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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'Keefe 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 SWP*, 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.