.20.

¹¹³⁴ M. CAPPELLETTI, *supra* note 3, at p.60 (in French: 's'il en est ainsi, l'ordre judiciaire, retranche dans l'image que l'on en a eu au dix-neuvième siècle finira par n'être plus qu'une survivance respectable mais dépourvue d'importance et dépassée, parce qu'elle se sera montre incapable de s'adapter aux exigences d'un monde qui a radicalement change. L'autre terme de l'alternative est que les juges de ces tribunaux eux-mêmes se révèlent capables de grandir, en s'élevant au niveau de ces nouvelles taches pressantes, et qu'ils sachent devenir ainsi eux-mêmes les protecteurs, en dehors des droits individuels traditionnels, des droits nouveaux de caractères diffus, collectif, fragmentes qui sont de grande importante et caractéristique dans une civilisation de masse', translation from the author, at p.60).

¹¹³⁵ D. HENSLER, *supra* note 8; see also: A. GARAPON, J. ALLARD and F. GROS, *supra* note 17 (highlighting that in advanced democracies, legitimacy is ultimately collectively viewed and assessed by the quality of the service provided).

c) Judges and Regulators as Complementary Actors

Between relying too much on judges and discarding judges, a compromise seems possible. Judges and regulators should not be perceived as substitutes but as complementary agents in charge of monitoring mass claims. Although it goes beyond the scope of this research to extensively discuss such a division of labour between judges and regulators, one may however notably pinpoint the review of mass settlement agreements as an issue where such cooperation appears particularly relevant. As an illustration, rule 19(b) of the 2006 Israeli class action Law provides that judges cannot clear a settlement agreement without a prior opinion from an external settlement examiner. As MAGEN and SEGAL have explained, the examiner must be ‘a disinterested person who possesses expertise in the field pertaining to the representative action in question (such as consumer rights, securities, environmental damages etc.)’.¹¹³⁶ In his report, the examiner will notably conduct a cost and benefits analysis of the proposed settlement and shares his conclusions with the court and parties. Similarly, the creation of an external ‘guardian’ in charge of taking care of the interests of group members and of assisting judges when reviewing settlement agreements has also been advocated in others countries, such as notably in Australia.¹¹³⁷ In fields such as competition law or financial markets, national authorities and agencies should therefore be required to review the terms and conditions of proposed settlements agreements before judicial approval. The trade-off therefore consists of higher system costs versus higher quality.

7.2.2. Limiting the Scope of Application of Mass Devices?

Limiting mass procedures to situations where claims are likely to be identical and easily quantifiable is an argument nowadays defended in some European countries. This tends to be justified in the light of previous developments of this research (a). Albeit appealing, this solution is however not a suitable long-term solution (b).

a) Restricting the use of Mass Proceedings to the Treatment of Identical Claimants

Chapter 3 highlighted that homogeneity within the claimant group is a prerequisite for the use of innovative case management techniques such as bellwethers trials, samples or models cases. It was

¹¹³⁶ A. MAGEN and P. SEGAL, *The Globalization of Class Actions – National Report Israel*, available on http://globalclassactions.stanford.edu/sites/default/files/documents/Israel_National_Report.pdf (accessed 28 Octobre 2013).

¹¹³⁷ M. LEGG, ‘Mass Settlements in Australia, in: C. HODGES and A. STADLER (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar, 2013, pp.172-203.

notably said that generalization and extrapolation techniques from test cases or representative claimants can only hold in cases where the claimant group is homogeneous enough. Chapter 5 further suggested that the group's entitativity can impact on the way perceivers will process information about group members. Higher-entitativity group notably trigger greater attention and confidence in the mind of decision-makers. A way to ensure a high level of homogeneity within the claimant group (and therefore a high perceived entitativity) is to contain the use of mass proceedings to situations where claimants are identical. Following a logic that is comparable to the one of factory's employees working on the assembly line and performing the same tasks with identical items, judges' decisions would be justified insofar as they can mechanically be repeated to identical plaintiffs sharing comparable and easily quantifiable harms. If substantial differences between plaintiffs exists regarding relevant factors (for instance concerning negligence, causation, damage et cetera), mass litigation would become less suitable because no true economies of scale could be achieved. In such situations, plaintiffs would be so unlike that in essence every case would have to be handled individually. As shown earlier, this was an argument spearheaded by French policymakers when deciding to limit group actions to the treatment of material damage resulting from consumer and competition law.¹¹³⁸

b) Limits

There is however here a discrepancy between theory and practice. Even though French policymakers have restricted the group action to specific fields and excluded compensation for immaterial damage, recent health-related scandals - such as the Mediator or the PIP breast implants- have considerably supported claims for a broader application of group actions. In addition, the line between consumer issues and, for instance, health matters may sometimes be blurry. One could for instance argue that individuals who bought defective breast implants can be viewed as consumers, and are thus entitled to claim compensation through the French group action. Moreover, and as the questionnaire and interviews with French judges have revealed, judges themselves tend to consider that once group devices have been implemented, it ultimately turns out to be highly difficult to limit its scope of application to specific areas.¹¹³⁹ Other national examples with mass litigation are also illustrative. In the United States, despite the early warnings of the 1966 US advisory Committee which initially claimed that class actions were not suitable to handle large-scale accidents, the proceeding has been progressively extended to other domains such as notably toxic torts. In the Netherlands, the WCAM was initially implemented to deal with personal injury matters in the DES case, but has also successively been used in the fields of securities, financial products or

¹¹³⁸ See Chapter 3.

¹¹³⁹ See Chapter 6.

insolvency.¹¹⁴⁰ Attempts to restrict the scope of mass proceeding appear to be doomed to failure, and therefore do not constitute a suitable long-term solution. They may only postpone problems to future stages and fail to fully prepare judges to their new duties. Moreover, even in situations where plaintiffs are likely to be heterogeneous, in as far as there *are* similarities between cases - for example regarding the question whether the defendant acted wrongfully against the victims - such issues could be dealt with in a collective procedure.¹¹⁴¹

7.2.3. Relying Strongly on Panels?

In several mass proceedings, judges sit *en banc*. For instance, WCAM judges sit *in panel* of three. French High Court of First Instance judges will also take a collective decision when issuing their declaratory ruling on liability. This however does not hold for all mass proceedings: English GLO judges for example preside over cases alone. A possible remark consists of arguing that judicial interested attitudes and biases will ultimately be mitigated by the simple fact that judges can discuss and exchange their viewpoints and doubts with their colleagues. The idea is consequently straightforward and indeed appealing: several judges may do it better (*a*). The effect of panels on judicial behaviour remains however ambiguous and it is far from certain that panels can alone contribute to fully alleviate the problems previously identified (*b*).

a) Several Judges May Do It Better

Panels can affect the way judges think and behave. In this respect, the judge-guru sitting *en banc* would be more prone to discussions, while the judge-follower facing the watchful eyes of his peers would be incentivized to be more active. Similarly, judicial biases may also be mitigated by the mere confrontation of point of views and the sharing of experience and knowledge.¹¹⁴² Following this logic, WCAM judges and French Group Action judges sitting in panels would thus be more protected against their own biases as compared to their English and American counterparts sitting alone.

To some extent these assertions tend to be supported in the economic and behavioural literature which

¹¹⁴⁰ Wet van 26 juni 2013, *Stb.* 2013, 255

¹¹⁴¹ L.T. VISSCHER and A.P. BIARD, *supra* note 134.

¹¹⁴² B.L. BARTELS, 'Top-Down and Bottom-Up Models of Judicial Reasoning', in: D. KLEIN and G. MITCHELL (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010 (observing: 'the possibility of having to justify one's decision to another person or group leads to more careful scrutinizing of the attributes and information specific to the context, and less of a reliance on the potentially biasing predisposition one brings to the case', at p.45).

indeed suggests that group membership can alter individual attitudes and decision-making.¹¹⁴³ Experimental games have for instance revealed that groups are more rational than single individuals, and that they can better perceive strategic relationships with other participants.¹¹⁴⁴ Other studies have highlighted that groups tend to perform better than the best individuals to complex intellectual problems,¹¹⁴⁵ and that groups ultimately appeared ‘less behavioural’ than single decision-makers, and thus more rarely prone to cognitive errors.¹¹⁴⁶ In other words, by referring to the architecture of the cognitive process described in Chapter 5, panels would enable decision-makers to switch more easily from their intuitive System 1 to their more neutral and rule-governed System 2. Research has also shown that groups lead individuals to take more risky decisions than they would have taken when acting alone. A field survey conducted with American district judges for instance revealed that judges sitting *en banc* used the panel as a shield: benefitting from the support of their colleagues, judges were more prone to take unpopular or controversial decisions.¹¹⁴⁷ Put simply, these insights suggest that panels can indeed be a tool to enhance judicial intervention in mass claims. The key issue is however whether this tool is *per se* a sufficient one.

b) Limits

A closer look reveals that the effects of group on decision-making and the capacity of groups to mitigate biases are in reality more ambiguous.¹¹⁴⁸ Such ambiguity also applies to judicial panels.¹¹⁴⁹ Judges’

¹¹⁴³ G. CHARNESS, L. RIGOTTI and A. RUSTICHINI, ‘Individual Behaviour and Group Membership’, (97) *The American Economic Review*, 2004, pp.1340-1352 (substantiating their claims with a series of experimental games)

¹¹⁴⁴ G. BORNSTEIN and I. YANIV, ‘Individual and Group Behaviour in the Ultimatum Game: Are Groups More ‘Rational’ Players?’, (1) *Experimental Economics*, 1998, pp.101-108.

¹¹⁴⁵ P.R. LAUGHLIN and H.R. CAREY, ‘Groups Perform Better Than The Best Individuals on Letters-to-Numbers Problems: Effects of Induced Strategies’, (15) *Group Processes & Intergroup Relations*, 2012, pp. 231-242; P.R. LAUGHLIN, E.C. HATCH, J.S. SILVER and L. BOH, ‘Groups Perform Better than the Best Individuals on Letters-to-Numbers Problems: Effects of Group Size’, (90) *Journal of Personality and Social Psychology*, 2006, n°4, pp.644-651

¹¹⁴⁶ G. CHARNESS and M. SUTTER, ‘Groups Make Better Self-Interested Decisions’, (26) *Journal of Economic Perspectives*, 2012, n°3, pp.157-176

¹¹⁴⁷ A. TAHA, ‘How Panels Affect Judges: Evidence From United States District Courts’, (39) *University of Richmond Law Review*, 2005, pp.1235-1278 (pointing out ‘the great political popularity of the [Federal Sentencing] Guidelines at the time and suggest that ‘some judges may perceive panels as providing political cover for unpopular decisions’, at p.1239).

¹¹⁴⁸ N.L. KERR, G.P. KRAMER and R.J. McCOUN, ‘Bias in Judgment: Comparing Individuals and Groups’, (103) *Psychological Review*, 1996, n.4, pp.687-719 (highlighting ‘there can be no simple answer to the question “which is more biased, individuals or groups”’, at p.715).

¹¹⁴⁹ F.S. TEN VELDEN and C.K.W. DE DREU, ‘Groups As Motivated Information Processors’, in: R.W.M. GIARD (Ed.), *Judicial Decision Making in Civil Law – Determinants, Dynamics and Delusions*, Eleven International Publishing, 2012, 118 p.

personal objectives and interests do not fully disappear when sitting *en banc*. The secret nature of panels may for instance allow low-effort judges to free ride on the work of their colleagues. Their concerns for reputation *vis-à-vis* their peers can push them to simply agree with the opinion of the most charismatic or powerful judges. Relatedly, deference *vis-à-vis* senior judges may refrain some of them from dissenting. An empirical study conducted by EISENBERG and his colleagues have notably shown that Israel Supreme Court judges' voting patterns tended to differ significantly when presiding or non presiding over cases, and found that judges were more likely to vote in their preferred direction when presiding the case than when acting as a mere panel members.¹¹⁵⁰ As other commentators have finally observed, 'the group decision may actually reflect the judgment of the most powerful group member rather than the integration of all group members' judgments'.¹¹⁵¹ Therefore, it appears far from certain that the incentives of a charismatic judge willing to endorse the role of judge-guru (or alternatively the one of a judge-follower) will ultimately be tamed by panels. Based on psychological literature, it is likely that the entire panel will ultimately endorse the same attitude. Panel is therefore a starting point to mitigate the problems identified in this research, but it is not *per se* a sufficient one.

7.2.4. Preliminary Conclusion

This section has pointed out the limits of the commonplace arguments that are often set forth to mitigate the vagaries of judicial decision-making and attitudes. Discarding judges is a radical solution that fails to adapt the judiciary to new challenges in ever-growing mass consumption and mass production societies. Restricting the scope of application of mass proceedings also fails to actively embrace the challenges that judges will sooner or later encounter. Panels in turn cannot alone be a panacea.

In turn, this section has also shown that regulators can assist judges in the monitoring of mass claims and that panels are potential tools for mitigating judicial errors. Arguably, requiring the assistance of regulators and the intervention of several judges for the monitoring of mass claims is costly: it decreases flexibility in case management and increase delays. However, the likelihood of cognitive errors and interested attitudes may also be reduced. Furthermore, and specifically in Civil Law countries where, as said previously, judges may not be used to take decisions impacting on large pool of individuals,¹¹⁵² these

¹¹⁵⁰ T. EISENBERG, T. FISHER and I. ROSEN-ZVI, 'Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court', (19) *Psychology, Public Policy and Law*, 2013, n°3, p.282-296.

¹¹⁵¹ F.S. TEN VELDEN and C.K.W. DE DREU, *supra* note 1149, at p.82.

¹¹⁵² M. CAPPELLETTI, *supra* note 3, at p.676.

measures may be used as shields, since they avoid a clear identifiability of a single judge. Other remedies have now to be investigated.

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7.3. FORWARD-LOOKING SOLUTIONS: CLARIFYING A STRATEGY AND DEFINING TACTICS

Although often used indistinctly, differences do exist between the terms *strategy* and *tactic*. The first refers to the *goals* that policymakers seek to achieve. It appears essential that policymakers provide judges with a clear prioritization and hierarchy of objectives that mass litigation is aimed at achieving (7.3.1). As indeed SENECA pointed out, ‘if one does not know to which port one is sailing, no wind is favorable’.¹¹⁵³ Indeed, it cannot be expected from the captain of a vessel to navigate safely and promptly toward his final destination without clear maps and sufficient resources. Hence, enhanced consideration must be given to the tactics, *i.e.* the means which are necessary to achieve those goals. Among possible tactics, particular attention will be given to the need for preparing (7.3.2) and guiding (7.3.3) courts in the administration of mass claims. A discussion on possible solutions for debiasing judges will follow (7.3.4). Finally, the need for judicial specialization in mass claims will be discussed (7.3.5).

7.3.1. Clarifying a Strategy: Prioritizing the Goals of Mass Litigation

a) The Actual Absence of a Clear Prioritization of Objectives

As shown in the early developments of this research, mass proceedings can be considered as management tools in judicial hands enabling judges to reach economies of scale; as compensation-enhancing mechanisms facilitating access to justice; and as dissuasive mechanisms discouraging misbehaviour. Very often, those goals are addressed indistinctly. As an illustration, consider Article 1 of the 2006 Israeli Class Action Law which provides that:

¹¹⁵³ SENECA, *Lettres à Lucilius*, VIII, p.71.

‘The goal of this law is to set uniform rules in the matter of the submitting and managing class actions, in order to improve the defence of privileges, and in doing so particularly promote these: actualizing the privileges of access to the court house, including the types of the population that find it difficult addressing the court as individuals; enforcing the law and deterring its breaking; giving proper assistance to those harmed by the violation of the law; efficient, fair and exhaustive management of suits’.¹¹⁵⁴

Noteworthy, goals are here listed in a single and unique sentence. This article is a piecemeal of objectives which fails to provide a clear hierarchy. A report commissioned by DG SANCO of the European Commission on the Evaluation of the Effectiveness and Efficiency of Existing collective Redress Proceedings in Europe also pointed out the absence of clear goals and argued that some mass devices have appeared to be more ‘case-management tools rather than collective redress mechanisms’.¹¹⁵⁵ In Australia for instance, MULHERON has observed that the objective of behavioural modifications has not ultimately be ‘viewed as a valid objective in Australian class action jurisprudence’.¹¹⁵⁶ A similar view was until recently also retained in several European countries where scholars traditionally regarded the deterrent function of private law as being of limited significance, deterrence remaining mostly a matter of criminal law.¹¹⁵⁷ Debates taking place within the EU Commission between different Directorates General are also illustrative of a lack of consensus about the goals of mass litigation.¹¹⁵⁸ On the one hand, the Directorate General for Competition (DG COMP), followed by a vast majority of European competition authorities, strongly emphasises the deterrent function of mass proceedings.¹¹⁵⁹ On the other hand, other Directorates General (such as DG SANCO or DG JUSTICE) mostly focus on compensation and access to justice.¹¹⁶⁰

¹¹⁵⁴ Cited in: M. KARAYANNI, Israeli Report on Class action (also cited by D.CORAPI, ‘Class Actions and Collective Actions’, in: D.FAIRGRIEVE and E.LEIN (Eds.), *Extraterritoriality and Collective Redresses*, Oxford University Press, pp.3-14, at p.4).

¹¹⁵⁵ Civic Consulting and Oxford Economics, ‘Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union - Final Report’, 26 August 2008.

¹¹⁵⁶ R. MULHERON, *supra note 326*, at p.66.

¹¹⁵⁷ C.HODGES, ‘Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress’, in: W.V.Boom and J.Steel (Eds.), *Mass Justice – Challenges of Representation and Distribution*, 2011, Edward Elgar Publishing, p.101-117 (observing: ‘there has been limited debate in Europe on whether public norms and behaviour control should be pursued as a primary mechanism through the mechanisms of private law, until the recent and on-going debate on enhancement of competition damages’).

¹¹⁵⁸ C. PRIETO, ‘Recours collectifs: une quete d’harmonisation...au sein de la Commission europeenne’, *Revue Trimestrielle de Droit Européen*, 2011, p.1.

¹¹⁵⁹ See for instance in France: Conseil de la concurrence (devenue Autorité de la concurrence), Avis relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles, 21 September 2006 (available on: www.autoritedelaconcurrence.fr/user/standard.php?id_rub=184&id_article=613, accessed 27 February 2012).

¹¹⁶⁰ From November 2014, the Directorate of consumers affairs of DG SANCO will become part of DG JUST.

b) Why Does a Prioritization of Goals Matter for Judges?

Prioritizing goals can help and guide judges when monitoring mass claims. To substantiate this argument, consider the judicial control over the shape and the size of the claimant group. Chapter 3 highlighted some of the key dilemmas that judges face in such circumstances: while retaining broad criteria to be met to be included into the group, judges can facilitate deterrence by maximizing the group's size. Yet, as previously shown, doing so may also impair claimants' interests.¹¹⁶¹ Furthermore, increasing the size of the group is likely to increase the complexity of judicial management since judges will have to identify several subgroups to take into consideration claimants' different interests and status. Alternatively, those judges who perceive mass proceedings as mainly management tools may be more inclined to deny certification or to fix stricter criteria in order to ensure high homogeneity within the group, and thus easier case management. Judges who want to decrease their workload or to facilitate judicial economies may be prone to reject group lawsuits. As an observer pertinently suggested regarding the American context, 'a decision based on overall judicial economy may place the court's interests in decreasing litigation above the rights of plaintiffs to have their day in court'.¹¹⁶² As a consequence, he adds, 'while prohibiting a class action may preserve the court's goal of judicial economy; it might not ultimately enhance the goals for justice'.¹¹⁶³ In other words, some judges may prioritize deterrence while others may rather focus on case management or access to justice. As shown in Chapter 4, heterogeneity in judicial attitudes *vis-à-vis* mass devices may exist.

Elected policymakers should thus prioritize objectives as a way to reduce judicial discretion in this domain. Prioritizing the goals is essential to guide judicial behaviour and its absence creates an area of uncertainty for judges and parties. It may not be the role of judges to decide whether mass devices should primarily be compensation-enhancing mechanisms, case management devices or deterrent tools. These political trade-offs have to be decided by policymakers. Extensive discussions have taken place about the procedural design of mass proceedings, but a consensus is still lacking on the goals to be achieved at both the European and Member-States levels.¹¹⁶⁴ As stressed along these lines, within a same country, different

¹¹⁶¹ B. ALLEMEERSCH, *supra* note 528 (highlighting: 'the larger the class and the more dispersed it is, the higher the chances that interests of minority groups will not be sufficiently preserved').

¹¹⁶² M.C. HAHN, 'Smokers' Chances of a Fair Fight against the Tobacco Companies Go Up In Flames: A Study of Philip Morris Inc. V. Angeletti and its Effects on the Viability of Class Actions Lawsuits in Maryland Tobacco Litigation', (31) *University of Baltimore Law Review*, 2001, p.103

¹¹⁶³ *Idem*

¹¹⁶⁴ C. PRIETO, *supra* note 1158; Y. HESS, 'Proposed Collective Redress in Europe in the Perspective of Deterrence of Corporate Wrongdoing', (10) *European Company Law*, 2013, n°3, pp.123-128 (highlighting: 'before collective redress is introduced into the European legal system, it is important to establish the goals one wants this

actors (regulatory bodies, judges, associations, companies) may still consider the proceeding from different perspectives. Without clear hierarchy of goals, uncertainty on the scope of the adequate monitoring behaviour will subsist. One may therefore be doubtful and sceptical *vis-à-vis* tools maintaining such uncertainty which ultimately allow policy-makers to simply pass the buck to judges. An illustration is for instance the English Draft for Court Rules on Collective Proceeding which leaves to judges the decision to prefer the opt-in or the opt-out systems according to the needs of the mass claim at stake. While favouring the opt-in approach, the 2013 recommendations of the EU Commission also maintains a possibility to refer to the opt-out system whenever the court deems it necessary, or when it is justified by 'a sound administration of justice'.¹¹⁶⁵ As previously discussed, selecting the opt-in or the opt-out system is principally a political trade-off which consists of determining which interests- between the one of claimants and the one of companies – will *by default* be protected. Furthermore, opt-in and opt-out schemes have great implications, notably in terms of deterrence and access to justice. Such decisions should thus prior be agreed by policymakers, and not left to judges.

7.3.2. Defining Tactics (i): Preparing Courts to the Monitoring of Mass Claims

Once a strategy has been clarified, it is possible to propose tactics to achieve those goals. In this view, preparing courts to the monitoring of mass claims demands an adaptation of Civil Law jurisdictions (a). This also requires enhanced consideration for courts' resources (b), and a faster evolution towards digitalized and connected courts (c).

a) Adapting Civil Law Jurisdictions to the Administration of Mass Claims

Policymakers should keep in mind that mass devices represent an important evolution for judicial practices, and, like all institutions, judiciaries may remain 'a step behind the tasks that they must

legal instrument to serve. Does Europe really want collective redress only as a means of providing compensation to the victims of the wrongdoing in some specific cases? Or is Europe interested in this instrument as a valuable means of deterring the misconduct and unlawful and unfair business practices? Without goal preference, it is impossible to adequately determine the optimal policy preferences and features that the European model of collective redress should possess').

¹¹⁶⁵ Communication (EC), 'Towards a European Horizontal Framework for Collective Redress', COM (2013) 401 Final, 11 June 2013 (pointing out: 'under the European horizontal framework on collective redress the claimant party should be formed on the basis of the 'opt-in' method and that any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice').

perform'.¹¹⁶⁶ This observation is particularly relevant when applied to Civil Law judges, since mass litigation renews judicial roles in the traditional civil justice scheme. As earlier highlighted, Civil Law judges may indeed be less inclined than their Common Law counterparts to take decisions impacting large pools of individuals. The initial reaction of the Dutch judiciary regarding the implementation of the WCAM in 2006 is here illustrative. As an observer recalls, judges' reactions were at that time contrasted and often 'resistant' as many initially considered that dealing with large-scale damage involving many claimants was a task falling primarily on the legislature.¹¹⁶⁷ In the same vein, a French judge claimed in the questionnaire that, in his view, the current status of French judges prohibits them to endorse any judicial or political responsibilities to a greater extent.¹¹⁶⁸ Suspicions *vis-à-vis* judges going beyond the scope of their mandates and exceeding their powers (the so-called fears of a *gouvernement des juges*) are still pregnant in countries such as France or Poland where perceptions about the judiciary may still be contrasted.¹¹⁶⁹ In countries where mass proceedings have been recently implemented, increased consideration must therefore be given to the respective roles of the different stakeholders involved into the proceeding.¹¹⁷⁰

b) Enhanced Considerations for Courts' Resources

For decades, the lack of resources has been denounced by judges and policymakers as a key factor negatively impacting on the work of the judiciary.¹¹⁷¹ A recent survey conducted in March 2014 also showed that insufficient resources could partly explain the actual negative perceptions shared by a majority of French citizens about the judiciary and its functioning.¹¹⁷² The new responsibilities and duties

¹¹⁶⁶ D.L. HOROWITZ, *The Courts and Social Policy*, The Brookings Institution, 1977, 309 p.(stressing that this situation is 'very much the situation of courts. Their policymaking functions have gradually been superimposed on a structure that evolved primarily to decide individual cases', at p.23).

¹¹⁶⁷ I. TZANKOVA, *supra note 60*.

¹¹⁶⁸ See Chapter 6.

¹¹⁶⁹ As pointed out in Chapter 3, in Poland, suspicion is associated with the communist period and the links that at time existed between the Judiciary and the Executive. In France, suspicion is enrooted in French history since the 1789 Revolution. It often revivifies in discussions about examining judges intervening in criminal cases (*juge d'instruction*). See on this point: J.D. BREDIN, 'Un gouvernement des Juges', (68) *Pouvoirs*, 1994.

¹¹⁷⁰ S. AMRANI-MEKKI, *supra note 1068*, see also: S. BRUNENGO-BASSO, *L'émergence de l'action de groupe : processus de fertilisation croisée*, Presse Universitaire d'Aix-Marseille, 2011, 343 p. (observing: 'l'inadaptation de la réflexion actuelle des pouvoirs publics sur l'introduction en droit français de l'action de groupe', at p.291).

¹¹⁷¹ See for instance : H. HAENEL and J. ARTUIS., *Justice sinistrée – Démocratie en danger*, Economica, 1991 ; C. JOLIBOIS and P. FAUCHON, *Quels Moyens pour quelle Justice ?*, Mission d'information de la Commission des Lois chargée d'évaluer les moyens de la justice, rapport n°49, 1996/1997 (available on www.senat.fr, accessed 17 December 2013).

¹¹⁷² Institut CSA pour l'Institut de la Justice, 'Les français et le fonctionnement de la justice', February 2013.

assigned to judges for the administration of mass claims importantly would thus call for an increase in judicial resources. This notably implies an increase in court's logistics (regarding court's personnel and assistants) in order to facilitate the receiving of objections from claimants, the preparation of hearings or the maintenance of updated group's registers. Dividing tasks is essential to avoid overburdening judges with the administrative aspects of mass claims. Arguably, one may object that increasing court's resources is a costly measure for society. Such costs may however be lower than the costs of errors which would have dramatic consequences due to the financial interests at stake, the number of individuals involved, and the costs of individual successive litigation.

c) A Faster Evolution toward Digitalized and Connected Courts?

Since the 2000s, extensive consideration has been given in Europe to the rise of internet and information technologies applied to case management and judicial administration. Dematerialization of procedures are said to make justice more accessible to more people and at lower costs. The benefits associated with this *e-justice* remain nowadays controversial and highly debated among legal scholars. Even though it goes beyond the scope of this research to extensively discuss the pros and cons of the use of ICTs within courtrooms, this issue is however worth briefly addressing since ICTs may become cornerstone tools for both judges and parties involved in mass disputes.

First, ICT tools facilitate a better circulation of information *between courts and claimants*. As an illustration, a system of video conferencing has been implemented in several French cities which enables individuals living far from the tribunals to receive information about their procedure and to request the communication of additional documents.¹¹⁷³ Similar tools can be of interest for the administration of mass claims which may concern plaintiffs located in several cities. As a manner to centralize the dispute, mechanisms, such as for instance videoconferences, can become tools facilitating contacts and enabling claimants to present objections during hearings.

Second, ICT tools facilitate information and knowledge-sharing *between courts*. An intrinsic characteristic of large-scale damage – for instance caused by defective products or corporate misbehaviour - is that they often occur in several jurisdictions, sometimes at a same period of time, sometimes with time lags. Interestingly, dialogues between judges who deal, or have dealt, with mass claims have progressively multiplied. This may first concern dialogues between judges within a same country. As an illustration, Judge HAPPAS, when appointed as new mass-tort judge in charge of a pharmaceutical litigation,

¹¹⁷³ P. CHEVALIER, 'Expérience de télé-procédure dans les juridictions françaises', *Droit et Patrimoine*, 2002, n°103

highlighted that she first ‘sought out advice from judges handling similar matters in federal and state courts’.¹¹⁷⁴ Judicial dialogues may also concern judges from different countries. For example, Dutch judges involved in the *Converium* WCAM extensively took into consideration the reasoning of American judges who dealt with the *Converium* class action lawsuits. Therefore, a comparable sharing of information could interestingly be implemented and institutionalized at the EU level via an internet platform where judges could be provided with information such as the scope of a mass damage in other countries, the number of people involved in the dispute, the number of objections received, the number of people who opt-in/opt-out, *et cetera*. Importantly, information exchanged should be subject to confidentiality in order to notably ensure that the reputation of companies is not unfairly harmed. Such initiative would also be in line with other current initiatives conducted at the EU level in other fields which nowadays aim at disseminating and coordinating information between public authorities.¹¹⁷⁵ One more time, efficient resolution of mass disputes requires cooperation *within* and *between* jurisdictions.

7.3.3. Defining Tactics (ii): Guiding Court throughout the Administration of Mass claims

The scope of judicial intervention should be clarified with guidelines aimed at listing the different issues requiring enhanced supervision and vigilance. This is the path that has been followed by the United States for decades, and this approach is also of relevance for Civil Law judges (*a*). Since this research mainly focused on Law and Economics and behavioural perspectives, insights from these disciplines should be incorporated into such guidelines as a possible solution for debiasing judges (*b*).

a) The US Experience with Guidelines in Mass Litigation and Its Relevance for Civil Law Judges

In the 1960’s the US Federal Judicial Centre started to elaborate a manual perceived as ‘a great reservoir of experience in the conduct of protracted litigation accumulated over the years and lying dormant within the legal profession’. Even though the first edition of the manual – entitled *Manual for Complex and Multi-District Litigation* –initially briefly tackled the issue of mass litigation, its importance increased and

¹¹⁷⁴ C. TOUTANT, ‘Happas, Newest Mass-Tort Judge, Is Assigned Pharmaceutical Litigation’, *New Jersey Law Journal*, 21 September 2007 (Justice J.HAPPAS appointed as mass-tort judge to deal with pharmaceutical litigation who said that to get up to speed on mass torts, she ‘[had] not only pored over the voluminous case records but also sought out advice from judges handling similar matters in federal and state courts’).

¹¹⁷⁵ See notably: Regulation (EC) n.2006/2004 of the European Parliament and of the Council on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Law (the Regulation on Consumer Protection Regulation), 27 October 2004.

became significant in the 3rd and successive editions released from 1995.¹¹⁷⁶ In parallel, a *pocket guide for judges* collecting best practices was also published.¹¹⁷⁷ The objective was to clarify the roles of the different stakeholders intervening in complex cases.

Progressively, an interrogation arose regarding the binding authority that had to be associated with such guidelines.¹¹⁷⁸ As a prominent American author highlighted, some American lawyers and judges referred to the Manual ‘like a treatise’,¹¹⁷⁹ a sort of oracle likely to provide solutions to all kind of problems. Yet, as the authors of the fourth edition clarified, ‘practices and principles that served in the past may not be adequate, their adaptation may be difficult and controversial, and novel and innovative ways may to be found’.¹¹⁸⁰ Put differently, criticisms principally feared a ‘freezing’ of case management techniques at a certain period of time, which would turn out to be of no further use for the handling of future cases. A second danger was that judges without experience might be tempted to strictly follow the rules catalogued in the guidelines because of their ‘moral authority’.¹¹⁸¹ As SCHELLING indeed observed on a broader scale, ‘one of the reasons for having a book of rules about when to run the risk and when not to (...) is to relieve the man who gives the order, the man in the control tower, of personal guilt for the instruction he gives’.¹¹⁸²

Guidelines may be well-suited to facilitate the work of Civil Law judges. The roles of guidelines can here be twofold. First, they give to Civil Law judges who are often portrayed as being more legalists than their Common Law counterparts a textual basis upon which they can ground their decisions. They also provide them with visibility on tasks that differ from their traditional adjudicative attributes. Results from the survey conducted with French judges also showed judges’ interest for this tool. Furthermore, guidelines will be useful when clarifying judicial intervention *vis-à-vis* society: they may notably provide judges with enhanced legitimacy and are likely to decrease criticisms about judges exceeding the scope of their powers. In other words, guidelines have an important pedagogic role *vis-à-vis* society as a whole: they can better legitimize the active judging required for the monitoring of mass disputes.

¹¹⁷⁶ T.E. WILLGING, *supra* note 801.

¹¹⁷⁷ B.J. ROTHSTEIN and T.E. WILLGING, *supra* note 164.

¹¹⁷⁸ T.E. WILLGING, *supra* note 801.

¹¹⁷⁹ *Idem*.

¹¹⁸⁰ Manual for Complex Litigation, 4th Ed, at p.3.

¹¹⁸¹ T.E. WILLGING, *supra* note 801, at p.2225.

¹¹⁸² T. SCHELLING, *supra* note 878, at p.130.

b) Incorporating Law & Economics and Behavioural Insights into the Guidelines

Guidelines may also help decrease heterogeneity in judicial attitudes. As however below explained, guidelines are not *per se* sufficient and should be accompanied with judicial specialization. Guidelines and judicial specialisation are the two sides of the same coin: well-trained and specialised judges may better know how correctly handling the guidelines. Arguably, one may however say that guidelines can only result from experience, and since mass proceedings are still relatively new in Europe, critics may argue that it is nowadays too early to implement guidelines. This argument can however be contested: as stressed throughout this research, judicial intervention in mass claims tends to converge regardless of the idiosyncrasies of national mass devices. Experiences drawn from other jurisdictions may therefore be used as a preliminary substance for establishing guidelines, and, arguably, the European Commission could provide a first working draft of Best Practices and/or recommendations addressed to judges for the treatment and resolution of mass claims. As discussed below, guidelines should also include solutions for correcting judges' behavioural biases.

7.3.4. Defining Tactics (iii): Debiasing Judges?

As discussed in Chapter 5, individuals may behave as boundedly rational decision-makers. The behavioural literature has however progressively set forth methods for correcting individuals' biases and errors (*a*). These insights can be used to suggest possible remedies for debiasing the outlier effect (*b*), the vividness heuristics and the identifiable victim effects (*c*), as well for preventing against heuristics entrepreneurs (*d*).

a) Preliminary Remarks -Mitigating Behavioural Biases: Remedies and Controversies

The behavioural literature notably identifies two solutions for correcting individuals' biases. The first one consists of insulating legal outcomes from the influence of decision-makers' biases. In simple terms, this approach aims at restricting the scope of individual decision. The second is known as 'debiasing through law' and refers to the framing of legal policies in a way that does not insulate individuals, but rather that '[operates] directly on the boundedly rational behaviour and [attempts] to help people either to reduce or to eliminate it'.¹¹⁸³ This approach, SUNSTEIN and JOLLS argue, is 'less intrusive, more direct and [is a]

¹¹⁸³C. JOLLS, C.R. SUNSTEIN and R. THALER, *supra* note 791, at p.200.

more democratic response to the problem of bounded rationality'.¹¹⁸⁴ In contrast to the insulation technique, debiasing through law does not exclude individual's choices but leads people to take their decision in a more rational way by, for instance, providing them with enhanced information through warnings and disclosure. These behavioural remedies have often been portrayed as 'paternalistic' in the sense that they modify choice infrastructure by 'nudging' individuals towards decisions that better match their interests.¹¹⁸⁵

This literature has however been the target of numerous criticisms. First, remedies aimed at correcting behavioural biases have been contested for constraining individual's autonomy and freedom of choice. Second, governments or agencies who decide to act paternalistically to protect their agents should not themselves fall prey to behavioural biases. Third and as stressed in Chapter 5, mapping the human brain and its cognitive errors is nowadays still an ongoing process. Attempts to correct behavioural biases should thus be built on a clear and well-established body of evidence. Yet, as Chapter 5 and 6 have shown behavioural evidence on – for instance - the impact associated with the number of claimants on decision-making still remains inconclusive. Additional work should therefore be conducted in this area. As an attempt to however pave the way in that direction, solutions to mitigate some of the behavioural biases which judges may be subject to in mass litigation are investigated.

b) Example n°1: Debiasing the Outlier Effect

Chapter 5 pointed out the likelihood of outlier effects in mass litigation where stronger and identified individuals tend to influence the perception of the claimant group as a whole. Based on this argument, one may question the relevance of group procedures in which claimant(s) with the largest financial interest in the lawsuit are ultimately appointed as lead plaintiff(s).¹¹⁸⁶ In such situations, judges may indeed be particularly prone to the outlier effect. A possible remedy to the outlier effect is to disclose information.

¹¹⁸⁴ *Idem*, at p.201

¹¹⁸⁵ SUNSTEIN encapsulates the rationale of such paternalistic approaches by highlighting that 'their unifying theme (...), however diverse, is that government does not believe that people's choice will promote their welfare and it is taking steps to influence or alter people's choices for their own good' In acting paternalistically, government may be attempting (1) to affect outcomes without affecting people's actions or beliefs, (2) to affect people's actions without influencing their beliefs, (3) to affect people's beliefs in order to influence their actions, or (4) to affect people's preferences, independently of affecting their beliefs, in order to influence their actions., at p.22)

¹¹⁸⁶ This is for example the case in US securities class actions lawsuits where the Court shall 'adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that— has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i); *in the determination of the court, has the largest financial interest in the relief sought by the class*; and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure (15 U.S. Code § 78u-4 - Private securities litigation, emphasis added).

This was the solution proposed by the Special Master appointed in the asbestos-related *Cimino* class action. ‘The Court’, he reported, ‘can take care of the possibility of prejudice *by instructing* the jury (...) that it must not judge all cases in the class as the most or least serious of the class representatives and perhaps *by pointing out to the Jury* the relatively small percentage of mesothelioma plaintiff [i.e. plaintiffs with the most severe injury] in the class as a whole’.¹¹⁸⁷ Information provision reminding judges about the rest of the group may consequently help mitigating the outlier effect.

c) Example n°2: Debiaising the Vividness Heuristic and the Identifiable Victim Effect

Chapter 5 also highlighted the existence of vividness heuristics which lead decision-maker to be sensitive to vivid and image-provoking information and to neglect pallid data summary or statistical information. Relatedly, individuals tend to be more sensitive to the personalized situation of a single victim as compared to a group of similar plaintiffs viewed *en masse*. Interestingly, Chapter 3 has however shown that cost efficiency considerations have supported the use of statistical evidence in mass litigation. In a similar logic, FORD points out that ‘a focus on collective justice requires us to resist the natural impulse to prefer dramatic narratives to hard evidence and to respond to identifiable victims with a face than to systemic social problems’.¹¹⁸⁸ The key issue is therefore to ensure that judges handling statistical data and information about the group will not overlook the interests of absent claimants. A possible solution is here again to educate judges about their possible biases. This idea was tested by SLOVIC, LOEWENSTEIN and SMALL through an experiment conducted with lay persons that aimed at clarifying the reactions and decisions of participants who had previously been informed about the identifiable victim effect and its consequences.¹¹⁸⁹ Interestingly, the authors found that informed decision-makers gave less to identified victims, while not giving more to statistical victims. They ultimately observed that ‘people discount sympathy towards identifiable victims but fail to generate sympathy toward statistical victims’. Debiasing the identifiable victim effect through disclosure of information might therefore not be a sufficient solution. As discussed in the preliminary remarks, solutions to cope with the identifiable victim effect appear to be a field where more empirical research is needed before drawing policy recommendations.

¹¹⁸⁷ J.RATLIFF, *supra* note 991 (*emphasis added*).

¹¹⁸⁸ R.T. FORD, ‘Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes’, (32) *Berkeley Journal of Employment & Labour Law*, 2011, pp.513-529.

¹¹⁸⁹ D.A. SMALL, G. LOEWENSTEIN, P. SLOVIC, ‘Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims’, (102) *Organizational Behaviour and Human Decision Processes*, 2007, pp.143-153.

d) Example n°3: Warning against Heuristics Entrepreneurs

Finally, Chapter 5 suggested that judges' behavioural biases can be manipulated by parties willing to pursue their own agenda. Claimants' associations may for instance amplify the existence of outliers in the claimant group. Based on the results of the experiment presented in Chapter 6, they may also be tempted to overstate the presence of numerous claimants to obtain more damages. There are two possible filters against possible manipulations from heuristics entrepreneurs. The first one is the role played by the opposite party (defendant). A defendant will for instance put lots of effort and energy to prove the insufficient representativeness of samples or test cases, or to highlight the effects associated with outliers. In simple terms, the opposite party will act as a counter-voice and points out the possible manipulations from heuristics entrepreneurs. The second filter must be judges themselves. In this view, it appears necessary to teach judges - through special training, guidelines and as discussed below specialization - so as to maintain them vigilant against such biases.

7.3.5. Defining Tactics (iv): Specialising Judges?

A final remedy can consist of promoting judicial specialisation for the treatment of mass disputes (*a*). Questions however remain regarding the forms of such specialisation (*b*).

a) Benefits and Limits of Judicial Specialisation

➤ *Benefits*

Literature has highlighted that specialisation leads judges to act as repeated players. As a consequence, they can develop a particular expertise which increases their skills, efficiency and performance when dealing with complex cases.¹¹⁹⁰ During the past decades, ever-increasing technical sophistication of the law has indeed encouraged an ever-specialization of courts.¹¹⁹¹

¹¹⁹⁰ C. GUTHRIE J.J RACHLINSKI, and A. WISTRICH, 'Inside the Judicial Mind', (86) *Cornell Law Review*, 2000, p.777 (observing 'greater experience, training and specialization should enable judges to make better decisions', at p.84); E.HANSFORD, 'Measuring the Effects of Specialization With Circuit Split Resolutions', (63) *Stanford Law Review*, 2011, pp.1145-1176 (finding evidence that enhanced specialization increased court's performance).

¹¹⁹¹ M. MALAURIE-VIGNAL, 'L'hyper-technicité et la proximité du droit », *Contrats Concurrence Consommation*, 2006, repère n°1 (observing : une 'hyper-spécialisation des juridictions en tant que réponse à une 'hyper-technicité du droit'). As an illustration, in 2005 the number of French tribunals in charge of competition matters, intellectual property and bankruptcy law was restricted (see : décret n° 2005-1756 du 30 décembre 2005 fixant la liste et le ressort des juridictions spécialisées en matière de concurrence, de propriété industrielle et de difficultés des entreprises).

In a similar logic, some European countries have given exclusive jurisdiction to a restricted number of courts for the treatment of mass claims. The example of the Amsterdam Court of Appeal which has exclusive jurisdiction to deal with collective settlements is illustrative.¹¹⁹² In France, exclusive jurisdiction for the treatment of group actions was explicitly mentioned in the 2010 report, but has finally been abandoned in the latest version of the 2014 bill on Consumer Law. This being said, there is however an important exception to this rule which regards situations where defendants are located outside France. In such circumstances, the Paris High Court of First Instance will have exclusive jurisdiction to deal with the group action.¹¹⁹³ This decision has first and been foremost motivated by a desire to centralize the dispute in situations where defendants are located outside France, but does not seem to have *per se* been adopted to encourage a judicial specialization. Finally, in England, judges handling GLOs are few and have over time developed their own *savoir-faire*.

From a Law & Economics perspective, judicial specialization can be viewed as a possible technique to modify judicial incentives. As extensively explained in Chapter 4, unlike usual workers, behaviour of insulated judges cannot be influenced through the use of sticks and carrots. This insulation is beneficial for society: it minimizes risks of corruption and preserves judges' independence. Preceding developments have however pointed out that judges also respond to incentives that are mostly non-pecuniary, such as prestige, reputation, career concerns or taste for public service. Interestingly, BAUM observes that 'more subtly, judges' awareness of their importance in a field can shape their perceptions of their role and ultimately their choices'. The author further stresses that 'judges may find it satisfying to specialise [,] might enjoy judging in a high-prestige field such as corporate law or tax law', or that they can 'gain acclaim by serving in a court that people perceive as innovative'.¹¹⁹⁴ Specialised courts may give judges greater visibility and public exposure *vis-à-vis* society and the legal profession. Attracting public attention and seeking prestige are arguments that judges-guru may seek to maximize when monitoring mass claims.

¹¹⁹² W.H VAN BOOM., *supra* note 120.

¹¹⁹³ New article R.423-2 Consumer Code.

¹¹⁹⁴ L. BAUM, *supra* note 1114, at p.8 and p.54.

➤ *Limits*

The benefits of specialisation on judicial outputs are however neither straightforward nor automatic. They tend to remain highly contingent on the conditions under which specialised courts operate.¹¹⁹⁵ Moreover, evidence on the benefits of judicial specialization is nowadays still scarce and inconclusive.¹¹⁹⁶ Specialisation may for instance fail to eradicate judicial biases. RACHLINSKI, GUTHRIE and WISTRICH found for instance evidence that specialised judges tend to make the same cognitive errors as generalist judges with regards notably to the anchoring or framing effects.¹¹⁹⁷

Furthermore, even though judicial specialization has drastically increased during last decades, judges often still remain hostile to specialization. As evidenced in the questionnaire conducted with French judges, a majority of respondents did not consider specialised courts as a suitable solution for the monitoring of mass disputes. In other jurisdictions, similar judicial reluctance toward specialisation is also palpable. As a US Federal judge has explained, ‘I like the fact that federal judges are generalists. I often say that judges may be the last generalist in professional life, and I have resisted mightily any suggestion that the federal courts become specialised in any particular area’.¹¹⁹⁸ In spite of this argument, there is already a great deal of specialisation within judiciaries and, as explained below, judges may importantly benefit from the creation of a specialised court for enhancing their reputation and prestige in the legal profession.

b) Forms of Judicial Specialization: an Open Question for the Future

Doubts remain *vis-à-vis* the forms of court specialization in mass litigation. Should policymakers establish ‘disaster courts’ with specific rules, support personnel and expert judges specifically trained to deal with mass litigation?¹¹⁹⁹ It is however rather doubtful that the number of claimants can *per se* constitute a sufficient criterion for judicial specialisation. An alternative is to reserve the treatment of mass litigation

¹¹⁹⁵ L. BAUM, ‘Judicial Specialization and the Adjudication of Immigration Cases’, (59) *Duke Law Journal*, 2010, pp.1501-1561 (observing : ‘the actual effects of giving jurisdictions over a field to a specialised court will depend on variables such as the mechanisms for selection of judges, the technicality of their work, the substantive and procedural legal rules that govern the court, and the configuration of interest groups in the field’. She adds that ‘as a result, the relationship between specialization and the outputs that courts produce is highly complex’, at p.1542).

¹¹⁹⁶ L. BAUM, ‘Probing the Effects of Judicial Specialization’, (58) *Duke Law Journal*, 2009, pp.1667-1684. However, see: E. HANSFORD, *supra* note 1169.

¹¹⁹⁷ C GUTHRIE, J.J. RACHLINSKI, A. WISTRICH, ‘Inside the Bankruptcy Judge’s Mind’, (86) *Boston University Law Review*, 2006, pp.1226-1265.

¹¹⁹⁸ Cited in: L. BAUM, *supra* note 1114.

¹¹⁹⁹ J.B. WEINSTEIN, ‘Procedural and Substantive Problems in Complex Litigation Arising From Disasters’, (5) *Touro Law Review*, 1988, n°1.

to a specific chamber of a specialised tribunal. For example, one may decide that a specific chamber of the environmental court will be in charge of large-scale environmental damage.¹²⁰⁰ In doing so, problems may however potentially arise in cross-cutting disputes which could for example mix environmental and health issues. A possible solution to cope with this difficulty could be to appoint *ad hoc* courts which would be composed of judges sitting in specialised chamber of environment and health courts.

7.3.6. Preliminary Conclusion

This chapter has shown that the roles of judges should be guided by a strategy (clarifying the goals pursued by mass devices) followed by different tactics. Giving courts sufficient resources, providing judges with guidelines, facilitating judicial dialogues, enhancing e-justice, debiasing and specializing judges are solutions which can be investigated and should nowadays accompany debates on the roles of judges in mass disputes. Importantly, other solutions – such as notably the use of judicial liability as a way to influence judicial attitudes –¹²⁰¹ should also be given enhanced attention in future research.

¹²⁰⁰ See: B. J.PRESTON, ‘Benefits of Judicial SPecialization in Environmental Law: the Land and Environment Court of New South Wales as a Case Study’, (29) *Pace Environmental Law Review*, 2012, pp.396-440 (describing the benefits associated with the environmental court launched in New South Wales, Australia).

¹²⁰¹ A topic that has recently started to be addressed by Law & Economics scholars, see on this question: A. TSAOUSSI and E. ZERVOGIANNI, *supra* note 645.

7.4. CONCLUSION

To recapitulate, a set of policy recommendations can be proposed to help policymakers and judges for the management and resolution of mass claims. Based on previous developments, they may be summarized as follows:

1. Policymakers should change their current views on judges when acting in the mass litigation area. When evaluating and adapting existing forms of mass litigation, as well as in designing new forms, it is essential to bear in mind the idiosyncrasies of decision-making. The effects associated with the 'mass' context should also further be taken into consideration. In addition, increased attention should be given to the judicial incentives structure, and to cognitive biases which may importantly shape the outcomes of mass disputes. Judge sitting in panels may be less inclined to such biases and self-interested attitudes. However, and as stressed throughout this Chapter, the absence of clear-cut evidence on the corrective effect of panels on judicial decision-making and attitudes calls today for a precautionary approach;

2. Policymakers should guide the intervention of judges. Importantly, a clear prioritization of goals to be achieved through mass proceedings is needed to reduce uncertainty in the scope of appropriate judicial monitoring;

3. Policymakers should assist and facilitate the intervention of judges in mass litigation. Guidelines may be released to help judges when monitoring mass claims. These guidelines can facilitate and legitimate the roles of (Civil Law) judges whose intervention may depart from their traditional practice. They have also pedagogic roles for judges, parties and society. They may help debias judges and should therefore include behavioural insights, such as the identified victim effect or the outlier effect. External assistance should also be provided for the treatment and resolution of technical issues. External examiners may for instance be required to intervene for the reviewing of mass settlement agreements. Finally, coordination tools, such as an online platform, may also be developed – potentially at the EU level – to help judges exchange information about the treatment of mass claims (on the number of claimants, number of opt-in/opt-out, scope of mass harm situations *et cetera*);

4. Policymakers should (re)organise their judiciaries for the treatment of mass claims. Enhanced consideration should be given to courts' logistics, human and financial resources. The issue of specialisation and the design of such specialised courts should further be discussed. Mass litigation may also encourage a faster transition to ITCs within courtrooms, since new technologies -such as video-conferencing- are likely to facilitate communication between judges and claimants.

Therefore, based on these developments, the text of the 2013 recommendations of the European Commission on common principles for injunctive and compensatory collective redress mechanisms¹²⁰² could be completed as follows: ‘a key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions, as well as in managing the collective redress actions effectively. *However, in doing so, Member States should not too heavily rely on their judges, but importantly adapt their courts to the treatment and resolution of collective redress actions. They should notably ensure that judges are given clear guidances, are supported with sufficient resources (human, financial and logistics) and provided with external assistance. Finally, Member States may help identify Best Practices for facilitating the judicial management of mass claims.*

¹²⁰² (EC) 2013 Recommendations, *supra* note 5.

GENERAL CONCLUSION

&

PATHS FOR FUTURE RESEARCH

In a recent novel, VARGAS LLOSA concludes about his main character that ‘it is impossible to know definitely a human being, totality that always slips through the theoretical and rational nets that try to capture it’.¹²⁰³ Indeed, human beings can neither be entirely simplified, nor fully understood. The legal myths relating to judging can however today be unravelled, and that was one of the objectives pursued in this research. Although controversial, the added value of rational choice theory and behavioural economics proposes alternative methodologies to investigate judicial attitudes, which are different from the traditional legal views on judges. These approaches question what the legal literature has often held as unquestionable: the personality, preferences and biases of judges.

The aim of this thesis was to propose different perspectives on judges and judicial attitudes as a an attempt to discuss a burning policy issue – the implementation and development of mass litigation procedures - which presently stands at the forefront of many policy agendas in Europe and beyond. The research identified the different roles that policymakers have assigned to judges in the treatment and monitoring of mass disputes. These roles were then assessed from a rational choice perspective and from a behavioural Law & Economics angle. Importantly, the outcomes of mass disputes tend to be nowadays highly dependent on judges’ behaviour and preferences. Two reality checks were then conducted, and possible solutions to remedy judges’ vulnerabilities were finally discussed.

Remarkably, the contrast between the manner policymakers and the law address the work of judges with respect to mass claims on the one hand, and insights from social sciences on the other, is striking. This gap represents clear opportunities for future research for lawyers (*i*), economists (*ii*), behavioural researchers and psychologists (*iii*), sociologists and political scientists (*iv*).

¹²⁰³ M. VARGAS LLOSA, *The Dream of the Celt*, Faber & Faber, 2012 (translated from Spanish by Edith Grossman), at p.493

- (i) *Vis-à-vis lawyers*, mass litigation represents a constantly evolving topic in Europe. As an illustration, when I started this research, group actions were still in limbo in France and many thought at that time that their chance of eventually being implemented into the French legal system was low. Yet, after several decades of discussion, group actions have been adopted. Instead of remaining blocked with endless debates about American-style class action lawsuits, legal scholars should instead view experiences in other European countries with mass litigation as opportunities for cross-fertilization. Moreover, legal scholars should give particular attention to the use of case management techniques in mass claims. As discussed in this research, a key issue - which is currently already pivotal but which will have also growing importance in the coming years - regards solutions for delivering and ensuring a high-quality justice to many and at lower costs. Developments of mass litigation will sooner or later require judiciary to adopt new case management techniques. As a suggestion following up the 2013 recommendations on collective redress of the European Commission, it will also turn out to be useful to prepare a set of best practices or guidelines addressed to European judges when dealing with mass claims. Finally, greater attention should be given to judicial attitudes in mass litigation dealing with specific fields of substantive law such as environment, toxic tort or health law. Judicial attitudes might possibly diverge depending on the areas at stake;
- (ii) *Vis-à-vis economists*, greater attention should be given to the dynamics of mass litigation, and more specifically to the relationship between different protagonists involved in mass claims. In this view, a particular emphasis should be placed on the work performed by associations (and on their incentives) in mass claims. Since voices tend nowadays to support more and more active judging, studies should also investigate solutions for incentivizing judges to work efficiently. Although system of bonuses and premium are currently considered to be controversial, other solutions need to be explored. On a broader level, efforts should be made to multiply studies with and on Civil Law judges, taking into account the idiosyncrasies of Continental judiciaries and subsequent sub-branches of the judiciary (commercial judges, labour judges, *et cetera*);
- (iii) *Vis-à-vis behavioural economists and psychologists*, the mass litigation context is an object of investigation for many possible studies. Following the experiment conducted in this research, one should further question the impact of multiple claimants and large-scale damage on legal decision-making. As observed above, evidence is currently scarce and contrasted.

Experiments should be conducted with legal professionals on this important issue to know if and how extra-legal factors such as the number of parties involved impact on the outcomes of mass disputes;

- (iv) *Vis-à-vis sociologists and political scientists*, mass litigation is also a promising field of research since it changes the roles of judges in society and the perceptions that citizens may have of their judiciary. One could notably run a questionnaire in a couple of years from now to collect viewpoints of European judges on the treatment of mass claims. Furthermore, as a way to expand the work done in this thesis, a questionnaire could also be conducted with French judges to compare the viewpoints expressed in 2013 and the viewpoints after several years of practice with group actions. More precisely, this exercise could interestingly be conducted in early 2016 since the law reforming Consumer Law passed in March 2014 clearly stated that the government will have to report to the Parliament on the successes and failures of the group action, and ultimately propose recommendations for improving its functioning.¹²⁰⁴ This may turn out to be key occasion for collecting judicial viewpoints on mass litigation.

As a matter of fact, mass litigation and judges will be a promising field of research for scholars with various backgrounds. However, the most important challenge will be to ensure that all these studies manage to cross-fertilize and exchange their findings, so that scholars can maintain cross-disciplinary approaches. In this field, like in many others, researchers should finally keep in mind that ‘every scientific matter of inquiry that places Man at the center of their study is similarly structured. We must order and classify the areas of convergence between these sciences, so that they can ultimately be fused into a harmonious and consistent collective of knowledge’.¹²⁰⁵

¹²⁰⁴ Loi 2014-344 of 17 March 2014, Article 2 (IV) (in French: ‘trente mois au plus tard après la promulgation de la présente loi, le Gouvernement remet au Parlement un rapport évaluant les conditions de mises en œuvre de la procédure d’action de groupe et propose les adaptations qu’il juge nécessaire’).

¹²⁰⁵ F. GARDE, *Ce qu’il advint du sauvage blanc*, Gallimard, 2013, at p.332 (translation from the author. In French: ‘j’esquisse aujourd’hui le théorème suivant: toutes les sciences ayant l’homme pour objet d’études obéissent aux mêmes principes et sont structurés d’identique façon. Il faut constater et cultiver ces convergences, afin qu’elles fusionnent en un ensemble harmonieux’).


Appendix 1


Experiment (Dutch Version)

<i>Single</i>	<i>Multiple</i>
1700 personen zijn ingeënt met een vaccin (geneesmiddel) om de ziekte X te voorkomen. Het middel is geproduceerd door het bedrijf Alpha. De heer Jansen is een van de personen die ingeënt is met het middel.	115 600 personen zijn ingeënt met een vaccin (geneesmiddel) om de ziekte X te voorkomen. Het middel is geproduceerd door het bedrijf Alpha. Onder de ingeënte personen zijn Jansen, Vervink, Pasternaak, Van de Werf, TeHaar, Habili, Emeraldal en Eijkestein en nog 60 andere personen.
<i>Weaker Claim</i>	<i>Stronger Claim</i>
<p>“Er is geen onomstotelijk bewijs over het verband tussen inenting met het middel en de ontwikkelde klachten. De laatste epidemiologische studies kunnen het causaal verband niet buiten twijfel vaststellen.</p> <p>De advocaat van de heer Jansen (OR <i>van de 68 personen</i>) heeft vergelijkbare rechtszaken onderzocht, waarbij precies hetzelfde middel en dezelfde gezondheidsklachten centraal stonden.</p> <p><i>In deze zaken werden experts opgeroepen en op basis van hun conclusies werd in 46% van de gevallen de eis van benadeelden afgewezen en in 54% van de gevallen werd de eis toegewezen.</i></p> <p>De advocaat van de tegenpartij, het bedrijf Alpha, stelt dat de klachten zich eerder hadden moeten voordoen als zij echt door het middel zouden zijn veroorzaakt. In dit geval deden de klachten zich pas na een jaar voor. En ook wordt betoogd dat de klachten van de eiser aan predispositie te wijten zijn en dat veel personen die zijn ingeënt geen klachten hebben.”</p>	<p>“Er is geen onomstotelijk bewijs over het verband tussen inenting met het middel en de ontwikkelde klachten. De laatste epidemiologische studies kunnen het causaal verband niet buiten twijfel vaststellen.</p> <p>De advocaat van de heer Jansen (OR <i>van de 68 personen</i>) heeft vergelijkbare rechtszaken onderzocht, waarbij precies hetzelfde middel en dezelfde gezondheidsklachten centraal stonden.</p> <p><i>In deze zaken werden experts opgeroepen en op basis van hun conclusies werd in 36% van de gevallen de eis van benadeelden afgewezen en in 64% van de gevallen werd de eis toegewezen.</i></p> <p>De advocaat van de tegenpartij, het bedrijf Alpha, stelt dat de klachten zich eerder hadden moeten voordoen als zij echt door het middel zouden zijn veroorzaakt. In dit geval deden de klachten zich pas na een jaar voor. En ook wordt betoogd dat de klachten van de eiser aan predispositie te wijten zijn en dat veel personen die zijn ingeënt geen klachten hebben.”</p>

Appendix 2

The Questionnaire as Displayed on the Screen of Respondents





De nombreux objectifs ont été associés aux actions de groupe. Dans quelle mesure estimez-vous qu'un mécanisme d'action de groupe doit en effet permettre:

	Très important	Plutôt important	Sans opinion	Plutôt secondaire	Très secondaire
D'encourager les actions en justice de demande en réparation d'un faible montant	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D'encourager et d'accroître la dissuasion des comportements d'entreprises frauduleux ou illicites	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
De faciliter le travail des juges (rationalisation des ressources judiciaires, économies procédurales, gain de temps...)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
De faciliter la cohérence sur le fond des décisions de justice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D'améliorer l'indemnisation des victimes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Estimez-vous que les procédures d'action de groupe doivent demeurer restreintes à un champ d'application étroit (uniquement le droit de la concurrence) ou doivent-elles pouvoir être appliquées de manière plus générale, potentiellement à tous les domaines du droit ?

☐ Seulement le droit de la concurrence
☐ Tous les domaines sans distinction
☐ Certains domaines en particuliers:

☐ Sans opinion

Appendix 3

Questionnaire (Translation French/ English)

▪ Question 1

FRENCH : De nombreux objectifs ont été associés aux actions de groupe. Dans quelle mesure estimez-vous qu'un mécanisme d'action de groupe doit en effet permettre...

ENGLISH: *Many objectives have been associated with group proceedings. To what extent do you consider that a group proceeding should indeed be aimed at...*

- D'encourager les actions en justice de demande en réparation d'un faible montant
Enhancing compensation of small claims
- D'encourager et d'accroître la dissuasion des comportements d'entreprises frauduleux ou illicites
Enhancing and increasing deterrence of corporate misbehavior
- De faciliter le travail des juges (rationalisation des ressources judiciaires, économies procédurales, gain de temps...)
Helping judicial management of mass litigation (saving judge's time and resources)
- De faciliter la cohérence sur le fond des décisions de justice
Facilitating a better substantial coherence of judicial decisions
- D'améliorer l'indemnisation des victimes
Enhancing plaintiffs' compensation

▪ Question 2

Estimez-vous que les procédures d'action de groupe doivent demeurer restreintes à un champ d'application étroit (uniquement le droit de la concurrence) ou doivent-elles pouvoir être appliquées de manière plus générale, potentiellement à tous les domaines du droit ?

According to you, the scope of application of group proceedings must be restricted to specific fields (only competition law), or should be potentially applicable more widely?

- Seulement le droit de la concurrence
Only competition law
- Tous les domaines du droit sans distinction
All fields without distinction
- Certains domaines en particulier (veuillez indiquer ces domaines)
Some specific fields (if so, please indicate these fields)
- Sans opinion
Without opinion

▪ Question 3

Selon vous, comment doit se comporter le juge lorsqu'il est en charge d'une action de groupe:

According to you, how the judge should behave when he is in charge of a group action?

- Etre très actif. (d'avantage que ce qui est requis aujourd'hui dans la conduite des actions civiles individuelles)
Be very active (more than what is today required for the monitoring of individual lawsuits)
- Etre actif (sans pour autant qu'il soit nécessaire d'être plus actif que ce qui est aujourd'hui requis dans la conduite des actions civiles individuelles)
Be active (but not more than what is today required for the monitoring of individual lawsuits)
- Etre passif (Laisser principalement la conduite de la procédure aux associations de consommateurs et/ou avocats et ne jouer qu'un rôle de contrôle *ex post*)
Be passive (leaving the monitoring of the proceeding primarily to associations and/or lawyers, and performing an ex post control).

▪ Question 4

Dans quelle mesure estimez-vous que les missions suivantes devraient être confiées au juge en charge de la conduite d'une action de groupe :

To what extent do you think that the following tasks should be endorsed by the judge in charge of monitoring a group action?

- Fixer les critères de rattachement des demandeurs individuels au groupe et s'assurer de l'homogénéité des demandeurs au sein du groupe
Determining the criteria to be met to be part of the group and ensuring homogeneity of plaintiffs within the claimant group
- Distinguer et sanctionner les demandes individuelles jugées non-fondées ou dilatoires
Distinguishing and punishing frivolous claimants
- Veiller sur les intérêts des demandeurs absents ou représentés
Taking care of the interests of absent or represented parties
- S'assurer d'une bonne médiatisation de la procédure dans la presse
Ensuring the advertising of the proceeding in the media
- Revoir les conditions de la transaction (d'un point de vue tant procédural que substantiel) éventuellement in fine conclue entre les parties
Supervising and reviewing the terms of the final settlement potentially concluded between parties (from both a procedural and substantial perspectives)
- Contrôler la bonne représentativité des associations de consommateurs et/ou avocats, ainsi que la qualité de leur communication/relations avec les demandeurs
Controlling the adequate representativeness of consumer associations and/or lawyers , as well as their adequate communication with their members/clients
- Se prononcer sur le montant des frais d'avocats
Reviewing the amounts of lawyers' fees

▪ **Question 5**

Estimez-vous que la conduite d'une action de groupe doit-être placée sous l'autorité :

Do you think that a group action should be monitored by...

- D'un juge unique
A single judge
- De plusieurs juges
Several judges (a panel)
- Sans opinion
Without opinion

▪ **Question 6**

Considérez-vous que les tâches suivantes sont susceptibles d'être difficiles à accomplir pour le juge en charge de la conduite de l'action de groupe ?

To what extent do you consider that the following tasks are likely to be difficult to fulfill for the judge in charge of a group action?

(regarding the lists of the tasks here listed, refer to Question 4)

▪ **Question 7**

Selon vous, l'intervention du juge en matière d'action de groupe devrait être:

According to you, the judicial monitoring in a group action should be...

- Limitée et sujette à des règles strictes
Limited and regulated by strict rules
- Limitée mais guidée par de simples lignes directrices
Limited but guided by broad guidelines
- Etendues mais sujette à des règles strictes
Wide but regulated by strict rules
- Etendues et guidées par de simples lignes directrices
Wide and regulated by broad guidelines
- Sans opinion
Without opinion

▪ **Question 8**

Dans quelle mesure considérez-vous que les points suivants sont susceptibles d'être une source de difficulté susceptible d'affecter le travail du juge en charge d'une action de groupe:

To what extent do you consider that the following issues are likely to be problematic from the perspective of the judge in charge of a group action ?

- Pression médiatique ou politique
Media or political pressure
- Pression de l'opinion publique

Pressure from public opinion

- Accroissement important de la charge de travail du juge
Tasks highly time consuming or burdensome from the judges' point of view
- Perspective d'être potentiellement confronté à de très nombreuses victimes
Perspective of potentially facing numerous victims
- Surexposition du juge en charge de l'action de groupe (dans les médias ou au sein de la profession)
Judicial overexposure (in the media or within the legal profession)
- Difficile communication entre le juge et les parties
Difficult communication between the judges and the parties
- Définir le niveau adéquat de médiatisation de la procédure dans les médias
Defining the adequate level of advertising of the proceeding in the media
- Potentiel Manque de visibilité sur les intérêts des demandeurs absents ou représentés
Potential lack of visibility on the interests of absent or represented claimants
- Prise en compte des intérêts des entreprises défenderesses (protéger notamment leur réputation)
Taking into account the interest of companies (notably in terms of reputation costs)
- Manque de ressources financières et/ou humaines du monde judiciaire
Lack of financial and/or human judicial resources to deal with mass cases

▪ **Question 9**

Avez-vous d'autres sujets d'inquiétudes (si non, veuillez s'il vous plait indiquer 'non' dans la case ci-dessous)

Do you have any other concerns? (if not, indicate 'no' in the box below)

▪ **Question 10 and 10 bis**

Dans quelle mesure estimez-vous que le travail opéré par les associations de consommateurs (ou par tout autre association susceptible d'engager une action de groupe) est généralement digne de confiance

To what extent do you consider that the work performed by consumers' association (or any plaintiffs' associations entitled to file a group lawsuit) is generally trustworthy?

Dans quelle mesure estimez-vous que le travail opéré par les associations de consommateurs (ou par tout autre association susceptible d'engager une action de groupe) doit être maintenue sous un strict contrôle du juge

To what extent do you consider that the work performed by consumers' association (or any plaintiffs' associations entitled to file a group lawsuit) should be kept under close judicial supervision?

▪ **Question 11**

Considérez-vous la perspective d'être en charge d'une action de groupe comme étant une expérience :

Do you view the fact of being in charge of a group action as being an experience...

- Potentiellement intimidante
Potentially intimidating
- Potentiellement motivante

- *Potentially motivating*
- Potentiellement inquiétante
- *Potentially worrying*
- Est susceptible de représenter un véritable défi pour le juge
- *Likely to constitute a real challenge for the judge*

▪ **Question 12**

Souhaitez-vous, à titre personnel, être en charge de la conduite d'une action de groupe dans le futur :
Would you personally enjoy monitoring a group action ?

- Oui, clairement
- *Yes, really*
- Oui pourquoi pas
- *Yes, why not*
- Non pas nécessairement
- *No, not necessarily*
- Non, vraiment pas
- *No, really not*
- Sans opinion
- *Without opinion*

▪ **Question 13**

Quels sont selon vous les outils susceptibles de faciliter le travail du juge qui serait demain en charge de la conduite d'une action de groupe ?

According to you, what are the tools to be used for facilitating the judicial monitoring of a group action ?

- Mise en place d'une juridiction spécialisée
- *A specialised court*
- Mise en place d'une formation spécialisée pour les juges
- *Judicial education and training*
- Ediction de lignes directrices ou d'un code de bonnes conduites
- *Guidelines or best practices*
- Assistance extérieures (experts, autorités spécialisées...)
- *External assistance (experts, specialised agencies...)*

▪ **Question 14**

En conclusion, avez-vous tout autre point, inquiétude ou suggestion que vous souhaiteriez partagé au sujet des mécanismes d'action de groupe ?

Finally, do you have any other concerns or point of views that you would like to share regarding group actions?

Appendix (4)

Frequencies per Question: Complete Overview

f= frequency (or number of respondents per question)

NB: The responses to open-ended questions are hereafter not reported.

- *Many objectives have been associated with group proceedings. To what extent do you consider that these mechanisms should indeed be aimed at...*

	Very important	rather important	without opinion	Rather secondary	Very secondary	Total
Facilitating the compensation of low-claim plaintiffs	<i>F=13</i>	12	2	10	3	<i>40</i>
Promoting and increasing deterrence against unlawful corporate behaviours	28	11	1	0	0	<i>40</i>
Facilitating the judges' work (saving in terms of resources, times..)	12	16	3	9	0	<i>40</i>
Facilitating the coherence of rulings on a same topic/same legal issue	17	20	0	3	0	<i>40</i>
Facilitating compensation of plaintiffs	17	19	1	3	0	<i>40</i>

- *Do you consider that group proceedings should be restricted to (a) specialized area(s) or applied to all fields of law?*

Competition Law only	All fields of Law without distinction	Only some fields in particular	No opinion	total
4	17	13	6	40

- *According to you, how should a judge behave when he is in charge of monitoring a collective proceeding?*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>total</i>
Being <i>very</i> active (more than what is currently required for the conduct of individual lawsuit)	2	3	7	26	2	40
Being active (but not more than what is currently required for the conduct of individual lawsuit)	6	25	7	2	0	40
Being Passive (Leaving the conduct of the proceeding primarily to plaintiffs organization/consumer organization/ lawyers(and maintaining only an <i>ex post</i> intervention)	3	7	3	18	9	40

- *To what extent do you consider that the following tasks should be endorsed by the judge(s) in charge of monitoring a collective proceeding?*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Determining the criteria that are required to be member of the group and ensuring the homogeneity of plaintiffs within the group	11	20	4	5	0	40
Distinguishing and if necessary punishing frivolous or unmeritorious individual claims	10	28	2	0	0	40

Taking care of the interest of absent or represented plaintiffs	8	17	3	9	3	40
Ensuring the publicity of the proceeding in the media	0	2	5	11	22	40
Supervising and reviewing the settlement potentially concluded between litigants (from both a substantial and procedural perspectives)	5	20	3	11	1	40
Controlling the adequate representativeness of consumer organization or lawyers, as well as their communication with their member/clients.	10	16	9	2	3	40
Reviewing the fees of lawyers	7	15	12	3	3	40

- *Do you think that a collective proceeding should be managed by:*

<i>A single judge</i>	<i>A panel (several judges)</i>	<i>No opinion</i>	<i>total</i>
8	25	7	40

- *Do you think that the following tasks might be difficult to fulfill by the judge in charge of a collective proceeding?*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Determining the criteria that are required to be member of the group and ensuring the homogeneity of plaintiffs within the group	7	16	2	14	1	40
Distinguishing and if necessary punishing frivolous or unmeritorious individual claims	2	15	2	21	0	40

Taking care of the interest of absent or represented plaintiffs	6	17	3	14	0	40
Ensuring the publicity of the proceeding in the media	16	2	18	3	1	40
Supervising and reviewing the settlement potentially concluded between litigants (from both a substantial and procedural perspectives)	4	21	3	11	1	40
Controlling the adequate representativeness of consumer organization or lawyers, as well as their communication with their member/clients	4	20	3	12	1	40
Reviewing lawyers' fees	4	9	9	12	6	40

- *According to you, the intervention of the judge should be:*

<i>Limited and subject to strict rules</i>	<i>Limited but solely regulated by broad guidelines</i>	<i>Wide but subject to strict rules</i>	<i>Wide and solely regulated to broad guidelines</i>	<i>Without opinion</i>	<i>Total</i>
9	5	18	8	0	40

- *To what extent do you consider that the following points are likely to be an obstacle from the perspective of the judge in charge of monitoring of a group proceeding?*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Media or political pressure	16	19	0	5	0	40
Pressure from public opinion	12	22	0	6	0	40
Tasks highly time-consuming	14	23	1	2	0	40

or drastically burdensome from judge's point of view						
Perspective of facing potentially numerous litigants	4	20	5	11	0	40
Judicial overexposure (in the media or within the legal profession)	9	19	5	7	0	40
Difficult communication between the judges and the litigants	1	9	6	22	2	40
Defining correctly the level of mediatization of the proceeding in the media	10	12	14	3	1	40
Lacking information about the interest of absent and represented parties	2	23	8	6	1	40
Taking into account the interest of companies (notably in terms of reputation)	1	19	7	11	2	40
Lack of financial or human resources to deal with mass cases	33	6	0	0	1	40

- *Do you consider that the work performed by consumer organization/association of plaintiffs...*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Is usually trustworthy	2	31	5	2	0	40
Should be kept under close judicial scrutiny	10	21	2	6	1	40

- *Do you consider the perspective of managing a collective proceeding as being an experience...*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Potentially intimidating	5	12	7	14	2	40
Potentially motivating	6	31	2	1	0	40
Potentially worrying	2	13	8	15	2	40
may constitute a real challenge for the judge	10	22	3	4	1	40

- *Would you personally enjoy monitoring a collective proceeding?*

<i>Yes really</i>	<i>Rather yes</i>	<i>Without opinion</i>	<i>Rather Not</i>	<i>Really not</i>	<i>Total</i>
6	28	1	3	2	40

- *What are the tools that may help the judge in the fulfillment of his tasks?*

	<i>Strongly agree</i>	<i>Rather agree</i>	<i>Without opinion</i>	<i>Rather disagree</i>	<i>Strongly disagree</i>	<i>Total</i>
Creation of a specialized jurisdiction	8	12	8	11	1	40
Specialized judicial education	26	13	0	1	0	40
Guidelines	13	23	2	2	0	40
External assistance (experts, regulatory agencies...)	23	14	1	2	0	40

Appendix (5)

Questions asked during the Semi-Structured Interviews

(The persons were contacted by emails in which I presented the aim of the research. On average, these interviews last between 30 and 45 min. They took place in Paris (with judges) and in Brussels (with the consumer association).

▪ Interviews with Judges

- What is your overall opinion about the implementation of a group action in France?
- Do you think that the action should be restricted to specific fields?
- Do you think the group action will change the role of judges
- What are, according to you, the objectives pursued by the group action?
- Do think that the group action should be handled by specialized agencies rather than by judges?
- What should be the roles of consumer associations?

▪ Interview With the representative of a consumer association

- Are you optimistic *vis-à-vis* the work expected from judges for the monitoring of group proceedings?
- What is the role of consumer association *vis-à-vis* mass proceedings?
- Do you think that the personality of the judge will affect the way the case is monitored?
- Do you think that judges take peculiar decisions when their decisions are likely to affect a large group of claimants?

Index of Cases

▪ **United States**

Ashcroft v. Iqbal, 556 US, 662 (2009)

Bell Atlantic v. Twombly, 550 US, 544, 566 (2007)

Morrison v. National Australia Bank, USSC, 29 March 2010

In Re Richardson-Merrell, Inc., 624 F, Supp.1212, 17 September 1985

Reynolds v. Beneficial National Bank, 288 F.3d 277, 279-80 - 7th Cir. 2002

In Re Rhone-Poulenc Rorer Incorporated, 51 F3d 1293 (7th Circuit), 1995

In Re Rhone-Poulenc Rorer Incorporated, 138 F.3d 695, 11 March 1998

Eisen v Carlisle and Jacquelin 417 US 156, 177-78, 94 S Ct 2140 – 1974

United States v. Carroll Towing Co., 159 F, 2d 169 (2nd. Circ.1947)

Dukes v. Wal-Mart Stores Inc., 222, F.R.D, 137, 145-66, 26 April 2010

Wal-Mart Stores Inc. v. Dukes, 564 US (2011)

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)

In Re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985 *part*, 818 F.2d 179 (2d Cir. 1987)

Cimino v. Raymark Industries Inc., 1998 WL, 480147, 5th Circuit, 17 August 1998

Hilao v. Estate of Marcos, 9th circuit, 103 F., 3d 767, 782-787, 1996

In Re Simon 11 Litigation, No.00-CV-5332, 2002 U.S. Dist. Lexis 19773 (E.D.N.Y. Oct. 15, 2002),

Sindell v. Abbot Laboratories, 26 Cal 3d 588 (1980) 607 P. 2d 924

▪ **France**

Constitutional Council, décision n°2014-690 DC, 13 March 2014 *sur la loi relative à la consommation*

Constitutional Council, décision n°89-257 DC, 25 July 1989 *sur la loi modifiant le code du travail et relative à la prévention du licenciement économique et au droit à la conversion.*

Cass. civ 1e.29 mai 2013, pourvoi n° 12-20903

Cass. civ.1e. 26 May 2011, pourvoi n.10-15.676

Cass, ass.plen., 7 January 2011, pourvoi n°09-14316

Cass.civ. 1e, 24 September 2009, pourvois n°08-10081 and n°08-16305

Cass. civ.2e, 2 May 2004, pourvoi n°02-30981

Cass. civ. 1e, 23 September 2003, pourvoi n°01-13063

Cass. civ. 2e, 21 July 1982, pourvoi n.81-12850 (« *Desmares* »)

Cass.civ., 6 March 1876, *Commune de Pelissanne c./Marquis de Galiffet* (affaire dite du 'Canal de Craponne')

CE, décision n°267635, 5e et 6e sous-section reunies, 9 March 2006

Paris Court of Appeal, 26 October 2012, n°10/18297

Paris Court of Appeal, 11e ch., pôle 5, 22 January 2010, n°08/09844

Paris Court of Appeal, 1^{re} ch. Section H, 8 April 2009, *B. c/ AMF*

Paris Court of Appeal, 1^{re} ch. H, 1^{er} April 2003

Versailles Court of appeal, CT0196, 17 March 2006

Trib.correctionnel de Château-Thierry, 4 March 1898

Conseil de la concurrence, Décision n°05-D-65 *relative à des pratiques constatées dans le secteur de la téléphonie mobile*, 30 November 2005

▪ **The Netherlands**

Hoge Raad, 9 October 1992, NJ 1994,535 (*DES v. Daughters*).

Amsterdam Court of appeal, *Stichting DES Centrum v X*, 1 June 2006, LJN AX 6440

Amsterdam Court of appeal, *Dexia Bank Nederland v Stichting Platform Aandelenlease*, 25 January 2007, LJN AZ7033

Amsterdam Court of appeal, *Shell Petroleum v Dexia Nederland*, 29 May 2009, LJN BI5744

Amsterdam Court of appeal, *Stichting Converium Securities Compensation v Liechtensteinsche Landesbank*, 17 January 2012, LJN BV1026

Amsterdam Court of Appeal, *Stichting Vie d'or*, 29 April 2009, LJN BI2717

- **England and Wales**

EWCH *Corby Group Litigation v. Corby District Council*, [2009] 1944 (TC), 29 July 2009

EWCH 1134 (QB), *Ashton Morton Slack Solicitors*, 2006

- **European Court of Human Rights**

ECHR, *Vernillo v. France*, case n° 11889/85, 20 February 1991

Bibliography

▪ **Academic reviews**

A

ABRAMS K. and KEREN H., 'Who's Afraid of Law and the Emotions?' (94) *Minnesota Law Review*, 2010, pp.1998-2072

ACKERMAN B.A., 'Law and the Modern Mind' by Jerome Frank', (103) *Deadelus*, 1974, n°1, pp.119-130

ADAVAL R., 'Numerosity and Consumer Behavior', (39) *Journal of Consumer Research*, 2013, n°5, pp.11-14

AGHION P., HART O. and MOORE J., 'The Economics of Bankruptcy Reform', (8) *Journal of Law, Economics & Organization*, 1992, pp.523-546

ALEXANDER J.C., 'Judge's Self-Interest and Procedural Rules – Comment on Macey', (23) *Journal of Legal Studies*, 1994, n°1, pp.647-665

ALEXANDER J.C., 'Do the Merits Matter? A Study of Settlements in Securities Class Action', (43) *Stanford Law Review*, 1991, pp.497-598

ALHAKAMI A.S. and SLOVIC P., 'A Psychological Study of the Inverse Relationship between Perceived Risk and Perceived Benefit', (14) *Risk Analysis*, 1994, pp.1085-1096

ALLEMEERSCH B., 'Transnational Class Settlements – Lessons from Converium', in: WRBKA S., Van UYTSEL S. and SIEMS M. (Eds.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests*, Cambridge University Press, 2012, pp.364-384

ALLISON J.W.F., 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication', (53) *Cambridge Law Journal*, 1994, n°2, pp.367-383

AMRANI-MEKKI S., 'Action de Groupe : L'Intendance Suivra...', *Gazette du Palais*, 25 May 2013, n°145, p.3

AMRANI-MEKKI S., 'La Rengaine de l'Action de Groupe', *Gazette du Palais*, 8 September 2012, n°252, p.3.

AMRANI-MEKKI S., 'Rapport spécial dans le domaine de la justice', in: C. PRIETO (Ed.), *Cohérence Européenne des recours collectifs – Réponse à la Consultation publique de la Commission Européenne*, Trans Europe Experts, Société de législation comparée, vol.2, 2011, p.269

AMRANI-MEKKI S., 'Inciter les Actions en Dommages et Intérêts en Droit de la Concurrence – Le Point de Vue d'un Processualiste', (4) *Concurrences*, 2008.

AMRANI-MEKKI S., 'Action de groupe: saisine du conseil constitutionnel', *Gazette du palais*, 11 March 2014, n.70, p.3

ANDERSON C.A, LINDSAY J.J. and BUSHMAN B.J., 'Research in the Psychological Laboratory: Truths or Triviality?', (8) *Current Directions in Psychological Science*, 1999, n°1, pp.3-9

ANDERSON A.G., 'Conflict of Interest: Efficiency, Fairness & Corporate Structure', (738) *University of Chicago Law Review*, pp.738-795

ANDREWS N., 'Multi-Party Proceeding in England: Representative and Group Actions', (11) *Duke Journal of Comparative and International Law*, 2001, pp. 249-267

ANDREWS N., 'The New English Civil Procedure Rules (1998), in: VAN RHEE C.H. (Ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerpen/Oxford, Intersentia, 2007, pp. 161-181

ARNDT J., LIEBERMAN J.D., COOK A. and SOLOMON S., 'Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision-Making', (11) *Psychology, Public Policy and Law*, 2005, n°3, pp.407-438.

ARROW K.J., 'Is Bounded Rationality Unboundedly Rational? Some Ruminations', in: AUGIER M. and MARCH J.G. (Eds.), *Models of a Man – Essays in Memory of Herbert A. Simon*, 2004, MIT Press, Cambridge & London, pp.47-56

ASCENSI L. and BERNHEIM-DESVAUX S., 'La médiation collective, solution amiable pour résoudre les litiges de masse ?', *Contrats, concurrence, consommation*, n°8, 2012

AUBERT J. –L ., 'L'Arrêt Desmares, une Provocation... à d'Autres Réformes', *Recueil Dalloz*, 1983, chronique n° 1

AVERILL J.R., 'What Are Emotions Really?', (12) *Cognition & Emotion*, 1998, n°6, pp.849-855.

AZAR-BAUD M.J., 'L'Entrée Triomphale (?) de l'Action de Groupe en Droit Français', *Recueil Dalloz* 2013, p.1487

B

BACACHE M., 'Action de groupe et responsabilité civile', *Revue Trimestrielle de Droit Civil*, 2014, p.450

BACACHE M., 'Domaine de l'Action de Groupe Quant aux Préjudices Subis', *Gazette du Palais*, 16 May 2013, n°136, p.19

BACACHE M., 'La Réparation des Accidents Médicaux : une Conciliation Délicate entre les Intérêts des Patients et ceux des Médecins', *Recueil Dalloz*, 2008, p.816

BACKHAUS J., 'The Law Firm as an Investment Bank in Class Actions', (32) *European Journal of Law & Economics*, 2011, pp.225-228

BAI L., COX J.D. and THOMAS R.S., 'Lying and Getting Caught: An empirical Study of the Effects of Securities Class Action Settlement on Targeted Firms', *Vanderbilt University Law School Law & Economics*, 2010, Working Paper n°10-09

BAILIS D.S. and Mc COUN R.J., 'Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation', (20) *Law and Human Behavior*, 1996, n°4, pp.419-429

BALENSI Y., 'Modalités de Mise en Œuvre de l'Action de Groupe : des Corrections à Apporter au Projet du Gouvernement', *Gazette du Palais*, 16 May 2013, n°136, p.50

BARTELS B.L., 'Top-Down and Bottom-Up Models of Judicial Reasoning', in: KLEIN D. and MITCHELL G. (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010

BAUDOT O., 'Harangue à des magistrats qui débutent', 1974

BAUM L., 'Motivation and Judicial Behaviour: Expanding the Scope of Inquiry', in: KLEIN D. and MITCHELL G. (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.3-25

BAUM L., 'Judicial Specialization and the Adjudication of Immigration Cases', (59) *Duke Law Journal*, 2010, pp.1501-1561

BAUM L., 'Probing the Effects of Judicial Specialization', (58) *Duke Law Journal*, 2009, pp.1667-1684

BEENSTOCK M. and HAITOVSKY Y., 'Does the Appointment of Judges Increase the Output of the Judiciary', (24) *International Review of Law & Economics*, 2004, pp.351-369

BENNETT H. and BROE G.A., 'Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning', (42) *Australian Journal of Forensic Sciences*, March 2010, n°1, pp.11-18

BENOHR I., 'Consumer Dispute Resolution after the Lisbon Treaty: Collective Actions and Alternative Procedures', *Journal of Consumer Policy*, 2012

BERNARD A., 'Law and Economics, une science idiote ?', *Recueil Dalloz*, 2008, p.2806

BERNARD-REQUIN M., 'La Recherche de la Vérité en Psychologie et Psychiatrie Judiciaire. La Psychologie dans la Décision Judiciaire', (170) *Annales médico-psychologiques revue psychiatrique*, 2012, n°2, pp.124-126

BERNSTEIN R., 'Judicial Economy and Class Actions', (7) *Journal of Legal Studies*, 1978, pp.349-370

BETSON D. and TIDMARSH J., 'Optimal Class Size, Opt-Out Rights, and "Invisible" Remedies', (79) *George Washington Law Review*, 2011, p.542-576

BIARD A.P and VISSCHER L.T., 'Judges and Mass Litigation: Revisiting the Judicial Cathedral through Rational Choice Theory and Behavioural Economics', (7) *Aansprakelijkheid, Verzekering & Schade*, 2014, pp.39-48.

BLENNERBASSET J., 'Environmental Enforcement in Ireland – The Need to Get a Piece of the Multi-Party Action', in: KINGSTON S. (Ed.), *European Perspectives on Environmental Law and Governance*, Routledge, London, 2013, pp.215-235

BONE R.G., 'Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity', (46) *Vanderbilt Law Review*, 1993, pp.561-662

BONE R.G., 'Modelling Frivolous Suits', (145) *University of Pennsylvania Law Review*, 1997, pp.519

BONE R.G., 'Class Action', in: SANCHIRICO C.W. (Ed.), *Procedural Law and Economics*, (8) *Encyclopaedia of Law and Economics*, 2nd ed., p.67-83

BORE L., 'Le projet d'action de groupe: action mort-née ou premier pas?', *Gazette du Palais*, 16 May 2013, p.29

BORENSTEIN S., 'Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits', (39) *Journal of Law and Economics*, 1996, n°2, pp.379-404

BORGHETTI J.-S., 'Responsabilité du fait du DES: En route vers la Market Share Liability', *Revue des Contrats*, January 2010, n°1, p.90

BORNSTEIN B.H. and WIENER R.L., 'Emotion and the Law : A Field whose Time Has to Come', in: BORNSTEIN B.H. and WIENER R.L. (Eds), *Emotion and the Law*, Nebraska Symposium on Motivation, 2010

BORNSTEIN G. and YANIV I., 'Individual and Group Behaviour in the Ultimatum Game: Are Groups More 'Rational' Players?', (1) *Experimental Economics*, 1998, pp.101-108

BOURREAU-DUBOIS C., DORIAT-DUBAN M. and RAY J.-C., 'Child Support Order: How Do Judges Decide Without Guidelines? Evidence from France', (11) *European Journal of Law & Economics*, 2012

BREDIN J.D., 'Un gouvernement des Juges', (68) *Pouvoirs*, 1994

BROWN R., 'Consideration of the Origin of Herbert Simon's Theory of 'Satisficing (1933-1947)', (42) *Management Decision*, n°10, pp.1240-1256

BRUINE DE BRUIN W., 'Framing Effects in Surveys: How Respondents Make Sense of the Questions We Ask', in: KEREN G. (Ed.), *Perspectives on Framing*, The Society for Judgement and Decision Making Series - Psychology Press, London, 2010, 344 p.

BURCH E.C., 'Procedural Justice in Non-class Aggregation', (44) *Wake Forest Law Review*, 2009, p.1

BUSCHKIN I.T., 'The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, (1990) *Cornell Law Review*, 2005, pp. 1564-1599

BRETZNER J.D., 'Ombres et Lumières Autour de la Qualité pour Agir dans l'Action de Groupe', *Gazette du Palais*, 16 May 2013, n°136, p.31

C

CABANAC M., 'What is Emotion?', (60) *Behavioural Processes*, 2002, pp.69-83

CABRASER E.J., 'The Essentials of Democratic Mass Litigation', (45) *Columbia Journal of Law & Society*, 2012, pp.499-523

CADIET L, 'Efficience v. Equité', in *Mélanges Jacques van Compernelle*, Bruxelles, Bruylant, 2004

CALABRESI G. and SCHWARTZ K., 'The Costs of Class Actions: Allocation and Collective Redress in the US Experience', (32) *European Journal of Law & Economics*, 2011, pp.169-183

CALVES G., 'Mieux connaître les contentieux de masse: l'apport des travaux sociologiques', *Revue Française de Droit Administratif*, 2011, p.477

CAMPBELL D.T., 'Common Fate, Similarity and Other Indices of the Status of Aggregates of Persons as Social Entities', (3) *Behavioural Sciences*, 1958, pp.14-35

CANIVET G., 'Réflexions sur la place du citoyen dans le marché unique européen', *Revue Trimestrielle de Droit Européen*, 2008, p. 119

CASSONE A. and RAMELLO G., 'The Simple Economics of Class Actions: Private Provision of Club and Public Goods', (32) *European Journal of Law & Economics*, 2011, pp. 205-224

CASTAING C., 'Les procédures civiles et administratives confrontées aux mêmes exigences du management de la justice', *AJDA*, 2009, p.913

CHAMBERLAIN J. and MILLER M.K., 'Stress in the Courtroom: Call for Research', (15) *Psychiatry, Psychology and Law*, 2008, n°2, pp.237-250

CHANTEPIE G., 'Moment d'Appréciation de la Lésion et Effet d'une Décision Rétroactive', *Recueil Dalloz*, 2009, p.2588

CHARNESS G., RIGOTTI L. and RUSTICHINI A., 'Individual Behaviour and Group Membership', (97) *The American Economic Review*, 2004, pp.1340-1352

CHARNESS G. and SUTTER M., 'Groups Make Better Self-Interested Decisions', (26) *Journal of Economic Perspectives*, 2012, n°3, pp.157-176

CHARRIERE-BOURNAZEL C., 'L'Action de Groupe à la Française: un Leurre', 2 May 2013, available on www.cnb.avocat.fr/L-action-de-groupe-a-la-francaise-un-leurre--Editorial-du-President-Charriere-Bournazel--2-mai-2013_a1589.html.

CHAYES A., 'The Role of the Judge in Public Law Litigation', (89) *Harvard Law Review*, 1976, p.1281

CHENG E.K., 'When 10 Trials are better than 1000: An Evidentiary Perspective on Trial Sampling', (160) *University of Pennsylvania Law Review*, pp.955-966, 2012

CHEVALIER P., 'Expérience de Télé-Procédure dans les Juridictions Françaises', *Droit et Patrimoine*, 2002, n°103

CHIN D., 'Sentencing: A Role for Empathy', (160) *University of Pennsylvania Law Review*, 2012, pp.1561-1584

CHOI S.J., GULATI M. and POSNER E.A., 'How Well Do Measures of Judicial Ability Predict Judicial Performance? A Case Study Using Securities Class Actions', (33) *International Review of Law & Economics*, 2013, pp.37-53

CHOI S.J., GULATI M. and POSNER E.A., 'What do Federal District Judges Want? An Analysis of Publications, Citations and Reversals', (28) *Journal of Law, Economics & Organization*, n°3, 2012

CHOI S.J. GULATI M, POSNER E.A., 'Are Judges Overpaid? A Sceptical Response to the Judicial Salary Debate', (1) *Journal of Legal Analysis*, 2009, issue n°1, pp.47-117

CHOI S.J and GULATI M., 'A Tournament of Judges?', (92) *California Law Review*, 2004, n°1, pp.299-322

CHORTEK M., 'The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials', (32) *Review of Litigation*, 2013, p.117

CLAUDEL E., 'Action de groupe et autres dispositions concurrence de la loi consommation : un dispositif singulier', *Revue trimestrielle de droit commercial*, 2014, p.339

COHEN D., 'Introduire des Actions de Groupe en Droit Francais ? Réactions à l'Analyse du Professeur Demougin', in : COHEN D. (Ed.), *Droit & Economie du Procès Civil*, LGDJ, 2010, pp.105-117

COHEN M.A., 'The Motives of Judges: Empirical Evidence from Antitrust Sentencing', (12) *International Review of Law & Economics*, 1992, pp.13-30

CONTINI F. and MOHR R., 'Reconciling Independence and Accountability in Judicial Systems', (26) *Utrecht Law Review*, 2007, n°2

COOK C., HEATH F. and THOMPSON R.L., 'A Meta-Analysis of Responses Rates in Web- or Internet-Based Surveys', (60) *Educational and Psychological Measurement*, 2000, pp.821-836

COOTER R., 'The Objectives of Private and Public Judges', (41) *Public Choice*, 1983, pp.107-132

COOTER R. and RUBINFELD D.L., 'Economic Analysis of Legal Disputes and Their Resolution', (27) *Journal of Economic Literature*, 1989, n°3, pp.1067-1091

CORAPI D., 'Class Actions and Collective Actions', in: FAIRGRIEVE D. and LEIN E. (Eds.), *Extraterritoriality and Collective Redresses*, Oxford University Press, 2012, pp.3-14

CRAWFORD M., MATTHEW T., SHERMAN S.J. and HAMILTON D.L., 'Perceived Entitativity, Stereotype Formation, and the Interchangeability of Group Members', (83) *Journal of Personality and Social Psychology*, 2002, n°5, pp.1076-1094

D

DAICOFF S., 'Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism', (46) *The American University Law Review*, 1997, pp.1337-1427

DALLA PELLEGRINA L. and SARACENO M., 'Securities Class Actions in the US Banking Sector: Between Investor Protection and Bank Stability', (7) *Journal of Financial Stability*, 2011, pp.215-227

DAM K.W., 'Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest', (4) *Journal of Legal Studies*, 1975, n°1, pp.47-73

DANZIGER S., LEVAV J. and AVNAIM-PESSO L., 'Extraneous Factors in Judicial Decisions', (108) *Proceedings of the National Academy of Sciences*, 2011, pp.6889-6892

DEFFAINS B., 'Pour une théorie économique de l'imprévision en droit des contrats', *Revue Trimestrielle de Droit Civil*, 2010, p.719

DEFFAINS B. and LANGLAIS E., 'Informational Externalities and Settlements in Mass Tort Litigations', (vol.32), *European Journal of Law & Economics*, 2011, pp.241-262

DEFOORT B., 'Incertitude Scientifique et causalité : la Preuve par Présomption', *Revue Française de Droit Administratif*, 2008, p.549

DEKAY M.L., NICKERSON C.A.E., UBEL P.A., HERSHEY J.C, SPRANCA M.D and ASCH D.A., 'Further Explorations of Medical Decisions for Individuals and For Groups', (20) *Medical Decision-Making*, 2000, pp.39-44

DE MUNAGORRI R.E., 'L'analyse économique est-elle une source du droit ?', *Revue trimestrielle de droit civil*, 2006, p.505

DEMERGUE M., 'Des influences sur les jugements des juges', Symposium organised by the French Senate : *L'office du juge*, 29 Septembre 2006, p.371, available on www.senat.fr/notice-rapport/2005/office_du_juge-notice.html

DESVOUSGES W.H., JOHNSON F.R., DUNFORD R.W., HUDSON S.P and WILSON K.N., 'Measuring Natural Resource Damages With Contingent Valuation: Tests of Validity and Reliability', in: HAUSMAN J.A.Q, *Contingent Evaluation: A Critical Assessment*, pp.91-164

DEUTSKENS.RUYTER, K.D, WETZELS M. and OOSTERVELD P., 'Response Rate and Response Quality of Internet-Based Surveys: An Experimental Study', (15) *Marketing Letters*, 2004, n°1, pp.21-36

DEWATRIPONT M. and TIROLE J., 'Advocates', (107) *Journal of Political Economy*, 1999, n°1, pp.1-39

DHAMI M.K., 'Psychological Models of Professional Decision Making', (14) *Psychological Science*, 2003, n°2, pp.175-180

DHAMI M.K., 'Bailing and Jailing the Fast and Frugal Way, (14) *Journal of Behavioural Decision-Making*, 2001, pp.141-168

DION N., 'Le Juge et le Désir du Juste', *Recueil Dalloz* 1999, p.195

DION K, BERSCHIED E. and WALSTER E., 'What is Beautiful is Good', (24) *Journal of Personality and Social Psychology*, 1972, pp.285-290

DONALD E.E., 'Managerial Judging and the Evolution of the Procedure', *Yale Law School Legal Scholarship Series Paper*, 1986, n°2197

DRAHOZAL C.R., 'A Behavioural Analysis of Private Judging', (67) *Law & Contemporary Problems*, 2004, pp.105-132

DRAI P., 'Le Délibéré et l'Imagination du Juge', in : *Mélanges en l'honneur de Roger Perrot : Nouveaux Juges, Nouveaux Pouvoirs*, Dalloz, 1996, pp.107-120

DRUCKMAN J.N. and Mc DERMOTT R., 'Emotion and the Framing of Risky Choice, (30) *Political Behaviour*, n°3, pp.297-321

DU CHASTEL A., 'L'action de groupe ou le Mythe de Sisyphe', *Petites Affiches*, 23 June 2008, n°125, p.6

DUFOUR O., 'L'action de groupe à la Française, c'est pour bientôt !', *Petites Affiches*, 25 April 2013, n°83, p.3

DUPONT N., 'L'Action en Représentation Conjointe des Associations de Consommateurs ou l'Action Mal-Aimée des Juges', *Recueil Dalloz*, 2011, p.1884

DUXBURY N., 'The Reinvention of American Legal Realism', (12) *Journal of Legal Studies*, 1992, n°2, pp.137-177

DUZINSKY D.M., 'Tobacco Litigation: Statistics Permitted for Proof of Causation and Damages in Class Action', (31) *Journal of Law, Medicine and Ethics*, 2003, pp.161-163

E

EDWARDS B.K. and STARR R.M., 'A Note on Indivisibilities, Specialization and Economies of Scale', (77) *American Economic Review*, n°1, March 1987

EASTERBROOK F., 'What's so special about judges?', (61) *University of Colorado Law Review*, 1990, pp.773-782

EFRAN M.G., 'The Effect of Physical Appearance on the Judgement of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task', (8) *Journal² of Research in Personality*, 1974, pp.45-54

EHRLICH E., 'Judicial Freedom of Decision: Its Principles and Objects', in: BRUNCKEN E. and REGISTER L.B. (Eds.), *Science of Legal Method: Selected Essays by Various Authors*, Boston, The Boston Book Company, 1917

EISENBERG T., FISHER T. and ROSEN-ZVI I., 'Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court', (19) *Psychology, Public Policy and Law*, 2013, n°3, p.282-296

EISENBERG T. and MILLER G., 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', (57) *Vanderbilt Law Review*, 2004, p.1529

ENGEL C and GIGERENZER G., 'Law & Heuristics – An Interdisciplinary Venture', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & the Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp.1-16

ENGLISH B., 'Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations', *Law & Policy*, 2006, pp.497-514

ENTMAN S.S., REILLY B.A., GLASS C.A., SLOAN A., HICKSON G.B., ZHANG H.H, 'Tort Liability and Obstetricians' Care Levels', (17) *International Review of Law & Economics*, 1997, pp.245-260

EPSTEIN R.A., 'The Optimal Complexity of Legal Rules', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press

EPSTEIN R.A., 'Class Actions: Aggregation, Amplification and Distortion', *Olin Law & Economics Working Paper*, no.182, April 2003

EPSTEIN R.A., 'Independence of Judges, the Use and Limitations of Public Choice Theory', (1990) *Brigham Young University Law Review*, 1990, issue n°3

EPSTEIN L. and JACOBI T., 'The Strategic Analysis of Judicial Decisions', (6) *Annual Review of Law and Social Science*, 2010, pp.341-358

F

FAIRGRIEVE D. and HOWELLS G., 'Collective Redress Procedures-European Debates', (58) *International and Comparative Law Quarterly*, 2009, pp. 379-409

FANTINO E., 'Context: A Central Concept', (54) *Behavioural Processes*, 2001, pp.95-110

FANTINO E. and STOLARZ-FANTINO S., 'Decision-Making: Context Matters', (69) *Behavioural Processes*, May 2005, n°2, pp.165-171

FARGES B., 'Le Principe de Loyauté dans l'Administration de la Preuve', *Revue trimestrielle de droit civil*, 2011, p.127

FAURE M.G. and VISSCHER L.T., 'The Role of Experts in Assessing Damages – A Law & Economics Account', (3) *European Journal of Risk Regulation*, 2011, pp.376-396

FEES E. and HALFMEIER A., 'The German Capital Markets Model Case Act (Kapmug) – A European Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reforms', January 2012 (www.ssrn.com/abstract=1684528)

FEINBERG K.R., 'Democratization of Mass Litigation: Empowering the Beneficiaries', (45) *Columbia Journal of Law and Social Problems*, 2012, pp.481-497.

FERRER R., 'The Effects of Lawyers' Career Concerns in Litigation', *American Law & Economics Association Annual Meetings*, 2008, paper n°68

FISCHHOFF B., 'Hindsight v. Foresight: The Effect of Outcome Knowledge on Judgement under Uncertainty', (104) *Journal of Experimental Psychology: Human Perception & Performance.*, 1975, pp.288-299

FITZPATRICK B.T., 'Do Class Action Lawyers Make Too Little?', (158) *University of Pennsylvania Law Review*, 2010, pp. 2043-2083

FITZPATRICK B.T., 'An Empirical Study of Class Action Settlements and their Fees Awards', (12) *Journal of Empirical Legal Studies*, 2010, pp.811-846

FLEMING J.G., 'Mass Torts', (42) *American Journal of Comparative Law*, 1994, n°3, pp.507-529

FORD R.T., 'Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes', (32) *Berkeley Journal of Employment & Labour Law*, 2011, pp.513-529

FRAISSE R., 'Le législateur et les juges en matière de responsabilité: duo ou duel?', *Actualité Juridique du Droit Administratif*, 2005, p.2215

FRANK J., 'Are Judges Humans? Part one: The Effect on Legal Thinking of the Assumption That Judges Behave like Human Being', *University of Pennsylvania Law Review and American Law Register*, 1931, n°1, pp.17-53

FRANK J., 'Are Judges Human? Part Two: As Through a Class Darkly', (80) *University of Pennsylvania Law Review and American Law Register*, 1931, n°2, pp.233-267

FRIED C., 'The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation', (85) *Yale Law Journal*, 1976, n°8, pp.1060-1089

FRIEDMAN M., 'The Methodology of Positive Economics', in: *Essays in Positive Economics*, University of Chicago Press, 1966, pp.3-16

FRISON-ROCHE M.-A., 'Le Pouvoir Processuel des Associations et la Perspective de la Class Action', *Petites affiches*, 24 April 1996, n°50, p.28

FRISON-ROCHE M.A., 'Le Modèle du Bon Juge Magnaud', in : *Mélange en l'honneur du doyen Georges Wiederkehr : De Code en Code*, Dalloz-Sirey, Paris, 2009, pp.335-342

FULLER L.L., American Legal Realism, (82) *University of Pennsylvania Law Review*, 1934, p.429

FULLER L.L. and WINSTON K.I., 'The Forms and Limits of Adjudication', (92) *Harvard Law Review*, 1978, pp. 353-409.

G

GAECHTER S., ORZEN H., RENNER E. and STARMER C., 'Are Experimental Economists Prone to Framing Effects? A Natural Field Experiment', (70) *Journal of Economic Behaviour & Organization*, 2009, pp.443-446

GALLANIS T.P., 'Reasonable Doubt and the History of the Criminal Trial', (76) *University of Chicago Law Review*, 2009, p.941-963

GARCIA VILLEGAS M., 'Champ Juridique et Sciences Sociales en France et aux Etats-Unis', (59) *L'Année Sociologique*, 2009, n°1, pp. 29-62

GAROUPA N., 'The Law & Economics of Legal Parochialism', (10) *Illinois Law Review*, 2011, n°5, p.1517

GAROUPA N. and GINSBURG T., 'Reputation, Information and the Organization of the Judiciary', (4) *Journal of Comparative Law*, 2010, pp.226-254

GENNAIOLI N., 'Judicial Fact Discretion', in: SCHLEIFER A (Ed.), *The Failure of Judges and the Rise of Regulators*, Walras-Pareto Lecture, 2012, pp.23-52

GIBSON J.L. and CALDEIRA G.A., 'Has Legal Realism Damaged the Legitimacy of the US Supreme Court?', (45) *Law & Society Review*, 2011, n°1, pp.195-219

GIDI A., 'The Class Action Code: a Model for Civil Law Countries', in: BACKHAUS J., CASSONE A. and RAMELLO G. (Eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, 2012, pp. 351-370

GIESEN I., 'De rol van de rechter in massaschade: aangepaste of partijautonomie? Een nota van een scepticus', *Nederlands Juristenblad*, 2128, 2007

GIGERENZER G., 'Heuristics', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp.17-44

GIGERENZER G. and GAISSMAIER W., 'Heuristic Decision-Making', (62) *Annual Review of Psychology*, 2011, pp.451-482

GIGERENZER G. and TODD P., 'Fast and Frugal Heuristics – The Adaptive Toolbox', in: GIGERENZER G., TODD P. and The Centre for Adaptive Behaviour and Cognition (ABC Research Group), *Simple Heuristics That Make Us Smart*, 1999, Oxford University Press, 415 p.

GILLES M. and FRIEDMAN G.B., 'Exploding the Class Action Agency Costs Myth: the Social Utility of Entrepreneurial Lawyers', (155) *University of Pennsylvania Law Review*, 2006, pp.103-164

GILMORE G., 'Legal Realism: Its Causes and Cures', (70) *Yale Law Journal*, 1961, n°7, pp.1037-1048

GINTIS H., 'The Human Actor in Ecological-Economic Models – Beyond Homo Economicus: Evidence from Experimental Economics', (35) *Ecological Economics*, 2000, pp.311-322

GLAESER E., 'The Rise of the Regulatory State', (41) *American Journal of Economic Literature*, 2003, pp.401-425

GLAESER E.L. and JOHNSON S., 'Coase versus the Coasians', in: SCHLEIFER A (Ed.), *The Failure of Judges and the Rise of Regulators*, Walras-Pareto Lecture, 2012, pp.177-208

GLENN P.H., 'Une justice de masse? Réflexions sur la responsabilité civile en Amérique du nord', (26) *Victoria University of Wellington Law Review*, 1996, p.316.

GOGOS D., 'Nouvelles Tendances d'Interprétation du Droit Privé Allemand', (9) *Revue Internationale de Droit Comparé*, n°3, July-September 1957, pp.528-536

GOLDMAN W. and LEWIS P., 'Beautiful is Good: Evidence that the Physically Attractive are more socially Skilful', (13) *Journal of Experimental Social Psychology*, 1977, issue 2, pp.125-130

GRABILL J.T., 'Judicial Review of Private Mass Tort Settlements', (42) *Seton Hall Law Review*, 2012, pp.123-183

GRAHAM R.N.M., 'What Judges Want: Judicial Self-Interest and Statutory Interpretation', (30) *Statute Law Review*, 2009, pp. 38-72

GRAHAM J., 'Collective Redress in the European Union: Reflections from a National Judge', (41) *Legal Issues of Economic Integration*, 2014, pp.289-304

GRAVELLE H. and WATERSON M., 'No Win, No Fee: Some Economics of Contingent Legal Fees', (103) *Economic Journal*, pp.1205-1220

GUEGAN-LECUYER A., 'Incertitude et Causalité dans la Perspective des Dommages de Masse', Symposium *Risque, Assurance, Responsabilité: Le Traitement Juridique et Judiciaire de l'Incertitude*, Court of Cassation, 2008, (available on : http://www.courdecassation.fr/IMG/File/intervention_mme_lecuyer.pdf)

GULATI M. and BAINBRIDGE S.M., 'How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions', (51) *Emory Law Journal*, 2002, pp.51, pp.83-151

GUTHRIE C., 'Framing Frivolous Litigation: a Psychological Theory', (67) *University of Chicago Law Review*, 2000, n°1, pp.163-216

GUTHRIE C., RACHLINSKI J.J. and WISTRICH A.J., 'Blinking on the Bench: How Judges Decide Cases', (93) *Cornell Law Review*, 2007, p.1

GUTHRIE C., RACHLINSKI J.J. and WISTRICH A.J., 'Inside the Bankruptcy Judge's Mind', (86) *Boston University Law Review*, 2006, pp.1226-1265

GUTHRIE C., RACHLINSKI J. and WISTRICH A.J., 'Inside the Judicial Mind', (86) *Cornell Law Review*, 2001, n°4

GUTHRIE C., RACHLINSKI J.J. and WISTRICH A.J., 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Discarding', (153) *University of Pennsylvania Law Review*, 2005, n°4, pp.1251-1345

GUTHRIE C., RACHLINSKI J.J. and WISTRICH A.J., 'Context Effects in Judicial Decision Making', Paper presented at the annual meeting of the American Psychology-Law Society, 2010

G'SELL F., 'DES Daughters Cases: Cour de Cassation 24 September 2009 and 24 January 2010 and CA Paris 26 October 2012', (2) *European Review of Private Law*, 2013, pp. 587-590

G'SELL-MACREZ F., 'La Preuve du lien de causalité : comparaisons franco-américaines à propos des arrêts Distilbène', *Les Petites Affiches*, 29 Octobre 2010, p.6

H

HAHN M.C., 'Smokers' Chances of a Fair Fight against the Tobacco Companies Go Up In Flames: A Study of Philip Morris Inc. V. Angeletti and its Effects on the Viability of Class Actions Lawsuits in Maryland Tobacco Litigation', (31) *University of Baltimore Law Review*, 2001, p.103

HAMER J., 'Sensitive Judges – How to Resolve the Tangle of Legal Decision-Making and Emotion', (8) *Utrecht Law Review*, 2012, pp.189-199

HAMILL R., WILSON T.D and NISBETT R.E, *Ignoring Sample Bias: Inferences about collectivities from Atypical cases*, unpublished manuscript, university of Michigan, 1979

HAMILTON D.L., 'Understanding the Complexities of Group Perception: Broadening the Domain', (37) *European Journal of Social Psychology*, 2007, pp.1077-1101

HAMILTON D.L and SHERMAN S.J., 'Perceiving Persons & Groups', (103) *Psychological Review*, 1996, n°2, pp. 336-355

HANOCH Y., 'Neither an Angel nor an Ant: Emotion as an Aid to Bounded Rationality', (23) *Journal of Economic Psychology*, 2002, pp.1-25.

HANOCH Y., 'The Effects of Emotions on Bounded Rationality: A Comment on Kaufman', (49) *Journal of Economic Behavior & Organization*, 2002, n°1, pp.131-135

HANSFORD E., 'Measuring the Effects of Specialization With Circuit Split Resolutions', (63) *Stanford Law Review*, 2011, pp.1145-1176

HANSMANN H. and KRAAKMAN R., 'Toward Unlimited Shareholder Liability for Corporate Torts', (100) *Yale Law Journal*, May 1991, pp.1879-1934

HARCOURT B.E., 'Une généalogie de la rationalité actuarielle aux Etats-Unis aux XIXe and XXe siecle', *Revue de Sciences Criminelle*, 2010, p.31

HARDIN G., 'The Tragedy of the Commons', (162) *Sciences*, 1968, pp. 1243-1248

HARNAY S. and MARCIANO A., 'Seeking Rents through Class Actions and Legislative Lobbying: A Comparison', (32) *European Journal of Law & Economics*, 2011, pp.293-304

HARNAY S. and MARCIANO A., 'Judicial Conformity versus Dissidence: An Economic Analysis of Judicial Precedent', (23) *International Review of Law & Economics*, 2004, pp.405-420

HAY B. and ROSENBERG D., 'Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy', (75) *Notre Dame Law Review*, 2000, p.1377

HELLAND E., 'Reputational Penalties and the Merits of Class Action Securities Litigation', (49) *Journal of Law & Economics*, 2006, n°2, pp. 365-395

HELLAND E. and TABARROK A., 'Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets', (19) *Journal of Law, Economics and Organization*, 2003, n°2, pp.517-542

HELLAND E. and KLINK J., 'The Effect of Judicial Expense on Attorney Fees in Class Actions', (36) *Journal of Legal Studies*, 2007, pp. 171-187

HELLERSTEIN A.K., HENDERSON J.A., TWERSKI A.D, 'Managerial Judging: The 9/11 Responders' Tort Litigation', *Brooklyn Law School Legal Studies Research Papers*, October 2012, n°298

HENRICH J., BOYD R., BOWLES S., CAMERER C., FEHR E., GINTIS H. and MCELREATH R., 'In Search of Homo Economicus: Behavioural Experiments in 15 Small-Scale Societies', (91) *The American Economic Review*, 2001, n°2, pp.73

HENSLER D., 'Justice for the Masses? Aggregate Litigation & its Alternatives', (143) *Daedalus*, n°3, summer 2014, pp. 73-82

HENSLER D., 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation', (11) *Duke Journal of Comparative and International Law*, 2001, pp.179-213

HENSLER D. and ROWE T.D., 'Beyond it Just ain't Worth It: Alternative Strategies For Damages Class Action D.R Reform', (64) *Law & Contemporary Problems*, 2001, n°2-3, Complex Litigation at the Millennium, pp.137-161

HESS Y., 'Proposed Collective Redress in Europe in the Perspective of Deterrence of Corporate Wrongdoing', (10) *European Company Law*, 2013, n°3, pp.123-128

HODGES C., 'What are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where are We Headed?', (622) *Annals of the American Academy of Political and Social Sciences*, The Globalization of Class Actions, 2009, p. 330-345

HODGES C., 'Settlement and Its Pitfalls in England and Wales', in: HODGES C. and STADLER A. (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar Publishing, 2013, pp.106-131

HODGES C., 'Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress', in: BOOM W.V and STEEL J., *Mass Justice – Challenges of Representation and Distribution*, 2011, Edward Elgar Publishing, p.101-117

HODGES C. and CREUTZFELD-BANDA N., 'Parallels Tracks in Mass Litigation: Public and Private Responses to the Buncefield Explosion in England', in: HENSLER D., HODGES C., and TZANKOVA I. (Eds), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation*, Edward Elgar Publishing, Forthcoming, 2014

HOOIJDONK M.V. and EIJSVOOGEL P., *Litigation in the Netherlands – Civil Procedure, Arbitration and Administrative Litigation*, Wolters Kluwer Law & Business, 2012, pp.104-110

HOROWITZ I.A. and BORDENS K.S., 'The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damages Awards, and Cognitive Processing of Evidence', (85) *Journal of Applied Psychology*, 2000, n° 6, pp.909-918

HOROWITZ I.A. and BORDENS K. S., 'An Experimental Investigation of Procedural Issues in Complex Tort Trials', (14) *Law & Human Behavior*, 1990, pp.269-285

HOROWITZ I.A., I.BROLLY and FORSTER LEE L., 'Effects of Trial Complexity on Decision-Making', (81) *Journal of Applied Psychology*, 1996, n°6, pp. 757-768

HOROWITZ I.A and BORDENS K.S., 'The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?', (22) *Law & Psychology Review*, 1998, p.43-66

HOROWITZ I.A and BORDENS K.S., 'The Effects of Outlier Presence, Plaintiff Population Size, & Aggregation of Plaintiffs on Simulated Civil Jury Decisions', (12) *Law & Human Behavior*, 1988, n°3, pp.209-229

HUMPHERY-JENNER L M., 'Internal and External Discipline Following Securities Class Actions', (21) *Journal of Finance and Intermediation*, 2012, pp.151-179

HUTCHESON J.C. Jr., 'The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision', (14) *Cornell Law Review*, 1929, pp. 274-288

I

ISSACHAROFF I. and MILLER G.P., 'Will Aggregated Litigation Come to Europe?', (62) *Vanderbilt Law Review*, 2009, n°1, p.177

J

JAFFE P.G., CROOKS C.V., LEE DUNFORD-JACKSON B. and TOWN M., 'Vicarious Trauma in Judges – The Personal Challenge of Dispensing Justice', (45) *Judges Journal*, 2006, pp.12-18

JAMIN C., 'Le rendez-vous manqué des civilistes français avec le réalisme juridique: Un exercice de lecture comparée', *Droits – Puf*, 2010, n°51

JENNI K.E. and LOEWENSTEIN G., 'Explaining the Identifiable Victim Effect', (14) *Journal of Risk and Uncertainty*, 1997, pp.235-257

JOLLS C., SUNSTEIN C.R. and THALER R., 'A Behavioural Approach to Law & Economics', (50) *Stanford Law Review*, 1998, n°5, pp.1471-1550

JONES M.B. and WIENER R.L., 'Effects of Mortality Salience on Capital Punishment Sentencing Decisions', (33) *Basic and Applied Social Psychology*, 2011, pp. 167-181

JONGBLOED A.W., 'The Netherlands', in: VAN RHEE C.H. (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.64-96

JOURDAIN P., 'Faute de la victime. Exceptions à l'exonération partielle. Cause exclusive. Faute de provocation', *Revue Trimestrielle de Droit Civil*, 1993, p.140.

K

KAHNEMAN D. and TVERSKY A., 'Framing Decisions and the Psychology of Choice', (211) *Science*, 1981, n°4481, pp.453- 458

KAHNEMAN D., 'Maps of Bounded Rationality: Psychology for Behavioural Economics' (Nobel Prize Lecture), (93) *The American Economic Review*, 2003, n°5, pp.1449-1475

KAHNEMAN D., RITOV I. and SCHKADE D., 'Economic Preferences or Attitudes Expressions?: An Analysis of Dollar Responses to Public Issues, (1) *Journal of Risk and Uncertainty*, 1999, pp.203-235

KALVEN H. and ROSENFELD M., 'The Contemporary Function of the Class Suit', (8) *University of Chicago Law Review*, 1941, n°4, pp. 684-721

KAPLAN B., 'Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, (81) *Harvard Law Review*, 1967, n°2, pp.356-416

KAPLOW L., 'Rules Versus Standards: an Economic Analysis', (42) *Duke Law Journal*, 1992, n°3, pp.557-627

KARAPANOU V. and VISSCHER L.T., 'Towards a Better Assessment of Pain and Suffering Damages', (1) *Journal of European Tort Law*, 2010, pp.48-74

KAUFMAN B.E., 'Emotional Arousal as a Source of Bounded Rationality', (38) *Journal of Economic Behaviour & Organization*, 1999, pp.135-144

KAUFMAN B.E., Discussion on Emotion & Bounded Rationality: Reply to Hanoch', (49) *Journal of Economic Behaviour & Organization*, 2002, pp.137-141

KERKMEESTER H., 'Methodology: General', in: *Encyclopedia of Law & Economics*, 1999

KERR N.L., KRAMER G.P. and Mc COUN R.J., 'Bias in Judgment: Comparing Individuals and Groups', (103) *Psychological Review*, 1996, n.4, pp.687-719

KERSTHOLT J.H. and JACKSON J.L., 'Judicial Decision Making: Order of Evidence Presentation and Availability of Background Information', (12) *Applied Cognitive Psychology*, 1998, pp.445-454

KESKE S., RENDA A. and VAN DEN BERGH R., 'Financing and Group Litigation', in: VISSCHER L.T. and TUIL M. (Eds.), *New Trends in Financing Civil Litigation in : A Legal, Empirical and Economic Analysis*, Edward Publishing, 2010, pp.57-90.

KHATCHADOURIAN H., 'What is Rationality?' (24) *Theoria*, 1958, n°3, p. 172

KIM P.T., 'Beyond Principal-Agent Theories: Law and the Judicial Hierarchy', (105) *Northwestern University Law Review*, 2011, n°2, pp.505-535.

KIRCHNER C., 'The Difficult Reception of Law and Economics in Germany', (11) *International Review of Law & Economics*, 1991, pp.277-292

KLAASSEN C.J.M., 'De rol van de (gewijzigde) WCAM bij de collectieve afwikkeling van massaschade en nog wat van die dingen', *Ars Aequi*, 2013, p. 633.

KLEIN D. and MORRISROE D., 'The Prestige and Influence of Individual Judges on the US Courts of Appeals', (28) *Journal of Legal Studies*, 1999, n°2, pp.371-391

KLICK J. and HELLAND E., 'The Trade-offs between Regulation and Litigation: Evidence from Insurance Class Action', *Journal of Tort Law*, 2007

KOCKESEN L. and USMAN M., 'Litigation and Settlement under Judicial Agency', (32) *International Review of Law & Economics*, 2012, pp. 300-308.

KODEK E., 'Collective Redress in Austria' in: HENSLER D., HODGES C., TULIBACKA M. (Eds), 'The Globalization of Class Actions', (622) *The Annals of the American Academy of Political and Social Science*, March 2009, p.86-94

KOGUT T. and RITOV I., 'The Singularity Effect of Identified Victims in Separate and Joint Evaluations', (97) *Organizational Behaviour and Human Decision Processes*, 2005, n°2, pp.106-116

KOGUT T. and RITOV I., 'The Identified Victim Effect: An Identified Group or Just a Single Individual?', (18) *Journal of Behavioural Decision-Making*, 2005, pp.157-167

KOKU P.S., 'An Analysis and the Effects of Class-Action Lawsuits', (59) *Journal of Business Research*, 2006, pp. 508-515

KONECNI V.J. and EBBESEN E.B., 'The Mythology of Legal Decision-Making' (7) *International Journal of Law and Psychiatry*, 1984, pp.5-18

KONIAK S.P. and COHEN G.M., 'Under Cloak of Settlement', (82) *Virginia Law Review*, 1996, n°7, pp.1051-1280

KOROBKIN R.B. and ULEN T.S., 'Law & Behavioural Science: Removing the Rationality Assumption from Law & Economics', (88) *California Law Review*, 2000, n°4, pp. 1051-1144

KOZINSKI A., 'What I Ate for Breakfast and Other Mysteries of Judicial Decision-Making', in: O'BRIEN D.M (Ed.), *Judges on Judging –Views from the Bench*, 3rd Ed., CQ Press, 2009, 372, pp.96-102

KRAMER X.E., 'Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements (WCAM)', in: HODGES C. and STADLER A. (Eds.), *Resolving Mass Disputes – ADR and Settlement of Mass Claims*, Edward Elgar Publishing, 2013, pp. 63-90

KRITZER H.M., FELSTINER W.L.F, SARAT A., TRUBEK D.M., , 'The Impact of Fee Arrangement on Lawyer Effort', (19) *Law & Society Review*, 1985, n°2, pp.251-278

L

LACROIX-ANDRIVET J.P., 'Procédure devant le tribunal de grande instance', in : GUINCHARD S. (Ed.), *Dalloz action droit et pratique de la procédure civile*, 2012

LADINSKI J., 'The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients', (11) *Law & Society Review*, 1976, n°2, pp.207-223

LAHAV A.D., 'The Law and Large Numbers: Preserving Adjudication in Complex Litigation', (59) *Florida Law Review*, pp.383-436

LAHAV A.D., 'Bellwether Trials', (76) *George Washington Law Review*, 2008, pp.576

LAFOND P.-C., 'Le Recours Collectif et le Juge Québécois : de l'Inquiétude à la Sérénité', *Petites Affiches*, 10 June 2005, p.11

LANDES W.M, Sequential Versus Unitary Trials: An Economic Analysis, (22) *Journal of Legal Studies*, 1993, n°1, pp.99-134

LANDSMAN S. and RAKOS R.F., 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation', (12) *Behavioural Sciences & The Law*, 1994, pp.113-126

LAROSE H. and STANDING L., 'Does the Halo Effect Occur in the Elderly?', (26) *Social Behaviour & Personality: an International Journal*, 1998, n°2, pp.147-150

LAUGHLIN P.R and CAREY H.R., 'Groups Perform Better Than The Best Individuals on Letters-to-Numbers Problems: Effects of Induced Strategies', (15) *Group Processes & Intergroup Relations*, 2012, pp. 231-242

LAUGHLIN P.R., HATCH E.C., SILVER J.S. and BOH L., 'Groups Perform Better than the Best Individuals on Letters-to-Numbers Problems: Effects of Group Size', (90) *Journal of Personality and Social Psychology*, 2006, n°4, pp.644-651

LECUYER H., 'En Route Vers la Market Share Liability ? Quelles suites à la Jurisprudence relative à la responsabilité du fait du DES ?', *Petites Affiches*, 22 mai 2012, p.3

LEE E.G and WILLGING T., 'Impact of CAFA on Federal Courts - Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules', *Federal Judicial Center*, April 2008

LEGG M., 'Mass Settlements in Australia, in: HODGES C. and STADLER A. (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edwar Elgar Publishing, 2013, pp.172-203

LEJEUNE A., 'Les Professionnels du Droit comme Acteurs du Politique : Revue Critique de la Littérature Nord-Américaine et Enjeux pour une Importation en Europe Continentale', *Sociologie du Travail*, 2011, n°53, pp. 216-233

LEMPEREUR A. and SCODELLARO M., 'Conflits d'Intérêts Economiques entre Avocats et Clients : La Question des Honoraires', *Recueil Dalloz* 2003, p.1380

LEON M. ODEN G.C and ANDERSON N.H., 'Functional Measurement of Social Values', (27) *Journal of Personality and Social Psychology*, 1973, n°3, pp. 301-310

LERMAN L.G., 'Lying to Clients', (138) *University of Pennsylvania Law Review*, 1990, n°3, pp.659-760

LEVIN I.P., SCHNEIDER S.L and GAETH G.J., 'All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects', (76) *Organisational Behaviour and Human Decision Processes*, 1998, n°2, pp.149-188

LEVIT G., 'Career Judges and the Appeals Process', (36) *RAND Journal of Economics*, 2005, n°2, pp. 275-297

LHEUREUX N., 'Effective consumer access to justice: Class actions', (15) *Journal of Consumer Policy*, 1992, pp. 445-462

LICKEL B.,HAMILTON D, UHLES A., NEVILLE A., WIECZORKOWSKA G., LEWIS A. and SHERMAN S. 'Varieties of Groups and the Perception of Group Entitativity', (78) *Journal of Personality and Social Psychology*, 2000, pp.223-246

LICKEL B.,DENSON T.F, CURTIS M. and. STENSTROM D.M, 'The Roles of Entitativity and Essentiality in Judgements of Collective Responsibility', (9) *Group Processes & Intergroup Relations*, 2006, pp.43-61

LICKEL B, MILLER N.,STENSTROM D.M, DENSON T.F. and SCHMADER T., 'Vicarious Retributions: The Role of Collective Blame in Intergroup Aggression', (10) *Personality and Social Psychology Review*, 2006, pp.372-390

LIENHARD C., 'Médiateur, Loi Fourcade : Regrettables Régressions du Droit des Victimes', *Gazette du Palais*, 16 July 2011, n°197, p.3.

LOEWENSTEIN G., 'Emotions in Economic Theory and Economic Behaviour', (90) *The American Economic Review*, May 2000, pp.426-431

LOS W.J.J., 'Toepassing Van De WCAM – Bespiegelingen over de rol en taak van de rechter', in: LOS W.J.J. (Ed.), *Collectieve acties in het algemeen en de WCAM in het bijzonder*, Nederlandse Vereniging voor Procesrecht n°28, Den Haag: BJu 2013, p. 25-29.

LUCIEN A., 'Staging and the Imaginary Institutions of the Judge', (23) *International Journal for the Semiotics of Law*, 2010, pp.185-206

M

MACEY J.R., 'Judicial Preferences, Public Choice, and the Rules of Procedure', (23) *Journal of Legal Studies*, 1994, n°1, pp.627-646

MACEY J.R. and MILLER G.P., 'Judicial Review of Class Action Settlement', (1) *Journal of Legal Analysis*, 2009, n°1, p.167

MALAURIE P., 'La Mythologie et le Droit', *Defrénois*, 15 August 2003, n°15, p.951

MALAURIE M.-VIGNAL, 'L'hyper-technicité et la proximité du droit », *Contrats Concurrence Consommation*, 2006, repère n°1

MALOUFF J.M., EMMERTON A.J. and SCHUTTE N.S., 'The Risk of Halo Bias as a Reason to Keep Students Anonymous During Grading', (40) *Teaching of Psychology*, 2013, pp.233-240

MAGEN A. and SEGAL P., 'The Globalization of Class Actions – National Report Israel', available on http://globalclassactions.stanford.edu/sites/default/files/documents/Israel_National_Report.pdf

MAGNIER V., 'Rapport spécial en droit financier et boursier' in: PRIETO C. (Ed), *Cohérence des recours collectifs – Réponse à la consultation Publique de la Commission européenne*, Coll. Trans Europe Experts, Société de législation comparée, 2011, pp.173-219

MAGNIER V., 'Report on France', (622) *Annals of the American Academy of Political and Social Sciences (The Globalization of Class Actions)*, 2009, pp.114-124

MAJETTI R., 'Le phénomène Magnaud', (37) *La Revue Socialiste*, 1903, pp. 651-662

MARCUS R.L., 'They Can't Do That, Can They? Tort Reform via Rule 23', (80) *Cornell Law Review*, 1995, pp. 858-908

MARCUS R.L., 'Confronting the Consolidation Conundrum', *Brigham Young University Law Review*, 1995, pp.879-924

MARCUS R.I., 'Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits of Class Certification', (79) *George Washington Law Review*, 2011, pp.324-373

MARCUS R.I., 'America's Dynamic and Extensive Experience with Collective Litigation', in: HODGES C. and STADLER A. (Eds), *Resolving Mass Disputes – ADR and settlements of Mass Claims*, Edward Elgar Publishing, 2013, pp.148-171

MAREWSKI J.N and GIGERENZER G., 'Heuristic Decision-Making in Medicine', (14) *Dialogues in Clinical Neuroscience*, 2012, n°1, available on www.ncbi.nlm.nih.gov/pmc/articles/PMC3341653/pdf/DialoguesClinNeurosci-14-77.pdf

MARONEY T.A., 'The Persistent Cultural Script of Judicial Dispassion', (99) *California Law Review*, 2011, p.629-682

MARONEY T.A., 'Emotional Regulation and Judicial Behaviour', (99) *California Law Review*, 2011, pp.1485-1555

MARONEY T.A., 'Angry Judges', (65) *Vanderbilt Law Review*, 2012, pp.1205-1284

MARTINET L. and DU CHASTEL A., 'Du retour de l'action de groupe et du mythe de Sisyphe', *Petites Affiches*, 10 March 2009, n°49, p. 6

Mc GINTY S., 'From Peasant to Shareholder – Divergent Paths of Group Litigation in Tokugawa Japan in England, in: WRBKA S., VAN UYTSEL S and SIEMS M. (Ed.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press, 2012, pp.119-142

Mc GOVERN F.E., 'Resolving Mature Mass Tort Litigation', (69) *Boston University Law Review*, 1989, pp.659

Mc GOVERN F.E., 'An Analysis of Mass Tort for Judges', (73) *Texas Law Review*, 1995, pp.1821-1845

MENKEL-MEADOW C., 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)', (83) *Georgetown Law Review*, 1995, pp.2663-2696

MENKEL-MEADOW C., 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road', (90) *Cornell Law Review*, 1995, pp.1159-1221

MICELI T.J. and COSGEL M.M., 'Reputation and Judicial Decision-Making', (23) *Journal of Economic Behaviour and Organization*, 1994, pp.31-51

MILLER, A.H., 'Of Frankenstein Monsters and Shining Knights: Myths, Reality and the Class Action Problem', (92) *Harvard Law Review*, 1979, n°3, pp.664-694

MILLER M.K., GREENE E., DIETRICH H., CHAMBERLAIN J. and SINGER J.A., 'How Emotion Affects the Trial Process', (92) *Judicature*, September-October 2008, n°2

MITCHELL G., 'Revisiting Truth or Triviality: The External Validity of Research in the Psychological Laboratory', (7) *Perspectives on Psychological Science*, 2012, p.109

MOLFESSIS N., 'L'exorbitance de l'action de groupe à la française', *Recueil Dalloz*, 2014, p.947

MOLOT J.T., 'An Old Judicial Role for a New Litigation Era', (113) *Yale Law Journal*, 2003, p.27-118

MONEY-KYRLE R. and HODGES C., 'European Collective Action: Towards Coherence?' *Maastricht Journal of European and Comparative Law*, 4, 2012

MONTADA L., 'Justice: Just a Rational Choice?', (11) *Social Justice Research*, n°2, 1998, pp.81-101.

MONROE M.C. and ADAMS D.C., 'Increasing Responses Rate to Web-Based Surveys', (50) *Journal of Extension*, 2012

MOORE K.A., 'Are District Court Judges Equipped to Resolve Patent Cases', (15) *Harvard Journal of Law & Technology*, 2001, n°1

MOORE U. and CALLAHAN C.C., 'Law and Learning Theory: A Study in Legal Control', (43) *Yale Law Journal*, 1943

MULHERON R., 'Reform of Collective Redress in England and Wales: A Perspective of Need', *Research paper for submission to the Civil Justice Council of England and Wales*, 2007, available on www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FOther+papers%2Freform-of-collective-redress.pdf

MULHERON R., 'The Impetus for Class Actions Reform in England Arising From the Competition Law Sector', in: WRBKA S., VAN UYTSEL S. and SIEMS M. (Ed.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests*, Cambridge University Press, 2012, pp.385-412

MULHERON R., 'The Case for an Opt-Out Class Action for European Member States: a Legal and Empirical Analysis', (15) *Columbia Journal of European Law*, 2009, pp.409-453

MURAMATSU R. and HANOCH Y., 'Emotion as a Mechanism for Boundedly Rational Agents: the Fast and Frugal Way', (26) *Journal of Economic Psychology*, 2005, pp.201-221

MURRAY R.P., 'Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation', (69) *California Law Review*, 1981, pp.1079-1203

N

NAGAREDA R., 'Aggregate Litigation across the Atlantic and the Future of American Exceptionalism', (62) *Vanderbilt Law Review*, 2009, n°1, p.1

NAGAREDA R., 'Autonomy, Peace, and Put Options in Mass Tort Class Actions', *Harvard Law Review*, January 2002, pp.115-747

NAGAREDA R., 'Mass Resolution of Mass Torts: Emerging issues in the United States and the Global Future', in: STEEL J. and BOOM W. (Ed.), *Mass Justice: Challenges of Representation and Distribution*, Edward Elgar Publishing, 2011, p.26

NELSON L., 'Is Alabama a Jurisdiction out of Control? – That Depends', (27) *Cumberland Law Review*, 1996, p.987-991

NEWELL A., SHAW J.C. and. SIMON H.A., *The Processes of Creative Thinking*, 16 September 1958, presented before a symposium at the University of Colorado, May 1958

NEWHEISER A.-K., SAWAOKA T. and DOVIDIO J.F., 'Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion', (48) *Journal of Experimental Social Psychology*, 2012, pp.931-936

NEYRET L., 'L'imputabilité de la sclérose en plaques au vaccin contre l'hépatite B', *Recueil Dalloz*, 2007, p.2204

NOVEY L.B., 'Collective Judicial Management of Mass Toxic Tort Controversies: Lessons and Issues From the Agent Orange Litigation', (27) *Social Science & Medicine*, 1988, n°10, pp.1071-1084

NORDGREN L.F. and MCDONNELL M.-H., 'The Scope-Severity Paradox: Why Doing More Harm is Judged to Be Less Harmful', (2) *Social Psychological and Personality Science*, 2011, pp.97-102

O

ODY M.-J., 'Le Juge du 21e Siècle: un Soufflé qui n'Evitera pas l'Asphyxie – à Propos du Rapport Delmas-Goyon', *Gazette du Palais*, 11 March 2014, n°70, p.21

OGUS A., 'What Legal Scholars Can Learn from Law and Economics', (79) *Chicago-Kent Law Review*, 2004, pp.383-401

O'LAUGHLIN M.J. and MALLE B.F., 'How Do Explain Actions Performed by Groups and Individuals', (82) *Journal of Personality and Social Psychology*, 2002, pp.33-48

O'NEILL K., 'Agent Orange on Trial: Mass Toxic Disasters in The Courts – Book Review', (15) *Review of Law and Social Change*, 1986-1987, pp. 415-428

OST F., 'Le Juge Pacificateur, Juge-arbitre et Juge entraîneur. Trois modèles de justice' in : GERARD P., OST F. and VAN DE KERCHOVE M. (Eds.), *Fonction de juge et pouvoir judiciaire : transformation et déplacement*, Publication des facultés universitaires de Saint Louis, 1983

OST F., 'Jupiter, Hercule, Hermès : Trois modèles du Juge', in : BOURETZ P. (Ed.), *La Force du Droit*, Ed. Esprit, 1991, pp.241-272

P

PACCES A.M. and VISSCHER L.T., 'Law & Economics – Methodology', in: VAN KLINK B. and TAEKEMA S. (Eds.), *Interdisciplinary Research into Law*, 2011, Berlin: Mohr, pp.85-107;

PACE N.M., 'Class Actions in the United States of America: An Overview of the Process and the Empirical Literature', Country report, Global Class Actions Exchange, available on http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf

PACHUR T., STEINMANN F. and HERTWIG R., 'How Do People Judge Risks: Availability Heuristic, Affect Heuristic or Both?', (18) *Journal of Experimental Psychology: Applied*, 2012, pp.314-330

PANSIER F.J., 'Transaction et Rôle du Juge', *Cahiers Sociaux du Barreau de Paris*, May 2004 ; n°160, p.223

PERROT R., 'Le Juge Unique en Droit Français', (29) *Revue internationale de droit comparé*, 1977, n°4, pp.659-674

PETCHENIK J. and WATERMOLEN D.J., 'A Cautionary Note on Using the Internet to Survey Recent Hunter Education Graduates', (16) *Human Dimensions of Wildlife: An International Journal*, 2011, issue 3, pp.216-218

PETERS G., 'Nouveau Management Public (New Public Management)', in: L.BOUSSAGUET (Ed.), *Dictionnaire des Politiques Publiques*, Presses de Sciences Po – Références, 2010, pp. 398-404

PICKETT C.L., 'The Effects of Entitativity Beliefs on Implicit Comparisons between Group Members', (27) *Personality and Social Psychology Bulletin*, 2001, pp.515-525

PICKETT C.L. and PERROTT D.A., 'Shall I Compare Thee? Perceived Entitativity and Ease of Comparison', (40) *Journal of Experimental Social Psychology*, 2004, pp.283-289

PIPERIDES C., 'Group Report: What is the Role of Heuristics in Litigation', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press pp. 343-377

PORTMANN A., 'Il est inacceptable de réserver l'action de groupe à 17 personnes morales', *Dalloz actualité*, 29 April 2013

POSNER R.A., 'What Do Judges and Justices Maximize? The Same Thing Everybody Else Does', (3) *Supreme Court Economic Review*, 1994, pp.1-41

POSNER R.A., 'An Economic Approach to Legal Procedure and Judicial Administration', (2) *Journal of Legal Studies*, 1973, n°2, pp.399-458

POSNER R.A., 'The Role of the Judge in the Twenty-First Century', (86) *Boston University Law Review*, 2006, pp.1049-1068

PRESTON B.J., 'Benefits of Judicial Specialization in Environmental Law: the Land and Environment Court of New South Wales as a Case Study', (29) *Pace Environmental Law Review*, 2012, pp.396-440

PRIEST G.L., 'Procedural versus Substantive Controls of Mass Tort Class Actions', *Journal of Legal Studies* (J.M.OLIN Program in Law and Economics Conference on Tort Reform), June 1997.

PRIETO C., 'Recours collectifs: une quete d'harmonisation...au sein de la Commission europeenne', *Revue Trimestrielle de Droit Européen*, 2011, p.1

R

RABIN M., 'Inference by Believers in the Law of Small Numbers', (117) *The Quarterly Journal of Economics*, 2002, n°3, pp.775-816

RACHLINSKI J.J., 'The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters', (85) *Cornell Law Review*, 2000, pp.739-766.

RACHLINSKI J.J., 'A Positive Psychological Theory of Judging in Hindsight', (65) *University of Chicago Law Review*, 1998, p.571-625

RACHLINSKI J.J., 'Does Empirical Legal Studies Shed more Light than Heat', Lecture at Erasmus University, 20 March 2013

RACHLINSKI J.J. and VAN BOOM W., 'Inside the Civil Judge's Mind', presented during the 6th topics workshop of the International Max Planck Research School (IMPRS) on Adapting Behavior in a Fundamentally Uncertain World, at Erasmus University Rotterdam, 15-19 October 2012.

RADE C., 'Causalité Juridique et Causalité Scientifique: de la Distinction à la Dialectique', *Recueil Dalloz*, 2012, p.112

RADIN M., 'The Theory of Judicial Decisions: Or How Judges Think', (11) *American Bar Association Journal*, 1925, pp.357-362

RAMELLO G., 'Aggregate Litigation and Regulatory Innovation: Another View of Judicial Efficiency', (32) *International Review of Law and Economics*, 2012, pp. 63-71

RAMSEYER J.M., 'Talent Matters: Judicial Productivity and Speed in Japan', (32) *International Review of Law & Economics*, 2012, pp.38-48.

RAMSEYER J.M and RASMUSSEN E.B., 'Judicial Independence in a Civil Law Regime: The Evidence from Japan', (13) *Journal of Law, Economics & Organization*, 1997, n°2, pp.259-286

RATLIFF J., 'Special Master's Report in *Cimino v. Raymark Industries Inc.*', (10) *The Review of Litigation*, 1991, pp.521-546

RAVE T., 'Governing the Anticommons in Aggregate Litigation', (66) *Vanderbilt Law Review*, 2013, pp.1183-1258

RESNIK J., 'Managerial Judges', (96) *Harvard Law Review*, 1982, n°2, pp.374-448

RESNIK J., 'Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation', (48) *University of Pennsylvania Law Review*, 2000, pp.2119

RICHARD L., 'The Lawyer Types – How Your Personality Affect Your Practice', (79) *A.B.A Journal*, 1993, p.74

RITTER L.A. and. SUE V.M, 'The Survey Questionnaire', *New Directions for Evaluation – Special Issue: Using Online Surveys in Evaluation*, autumn 2007, n°115, pp.37-45

ROBBENNOLT J.K., Mc COUN R.J. and DARLEY J.M., 'Multiple Constraints Satisfaction in Judging', in: KLEIN D. and MITCHELL G. (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.27-39.

ROE M.J., 'Bankruptcy and Mass Tort', (84) *Columbia Law Review*, 1984, pp.846-922

ROEDDER W.C., 'An Introduction to the Class Action Fairness Act of 2005', (56) *FDCC Quarterly*, 2006, pp.443-464

ROGERS J.L. and BUSKIRK V., 'Shareholder Litigation and Changes in Disclosure Behaviour', (47) *Journal of Accounting and Economics*, 2009, pp.136-156

ROMANO R., 'The Shareholder Suit: Litigation without Foundation?', (7) *Journal of Law, Economics & Organization*, 1991, n°1, pp.55-87

ROME F., 'Retour à la case 'Desmares'?', *Recueil Dalloz*, 2008, p.905

RONTCHEVSKY N., 'La Cour de cassation admet la méthode du faisceau d'indices en matière de preuve du manquement d'initié', *Revue Trimestrielle de Droit Commercial*, 2010, p.578

ROSENBERG D., 'Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't', (37) *Harvard Journal on Legislation*, 2000, n°2, p.393

ROSENBERG D., 'Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Actions vs. Collateral Estoppel vs. Standard Claims Market', *Harvard Law School Public Law Research Paper* n° 044, 2002

ROSENBERG D., 'The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System', (97) *Harvard Law Review*, 1984, pp.849-929

ROSENBLATT A., GREENBERG J., SOLOMON S., LYON D. and PYSZCZYNSKI T., 'Evidence For Terror Management Theory: The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values', (57) *Journal of Personality and Social Psychology*, 1989, n°4, pp.681-690

ROSENFELD A., 'An Empirical Test of Class Action Settlement', (5) *Journal of Legal Studies*, 1976, n°1, pp.113-120

ROSTAIN T., 'Educating Homo Economicus: Cautionary Notes on the New Behavioural Law & Economics Movement', (34) *Law & Society Review*, 2000, n°4, pp.973-1006

ROTHBART M., SOLOMON F., JENSEN C., HOWARD J. and BIRRELL P., 'From Individual to Group Impressions: Availability Heuristics in Stereotype Formation', (14) *Journal of Experimental Social Psychology*, 1978, n°3, pp.237-255

ROUSSEL V., 'Les Magistrats dans Les Scandales Politiques', *Revue Française de Science Politique*, 1998, n°2, pp.245-273

ROWLEY C.K., 'An Intellectual History of Law and Economics: 1739-2003', in: PARISI F. and ROWLEY C.K. (Eds), *The Origins of Law & Economics – Essays by the Founding Fathers*, The Locke Institute, 2005, pp.3-32

ROZES S., 'Un nouveau profil pour les juges', in : *Mélange en l'honneur de R.PERROT – Nouveaux juges nouveaux pouvoirs*, Dalloz, 1995, pp.435-441

S

SAH S. and LOEWENSTEIN G., 'More Affected = More Neglected: Amplification Bias in Advice to the Unidentified and Many', (3) *Social Psychological and Personality Science*, 2012, pp.365-372

SAINATI G., 'Vers une Justice managériale?', in: W.PELLETIER and L.BONELLI (Ed.), *L'Etat démantelé*, La Découverte – Cahiers Libres, 2010, pp.129-138

SAKS M.J and BLANCK P.D., 'Justice Improved: the Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts', (44) *Stanford Law Review*, pp.815, 1992

SAMUELSON W. and ZECKHAUSER R., 'Status Quo Bias in Decision Making', (1) *Journal of Risk and Uncertainty*, 1988, pp.7-59.

SARACENO M., 'Group Litigation, Access to Justice and Deterrence', *Amsterdam Centre for Law and Economics Working Paper*, n°.2008-04, 2008

SCHAEFER H.-B., 'The Bundling of Similar Interests in Litigation- The Incentives for Class Action and Legal Actions Taken by Associations', (9) *European Journal of Law & Economics*, 2000, pp. 183-212

SCHAEFER H.-B., 'Legal Rules and Standards', in: ROWLEY C.K. and SCHNEIDER F. (Eds.), *Encyclopaedia of Public Choice*, Kluwer Academic Publisher, 2004, pp.671-674

SCHAUER F., 'Incentives, Reputation and the Inglorious Determinants of Judicial Behaviour', (68) *University of Cincinnati Law Review*, 2000, n°3, p.615

SCHAUER F., 'Is There a Psychology of Judging', in: KLEIN D. and MITCHELL G. (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.103-120

SCHELLING T.C., 'The Life You Save May Be Your Own', in: CHASE S.B (Ed.), *Problems in Public Expenditure Analysis*, Brooking Institution, Washington D.C., 1968, pp.127-176

SCHLEGEL J.H., 'American Legal Realism and Empirical Social Sciences: The Singular Case of Underhill Moore', (29) *Buffalo Law Review*, 1980, pp.264-303

SCHNEIDER M.R., 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal', (20) *European Journal of Law & Economics*, 2005, pp.127-144

SCHUCK P.H., 'Mass Torts: an Institutional Evolutionist Perspective', (80) *Cornell Law Review*, 1995, p.941-988

SCHULDT J.P., MULLER D. and SCHWARZ N., 'The Fair Trade' Effect: Health Halos From Social Ethics Claims', (3) *Social Psychological and Personality Science*, 2012, pp.581-589

SCHULZ J., 'Rules of Evidence as Heuristics', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press

SCHVEI N.A., PUHL R.M., LEVANDOSKI K.A and BROWNELL K.D., 'The Influence of a Defendants' body weight on perceptions of guilt', (37) *International Journal of Obesity*, 2013, pp.1275-1281

SCHWARTZ H., 'Herbert Simon & Behavioural Economics', (31) *Journal of Socio-Economics*, 2002, pp.181-189

SELVIN M. and PETERSON M.A., 'Mass Justice: The Limited and Unlimited Powers of Courts', (54) *Law & Contemporary Problems*, 1991, n°3, pp.227-247.

SEMMLER C. and BREWER N., 'Effects of Mood and Emotion on Juror Processing and Judgements', (20) *Behavioural Sciences and the Law*, 2002, pp.423-436

- SHAVELL S. 'A Model of the Optimal Use of Liability and Safety Regulation', (15) *Rand Journal of Economics*, 1984, n°2
- SHAVELL S., 'An Analysis of Causation and the Scope of Liability in the Law of Torts', (9) *Journal of Legal Studies*, 1980, pp.463-516
- SHAVELL S., 'Risk Sharing and Incentives in the Principal Agent Relationship', (10) *Bell Journal of Economics*, 1979, n°1, pp.55-73
- SHAVELL S. and ROSENBERG D., 'A Model in which Suits are Brought for their Nuisance Value', (5) *International Review of Law & Economics*, 1985, pp.3-13
- SHEEHAN K. and MILLAN S.MC, 'Response Variation in E-mail Surveys: An Exploration', (39) *Journal of Advertising Research*, 1999, pp.45-54
- SHEN F.X., 'The Overlooked Utility of the Defendant Class Action', (88) *Denver University Law Review*, 2010, pp.73-181
- SHERMAN E.F. 'Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process', (25) *Review of Litigation*, 2006, pp. 691-718
- SHERMAN S.J. and PERCY E.J., 'The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible For the Misdeeds of Individual Members', (137) *Journal of Law and Policy*, 2011, pp. 137-170
- SHERWIN E., 'Features of Judicial Reasoning', in: KLEIN D. and MITCHELL G. (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.121-130.
- SHESKIN D.J., 'Outlier', in: SALKIND N.J. (Ed.), *Encyclopaedia of Research Design*, 2010
- SHOEMAKE D.A., 'Bifurcation: A Powerful but Underutilized Tool in South Carolina Civil Litigation', (59) *South Carolina Law Review*, 2008, pp.433-453
- SILICIANO J.A., 'Mass Torts and the Rhetoric of Crisis', (80) *Cornell Law Review*, 1995, pp.990-1013
- SILVER C., 'We're scared to death': Class Certification and Blackmail', (78) *New York University Law Review*, October 2003, p.1357
- SIMARD L.S. and TIDMARSH J., 'Foreign Citizens in Transnational Class Actions', (97) *Cornell Law Review*, 2011, pp. 87-129
- SIMON H.A., 'Rational Decision-Making in Business Organizations, *Nobel Memorial Lecture*, 8 December 1978
- SIMON H.A., 'A Behavioural Model of Rational Choice', (69) *The Quarterly Journal of Economics*, 1955, n°1, pp.99-118
- SIMON H.A., 'Rational Choice and the Structure of the Environment' (1956), in: SIMON H.A., *Models of Man: Social and Rational – Mathematical Essays on Rational Human Behaviour on a Social Setting*, 1957, John Wiley & Sons, New York, pp. 241-257

SIMON D., 'In Praise of Pedantic Eclecticism', in: KLEIN D. and MITCHELL G. (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, pp.131-148

SIMON J., FOULON C. and FERRER A., 'Faut-il introduire l'action de groupe en droit du travail ?', *Revue de droit du travail*, 2012, p.603

SLOVIC P., 'If I Look at the Mass I Will Never Act: Psychic Numbing and Genocide', (2) *Judgement and Decision-Making*, 2007, n°2, pp.79-95

SLOVIC P., FINUCANE M.L, PETERS E. and Mc GREGOR D.G, 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics', (31) *Journal of Socio-Economics*, 2002, pp.329-342

SLOVIC P., FINUCANE M.L, PETERS E. and Mc GREGOR D.G., 'The Affect Heuristic', (177) *European Journal of Operational Research*, 2007, pp.1333-1352

SMALL D.A. and LOEWENSTEIN G., 'The Devil You Know: The Effects of Identifiability on Punishments', (18) *Journal of Behavioural Decision-Making*, 2005, pp.311-318

SMALL D.A. and LOEWENSTEIN G., 'Helping a Victim or Helping the Victim: Altruism and Identifiability', (26) *Journal of Risk and Uncertainty*, 2003, pp.5-16

SMALL D.A, LOEWENSTEIN G., SLOVIC P., 'Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims', (102) *Organizational Behaviour and Human Decision Processes*, 2007, pp.143-153

SMITH R.W, FARO D. and BURSON K.A., 'More for the Many : The Influence of Entitativity on Charitable Giving', (39) *Journal of Consumer Research*, 2013, pp.961-976

SMYTH R., 'Do Judges Behave as Homo Economicus, and if so, can we measure their performance? An Antipodean Perspective on Tournament of Judges', (32) *Florida State University Law Review*, 2005, pp.1299-1330

SONGER D.R., SEGAL J.A, CAMERON C.M., 'The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions', (38) *American Journal of Political Sciences*, 1994, pp. 673-696.

SPAACK T., 'Naturalism in Scandinavian and American Realism: Similarities and Differences', in: DAHLBERG M. (Ed.), *De Lege, Uppsala-Minnesota Colloquium: Law, Cultures and Values*, pp. 33-83, Uppsala, March 2009

SPELLMAN B.A., 'On the Supposed Expertise of Judges in Evaluating Evidence', (157) *University of Pennsylvania Law Review*, 2007

STADLER A, 'Collective Redress Litigation – A New Challenge for Courts in Europe', in: A.BRUNS (Ed.), *Festschrift für Rolf Stürner zum, 70. Geburtstag*, Mohr Siebeck, Tübingen, 2013, Teilband 2, pp.1801-1816

STIGLER G., 'Economics: The Imperial Science', (86) *Scandinavia Journal of Economics*, 1984, pp.301-313.

STEPHEN F.H., FAZIO G. and TATA C., 'Incentives, Criminal Defence Lawyers and Plea Bargaining', (28) *International Review of Law & Economics*, 2008, pp.212-219

STIGLITZ J., 'Principal and Agent', in: DURLAUF S.N. and BLUME L.E. (Eds.), *The New Palgrave Dictionary of Economics*, 2nd Ed., 2008

STOUT L.A., 'Judges As Altruistic Hierarchs', *Wm & Mary Law Review*, 2001-2002, pp.1605-1627

STRAS S.D.R., 'Incentives Approach to Retirement', (90) *Minnesota Law Review*, 2006, n°5, p.1417

STUYCK J., 'EC Competition Law after Modernization: More Than Ever in the Interest of Consumers', (28) *Journal of Consumer Policy*, 2005, pp.1-30

STUYCK J., 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question', (20) *European Business Law Review*, 2009, pp.483-505

SUCHMAN E.A. and CANDLESS B.M.C., 'Who Answers Questionnaires?', (24) *Journal of Applied Psychology*, 1940, n°6, pp.758-769

SUSSKIND J., MAURER K., SHERMAN J.W., THAKKAR V. and HAMILTON D.L., 'Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions', (76) *Journal of Personality and Social Psychology*, 1999, n°2, pp.181-191

SUNSTEIN C.R. and KURAN T., 'Availability Cascades and Risk Regulation', (51) *Stanford Law Review*, 1999, pp.683-768

T

TAHA A., 'How Panels Affect Judges: Evidence From United States District Courts', (39) *University of Richmond Law Review*, 2005, pp.1235-1278

TAMANAHA B.Z., 'Understanding Legal Realism', (87) *Texas Law Review*, 2009, p.731

TATA C., 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work', (34) *Journal of Law & Society*, 2007, n°4, pp.489-519

TATA C., GORIELY T. and al., 'Does Mode of Delivery Make a Difference to Criminal Cases Outcomes and Client Satisfaction?', (50) *Criminal Law Review*, n2, 2004

TENBRUNSEL A.E., DIEKMANN K.A. and NAQUIN C.E., 'Unethical behaviour directed toward group versus individuals: The Role of Target Type in Promoting Misrepresentation', *unpublished manuscript*

TEN VELDEN F.S. and DE DREU C.K.W., 'Groups As Motivated Information Processors', in: GIARD R.W.M. (Ed.), *Judicial Decision Making in Civil Law – Determinants, Dynamics and Delusions*, Eleven International Publishing, 2012, 118 p

THORNDIKE E.L., 'A Constant Error in Psychological Ratings', (3) *Journal of Applied Psychology*, 1920, pp.25-29

TOUTANT C., 'Happas, Newest Mass-Tort Judge, Is Assigned Pharmaceutical Litigation', *New Jersey Law Journal*, 21 September 2007

TRAVIS C.B., PHILLIPPI R.H and TONN B.E., 'Judgment Heuristics and Medical Decisions', (13) *Patient Education and Counselling*, 1989, pp.211-220

TSAOUSSI A. and ZERVOGIANNI E., 'Judges as Satisficers: a Law & Economics Perspective on Judicial Liability', (29) *European Journal of Law & Economics*, 2010, pp.333-357

TUMONIS V., 'Legal Realism & Judicial Decision-Making', (19) *Jurisprudencija*, 2012, n°4, pp.1361-1382

TUNC A., 'Grand Outlines of the Code of Napoleon', (29) *Tulane Law Review*, 1955, pp.431-452

TVERSKY A. and REDELMEIER R.A., 'Discrepancy between Medical Decisions for Individuals Patients and for Groups', (322) *The New England Journal of Medicine*, 1990, pp.1162-1165

TVERSKY A. and KAHNEMAN D., 'Belief in the Law of Small Numbers', (76) *Psychological Bulletin*, 1971, n°2, pp. 105-110

TVERSKY A. and KAHNEMAN D., 'The framing of decisions and the psychology of choice', (211) *Science*, 1981, pp.453-458

TZAKAS D.-P., 'Collective Redress in the Field of EU Competition Law: the Need for an EU Remedy and the Impact of the Recent Commission Recommendation', (41) *Legal Issues of Economic Integration*, 2014, pp.225-242

TZANKOVA I., 'Class Actions, Group Litigation and Other Forms of Collective Litigation', in: Global Class Actions Project – Country report Netherlands, 2007.

TZANKOVA I and KORTMANN J., 'Remedies for Consumers of Financial Services: Collective Redress and Improvement of Class Representation', *European Journal of Consumer Law*, 2010, n°1

TZANKOVA I. and HENSLER D., 'Collective Settlements in the Netherlands: Some Empirical Observations', in: HODGES C. and STADLER A. (Eds.), *Resolving Mass Disputes – ADR and Settlements of Mass Claims*, Edward Elgar Publishing, 2013, pp.91-105.

TZANKOVA I. and VAN LITH H., 'Class Actions and Class Settlements Going Global: The Netherlands', in: D.FAIRGRIEVE and E.LEIN (Eds.), *Extraterritoriality and Collective Redress*, 2012, Oxford University Press, p. 67-91

TZANKOVA I., Global Class Action Project – Country report 'The Netherlands', available on www.globalclassactions.stanford.edu/content/class-actions-netherlands

U

ULEN T., 'An Introduction to the Law and Economics of Class Action Litigation', (32) *European Journal of Law & Economics*, 2011, pp. 185-203

V

VAN BOOM W.H., 'Collective Settlement of Mass Claims in the Netherlands', in: CASPER M., A. JANSSEN, POHLMANN M., SCHULZE R. (Eds.), *Auf dem Weg zu einer Europäischen Sammelklage?*, Munich, Sellier, 2009, pp. 171-192

VAN DEN BERGH R. and VISSCHER L., 'The Preventive Function of Collective Actions for Damages in Consumer Law', (01) *Erasmus Law Review*, 2008

VAN DIJCK G., 'When Do Individuals Participate in Class Actions?', *Tilburg Law School Legal Studies Research Paper*, n°03/2011, December 2010

VAN LITH H., 'Cultural Dimensions of Group Litigation – Netherlands', *International Association of Procedural Law, Moscow conference*, 2012

VAN RHEE C.H., 'English Civil Procedure until the Civil Procedure Rules (1998)', in: VAN RHEE C.H. (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.129-159

VAN RHEE C.H., 'Dutch Civil Procedural Law in an International Context', in: DEGUCHI M. and STORME M. (Eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society – Legislative and Legal Educational Assistance to other countries in Procedural Law*, Antwerpen/Apeldoorn, 2008, p.191-212

VAN RHEE C.H., 'Civil Litigation in Twentieth Century Europe', (75) *The Legal History Review*, 2007, n°3, pp.307-319

VEILLARD I. and VOLDERS B., 'La consécration des actions de groupe en Europe – La traversée de l'Atlantique aurait-elle adouci le Monstre à la Frankenstein ?', *Revue de jurisprudence commerciale*, March-April, 2008, n°2, pp.67-80

VERKERK R., 'Powers of the Judge- the Netherlands', in: VAN RHEE C.H. (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.281-293

VERKIJK R., 'Beyond Winning: Case Management and The Roles of Lawyers in the Principles', in: VAN RHEE C.H. (Ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerpen/Oxford, Intersentia, 2007.

VERPEAUX M., 'L'Action de Groupe est-elle Soluble dans la Constitution', *Recueil Dalloz*, 2007, p.258

VERPLANKEN B., 'Need for Cognition and External Information Search: Responses to Time Pressure During Decision-Making', (27) *Journal of Research in Personality*, 1993, pp.238-252

VIDMAR N., 'The Psychology of Trial Judging', (20) *Current Directions in Psychological Science*, 2011, pp.58-62,

VIGOUR C., *Temps judiciaire et logique gestionnaire, tensions autour des instruments d'action et de mesure*, GIP Droit & Justice, Décembre 2011

VISCUSI K., 'How Do Judges Think about Risk?' (1) *American Law and Economics Review*, 1999, n°1/2, pp.26-62

VISCUSI W.K., 'Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?', (8) *International Review of Law and Economics*, 1988, pp.203-220

VISSCHER L.T., 'The Duty of Lawyers to Serve Their Clients'Interests – An Economic and Psychological Account', *RILE Working Paper Series*, 2014/03, January 2014

VISSCHER L.T., 'Gedrag van Advocaten', in: VAN BOOM W.H., GIESEN I. and VERHEIJ A.J. (Eds.), *Capita Civilologie – Handboek Empirie en Privaatrecht* (Civilologie/Civilology, deel 6), Den Haag, Boom Juridische Uitgevers, 2013, pp.1123-1157

VISSCHER L.T. and BIARD A.P., 'Dutch Mass Litigation From a Legal and Economic Perspective and its Relevance for France', *RILE Working Paper Series*, 2014/02, April 2014

W

WAGNER G., 'Heuristics in Procedural Law', in: GIGERENZER G. and ENGEL C. (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press

WEBER M., 'The Area of Economics, Economic Theory and the Ideal Type', in : WEBER M., *Essays in Economic Sociology* (Ed.by R.SWEDBERG), Princeton University Press, 1998, pp.242-248

WEBER F. and VAN BOOM W., 'Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005)', (1) *Contratto e Impresa – Europa*, 2011

WECHSLER D., 'What Constitutes an Emotion?', (1932) *Psychological Review*, 1925, pp.235-240

WEINSTEIN J.B. and HERSHENOV E.B., 'The Effect of Equity on Mass Tort Law', *University of Illinois Law Review*, 1991, issue 2, pp.269-327

WEINSTEIN J.B., 'An Introduction to Who's Who in Mass Toxic Torts', (80) *Cornell Law Review*, 1994, at p.845

WEINSTEIN J.B., 'Litigation and Statistics', (3) *Statistical Science*, 1988, n°3, pp.286-297

WEINSTEIN J.B., 'The Democratization of Mass Actions in The Internet Age', (45) *Columbia Journal of Law and Social Problems*, 2012, pp.451-471

WEINSTEIN J.B., 'Procedural and Substantive Problems in Complex Litigation Arising From Disasters', *Touro Law Review*, vol.5, n.1, 1988

WICKERSMAN M.E., 'You Make the Call: Tips for Making Public Decisions', *the Public Manager*, 2011.

WIJFFELS A., 'Powers of the Judge – France', in: VAN RHEE C.H (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005, pp.269-280

WILDER D.A., 'Perceiving Persons as a Group: Effects on Attributions of Causality and Beliefs', (41) *Social Psychology*, 1978, n°1, pp.13-23

WILLGING T.E., 'Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation', (148) *University of Pennsylvania Law Review*, 2000, pp.2225-2261

WHITE M.J., 'Asbestos and the Future of Mass Tort', (18) *Journal of Economic Perspectives*, 2004, pp.183-204

Y

YEAZELL S.C., 'The Misunderstood Consequences of Modern Civil Process', *Wisconsin Law Review*, 1994, pp.631-678

YEAZELL S.C., 'Group Litigation and Social Context: Toward a History of the Class Action', *Columbia Law Review*, 1977, p.866

YEAZELL S.C., 'From Group Litigation to Class Action – Part I: The Industrialization of Group Action', (27) *University of Chicago Law Review*, 1980, pp.514-564

YEAZELL S.C., 'From Group to Class Action – Part II: Interest, Class and Representation', (27) *University of Chicago Law Review*, 1980, pp.1067-1121

YEAZELL S.C., 'Collective Litigation as Collective Action', *University of Illinois Law Review*, 1989, n°1, pp.43-68

YOON A., 'Senior Federal Judges and The Political Economy of Judicial Tenure', (501) *Journal of Empirical Legal Studies*, 2005

Z

ZAJCZ K. and KOVAC M., 'What Do the European Judge Strive For – An Empirical Assessment', *International Journal for Court Administration*, April 2011

ZEISEL H. and CALLAHAN T., 'Split Trials and Time Savings: A Statistical Analysis', (76) *Harvard Law Review*, 1963, n°8, pp.1606-1625

Others:

'Pour une recherche juridique critique, engage et ouverte', *Recueil Dalloz*, 2010, p.1505

Unsigned note, 'Risk-Preference Asymmetries in Class Action Litigation', (119) *Harvard Law Review*, 2005, pp.587-608

▪ **Books**

A

ALGAN Y. and CAHUC P., *La société de défiance – Comment le modèle français s'autodétruit*, édition Rue d'Ulm, coll. Cepremap, Paris, 2007

B

BACKHAUS J., CASSONE A. and RAMELLO G. (Eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar Publishing, 2012, 400 p.

BAUM L., *Specializing the Courts*, University of Chicago Press, 2011, 282 p.

BECKER G.S., *The Economic Approach to Human Behavior*, University of Chicago Press, 1976, 320 p.

BECKER E., *The Denial of Death*, Free Press, 1973, 336 p.

BRUNENGO-BASSO S., *L'émergence de l'action de groupe : processus de fertilisation croisée*, Presse Universitaire d'Aix-Marseille, 2011, 343 p. (doctoral dissertation).

BUSCAGLIA E. and RATLIFF W.E., *Law and Economics in Developing Countries*, Hoover Institution Press, 2000, 126 p

C

CAMUS A.G., *Lettres sur la profession d'avocat*, 5^E Ed, Bruxelles Librairie de Jurisprudence de H.Tarlier, 1833

CAPPELLETTI M., *Le Pouvoir des juges*, Economica, coll.droit public positif, Presses Universitaire d'Aix-Marseille, 1990, 402 p.

CARBONNIER J., *Sociologie juridique*, Quadrigue Manuel Presse Universitaire de France, 2004, 415 p.

CARDOZO B.N., *the Nature of the Judicial Process*, Yale University Press, 1978, 40th ed. (1st Ed.: 1921), 180 p.

COHEN D. (Ed.), *Droit & Economie du Procès Civil*, LGDJ, 2010, 279 p.

COOTER R. and ULEN T., *Introduction to Law & Economics*, Addison Wesley Longman, 3rd ed., 2000, p.391

D

DE BEEN W., 'Legal Realism Regained – Saving Realism from Critical Acclaim', *Stanford Law Books*, 2008, 264p.

DEFFAINS B., DORIAT-DUBAN M. and LANGLAIS E., *Economie des actions collectives*, PUF Droit & Justice, Paris, 2008, 64 p.

DEMOGUE R., *Les notions fondamentales du Droit privé : essai critique pour servir d'introduction à l'étude des obligations*, 1911, Librairie Nouvelle de Droit et de Jurisprudence Arthur Rousseau

DWORKIN R., *Law's Empire*, Belknap Press, 1986, 470 p.

E

ELIACHEFF C. and SOULEZ-LARIVIERE D., *Le Temps des Victimes*, Albin Michel, Paris, 2006, 293 p.

ENGEL C., *Legal Experiments: Mission Impossible?*, Erasmus Law Lecture, n°28, Eleven International Publishing, 2013

F

FAIRGRIEVE D. and LEIN E. (Eds.), *Extraterritoriality and Collective Redress*, 2012, Oxford University Press.

FAURE M.G., *The Impact of Behavioural Law and Economics on Accident Law*, Erasmus Law Lectures, n°19, Boom Juridische Uitgevers, 2009, 84 p.

FILLON C., BONINCHI LECOMPTE M.A., *Devenir Juge – Mode de Recrutement et Crise des Vocations de 1830 à nos jours*, Droit & Justice PUF, Paris, 2008

FODDY W., *Constructing Questions for Interviews and Questionnaires – Theory and Practice in Social Research*, Cambridge University Press, 1993, 228 p.

FRANK J., *Law and the Modern Mind*, Anchor Book, 6th ed., 1963 (1st ed.: 1931)

G

GARAPON A. and PAPADOPOULOS I., *Juger en Amérique et en France*, Odile Jacob, 2010, 322 p.

GARAPON A., ALLARD J. and GROS F., *Les vertus du Juge*, Dalloz, 2008, Paris, 184 p.

GARAPON A., *Bien Juger, Essai sur le Rituel Judiciaire*, Odile Jacob, coll. Opus, 1997, Paris

GEARY D.C., *The Origin of Mind: Evolution of Brain, Cognition and General Intelligence*, American Psychological Association, 2005

GERARD P., OST F. and VAN DE KERCHOVE M. (Eds.), *Fonction de juge et pouvoir judiciaire : transformation et déplacement*, Publication des facultés universitaires de Saint Louis, 1983

GIARD R.W.M (Ed.), *Judicial Decision Making in Civil Law – Determinants, Dynamics and Delusions*, Eleven International Publishing, 2012, 118 p

GILBOA I., *Rational Choice*, MIT Press, 2010, 176 p.

GIOLCOLI N., *Modeling Rational Agents*, Edward Elgar Publishing, 2003, 480 p

GREILSAMER L. and SCHNEIDERMAN D., *Les Juges Parlent*, Fayard, 1992, 574 p.

GROOPMAN J., *How Doctors Think*, Mariner Book, 2008, 320 p.

GUARNIERI C. and PEDERZOLI P., *The Power of Judges- A Comparative Study of Courts and Democracy*, Oxford University Press, 2002

H

HAENEL and ARTUIS J., *Justice sinistrée – Démocratie en danger*, Economica, 1991

HENSLER D.R (Ed)., *Class Action Dilemmas – Pursuing Public Goals for Private Gains*, Rand Institute for Civil Justice, 2000, 609 p.

HODGES C., *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe*, Hart Publishing, 2008, Oxford, 319 p.

HODGES C. and STADLER A. (Eds.), *Resolving Mass Disputes – ADR and Settlements of Mass Claims*, Edward Elgar Publishing, 2013, 322 p

HOLMES O.W., *The Path of the Law*, (10) *Harvard Law Review*, 1897, p.457

HOROWITZ D.L., *The Courts and Social Policy*, The Brookings Institution, 1977, 309 p.

HOWELLS G., *The Law of Product Liability*, Butterworth Common Law Series, 2nd ed.

K

KAHNEMAN D., *Thinking Fast and Slow*, Farrar, Straus and Giroux, 2011, New York, 500 p.

KAHNEMAN D., TVERSKY A. and SLOVIC P. (Eds.), *Judgment under Uncertainty: Heuristics and Biases*, Cambridge University Press, 1982, 555 p.

KENT M., *Oxford Dictionary of Sport, Sciences and Medicine*, 3rd ed., 2012

KESKE S., *Group Litigation in European Competition Law: A Law and Economics Perspective*, 2009, 340 p. (doctoral dissertation)

KIRCHGAESSNER G., *Homo Oeconomicus: The Economic Model of Behaviour and Its Applications in Economics and Other Social Sciences*, Springer, 2008.

KLEIN D. and MITCHELL G. (Eds.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010, 338 p.

KRYNEN J., *L'Etat de Justice en France, XIIIe-XXe siècle – L'Emprise Contemporaine des Juges*, Bibliothèque des Histoires, NRF – Gallimard, 2012

L

LANDIS J.M., *The Administrative Process*, Yale University Press, 1938, 160 p

M. De S.-O.-L'E.LASSER, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, Oxford, 2004

LLEWELLYN K.N., *The Bramble Bush: On our Law and its Study*, 1930

LUTH H., *Behavioural Economics in Consumer Policy – The Economic Analysis of Standard Terms in Consumer Contracts Revisited*, Intersentia, 2010, 321 p. (doctoral dissertation)

M

MACKAAY E., *Law and Economics for Civil Law Systems*, Edward Elgar Publishing, Cheltenham, 2013

MATTEI U., *Comparative Law and Economics*, The University of Michigan Press, 1997

MERRYMAN J.H. and PEREZ-PERDOMO R., *The Civil Law Tradition – An Introduction to the Legal Systems of Europe and Latin America*, Stanford University Press, 3rd ed, 2007, 192 p.

MICELI T., *The Economic Approach to Law*, Stanford University Press, 2004, 379 p

MILLER C.J and GOLDBERG R.S., *Product Liability*, Oxford University Press, 2004, 2nd ed

MOLES P. and TERRY N., *Handbook of International Terms*, Oxford University Press, 1999

MULHERON R., *The Class Action in Common Law Legal Systems – A Comparative Perspective*, Hart Publishing, Oxford, 2004

MURPHY W.F, *Elements of Judicial Strategy*, University of Chicago Press, Chicago & London, 1965

N

NISBETT R. and ROSS L., 'Human Inferences: Strategies and Shortcomings of Social Judgement', Prentice Hall, 1980, 334 p

O

OGUS A. and FAURE M., *L'analyse économique du droit: le cas français*, éd..Panthéon-Assas, Paris, 2002, 176 p.

OLSON M., *The Logic of Collective Action*, Harvard University Press, 1965

P

PAYNE.S.L, *The Art of Asking Questions*, Princeton University Press, 1951, 250 p.

PARKINSON B., *Ideas and Realities of Emotion*, 1995, Routledge, London

POPPER K., *The Poverty of Historicism*, Routledge & Kegan Paul, London, 6^e ed, 1972

POSNER R.A, *Overcoming the Law*, Harvard University Press, 1995, 597 p.

POSNER R.A., *The Economics of Justice*, Harvard University Press, 1981

POSNER R.A., *How Judges Think*, Harvard University Press, London/Cambridge, 2008, 385 p.

POSNER R.A., *The Federal Courts - Challenge and Reforms*, Harvard University Press, 1999, 430 p.

POSNER R.A., *Economic Analysis of the Law*, Little, Brown & Company, 4th ed, 1992, 722 p.

POSNER R.A., *Frontiers of Legal Theory*, Harvard University Press, 2004, 464 p.

PRIETO C. (Ed), *Cohérence des recours collectifs – Réponse à la consultation Publique de la Commission européenne*, Coll. Trans Europe Experts, Société de législation comparée, 2011, pp.173

R

ROSENBERG J.M, *Dictionary of Business & Management*, John Wiley & Sons Inc., 1995

ROSENZWEIG P., *The Halo Effect...and the Eight Other Business Delusions That Deceive Managers*, Free Press, United States, 2007

ROTHSTEIN B.J. and WILLGING T.E., *Managing Class Action Litigation: A Pocket Guide For Judges*, 3rd ed., Federal Judicial Centre, 2010 (available on [www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/\\$file/ClassGd3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf))

S

SCHAEFER H.-B. and OTT C., *The Economic Analysis of Civil Law*, Edward Elgar Publishing, 2005

SCHAUER F., *Thinking Like a Lawyer – a New Introduction to Legal Reasoning*, Harvard University Press, 2012, 256 p.

SCHELLING T.C, *The Strategy of Conflict*, Harvard University Press, 1st ed. 1960 (reprinted in 1981), 328 p.

SCHLEIFER A. (Ed.), *The Failure of Judges and the Rise of Regulators*, The Walras-Pareto Lectures, MIT Press, 2012

SCHUCK P.H., *Agent Orange on Trial – Mass Toxic Disasters in the Courts*, The Belknap Press of Harvard University Press, Cambridge and London, 1986

SIMON H., *Administrative Behavior - a Study of Decision-Making Processes in Administrative Organizations*, Free Press, 4th Ed, 1997, 368 p.

SMITH A., *Theory of Moral Sentiments*, 1759

STARCK B., *Essai d'une théorie générale de la responsabilité civile, considérée en sa double fonction de garantie et de peine privée*, Paris, Ed. L. Rodstein, 1947 (doctoral dissertation)

STEEL J. and BOOM W. (Ed.), *Mass Justice: Challenges of Representation and Distribution*, Edward Elgar Publishing, 2011

SUNSTEIN C.R., *Why Societies Need Dissent*, Harvard University Press, 2003, 246 p.

SUNSTEIN C.R., *Why Nudge? The Politics of Libertarian Paternalism*, Yale University Press, New Heaven/London, 2014, 195 p.

T

THALER R.H. and SUNSTEIN C.R., *Nudge – Improving Decisions about Health, Wealth and Happiness*, Penguin Books, London, 2009, 305 p.

TRUCHE P., *Juger et être jugé – Le magistrat face aux autres et à lui-même*, Fayard, 2001, 191 p.

V

VAN RHEE C.H. (Ed.), *European Traditions in Civil Procedure*, Ius Commune: European and Comparative Law Series, Intersentia, vol.54, 2005

VAN RHEE C.H. (Ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerpen/Oxford, Intersentia, 2007

VISSCHER L.T. and TUIL M. (Eds.), *New Trends in Financing Civil Litigation in Europe*, Edward Elgar Publishing, 2010

W

WEBER F., *Towards an Optimal Mix of Public and Private Enforcement in Consumer Law*, 2012, 519 p. (doctoral dissertation)

WEINSTEIN J.B., *Individual Justice in Mass Tort Litigation – The Effects of Class Actions, Consolidations, and Other Multi-Party Devices*, Northwestern University Press, 1995

WHITMAN J.Q., *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, Yale, 2008, 276 p.

WRBKA S., VAN UYTSEL S and SIEMS M. (Ed.), *Collective Actions – Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press, 2012,

WRIGHTSMAN L., NIETZEL M.T., FORTUNE W.H., *Psychology and the Legal System*, Brooks Cole Publishing, 3rd Ed, 1987

Z

ZUCKERMAN A.S., *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999

- **Official documents, surveys, studies**

- ***European Union / Europe***

Official documents

EU Commission, Recommendations on Common Principles for Injunctive and Compensatory Collective Redress Mechanism in the Member States Concerning Violations of Rights Granted Under Union Law, 2013/396/EU, 11 June 2013

EU Commission, Communication 'Towards a European Horizontal Framework for Collective Redress', COM (2013) 401 Final, 11 June 2013

EU Commission, Public Consultation 'Towards a Coherent European Approach to Collective Redress', 2011, www.ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html

EU Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 Final, 2 April 2008

EU Commission, Green Paper on Consumer Collective Redress – Questions and Answers, Memo/08/741, 27 November 2008 (COM 2005- 672, 19 December 2005)

EU Commission, 'Alternative Dispute Resolution for Consumers Dispute in the Single Market', COM (2011)791 final

EU Parliament, Resolution 'Towards a Coherent Approach to Collective Redress', 2 February 2012

Surveys

EU Commission, 'Consumers Redress in the European Union: Consumers experiences, Perceptions and Choices', *Euro-barometer*, August 2009

EU Commission, Consumer Conditions Scoreboard, July 2013, 9th ed.

EU Commission, 'European Union Citizens and Access to Justice', *Euro-barometer*, 2004

EU Commission (DG SANCO), report from Civic Consulting, 'Study Regarding the Problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems', August 2008

Studies

EU Commission – DG SANCO, *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union*, Final Report, Civic Consulting and Oxford Economics, 26 August 2008 (www.ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

University of Heidelberg, 'Evaluation of Contributions to the Public Consultation and Hearing: Towards a Coherent European Approach to Collective Redress', Just/2010/JCIV/CT/0027A4, 2 October 2012, p.12, www.ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html

FALLA E., PUTTEMANS A. and BOULARBAH H., 'Powers of the Judge in Collective Redress Proceedings', Research Paper submitted to the European Consumers' Organization -BEUC, February 2012

MICKLITZ H.-W. and STADLER A. (with BEUCHLER H. and MOM A.), 'Gruppenklagen in den Mitgliedstaaten der Europäischen Gemeinschaft & Den Vereinigten Staaten von Amerika', *Gutachten im Auftrag des Vereins für Konsumenteninformation Wien*, 12 August 2005

➤ **England and Wales**

Civil Justice Council of England and Wales, 'Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions', *Recommendations to the Lord Chancellor – Final Report*, November 2008.

Civil Justice Council of England and Wales, Draft Court Rules for Collective Proceedings (2009), on www.ec.europa.eu/competition/consultations/2011_collective_redress/herbert_smith_llp_cjc_en.pdf

WOOLF, *Reports on Access to Civil Justice*, 1995, available on www.webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/interim/woolf.htm,

Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007 available on www.judiciary.gov.uk/publications-and-reports/reports/civil/commercial-court/long-trials-working-party-report

➤ **Scotland**

Scottish Law Commission Research Paper n°98, available on www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/1990-1999/

➤ **France**

Autorité des Marchés Financiers, *Rapport relatif à l'indemnisation des préjudices subis par les épargnants et les investisseurs*, 25 January 2011

Autorité de la concurrence, *Avis relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles*, 21 September 2006 (available on: www.autoritedelaconcurrence.fr/user/standard.php?id_rub=184&id_article=613)

Sénat, Rapport d'information n°499, L'action de groupe à la française - Parachever la protection du consommateur, 2009-2010

Sénat, Rapport d'information fait au nom de la Commission des Lois constitutionnelles, de législation, du suffrage universel, du règlement et d'administration générale *sur le Class Actions*, sous la présidence de M. J.-J. HYEST, 14 March 2006, n°249

GABAIX X., LANDIERA. and TIROLE J., 'La protection du consommateur: rationalité limitée et régulation', Rapport au Conseil d'Analyse Economique', La Documentation Française, 2012, 92 p.

GUINCHARD S. (Ed.), 'L'ambition raisonnée d'une justice apaisée', official report to the Ministry of Justice, 2008 (available on www.ladocumentationfrancaise.fr/rapports-publics/084000392/)

MAGENDIE J.C., Rapport au garde des sceaux 'Célérité et qualité de la justice – La gestion du temps dans le proces', 15 juin 2004

CALAIS-AULOIS, Rapport de la Commission pour la codification du droit de la consommation, Proposition pour un code de la consommation, 1985

STEFF A., 'Les Contestations en Matière d'Honoraires d'Avocats', Report for the French Court of Cassation, 1999, available www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/antoine_steff_5799.html

JOLIBOIS C. and FAUCHON P., Quels Moyens pour quelle Justice ?, Mission d'information de la Commission des Lois chargée d'évaluer les moyens de la justice, rapport n°49, 1996/1997

Institut des Hautes Etudes sur la Justice (IHEJ), *La prudence et l'autorité – L'office du juge au XXI^e siècle*, report for the Ministry of Justice, May 2013, 219 p. (available on www.ihej.org/wp-content/uploads/2013/07/rapport_office_du_juge_mai_2013.pdf).

Institut CSA pour l'Institut de la Justice, 'Les français et le fonctionnement de la justice', February 2013

Cahier de l'Institut d'Etude sur la Justice, 'le rôle du juge dans la société', Bruxelles, 2002, 186 p.

➤ **United States**

US Federal Rules of Civil Procedures 23 Advisory Committee's note (1966).

FDA Bulletin, Diethylstilboestrol contraindicated in pregnancy: Drug's Use Linked to Adenocarcinoma in the Offspring, *California Medicine – The Western Journal of Medicine*, November 1971, p.85

➤ **The Netherlands**

VAN LITH H., *The Dutch Collective Settlement Act and Private International Law/Aspecten van Internationaal Privaatrecht in de WCAM*, 2010

ASSER D.H., GROEN H.A., TZANKOVA I.N. and VRANKEN J.B.M., *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, 2006.

➤ **Others**

Global Class Action Exchange Project, available on <http://globalclassactions.stanford.edu/about>

- **Press releases**

- ***United States***

New York Times, 12 July 1883, ‘Judges and Lawyers: How Long Pleadings Exhaust the Patience and Health of the Court’

- ***France***

Le Point, ‘Action de Groupe et Santé : Vers un Projet de Loi Spécifique pour 2014’, 24 June 2013, available on www.lepoint.fr/sante/actions-de-groupe-et-sante-vers-un-projet-de-loi-specifique-pour-2014-24-06-2013-1685207_40.php

Le Point, ‘L’Extension de l’action de groupe à l’environnement à l’étude’, 26 June 2013, available on www.lepoint.fr/culture/l-extension-de-l-action-de-groupe-a-l-environnement-a-l-etude-26-06-2013-1686278_3.php

Le Monde, ‘Consommation : le Parlement adopte les « class actions » à la française’, www.lemonde.fr/vous/article/2014/02/13/consommation-l-action-de-groupe-votee-au-parlement_4365812_3238.html

UFC Que Choisir?, www.quechoisir.org/telecom-multimedia/telephonie/communiqu-e-entente-telephonie-mobile-une-condamnation-historique-et-definitive

UFC Que Choisir ?, ‘L’UFC Que Choisir lance la première action de groupe... contre Foncia Groupe’ (<http://www.quechoisir.org/droits-justice/systeme-judiciaire/action-en-justice/communiqu-e-l-ufc-que-choisir-lance-la-premiere-action-de-groupe-contre-foncia-groupe-44-millions-d-euros-doivent-etre-reverses-aux-locataires>)

Le Monde, ‘L’Europe à l’épreuve des tribunaux’, interview with A.VOSSKUHLE, 1 October 2012

Le Monde, ‘Le droit néerlandais sur les class actions menace les entreprises françaises’, 19 April 2013.

Libération, ‘Des primes chez les juges’, 25 September 2003, available on <http://www.liberation.fr/societe/0101455377-des-primes-chez-les-juges>

Le Monde, ‘La France s’ouvre à l’action de groupe’, 2 May 2013 (available on www.lemonde.fr/economie/article/2013/05/02/la-france-s-ouvre-a-l-action-de-groupe_3169429_3234.html)

Le Point, ‘Les consommateurs pourront bientôt utiliser l’action de groupe’, 12 June 2013 (available on www.lepoint.fr/societe/les-consommateurs-pourront-bientot-utiliser-l-action-de-groupe-12-06-2013-1680212_23.php),

➤ **The Netherlands**

Nauta Dutilh ‘global settlement approved by Dutch court’ (available on: www.newsletter-nautadutilh.com/NL/xzine/class_actions/global_settlement_approved_by_dutch_court.html?cid=4&xzine_id=4286)

Financieele Dagblad, ‘Nederland wordt straks paradijs voor massaclaims’, 29 December 2011

➤ **Germany**

Frankfurt Court of appeal (Oberlandesgericht) www.olg-frankfurt.justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?rid=HMdJ_15/OLG_Frankfurt_am_Main_Internet/nav/d44/d4471596-ad85-e21d-0648-71e2389e4818,b16651b6-4d15-731f-012f-312b417c0cf4,,11111111-2222-3333-4444-100000005004%26_ic_uCon_zentral=b16651b6-4d15-731f-012f-312b417c0cf4%26overview=true.htm&uid=d4471596-ad85-e21d-0648-71e2389e4818

▪ **Symposium/Conferences**

Symposium : *Faut-il ou non une class action à la française* (*Petites Affiches*, 13 Septembre 2005, n°182, p.3)

Symposium Pour mieux réparer les préjudices collectifs : une class action à la française ? (organised by Droit & Démocratie, *La Gazette du Palais*, 2001, p.147).

Symposium ‘Pour de véritables actions de groupe: un accès efficace et démocratique la justice’, 10 November 2005, available on www.courdecassation.fr/cour_cassation_1/autres_publications_discours_2039/publications_2201/obstacles_juridiques_action_groupe_8449.html,

Symposium : ‘L’office du juge, Symposium, Sénat, September 2006 (report available on www.senat.fr/colloques/office_du_juge/office_du_juge.pdf, accessed May 2014) ;

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Executive Summaries

➤ **English summary: Judges and Mass Litigation – a (Behavioural) Law & Economics Perspective**

Judicial duties have for decades extended far beyond the scope of traditional adjudication, judges being progressively called upon to occupy the role of social engineers. Meanwhile, contexts in which judges evolve have transformed: mass damage nowadays tends to multiply and create new challenges not only for legal actors, but also for society at large. In spring 2011, the replies received by the European Commission to its public consultation on collective redress indicated European stakeholders' strong interest in seeing judiciaries play prominent and leading roles in the supervision and monitoring of procedures which enable groups of claimants to seek together compensation for damage caused by mass events. In its 2013 Recommendations, the EU Commission further highlighted that 'a key role should be given to courts in protecting the rights and interests of all the parties involved in a collective redress actions as well as in managing the collective redress actions effectively'. Judges are thus expected to be neutral and robust agents while assuming heavy responsibilities under a considerable burden.

After having briefly introduced the topic (**Chapter 1**) and explained why the rationale of mass litigation indeed may require the intervention of judges as safeguards (**Chapter 2**), this thesis explores the new responsibilities falling upon judges and the novelties that mass litigation may bring to their practice. The comparative analysis of five different mass litigation procedures highlights convergences in judicial intervention, and helps clarify the type of judges that policymakers nowadays tend to expect to monitor and resolve mass disputes (**Chapter 3**). Interestingly, the study of judicial behaviour and judicial decision-making has recently pervaded social sciences and subsequently been embraced by lawyers, economists and psychologists. These different branches of study have shed light on the way judges manage and decide cases beyond the traditional assumption positing that they are mere neutral decision-makers simply applying law to facts. Such insights from social sciences offer complementary views that are worth considering in times where judges have been assigned increased responsibilities in our society: expecting too much from judges who might not be able to live up to these expectations could be detrimental for the judiciary's functioning and reputation, and ultimately for the whole treatment of mass litigation. Referring to rational choice theory, this research tends thus to propose a view 'from the inside' of judges dealing with mass litigation. It discusses the issue of judicial incentives and points out the influence of judicial attitudes on the resolution of mass claims (**Chapter 4**). Going then a step further and assuming that

individuals do not behave as rational utility maximizing agents but have a bounded rationality and may be prone to bias, insights from behavioural law & economics show how contexts – here, the ‘mass’ context – can influence judicial decision-making. It notably questions whether decision-makers tend to behave differently when facing groups or numerous individuals, and highlights the associated consequences for the treatment of mass claims (**Chapter 5**). Since the analysis would not be complete without empirical testing, the research proposes two reality checks in order to verify whether the theoretical developments previously set forth can be substantiated in practice. The first check consists of an online questionnaire conducted with French judges, aimed at collecting judicial viewpoints on the French group action. The second is an experiment intended to discuss the impact of multiple claimants on legal decision-making (**Chapter 6**). The analysis finally discusses alternative solutions to remedy judges’ vulnerabilities (**Chapter 7**) and proposes paths for future research in this field (**Chapter 8**).

This research ultimately shows that policymakers have a view of the relationship between judges and mass claims that is mostly one-sided: judges have a key role to play for the management and resolution of mass disputes. Yet, insights from social sciences tend to suggest that this relationship is actually double-sided: judges do not only have an important role in mass litigation, but mass claims also can have a great impact on judicial attitudes and decision-making. Therefore, the first audience that this research seeks to target is policymakers at both EU and Member States levels who have recently implemented - or are currently discussing - the implementation of mass devices. Viewpoints of judges should be better taken into account and enhanced consideration should be given to judges’ strengths and weaknesses when evaluating and/or adapting existing forms of mass litigation tools. The second audience are judges themselves. The research contributes to shed some light on their new roles in the treatment of mass claims. It highlights the pitfalls that they may face, and errors that they may be prone to make on such circumstances. It also draws their attention to the consequences of their attitudes in mass disputes. When considering the prominent roles played by judges in this field, these findings will finally be of interest for all parties likely to be involved in mass claims.

➤ **Samenvatting: Rechters en collectieve acties – Een (gedrags)rechtseconomisch perspectief**

De juridische taken van rechters reiken al decennia veel verder dan loutere traditionele rechtspraak omdat rechters steeds meer de rol van maatschappelijke probleemoplossers moeten vervullen. Ondertussen is de context waarin rechters opereren veranderd: massaschade lijkt steeds meer voor te komen en leidt tot nieuwe uitdagingen, niet alleen voor de juridische actoren, maar ook voor de samenleving als geheel. In voorjaar 2011 wezen de reacties die de Europese Commissie ontving op haar publieke consultatie over collectieve actie uit dat Europese belanghebbenden er een sterk belang aan hechten dat de rechterlijke macht een prominente en leidende rol heeft in het toezicht op en de controle van de procedures die een groep eisers in staat stelt tezamen vergoeding van massaschade na te streven. Van rechters wordt dus verwacht dat zij neutraal en robuust zijn, terwijl zij een zware verantwoordelijkheid en last op zich moeten nemen.

Nadat is besproken waarom de rationale van massaschadeclaims inderdaad de tussenkomst van rechters als waarborg vereist (**hoofdstuk 2**), wordt in dit proefschrift onderzocht welke nieuwe verantwoordelijkheden rechters met de komst van massaschadeclaims hebben gekregen en wat dit in de praktijk betekent. De vergelijkende analyse van vijf verschillende massaschadeprocedures belicht overeenkomsten in rechterlijke interventie en maakt duidelijk welk type rechters beleidsmakers tegenwoordig lijken te verwachten om massaconflicten te monitoren en te beslechten (**hoofdstuk 3**). Interessant is dat het onderzoek naar het gedrag en de besluitvorming van rechters sinds enige tijd is doorgedrongen tot de sociale wetenschappen en vervolgens is omarmd door juristen, economen en psychologen. Deze verschillende takken van onderzoek hebben een nieuw licht geworpen op de manier waarop rechters zaken behandelen en beslissingen nemen en gaan verder dan de traditionele veronderstelling dat zij louter de neutrale juridische besluitvormers zijn die simpelweg wetgeving op de feiten toepassen. Zulke inzichten vanuit de sociale wetenschappen geven aanvullende gezichtspunten die het waard zijn om in overweging te nemen in tijden waarin rechters steeds meer verantwoordelijkheden krijgen toegewezen in onze samenleving: als teveel wordt gevraagd van rechters die wellicht niet aan deze verwachtingen kunnen voldoen, kan dat schadelijk zijn voor het functioneren en de reputatie van de rechterlijke macht, en uiteindelijk voor de gehele behandeling van massaschadeclaims. Verwijzend naar de rationale keuzetheorie tracht dit proefschrift een perspectief ‘van binnen uit’ voor te stellen van rechters die met massaschadeclaims te maken hebben. Het behandelt het punt van de prikkels die rechters krijgen en laat de invloed van de houding van de rechter zien bij de oplossing van massaschadeclaims (**hoofdstuk 4**). Vervolgens gaat het proefschrift een stap verder en, ervan uitgaande dat individuen zich

niet gedragen als rationele personen die naar nutsmaximalisatie streven, maar die een begrensde rationaliteit hebben en bevooroordeeld zouden kunnen zijn, laten inzichten vanuit de gedragsrechtseconomie zien hoe context – hier, de ‘massa’ context – de rechterlijke besluitvorming kunnen beïnvloeden. Er wordt met name onderzocht of besluitvormers de neiging hebben zich anders te bedragen wanneer zij geconfronteerd worden met een groep of een groot aantal individuen, en de daaraan verbonden gevolgen voor de behandeling van massaschade claims worden benadrukt (**hoofdstuk 5**). Aangezien het onderzoek niet compleet zou zijn zonder dit empirisch te testen, zijn er twee *reality checks* uitgevoerd teneinde na te gaan of de theoretische ontwikkelingen die eerder beschreven zijn zich in de praktijk voordoen. De eerste *check* bestaat uit een online vragenlijst die is voorgelegd aan Franse rechters, gericht op het verzamelen van rechterlijke standpunten betreffende de Franse groepsactie. De tweede is een experiment dat bedoeld is om de invloed van meerdere eisers op rechterlijke besluitvorming te onderzoeken (**hoofdstuk 6**). Ten slotte bespreekt het onderzoek alternatieve oplossingen voor de rechterlijke kwetsbaarheid (**hoofdstuk 7**).

Dit onderzoek maakt duidelijk dat beleidsmakers een zeer eenzijdig beeld hebben van de verhouding tussen rechters en massaschadeclaims: rechters hebben een sleutelrol in de behandeling en besluitvorming van massaclaims. Echter, inzichten vanuit sociale wetenschappen lijken te suggereren dat deze verhouding juist tweezijdig is: niet alleen spelen rechters een belangrijke rol in rechtspraak inzake massaschade, maar massaschadeclaims kunnen op hun beurt een grote invloed hebben op de rechterlijke houding en besluitvorming. Derhalve bestaat de doelgroep die dit onderzoek primair wil bereiken uit beleidsmakers, zowel op EU- als op lidstaat niveau, die recentelijk instrumenten voor massaclaims hebben geïmplementeerd, of hierover momenteel over nadenken. Er zou meer rekening gehouden moeten worden met de standpunten van rechters en de sterke en zwakke punten van rechters zouden meer in overweging genomen moeten worden bij het evalueren of aanpassen van bestaande vormen van massaschade-instrumenten. De tweede doelgroep bestaat uit de rechters zelf. Het onderzoek draagt bij aan inzicht over hun nieuwe rol bij de behandeling van massaclaims. Het laat zien welke valkuilen zij zouden kunnen tegenkomen en welke fouten die zij onder zulke omstandigheden zouden kunnen maken. Het vestigt ook hun aandacht op de gevolgen van hun gedrag in massaschadezaken. Ten slotte zijn de uitkomsten van dit onderzoek, gezien de prominente rol die rechters spelen, van belang voor alle partijen die wellicht in massaschadeclaims betrokken kunnen raken.

➤ ***Resumé en français: Les juges et le contentieux de masse: une perspective d'analyse économique (et comportementale) du droit***

L'office du juge a profondément évolué au fil des dernières années, les juges étant progressivement appelés à jouer le rôle d'ingénieurs sociaux intervenant dans tous les aspects de nos sociétés modernes. En parallèle, les contextes dans lesquels les juges évoluent ont connu d'importants bouleversements. En particulier, les dommages de masse résultant de la commercialisation à grande échelle de produits défectueux ou liés à des comportements d'entreprises frauduleux tendent aujourd'hui à se multiplier, et créent des défis d'un type nouveau tant pour le monde judiciaire que la société dans son ensemble. Au printemps 2011, les réponses reçues par la Commission européenne à sa consultation publique sur les mécanismes de recours collectifs ont souligné le souhait partagé par une vaste majorité d'acteurs européens de donner un rôle primordial aux juges pour la conduite et la supervision de procédures de recours collectif qui permettent à des demandeurs d'agir en justice ensemble en réparation de leur préjudice ou en cessation d'une pratique illicite. Dans ses recommandations de 2013 sur les recours collectifs, la Commission s'est à son tour fait l'écho de cette volonté en soulignant que 'les juridictions devraient se voir confier un rôle clé dans la protection des droits et des intérêts de toutes les parties concernées par une action collective, ainsi que dans la gestion efficace de ce type de recours'. Il est par conséquent requis et attendu des juges qu'ils agissent en agents neutres, capables d'assumer d'importantes responsabilités, tout en faisant face à une charge très conséquente de travail.

Après avoir brièvement introduit le thème de cette recherche (**Chapitre 1**) et avoir clarifié en quoi la logique économique et le fonctionnement du contentieux de masse – entendu via le prisme des recours collectifs - en effet requiert l'intervention du juge afin de s'assurer que les coûts générés par ces procédures ne dépassent pas les bénéfices qui leur sont associés (**Chapitre 2**), cette recherche explore plus en détails les nouvelles responsabilités incombant aux juges et les nouveautés que le contentieux de masse apportent à la pratique judiciaire. L'analyse comparative de cinq procédures de masse en Europe et aux Etats-Unis permet de clarifier le type de juge qui est aujourd'hui idéalement souhaité pour une conduite et une supervision efficace des contentieux collectifs (**Chapitre 3**). Puis, cette recherche s'intéresse aux éclairages alternatifs qui permettent d'apprécier ce débat sous des angles différents. L'étude du comportement et de la prise de décision judiciaire est en effet devenue ces dernières années un important objet d'investigation pour les sciences sociales, et a été abordée par des juristes, des économistes ou encore par des chercheurs en économie comportementale et cognitive. Ces points de vue alternatifs sur les juges et le monde judiciaire permettent d'envisager autrement la façon dont les juges agissent et décident. A une époque où les juges se voient donner une place croissante dans notre société, ces enseignements

méritent aujourd'hui d'être étudiés et pris en considération : trop attendre ou trop exiger des juges pour la conduite du contentieux de masse pourrait en effet s'avérer préjudiciable pour le fonctionnement et la réputation de la magistrature, et plus généralement, pour la résolution des litiges collectifs dans leur ensemble. S'appuyant tout d'abord sur la théorie économique dite du choix rationnel, cette recherche propose une vue 'de l'intérieur' des juges impliqués dans la résolution des contentieux de masse. Le juge est alors perçu comme un être rationnel ayant des préférences et répondant à des incitations. Ce point de vue permet de mettre en lumière l'influence de la personnalité du juge sur la résolution des litiges de masse (**Chapitre 4**). Puis, partant cette fois du postulat que les juges n'agissent plus comme des agents rationnels, mais ont une rationalité limitée et peuvent être sujets à des biais cognitifs, l'apport de l'économie comportementale et de la psychologie permet de mieux comprendre comment le contexte (ici tout particulièrement, le contexte *de masse*) est susceptible d'influencer la prise de décision judiciaire et la résolution des litiges collectifs (**Chapitre 5**). Deux travaux empiriques viennent ensuite tester ces hypothèses: le premier est un questionnaire en ligne conduit auprès de juges français et destiné à collecter des avis et perceptions de juges sur l'action de groupe récemment introduite en France. Le second est une expérience comportementale visant à mieux comprendre l'impact du nombre de demandeurs sur les décisions des acteurs judiciaires. Il s'agira en particulier de comprendre si - et si oui, de quelle manière - le nombre de personnes impliquées dans un contentieux de masse tend à modifier les décisions relatives à la responsabilité et à la fixation des dommages et intérêts alloués (**Chapitre 6**). La recherche s'achève en explorant différentes solutions pour pallier les vulnérabilités des juges qui auront été préalablement identifiées (**Chapitre 7**), et en suggérant plusieurs possibles voies pour des recherches ultérieures dans le domaine (**Chapitre 8**).

Pour récapituler : cette recherche met en évidence que la relation entre les juges et le contentieux de masse est aujourd'hui encore essentiellement perçue comme étant à sens unique, les juges ayant un rôle essentiel à jouer pour la résolution des litiges collectifs. Néanmoins, les enseignements des sciences sociales tendent à montrer que cette relation est en réalité à double sens : les contentieux collectifs ont également des conséquences sur les attitudes et les choix des juges. Leurs personnalités et leurs décisions sont susceptibles d'influencer de manière significative la conduite des litiges collectifs.

Le premier public auquel cette recherche s'adresse sont les décideurs publics des pays - notamment au sein de l'Union européenne où ce débat reste d'une vive actualité - qui ont récemment introduit, ou sont en voie d'introduire, des mécanismes de recours collectifs dans leur système juridique. A la suite de cette étude, il apparaît fortement souhaitable de mieux prendre en compte les opinions et vues des juges dans toutes discussions ayant trait au fonctionnement des mécanismes de recours collectifs. Cette étude s'adresse ensuite aux juges eux-mêmes. Cette recherche clarifie leurs rôles successifs dans la conduite des

contentieux collectifs, et met en avant les difficultés et erreurs susceptibles d'être commises. Enfin, étant donné le rôle essentiel joué par les juges dans ce domaine, cette recherche sera également d'intérêt pour toute partie à même d'être un jour elle-même impliquée dans un litige de masse.

