COLLECTIVE SETTLEMENTS

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European Rules of Civil Procedure. A Commentary on the ELI/UNIDROIT Model Rules **(Astrid Stadler, Vincent Smith and Fernando Gascón Inchausti, eds.), Edward Elgar, Cheltenham, 2023, 711 pp. (pp. 604-630)**

ISBN 978-1-80088-783-1.

Fernando Gascón Inchausti, «Collective settlements», en A. Stadler / V. Smith / F. Gascón Inchausti (eds.), *European Rules of Civil Procedure. A Commentary on the ELI/UNIDROIT Model Rules*, Edward Elgar, Cheltenham, 2023, 711 pp., pp. 604-630. ISBN 978-1-80088-783-1.

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General Introduction to Collective Settlements

Pre221.01

Any regulation of collective redress mechanisms that claims to be modern, efficient, and effective cannot be understood without collective settlements. When collective redress began to be discussed on a doctrinal and regulatory level some decades ago, the emphasis was on issues directly connected to the judicial process itself and its development: for example, who had standing to seek collective redress, what remedies could be sought or what kind of controls the court had to establish in order to admit a collective action to proceed, among others. These issues remain crucial, but the experience in some jurisdictions (US, Canada, Australia or The Netherlands, for instance[1]) and the current global trend in favour of agreed solutions to disputes have served to put the focus on collective settlements.

Pre221.02

A large majority of collective proceedings end in collective settlements. And, precisely for this reason, a large number of collective proceedings are brought in order to reach a collective settlement or, at the very least, contemplating that an agreement to terminate them is highly possible or likely to be reached.

Pre221.03

The ERCP have not been unaffected by this phenomenon. On the contrary, they have taken it on board and have become a good example of detailed regulation on this issue, which goes beyond simple proclamations or generic provisions.[2] In particular,

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[1] For an overview of the situation in the Netherlands, England and Wales, Canada, Australia and the US, see Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes. ADR and Settlement of Mass Claims* (Edward Elgar 2013); Among the leading cases in the US Supreme Court, see *Phillips Petroleum Co. v. Shutts* [472 US 797 (1985)]; *Amchem Products, Inc. v. Windsor* [521 U.S. 591 (1997)]; *Ortiz v. Fibreboard Corp.* [527 US 815 (1999)] and *Devlin v. Scardelletti* [536 U.S. 1 (2002)]. The situation in Canada and in the US is also addressed in Catherine Piché, *Le règlement à l'amiable de l'action collective* (Thomson Reuters Yvon Blais 2014); For the situation in Italy (but also in other jurisdictions), see Gregorio Gitti and Andrea Giussani (eds), *La conciliazione collettiva* (Giuffrè 2010). Addressing the situation in Spain, Fernando Gascón Inchausti, *Tutela judicial de los consumidores y transacciones colectivas* (Thomson Reuters Civitas 2010).

[2] The literature on this topic is still rather scarce: see Astrid Stadler, Emmanuel Jeuland and Vincent Smith (eds), *Collective and Mass Litigation in Europe. Model Rules for Effective Dispute Resolution* (Edward Elgar 2020); Catherine Piché, '«Andrà

the ERCP are much more precise and detailed on this point than their more direct "rival", the 2020 EU Directive on representative actions[3] - approved shortly after the ERCP themselves.

Pre221.04

Indeed, the 2020 Directive devotes a single article to this issue, Article 11, which is primarily programmatic in nature and aims to establish minimum standards on this point. Specifically, the EU legislator seems content to achieve two main objectives:

> i) Giving the court the power to invite the parties to reach a settlement - assuming, of course, that the agreement can also be the fruit of a negotiation not induced by the court.
>
> ii) Requiring judicial control over the proposed settlement, so that it is only binding if it has been approved by the court - at present some national systems do not expressly require this, perhaps because this issue has not been specifically regulated in their collective redress rules either. In this regard, the EU Directive requires the refusal of approval of an agreement which "is contrary to mandatory provisions of national law, or includes conditions which cannot be enforced, taking into consideration the rights and interests of all parties, and in particular those of the consumers concerned" (Article 11(2)). A more exhaustive control of the content of the agreement, on the other hand, is optional: only if the Member States, when transposing the EU Directive, so decide, can the court refuse to approve the agreement as "unfair".

Pre221.05

The ERCP, as will be seen below, are not satisfied with this, but offer much more complete guidelines and models of regulation which, for this very reason, could be followed by national legislators called upon to implement the EU Directive – and, of course, also by those of other jurisdictions outside the EU willing to do so.

Pre221.06

The main objective of the ERCP at this point is to seek the best possible balance between two primary objectives:

> (i) On the one hand, to promote negotiation and compromise as a way to end a dispute that has a collective dimension, since it arises from a mass harm. In this connection, it is common to point out the advantages of settlement for

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tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' [2021] 1 International Journal of Procedural Law, 13; José María Salgado and Francisco Verbic, 'Los procesos colectivos en el Proyecto ELI-UNIDROIT sobre principios del Derecho Procesal Civil Europeo' [2022] 323 Revista de Processo, 251.

[3] Council and European Parliament Directive (EU) 2020/1828 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) [2020] OJ L 409/1.

both group members and defendants. Group members, because they secure redress - even if it is not as full or as large as they had hoped - without bearing the costs and time involved in the process. For defendants, and in addition to the above, because they can better manage the economic and reputational risk that is often associated with collective litigation and can "turn the page" on terms that are acceptable to them.[4]

(ii) On the other hand, of course, to ensure that the settlement reached is fair to group members – also to the defendant –, i.e., that it is acceptable. And this, in turn, implies establishing safeguards and control mechanisms that must address, of course, the content of the settlement, but also its direct protagonists - those who negotiate and close the settlement on behalf of the group members - in order to avoid conflicts of interest that may tarnish the fairness of the agreement.

Pre221.07

Implementing these safeguards and controls requires at least two elements: an empowered judge and time to activate them. Therefore, it should be noted that the collective settlement system offered by the ERCP does not aim at speed per se, but at avoiding the courts having to adjudicate on the merits of the dispute, ensuring that the agreed solution is reasonable and fair.

Pre221.08

The regulation of collective settlements in the ERCP is designed to apply only to genuine situations of collective redress under the ERCP themselves: it is therefore placed in Section 2 of Part XI and backs against the categories and the general rules on collective proceedings, to which numerous references are made.

Pre221.09

The provisions on collective settlements do not apply to collective interest injunctions. These claims seek to force the defendant to comply with the law, and not so much the compensation of the parties affected by a mass harm, which explains why neither negotiations nor agreements make sense.

Pre221.10

Finally, it should be noted that the ERCP expressly distinguish between collective agreements reached within the framework of already commenced collective proceedings [Subsection D, ERCP Rules 221 to 226] and those reached outside collective proceedings (Subsection F, ERCP Rules 229 to 232).

The key, in both cases, is judicial approval to make the agreement binding. But the differences in context make a separated regulatory treatment advisable: this distinction according to the point in time at which the settlement is reached is

[4] On this, see Astrid Stadler, 'Collective settlements', in Stadler, Jeuland and Smith (eds), *Collective and Mass Litigation in Europe* (n 2) 233, 234.

entirely sensible and constitutes good practice in promoting, at the national level, a regulation of collective settlements.[5]
However, it also raises the first question for the reader of the ERCP: since the legal regime is not the same, which is the relevant time to apply one subsection (D) or the other (F)?

Pre221.11
For the ERCP, the relevant time is the moment at which there are "commenced collective proceedings". The reference, however, may give rise to doubts. According to the general provision of ERCP Rule 52, a collective proceeding should be understood to have commenced when a statement of claim is filed that complies with the requirements of ERCP Rule 210. However, this is not sufficient for the proceeding to be considered a collective one: for this purpose, the court must have issued a collective proceeding order in accordance with ERCP Rules 212 and 213. And it only makes sense to speak of collective proceedings, especially for the purposes of contemplating one of their outcomes - the settlement, but also the judgment - if a court has indeed expressly "labelled" the proceedings as "collective" proceedings. For this very reason, ERCP Rule 229(1), when referring to the standing to reach a collective settlement outside the collective proceedings, also points out as the determining factor whether or not a collective proceeding order has been issued. This is the most reasonable solution, also in view of the possible use of the ERCP as a model for national legislators.

Pre221.12
Indeed, the basic differentiating element between collective settlements prior to the proceedings and those reached during the proceedings lies in the fact that for the latter it has already been established that the conditions of admissibility (commonality, adequacy of representation) on which the legitimacy of the negotiation of the agreement "as a collective one" is based - i.e. with the aim of binding all the group members – have already been met.

D. SETTLEMENTS IN COMMENCED COLLECTIVE PROCEEDINGS

Rule 221. Court Approval
A group member will not be bound by any agreement settling a collective proceeding in whole or in part unless that agreement is approved by the court.

A. General issues
B. Court approval
C. Consequences of court approval or non-approval

[5] Stadler also highlights that "the court will be much more familiar with the whole dispute if the settlement is proposed while a collective action is pending" (Stadler, 'Collective settlements' (n 4) 237).

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A. General issues

221.01

ERCP Rule 221 establishes the general principle on which the whole regulation of collective settlements is based: the court's approval is essential for the agreement to be binding on all members of the group. This requirement of judicial approval also appears in the EU Directive, where it serves the very same purpose. Without such approval, therefore, the agreement would only have the effectiveness of a contract and would at most be binding only on those who had signed it, i.e. the qualified claimant and the defendant.[6] Obviously, this is not the goal pursued by the parties when they negotiate and conclude a settlement agreement within the framework of collective proceedings, as they always aspire to obtain the extension of the effectiveness of the agreement beyond those who have signed it - by definition, those who have reached the settlement are not all those who are expected to be affected by it.

221.02

When the collective proceeding has been constructed according to the opt-in model, the subjective scope of effectiveness may be easier to delineate, especially if the settlement is reached when the time period established for potential group members to join the group has closed. Indeed, it is reasonable to assume that this will be of the utmost importance, especially for the defendant, when considering negotiation and settlement. If the collective proceeding follows the opt-out model, the impact of the settlement may be even greater, since the number of group members will not always be clearly established.

221.03

The standard of judicial approval, in any case, is unquestionable[7] - although it was certainly not provided for in the rules of some national systems prior to the implementation of the EU Directive.[8] There is no need to explain in further detail the

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[6] See also ERCP Rule 221 C 2.

[7] Outside European soil, the clearest and most renowned example is offered, of course, by Rule 23(e) of the US Federal Rules of Civil Procedure: "The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement— may be settled, voluntarily dismissed, or compromised *only with the court's approval*" (emphasis added). A similar rule applies under Australian law, pursuant to Section 33V(1) of the Federal Court of Australia Act 1976 (as amended in 1992): "A representative proceeding may not be settled or discontinued without the approval of the Court".

[8] In Austria, for instance, the very peculiar system established in Section 29 of the Consumer Protection Act – assignment of claims for the purpose of filing the claim – does not establish special rules for settlement and court approval is not required. In England and Wales, opt-in collective proceedings in the framework of a Group Litigation Order are not subject to special settlement rules. The same applies to class action proceedings under the Hungarian Code of Civil Procedure, whose settlement

reason: it is a matter of ensuring that the agreement has not been concluded to the detriment of the interests of the members of the group. Therefore, as stated in the Comments, approval is not needed if the negotiation only leads to a plurality of individual agreements (in such a case the general provision of ERCP Rule 141 would apply to each agreement, which only requires court approval for it to be declared enforceable).[9]

B. Court approval

221.07

The ERCP consistently refer to court approval, but do not go so far as to define it. In any case, it must be understood that it is a formal, ad hoc and express decision. This means at least three things: (i) it must be reflected in an order (the so-called "settlement approval order" referred to in ERCP Rule 224); (ii) it must be the result of the procedure followed to reach it; and (iii) it cannot be deduced or presumed from any other decision of the court.

As will be seen below, the procedure to reach the court's approval is laborious and involves two stages: firstly, submitting it to the consideration and possible comments of the members of the group to be bound by the settlement; finally, analysing the fairness and adequacy of the proposed settlement, in order to decide on its approval.

221.08

ERCP Rule 221 also provides for the possibility that the settlement is not complete, but partial, i.e. it only aims at settling the collective proceeding in part. This scenario can be imagined, for example, when the individuals affected by the mass harm have been divided into subgroups. This provision is a clear sign of flexibility and pragmatism on the part of the ERCP: in certain cases only a partial agreement is possible, so that a potential requirement for the agreement to settle the dispute completely could, paradoxically, prevent the dispute from being settled. A partial agreement is preferable to no agreement at all.

221.09

Where the agreement submitted to the court for approval is partial, the court should make any necessary procedural adjustments. In some cases, it will be necessary to suspend the entire collective proceeding in order to verify whether the settlement is acceptable, so that only when the settlement is approved - if it is the case - will the proceedings resume, with respect to those aspects that have not been covered by the settlement. In other cases, it will be possible for the proceedings to continue to

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is governed by the general rules. In Norway – to close the list of examples –, whereas settlement in opt-out class actions require the approval of the court, there are no special rules applicable to settlements in opt-in class actions (pursuant to Section 35 of the Norwegian Disputes Act).

[9] ERCP Rule 221 C 2.

move forward with respect to what has not been agreed, in the interest of the right to a process without undue delay.

C. Consequences of court approval or non-approval

221.10

The main legal consequence of the court's approval of the agreement - if it was reached during the proceeding - is its binding effect on all members of the group, in the terms established by ERCP Rules 225 and 226, which distinguish according to whether the collective proceeding has been constructed in opt-in or opt-out terms.

221.11

The ERCP say nothing, on the other hand, about the consequences of non-approval. On this point, Article 11(3) of the EU Directive does state that if the settlement is not approved, the court - or administrative authority - "shall continue to hear the representative action concerned". Under the EU Directive model, therefore, it seems that an agreement not approved by the court would not even be binding on the signatories.

221.12

This is the most reasonable option, even if it is shocking to a certain extent, as it obliges parties who have clearly expressed their wish to terminate the proceedings to continue with them. For this very reason, although the rejection of the approval of the agreement should mean the resumption of the process - which, logically, has been suspended while the procedure for approving settlements is being conducted - the possibility should also be considered that, in such a case, the parties seek some other formula to put an end to the proceedings, even if it is without a binding agreement. In this scenario, both the general rules and the special case management rules should be applied to prevent this type of conduct from ending up damaging the members of the group. In other words, the qualified claimant, also pursuant to ERCP Rule 214, is expected to make a special commitment to the case, which compels him or her to continue moving the proceedings forward until it can end with a solution on the merits, either by means of a settlement or, if this is not possible - which includes the court rejecting the proposal agreed by him or her - by means of a judgment.[10]

[10] Article 840-bis VI of the Italian Code of Civil Procedure provides an example of how the legislator tries to prevent this from happening – always bearing in mind that Italian collective actions follow an opt-in model. In case the initial plaintiff abandons his or her action as a result of settlement or conciliation attempts, the court will offer the remaining damages parties who have joined the proceedings the possibility to assume the formal status of plaintiffs. If none of them do so, then the court shall dismiss the proceedings. The solution under Belgian law is more forceful: the group representative cannot withdraw from the proceedings without the court's authorisation (Article XVII.65 of the Belgian Code of Economic Law).

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Rule 222. Application for the approval of a settlement agreement
(1) A party to a proposed settlement agreement may apply to the court for approval under Rule 221.
(2) The application for approval shall include:
(a) the description of the group whose members will be bound by the settlement;
(b) a copy of the proposed settlement agreement. In a collective proceeding for compensation, the proposed agreement shall include the total amount of compensation payable, and the criteria for distributing the compensation to each group member;
(c) the proposed administration of the compensation fund and method of distributing the compensation payment to group members; and
(d) a concise statement of reasons showing why the terms of the settlement agreement are fair and adequate.

A. Standing to enter into the agreement

222.01

The ERCP - like the EU Directive - take the existence of redress agreements for granted, i.e., they are based on the premise that collective agreements (should) exist and are thus directly concerned with establishing the guidelines for their approval. In doing so, they make it clear that their system of collective redress - which they offer as a model to national lawmakers - gives qualified claimants the power to negotiate and enter into agreements, without prejudice to the fact that the result of such negotiation must then be supervised by the court and be subject (at least) to some form of assessment by the affected group members.

222.02

It has already been said that, according to the ERCP system, the rules on settlements in commenced collective proceedings apply once the collective proceeding order has been issued by the court. This means that the court has already verified that the person or entity bringing the collective proceedings meets the standards of ERCP Rule 209 and that, where appropriate, the court has even had to select which of the various possible qualified claimants will end up taking the active role in the proceedings (ERCP Rule 213(3)). Verification by the court makes the qualified claimant reliable in all respects (including for a settlement that, by definition, involves giving up something) which do not belong to the negotiating party, but to the members of the group.

222.03

The ERCP, by virtue of ERCP Rule 213(3), also envisage the possibility that in a particular proceeding there are several qualified claimants, either generally, or because one or more of them are qualified claimants for one or more subgroups - as can be deduced from ERCP Rule 214. In these cases, the "singular" provision of ERCP Rule 222(1) ("A party…"), which grants the initiative also to only one of the parties, can have its full meaning. If there are several qualified claimants, it is therefore conceivable that the defendant may have been able to reach an agreement with one or more, but not with all of them. On this point, the ERCP show again one of their greatest virtues, flexibility: even if the agreement is not complete, or not assumed by all, it is preferable to analyse it and, if appropriate, approve it.

B. Initiative

222.04

The procedure leading to the approval of a collective settlement begins at the request of at least one of the parties. This is the point in time when the ERCP become interested in the settlement. Nothing is said in them, however, about what may have happened before, i.e. about the manner in which the parties may have reached the agreement in question.

222.05

The EU Directive does envisage a double option at this point: plaintiff and defendant may jointly propose to the court a negotiated agreement (Article 11(1)(a)); but it may also be the court that invites them to negotiate and reach an agreement "within a reasonable time limit" - with the consequent stay of the proceedings in the meantime (Article 11(1)(b)). In some national legal systems, in fact, the existence of the agreement is linked to the prior development of mediation between the parties, as is the case in France[11] and, in a way, in Belgium.[12] The advantage of mediation is the intervention of a third party, which reduces the risk of collusion.[13]

222.06

Any of these possibilities fits seamlessly into the ERCP system. In particular, the possibility for the court to trigger the negotiation leading to the settlement is part of its case management powers, as follows from ERCP Rule 49(1), which also applies to collective proceedings pursuant to ERCP Rule 218(1). It is also foreseen in some domestic legislations.[14]

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[11] See Articles L623-22 and L623-23 of the French Code of Consumer Law.

[12] See Article XVII.45.§2 of the Belgian Code of Economic Law.

[13] Also Stadler, 'Collective settlements' (n 4) 245 (footnote 42).

[14] In Italy, for instance, pursuant to Article 840-quaterdecies of the Italian Code of Civil Procedure, the court is entitled, "where possible", to submit an agreement proposal; in Belgium, the court may appoint a mediator to foster the negotiation (see Article XVII.45.§2 of the Belgian Code of Economic Law).

222.07

It has already been pointed out, on the other hand, that the EU Directive's system seems to provide for the desirability of both parties submitting the agreement reached to the court for approval. ERCP Rule 222(1) is content for either of them to do so, without this being seen to diminish or reduce the guarantees for the members of the group. What matters, at the end of the day, is to reach a settlement reflecting a genuine agreement and whose content is fair and adequate: who has submitted it to the court is irrelevant.

C. Content of the application

222.08

ERCP Rule 222(2) makes it clear that a copy of the proposed agreement must be provided: a reference to its content is not sufficient. But, above all, with ERCP Rule 222(2) the ERCP propose the minimum content that the application for approval should contain in order for the court to have a duty to consider it and to initiate the procedure for its approval. The four paragraphs expressly included in the rule set a high level of specification regarding the content of the proposed settlement, without which a review of fairness and adequacy would be purely formal and illusory.[15] These specification requirements concern the personal scope of the agreement (1), the actual terms of the agreement reached (2) and the reasons justifying its judicial approval (3).

1. Persons

222.09

The first requirement of specificity concerns the subjective scope of the agreement ("the description of the group whose members will be bound by the settlement"). It has already been seen above that the ERCP are open to the approval of partial agreements, so that it cannot be presumed that the personal scope of the agreement is the same as that of the proceedings themselves. However, this does not mean absolute freedom: although it is not stated, it seems logical to think that the agreement cannot affect subjects other than those referred to in the collective proceeding order (ERCP Rule 213(1)(c)), because only with regard to them is it understood that there is a collective proceeding and a qualified claimant16 (). But it is possible to imagine cases in which the proposed agreement refers only to a part of them, whether they were part of a subgroup identified as such from the beginning, or whether it is the proposed agreement limited to a part of the members of the group that provokes the subsequent creation of one or more subgroups.

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[15] Piché speaks about "transparent and honest disclosure" (Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2) 34). See also Stadler, 'Collective settlements' (n 4) 259.

[16] For cases where a collective proceedings order has not yet been made see below the commentary to ERCP Rule 229.

2. Terms

222.10

The second block of specificity requirements concerns the actual terms of what has been agreed, especially when it is a collective proceeding for compensation. At this point, there are two main possibilities for structuring the compensatory agreement.

222.11

On the one hand, it is possible to think of an agreement that, in the same way as a judgment, provides for the payment of compensation individually to the members of the group affected by the mass harm. In this case, the court needs to know the total amount of compensation payable, and the criteria for distributing the compensation to each group member. This information allows the court, either on its own or with the help of an expert, to make an estimate - albeit an approximate one - of what the class members will receive, without which it would not be able to assess whether the settlement is fair.

222.12

It is also possible that the settlement provides for the creation of a compensation fund, in cases where individualised compensation to the persons affected by the mass harm is not possible or does not make sense, e.g. because the amount would be too small or because it would be too difficult for the affected persons to prove their status as such - as in many antitrust collective litigation cases, where the consumers who paid overcharges no longer have the purchase receipt to prove the harm. In these cases, the settlement agreement should specify - and the court should be aware of - the proposed administration of the compensation fund and method of distributing the compensation payment to group members. Following the example of Dutch law, in many cases it will be best practice to establish and appoint a board to manage the fund, entrusted to experts.[17] In fact, it has been pointed out that this second option opens the door to *cy-près* funds solutions, usual in common law systems, which do not seem to be an easy fit under the ERCP system when the proceeding ends with a judgment, due, above all, to the way in which the national substantive systems conceive the compensation of damages.[18] This view, in fact, suggests that judges will tend to be more cautious about this type of agreement than about other, more "orthodox" ones, in which individual compensation is provided for.

222.13

Monetary compensation does not necessarily have to be the substance of the collective agreement. Depending on the nature of the mass harm, it is also possible

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[17] ERCP Rule 222 C 2.

[18] On this, see ERCP Part XI Introduction C 3, ERCP Rule 215 C 4 and ERCP Rule 222 C 3. Also Stadler, 'Collective settlements' (n 4) 251.

to consider agreements whereby the defendant undertakes to perform other actions (e.g., repair or replacement of defective objects or products).[19]

3. Reasons

222.14

Finally, the ERCP require that the application includes an explanation of why the terms of the settlement agreement are fair and adequate. This may seem a somewhat naïve requirement, as it is hard to imagine that the parties will openly acknowledge that the agreement is unbalanced or that, e.g. it gives unjustified advantages to the qualified claimant compared to what the other members of the group are to receive.[20] But it is consistent with the requirement for the qualified claimant to act at all times in the interests of the group as a whole and may also serve as a yardstick for the court to measure the transparency of the parties to the agreement in explaining its benefits. A finding by the court that the reasons given by the parties in their statement are not true will most likely lead the court to reject the agreement. In any event, the parties' assertions do not exhaust the information that the court should be enabled to use to decide on the approval of the agreement, since ERCP Rule 223 gives it broad powers to supplement the information gaps and/or to solve its doubts.

Rule 223. Procedure for Approving Settlements

(1) Before approving a settlement the court may

(a) make any order necessary to obtain further information in order to assess the fairness and adequacy of the proposed settlement,

(b) appoint an expert to assist the court.

(2) The court must

(a) advertise the proposed settlement according to Rule 219, ensuring that it is clear that the court has not reached a conclusion on the fairness of the settlement,

(b) fix a period within which any comments may be made, and

(c) consider all comments made by the group members and the parties.

(3) The court may consider all other relevant comments received.

A. General overview

B. First assessment of the application

C. Intervention by the parties, group members and third parties

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[19] On this, see Geoffrey P Miller and Lori S Singer, 'Nonpecuniary Class Action Settlements' [1997] 60 Law and Contemporary Problems 97; Howard Erichson, 'A Typology of Aggregate Settlements' [2005] 80 Notre Dame Law Review 1769.

[20] As Piché explains, a dynamic is generated in these cases in which both parties want to see the settlement approved, giving rise to what she calls an "adversarial void", which the judge has difficulty in filling (Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2) 36).

D. Court activity to assess the fairness and adequacy of the proposed settlement

A. General overview

223.01

The approval of the agreement renders it binding on the members of the group. For this reason, approval by the court cannot be automatic, nor is it reasonable for it to be limited to the verification of merely formal requirements. The ERCP have chosen to be demanding in two points: (a) what is checked and (b) who checks it.

223.02

(a) As to the former, a material control has been provided for to ensure that the agreement is fair and adequate, taking into account the parameters offered by ERCP Rule 224.

223.03

(b) As to the latter, although approval is the exclusive responsibility of the court, it has been considered reasonable to consult the parties who will be affected by the agreement, as a way of achieving a double goal:

(i) to increase the data and assessments available to the court before deciding on the approval of the agreement;

(ii) to reinforce the legitimacy of the extension of its effects to those who have not participated in its negotiation – either by opting-in or by opting-out.

This is something that was already provided for in some national legislations [21] and which the ERCP have considered as best practice.

223.04

Hence, the procedure for the approval of a collective settlement can be complex and time-consuming. In general terms, once the application has been submitted, the procedure consists of three main stages: a first analysis by the court, which focuses more on the application than on the agreement itself (B); a second step, in which the agreement is submitted to the comments and assessments of the members of the group and other parties (C); and a third stage, in which the court carries out the proceedings it considers necessary to assess whether the agreement is fair and adequate (D).

B. First assessment of the application

223.05

Although not expressly stated in the ERCP, the first thing the court should do when it receives the application is to verify that it complies with the requirements set out in ERCP Rule 222(2). If the application is complete, the court should set in motion the procedure to decide whether or not to approve the settled agreement. If it is not,

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[21] Namely the US (under Rule 23(e)(1) FRCP) and Australia (according to section 15.2 of the Class Actions Practice Note of the Federal Court of Australia).

it is part of its managerial powers to ask the applicant to cure the deficiencies in the application and to submit it again.[22]

C. Intervention by the parties, group members and third parties

223.06

It has already been explained above[23] that the legal standing of the qualified claimant to bring and conduct collective proceedings also entitles him or her to negotiate and enter into collective agreements. However, it is considered good practice to subject the agreement to a possible analysis and assessment of the group members it is intended to bind. ERCP Rule 223(2) therefore makes it mandatory to set up a mechanism for group members to take knowledge of the agreement submitted for the court's approval and to present their observations or comments to the court. This phase of the approval procedure has in turn two sub-phases.

223.07

(i) On the one hand, the agreement must be advertised, following the possibilities opened up by ERCP Rule 219(2). In principle, the same means should be used to advertise the agreement as to communicate the collective proceeding order. The rule also emphasises a basic point: when advertising the settlement, it should be made clear that the court has not yet approved it, i.e., it has not reached any conclusion on its fairness. The members of the group must in any event be sufficiently informed of all the elements necessary to take a position and, if possible, to decide whether to adhere to the agreement or to exclude themselves from it. Such information may include, inter alia, the content of the agreement, the collective litigation of which it forms part, the consequences that its approval may have on the legal position of the members of the group or the foreseeable development of the procedure for approval of the agreement.[24]

223.08

(ii) The ERCP do not propose requiring an explicit ratification of the agreement by its addressees: the advertising does not seek the adherence of the addressees, but their comments. Therefore, the deadline for submitting comments should not be too long, and group members should also be provided with a quick and easy mechanism to do so - in the style of an online questionnaire. Using a platform, such as the Secure Electronic Platform referred to in ERCP Rule 220, should be a good practice to implement this.[25]

223.09

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[22] A good example is offered by Article 14 of the Slovenian Act on Collective Claims.

[23] See supra 222.01.

[24] A very good example in this regard is provided by section 15.2 of the Class Actions Practice Note of the Federal Court of Australia.

[25] In this vein, see Article 840-quaterdecies of the Italian Code of Civil Procedure.

However, from the terms in which ERCP Rules 225 and 226 are drafted, an interesting factor can be deduced: if the settlement is approved, it will bind the parties that have joined the proceeding - if it was structured as an opt-in - or those that have not excluded themselves from it - in cases of opt-out – "at the time the order approving the settlement is made". The ERCP, therefore, suggest as a good practice that the advertisement of the existence of the settlement proposal should open the door to two different possible reactions from group members.

223.10
First, those who had not done so up to that time may then decide to join the collective proceeding, probably because the content of the agreement is sufficiently beneficial and its existence eliminates the risk of being prejudiced by a worse judgment. In fact, it even seems to be suggested by the wording of ERCP Rule 225 that the deadline for opting-in, if already closed, be reopened while the court decides on the approval of the settlement. The latter may be risky for the defendant, which in opt-in structured collective proceedings cases may be exposed to the danger that many "unexpected" opt-ins in the settlement approval period may increase the cost of the settlement in terms they cannot bear.

223.11
Second, those who have not done so up to that point may then decide to opt out of the collective proceeding, probably because the content of the agreement does not seem sufficient to them and they prefer to litigate individually in search of a better outcome for themselves. Again, the wording of ERCP Rule 226 seems to suggest that the opt-out period, even if it was already closed, is reopened while the court decides whether to approve the settlement. And, again, this is a risky option for the defendant, as a mass "flight" of group members reduces the personal scope of the settlement, which may then not be of as much interest if it does not free him or her from the danger of being subjected to subsequent individual litigation.

223.12
Thus, although it is true that the ERCP do not make judicial approval of the agreement subject to its "collective" ratification by the group members,[26] they do open up the possibility of a plurality of individual ratifications or rejections, which may to a large extent distort its economic sense for the defendant. This is therefore an element that national legislators must weigh carefully when implementing a system of collective protection inspired by the ERCP. It should be noted that the ERCP system is very demanding as to the control of the content of the agreement and, even before that, to the conduct of the qualified claimant. For the same reason, a national procedural model would also be acceptable, in which the agreement binds

[26] This brings them closer to the provisions of the EU Directive, whose Article 11(4) considers it compatible with the system to establish "rules allowing the individual consumers affected by the representation action and by the subsequent agreement to accept or refuse to be bound by the agreements".

those who have joined or have not excluded themselves from the proceedings in accordance with the ordinary provisions of the collective proceeding order, without the need to offer them new opportunities for opting-in or opting-out.[27]

223.13
Apart from the members of the group, the parties themselves are also allowed to submit comments, which should serve to supplement the concise statement of reasons to be included in the application or, as the case may be, to allow those parties who have not wished to sign the agreement or have not requested its approval to take a stand.

223.14
Finally, the ERCP are not closed to the intervention of a kind of amicus curiae, who could also make relevant comments on the agreement (ERCP Rule 223(c)).[28] Although it will not be frequent, it is possible to imagine this type of intervention in collective proceedings within the framework of the so-called "strategic litigation".

D. Court activity to assess the fairness and adequacy of the proposed settlement
223.15
Placing the burden on the court to ensure that the proposed settlement is fair and adequate is only a sensible decision if the court is given the tools that will actually enable it to fulfil the role it is entrusted with. The ERCP here again propose making use of flexibility.

223.16
The ERCP impose only one duty on the court, that of considering all comments made by the group members and the parties – but the court could ignore those received from other individuals and entities, potentially acting as amici curiae.

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[27] See Stadler, 'Collective settlements' (n 4) 259. For a different approach, for instance, under US federal law, and pursuant to Rule 23(e)(4) FRCP, the court is empowered to "refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so". See also Rhonda Wasserman, 'The curious complications with back-end opt-out rights' [2007] 49 William and Mary Law Review 373.

[28] Addressing the situation in Canada and the US, see Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2) 74–75, showing that the courts are sometimes wary of the hidden interests of these individuals or entities. Article 1014 of the Dutch Code of Civil Procedure also allows foundations or associations representing the interests of the beneficiaries of the agreement to file a written statement before the court dealing with the application. In a similar vein, Article 16(1) of the Slovenian Act on Collective Claims.

223.17

And, above all, they give the court a very broad power, that of making any necessary decision.[29] In particular, and taking the regulation and practice of some jurisdictions as an example, it is pointed out that the court may appoint an expert.[30] Apart from experts and potential amici curiae, the other sources of information to which the court can have recourse will therefore mostly be witnesses and, above all, documents and data stored in files, whether public or private. It should be borne in mind that access to witnesses, documents and data will in any case be conditioned by the actual powers of the court in that regard - and will be more difficult to carry out, e.g. if the information is located abroad.

223.18

As for the appointment of the expert, the only criterion is that the court considers it necessary for him or her to assist, which in turn will depend on the circumstances of the case and the greater or lesser specialisation and experience of the court.[31] This highlights the importance of adapting the internal judicial organisation to the requirements of collective proceedings, especially when it comes to implementing a new model of this kind in procedural systems that do not yet have experience in collective litigation.

223.19

In addition, a significant problem that the appointment of an expert may raise are the costs and, more specifically, the determination of who will have to bear them - discarding the possibility that it will be the court itself. It has already been pointed out that the procedure for approving the agreement also generates the costs associated with its advertisement. These advertisement costs, however, are predictable and can thus be foreseen as necessary - the parties must count on them if they want the agreement to be approved by the court - which in turn allows the parties to assume that they will have to bear them and to make provision for them, either in the agreement itself or separately.[32] The same does not apply to the possible costs of an expert, as the court does not have to appoint one, nor can the cost of an expert be calculated a priori. In order to avoid practical difficulties, it would be good practice when implementing the ERCP model that the costs of the proceedings, including the costs of the procedure for the approval of the settlement, should be addressed in the agreement and that this should be required by domestic

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[29] Stadler, however, recalls the general application of the principle of proportionality (ERCP Rule 5) when addressing the use of these powers (Stadler, 'Collective settlements' (n 4) 255).

[30] See, for instance, Article 1016 of the Dutch Code of Civil Procedure.

[31] On the relevance of experts in Canadian class action practice, see Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2) 36–37.

[32] See, for instance Article XVII.45.§3.9º of the Belgian Code of Economic Law.

implementing legislation. Indeed, these can be significant expenses and, depending on who bears them, the final sum to be received by the group members could be affected. ERCP Rule 224(d), which expects the court to assess the terms agreed between the parties as to the payment of the costs of the action, "whether contained in the proposed settlement agreement or not", is also along these lines. It follows that, in one way or another, the court must come to know the amount: the simplest course of action, therefore, is to disclose them at the outset, by including them in the agreement itself or, at least, in the application to the court for approval.

223.20

More generally, from an organisational or procedural point of view, the importance of a proper handling by the court of its case management powers - both general and specific to collective proceedings - should be emphasised when the procedure for the approval of the agreement is being carried out.[33] The court, in other words, should consider itself empowered to take all case management decisions necessary to fulfil its functions in deciding whether or not to approve the proposed settlement. The most obvious one is to organise a hearing, along the lines of fairness hearings in the US system.[34] Bearing in mind that it may increase costs, the court should limit itself to arranging a hearing when it really considers that it can bring added value and, of course, depending on the type of information the court wants to receive. Thus, for example, if it is a matter of examining witnesses, or group members, it is reasonable to hold a proper hearing, in which the parties to the settlement agreement are allowed to intervene. Even if it is not an adversarial hearing on the merits of the case, it is reasonable to hear those interested in upholding approval of the settlement and to allow them to confront those who might argue against that outcome.

Rule 224. Settlement Approval Orders

The court shall not make an order approving a settlement agreement where

(a) the amount of compensation agreed for the group or any sub-group is manifestly unfair,

(b) the terms of any other undertaking by a defendant are manifestly unfair,

(c) the settlement is manifestly contrary to the public interest (*ordre public*) or

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[33] On this, see Magne Strandberg and Vincent Smith, 'Case management and the role of the judge' in Stadler, Jeuland and Smith (eds), *Collective and Mass Litigation in Europe* (n 4), 153.

[34] See Stadler, 'Collective settlements' (n 4) 261. In the American system the holding of such a hearing is mandatory, pursuant to Rule 23(e)(2) FRCP. The situation appears to be similar under Dutch law (see Article 1013-5 of the Dutch Code of Civil Procedure) and under Slovenian law (Article 16(3) of the Slovenian Act on Collective Claims), for instance.

(d) the terms, whether contained in the proposed settlement agreement or not, as to the payment of legal and other associated costs of the action are manifestly unreasonable.

A. Scope of the provision
B. Criteria and red lines
C. The court decision approving or rejecting the settlement

A. Scope of the provision

224.01

Despite its heading, this rule is not really concerned with the order itself, but rather with the guidelines or elements to be taken into account by the court when assessing whether the agreement submitted for its approval is fair and adequate. In fact, rather than defining what is meant by fair and adequate, what ERCP Rule 224 does is to establish red lines, i.e. the cases in which the agreement could not in any way be approved.[35] In this, the ERCP depart from other legal models, which have dared to establish parameters for assessing, in a positive way, that the agreement deserves judicial approval.[36] On the other hand, the standard by which to weigh the issues referred to in the rule is the same: the "manifest" nature of the element from which the inadequacy or unfairness of the agreement is to be deduced. It can be inferred from this that courts, as a matter of principle, should show a certain deference to settlement proposals.[37]

224.02

The key element for the ERCP is the fairness of the agreement,[38] which refers to its content, and which explains why the procedure for its approval is complex. On this

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[35] Following the path of the Dutch system (see Article 7:907-3 of the Dutch Civil Code). A blacklist system is also to be found in Article XVII.49.§2 of the Belgian Code of Economic Law and in Article 17 of the Slovenian Act on Collective Claims.

[36] Once again, Rule 23(e)(2) FRCP, which expects the court to assess whether the class representatives and class counsel have adequately represented the class, the proposal was negotiated at arm's length, the relief provided for the class is adequate, and the proposal treats class members equitably relative to each other. For a review of the many factors that may deserve consideration, see *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–324 (3d Cir. 1998).

[37] This is suggested by Salgado and Verbic, 'Los procesos colectivos en el Proyecto ELI-UNIDROIT sobre principios del Derecho Procesal Civil Europeo' (n 2) 265.

[38] In a similar vein, the settlement of opt-out claims brought in England and Wales under the Collective Proceedings Order system needs the approval of the Competition Appeals Tribunal, which will only be granted if the agreed terms "are just and reasonable". The settlement of German model declaratory actions will only be approved by the court if it is considered reasonable under the circumstances of the case (§ 611 (3) ZPO). Under Bulgarian law, opt-out collective proceedings may

point, in fact, there is a clear difference with the model offered by the EU Directive. Article 11.2 of the EU Directive only imposes a non-negotiable minimum on Member States: agreements that are contrary to mandatory national rules or that include conditions that cannot be fulfilled cannot be approved. But the control over the fairness or unfairness of the agreement is not imposed: "Member States may lay down rules to allow the court or administrative authority to refuse to approve a settlement on the grounds that the settlement is unfair".

224.03

The EU legislator is obviously not unaware that the option for this reinforced level of control is more protective for consumers, as it prevents abuses to their detriment. However, it seems to have borne in mind that a substantive control of the fair, balanced or equitable nature of a collective agreement is complex and, in some cases, discretionary. This is possibly the reason why it has been left to national legislators to decide whether to impose it or not. The ERCP, on the other hand, consider that a substantive control of fairness is indispensable. By carrying out this type of more exhaustive control, the courts take on a more active role in defending the rights of group members, which is generally consistent with the design of collective proceedings in the ERCP.[39] Indeed, it should be considered a best practice.[40]

B. Criteria and red lines

224.04

The criteria and red lines on which the control of fairness depends are associated with the amount of compensation and the terms of any other undertaking by the

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be settled, subject to the approval of the court, after checking that the settlement is not contrary to the law and principles of morality and good faith and that the harmed interest can be protected to a sufficient degree by the settlement. In France, court approval should be given if the court considers that the agreement is consistent with the interests of those to whom it is intended to apply (Article L623-23 of the French Code of Consumer Law). In Belgium reasonableness is also the yardstick for judicial approval (Article XVII.49§2 of the Belgian Code of Economic Law). The threshold in Portugal is not so demanding: pursuant to Article 290(3) of the Code of Civil Procedure, the court's review will be limited to check the standing of the parties and the waivable nature of the rights at stake.

[39] On this, see Alexandre Biard, *Judges and Mass Litigation – A (Behavioural) Law & Economics Perspective* (Erasmus Universiteit Rotterdam 2014); Alexander Eggers, *Gerichtliche Kontrolle vom Vergleichen im kollektiven Rechtsschutz* (Mohr Siebeck 2019); Addressing the role of the judge as protector of the absent group members, Élodie Falla, *The Role of the Court in Collective Redress Litigation. Comparative Report* (Larcier 2014) 152–7.

[40] Addressing the practice in the US, Australia and The Netherlands, see Stadler, 'Collective settlements' (n 2) 240–249; for Canada, see Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2).

defendant. This includes, of course, establishing conditions that cannot be complied with, as referred to in the EU Directive, but also others, such as the so-called "coupon settlements", frequent in the US class action practice, which have been the subject of strong criticism, since the compensation they offer to consumers who have suffered damage consists of discounts applied to subsequent purchases to be made in the same shop or chain of shops.[41] Although ERCP Rule 224 does not expressly mention it, the court can be expected to analyse not only the adequacy of the relief provided for the group, but also that the proposal treats all group members "equitably relative to each other"[42].

224.05

Regarding the infringement of public policy, it is worth recalling the nature of the ERCP as model rules, designed to be developed by national legislators. The purpose of this provision is to indicate the advisability of establishing limits associated with values considered essential in each national system, including infringement of the mandatory rules referred to in the EU Directive.

224.06

Finally, a reasonableness check on the amount and distribution of the costs of the action is expressly provided for. The aim is to avoid that in practice the agreed amount does not reach the addressees and ends up being diluted in the payment of legal costs. It should be borne in mind, however, that in many cases collective litigation is supported by third party funding and that the court, by "certifying" the collective proceeding, has accepted that a part of the proceeds will go to the funders; similar considerations should be done if the qualified claimant entered into a success fee agreement with the lawyers. It is reasonable, therefore, that such agreements should also be maintained in the event of a settlement. Accordingly, they should only be an obstacle to approval if they create an imbalance beyond what was initially reported when filing the collective claim and "certifying" the collective proceeding.

224.07

It is true, on the other hand, that the way in which the red lines have been drafted by the ERCP is very broad and that any court could rely on any of its paragraphs to uphold the refusal of approval in a particular case. However, it is also reasonable to

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[41] On this, see Howard Erichson, 'Aggregation as disempowerment: Red flags in class action settlements' [2017] 92 Notre Dame Law Review 859; Steven E Hantler and Robert E Norton, 'Coupon Settlements: The Emperor's Clothes of Class Actions' [2005] 18 Georgetown Journal of Legal Ethics 1343; or Christopher Leslie, 'A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation', [2002] 49 UCLA Law Review 991.

[42] Borrowing the terms of Rule 23(e)(2)(D) FRCP.

understand that these need not be the only grounds for refusing approval, as an agreement may be found to be unfair or inadequate on other grounds.[43]

C. The court decision approving or rejecting the settlement

224.08

The ERCP are not explicit in regard to the content of the decision by which the court decides on the agreement. This opens the door to a subsequent regulatory development that envisages different scenarios, depending on whether the court considers that it should approve or reject it.

224.09

The court may reject the agreement as unfair or inadequate. It goes without saying that this decision must in any case be sufficiently reasoned.[44] National legislators may provide, for the sake of flexibility, that the court may first of all grant the parties a period of time within which, after renegotiation between them, they may submit a new proposal that is acceptable.[45] In order to do so, of course, the court will have to indicate to the parties which parts of the agreement it finds unacceptable and for what reasons, so that they can overcome the hurdle in an effective manner.

If the rejected agreement is not capable of cure, or is not cured, the consequence, as seen above, should be the resumption of the proceedings.[46]

224.10

If the court considers that the agreement is acceptable, it must without further ado issue a decision approving it, in which, in addition, it will make explicit its binding nature, in the terms that will be discussed below.[47]

224.11

In developing the ERCP system, it is desirable that national legislators address the appeal against the court's decision.[48] The parties should be able to appeal against a

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[43] Also Stadler, 'Collective settlements' (n 4) 250.

[44] This requirement to provide a statement of reasons is expressly set out in ERCP Rule 232(a) where approval of a settlement reached outside the proceedings is refused.

[45] ERCP Rule 224 C 5 also suggests it; see also Article 17(2) of the Slovenian Act on Collective Claims. Dutch law goes even further: it does not only allow the court to offer the parties the opportunity to add further contractual provisions to the agreement or to change its content; the court may also complete or amend the agreement, but "with the approval of the parties who have concluded" it (see Article 7:907-4 of the Dutch Civil Code).

[46] See supra 221.10.

[47] See the Commentary to ERCP Rules 225 and 226.

[48] See Samuel Issacharoff and Richard Nagareda, 'Class Settlements under Attack' [2008] 156 University of Pennsylvania Law Review 1649; Timothy Duffy, 'The Appealability of Class Action Settlements by Unnamed Parties' [1993] 60 University of Chicago Law Review 933.

rejection by the court, if they disagree with the reasons why the agreement has been found to be unfair or inadequate.[49] The national regulation should be more careful in establishing possible appeals against the decision approving the agreement.[50] Indeed, it is conceivable that it could be challenged by any of the parties to the proceedings who had not signed it from the outset. And it is also possible to imagine that those members of the group who do not agree with the settlement might want to challenge it; opening this type of appeal, however, would be totally dysfunctional. Allowing class members to opt out of the agreement prior to its judicial approval[51] is one way of justifying a possible legislative decision to deny them recourse. But, strictly speaking, it is not necessary. Just as group members would not be able to appeal an adverse judgment on the merits, so too would it be justified to exclude group members from challenging a decision approving a settlement that they do not like and that will be binding on them – in cases where they have not been offered a new opportunity to opt out once the proposed settlement has been submitted to the court for approval.

Rule 225. Approved Settlements in Opt-in Actions
An approved settlement binds all group members who have opted-in at the time the order approving the settlement is made.

Rule 226. Approved Settlements in Opt-out Proceedings
An approved settlement binds all group members unless they have opted-out of the collective proceedings at the time the order approving the settlement is made.

A. General issues
B. Meaning of "binding"

A. General issues
225-226.01
The effectiveness of the agreements, once approved, is dealt with, albeit partially, in ERCP Rules 225 and 226. Indeed, they address the binding effect of the agreement towards the group members, distinguishing according to the way in which the collective procedure has been constituted. If it is an opt-in proceeding, the agreement will bind those who have joined the proceeding; and in proceedings structured under the opt-out regime, the binding effect will extend to all those who

[49] See, for instance, Article 24(2) of the Slovenian Act on Collective Claims, that demands the challenge to be submitted jointly by all the parties to the agreement.

[50] The German ZPO excludes it for the decision approving the settlement of a model declaratory action (§ 611(3)). The Slovenian Act on Collective Claims excludes an appeal against the decision approving the settlement, but admits challenging the settlement itself on the same grounds applicable to the challenge of any judicial settlement (Articles 24(1) and 24(3)).

[51] See supra 223.11.

have not excluded themselves from the proceeding. The result, therefore, is the same as with a judgment and it is reasonable that it should be so, for the very logic of collective litigation. The only difference with the judgment is the relevant time up to which the opt-in or opt-out may have occurred: ERCP Rules 225 and 226 place it at the time when the settlement is approved, not at the time initially established in the collective proceeding order.

225-226.02

As already pointed out, this suggests the desirability that the submission to the court of a settlement proposal should lead to the reopening of the opt-in or opt-out time limits -depending on the type of proceedings.[52] The disadvantages that this may lead to have also been highlighted.[53] But the ERCP do not suggest — and this is made clear in the official comment — that an additional period for opting-in or opting-out is opened after the settlement has already been approved by the court.[54]

B. Meaning of "binding"

225-226.03

In the case of a settlement the notion of res judicata does not apply, since nothing has been judged by the court.[55] However, it is possible to speak of binding effect. ERCP Rules 225 and 226 refer to the binding effect of the settlement vis-à-vis the group members. And this means that a group member could not subsequently bring an individual action against the same defendant seeking compensation for the same harmful event to which the settlement refers,[56] nor could those group members bring a collective proceeding. If they did so, the defendant could successfully raise the so-called "exceptio pacti", which would lead to the dismissal of the action.[57] Therefore, the binding effect that ERCP Rules 225 and 226 attribute to the judicially

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[52] Also Salgado and Verbic, 'Los procesos colectivos en el Proyecto ELI-UNIDROIT sobre principios del Derecho Procesal Civil Europeo' (n 2) 265; and Stadler, 'Collective settlements' (n 4) 250.

[53] See supra 223.09–223.10.

[54] ERCP Rule 225 C 2 and ERCP Rule 226 C 2. This is, by contrast, one of the requirements of the German system for the settlement of model declaratory actions, where consumers may opt-out during a month following the advertisement (§ 611 (4) ZPO). Articles 18(2) and 19(2)(6) of the Slovenian Act on Collective Claims also offers group members the opportunity of opting in or opting out once the agreement has been approved by the court. The same applies under French law, pursuant to Article L623-23 of the French Code of Consumer Law.

[55] In the comparative landscape, it is not common for settlements - in general terms, i.e. in non-collective litigation - to be recognised as res judicata: only some legal orders assume clearly that settlements concluded in civil litigation acquire a res judicata effect (e.g., Croatia, Slovenia and Switzerland).

[56] Stadler also describes it as a "preclusive effect" (Stadler, 'Collective settlements' (n 4) 262).

[57] This is the meaning in which Article L623-28 of the French Code of Consumer Law grants *autorité de la chose jugée* to the judicial decision approving a settlement.

approved settlement is functionally equivalent to the effectiveness that a final judgment issued at the end of the proceedings would have, according to ERCP Rule 227(1) and (2).

225-226.04
Obviously, the settlement also has binding effects on the parties to the proceedings in the proper sense. And it should also have binding effects on any other potential qualified claimant seeking to bring a new collective proceeding against the same defendant in respect of claims that are covered by the judicially approved settlement.

225-226.05
In addition to this binding effect, and although the ERCP do not expressly say so, the judicially approved agreement must be enforceable, in terms identical to those provided for judgments in ERCP Rule 227(3). Moreover, it should be borne in mind that the ERCP do not deal with the enforcement proceedings, so that there is no model for national legislators to follow in this regard. It would be therefore advisable for national legislators who decide to adopt the ERCP model to specifically develop rules addressing compliance and enforcement of collective settlements. Indeed, it should be considered good practice for the agreement itself to specify the manner in which the defendant will comply with it and, where appropriate, the type of cooperation to be provided by the beneficiaries[58] or by the qualified claimant in order to proceed with voluntary compliance - e.g., to identify as many beneficiaries as possible in an opt-out system. Encouraging and facilitating the voluntary performance of settlements will serve to reduce the need to resort to forced enforcement in the strict sense, which would always be more costly and inconvenient for the best satisfaction of the rights of the group members.

225-226.06
The ERCP do not deal with *all* the effects or consequences attached to a collective agreement. Among the issues that the ERCP do not address - but which should be envisaged by national legislators when implementing a collective action system modelled on the ERCP - the following may be highlighted:
(a) In settlements that have been approved under an opt-out model, mechanisms should be put in place to allow class members who can duly prove that they were not aware of the existence of the harm, or of the collective proceedings and of the possibility of excluding themselves from them, to opt out from the settlement.[59]
(b) It is possible that, after a settlement agreement has been approved, new damages may arise, whether foreseeable or not. It would be reasonable for national laws to

[58] In this vein, see for instance Article 22(1) of the Slovenian Act on Collective Claims.

[59] Examples of regulation can be found, among others, in The Netherlands (Article 7:908-3 of the Dutch Civil Code), Slovenia (Article 20 of the Slovenian Act on Collective Claims), and Belgium (Article XVII.49.§4 of the Belgian Code of Economic Law).

require the parties to include appropriate provisions in the agreement itself, including the possibility to revise the agreement at a later stage.[60]
(c) Finally, although on a somewhat different level, national legislators should also clarify that what the parties have established in a settlement agreement, whether or not it has been approved, should not have any effect beyond the proceedings and should therefore not be equated with an admission of culpability or liability to non-group members.[61]

225-226.07
The cross-border effectiveness of collective settlements is guided by ERCP Rule 235.

F. COLLECTIVE SETTLEMENTS OUTSIDE COLLECTIVE PROCEEDINGS

Pre229.01
When the settlement is negotiated and approved in the framework of already commenced collective proceedings the scenario is relatively straightforward, as the reciprocal incentives are clear, both for the defendant and for the qualified claimant. The ERCP, however, also acknowledge that it will be of great practical use if binding effects were also granted to settlements negotiated and agreed before the proceedings have reached the point in which the court certifies that they can continue as collective. Indeed, the ERCP consider as much logical if such agreements can be negotiated even before the statement of claim is filed, following the pioneering model of Dutch law, established through the 2005 Act on Collective Settlements (*Wet collectieve afwikkeling massaschade*), amending both the Dutch Civil Code and the Code of Civil Procedure.

Pre229.02
Indeed, it shall be recalled that, pursuant to ERCP Rule 210(1)(g), the ERCP system of collective redress requires settlement attempts to have been tried before formally commencing proceedings.[62] If the ERCP encourage negotiated solutions to such an extent - only the failure of negotiations makes collective proceedings admissible - they must give the same value and effectiveness to an agreement reached outside the proceeding as to an agreement reached while the collective proceeding is already underway.

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[60] Here again, the example of Belgian law is of interest: see Article XVII.45.§3.11º of the Belgian Code of Economic Law.

[61] See infra 232.04.

[62] This provision is assessed very positively by Piché, '«Andrà tutto bene/Ça va bien aller»: Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective' (n 2) 32–34. She notes, however, an important shortcoming: before the collective order is issued no one can be considered to be a qualified claimant and be regarded as a valid subject to lead "a group discussion about settlement", which will be more likely to occur after the order is issued (at 34).

Pre229.03

The legal option for the approval of agreements prior to the collective proceeding order cannot disregard that there has not yet been a judicial control as to whether collective redress is possible in the case at hand, an assessment on which the standing of the qualified entity that has negotiated the agreement in the interest of group members also depends. Approval, in these cases, needs to be subject to additional requirements and controls, without which the extension of the binding effect to third parties - even the mere fact of subjecting them to the dilemma of having to opt out from the agreement - could be constitutionally dubious. The binding character of the collective agreement concluded *in the course of the proceedings* stems from the fact that a court has considered it admissible in such a case that the action of the qualified claimant has an effect on the legal position of other subjects - the members of the group - who are not parties to the proceedings. It is this judicial control and the possibility of opt-in or opt-out - depending on how the collective proceedings have been constructed - that legitimises from a constitutional point of view the effectiveness of collective judgments and settlements in respect of parties who have not been involved in the litigation. Equivalent controls and requirements must also be established when a collective settlement is intended to be entered into outside collective proceedings.

Pre229.04

The ERCP locate these additional requirements and controls at two points: the standing to negotiate and reach an agreement, which is more restrictive (ERCP Rule 229); and the procedure to approve it, which involves similar mechanisms to those that precondition the issuance of a collective proceeding order (ERCP Rules 230 and 231).

Rule 229. Standing to Reach Settlement

(1) Any entity fulfilling the requirements in Rules 208(a) and (b) to be a qualified claimant may reach a collective settlement agreement for a group even where a collective proceeding order has not been made.

(2) Any such collective settlement agreement shall be negotiated in good faith for the benefit of all group members.

229.01

Only organisations authorised to bring collective proceedings (ERCP Rule 208(a)) and ad hoc established entities (ERCP Rule 208(b)) are entitled to enter into judicially approvable agreements in the interest of a group of persons affected by a mass harm. This is intended to ensure a sufficient level of representativeness. In fact, when potentially adopting the ERCP model at a national level it would also make great sense to apply the first two requirements imposed by ERCP Rule 209 to be considered a qualified claimant. On the one hand, organisations and ad hoc entities shall have no conflict of interest with any group member (ERCP Rule 209 (a)). As for the sufficient capability to conduct the collective proceeding referred to in ERCP

Rule 209(b), it should be understood in this context not only - or not so much - as the capability to conduct the negotiation, but also to undertake the tasks that may be necessary to contribute to the compliance with an approved settlement and, if necessary, to promote its enforcement.

229.02

By contrast, natural persons who are members of the group are excluded for reasons of precaution,[63] but also of mere pragmatism.[64]

229.03

The additional requirement, formulated in section (2) of the rule, that the agreement be negotiated in good faith for the benefit of all group members is no more than the expression of a generic desideratum, which is linked to the duty that ERCP Rule 214 imposes on the qualified claimant to "at all times act in the best interests of the whole group", but which is difficult to control in practice. Strictly speaking, the important point is to ascertain that the agreement reached is fair and adequate; it can be presumed that only a good faith negotiation can lead to an agreement that is beneficial to the members of the group, but the court will not really have the tools to check the terms of the negotiation, nor are there any consequences if it is concluded that the negotiation did not meet this standard – provided, I insist, that the agreement is fair and adequate, despite the fact, e.g., that a serious conflict of interest has been discovered.[65]

Rule 230. Application for Approval of Collective Settlement

(1) An application to the court for approval of a collective settlement agreement in accordance with Rule 229 must be made by all of the parties to it.

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[63] ERCP Rule 229 C 2 states in this regard that "there is a certain risk that a defendant may select a specific group member in order to negotiate a low level of settlement".

[64] ERCP Part XI Introduction C 5 also states, at a previous moment, that "it is unlikely that an entity which is potentially liable for a mass harm will enter into settlement negotiations with a single individual member of the group".

[65] Addressing the risks of collusion and undue pressure in this kind of negotiation in the US class action context, see Darren Franklin, 'The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat or just a Phantom Menace?' [2000] 53 Stanford Law Review 163; William Henderson 'Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements' [2003] 77 Tulane Law Review 813; John Coffee, 'The Corruption of the Class Action: The New Technology of Collusion' [1995] 80 Cornell Law Review 851; Richard Nagareda, 'Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights' [2003] University of Chicago Legal Forum 141; Richard Nagareda, 'Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA' [2006] 106 Columbia Law Review 1872.

(2) The application shall include all of the information required under Rule 222(2). It shall also specify whether a binding settlement shall be reached on an opt-in or an opt-out basis.

230.01
Where the settlement has been agreed in the course of the proceedings, it is sufficient for the application for approval to be submitted by any of the parties. If, on the other hand, the agreement has been reached outside the proceedings, the ERCP demand the application to be submitted jointly by all the signatories to the settlement. This standard aims at ensuring prima facie the existence of a genuine agreement.

230.02
As to the content of the application, a general reference is made to ERCP Rule 222(2). However, an additional element is added: the parties must indicate whether the binding effect of the agreement is to be constructed on an opt-in or on an opt-out basis. This is undoubtedly a crucial aspect, since the negotiation and the agreement are approached in very different ways depending on the expected scope of effectiveness. Indeed, it is not the application for approval itself that should specify the binding scope of the agreement, but this should be deduced from the agreement itself.

230.03
The ERCP do not determine whether or not this specific request by the parties binds the court in approving the settlement. ERCP Rule 232(b) suggests that the court has the final say. This is reasonable, given the primary role of judicial control in giving binding effect to collective settlements, especially if they have been reached outside the proceedings. However, a modification by the court in this respect is not an afterthought, but a substantial change. Thus, if the parties requested approval of the agreement on an opt-out basis, the court should not simply approve it on an opt-in basis, or vice versa, as it would be altering the economic significance of the agreement. An opportunity for the parties to amend the agreement ought to be offered.

230.04
In a different vein, it is reasonable to expect that national legislators who decide to implement the ERCP model will introduce some rule regarding the effects of this application on the limitation periods for bringing the individual claims that would be affected by the agreement.[66]

[66] In this regard, see Article 7:907-5 of the Dutch Civil Code. In addition, and pursuant to Article 7:907-8, the persons on whose behalf the agreement has been concluded are entitled to withhold performance of the obligations resting on them while the procedure for approval is pending.

Rule 231. Approval Procedure

The procedure for approval of collective settlements in Rule 223 applies to any application to approve a collective settlement following an application under Rule 230.

231.01

The procedure for granting binding effect to a collective settlement reached outside the proceedings is more complex than the one foreseen when a settlement is reached in the framework of proceedings that have already been certified as collective. Once the application is filed, the procedure has two main phases:

(i) a first phase, referred to in ERCP Rule 231, which aims to enable the court to decide whether the settlement is fair and adequate and therefore deserves to be approved;

(ii) and a second phase, provided for in ERCP Rule 232, which aims to allow group members to opt in or opt out of the settlement, after which the settlement, previously approved, shall be declared legally binding.

231.02

Regarding the first stage, ERCP Rule 231's *en bloc* reference to ERCP Rule 223 entails the following consequences:

(i) The court shall set up a mechanism for group members to take knowledge of the agreement submitted for the court's approval and to present their observations or comments to the court: a first advertisement of the proposed settlement is therefore mandatory to approve it.

(ii) The court may take all necessary steps to assess the fairness and adequacy of the proposed settlement, including the appointment of an expert and the holding of a hearing with the parties to the agreement.

231.03

As mentioned above, when implementing this provision at a domestic level it would be a good practice to require the parties to determine in the settlement who will have to bear the costs arising from the approval procedure, both necessary (the advertisement) and potential (the expert).

Rule 232. Approval Order and Opt-in/Opt-out Procedure

The court must approve the proposed collective settlement on the basis of Rule 224.

(a) If the court does not approve the proposed collective settlement it must give its reasons for refusing to approve it, and must remit the agreement to the parties.

(b) The court must advertise the approved settlement in accordance with Rule 219(2), give information on whether the settlement shall become binding based on an opt-in or opt-out procedure, and fix a period of at least three months for the group members to opt-in or opt-out. The court shall decide to whom and how the notification to opt-in or to opt-out shall be given. If the

terms of the settlement require a fixed number or percentage of group members to accept the settlement this must also be communicated clearly.
(c) After the period fixed for opt-in or opt-out notifications and, where applicable, if the necessary number or percentage of group members have opted-in or have not opted-out, the court shall declare the approved settlement binding. Otherwise the court shall declare that the approval proceedings have been terminated without a binding settlement.
(d) An approved settlement shall bind all of the persons who have opted-in to the settlement or who have not opted- out of the settlement.

A. Criteria for approval
B. Refusal of approval
C. Opt-in or opt-out proceedings for group members
D. Binding effect of settlement

A. Criteria for approval

232.01

The criteria on which the approval of a collective agreement depends are always the same and are set out in ERCP Rule 224. The fact that the settlement has been reached outside the proceedings does not, therefore, oblige different controls to be carried out: the relevant yardsticks remain the fairness and the adequacy of the agreement.

B. Refusal of approval

232.02

The refusal of approval, which must be reasoned, determines the remittal of the agreement to the parties. As seen when dealing with agreements reached within the proceedings,[67] it may be good practice for the court to offer the parties the possibility to amend the agreement, at least in the event of certain shortcomings. In any case, there is nothing to prevent the parties from submitting a new agreement in the future, as long as there are no open proceedings concerning the same mass harm.

232.03

The court's refusal of approval means that, at most, the agreement can have effects only between those who have signed it, if there is anything in the agreement serving that purpose (e.g., the distribution among the parties of already incurred costs, necessary to reach the agreement). But the agreement cannot be taken to the next stage of the approval procedure and, consequently, cannot become binding. National legislators, when adapting the ERCP system to their domestic legal systems, must assess whether or not it is appropriate to allow an appeal against a decision refusing approval - as well as against a decision granting it. An affirmative answer is reasonable, given the general impact of the court's decision and the previous

[67] See supra 224.08.

absence of any previous court proceedings, where issues as standing of the parties and the appropriateness of collective proceedings would have already been addressed – and relevant decisions on these issues challenged.

232.04

National legislators should also decide whether the settlement proposal reached, but rejected, may be used in subsequent proceedings against the same defendant as proof of his or her assumption of liability and of what he or she was willing to concede to the harmed parties. It is reasonable to understand that it cannot, either by granting confidentiality to the procedure - as occurs in mediation[68] - or by including an express provision stating that the signing of an agreement does not imply assumption of liability by the defendant - as is already the case in some national legal systems.[69]

C. Opt-in or opt-out proceedings for group members

232.05

If the court approves the agreement - by considering, in accordance with ERCP Rule 224, that it is fair and adequate - the second stage of the procedure is opened, which is necessary for the agreement to become binding. When the settlement is reached within the collective proceeding, its approval automatically determines its binding effect, in the terms of ERCP Rules 225 and 226. On the other hand, agreements approved outside the proceedings still need to go through the opt-in or opt-out phase. Practice shows, moreover, that in some agreements the effectiveness is conditional on a certain number or percentage of the group members adhering to it,[70] something that must also be taken into account at this stage of the proceedings. For domestic legal development, legislators can set this adherence threshold themselves; but it may be equally reasonable to simply leave it to the parties to set it, as they are ultimately best placed to define at what level it is economically rational to enter into the settlement.[71]

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[68]Council and European Parliament Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3, art 7; See also Article L. 1143-7 of the French Code of Public Health -regarding mediation in the context of the specific *action de groupe* in that legal field.

[69] Article XVII.46 of the Belgian Code of Civil Procedure expressly states that the conclusion of a collective redress agreement does not imply an admission of liability or culpability of the defendant; Article XVII.51 establishes the same (lack of effect) for the judicial order approving a collective redress agreement.

[70] According to the Polish Act of 17 December 2009 on the Assertion of Claims in Group Proceedings, for instance, more than half of the members of the group have to agree on the terms of the settlement. In the case of the German model declaratory actions, an approved settlement will only reach full effectiveness if less than 30% of the consumers that had initially opted in to the proceedings do not opt out from the settlement.

[71] See also ERCP Rule 232 C 3.

232.06

When the court approves the agreement, it must decide whether its effectiveness vis-à-vis the group members is to be constructed by way of opt-in or opt-out. The parties have to decide one way or the other in the agreement itself and in the application (ERCP Rule 230(2)), although the court has the final say in deciding on the approval, probably taking into account the number of potential claims involved and the existence of reasonable incentives for the members of the group to opt-in.[72] It is difficult for the court to simply switch from one model to another, as it alters the internal economic balance of the agreement; it would be better practice in such a case for the court to reject the agreement and invite the parties to reformulate it according to the reverse structure to the one they requested. In practice, it can be expected that potential defendants prefer the agreement to be approved on an opt-out basis, protecting them from subsequent individual claims.

232.07

In any event, once the agreement has been approved, the advertising and opt-in/opt-out mechanisms must be triggered, in the terms provided for by ERCP Rule 232 (b) and (c), and with the subsidiary application of ERCP Rule 219.

D. Binding effect of settlement

232.08

After expiry of the time limit, the court will formally declare the agreement to be binding. Depending on how it is structured, the agreement will bind only those who have opted in or all those who have not opted out (paragraph (d) of the rule). The provisions of ERCP Rules 225 and 226 apply.

232.09

Notably, if the court approved an agreement whose effectiveness was made conditional upon a certain number or percentage of group members opting in or not opting out, the court will have to make appropriate inquiries to ascertain that this threshold is reached. To this end, even if not expressly stated, it may be appropriate to hear the parties. If the numbers have not been reached, the court will simply state that "the approval proceedings have been terminated without a binding settlement". The practical effects of this decision should be the same as those of a refusal of approval.

[72] See in this regard the ERCP Rule 215 C 5.