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CONTENTS

EDITORIAL

Editorial - Private Enforcement and Collective Redress: the Benefits of Empirical Research and Comparative Approaches

Barry J Rodger 1

ARTICLES

Private Enforcement of Antitrust Law in Japan: An Empirical Analysis

Simon Vande Walle 7

Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation

Jocelyn G Delatre 29

Enhancing the Consumers' Role in EU Private Competition Law Enforcement: a normative and practical approach

Maria Ioannidou 59

Collective Actions: Rethinking Funding and National Cost Rules

Charlotte Leskinen 87

THE COMPETITION LAW REVIEW

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Editorial - Private Enforcement and Collective Redress: the Benefits of
Empirical Research and Comparative Approaches*Barry J Rodger**

It is clear from a cursory examination of the academic literature in the field that private enforcement is an established, well-developed and vibrant mode of enforcement of US antitrust law constituting the preponderance of antitrust enforcement activity; complemented by public enforcement by the DOJ and FTC.¹ Historically, a range of factors have combined to ensure that private enforcement is effectively the default setting for antitrust enforcement in general, namely: the wider litigative culture; the significant period of development of antitrust law and economics; and, specific characteristics of US civil procedure - the rules on discovery, the funding of actions, the availability of class actions, and the existence of treble damages actions - together with clarification (and modification) of the legal position in relation to issues such as the passing-on defence and standing for indirect purchasers. Private antitrust enforcement is a well developed and mature system of litigation in the US, in contrast with the position in the EU.

Nonetheless, the basic EU doctrine of direct effect ensures that certain EU Treaty rules create rights and obligations which can be enforced in the domestic courts - and in an early Art 267 TFEU ruling, the ECJ confirmed that the doctrine applied to the Treaty competition rules.² Moreover, it is clear that during the last 20 years, the European Commission has sought to encourage and facilitate private enforcement of EU competition law, and a similar process has taken place in certain Member States; for instance in the United Kingdom since 1998, including the introduction of the Enterprise Act 2002 which made provision inter alia for follow-on actions before a specialist Competition Appeal Tribunal (CAT). These 'decentralisation/modernisation' processes were promulgated, at least partly, to develop a greater complementary role for private litigation and thereby enhance the deterrence and effectiveness of EU competition law and alleviate the authorities' resource limitations. Accordingly, there have been a number of important developments to encourage private enforcement of competition law, such as the Commission Notice on Co-operation with the National Courts in 1993,³ the ECJ's *Crehan* and *Manfredi* rulings,⁴ and the introduction of

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¹ See also, for example, C Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: OUP, 1999); RH Lande and JP Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 U.S.F.L.R. 879; and the US Antitrust Modernization Commission, Report and Recommendations, 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

² See *Belgische Radio en Televisie v SV SABAM* (Case 127/73) [1974] E.C.R. 51.

³ Commission Notice on Co-operation with the National Courts [1993] OJ C39/6.

Regulation 1/2003. In this context, there has been considerable literature on the application of the EU competition law rules in the national courts,⁵ and this burgeoning literature has been enhanced by two fairly recent significant publications in the field. *The 'Right to Damages' Under EU Competition Law*, by Veljko Milutinovic,⁶ was published by Kluwer as part of the European Monographs series and was derived from a Ph.D. by the author at the EUI, where I had the pleasure to be on the examining panel. This book provides a much-needed contemporary analysis of European developments, focusing on the Commission and Court, and seeking to answer the question 'why we are where we are?' by assessing the legal context in which private enforcement has developed. This is an excellent addition to the literature, although it does not (seek to) consider two of the developing themes in the debate, namely consumer redress and funding difficulties, two issues which are developed in detail in contributions to this issue of the Review, considered further below.

The International Handbook on Private Enforcement of Competition Law, edited by Albert E Foer and Jonathon W Cuneo,⁷ effectively does 'what it says on the tin' by assessing global developments in this area, with separate Parts of the book devoted to the US, Europe, Americas, Asia, Africa and Australia, together with a final part entitled 'The Future of Private Enforcement'. It is an excellent and important piece of comparative work in this field. Part I, Introduction, brings together the seminal work of Lande, providing an overview of his earlier empirical study on the benefits of private enforcement, together with a piece by Connor in which he gathers together his various writings on the impact of international cartels. This is an impressive start to the book, and albeit some readers may already be familiar with much of the content, it is worth revisiting. Jonathon W Cuneo's introductory chapter on 'differing traditions', provides fascinating historical insights, noting for instance that Adam Smith's *Wealth of Nations* was published in the same year, 1776, as the Declaration of Independence which is the root of US antitrust laws. Part II of the book on 'Experiencing Private Enforcement in the US' provides a comprehensive stage by stage discussion of the process of US antitrust litigation, with Chapters 12 and 14, on Funding Litigation, and Class Notice and Claims Administration, respectively, of particular interest in the ongoing EU debate, as discussed in this issue by Leskinen and Ioannidou. Part III of the book deals with Europe, and a good overview, setting the scene, is provided by Vrcek, although

⁴ *Courage Ltd v Crehan* (Case C-453/99) [2001] E.C.R. I-6297; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Case C 295/04) [2006] E.C.R. I-6619.

⁵ R Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of Member States' [1994] E.C.L.R. 60; Kon and Maxwell, 'Enforcement in National Courts of the EC and New UK Competition Rules: Obstacles to Effective Enforcement' [1998] E.C.L.R. 443; A MacCulloch and BJ Rodger, 'Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts' [1996] E.C.L.R. 393. In relation to *Crehan* (Case ???) [2001] E.C.R. I-6297: A Komninos 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community right to damages' [2002] C.M.L. Rev. 447; G Monti, 'Anti-competitive agreements: the innocent party's right to damages' (2002) 27 E.L. Rev. 282; A Andreangelini, '*Courage Ltd v Crehan* and the Enforcement of Article 81 EC before National Courts' [2004] E.C.L.R. 758; N Reich, 'The 'Courage' doctrine: encouraging or discouraging compensation for antitrust injuries?' [2005] C.M.L. Rev. 35.

⁶ Kluwer Law International, 2010, ISBN 978-90-411-3235-2.

⁷ In association with the American Antitrust Institute, Edward Elgar, 2010, ISBN 978-1-84844-877-3.

discussion of the subsequently withdrawn Commission Directive was, perhaps, precipitate, and the Commission agenda has developed since this was written. Chapters 16- 22 provide discussions of the legal context for private enforcement in England and Wales, France, Germany, Italy, the Netherlands, Spain, Sweden and Turkey, with the authors following a consistent approach to allow for easy cross-comparison in dealing with the issues that arise. In his 'Overview of the Americas', Cuneo discusses the interesting systemic divergences between those countries with a common law and a civil law tradition. Nonetheless, Part IV on the Americas, lacks as consistent an approach as Part III. Part V, on Asia, Africa and Australia, inevitably, in comparing Australia, Israel, Japan and Korea with other countries from those Continents, displays a 'wide range of variation' (p477) in relation to private enforcement which in itself is fascinating, but unfortunately this is also reflected in the varying strength and depth in the chapters in this Part. Part VI on the Future of Private Enforcement starts with a chapter on International Settlements, by Sorkin. This is an interesting piece, but it is not clear how well it fits within the Part VI theme and it should also have been noted that the issue is also partly dependent on international private law rules of jurisdiction. The final chapter by Foer and Cuneo, Towards an Effective System of Private Enforcement, is enlightening and a worthy finale to this book. They understand the variations in different national legal systems and do not set out to be prescriptive, asking the key question: 'why there is no ideal model for private enforcement' (592)? They stress that it is important to recognise 5 key variables in this context: variations in cultural and moral values, political values, legal and economic contexts and institutional capabilities. Nonetheless, in assessing the functions required for a private enforcement system to be effective, they leave it to individual jurisdictions to find their own solutions to these questions, based on the experiences outlined in the previous chapters, and they clearly refrain from advocating or prescribing a one size fits all model. This is an important departure point when we look to the European private enforcement debate post-White Paper, considered in detail in the 3 final articles in this issue of the Review. In his preface to the book, Albert Foer discusses the fact that there has been very little empirical literature in the field. Lande's work has been crucial in that context and there has been increasing consideration of private litigation in practice within the EU.⁸ The book further demonstrates the value of comparative work in the field.

These twin facets of comparative learning and empirical data make Vande Walle's contribution to this issue, 'Private Enforcement of Antitrust law in Japan: An Empirical Analysis', charting the development of private enforcement in Japan, fascinating and important. Empirical research of this type is a welcome addition to the competition law academic literature and provides new and different insights. Vande Walle examines all competition law cases in the post-war period, noting an increase in the last twenty years, and there is potential scope here for comparing developments under the UK

⁸ See for example, B Rodger, *Article 234 and Competition Law: An Analysis*, editor, Kluwer Law International, 2008, ISBN 978-90-411-2605-4; B Rodger, 'Competition Law Litigation in the UK Courts: a study of all cases 2005-2008' - Parts I and II [2009] 2 Global Competition Litigation Review 93-114 and 136-147; and in relation to Germany, S Peyer 'Myths and Untold Stories- Private Antitrust Enforcement in Germany' July 2010, CCP Working Paper No. 10-12.

follow-on actions provisions of the Enterprise Act 2002. The availability of residents' lawsuits is a fascinating phenomenon, and it is interesting to note that injunctive relief only became available latterly, effectively reversing the position for instance in the UK. The focus on bid-rigging cases is interesting, and we may see a rise in cases in that context in the UK following the OFT Construction cartel decision, although Vande Walle notes that damages have been predominately recovered in Japan by public entities, and it is ironic that in fact there has been very little or no redress effectively for consumers. Overall, his conclusion, based on the empirical data, is one of scepticism, and that disappointingly to date private enforcement has been of limited significance, except in relation to bid-rigging cases involving recovery by public entity plaintiffs.

Clifford Jones, in his editorial to Issue 3(1) of the Review, on the same topic of private enforcement, considered the EU to be at the start of the third devolution of EU competition law enforcement, in which private enforcement would take on a more significant role following the Commission Green Paper. There is some evidence of the existence of, and increased resort to, litigation to secure some form of redress in relation to alleged anti-competitive behaviour in the UK and Germany at least,⁹ and the arrival, in the UK, of the American antitrust plaintiff bar. Further, it is arguable, following the Commission White Paper on damages actions for breach of the EU antitrust rules,¹⁰ and the more recent Commission Consultation on 'Towards a Coherent European Approach to Collective Redress'¹¹ that we are entering a fourth phase, focusing on effective consumer redress. The remainder of the articles in this issue concentrate on this broad theme, and in the case of Delatre and Leskinen in particular, provide interesting comparative approaches to the issues of the appropriate models of collective/group actions and funding for this type of litigation respectively.

Delatre, in 'Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation' provides a comparative study of group actions in existence in a number of Member States, with a particular emphasis on the Danish, Portuguese, English, French and Dutch experience, comparing the different approaches taken by Member States, contrasting them with the propositions contained in the European Commission's White Paper. As Delatre stresses, despite the Commission's reticence to consider an opt-out model: 'The opt-out mechanism is present – albeit in various forms – in four major European countries. It is as much part of this European experience as any other model'. The article includes a fascinating diversion on the work of Thaler and Sunstein,¹² and envisages class action mechanism as a choice architecture, a 'nudge' in which the model of passive consent overcomes the traditional mode of rational apathy, exemplified by the incredibly low rates of participation in opt-in actions. Mulheron has

⁹ Ibid.

¹⁰ At <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>. Editorial Comments, 'A little more action please! The White Paper on damages actions for breach of the EC antitrust rules' [2008] CML Rev 609; F Bulst, 'Of Arms and Armour - The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' (2008) 2 Bucerius Law Journal 81.

¹¹ At http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html.

¹² RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Caravan, Yale University Press, Yale 2008).

for instance noted that opt out rates in Portugal are close to zero, so the mechanism there acts as a ‘nudge’ for consumers. Delatre provides a sustained critique of the alleged excesses of opt out actions - re costs and unmeritorious actions- as being without foundation. There is an absence of any empirical basis for the criticisms and the alleged excesses are arguably not a by-product of the opt-out mechanisms *per se* but a result of various aspects of the US system of litigation. Indeed Delatre urges the opening of an EU debate on opt-out mechanisms which has, to date, never effectively taken place. This article draws on European experience which appears to have been overlooked or neglected, and suggests that an opt-out model may be superior to the models considered in the White Paper, and argues for a Directive to allow flexibility and a multi-speed approach to the adoption of collective redress models across the EU.

Ioannidou’s article, ‘Enhancing the Consumers’ Role in EU Private Competition Law Enforcement: a normative and practical approach’, focuses similarly on the issue of how best to approach the vexed question of enhancing collective redress in a competition law context in the EU, focusing on central themes of access to justice and consumer empowerment. She considers the key dichotomy in the debate on private enforcement between deterrence and compensation, and sets out an approach whereby Group A and Group B types of claims should be distinguished. Although the borderline between these two classes of claim will be difficult to draw precisely in monetary terms (and across jurisdictions), the core argument is that for particularly low value claims involved in Group B type claims, access to justice means something different - akin to moral justice. In this context she develops notions of the collective consumer interest - and how to achieve ‘effective’ redress for such Group B claims, which does not necessarily entail recoupment of damages for all individuals concerned. Ioannidou emphasises the compromise between an individual’s right to damages and its functional deterrent role in the context of competition law enforcement, with the latter playing a more decisive role in Group B type claims, in relation to which, for instance, *cy-pres* awards may be made. Ioannidou’s article is a fascinating approach, advocating a distinct and distinctive approach to competition law consumer collective actions. One of the issues in this context remains the funding of such consumer bodies, and this is a key plank of Leskinen’s article: ‘Collective Actions: rethinking Funding and National cost Rules’. Leskinen sets out to demonstrate that some form of contingency fees or adjusted cost rules would be necessary in order to enhance access to justice for victims of competition law infringements by incentivising lawyers. Leskinen provides a convincing argument, and again draws on experience in some Member States where some form of contingency fees have been adopted, suggesting that this may allow for sufficient political support among Member States to adjust cost rules on an EU-wide basis. The article also looks at alternatives to public funding of collective actions, and in line with Delatre/Ioannidou, concludes that collective actions would be necessary in order to increase access to justice for victims of antitrust violations, but to be effective, funding and incentives to raise actions would also need to be introduced.

The books reviewed in this editorial and the articles contained in this issue reflect the debate in relation to private enforcement of competition law in the EU and the tensions inherent in achieving a suitably coherent scheme, particularly across the EU’s different legal systems, and in relation to consumer redress primarily. Moreover, they

demonstrate, in the context of this ongoing debate, the importance and value of both empirical and comparative work, which can facilitate a more mature and enlightened discussion of the relevant issues. It is hoped that the outcomes from my forthcoming AHRC funded project on Comparative Private Enforcement and Consumer Redress in the EU will add to the quality of the debate on this significant phase in the development of EU competition law enforcement.

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Private Enforcement of Antitrust Law in Japan: An Empirical Analysis

*Simon Vande Walle**

This article assesses the role of private antitrust litigation in Japan through an empirical analysis. An attempt was made to collect data concerning all actions for damages and injunctive relief in the post-war era. Based on this data, the article gauges how much private antitrust litigation has contributed to the deterrence of antitrust violations, compared to public enforcement by the Japan Fair Trade Commission. It also evaluates to what extent private antitrust litigation has achieved compensation for those harmed by antitrust violations. The article includes findings on (1) the number of private antitrust actions, (2) the types of antitrust infringements invoked (bid-rigging, cartels other than bid-rigging, monopolization and unfair trade practices), (3) the success rate of antitrust litigation, (4) the magnitude of the damages awards and settlements, (5) the proportion of stand-alone versus follow-on cases, and (6) the kind of plaintiffs that have recovered damages.

INTRODUCTION

Private litigation was part of the enforcement arsenal from the very beginning of Japanese antitrust law. The treble damages provision advocated by the U.S. occupation authorities did not make it into the final draft¹, but the Japanese Antimonopoly Act of 1947² nonetheless clearly spells out a right to damages for victims of antitrust infringements.³ In addition, scholars and courts soon established that plaintiffs could also obtain damages based on the general tort provision of the Civil Code.⁴

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¹ Sensui & Nishimura, 'Genshi dokusenkinshihō no seitei katei to genkōhō he no shisa - kōtorii no soshiki, shihōseido, songaibaishō, keijiseido [The Enactment of the Original Antimonopoly Act and its Implications for the Current Antimonopoly Act - The JFTC's Organization, Judicial System, Damages and Criminal System]' (2008) 04-08 Competition Policy Research Center Report 164-167, available at <http://www.jftc.go.jp/cprc/english/cr-0408.pdf>, English summary at <http://www.jftc.go.jp/cprc/english/cr-0408abstract.pdf>; First, 'Antitrust in Japan: The Original Intent' (2000) 9 Pac. Rim L. & Pol'y J. 1, 49, 56.

² Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, as amended. [hereinafter Antimonopoly Act]

³ Antimonopoly Act, Art. 25-26. Actions on this basis require a decision from the Japan Fair Trade Commission that is final and binding. See part 1, section (a).

⁴ Minemura & Shōda, Shiteki dokusen kinshihō [The Antimonopoly Act], Tokyo, Nihon hyōron shinsha, 1956, 432; Yokota, 'Shiteki dokusen kinshi hō ihan no hōritsu kōi no kōryoku - shihōken to kōseitōrihikiinkai no kengen to no kankei [Validity of Juristic Acts that Violate the Antimonopoly Act - The Relationship Between the Judicial Power and the Authority of the Fair Trade Commission]' (1949) 1(8)

For decades, however, these provisions remained virtually unused.⁵ Private enforcement of competition law was all but nonexistent. According to some observers, there has been a ‘dramatic change’ in this situation in recent years.⁶ Private antitrust lawsuits, so we are told, are now an integral part of the Japanese enforcement landscape.⁷ Others take a more sceptical view and maintain that private suits have produced little impact⁸ and remain rare.⁹

These widely differing views are not based on thorough empirical research. In fact, there has been very little empirical quantitative research about Japanese private antitrust litigation. As a result, we do not know exactly how many private antitrust cases have been filed. We also lack data on the rate of success and the amounts recovered by these lawsuits. Hence, we have no basis to assess the contribution of private antitrust litigation to deterrence and compensation.

This article tries to fill that gap and put the debate about the role of private enforcement in Japan on more solid footing by providing and analyzing empirical data. An attempt was made to collect data for all actions for damages and injunctive relief based on alleged antitrust violations in the post-war era.

The picture that emerges from the more than 270 cases analysed for this article is not black or white. Private enforcement is not a monolith. There are various private enforcement mechanisms and many different areas in which they play a role. Overall, however, the data shows that the deterrent effect of private enforcement is still limited in Japan. The only area where it has really played a significant role is bid-rigging, where an original litigation mechanism allowed activist plaintiffs to obtain substantial recoveries on behalf of local governments and where public entities frequently seek and obtain damages. In areas other than bid-rigging, the deterrent effect of private enforcement has been much less significant. The contribution of private antitrust litigation to providing redress for those harmed by violations has also been quite

HŌSŌ JIHŌ 262, 270-271 (1949); Imamura, *Dokusenkinshihō* [The Antimonopoly Act], Tokyo, Yūhikaku, 1961, 186. This scholarly view was espoused by the courts in *Satō v. Sekiyu renmei*, 43(11) MINSHŪ 1340, 1477 (Yamagata District Ct., 31 March 1981), *rev'd* 43(11) MINSHŪ 1539 (Sendai High Ct., 26 March 1985), *rev'd sub nom.* *Nihon sekiryū K.K., v. Satō* 43(11) MINSHŪ 1259 (Sup. Ct., 8 December 1989). Actions on the basis of tort can be brought regardless of any prior Fair Trade Commission decision.

⁵ See part 3 (only five cases until 1971). See also, e.g., Ramseyer, ‘The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan’ (1985) 94 *Yale L.J.* 604.

⁶ Ishida & Fujiyama, ‘Japan’, in Gotts (ed), *The Private Competition Enforcement Review*, 3d ed, London, Law Business Research, 2009, 129.

⁷ Kozuka, ‘The Enforcement of the Competition Law in Japan: The Rise of Private Initiatives by Litigious Reformers’, in Wolff, Nottage & Anderson (eds), *Who Judges Japan?: Popular Participation in the Japanese Legal Process*, Cheltenham, Edward Elgar, forthcoming 2012 (arguing that the traditional view of antitrust enforcement in Japan, with the JFTC as sole enforcer, no longer holds).

⁸ Ramseyer, ‘Toward a Theory of Jurisdictional Competition: The Case of the Japanese FTC’ (2005) 1 *J. Comp. L. & Econ.* 247, 254 (‘Fundamentally, *neither* private suits under the [Antimonopoly] Act nor private suits under the Civil Code much matter.’).

⁹ Oda, *Japanese law*, 3d ed, Oxford University Press, 2009, 362 (‘...litigation for damages involving breach of the Anti-Monopoly Law has been rare.’).

limited. Although local governments and government agencies have recovered tens of billions of yen, businesses have recovered much less, and consumers virtually nothing.

Part 1 surveys the various forms of private antitrust enforcement in Japan. Part 2 explains which cases are covered by this study and how data were collected. Part 3 and part 4 analyze the number of private antitrust cases and the remarkable increase in cases during the past two decades. Part 5 examines the types of infringements for which cases have been brought. Part 6 gauges how successful private antitrust cases have been. Part 7 and part 8 assess the deterrent effect of private antitrust litigation. Part 9 evaluates the compensatory effect of private lawsuits. Finally, part 10 draws upon the findings in the preceding parts and gives an overall assessment of the role of private antitrust litigation in Japan.

1. PRIVATE ANTITRUST ENFORCEMENT IN ITS VARIOUS FORMS

Private antitrust enforcement in Japan can be categorized in five different forms: (a) regular damages actions, (b) damages actions brought as residents' lawsuits, (c) actions for injunctive relief, (d) actions invoking the sanction of voidness, and (e) derivative actions.

(a) Damages actions

Damages actions can be filed either on the basis of the Antimonopoly Act (Article 25) or on the basis of the general tort provision of the Civil Code (Article 709). The first option is only available after the Japan Fair Trade Commission (JFTC) has rendered a final and binding decision.¹⁰ Once such a decision is available, the infringer is strictly liable, i.e. plaintiffs need not prove negligence or intent on the part of the infringer.¹¹ These actions must be brought before the Tokyo High Court¹² and benefit from a special statute of limitations period that only starts to run after the JFTC's decision becomes final.¹³

The second option is to seek damages on the basis of the general tort provision of the Japanese Civil Code (Article 709). In such an action, the plaintiff can use the antitrust violation as proof of some of the elements of the tort.¹⁴ Actions in tort can be brought regardless of any prior public enforcement action by the JFTC. Although there is no strict liability when plaintiffs sue on the basis of tort, in practice, meeting the burden of proof on negligence and intent is easily satisfied if the plaintiff can prove an antitrust violation. Hence, in practice, there is not much difference between actions on the basis

¹⁰ Antimonopoly Act, Art. 26(1).

¹¹ Antimonopoly Act, Art. 25(2).

¹² Antimonopoly Act, Art. 85.

¹³ Antimonopoly Act, Art. 26(2).

¹⁴ In most but not all cases proof of an antitrust violation is sufficient evidence of unlawful conduct (*kenri shingai* or *ihōsei*) and intent/negligence (*koji/kashitsu*). The plaintiff must then only prove the two remaining elements of the general tort, i.e. damage and causality. See Murakami & Yamada, *Dokusen kinshihō to sashitome songai baishō* [The Antimonopoly Act - Injunctive Relief and Damages Actions], 2d ed, Tokyo, Shōji hōmu, 2005, 84.

of the Antimonopoly Act and actions on the basis of tort. Plaintiffs therefore often prefer to sue on the basis of tort, even if they could sue on the basis of the Antimonopoly Act, *inter alia* because it allows them to sue in their local district court¹⁵ rather than in the Tokyo High Court.

In some cases, plaintiffs have sued neither on the basis of the Antimonopoly Act nor on the general tort provision, but on the basis of the Civil Code's provisions regarding unjust enrichment.¹⁶ In several cases involving bid-rigging for instance, plaintiffs have successfully argued that the contract with the bidder was invalid because it came about as a result of illegal bid-rigging.¹⁷ Hence, the overcharge paid under the contract had no 'legal cause' and could be reclaimed from the bid-rigger as an unjust enrichment.

Finally, in a number of cases, antitrust violations served as a basis for a contractual damages claim. These cases were typically brought by distributors against their supplier, after their distribution contract had been terminated. The distributors then sought damages, alleging that the termination was unlawful because it was based on the distributor's non-compliance with an obligation that infringed antitrust law, such as an obligation not to sell below a certain resale price or to certain categories of customers.¹⁸

(b) Damages Actions Brought as Residents' Lawsuits

From 1992 to 2002, a considerable number of damages actions were filed in the form of residents' lawsuits (*jūmin soshō*), a private antitrust enforcement mechanism that seems unique to Japan.¹⁹ Residents' lawsuits are lawsuits brought by regular citizens on

¹⁵ Actions on the basis of Article 709 Civil Code can, among others, be brought in the district court of the place where the tort was committed (Minsohō [Code of Civil Procedure], Art. 5(9)).

¹⁶ Minpō [Civil Code], Art. 703-704.

¹⁷ See, e.g., Japan v. Dai nihon insatsu K.K. et al. 1734 HANREI JIHŌ 28 (Tokyo D. Ct., 31 March 2000), *aff'd* 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001), *aff'd* Nos. h13-o-757 and h13-ju-747 (Sup. Ct., 28 March 2002) (action on the basis of unjust enrichment brought by Japan's Social Insurance Agency against printing companies that had rigged bids for peel-off seals widely used in Japan to keep letters confidential). For a recent example resulting in the largest antitrust damages award in Japan's history, see Japan v. Kosumo sekiryu K.K. et al., No. h17-wa-26475 (Tokyo District Ct., 27 June 2011).

¹⁸ See, e.g., K.K. Kosaka yakkyoku v. Taishō seiyaku K.K., 9 SHINKETSUSHŪ 162 (Tokyo High Ct., 19 February 1958) (action for damages by a distributor against a manufacturer of cosmetics after his contract had been suspended for violating a non-compete clause; case settled); K.K. Ferokkusu v. K.K. Aroinsu keshōhin, 1566 HANREI JIHŌ 85 (Osaka District Ct., 7 November 1995), *rev'd* 1612 HANREI JIHŌ 62 (Osaka High Ct., 28 March 1997) (action for damages by a distributor against a manufacturer of cosmetics after his contract had allegedly been terminated for selling below price; claim accepted but not on antitrust grounds); A. v. Oppen keshōhin K.K. v. 39 SHINKETSUSHŪ 581 (Osaka District Ct., 24 July 1992, *aff'd* 40 SHINKETSUSHŪ 667 (Osaka High Ct., 14 September 1993) (action for damages by a distributor against a manufacturer of cosmetics after his contract had been terminated for selling to a discount store, in violation of a door-to-door sales requirement; claim rejected).

¹⁹ The residents' lawsuit mechanism was introduced in the Local Autonomy Act at the behest of the American occupation authorities and was inspired by the U.S. taxpayer lawsuits. However, in the U.S., taxpayer lawsuits are generally not used to enforce antitrust law. Residents' lawsuits also differ from *qui tam* actions in the U.S., as found in, *inter alia*, the False Claims Act (U.S.C. § 3730(b)(1) (2006)). In these lawsuits, a private person sues in the name of the U.S. Government but the recovery is shared between the government and the private person. By contrast, in a residents' lawsuit, the recovery goes entirely to the local government.

behalf of their local government, i.e. the prefecture, city, town or village they reside in.²⁰ They were never conceived as a tool for the enforcement of antitrust law, but as a way for citizens to prevent squandering of taxpayer money. For example, if a public official spends government money on lavish entertainment and *geishas*, and the local government itself fails to sue him for damages, the residents can bring an action on behalf of the local government.²¹ In the nineties, activist plaintiffs, outraged by widespread bid-rigging for government contracts, used this mechanism to seek damages from companies that had engaged in bid-rigging for public works.²² The residents, organized in local non-profit organizations called ‘Citizen Ombudsman’, first requested local governments to seek damages themselves.²³ As these requests were mostly turned down – often some local officials were involved in the bid-rigging – the residents took matters into their own hands and brought damages actions on behalf of their local government.

Although the initial actions were rejected by the courts on formal grounds, the residents persisted, ultimately resulting in an avalanche of damages awards in bid-rigging cases. Since the lawsuits are brought on behalf of the local government, any recovery goes into the budget of the local government. The local residents themselves do not receive anything but if their suit is successful, they can recover part of their attorney fees.²⁴ With so few incentives, it is not surprising that residents’ lawsuits are generally brought by ideologically motivated plaintiffs, acting as a ‘private attorney-general’ out of a sense of economic injustice. In addition, attorneys play an important role in bringing these suits. In some cases, they have worked on a contingency basis²⁵, which is otherwise uncommon in Japan.

The surge in residents’ lawsuits came to an abrupt end in 2002, when a legislative amendment removed the possibility for residents to sue on behalf of their local government.²⁶ Residents are now barred from suing directly on behalf of the local

²⁰ Chihō jichi hō [Local Autonomy Act], Law No. 67 of 1947, Art. 242-2(1) (in its version prior to an amendment in 2002).

²¹ See, for such a case, Mitsuyoshi Itō v. Teruo Morijima, 17 HANREI TAIMUZU 101, 103 (Sup. Ct., 5 September 1989) (holding that the expenses to welcome guests were excessive and therefore illegal), *aff’d* 1227 HANREI JIHŌ 42 (Nagoya High Ct., 17 July 1986).

²² The first case was filed in the wake of the so-called Saitama Saturday Club scandal, which involved systematic bid-rigging by a group of sixty-six major construction companies that allocated contracts for public works in Saitama. Residents of Saitama Prefecture v. Kajima Kensetsu K.K., No. h4-gyōu-13, 28060884 (Urawa District Ct., 13 March 2000) (Lex/DB Database), *aff’d*, No. h12-gyōko-245, 25410184 (Tokyo High Ct., 26 April 2001) (Lex/DB Database), *aff’d* No. h13-gyōtsu-235 (Sup. Ct., 26 June 2003).

²³ Before being able to file suit, residents must request an audit (Local Autonomy Act, Arts. 242 and 242-2), which can result in a recommendation to sue.

²⁴ Chihō jichi hō [Local Autonomy Act], Law No. 67 of 1947, as amended, Art. 242-2(12). Prior to a 2002 amendment, this rule was laid down in Local Autonomy Act, Art. 242-2(7).

²⁵ See Residents of Uji City v. Uji City, 63(4) MINSHŪ 703 (Sup. Ct., 23 April 2009), English translation at www.courts.go.jp/english/judgments/text/2009.04.23-2007.-Ju-.No.2069.html (mentioning an agreement between the plaintiffs and their attorneys that the attorneys would receive whatever would be successfully recovered from Uji City on the basis of the provision allowing for the recovery of attorney fees).

²⁶ Chihō jichi hō nado no ichibu wo kaisei suru hōritsu [Law Partially Amending the Local Autonomy Act], Law No. 4 of 2002, which entered into force on 1 September 2002.

government, although they can still seek a court judgment ordering the local government to seek damages.²⁷

(c) Injunctions

Injunctions directly based on antitrust law have only been possible since 2001, after an amendment to the Antimonopoly Act.²⁸ Prior to that amendment, some plaintiffs had tried to seek injunctive relief against antitrust infringements on the basis of contract and tort, but mostly without success.²⁹ Even now, the possibilities for obtaining injunctive relief are limited, as only a specific category of antitrust violations, namely unfair trade practices, can be enjoined. Moreover, plaintiffs face a fairly high threshold, because they must show that they suffer or are likely to suffer ‘extreme’ damage.³⁰

(d) Derivative Actions

Antitrust violations have also been alleged in a number of derivative suits brought under the Companies Act.³¹ These suits were brought by disgruntled shareholders seeking damages on behalf of the company from directors and officers, alleging that they failed to prevent an antitrust violation from occurring or failed to seek leniency after becoming aware of the violation. In most cases, the alleged harm resulted from the fact that the company had to pay antitrust penalties, or that it made a payment to a customer in violation of antitrust law.

²⁷ Local Autonomy Act, as amended, Art. 242-2(1)(iv). For an example, see *Residents of Aichikawa Town v. Mayor of Aichikawa Town*, 1342 HANREI TAIMUZU 142 (Ōtsu District Ct., 1 July 2010).

²⁸ *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu* [Act to Partially Amend the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 76 of 2000, which entered into force on 1 April 2001.

²⁹ See, e.g., *K.K. Miyagi famirī kurabu v. Nihon koromubia K.K. et al*, 1110 HANREI JIHŌ 13 (Tokyo District Ct., 29 March 1984) (rejecting application for interim injunctive relief filed by a music record retailer against his supplier after his agreement was terminated because he had sold to record rental companies); *Shinshinshōji K.K. v. K.K. Edōin and Rī Japan K.K.*, 1490 HANREI JIHŌ 111 (Osaka District Ct., 21 June 1993) (rejecting application for interim injunctive relief filed based on tort, holding that the remedy for a tort is damages, not injunctive relief); *K.K. Fujiki honten v. Shiseidō Tokyo hanbai K.K.*, 1474 HANREI JIHŌ 25 (Tokyo District Ct., 27 September 1993), *rev'd* 1507 HANREI JIHŌ (Tokyo H. Ct., 14 September 1994), *aff'd* 1664 HANREI JIHŌ 3 (Sup. Ct., 18 December 1998) (rejecting application for interim relief by retailer against cosmetics supplier after contract termination); *Y.K. Egawakikaku v. Kaō keshōhin hanbai*, 1500 HANREI JIHŌ 3 (Tokyo District Ct., 18 July 1994), *rev'd* 1624 HANREI JIHŌ 55 (Tokyo High Ct., 31 July 1997), *aff'd* 1664 HANREI JIHŌ 14 (Sup. Ct., 18 December 1998) (rejecting application for injunctive relief by retailer against cosmetics supplier after contract termination); *K.K. Kawachiya v. Shiseidō Hanbai K.K.*, 47 SHINKETSUSHŪ 640 (Tokyo District Ct., 30 June 2000) (rejecting application for injunctive relief by discount shop against cosmetics supplier after contract termination). But see *X. v. Hiruzen rakunō nōgyō kyōdō kumiai*, Nos. h8-wa-1089 and h9-wa-1242 (Okayama District Ct., 13 April 2004), discussed in *Shiraishi, Dokkinhō jirei no kandokoro* [The Key Points of Competition Law Case Law], 2d ed, Tokyo, Yūhikaku, 2010, 184-188 (granting injunctive relief to plaintiff excluded from trade association’s farm); *K.K. Fujiki honten v. Makkusu fakutā K.K. et al.*, 49 SHINKETSUSHŪ 766 (Kobe District Ct., 17 September 2002) (finding that the termination violates the Antimonopoly Act and declaring that plaintiff is entitled to supplies).

³⁰ Antimonopoly Act, Art. 24.

³¹ *Kaishahō* [Companies Act], Art. 847. Prior to 2005, the legal basis of these suits was *Shōhō* [Commercial Code], Art. 276.

Around a dozen such cases have been brought. The initial cases were mostly rejected by the courts.³² Recently, however, several cases, all related to bid-rigging, have settled for non-negligible amounts.³³ Other cases are still pending.³⁴

(e) Voidness

Antitrust law can also be invoked in support of a claim or defense that a specific legal act is void under Article 90 of the Civil Code. According to Japanese case law, an act that violates antitrust law is not automatically void.³⁵ Instead, courts decide this on case-by-case basis, taking into account such factors as the seriousness of the violation, the aim of the specific antitrust rule that was violated and the need to protect legal certainty.³⁶

³² X et al. on behalf of Nomura shōken v. Y, 827 HANREI TAIMUZU 39 (Tokyo District Ct., 16 September 1993), *aff'd* 890 HANREI TAIMUZU 45 (Tokyo High Ct., 26 September 1995), *aff'd* 1046 HANREI TAIMUZU 92 (Sup. Ct., 7 July 2000) (claim rejected); X et al. on behalf of Nomura shōken v. Y, 976 HANREI TAIMUZU 277 (Tokyo District Ct., 14 May 1998), *aff'd* 1064 KINYŪ SHŌJI HANREI 21 (Tokyo High Ct., 27 January 1999); Asai et al. on behalf of Nikkō shōken K.K. v. Iwasaki et al., 43 SHINKETSUSHŪ 499 (Tokyo District Ct., 13 March 1997), *aff'd* 1058 HANREI TAIMUZU 251 (Tokyo High Ct., 23 February 1999) (rejecting derivative action because, although the company had violated the Antimonopoly Act by compensating the investment losses of a particularly important client, the directors had not been aware of this illegality and had therefore not been negligent); X et al. on behalf of Mitsubishi shōji v. Y., 51 SHINKETSUSHŪ 991 (Tokyo District Ct., 20 May 2004) (claim rejected); X et al. on behalf of Nihon shinpan K.K. v. Y, 1934 HANREI JIHŌ 121, No. h15-wa-1807 (Tokyo District Ct., 3 March 2005) (claim rejected because the directors did not violate the Antimonopoly Act). But see X on behalf of Hitachi seisakusho K.K. v. Y, 190 SHIRYŌBAN SHŌJI 233 (Tokyo District Ct., settled 21 December 1999) (directors paid 100 million yen to company to settle allegations that they unlawfully failed to prevent bid-rigging for sewage construction works).

³³ X on behalf of Mitsui zōsen K.K. [Mitsui Engineering & Shipbuilding Co., Ltd.] v. Y, unreported (Tokyo District Ct., settled 30 July 2010) (former directors paid 80 million yen to the company to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); Morioka et al. on behalf of Sumitomo kinzoku kōgyō K.K. [Sumitomo Metal Industries, Ltd.] v. Y, unreported (Osaka District Ct., settled 30 March 2010) (directors paid 230 million yen to the company to settle a variety of allegations, including failure to prevent bid-rigging for the construction of steel bridges and a cartel in the market for stainless steel plates); X et al. on behalf of Hitachi zōsen K.K. v. Y, unreported (Osaka District Ct., settled 22 December 2009) (directors paid 250 million yen to the company to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); X et al. on behalf of Kobe seikōjo K.K. [Kobe Steel K.K.] v. Y, unreported (Kobe District Ct., settled 17 February 2010) (directors paid 88 million yen to settle allegations that they were negligent in preventing bid-rigging for the construction of steel bridges); X et al. on behalf of K.K. Ōbayashigumi v. Y, unreported (Osaka District Ct., settled 5 June 2009) (directors paid 200 million yen to settle allegations that they were negligent in preventing bid-rigging for the construction of a subway line in Nagoya and several other projects); Miyake et al. on behalf of Goyō kensetsu K.K. [Penta-Ocean Construction] v. Suino et al, unreported (Tokyo District Ct., settled 30 May 2008) (directors paid 88 million yen to the company to settle allegations that they had failed to prevent bid-rigging, resulting in a penalty (surcharge) for the company, and made an unlawful political donation).

³⁴ Pending cases include damages actions filed by shareholders of Mitsubishi jūkōgyō K.K. [Mitsubishi Heavy Industries], IHI K.K., Sumitomoikai jūkōgyō K.K. (all relating to bid-rigging for the construction of steel bridges) and Sumitomo denki kōgyō K.K. [Sumitomo Electric Industries] (relating to a cartel in the market for fiber-optic cables).

³⁵ K.K. Miyagawa v. Gifu shōkō shinyōkumiai [Gifu Commercial and Industrial Credit Association], 31 MINSHŪ 449, 459 (Sup. Ct., 20 June 1977).

³⁶ Iyo tetsudō K.K. [Iyo Railways K.K.] v. Okudōgo onsen kankō basu K.K. [Okudōgo Hot Spring Tourist Bus], No. s46-wa-156, 27441751 (Matsuyama District Ct, 19 April 1976) (Lex/DB Database), *aff'd* 629 HANREI TAIMUZU 179 (Takamatsu High Ct., 8 April 1986), *aff'd on other grounds* 724 HANREI TAIMUZU 160 (Sup. Ct., 24 November 1989). But see Japan v. Dai nihon insatsu K.K. et al., 1734 HANREI JIHŌ 28, 46

2. SCOPE OF THIS STUDY AND METHODOLOGY

(a) Scope

The aim of this study was to analyze all actions for damages, including those brought in the form of residents' lawsuits,³⁷ and all actions for injunctive relief based on alleged violations of antitrust law. In other words, the study covers the enforcement mechanisms described above under sections (a), (b) and (c). Damages claims were included regardless of whether they were filed by the plaintiff or as a counterclaim by the defendant.

By contrast, the study does not cover the enforcement mechanisms described under sections (d) and (e). In other words, the study does not include cases in which antitrust law was invoked to allege the voidness of a legal act or contractual clause, unless that allegation was accompanied by a claim for damages or injunctive relief. Neither does the study include the dozen or so derivative actions described in section (e) above.

In some bid-rigging cases, the courts made no explicit finding that there was a violation of the Antimonopoly Act but simply found 'illegal bid-rigging' and referred to the JFTC decision in which this bid-rigging was deemed a violation of the Antimonopoly Act.³⁸ Those cases are essentially based on a violation of antitrust law and were therefore included.

'Private' antitrust litigation in the context of this study denotes litigation based on private law, brought before the regular courts, as opposed to criminal cases brought by a prosecutor or administrative cases brought by the JFTC. This definition does not require plaintiffs to be only private individuals and companies. Public entities such as the State, local governments and public agencies engage in many transactions and when they become the victims of anticompetitive conduct such as bid-rigging they may seek redress. This has been particularly the case in Japan. Cases in which these entities sought redress before the civil courts are included in the database.

(b) Methodology

For each case, the following data was collected: the filing date, the kind of case (regular damages action, residents' lawsuit or injunction), the type of antitrust infringement alleged, the kind of plaintiff, the outcome, any damages recovered and whether the case was a follow-on case or a stand-alone case.

SHINKETSUSHŪ 695 (Tokyo District Ct., 31 March 2000), *aff'd* 1742 HANREI JIHŌ 96, 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001) (holding that a contract tainted by bid-rigging is invalid as a matter of course).

³⁷ The study includes all damages actions in the form of residents' lawsuits, but does not include actions by residents against local governments to obtain a court order obliging the local government to seek damages. Of course, if such a residents' action against the local government effectively results in a damages action by the local government, the latter action is covered by the study.

³⁸ See e.g., Japan v. Dai nihon insatsu K.K. et al. 1734 HANREI JIHŌ 28 (Tokyo District Ct., 31 March 2000), *aff'd* 47 SHINKETSUSHŪ 690 (Tokyo High Ct., 8 February 2001), *aff'd* Nos. h13-o-757 and h13-ju-747 (Sup. Ct., 28 March 2002).

Cases and data were collected and cross-checked using various sources. These include (1) the JFTC's annual decision reporter (*shinketsushū*), (2) the JFTC's annual reports, (3) the JFTC's online database³⁹, (4) the Lex/DB database and (5) the Westlaw Japan database. A number of cases from before 2000 were identified through (6) an inventory drawn up by two study groups.⁴⁰ Finally, additional cases were identified and data on settlements was obtained through (7) various law review articles, books, newspaper databases and websites of scholars⁴¹ and some of the parties involved.⁴²

Although a wide variety of sources were consulted, it cannot be guaranteed that *every* case has been identified. However, to the extent that some cases remained under the radar, their number is likely to be small and it is suggested that they are unlikely to dramatically change the picture that emerges from the data reported in this article.

This data-gathering effort is most meaningful with respect to antitrust damages actions that were based on the Japanese Civil Code. This is by far the most popular avenue for plaintiffs seeking damages in Japan but it is specifically in this area that data are lacking. By contrast, for damages actions based on the Antimonopoly Act and injunctions, it is much easier to collect data because information about these cases is regularly published by the JFTC. This is because courts in Japan had, until very recently, a duty to ask the JFTC's opinion on damages whenever an action for damages was filed on the basis of the Antimonopoly Act.⁴³ In addition, courts have a duty to notify the JFTC when an injunction suit is filed.⁴⁴ No such duty exists in relation to actions based on the Civil Code. In the JFTC's annual reports and decision reporters, *some* of those cases are mentioned, but not all. As the number of cases has increased in recent years, the annual reports of the JFTC are less and less exhaustive.

³⁹ <http://snk.jftc.go.jp/JDSWeb/jds/dc/DC001.do>. This database contains mostly JFTC decisions and litigation concerning those decisions and few private cases.

⁴⁰ Higashide (ed), *Dokkinhō ihan kōi to minjiteki kyūsaiseido - 'Dokusenkinshihō ihan kōi ni kakaru minjiteki kyūsaiseido kenkyūkai' hōkoku* [Antitrust Violations and Civil Remedies - The Report of the 'Research Group on The Civil Remedy System for Antitrust Violations'], Tokyo, Shōji hōmu kenkyūkai, 2000, 131-142; Higashide, *Dokkinhō ihan to minji soshō - sashitome seikyū songai baishō seido* [Antitrust Violations and Civil Litigation - Injunctions and Damages Actions], Tokyo, Shōji hōmu kenkyūkai, 2001, 110-151; Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30.

⁴¹ These included <http://shiraishitadashi.jp/list/case.html> (listing legally significant JFTC decisions and court judgments, including those rendered in private cases).

⁴² These included <http://www.ombudsman.jp/dangou/> (providing information about a large number of residents' lawsuits).

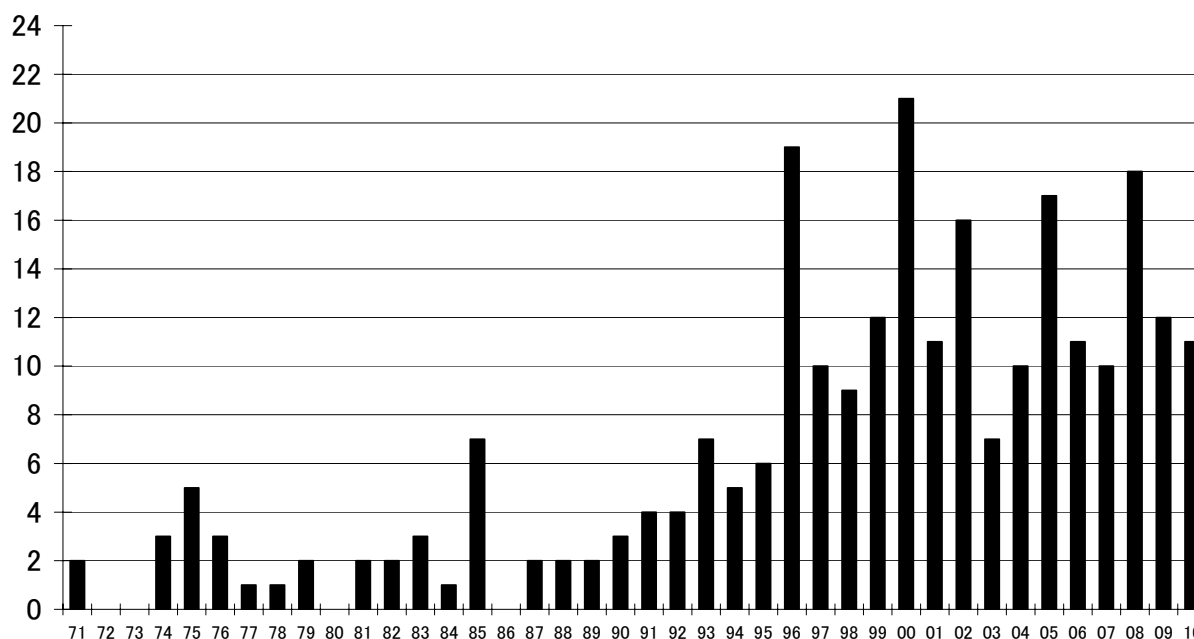
⁴³ Antimonopoly Act, Art. 84(1). A 2009 amendment changed this duty into an option (*Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu* [Act to Partially Amend the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 51 of 2009).

⁴⁴ Antimonopoly Act, Art. 83-3(1).

3. THE NUMBER OF CASES IN THE POST-WAR ERA⁴⁵

In the first twenty-four years of the Antimonopoly Act's existence, from 1947 until 1970, there were only five private lawsuits.⁴⁶ It was not until the economically turbulent seventies, which sparked renewed attention for antitrust law in general, that the number of filings started to rise (Graph 1).

Graph 1 - Cases Filed per Year Since 1971



Among the cases that made up the first small wave of cases in the mid-seventies were three notorious cases brought by consumers against a cartel of oil companies⁴⁷, and a

⁴⁵ The following three rules were used when counting the number of filed cases. First, cases brought in different courts, but by the same plaintiff and related to the same antitrust violation were treated as one. Hence, the thirty five cases (now reduced to twelve) cases filed by Independent Administrative Corporation Japan Highway, successor of all debts and liabilities of Japan Highway Public Corporation, in 2008 were treated as one case. Second, if cases were initially filed separately but then joined, they were treated as one case. Third, if a plaintiff filed suit and the case was dismissed for a technical reason, and subsequently the same plaintiff filed the same action against the same defendant in a new case, those two cases were treated as one case.

⁴⁶ K.K. Shirokiya v. Yokoi sangyō K.K. et al., 35 HANREI TAIMUZU 36 (Tokyo High Ct., 1 December 1953) (claim for injunctive relief filed in 1953; rejected because no violation of the Antimonopoly Act); Tokushige v. Ukai et al., 8(8) KAMIN 1452 (Tokyo High Ct., 5 August 1957) (claim filed in 1953 seeking dissolution of cooperative that allegedly engaged in monopolistic conduct; claim accepted but not on antitrust grounds); Meiji kōzai K.K. v. Tokyo tsūshō K.K., 14(7) KAMIN 1322 (Tokyo District Ct., 5 July 1963) (claim filed in 1961 to have property returned after transfer that allegedly violated antitrust law; claim rejected); K.K. Kosaka yakkyoku v. Taishō seiyaku K.K., 9 SHINKETSUSHŪ 162 (Tokyo High Ct., 19 February 1958) (damages action filed in 1956 on the basis of Article 25 of the Antimonopoly Act; settled); Shige Katō v. Tokkyo sponji surippā kyōkai soshiki et al., 17 SHINKETSUSHŪ 269 (Tokyo High Ct., 24 November 1958) (damages action filed in 1958 on the basis of Article 25 of the Antimonopoly Act; claim rejected).

⁴⁷ Kai v. Nihon sekiryū K.K., 41(5) MINSHŪ 879 (Tokyo High Ct., 17 July 1981), *aff'd* 41(5) MINSHŪ 785 (Sup. Ct., 2 July 1987); Satō v. Sekiryū renmei, 43(11) MINSHŪ 1340 and 997 HANREIJIHŌ 18 (Yamagata District Ct., 31 March 1981), *rev'd* 43 MINSHŪ 1539 and 1147 HANREIJIHŌ 19 (Sendai High Ct., 26 March 1985), *rev'd sub*

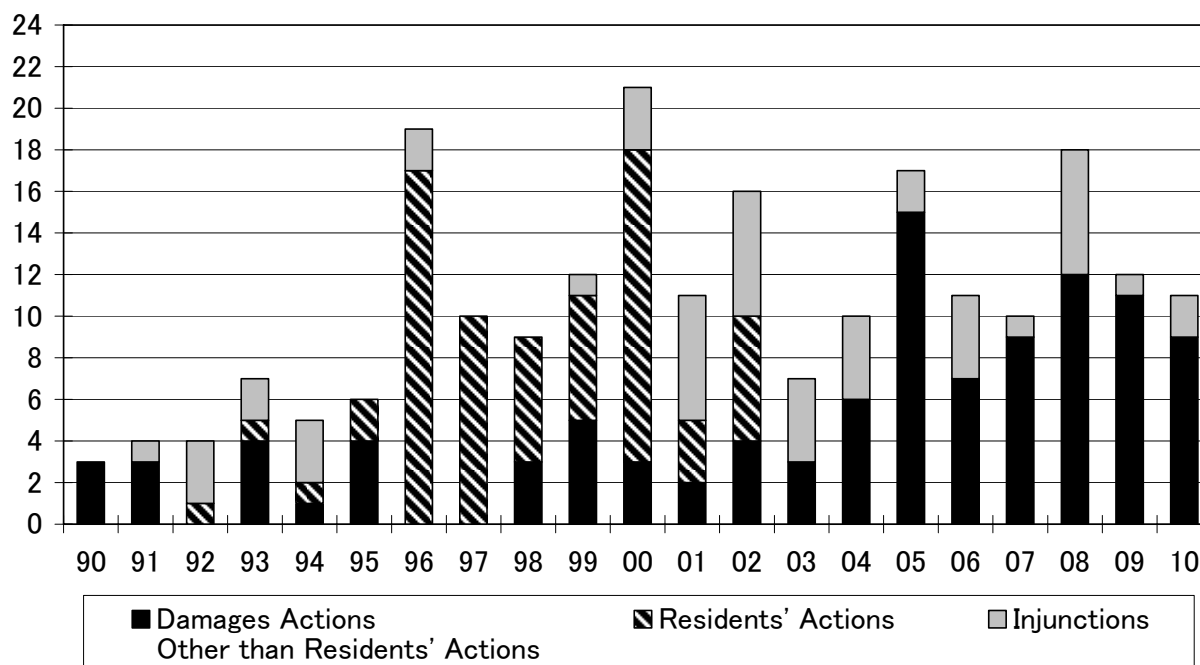
number of lawsuits by victims of a pyramid scheme, who were suing on the basis of ‘deceptive customer inducement’. This is an unfair trade practice in Japan and hence prohibited by the Antimonopoly Act, although in many countries such conduct would probably fall outside the scope of antitrust law.

In the eighties, as antitrust law again faded to the background in Japan, the number of case filings remained small. But the two decades that followed saw a veritable surge in case filings. It is this explosion in the number of cases in the past two decades that has led some observers to conclude that private enforcement is now fully part of Japan’s enforcement mix. The next section takes a closer look at this increase in the past two decades.

4. A CLOSER LOOK AT THE NUMBERS IN THE LAST TWO DECADES

At the macro-level, the sharp increase in the number of private antitrust lawsuits during the past two decades must be seen against the background of a general trend towards more litigation in Japan. Although litigation levels were long notoriously low, the country took a ‘turn to litigation’ in the nineties.⁴⁸ From 1986 to 2001, Japan’s general civil litigation rate increased by 29 percent.⁴⁹ Hence, to some extent, the increase in antitrust cases is simply a reflection of a broader trend – a rising tide lifts all boats. The specific increase in the antitrust field is nonetheless much sharper than the increase in litigation generally.

Graph 2 - Cases Filed Between 1990 and 2010 by Type



nom. Nihon sekiyu K.K., v. Satō 43(11) MINSHŪ 1259 (Sup. Ct., 2nd P.B., 8 December 1989); Noriko Miyazaki v. Nihon sekiyu K.K., 28 SHINKETSUSHŪ 188 (Tokyo High Ct., settled 2 July 1981).

⁴⁸ Ginsburg & Hoetker, ‘The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation’ (2006) 35 J. Legal Stud. 31-59.

⁴⁹ Ginsburg & Hoetker, *id.*, 56.

If we break down the cases in different categories and look at the evolution in each category, it becomes clear that residents' lawsuits⁵⁰ and suits for injunctive relief⁵¹ have been the key drivers of the increase in filings (Graph 2).

The first residents' lawsuit was filed in 1992, sparked by outrage over widespread bid-rigging in Saitama Prefecture and the JFTC's decision not to refer the case to the prosecutor's office for criminal charges.⁵² More suits followed and, in 1996, a coordinated series of lawsuits was initiated throughout the country against companies that had rigged bids for the installation of equipment in sewage and tap water systems. This series of lawsuits explains the spike in cases in 1996. In 2000, another wave of lawsuits followed, this time in the wake of bid-rigging for the construction of waste incineration plants throughout Japan.

In 2002, the steady stream of residents' lawsuits came to an abrupt end, as the law enabling these lawsuits was changed and residents were stripped of their right to bring lawsuits on behalf of their local government.⁵³ But instead of local residents suing on behalf of their local government, the local governments themselves increasingly started suing for damages, up to a point where, at present, it has almost become standard practice for public entities to seek damages if bid-rigging is uncovered. Two factors contributed to this development. First, the success of the residents' lawsuits and some high-profile cases⁵⁴ had demonstrated the feasibility of recovering taxpayer money from bid-riggers. The residents' lawsuits therefore served as a catalyst for damages actions. Second, local governments were put under pressure to seek damages by the same non-profit organizations that had been the driving force behind the residents' lawsuits. Although these local activists no longer had the power to sue on behalf of the local government, they could still apply for a court order obliging the local government to seek damages.⁵⁵

As a result of the increasing number of damages actions by local governments and public agencies, the number of regular damages actions, coloured black in the graph, has increased, especially since 2002.

⁵⁰ See part 1, section (b), for a discussion of these lawsuits.

⁵¹ See part 1, section (c). The residents' lawsuits against local government under the revised Local Autonomy Act are not included in the graph. See n 37.

⁵² Residents of Saitama Prefecture v. Kajima kensetsu K.K., No. h4-gyōu-13, 28060884 (Urawa District Ct., 13 March 2000) (Lex/DB Database), *aff'd* No. h12-gyōko-245, 25410184 (Tokyo High Ct., 26 April 2001) (Lex/DB Database), *aff'd* No. h13-gyōtsu-235 (Sup. Ct., 26 June 2003).

⁵³ See part 1, section (b).

⁵⁴ E.g., Tokyo Metropolitan Prefecture v. Aichi tokei denki K.K. et al., No. h10-wa-1 (Tokyo High Ct., settled 22 June 2002 and 4 October 2002) (resulting in a recovery of over two billion yen from companies that had rigged bids for the supply of water meters).

⁵⁵ Local Autonomy Act, Art. 242-2(1) (in its version after the 2002 amendment). See, e.g., Shimin ombuzuman Yamagata Prefecture kaigi et al. v. Governor of Yamagata Prefecture et al., No. h18-gyōu-2 (Yamagata District Ct., 10 March 2009), *aff'd* No. h21-gyōko-13 (Sendai High Ct., 12 March 2010) (ordering the Governor of Yamagata Prefecture to seek 260 million yen in damages from companies that rigged bids for the construction of steel bridges).

A second major driver of the increase in filings is the increase in cases seeking injunctive relief. Prior to 2001, there was no legal basis for plaintiffs to seek injunctive relief against antitrust infringements as such. Plaintiffs did seek injunctive relief on the basis of contract or tort, invoking antitrust violations in support of their claim, but the number of cases was small. An amendment to the Antimonopoly Act⁵⁶, which entered into force in 2001, made it possible to seek injunctive relief directly on the basis of antitrust law and resulted in more cases being filed, contributing to the rise in antitrust filings in the 2000s.⁵⁷

5. TYPES OF ANTITRUST VIOLATIONS

Japanese substantive competition law prohibits three types of conduct: (1) unreasonable restraints of trade,⁵⁸ (2) private monopolization,⁵⁹ and (3) unfair trade practices.⁶⁰ The first two of these three categories have a clear parallel in EU and U.S. antitrust law. The prohibition on unreasonable restraints of trade is comparable to Section 1 of the Sherman Act and Article 101 of the Treaty on the Functioning of the European Union, although in Japan it only covers horizontal agreements, not vertical agreements.⁶¹ The prohibition on private monopolization corresponds to Section 2 of the Sherman Act and Article 102 of the Treaty on the Functioning of the European Union.

The prohibition on unfair trade practices is, from a European or U.S. perspective, somewhat more peculiar. In Japan, it is an umbrella term for several types of anticompetitive conduct, listed in the Antimonopoly Act⁶² and further specified in a notice issued by the Japan Fair Trade Commission.⁶³ The list includes vertical price fixing, tie-in sales, refusals to deal, selling at unjustly low prices and discriminatory pricing. It also contains some practices that would probably not be considered part of antitrust law in other jurisdictions.⁶⁴ ‘Abuse of a superior bargaining position’, for instance, is one of the unfair trade practices.⁶⁵ Although the term is similar to the EU’s

⁵⁶ See part 1, section (c).

⁵⁷ The injunction cases prior to 2001 were filed prior to the amendment of the Antimonopoly Act and sought an injunction on a different basis.

⁵⁸ Antimonopoly Act, Art. 2(6) and Art. 3, last part of the first sentence.

⁵⁹ Antimonopoly Act, Art. 2(5) and Art. 3, first part of the first sentence.

⁶⁰ Antimonopoly Act, Art. 2(9) and Art. 19.

⁶¹ K.K. Asahi shimbunsha et al. v. JFTC, 2 HANREI JIHŌ 8 (Tokyo High Ct., 9 March 1953) (holding that companies must be in a competitive relationship for the prohibition on unreasonable restraints of trade to apply). But see Japan v. Toppan mūa et al., 840 HANREI TAIMUZU 81, 88 (Tokyo High Ct., 14 December 1993) (expressing doubts in *obiter dictum* as to the validity of this view).

⁶² Antimonopoly Act, Art. 2(9).

⁶³ Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of 18 June 1982, as amended in 2009), at http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/unfairtradepractices.pdf. In addition, there are also notices prohibiting certain conduct in specific business sectors, such as large-scale retailing and the newspaper business.

⁶⁴ Obviously, such incongruities in substantive antitrust law make comparisons of private enforcement levels between jurisdictions more difficult, since an ‘antitrust case’ in one jurisdiction, may not be considered an antitrust case in another jurisdiction.

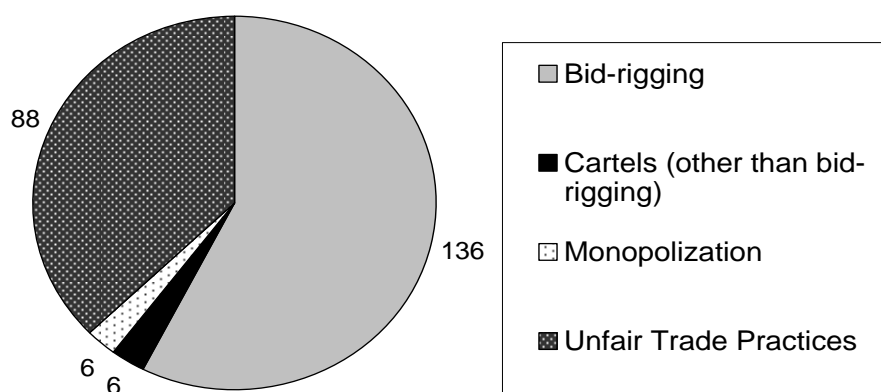
⁶⁵ Antimonopoly Act, Arts. 2(9)(v) and 2(9)(vi)(e).

prohibition on abuse of a dominant position, in fact, it is an entirely different concept. The infringement does not require a dominant position on the market. Instead, what matters is the infringer's bargaining position relative to its business partner. Hence, the number two player in a market can perfectly engage in an 'abuse of a superior bargaining position'.

The cases in the database were categorized on the basis of these three main prohibitions but with a further refinement. Given the importance of bid-rigging cases in Japan, the category "unreasonable restraints of trade", i.e. the ban on horizontal anticompetitive agreements, was divided into two subcategories: cases alleging bid-rigging and cases alleging horizontal restraints other than bid-rigging. All thirty-seven actions for injunctive relief filed on the basis of the Antimonopoly Act related to unfair trade practices for the simple reason that the Antimonopoly Act only allows injunctions for those kinds of infringements. Accordingly, we shall focus on the types of infringements invoked in damages actions and the handful of injunction suits filed prior to 2001.

Graph 3 clearly shows the preponderance of bid-rigging cases. Cases challenging cartels other than bid-rigging are virtually absent. Only six cases have been filed in the post-war history. Scholars have identified various factors to try to explain this low number, including the lack of an opt-out class action mechanism⁶⁶ and a reluctance on the part of Japanese companies to sue business partners.⁶⁷ Another factor is probably the fact that public enforcers – the JFTC and public prosecutors – have uncovered far more bid-rigging cases than other cartels, and private litigation is often brought in the wake of public enforcement.⁶⁸

Graph 3 - Types of Infringements in Damages Actions



⁶⁶ See, e.g., Ramseyer, 'The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan' (1985) 94 Yale L.J. 631.

⁶⁷ See, e.g., Iyori & Uesugi, *The Antimonopoly Laws and Policies of Japan*, New York, Federal Legal Publications, 1994, 239.

⁶⁸ See part 6.

In relation to monopolization, the conclusions are less straightforward because some monopolization cases may have been filed as an unfair trade practices case. For instance, a monopolist's refusal to deal could be challenged as private monopolization but also as an unfair trade practice, since refusals to deal are one of the types of unfair trade practices.

6. SUCCESS RATE

Initially, plaintiffs mainly lost or, at best, obtained settlements.⁶⁹ Prior to 1990, there were only two final judgments holding in favour of antitrust plaintiffs.⁷⁰ The situation started to change in the nineties. One of the decisions heralding this change was a 1990 decision in the *Toshiba Elevator Case*⁷¹, affirmed on appeal in 1993⁷². The court held that Toshiba Elevator's refusal to supply spare parts to anyone who did not rely on Toshiba for the servicing of its elevators amounted to illegal tying, and awarded damages to the plaintiffs. From 1990 onwards, favourable decisions gradually became more frequent and in the 2000s, plaintiffs, especially local governments in bid-rigging cases, regularly obtained favourable judgments or settlements.

In total, around 27 percent of the antitrust cases surveyed were successful or partially successful. 'Successful or partially successful' was defined as a win or partial win on the merits of the antitrust claim. Around 36 percent of cases settled and the remaining 37 percent of all cases were unsuccessful, i.e. did not result in a win or partial win on the merits.

The success rate was much lower for actions seeking injunctive relief than for damages actions. Out of the twenty-seven injunction cases with a final outcome that were filed based on the injunction system introduced in 2001⁷³, nineteen had a negative outcome for plaintiffs and eight were settled. Not a single injunction case under the new system has ended in a final favourable judgment for plaintiffs.⁷⁴ Many of these cases failed because plaintiffs were unable to establish that an unfair trade practice had occurred or

⁶⁹ Information on settlements was obtained through analysis of the JFTC's reporter (which publishes extracts of the settlement record (*wakaichōsho*)), newspaper articles, the websites of the parties involved and settlements mentioned in Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30.

⁷⁰ *Tomobe v. Shinakawa shinyō kumiai*, 1165 HANREI JIHŌ 119, 548 HANREI TAIMUZU 273 (Tokyo District Ct., 25 October 1984) (awarding 800,000 yen to plaintiff because loan contract was void, among others because it violated the Antimonopoly Act); *Izumikyo et al. v. K.K. Shirokō*, 959 HANREI JIHŌ 17 (Osaka District Ct., 29 February 1980) (awarding 26.6 million yen in unfair trade practice case).

⁷¹ *Kōsei denki Y.K. et al. v. Tōshiba shōkōki sābisu K.K.*, 1365 HANREI JIHŌ 91 (Osaka District Ct., 30 July 1990).

⁷² *Kōsei denki Y.K. et al. v. Tōshiba erebēta tekunosu K.K.*, 1479 HANREI JIHŌ 21, 40 SHINKETSUSHŪ 651 (Osaka High Ct., 30 July 1993).

⁷³ See part 1, section (c).

⁷⁴ But see *X K.K. v. Y K.K.*, No. h22-yo-20125, 2011 WLJP CS03306001 (Tokyo District Ct., 30 March 2011) (Westlaw Japan) (granting a provisional injunction, but decision not yet final).

was imminent⁷⁵, which is one of the substantive requirements to obtain injunctive relief.⁷⁶

7. DETERRENT EFFECT: FOLLOW-ON VERSUS STAND-ALONE

When considering whether to violate antitrust law or not, companies are likely to take into account, *inter alia*, the chance that they may be caught and the size of the sanction if they get caught.⁷⁷ Private enforcement has the capacity to impact on both factors. It can increase the probability of detection as well as the magnitude of the penalty and, in doing so, contribute to deterrence. However, only stand-alone cases increase the probability of detection as follow-on cases are brought after the JFTC has already uncovered the conduct.

In Japan, there have been few successful stand-alone cases and, hence, the role of private enforcement in detecting anticompetitive conduct has been limited. Out of all the damages actions that ended in a damages award or settlement, more than 78 percent were filed after a prior investigation by the JFTC or the public prosecutor. Not surprisingly, the stand-alone cases – 22 percent of the total number of successful damages actions – mostly related to private monopolization and unfair trade practices, conduct that is more easily detectable than price-fixing and bid-rigging.

All actions seeking injunctive relief were stand-alone cases, probably because of the nature of injunctive relief. As in most jurisdictions, it usually takes several years for the public authorities to investigate, prosecute and adjudicate a case. By that stage, it is normally too late for an injunction to be effective. Although all injunction cases were stand-alone cases, it is unlikely that they contributed significantly to the detection of antitrust violations, as most cases were dismissed by the courts.⁷⁸

In summary, based on the low number of successful stand-alone cases, it seems that private antitrust litigation has not assisted greatly in detecting antitrust violations.

8. DETERRENT EFFECT: MAGNITUDE OF THE RECOVERY

Private damages actions also contribute to deterrence of antitrust violations by imposing financial sanctions in the form of damages. The magnitude of the damages recovered through private lawsuits is therefore an important element in determining the deterrent effect of private enforcement. Further, by comparing the amounts of damages recovered through private litigation with the penalties imposed through public enforcement, we can develop a basic snapshot of the relative importance of private lawsuits in enforcing antitrust law.

⁷⁵ See, e.g. *Yamato unyu K.K. v. Yūbin jigyō K.K.*, 1203 HANREI TAIMUZU 81 (Tokyo District Ct., 19 January 2006), *aff'd sub nom. Yamato unyu K.K. v. Nihon yūsei kōsha*, 54 SHINKETSUSHŪ 699 (Tokyo High Ct., 28 November 2007), *aff'd* 55 SHINKETSUSHŪ 1023 (Sup. Ct., 17 February 2009); *Sekino shōji K.K. et al. v. Za tōkai et al.*, 1151 HANREI TAIMUZU 285 (Tokyo District Ct., 31 March 2004).

⁷⁶ See part 1, section c.

⁷⁷ Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 J. Political Econ. 176-177.

⁷⁸ See part 6 (success rate of cases seeking injunctive relief very low).

In the first forty years of the Antimonopoly Act, from 1947 up until the end of the eighties, there were no significant damages awards or settlements.⁷⁹ From 1989 onwards, damages were awarded in several cases, but generally only for very modest amounts. The only plaintiff able to secure a major recovery was the U.S. Government. In 1989, it recovered 4.7 billion yen (34 million USD at the time) through a settlement with Japanese construction companies that had rigged bids for works at the U.S. Navy's base in Yokosuka.⁸⁰

From 1999 onwards, private damages suits became more significant in monetary terms. By that time, some of the residents' lawsuits had started to bear fruit. These actions often resulted in large damages awards, simply because of the scale of the construction projects. The damages were often estimated conservatively by courts – typically between 5 and 10 percent of the contract price – but given the enormous size of some of the construction projects, this nonetheless led to significant damages awards. Thus, a series of judgments awarded damages running into several billions of yen to local governments who had overpaid for the construction of waste incineration plants.⁸¹ Many of these suits became final after Supreme Court appeals were dismissed in 2009. This explains why the aggregate damages in 2009, as shown in graph 4, exceeded twenty billion yen, an all-time high.

The figures in graph 4 are based on the damages awarded in final judgments (excluding interest) and amounts recovered through settlements.⁸² Since there were a number of settlements for which data were unobtainable, the figures in the graph somewhat

⁷⁹ The two largest recoveries in that period were *Izumikyō et al. v. K.K. Shirokō*, 959 HANREI JIHŌ 17 (Osaka District Ct., 29 February 1980) (26.6 million yen awarded to victims of a pyramid scheme based on, among others, finding of an unfair trade practices) and *Noriko Miyazaki v. Nihon sekiryū K.K.*, 28 SHINKETSUSHŪ 188, at 195 (Tokyo High Ct., settled 2 July 1981) (Tokyo High Ct., 2 July 1981) (settlement payment of nine million yen in oil cartel case).

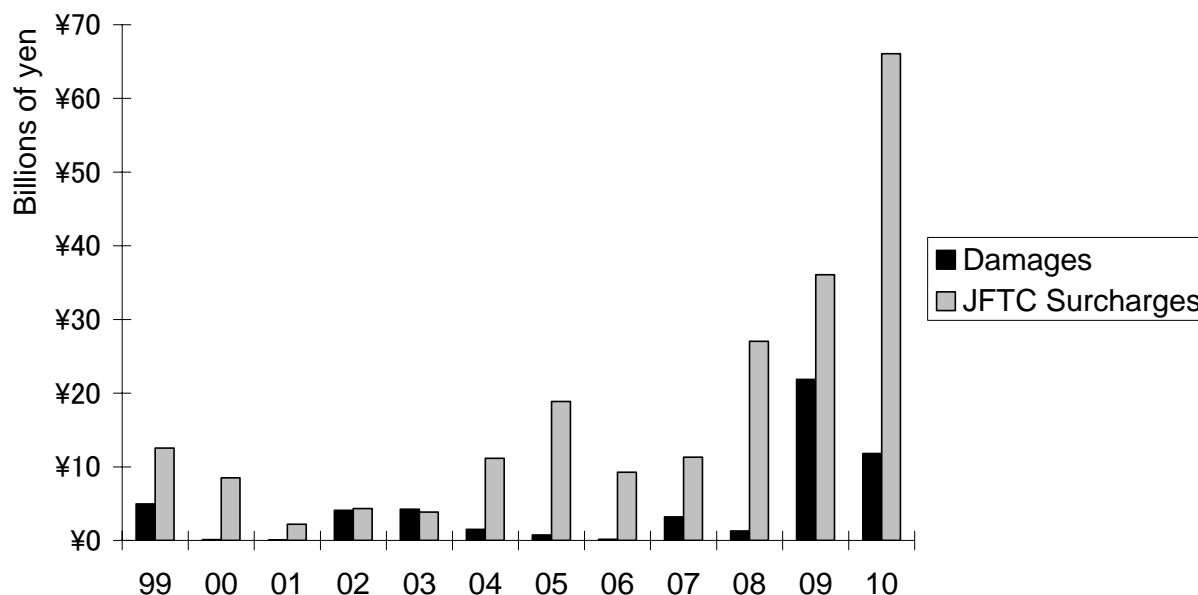
⁸⁰ *Iyori & Uesugi*, *The Antimonopoly Laws and Policies of Japan*, New York, Federal Legal Publications, 1994, 92. The United States initiated proceedings to obtain a provisional attachment against one of the companies that did not settle. These proceedings were ultimately settled as well. *U.S.A. v. Hosaka kensetsu K.K.*, 829 HANREI TAIMUZU 289 (Yokohama District Ct., Kawasaki Branch, 17 March 1994), *appealed* No. h6-ne-1295 (Tokyo High Ct., settled 8 September 1999).

⁸¹ See, e.g., *Residents of the Tokyo Metropolitan Area v. K.K. Takuma et al.*, No. h12-gyōu-185, 2007 WLJP CA03208020 (Tokyo District Ct., 20 March 2007) (Westlaw Japan), *aff'd* Nos. h19-gyōko-119 and h19-gyōko-151, 2009 WLJP CA05126001 (Tokyo High Ct., 12 May 2009) (Westlaw Japan), *aff'd* Nos. h21-gyōtsu-245 and h21-gyōhi-310 (Sup. Ct., 10 December 2009) (resulting in a recovery of 4.4 billion yen, to which a settlement with the other defendants added 5.3 billion yen); *Residents of Yokohama City v. JFE Engineering K.K. et al.*, No. h12-gyōko-34, 2006 WLJP CA06219003 (Yokohama District Ct., 21 June 2006) (Westlaw Japan), *aff'd* No. h18-gyōko-191 and h18-gyōko-240, 2008 WLJP CA03189005 (Tokyo High Ct., 18 March 2008) (Westlaw Japan), *aff'd* unreported (Sup. Ct., 23 April 2009) (resulting in a recovery of three billion yen).

⁸² Information on settlements was obtained through the JFTC's reporter, newspaper articles, the websites of parties and amounts mentioned in *Matsushita & Chiteki Zaisan Kenkyūsho* [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 18-30. We excluded the settlement between Intel and AMD, which resulted in an extremely large recovery for AMD of 1.25 billion dollar. This settlement ended two cases brought by AMD against Intel before the Japanese courts, but it settled many other cases as well, including the litigation brought by AMD against Intel in U.S. District Court in Delaware. Hence, the settlement amount is many times the amount claimed before the Tokyo courts. Since the amount of the claim in the Delaware case is unknown, it is impossible to apportion the settlement money to each case.

underestimate the total recovery for plaintiffs. The cases were assigned to the year in which the settlement was concluded or the year in which the final judgment was rendered.⁸³

Graph 4 - Public v. Private: Comparison of Damages and JFTC Surcharges



On the public enforcement side, the figures in graph 4 represent the penalties imposed on infringers by the JFTC, i.e. the so-called surcharges that are calculated as a percentage of the firm's sales of the relevant product. Antitrust violations can also be criminally prosecuted in Japan. Although only the most flagrant violations are prosecuted and few cases are brought – typically one per year – criminal sanctions are likely to have a significant deterrent effect as well, although this cannot be quantified in this context.

The comparison with the penalties imposed by the JFTC demonstrates that, in some years, the damages awarded were relatively significant. In 2002 and 2003, the damages awarded were at approximately the same level as the penalties. Hence, the development of private enforcement contributed to deterrence by increasing the overall level of the expected sanction and, in some years, its potential deterrent effect was equal to that of the JFTC's penalties. In recent years, those penalties have greatly increased and dwarfed the overall level of damages awards, as the JFTC has increased its enforcement and a 2005 amendment increased the level of penalties.⁸⁴ However, the aggregate amount of

⁸³ If the settlement was spread over several years, for instance because some defendants settled earlier than others, or if there was a settlement for some defendants and a judgment for others, the year of the final settlement or judgment was taken as the relevant year.

⁸⁴ Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu wo kaisei suru hōritsu [Act to Partially Amend the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 35 of 2005; no English translation of this amendment is available but an English translation of the consolidated version of the Antimonopoly Act is available at http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/amended_ama09.pdf (version as of January 2012).

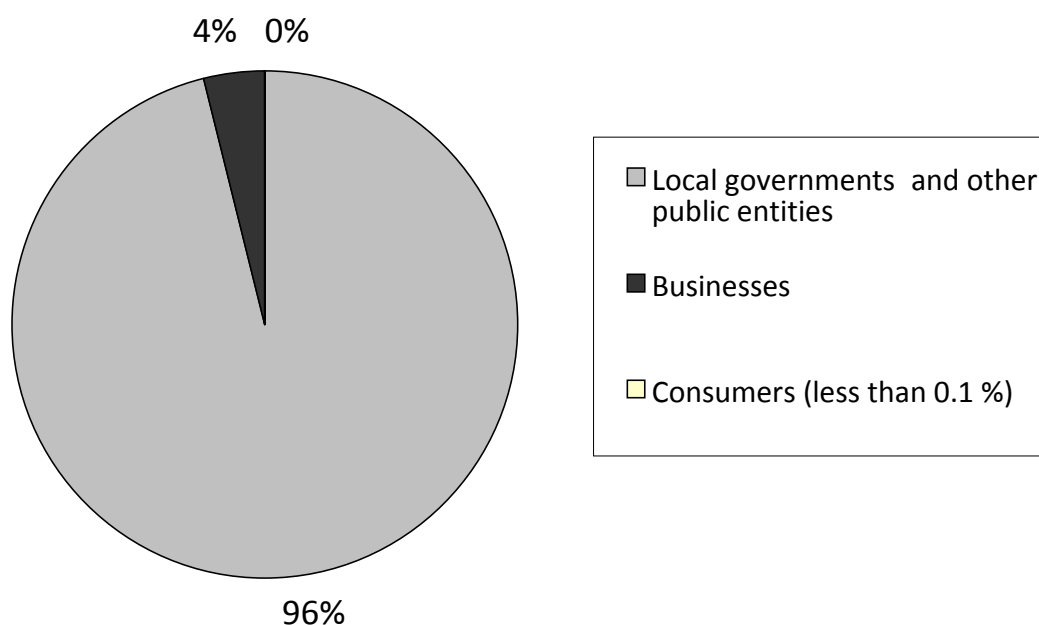
damages awarded in 2009 was still significant. Hence, private enforcement clearly mattered in terms of monetary deterrence, although, as we will see in the next section, almost all of these monetary sanctions were imposed in bid-rigging cases, brought by public entities.

9. COMPENSATORY EFFECT

Apart from its contribution to enhancing deterrence, private antitrust litigation is also, or – depending on one’s viewpoint – primarily a means of redress for those harmed by antitrust violations: consumers, businesses and also public entities, such as local governments or government agencies that have overpaid for goods or services they procured. In Japan, the latter group has been the beneficiary of the lion’s share of antitrust damage recoveries, as shown by graph 5.

Of the approximately sixty billion yen recovered by plaintiffs through final damages awards and known settlements⁸⁵, 96 percent went to public entities. All of these recoveries related to bid-rigging. The public entities that recovered damages include local governments, government agencies and the United States, which has recovered substantial amounts for bid-rigging for works at its military bases in Japan.

Graph 5 - Recovery by Type of Plaintiff



⁸⁵ For some minor settlements, data was not available, so the actual amount is higher, but not by much. In addition, there have been some significant judgments and settlements recently (including a 8.4 billion yen damages award rendered by the Tokyo High Court in a case brought by Japan against oil companies that rigged bids for the delivery of jet fuel), but these have not become final yet and were therefore not included.

Only 4 percent of the total recovery went to businesses.⁸⁶ The recovery for consumers was less than 0.1 percent. Indeed, there have been only six damages actions brought by consumers. In four of those cases, the consumers recovered nothing⁸⁷ and in the other two cases, they settled for minor amounts.⁸⁸

10. ASSESSMENT: THE ROLE OF PRIVATE ANTITRUST LITIGATION IN JAPAN

Private antitrust litigation has evolved from virtual non-existence to a level where around a dozen new cases are filed each year.⁸⁹ Through these cases, antitrust plaintiffs have recovered tens of billions of yen in damages (hundreds of millions of dollars or euros).⁹⁰ In some years, the total amount of damages recovered was equal to the penalties imposed by the JFTC.⁹¹ Clearly, private antitrust litigation has grown in importance and scope. This study has charted this remarkable evolution and analyzed to what extent various forms of private antitrust litigation, such as damages actions, residents' lawsuits and actions for injunctive relief, have been successful in increasing deterrence and providing compensation.⁹² The results greatly varied depending on the mechanism used and the type of anticompetitive conduct at issue.

It is difficult to encapsulate this multicoloured experience in a single catchphrase but if an overall assessment nonetheless has to be made, the conclusion would have to be that private antitrust litigation in Japan still remains of limited significance in deterring antitrust violations and providing compensation to those harmed.

⁸⁶ The largest component of the aggregate amount recovered by businesses is a recent settlement between Usen K.K. and Kyanshisutemu K.K. for two billion yen (USEN K.K. v. K.K. Kyanshisutemu, 55 SHINKETSUSHŪ 1029 (Tokyo District Ct., 10 December 2008), *appealed* unreported (Tokyo High Ct., settled 29 July 2010).

⁸⁷ Ōkawa v. Matsushita Denki Sangyō K.K., 863 HANREI JIHŌ 20 (Tokyo High Ct., 19 September 1977); Kai v. Nihon sekiryū K.K., 41(5) MINSHŪ 879 (Tokyo High Ct., 17 July 1981), *aff'd* 41(5) MINSHŪ 785 (Sup. Ct., 2 July 1987); Satō v. Sekiryū renmei, 43(11) MINSHŪ 1340 (Yamagata District Ct., 31 March 1981), *rev'd* 43(11) MINSHŪ 1539 (Sendai High Ct., 26 March 1985), *rev'd sub nom.* Nihon sekiryū K.K., v. Satō 43(11) MINSHŪ 1259 (Sup. Ct., 8 December 1989); X v. Y., unreported (Chiba District Ct., Matsudo Branch, settled 5 November 1996), described in Matsushita & Chiteki Zaisan Kenkyūsho [Institute of Intellectual Property] (eds), *Kyōsō kankyō seibi no tame no minjiteki kyūsai* [Civil Redress To Maintain a Competitive Environment], Tokyo, Shōji hōmu kenkyūkai, 1997, 24 (settlement but without any monetary payment). Arguably, there is one other case: X v. Arueko K.K., 52 SHINKETSUSHŪ 902 (Okayama District Ct., 21 December 2005), *aff'd* 53 SHINKETSUSHŪ 1059 (Hiroshima High Ct., Okayama Branch, 21 December 2006) (consumers seeking an injunction to obtain a wider choice of companies responsible for cleaning septic tanks also sought damages, although the damages claim was only very indirectly based on a violation of antitrust law).

⁸⁸ Noriko Miyazaki v. Nihon sekiryū K.K., 28 SHINKETSUSHŪ 188, at 195 (Tokyo High Ct., settled 2 July 1981) (nine million yen settlement); Tanaka et al. v. Kyoto jōhō jidōsha kyōkai et al., 545 HANREI TAIMUZU 100, 103 (Kyoto District Ct., settled 30 November 1984) (payment of 109,490 yen to consumers).

⁸⁹ See part 3 (chart with number of filings per year) and part 4 (chart with number of filings per year from 1990 to 2010).

⁹⁰ See part 8 (chart with amounts recovered per year).

⁹¹ See *id.* (JFTC penalties and damages at approximately the same level in 2002 and 2003).

⁹² This article has focused on private antitrust litigation's contribution to deterrence and compensation. Private antitrust litigation may also contribute to the development of antitrust law but the assessment of that contribution has been left for another day.

First, the successful cases and large damages award have been very much concentrated in one area: bid-rigging. In other areas, private lawsuits have done little to deter violations and have rarely compensated victims. The JFTC regularly uncovers price-fixing cartels, but no private actions have followed⁹³, nor have any major stand-alone actions been brought with respect to price-fixing. Likewise, cases challenging monopolistic conduct have also been relatively scarce and have rarely resulted in substantial recoveries.⁹⁴

Second, most antitrust damages actions have been follow-on cases. Those cases did not contribute to the detection of violations but merely increased the sanction on infringers by imposing damages. Although, from a deterrence point of view, such an additional sanction is probably warranted because of Japan's relatively low level of public penalties,⁹⁵ it nonetheless means that private antitrust litigation has not played a significant role in detecting violations that public enforcers overlooked or had no resources to pursue.

Third, the main users and beneficiaries of private antitrust litigation have been local governments and government entities. By contrast, businesses have been much less successful in obtaining damages and consumers have recovered virtually nothing. Hence, private litigation has, somewhat paradoxically, mainly resulted in compensation for public entities, not private plaintiffs.

Admittedly, in assessing the role of private antitrust litigation in Japan, much depends on the eye of the beholder. Measured against American standards, the level of private antitrust litigation in Japan is insignificant. While around a dozen cases are filed each year in Japan, up to a thousand cases are filed in the U.S.⁹⁶ In a single recent class action in the U.S.⁹⁷ plaintiffs recovered a multiple of what Japanese plaintiffs have recovered in the entire post-war period.⁹⁸

⁹³ See note 47 for the rare exception, a case brought in the seventies.

⁹⁴ Two rare exceptions are *Nihon ei emu di K.K. [AMD Japan Co. Ltd.] v. Intel K.K.*, Nos. h17-wa-4 and h17-wa-13151 (Tokyo High Ct., settled 11 November 2009); *USEN K.K. v. K.K. Kyanshisutemu*, 55 SHINKETSUSHŪ 1029 (Tokyo District Ct., 10 December 2008), *appealed* unreported (Tokyo High Ct., settled 29 July 2010).

⁹⁵ The surcharges that the JFTC can impose range from 1 percent to 10 percent of the infringer's sales amount in the specific product or service to which the infringement relates (Antimonopoly Act, Art. 7-2(1)). The exact rate depends on the type of violation (cartels attract higher sanctions than certain types of monopolization and unfair trade practices) and type of infringer (small enterprises, among others, benefit from a lower rate). Criminal sanctions are also available but are rarely imposed.

⁹⁶ Sourcebook of Criminal Justice Statistics Online, Table 5.41.2010 <http://www.albany.edu/sourcebook/pdf/t5412010.pdf> (listing the number of antitrust cases filed in U.S. District Courts and indicating yearly filings of 1287 (2008), 792 (2009) and 523 (2010) in federal court alone). The U.S. economy and population is almost three times as large as Japan's but even if we account for this difference, the contrast remains enormous.

⁹⁷ *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (class action resulting in settlement of over 3.3 billion dollars).

⁹⁸ Until present, plaintiffs in Japan recovered an estimated 60 billion yen (around 790 million dollars) through final judgments and settlements.

By contrast, compared to many jurisdictions in Europe, Japan's level of private antitrust litigation record looks rather normal and perhaps even surprisingly robust for a country with few lawyers⁹⁹ and few lawsuits per capita.¹⁰⁰ The almost 200 damages actions brought before Japanese courts compare rather well with the 104 damages actions identified for the whole of the European Union in a 2004 study,¹⁰¹ although that tally was underinclusive and obscures the fact that actions for injunctive relief play a much greater role than damages actions in many EU jurisdictions.¹⁰² A study of private antitrust litigation in the UK, which covered not just damages actions but all kinds of competition law cases, found ninety antitrust cases in which judgments had been rendered in the period up to 2004¹⁰³ and an additional twenty-seven cases from 2005 until 2008.¹⁰⁴ Private enforcement in Japan appears to be at a similar level of development and practice with over 200 antitrust damages and injunction cases in which judgments were rendered, but with a population and economy that is more than twice as large as the UK's. Ultimately, however, these comparisons corroborate the overall conclusion that, as in most European jurisdictions, private antitrust litigation does not, as yet, play a crucial role in deterring antitrust violations and compensating consumers and businesses harmed by those violations.

⁹⁹ Japan has 23 lawyers per 100,000 inhabitants. The average for the EU is 120. By contrast, the U.S. has around 390 lawyers per 100,000 inhabitants. For Japan: own calculation, based on the following data: population of 125.77 million (October 2010) and 30,000 lawyers. For the EU: see European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2010 (Data 2008): Efficiency and Quality of Justice* (Council of Europe, 2010), p. 237. For the U.S.: own calculation, based on the following data: population of 307 million (July 2009) and 1.2 million lawyers (ABA data, 2010).

¹⁰⁰ Wollschläger, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Culture in the Light of Judicial Statistics', in Baum (ed), *Japan: Economic Success and Legal System*, Berlin, Walter de Gruyter, 1997, at 95.

¹⁰¹ Waelbroeck, et al., 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report' (2004) 100-101. Often, this study is cited as finding only sixty cases. However, that is the number of judged cases identified and mentioned in the initial paragraph of the report. On pages 100-101 of the report, a more complete picture is given. The table on those pages shows 104 damages actions in total.

¹⁰² See, e.g., for Germany: Peyer, *Myths and Untold Stories – Private Antitrust Enforcement in Germany*, 48, 50, 72 (U. of East Anglia – Centre for Competition Policy Working Paper, Paper No. 10-12, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695 ('injunctions are widely and successfully used in antitrust cases in Germany').

¹⁰³ Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004: Part 1', (2006) 27(5) *Eur. Competition L. Rev.* 244.

¹⁰⁴ Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases 2005-2008 – Part I', (2009) *Global Competition Litig. Rev.* 95.

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Beyond the White Paper: Rethinking the Commission's Proposal on Private
Antitrust Litigation*Jocelyn G Delatre**

This paper provides a comparative study of group actions in existence in a number of Member States, with a particular emphasis on the Danish, Portuguese, English, French and Dutch experience, comparing the different approaches taken and contrasting them with the propositions contained in the European Commission's White Paper on Damages Actions for Breach of Antitrust law and Green Paper on Consumer Collective Redress. It will focus on the way these procedures function, on the choices the jurisdictions have made and the issues at the heart of the debate. The case will be made that the opt-out group action model, based on the US class action has not been given sufficient consideration in the White Paper and the documents accompanying it, and has been dismissed, not because it was not the right model for the European Union, or because of its inherent defects, but for political reasons. To that end, focus will be placed on the European Commission's White Paper with a snapshot analysis of the differences and similarities between these experiences. This paper will show that the opt-out model is already present in various jurisdictions in Europe, and through a comparative study of opt-in and opt-out models of collective actions in Europe, will attempt to demonstrate that not only is the opt-out model effective, it may very well be superior in various ways to the models considered in the White Paper.

INTRODUCTION

Class actions in competition law are common in the United States.¹ However, they are scarce in the European Union, where private enforcement has traditionally been overshadowed by a centralised public enforcement system, whether at national or European level. Yet, in the last two decades, a number of Member States have adopted legislation to allow for class actions. Such legislation has generally been enacted with a view to allowing consumers to better defend their rights. It may however also be seen as a means for promoting the private enforcement of law, whether it be consumer law or competition law. In 2008, the European Commission published a White Paper on Damages Action for Breach of EC Antitrust Rules² which suggested the introduction of collective action procedures in the Union. It makes the case for an effective system of private enforcement by means of damages actions.³ The Commission insisted that

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¹ RH Lande, 'Benefits of Private Enforcement: Empirical Background' in A Foer and J Cuneo (eds), *The International Handbook of Private Enforcement of Competition Law* (Northampton, Edward Elgar, 2010) 4; TS Longman and J Ostoyich, 'US Private Enforcement' (2011) *The Antitrust Review of the Americas*.

² Commission, 'On Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM (2008) 165 Final.

³ *Ibid*, 4.

the policy choices proposed in its White Paper consisted of balanced measures that were 'rooted in European legal culture and traditions.'⁴

This paper argues that in fact, the Commission's proposal,⁵ by focusing on the dichotomy of group/representative action and rejecting the notion of an opt-out model through fear of a US-style class action, ignored the experience of a number of European jurisdictions in this area. A number of Member States have introduced actions which are radically different from the models proposed by the White Paper, while others have successfully introduced opt-out group action procedures which are closely modelled on the US class action. At the same time, it ignored the less than impressive track record of other Member States which had already introduced similar procedures to those recommended by the White Paper.

The Commission proposed that introducing an opt-in group action and, conjunctly, a representative action was the option which best adhered to European legal culture and tradition. Therefore, since this prevailing European experience is the basis for that policy choice, we need to look at the Member States which have introduced an opt-in group action and/or a representative action to assess how they have fared compared to those Member States which elected to introduce another type of procedure on the basis of criteria which were set by the Commission's White paper.

The opt-out model has been the subject of considerable attention during the public consultation held by the Commission on the topic of a coherent approach to collective redress.⁶ As explained by Judge Jones in his contribution to the public hearing on collective redress held by the Commission on 5 April 2011,⁷ the opt-out system presents undeniable advantages and must be examined, not from the perspective of American class action litigation, but from the perspective of European experience, with a view to devising a European mechanism for collective redress that will ensure access to justice and compensation, but which will present acceptable safeguards to prevent the excesses that have repeatedly been attributed to the US model.

To do so, this paper will focus on a number of Member States which have chosen to introduce, in one way or another, an opt-out group or representative action, namely Portugal, Denmark and the Netherlands. As a point of comparison, other Member States which have chosen an opt-in mechanism of collective redress, such as the UK and France, will also be considered. This examination of national collective procedures is intended to give a snapshot of development at national level in the area of collective redress, with a view to putting the Commission's proposal into perspective, and perhaps to rehabilitate the opt-out class action model, which appears to have suffered a beating it perhaps did not deserve, so it may be properly and fairly considered as a

⁴ Ibid.

⁵ Ibid, 4.

⁶ See Commission (EU) Public Hearing on Collective Redress, 5 April 2011. Recording of the sessions of the public hearing are available on the Commission's website at <http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html>.

⁷ Ibid.

viable solution when the Commission takes its next steps in its approach to collective redress.⁸

I. REVIEWING THE WHITE PAPER'S PROPOSALS ON DAMAGES ACTIONS

A. Objectives of the White Paper

The stated objectives of the White Paper on Damages Actions for Breach of EC Antitrust Rules, broadly interpreted, are threefold. The first objective, which the Commission considered as the primary objective of the White Paper, was to ensure that victims of EU competition law infringements would be compensated fully. It aimed to achieve this by proposing measures which would ensure those victims would have access to effective redress mechanisms.⁹ Arguably, there are two components to this objective: procuring an effective redress mechanism and ensuring that victims are compensated fully. Although closely linked, these two objectives are not necessarily mutually inclusive and should therefore be considered separately.¹⁰

According to the Commission, corrective justice is the main goal to be achieved by introducing collective litigation procedures. If concerns over enforcement and deterrence are later expressed by the White Paper, they do not predominate. In fact, they are merely acknowledged in passing, and are not considered an objective – even a secondary one – by the White Paper.¹¹ The second stated objective of the White Paper adopts a somewhat more pragmatic approach. The Commission assures that it:

‘followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach. The policy choices proposed ... consist of *balanced measures* that are rooted in *European legal culture and traditions*.’¹²

By referring to ‘balanced measures’ and ‘European legal culture and traditions’, two concepts which it has yet to define, one can clearly read the Commission’s implicit rejection of the US class action model and of what is now commonly, and quietly, referred to as its ‘excesses’. This could arguably be construed as a discrete acknowledgement of the unfavourable responses found within the public consultation launched by the Commission prior to the publication of the White Paper.¹³ Rejection of

⁸ ‘Towards a Coherent European Approach to Collective Redress: Next Steps’ Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli SEC(2010) 1192 OJ 1932, 5 October 2010, available at <<http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>>.

⁹ White Paper, op cit, n 2, 3.

¹⁰ SMC Gibbons, ‘Group Litigation, Class Actions and Lord Woolf’s Three Objectives - A Critical Analysis’ (2008) 27 CJK 208.

¹¹ White Paper, op cit, n 2, 3.

¹² Ibid.

¹³ See for example MEDEF, ‘Réponse du MEDEF au Livre Vert sur les Actions en Dommages-Intérêts pour infraction aux règles communautaires sur les ententes et abus de positions dominantes’, 3; CCIP, ‘les Actions en Dommages-Intérêts en matière de pratiques anticoncurrentielles – réaction de la CCIP’, 18; AFEC, ‘Réponse de l’AFEC au Livre Vert actions en dommages-intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante’, 16; CEA, ‘Damages Actions for Breach of the EC

the US Class action was further confirmed by the Commission in the Joint Information Note¹⁴ which preceded the consultation on Collective Redress which ended in April 2011. The note insisted that the Commission was 'firmly opposed to introducing a class action along the US model into the EU.'¹⁵

The impact assessment¹⁶ of the proposed policies was carried out by assessing the capacity of each policy option to satisfy a number of specific objectives.¹⁷ These objectives are defined in more detail than those referred to in the White Paper. The objectives are: providing full compensation for victims; increasing deterrence, enforcement and compliance; guaranteeing effective access to justice for all victims; ensuring appropriate and efficient use of the judicial system; and finally, establishing a level playing field and legal certainty for businesses. The opt-out procedures available in Europe must be assessed, independently from other mechanisms, and contrasted with other opt-in procedures on the basis of these criteria.

B. Proposals of the Commission's White Paper

In its White Paper, the Commission suggests the introduction of a bundle of measures. It first suggests the introduction of two procedures: an opt-in collective action and a representative action led by consumers' associations.¹⁸ The proposal also advocates a minimum level of disclosure *inter partes*. It recommends that access to evidence be based on fact pleading and subject to strict judicial control of the plausibility of the claim. The claimant would have to present all the facts and means of evidence available to him. These facts should show plausible grounds to believe that the claim is serious. The claimant should then demonstrate to the court that there is no other reasonable way to obtain the requested evidence, and that such disclosure is relevant, necessary and proportionate.¹⁹

The Commission also recommends that final decisions taken on the basis of Articles 101 and 102 TFEU by National Competition Authorities and the Commission be binding on follow-on actions, once all appeal avenues have been exhausted.²⁰ It also advocates strict liability for damages caused by the infringement of Articles 101 and 102 TFEU, unless the infringer can demonstrate the existence of an excusable error.²¹

Antitrust Rules – CEA Response to the Green Paper', 3, available on the Commission's website at <http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html>.

¹⁴ Joint Information Note, op cit, n 8.

¹⁵ Ibid, 6.

¹⁶ White Paper Impact Study 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' DG COMP/2006/A3/012.

¹⁷ Ibid, 23-25.

¹⁸ White Paper, op cit, n 2, 4.

¹⁹ Ibid, 5.

²⁰ Ibid, 5-6.

²¹ Ibid, 6.

As regards damages calculation, it is indicated in the White Paper that the Commission intends to draw up a non-binding, guiding framework for the quantification of damages in antitrust cases.²²

On the question of passed-on damage, the Commission suggests that defendants should be afforded the possibility of invoking the passing-on defence against a claim for compensation for overcharge, but also that a rebuttable presumption of passed-on illegal overcharge should be established, by which the damage is presumed to have been passed-on in its entirety unless proven otherwise.²³ It finally recommends a limitation period of 2 years to bring a follow-on action, starting from the date of the infringement decision.²⁴

C. Consideration and Rejection of the Opt-out Model by the Commission

1. The Op-out Model of Policy Option 1

The White Paper impact assessment suggested 5 different policy options for consideration.²⁵ These options ranged from Option 1 suggesting bold legislative measures which would maximise the facilitation of claims and incentives for victims,²⁶ to Option 5, which in short, suggested the Commission should refrain from taking any action with regards to antitrust damages action.²⁷

The only policy which considered the opt-out model was the first one. It suggested setting strong incentives for claimants to bring damages action, such as making double damages available, and providing an ‘opt-out’ class action, through which a small number of victims would be able to claim for the entire group they represent, with the exception of victims who would expressly decide not to be included.²⁸

It recommended introducing double damages for all types of infringements of Articles 101 and 102 TFEU as an added incentive for consumers, and mandatory one-way fee shifting, providing that the claimant would never be liable for the defendant’s costs, except in cases of frivolous or vexatious suits. It also allows for broad access to evidence through rules of disclosure, allowing for any and all relevant documents to be produced by the defendant, on demand from the claimant. This Policy Option excludes the use of the passing-on defence. It allows, however, indirect purchasers to file a claim when they demonstrate causality between the harm suffered and the infringement.

²² This framework has since been drawn up in a document entitled ‘Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts’, elaborated by Oxera and a team led by AP Komninos, and published in December 2009, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf>.

²³ White Paper, op cit, n 2, 7-8.

²⁴ Ibid, 8.

²⁵ Commission, ‘Commission Staff Working Paper Document - Accompanying Document the White Paper on Damages Actions for Breach of EC Antitrust Rules: Impact Assessment Report’ {COM(2008) 165 final} {SEC(2008) 404} {SEC(2008) 406}, 28.

²⁶ Ibid, 29.

²⁷ Ibid, 32.

²⁸ Ibid, 29-30.

Policy Option 1 suggests rendering the findings of any NCA in the EU binding on civil courts and imposing a strict liability rule for infringement of EU competition law once it has been established. However, contrary to the proposal contained in the White Paper, the option suggests a limitation period of 20 years, with a shorter period of five years if the plaintiff could reasonably have been aware of his right to compensation.

2. Understanding the Rationale for the Rejection of Policy Option 1

The White Paper, by expressly proposing an opt-in model, implicitly rejected the opt-out option adopted by Portugal, and, to a certain extent, by Norway and Denmark. The White Paper, in essence, opted for the second Policy Option set out in the Impact Assessment,²⁹ which kept the idea of the availability of double damages but suggested the creation of an opt-in class action, together with that of a representative action.

The White Paper does not give any indications as to the reasons which motivated this choice. However, the staff working paper³⁰ briefly addresses the issue, weighing the pros and cons of the opt-in versus opt-out solution. It explains that:

‘An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim’s harm. However, the analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level.’³¹

The Impact Assessment Report, while considering Policy Option 1 – of which an opt-out class action was an essential component – dismissed this mechanism by referring to ‘certain negative effects of opt-out class actions’ without providing further explanation.³² The Impact Assessment report further rejected all of Policy Option 1, declaring that:

²⁹ Ibid, 30-31.

³⁰ Commission, ‘Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules’ COM(2008) (Staff Working Paper) 165 final, available at <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 30 November 2011.

³¹ Ibid, 20-21.

³² Impact Assessment Report, op cit, n 25, 52.

‘the Impact Study concludes that this scenario could lead to development of a litigation culture whose benefits, including in terms of its contribution to macro-economic variables, appear questionable, even compared with the *status quo*.’³³

It is submitted that the debate on the opt-out class action model was not only evaded by the White Paper, as the opt-out model was never considered independently from the Policy Option 1 package, but effectively shunned and prevented through a vague reference to the allegedly inherent and undeniable ‘negative effects’³⁴ and ‘excesses’³⁵ it would bring in its wake, despite the fact that these alleged consequences were never described.

There are thus two conflicting concerns here. The Commission notes that the opt-out model could potentially better serve the notion of corrective justice, but yet rejects this option out of concern over the fact that an opt-out model will appear too aggressive compared to traditional litigation. This is interesting in two ways. First of all, the option was rejected because, in short, it would be difficult to convince Member States to adopt such an aggressive and risky procedure, not because the alternate opt-in model better serves the objectives set by the Commission. On the contrary, the Commission admits the opt-out model would be better in terms of corrective justice. Secondly, this decision was based on theoretical concerns over corrective justice, which is not the approach adopted by Member States which have introduced an opt-out model. Denmark and Norway, in particular, have adopted an opt-out model for purely practical issues because an opt-in model requiring complainants to expressly register was deemed impractical.³⁶ This notion is simply ignored by the White Paper. The rejection of the opt-out model by the Commission may have been understandable had it been based on a study of the US experience and its potential for abuse. However, the concern here is that the Commission did not consider the issue at all. Any criticism or debate over alleged excesses and negative effects concerned Policy Option 1 as a package.³⁷ The only document which considers the opt-in/opt-out debate is the impact study. It covers the topic in three pages of what can arguably be regarded as a shopping list of issues and concerns, shows a complete lack of empirical data and provides no analysis of any kind.³⁸

This has led some commentators to argue that the White Paper’s arguments against the opt-out mechanism are contradicted by the national experiences of a number of

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid, 21.

³⁶ See K Viitanen, ‘Enforcement of Consumers’ Collective Interests by Regulatory Agencies in the Nordic Countries’ in W van Boom and M Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Groningen, Europa Law Publishing, 2007) 13; See also E Werlauff, ‘Class Actions in Denmark – From 2008’ (The Globalisation of Class Actions Conference, Oxford, December 2007) available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Demark_National_Report.pdf> accessed 30 November 2011.

³⁷ Impact Assessment Report, op cit, n 25, 29-30, 38-39.

³⁸ White Paper Impact Study, op cit, n 16, 286-288.

jurisdictions³⁹, namely Portugal, The Netherlands, Norway and Denmark. Gaudet also argues that 'On the topic of opt-outs, the White Paper may have been out-dated as soon as it was released.'⁴⁰ This conclusion is debatable. The conclusion that can be drawn, if any, from national developments on collective redress concerning the issue of the opt-out model is that it is mostly discarded, and when it is not, it is expressly limited in scope.⁴¹ Furthermore, in some cases, the opt-out option appears out of the question. French law, for example, prohibits actions by proxy in which the claimant is not identified, under the principle 'nul ne plaide par procureur'.⁴² This has led commentators to suggest that if the introduction of an opt-in group action in which claimants are identified would be possible under French law, an opt-out procedure would not.⁴³ Therefore, the White Paper did not ignore the experience of Member States which adopted an opt-out approach, but, arguably, gave precedence to the experience of Member States which did not.

Nevertheless, the Commission, at some point during the drafting of the White Paper, appears to have lost track of its own objectives – effective enforcement and corrective justice – and substituted them for the concern which has been voiced over alleged excesses. It should be recalled that the objective set in the White Paper was to ensure that 'all victims of infringements of EU competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered.'⁴⁴ The question thus becomes: is the creation of an opt-in group action and a representative action procedure the best way to ensure that all victims of these infringements will be fully compensated?

It is submitted that, arguably, the compensation of all victims of EU competition law infringement is impossible. The concern is therefore to ensure that as many victims as possible will be compensated for the harm they suffered. In this context, the choice of which type of procedure should be developed – opt-in or opt-out – is fundamental. The question which should thus be asked goes to which procedures will ensure the largest participation, i.e. the highest number of claimants.

³⁹ R Gaudet, 'Turning a Blind Eye: The Commission's Rejection of Opt-Out Class Actions Overlooks Swedish, Norwegian, Danish and Dutch Experience' (2008) 30(3) ECLR 107, 116.

⁴⁰ Ibid, 116-117.

⁴¹ Portugal may appear as an exception, but in reality, since the entire group action is limited in scope, the opt-out option need not be specifically limited.

⁴² Cass. Civ. 2e, 21 November 2001. See F Caballero, 'Plaidons par procureur! De l'archaïsme procédural à l'action de groupe', RTDciv 1985, 247.

⁴³ See V Magnier, 'Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters – Country Report France' (The Globalisation of Class Actions Conference, Oxford, December 2007) available at <http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf> accessed 30 November 2011; See also Former French Chief Justice G Canivet, 'Des Obstacles Juridiques à L'action de Groupe' paper delivered at the conference on 10 November 2005 on the topic 'Pour de Véritables Actions de Groupe: un accès efficace et démocratique à la justice'.

⁴⁴ White Paper, op cit, n 2, 2-3.

II. THE EUROPEAN EXPERIENCE WITH COLLECTIVE REDRESS

A. Redefining the Notion of European Experience

As explained above, the White paper on Damages Actions for Breach of EC Antitrust Rules proposes a policy which is rooted in European legal culture and tradition. This was one of the main purposes of the public consultation on collective redress launched in October 2010. The joint information note which launched the consultation insists that ‘The objective is to ensure from the outset that any further proposal in this field... fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law.’⁴⁵

The reality is that, although some similarities exist, a close examination of the collective redress mechanisms available in Europe shows a complete lack of discernable pattern on which to base a proposal. There is a lack of homogeneity in procedural law and the widest range of mechanisms available to European consumers. Those mechanisms range from the far reaching Portuguese popular action, the closest equivalent in Europe to the US class action, to mechanisms with a strictly limited scope, whether procedurally or substantively, such as the Dutch and German procedure. These last two procedures may also be seen as atypical, in the sense that they very different from the models by the Commission’s White Paper, which limited itself to suggesting an opt-in group action and a representative action. Furthermore, the European landscape in the area of collective redress is not frozen, and new developments should always be expected. A recent example is that of the Italian class action, available to consumers since 1 January 2010.⁴⁶ Beyond the fact that there is such a diversity of collective redress mechanisms available in Europe, there are still a number of countries which have not yet introduced such a mechanism, have no intention to, and have yet to accept the very notion of collective redress. This reality is well known by the Commission which, in its joint information note, admitted that mechanisms to compensate groups of victims varied greatly in the EU, and that every Member State’s compensatory redress system was unique.⁴⁷

In the words of the Ashurst study on the condition of claims for damages in case of infringement of EU Competition Law:

‘The level of diversity in this area means that any attempt at categorisation looks very much like shoe-horning and is moreover often inadequate due to the non-equivalence of terms in the different Community languages.’⁴⁸

It is submitted that, in reality, this lack of homogeneity, the presence of this patchwork of solutions in which most researchers struggle to find a discernable pattern and identify a trend, and the overall novelty of these developments exclude the existence of

⁴⁵ Joint Information Note, *op cit*, n 8, 5.

⁴⁶ Article 140-*bis* Italian Consumer Code.

⁴⁷ Joint Information Note, *op cit*, n 8, 4.

⁴⁸ D Waelbroeck, D Slater and G Even-Shoshan, ‘Comparative Report’ in *Study on the condition of claims for damages in case of Infringement of EC Competition Law* by Ashurst, 31 August 2004, 2.

a European legal tradition in the area. It must be admitted that, if no European-wide pattern is detectable, there may be, in some cases, regional patterns. The best example of such a pattern can be found in the Nordic experience. Norway, Denmark and Finland have largely been influenced by their Swedish neighbour when elaborating their own collective procedure, to such a point that it is possible to talk of a Nordic Model⁴⁹ of collective redress. This pattern does not extend, however, to the rest of Europe and other countries appear to have followed their own path with little or no concern for their neighbours' experience. Therefore, at best, one may refer to a European experience in collective redress, not to a legal tradition, of which none is discernable.

It is also submitted that the only discernable trend or pattern, if any, in this European experience is the presence of mechanisms aimed at preventing any potential tendency to misuse collective redress mechanisms by bringing groundless actions or frivolous claims. The first mechanism is what Fairgrieve and Howells define as 'gate-keepers'⁵⁰, whereby an entity, public or private, is put in place to counteract any potential tendency to misuse the procedure by bringing groundless actions. These gate-keepers can roughly be divided into two categories: public consumer ombudsmen, notably in the case of Nordic countries, but also England and Wales,⁵¹ and private consumer associations in the case of representative actions such as that of Italy and France.⁵² Another mechanism is the multi-phase procedure, such as the Danish approval stage and especially the German Test case procedure. As noted by Fairgrieve and Howells, these mechanisms all take radically different forms but all stem from the same concern over the misuse of the procedure.⁵³ This last aspect could qualify as proof of good planning on the part of Member States which, drawing useful conclusions from other countries' experience in collective actions, chose to prevent any overflow before it even happened. However, this could also be an indication that Member States are generally uncomfortable with, and somewhat afraid of, the procedure they created and insist on limiting its scope and potency. Thus, another aspect of collective redress in Europe appears to be that generally wherever a collective action has been put into place, it has systematically been restricted and limited in scope.

Nevertheless, it is impossible to readily exclude a model of collective redress on the ground that it would not be consistent with the European experience on the topic. Essentially every model of collective litigation may be found in Europe, and the somewhat controversial opt-out class action does not constitute an exception. If the procedures available in Europe take various shapes and forms, it can be argued that overall, most countries which have adopted a collective redress mechanism have chosen a mechanism which, in one way or another, requires claimants to come forward

⁴⁹ See K Viitanen, *op cit*, n 36; See also C Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford, Studies of the Oxford Institute of European and Comparative Law, 2009) 27-37.

⁵⁰ D Fairgrieve and G Howells, 'Collective Redress Procedures – European Debates' (2009) 58 *International and Comparative Justice Quarterly* 379, 400.

⁵¹ C Hodges, *op cit*, n 49, 16.

⁵² *Ibid*, 37-43.

⁵³ D Fairgrieve and G Howells, n 50, 401.

to affirm their right and join a proceeding.⁵⁴ This requirement is present in a large number of procedures in Europe and the opt-in model is thus a dominant one. However, it is not unique.

The opt-out mechanism is present – albeit in various forms – in four major European countries. It is as much part of this European experience as any other model. Therefore, there is no clear indication of what an ideal class action model could be in terms of compliance with the European experience, and therefore no indication that an opt-in model is more in line with this experience than an opt-out one. In any case, stating that opt-out class actions would not comply with European legal tradition is a groundless statement which is not empirically supported and represents an unwelcome academic shortcut to an important current debate.

B. Reviewing the Opt-out Mechanisms Available for Consideration in Europe

Four European countries have introduced four different types of opt-out actions, which must be studied in order to re-focus the debate on this European experience and dispel fears prompted by American litigation culture and experience.

1. The Portuguese Popular Action

(a) Mechanism

Portuguese legislation on group actions is viewed, in theory, as the most liberal in Europe.⁵⁵ There is only one collective redress mechanism in Portugal that may provide for damages as a remedy. It is not specifically directed at consumers, although consumer rights are one of the explicitly listed groups of interest to which the mechanism is addressed. The action is called ‘*acção popular*’, which translates as ‘popular action’ or ‘collective action’. It has been given an important place in Portuguese law, having been expressed as a right in the Portuguese Constitution in 1989.⁵⁶

The first stage of the procedure is the presentation of a petition to a court, which must respect the general requirements of the Portuguese Civil Code,⁵⁷ by providing information relating to the forum, the parties, the form of the procedure to be followed, the facts and legal arguments supporting the claim, the claim itself and its monetary value. There is no certification stage comparable to that of the US class action.⁵⁸

In the second stage, other parties which have an interest in the action are summoned to participate in the action – within a time frame determined by the court – through advertisements published in the media. Interested parties are invited either to join the

⁵⁴ C Hodges, n 49, 119.

⁵⁵ Ibid, 387.

⁵⁶ Constitutional Law 1/89 of July 8th 1989.

⁵⁷ Article 467, Portuguese Civil Code.

⁵⁸ T Arantes Fontes and João Pimentel, ‘The International Comparative Legal Guide to: Class & Group Actions 2011 – A practical cross-border insight into Class and Group Actions work’ Global Legal Group, Chapter 20.

action or to opt-out expressly. There is a presumption of participation in the group. That is to say that parties which have opted-in will be formally identified as parties to the action, but that potentially affected parties who chose to take no action will also be considered members of the group or class. Only the parties which availed of their right to opt-out of the action will not be considered members of the group. This right to opt-out is conserved by interested parties until the end of the period during which evidence will be collected.⁵⁹

Anyone may bring and lead the proceedings, whether they are individuals, associations or foundations defending specific and relevant interests, local authorities, the Public Prosecutor and the Directorate-General for Consumers.⁶⁰ As such, the action will either take the form of an opt-out group action or of an opt-out representative action, depending on the status of the class leader.

According to Antunes, the key issue here relates to the protection of diffuse interests and collective interests, which he defines as 'supra-individual' (i.e. above the individual), together with homogeneous individual (i.e. fragmented) interests or rights.⁶¹ These interests are dealt with through *res judicata*, binding all members of the class who have not expressly exercised their right to opt-out.⁶²

All types of damages are recoverable,⁶³ consumers being able to claim for material and non-material damages, as well as for compensation.⁶⁴ However, under Portuguese Law, punitive and exemplary damages, as well as double/treble damages, are not available.⁶⁵

(b) Cost

The cost depends on whether the action is successful or not. If the claimant wins, the 'loser pays' rule applies and the claimant is exempt from paying the court fees. If the action is unsuccessful, the claimant may be forced to pay a portion of the court fees, between 10% and 50%, at the court's discretion. In any case, the defendant is expected to pay the court fees regardless of the result.

Quota litis is prohibited by the Portuguese Bar Association and therefore conditional or contingency fees are not available. However, legal aid may be available, provided the plaintiff(s) demonstrate they are in a state of economic need.⁶⁶

⁵⁹ L. Tortell, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – Country Report Portugal', 6, available at <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html> accessed 30 November 2011.

⁶⁰ Article 52(3)(a) of the Portuguese Constitution; Article 2(1) of Law 83/95 – Participation and Popular Action Law.

⁶¹ HS Antunes, 'Class actions, Group Litigation and other forms of Collective Litigation (Portuguese Report)' (The Globalisation of Class Actions Conference, Oxford, December 2007) 6 <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf> accessed 30 November 2011.

⁶² Ibid.

⁶³ T Arantes Fontes and João Pimentel, *op cit*, n 58, 125.

⁶⁴ Ibid.

⁶⁵ Ibid.

(c) Feedback

According to Tortell,⁶⁷ the mechanism has been little used in practice.⁶⁸ She believes the reason for this is that the landscape of Portuguese consumer law is dominated by non-judicial and conciliatory mechanisms and bodies. In Tortell's opinion, the collective redress mechanism fills a void by attempting to provide a remedy for notoriously difficult mass cases, but admits that there are doubts as to whether it has achieved that aim in the best possible way.⁶⁹

Nevertheless, Tortell believes there are indications that it is becoming increasingly relevant, at least insofar as the understanding of the mechanism is increasing among the legal community. In Tortell's opinion, it appears that there has already been considerable development in the use of this procedure, which is still considered a relatively new procedure given that it was only introduced in 1995.⁷⁰

Tortell further argues that the introduction of this collective redress action appears to have resulted in a greater understanding of consumer law among lawyers and judges, as well as an enhanced role for the most important consumer organisation, DECO. Despite this, DECO appears to have remained a rather small organisation with limited resources. It follows that the use of the popular action mechanism rests on the dedicated time and effort of experienced lawyers. There appears to have been a shift in more recent years to an approach that prioritises the quality of legal representation, but the effectiveness of the organisation is still hampered by its general lack of resources. The existence of the mechanism also appears to have had an important impact in terms of the knowledge among companies of case law development and there is a general sense that these cases have had a degree of deterrent effect. Tortell concludes that:

‘The mechanism is potentially important, and has proven to be an interesting way of bringing cases that are likely to have otherwise occurred within the ordinary rules of procedure. Having said that, there have been an extremely small number of cases in total, and a number of them have been unsuccessful. Clearly there is a problem with the effectiveness of the mechanism. In particular, this seems to be associated with general factors to do with the Portuguese judicial system: its relative slowness, high cost and lack of predictability in comparison with the non-judicial solutions.’⁷¹

2. The Norwegian Representative Litigation

Nordic countries have been at the forefront of European developments in this field. The Swedish group action was introduced in 2003. Following this reform, group action legislation was introduced in Denmark⁷² and Finland.⁷³ The Swedish model, which was

⁶⁶ Ibid.

⁶⁷ L. Tortell, *op cit*, n 59.

⁶⁸ Ibid, 2.

⁶⁹ Ibid, 191.

⁷⁰ Ibid, 3.

⁷¹ Ibid.

⁷² Danish Class Action Act 2007.

the first to be introduced, has inspired the other Nordic reforms on group actions. Sweden, however, has chosen not to adopt an opt-out alternative. However, Denmark and Norway have chosen to add an opt-out alternative to the opt-in procedure.

Norway provided for opt-in and opt-out actions with the Norwegian Dispute Act.⁷⁴ A class action may be brought by or directed against a class in relation to disputes with an identical or substantially similar factual and legal basis, and which is approved by the court as a class action. The plaintiffs indicate whether they intend the action to be an opt-in or opt-out one. It is, however, ultimately up to the court to decide whether the opt-in or opt-out alternatives best suit the action. The court also has the option to reject both solutions, refuse to aggregate the claims altogether and order the lawsuit to proceed as individual claims.

The opt-in procedure is the principal mechanism, the opt-out solution is an alternative, available in specific circumstances in which individual court actions are not sensible, notably due to the fact that the claims involve amounts or interests that are so low it must be assumed that a vast majority of potential claimants would not have enough incentive to bring them as individual actions.

3. The Danish Group Action

The Danish Group action (*Gruppesøgsmål*) was instituted by an amendment to the Administration of Justice Act.⁷⁵ This procedure is, in principle, an opt-in group action. The Act has a solely procedural aspect and leaves rules on substantive matters unchanged. The group action may indeed be brought in three ways:

- i. by an individual, natural or legal person: that person must have a claim which is subject to the action, that is to say that the individual must be a member of the class;
- ii. by consumer associations, if the case falls within the purview of the association;
- iii. by a Public Authority: the action is brought by an independent body authorised by law to act as group representative. So far, only the Consumer Ombudsman has been authorised to act as group representative in cases which fall within the scope of his remit.

The action is introduced like a normal civil action. However, the writ, in addition to the information usually required, must also contain information pertaining to the group, its description, the way group members may be identified and notified, and a suggestion for a group representative.

As explained above, the Danish Group action is based on an opt-in model. The legislation, however, does allow for an opt-out approach, which may only be adopted following a court decision. The group representative will request that the group include all members which do not expressly opt-out of it. This option is restricted by two

⁷³ Act on Class Actions, *Ryhmäkannelaki*, 444/2007.

⁷⁴ Act Relating to Mediation and Procedure in Civil disputes, 17 June 2005, no. 90, effective January 2008.

⁷⁵ Chapter 23a (§§ 254 a-254 k) of the Administration of Justice Act, as amended by Act 181/2008 (effective from 1 January 2008).

conditions. First of all, it may only concern cases in which the action relates to claims of such a small amount, which cannot be expected to be furthered in individual proceedings.⁷⁶ Secondly, the opt-in action must be deemed an inefficient way of handling the group, in particular with regards to its size, the administration of which would require disproportionate resources.⁷⁷

On 1 January 2008, new rules governing group actions were introduced in Denmark, which introduced an approval stage somewhat similar to the US Class Action certification.⁷⁸ The court approval stage is designed to allow for the filtering-out of claims which are deemed unsuitable for the group action procedure,⁷⁹ thus aiming at diminishing the potential for abuse of the procedure.⁸⁰

If the action is approved by the court, the group members must be notified, and given the option to opt in or out. The form and substance of this notification is decided by the court on a case by case basis and can take the form of individual notices or public advertisement.

4. The Dutch Collective Settlement Procedure

One of the best-known collective redress procedures is the Dutch settlement mechanism.⁸¹ This procedure is rather unusual as it only deals with the settlement aspect of a multi-party claim. Two important points must be understood here: first, as far as the action is concerned, claimants are on their own. Individual claims will only be aggregated during the settlement phase. Second, as the procedure deals with settlement only, it appears that the Dutch legislator actually expects claimants to settle.⁸² Hodges explains that this has stemmed from a specific need to provide a mechanism for the court to deal with and resolve unusual cases by providing a way to bind as many people with similar claims as possible to a settlement reached by parties to a case settled on similar grounds.⁸³

The case from which this procedure emerged is called the DES Case.⁸⁴ In this case, a number of women brought an action in 1986 against 13 manufacturers of pharmaceutical products for harm caused by a drug linked with cervical cancer and other injuries. The court required that DES users register in order to preserve their rights. Within six weeks of the decision's publication, 18,000 people had registered (out of an estimated 440,000 potential victims). The pharmaceutical industry and its insurers

⁷⁶ C Hodges, *op cit*, n 49, 34.

⁷⁷ P Møgelvang-Hansen, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country Report Denmark' 1 August 2008, 4-5, available at <http://ec.europa.eu/consumers/redress_cons/da-country-report-final.pdf> accessed 30 November 2011.

⁷⁸ Act No 181 of 28 February 2007.

⁷⁹ D Fairgrieve and G Howells, *op cit*, n 50, 383.

⁸⁰ C Hodges, *op cit*, n 49, 28.

⁸¹ D Fairgrieve and G Howells, *op cit*, n 50, 388.

⁸² C Hodges, *op cit*, n 49, 70.

⁸³ *Ibid.*

⁸⁴ HR (October 1992, NJ 1994/535 (DES)).

initiated negotiations to reach a settlement, which was reached seven years later, in 1999, with the creation of a €35 million fund on the condition that the settlement be final, which implied that as many people as possible needed to be bound by the settlement if they ever were to be compensated. The existing law on collective redress at the time required victims to opt-in.⁸⁵ This was deemed unworkable. The Ministry of Justice thus introduced a bill containing an opt-out procedure which came into force in July 2005 and enabled this 20 year-long litigation to be settled.⁸⁶

The Act on Collective Settlement of Mass Damages 2005⁸⁷ provides for the court approval of collective settlements where a settlement has previously been reached between an infringing party and a claimant, an association or foundation, which must be sufficiently representative of the interests of those for the benefit of whom the agreement was concluded.⁸⁸ On the parties' request, the Amsterdam Court of Appeal declares the settlement fair and binding even on non-parties to the agreement, after reviewing whether the amount of compensation agreed is reasonable.⁸⁹ Following the court's approval, any individual entitled to compensation becomes party to the settlement, with the exception of those individuals who have expressly chosen to opt-out of it.

Compensation is awarded to claimants on the basis of the characteristics of the class/group of which they are a member and not on the basis of their personal characteristics.⁹⁰ Fairgrieve and Howells explain that this approach, named 'Damage Scheduling', was adopted in order to make it possible for a 'tailor-made' settlement to be reached.⁹¹ Any individual which has not opted-out is deemed to be bound to the settlement regardless of whether that person was even aware of the settlement at the time. This individual may nevertheless opt-out at a later time.⁹²

III. REVISITING THE WHITE PAPER'S FINDINGS

A. Reassessing the Respective Impacts of the Opt-in and Opt-out Models on Consumer Participation

In their book 'Nudge'⁹³, Thaler and Sunstein discuss and explain the way people make choices in life, and in particular, how they are influenced in making these choices. The authors refer in particular to the importance of what they call '*choice architects*', a person who has the responsibility for organising the context in which people make their

⁸⁵ Dutch Civil Code, Art 3:305 a-c.

⁸⁶ C Hodges, op cit, n 49, 70-71.

⁸⁷ Dutch Civil Code, Arts7:907-7:910of.

⁸⁸ C Hodges, op cit, n 49, 71.

⁸⁹ D Fairgrieve and G Howells, op cit, n 50, 388.

⁹⁰ Ibid.

⁹¹ Ibid, 389.

⁹² C Hodges, op cit, n 49, 71.

⁹³ RH Thaler and CR Sunstein, 'Nudge: Improving Decisions about Health, Wealth and Happiness' (Yale, Yale University Press, 2008).

decisions, which they refer to as choice architecture.⁹⁴ They argue that there is no such thing as a neutral design and that even small details may have a major impact on people's behaviour. Furthermore, that choice architects regularly use these small details to influence the decisions of others.⁹⁵ The less intrusive way to do so is by using what the authors refer to as a 'nudge', which they define as 'any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentive. To count as a mere nudge, the intervention must be easy and cheap to avoid.'⁹⁶

A class action mechanism can be viewed as such a 'choice architecture', in which opt-in or opt-out options are in fact 'nudges'. In the opt-in mechanism, the potential victim of an infringement is expected to actively join and potentially participate in the action, but is allowed not to, which implies remaining passive. This is called active-consent. It will require at least some, if not considerable, effort on the victim's part. The victim will therefore have to surmount a number of obstacles every step of the way, one of which is simply his or her own reluctance to participate in something as serious as a lawsuit. In the opt-out model, the potential victim is automatically opted-in, and is expected to remain passive – although nothing forbids him or her from taking a more active role in the action – but is authorised to expressly opt-out. This is called passive consent. In the former, action allows one to join the procedure, whereas in the latter, inaction allows one to remain part of the procedure.

The rate of passive consent is naturally higher than that of active consent. To illustrate this point Hensler and Rowe quote research carried out on parental behaviour towards school forms, comparing the result between parents who are asked to return a school form to authorise their child to take part in an activity (active consent) and those who are asked to sign a form saying they refuse to let their child participate, a lack of response in this case implying tacit acceptance (passive consent).⁹⁷ Participation rates are much higher under a passive-consent regime because, typically, relatively small numbers come forward to object.

The obvious incentive is always not to do anything, to remain passive. This is referred to as rational apathy. This potential for apathy was factored in by the White Paper which admitted that 'opt-out class actions and the various incentives [in Policy Option 1] lead to a large increase in number of victims compensated.'⁹⁸ This is because this mechanism feeds into that natural apathy, nudging it into passive consent.

The Danish opt-out alternative for small claims, for example, was introduced for this very reason. It specifically addresses those claims which are so small that they cannot objectively be expected to be brought in individual actions, because the risk of

⁹⁴ Ibid, 4.

⁹⁵ Ibid, 5.

⁹⁶ Ibid, 6.

⁹⁷ D Hensler and T Rowe, 'Beyond "It just ain't worth it": Alternative Strategies for Damages Class Action Reform' (2001) 64 *Law and Contemporary Problems* 137, 146.

⁹⁸ White Paper Impact Assessment Report, op cit, n 25, 38.

individual litigation is deemed to be disproportionate to the potential – uncertain – outcome of the action.⁹⁹

1. Lack of Attractiveness of the Opt-in Mechanism

The opt-in system may be perceived as eliminating the fear or reluctance of bringing an individual claim for victims. The idea that one is not alone may be comforting enough. Nevertheless, opting-in, requiring active consent, requires affirmative action. This need to opt-in can often appear difficult to surmount for victims, which some might even compare to that of bringing an individual claim. There may exist a number of compelling economic, psychological or social barriers preventing affirmative action being taken to opt-in.¹⁰⁰ This is particularly true with small claims, in which many victims consider the amount of damages awarded not worth overcoming these barriers,¹⁰¹ or simply not worth their time and effort.¹⁰²

This is the downside of the *in terrorem* effect of filing an opt-in class action. The opt-in mechanism allegedly acts as a deterrent against unmeritorious lawsuits, promotes meritorious claims and encourages defendants to contest unmeritorious ones.¹⁰³ In actual fact, this effect is so potent that it tends to backfire by deterring meritorious claims and complainants. In this particular context, the opt-in class action ceases to be neutral and actually becomes a deterrent rather than an incentive.

The benefit of the opt-in class action therefore is only truly felt when there is a widely shared perception that the alleged wrongdoing is significant and that the potential remedies are worth pursuing. This implies a more or less direct loss, of a substantial size. In these large claims, where rational apathy is very low, the incentive to join an action which already exists will be fuelled by the added incentive of the class action discussed above. In the case of small claims, however, there is very little incentive for victims to bring an action to begin with. The incentive of joining a suit will not overcome the rational apathy. On the contrary, it may very well fuel it and deter claimants.

These small claims are of particular interest from a regulatory point of view. They concern infringements which have created a loss which has been passed-on several times over, is fragmented and largely spread among economic operators and consumers. They typically involve a small harm caused to a large number of victims and can secure large benefits to the infringer.¹⁰⁴ In any case, they may be, and often are of substantial interest from a regulatory enforcement point of view, ensuring enforcement where a NCA might choose not to act. However, they are of very little interest to consumers from a financial or economic point of view and are typically extremely

⁹⁹ P Møgelvang-Hansen, *op cit*, n 77, 4-5.

¹⁰⁰ Leuven Study, 289.

¹⁰¹ *Ibid*, 31.

¹⁰² D Hensler and T Rowe, *op cit*, n 97, 141.

¹⁰³ White Paper Impact Study, *op cit*, n 16, 287.

¹⁰⁴ D Hensler and T Rowe, *op cit*, n 97, 146.

difficult to detect and prove. This is a situation which is expressed by a typically low participation in opt-in group and representative actions at large.

The European experience is further proof of this, as it shows the rate of participation to these types of actions is typically low. For example, in the case of *Altroconsumo v Parmalat* in Italy, 3,000 class members opted in, from a class of hundreds of thousands of investors. Another compelling example can be found in the Action in Joint Representation, an opt-in representative action, brought in France by *UFC-Que Choisir*, a consumer's association, against the three main French mobile providers *Orange France*, *SFR* (Vodafone) and *Boygues Telecom*. This was a follow-on action, after the three companies were fined €534 million for collusive behaviour by the *Conseil de la Concurrence*, France's national competition regulator. This was at the time the highest fine ever imposed in France in a competition law case. Following *UFC-Que Choisir* filed the initial claim. 12,521 consumers registered with *UFC-Que Choisir*. Here again, this was a record, with the highest rate of participation in a lawsuit in the history of the Republic. However, this was out of a class of 20 million mobile phone subscribers which would potentially have qualified as victims.¹⁰⁵ This brings the rate of participation in this action to a mere 0.03%.¹⁰⁶

In her study of opt-in group and representative actions in Europe, Mulheron considers that, overall, the rate of participation in opt-in actions is on average lower than 1%.¹⁰⁷

2. Very Large Participation in Opt-out Actions

On the other hand, by invoking rational apathy, and relying on passive consent, an opt-out configuration will ensure a high level of participation whether or not the original incentive is strong. Studies tend to show that the rate of participation in opt-out actions is considerably higher than participation in opt-in actions. Mulheron in her study on collective redress determined that while opt-in regimes attract a lower degree of participation,¹⁰⁸ rates of participation under opt-out regimes were typically very high.¹⁰⁹ Mulheron's conclusions show that where empirical data is available, opt-out rates may be as low as 0.1% and, in any case, are never higher than 13% of claimants.¹¹⁰

In Europe specifically, Mulheron considered the case of the opt-out procedures in Portugal and the Netherlands.¹¹¹ In the Dutch case *Dexia WCAM*¹¹², Dexia, its subsidiary Legio Lease and several other companies were sued by a large number of

¹⁰⁵ Information available on the Consumer's Association's website <<http://www.cartelmobile.org/>>.

¹⁰⁶ R Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' 7 Civil Justice Council, 152.

¹⁰⁷ Ibid, 154.

¹⁰⁸ Ibid, 154-156.

¹⁰⁹ Ibid, 147-153.

¹¹⁰ Ibid, 147.

¹¹¹ Mulheron indicates that, at the time of writing, there was no empirical study available on opt-out rate in Portugal and the Netherlands. The figures presented therefore were gathered through individual case data on a small case sample.

¹¹² LJN: AZ 7033.

Dutch investors which had suffered losses resulting from misleading or inadequate information about a securities lease product offered by Dexia's subsidiary and the risks attached to it. A settlement agreement was reached in April 2005. The settlement agreement was later declared collectively binding upon request, with the possibility for parties to opt-out¹¹³, based on the new rules on Mass Settlement¹¹⁴ introduced in August 2005.¹¹⁵ The total class size was approximately 715,000 consumers.¹¹⁶ With a total number of opt-outs of 24,700¹¹⁷, the rate of participation in the settlement was approximately 97%.¹¹⁸

With regards to the Portuguese popular action, Mulheron's study considers three cases through which the rate of participation in group actions in Portugal can be assessed.¹¹⁹ In *DECO v Portugal Telecom*, a case was brought alleging that Portugal Telecom had over-charged almost 2 million customers a total of €120 million. The average claim per customer was therefore around €60 each.¹²⁰ Only 5 people opted out of the action.¹²¹ In *DECO v Academia Opening*, the class consisted of about 1,200 to 1,500 people. There were no known opt-outs. Finally in *DECO v Water provider company*, the class consisted of about 1,000–2,000 persons. As in *DECO v Academia Opening*, there were no known opt-outs in this case either. Therefore, taking all three cases together, Mulheron estimates the rate of participation to opt-out class actions in Portugal to be close to 100%.¹²²

Here again, this is particularly interesting for small claims which, with a very low incentive to bring a claim or participate in an opt-in class action, benefit from the opt-out mechanisms' 'nudge'. It is argued that the opt-out mechanism is sufficient on its own and without further incentives to lead to a substantial increase in the number of victims compensated. On the whole, statistics show that an overwhelming number of victims do not opt-out. On the other hand, statistics also show that an overwhelming majority of potential victims tend not to opt-in. In the Portuguese case, the incentives relating to the cost of the action and the level of damages present in Policy Option 1 did not exist as damages were awarded on a purely compensatory basis, whereas cost, at least in part, is born by the plaintiff when the action fails. Nonetheless, the rate of opt-outs is close to 0%.

¹¹³ BEUC, 'Private Group Actions – Taking Europe Forward', 8 October 2007, 15.

¹¹⁴ Dutch Civil Code, Art. 7:907-910 and Dutch Code of Civil Procedure, Art. 1013-1018.

¹¹⁵ I Tzankova, 'Netherlands National Reports, Part 1' (The Globalisation of Class Actions Conference, Oxford, December 2007) 3, available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Demark_National_Report.pdf> accessed 30 November 2011.

¹¹⁶ R Mulheron, op cit, n 106, 152.

¹¹⁷ I Tzankova, op cit, n 115, 15.

¹¹⁸ R Mulheron, op cit, n 106, 153.

¹¹⁹ Ibid, 152.

¹²⁰ C Hodges, op cit, n 49, 40.

¹²¹ R Mulheron, op cit, n 106, 152.

¹²² Ibid.

It is therefore submitted that, in a bundle of similar incentives regarding the cost of the action, damages and legal fees, the opt-out arrangement of a class action invariably includes more participants than the alternate opt-in arrangement, as for equal incentives, the rate of rational apathy of victims will always be higher than the rate of victims who opt-in. In fact, one could even go as far as to theorise that an opt-out mechanism is an incentive in itself, as it allows victims to remain inactive, while an opt-in mechanism is a disincentive in itself, as it forces victims to act.

B. Revaluating the Alleged Excesses of the Opt-out Model

During the public consultation on the White Paper on Damages Actions for Breach of Antitrust Rules, opposition to the opt-out option for collective redress mechanisms has been strong, and references to the potential danger of introducing an opt-out group action mechanism are widespread.¹²³ This is due to the widely-held perception that opt-out actions can lead to excesses.¹²⁴ That opt-out mechanisms, by themselves, engender litigation excesses is usually considered a given, and rarely grounded by empirical evidence, other than a vague reference to the US class action.¹²⁵

This tends to somewhat shift the burden of proof. The issue ceases to be whether opt-out class actions are beneficial, but instead, to determine that they are not detrimental to a system. The mechanism is presumed guilty, and proving a negative is always extremely difficult. It is particularly difficult when one cannot address a clear and definite set of concerns or criticism, but instead, one has to attempt to repel general hostility and fear. It is therefore necessary to first determine a list of objections against the opt-out model, which unfortunately, for these same reasons, cannot be exhaustive, in order to present an argument against this notion that opt-in actions lead to excesses. The White Paper's impact study and the Leuven Report help shed some light on the nature of these potential excesses.

1. On the Question of the Cost of Opt-out Actions

One of the main criticisms of the opt-out mechanism is its alleged cost.

'Opt-out class actions can lead to economies of scale but they are normally expensive to litigate due to high court (and often lawyer's) fees, principal agent

¹²³See Association des Avocats Praticant le Droit de la Concurrence (APDC) « Observations sur le « Livre Blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante » ; Confederation of British Industry (CBI) « DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES - CBI response to Commission White Paper » 11 July 2008, 3; Mouvement des Entreprises de France (MEDEF) « White Paper on damages actions for breach of the Community rules concerning cartels and abuses of a dominant position - MEDEF's Observations » July 2008, 4 ; Confederation of Finnish Industries (EK) « Contribution to the public consultation on the White paper on Damages actions for breach of EC antitrust rules » 3-4 ; Confederation of Swedish Enterprises 'Comments on the White paper on Damages actions for breach of EC antitrust rules', 14 July 2008, 3-4 available on the European Commission's website at <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html> accessed 30 November 2011.

¹²⁴White Paper Staff Working Paper, op cit, n 25, 20-21.

¹²⁵Ibid.

problems, costs linked to the certification of the class, high costs of distribution of damages, etc. These costs might in some cases outweigh the economies of scale'.¹²⁶

There is little in terms of explanation or justification to substantiate that statement in the White Paper. In particular, how an opt-out mechanism specifically would engender high lawyers' fees or court fees is not elaborated upon. Gaudet sees in this statement a reference to the principal-agent problems in contingency fees arrangements.¹²⁷ Contingency and conditional fees would undeniably increase the cost of litigation. However, three points should be noted about them. First of all, by nature, they are conditional upon the success of the suit. They increase the cost in victory, not in general. Second, contingency or conditional fees are not linked to the opt-out model, but exist independently and are available, when permitted, in individual claims as well as opt-in class actions or any other action for that matter. Finally, they are banned in most countries in Europe, and in any case, they are prohibited in the four countries up for consideration here.¹²⁸ Conversely, even in countries in which these fees exist, they can be prohibited in class actions if the concern is shown to be empirically supported. Therefore, when specifically relating to the opt-out mechanism, this particular point is moot.

Similarly, the cost linked to the certification of the class can be linked to any type of collective redress mechanism and is not specifically attached to the opt-out model. It is unclear how an opt-out class action certification would involve a higher cost than an opt-in one. In any case, it should be noted that this certification phase, although found in most procedures in the world, is not a *sine qua non* condition to filing a class action. The Portuguese law on class actions, for example, does not provide for a mechanism of preliminary certification regarding the entitlement to take action, and the legislator does not appear to want to change this situation for the time being.¹²⁹

On the other hand, it must also be understood that opt-in class actions come at a cost as well. Handling and processing a great number of individual claims is an extremely difficult, time consuming operation and also potentially very costly one. Gaëlle Patetta, the head of the legal department of the consumers' association *UFC-Que Choisir* which led the French mobile phone cartel case¹³⁰, explained that it took 21 lawyers, 3 m³ (106 ft³) of paper and €500,000 simply to handle the complaints.¹³¹ Retrospectively, Patetta considers that this operation perfectly illustrates the impossibility for consumer associations to bear the economic and human weight of having to manage several

¹²⁶ White Paper Impact Study, op cit, n 16, 570.

¹²⁷ Gaudet, op cit, n 39, 2.

¹²⁸ D Waelbroeck, D Slater and G Even-Shoshan (n 48) 94; C Bernt-Hamre, 'Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts' (The Globalisation of Class Actions Conference, Oxford, December 2007) 17.

¹²⁹ T Arantes Fontes and João Pimentel, op cit, n 58, 123.

¹³⁰ See above at III (A) (1).

¹³¹ G Patetta, 'Opportunité du choix de l'opt-in/opt-out – Le point de vue de l'UFC-Que Choisir' in A Legendre (ed), *L'action de Collective ou action de groupe – Se préparer à son introduction en droit français et en droit belge* (Brussels, Larcier, 2010).

thousand complaints.¹³² Jeuland considers that, ultimately, it is the cost of the French representative action, squarely resting on the consumer association's shoulder, which was the cause of its failure.¹³³

2. The Principal-agent Problem and the Right to a Day in Court

Concerns have also been voiced over the principal-agent relationship in class actions,¹³⁴ based on the limited ability of the represented parties to monitor and control the conduct of the lead plaintiff or the lawyers as the number of represented parties increases. There may be conflicts of interest between the lead plaintiff and/or the lawyers and the other, more passive plaintiffs, which may result in inadequate representation.¹³⁵ These conflicts may notably concern the opportunity or the value of a potential settlement, which is particularly problematic considering the high rate of class action settlements.¹³⁶

However, this is a general concern over class actions, as depicted in the White Paper Impact study. With opt-out class actions, the concern goes to the opportunity for a claimant to opt-out of an undesirable settlement in order to pursue an individual action. The concern is double: claimants may not be able to opt-out at that stage of the proceedings, and in any case, claimants who may be unaware that they are involved in a lawsuit may not be able to avail of that opportunity when it is possible. This goes to the right of a party to a claim to her 'day in court'. In essence, this is the right for a claimant to be heard and her right to disposition, which, in this situation, would allegedly be denied or seriously compromised by the class action mechanism. This right exists, in various forms, in many European member states. Issues were notably raised regarding the German constitutional rights which guarantee the freedom of disposition (*Dispositionsfreiheit*) and the right to a 'day in court' (*rechtliches Gehör*)¹³⁷ or the French constitutional prohibition of actions by proxy.¹³⁸

The first issue could be solved by providing for the possibility to opt-out of a settlement. This could be done while the settlement is considered by the court or after the court's decision, during a reflection period set by the judge. This solution is inapplicable under Portuguese law, as plaintiffs are only allowed to opt-out up until the

¹³²Ibid.

¹³³E Jeuland, 'Experience Nationale: La France' in J-M Baudel and J Fourvel (eds), *Les Recours Collectifs : Étude Comparée* (Paris, Société de législation comparée, 2006).

¹³⁴White Paper Impact Study, op cit, n 16, 279.

¹³⁵Ibid.

¹³⁶F Cafaggi and H-W Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community', EUI Working paper LAW No.2007/22, European University Institute, San Domenico di Fiesole, 2007, 10; PH Lindblom and K Nordback, 'The Swedish Group Proceedings Act' in Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (ed), *Kollektive Rechtsdurchsetzung – Chancen und Risiken*, Bamberg, 2006, 197.

¹³⁷White Paper Impact Study, op cit, n 16, 288.

¹³⁸'Nul ne plaide par procureur'. See Cass. Civ. 2^e, 29 November 2001, Bulletin 2001 II N° 175, 120. See also F Caballero, 'Plaidons par procureur! De l'archaïsme procédural à l'action de groupe' RTDciv 1985, 247; V Magnier, op cit, n 43, 19.

end of the production of evidence phase.¹³⁹ However, this option is made available in the Netherlands. Under Dutch law, after the settlement is declared binding, the court will fix a term for plaintiffs to opt-out of the settlement. Those who do not opt-out will be bound by it.¹⁴⁰

The second issue could simply be solved by adequate notification to all potential participants. However, this option could present serious problems in terms of cost and effectiveness. A possible alternative would be to impose a clear burden of care upon, and ensure strict control of, the class representative. A form of this option can be found in all 4 procedures considered. In the Norwegian class action, the class representative has an obligation to safeguard the rights and obligations of the class in the action.¹⁴¹ If this obligation is not respected, or the class representative cannot properly safeguard the rights of the class, the court can revoke his appointment and designate a new class representative.¹⁴² The duty of care of the class representative in the Danish opt-in class action is similar. However, the Danish law provided a supplementary safety mechanism for its opt-out alternative: the class representative must be a public independent authority, such as the Consumer Ombudsman.¹⁴³

In the Dutch mass settlement procedure, any participant who does not agree with the settlement project, but nevertheless does not wish to opt-out of the procedure may raise his opposition in writing to the court.¹⁴⁴ In the Royal Dutch Shell settlement agreement¹⁴⁵, further protection was offered to the class members. Each class member could file a claim form to help determine the amount of money he or she was entitled to recover.¹⁴⁶ The forms are reviewed and the amount the claimant should recover is determined by administrators.¹⁴⁷ If a dispute arose between a class member and an administrator concerning the administrator's rejection of his claim or his evaluation of the amount to be allocated to the class member, the class member could submit the dispute to a court or tribunal within 30 days.¹⁴⁸ For the purpose of this particular action, the class member acted as an individual, with all the advantages and costs attached to such an endeavour.¹⁴⁹

¹³⁹ Article 15(4) Law 83/95.

¹⁴⁰ Article 7:908(2) of the Dutch Civil Code.

¹⁴¹ Norwegian Dispute Act, Ch 35, § 35-9 (1).

¹⁴² Ibid, Ch 35, § 35-9 (3).

¹⁴³ K Viitanen (n 36) 13.

¹⁴⁴ Article 1014 of the Dutch Code of Civil Procedure. See M Loos, 'Country Report The Netherlands' Civic Consulting *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*, 18 July 2007, available at <http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf> accessed 30 November 2011.

¹⁴⁵ Royal Dutch Shell Settlement Agreement, available at <<https://www.royaldutchshellsettlement.com/>>.

¹⁴⁶ Ibid, 15.

¹⁴⁷ Ibid, 16.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid, 17.

The notion that an opt-out system prevents claimants from pursuing an action on their own remains a rather theoretical issue for academic debate. However, as the Leuven study points out, an overwhelming majority of victims would not have filed a claim in the first place if it were not for the opt-out action.¹⁵⁰ This is demonstrated by the low rate of participation to opt-in class action overall.¹⁵¹

Lindblom, responding to concerns that the Swedish class action would be contrary to Swedish constitutional rights, argues that ‘Even with an opt-out regime, the members of the class are not deprived of their day in court. They get notice and may opt-out. There are many special safeguards (superiority, counsel, adequacy of representation, notice, settlement check up etc.) in group proceedings taking care of their interests. And if the claims are individually not recoverable for the group members, the alternative to a class action is not an individual action but no access to justice at all.’¹⁵²

3. On the Tendency of Opt-out Actions to Promote Unmeritorious Lawsuits

Another perceived risk attached to the opt-out mechanism is that it may increase the number of unmeritorious lawsuits. These cases would have little to no chance of reaching the final stage of the action, but would only be filed to extract a settlement as a form of blackmail, and would tend to clog the courts’ processes. The claim would arguably have no merit but considering the size of the class and possible length of the action, it would be cheaper, from a commercial point of view, for the defendant to simply settle. This perception is as popular¹⁵³ as it is contested.¹⁵⁴

First of all, it is unclear why the threat of facing an opt-out class action would force defendants to settle more than an opt-in one. If the size of the class is certainly an issue, this is not to say that an opt-in action, even with fewer claimants, would not have the same effect. Second, there are here again methods by which to limit the risk of abuse. A strong control over cases by courts, notably during the certification period, in which the plaintiffs have to demonstrate the merit of their case, is a classic example.¹⁵⁵

Another possibility is to let the court decide which form the action should take, opt-in or opt-out. This mechanism can be found in both Norwegian and Danish procedures, in which the court, after hearing the plaintiffs and ruling on the merit of the case, will decide which form the action should take.

A third possibility is to ensure that the court is required to control and approve settlements. In the Dutch Mass Settlement procedure, the settlement agreement must be presented to the court for approval. It must contain:¹⁵⁶

¹⁵⁰Leuven Study, 291.

¹⁵¹See above at III (A) (1).

¹⁵²Gaudet, op cit, n 39, 3.

¹⁵³HB Schäfer, ‘The bundling of similar interests in Litigation. The Incentives for Class Action and legal Actions taken by Associations’ (2000) 9(3) *European Journal of Law and Economics* 183.

¹⁵⁴C Silver, ‘We’re Scared to Death: Class Certification and Blackmail’ (2003) 78 NYU L Rev 1357.

¹⁵⁵C Hodges, op cit, n 49, 119.

¹⁵⁶Article 7:907 – 2 of the Dutch Civil Code.

- a) description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
- b) the most accurate indication possible of the number of persons belonging to the group or groups;
- c) the compensation that will be awarded to these persons;
- d) the conditions which these persons must meet to qualify for the compensation;
- e) the procedure by which the compensation will be established and can be obtained;
- f) the name and domicile of the person to whom the written notification referred to in Article 7:908, paragraph 2 and 3, can be sent.

Each claim is evaluated by court-appointed administrators. In any case, the court will have the obligation to reject the settlement if:

- a) the agreement does not comply with the provisions of paragraph 2;
- b) the amount of the compensation awarded is not reasonable having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;
- c) insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;
- d) the agreement does not provide for the independent assessment of the compensation to be paid pursuant to the agreement;
- e) the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
- f) the foundation or association referred to in paragraph 1 is not sufficiently representative with regard to the interests of persons on whose behalf the agreement was concluded;
- g) the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration by the court that the agreement is binding;
- h) there is a legal person who will provide the compensation pursuant to the agreement and he is not a party to the agreement.¹⁵⁷

As a supplementary safety net, the court could be given the right to evaluate and approve the settlement, amongst other factors, on the basis of its fairness, its merit and the financial and economic effect this settlement could have on the plaintiff and/or the general economy of the country.¹⁵⁸

While it is difficult to obtain definite figures on the topic, the European experience does not appear to vindicate this fear. Overall, in the four countries which have introduced opt-out class actions, very few cases have been brought. Three cases were brought under the Portuguese Popular action.¹⁵⁹ While three private opt-in actions have

¹⁵⁷ Article 7:907 – 3 of the Dutch Civil Code.

¹⁵⁸ C Hodges, *op cit*, n 49, 120.

¹⁵⁹ R Mulheron, *op cit*, n 106, 152.

been brought in Denmark since the law on Group action came into force, the Danish opt-out alternative has, to date, never been used.¹⁶⁰

In fact, this limited number of cases is, paradoxically, the cause of another criticism of collective redress, according to which a limited number of group actions would tend to show that introducing a collective redress mechanism is not necessary, as these mechanisms are rarely used in member states in which they have been introduced. Another way of looking at this would be to note that the low level of collective actions may mean that no infringement has resulted in harm which was sufficiently widespread amongst consumers to justify the use of a collective action. This may indeed demonstrate that market operators comply with the law, or resolve their differences through alternative dispute resolution procedures, which, ultimately, is *inter alia* what the Commission hopes to accomplish by introducing collective redress as a mechanism for private competition law enforcement.

In any case, it appears that from the perspective of the European experience with opt-out actions, the fear of an onslaught of unmeritorious lawsuits is generally not supported by available empirical evidence.

C. Compensating for the Limitations of Opt-in Actions

Considering the lower incentive provided by the opt-in model compared to the opt-out model, a regulator is faced with two options: the first option is to simply accept that an opt-in mechanism will typically attract a very low level of claimants, and that, on average, a large majority of victims will not be compensated. This would however go against the objective of the white paper to compensate all victims.

The second option consists in compensating for the lack of attractiveness of an opt-in action. To ensure a higher rate of participation in an opt-in group action, legislators will have to compensate for the lack of incentive an opt-in mechanism presents to potential claimants by providing other incentives. This can be done by adopting a more liberal approach to the other aspects of the action, as suggested in the Commission's impact assessment paper Policy Option 2. These incentives can relate to the cost of the action, the level of damages recoverable, etc.

Opt-in collective actions do reduce the rational apathy problem to an extent, as it is clear that a large majority of victims will be more willing to participate in a lawsuit when they are not the only claimant,¹⁶¹ but, as seen above, it far from eliminates it. A reason for this is the *pro rata* of cost which every participant will have to bear in a loser-pays litigation system. To circumvent this problem, the White Paper suggests that courts should be able to derogate from the rule, in certain cases, through a cost order. This is by far the most reasonable way of circumventing the issue, and limits the added incentive to bring unmeritorious suits. Typically, in representative actions, the cost for

¹⁶⁰Communication with Katrine de Neergaard, Chief Advisor at the Danish Consumer Ombudsman, 05.04.2011. Copy with the author.

¹⁶¹EU average of 79%, and 41% of Hungarian consumers in 2010. See Flash Eurobarometer 299 'Consumer attitudes towards cross-border trade and consumer protection', March 2011, 8, available at <http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf> accessed 30 November 2011.

each individual plaintiff is zero as the representative – usually a consumer association – is regarded as the loser.

In any case, it should be noted that the definite number of class members whom will share the costs will only be known after the expiration of the opt-in period. Until then, the potential lead plaintiff – the named plaintiff – may remain reluctant to initiate proceedings, unless the risk associated with losing is borne by another party, such as a lawyer working on a contingency fee basis, an after-the-event insurance or a professional financier.

D. Reviewing the Options for Introducing an Opt-out Class Action Mechanism

The opt-out mechanisms introduced in Portugal, Norway, Denmark and The Netherlands can be regarded as different stages, or levels of opt-out group or class action.

The Portuguese Popular Action is an all out opt-out class action with no real procedural mechanism to limit or restrain the action, other than those already pre-existing in Portuguese procedural law. It also admits two forms of action, Group and Representative actions, rather like the Commission's proposal in the White Paper.

The Norwegian system contains what could constitute a primary limitation to the opt-out mechanism. Where the victims' claims are substantial, no extra incentive for victims to bring their claim would be necessary. Victims are expected to make the effort to join the action to get compensation, and therefore an opt-in action is sufficient. The lack of attractiveness of the mechanism compared to the opt-out action is expected to be compensated by the natural incentive to seek compensation. In the case of small claims, where the opt-in action does not constitute enough of an incentive for consumers to join the action, and where no amount of added incentive will likely be strong enough to attract a large number of claimants, the opt-out mechanism would be the surest and most cost-effective mechanism to ensure a high participation in the action.

A second level of limitation can be found in the Danish action. On top of the small claims limitation which can be found in the Norwegian action, Danish law puts a public authority in charge of the opt-out action. This ensures supervision from a well-funded body, and limits the principal-agent problem. It strongly reduces the risk of inadequate representation by ensuring that the class representative will not be tempted to put its own interest above that of the class. It also widely limits the risk of a settlement detrimental to the class.

Finally, a third limitation option may be found in the Dutch Mass Settlement procedure. This mechanism leaves the action itself entirely in the hands of individual consumers. The issue of whether opt-out actions promote unmeritorious lawsuits simply vanishes here. Preoccupied solely with the amiable resolution of the dispute, it only ensures that as many claimants as possible can benefit from ongoing settlement negotiations, while ensuring that those who do not want to take part in it will have their 'day in court'.

These are rationalised, experienced, ‘field-tested’ procedures, which are undeniably ‘European’. They offer a panel of options for the introduction of an opt-out class or representative action in Europe. Considering the reluctance of many Member States and a number of respondents to the DG Competition public consultation regarding the opt-out mechanism, it would appear that the Norwegian and Dutch models offer the best compromise.

The Portuguese model, although it has, to date, not led to any of the excesses commonly attributed to the opt-out class action, remains perhaps too broad in its scope. The Dutch Mass Settlement procedure on the other hand may be considered too restrictive in this regard.

Therefore, a new proposal on damages actions for breach of EU antitrust rules could put forward an opt-out mechanism for small claims, which could be led by individuals, a public authority, or perhaps also a consumers’ association, as an option. If this proposal was ever to take the form of an EU directive, this mechanism could be made optional, and Member States could be given discretion in implementing it in whichever form they prefer, or of rejecting it, and instead implementing an opt-in only procedure. This solution would allow Member States to reap the benefit of the most appropriate and feasible opt-out model, while allowing the most reluctant Member State to simply opt-out.

CONCLUSION

It is unclear why these options were not put forward by the White Paper on Damages Actions for Breach of EU Antitrust Rules. More surprising still is the fact that the options appear not to have been considered at all by the Commission. As argued above, considering the European experience with collective redress mechanisms, and opt-out actions in particular, the reality is that the debate on the opt-out class action never truly took place.

This is the perfect time to revisit this topic and the proposals submitted by the White Paper. During the public hearing on collective redress held by the European Commission on 5 April 2011,¹⁶² the presentation by the first panellist, Monique Goyens, entitled ‘Lost in Consultation’, appeared to be a success among the participants. A number of panellists and participants during their intervention reminded the Commission that the time for conversation, debate and consultation on the need to introduce a mechanism for collective redress in the EU had elapsed. They insisted that it was in fact time for the Commission to make up its mind on this topic, and to proceed to the far more pressing debate on the details of the mechanism which would eventually, perhaps inevitably, be introduced. This article seeks to make a contribution to this debate. As a number of national competition authorities continue to view private enforcement as an important tool towards a more competitive economy, and while a number of Member states have introduced or envisage introducing reforms on

¹⁶²Commission (EU) Public Hearing on Collective Redress, op cit, n 6.

collective redress,¹⁶³ the opt-out model should remain an important element in the debate on access to justice and consumer redress. This debate should not evade any issue or reject any option out of hand. Every path should be thoroughly evaluated if this debate is to produce the best proposal for collective redress and private enforcement. Achievability is a factor, undeniably, and the fact that some Member States still consider the issue of collective redress with great reluctance should not be forgotten. However, this issue should not force scholars or regulators into a middle-ground mindset which precludes them from considering certain options because they were deemed too extreme, particularly when these options present undeniable advantages.

The opt-out mechanism for class or representative actions is such an option, set aside, perhaps too quickly, without really being given a chance, due to the fear of its alleged excesses. These excesses need to be avoided, but if indeed they exist, they have arguably more to do with the American litigation system than the opt-out mechanism of its class action. The European experience shows that these excesses are not simply a by-product of the opt-out class action. It shows that they can be contained, prevented even, and that opt-out actions are a credible option, not a path to a litigation society.

While the debate on collective redress is still ongoing, it is important to consider all alternatives objectively and without preconceptions. If the objective of collective redress is truly to ensure the full compensation of all victims of infringements, then the opt-out class action model appears to be one of the most effective private enforcement mechanisms available to regulators, which could greatly improve access to justice for consumers, particularly in situations in which they are least likely to seek justice.

¹⁶³Italy has allowed for consumers to file class actions since 1 January 2010. See R Comolli, MDE Santis and F Lo Passo, 'Italian Class Action Eight Months In: The Driving Forces' Nera Economic Consulting, available at <http://www.nera.com/nera-files/pub_italian_class_actions_1110_pdf.pdf> accessed 30 November 2011.

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Enhancing the Consumers' Role in EU Private Competition Law Enforcement:
A normative and practical approach*Maria Ioannidou**

Despite the long debate concerning the future of private competition law enforcement in Europe the issue remains on the Commission agenda and no concrete results have been achieved to date. This article traces the main developments of collective redress mechanisms and consumer involvement in both the Commission's practice and the European Court of Justice's ('CJEU') jurisprudence in order to discern the main functions that should be attributed to collective consumer actions in the field of competition law. The multiple beneficial functions of such actions form the 'added value spectrum' that justifies consumer participation in private competition law enforcement. The added value spectrum, together with arguments drawn from the nature of consumer claims in competition law, a proposed distinctive notion for 'access to justice' and the distinction between aggregated individual and collective consumer interest offer normative justifications in favour of different collective action mechanisms for low value consumer claims in the competition law field. Following this normative analysis, the article moves on to formulate these collective action mechanisms that could, indeed, allow for consumer involvement in EU private competition law enforcement.

I. INTRODUCTION

The increased importance attributed to consumer interests in EU competition law rhetoric,¹ the debate on private enforcement,² as well as the current efforts in the field of consumer collective redress³ suggest that the time is ripe to reflect on the role of consumers in private competition litigation and examine the necessary measures that could incentivise consumers to rise as active players in the competition enforcement field. In particular, this paper deals with the role of final consumers in private competition law litigation.⁴ First it gives a critical account of the Commission's efforts to date (Part II). Second, it explores different normative justifications warranting increased consumer involvement in EU competition law enforcement (Part III). Following that it attempts to categorise consumer claims arising from competition law violations and distinguishes two groups of consumer claims ('Group A' and 'Group B' consumer claims). Based on this categorisation, it advances further normative grounds

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¹ See for example Commission (EC), 'Report on Competition Policy 2008' COM (2009) 374 final [108].

² Commission (EC), 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final, 19 December 2005 ('GP'); Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final, 2 April 2008 ('WP').

³ Commission (EU), 'Public Consultation: Towards a Coherent Approach to Collective Redress' (Staff Working Document) SEC(2011) 173 final ('*Public Consultation*').

⁴ For the purposes of this paper private enforcement is ascribed a narrow meaning comprising only damages actions and not actions for injunctions or the defensive use of competition law under Article 101(2) TFEU.

calling for distinct collective redress measures for 'Group B' consumer claims (Part IV). The last part focuses on the formulation of the specific collective redress measures that could potentially increase consumer involvement in private competition law enforcement (Part V).

II. COMMISSION EFFORTS IN SHAPING EU COLLECTIVE REDRESS MECHANISMS

1. Collective Redress Procedures in Competition and Consumer Law as Distinct Initiatives

In the last decade, heated discussions have emerged at EU level on consumer collective redress. First, in the consumer law field, the Commission, in more than one occasion, has pointed to the need to enhance redress mechanisms for consumers.⁵ In particular, in its *Consumer Policy Strategy 2007-2013* it specifically stated that collective redress actions will be considered in the field of competition and consumer law without drawing a distinction between them.⁶ However, in its subsequent *Green Paper on Consumer Collective Redress*, the Commission excluded collective redress procedures for victims of competition law from its material scope and referred to the respective treatment of this issue in its *WP*.⁷ This suggests that according to the Commission a distinctive approach to competition claims was warranted.

Interestingly, in the competition field the Commission managed to reach a concrete proposal on collective actions,⁸ whereas a more vague approach is adopted in its *Green Paper on Consumer Collective Redress*. For competition law claims two procedures were proposed; the first concerned actions brought by representative associations such as consumer associations on behalf of identified or in limited situations identifiable victims and the second concerned opt-in collective actions.⁹

On the contrary, in the consumer field, it restricted itself to making general declarations on elements contributing to the effectiveness and efficiency of collective actions and putting forward four options for further consultation.¹⁰ The fourth option on the introduction of an EU consumer collective redress mechanism in all Member States focused inter alia on whether opt out collective actions should be introduced and the

⁵ Commission (EEC), 'Three Year Action Plan of Consumer Policy in the EEC (1990-1992)' COM(90) 98 final; 'Internal Market After 2002: Meeting the Challenge' (Sutherland Report) SEC(92) 2044, 10; Commission (EC), 'Consumer Policy Strategy 2002-2006' (Communication) COM(2002) 208 final [3.2.3]; Commission (EC), 'Consumer Policy Strategy 2007-2013' (Communication) COM(2007) 99 final ('Consumer Policy Strategy 2007-2013') [5.3].

⁶ Consumer Policy Strategy 2007-2013, *ibid*, [5.3].

⁷ Commission (EC), 'Green Paper on Consumer Collective Redress' COM(2008) 794 final, OJ [2010] C128/18 ('*Green Paper on Consumer Collective Redress*') [1.5]; *WP*, *op cit*, n 2.

⁸ *WP op cit*, n 2, [2.1]; *Draft Damages Directive* (now withdrawn – draft on file with the author) Articles 5-7.

⁹ *Ibid*.

¹⁰ *Green Paper on Consumer Collective Redress*, *op cit*, n 7, [2.13], [2.14], [4.19-4.60]. The subsequent Commission consultation paper included a fifth option. See Commission (EC), 'Follow-up to the Green Paper on Consumer Collective Redress' [3.2.5] available at http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf

Commission did not dismiss this possibility,¹¹ as the Commission proposal in the field of competition law also reveals. However, the fact that this Commission proposal was subsequently withdrawn indicates the practical difficulties likely to be faced by the Commission in proposing opt-out mechanisms in the future.

2. Merging the two: The right way forward?

Public consultation on the common legal principles which should guide any future proposals on EU collective redress procedures (already announced in the last two Commission Work Programmes)¹² ended on April 30th 2011 with the Commission holding a public hearing on April 5th 2011 and vouching to publish a Communication on the outcome of the consultation by the end of 2011.¹³ These coordinated reforms will first lead to the adoption of a general EU legal framework on collective redress which will then be used as a baseline for specific legislative initiatives in the different policy domains. For the competition field, Commissioner Almunia seems to favour the adoption of a Directive setting common standards and minimum requirements.¹⁴ A question related to this coordinated reform approach is whether the development of a general framework will prove to be beneficial to collective redress mechanisms in the field of competition law or, alternatively, whether it will lead to the adoption of modest mechanisms unable to address consumer claims.

An initial, tentative answer to this question can be derived from the common core principles identified by the Commission in its consultation document, which are rather abstract and seem inadequate to guide any meaningful initiative in the adoption of collective redress procedures. These common principles are the following: (1) the need for effectiveness and efficiency of redress; (2) the importance of information and of the role of representative bodies; (3) the need to take account of collective consensual resolution as a means of alternative dispute resolution; (4) the need for strong safeguards to avoid abusive litigation; (5) availability of appropriate financing mechanisms, notably for citizens and SMEs; and (6) the importance of effective enforcement across the EU.¹⁵

Given their particularly abstract wording, these principles could potentially suit or upset all interested stakeholders at the same time. All stakeholders would agree that the adopted collective redress mechanisms should be effective and efficient. But how is

¹¹ *Green Paper on Consumer Collective Redress*, op cit, n 7, [4.56-4.57]; the same is true for EESC but indicating a preference to opt-in [5.2.3]. See EESC, ‘Opinion on the Green Paper on Consumer Collective Redress’ OJ [2010] C128/97 [5.1.2]; EESC, ‘Opinion on Defining the Collective Action System and Its Role in the Context of Community Consumer Law’ OJ [2008] C162/1 [7.2]; Mulheron, ‘The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis’ (2009) 15 Colum J Eur L 409, 451.

¹² Commission (EU), ‘Commission Work Programme 2010’ (Communication) COM(2010) 135 final 8; Commission (EU), ‘Commission Work Programme 2011’ (Communication) COM(2010) 623 final 8.

¹³ *Public Consultation* (n3); Personal notes from the public hearing (on file with the author). The event on the public hearing was recorded and it is available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm; Almunia, ‘Public Enforcement and Private Damages Actions in Antitrust’ (Speech 11//598, European Parliament, ECON Committee, Brussels 22/09/11).

¹⁴ Almunia, ‘Common Standards for Group Claims Across the EU’ (Speech 10/554, Valladolid 15/10/10).

¹⁵ Public Consultation, op cit, n 3, [15].

effective to be interpreted? The difficult test is to define the exact content of vague pronouncements on generally accepted propositions, which becomes even more difficult given that the Commission itself seems to mix the effective enforcement of EU law through public enforcement with the effective enforcement of substantive rights, implying that they serve the same purpose.¹⁶ A coherent approach to collective redress as advocated by the Commission¹⁷ is indeed welcome and desirable to the extent that distinctive characteristics of specific EU law fields, such as EU competition law, do not require a sectoral approach.¹⁸ Suffice to say here that a close reading of the consultation document itself reveals indeed two distinct strands of approach towards collective redress procedures.¹⁹

III. 'ADDED VALUE SPECTRUM': NORMATIVE JUSTIFICATIONS FOR INCREASED CONSUMER INVOLVEMENT IN THE FIELD OF COMPETITION LAW

This section seeks to build a normative framework justifying increased consumer involvement as well as a distinctive approach to consumer collective redress in EU competition law. For this purpose, it develops an 'added value spectrum' unique to consumer damages claims in competition law. By drawing arguments from the Union institutions' stance towards private competition law enforcement and the right to damages for competition law violations as pronounced by the CJEU, it identifies first the primary aim of competition damages actions and argues that this primary aim is different in competition law actions from that of consumer law actions. In as much as measures structured upon and simultaneously furthering this primary aim are put in place, this section further advances the proposition that additional important derivative aims can be attained as well.

1. Principal Aims: Deterrence v Compensation

This section embarks first on an examination of the relevant EU jurisprudence before turning to discern how this has affected Commission efforts and rhetoric. Identifying the primary aim of private enforcement in EU competition law is vital since the

¹⁶ Public Consultation, op cit, n 3, [1-5], [10]

¹⁷ Public Consultation, op cit, n 3, [30].

¹⁸ On the UK government's preference for a sectoral approach see Ministry of Justice, 'The Government's Response to Civil Justice Council's Report: Improving Access to Justice Through Collective Actions' (July 2009) <http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf> accessed 9 June 2011 [9].

¹⁹ Note for example Public Consultation (n3) [19] the reference to the need to take account of consensual resolution as ADR with the Commission expressly stating that '...it should be explored whether and in which policy areas resorting to collective consensual resolution of the dispute could become a legal requirement before going to court [...] An initiative on ADR which deals with individual and collective ADR in consumer matters is under preparation'. For arguments why ADR mechanisms are ill suited for low value consumer claims see CLEF, 'Guidelines for Consumer Organisations on Enforcement and Collective Redress' (September 2009) 26.

adopted measures should be consistent, promote and reflect this underlying aim in the EU context.²⁰

*Courage*²¹ and *Manfredi*²² deal with the right to damages in the field of private competition law enforcement,²³ and point to its underlying aims which seem to be the natural offspring of the Court's rich case law on the effective application of EU law before national courts.²⁴ In particular, the Court, in formulating the right to damages in private competition law enforcement, employs 'the principle of effectiveness' which embraces both the effective judicial protection of individual rights as well as the principle of full effectiveness of Union law.²⁵ However, the meaning attributed to this principle in *Courage* seems wider than that set out in *Francovich*.²⁶ In *Courage* the Court not only refers to the 'full effectiveness' of EU rules and the 'protection of rights they confer on individuals'.²⁷ It further adds that:

'in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages ... Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view,

²⁰ Cf Opinion of Tesouro AG in Joined Cases C-46/93 and 48/93 *Brasserie du Pecheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029 [47] noting that 'Member States' autonomy with regard to judicial remedies for the infringement of rights conferred by Community provisions is firmly tight to the result sought by Community law'.

²¹ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 ('*Courage*').

²² Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 ('*Manfredi*').

²³ See also C-421/05 *City Motors Groep NV v Citroën Belux NV* [2007] ECR I-653 [33-34]; The majority of commentators accept that a Union right in damages exists; for example see Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, Oxford 2008) 172-176; Van Gerven 'Harmonisation of Private Law: Do we need it?' (2004) 41 CML Rev 505, 520; Drake, 'Scope of *Courage* and the principle of 'individual liability' for damages' (2006) 31 EL Rev 841, 849; Reich, 'The '*Courage*' doctrine: Encouraging or Discouraging Violations for Antitrust Injuries?' (2005) 42 CML Rev 35, 38; Contra Mieke, 'Modernisation and Enforcement Pluralism' (2005) <www.cms.uva.nl/template/downloadAsset.cfm?objectid...5AF8...> 25-27; Case T-395/94 *Atlantic Container Line v Commission* [2002] ECR II-875 [414].

²⁴ On an analysis of the relevant case-law see Temple Lang, 'The Principle of Effective Protection of Community Law Rights' in O'Keeffe and Bavasso (eds), *Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International 2000) 235, 250, 273; Smith, 'The *Francovich* Case: State Liability and the Individual's Right in Damages' (1992) 13 ECL Rev 129, 132; Hoskins, 'Garden Cottage Revisited: The Availability of Damages in the National Courts for Breach of the EEC Competition Rules' (1992) ECL Rev 257, 259; Opinion of Van Gerven AG in Case C-128/92 *H J Banks & Co v British Coal Corporation* [1994] ECR I-1209 ('*Opinion of Van Gerven AG in Banks*').

²⁵ Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in Barnard and Odudu (eds), *The Outer Limits of the European Union* (Hart 2009) 401, 404, 416; Tridimas, *The general principles of EU law* (OUP 2006) 418; Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart 2004) 27-45.

²⁶ Joined Cases C-6/90 and 9/90 *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357 ('*Francovich*').

²⁷ *Courage*, op cit, n 21, [25-26]; Cf *Francovich*, op cit, n 26, [32-33].

actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community'.²⁸

Thus, the Court clearly accepts the potential of damages actions to increase compliance with competition law norms and therefore act in the public interest.²⁹ The Court's wording and reasoning attribute greater importance to the functional aspect of the right to damages in contributing to the effective application of competition law (second limb of the principle of effectiveness) than to the actual provision of compensation to the victims (first limb of the principle of effectiveness). As the AG in *Courage* points out, the deterrent potential of damages actions has also been supported by the UK and the Commission, a view which he also shares. This deterrent effect is seen as an implication of the direct effect of the competition provisions.³⁰

The potential of damages actions to contribute to effective competition law enforcement was reiterated in *Manfredi*,³¹ a preliminary reference case resulting from three consumer actions brought before Italian courts. In essence, *Manfredi* followed the *Courage* line of reasoning but it also addressed the issue of punitive damages. The Court accepted that damages actions may '[contribute] to the maintenance of effective competition in the Community', however it did not go as far as to accept an obligation on the part of national courts to grant punitive damages, which is an issue to be solved according to national law based on the principle of equivalence and effectiveness.³² Thus, the Court as a matter of EU law accepts that damages actions can assume a deterrent role without punitive damages being necessary to that effect.

Building its efforts to increase private EU competition law enforcement on the Court's case law, the Commission in its *GP* embraced both compensation and deterrence as equally important goals.³³ However, there was criticism of the deterrence element of private enforcement the Commission was seeking to promote,³⁴ which may explain the

²⁸ *Courage*, op cit, n 21, [26-27]. *Manfredi*, op cit, n 22, [60], [91].

²⁹ Komninos, 'Civil Antitrust Remedies Between Community and National Law' in Barnard and Odudu (eds) *The Outer Limits of European Union Law* (Hart 2009) 363, 382 where he notes that more authoritative words in favour of the 'private attorney – general' role could not be pronounced.

³⁰ Opinion of Mischo AG in *Courage*, op cit, n 21, [56-58]. On the direct effect of the competition provisions Case C-127/73 *Belgische Radio en Televisie and Societe belge des auteurs, compositeurs et editeurs v SV SABAM and NV Fonior 'BRT I'* [1974] ECR 51 [16]; See also Case 37/79 *Marty v Estee Lauder* [1980] ECR [13]; C-234/89 *Stergios Delimitis v Henninger Braue AG* [1991] ECR I-935 [45]; C-242/95 *GT-Link AC v De Danske Statsbaner* [1997] ECR I-4349 [57]; C-282/95 P *Guerin Automobiles v Commission of the European Communities* [1997] ECR I-1503 [39].

³¹ *Manfredi*, op cit, n 22, [60], [89-91]; see also Opinion of Geelhoed AG in *Manfredi*, [65].

³² Interestingly despite the fact that the Italian government submitted that punitive damages are contrary to Italian legal system (*Manfredi* op cit, n 22, [85]), the Italian court did award punitive damages in the end. See Oxera, 'Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts' (December 2009) (Study prepared for the European Commission) ('*Oxera Study*') 94.

³³ *GP*, op cit, n 2, [1.1].

³⁴ See for example ICC, 'ICC Comments on the Commission Green Paper on damages actions for breach of the EC antitrust rules' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/icc.pdf>; also CBI, 'EC Commission Green Paper on Damages Actions – CBI Response' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/cbi.pdf> 1. See --, 'White Paper: adopts a conservative approach'(2008)1 GCLR R-48; --, 'French Government Bodies

subsequent shift in goals reflected in the *WP* where compensation was - at least overtly³⁵ - identified as the first and foremost guiding principle for the proposed measures to improve the conditions for bringing damages actions before national courts.³⁶ The deterrent effect (previously identified as a standalone aim) would flow inherently from the improvement in compensatory justice.

The *Draft Damages Directive* also reflected this approach. On a closer reading though, the *Draft Damages Directive* seems to have adopted a functional approach towards private damages claims by enlisting private actors to the effective enforcement of competition law, stating in its Explanatory memorandum:

‘The present legislative proposal gives effect to Articles [101 & 102 TFEU] [...] by rendering more effective the right of victims of infringements of these Articles to obtain compensation for the harm they have suffered’.³⁷

The mixed Commission approach overtly promoting compensation but tacitly aiming at advancing deterrence is evident in its proposal on collective consumer actions. Its proposal demonstrated anxiety in attempting to differentiate itself from the US class action system and presents itself as a combination of the approaches in individual Member States.³⁸

The above analysis indicates that private enforcement of EU competition law is supported by general EU law principles as formulated in the Court’s case law. It is premised on the directly effective individual right derived from the Treaty competition provisions. However, private enforcement does not only cater for the effective judicial protection of those rights but also, and even more importantly from an overall enforcement perspective, it contributes to the functioning of effective competition by increasing compliance with the relevant substantive norms. European courts place particular emphasis on the latter function. Regretfully, the Commission has distanced itself in its rhetoric from the relevant case law. In light of the received criticism,³⁹ the Commission chose to alter its rhetoric and conceal the deterrence goal, thereby risking the success of any future initiative in the field of private competition law enforcement.

2. Formulating the Added Value Spectrum: Chosen Primary aim, its relevance to the derivative aims and the unique competition enforcement approach

Building on the discussion on the identification of deterrence and compensation as the principal aims of damages actions in EU competition law based on Union institutional

comment on White Paper on damages actions for breach of EC antitrust rules’ (2008) 1 GCLR R-51; --, ‘Germany Comments on the Commission’s White Paper on damages actions for breach of the EC antitrust rules’ (2008) 1 GCLR R-52.

³⁵ The proposal of certain measures reveals that this is not the case. See section V below.

³⁶ *WP*, op cit, n 2, [1.2]; Commission (EC), ‘Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules’ SEC (2008) 404, 2 April 2008 (‘WP SWP’) [14-15] .

³⁷ *Draft Damages Directive*, op cit, n 8, Explanatory Memorandum [1.1].

³⁸ *WP SWP*, op cit, n36, [38-59]. For an analysis of the Commission proposals see section V below.

³⁹ See text to n 34 above.

pronouncements, this section moves on to formulate the 'added value spectrum' which justifies increased consumer involvement in private competition law enforcement. The spectrum consists of the following five reasons, namely that consumer involvement:

- (1) increases the deterrent effect of competition norms,
- (2) provides compensation to affected consumers,
- (3) aligns practice and rhetoric,
- (4) cultivates a 'competition culture' and increases legitimacy of European competition policy, and
- (5) raises consumer 'empowerment' and approaches the 'informed consumer' ideal as a spur to competitiveness.

The first two can be drawn directly from the CJEU jurisprudence and therefore form the two 'principal aims' whereas the latter three are deemed to be 'derivative aims'. The derivative aims are dependent upon the principal aims since, when the goals of deterrence and compensation appear in conflict, a choice between the two impacts on the functionality of collective actions and their subsequent potential to further promote the three important 'derivative aims'.⁴⁰

Align Practice and Rhetoric

The increased attention paid to the consumer interest in policy documents and declarations does not match its treatment in EU jurisprudence.⁴¹ Procedural measures allowing for increased consumer participation could direct authorities and courts' attention to consumer interests.⁴² In his Foreword to the 30th Report on Competition Policy the then Commissioner Monti emphasized that a more direct consumer involvement in competition matters, 'helps competition policy to focus more clearly on actions, which are ultimately beneficial to consumer's interests'.⁴³ In addition to the

⁴⁰ For the conflict between deterrence and compensation in 'group A' and 'group B' consumer claims see text to n 56 and text to n 76 below.

⁴¹ Note for example the inconsistencies between policy documents on the 'reformed approach' to Article 102 and the actual Commission practice and EU courts jurisprudence. See Commission (EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (9 February 2009) C/2009 864 final [19]. DG Competition, 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (December 2005) available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>, [1] [4]. Commission approach in the *Prokent-Tomra* Case COMP/E-1/38.113 upheld by the GC in Case T-155/06 *Tomra Systems and Others v Commission* [2010]. See also C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] nyr [24], [26], [61], [64]. Akman, "'Consumer Welfare" and Article 82: Practice and Rhetoric' (2009) 32 *World Competition* 72. Geradin, 'The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?' (2010) 1 *JECLAP* 112.

⁴² Reich, *Competition Law and the Consumer in Gormley*(ed), *Current and Future Perspectives on EC Competition Law* (Kluwer 1997) 126, 137; Buttigieg, 'Consumer Interests under the EC's Competition Rules on Collusive Practices' [2005] *EBLR* 643, 664; Haracoglou, 'Competition Law, Consumer Policy and the Retail Sector: the Systems' Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law'(2007) 3 *CompLRev* 175, 196, 205; Asher, 'Enhancing the Standing of Competition Authorities with Consumers' (15 April 2004, ICN Conference, Korea).

⁴³ Monti, 'Foreword' (2001) XXXth Report on Competition Policy 8.

avenues open to consumers in public enforcement procedures,⁴⁴ private enforcement provides an alternative path for direct consumer involvement.

Enhancing private enforcement mechanisms could potentially incentivise consumers to launch competition complaints in order to bring follow-on actions after the competition authority has ruled on the competition law violation. In turn, this interplay between public and private enforcement and the systemic involvement of consumers could influence the assessment of consumer harm by the competition authorities. Consumer participation allows competition policy to focus on consumer interests and could also influence competition law enforcement by incorporating consumer interest in the competition law analysis. The importance of consumer input is also recognised by the Commission when looking for the linkages between the competitive process and consumer welfare.⁴⁵ Consumer procedural involvement possesses the potential to highlight those linkages.

Legitimisation of EU Competition Policy

The Member States-Union interplay, the complex matrix of competence allocation at these different levels, and the multiplicity of the actors involved and the Treaty revisions in the last 15 years, which culminated in the recently adopted Lisbon Treaty, prompt debate on the ‘democratic deficit’ of the European Union.⁴⁶ The ‘democratic deficit’ is taken here as synonymous with the distance between EU citizens and EU policy decision making. This can be attributed to the Union’s complex and secretive nature as well as to the difficulties in establishing accountability.⁴⁷ One of the main challenges for the Union is to re-connect with and benefit the European citizens.⁴⁸ Even though there is a distinction between the ‘consumer role’ and the ‘citizen role’,

⁴⁴ For example complaints to the Commission or NCAs. See Council (EC), ‘Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [81] and [82] of the Treaty’ [2003] OJ L1/1 Article 7(2); Commission (EC), Regulation 773/2004 relating to the conduct of proceedings by the Commission [2004] OJ L 123/18 Article 5 (1); Commission (EC), ‘Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty’ OJ 2004 C101/65 [31], [40].

⁴⁵ Commission (EC), Report on Competition Policy 2008 [368] stating that ‘Consumer input is also an important asset in understanding markets, as consumers and their representatives are best placed to explain directly how they perceive the impact of a particular action’, [370].

⁴⁶ On the functionality and legitimacy of the European edifice see Tridimas and Nebbia, ‘Introduction’ in Tridimas and Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart, 2004) and contributions therein.

⁴⁷ Moravcsik, ‘Europe without Illusions’ 112 Prospect (23 July 2005) available at <http://www.prospectmagazine.co.uk/2005/07/europewithoutillusions/> (accessed 30 September 2011) rejects the idea of a ‘democratic deficit’ in EU; Cf Siedentop, A crisis of legitimacy (ibid); Harlow, ‘Citizen access to political power in EU’ (1999) WP Robert Schuman Centre; Van Gerven, ‘Wanted: More Democratic Legitimacy for the European Union’ in Wouters, Verhey and Kiiver (eds), *European Constitutionalism Beyond Lisbon* (Intersentia, 2009) 147, 148, 153; On the notion of accountability see Neyer, ‘Justice, not Democracy: Legitimacy in the European Union’ (2010) 48 JCMS 903; Benz, Harlow and Papadopoulos, ‘Introduction’ (2007) 13 ELJ 441, 443-445.

⁴⁸ *Consumer Policy Strategy 2007-2013*, op cit, n 5, 2; Commission (EC), ‘A Single Market for Citizens’ (Communication) COM(2007) 60 final 3.

with the latter wider in scope,⁴⁹ it is 'in their role as consumers that the EU can most directly connect to the daily lives of our citizens and demonstrate the benefits of the EU'.⁵⁰

Procedural measures allowing for active consumer involvement in private competition law enforcement possess the potential to bring EU citizens closer, in their capacity as consumers, to EU competition policy and to act as an alternative form of control on the decision-making of the Commission and national competition authorities.

Consumer Education and Empowerment

Competition law caters for the availability of consumer choice and consumer law provides consumers with the relevant information for the effective exercise of this choice.⁵¹ Effective enforcement and the involvement of the relevant actors can partially assume the role of information proliferation. It can also address the problem that consumer education fails to deliver results to less privileged consumers especially if the power of the advertising industry is taken into account.⁵² Here, the term information does not entail supplying detailed data (necessary for concluding contracts and/or choosing products or services) but rather raising awareness and prompting the consumer to be more responsible, to search for available options and to make use of the already available information. Informed consumer in this context is the 'aware', 'suspicious' and 'assertive' consumer, who actively seeks rather than passively waits for information. Devising the necessary procedural measures allowing for consumer damages actions in the competition law field and following that, achieving successful judgments against infringing undertakings could lead towards a more assertive and active stance on consumers' part.

Even if one ascribes to neoclassical economic theories of information which view information asymmetries and imperfect information as a market failure, potentially calling for state regulation⁵³ or to bounded rationality theories identifying additional problems in people's ability to process the relevant information,⁵⁴ this section's central

⁴⁹ Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship or Justice?' 241, 248, 262-264 in Grundmann, Kerber and Weatherill, *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter 2001); Lewinsohn – Zamir, 'Consumer Preferences, Citizen Preferences and the Provision of Public Goods' 108 (1998-1999) Yale L J 377, 378.

⁵⁰ *Consumer Policy Strategy 2007-2013*, op cit, n 5, 2; see also Commission (EC), 'Staff Working Document Accompanying the Report on Competition policy 2008' COM(2009)374 final [354].

⁵¹ Cf Averitt and Lande 'consumer choice' theory as a standard for enforcing competition rules, Averitt and Lande, 'Using the "consumer choice" approach to antitrust law' (2007) 74 Antitrust L J 176; Averitt and Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust L J 713.

⁵² This problem was identified in Wilhelmsson, 'The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law – A Comment' in Howells et al (eds), *The Yearbook of Consumer Law 2007* (Ashgate 2007) 211, 215.

⁵³ Grundmann, Kerber and Weatherill, 'Party Autonomy and the Role of Information in the Internal Market – An Overview' 3,12-16 in Grundmann, Kerber and Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter 2001); Stigler, 'Economics of Information' (1961) 64 J Pol Econ 213.

⁵⁴ First developing 'bounded rationality' theory, see Simon, *Models of Man* (1957).

proposition remains valid. A more involved and assertive consumer could potentially actively seek more information and in the event that information is available be more careful in processing it.

Synopsis

In formulating the ‘added value spectrum’ supporting an increased consumer involvement, arguments are drawn not only from the EU competition law field but also from the wider EU law discipline. Competition law enforcement-specific arguments support the formulation of the principal aims. The increased consumer involvement advocated here could potentially address market failures through deterrence of competition law violations, as well as market failures pertaining to the demand side of the market thereby contributing to the proliferation of consumer information. It is also based on justice considerations and a quest to bring European policies closer to European citizens.

IV. THE DISTINCTIVE COMPETITION LAW APPROACH IN LIGHT OF A PROPOSED GROUPING OF CONSUMER CLAIMS

This section offers further normative justifications for the herein proposed ‘distinctive competition law approach’. First, it distinguishes between two types of consumer claims for competition law violations; ‘group A’ comprises claims of a certain value that can potentially be brought as individual claims and ‘group B’ consumer claims that are of such a low value that can only be brought collectively. By exploring the ‘access to justice’ ideal and employing the distinction between the aggregation of individual consumer interests and collective consumer interest it explains why the Commission advocated compensatory approach is not capable of addressing ‘group B’ consumer claims.

1. Two Types of Claims

Consumer damages claims can be grouped in two categories based on their respective value and it is argued that the *aims* pursued by each differ in certain respects. The first category (‘group A consumer claims’) comprises claims of certain value that can be brought either individually⁵⁵ or through an aggregation mechanism. In this case however, the aggregation mechanism performs a different function than in the case of very small consumer claims. It merely facilitates individual claims rather than permitting litigation that would not, in any case, be brought without it; in the second category (‘group B consumer claims’) fall claims where judicial costs would exceed the value of the claim.⁵⁶ In this case, aggregation mechanisms should promote deterrence and

⁵⁵ Even though this would be unusual for consumer claims in the field of competition law *Manfredi* suggest that it is possible. For an analysis in *Manfredi* see Nebbia, ‘...So What Happened to Mr Manfredi? The Italian Decision Following the Ruling of the European Court of Justice’ (2007) ECLR 591 with further reference to *Sentenza del Giudice di Pace di Bitonto No.172/2003, Manfredi c Lloyd Adriatico*.

⁵⁶ On a similar distinction see Coffee Jr, ‘The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action’ (1987) 54 U Chi L Rev 877, 904-906. Coffee also identifies a third ‘Type C class action’ category comprising both of marketable and unmarketable claims. See also for a similar categorisation of claims in general and not just consumer claims Redisch, Julian and Zyontz, ‘Cy Pres Relief

disregard the traditional compensatory function. The conflict between deterrence and compensation is to be found in this category of collective actions and should be resolved in accordance with the former.

Distinguishing between 'group A' and 'group B' consumer claims on a European wide basis is particularly challenging given that the costs of bringing an individual claim differ in EU Member States. In formulating a general rule of thumb, the following study for DG SANCO can be employed.⁵⁷ Member States' national reporters were asked to estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking individual redress through ordinary court procedures. The answers provided varied widely and depicted certain diversity in consumer willingness to bring individual claims in different Member States⁵⁸

What can be deduced from the relevant responses is that in all Member States consumers will not file a claim if its value is lower than 50 Euros.⁵⁹ However, it seems that generally consumers would be reluctant to start procedures even if their claim amounts to a hundred Euros or more. In addition, the complexity of competition claims would also influence consumer willingness to undertake competition litigation since this directly impacts on their chances of success.⁶⁰ 'Group B' consumer claims contain claims whereby legal costs in the respective jurisdiction exceed the value of the claim. Since legal costs vary widely in different Member States, 'Group B' may be wider or narrower depending on these costs in the respective jurisdiction. Reaching consensus on the definition of 'Group B' consumer claims is very important. To that regard the €2,000 threshold in the Small Claims Regulation is instructive.⁶¹ In any case, €2,000 could serve as an upper limit.

and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis' (2010) 62 Fla L Rev 617, 618 n1. Distinction between Group A and Group B claims also resembles the distinction between negative expected value claims (NEV) and positive expected value claims (PEV). See Silver, "'We are scared to death": Class Certification and Blackmail' (2003) 78 NYU L Rev 1357, 1371. The herein proposed distinction is different in the sense that group B consumer claims are NEV claims but group A claims are not PEV claims, since this category comprises of large claims; rather they should be treated as a separate category between PEV and NEV claims.

⁵⁷ See also Civic Consulting, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union' (Final Report prepared for DG SANCO, 26 August 2008) <http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf> accessed 30 September 2011 ('Civic Consulting Study').

⁵⁸ On the individual Reports submitted see http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm. See questions [1.7.1] in the national reports. These reports are specific to consumer law but are relevant here in as much an argument can be made regarding the value of the claim. Further research to that regard is certainly warranted.

⁵⁹ Since this was the lowest threshold provided in Germany.

⁶⁰ According to rational choice theory a consumer would only undertake court procedures if the value of his/her claim exceeds judicial costs multiplied by her chances of success. I am grateful to Mr Vande Walle for raising this point.

⁶¹ Council Regulation (EC) No 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1 Article 2(1). See Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?'(2011) 48 CMLRev 1125, 1140.

‘Group B’ consumer claims should comprise claims of lower value but agreeing on the exact value of those claims seems very difficult in light of the existing diversity on legal costs in different Member States. However, given the complexity of competition claims it seems unlikely for consumers to bring claims exceeding several hundred Euros and in any case consumer damage flowing from a competition law violation would in the majority of cases be lower than this threshold.

2. Exploring ‘Access to Justice’: Distinctive notion for ‘group B’ consumer claims

‘Access to justice’ is often used as a catchphrase for the formulation of measures facilitating consumer claims to reach the courts or be resolved in alternative fora⁶² and it is an umbrella term comprising many different meanings.⁶³ In competition law the compensatory potential of collective actions is taken as synonymous with ‘access to justice’.⁶⁴ However ‘access to justice’ not only comprises the final goal but also the means, i.e. the necessary procedures to achieve that goal.⁶⁵

This section explores ‘access to justice’ for the purposes of low value consumer claims in the field of competition law (‘group B’ consumer claims) and argues that the compensatory approach (while workable in consumer law) is too narrow and not designed to address the majority of consumer claims in the field of competition law. Since collective action mechanisms aim at facilitating access to justice in both fields of law,⁶⁶ the demarcation of this aim can act as a justification for the introduction of different mechanisms in the field of competition law.

In the consumer law field, the Commission, back in 1984, launched the debate on improving access to justice for consumers and examined different means of solving consumer disputes.⁶⁷ ‘Access to justice’ signalled the Commission’s quest to provide

⁶² On ADR mechanisms in different Member States see Civic Consulting, ‘Study on the Use of Alternative Dispute Resolution in the European Union’ (16 October 2009) (Report prepared for DG SANCO); The Study Center for Consumer Law – Center for European Economic Law, ‘An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings’ (Final Report) (17 January 2007) (‘Leuven Study’) <http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf>.

⁶³ For a distinction between a narrow and broad concept of access to justice see Ramsay, Consumer Redress and Access to Justice in Rickett and Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (CUP 2003) 17, 19. For a broad approach see also Nordh, ‘Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reform and a Forthcoming Proposal’ (2001) 11 *Duke J Comp&Int’l L* 381, 387-388.

⁶⁴ *WP SWP*, op cit, n 36, [40].

⁶⁵ Micklitz, ‘Privatisation of Access to Justice and Soft Law – Lessons from the European Community?’ in Wilhelmsson and Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Ashgate 1999) 505 pointing to both elements of ‘access to justice’.

⁶⁶ See for example Commission (EC), ‘Annex to the Green Paper, Damages actions for breach of the EC antitrust rules’ (Staff Working Paper) SEC(2005) 1732, 19 December 2005 (‘GP SWP’) [200].

⁶⁷ Commission (EEC), ‘Discussion Paper – Consumer Redress – Memorandum for the Commission’ COM(84) 629 final (‘Consumer Redress Memorandum’); Commission (EC), ‘Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market’ COM(93) 576 final with further references to earlier documents; EESC, ‘Opinion on the Green Paper on access of consumers to justice and the settlement of consumer disputes in the Single Market’ OJ 1994 C295/1 [2.1.2], [2.2.1]; On the Green

consumers with the necessary avenues to enforce their substantive rights, in case of breach.⁶⁸ In the context of consumer law, a multiplicity of ADR mechanisms exist in individual Member States and the Commission is currently examining the effectiveness of those mechanisms.⁶⁹ In addition, the Commission has also examined collective redress mechanisms for low value consumer claims.⁷⁰ Collective redress mechanisms in consumer law have been associated with the access to justice movement.⁷¹ All these mechanisms emphasise the provision of effective redress to consumers pointing to the perception of 'access to justice' as the sum of the procedural mechanisms that allow for the bringing of consumer claims and the successful enforcement of consumer rights.

The picture is more blurred as to the 'access to justice' notion in competition law. This is because the final goals private damages actions serve in the competition field are ambiguous. True, the Commission currently emphasises the compensatory goal,⁷² in line with Member States' tort law;⁷³ this approach conforms with neither the Commission's previous declarations, and arguably its covert aspirations, nor with the CJEU approach.⁷⁴ In addition, pragmatic considerations in the case of very low consumer losses call for the structuring of effective procedural measures, where the compensatory principle yields to the aim of deterring competition law violations, and thereby emphasise the deterrent function of collective action procedures in the field of competition law.

The Commission could possibly reconcile the functional approach to consumer claims with the prevailing national legal systems' compensatory approach by distinguishing between two types of consumer claims and adopting a broader approach to the 'access to justice notion' for 'group B' consumer claims. Therefore, two types of collective

Paper see Hodges, 'Multi Party Actions: A European Approach' (2001) 11 *Duke J Comp & Int'l Law* 321, 322-323.

⁶⁸ See for example *Consumer Redress Memorandum*, op cit, n 67, stating that '...one aspect of the Community's concern for its citizens is its interest in access to justice, in particular to obtain a just and fair settlement of disputes arising out of ordinary consumer transactions'.

⁶⁹ *Leuven Study*, op cit n 62; For arguments why ADR mechanisms are ill suited for 'Group B' consumer claims see CLEF, 'Guidelines for Consumer Organisations on Enforcement and Collective Redress' (September 2009) 26; See also Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) *Law Q Rev* 55, 81.

⁷⁰ Green Paper on Consumer Collective Redress, op cit, n 7.

⁷¹ On 'access to justice' see generally the following ambitious 6 volume project, Cappelletti (gen ed), *Access to Justice* (Sijthoff and Noordhoff 1978-1979). On an evaluation of this initiative see Sarat, 'Book Review' (1980) 94 *Harvard LRev* 1911.

⁷² *WP*, op cit n 2, [1.2]; *WP SWP*, op cit, n 36, [14-15]; *Draft Damages Directive*, op cit, n 8, Explanatory Memorandum [1.1].

⁷³ On German and French law see *Wagner*, op cit, n 69, 59-60; For an account of the Dutch situation see Kortmann, 'The Tort Law Industry' [2009] *ERPL* 789, 799, 810. Essentially this echoes the principle of corrective justice which inflicts a rectification duty upon the tortfeasor and it can be contrasted to the prevailing economic analysis underlying common law. See Coleman, 'The Practice of Corrective Justice' in Owen (ed), *Philosophical Foundations of Tort Law* 54, 57, 66. On the principle of corrective justice and the importance of a 'bipolar relationship of liability' as an important feature of private law relations see Weinrib, *The Idea of Private Law* 2, 56-83, 114-144; Coleman (ibid) 67.

⁷⁴ See text at n 27.

action procedures are called for.⁷⁵ The first stands as the general rule applicable both in the field of consumer law and also to ‘group A’ consumer claims in competition law. In this case no conflict exists between the compensation and deterrence principle. An example in that context is the contemplated form of opt-in collective actions.⁷⁶

Collective actions for ‘group B’ consumer claims will then come as an exemption to the above general rule. ‘Access to justice’ is served in the sense that the relevant mechanisms remain in place for the collective damages action to reach the courts, even if compensation is not delivered to each and every consumer.⁷⁷ Nonetheless, consumers obtain the moral satisfaction that the perpetrator has been brought to justice and held liable for the relevant competition law violation.⁷⁸ In this case, ‘access to justice’ is conferred a broader meaning. It comprises of the means provided to consumers (or their respective organisations) to have their claims heard by the courts. However, these mechanisms are not pursued primarily to compensate the victims, but to deprive the perpetrators of the anticompetitive gains and deter future wrong doings, thus serving the interests of the consumer in an alternative way. These actions can be seen as promoting ‘access to justice’ *lato sensu* in the sense that they serve the collective consumer interest, this being the second demarcation criterion for collective action mechanisms.

3. Individual v Collective Consumer Interest as a Demarcation Criterion

Private damages actions aim at compensating the victim of the respective wrong. The individual interest of the claimant in this case is to obtain compensation. In the competition law context, the Commission emphasis on the compensatory component is sensible only for customers and competitors’ claims and to a lesser extent for ‘group A’ consumer claims. On the contrary, if this emphasis on compensation is taken at face value effective collective action mechanisms for ‘group B’ consumer claims (these being the majority of claims in the competition law field) cannot be devised. Seeking to fulfil the individual consumer interest in such cases, in the sense of delivering compensation, can be overtly costly,⁷⁹ especially taking into account that individual consumers themselves pay little regard to enforcing their right to compensation. Enforcement mechanisms for the collective consumer interest could potentially provide a solution to this conundrum.

⁷⁵ On a similar vein calling for a bifurcated approach towards collective redress for mass torts and scattered losses see Wagner, *op cit*, n 69, 78-80.

⁷⁶ *WP*, *op cit*, n 2, [2.1]; *Draft Damages Directive*, *op cit*, n 8, Articles 5.

⁷⁷ See *Howells and Weatherill*, *Consumer Protection Law* (Ashgate 2005) 606.

⁷⁸ Lindblom, ‘The Globalisation of Class Actions-National Report: Group Litigation in Sweden’ (2007) (hereinafter *Swedish National Report*) <http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf> 36.

⁷⁹ *Leuven Study*, *op cit*, n 62, [427].

The collective consumer interest has already been accepted as the protected legal interest in other EU law measures,⁸⁰ despite the difficulties in defining this term.⁸¹ However, it is generally accepted that 'collective consumer interest' represents something more than the sum of individual consumer interest.⁸² In the context of competition law, collective actions serving the 'collective consumer interest' would have an important deterrent effect and market rectification potential. The importance lies not in compensating individual victims but rather in maintaining an effective market structure⁸³ both for current affected consumers as well as consumers buying the respective products in the future. The Commission could in principle advocate a broader approach to collective action mechanisms for low value consumer claims pursuing the collective consumer interest.

This approach would not abandon the right to damages for competition law violations as pronounced by the CJEU,⁸⁴ but would merely adopt a pragmatic enforcement approach to this right which is given a different and wider content. Compensation will not be delivered to all affected consumers. However devising appropriate private enforcement mechanisms allows, in principle, the delivery of compensation and most importantly deters competition law violations, thereby fulfilling the functional dimension of the right to damages. The consumer right to damages comprises not only the provision of actual compensation but also additional benefits consumers derive from the exercise of this right, notably the deterrence of competition law violations and the sustainment of a competitive economy. This deterrent function of the consumer right to damages can be seen as serving the collective consumer interest.

Thus, two different collective action mechanisms should be devised; the first serving the aggregation of individual consumer interests and compensating individuals (group A consumer claims) and the second promoting the collective consumer interest of maintaining competitive market structures (group B consumer claims). In what follows, the focus is on structuring effective collective action mechanisms for 'group B' consumer claims.

V. STRUCTURING EFFECTIVE REDRESS PROCEDURES

In light of the normative arguments advanced above (section III and IV) consumer claims for competition law breaches should be treated in a manner different from

⁸⁰ Directive 98/27 EC on Injunctions for the Protection of Consumer Interests OJ 1998 L166/51 Article 1; Directive 2009/22/EC (codified version) OJ 2009 L110/30 Article 1; Regulation (EC) No 2006/2004 on consumer protection cooperation OJ 2004 L 364/1 Article 1 and 2(4).

⁸¹ Safjan, Gorywoda and Janczuk, 'Taking Collective Interest of Consumers Seriously: A View from Poland' (2008) EUI Working Papers 2008/26, 8-14.

⁸² *Leuven Study*, op cit, n 62, [449]; OECD, 'Report on Consumer Dispute Resolution and Redress in the Global Marketplace' (April 2005) 30 stating that actions to the collective consumer interest 'vindicate the general consumer interest without any showing of actual harm to individual consumers ... regarded as an important mechanism to correct market failures where the collective harm ... is more than the sum of the individual losses involved'.

⁸³ For a similar approach (but not in the competition law context) see *Safjan et al*, op cit, n 81, 8.

⁸⁴ *Courage*, op cit, n 21, [24-27]; *Manfredi*, op cit, n 22, [90-91].

consumer claims in general. Further, as the Commission concedes, any future EU proposal should ‘fit well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law’.⁸⁵ However, as the DG SANCO initiative on the ‘Evaluation of the effectiveness and efficiency of collective redress mechanisms in the EU’ reveals, national mechanisms are not effective in addressing ‘group B’ consumer claims,⁸⁶ whereas satisfactory mechanisms exist for ‘group A’ consumer claims at least in some Member States. Therefore, national legal orders could not – at least at this stage – act as a benchmark for an effective collective redress mechanism for ‘group B’ consumer claims. On the contrary, the CJEU case law on the right to damages for competition law violations as well as the normative justifications for a distinct competition law approach advanced above support the adoption of measures based on the deterrence rationale. In that context the US ‘class action system’ can provide useful insights since controversial issues raised in the EU collective redress debate have also been raised in the US; the EU legislator should profit from the US example instead of resorting to general aphorisms. In the following analysis the US legal system is employed as an example where necessary.

1. Key Issues in Devising Effective Collective Redress Procedures

i. Standing: Lead plaintiff and entrepreneurial lawyer *v* consumer organisation

A joined reading of the *GP* and *WP* on the issue of collective redress procedures reveals that the Commission favours a solution where collective claims are brought by consumer organisations rather than individual consumers. The *GP* puts forwards two options;

‘a cause of action for consumer organisations without depriving individual consumers of bringing an action’ and ‘a special provision by group of purchasers other than final consumers’. It also expressly states that ‘beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action’.⁸⁷

Thus, the *GP* suggests that consumer claims merit a different approach and only consumer organisations can in effect protect those interests.

Subsequently in its *WP* the Commission seems to suggest that opt-in collective actions brought by individuals will also be open to final consumers. The *WP* reads:

‘individual consumers, but also small businesses, especially those who have suffered scattered and relatively low damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result many of the victims remain uncompensated’.⁸⁸

⁸⁵ Public Consultation, op cit, n 3, [10].

⁸⁶ *Civic Consulting Study*, op cit, n 57. For the national reports see n 58.

⁸⁷ *GP*, op cit, n 2, [2.5].

⁸⁸ *WP*, op cit, n 2, [2.1]. This latter procedure is defined in the withdrawn *Draft Damages Directive* as group action and the way it is framed resembles joinder procedures, rather than actually workable group actions, when a large number of victims is involved. See *Draft Damages Directive*, op cit, n 8, Article 5.

It then goes on to propose two collective action mechanisms; one representative, but not only confined to consumer organisations, that in restricted cases (regretfully not defined) can be brought on behalf of identifiable victims, and an opt-in procedure open to everyone.⁸⁹ Regarding the opt-in mechanism, the Commission itself seems not to regard it as appropriate to address consumer claims given that in its *GP* it excluded final consumers from bringing actions of this type.⁹⁰

It is actually regrettable that the Commission fails to distinguish consumer from other (e.g. purchaser, competitor) claims in its *WP*. In the case of 'group B' consumer claims, the consumers are not deterred from bringing an action because of the 'delays, uncertainties, risks and burdens involved' but merely because these claims are of such low value that in any case they would not be litigated individually. The Commission was certainly aware of this fact when it proposed the introduction of representative actions on behalf of identifiable victims, also indicating that the Commission finds merit in such actions. However, its role as a policy shaping authority for competition law in Europe compels the Commission to adopt a clearer stance regarding its proposals, their respective aims as well as their future potential.

According to the Commission proposal, consumer organisation collective actions can, in theory, address 'group B' consumer claims. The employed representative action model can easily be explained in light of the Member States' legal traditions and consumer organisations' role in bringing actions in the consumer interest.⁹¹ Therefore, this proposal is more likely to be approved by individual Member States than a more radical approach of proposing, for example, opt-out procedures brought by a lead plaintiff. The latter solution reflects the US class action model that for small claim consumer class actions is essentially based on the primordial role of class counsel.⁹²

Controlling the behaviour of entrepreneurial lawyers still remains a thorny issue in the US.⁹³ The provision of a leading role to lawyers is unlikely to achieve consensus in

⁸⁹ Ibid.

⁹⁰ Commission officials have also expressed this view. See Smith, 'Will Europe provide effective redress for cartel victims?' (2008) 42 CPI 65, 71.

⁹¹ This is the prevailing approach in EU consumer law. See Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the Case?' (2006) 43 CMLRev 1381, 1387. Cafaggi and Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16 ERPL 391, 417; see also Opinion of Jacobs AG in C-195/98 *Oesterreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Oesterreich* [2000] ECR I-10497 [47] where he states that 'Collective rights of action are an equally common feature of modern judicial systems ... The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents'.

⁹² Issacharoff, 'Group Litigation of Consumer Claims: Lessons from the US Experience' (1999) 34 Texas Int'l L J 135, 146-147.

⁹³ Macey and Miller, 'The Plaintiff's Attorney's Role in Class Action and Derivatives Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 U Chi L Rev 1; Hay and Rosenberg, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy' (2000) 75 Notre D L Rev 1377; on the changes introduced by the Class Action Fairness Act 2005 see Blaire and Piette, 'Coupons and Settlements in Antitrust Class Actions' (2006) 20 Antitrust 32. Blaire and Piette, 'Coupon Settlements: Compensation and Deterrence' (2006) 51 AB 661.

Europe given the controversial US experience but most importantly due to the general EU legal culture and approach towards legal services. Effectively this proposal would require less intrusive amendments to national rules of civil procedure. Further, the fact that consumer organisations would assume the role of the litigator in the consumer interest would send a stronger signal towards the interplay between competition and consumer law and the potential of the former to be employed in the consumer interest, thus advancing the proposed spectrum in a better way.

On the other hand, the Commission proposal on opt-in collective actions could prove to be operational for ‘group A’ consumer claims. Plaintiffs’ lawyers’ success in bringing actions of this type might in the future change attitudes towards the role of those lawyers in consumer litigation, thereby facilitating further reforms in this field to extend their role for ‘group B’ consumer claims as well. Structuring alternative mechanisms to enable individual consumers, through their respective lawyers, to bring collective actions akin to a US class action can potentially address the problems attributed to the functioning and role of consumer associations;⁹⁴ however, this is not a realistic approach for the time being in light of the prevailing legal approach in the vast majority of EU Member States. In any case, if consumer organisations are to be allocated the main role of litigators in the consumer interest the Commission should address different obstacles hindering those actions, for example the funding of consumer organisations.⁹⁵

In addition, the consultation paper considers the conditions that representative entities have to fulfil in order to be granted standing in collective redress procedures and provides the national rules implementing the Aarhus Convention as an example where some Member States require NGOs to accord with certain criteria in order to be granted standing in collective proceedings.⁹⁶ These criteria, as provided in the Regulation implementing the Aarhus Convention, include the nature of the representative entity as an independent, non profit-making legal person in accordance with Member State’s national law or practice having as its primary stated objective the promotion of environmental protection and have been in existence for more than two years prior to the date of raising the action.⁹⁷ Analogous criteria could be adopted in the context of an EU wide legislation on collective redress. Consumer organisations would be granted standing only if they are constituted as non-profit organisations with the

⁹⁴ On these problems and ways to address them see Epstein, ‘Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?’ (2007) 3 *CompLRev* 209.

⁹⁵ On the broader issue of the legitimacy of consumer organisations see Hodges, ‘Competition Enforcement, Regulation and Civil Justice: What is the case?’ (2006) 43 *CML Rev* 1381, 1391, questioning their legitimacy based on the five tests developed by Baldwin, i.e. legislative mandate, accountability, due process, expertise and efficiency. Baldwin, *Rules and Government* (Clarendon 1995).

⁹⁶ Public Consultation, op cit, n 3, [25].

⁹⁷ Article 11 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13. Generally on the Aarhus Convention see Richardson and Razzaque, ‘Public Participation in Environmental Decision Making’ in Richardson and Wood (eds), *Environmental Law for Sustainability* 165, 174-177.

objective of promoting the consumer interest and have been in existence for two years prior to the action so as to assuage fears of speculative litigation.⁹⁸ In addition, consumer organisations should be sufficiently representative in that they have a large member base. An EU legislative measure could for example provide that the consumer organisation granted standing to sue represent a specified minimum percentage of the country's population. Ex ante criteria for standing could provide for the independence of consumer organisations and justify the bringing of opt-out collective actions, thereby representing the interests of a wider group of consumers and not only its members.⁹⁹

Regulating the criteria for consumer organisation standing at EU level could improve the mutual recognition of the respective organisations in different Member States. Further, it could facilitate the building of an informal network of recognised consumer organisations in the EU whereby they exchange information regarding suspected market failures and possible future collective redress actions as well as improve their cooperation in cross border cases.

ii. Forming the group: opt-in *v* opt-out

The experience with consumer organisations bringing collective claims in the consumer interest in England and France clearly indicates that the opt-in nature of the respective mechanisms is not workable for 'group B' consumer claims.¹⁰⁰ Aware of the difficulties, the Commission proposed the introduction of representative actions on behalf of identifiable victims.¹⁰¹ The opt-out nature of this collective action mechanism is more evident in the relevant Article of the *Draft Damages Directive* which was subsequently withdrawn¹⁰² in light of the criticism of the proposed introduction of opt-out collective actions.¹⁰³

⁹⁸ Cf Article 7 Draft Damages Directive, op cit, n 8.

⁹⁹ Martinazzi, 'Class Representation: Opt-in, Opt-out or Representative Action?' (Spring 2011) (4) (2) CPI 2, 5.

¹⁰⁰ See *OFT 916resp*, 'Private actions in competition law: effective redress for consumers and business' (Recommendations) (November 2007) [5.7 *et seq*]; see also 'Which' announcement that it does not intend to bring more actions under the current regime in Pheasant and Bicarregui, 'Striking the right balance between a 'competition culture' not a 'litigation culture? Comment on the European Commission's White Paper on damages actions for breach of EC antitrust rules' (2008) 1 GCLR 98, 102; Robertson, 'UK Competition Litigation: From Cinderella to Goldilocks?' [2010] CompLaw 275, 288-292; on the extremely disproportionate relation between damages granted to consumers and the costs incurred by the consumer organisation see *The Consumers' Association v JJB Sports Plc* [2009] CAT 2 [31-32]; on the 'cartelmobile' case see <http://www.cartelmobile.org/>. See also Leskinen, 'Collective Antitrust Damages Actions in the EU: the opt-in v the opt-out model' (2010) Working Paper IE Law School 10-03 13-14 with further references on this case. UFC Que Choisir, 'Contribution au livre vert de la Commission' (2006) 10-12.

¹⁰¹ WP, op cit, n 2, [2.1].

¹⁰² *Draft Damages Directive*, op cit, n 8, Article 6(4) ('any injured party belonging to the group can exercise its right not to be represented').

¹⁰³ See European People's Party's statements (the leading party in the previous European Parliament) that it would not support any kind of opt-out system. See Tait, 'EU rules to ease burdens on antitrust victims' *The Financial Times* (London 26 June 2009) http://www.ft.com/cms/s/0/aa75d416-61b3-11de-9e03-00144feabdc0,dwp_uuid=70662e7c-3027-11da-ba9f-00000e2511c8.html?nclick_check=1 accessed 30 September 2011. EP Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI) [10].

According to the *Draft Damages Directive* the representative organisation would not have to individually identify the injured parties that belong to the group but it would have to inform all those who may have claims for damages within the scope of the representative action. The collective action could be dismissed if these conditions were not satisfied.¹⁰⁴ The fact that the consumer organisation would be charged with this role would have solved the problem of soliciting prospective client – plaintiffs by plaintiffs’ lawyers, which would be incompatible with the provisions regulating lawyers’ services in the majority of Member States.¹⁰⁵

The opt-out nature of the Commission’s proposed representative action sought to strike a sensible balance between efficiency and due process rights of plaintiffs and defendants. What the Commission overlooked was the need to undertake a vigorous campaign in favour of its proposal, to persuade reluctant Member States of its merits, instead of seeking to conceal, to a great extent, its opt-out nature.¹⁰⁶ Reassurances that due process rights would be protected were required, in addition to clarification that opt-out procedures were, in any event, already in place in certain Member States, thereby indicating that they are not completely alien to Member States’ legal traditions.¹⁰⁷

The strongest argument raised against opt-out collective actions is that they would amount to a violation of the constitutional rights of group members, namely the right to be heard.¹⁰⁸ In addition, they might be seen as contrary to Article 6 ECHR and Article 47 of the Charter of Fundamental Rights.¹⁰⁹ This approach appears rather formalistic, as it loses sight of the modern economic reality of transnational consumer markets entailing increased risks for consumer damage on a large scale. In addition, due process rights of individual members are not disregarded, in the sense that they are given the opportunity to opt-out from the class. In addition, the US experience shows that for claims of minimal value the opt-out rates are very low, since in any case these claims cannot be litigated individually.¹¹⁰ Since opt-out collective actions increase access

¹⁰⁴ *Draft Damages Directive*, op cit, n 8, Article 6(2)-(3).

¹⁰⁵ Sousa Antunes, ‘Class Actions, Group Litigation & Other Forms of Collective Litigation’ (Portuguese Report - 2007) submitted under the auspices of the project ‘Globalisation of Class Actions’ undertaken by Stanford Law School and the Oxford Centre of Socio-Legal Studies see <<http://www.law.stanford.edu/calendar/details/1066/>> 14.

¹⁰⁶ See for example *Draft Damages Directive*, op cit, n 8, Explanatory Memorandum [2.1] (...respondents welcomed the choice not to suggest ... opt-out class actions).

¹⁰⁷ Gaudet, ‘Turning a blind eye: the Commission’s rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience’ (2009) 30 ECLR 107.

¹⁰⁸ Stadler, ‘Collective Action as an Efficient Means for the Enforcement of European Competition Law’ in Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 202, 211 where she accepts though that ‘[opt-in collective actions] most likely do not constitute a solution to minor and dispersed damages’.

¹⁰⁹ *Leuven Study* (n62) 380. For an account of the French legal system rejecting the opt-out see Magnier, ‘Class Actions, Group Litigation and Other Forms of Collective Litigation’ (French national report on collective actions submitted under the auspices of the project ‘Globalisation of Class Actions’) 12-13, 17-18.

¹¹⁰ Eisenberg and Miller, ‘The Role of Opt-Out and Objectors in Class Action Litigation: Theoretical and Empirical Issues’ (2004) NYU Law and Economics Research Paper Series Working Paper No 04-004, 4. Issacharoff, ‘Preclusion, Due Process and the Right to Opt-out’ (2002) 77 Notre Dame L Rev 1057, 1060

to justice for consumers with low value claims, they cannot be said to amount to a violation of constitutional rights as long as certain procedural guarantees, i.e. adequate notice, are in place.¹¹¹ Due process concerns regarding group members' rights can be alleviated if there is an express legal provision stating that 'this collective action procedure can only be brought for claims where the minimum average litigation costs exceed the individual damage of group members', thus precluding the possibility to be litigated individually.¹¹²

iii. Costs and funding of collective actions

For Group B consumer claims, if actions are brought by consumer organisations, the issue of funding these organisations also needs to be addressed.¹¹³ In the US, consumer class actions are basically financed by lawyers operating on a contingency fee agreement. Financing consumer collective actions in Europe in a similar way can shift its representative character towards US type class action litigation where the lawyers acting on behalf of the organisation assume the economic risk, and thereby seek to be more actively involved and control the consumer organisation. There is a risk that a consumer organisation dependent on those lawyers will resemble the inactive representative plaintiff in US type class actions. This is not an acceptable possibility in light of the need to employ strong consumer organisations in private competition law enforcement of 'group B' consumer claims and their potential to contribute to the cultivation of a competition culture amongst the beneficiaries of competition law.

In addition, contingency fees would require changes in litigation funding rules in the majority of Member States.¹¹⁴ Regulating funding for consumer organisations presents itself to be a more acceptable option, despite a limited acceptance of contingency

where he points out that 'an individual litigant who is unlikely to sue outside an aggregate action is similarly unlikely to exercise a right to opt-out into the domain of unviable individual claims'.

¹¹¹CJC, 'Improving Access to Justice Through Collective Actions' (2008) <http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf> ('CJC Report')133; Stuyck, 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question' [2009] EBLR 483, 491. Adequate notice is important in US class actions. Interestingly, Dam questions whether the requirement of individual notice rests on FRCP 23 or the Due Process clause of the Fifth Amendment. Dam, 'Class Action Notice: Who Needs it?' (1974) Supreme Court Review 96, 109.

¹¹²Cf *OFT 916resp*, op cit, n 100, [7.33] where the OFT suggests that it is for the court to decide whether to allow an action to proceed as opt-out. A provision, like the one proposed herein, will facilitate the courts in their judgment.

¹¹³See BEUC, 'Damages Actions for Breach of EC Antitrust Rules – BEUC Response to the White Paper' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/beuc_en.pdf> 11 accepting that '... financing legal action is also a problem for consumer organisations themselves. This is why at the moment are not able to represent consumers in competition cases'; on funding possibly hindering collective litigation see *Public Consultation*, op cit, n 3, [27].

¹¹⁴Very few Member States accept contingency fee arrangements. See Waelbroeck, Slater and Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' ('Ashurst Study') (31 August 2004) 93-94, 116. Viitanen, 'The Crisis of the Welfare State, Privatisation and Consumers' Access to Justice' in Wilhelmsson and Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Ashgate 1999) 549, 562.

arrangements in certain EU jurisdictions.¹¹⁵ However, the funding rules should be structured so as to minimise to the greatest extent external influences on the consumer organisation, both public and private. Thus, a possible solution could be for consumer organisation funding to be raised both from private and public sources. In relation to public funding, it should be noted that EU legislation provides for funding of European consumer associations.¹¹⁶ Similar provisions could be introduced in Member States for national authorised consumer associations.

In effect, the first option would be for the consumer organisation to be self funded by its own members. However, this would not be viable given that a very large number of members are required and the consumer organisation members would end up subsidizing other non-member consumers, thereby exacerbating the free rider problem. In authorising consumer organisations to take collective action Member States should consider their respective size and member base.¹¹⁷ In addition, a fund could be created with the aim of financing consumer organisation collective actions.¹¹⁸ Fund profits could emanate from a portion of consumer damages awards and/or public fines. A three-tier funding system is proposed which is premised on member financing, special funds for consumer collective litigation and public funding. Funding stemming from three different sources would mitigate possible capture problems.

An alternative proposal could be for professional litigation funders to assume the costs of litigation subject to claiming a percentage of the award. While this is a type of contingency fee,¹¹⁹ it may appear preferable than funding consumer organisations from

¹¹⁵The German Constitutional Court accepted that under certain circumstances, there is a constitutional right to be able to bring a case through a contingency fee arrangement with a lawyer. BVerfG, 1 BvR 2576/04 vom 12.12.2006. As a result contingency fees were permitted in 2008. See Hodges, Vogenauer and Tulibacka, 'Introduction' in Hodges, Vogenauer and Tulibacka (eds) *The Costs and Funding of Civil Litigation* (Hart 2010) 26. Contingency fees are also permitted in Spain. See Aranzazu Calzadilla Medina, Trujillo Cabrera and Ferreres Comella, 'Spain' in *Hodges, Vogenauer and Tulibacka* (ibid) 492. For the discussion in lifting the restriction on contingency fees in the England see Ministry of Justice, 'Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations' (Government Response) (March 2011) 8

¹¹⁶EU consumer organisations can obtain funding from the EU budget. See Decision No 1926/2006/EC of the European Parliament and of the Council of 18 December 2006 Establishing a Programme of Community Action in the Field of Consumer Policy (2007-2013) [2006] OJ L404/39 Article 4(1) (c), Annex II Article 5.

¹¹⁷See text to n 97 above arguing that the standing conditions for consumer organisations should be regulated at EU level and provide amongst other conditions to fulfil the criterion of a sufficient member base.

¹¹⁸In support of a contingency legal aid fund (and ways to collect initial start up capital) as well as the situation in Quebec and Ontario see Riley and Peysner, 'Damages in EC antitrust actions: who pays the piper?' (2006) *ELRev* 748, 756-757, 760-761. See also BEUC, 'Damages Actions for breach of EC anti-trust rules: BEUC position on the Commission's Green Paper' (21/4/2006) 7.

¹¹⁹For the adoption of this funding method by Austrian consumer organisations see Freshfields, *Class Actions and Third Party Funding of Litigation* (June 2007) available at <http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf> 7 with further reference to Austrian Supreme Court judgment holding these agreements permissible despite formal contingency fees agreements being unlawful in Austria. On a proposal supporting strong professional funding litigation see Claims Funding International, 'Submission to the Commission for the European Communities by Claims Funding International plc- White Paper on Damages actions for breach of the EC anti-trust rules' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/claimsfi_en.pdf>, 3-4. Third part funders are now accepted in the UK as well, doing away with the common law crimes of maintenance and champerty in view of increasing access to

the public purse. Public funding allows leeway for governmental control of setting priorities in pursuing collective actions. On the other hand, this funding solution entails possible agency problems in as much as the professional funder will control the consumer organisation, potentially causing a misalignment of incentives between the consumer organisation as the representative plaintiff and the represented consumers. These agency problems are unlikely to occur if the above diversified funding model is adopted.

Actions brought by consumer organisations would also be greatly facilitated if an exception were to be introduced to the 'loser pays' rule which is to be found in the majority of Member States.¹²⁰ Consumer organisations could be exempted from paying the defendant's cost, should the case be lost, except in cases of bad faith litigation.¹²¹ Modifications to the 'loser pays' rule have already been introduced at the EU level in the field of enforcement of IP rights and the small claims procedure,¹²² suggesting the possibility of extending these exceptions for consumer collective redress procedures in the future.

iv. Calculation and distribution of damages

A further issue that should be specifically addressed for opt-out collective actions brought by consumer organisations concerns the calculation¹²³ and distribution of damages to individual consumers. Calculating large scale consumer damages is indeed complex; therefore, the calculation of aggregate consumer damages based on the illegal gains rather than on the aggregation of individual losses should be considered since in opt-out collective actions for very low losses, the latter method of calculating damages is almost impossible to implement.¹²⁴

justice. See Hodges, Vogenauer and Tulibacka, *The Costs and Funding of Civil Litigation* 106. *CJC Report*, op cit, n 115, 179.

¹²⁰ *GP SWP*, op cit, n 66, [204], [212]. *WP SWP*, op cit, n 36, [252]. *Sousa Antunes* op cit, n 105, 14 (the so called American rule operates in Portuguese law ... a strong impetus to the initiation of popular action); *Lindblom*, op cit, n 78, 19 stating that this rule is a crucial factor for the rarity of collective actions in Sweden.

¹²¹ BEUC op cit, n 113, 7; Gidi, 'Class Actions in Brazil – A Model for Civil Law Countries' (2003) 51 *Am J Comp L* 311,340 arguing that the one-way fee shifting has facilitated collective litigation in Brazil; An argument to that regard can also be drawn by analogy from the environmental law field see Case C-427/07 *Commission v Ireland* [91-94].

¹²² See Article 14 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16. Article 16 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

¹²³ This part only addresses intrinsic issues pertaining to the calculation of damages in collective actions brought by consumer organisations and does not deal with the complex issue of calculating competition law damages in general. On the complexity of the issue and Commission intentions to issue guidance on the calculation of damages see *WP SWP*, op cit, n 36, [198-199]; *Oxera Study*, op cit, n 32, aiming at assisting the Commission in preparing such guidance.

¹²⁴ *Epstein*, op cit, n 94, 222 referring to the *Danish SAS/Maersk* case where the Danish Consumer Council failed to bring the case because of insurmountable evidentiary difficulties in calculating the exact loss for every consumer.

Regarding the distribution of the damages award, the CJEU proclaimed right to damages does not allow for the formulation of a distribution system that disregards damages suffered by individual consumers or provide for the consumer organisation or other entity to retain the monetary reward.¹²⁵ Simultaneously, the Commission advocated ‘full compensation’ aim of damages actions cannot be fully attained for ‘group B’ consumer collective actions.¹²⁶ Distribution of damages awards to each and every affected consumer is not feasible (narrow approach to damages distribution). A compromise is called for between the protection of the individual right to damages and its functional deterrent role in the context of competition law enforcement.

The Commission in its *Draft Damage Directive* effectively sought to reconcile the individual consumer right to damages with the deterrent effect of collective actions by providing for the injured parties to obtain their part of damages accepting at the same time that damages should be distributed to victims to the greatest possible extent and that a part of the award should go to the consumer organisations in order to cover its expenses in bringing the action.¹²⁷

This proposal could be read as recommending the introduction of a form of cy-près distribution mechanism,¹²⁸ in as much as it leaves open the possibility for the unclaimed fund to remain with the consumer organisations.¹²⁹ As long as priority is given to individual consumers to claim their respective damages, no violation of the compensatory principle can be established, where consumers did not claim individually, thereby allowing the damages to be retained by the consumer organisation. In addition, this solution resembles the US approach of damages distribution in consumer claims,¹³⁰ which despite the criticism it received, draws a satisfactory compromise between the compensatory and regulatory functions of civil litigation. Criticism of the structural and constitutional problems of the judge made cy-près doctrine in the US¹³¹ can be alleviated through the introduction of a cy-près distribution mechanism by individual Member States based on EU legislative action. This solution to damages distribution can be identified as the narrow plus approach.

¹²⁵ See for example the German skimming off procedure. In as much as the illegal gains revert to the State, a similar procedure cannot be employed in competition law, in light of the CJEU pronouncements.

¹²⁶ See Schaefer, ‘The Bundling of Similar Interests in Litigation. The Incentive for Class Action and Legal Actions Taken by Associations’ (2000) 9 Eur J L&Econ 183, 201 (‘it is conceivable to waive the requirement of providing an exhaustive list of the injured persons if this is unreasonable and to calculate the total loss on the basis of probabilities instead’).

¹²⁷ *Draft Damages Directive*, op cit, n 8, Article 6(5). On the Commission contemplating alternative distribution mechanisms see *WP SPW*, op cit, n 36, [47], [52]; *GP SPW*, op cit, n 66, [199].

¹²⁸ For a definition of ‘cy-près’ see Mulheron, *The Modern Cy-près Doctrine* (UCL 2006) 1-5. As Mulheron notes the cy pres doctrine in a wider sense extends both to the calculation and distribution of damages. Ibid 224.

¹²⁹ For a cy-près system adopted in Brazil, a civil law country, see *Gidi*, op cit, n 121, 339.

¹³⁰ In view of the Due Process Clause individual claimants cannot be precluded from claiming their damage leaving the remaining amount for cy-près distribution. See *Dam*, ‘Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest’ (1975) 4 J Legal Stud 47, 62.

¹³¹ *Redisch et al*, op cit, n 56, 641-649.

From a normative perspective, a third wider approach can be identified, advocating the establishment of a special consumer fund. Damages awards would go directly to the 'consumer fund' that would be responsible for administering the award, granting a part of it to consumer organisations for their litigation expenses. The remainder would be used for furthering the consumer interest in an alternative way, other than by delivering compensation to affected consumers, for example by undertaking consumer education campaigns.¹³² The wide approach is to be distinguished from the US judge made *cy pres* doctrine that varies considerably in different cases. Here, a consumer fund would be established by law and could be administered by a board consisting of members of recognised consumer organisations, subject also to public oversight.¹³³ Such a consumer fund with the avowed purpose of furthering consumer interests would then choose what would be done with the fund, whether it would administer awards itself or distribute it to other entities, an approach which would provide a different level of legitimacy from the choice of *ad hoc* causes on a case by case basis.

The 'narrow option' cannot accommodate 'group B' consumer claims. The 'narrow plus' option seems as an acceptable compromise between the 'narrow' and 'wide' approach and it is also in conformity with EU law. The third approach would not appear to be accommodated under EU law given that it totally disregards the consumer right to damages as formulated by the CJEU.

VI. CONCLUSION

Contrary to the current shift in the Commission approach towards collective redress procedures, this paper has argued in favour of a distinctive competition law approach towards consumer collective actions. This distinctive approach is supported both by the 'added value spectrum' offering different normative justifications for increased consumer involvement as well as by the proposed grouping of consumer claims for competition law violations. In as much as 'group B' claims comprise very low value consumer claims, different mechanisms are called for that serve the wider 'access to justice ideal' and further the collective rather than the aggregation of individual consumer interests. These collective action mechanisms should grant standing to authorised consumer organisations that fulfil the conditions for authorisation provided for in EU legislation and should be of an opt-out nature. Authorised consumer organisations should be funded through an effective three-tier funding system whereby funds stem from their members, public funds as well as from an established consumer collective litigation fund. Finally, a narrow plus approach towards the distribution of the damages award should be preferred, according to which priority should be granted to consumers filing a claim for their individual damage and the remainder should revert back to the consumer organisation bringing the action to cover its expenses and be further used to promote consumer related purposes.

¹³²Which? points to the fact that such a fund exists in Australia. See Which?, Green Paper on Damages Actions for Breach of the EC Antitrust Rules - Response by Which? (12 April 2006) 9.

¹³³For a proposal of an equitable trust based on court discretion see Barnett, 'Equitable Trusts: An Effective Remedy in Consumer Class Actions' (1987) 96 Yale L J 1591, 1609-1614.

Ultimately, the framework advocated would appear to strike a delicate balance between the right to damages and compensation to individual consumers on the one hand and effective enforcement of competition norms in the consumer interest, on the other.

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Collective Actions: Rethinking Funding and National Cost Rules

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This paper aims to demonstrate that some form of contingency fees or adjusted cost rules would be necessary in order to enhance access to justice for victims of competition law violations. Arguably, the possible negative risks of contingency fees are lower than believed and they could incentivize lawyers to pick only meritorious cases to a higher degree than lawyers working on the basis of hourly fees. Moreover, some Member States have recently allowed for some form of contingency fees, so it might be feasible to achieve sufficient political support among Member States for adjusting the cost rules. The paper explores some options as to how to adjust the cost rules, and considers the feasibility of harmonization of those rules. It also briefly analyzes alternatives to public funding of collective actions, such as third party funding and private legal insurance. The paper concludes that collective actions would be necessary in order to increase access to justice for victims of competition law violations, but would not suffice, unless funding is ensured and sufficient incentives for claimants to bring actions are provided by limiting their cost exposure through the introduction of a modified form of contingency fees and/or a significant adjustment of the national costs rules.

1. INTRODUCTION

The European Commission recently launched a public consultation concerning collective redress in the EU.¹ It suggests the adoption of a horizontal approach, i.e. the under-lying idea is to adopt a common framework that would be applicable to different types of actions, such as competition law damages actions and consumer and environmental claims. The reason for this is that victims of competition law infringements, environmental damages or breaches of consumer rights often face problems that are common to them when they seek to enforce their rights. Moreover, the lack of collective actions should make it very difficult and/or unattractive for consumers and SMEs in practice to bring a claim for damages.²

With regard to competition law damages actions, there are indeed many obstacles facing victims of competition law infringements in bringing such damages actions. For instance, it is difficult to prove a competition law violation and to quantify the damages

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¹ Commission Staff Working Document, Public consultation: Towards a coherent European Approach to Collective Redress, SEC (2011)172 final, 4.2.2011.

² Cf. Almunia, 'Common standards for group claims across the EU', speech delivered at EU University of Valladolid, School of Law, Valladolid, October 15th, 2010.

in that the burden of proof is high and the access to evidence is limited.³ One of the biggest obstacles is the cost of such actions. The legal fees, for example in the United Kingdom,⁴ can be very high, while the damages awarded in the EU jurisdictions tend to be low and usually only aim to compensate the loss suffered.⁵ Since most EU Member States currently apply the ‘loser pays’ principle (meaning that the unsuccessful plaintiff must pay the other party’s legal costs) and the claimant must pay certain fees in advance, victims may be discouraged from bringing an action if the outcome of the action is uncertain⁶ and the possible damages awards are modest.

The introduction of collective actions would enhance victims’ access to justice in that they could take advantages of economies of scale and bundle their resources. This would, in turn, reduce the costs of damages actions. However, the effectiveness of collective actions would depend on the type of collective actions introduced. In addition, there must be sufficient funding and incentives for collective actions to be brought. Representative actions, where a qualified entity, such as a consumer association, brings a claim on behalf of all or a part of its members,⁷ generally depend on public funding. In addition, there may be political constraints or potential conflicts of interests limiting the possibilities for actually bringing a representative action.⁸ Similarly, opt-in collective actions brought by a claimant on behalf of the group will only be successful if the group of claimants is large enough for the action to be worthwhile.⁹ Conversely, opt-out collective actions, in which the individual claimants are automatically considered members of the group, unless they explicitly opt out from the group, would have the advantage of the group usually being sufficiently large to make a claim viable even in cases involving numerous claims of low value.¹⁰

Nevertheless, any form of collective action would still require the existence of some incentives for potential claimants to bring the action in the first place. Because of the ‘loser pays’ principle and the lack of treble damages or punitive damages to incentivize damages actions in the EU, an additional ‘driving force’ may be required. It is not realistic to simply rely on representative bodies, unless their funding is significantly increased, since they may face political constraints and are in any case not able to keep

³ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, p 5.

⁴ Cf. e.g. Peysner, ‘The Costs and Financing in Private Third Party Competition Damages Actions’ (2006) 3 (1) *CompLRev* 97, p 98.

⁵ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, p 55.

⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

⁷ *Ibid.*, p 18.

⁸ *Ibid.*, p 21.

⁹ Cf. Leskinen, ‘Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model’, Working Paper IE Law School, WPLS10-03, 26.4.2010, p 29, available at <http://ssrn.com/abstract=1612731>.

¹⁰ Cf. Mieke, ‘Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB’, in the Workshop ‘Remedies and Sanctions in Competition Policy’, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, p 11.

the gains where the action is successful, so they might refrain from bringing complex, but meritorious cases.¹¹ In fact, despite the wide availability of representative actions in the EU, they have not been frequently brought.¹²

This paper aims to demonstrate that some form of contingency fees or adjusted cost rules would also be necessary in order to enhance access to justice for victims of competition law infringements. In the United States, where class actions are commonly brought, practically all class actions have been brought thanks to contingency fees.¹³ The paper intends to demonstrate that the possible negative risks of contingency fees are lower than believed and that there is some evidence that they could incentivize lawyers to pick only meritorious cases to a higher degree than lawyers working on the basis of hourly fees.¹⁴ In addition, some Member States, such as Sweden¹⁵ and Germany,¹⁶ have recently adjusted their costs rules and now allow some form of contingency fees. Accordingly, it might also be feasible to achieve sufficient political support to modify the cost rules, at least to a limited extent. The paper explores some options for how to adjust the cost rules and considers the feasibility of a harmonization. Moreover, it briefly analyzes alternatives to public funding of collective actions, such as third party funding and private legal insurance.

The paper concludes that collective actions would be necessary in order to increase access to justice for victims of competition law violations, but would not suffice, unless funding is ensured and there would be sufficient incentives for claimants to bring the actions by limiting their cost exposure through the introduction of a modified form of contingency fees and/or a significant adjustment of the national costs rules.

2. A BRIEF OVERVIEW OF AVAILABLE COLLECTIVE ACTIONS IN THE EU

In recent years, several Member States have introduced collective action procedures, which enable individuals to bring an action on behalf of a group.¹⁷ However, the various national types of collective action are based on different models.

Traditionally, so-called representative actions, in which e.g. a consumer organization or some other representative body, such as a trade association, brings an action on behalf of its members in order to seek compensation for the harm that the members have

¹¹ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, p 23.

¹² Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (JAN) *C.J.Q.* 96, p 115.

¹³ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

¹⁴ Cf. Helland & Tabarrok, 'Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *Journal of Law, Economics & Organization* 517, p 540.

¹⁵ Articles 38 of the Swedish Group Proceedings Act 2002 (2002:599).

¹⁶ Article 4a(1) of the German Lawyers' Remuneration Act.

¹⁷ Cf. Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, p 1.

suffered, have predominated.¹⁸ This appears to reflect Member States' desire to ensure that the collective redress mechanism is not abused. But the drawback of representative actions is that their effectiveness is limited by both political and financial restraints in that they are usually financed through public means.¹⁹ A representative entity might therefore refrain from bringing an action if the success of the action were uncertain or the costs of the action might be too high.²⁰ A further disincentive is that the representative entity would normally not be able to keep any possible gains of the action but must distribute them to the group members. In addition, in case the action was unsuccessful, the representative entity would be obliged to pay both its own costs and the defendants' litigation costs.²¹ This is at least a partial explanation as to why only relatively few representative actions have been brought in the EU despite their availability in some form in most Member States.²²

The novelty of certain recently introduced national collective procedures is that they provide for the possibility of individuals bringing a collective action on behalf of the whole group of claimants without the involvement of a representative body.²³ But even in relation to collective actions brought by individuals there are important differences between the various national collective action models. The most notable difference is the choice between the so-called 'opt-in' and 'opt-out' model. In the 'opt-in' model, the individual claimants must express their wish to join the collective action in order to be recognized as group members and be bound by the judgment resulting from the collective action, whereas in the 'opt-out' model, individuals are automatically members of the group, unless they explicitly opt out from it.²⁴

¹⁸ Cf. Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings', Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, Leuven, January 17th, 2007, p 281.

¹⁹ Cf. Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 21, Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Mode', Working Paper IE Law School, WPLS10-03, 26.4.2010, p 29, available at <http://ssrn.com/abstract=1612731> and Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, p 11.

²⁰ Cf. Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model', Working Paper IE Law School, WPLS10-03, 26.4.2010, p 29, available at <http://ssrn.com/abstract=1612731>.

²¹ Cf. Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, p 210.

²² Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, p 115.

²³ Cf. Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, pp 1-2.

²⁴ Cf. Mieke, 'Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB', in the Workshop 'Remedies and Sanctions in Competition Policy', Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, p 11.

In general, to date opt-in collective actions have been preferred over opt-out collective actions in the EU given that only Portugal²⁵ and, in certain cases, Denmark²⁶ provide for opt-out collective actions and the Netherlands provides for an opt-out collective settlement model for mass monetary damages.²⁷ The Portuguese opt-out collective action ('popular action') is the most extensive form of collective action based on the 'opt-out' model available in the EU. It can be brought by any citizen or by local authorities or any association or foundation on behalf of collective interests of citizens, provided that the protection of the interests at issue is included in its objectives.²⁸ In Denmark, the possibility of bringing an opt-out collective action is limited to cases where the claims of each group member do not exceed 2000 DKK and only public authorities can bring such an action.²⁹

Some forms of collective action are usually available in fields such as consumer and environmental protection³⁰ but are less common in competition law cases. The possibility of bringing collective actions for damages varies across the Member States, with certain Member States only allowing collective damages actions in specific subject matters,³¹ whereas many others do not restrict the type of claims that can be brought.³² Moreover, collective actions are often limited to applications for injunctive relief.³³ In addition, in some civil law jurisdictions in the EU, it is only possible to bring collective actions in order to obtain individual damages.³⁴

²⁵ Participation and Popular Action Law 83/95 of Aug. 31st, 1995.

²⁶ Cf. Gaudet, 'Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience' (2009) 30 (3) *E.C.L.R.* 107, p 114.

²⁷ Cf. Tzankova & Lunsingh Schleurleer, 'Netherlands Class Actions, Group Litigation and Other Forms of Collective Litigation', Netherlands National Report – part 1, pp 7-8, available at http://globalclassactions.stanford.edu/sites/default/files/documents/Netherlands_National_Report.pdf.

²⁸ Cf. Mulheron, 'The case for an opt-out class action for European Member States: a legal and empirical analysis' (2009) 15 Summer *Colum. J. Eur. Law* 409, pp 421-422.

²⁹ Cf. Gaudet, 'Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience' (2009) 30 (3) *E.C.L.R.* 107, p 114.

³⁰ Cf. Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings', Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, Leuven, January 17th, 2007 (hereinafter 'Leuven Consumer Redress Study'), p 278.

³¹ *Ibid.*, p 278. For instance, in Spain, the collective action can be used to claim damages caused by consumption or use of products and to determine the contractual or non-contractual liability of the professional. Article 11 of the Civil Procedure Law 1/2000, BOE n° 7, of January 8th, 2000.

³² For instance, in France, a consumer association can bring a claim on behalf of victims of the same unfair practice that can relate to any kind of dispute. *Cf.* Leuven Consumer Redress Study, p 278.

³³ Cf. Waelbroeck, Slater & Even-Shoshan, 'Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules', August 31st, 2004, pp 46-47.

³⁴ Cf. Leuven Consumer Redress Study, p 270.

In relation to competition law infringements, Member States usually allow for collective damages actions to be brought only on behalf of consumers.³⁵ Nevertheless, to date, few such actions have been brought.³⁶

The availability of collective procedures also forms part of the Commission's proposals on enhancing private enforcement of the EU competition rules. However, in its White Paper on Damages actions for breach of the EC antitrust rules,³⁷ the Commission only proposed the introduction of opt-in collective actions³⁸ and representative actions.³⁹ Although the proposals could make it easier and cheaper for individuals to bring a competition law damages action by allowing them to take advantage of economies of scale and bundling their resources, both types of actions would still have important limitations.⁴⁰

Representative actions would face the problem of limited financial resources discussed above and thus it would be probable that representative bodies would limit themselves to bringing damages actions that they are certain of winning, while avoiding bringing complex cases even if those cases were meritorious.⁴¹ Moreover, they might also refrain from bringing an action because of political reasons in that they are dependent on public funding or, in cases where their members are both infringers and victims of a competition law infringement, because of conflicts of interest.⁴²

Similarly, financing poses a considerable obstacle to bringing collective actions based on the 'opt-in' model. This is due to the fact that potential claimants must be identified

³⁵ Cf. Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model', Working Paper IE Law School, WPLS10-03, 26.4.2010, p 7, available at <http://ssrn.com/abstract=1612731>.

³⁶ Cf. Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, p 5.

³⁷ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 2.4.2008.

³⁸ With opt-in collective actions the European Commission refers to actions, in which victims expressly decide to combine their individual claims into one single action. Commission Staff Working Paper SEC (2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM (2008) 165 final, 2.4.2008, p 20.

³⁹ The European Commission is suggesting that victims of antitrust violations should have the right to be represented in a representative action for damages by qualified entities. Qualified entities should include entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests. Alternatively, other existing entities could be certified in order to bring a representative action in relation to a particular infringement on an *ad hoc* basis. Commission Staff Working Paper SEC (2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM (2008) 165 final, 2.4.2008, pp 18-20.

⁴⁰ Cf. Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, p 9.

⁴¹ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, p 23.

⁴² Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 21.

in advance and they must expressly 'opt in' in order to join the collective action. However, it is not always feasible to reach all individual claimants before the action is initiated as it might be difficult to identify indirect purchasers and final consumers.⁴³ There is consequently an important risk that a group of claimants would be too small for a damages action to be worthwhile. This risk is accentuated in cases involving low-value claims in that – even though the aggregate claims could be considerable – the individual claims are small and do not necessarily incentivize claimants to take active steps to join the collective action.⁴⁴ This could explain the low participation rate of affected consumers in opt-in collective competition law damages actions in the EU as demonstrated by the collective actions brought in relation to football shirts⁴⁵ and mobile phone operator⁴⁶ cartels in England and in France, respectively.

As a consequence, if the group representative is obliged to pay for the costs of litigation, without having the right of contribution from other group members, locating a group representative in a collective action in EU jurisdictions based on the 'opt-in' model may be difficult, since the incentives for bringing the action would be too small (the group representative would at best receive his own small share of the damages award), and the risks would be too high (the obligation to pay both the defendant's and his own litigation costs if the action was unsuccessful).⁴⁷

By contrast, opt-out collective actions generally ensure that the group of claimants will be sufficiently large since the action can be brought on behalf of the whole group, except for those group members who decide to opt out from the action.⁴⁸ But, as the number of group members which decide to opt out tends to be low,⁴⁹ once the group plaintiff has decided to bring the action, it will often be viable and would therefore be particularly suited for cases involving multiple claims of low value. In other words, collective actions based on the 'opt-out' model remedy the risk of the group being too small to make the action worthwhile.

⁴³ Cf. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe' (2003) 26 (3) *World Competition* 473, p 487.

⁴⁴ Cf. Leskinen, 'Antitrust Damages Actions: the Case for Opt-Out Collective Actions in Cases Involving Numerous Individual Claims of Low Value', paper presented at the Congress 'La Aplicación Privada del Derecho de la Competencia', EU University of Valladolid, School of Law, Valladolid, October 15th, 2010, p 10.

⁴⁵ Cf. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2008, p 25.

⁴⁶ *Ibid.*, p 84.

⁴⁷ Cf. Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, p 199.

⁴⁸ Cf. Mieke, 'Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB', in the Workshop 'Remedies and Sanctions in Competition Policy', Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, Thursday, February 17th, 2005, p 11.

⁴⁹ Cf. BEUC, The European Consumers' Association, 'European Group Action. Ten Golden Rules', available at: http://www.euractiv.com/ndbtext/European_Group_Action_10_Golden_Rules.pdf and Mulheron, 'Reform of collective redress in England and Wales: a perspective of need', Civil Justice Council of England and Wales, 2008, p 153, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf.

In February 2011, the Commission launched a public consultation regarding collective redress,⁵⁰ the aim of which is to identify some common legal principles on collective redress which should guide possible initiatives for collective redress in EU legislation. The public consultation note lists six common core principles which could serve as guidance for EU initiatives for collective redress: 1) the need for effectiveness and efficiency of redress; 2) the importance of information and of the role of representative bodies; 3) the need to take account of collective consensual resolution as a means of alternative dispute resolution; 4) the need for strong safeguards to avoid abusive litigation; 5) the availability of appropriate financing mechanisms, notably for citizens and SMEs; and 6) the importance of effective enforcement across the EU.⁵¹

According to the Competition Commissioner Joaquín Almunia, the Commission intends to ‘agree on a common European approach and a general legal framework to collective redress across the Union in the spring of 2011.’⁵² Although private enforcement of the competition rules is one important element of the collective redress strategy in the EU, coordinated reforms on collective redress could also benefit other policy areas, such as environmental policy and consumer protection. The public consultation therefore covers policy areas closely linked to collective redress and, in the light of the results obtained, the Commission will adopt a general EU legal framework for collective redress. Thereafter, specific legislative initiatives will be launched in the various policy areas. Based on the common principles, the Competition Commissioner intends to present a proposal on competition law damages actions in order to ensure the right to compensation for competition law infringements. The proposal would establish common standards and minimum requirements for competition law damages actions that the Member States will then implement into their legal systems.⁵³

Nonetheless, it is clear that individual consumers, and also businesses (SMEs in particular), do not always have the means and the expertise to enforce their rights through individual claims. Consequently, introducing collective redress mechanisms that would make it easier and less costly for harmed individuals and companies to enforce their rights granted under EU law by bringing a collective action under the same conditions throughout the EU, would increase access to justice. However, this objective may not be achieved if the Commission advocates the introduction of collective actions based on the ‘opt-in’ model, which may not guarantee access to justice in all situations, in particular where claims would be too small to be viably

⁵⁰ Commission Staff Working Document, Public consultation: Towards a coherent European Approach to Collective Redress, SEC(2001)172 final, 4 February 2011.

⁵¹ *Ibid.*, pp 5-6.

⁵² Cf. Almunia, ‘Common standards for group claims across the EU’, speech delivered at EU University of Valladolid, School of Law Valladolid, October 15th, 2010. Meanwhile, the date for adopting a Communication establishing common principles on collective redress has been postponed until the end of 2011. Cf. Almunia, ‘Public enforcement and private damages actions in antitrust’, speech delivered at the European Parliament, ECON Committee, September 22nd, 2011.

⁵³ Cf. Almunia, ‘Common standards for group claims across the EU’, speech delivered at EU University of Valladolid, School of Law Valladolid, October 15th, 2010.

enforced individually.⁵⁴ Arguably, the envisaged reforms of competition law damages actions should not be governed by the fear of ‘importing a US-style litigation culture’⁵⁵ that would potentially lead to abuses. Instead, a more balanced approach is needed which would include an objective analysis of the implications for the enforcement of the competition rules of introducing opt-out collective actions in the EU. In addition, due to the costs of bringing a competition law damages action, it would not only be necessary to facilitate bringing claims by introducing collective actions, but the funding and other incentives for bringing such actions must also be ensured.

3. FUNDING AND COSTS OF COLLECTIVE ACTIONS IN THE EU

3.1 Some General Remarks

In order to bring any action for damages, collective or individual, in the EU, some initial funding is needed in that in most Member States, court fees must be paid up-front. Even though such are generally calculated as a percentage of the value of the claim and the percentage level is low in most Member States, they may discourage certain competition law damages actions from being brought where the outcome of the action is uncertain and the value of the claim is high.⁵⁶ In addition, funding is also needed to cover legal fees and possibly expert fees if the case requires complex economic analysis, and for discovery in those jurisdictions where it is available. Consequently, the overall costs for bringing a competition law damages action can be significant, and may constitute a strong disincentive to bringing the action in the first place, especially if the claim is lower than the expected costs, unless the claimant can rely on some additional funding.

Indeed, national legal aid mechanisms do exist in all Member States, and their scope is often limited either to certain categories of claimants or to certain types of litigation.⁵⁷ Moreover, there has lately been a tendency to reduce public funding and the scope of civil legal aid schemes.⁵⁸ Another alternative, to reduce legal costs, is to rely on legal aid insurance. To date, it has not been extensively used in competition law damages actions.⁵⁹

Another possibility would be third party funding, whereby a third party, which could be a company, bank or hedge fund,⁶⁰ would pay all or a part of the costs of an action. In exchange, the third party would retain a share of the damages awards of a successful

⁵⁴ Cf. Taruffo, ‘Some Remarks on Group Litigation in Comparative Perspective’ (2001) 11 *Spring/Summer Duke Journal of Comparative and International Law* 405, p 413.

⁵⁵ Cf. Almunia, ‘Common standards for group claims across the EU’, speech delivered at EU University of Valladolid, School of Law Valladolid, October 15th, 2010.

⁵⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 79.

⁵⁷ *Ibid.*

⁵⁸ Cf. Hodges, ‘Europeanization of civil justice: trends and issues’ (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

⁵⁹ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 80.

⁶⁰ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law.* 30, p 30.

action.⁶¹ Third party funding appears to have increased in recent years.⁶² In England and Wales, external financial options are being offered by nearly all leading practices in London,⁶³ although its use in competition law cases is novel.⁶⁴ However, it seems to be on the rise in the EU, exemplified, for instance, by the expressed intention of the Dublin-based Claims Funding International to fund ‘complex multi-party antitrust cases in Europe where businesses are seeking damages for losses caused by a cartel that has already had a decision against it from a regulatory body’.⁶⁵

The costs of bringing a collective damages action can be considerable, precisely because of the complexity of such cases, the involvement of multiple parties, the difficulty in allocating the proceeds, etc. The risk of potential litigation costs outweighing the possible gains is to a certain extent minimized for collective actions as they permit the realization of economies of scale for claimants given that the greater the number of claimants, the lower will be the average costs of representation. This will, in turn, facilitate the raising of competition law damages actions because the significant economic resources and technical expertise involved in such cases will be reduced pro rata.⁶⁶

The funding of collective actions cannot be examined without also analyzing the costs rules as limited funding is likely to lead to a risk avoidance strategy since the prevailing cost rule in the EU is the ‘loser pays’ principle. Thus, there is a risk that meritorious claims will not be brought by claimants with low incomes.⁶⁷

With regard to representative actions, consumer organizations or other representative bodies normally pay the litigation costs.⁶⁸ This evidently reduces the financial risk of claimants, but it does not eliminate the problem of ensuring there is sufficient funding given that representative bodies are often financed through State resources. Consequently, representative bodies might be forced to prioritize their resources,⁶⁹ which may limit them to bringing actions that they deem to be successful and to avoid

⁶¹ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 80.

⁶² Hodges, Vogenauer and Tulibacka note that third-party funders are spreading from Australia to Austria, Germany, Ireland, the Netherlands and the United Kingdom. Cf. Hodges, Vogenauer & Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’, Legal Research Paper Series, Paper No 55/2009, December 2009, p 30, available at <http://ssrn.com/abstract=1511714>.

⁶³ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law.* 30, p 30.

⁶⁴ Cf. Koutsoukis, & O’Shea, ‘Litigation funding in European antitrust cases: legal and practical issues’ (2009) 2 (2) *G.C.L.R.* 74, p 75.

⁶⁵ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law.* 30, p 30.

⁶⁶ Cf. Polverino, ‘A Class Action Model for Antitrust Damages Litigation in the European Union’, August 28th, 2006, p 36, available at: <http://ssrn.com/abstract=927001>.

⁶⁷ Hodges, ‘Europeanization of civil justice: trends and issues’ (2007) 26 (Jan) *C.J.Q.* 96, pp 100-101.

⁶⁸ This is the situation, for example, in France. Cf. France – National Report, 15 November 2006, prepared for the Leuven Consumer Redress Study, p 15.

⁶⁹ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 21.

bringing complex cases in order to avert the risk of losing⁷⁰ and, as a result, being obliged to pay the defendants' litigation costs.

The situation is accentuated with respect to collective actions brought by individuals. The risk of losing, associated with the obligation to pay the other party's litigation costs, serve as a disincentive to claimants with small damages claims from initiating proceedings,⁷¹ unless the group representative has a right of contribution from other group members. In the latter case, the other group members might not be interested in joining the collective action.

As the 'loser pays' rule might discourage claimants from bringing meritorious competition law damages actions, the financial risk of bringing an action should be reduced in order for claimants to be willing to take the risk of losing the action and paying the costs. One possibility would be to cap the costs which claimants must pay in case the claim is unsuccessful. This would, in particular, be justified in complex cases the outcome of which is uncertain. Nonetheless, it would be necessary to adopt safeguards that would impede claimants from bringing unfounded actions, by requiring claimants who do so to pay the defendants' legal costs.

Another way to foster competition law damages actions would be to allow some form of contingency fee arrangements in that lawyers would then have an incentive to act as a 'driving force' in bringing the action.⁷² This would be of particular importance in collective actions where claimants do not have the expertise and experience required to act as group representatives. Contingency fees would also give an incentive to lawyers to achieve the best possible recovery for their clients since their own recovery would depend on that of their clients.

Although contingency fees have generally been prohibited in many Member States,⁷³ more recently, a change has been noticed in that certain Member States have become more permissive towards contingency fees.⁷⁴ This change of attitude can, at least partly, be attributable to Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes,⁷⁵ which lays down an obligation for Member States to achieve effective access to justice and representation mainly through a legal aid

⁷⁰ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, p 23.

⁷¹ Cf. Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, p 199.

⁷² Such arrangements are common in the United States, where practically all class actions are brought by lawyers under contingency fee arrangements. Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

⁷³ Cf. Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective' (2001) 11 Spring/Summer *Duke Journal of Comparative and International Law* 405, p 415.

⁷⁴ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

⁷⁵ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, pp 41-47.

system.⁷⁶ However, it is not necessary to grant legal aid to applicants if they have effective access to other mechanisms that cover the costs of proceedings.⁷⁷ This has encouraged Member States to introduce private funding instead of increasing State funding. Although many Member States still provide legal aid, its scope and coverage is limited. Furthermore, a growing trend of further limitation of government funding can be observed. As a consequence, there is a tendency to permit more flexible ways to reward lawyers.⁷⁸

Next, this paper aims to examine the existing costs rules and the availability of contingency fees in a range of EU Member States.

3.2. Costs Rules and Availability of Contingency fees in England and Wales, Germany, France, Spain and Sweden

3.2.1. England and Wales

In England and Wales, it is possible to enter into a conditional fee agreement, whereby if the claim is successful, the claimant's lawyer can obtain a success fee in addition to the initial legal fee. By contrast, if the claim is unsuccessful, the lawyer must pay both sides' costs.⁷⁹ This consequently shifts the risk from the claimant to the lawyer, as long as the lawyer is willing to bring the action in the first place. Nevertheless, despite the availability of conditional fee arrangements in the High Court and the Competition Appeal Tribunal, they do not appear to be very common yet in competition law damages actions.⁸⁰ Again, the reason seems to be the complexity and unpredictability of these actions.⁸¹

It is also possible in England and Wales to insure against the other party's costs by using 'After the Event Insurance'. The insurance premium must be paid in advance but, if the action is successful, it can be recovered. Nonetheless, due to the uncertain outcome of many competition law damages actions, insurers are likely to charge too high a premium which will discourage the wide use of such insurance.⁸²

⁷⁶ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, p 99.

⁷⁷ Article 5(5) of Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, pp 41–47.

⁷⁸ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99–100.

⁷⁹ Cf. Centre for European Policy Studies, Erasmus University, Rotterdam and Luiss Guido Carli, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios', Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report, Brussels, Rome and Rotterdam, December 21st, 2007, p 208.

⁸⁰ This was at least the situation in 2006 (cf. Peysner, 'The Costs and Financing in Private Third Party Competition Damages Actions' (2006) 3 (1) *CompLRev* 97, p 99), and fees calculated on an hourly basis still remain the normal model for calculating lawyers' fees. Cf. Smith, Maton & Campbell, 'England and Wales' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 296–315, p 314.

⁸¹ Cf. Peysner, 'The Costs and Financing in Private Third Party Competition Damages Actions' (2006) 3 (1) *CompLRev* 97, p 99.

⁸² *Ibid.*, pp 99–100.

At present, only specified bodies that meet the criteria laid down by the Secretary of State can bring a representative action for competition law damages before the Competition Appeal Tribunal ('CAT') and they can only do so on behalf of named consumers who have consented to be bound by the outcome of the litigation.⁸³ The only specified body so far to fulfil the criteria is Which?, the former Consumers' Association.⁸⁴

The CAT does not apply the 'loser pays' principle,⁸⁵ but instead it may decide that both parties pay their own costs.⁸⁶ However, if the final award following a hearing is lower than the defendants' offer to settle, the CAT will order the claimant to pay any costs incurred by the defendant (with interest) after the latest date on which the payment or offer could have been accepted, unless it considers it unjust to do so.⁸⁷ As a consequence, the defendant will have a strong incentive to offer a settlement given the possibility that the claimant would then have to bear the costs incurred by the defendant.⁸⁸

In order to incentivize lawyers to bring well-founded competition law damages actions, the Office of Fair Trading ("OFT") has proposed that, in certain cases, it should be possible to increase the percentage of the success fee in conditional fee arrangements by more than 100%, which is currently the maximum percentage of increase available.⁸⁹ Depending on the circumstances, this could be justified, for instance, when the legal issues at stake are complex and novel. The funding arrangement would in any case be subject to judicial supervision. Moreover, the OFT recommends that courts should be given discretion to cap parties' cost liabilities in competition cases, since this would provide claimants with certainty as to their potential exposure if they lost their case. In addition, cost-capping can reduce incentives to run up costs with the result that parties are encouraged to conduct litigation efficiently.⁹⁰

The UK Civil Justice Council, in turn, has recommended the establishment of a Supplemental Legal Aid Scheme, the acceptance of properly regulated third party funding as a mainstream funding option, and, in the absence of other effective funding mechanisms, contingency fees.⁹¹

⁸³ Section 47B of the Competition Act 1998.

⁸⁴ Office of Fair Trading, 'Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules', OFT844, May 2006, pp 13-14.

⁸⁵ Cf. Peysner, 'The Costs and Financing in Private Third Party Competition Damages Actions' (2006) 3 (1) *CompLRev* 97, p 108.

⁸⁶ *Ibid.*, p 99.

⁸⁷ CAT Rules 43.7.

⁸⁸ Cf. Peysner, 'The Costs and Financing in Private Third Party Competition Damages Actions' (2006) 3 (1) *CompLRev* 97, p 109.

⁸⁹ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, pp 30-31.

⁹⁰ *Ibid.*, pp 32-34.

⁹¹ Civil Justice Council, 'Improving Access to Justice through Collective Actions', Developing a More Efficient and Effective Procedure for Collective Actions, A Series of Recommendations to the Lord Chancellor, July 2008, p 151.

Nevertheless, as long as the English legislation only provides for representative actions for damages, allowing a substantial increase in the percentage of the success fee in conditional fee arrangements – if the UK government decides to act upon OFT's recommendations – is unlikely to significantly facilitate collective competition law claims in England. On the other hand, cost-capping would serve to reduce the financial risks of the representative body bringing a representative action for competition law damages.

3.2.2. Germany

In Germany, the rules for calculating both lawyers' and court fees vary considerably from the English cost rules in that they are regulated by statute. These fees are contained in tables of fixed tariffs and the parties may not deviate from them for the purpose of fee shifting. The fees are calculated on the basis of the amount in dispute and then a multiplier is applied to the tariff in question. The multiplier will depend on the steps taken at the various stages of the legal proceedings and it is assumed that cases dealt with in the lower courts will involve less effort.⁹² The calculation of lawyers' fees therefore depends on the nature of the proceedings but does not consider specific effort required in a particular case. The idea is simply that cases involving smaller sums usually require less effort to resolve. In civil litigation, the lawyer is entitled to a case-handling fee and a hearing fee, which are due early: the former, once the lawsuit is pending and, the latter, at the first oral hearing before the court. If the parties agree to settle their dispute, the lawyer can charge an additional settlement fee. As to court fees, they must already be paid when the action is brought, but the claimant can recover the cost paid in advance from the defendant if he wins the case.⁹³

Nevertheless, in competition law damages cases, the claimant may request the court to adjust the case value to his financial situation if the obligation to bear the full litigation costs would otherwise jeopardize his financial situation considerably. The court may make an adjustment dependent on whether the claimant can plausibly demonstrate that the costs that he would have to bear will not be covered by a third party. As a consequence, the party benefitting from the adjustment will also only be responsible for paying the fees of his lawyer corresponding to the adjusted case value.⁹⁴

However, it is possible for a party and lawyer to agree on hourly fees, but those fees must not be lower than the fees provided by statute. Such higher fees are generally not recoverable from the other party.⁹⁵ This is because the German litigation model is based on the principle of full fee shifting but it is only limited to fixed fees. The obligation of the losing party to pay for the costs of the proceedings is thus confined to

⁹² Cf. Wagner, 'Litigation costs and their recovery: the German experience' (2009) 28 (3) *C.J.Q.* 367, pp 367-370.

⁹³ *Ibid.*, pp 370-372.

⁹⁴ Article 89a of the Act against Restraints in Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

⁹⁵ Cf. Wagner, 'Litigation costs and their recovery: the German experience' (2009) 28 (3) *C.J.Q.* 367, p 378.

the costs that were fixed by statute regardless of whether the party and his lawyer have agreed to another type of remuneration for the lawyer.⁹⁶

Until recently, German law prohibited agreements to the effect that lawyers' fees (or the amount of those fees) depended on the outcome or success of the claim. Agreements according to which the lawyer would obtain a part of the contested amount in fees were similarly prohibited. Lawyers could also not oblige themselves to pay court, administrative or other fees.⁹⁷ Nevertheless, this strict prohibition of contingency fees was first adjusted by a ruling by the German Federal Constitutional Court in 2006, which held that a complete ban was contrary to the constitutional right of the professional freedom of lawyers since potential claimants could be deterred from enforcing their rights due to the risk of losing and, consequently, the obligation to bear the costs of the litigation.⁹⁸ As a result, the Lawyers' Remuneration Act (*Rechtsanwaltsvergütungsgesetz*) was amended in 2008, allowing contingency fees but only in cases where the claimant would otherwise not be able to enforce his rights because of his financial situation.⁹⁹ The agreement between lawyer and client must contain the estimated remuneration according to statute and, if applicable, the agreed remuneration for which the lawyer would be willing to accept the case, and an indication of what remuneration would be applicable and under what conditions.¹⁰⁰ Furthermore, contingency fees would be excluded from the costs which are recoverable under fee shifting.¹⁰¹

Germany does not currently provide for collective actions for damages.¹⁰² However, a German court has permitted a Belgian company, Cartel Damage Claims SA, which was specifically founded for the purpose of competition law litigation,¹⁰³ to bring in its name damages claims that it had bought from several customers of the cement cartel who had allegedly been harmed by the cartel.¹⁰⁴ In other words, under German law, it might be possible to bundle several claims into one legal person, but the admissibility

⁹⁶ Ibid., pp 374-375.

⁹⁷ Article 49b (2) of the Rules and Regulations for the Bar (*Bundesrechtsanwaltsordnung*).

⁹⁸ Bundesverfassungsgericht, Dec. 12, 2006, Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 BvR 2576/04.

⁹⁹ Article 4a(1) of the Lawyers' Remuneration Act.

¹⁰⁰ Article 4a(2) of the Lawyers' Remuneration Act.

¹⁰¹ Article 4a(3) of the Lawyers' Remuneration Act.

¹⁰² Cf. Mieke, 'Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB', in the Workshop 'Remedies and Sanctions in Competition Policy', Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, Thursday, February 17th, 2005, p 50.

¹⁰³ Cf. Thomas, 'Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen)' 2007-I January N° 12706 *e-Competitions*.

¹⁰⁴ Cf. Thomas, 'De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA)' 2007-II February N° 13224 *e-Competitions*.

of this type of bundling will be decided by the German Federal Court of Justice when it will rule on the substance of the case.¹⁰⁵

3.2.3. France

In France, contingency fees are illegal.¹⁰⁶ However, it is possible to agree on 'complementary fees', which can be calculated on the basis of the outcome of the action, provided that they do not exceed a reasonable portion of the fixed fees.¹⁰⁷ It should also be borne in mind that French courts impose almost no charge on litigants for raising court actions.¹⁰⁸ The limited court fees (*dépens*) are subject to fee shifting, whereas lawyers' fees (*frais*) are not.¹⁰⁹ Court fees are generally paid at the end of the procedure, but when an expert is appointed, the claimant may have to pay a stipulated sum in advance.¹¹⁰ Since the court fees are low, they are not expected to constitute a significant obstacle to bringing an action in French courts. However, as lawyers' fees can be considerable¹¹¹ and experts might be needed in competition law damages actions in order to demonstrate and quantify the damage, the incentives for bringing competition law damages actions are not necessarily sufficient.

Furthermore, the possibility of bringing collective actions for damages is severely limited by the burdensome procedure that requires every consumer to give a mandate and that they must be personally informed. Moreover, the procedure is too costly for consumer organizations since insurance companies are not willing to cover the costs.¹¹²

3.2.4. Spain

In Spain, a recent judgment of the Spanish Supreme Court in 2008 has clarified that contingency fees are to be allowed,¹¹³ contrary to an earlier Decision of the General Council of the Spanish Bar. Until this Supreme Court Judgment, the rules of professional conduct of the Spanish Bar prohibited agreements between lawyer and client under which it was agreed that the lawyer would only charge for a part of the sum awarded as a result of the litigation. Nevertheless, it provided that the lawyer and client

¹⁰⁵Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of April 7th, 2009 in Case No. KZR 42/08 and Leskinen, 'Recent Developments on Collective Antitrust Damages Actions in the EU' (2011) 4 (2) *G.C.L.R.* 79, p 82.

¹⁰⁶Article 10 of Act n°71-1130 of December 31, 1971 on the reform of certain legal professions (*Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*).

¹⁰⁷Cf. Magnier, 'The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe' in Hensler, Hodges & Tulibacka (eds.), *The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*, Volume 622, Sage Publications (CA), 2009, pp 114-124, p 122, note 20.

¹⁰⁸Cf. Hodges, Vogenauer & Tulibacka, 'Costs and Funding of Civil Litigation: A Comparative Study', p 11, available at <http://ssrn.com/abstract=1511714>.

¹⁰⁹*Ibid.*, p 20.

¹¹⁰National Report on France prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, p 27.

¹¹¹Cf. Hodges, Vogenauer & Tulibacka, 'Costs and Funding of Civil Litigation: A Comparative Study', p 56, available at <http://ssrn.com/abstract=1511714>.

¹¹²Leuven Consumer Redress Study, p 274.

¹¹³Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

could agree that the lawyer would charge a part of the amount recovered in order to increase the fee to cover the costs incurred by the lawyer.¹¹⁴ The Supreme Court rejected the argument of the General Council of the Spanish Bar that the prohibition of contingency fees was a measure of general interest that aimed to guarantee the independence of lawyers by holding that if that was the aim of the prohibition, it would also have prohibited lawyers from charging a part of the amount recovered in order to increase their fee. Instead, the Court held that the prohibition of contingency fees resulted in minimum price fixing in relation to lawyers' fees.¹¹⁵

The costs for raising court proceedings depend on the specific characteristics of the case and the complexity of the issues at stake.¹¹⁶ In any case, the claimant must pay a judicial fee unless he is a non-profit organization, a legal entity (partly or wholly) exempted from company tax, an individual or a small company.¹¹⁷ As regards costs incurred during court proceedings, in principle, the 'loser pays' rule applies, unless the court finds that the case raises serious legal or factual doubts in the light of previous case law. If the claim is only partly successful, each party bears his own costs and half of the common costs incurred, unless one of them has acted recklessly. The amount that the losing party must pay for the legal and other professional fees must not exceed a third of the value of the action, unless he is found to have acted recklessly.¹¹⁸

Under Article 11 of the Civil Procedure Law 1/2000, consumer and user associations can bring collective actions for damages caused by competition law infringements.¹¹⁹ Moreover, if the members of the affected group are identified or are easily identifiable, the affected group can also bring a collective action for damages.¹²⁰ The Supreme Court ruling on contingency fees could therefore open new possibilities for individuals to bring a collective action, provided that lawyers will agree to bring collective competition law damages actions under a contingency fee arrangement.

3.2.5. Sweden

Contrary to Spain, the general rule in Sweden is that contingency fees are not allowed since the Swedish Bar Association regards them as disproportionate.¹²¹ However, the Swedish Group Proceedings Act provides for a moderate form of contingency fees in

¹¹⁴Cf. Vérguez Muñoz & Pérez Guerra, 'Comentario a la Sentencia del Tribunal Supremo de 4 de noviembre de 2008, las implicaciones de la *cuota litis* desde la perspectiva del Derecho de la competencia' (2009) March/April No 8 *Gaceta Jurídica de la Unión Europea y de la Competencia* 107, p 107.

¹¹⁵Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

¹¹⁶Cf. Folguera Crespo & Martínez Corral, 'Spain. The judicial application of European competition law' in Rodríguez Iglesias & Ortiz Blanco (eds.), *The judicial application of Competition Law*, Proceedings of the XXIV FIDE Congress Madrid 2010 Vol.2, Servicio de publicaciones de la Facultad de Derecho Universidad Complutense, Madrid, 2010, pp 391-429, p 414.

¹¹⁷Article 35 of Law 53/2002 of December 30th, on tax, administrative and social measures.

¹¹⁸Article 394 of Law 1/2000 on Civil Procedure, of January 8th, 2000.

¹¹⁹Asociación Española para la Defensa de la Competencia, 'Observations to the Green Paper on Damages actions for breach of the EC antitrust rules', p 8.

¹²⁰Article 11 of the Civil Procedure Law 1/2000, of January 7th, BOE No. 7, of January 8th, 2000.

¹²¹National Report on Sweden prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, p 12.

that group members may conclude a so-called ‘risk agreement’ with their lawyer, pursuant to which the amount of remuneration will depend on the extent to which their claims have been successful.¹²² Furthermore, the evaluation study of the Group Proceedings Act found that an exception from the prohibition of contingency fees should be made in group litigation cases in certain circumstances. ‘No win, no fee’ agreements should be approved as such, but the percentage of the value of the litigation at issue which the lawyer may claim if the case is successful should be assessed on a case-by-case basis, but should, in any case, not exceed 30%.¹²³

Although Sweden also provides for collective opt-in actions brought by an individual on behalf of all individuals belonging to the group who have decided to join the action,¹²⁴ and allows a modified form of contingency fees, few actions have been brought¹²⁵ and none in relation to a competition law infringement.

Court fees in Sweden are practically non-existent. The claimant must merely pay an application fee corresponding approximately to €50 when he files an application for a summons with the civil court. As regards the allocation of costs in court proceedings, the ‘loser pays’ principle generally applies, but it is also possible to apportion the costs between the parties depending on the success of their claims.¹²⁶ Compensation for litigation costs includes the costs for preparation and presentation of the case as well as lawyers’ fees to the extent that the costs have been reasonably incurred in order to enforce the party’s rights. Similarly, compensation must be paid for the effort and time of the party involved in the litigation. Compensation also covers interest accrued.¹²⁷

In addition to the jurisdictions examined above, Estonia, Finland, Hungary, Italy, Lithuania, Slovakia and Slovenia also permit contingency fees.¹²⁸ Moreover, in a number of other Member States, such as Austria, Denmark, Portugal and Romania, success fees are allowed.¹²⁹

¹²² Article 38 of the Group Proceedings Act 2002 (2002:599)

¹²³ DS 2008:74 (Evaluation of the Group Proceedings Act), pp 178-179.

¹²⁴ Sections 1, 4 and 14 of the Swedish Group Proceedings Act (2002:599).

¹²⁵ Cf. Lindblom, ‘Global class actions. National report: Group Litigation in Sweden, update paper sections 2.5 and 3’, p 2, available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20-08.pdf.

¹²⁶ Cf. Öberg & Lundström, ‘Sweden. The judicial application of European competition law’- in Rodríguez Iglesias & Ortiz Blanco (eds.), *The judicial application of Competition Law*, Proceedings of the XXIV FIDE Congress Madrid 2010 Vol.2, Servicio de publicaciones de la Facultad de Derecho Universidad Complutense, Madrid, 2010, pp 431-458, p 456.

¹²⁷ Section 8 of Chapter 18 of the Code of Judicial Procedure.

¹²⁸ Cf. Hodges, Vogenauer & Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’, Legal Research Paper Series, Paper No 55/2009, December 2009, p 29, available at <http://ssrn.com/abstract=1511714>. However, in Lithuania, 50 per cent uplift is illegal, while Slovakia and Slovenia only permit contingency fees up to 20% and 15%, respectively. *Ibid.*, Appendix VI, p 81.

¹²⁹ *Ibid.*, p 81.

3.2.6. Concluding Remarks

To summarize, Member States regulate contingency fees in divergent ways. While contingency fees are allowed in a minority of Member States, many Member States still prohibit contingency fees¹³⁰ even though some have instead developed alternative fee arrangements that provide for certain types of risk agreements which derogate from the general rules applicable to lawyers' fees.

By contrast, in the United States, it is possible to agree that a lawyer will only be paid if the action is successful. Therefore, in that context it may be in the lawyer's interest to seek damages that are as great as possible and, as a consequence, he or she will also try to reduce costs in order to maximize the gains.¹³¹ It is thus of particular interest to now turn to the U.S. model in order to analyze the role of contingency fees in class actions and examine whether the U.S. model could be used as inspiration when the EU contemplates the introduction of an EU collective redress mechanism.

4. A PROPOSAL FOR RETHINKING FUNDING OF COLLECTIVE ACTIONS

4.1. The Role of Contingency Fees in Class Actions in the United States

In the United States, each party bears his own litigation costs.¹³² However, in antitrust damages actions, Section 4 of the Clayton Act provides that successful claimants may recover treble damages and reasonable attorneys' fees and costs.¹³³ It thus provides for one-way fee shifting,¹³⁴ i.e. the defendant must pay the costs and reasonable attorney's fees of the successful claimant and must always pay its own legal costs. But if the claimant loses the action, he will not be obliged to compensate the defendant for his attorney's fees or costs.¹³⁵ In other words, the claimant will, in principle, not be liable for the defendant's costs even if his action is unsuccessful.¹³⁶

In class actions, the level of attorney's fees of successful claimants will ultimately be determined by the judge, who must review the reasonability of the awards. In general, two methods are employed to calculate the attorney's fees, in common fund cases and fee shifting cases.¹³⁷ In the former, the fee is based on a percentage of the fund, which

¹³⁰Cf. Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective' (2001) 11 Spring/Summer *Duke Journal of Comparative and International Law* 405, p 415.

¹³¹Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 289.

¹³²Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 October *Fordham L. Rev.* 51, p 54.

¹³³15 U.S.C. § 26.

¹³⁴Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 288.

¹³⁵Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 October *Fordham L. Rev.* 51, pp 57–58.

¹³⁶However, there are some exceptions to this rule. For instance, if the claimant has breached Rule 11 of the Federal Rules of Civil Procedure, he will be liable for paying the defendant's litigation costs. 28 U.S.C. §11(c).

¹³⁷Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 289.

has been created for the benefit of the class, while in the latter, the fee is commonly calculated by using the so-called lodestar method,¹³⁸ which means that the attorney's hourly rate will be multiplied by the hours worked. If it is appropriate, the courts adjust the figure so that it reflects the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.¹³⁹ In antitrust actions, many courts use the lodestar method to calculate the reasonability of attorneys' fees,¹⁴⁰ including in verifying the reasonability of a percentage-based attorney fee request.¹⁴¹

The rationale for awarding attorneys' fees to successful claimants is to seek to ensure that meritorious damages claims will be efficiently brought as it provides additional incentives for private litigants to pursue anti-competitive conduct.¹⁴² Similarly, the one-way fee shifting rule compensates claimants for undertaking risky, costly litigation.¹⁴³

However, the fact that the claimant will, in principle, not be obliged to compensate for the defendant's costs and attorneys' fees does not mean that bringing an antitrust damages action is completely risk-free. In fact, if the claimant loses the case, he would have to bear his own litigation costs, including his attorneys' fees.¹⁴⁴ Therefore, claimants lacking sufficient funds could be discouraged from bringing meritorious actions. However, there is the possibility of reducing the claimant's risk by allowing him to conclude a contingency fee arrangement with his lawyer.¹⁴⁵ Under a contingency fee arrangement, the lawyer will only be paid if he wins the case. In that case, his fee will consist of a percentage of the recovery obtained for the client. If the action is unsuccessful, the lawyer receives no payment.¹⁴⁶ The lawyer thus bears the risk of losing the case and will be liable for the costs incurred in litigating the case. In addition to the risk of losing the case, the lawyer also faces other risks, such as: being fired before recovery but after he has undertaken significant work; winning the case but the award is minimal (or, even if the award is adequate, the defendant is unable to pay it).

¹³⁸ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹³⁹ Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250 and *Hensley v. Eckerhart*, 461 U.S. 424 (1982), para. 433.

¹⁴⁰ Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250.

¹⁴¹ Cf. Wildfang & Slaughter, 'Funding Litigation' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 220-239, p 234. The lodestar method is more typical in statutory fee shifting cases (e.g. antitrust cases), but the U.S. Third Circuit has suggested that regardless of the method chosen for the verification of the reasonableness of attorneys' fees, the court should use a second method of fee approval to cross-check its initial fee calculation. Cf. *In re Rite Aid Corp. Sec. Litig.*, 396 F. 3d 294 (3^d Cir. 2005) para. 300.

¹⁴² Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250.

¹⁴³ *Ibid.*, p 251.

¹⁴⁴ Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 *October Fordham L. Rev.* 51, p 54.

¹⁴⁵ Indeed, in the United States, contingency fees are common in private antitrust litigation, including class actions. Cf. Wildfang & Slaughter, 'Funding Litigation' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 220-239, p 234.

¹⁴⁶ Cf. Shajnfeld, 'A critical survey of the law, ethics, and economics of attorney contingent fee arrangements' (2009/2010) 54 *N.Y.L. Sch. L. Rev.* 773, p 775.

Moreover, his client might accept a low settlement figure or refuse to accept a reasonable offer to settle and instead choose to undertake risky litigation.¹⁴⁷

Contingency fees have been justified for the following principal reasons. First, they enable parties who would otherwise not be able to afford litigation to enforce their rights. Since litigation today is more complex and often requires the use of experts and economic evidence, contingency fees are particularly important in assisting claimants who would have difficulties in paying legal fees in advance. Second, they facilitate the alignment of lawyers' and clients' interests in that both will receive a part of the recovery of the litigation. Third, since lawyers' fees depend on the outcome, they will have an incentive to only accept cases that are meritorious and where there is sufficient proof to ensure the action is likely to succeed. Finally, parties should in general be allowed to contract freely and, therefore, restrictions on contingency fees would also restrict this freedom.¹⁴⁸

Arguably, contingency fees give lawyers incentives to handle cases in a way that will result in a favourable outcome for their client as their own reward will increase as a consequence. Moreover, their reputation as lawyers is also at stake. Therefore, they can normally be assumed to act in the best interest of their clients even under a contingency fee arrangement. Nevertheless, reputational impact alone is insufficient to ensure lawyers act responsibly toward their clients, because clients are not always in a position to determine this issue. In addition, they may not have the means, access to media or credibility to attack their lawyers' reputation.¹⁴⁹ This is why certain safeguards might be necessary to ensure that contingency fees will not give lawyers perverse incentives.

Contingency fees are often necessary in order for the claimants to bring a class action since class actions are usually costly and, therefore, they are in general instigated by lawyers.¹⁵⁰ Moreover, if the individual claimant can only recover his own damages, which even trebled may be a modest amount, the incentive to initiate burdensome proceedings is low. Instead, the remuneration for the class action lawyer is crucial.¹⁵¹ In addition, the one-way fee shifting rule provides an important incentive to private antitrust litigation¹⁵² since the lawyer will obtain compensation for the costs of the litigation and his own work if the class action is successful.

Lawyers usually have greater liquidity than consumers and have the capacity to assess whether the class action is likely to succeed. Consequently, they will only accept cases

¹⁴⁷Ibid., p 788.

¹⁴⁸Ibid., p 776.

¹⁴⁹Ibid., p 777.

¹⁵⁰Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

¹⁵¹Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, pp 288-289 and Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, 197.

¹⁵²Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 298.

that will offer sufficient benefits. In addition, they can take advantage of portfolio diversification whereby they handle several cases simultaneously. Contingency fees will therefore give them incentives to bring the class action and they are an effective way of funding class actions¹⁵³ since the prospect of large awards makes lawyers more willing to pay for up-front legal costs. In fact, virtually all class actions in the United States are funded by contingency fee arrangements.¹⁵⁴

Class actions are often settled and the parties agree on the amount that is to be paid to the class attorney in fees. This amount must be approved by the court.¹⁵⁵ This is particularly crucial when the settlement consists of large sums as class attorneys have more incentives to settle in these cases. In addition, once the class has been certified, it is difficult for claimants to monitor the behaviour of the class attorney and, thus, it is necessary that the court should instead exercise control over the class attorney's fees.¹⁵⁶

Sometimes the settlement in a class action is a so-called coupon settlement, whereby class members will receive a coupon for a discount in purchasing another of the defendant's products while the class attorneys are paid fees in cash. Courts have often rejected coupon settlements as unfair.¹⁵⁷ Indeed, the Class Action Fairness Act of 2005 provides that the court may approve coupon settlements only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.¹⁵⁸ Moreover, if the proposed settlement provides for a recovery of coupons to a class member, the portion of any attorney's fee to class counsel must be proportionate to the value of the recovery of the class members.¹⁵⁹ In order to receive expert testimony, the court may also appoint a witness qualified to provide information on the actual value to the class of the coupons which are redeemed.¹⁶⁰

These measures intend to guarantee that the class attorney does not have an incentive to pursue settlement in a case in exchange for a large fee while class members would receive little compensation. Thus, they also serve to limit the risks that under a contingency fee arrangement, lawyers would pay insufficient regard to the interests of the class members.

¹⁵³ Cf. Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, pp 198-199.

¹⁵⁴ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

¹⁵⁵ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁵⁶ Cf. Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union', August 28th, 2006, p 15, available at: <http://ssrn.com/abstract=927001>.

¹⁵⁷ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁵⁸ Sec. 3(e) of the CAFA, 28 USC § 1712.

¹⁵⁹ Sec. 3(a) of the CAFA, 28 USC § 1712.

¹⁶⁰ Sec. 3(d) of the CAFA, 28 USC § 1712.

4.2. Lessons to Learn from the US Experience of Contingency Fees

Contingency fees have many advantages in facilitating meritorious litigation, especially when coupled with no obligation to pay for the defendant's litigation costs and the availability of an opt-out class action mechanism. They shift the risk of litigation from the client to the lawyer in that the lawyer will bear the costs of litigation in case the claim is unsuccessful. As a result, claimants have greater incentives to enforce their rights and are more likely to bring an action.¹⁶¹ Since opt-out class actions ensure that the group of claimants will be sufficiently large for the class action to be worthwhile, lawyers are more likely to take the risk of bringing the action under a contingency fee arrangement as they generally have more liquidity than consumers.¹⁶² Because contingency fees serve to lower the threshold for bringing a competition law damages action, compensation for victims of competition law infringements is, arguably, better ensured.

In addition, contingency fees help align the interests of lawyers and clients since both will receive a part of the recovery of the litigation. Thus, contingency fees give lawyers incentives to obtain a favourable outcome for their client as their own reward will increase as a result. Moreover, their reputation as lawyers is also at stake. Accordingly, lawyers will generally also have an incentive to only accept cases which are meritorious and likely to succeed.¹⁶³

However, these assumptions may have to be adjusted in jurisdictions where there is a 'loser pays' rule. In those jurisdictions, the claimant would normally be responsible not only for his own litigation costs but also the costs of the defendant if his claim failed. As a consequence, a lawyer bringing an action on behalf of his client on the basis of a contingency fee arrangement would assume the risk of compensating the defendant's litigation costs, including his lawyers' fees, as well as not receiving any payment for his work from his own client because of the 'no win, no fee' agreement. The lawyer's risk is therefore clearly increased, even under a contingency fee arrangement, in jurisdictions which apply the 'loser pays' rule. This suggests that contingency fees should be examined in the context of all procedural rules applicable in a particular jurisdiction as the various procedural elements in a legal system are intertwined. Consequently, the introduction of contingency fees alone might be insufficient to significantly increase private enforcement in the EU if other procedural aspects are not duly considered and, if appropriate, some other amendments made to the applicable procedural rules.¹⁶⁴

¹⁶¹ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2746.

¹⁶² Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

¹⁶³ Cf. Shajnfeld, 'A critical survey of the law, ethics, and economics of attorney contingent fee arrangements' (2009/2010) 54 *N.Y.L. Sch. L. Rev.* 773, pp 776-777.

¹⁶⁴ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2747.

In fact, the damages awardable must be sufficiently large for contingency fees to work.¹⁶⁵ If the claim is of low value, even the prospect of obtaining a percentage of the recovery would not provide a sufficiently strong incentive for lawyers to agree to bring damages actions under a contingency fee arrangement. The challenge for the EU is greater since, in the majority of jurisdictions, compensation can only be sought for the actual damages, including the loss of profit (plus interest).¹⁶⁶ Consequently, any agreement on a contingency fee based on a share of the recovery would therefore impede the claimant from obtaining full compensation for the harm that he has suffered as a result of a competition law infringement.

In the United States, there is also a risk that frivolous class actions might be brought because of a combination of:- the prospect of obtaining treble damages, the potentially large contingency fees for lawyers and absence of any responsibility of an unsuccessful claimant to pay the defendant's costs and lawyers' fees.¹⁶⁷ Competitors have high incentives to bring antitrust damages actions because there is a possibility that the potentially high costs for the defendant to defend himself and the risk of treble damages induce the defendant to settle the action even though his conduct was not anti-competitive.¹⁶⁸ To reduce such negative effects of private antitrust litigation, the U.S. Supreme Court has limited the claimants' right to bring an antitrust damages action to situations where they have been harmed by illegal conduct and the antitrust injury is an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'¹⁶⁹ In essence, the aim of the U.S. antitrust laws is therefore to protect competition, not competitors, i.e. an antitrust injury is only established if the anti-competitive conduct harms consumer welfare generally.¹⁷⁰ Accordingly, it is not possible to seek compensation for injury which stems from competition.¹⁷¹ In order to limit excessive and unfounded damages claims,¹⁷² the U.S. courts have therefore restricted the scope of antitrust laws to cases where the

¹⁶⁵ Ibid.

¹⁶⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 56. Nevertheless, it should be noted that in the United States, even the so-called treble damages tend to be equivalent to single damages since they do not include prejudgment interest and other factors, e.g. allocative inefficiency effects felt by society and the value of the time plaintiffs have spent on litigation. Cf. Lande & Davis, 'Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries Considering a Private Right of Action for Competition Law Violations', p 16, available at <http://ssrn.com/abstract=1474804>.

¹⁶⁷ Cf. Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union', August 28th, 2006, p 34, available at: <http://ssrn.com/abstract=927001>.

¹⁶⁸ Cf. Ginsburg, 'Comparing antitrust enforcement in the United States and Europe' (2005) 1 (3) *Journal of Competition Law and Economics* 427, pp 435-436.

¹⁶⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), para. 489.

¹⁷⁰ Cf. Cramer & Simons, 'Parties entitled to pursue claims' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 83-110, p 85.

¹⁷¹ Cf. Jones, *Private Enforcement of Antitrust Law in the EU, UK and the USA*, Oxford University Press, New York, 1999, p 175.

¹⁷² Cf. e.g. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)

plaintiff has suffered an injury resulting from the defendant's illegal conduct, which the antitrust laws were designed to prevent.¹⁷³

More recently, in *Bell Atlantic Corp. v. Twombly* in 2007, the Supreme Court further limited claimants' possibilities of bringing an antitrust action in holding that claimants must demonstrate that there is a plausible ground for their claim by providing enough factual matter supporting their claim. The Court stated that otherwise a claimant with an unfounded claim could force a defendant to agree to an unreasonably high settlement by taking advantage of wide and expensive discovery.¹⁷⁴ The plausibility requirement makes it is easier for courts to reject unfounded actions.¹⁷⁵

Furthermore, antitrust damages actions tend to be complex and lengthy. Because of the time and money required to bring an antitrust damages action, it is likely that lawyers will only select those actions which are most likely to succeed.¹⁷⁶ Since the outcome of antitrust cases is too uncertain and it is too expensive to bring unfounded antitrust cases, class action abuse normally occurs in other types of cases, such as securities actions and business tort cases.¹⁷⁷ Furthermore, defendants usually do not settle early because they can first make a motion to dismiss the case, then they can oppose class certification, and finally they can motion for a summary judgment. Therefore, it is unlikely that a frivolous antitrust case will pass all these stages. Following the enactment of the Class Action Fairness Act of 2005, it is also considerably more difficult to bring class actions in State courts where abuses have traditionally occurred.¹⁷⁸ In addition, under Rule 11 of the Federal Rules of Civil Procedure, parties and their lawyer can be sanctioned for bringing frivolous cases.¹⁷⁹

It has also been claimed that contingency fees generate more low-value litigation than hourly fees.¹⁸⁰ However, the results of an empirical study by E Helland and A Tabarrok demonstrate that under contingency fees arrangements, lawyers accepted fewer cases, whereas lawyers working on an hourly fee tended to advise their clients to continue pursuing the claim regardless of the actual likelihood of its success. The authors concluded that lawyers are more likely to scrutinize case quality objectively under contingency fee arrangements than in working under an hourly fee. Consequently, merely the fact that a lawyer accepts a case reveals its quality to the client as a lawyer working under contingency fee arrangements would not be likely to accept a case of

¹⁷³ Areeda, Kaplow & Edlin, *Antitrust Analysis*, Aspen Publishers, New York, 2004, pp 687-68.

¹⁷⁴ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), paras. 556-558.

¹⁷⁵ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, pp 2741-2742.

¹⁷⁶ *Ibid.*, p 2740.

¹⁷⁷ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618 and Davis & Cramer, 'Antitrust, Class Certification, and the Politics of Procedure', University of San Francisco Law Research Paper No. 2010-06, p 978, available at <http://ssrn.com/abstract=1578459>.

¹⁷⁸ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618.

¹⁷⁹ 28 U.S.C. §11(c).

¹⁸⁰ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2736.

low quality with limited chances of recovery.¹⁸¹ Similarly, lawyers working on an hourly fee tended to delay settlement¹⁸² because they had an incentive to increase the number of billable hours. Instead, under contingency arrangements, lawyers had incentives to be more selective in choosing their cases in order to ensure payment and, therefore, they were more likely to settle.¹⁸³

However, the impartiality of lawyers working on a contingent fee has been questioned because of their financial stake in the outcome of the litigation, which may lead them to accept a low value settlement to ensure some form of payment.¹⁸⁴ But in class actions this risk could be significantly reduced if the interests of attorneys and class members were aligned by tying attorneys' fees to the net recovery of the class,¹⁸⁵ as effectively provided by the Class Action Fairness Act of 2005.¹⁸⁶ In addition, all class actions settlements must now be approved by a court,¹⁸⁷ with a view to ensuring the fairness of settlements.

To conclude, the possibility of large contingency fees provides incentives to lawyers to bring damages actions and is an essential prerequisite of the functioning of the class action mechanism, in particular, when the individual claims are small.¹⁸⁸ Contingency fees therefore serve as the engine of class actions and increase access to justice for victims of competition law infringements since competition law damages actions can often be highly complex, time-consuming and expensive in that economic experts may also be required. The risk of the uncertain outcome coupled with high costs could otherwise discourage victims from even trying to bring a meritorious case. The increase in access to justice would also be likely to materialize in cases involving numerous claims of low value in that the possibilities of consumer organizations and other representative bodies bringing an action is limited by financial and political constraints and sometimes by conflicts of interest.¹⁸⁹ As public funding is decreasing,¹⁹⁰ there is thus a need to ensure sufficient funding of collective actions either by introducing contingency fees in the EU or by finding other alternatives to fund collective actions. Otherwise the introduction of an EU collective redress mechanism would not be

¹⁸¹ Cf. Helland & Tabarrok, 'Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *Journal of Law, Economics & Organization* 517, pp 519 and 540.

¹⁸² Ibid., p 536.

¹⁸³ Ibid., pp 519-520.

¹⁸⁴ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, p 103.

¹⁸⁵ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 293.

¹⁸⁶ 28 USC § 1712.

¹⁸⁷ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁸⁸ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

¹⁸⁹ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 21.

¹⁹⁰ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

sufficiently efficient in order to significantly increase access to justice. However, if the EU were to adopt contingency fees, they should be subject to judicial scrutiny or be regulated in another effective manner in order to reduce their possible negative effects.¹⁹¹

4.3. Feasibility of Introducing Contingency Fees into the EU

Given the arguments for introducing at least some form of contingency fees in the EU in order to increase the effectiveness of a possible EU collective redress mechanism, and thus also enhance access to justice, it is necessary to consider whether there is a legal basis for adopting contingency fees at the EU level. The possible legal bases would depend on whether a specific collective redress mechanism for competition cases or a general, horizontal collective redress mechanism were adopted. It could, for example, be envisaged that the EU would adopt a collective redress mechanism covering a number of policy areas and, in addition, the Commission would propose the adoption of certain common procedural rules for competition law damages actions if there was a specific need for special rules in order to enhance private enforcement.

If the Commission sought to harmonize certain procedural rules governing competition law damages actions, Article 103 TFEU [ex Article 83 EC] would be the most appropriate legal basis with a view to ensuring a more efficient application of Articles 101 and 102 TFEU. According to Article 103 TFEU, the Council has the competence, on a proposal from the Commission and after consulting the European Parliament, to lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Article 103(2) TFEU contains a list of situations, in which regulations or directives shall *in particular* (emphasis supplied) be designed. Even though none of those situations refer to the adoption of a regulation or a directive in order to harmonize the procedural rules governing competition law damages actions, the wording ‘in particular’ indicates that this paragraph should not be narrowly construed but should be interpreted extensively. Accordingly, given the currently ineffective enforcement of the prohibitions laid down in Articles 101 and 102 TFEU, providing greater effect to these provisions by the means of either regulations or directives at Union level may be justified.¹⁹²

Furthermore, the ECJ has held that the effectiveness of Articles 101 and 102 TFEU requires that any individual who has suffered harm as a result of a violation of the EU competition rules have a right to damages.¹⁹³ The right to damages thus has direct effect and any individual concerned must therefore be able to enforce that right before the national courts. Since the national procedural rules governing competition law damages actions frequently impede victims of competition law infringements from

¹⁹¹ Ibid., p 108.

¹⁹² Cf. Leskinen, ‘The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions’, Working Paper IE Law School, WPLSO8-01, 15.1.2008, pp 17-18, available at <http://papers.ssrn.com/abstract=1138797>.

¹⁹³ Cf. Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 24.

enforcing their right to damages in practice,¹⁹⁴ they consequently impede the effective and uniform application of European Union law. The need to ensure that individuals can enforce their rights stemming from the Treaty in the same manner,¹⁹⁵ regardless of the Member State in which they are domiciled, would thus justify the adoption of harmonizing measures by the Council on the basis of Article 103 TFEU.¹⁹⁶ Admittedly, it would require an extensive interpretation of the wording of Article 103 TFEU, but it would be justified by the need for an efficient and uniform application of the EU competition rules throughout the EU and the need to ensure the direct effect of Articles 101 and 102 TFEU.

However, if the Commission were to favour a horizontal approach and ensure the adoption of an efficient collective redress mechanism by guaranteeing sufficient funding, Article 81 TFEU [ex Article 65 EC] may provide the more appropriate legal basis. Article 81 TFEU allows, in certain situations, the adoption of measures for the approximation of the laws and regulations of the Member States in the field of judicial cooperation in civil matters having cross-border implications. Article 81(2)(f) would allow the elimination of obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedures applicable in the Member States when this is necessary in order to ensure the proper functioning of the internal market. The use of this provision as a legal basis would be justified by the need to ensure that individuals and companies could effectively enforce the substantive rights granted to them by EU law and that these rights enjoy the same protection across the EU, thus avoiding competitive advantages for companies established in Member States where it is difficult for consumers to enforce their rights. In addition, national legislation in some Member States currently makes it impossible for consumer organizations to bring collective actions on behalf of consumers who are non-nationals.¹⁹⁷ The introduction of an EU collective action would therefore improve access to justice in cross-border situations and, consequently, reduce the competitive disadvantages faced by companies domiciled in Member States with more efficient enforcement procedures.

In order to adopt any Union legislative measure, the existence of a political will among the Member States is essential.¹⁹⁸ Depending on which legal basis the harmonizing

¹⁹⁴Cf. Leskinen, 'The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions', Working Paper IE Law School, WPLSO8-01, 15.1.2008, p 11, available at <http://papers.ssrn.com/abstract=1138797>.

¹⁹⁵Ibid., pp 22-23 and Cour de cassation, 'Observations de la Cour de cassation française sur le livre vert', p 1.

¹⁹⁶Cf. Leskinen, 'The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions', Working Paper IE Law School, WPLSO8-01, 15.1.2008, pp 17-18, available at: <http://papers.ssrn.com/abstract=1138797>.

¹⁹⁷For instance, in France, only consumers associations which represent consumers at a national level may bring a representative action on behalf of consumers who have been injured as a result of the actions of the same professional. Article L.422-1 of the Consumer Code.

¹⁹⁸The lack of potential support is likely to explain why the Commission in October 2009 decided to withdraw its Draft Proposal for a Directive on Damages Actions for Infringements of Articles 81 and 82 of the Treaty as the Draft Directive was generally considered as controversial. Cf. Chellel, 'Competition class actions suffer setback as EU shuns directive' October 6th, 2009 *The Lawyer*.

measure would eventually be based on, the support required for the measure would vary. Although Articles 81 and 103 TFEU both require a qualified majority in the Council, under Article 103 TFEU, the European Parliament must only be consulted, whereas under Article 81 TFEU, the Parliament participates fully in the legislative procedure.

The assessment of the potential existence of sufficient political will in the Member States to adopt common rules on contingency fees needs to take into account at least the following considerations.

First, because national procedural rules diverge considerably, it will be difficult to find a consensus about how to design common procedural rules and introduce legal devices that do not exist in many of the Member States. Second, due to the divergent legal systems and traditions, any harmonization of the national civil procedure laws should be implemented by adopting a directive because it would be a more flexible tool than a regulation in that it would only establish the framework and the objectives that the Member States must attain, while the Member States could design the specific procedural devices. In this way, Member States could adopt mechanisms that would be in compliance with their legal systems and traditions, which would increase the likelihood of effective application.¹⁹⁹

Third, it must also be borne in mind that there are considerable differences in the litigation culture between the EU and the United States. In fact, it is a common fear in Europe that the U.S. antitrust enforcement system with class actions, treble damages, one-way fee shifting and contingency fees leads to abuses, with lawyers making huge fees at the cost of class members.²⁰⁰ Consequently, the proposed introduction of some of the U.S. procedural devices in the EU legal system has been met with scepticism. This could explain why Neelie Kroes, the then Commissioner for Competition Policy, affirmed that the Commission would intend to design solutions compatible with European cultures and traditions.²⁰¹

In this context, to what extent is it likely to be feasible to introduce contingency fees in the EU? Although contingency fees do not exist or are seldom used in a majority of Member States, in recent years, certain Member States have become more permissive towards contingency fees. England and Wales have adopted conditional fee arrangements under which lawyers can obtain a success fee in addition to the initial legal fee.²⁰² Germany now permits contingency fees but only if the claimant would

¹⁹⁹ Cf. Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model', Working Paper IE Law School, WPLS10-03, 26.4.2010, p 46, available at <http://ssrn.com/abstract=1612731>.

²⁰⁰ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 617.

²⁰¹ Cf. Kroes, 'Making consumers' right to damages a reality: the case for collective redress mechanisms in the antitrust claims', speech at the Conference on Collective Redress, Lisbon, November 9th, 2007, p 4.

²⁰² Cf. Centre for European Policy Studies, Erasmus University, Rotterdam and Luiss Guido Carli, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios', Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report, Brussels, Rome and Rotterdam, December 21st, 2007, p 208.

otherwise not be able to enforce his rights because of his financial situation.²⁰³ Similarly, the Spanish Supreme Court has also affirmed that contingency fees must be allowed.²⁰⁴ In France and Sweden, contingency fees are not allowed²⁰⁵ but both countries permit some type of additional fees, which can be calculated on the basis of the outcome of the action, although Sweden only provides for this possibility in collective actions.²⁰⁶

These examples demonstrate that the introduction of some form of contingency fee could be possible, although it is likely that Member States would not be willing to accept a U.S. style contingency fee where the lawyer's fee is calculated solely as a percentage of recovery. In fact, most of the respondents to the Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules²⁰⁷ stated that contingency fees should not be encouraged.²⁰⁸ Instead, it is more probable that Member States will consider introducing the possibility of paying the lawyer an additional fee, which would be calculated as a percentage of recovery if the competition law damages action were successful. However, France seems to be strongly opposed to any Union legislation regarding cost rules on the basis that they form part of Member States' competence.²⁰⁹ Consequently, it would appear to be difficult for any binding harmonizing measure to be introduced in this area.

Moreover, the feasibility of introducing contingency fees in the EU cannot be examined in isolation because the different procedural rules applicable to competition law damages actions are intertwined. It must therefore be considered whether the 'loser pays' principle and court fees rules require to be adjusted. In other words, there would need to be sufficient political will among the Member States to accept 'the whole package' of harmonization of national civil procedure rules. There would also be similar considerations regarding the adoption of a horizontal redress mechanism if it were coupled with a (partial) harmonization of the costs rules applicable to such actions, since separate costs rules for collective actions would lead to a fragmentation of the national civil procedure rules.

²⁰³ 4a(1) of the Lawyers' Remuneration Act.

²⁰⁴ Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

²⁰⁵ Article 10 of Act n°71-1130 of December 31st, 1971 on the reform of certain legal professions (*Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*) and Articles 38-39 of the Group Proceedings Act 2002 (2002:599).

²⁰⁶ Cf. Magnier, 'The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe' in Hensler, Hodges & Tulibacka (eds.), *The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*, Volume 622, Sage Publications (CA), 2009, pp 114-124, p 122, note 20 and Articles 38-39 of the Group Proceedings Act 2002 (2002:599).

²⁰⁷ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005.

²⁰⁸ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, pp 74-75.

²⁰⁹ Autorités françaises, 'Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante – Observations des autorités françaises', p 3.

Nevertheless, it would not be the first time that the EU legislator has encroached upon Member States' rules regarding legal costs. In fact, Directive 2004/48/EC on the enforcement of intellectual property rights provides an exception to the general rule that the unsuccessful party shall bear the reasonable and proportionate costs of the proceedings if a deviation is justified by equity considerations.²¹⁰ Consequently, introduction of a modification to the 'loser pays' principle in collective actions (or only in competition law damages actions) could be envisaged if this is necessary to ensure the effectiveness of such actions.

However, the Commission will have a difficult task in convincing the Member States that harmonization of the national civil procedure rules governing competition law damages actions is necessary and justified. Furthermore, it must demonstrate why competition law damages actions should be governed by different procedural rules than other tort-related actions.²¹¹ It should also be noted that the European Parliament and Germany are opposed to an unnecessary fragmentation of national procedural laws.²¹²

4.4. Other Options to Ensure Sufficient Funding and Incentives for Bringing Collective Actions

Due to the uncertainty about whether there would be sufficient political support for the introduction of contingency fees, alternative ways of improving the effectiveness of collective damages actions must also be contemplated.

Instead of proposing harmonizing legislation, the Commission could issue recommendations to the Member States on measures that should be adopted in order to enhance private enforcement. Although the recommendations would not have binding effect, they would send a clear signal to the Member States on what is expected in order to ensure the effectiveness of private enforcement of substantive EU rights. Member States could then assess whether their national civil procedure rules would require amendment in order to ensure the effectiveness of collective damages actions and they may voluntarily implement some of the recommendations proposed by the Commission.

Other options for providing sufficient funding would be to promote third party funding and legal insurance. In addition, the capping of legal costs could be required and some type of modification of the 'loser pays' principle may also be considered.

²¹⁰ Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, pp 45–86.

²¹¹ Cf. Rizzuto, 'Does the European Community have legal competence to harmonise national procedural rules governing actions for damages from infringements of European Community antitrust rules?' (2009) 2(1) *G.C.L.R.* 29.

²¹² Bundesministerium für Wirtschaft und Technologie, Bundesministerium der Justiz, Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz, 'Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for breach of the EC antitrust rules"', p 3.

Legal insurance makes it possible to reduce the adverse cost risks of having to pay the costs of the winning party. In England and Wales, the so-called ‘After the Event Insurance’ can be purchased after the event giving cause to the litigation has arisen.²¹³ Although the premium has to be paid in advance, it can be recovered if the insured party wins the case. However, if the premium is high and exceeds the litigation costs that must be paid up-front, it may discourage potential claimants from subscribing the insurance policy.²¹⁴ In addition, in practice, it can be difficult to enforce an After the Event Insurance since insurers are likely not to be willing to pay out compensation that constitutes large amounts if there is any possibility of avoiding this.²¹⁵

The problems related to legal insurance²¹⁶ and the need for litigation funding are the reason why third party funding has been introduced. Third party funding has the advantage of off-setting the financial inequality between parties and can thus increase access to justice. Furthermore, the funder’s due diligence, in scrutinizing claims prior to initiating litigation, serves to select claims that are meritorious.²¹⁷ Usually, the likelihood of success must be at least 60% in order for the third party to be interested in funding a case.²¹⁸ Arguably, this has the welcome effect of limiting vexatious litigation. But the drawback is that in respect to collective actions, due to the complexity and high costs involved in such actions, the expected amount of damages to be awarded must be considerable in order for a third party funder to be willing to fund the action, especially in jurisdictions only providing for opt-in collective actions.²¹⁹ In addition, conflicting interests could limit the effectiveness of cases involving third party funders, above all if several stakeholders are involved, since e.g. a litigant, funder and insurer do not necessarily have the same incentives to settle or to pursue a case.²²⁰

In England and Wales, the possibility of relying on litigation funding may also be limited by the doctrine of champerty, whereby a litigation funding contract under which a party is taking a share of the proceeds of litigation from the claimant can be considered contrary to public policy and can be invalidated by a court.²²¹ In other jurisdictions, it could be easier for third party funding to contribute to increase access to justice and it is, for instance, available in Germany. Moreover, Claims Funding International has announced its intention of bringing follow-on actions in cartel cases across the EU.²²²

²¹³ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 31.

²¹⁴ Cf. Peysner, ‘The Costs and Financing in Private Third Party Competition Damages Actions’ (2006) 3 (1) *CompLRev* 97, pp 99-100.

²¹⁵ Cf. Koutsoukis & O’Shea, ‘Litigation funding in European antitrust cases: legal and practical issues’ (2009) 2 (2) *G.C.L.R.* 74, p 78.

²¹⁶ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, pp 31-32.

²¹⁷ Cf. Mulheron & Cashman, ‘Third party funding: a changing landscape’ (2008) 27 (3) *C.J.Q.* 312, p 316.

²¹⁸ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 31.

²¹⁹ Cf. Mulheron & Cashman, ‘Third party funding: a changing landscape’ (2008) 27 (3) *C.J.Q.* 312, pp 317-318.

²²⁰ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 33.

²²¹ Cf. Koutsoukis & O’Shea, ‘Litigation funding in European antitrust cases: legal and practical issues’ (2009) 2 (2) *G.C.L.R.* 74, p 78.

²²² Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 30.

Other alternatives to enhance the institution of collective actions would be to cap costs, by empowering national courts to derogate from the normal cost rules and adjust the court fees so that only reasonable and proportionate legal costs could be recovered from the losing party. In this context, the recommendations of the OFT on capping parties' cost liabilities²²³ and the possibility in Germany of adjusting the litigation costs of the claimant in a competition case²²⁴ could serve as inspiration. However, it would arguably be necessary to ensure that cost-capping would not undermine the incentives created by contingency fee arrangements in meritorious damages actions.

In addition, the application of the 'loser pays' principle should be limited in line with Directive 2004/48/EC on the enforcement of intellectual property rights, thus allowing courts to derogate from the 'loser pays' principle if its application does not result in a fair outcome in the case in question.

5. CONCLUSIONS

The possible introduction of an EU collective redress mechanism alone would not suffice to significantly increase access to justice, but its effectiveness will depend on the particular model adopted as well as the available funding and the incentives for bringing collective actions. This is because bringing competition law damages actions is costly and time-consuming, the damages awarded tend to be small in the EU, and the outcome uncertain.²²⁵ Therefore, the risks of bringing an action seldom outweigh the potential benefits. The lack of incentive, combined with the fact that, in general, the 'loser pays' principle is applied in most Member States,²²⁶ thus increases the risks of bringing a competition law damages action as the claimant may have to pay the defendant's litigation costs in addition to his own costs. Furthermore, the lack of opt-out collective actions makes virtually all low-value cases difficult to enforce.²²⁷

Since public funding is decreasing,²²⁸ alternative funding is required as it is not likely to be feasible that representative bodies will have the resources and the interest to bring all meritorious cases. Contingency fees or third party funding could serve to provide the necessary incentives to bring complex, but meritorious collective actions. Law firms would also, in general, have the required expertise to bring collective competition law

²²³ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, pp 33-34.

²²⁴ Cf. Wagner, 'Litigation costs and their recovery: the German experience' (2009) 28 (3) *C.J.Q.* 367, pp 374-375.

²²⁵ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, p 55 and Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

²²⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

²²⁷ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

²²⁸ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

damages actions. Because lawyers would only be paid if the action were successful, they would have a strong incentive only to pick cases that are likely to be profitable.

In the United States, virtually all class actions are brought on a contingency fee basis.²²⁹ Admittedly, the U.S. model may have its flaws and it is possible that contingency fees may sometimes lead to abuse by lawyers.²³⁰ However, there is some evidence that indicates that this risk would usually be even greater when the lawyer is working on an hourly fee.²³¹ In any case, the risks involved in contingency fees could be minimized if sufficient safeguards were put in place. Due to the costs and the uncertain outcome of antitrust cases, it is normally not worth bringing a frivolous action. Moreover, U.S. courts can reject a claim fairly easily if the claimant cannot prove the existence of an antitrust injury and that his claim is plausible.²³² Consequently, the situations in which abuses could occur are limited. The U.S. experience of contingency fees could therefore serve as an inspiration in the EU, although the model chosen should try to avoid the risks related to contingency fees by providing appropriate safeguards and by adjusting the use of contingency fees to the European legal and social context.

In fact, modified contingency fees already exist in some Member States as discussed above. But, at present, U.S.-style contingency fees do not seem to have much support in the EU.²³³ France is strongly opposed to any Union legislation regarding costs rules, on the basis that they fall under Member States' competence,²³⁴ and it may be difficult to find sufficient political support for any binding harmonizing measures in this area. However, the introduction of an EU collective redress mechanism should at least be combined with an obligation for Member States to ensure sufficient funding of collective actions. Member States could then design their own appropriate models by combining elements such as some form of contingency fees, third party funding and

²²⁹ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

²³⁰ But overall, there is little evidence of strike suits in antitrust. Cf. Foer, *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States*, available at <http://www.antitrustinstitute.org/node/11001> and Davis & Cramer, 'Antitrust, Class Certification, and the Politics of Procedure', University of San Francisco Law Research Paper No. 2010-06, p 978, available at <http://ssrn.com/abstract=1578459>. Thus, it is unlikely that contingency fees will frequently result in abuse.

²³¹ Cf. Helland & Tabarrok, 'Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *Journal of Law, Economics & Organization* 517, p 540. Although the empirical study conducted by Helland and Tabarrok concerned tort, contract, real property and medical malpractice cases and not antitrust damages actions, the fact that antitrust damages actions tend to be costly, time-consuming and complex arguably suggests that rational lawyers would not be interested in pursuing such actions, unless they believed that the actions were likely to be successful. Cf. also Schnell, who argues that abuses usually occur in other fields than in the field of antitrust. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618.

²³² Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2749.

²³³ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 2.4.2008, pp 74-75.

²³⁴ Autorités françaises, 'Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante – Observations des autorités françaises', p 3.

legal insurance in taking into consideration the particular features of their civil procedures.

In addition, the Commission should issue recommendations regarding contingency fees, including appropriate safeguards for ensuring that they would not lead to abuse. For instance, courts could be empowered to approve and adjust contingency fees. In the long term, once some experience of the new collective redress mechanism has been gathered, it may be necessary to introduce contingency fees by legislation if the funding available in the Member States and the incentives for bringing collective actions prove unsatisfactory.

Finally, the Commission should propose binding rules regarding cost capping and the possibility for derogation from the 'loser pays' principle as these would increase access to justice by reducing the costs for bringing collective actions. It would also be more probable that Member States would support such measures if they were limited to particular situations necessitated by fairness considerations. Furthermore, as this type of adjustment of the costs rules already exists with regard to actions to enforce intellectual property rights, it shows that EU legislation on cost rules is feasible, at least to a limited extent.