Legal standing in climate-related lawsuits[1]

Erika Wagner

Abstract

This article highlights the need to establish collective actions in Austrian civil procedural law relating to so-called climate lawsuits. Collective actions of non-governmental organisations (NGOs), which seek to enforce (enhanced) environmental protection, have so far not been filed in Austria. To successfully bring a climate action, a Climate Liability Directive at the EU level, which contains the corresponding collective rights, must be introduced. In the light of the procedural safeguards of Article 6 and 13 ECHR and 47 CFREU, it is necessary to establish an additional legal procedure to ensure effective legal protection of individual interests. An individual would face significant hurdles if they had to bring a climate action against corporations to protect their legal interests. In the absence of other realistic options, it is necessary to supplement the constitutional standard of individual legal protection with collective models of legal protection. The EU's new proposal for a directive on representative actions for the protection of the collective interests of consumers confirms the trend towards collective redress, but it only concerns consumer protection law. The proposal contains many aspects that would also provide a suitable basis for climate liability cases. To expand the scope of application of the EU directive to climate protection law, it is necessary to urgently extend the appendix to climate-relevant legal acts of EU law, such as the Emissions Trading Directive. Climate protection law would then become relevant in private law climate suits.

1 Introduction

What kinds of civil actions should be considered?

First of all, claims for damages should be considered. These include claims for compensation of expenses for protective measures, e.g., for the construction of a dam, as claimed in the RWE case.[2] This case involved so-called salvage costs, which

1 This article was written on the occasion of the 2018 Conference on 'Climate change, responsibility and liability' held in Graz, Austria. The content reflects the then current state of research and law.

2 Higher Regional Court Hamm 30 November 2017 I-5 U 15/17 (*Lliuya v RWE*).

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had to be reimbursed according to the conditions of the law on compensation for damages.[3]

Claims for climate-related damage can be asserted nationally or supranationally by means of an action for injunctive relief (§ 1004 BGB, § 364 ABGB). One may refer to the criteria of prevailing local standards and the significance of the nuisance, relevant for national immission protection suits, and also apply them in cases of long-distance pollution.[4] On the broader scale of climate protection law, emissions from industrial nations affect the global climate. As a result, catastrophes occur on the other side of the world (especially in developing countries). The fact that the quality of the contribution of the emission changes during the course of its global distribution (on the one hand, CO_2 emissions; on the other hand, increases in temperature and drought) does not constitute an obstacle for immission protection suits.

For the assertion of supranational matters, the court under consideration must have international competence. Further, it must be possible to apply national laws to supranational issues, with legal rules determining which national laws apply in a given case. According to the Rome II regulation and national legal provisions, German and Austrian courts are generally competent for climate protection suits. Therefore, the relevant national legislation (German or Austrian law) is applicable to claims for damages or immission protection. Since we speak about environmental liability, developing nations can also put in claims for damages in accordance with their national rules. These countries could enact strict legislation on climate damages and bypass current legal problems (proof of causality), employing rules on presumption.

Currently, the entire discussion on climate protection claims revolves around the problem of causality. Plaintiffs must prove that the emissions of a particular CO_2 emitter have, at least with a high degree of probability, caused particular damage or contributed thereto. Many experts claim that it is not possible to provide that kind of proof of causality in climate protection matters, since the causal connection is not sufficiently clear (burden of proof with high probability).[5] Others, however, favour the introduction of a system of proportional liability for climate-related damage, according to the proportion of the greenhouse gas emitted.[6] From a scientific point of

3 Erika Wagner, 'Klimaschutz mit den Mitteln des Privatrechts? Präventive privatrechtliche Instrumente: Klimaschutzklagen' in Gottfried Kirchengast Eva Schulev-Steindl and Gerhard Schnedl (eds), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (Böhlau Verlag 2018) 230.

4 Erika Wagner, 'Weltklimavertrag und neue Dynamik im Klimaschutzrecht: Klimaklagen' in Katharina Pabel (ed), *50 Jahre JKU* (Verlag Österreich 2018) 11(27); Wagner, Klimaschutz mit den Mitteln des Privatrechts? (n 3) 223f.

5 See District Court Essen 15 December 2016 2 O 285/15 (*Lliuya v RWE*).

6 See Wagner, Klimaschutz mit den Mitteln des Privatrechts? (n 3) 227; see further the case *Fairchild v Glenhaven Funeral Services* (2002) UKHL 22, discussed by Nicola Durrant, 'Tortious liability for greenhouse gas emissions? Climate change, causation and public policy considerations' (2007) 7(2) Queensland University of Technology Law and Justice Journal 403;

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view, I am especially interested in the latter causality theory. In its decision of 30 November 2017, the Higher Regional Court of Hamm maintained that it was possible to bypass the proof of causality in the RWE case.[7]

Another object of the current controversy is the suitability of the European Greenhouse Gas Emission Allowance Scheme for averting climate protection claims (claims for damages and injunctive relief). This scheme compels some CO_2 producers (about 50%) to pay for their GHG emissions by obtaining respective emission allowances. The discussion revolves around the question of whether the fact that plants are officially authorised hinders the raising of claims for injunctive relief (§ 14 dt. BImSchG,[8] § 364a ABGB[9]).

For all the aforementioned reasons, I have proposed a European Climate Protection Directive, which addresses in particular the purchase of greenhouse gas certificates under the European Emissions Trading Scheme. It also contains rules regarding international competence and applicable laws.[10]

2 The legitimation of the individual in climate protection suits

2.1 Suing for health damage and pecuniary losses resulting from climatic conditions

In civil law, climate-related damages are not compensable insofar as they are supraindividual and 'only' stem from the effects of global warming.[11] Nevertheless, as last summer showed us, supraindividual damages also involve damages to private legal assets. The crop shortfalls on agricultural land resulting from droughts constitute damages to private legal assets (utilisation of property).[12] That is a good reason for regarding them as individual damages. It may be asserted that the possession of property is embedded in current climatic conditions and that the owner must accept global warming unconditionally and not demand compensation for related damages. However, this argument ignores the fact that it would be possible to utilise the plot of land differently were it not for the current effects of emissions on climate. What the effects of greenhouse gas emissions are on climate and what proportion of these

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Giedré Kaminskaité-Salters, *Constructing a private change lawsuit under English law: A comparative perspective* (Kluwer Law International 2010) 161ff.

7 Higher Regional Court Hamm 30 November 2017 I-5 U 15/17 (*Lliuya v RWE*).

8 German Federal Act on Protection against Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibrations and Similar Processes (Federal Immission Control Act) BGBl I S 1274, 2021 I S 123.

9 Austrian General Civil Code JGS 1811/946.

10 Wagner, Klimaschutz mit den Mitteln des Privatrechts? (n 3) 233f.

11 Wagner, Weltkimavertrag und neue Dynamik im Klimaschutzrecht (n 4) 24.

12 Ibid.

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effects can be attributed to particular perpetrators are merely questions of causality. They do not determine whether the resulting damages are individual or supraindividual. I have repeatedly shown that it is essential to bypass this inadequate causality theory (theory of joint liability).[13] In my opinion, the theory of proportional causation, on the basis of the respective CO_2 emissions, is applicable and must prompt a rethinking of the established phrase *conditio sine qua non*.

The same considerations apply to health-related damages. However, it will be more challenging to establish a causal connection in such cases since the illnesses in question have to be attributable to the hotter climate. It is well known that CO_2 in the atmosphere does not itself pose any danger to health. Therefore, only disorders caused by heat, such as strokes and circulatory problems, can be considered.

Nevertheless, we should not forget that climate-related claims also aim to assert fundamental rights, namely the right to life and health (Article 2 ECHR and Article 2 and 3 CFREU) and the right to property (Article 1 1. Additional Protocol to ECHR and Article 17 CFREU). The procedural guarantees according to Articles 6 and 13 ECHR and Article 47 CFREU ensure that effective legal protection is available.

What the situations described above have in common is that someone sues for declaratory relief, damages or injunctive relief based on another's emission-causing conduct.

Since there are hardly any realistic chances of individuals lodging suits, it might seem both legitimate and necessary to enhance the protection of individual rights by modelling collective actions; that is the only way to secure fundamental rights.

2.2 Suits in (consumer protection law) cases involving indirect effects on climate and air quality

In the VW emissions scandal, a legally prohibited cut-off device led to NO_x values in exhaust gases being exceeded. Consumers claimed damages because of their vehicle's shorter life span and reduced value, and because they were misled when making their purchase decisions. These legal proceedings had a lasting effect on the practices of diesel vehicle manufacturers.

Furthermore, entrepreneurs may sue one another for unfair business practices involving climate protection. For example, one of them could secure a competitive advantage by violating climate-relevant legal requirements. Similarly, a manufacturer could market his product by falsely maintaining that the production thereof was CO_2 neutral by affixing a carbon-neutral seal.[14] In these cases, which involve only 'indirect climate change litigation', it is essential to consider the possibilities for individu-

13 Ibid 227f.
14 See Oberster Gerichtshof Austria 28 January 2012 4 Ob 202/12b.

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als and associations to lodge claims. Here, too, suits for a declaratory judgment, compensatory damages and an injunction are conceivable.

2.3 Models for lodging claims

With regard to the lodging of claims, we have to distinguish between four aspects:

2.3.1 Rights of the individual to institute individual actions

The individual is legitimated to lodge complaints in proceedings for the reasons mentioned initially – that is, for claims involving personal rights, material property (substantive law) and consumer rights.

Currently, only individuals are entitled to lodge suits involving climate damage. Individual suits do not, however, seem to constitute an adequate instrument for combatting climate damage. One person will find it very difficult to locate the injuring party, identify potentially imminent damages, establish global causal connections,[15] and so on. The cost-related risk in the event of a loss in court is especially burdensome, since the potential opponents in climate-change litigation are international concerns with immense financial resources. Against this background, the European Commission, in its recommendation of 6 November 2013, stated that it was necessary to amend the fundamental rights to take account of this situation.[16]

2.3.2 Climate-related suits as class-action lawsuits

In Austria, the national variant of class-action lawsuits ('Austrian-style class action') has gained acceptance.[17] Yet, only liability claims can be asserted in the form of class actions, as will be shown in the following section. According to prevailing scholarly opinion, it is not possible to transfer cases for injunctive relief to an organisation.

15 See Bernhard Burtscher and Martin Spitzer, 'Haftung für Klimaschäden' (2017) 21 ÖJZ 945, 952.

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

17 Oberster Gerichsthof Austria 12 July 2005 4 Ob 116/05w.

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2.3.3 Models for class-action lawsuits in environmental law at the beginning of the 1990s (*de lege ferenda*)

Since the beginning of the 1990s, environmentalists have discussed the possibility of employing class-action lawsuits in matters concerning environmental protection law.[18] Some of the proposed concepts would be suitable for climate protection lawsuits.[19] I will discuss these in more detail in this article. However, we must remember that the class-action instrument failed to achieve its purpose in the 1990s because of opposition from businesses. It is evident that the demand for class-action lawsuits was, at that time, 'pure theory'. It would be easier to pass an elephant through the eye of a needle than to expand the possibilities for associations to initiate lawsuits. In fact, Elisabeth Köstinger, the Austrian minister for agriculture and the environment, perceived the restrictions on NGOs participating in environmental impact assessments to be an 'improvement' in terms of public participation. Currently, such organisations must have more than 100 members to participate. We should thank our minister for making us aware of the fact that no participation in proceedings and no legal protection is the best kind of participation for NGOs. That is logical, is it not?

2.3.4 Models for class-action lawsuits in the recent past (*de lege ferenda*)

In 2007, a draft law for class-action lawsuits was presented to the Federal Ministry of Justice.[20] It was rejected in the face of opposition from businesses. The same model has now been introduced in Germany, partly as a consequence of the VW emissions scandal. The so-called *Law on the introduction of a model action for a declaratory judgment in civil proceedings* came into effect on November 1, 2018. It is aimed at mass damages such as product defects.[21] In Austria, a similar draft bill was introduced as a motion by Kolba, Noll and their colleagues.

According to this proposal, consumer protection organisations would have legal standing and would be entitled to file claims for declaration. The same would apply

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18 'Initiative by the members of the National Council Stoisits, Langthaler, Freundinnen und Freunde regarding a Federal Law on the liability for damage resulting from the existence and operation of environmentally hazardous installations (Federal Environmental Liability Act)', 169/A XVIII. GP, the application is available at <https://bit.ly/3qL65DA> accessed 29 March 2022; Ministerial Draft 991 105/ME XCIII GP; Peter Rummel and Ferdinand Kerschner, *Umwelthaftung im Privatrecht: Überlegungen zu Rechtsdogmatik und Rechtspolitik* (Signum 1991) 74ff.

19 See Initiative (n 18); Ministerial Draft (n 18); Rummel and Kerschner (n 18) 74ff.

20 Ministerial Draft concerning a Federal Act amending the Code of Civil Procedure, the Court Fees Act and the Lawyers' Fees Act (*Zivilverfahrens-Novelle*) 2007, 70/ME XXIII.GP <www.parlament.gv.at/PAKT/VHG/XXIII/ME/ME_00070/> accessed 22 November 2021.

21 German Federal Act on the Introduction of a Civil Procedure Model Complaint 12 July 2018 BGBl I 2018/26, 1151.

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to non-profit foundations, which, according to their statutes, 'safeguard interests of other persons that are similar to their own interests and represent potential claimants'.

At the European level, a draft version of a directive on claims for collective injunction and damages was passed in accordance with the recommendation of the EU Commission of 6 June 2013.[22] This directive could also be of relevance, at least for indirect climate lawsuits. The list of applicable legal acts in Annex I should be extended to include emissions allowance trading or type approval to make it possible for direct climate lawsuits to be subsumed under this directive.

3 The Austrian form of class-action lawsuits

Austrian civil procedure is based on individual claims under private law. It involves two-party legal proceedings.[23] Collective legal protection is therefore basically 'exotic' in Austrian civil procedures. A genuine collective lawsuit is only provided for in the context of §§ 28 ff KSchG (Federal Consumer Protection Act) and § 14 UWG (Federal Act against Unfair Competition). Since respective possibilities for collective lawsuits did not suffice, the 'Austrian form of the class-action lawsuit' came into being.

3.1 Initial situation

How should the following hypothetical situation be evaluated? Because of a crop shortfall, a significant number of farmers from all over Austria lodge a lawsuit against a large CO_2 emitter, demanding compensation for financial losses. At the same time, they sue for damage to property because many of their animals have died. (They may possibly do this by assigning their claims to the Chamber of Agriculture.) Would it be possible for them to lodge a class-action lawsuit in this situation? The position of class-action lawsuits in jurisprudence is as follows:

There is no established case law for the Austrian class action. In a comprehensive *obiter dictum*, the Austrian Supreme Court (OGH) did, however, reassert the position it had previously taken in the *TUI* case.[24] According to OGH 4 Ob116/05w, a class-action lawsuit of this kind is basically permissible. The case in question dealt with a demand for repayment of the excessively high interest that many borrowers had paid

22 Commission Recommendation 2013/396/EU (n 16) 60.

23 Robert Fucik, 'Vor § 1' in Walter H Rechberger (ed), Kommentar zur ZPO (Springer 2016), 475 <https://link.springer.com/book/10.1007%2F978-3-211-69393-3> accessed 4 January 2022.

24 See Oberster Gerichtsthof Austria 12 July 2005 4 Ob 116/05w.

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to a credit institute. The collection assignation of the claims was transferred to the Austrian Consumers' Association (VKI). Following the 'mediatory solution' of *Kodek*[25] and *Kalss,*[26] the Austrian Supreme Court established, in addition to the requirements of § 227 ZPO (The Code of Civil Procedure), the following preconditions for the joint assertion of various claims from different claimants by means of a collection assignation:

- The legally relevant facts and circumstances do not have to be identical, but the reasons for the claims have to be essentially similar (there must be a significant common basis).
- In addition, virtually identical factual or legal questions – relating to the main question or to a relevant preliminary question that concerns all of the claims – have to be presented for consideration.[27]

If all these requirements are considered for climate change suits, the reasons for lodging claims have to be essentially similar. In case 4 Ob 116/05w, a large number of borrowers were involved, various interest rate adjustment clauses were subject to evaluation, and questions surrounding the limitation periods for claims and the acknowledgment of the settlements by the borrowers had to be considered. Nevertheless, the Supreme Court ruled that it was permissible to assert the claims that had been transferred to the Austrian Consumers' Association (VKI) by means of collective assignation.

There are some practical problems with the 'Austrian form of class-action lawsuits', according to *Klauser*[28] (who developed this kind of lawsuit together with the Austrian Consumers' Association):

- The claimants have to assign their claims to a third party, even if they only do so in order to achieve legal assertion.
- The association that acts as a plaintiff for all class members is ultimately liable for all of the opposing party's expenses. It further assumes all the organisational costs and therefore bears all costs and risks that will not be reimbursed, even in the case of a positive outcome. These costs are not foreseeable.
- The calling in of a litigation funder is not per se unproblematic. The enterprises that assume this function are profit-oriented and accept only cases

25 Georg E Kodek, 'Die Sammelklage nach österreichischem Recht – Ein neues prozeßrechtliches Institut auf dem Prüfstand' (2004) 8 ÖBA 615, 619ff.
26 Susanne Kalss, 'Massenverfahren im Kapitalmarktrecht' (2005) 5 ÖBA 322.
27 Oberster Gerichsthof Austria 12 July 2005 4 Ob 116/05w.
28 Alexander Klauser, 'Alpine, VW und noch immer keine echte österreichische Sammelklage' (2015) 6 VbR 182, 183ff.

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that they have a good chance of winning. They are not willing to finance social-politically motivated ones.[29]

3.2 The significance of the class-action lawsuit for cases involving climate liability

With respect to suits for claims in cases involving climate change liability, the following points must be made:

- The Austrian Supreme Court is right in not setting strict standards for the 'essentially similar reasons' that constitute a requirement for making claims.[30]
- On the other hand, it seems too far-reaching to regard the emissions of all CO_2 producers and the resulting climate-related damages as 'essentially similar reasons for making claims'.
- Let us use the facts from the RWE case[31] to construct a class-action suit. We can assume that the farmers in a valley whose land is flooded by water from a melting glacier would say that the nearby coal-fired power station is responsible. In my opinion, they would then have 'essentially similar reasons for making claims'.
- It will be difficult to find a litigation funder since the costs are not foreseeable.
- Another question is: to whom could the claims of the affected farmers reasonably be transferred? After all, the matter in question does not involve damaged consumers; therefore, the Austrian Consumers' Association would not be a competent party. If damage to consumers had occurred, the Austrian Technical Chambers of Agricultural Workers and the President's Conference of the Austrian Chambers of Agriculture would, according to the Consumer Protection Law (KSchG), have had the authority to act, but that was not the case. Besides, the Consumer Protection Law is not applicable if no contractual relationship exists. Climate change damages are tortious damages.
- NGOs and parties that are legal personalities would be authorised to sue for the damages the farmers had incurred.
- Injunction suits based on personal or property rights cannot be lodged as class-action lawsuits, as respective claims are not transferable.

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29 On this issue Erika Wagner, 'Rechtsprobleme der Fremdfinanzierung von Prozessen' (2001) 7 JBl 427, <https://rdb.manz.at/document/rdb.tso.LI0107270020> accessed 4 January 2022.

30 See Oberster Gerichsthof Austria 12 July 2005 4 Ob 116/05w.

31 Higher Regional Court Hamm 30 November 2017 I-5 U 15/17 (*Lliuya v RWE*).

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- In the aforementioned cases involving the VW emissions scandal, the Austrian Supreme Court decreed that the Austrian Consumers' Association was authorised to assert the consumer claims.
- Litigation funding would be necessary to enable the farmers to lodge a climate lawsuit. The financial means for class actions are provided by litigation funders that assume the entire risk of the litigation and receive a percentage of the amount awarded in case of a positive outcome. In the literature, a great deal of attention has been accorded to the relationship between the litigation funder and its clients.[32] Among other things, a violation of the *quota litis* (contingency fees) prohibition, according to § 879 para 2 no 2 ABGB (Austrian Civil Code), is being discussed.[33] In conjunction with class-action lawsuits and in the light of the *quota litis* discussion, the principle of 'equality of arms' as defined in 6 ECHR, has to be considered. Practically, litigation funding is only available to the claimant. The defendant has no possibility of avoiding the risk of losing the case. Many observers consider this a violation of § 879 para 2 of the Austrian Civil Code.[34] On the contrary, litigation funding of class actions makes an 'equality of arms' possible in the first place. It facilitates the assertion of claims and thereby establishes equal opportunities for the opposing parties in court. Usually – and especially in the case of class actions – the opposing parties are not equal. Generally, the claimant is economically less potent than the defendant. When considering the special circumstances surrounding class actions, litigation funding is permissible for them.[35]

3.3 Summary of the possibilities *de lege lata*

The Austrian class action theoretically provides a basis for asserting claims for climate damage *de lege lata*, which associations and NGOs could make use of. However, in view of the many practical problems involved, it does not yet afford sufficient collective legal protection against climate damage.

The Code of Civil Procedure in its current form was not conceived to deal with climate-relevant mass procedures. The parallel settlement of hundreds or thousands of individual cases would overwhelm the legal system. For that reason, England,

32 In considerable detail Wagner, JBL 2001 (n 29) 427ff.
33 See, e.g., Elisabeth Scheuba, 'Sammelklage – Einklang mit der ZPO erbeten' (2005) 10 ecolex 747, 749.
34 Scheuba (n 33) 749.
35 See Paul Oberhammer, 'Sammelklage, quota litis und Prozessfinanzierung' (2011) 11 ecolex 972.

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Sweden, France, Belgium, the Netherlands and other states have introduced group actions (see below).[36]

4 Collective legal protection in environmental law

The available instruments for consumer protection do not suffice for judicially asserting climate damages. At the beginning of the 1990s, when the introduction of environmental liability was envisaged, a number of draft laws containing highly constructive models for group-action lawsuits were proposed. However, none of them has yet been implemented in civil environmental liability laws.

4.1 1991 Draft Law of the Ministry 105/ME XVIII GP

According to §11 para 1, claims based on §§ 3 and 4 (claims for liability and injunction) can be asserted by:

1. the Federal Chamber of Commerce, the Association of the Austrian Chambers of Labour, the Austrian Chamber of Agriculture, the Presidential Conference of the Austrian Chambers of Agriculture and the Austrian Trade Union Conference.
2. the Environmental Ombudsman, the Environmental Fund and similar authorities established by law whose function is to protect the environment.
3. associations whose purpose is to protect the environment (according to their statutes) and which are materially and geographically affected by the environmental damage in question. Associations have to provide security for the legal costs of the accused party if it requests that they do so (para 1 no. 3. – security deposit).

The draft law provides legitimation for class actions. However, it still has to be ascertained whether climate damages are included.

The proposal applies to plants that endanger the environment (§ 1), meaning plants that pose a particular danger to the environment because of their nature, size or location. The damages included, however, cover only damage to persons, their health or their property. In my opinion, damage to property caused by the input of pollutants that affect the climate is therefore included.

In the aforementioned constellation, the relationship between individual and collective legal protection is still open to debate; the draft did not provide a solution.

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36 Martin Ebers, *Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht* (Jus Privatum 212, Mohr Siebeck 2016) 774.

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4.2 Motion 169/A XVIII GP – Motion of Stoists, Langthaler and Friends concerning a federal law for the liability for damages resulting from the existence and operation of plants that are environmentally dangerous (Law Concerning the Liability for Environmental Damage – *Umwelt-HG*)

4.2.1 Concentration of proceedings – § 27

As per § 27 of the proposed *Umwelt-HG* (Motion 169/A XVIII GP)

> diverse legal disputes resulting from a single damaging event can be combined in the sense of § 187 Code of Civil Procedures, even if neither the claimants nor the defendants in these proceedings are identical.

4.2.2 A large number of damaged persons – § 28

If the liability has been established and a harmful event has caused damage to a large number of individuals, § 28 of the proposed Umwelt-HG (Motion 169/A XVIII GP) provides that

> the court can, following its independent conviction, consolidate the compensation into a lump sum (§ 273 Code of Civil Procedures). It can thereby define classes of damage based on the degree of affectedness of the claimants. This can be done especially if guaranteeing case-by-case justice to each of the numerous claimants would lead to unacceptable delays in the proceedings.

Similarly, these provisions would have been applicable to climate-related damage cases in the draft law of the Green Party. Damage to the climate was expressly mentioned in the definition of environmentally hazardous plants (§ 1/1). The latter were defined as plants that pose a special danger to the environment because of their nature, size or location. These include dangers:

1. to humans, fauna and flora;
2. to the soil, water, air, the climate and the landscape;
3. resulting from interactions between the objects of protection listed in 1. and 2; and
4. to material goods.

Remarkably, according to this draft law, the proposed liability was not confined to damages to protected legal interests; it also included purely ecological damage (lasting damage to the ecosystem). Climate-related damages would definitely have been included. That was a very revolutionary proposal for civil-law specialists.

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4.3 The draft Law of the Conference of the Chamber of Workers – Law on Liability for Environmental Damage[37]

§ 14

(1) To assert claims according to §§ 2-6, these claims can be transferred to social-partner associations and to other associations – ones that are statutorily concerned with matters of environmental protection or with the representation of claims under neighbour law related to nuisances and have sufficient capital resources.

(2) The legal persons mentioned in paragraph 1 are furthermore legitimated to assert suits for the injunction of actions that cause lasting damage to the environment as well as suits for the partial or complete removal of lasting environmental damages.

§ 1a contains an exhaustive enumeration of the types of plants that pose a danger to the environment. It lists them according to how they are licensed. Although it does not explicitly reference climate protection, it does not exclude liability for climate-related damages.

4.4 Draft for an Environmental Damage Liability Act – Kerschner/Rummel

§ 5 paragraph 2

The owners of the affected real estate property are legitimated to make claims; so are those legal persons or public entities otherwise legitimated or obligated to take the aforementioned measures.

§ 1 paragraph 2

Plants or actions are hazardous to the environment if they are likely to cause damages to the soil, air or water by spreading substances, causing vibrations, producing heat, or similarly endangering the aforementioned goods.

Summary: This draft law also allows for the lodging of claims for climate-related damages to legally protected assets and provides a model for collective legal protection.

5 Suggestion for a class-action suit in European law

At the European level, there is a trend towards collective legal protection. This is even though the models currently being discussed are not designed for climate protection but rather for consumer protection. Nevertheless, they can, *de lege lata*, serve as cornerstones of class actions in climate cases.

37 Cornelia Mittendorfer and Gerhard Schuster, *Haftung für Umweltschäden*. (Informationen zur Umweltpolitik 65, Institut für Wirtschaft und Umwelt des österreichischen Arbeiterkammertages 1990).

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5.1 Genesis

In April 2018, *Věra Jourová,* the commissioner responsible for justice, consumer protection and gender equality, presented a 'new deal for consumers',[38] which contained a draft directive on legal action taken by organisations for the protection of the collective interests of consumers.[39] It was intended to replace the directive on injunctions for the protection of consumers' interests 2009/22/EC as well as to enhance the enforcement of consumer legislation, as called for by the EU Regulation 2394/2017 on cooperation in consumer protection (CPC-Regulation). The suggestion for the directive was based on the 'Fitness Check of Consumer and Marketing Law' of the Commission, which, among other matters, criticised the ineffectiveness of the injunction suit in protecting consumers from adverse practices.[40]

5.2 Establishing goals

Compared to the injunction-suit directive, the new directive is intended to have a broader application. Even more importantly, it is supposed to provide qualified entities with an improved set of instruments to assert the collective interests of consumers. According to the Commission, the proposal is, *inter alia*, in accordance with Article 11 of the Treaty on the Functioning of the European Union (TFEU). It also considers environmental protection requirements and is in line with the Aarhus Convention on Access to Information, Participation of the Public in Decision-Making Procedures and Access to Justice in Environmental Matters (Recital 43).

Regarding the preceding paragraph, the following clarification is necessary: The prevailing view is that the Aarhus Convention does not cover liability cases. From its wording, however, it could be maintained that injunction suits which, e.g., involve the permissibility of nuisances, have to do with 'decisions about an activity not mentioned in Annex I that could have a considerable impact on the environment'. For national law, this would mean that the public would have a right to participate in legal proceedings. According to Article 9 para 2, NGOs recognised in domestic law

38 European Commission, 'A new deal for Consumers: Comission strengthens EU consumer rights and enforcement' (European Commission Press Release IP/18/3041, 11 April 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041> accessed 6 May 2019.

39 European Commission, Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC of 11 April 2018, COM(2018) 184 final.

40 See European Commission, Report of the fitness check of 23 May 2017, SWD (2017) 209 final <https://bit.ly/3pJ3idP> accessed 6 March 2022; Civic Consulting, 'Study for the fitness check of consumer and marketing law' (European Commission, 2016) <https://ec.europa.eu/newsroom/just/items/59332> accessed 6 May 2019; Peter Rott and Axel Halfmeier, 'New Deal für Verbandskläger?' (2018) 72 VbR 136.

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could also challenge the legality of decisions on injunctions. Article 6 para 1 lit b, however, expresses a reservation; this participation is subject to the provisions of national law. Therefore, it is highly questionable whether the Aarhus Convention can be applied to injunction suits involving private law.

However, the new EU directive would provide some strategic impetus in the direction of increased collective participation. For example, in scenarios such as the emissions scandal, the victims of unfair business practices (e.g., misleading advertisements by an automobile manufacturer) could obtain collective compensation. This holds true even though the legal framework of the European Union does not include the type approval of vehicles in Annex I. This kind of collective legal protection has not yet been provided for in EU law.

5.3 Area of application

The Annex listing the EU legal acts that collective actions may enforce should be radically expanded. It is supposed to extend far beyond current law or the EU regulation 2394/2017 which deals with cooperation in consumer protection. In terms of scope, it comprises all violations of Annex I EU rules by entrepreneurs that harm or are likely to harm the collective interests of consumers in many areas, such as financial services, energy, telecommunications, health and the environment. In the future, it is intended to include 59 legal acts, with the list being continually updated. The list includes legal acts relating to capital markets law, insurance law, user's rights of telecommunication services, electricity and gas, passenger rights, food labelling, package tours, data protection and patent protection. It also includes environmentally related legal acts: eco design, requirements for the environmentally compatible design of energy-related products,[41] eco labels,[42] the overall energy efficiency of buildings[43] and other environmentally relevant legal acts.

It does not, however, contain an additional blanket clause pertaining to the violation of EU legal acts. Such clauses, which many member states have decreed (see comparison below), are intended to enhance consumer protection. The list does include product liability laws but not product safety laws. Some legislation that is relevant to the VW emissions scandal is missing: Directive 2007/46/EC and EC Regulation 715/2007 on the type approval of vehicles.

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41 No 29 of Annex I refers to Directive (EU) 2009/125/EC of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products OJ L 285/10.

42 No 34 of Annex I refers to Regulation (EC) 66/2010 of 25 November 2009 on the EU Ecolabel OJ L 27/1.

43 Directive 2010/31/EU of 19 May 2010 on the energy performance of buildings OJ L 153/13, Recital 13.

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5.4 Aims of lawsuits

The central aim of the proposal is to enhance the efficacy of legal actions taken by organisations. For this purpose, the injunction suit, currently the only instrument available to achieve this aim, is considered inadequate.[13] Therefore, it has been proposed that entities qualified in terms of Article 5 para 3 should be accorded the right to take measures to remove the lasting effects of violations. This kind of legal action is often designed as a 'claim to remedial action'.[44]

Article 6 para 1 goes into detail, explaining that such actions may oblige the entrepreneur to compensate the injured party, make repairs, reduce prices, allow the client to terminate a contract or reimburse the purchase price.

For this purpose, Article 6 para 1-3 envisages a graduated system:

1) Lawsuits for corrective measures that benefit all consumers are granted priority. Respective lawsuits may be filed if the affected consumers have suffered comparable damages and are identifiable; the relevant damages must result from the same practices that have been carried out over a certain period of time or in the context of a particular purchase (Article 6 para 2 lit a).

2) The second priority level applies to compensation claims in the public interest. These claims do not benefit individual consumers but rather promote a public goal in the collective interests of consumers (e.g., legal aid funds for consumers, awareness campaigns or consumer movements[45]). Under certain circumstances, the qualified entity that filed the lawsuit might also benefit because it is acting in the public interest; this is expressly stated in Recital 39.[46] According to Article 6 para 3, this kind of lawsuit is only possible if consumers suffered only slight losses, as it would require excessive effort to distribute the reimbursement among all of them.

3) According to Article 6 para 2, a subsidiary declaratory resolution is possible too. It should eventually provide the basis for individual suits or for further collective suits (to the extent that national laws permit them).

There is an opt-in solution: In view of the conflict with individual interests, the draft directive allows member states to require the individual consumers' mandates before issuing a declaratory or remedial order. This is in accordance with Article 6 para 1 sentence 2. The decision is only effective for those consumers who have been given an appropriate mandate (i.e., the opt-in solution). Of course, the member states may also choose an opt-out solution. If the remedial measures are only intended to benefit the collective or public interest, no mandate can be required from individual consumers (Article 6 para 3 lit b). However, the described instruments do not replace

44 See Rott and Halfmeier (n 40) 136.
45 COM (2018) 184 final (39) consideration 31.
46 See Rott and Halfmeier (n 40) 136.

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the legal protection that concerned consumers may claim based on EU or national law. Instead, they constitute additional measures.

4) Authorisation for lodging lawsuits: 'qualified entities'. According to the draft directive, only 'qualified submissions' are permitted. According to Article 4 of the directive, a submission is only considered 'qualified' if:

- it is properly submitted in accordance with the laws of the member state;
- the submitters have a justified interest in ensuring that the involved provisions of EU law are adhered to;
- it is not motivated by profit interests.

For a particular legal action, an entity can be designated as qualified *ad hoc*.

According to the draft directive, consumer organisations and independent public bodies must be guaranteed to come into question as qualified entities. In environmentally relevant matters, the draft directive allows NGOs and environmental ombudsmen to lodge suits; the Austrian Chamber of Labour and the Austrian Consumer Information Association (VKI) are also entitled to do so.

5) Cost barriers for proceedings/financing. The costs that organisations must incur to take legal actions are regarded as a significant barrier to the assertion of rights in most of the EU member states. Therefore, Article 15 para 1 requires member states to take all measures necessary to ensure that the costs of the legal actions taken by organisations do not constitute a financial barrier to the exercising of rights in relation to the measures, according to Article 5 and Article 6. Member states have to minimise legal costs or administrative fees and, if necessary, ensure access to legal aid or provide public funds for that purpose.

There is, however, a special transparency requirement for these costs. At the beginning of the proceedings, organisations must reveal the source of the financial resources generally used for their activity and the source of financial resources employed for the particular lawsuit. Besides that, they must demonstrate that they have sufficient financial resources to represent the interests of the consumers concerned in the best possible way and to bear the opponent's costs in case the action fails (Article 7 para 1).

Claimants usually turn to litigation funders (and other third parties) to obtain the financial resources needed for a class action. These funders are subject to special requirements when financing legal actions taken by organisations (Article 7). They are not permitted to exert any influence over the decisions of qualified entities, e.g., out-of-court settlements (which is very problematical). To prevent abuse, they are not allowed to provide financial resources for collective action against a defendant who is their competitor or whose financial support they rely on.

6) Supranational legal actions of organisations. Article 16 regulates supranational legal actions taken by organisations. In such cases, freedom from discrimination must be maintained. On the one hand, qualified entities are legitimised to undertake supranational legal actions. On the other hand, the intention is that single individu-

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als[47] or groups consisting of various persons should be able to assert the interests of consumers from various member states. For this to be possible, the qualified entity's seat on which the international competence is based will have to be accepted as the centre of the interests.[48]

7) Summary: Is there also a suitable basis for climate-relevant liability cases? The proposal for an EU directive contains many legal aspects that could enable it to serve as a suitable basis for climate liability cases. To extend its range of applications, it would be necessary to extend the list of climate-relevant legal acts, e.g., to include the directive on emission trading. The included acts would then become relevant to civil law. I can well imagine that this goal might be attainable. This extension is clearly desirable in terms of climate protection, fundamental rights protection and primary law.

Currently, the directive covers only climate-relevant situations that are already covered by consumer-relevant acts of law. It does not open up additional possibilities until its scope of applications is extended.

5.5 Collective legal protection inside and outside the EU

5.5.1 Austria

If a directive of the aforementioned kind – i.e., one on legal actions of organisations aimed at protecting the collective interests of consumers – prevailed in Austria, it would cause a massive upheaval. As previously explained, the concept of the *actio popularis* – an action initiated by an organisation in the absence of a private individual or economic interest – is alien to Austrian civil-law legislators. This is also true in the arena of climate-related damages. Indeed, only the social partners (the chambers),[49] the Austrian Consumers' Association (VKI) and the Austrian Senior Citizens' Association are legitimised to lodge injunction suits based on the Consumer Law (KSchG)[50] and the Unfair Competition Act (UWG).[51] Similarly, only the associations listed in § 29 of the Consumer Protection Act are legitimised to assert so-called legal test cases of organisations. These actions would be conceivable in cases of climate-related damage.

47 This results from Article 4 para 3 in connection with Article 15; see Rott and Halfmeier (n 40) 136.
48 Convincingly: Rott and Halfmeier (n 40) 136.
49 Bundesarbeitskammer, Wirtschaftskammer Österreich.
50 Federal Consumer Protection Act BGBl 1979/140, § 29.
51 Federal Act Against Unfair Competition BGBl 1984/448, § 14.

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Concerning legal test cases of organisations, see the accurate opinion in Motion 82/A XXVI.GP.

> 10: Legal test cases of organisations (…) contribute to the development of law and to legal security in the sense of strategic litigation, but they are not suitable for mass damages. Court rulings are not binding for other cases, even if their circumstances and legal situations are identical. Whether or not the exemplary clarification of factual or legal problems in a test case, which is the most economical solution, may be employed in a particular situation depends on the willingness of the opposing party to cooperate. If the other party does not waive the statute of limitations, the asserted claims could become time-barred before the decision is made. Since 2000, the year in which Austrian class actions were first pursued, there has been no case involving mass damages in which the defendant has agreed to waive the statute of limitations.

The possibility of a genuine class action (involving at least 50 claimants) and a test case was provided for in a ministerial draft of the amendment to the civil procedure law in 2007.[52] It would only have accorded the right to assert claims for test cases to associations in the sense of § 29 of the Consumer Protection Law.[53] The proposal failed due to the massive opposition to the concerned commercial interests. A motion to introduce legal test cases in Austria was recently presented; it is based on the German provisions for similar cases which came into effect on November 1, 2018. We will have to wait to see if it succeeds.

5.5.2 Europe

In informal documents, the EU has long been pursuing a plan to introduce collective legal aid in antitrust and consumer law.[54] Its efforts culminated in the recommendation of 2013/396/EU for 'Common foundations for collective injunction and damage compensation suits in cases of violations of rights guaranteed by Union law' (OJ L 201 of 26 July 2013, p. 60). That recommendation later led to the previously discussed proposal for a directive. While preparing that proposal, the EU has thoroughly examined the situation in its member states.

5.5.2.1 The situation in Germany

For a long time, organisations in Germany could only take legal action in cases regulated by the Act against Unfair Competition (UWG), the Law against Restraint of

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52 *Zivilverfahrens-Novelle* 70/ME XXIII. GP (n 20).

53 Walter H Rechberger, 'Reformen des Mehrparteienverfahrens der ZPO: Die geplante "Gruppenklage"' in Rudolf Welser (ed), *Reformen im österreichischen und im türkischen Recht: Vorträge der Österreichisch-Türkischen Juristenwoche 14. bis 17. April 2010 in Wien* (Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung, MANZ 2010) 57ff.

54 Commission of the European Communities, GREEN PAPER Damages actions for breach of the EC antitrust rules of 19 December 2005, COM(2005) 672 final.

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Competition (GWB)[55] and the Injunctions Act (UKlaG).[56] Besides that, they could only sue for injunction or elimination. Aggrieved capital investors could only sue for compensation under the provisions of the Capital Markets Model Case Act (CapMuG).[57]

Based on the Commission's 2013 recommendation on 'Common foundations for collective injunction and damage compensation suits in cases of violations of rights guaranteed by Union law', Germany passed a law allowing legal test cases.[58] It came into effect on November 1, 2018. The law stipulates that the statute of limitations is suspended if a legitimised association files a suit. If a settlement is reached, the consumer participates unless he has withdrawn from the suit. If a declaratory judgment is made, the consumer can use it to assert claims of their own against the company.[59]

5.5.2.2 Other EU member states

In the EU member states, there are various forms of mass procedures that are differently structured. In Europe, collective legal protection evolved very slowly. Sweden adopted the role of pioneer – it introduced group proceedings in 2002. Since then, similar proceedings have been introduced in a number of countries, such as Denmark (2007), Finland (2007), Norway (2008), Italy (2010), Poland (2009) and Bulgaria (2013). The manner in which mass procedures are regulated in the Netherlands merits special attention: in that country, there has been a law concerning collective mass damages since 2005. The aim of the procedure is to achieve a settlement. A growing number of international cases are being dealt with according to this model. One example is the *Shell* case with a settlement value of US$352.6 million.[60]

Sweden is considered one of the first countries to have introduced genuine group lawsuits based on the American class-action model. Furthermore, Swedish civil procedural law provides for two-party litigation and therefore affords no possibility for asserting collective interests. In 2003, Swedish legislators extended the legal protection to cover mass damages and damages to consumers and the environment. How-

55 German Federal Act against Restraints of Competition BGBl I S 1750, 3245.
56 German Federal Act on Injunctions for Consumer Rights and Other Infringements BGBl I S 3422, 4346.
57 German Federal Act on Model Proceedings in Capital Market Disputes BGBl I S 2182.
58 *Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage* BGBl I 26/2018 <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BgBl_Musterfeststellungsklage.pdf;jsessionid=379A0C64E6C76807F83DDBB5C29D293A.2_cid334?__blob=publicationFile&v=1> accessed 4 January 2022.
59 Verbraucherzentrale, 'Fragen & Antworten (FAQ) zu Musterfeststellungsklagen' <www.musterfeststellungsklagen.de/faq/musterfeststellungsklage-fragen-und-antworten> accessed 6 May 2019.
60 Gerechtshof Amsterdam 29 May 2009, 106.010.887 ECLI:NL:GHAMS:2009:BI5744.

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ever, unlike in American class actions, it is necessary to apply for participation in a procedure (opt-in).[61] In addition to claims under civil law, special regulations such as those in the Environmental Law Code are also actionable. Not only are 'private group claimants' (natural or legal persons) entitled to lodge suits, but also organisations that take legal group actions[62] and officials who undertake 'public group actions'. The unsuccessful party bears the entire cost.

In Italy, collective damage suits for consumer protection were introduced in 2009. The Italian government, therefore, is one of the most recent ones to have implemented group actions. With this instrument, consumers may sue for compensation – e.g., because of violations of general business conditions, prohibited actions or violations of competition laws. Every member of the group is entitled to make a claim, as are associations and committees.

The development in France is especially noteworthy as the country traditionally opposed group actions with opt-out mechanisms.[63] In 2014, however, the French consumer protection law was revised, making group actions with an opt-out mechanism possible. Authorised consumer protection associations are entitled to file respective suits. They assert the individual claims of consumers for damages that are directed against the same defendant. The individual consumer, in contrast, is not legitimised to lodge suits. The scope of application of the French group action includes claims relating to consumer protection law, competition law, health law, the prohibition of discrimination and environmental law.

In Belgium, a group action was similarly introduced in 2014. Only authorised consumer protection organisations and other associations are entitled to lodge suits, and only consumer demands may be asserted. The court may decide whether a given group is to be formed following the opt-in or the opt-out principle. For persons who do not reside in Belgium, only an opt-in is provided for. Prior to the court proceedings, an arbitration procedure is arranged; however, it only takes place after the court admits the suit.

The law on collective settlements in the Netherlands is particularly noteworthy. If a settlement is reached and approved by the competent court, the decision is binding for all cases of a similar nature.[64] In the Netherlands, a law for collective settlements

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61 Caroline Geiger, *Kollektiver Rechtsschutz im Zivilprozess, Die Gruppenklage zur Durchsetzung von Massenschäden und ihre Auswirkungen* (Veröffentlichungen zum Verfahrensrecht 120, Mohr Siebeck 2015) 94.

62 The prerequisite is that the association is a non-profit organisation and that the objective of consumer or environmental protection is enshrined in its statutes.

63 Opt-out: The affected persons may withdraw from the litigation group and proceed independently of the class action; opt-in: The affected persons must assign their claims to the plaintiff; in the event of a positive outcome, they receive financial compensation.

64 European Commission, Report on the Implementation of the Commission Recommendation of 11 June on common principles for injunctive and compensatory collective redress mechanisms

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in case of mass damage – WCAM[65] – has been in place since 2005; it is based on the opt-in principle. It should be mentioned that the procedures are solely aimed at reaching a settlement. This tried-and-proven system was originally conceived for national law only, but it has been employed in a growing number of international cases in the past few years. It is evident that the WCAM procedure has clearly upgraded the status of the Netherlands as a judicial location. Here, the scope of application is not restricted: all existing associations, as well as those that are formed on an ad hoc basis, are legitimised to lodge suits insofar as they pass the competence test of the court. After a claim has been admitted, the court determines the liability of the defendant. Thereafter, attempts are made to reach a settlement. This may be done by means of the WCAM procedure or through an opt-in settlement. Remarkably, there is a high degree of legal security for the affected persons, as the settlement is binding for the entire group. The opt-out system in the Netherlands poses the main problem of dealing with mass claims from many persons.

5.5.3 The American class-action model

In US class actions, one or more of the authorised claimants act both as an individual and as a representative of a group of persons with similar claims.[66] Only the so-called 'lead plaintiff' is given formal party status. The decision affects both the lead plaintiff and the members of the group the plaintiff represents insofar as they have not asked to be excluded from the court procedure (opt-out). The main fields of application for the class action are capital market law, consumer protection and environmental protection.[67] In the US, each party bears their own costs, independent of the outcome of the procedure. The lawyer's success fee is taken from the entire fund that the members have provided for compensation purposes.

A comparison of the previously described mass claims in different states shows that the design of the procedures varies considerably. Not only are the areas of application dissimilar, but groups are also formed differently (opt-in and opt-out). The vast majority of states rely on organisations that initiate the procedures in order to prevent misuse. The primary reason for this is to control admissibility. A conspicuous feature of most group suits is the possibility they afford to terminate the procedure with a settlement. The reason for the high proportion of settlements is that set-

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in the Member States concerning violations of rights granted under Union Law (2013/396/EU) of 25 January 2018, COM (2018) 40 final.

65 *WCAM – 'Wet collectieve afwikkeling massaschade'* (Dutch Act on the Collective Settlement of Mass Claims).

66 Geiger (n 61) 79.

67 Ibid.

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tlements save money and enable many of the sued companies to come to an agreement quickly and protect their corporate image.[68]

6 Summary: Legal actions taken by organisations in matters concerning environmental and climate protection

Austria will have to yield to the demands of the EU and other current legal tendencies. With respect to environmental and climate-related damages, it should consider the exemplary Swedish model. At this time, it would not be difficult for the Austrian legislator to implement legal actions taken by organisations in the areas of environmental and climate protection. After all, the European economy is booming. Such reforms do not seem probable in the light of the political reality in the past. Perhaps this will now change. Let us be hopeful, especially as effective climate protection has become urgent.

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