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Case management: the stepchild of mass claim dispute resolution

Ianika N. Tzankova*

Abstract

This article explores the phenomenon of judicial case management and its potential to lead to a more uniform practice in the handling of mass disputes. Due to globalization and industrialization, mass disputes increasingly occur in developed and developing economies. Mass disputes are disputes involving a large number of victims that seek remedies from another party, usually a corporation, for alleged infringements of their rights. One will find mass disputes in various substantive fields of law. Numbers pose a specific set of issues on the individuals or institutions dealing with these infringements, varying from challenges related to the logistics of the resolution to more fundamental issues and due process concerns such as equal treatment of the equally situated, preserving equality of arms, preventing contradictory rulings on identical questions of law, developing resolution and compensation schemes that meet established due process and procedural fairness standards, and therefore enhancing the trust in the functioning of legal systems.

Jurisdictions struggle with the tension between the classical idea of customized or individual treatment of the numerous claims and the efficiency of the judicial processes and have developed different answers to deal with mass disputes. All of these answers have in common that they require adequate case management. Generally speaking, the term case management covers a range of approaches and technologies used by law firms and courts to leverage knowledge and methodologies for managing the life cycle of a case or matter more effectively.

Although there are many parallels between the issues that individuals and institutions across jurisdictions face when dealing with mass disputes and there have been some efforts to collect and disseminate the existing practical wisdom and experience in a more sophisticated, user friendly fashion, the efforts so far have been scattered and often limited to a specific jurisdiction. Moreover, individuals or institutions having to deal with a mass dispute are seldom aware of the existing, and elsewhere already collected, expertise or are simply lacking the time,

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recourses, or skills to find and adjust the existing expertise to their own professional environment or to translate it to the needs of the specific case.

Despite the undeniable cultural, jurisprudential, and practical differences between jurisdictions, the collection and dissemination of the existing practical wisdom and expertise for the case management of mass disputes could reasonably be expected to assist the parties and the courts involved in mass claim dispute resolution and have a positive side effect on the development of uniform case management practices across the European Union (EU). Ideally, the first step of collecting and processing the existing experiences and practical wisdom with respect to the case management of mass disputes should be supplemented by a second step, namely the development and implementation of judicial case management training programs. Institutions such as American Law Institute and the International Institute for the Unification of Private Law could play a valuable role in the first stage of this process, even though it might end up with a practical tool kit of case management practices and devices rather than with abstract principles of case management of mass disputes. In view of the European developments such as Commission Recommendation (2013)401 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law and the European Networks of Council for the Judiciary, the EU should be facilitative in both the development of a case management toolkit and an accompanying judicial case management training program.

I. Introduction

Due to globalization and industrialization, mass disputes increasingly occur in developed and developing economies.¹ Mass disputes are disputes involving a large number of claimants that seek remedies from another party, usually a corporation, for alleged infringements of their rights. One will find mass disputes in various substantive fields of law: human rights (environmental damages, for example), life sciences (defective medical products or devices), financial law (financial products and services), competition law (anti-trust and price fixing), intellectual property, property damages claims (war and related), mass disasters and catastrophes, bankruptcies, and liquidation of companies. Some recent illustrative examples are the poly implant prosthèse silicon breast implant claims,² off-label use of drugs such as Vioxx,³ defective medical devices such as certain heart

¹ DR Hensler, 'How Economic Globalization Is Helping to Construct a Private Transnational Legal Order' in S Muller and others (eds), *The Law of the Future and the Future of Law* (TOAEP 2011).

² Cosmetic Surgery Law <<http://www.cosmeticsurgerylaw.co.uk/pip-implants-compensation-breast-implant-claim.html>> accessed 7 July 2014. Actions are also pending in France, the Netherlands, Australia, and Germany.

³ 'Report: Vioxx Linked to Thousands of Deaths' <http://www.msnbc.msn.com/id/6192603/ns/health-arthritis/t/report-vioxx-linked-thousands-deaths/#.UJEgDGewe_I> accessed 7 July 2014. Litigation started in the USA, Canada, and Australia but not in Europe and England.

valves,⁴ disputes arising from the global financial crisis such as Fortis⁵ / Madoff⁶ / Icesave,⁷ the Greek and Argentinean debts resulting in arbitrations,⁸ the Libor scandal,⁹ the Trafigura environmental case,¹⁰ the Roman Catholic church abuses,¹¹ the Air Cargo cartel cases,¹² and so on.

Numbers pose a specific set of issues on the individuals or institutions dealing with these infringements, varying from challenges related to the logistics of the resolution to more fundamental issues and due process concerns such as equal treatment of equally situated, preserving equality of arms, preventing contradictory rulings on identical questions of law, developing resolution and compensation schemes that meet established due process and procedural fairness standards, and, therefore, enhancing the trust in the functioning of legal systems.

In addition, tackling such issues adequately in order to avoid protracted litigation requires at least some degree of aggregation and concentration of the treatment of individual cases. Aggregation and concentration create a tendency for the 'confection' of the resolution process. This tendency could be viewed as problematic in relation to fundamental principles that guarantee individualized treatment and custom-made outcomes and needs to be adequately addressed. Jurisdictions struggle with this tension and have developed different answers to deal with mass disputes. Various types of mass disputes are handled in different ways across jurisdictions.¹³

⁴ 'Faulty Product Compensation Claims' <<http://www.thompsons.law.co.uk/product-liability/shiley-heart-valves.htm>> accessed 7 July 2014.

⁵ "'Misled Investors File Class Action against Fortis'" <http://www.ipe.com/news/misled-investors-file-class-action-against-fortis_38649.php#.UJEgVmewe_I> accessed 7 July 2014.

⁶ 'Madoff Victims File Class Action Suit against JP Morgan' <<http://jurist.org/paperchase/2011/11/madoff-victims-file-class-action-suit-against-jp-morgan.php>> accessed 7 July 2014.

⁷ 'Lansbank Islands Makes \$3.6 Billion Payment on Icesave Claims' <<http://www.businessweek.com/news/2011-12-07/landsbanki-islands-makes-3-6-billion-payment-on-icesave-claims.html>> accessed 7 July 2014.

⁸ 'The Abaclar Legacy: Investment Arbitration as an Obstacle to Greek Recovery' <<http://criticallegalthinking.com/2012/02/27/the-abaclat-legacy-investment-arbitration-as-an-obstacle-to-greek-recovery/#fn-5590-7>> accessed 7 July 2014.

⁹ 'Scandal That Could Ruin Banking Giants' <<http://www.dailymail.co.uk/news/article-2168473/Libor-scandal-ruin-banking-giants-US-lawyers-prepare-sue-financial-firms-hundreds-BILLIONS.html>> accessed 7 July 2014.

¹⁰ 'Trafigure Fee Day' <<http://www.thelawyer.com/trafigura-fee-day/1007136.article>> accessed 7 July 2014.

¹¹ 'Catholic Church Loses Abuse Liability Appeal' <<http://www.guardian.co.uk/law/2012/jul/12/catholic-church-loses-appeal-liability>> accessed 7 July 2014.

¹² 'Competition Law and Economics Network' <<http://clen.law.unimelb.edu.au/go/news-and-events/discussion-group>> accessed 7 July 2014; <<http://www.bloomberg.com/news/2010-09-30/air-france-klm-martinair-sued-for-european-role-global-air-cargo-cartel.html>> accessed 13 August 2014.

¹³ For example, through the civil judicial system (for a comparative overview, see PG Karlsgodt (ed), *World Class Actions: A Guide to Group and Representative Actions around the Globe* (Oxford University Press 2012)), administrative law and schemes (in the Netherlands, mass torts are often dealt with through administrative compensation schemes funded by the state or the insurance industry, some of which have a statutory basis), or the criminal system (in Belgium, the criminal law takes care also of civil actions for damages: see S. Voet, *THE L&H CASE: BELGIUM'S INTERNET BUBBLE STORY*, in D.R. Hensler, Ch. Hodges & I.N. Tzankova (eds.), *Class Actions*

A European initiative that has tried to capture the European culture of mass claim dispute resolution in common principles of collective redress is Commission Recommendation (2013)401 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, which was presented on 11 June 2013 as part of a legislative package proposal.¹⁴ The Recommendation is a non-binding legal instrument drafted to promote the effective mitigation of a large number of individual claims, while limiting the likelihood of ‘US-style’ class actions by defining common principles to be applied across the Member States. Some of these principles concern an explicit legislative choice for an opt-in framework, the prohibition of punitive damages, the granting of standing to act in collective actions to ad hoc certified or designated, non-profit, representative entities, the introduction of restrictive rules on third party funding, and the preservation of the loser pays principle and requirements for the use of alternative dispute resolution (ADR).

The Recommendation has an ambiguous character. It is unclear which method the Commission used to extract the alleged common principles from the great variety of collective redress regimes within the Member States.¹⁵ Moreover, given the restrictive and imperative language of the European Union (EU) Recommendation it seems to be a mix of a ‘wish list’ or demands of a lobby and (indeed) common European civil procedure features, rather than a snap shot of the status quo of European thinking on collective redress. If extracting common principles would be easy, then the work of institutes such as the European Law Institute (ELI), the American Law Institute (ALI), and the International Institute for the Unification of Private Law (UNIDROIT) would be much less complex and time consuming. Defining common principles is a tough task in itself, generally speaking, and even more so in relation to a politically controversial topic such as collective redress.

This article will describe and explore an alternative under-appreciated approach to the topic of collective redress that focuses not on the design of statutory frameworks of collective redress and not even on the definition of common principles but, rather, on something more practical: case management. This discussion was triggered by the fifth Annual Conference on the Globalization of Class Actions and Mass Litigation, which took place in December 2011 in The Hague and

in Context: How Economics, Politics and Culture Shape Collective Litigation, Edward Elgar 2014 forthcoming).

¹⁴ COM (2013)401 final [2013] OJ L201/60, COM (2013)404 final, 2013/0185 (COD). And also C Hodges, ‘Collective Redress: A Breakthrough or a Damp Squib?’ (2014) 37(1) *Journal of Consumer Policy* 67.

¹⁵ The European Law Institute’s (ELI) statement on collective redress demonstrates that some of the suggested ‘common principles’ are much less common within Europe than the EU Recommendation suggests. See, eg, the comments on opt-in and opt-out ELI draft statement on collective redress. Statement of the European Law Institute on Collective Redress and Competition Damages Claims, 2014.

included a panel on the case management of mass disputes.¹⁶ The panel featured US federal judge Lee Rosenthal, Sir David Steel of the English High Court of Justice, and Judge Ivan Verougstraete, former president of the Belgian Court of Cassation. This panel on judicial case management evoked considerable interest in the gap between the US and English judges' 'take charge' attitude towards mass dispute resolution and the seeming discomfort of the civil law judges with this approach. This divergence was reflected in a case study of *Deutsche Telekom v European Commission* (*Deutsche Telekom case*)¹⁷ and the discussion of the resolution of *Colour Quest Limited and Others v Total Downstream UK PLC, Total UK Limited and Hertfordshire Oil Storage Limited and Others* (*Buncefield case*) in England.¹⁸ The contrast of the way in which these two cases have been handled in the respective jurisdictions could not have been more different. Whereas the English judge was able to handle the case expeditiously using only his case management powers, the German judge was stuck in formalities and inflexible civil procedure.

This contrast raises the question whether there are cultural, jurisprudential, or practical obstacles to a more efficient judicial case management of mass claim dispute resolution.¹⁹ Generally speaking, at least three issues play a key role in the

¹⁶ It was organized by Deborah Hensler (Stanford University/Tilburg University), Christopher Hodges (Oxford Center for Socio Legal Studies and Erasmus University), and Ianika Tzankova (Tilburg University) and has been described by conference participants as 'an engaging and enlightening gathering of the world's top experts in the areas of class, collective, and mass litigation. For responses to the conference, follow the link to the blog of P Karlsgodt <<http://classactionblawg.com/2011/09/13/5th-annual-conference-on-the-globalization-of-class-actions-and-mass-litigation-december-8-9-2011/>>. Hensler, Hodges, and Tzankova are the co-organizers of an international conference series on the globalization of class actions and group proceedings that has been co-sponsored between 2007–11 by Stanford Law School, the Oxford Centre for Socio-Legal Studies, and Tilburg University.

¹⁷ Case C-280/08 *Deutsche Telekom v European Commission* [2010] ECR I-09555. For a summary of this case study, see P Karlsgodt, 'Notes from the 5th Annual Conference on the Globalization of Class Actions and Mass Litigation, Session 3 – Managing the Mass' <<http://classactionblawg.com/2011/12/27/notes-from-the-5th-annual-conference-on-the-globalization-of-class-actions-and-mass-litigation-session-3-managing-the-mass/>> accessed 7 July 2014. See also A Halfmeier, 'Litigation without End: The Failure of the German Approach to Private Enforcement of Securities Law' in DR Hensler, C Hodges and IN Tzankova (eds), *Class Actions in Context: How Economics, Politics and Culture Shape Collective Litigation* (Edward Elgar 2014).

¹⁸ *Colour Quest Limited and Others v Total Downstream UK PLC, Total UK Limited and Hertfordshire Oil Storage Limited and Others* [2009] EWCH 540 (Comm) [*Buncefield case*]. David Steel was the judge presiding over the resolution of the *Buncefield case*. See also N Creutzfeldt-Banda and C Hodges, 'Parallel Tracks in Mass Litigation: Public and Private Responses to the Buncefield Explosion in England' in Hensler, Hodges and Tzankova (n 17).

¹⁹ Although this article focuses on judicial case management, it should be noted that when it comes to mass disputes case management becomes relevant for a broader group of 'adjudicators'—not only judges but also arbitrators, regulators, and ombudsmen are increasingly becoming involved in the resolution of mass disputes. Generally speaking, a distinction can be made between in court, out of court (alternative dispute resolution (ADR), special masters, tribunals, special commissions) or court-annexed (through court appointed special masters or court related compensation schemes) mass claim dispute resolution. The courts in jurisdictions that have experience with the handling of mass disputes have developed various case management tools and techniques to handle this type of cases. Some of these techniques include the use of consolidation mechanisms or of ADR and special masters to help parties develop fair and efficient 'claim resolution facilities': facilities that distribute (settlement) funds to injured parties and provide them with remedies. Moreover, parties causing mass damages sometimes choose at their own initiative or under political pressure to use special masters and claim resolution facilities to distribute funds and run compensation schemes (eg, British Petroleum oil spill fund in the USA).

handling of mass disputes and influence how adjudicators or case managers respond to mass disputes. These three issues are: the lack of adequate administrative support and insufficient information technology (IT) systems,²⁰ the lack of adequate legislative implementation of aggregate devices for the handling of mass disputes, and the lack of, or insufficient, judicial case management skills.

That adequate administrative support and flawless operating IT systems are crucial for the handling of mass disputes is evident and does not need much clarification. The logistical burden on the judicial docket would be immense and unmanageable if courts would not be allowed or able to communicate with parties electronically or would not be allowed to use a modern means of communication. More and more of the implement systems within the Member States allow for the electronic filing of documents in ordinary cases, which also facilitates the case management of mass disputes. However, much of the availability and quality of the administrative support and IT systems depend on factors that lie outside the power of the judge case manager. The same is true for the lack of adequate legislative implementation of aggregate devices for the handling of mass disputes. When legislatures enact new legislation to cope with mass disputes, the explanatory notes will often set out in general terms how the device should be used in practice, but the assumption is that the actors involved will have to 'shape' the new legislation. The courts are expected to establish and develop practical guidelines and practices. It is impossible to anticipate and regulate at the outset all practical implications of new legislation. However, when a legislature introduces novel procedural concepts such as aggregate devices for the handling of mass disputes, which implicitly or explicitly require a fundamental change of culture or approach, additional measures facilitating the transition are key for the success of the implementation or the transition.²¹ Such measures facilitating the transition (such as training programs), however, are seldom considered, let alone implemented, by legislatures.

The lack of, or insufficient, personal case management skills is an issue that is closely related to the previous one, but it is a factor that case managers can more easily influence and effect than the previous two. It is evident that if adjudicators approach a mass dispute such as an 'ordinary' bilateral dispute they will face significant challenges in many respects. Also, if adjudicators do not make use of case management techniques,²² do not discuss with the parties arrangements about communications and filing of documents, or do not apply techniques to

²⁰ The limitation is dictated by the fact that the improvement of national court systems is an issue that can only be addressed by national legal systems.

²¹ Even though the Civil Procedure Rules of England and Wales introduced by Lord Woolf reflected the imposed change in litigation culture by the formulation of principles and overriding objectives, without customized judicial trainings, these rules would have become a dead letter. See JM Barendrecht and A Klijn, *Balanceren en vernieuwen: Een kaart van sociaal-wetenschappelijke kennis voor de Fundamentele Herbezinning Burgerlijk procesrecht* (Raad voor de Rechtspraak 2004).

²² Such as scheduling an early case management conference to identify relevant preliminary issues, discussing the sequence of relevant topics to address, determining a realistic but firm time table, and discussing the selection of test cases.

promote adequate settlements, the mass dispute will probably make a good case for a contemporary version of Charles Dickens' the *Bleak House*.²³ When adjudicators are not exercising proper case management in the mass disputes they are assigned to deal with, the question is whether this fault originates from a lack of familiarity and understanding of case management and aggregate litigation techniques and statutory restraints or from less tangible factors such as strong personal views and biases about the proper role of judges and the meaning of party autonomy, which are incompatible with the basic concept of case management in which a judge has an active role.²⁴

The set of issues identified earlier becomes even more apparent and difficult to deal with in transnational mass disputes. On the one hand, the existing legal and institutional infrastructure can be improved only by a coordinated national or supranational institutional effort, which involves complicated political processes. On the other hand, the national judges confronted with the handling of mass disputes have varying legal and cultural background and case management skills. The latter is probably easier to address while preserving short-term effects or improvements of existing practices. This article is a first attempt to explore the phenomenon of the case management of mass disputes and is structured as follows. The second section provides a brief discussion of the concepts and theoretical framework of judicial case management. The resolution of the English *Buncefield* case illustrates the relevance and potential of judicial case management for the effective resolution of mass disputes and will be briefly outlined in the third section. The story of the *Buncefield* mass claim resolution raises the question about the role of legal culture. The influence of legal culture on the manner in which judicial case management is being exercised will be explored in more detail in the fourth section and will be followed by an illustrative and non-exhaustive overview of the state of the art in relation to existing judicial case management tools and devices developed to handle mass disputes. The sixth section will conclude with some final reflections, suggestions, and observations about the potential role of the ALI and UNIDROIT in relation to the case management of mass disputes.

II. Defining case management

Generally speaking, the term case management refers to a subset of law practice management and covers a range of approaches and technologies used by law firms and courts to leverage knowledge and methodologies for managing the life cycle of a case or matter more effectively.²⁵ Broadly speaking, case management refers to the sophisticated information management and workflow practices that are

²³ *Bleak House*, <http://en.wikipedia.org/wiki/Bleak_Housez> accessed 7 July 2014.

²⁴ With respect to the implications of the concept of party autonomy for the funding of mass disputes, see IN Tzankova, 'Funding of Mass Disputes: Lessons from the Netherlands' (2012) 8(3) *Journal of Law, Economics and Policy* 549.

²⁵ 'Legal Management' <<http://www.encyclo.co.uk/define/Legal%20management>> accessed 7 July 2014.

tailored to meet the legal field's specific needs and requirements.²⁶ It requires proactive communication with parties and their lawyers (for example, setting case management conferences and conference calls with parties to discuss practical and logistical matters, rather than waiting months until the next oral hearing to raise such issues), setting and maintaining strict time lines for filing of motions (which need to be reasonable given the nature and complexity of the cases), assisting parties in prioritizing the factual and legal issues that they will have to deal with and reorganizing the order of discussion of legal issues if that makes sense from a judicial and party economy point of view, and so on. One may wonder how case management relates to procedural law.

With regard to the relationship between procedural law and case management, some individuals have observed that procedural law can be seen:

as providing the legal framework for the courts to manage cases and for parties to conduct litigation in order to enforce rights. Case management must then be conducted within the confines of procedural law, both at the clerical level and the level of the judge. Although, given the flexibility of the courts to actively steer the process, this can no longer be seen to be a sufficient definition. Case management should be seen to incorporate not only procedural values, but also organizational values.²⁷

Moreover, 'it stands between procedural law, which protects legal rights, and best practice. Furthermore, case management can characterize an organization's discretion to react to changes and challenges, both internal and external.'²⁸ In other words, case management needs to be embedded within a legal framework and facilitated by judicial organization, but, in itself, it does not require an extensive body of rules.

In common law jurisdictions, the term 'judicial case management' refers to the judge taking an active role in shepherding litigation to a conclusion, rather than leaving it to the lawyers to set the pace and determine the chronology of key events.²⁹ There are various stages in civil litigation, such as the filing of a complaint, answers, the fact-finding process (interrogatories, requests for documents including electronic documents, witness statements, depositions, and so on), and briefing and deciding potentially dispositive motions that occur before a hearing is held or a decision is rendered. When a complaint is filed and a case is assigned to a judge, the 'managerial' judge sets forth a schedule for the submission or completion of the relevant pleadings, court appearances, briefing and deciding potentially dispositive motions, and other matters. In complex multi-party

²⁶ See generally M Spencer Dixon and D Foster, 'Capturing More Time . . . And Keeping Your Clients Happy While Doing It,' *Law Practice Today* (March 2007); 'Legal Case Management' <http://en.wikipedia.org/wiki/Legal_case_management> accessed 7 July 2014.

²⁷ GY Ng, 'Case Management: Procedural Law v. Best Practices' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation*, Ius Commune: European and Comparative Law Series (Intersentia 2008) 132.

²⁸ Ibid 113.

²⁹ J Resnik, *Managerial Judges*, Faculty Scholarship Series Paper 951 (1982). <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1974&context=fss_papers> accessed 13 August 2014.

litigation, the judge will appoint committees of lawyers to represent plaintiffs and defendants and often issue orders specifying how such committees are to be financed. The judge may appoint a 'special master' to facilitate communication among the lawyers, decide discovery disputes, and encourage settlement. The judge and special master will confer regularly to discuss the progress of the case and how best it can be moved forward to conclusion. In the USA, virtually all class action and non-class mass litigation is managed in this fashion, usually with the full support of parties and lawyers.

Even though most civil law judges are unfamiliar with class actions, many civil law jurisdictions have some form of aggregate device to deal with mass disputes,³⁰ and most judges are familiar with the general concepts that underlie judicial case management as described earlier. Moreover, many scholars regard judicial control of civil litigation as a hallmark of continental 'inquisitorial' judging.³¹ It should be noted, however, that the inquisitorial judging model has traditionally been associated with the active role of the judge in relation to a specific part of the dispute resolution process, namely evidence gathering. Contrary to common law systems, in civil law systems, the judge is the one who examines the witnesses and drafts the report of the hearing of the witnesses. There is no, or little, room for 'aggressive US-style' cross-examination. Apart from the field of evidence gathering, one may wonder whether the differences between the role of the judiciary in adversarial and inquisitorial systems, as perceived nowadays, still exist to the extent that is traditionally prescribed by the respective procedural theories. Legislative reforms in the field of civil procedure or the evolvement of the judicial profession in many jurisdictions seems to have further limited the existing traditional differences in the perceptions about the active role of the judiciary in democratic societies.³² Nowadays, the personal skills, style, preferences, and background of the respective individuals seem to have a much bigger influence on the actual case management of the cases than the question whether the adjudicator operates within an inquisitorial or adversarial system.

If one would try to come up with a description of judicial case management that would try to capture the core elements of this activity in a more uniform way, the ALI / UNIDROIT Principles of Transnational Civil Procedure (PTCP) seem to be a

³⁰ DR Hensler, C Hodges and M. Tulibacka (eds), *The Globalization of Class Actions*, Annals of the American Academy of Political and Social Science, vol. 622 (March 2009) 7–29; Karlsgodt (n 13). <<https://www.law.stanford.edu/publications/the-globalization-of-class-actions-an-overview>> accessed 13 August 2014.

³¹ JH Langbein, *The German Advantage in Civil Procedure*, Faculty Scholarship Series, Paper 536 (1985) <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1530&context=fss_papers> accessed 13 August 2014; JC Reitz, 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure' (1990) 75 *Iowa Law Review* 987; RJ Allen and others, 'German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship' (1988) 82 *Northwestern University Law Review* 705. For a discussion of the history of case management in Europe from the end of the nineteenth century, see van Rhee (n 27) .

³² WDH Asser and others, *Een nieuwe balans* (BJu 2003); WDH Asser and others, *Uitgebalanceerd* (BJu 2006).

good point of reference.³³ Judicial case management as interpreted by the PTCP,³⁴ and perhaps similarly understood in many other jurisdictions,³⁵ refers to an approach to the proceedings before a court that holds that:

- The specific nature of the case should determine to a large extent the rules, directions and orders that govern the proceedings.
- Rules, directions and orders of proceedings before a court should to a large extent be determined at a lower level. That means that ideally laws should not give a detailed account of how the case is to proceed but that judges, parties and attorneys are to determine to a large extent the proceedings before the court.
- It is the court that should primarily be responsible for the proceedings. Therefore the court should have the necessary procedural discretionary powers.
- The court's discretion should be discretion in the weak sense. The court is to use its powers to achieve the disposition of the dispute fairly, efficiently, and with reasonable speed.³⁶

This description suggests that the key words for a successful case management of any mass dispute are flexibility and creativity. The working definition of case management that will be followed in this article will be the one emerging from the PTCP. This definition captures the most distinct features of case management as it is understood throughout various jurisdictions.

III. Case management of mass disputes: state of the art

Case management of mass disputes should be viewed as a species of 'ordinary judicial case management'. Most initiatives or tools related to the case management of mass disputes and complex litigation seem to be developed in common law jurisdictions. The types of tools that will be discussed in more detail in this section are guidelines, best practices, checklists and protocols, ad hoc task forces / designated judges, and training programs.

1. Manuals, guidelines, best practices, checklists, and protocols

Most materials with respect to the case management of mass disputes will not be found in statutory instruments but, rather, in so-called secondary sources that, with just a few exceptions, are not binding and are merely developed as an extra aid or facility for the users (judges/lawyers). They are to be found on the websites

³³ ALI-UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press 2006) [PTCP].

³⁴ R Turner, 'The Proactive Judge and the Provision of a Single Transnational Case Management System and Its Associated Procedures' in M Andenas, N Andrews and R Nazzini (eds), *The Future of Transnational Civil Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (BIICL 2004).

³⁵ See also *ibid* 73–91: 'the efforts of ALI/UNIDROIT...mirror...much of our own new rules'.

³⁶ RR Verkerk, 'What Is Judicial Case Management? A Transnational and European Perspective' in van Rhee (n 27) 27, provided this summary of the PTCP (n 33).

of the institutions that promote or sponsor the establishment of the guidelines, protocols, or practices. Some authors have warned that such secondary sources are lacking constitutional basis but have the potential for gaining, or being attributed as, a 'natural authority'.³⁷ To avoid any potential confusion and to address such criticism, the authors of these manuals, protocols, and guidelines state explicitly that they are not binding and are designed only as an aid—a toolbox for practitioners. The judge managing a mass dispute (class action) is free to use and modify or add to the toolbox depending on the needs of a particular case.³⁸ Judicial discretion remains the standard. The expectation, however, is that judges facing the challenges of mass disputes and in search of pragmatic 'no-nonsense' solutions will probably gratefully take advantage of, and reach out to, any tool or advice they could obtain and perceive as sensible and workable within their own jurisdictional or procedural setting. This acknowledgement will certainly be the case if the best practices or guidelines have some explanatory value and discuss not only the potential but also the downsides of a specific case management technique and if the decision maker can take these things into consideration when making a choice.

The existing materials with respect to the case management of mass disputes (manuals, guidelines, guides, best practices, checklists, and protocols) vary in content and scope, but all have been drafted by professionals involved in the resolution of mass disputes, rather than by the legislature—sometimes they are drafted exclusively by judges,³⁹ sometimes by judges and lawyers,⁴⁰ or sometimes by judges, lawyers, and scholars.⁴¹ The overview of the instruments in the following sections is illustrative rather than exhaustive for a variety of reasons. Apart from a language barrier that prevents the identification and study of potential relevant materials in languages other than English, French, and German, not all existing judicial case management initiatives are publicly available. For example, in the resolution of the *Dexia* matter,⁴² the Amsterdam District Court published

³⁷ AJ Simons, 'The Manual for Complex Litigation: More Rules or Mere Recommendations?' (1988) 62(3) *St John's Law Review* 473 art 8 <<http://scholarship.law.stjohns.edu/lawreview/vol62/iss3/8>> accessed 7 July 2014.

³⁸ See, eg, the quote from the *Manual for Complex Litigation* (n 45) 28, 29.

³⁹ The US *Manual for Complex Litigation* (n 45) and the *Guidelines of the Amsterdam Court of Appeal* (n 51), to be discussed later in this report, were drafted by members of the judiciary.

⁴⁰ The judicial protocols of the Canadian Bar Association are an example, and they will be discussed in more detail later in this article.

⁴¹ The judicial protocols of the American Bar Association are an example, and they will be discussed in more detail later in this article.

⁴² For many years, the *Dexia* matter was a news item in the Dutch media on a weekly basis. It was probably the first massive consumer mass claim dispute in the Netherlands. About 10 per cent of the Dutch households had a securities lease product that relied on big profits yet to be made on the stock markets. Between 1992 and 2003, Dexia sold over 700,000 lease contracts to about 400,000 consumers. The product was invented in the mid-1990s. The idea was to make stock markets available for consumers in general and to not discriminate low incomes in particular. The bull market in the 1990s made the product look like a risk-free investment. For a variety of reasons, also tax related, the product became very popular, but by the end of 2001 the stock market fell. The average loss per household that had such a product amounted to €3,000, according to estimations of Consumentenbond, but some households suffered losses up to €50,000 and in exceptional cases

an evaluation of the case management techniques and approaches it had developed and an overview of the challenges it had faced.⁴³ However, there is no publicly available information (yet) with respect to the subsequent measures that were taken as a result of later Supreme Court rulings, which had significant logistical implications for the resolution of pending individual cases.⁴⁴

The *US Manual for Complex Litigation*, already in its fourth edition, was established by the Federal Judicial Center (FJC) and is probably one of the oldest and most distinctive examples of initiatives aiming to facilitate the case management of mass disputes and complex litigation.⁴⁵ The introductory section of the Manual provides an instructive summary of the status, purpose, and content of the Manual and offers a perspective on how such devices should be presented to the public (humble and with awareness of their limitations):

The Manual's, . . . 'contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial or pretrial procedure must be cast.' . . .

First, it is not, and should not be cited as, authoritative legal or administrative policy . . .

The Manual's recommendations and suggestions are merely that. As always, the management of any matter is within the discretion of the trial judge. . . .

The Manual will also assist lawyers, who share with judges the responsibility for managing complex litigation in which they are involved. . . .

In offering an array of litigation management techniques and procedures, the Manual does not recommend that every complex litigation necessarily employ any such procedures or follow a standard pattern. Choices will depend on the needs of the litigation and many other considerations. What the Manual does urge is that choices be made, and that they be made starting early in the litigation. While those decisions are largely the responsibility of the court, the judge should not take the case from the lawyers, but rather provide guidance and direction, setting limits and applying controls as needed. . . .

Practices and principles that served in the past may not be adequate, their adaptation may be difficult and controversial, and novel and innovative ways may have to be found. While this Manual for Complex Litigation, Fourth should be helpful within the limits of its mission, it should be viewed as open-ended, and judges are encouraged to

even more. The case started rolling after the popular consumer television program *Radar* broadcasted a television special about the product in early 2002. After the show, an unusually high number (15,000–20,000) of disgruntled consumers contacted the service line of the television show. As a brand new owner of the acquired Dutch market leader, Dexia had to deal with the television show and the subsequent complaints. After the television show, the consumers were redirected to a lawyer and a special purpose vehicle (spv) was set up to represent the interests of the consumers who bought such a product. However, there was a large number of consumers (about 4,600) who were involved in individual proceedings. For various Dexia figures, see also WAJP van den Reek and CLJM de Waal, *De rechterlijke macht en financiële massaschade: De ervaringen van het team effectenlease van de rechtbank Amsterdam (Financial Mass Disputes in the Courts: Experiences of the special task force securities lease products of the Amsterdam District Court)*, volume 7 (Trema 2009) 275–81, 277.

⁴³ Van den Reek and De Waal (n 42).

⁴⁴ It required the hearing of witnesses in hundreds of cases.

⁴⁵ *Manual for Complex Litigation* (4th edn, Federal Judicial Center 2004).

be innovative and creative to meet the needs of their cases while remaining mindful of the bounds of existing law and any variations within their own circuits.⁴⁶

Another publication of the FJC that is noteworthy is the pocket guide for judges managing class action litigation, which is in its third edition. It includes case management practices and suggestions for judicial review and administration of class settlements, especially regarding the disclosure of claims rates and actual payments to class members. Furthermore, it contains an expanded treatment of the notice and claims processes.⁴⁷ The pocket guide refers to the 'Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide,' which provides guidance with respect to the notice to class members.⁴⁸

A task force of the Canadian Bar Association (CBA) has established judicial protocols consisting of best practices for judicial conduct in overlapping or multi-jurisdictional class actions. The protocols cover matters such as notice to class members, court-to-court communications, and the management of multi-jurisdictional class actions. These best practices were approved by the CBA in 2011. The task force members were from the judiciary as well as from the plaintiff and defence class action bar.⁴⁹ The Canadian protocol is intended to mirror and support two similar judicial protocols related to multi-jurisdictional class actions established by the American Bar Association, which has adopted in 2011 as best practice the Protocol on Court-to-Court Communications in Canada-US Cross-Border Class Actions and the Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings.⁵⁰ These protocols aim to facilitate coordination between the courts where possible while respecting judicial freedom and discretion.

Unlike the guidelines and protocols discussed, all of which state explicitly to be voluntary in nature, the guidelines established by the Amsterdam Court of Appeal in relation to the Dutch Act on Collective Settlements (Wet collectieve afwikkeling massaschade or WCAM) have a less voluntary status.⁵¹ These guidelines have to be followed by the court and the parties.⁵² The Amsterdam Court of Appeal has

⁴⁶ Footnotes omitted.

⁴⁷ BJ Rothstein and TE Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd edn, Federal Judicial Center 2010).

⁴⁸ 'Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide' (2010) <[http://www.fjc.gov/public/pdf.nsf/lookup/notcheck.pdf/\\$file/notcheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/notcheck.pdf/$file/notcheck.pdf)> accessed 7 July 2014.

⁴⁹ See also 'CBA National Task Force on Class Actions' <<http://www.cba.org/CBA/ClassActionsTaskForce/Main/>> accessed 7 July 2014.

⁵⁰ Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings <<https://www.cba.org/CBA/resolutions/pdf/11-03-A-Annex03.pdf>> accessed 7 July 2014.

⁵¹ The Dutch Act on Collective Settlements (Wet collectieve afwikkeling massaschade) (2005) makes it possible that a settlement reached out of court and approved by the Court is binding on all group members who did not opt out timely. See also Tzankova (n 24) 558–69. *Procesreglement verzoekschriftprocedures handels- en insolventiezaken gerechtshoven* [Guidelines of the Amsterdam Court of Appeal] <<http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civil-recht/Documents/Procesreglement%20verzoekschriftprocedures%20handel-%20en%20insolventiezaken%20Gerechtshoven.pdf>> accessed 7 July 2014.

⁵² HR 28 June 1996, NJ 1997, 495

exclusive jurisdiction to approve collective settlements and felt the need to establish guidelines governing a case management conference after the filing of the petition but prior to the fairness hearing. The WCAM did not provide for such a case management conference. During a case management conference, the Court and the petitioning parties discuss logistical matters and time lines related to the notices, the filing of an amended petition, additional exhibits or translations of materials required by the court, the need for an interim ruling on specific issues such as jurisdiction, the time line for objection, and so on. The evaluation of the WCAM has revealed that a case management conference is highly valued by the professionals involved and essential for the proper instruction of the case. As a result, the Dutch legislature has amended the WCAM and codified the existing practice of a case management conference after the filing of a case.⁵³ The details, however, are still to be found in the guidelines established by the Court of Appeal.

2. Judicial training programs

Case management programs designed specifically for the handling of mass disputes, class actions, and complex litigation seem to exist in the USA. Although, generally speaking, various judicial training programs exist within the EU, both at the EU level and within the Member States, there seem to be no judicial training programs focusing specifically on case management.

3. *Ad hoc judicial task forces: designated judges*

As was already mentioned with regard to the *Dexia* case, the Amsterdam District Court was confronted with over 4,500 individual cases by 2007.⁵⁴ A special judicial task force was formed by the Amsterdam District Court, which at some point in the litigation consisted of a staff of nine full time judges and 35 clerks. The litigation started by the end of 2003, but it took some time before its true magnitude and impact became apparent. The management problems originated from the fact that individual consumers were represented by a large number of lawyers. Communications with the court and arrangements about timetables and the handling of the cases were not easy to make. The judges assumed they could not aggregate claims because the factual circumstances of the cases varied too much. At the same time, dealing with the claims on a case-by-case basis was not a realistic option either because it would have taken years to complete and would have had a negative impact on all of the other cases before the Court. As the litigation emerged, a variety of case management measures were implemented by the Courts.

The first one was a draft of model judgments by three District Court judges, which was to be used by judges in District Courts throughout the country confronted with the resolution of similar cases. The models and templates were updated on a regular basis and included integrated comments made by the

⁵³ Article 1018 sub 8 Civil Procedure Code.

⁵⁴ See n[31] in this article.

judges dealing with the cases. The models were meant as an aid and had no binding character. It would have taken too long to achieve agreement between all of the judges involved. In addition, in the course of the litigation, new factual and judicial questions popped up, and flexibility was needed to respond to these queries. By the end of 2004, an informal working group was formed within the Amsterdam District Court consisting of about 10 members of the judiciary who became exclusively involved on both operational and judicial policy levels in the resolution of the *Dexia* claims.

By the end of 2006, the number of individual cases had risen to such proportions that the use of model judgments was not sufficient anymore, and a decision was taken to form an official *Dexia* Judicial Task Force (DJTF) to deal with the *Dexia* litigation. The DJTF started in 2007 with 7 judges (4.6 full time equivalent) and 3 clerks (3 full time equivalent). By the end of 2007, 11 extra clerks were hired, and, in 2008, the DJTF consisted of 11 judges (9.3 full time equivalent), 21 clerks (17 full time equivalent), and 8 administrative assistants (7.7 full time equivalent).

The DJTF selected four test cases it considered representative for the various subgroups of claims and issued rulings in those cases making use of a formula for the calculation of damages, so parties in other cases would be able to figure out what the outcome in their case would be once they figured out under which subgroup their case would be classified. This selection involved a margin of appreciation that would facilitate negotiations and out-of-court settlements of the remaining cases. The DJTF was criticized for the fact that it had selected the test cases without involving, or at least notifying, the parties involved. Notwithstanding this criticism, the approach had the ambition of streamlining the resolution process, creating uniformity, and facilitating the out-of-court resolution of the case. In 2009, about 2,100 cases were still pending.

4. *Intermezzo*

The overview of existing mechanisms to facilitate and promote an effective management of mass disputes shows that the initiatives have been driven by the stakeholders rather than by the legislature. Despite the differences between the jurisdictions and the contexts, there are repeating themes such as notices and communication with the group and early case management conferences, which facilitate damage scheduling of some sort. The existing knowhow, however, is dispersed and, not surprisingly, tailored along the statutory provisions of the respective jurisdictions. The existing knowhow is not available in a functional format that would make it more accessible and easily applicable in other jurisdictions or settings.

IV. Managing the mass: a case study of the Buncefield explosion

The downside attributed to case management has to do with the impartiality of the judiciary and the fear that the emphasis on efficiency that goes with case management, in general, and with mass disputes, in particular, might negatively

influence the quality of the judicial work and its end product.⁵⁵ This criticism ignores the fact that in relation to mass disputes case management is a necessity rather than an option, as has become apparent in the *Deutsche Telekom* case.

The handling of the English *Buncefield* case by Justice David Steel from the London High Court is a noteworthy example of successful judicial case management within the EU. And, again, it concerns a common law jurisdiction. The Buncefield fire was a major conflagration caused by a series of explosions in December 2005 at the Hertfordshire Oil Storage Terminal in Hertfordshire, England. The terminal was the fifth largest oil product storage depot in the United Kingdom, 60 per cent owned by Total UK Limited and 40 per cent owned by Texaco. A total of 2,700 claims were filed by residents, businesses, and insurers. The case was complicated from a legal point of view with cross claims, indemnity claims, and different types and categories of damages.

The case reached a judgment in March 2009, only three years and three months after the explosions that gave rise to the claims.⁵⁶ Total UK was found liable by Justice Steel. Once Total UK was found liable, it started to settle the claims. In December 2009, 92 per cent of the claims were settled.⁵⁷ Justice Steel managed to settle this case with its large numbers and complicated issues by applying case management skills and techniques. He prioritized and partialized the dispute. He focused first on the question whether the explosion was the result of a negligence (the answer was affirmative) and then whether Total UK or Texaco was liable for it and, if yes, in what proportion. His answer was that Total UK was solely liable. Once an answer was given to the two most important questions of liability and in the shadow of potential appeals, the case was settled. More importantly, the case was handled without a formal aggregation device such as group or class actions, and it demonstrates that if judges are properly trained in case management they can easily handle mass claims without formal collective redress mechanisms.

However, there is at least one critical note to be made with regard to the handling of the case by Judge Steel from mass claim dispute resolution perspective. Whereas Judge Steel applied ordinary case management techniques that are not specific for the resolution of mass claims, he probably took into account insufficiently that mass disputes have their own dynamics, especially when it comes to settlements.⁵⁸ In *Buncefield*, there was not a judicial oversight of the

⁵⁵ Resnik (n 29); Verkijk (n 36) 66–7, 132: ‘On the other hand, whilst the trend in both countries [the Netherlands and France] at the legislative level and policy making level has been indeed to increase the celerity of proceedings and the efficiency of the courts, the courts’ concerns are not only to reach conclusions within a reasonable time, but to do so in a responsible way. This includes not only taking active responsibility for procedures in civil litigation, but also maintaining a high quality in their judgments.’

⁵⁶ ‘James Blames Negligence for Buncefield Blast’ <<http://www.theguardian.com/business/2008/may/24/oil>> accessed 7 July 2014; ‘Buncefield Depot Fire: Total Faces 750m Damages Bill’ <<http://www.theguardian.com/uk/2009/mar/20/buncefield-oil-refinery-court-judgment>> accessed 7 July 2014.

⁵⁷ ‘Buncefield Locals Are Still Waiting for Compensation from Total UK’ <<http://www.theguardian.com/money/2009/dec/06/total-uk-buncefield-claims-outstanding>> accessed 7 July 2014.

⁵⁸ Tzankova (n 24)

settlement process and outcome, and, ideally, Justice Steel would have referred parties to a mediator or a special master to negotiate a collective settlement where damage scheduling would have been implemented for the various groups of victims. In addition, the parties should have ideally reported back to the Court about the statistics of the settlement: damage amounts, take-up rates, time lines of funds distribution, transaction costs, and so on. Such information is important not only for improving our knowledge for future cases but also for the judicial oversight of mass claim disputes. These types of disputes have become a matter of public order by virtue of their volume and big numbers. It is also a matter of public order that similarly situated victims are treated similarly. Despite such critical comments, the *Buncefield* case study should be viewed as a successful example of effective judicial case management in relation to mass disputes within the EU. The question is whether the judicial case management in the *Buncefield* case is a typical example of common law pragmatism, which leads to the question about the influence of legal culture on judicial conduct and attitude.

V. Case management and legal culture

Case management provides judges with the opportunity to aggregate and process in a more efficient way and to handle mass disputes. However, research focusing on the utility and operation of case management in relation to mass disputes is generally lacking.⁵⁹ Case studies suggest that some civil law judges seem to experience more difficulty efficiently managing mass disputes compared to common law judges.⁶⁰ This is also a conclusion that follows from a study that was conducted by the University of Brussels at the request of the Bureau Européen des Unions de Consommateurs (BEUC), which is the Pan European Organization of Consumer Associations.⁶¹ The aim of the BEUC study was to track and evaluate the role of the judiciary in six European Member States when handling mass disputes. The study covered one common law jurisdiction⁶² and five non-common law jurisdictions.⁶³ One of the main conclusions of the researchers was that the resolution of mass disputes in the five non-common law jurisdictions was problematic partly due to the inability of the judiciary to deal with such type of cases even though each of the five non-common law jurisdictions had

⁵⁹ In the European context, there has been some empirical research to an element of case management: case assignment. See PM Langbroek and M Fabri, *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia 2007). The countries covered in the study are England and Wales, Germany, Italy, the Netherlands, and Denmark.

⁶⁰ The *Buncefield* case study: N Creutzfeldt-Banda and C Hodges, 'Parallel Tracks in Mass Litigation: Public and Private Responses to the Buncefield Explosion in England' in Hensler, Hodges and Tzankova (n 17). The *Deutsche Telekom* case study: A Halfmeier, 'Litigation without End: The Failure of the German Approach to Private Enforcement of Securities Law' in Hensler, Hodges and Tzankova (n 17).

⁶¹ Powers of the Judge in Collective Redress Proceedings.

⁶² England and Wales.

⁶³ Italy, Sweden, Spain, Portugal, and Germany.

introduced some kind of a collective action or another aggregate device to deal with mass disputes.

The conclusion with regard to England, the only common law jurisdiction covered by the study, was contrasting. The interviewed judges stated that they often used case management techniques to deal with mass disputes and to facilitate an out-of-court resolution by the parties, instead of using a group litigation order, which is a statutory aggregate device available under the Civil Procedure Rules of England and Wales⁶⁴ and similar to the German *KapMug* group proceedings.⁶⁵ These observations suggest that even when jurisdictions are familiar with the general concept of case management, they experience substantial difficulties when they have to apply case management techniques in the context of mass disputes. The question that emerges from the noted empirical observations is why adjudicators are not exercising case management in the mass disputes they are assigned to deal with and whether it originates from a lack of familiarity and understanding of case management and aggregate litigation techniques, statutory restraints, or from less tangible factors such as legal culture and strong personal views and biases about the proper role of judges and the meaning of party autonomy, which are incompatible with the basic concept of case management. Moreover, could these issues be addressed?

An empirical study of case assignments and impartiality in six European judiciaries seems to confirm the notion that case management practices indeed reflect legal cultural traditions and preferences.⁶⁶ The authors describe the most striking conclusion from this study:

[T]he strong contrast between the formal approaches in Germany and Italy versus the informal approaches in Denmark and England & Wales—where law typically does not prescribe the actual internal case assignment process. As a consequence, it is easier for the German and Italian courts to live up to formal requirements of accountability for the internal case assignment than for the Danish courts, while the French take the middle ground with a dominant function for the head of court; this middle ground has recently also been taken in the Netherlands, where the courts have started to develop internal guidelines for the case assignment within the framework of internal court regulations. Whereas in Germany and Italy the law seeks to support the professional values of the judges and the heads of courts, by preventing judicial bias and unequal treatment of judges by the head of court, in Denmark and England & Wales the professional values are apparently considered to be self-evident and internalized by the judicial services—and do not seem to have the need to lay down these values in the form of rules. This tension becomes apparent in the Netherlands where a formalization process of case assignment and transparency rules started in 2005, even though

⁶⁴ In this respect, deserves mentioning the observation of two English practitioners attending the Conference Increasing Access to Justice through EU Class Actions, which was held at the European Parliament in Brussels on 12–13 November 2012, that ‘cases get really messed up as soon as judges start using the GLO’.

⁶⁵ Karlsgodt (n 13).

⁶⁶ The study was general of nature and not focusing on mass disputes: Langbroek and Fabri (n 59).

judges show a strong, professional awareness of their most essential values and actively protect them.⁶⁷

The observations of the researchers show that legal culture and tradition are indeed decisive in the attitude of the case manager and that there are no good reasons to assume that the observed attitude with respect to case management in the context of the internal assignment of cases would differ from case management in the context of the handling of mass disputes. The more legalistic or formalistic attitude in Germany and Italy, for example, apparently originates from the cultural perceptions in those countries that a formalistic approach increases accountability and offers better safeguards for impartiality. Formality conflicts with flexibility and leaves little room for creativity. Thus, if flexibility and creativity are instrumental for successful case management, could one say that there is no or little room for improvement of the case management of mass disputes in more legalistic or formalistic legal systems? Such a premise would be too straightforward and simplistic.

In Germany, a jurisdiction with a more formal legal culture and case assignment tradition, a far-reaching specialization within the courts is considered normal.⁶⁸ Although specialization may reduce organizational flexibility, it may create room at the same time for the development and implementation of specialized judicial educational case management programs or training for the handling of mass disputes. Even within jurisdictions with a more formalistic legal culture and tradition, there is room for the improvement of case management practices, although this effort might require specific and further-reaching implementation strategies.

To put it differently, an informal toolkit or a manual for the handling of mass disputes could be sufficient in jurisdictions with a more flexible legal culture because notions of accountability and impartiality are considered to be self-evident and internalized by the judicial services, so there is more flexibility to adjust the toolkit by a judge to a specific setting or context. Whereas judicial case management training programs that integrate the toolkit might be more appropriate in a formalistic legal environment because a formalized training format might be viewed as properly institutionalized and therefore less problematic from a legitimacy and accountability point of view.

Noting the influence of legal culture on a potential case management project, as discussed in this article, it is important to properly manage the expectations with respect to the implementation of subsequent project initiatives in various settings and jurisdictions. Sometimes an informal implementation approach will suffice and sometimes a more formally embedded training program would be more appropriate, if not necessary. Another indicator for the potential success of such initiatives follows from the existing academic research on indicators or preconditions for effective judicial case management. Noted research suggests

⁶⁷ Ibid 24.

⁶⁸ Ibid 24.

that, generally speaking, effective judicial case management is likely to flourish in an environment where:

- the rules of civil procedure do not prescribe a uniform procedural framework for each and every case but differentiate between different types of cases;
- these rules leave the judge the necessary discretion to manage individual cases (preferably in close cooperation with the parties) and the caseload as a whole;
- this discretion can only be exercised to promote certain well-defined goals, in particular, efficiency, appropriate speed, and moderate cost;
- the parties and their lawyers have a duty and the necessary incentives to cooperate;⁶⁹ and
- there are adequate sanctions in respect of parties and lawyers who refuse to cooperate; and courts are provided with adequate resources in order to create an environment where judges and highly qualified court staff can manage cases within a organizational framework that meets contemporary needs and standards.⁷⁰

These features of effective case management will have at least some explanatory and predictive value with regard to the more or less successful case management of mass disputes across various jurisdictions.

VI. Final reflections and observations

The discussions among legal scholars, practitioners, and policy makers with respect to the resolution of mass disputes have been dominated over the past decades by the controversy surrounding class and collective actions and other forms of aggregate dispute resolution, often resulting in inaction on the part of national or international legislatures to introduce adequate functioning collective redress mechanisms. The discussions on collective redress at the EU level are probably illustrative for the status quo.⁷¹ At the same time, mass disputes continue to occur and to present significant challenges for the courts and other dispute resolution bodies designated to cope with them. The handling of mass disputes requires specific case management skills from any type of adjudicator.

It appears that within the EU, on the one hand, there are jurisdictions where judicial case management is well embedded in the legal system, and these that seem to be capable of handling mass disputes more easily despite the unavailability of class or collective action devices.⁷² On the other hand, there are jurisdictions where class or collective actions formally exist but where those devices have not

⁶⁹ The literature and available empirical data suggest that this might not be entirely Utopia. Lawyers and parties will be more willing to cooperate when they are from the same network. Verkijk (n 36) 72–3 discusses some empirical data. Moreover, cooperating is in their own interest. It is more efficient, increases party autonomy, and boosts the independence of the lawyer (73–5).

⁷⁰ Van Rhee (n 27). The book discusses judicial case management in France, Scotland, Belgium, and the Netherlands.

⁷¹ COM (2013)401 final, COM (2013)404 final, 2013/0185 (COD) [2013] OJ L201/60.

⁷² The US mass torts practice that does not allow the use of class actions is an example.

been used much.⁷³ At the same time, jurisdictions having a similar legal framework for the handling of mass disputes and facing similar issues seem to produce different outcomes in terms of speed and efficiency of the resolution and distribution process, apparently also as a result of differing case management styles and approaches or legal culture.⁷⁴

Such observations raise the question whether a more pragmatic approach to the handling of mass disputes would result in more tangible effects in terms of efficiency and uniformity of the process. All mechanisms to deal with mass disputes, whether they are out of court, in court, or in an annexed court need proper case management at some point. Case management is therefore the constant factor when dealing with mass disputes. If lessons and best practices for the handling of mass disputes could be extracted from the case management styles that were successfully applied in a variety of jurisdictions and institutional settings and disseminated among the parties involved in the resolution process in other jurisdictions, it might in the end produce much more quality and uniformity in the resolution as well as in the actual results than is produced in the most sophisticated legal framework for collective redress that is not properly used or not used at all.

Another reason to focus on the virtues and potential of judicial case management for the resolution of mass disputes is the increased emphasis on the role of court-annexed ADR within the EU. Council Directive (EU) 2008/52 on certain aspects of mediation in civil and commercial matters was introduced and had to be implemented in 2010 by the Member States.⁷⁵ It paves the road for an intelligent and sophisticated use by judicial case managers of mediators and special masters to facilitate fair and reasonable collective settlements once judicial rulings on important legal questions of liability have been handed down. The introduction of mechanisms such as the Dutch Act on Collective Settlements, which was enacted in 2005 and implicates the court approval and oversight of collective settlements, has also been considered successful outside the Netherlands.⁷⁶ England, Germany, and Belgium are considering, or have introduced, collective settlement schemes, which is another indication that the significance of case management as an important court-annexed ADR tool within the EU will increase further.⁷⁷

Having said that, the challenge is to develop and implement proper case management when dealing with mass disputes within the courts of the Member States. It is easier said than done. Harmonization of civil procedure is an ambivalent topic for the European legislator because of the tension between the principle of

⁷³ Portugal is such an example.

⁷⁴ Halfmeier (n 60); Creutzfeldt-Banda and Hodges (n 60).

⁷⁵ Council Directive (EU) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136.

⁷⁶ Staatsblad 2005, no 380.

⁷⁷ In England, this is considered in the context of anti-trust enforcement; in Germany, in financial matters; and in Belgium, in the fields of consumer protection.

procedural autonomy and the EU principle of effectiveness.⁷⁸ Defining common principles are then often offered as a next best approach. In this article, a third option is discussed that fits better within the specifics of the case management of mass disputes that is continually evolving: the collection of good practices, manuals, and the like and the development of case management training programs to increase the understanding among the courts of the Member States about its virtues and vices. Although ‘the principle format’ seems to be less adequate for the case management of mass disputes, the development of alternative tools such as good practices, manuals, and so on still fits within the framework and school of thought of UNIDROIT, which is to study the needs and methods for modernizing and coordinating private law between States and to formulate principles and rules to achieve such objectives.

Ideally, the first step in collecting and processing the existing experiences and practical wisdom with respect to the case management of mass disputes should be supplemented by a second step—the development and implementation of judicial case management training programs. Institutions such as ALI and UNIDROIT could play a valuable role in the first stage of this process even though it might end up with a practical tool kit of case management practices and devices rather than with abstract principles of case management of mass disputes. In view of European developments such as EU Recommendation (2013)401 and existing institutional frameworks such as the European Networks of Council for the Judiciary, the EU should be facilitative in both the development of a case management toolkit and the accompanying judicial case management training programs.

Education about the case management of mass disputes also needs a coordinated approach for pragmatic reasons. Class actions and group actions represent a relatively small percentage of the total number of cases within a jurisdiction,⁷⁹ but numbers appear to be an inadequate indicator for the impact of such cases on the functioning of justice systems. Anecdotal evidence suggests that even one inadequately managed mass dispute can have a dramatic impact on the day-to-day operations of court systems and justice systems, in general. The transactional and emotional costs of such a negative impact are evident.⁸⁰ However, in absolute terms, the number of mass disputes within a jurisdiction is relatively low compared to the number of non-mass disputes, which justifies the costs related to the development and implementation of case management toolkits and skills-oriented training programs at the national level.

⁷⁸ For a discussion of this tension, see IN Tzankova and MA Gramatikov, ‘A Critical Note on Two EU Principles: A Proceduralist View on the Draft CFR’ in HW Micklitz, L Niglia and S Waterhill (eds), *The Foundations of European Private Law* (Hart 2011).

⁷⁹ US figures available from Federal Judicial Center.

⁸⁰ The case study of the *Dexia* case in the Netherlands is an illustrative example of the potential waste of judicial and Legal Aid resources that mass disputes pose on society. For a discussion of the funding issue, see Tzankova (n 24) 578–85, 589–90.