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Collective Actions: Rethinking Funding and National Cost Rules

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

1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

⁷ *Ibid.*, p 18.

⁸ *Ibid.*, p 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁴ Cf. Leuven Consumer Redress Study, p 270.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶ *Ibid.*, p 84.

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

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

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

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

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

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

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

⁵¹ *Ibid.*, pp 5-6.

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

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

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

3. FUNDING AND COSTS OF COLLECTIVE ACTIONS IN THE EU

3.1 Some General Remarks

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

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

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

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

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

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

⁵⁷ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.1. England and Wales

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

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

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

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

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

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

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

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

⁸² *Ibid.*, pp 99–100.

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

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

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

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

⁸³ Section 47B of the Competition Act 1998.

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

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

⁸⁶ *Ibid.*, p 99.

⁸⁷ CAT Rules 43.7.

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

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

⁹⁰ *Ibid.*, pp 32-34.

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

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

3.2.2. Germany

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

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

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

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

⁹³ *Ibid.*, pp 370-372.

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

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

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

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

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

⁹⁶ Ibid., pp 374-375.

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

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

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

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

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

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

¹⁰³ Cf. Thomas, 'Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen)' 2007-I January N° 12706 *e-Competitions*.

¹⁰⁴ Cf. Thomas, 'De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA)' 2007-II February N° 13224 *e-Competitions*.

of this type of bundling will be decided by the German Federal Court of Justice when it will rule on the substance of the case.¹⁰⁵

3.2.3. France

In France, contingency fees are illegal.¹⁰⁶ However, it is possible to agree on ‘complementary fees’, which can be calculated on the basis of the outcome of the action, provided that they do not exceed a reasonable portion of the fixed fees.¹⁰⁷ It should also be borne in mind that French courts impose almost no charge on litigants for raising court actions.¹⁰⁸ The limited court fees (*dépens*) are subject to fee shifting, whereas lawyers’ fees (*frais*) are not.¹⁰⁹ Court fees are generally paid at the end of the procedure, but when an expert is appointed, the claimant may have to pay a stipulated sum in advance.¹¹⁰ Since the court fees are low, they are not expected to constitute a significant obstacle to bringing an action in French courts. However, as lawyers’ fees can be considerable¹¹¹ and experts might be needed in competition law damages actions in order to demonstrate and quantify the damage, the incentives for bringing competition law damages actions are not necessarily sufficient.

Furthermore, the possibility of bringing collective actions for damages is severely limited by the burdensome procedure that requires every consumer to give a mandate and that they must be personally informed. Moreover, the procedure is too costly for consumer organizations since insurance companies are not willing to cover the costs.¹¹²

3.2.4. Spain

In Spain, a recent judgment of the Spanish Supreme Court in 2008 has clarified that contingency fees are to be allowed,¹¹³ contrary to an earlier Decision of the General Council of the Spanish Bar. Until this Supreme Court Judgment, the rules of professional conduct of the Spanish Bar prohibited agreements between lawyer and client under which it was agreed that the lawyer would only charge for a part of the sum awarded as a result of the litigation. Nevertheless, it provided that the lawyer and client

¹⁰⁵Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of April 7th, 2009 in Case No. KZR 42/08 and Leskinen, ‘Recent Developments on Collective Antitrust Damages Actions in the EU’ (2011) 4 (2) *G.C.L.R.* 79, p 82.

¹⁰⁶Article 10 of Act n°71-1130 of December 31, 1971 on the reform of certain legal professions (*Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*).

¹⁰⁷Cf. Magnier, ‘The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe’ in Hensler, Hodges & Tulibacka (eds.), *The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*, Volume 622, Sage Publications (CA), 2009, pp 114-124, p 122, note 20.

¹⁰⁸Cf. Hodges, Vogenauer & Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’, p 11, available at <http://ssrn.com/abstract=1511714>.

¹⁰⁹*Ibid.*, p 20.

¹¹⁰National Report on France prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, p 27.

¹¹¹Cf. Hodges, Vogenauer & Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’, p 56, available at <http://ssrn.com/abstract=1511714>.

¹¹²Leuven Consumer Redress Study, p 274.

¹¹³Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

could agree that the lawyer would charge a part of the amount recovered in order to increase the fee to cover the costs incurred by the lawyer.¹¹⁴ The Supreme Court rejected the argument of the General Council of the Spanish Bar that the prohibition of contingency fees was a measure of general interest that aimed to guarantee the independence of lawyers by holding that if that was the aim of the prohibition, it would also have prohibited lawyers from charging a part of the amount recovered in order to increase their fee. Instead, the Court held that the prohibition of contingency fees resulted in minimum price fixing in relation to lawyers' fees.¹¹⁵

The costs for raising court proceedings depend on the specific characteristics of the case and the complexity of the issues at stake.¹¹⁶ In any case, the claimant must pay a judicial fee unless he is a non-profit organization, a legal entity (partly or wholly) exempted from company tax, an individual or a small company.¹¹⁷ As regards costs incurred during court proceedings, in principle, the 'loser pays' rule applies, unless the court finds that the case raises serious legal or factual doubts in the light of previous case law. If the claim is only partly successful, each party bears his own costs and half of the common costs incurred, unless one of them has acted recklessly. The amount that the losing party must pay for the legal and other professional fees must not exceed a third of the value of the action, unless he is found to have acted recklessly.¹¹⁸

Under Article 11 of the Civil Procedure Law 1/2000, consumer and user associations can bring collective actions for damages caused by competition law infringements.¹¹⁹ Moreover, if the members of the affected group are identified or are easily identifiable, the affected group can also bring a collective action for damages.¹²⁰ The Supreme Court ruling on contingency fees could therefore open new possibilities for individuals to bring a collective action, provided that lawyers will agree to bring collective competition law damages actions under a contingency fee arrangement.

3.2.5. Sweden

Contrary to Spain, the general rule in Sweden is that contingency fees are not allowed since the Swedish Bar Association regards them as disproportionate.¹²¹ However, the Swedish Group Proceedings Act provides for a moderate form of contingency fees in

¹¹⁴Cf. Vérguez Muñoz & Pérez Guerra, 'Comentario a la Sentencia del Tribunal Supremo de 4 de noviembre de 2008, las implicaciones de la *cuota litis* desde la perspectiva del Derecho de la competencia' (2009) March/April No 8 *Gaceta Jurídica de la Unión Europea y de la Competencia* 107, p 107.

¹¹⁵Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

¹¹⁶Cf. Folguera Crespo & Martínez Corral, 'Spain. The judicial application of European competition law' in Rodríguez Iglesias & Ortiz Blanco (eds.), *The judicial application of Competition Law*, Proceedings of the XXIV FIDE Congress Madrid 2010 Vol.2, Servicio de publicaciones de la Facultad de Derecho Universidad Complutense, Madrid, 2010, pp 391-429, p 414.

¹¹⁷Article 35 of Law 53/2002 of December 30th, on tax, administrative and social measures.

¹¹⁸Article 394 of Law 1/2000 on Civil Procedure, of January 8th, 2000.

¹¹⁹Asociación Española para la Defensa de la Competencia, 'Observations to the Green Paper on Damages actions for breach of the EC antitrust rules', p 8.

¹²⁰Article 11 of the Civil Procedure Law 1/2000, of January 7th, BOE No. 7, of January 8th, 2000.

¹²¹National Report on Sweden prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, p 12.

that group members may conclude a so-called ‘risk agreement’ with their lawyer, pursuant to which the amount of remuneration will depend on the extent to which their claims have been successful.¹²² Furthermore, the evaluation study of the Group Proceedings Act found that an exception from the prohibition of contingency fees should be made in group litigation cases in certain circumstances. ‘No win, no fee’ agreements should be approved as such, but the percentage of the value of the litigation at issue which the lawyer may claim if the case is successful should be assessed on a case-by-case basis, but should, in any case, not exceed 30%.¹²³

Although Sweden also provides for collective opt-in actions brought by an individual on behalf of all individuals belonging to the group who have decided to join the action,¹²⁴ and allows a modified form of contingency fees, few actions have been brought¹²⁵ and none in relation to a competition law infringement.

Court fees in Sweden are practically non-existent. The claimant must merely pay an application fee corresponding approximately to €50 when he files an application for a summons with the civil court. As regards the allocation of costs in court proceedings, the ‘loser pays’ principle generally applies, but it is also possible to apportion the costs between the parties depending on the success of their claims.¹²⁶ Compensation for litigation costs includes the costs for preparation and presentation of the case as well as lawyers’ fees to the extent that the costs have been reasonably incurred in order to enforce the party’s rights. Similarly, compensation must be paid for the effort and time of the party involved in the litigation. Compensation also covers interest accrued.¹²⁷

In addition to the jurisdictions examined above, Estonia, Finland, Hungary, Italy, Lithuania, Slovakia and Slovenia also permit contingency fees.¹²⁸ Moreover, in a number of other Member States, such as Austria, Denmark, Portugal and Romania, success fees are allowed.¹²⁹

¹²² Article 38 of the Group Proceedings Act 2002 (2002:599)

¹²³ DS 2008:74 (Evaluation of the Group Proceedings Act), pp 178-179.

¹²⁴ Sections 1, 4 and 14 of the Swedish Group Proceedings Act (2002:599).

¹²⁵ Cf. Lindblom, ‘Global class actions. National report: Group Litigation in Sweden, update paper sections 2.5 and 3’, p 2, available at: http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20-08.pdf.

¹²⁶ Cf. Öberg & Lundström, ‘Sweden. The judicial application of European competition law’- in Rodríguez Iglesias & Ortiz Blanco (eds.), *The judicial application of Competition Law*, Proceedings of the XXIV FIDE Congress Madrid 2010 Vol.2, Servicio de publicaciones de la Facultad de Derecho Universidad Complutense, Madrid, 2010, pp 431-458, p 456.

¹²⁷ Section 8 of Chapter 18 of the Code of Judicial Procedure.

¹²⁸ Cf. Hodges, Vogenauer & Tulibacka, ‘Costs and Funding of Civil Litigation: A Comparative Study’, Legal Research Paper Series, Paper No 55/2009, December 2009, p 29, available at <http://ssrn.com/abstract=1511714>. However, in Lithuania, 50 per cent uplift is illegal, while Slovakia and Slovenia only permit contingency fees up to 20% and 15%, respectively. *Ibid.*, Appendix VI, p 81.

¹²⁹ *Ibid.*, p 81.

3.2.6. Concluding Remarks

To summarize, Member States regulate contingency fees in divergent ways. While contingency fees are allowed in a minority of Member States, many Member States still prohibit contingency fees¹³⁰ even though some have instead developed alternative fee arrangements that provide for certain types of risk agreements which derogate from the general rules applicable to lawyers' fees.

By contrast, in the United States, it is possible to agree that a lawyer will only be paid if the action is successful. Therefore, in that context it may be in the lawyer's interest to seek damages that are as great as possible and, as a consequence, he or she will also try to reduce costs in order to maximize the gains.¹³¹ It is thus of particular interest to now turn to the U.S. model in order to analyze the role of contingency fees in class actions and examine whether the U.S. model could be used as inspiration when the EU contemplates the introduction of an EU collective redress mechanism.

4. A PROPOSAL FOR RETHINKING FUNDING OF COLLECTIVE ACTIONS

4.1. The Role of Contingency Fees in Class Actions in the United States

In the United States, each party bears his own litigation costs.¹³² However, in antitrust damages actions, Section 4 of the Clayton Act provides that successful claimants may recover treble damages and reasonable attorneys' fees and costs.¹³³ It thus provides for one-way fee shifting,¹³⁴ i.e. the defendant must pay the costs and reasonable attorney's fees of the successful claimant and must always pay its own legal costs. But if the claimant loses the action, he will not be obliged to compensate the defendant for his attorney's fees or costs.¹³⁵ In other words, the claimant will, in principle, not be liable for the defendant's costs even if his action is unsuccessful.¹³⁶

In class actions, the level of attorney's fees of successful claimants will ultimately be determined by the judge, who must review the reasonability of the awards. In general, two methods are employed to calculate the attorney's fees, in common fund cases and fee shifting cases.¹³⁷ In the former, the fee is based on a percentage of the fund, which

¹³⁰Cf. Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective' (2001) 11 *Spring/Summer Duke Journal of Comparative and International Law* 405, p 415.

¹³¹Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 289.

¹³²Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 *October Fordham L. Rev.* 51, p 54.

¹³³15 U.S.C. § 26.

¹³⁴Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 288.

¹³⁵Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 *October Fordham L. Rev.* 51, pp 57–58.

¹³⁶However, there are some exceptions to this rule. For instance, if the claimant has breached Rule 11 of the Federal Rules of Civil Procedure, he will be liable for paying the defendant's litigation costs. 28 U.S.C. §11(c).

¹³⁷Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 289.

has been created for the benefit of the class, while in the latter, the fee is commonly calculated by using the so-called lodestar method,¹³⁸ which means that the attorney's hourly rate will be multiplied by the hours worked. If it is appropriate, the courts adjust the figure so that it reflects the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.¹³⁹ In antitrust actions, many courts use the lodestar method to calculate the reasonability of attorneys' fees,¹⁴⁰ including in verifying the reasonability of a percentage-based attorney fee request.¹⁴¹

The rationale for awarding attorneys' fees to successful claimants is to seek to ensure that meritorious damages claims will be efficiently brought as it provides additional incentives for private litigants to pursue anti-competitive conduct.¹⁴² Similarly, the one-way fee shifting rule compensates claimants for undertaking risky, costly litigation.¹⁴³

However, the fact that the claimant will, in principle, not be obliged to compensate for the defendant's costs and attorneys' fees does not mean that bringing an antitrust damages action is completely risk-free. In fact, if the claimant loses the case, he would have to bear his own litigation costs, including his attorneys' fees.¹⁴⁴ Therefore, claimants lacking sufficient funds could be discouraged from bringing meritorious actions. However, there is the possibility of reducing the claimant's risk by allowing him to conclude a contingency fee arrangement with his lawyer.¹⁴⁵ Under a contingency fee arrangement, the lawyer will only be paid if he wins the case. In that case, his fee will consist of a percentage of the recovery obtained for the client. If the action is unsuccessful, the lawyer receives no payment.¹⁴⁶ The lawyer thus bears the risk of losing the case and will be liable for the costs incurred in litigating the case. In addition to the risk of losing the case, the lawyer also faces other risks, such as: being fired before recovery but after he has undertaken significant work; winning the case but the award is minimal (or, even if the award is adequate, the defendant is unable to pay it).

¹³⁸ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹³⁹ Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250 and *Hensley v. Eckerhart*, 461 U.S. 424 (1982), para. 433.

¹⁴⁰ Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250.

¹⁴¹ Cf. Wildfang & Slaughter, 'Funding Litigation' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 220-239, p 234. The lodestar method is more typical in statutory fee shifting cases (e.g. antitrust cases), but the U.S. Third Circuit has suggested that regardless of the method chosen for the verification of the reasonableness of attorneys' fees, the court should use a second method of fee approval to cross-check its initial fee calculation. Cf. *In re Rite Aid Corp. Sec. Litig.*, 396 F. 3d 294 (3^d Cir. 2005) para. 300.

¹⁴² Antitrust Modernization Commission, 'Report and Recommendations', April 2007, p 250.

¹⁴³ *Ibid.*, p 251.

¹⁴⁴ Cf. Cavanagh, 'Attorneys' Fees in Antitrust Litigation' (1988) 57 *October Fordham L. Rev.* 51, p 54.

¹⁴⁵ Indeed, in the United States, contingency fees are common in private antitrust litigation, including class actions. Cf. Wildfang & Slaughter, 'Funding Litigation' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 220-239, p 234.

¹⁴⁶ Cf. Shajnfeld, 'A critical survey of the law, ethics, and economics of attorney contingent fee arrangements' (2009/2010) 54 *N.Y.L. Sch. L. Rev.* 773, p 775.

Moreover, his client might accept a low settlement figure or refuse to accept a reasonable offer to settle and instead choose to undertake risky litigation.¹⁴⁷

Contingency fees have been justified for the following principal reasons. First, they enable parties who would otherwise not be able to afford litigation to enforce their rights. Since litigation today is more complex and often requires the use of experts and economic evidence, contingency fees are particularly important in assisting claimants who would have difficulties in paying legal fees in advance. Second, they facilitate the alignment of lawyers' and clients' interests in that both will receive a part of the recovery of the litigation. Third, since lawyers' fees depend on the outcome, they will have an incentive to only accept cases that are meritorious and where there is sufficient proof to ensure the action is likely to succeed. Finally, parties should in general be allowed to contract freely and, therefore, restrictions on contingency fees would also restrict this freedom.¹⁴⁸

Arguably, contingency fees give lawyers incentives to handle cases in a way that will result in a favourable outcome for their client as their own reward will increase as a consequence. Moreover, their reputation as lawyers is also at stake. Therefore, they can normally be assumed to act in the best interest of their clients even under a contingency fee arrangement. Nevertheless, reputational impact alone is insufficient to ensure lawyers act responsibly toward their clients, because clients are not always in a position to determine this issue. In addition, they may not have the means, access to media or credibility to attack their lawyers' reputation.¹⁴⁹ This is why certain safeguards might be necessary to ensure that contingency fees will not give lawyers perverse incentives.

Contingency fees are often necessary in order for the claimants to bring a class action since class actions are usually costly and, therefore, they are in general instigated by lawyers.¹⁵⁰ Moreover, if the individual claimant can only recover his own damages, which even trebled may be a modest amount, the incentive to initiate burdensome proceedings is low. Instead, the remuneration for the class action lawyer is crucial.¹⁵¹ In addition, the one-way fee shifting rule provides an important incentive to private antitrust litigation¹⁵² since the lawyer will obtain compensation for the costs of the litigation and his own work if the class action is successful.

Lawyers usually have greater liquidity than consumers and have the capacity to assess whether the class action is likely to succeed. Consequently, they will only accept cases

¹⁴⁷Ibid., p 788.

¹⁴⁸Ibid., p 776.

¹⁴⁹Ibid., p 777.

¹⁵⁰Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

¹⁵¹Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, pp 288-289 and Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, 197.

¹⁵²Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 298.

that will offer sufficient benefits. In addition, they can take advantage of portfolio diversification whereby they handle several cases simultaneously. Contingency fees will therefore give them incentives to bring the class action and they are an effective way of funding class actions¹⁵³ since the prospect of large awards makes lawyers more willing to pay for up-front legal costs. In fact, virtually all class actions in the United States are funded by contingency fee arrangements.¹⁵⁴

Class actions are often settled and the parties agree on the amount that is to be paid to the class attorney in fees. This amount must be approved by the court.¹⁵⁵ This is particularly crucial when the settlement consists of large sums as class attorneys have more incentives to settle in these cases. In addition, once the class has been certified, it is difficult for claimants to monitor the behaviour of the class attorney and, thus, it is necessary that the court should instead exercise control over the class attorney's fees.¹⁵⁶

Sometimes the settlement in a class action is a so-called coupon settlement, whereby class members will receive a coupon for a discount in purchasing another of the defendant's products while the class attorneys are paid fees in cash. Courts have often rejected coupon settlements as unfair.¹⁵⁷ Indeed, the Class Action Fairness Act of 2005 provides that the court may approve coupon settlements only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.¹⁵⁸ Moreover, if the proposed settlement provides for a recovery of coupons to a class member, the portion of any attorney's fee to class counsel must be proportionate to the value of the recovery of the class members.¹⁵⁹ In order to receive expert testimony, the court may also appoint a witness qualified to provide information on the actual value to the class of the coupons which are redeemed.¹⁶⁰

These measures intend to guarantee that the class attorney does not have an incentive to pursue settlement in a case in exchange for a large fee while class members would receive little compensation. Thus, they also serve to limit the risks that under a contingency fee arrangement, lawyers would pay insufficient regard to the interests of the class members.

¹⁵³ Cf. Issacharoff & Miller, 'Will aggregate litigation come to Europe' (2009) 62 January *Vanderbilt Law Review* 179, pp 198-199.

¹⁵⁴ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

¹⁵⁵ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁵⁶ Cf. Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union', August 28th, 2006, p 15, available at: <http://ssrn.com/abstract=927001>.

¹⁵⁷ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁵⁸ Sec. 3(e) of the CAFA, 28 USC § 1712.

¹⁵⁹ Sec. 3(a) of the CAFA, 28 USC § 1712.

¹⁶⁰ Sec. 3(d) of the CAFA, 28 USC § 1712.

4.2. Lessons to Learn from the US Experience of Contingency Fees

Contingency fees have many advantages in facilitating meritorious litigation, especially when coupled with no obligation to pay for the defendant's litigation costs and the availability of an opt-out class action mechanism. They shift the risk of litigation from the client to the lawyer in that the lawyer will bear the costs of litigation in case the claim is unsuccessful. As a result, claimants have greater incentives to enforce their rights and are more likely to bring an action.¹⁶¹ Since opt-out class actions ensure that the group of claimants will be sufficiently large for the class action to be worthwhile, lawyers are more likely to take the risk of bringing the action under a contingency fee arrangement as they generally have more liquidity than consumers.¹⁶² Because contingency fees serve to lower the threshold for bringing a competition law damages action, compensation for victims of competition law infringements is, arguably, better ensured.

In addition, contingency fees help align the interests of lawyers and clients since both will receive a part of the recovery of the litigation. Thus, contingency fees give lawyers incentives to obtain a favourable outcome for their client as their own reward will increase as a result. Moreover, their reputation as lawyers is also at stake. Accordingly, lawyers will generally also have an incentive to only accept cases which are meritorious and likely to succeed.¹⁶³

However, these assumptions may have to be adjusted in jurisdictions where there is a 'loser pays' rule. In those jurisdictions, the claimant would normally be responsible not only for his own litigation costs but also the costs of the defendant if his claim failed. As a consequence, a lawyer bringing an action on behalf of his client on the basis of a contingency fee arrangement would assume the risk of compensating the defendant's litigation costs, including his lawyers' fees, as well as not receiving any payment for his work from his own client because of the 'no win, no fee' agreement. The lawyer's risk is therefore clearly increased, even under a contingency fee arrangement, in jurisdictions which apply the 'loser pays' rule. This suggests that contingency fees should be examined in the context of all procedural rules applicable in a particular jurisdiction as the various procedural elements in a legal system are intertwined. Consequently, the introduction of contingency fees alone might be insufficient to significantly increase private enforcement in the EU if other procedural aspects are not duly considered and, if appropriate, some other amendments made to the applicable procedural rules.¹⁶⁴

¹⁶¹ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2746.

¹⁶² Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

¹⁶³ Cf. Shajnfeld, 'A critical survey of the law, ethics, and economics of attorney contingent fee arrangements' (2009/2010) 54 *N.Y.L. Sch. L. Rev.* 773, pp 776-777.

¹⁶⁴ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2747.

In fact, the damages awardable must be sufficiently large for contingency fees to work.¹⁶⁵ If the claim is of low value, even the prospect of obtaining a percentage of the recovery would not provide a sufficiently strong incentive for lawyers to agree to bring damages actions under a contingency fee arrangement. The challenge for the EU is greater since, in the majority of jurisdictions, compensation can only be sought for the actual damages, including the loss of profit (plus interest).¹⁶⁶ Consequently, any agreement on a contingency fee based on a share of the recovery would therefore impede the claimant from obtaining full compensation for the harm that he has suffered as a result of a competition law infringement.

In the United States, there is also a risk that frivolous class actions might be brought because of a combination of:- the prospect of obtaining treble damages, the potentially large contingency fees for lawyers and absence of any responsibility of an unsuccessful claimant to pay the defendant's costs and lawyers' fees.¹⁶⁷ Competitors have high incentives to bring antitrust damages actions because there is a possibility that the potentially high costs for the defendant to defend himself and the risk of treble damages induce the defendant to settle the action even though his conduct was not anti-competitive.¹⁶⁸ To reduce such negative effects of private antitrust litigation, the U.S. Supreme Court has limited the claimants' right to bring an antitrust damages action to situations where they have been harmed by illegal conduct and the antitrust injury is an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'¹⁶⁹ In essence, the aim of the U.S. antitrust laws is therefore to protect competition, not competitors, i.e. an antitrust injury is only established if the anti-competitive conduct harms consumer welfare generally.¹⁷⁰ Accordingly, it is not possible to seek compensation for injury which stems from competition.¹⁷¹ In order to limit excessive and unfounded damages claims,¹⁷² the U.S. courts have therefore restricted the scope of antitrust laws to cases where the

¹⁶⁵ Ibid.

¹⁶⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 56. Nevertheless, it should be noted that in the United States, even the so-called treble damages tend to be equivalent to single damages since they do not include prejudgment interest and other factors, e.g. allocative inefficiency effects felt by society and the value of the time plaintiffs have spent on litigation. Cf. Lande & Davis, 'Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries Considering a Private Right of Action for Competition Law Violations', p 16, available at <http://ssrn.com/abstract=1474804>.

¹⁶⁷ Cf. Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union', August 28th, 2006, p 34, available at: <http://ssrn.com/abstract=927001>.

¹⁶⁸ Cf. Ginsburg, 'Comparing antitrust enforcement in the United States and Europe' (2005) 1 (3) *Journal of Competition Law and Economics* 427, pp 435-436.

¹⁶⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), para. 489.

¹⁷⁰ Cf. Cramer & Simons, 'Parties entitled to pursue claims' in Foer & Cuneo (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, pp 83-110, p 85.

¹⁷¹ Cf. Jones, *Private Enforcement of Antitrust Law in the EU, UK and the USA*, Oxford University Press, New York, 1999, p 175.

¹⁷² Cf. e.g. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)

plaintiff has suffered an injury resulting from the defendant's illegal conduct, which the antitrust laws were designed to prevent.¹⁷³

More recently, in *Bell Atlantic Corp. v. Twombly* in 2007, the Supreme Court further limited claimants' possibilities of bringing an antitrust action in holding that claimants must demonstrate that there is a plausible ground for their claim by providing enough factual matter supporting their claim. The Court stated that otherwise a claimant with an unfounded claim could force a defendant to agree to an unreasonably high settlement by taking advantage of wide and expensive discovery.¹⁷⁴ The plausibility requirement makes it is easier for courts to reject unfounded actions.¹⁷⁵

Furthermore, antitrust damages actions tend to be complex and lengthy. Because of the time and money required to bring an antitrust damages action, it is likely that lawyers will only select those actions which are most likely to succeed.¹⁷⁶ Since the outcome of antitrust cases is too uncertain and it is too expensive to bring unfounded antitrust cases, class action abuse normally occurs in other types of cases, such as securities actions and business tort cases.¹⁷⁷ Furthermore, defendants usually do not settle early because they can first make a motion to dismiss the case, then they can oppose class certification, and finally they can motion for a summary judgment. Therefore, it is unlikely that a frivolous antitrust case will pass all these stages. Following the enactment of the Class Action Fairness Act of 2005, it is also considerably more difficult to bring class actions in State courts where abuses have traditionally occurred.¹⁷⁸ In addition, under Rule 11 of the Federal Rules of Civil Procedure, parties and their lawyer can be sanctioned for bringing frivolous cases.¹⁷⁹

It has also been claimed that contingency fees generate more low-value litigation than hourly fees.¹⁸⁰ However, the results of an empirical study by E Helland and A Tabarrok demonstrate that under contingency fees arrangements, lawyers accepted fewer cases, whereas lawyers working on an hourly fee tended to advise their clients to continue pursuing the claim regardless of the actual likelihood of its success. The authors concluded that lawyers are more likely to scrutinize case quality objectively under contingency fee arrangements than in working under an hourly fee. Consequently, merely the fact that a lawyer accepts a case reveals its quality to the client as a lawyer working under contingency fee arrangements would not be likely to accept a case of

¹⁷³ Areeda, Kaplow & Edlin, *Antitrust Analysis*, Aspen Publishers, New York, 2004, pp 687-68.

¹⁷⁴ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), paras. 556-558.

¹⁷⁵ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, pp 2741-2742.

¹⁷⁶ *Ibid.*, p 2740.

¹⁷⁷ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618 and Davis & Cramer, 'Antitrust, Class Certification, and the Politics of Procedure', University of San Francisco Law Research Paper No. 2010-06, p 978, available at <http://ssrn.com/abstract=1578459>.

¹⁷⁸ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618.

¹⁷⁹ 28 U.S.C. §11(c).

¹⁸⁰ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2736.

low quality with limited chances of recovery.¹⁸¹ Similarly, lawyers working on an hourly fee tended to delay settlement¹⁸² because they had an incentive to increase the number of billable hours. Instead, under contingency arrangements, lawyers had incentives to be more selective in choosing their cases in order to ensure payment and, therefore, they were more likely to settle.¹⁸³

However, the impartiality of lawyers working on a contingent fee has been questioned because of their financial stake in the outcome of the litigation, which may lead them to accept a low value settlement to ensure some form of payment.¹⁸⁴ But in class actions this risk could be significantly reduced if the interests of attorneys and class members were aligned by tying attorneys' fees to the net recovery of the class,¹⁸⁵ as effectively provided by the Class Action Fairness Act of 2005.¹⁸⁶ In addition, all class actions settlements must now be approved by a court,¹⁸⁷ with a view to ensuring the fairness of settlements.

To conclude, the possibility of large contingency fees provides incentives to lawyers to bring damages actions and is an essential prerequisite of the functioning of the class action mechanism, in particular, when the individual claims are small.¹⁸⁸ Contingency fees therefore serve as the engine of class actions and increase access to justice for victims of competition law infringements since competition law damages actions can often be highly complex, time-consuming and expensive in that economic experts may also be required. The risk of the uncertain outcome coupled with high costs could otherwise discourage victims from even trying to bring a meritorious case. The increase in access to justice would also be likely to materialize in cases involving numerous claims of low value in that the possibilities of consumer organizations and other representative bodies bringing an action is limited by financial and political constraints and sometimes by conflicts of interest.¹⁸⁹ As public funding is decreasing,¹⁹⁰ there is thus a need to ensure sufficient funding of collective actions either by introducing contingency fees in the EU or by finding other alternatives to fund collective actions. Otherwise the introduction of an EU collective redress mechanism would not be

¹⁸¹ Cf. Helland & Tabarrok, 'Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *Journal of Law, Economics & Organization* 517, pp 519 and 540.

¹⁸² Ibid., p 536.

¹⁸³ Ibid., pp 519-520.

¹⁸⁴ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, p 103.

¹⁸⁵ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 293.

¹⁸⁶ 28 USC § 1712.

¹⁸⁷ Cf. Sherman, 'American class actions: significant features and developing alternatives in foreign legal systems' 215 *Federal Rules Decisions* 130.

¹⁸⁸ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

¹⁸⁹ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 21.

¹⁹⁰ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

sufficiently efficient in order to significantly increase access to justice. However, if the EU were to adopt contingency fees, they should be subject to judicial scrutiny or be regulated in another effective manner in order to reduce their possible negative effects.¹⁹¹

4.3. Feasibility of Introducing Contingency Fees into the EU

Given the arguments for introducing at least some form of contingency fees in the EU in order to increase the effectiveness of a possible EU collective redress mechanism, and thus also enhance access to justice, it is necessary to consider whether there is a legal basis for adopting contingency fees at the EU level. The possible legal bases would depend on whether a specific collective redress mechanism for competition cases or a general, horizontal collective redress mechanism were adopted. It could, for example, be envisaged that the EU would adopt a collective redress mechanism covering a number of policy areas and, in addition, the Commission would propose the adoption of certain common procedural rules for competition law damages actions if there was a specific need for special rules in order to enhance private enforcement.

If the Commission sought to harmonize certain procedural rules governing competition law damages actions, Article 103 TFEU [ex Article 83 EC] would be the most appropriate legal basis with a view to ensuring a more efficient application of Articles 101 and 102 TFEU. According to Article 103 TFEU, the Council has the competence, on a proposal from the Commission and after consulting the European Parliament, to lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Article 103(2) TFEU contains a list of situations, in which regulations or directives shall *in particular* (emphasis supplied) be designed. Even though none of those situations refer to the adoption of a regulation or a directive in order to harmonize the procedural rules governing competition law damages actions, the wording ‘in particular’ indicates that this paragraph should not be narrowly construed but should be interpreted extensively. Accordingly, given the currently ineffective enforcement of the prohibitions laid down in Articles 101 and 102 TFEU, providing greater effect to these provisions by the means of either regulations or directives at Union level may be justified.¹⁹²

Furthermore, the ECJ has held that the effectiveness of Articles 101 and 102 TFEU requires that any individual who has suffered harm as a result of a violation of the EU competition rules have a right to damages.¹⁹³ The right to damages thus has direct effect and any individual concerned must therefore be able to enforce that right before the national courts. Since the national procedural rules governing competition law damages actions frequently impede victims of competition law infringements from

¹⁹¹ Ibid., p 108.

¹⁹² Cf. Leskinen, ‘The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions’, Working Paper IE Law School, WPLSO8-01, 15.1.2008, pp 17-18, available at <http://papers.ssrn.com/abstract=1138797>.

¹⁹³ Cf. Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 24.

enforcing their right to damages in practice,¹⁹⁴ they consequently impede the effective and uniform application of European Union law. The need to ensure that individuals can enforce their rights stemming from the Treaty in the same manner,¹⁹⁵ regardless of the Member State in which they are domiciled, would thus justify the adoption of harmonizing measures by the Council on the basis of Article 103 TFEU.¹⁹⁶ Admittedly, it would require an extensive interpretation of the wording of Article 103 TFEU, but it would be justified by the need for an efficient and uniform application of the EU competition rules throughout the EU and the need to ensure the direct effect of Articles 101 and 102 TFEU.

However, if the Commission were to favour a horizontal approach and ensure the adoption of an efficient collective redress mechanism by guaranteeing sufficient funding, Article 81 TFEU [ex Article 65 EC] may provide the more appropriate legal basis. Article 81 TFEU allows, in certain situations, the adoption of measures for the approximation of the laws and regulations of the Member States in the field of judicial cooperation in civil matters having cross-border implications. Article 81(2)(f) would allow the elimination of obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedures applicable in the Member States when this is necessary in order to ensure the proper functioning of the internal market. The use of this provision as a legal basis would be justified by the need to ensure that individuals and companies could effectively enforce the substantive rights granted to them by EU law and that these rights enjoy the same protection across the EU, thus avoiding competitive advantages for companies established in Member States where it is difficult for consumers to enforce their rights. In addition, national legislation in some Member States currently makes it impossible for consumer organizations to bring collective actions on behalf of consumers who are non-nationals.¹⁹⁷ The introduction of an EU collective action would therefore improve access to justice in cross-border situations and, consequently, reduce the competitive disadvantages faced by companies domiciled in Member States with more efficient enforcement procedures.

In order to adopt any Union legislative measure, the existence of a political will among the Member States is essential.¹⁹⁸ Depending on which legal basis the harmonizing

¹⁹⁴Cf. Leskinen, 'The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions', Working Paper IE Law School, WPLSO8-01, 15.1.2008, p 11, available at <http://papers.ssrn.com/abstract=1138797>.

¹⁹⁵Ibid., pp 22-23 and Cour de cassation, 'Observations de la Cour de cassation française sur le livre vert', p 1.

¹⁹⁶Cf. Leskinen, 'The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions', Working Paper IE Law School, WPLSO8-01, 15.1.2008, pp 17-18, available at: <http://papers.ssrn.com/abstract=1138797>.

¹⁹⁷For instance, in France, only consumers associations which represent consumers at a national level may bring a representative action on behalf of consumers who have been injured as a result of the actions of the same professional. Article L.422-1 of the Consumer Code.

¹⁹⁸The lack of potential support is likely to explain why the Commission in October 2009 decided to withdraw its Draft Proposal for a Directive on Damages Actions for Infringements of Articles 81 and 82 of the Treaty as the Draft Directive was generally considered as controversial. Cf. Chellel, 'Competition class actions suffer setback as EU shuns directive' October 6th, 2009 *The Lawyer*.

measure would eventually be based on, the support required for the measure would vary. Although Articles 81 and 103 TFEU both require a qualified majority in the Council, under Article 103 TFEU, the European Parliament must only be consulted, whereas under Article 81 TFEU, the Parliament participates fully in the legislative procedure.

The assessment of the potential existence of sufficient political will in the Member States to adopt common rules on contingency fees needs to take into account at least the following considerations.

First, because national procedural rules diverge considerably, it will be difficult to find a consensus about how to design common procedural rules and introduce legal devices that do not exist in many of the Member States. Second, due to the divergent legal systems and traditions, any harmonization of the national civil procedure laws should be implemented by adopting a directive because it would be a more flexible tool than a regulation in that it would only establish the framework and the objectives that the Member States must attain, while the Member States could design the specific procedural devices. In this way, Member States could adopt mechanisms that would be in compliance with their legal systems and traditions, which would increase the likelihood of effective application.¹⁹⁹

Third, it must also be borne in mind that there are considerable differences in the litigation culture between the EU and the United States. In fact, it is a common fear in Europe that the U.S. antitrust enforcement system with class actions, treble damages, one-way fee shifting and contingency fees leads to abuses, with lawyers making huge fees at the cost of class members.²⁰⁰ Consequently, the proposed introduction of some of the U.S. procedural devices in the EU legal system has been met with scepticism. This could explain why Neelie Kroes, the then Commissioner for Competition Policy, affirmed that the Commission would intend to design solutions compatible with European cultures and traditions.²⁰¹

In this context, to what extent is it likely to be feasible to introduce contingency fees in the EU? Although contingency fees do not exist or are seldom used in a majority of Member States, in recent years, certain Member States have become more permissive towards contingency fees. England and Wales have adopted conditional fee arrangements under which lawyers can obtain a success fee in addition to the initial legal fee.²⁰² Germany now permits contingency fees but only if the claimant would

¹⁹⁹ Cf. Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model', Working Paper IE Law School, WPLS10-03, 26.4.2010, p 46, available at <http://ssrn.com/abstract=1612731>.

²⁰⁰ Cf. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 617.

²⁰¹ Cf. Kroes, 'Making consumers' right to damages a reality: the case for collective redress mechanisms in the antitrust claims', speech at the Conference on Collective Redress, Lisbon, November 9th, 2007, p 4.

²⁰² Cf. Centre for European Policy Studies, Erasmus University, Rotterdam and Luiss Guido Carli, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios', Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report, Brussels, Rome and Rotterdam, December 21st, 2007, p 208.

otherwise not be able to enforce his rights because of his financial situation.²⁰³ Similarly, the Spanish Supreme Court has also affirmed that contingency fees must be allowed.²⁰⁴ In France and Sweden, contingency fees are not allowed²⁰⁵ but both countries permit some type of additional fees, which can be calculated on the basis of the outcome of the action, although Sweden only provides for this possibility in collective actions.²⁰⁶

These examples demonstrate that the introduction of some form of contingency fee could be possible, although it is likely that Member States would not be willing to accept a U.S. style contingency fee where the lawyer's fee is calculated solely as a percentage of recovery. In fact, most of the respondents to the Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules²⁰⁷ stated that contingency fees should not be encouraged.²⁰⁸ Instead, it is more probable that Member States will consider introducing the possibility of paying the lawyer an additional fee, which would be calculated as a percentage of recovery if the competition law damages action were successful. However, France seems to be strongly opposed to any Union legislation regarding cost rules on the basis that they form part of Member States' competence.²⁰⁹ Consequently, it would appear to be difficult for any binding harmonizing measure to be introduced in this area.

Moreover, the feasibility of introducing contingency fees in the EU cannot be examined in isolation because the different procedural rules applicable to competition law damages actions are intertwined. It must therefore be considered whether the 'loser pays' principle and court fees rules require to be adjusted. In other words, there would need to be sufficient political will among the Member States to accept 'the whole package' of harmonization of national civil procedure rules. There would also be similar considerations regarding the adoption of a horizontal redress mechanism if it were coupled with a (partial) harmonization of the costs rules applicable to such actions, since separate costs rules for collective actions would lead to a fragmentation of the national civil procedure rules.

²⁰³ 4a(1) of the Lawyers' Remuneration Act.

²⁰⁴ Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

²⁰⁵ Article 10 of Act n°71-1130 of December 31st, 1971 on the reform of certain legal professions (*Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*) and Articles 38-39 of the Group Proceedings Act 2002 (2002:599).

²⁰⁶ Cf. Magnier, 'The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe' in Hensler, Hodges & Tulibacka (eds.), *The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*, Volume 622, Sage Publications (CA), 2009, pp 114-124, p 122, note 20 and Articles 38-39 of the Group Proceedings Act 2002 (2002:599).

²⁰⁷ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005.

²⁰⁸ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, pp 74-75.

²⁰⁹ Autorités françaises, 'Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante – Observations des autorités françaises', p 3.

Nevertheless, it would not be the first time that the EU legislator has encroached upon Member States' rules regarding legal costs. In fact, Directive 2004/48/EC on the enforcement of intellectual property rights provides an exception to the general rule that the unsuccessful party shall bear the reasonable and proportionate costs of the proceedings if a deviation is justified by equity considerations.²¹⁰ Consequently, introduction of a modification to the 'loser pays' principle in collective actions (or only in competition law damages actions) could be envisaged if this is necessary to ensure the effectiveness of such actions.

However, the Commission will have a difficult task in convincing the Member States that harmonization of the national civil procedure rules governing competition law damages actions is necessary and justified. Furthermore, it must demonstrate why competition law damages actions should be governed by different procedural rules than other tort-related actions.²¹¹ It should also be noted that the European Parliament and Germany are opposed to an unnecessary fragmentation of national procedural laws.²¹²

4.4. Other Options to Ensure Sufficient Funding and Incentives for Bringing Collective Actions

Due to the uncertainty about whether there would be sufficient political support for the introduction of contingency fees, alternative ways of improving the effectiveness of collective damages actions must also be contemplated.

Instead of proposing harmonizing legislation, the Commission could issue recommendations to the Member States on measures that should be adopted in order to enhance private enforcement. Although the recommendations would not have binding effect, they would send a clear signal to the Member States on what is expected in order to ensure the effectiveness of private enforcement of substantive EU rights. Member States could then assess whether their national civil procedure rules would require amendment in order to ensure the effectiveness of collective damages actions and they may voluntarily implement some of the recommendations proposed by the Commission.

Other options for providing sufficient funding would be to promote third party funding and legal insurance. In addition, the capping of legal costs could be required and some type of modification of the 'loser pays' principle may also be considered.

²¹⁰ Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, pp 45–86.

²¹¹ Cf. Rizzuto, 'Does the European Community have legal competence to harmonise national procedural rules governing actions for damages from infringements of European Community antitrust rules?' (2009) 2(1) *G.C.L.R.* 29.

²¹² Bundesministerium für Wirtschaft und Technologie, Bundesministerium der Justiz, Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz, 'Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for breach of the EC antitrust rules"', p 3.

Legal insurance makes it possible to reduce the adverse cost risks of having to pay the costs of the winning party. In England and Wales, the so-called ‘After the Event Insurance’ can be purchased after the event giving cause to the litigation has arisen.²¹³ Although the premium has to be paid in advance, it can be recovered if the insured party wins the case. However, if the premium is high and exceeds the litigation costs that must be paid up-front, it may discourage potential claimants from subscribing the insurance policy.²¹⁴ In addition, in practice, it can be difficult to enforce an After the Event Insurance since insurers are likely not to be willing to pay out compensation that constitutes large amounts if there is any possibility of avoiding this.²¹⁵

The problems related to legal insurance²¹⁶ and the need for litigation funding are the reason why third party funding has been introduced. Third party funding has the advantage of off-setting the financial inequality between parties and can thus increase access to justice. Furthermore, the funder’s due diligence, in scrutinizing claims prior to initiating litigation, serves to select claims that are meritorious.²¹⁷ Usually, the likelihood of success must be at least 60% in order for the third party to be interested in funding a case.²¹⁸ Arguably, this has the welcome effect of limiting vexatious litigation. But the drawback is that in respect to collective actions, due to the complexity and high costs involved in such actions, the expected amount of damages to be awarded must be considerable in order for a third party funder to be willing to fund the action, especially in jurisdictions only providing for opt-in collective actions.²¹⁹ In addition, conflicting interests could limit the effectiveness of cases involving third party funders, above all if several stakeholders are involved, since e.g. a litigant, funder and insurer do not necessarily have the same incentives to settle or to pursue a case.²²⁰

In England and Wales, the possibility of relying on litigation funding may also be limited by the doctrine of champerty, whereby a litigation funding contract under which a party is taking a share of the proceeds of litigation from the claimant can be considered contrary to public policy and can be invalidated by a court.²²¹ In other jurisdictions, it could be easier for third party funding to contribute to increase access to justice and it is, for instance, available in Germany. Moreover, Claims Funding International has announced its intention of bringing follow-on actions in cartel cases across the EU.²²²

²¹³ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 31.

²¹⁴ Cf. Peysner, ‘The Costs and Financing in Private Third Party Competition Damages Actions’ (2006) 3 (1) *CompLRev* 97, pp 99-100.

²¹⁵ Cf. Koutsoukis & O’Shea, ‘Litigation funding in European antitrust cases: legal and practical issues’ (2009) 2 (2) *G.C.L.R.* 74, p 78.

²¹⁶ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, pp 31-32.

²¹⁷ Cf. Mulheron & Cashman, ‘Third party funding: a changing landscape’ (2008) 27 (3) *C.J.Q.* 312, p 316.

²¹⁸ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 31.

²¹⁹ Cf. Mulheron & Cashman, ‘Third party funding: a changing landscape’ (2008) 27 (3) *C.J.Q.* 312, pp 317-318.

²²⁰ Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 33.

²²¹ Cf. Koutsoukis & O’Shea, ‘Litigation funding in European antitrust cases: legal and practical issues’ (2009) 2 (2) *G.C.L.R.* 74, p 78.

²²² Cf. Martin, ‘And then there were three’ (2008) 81 *Euro. Law* 30, p 30.

Other alternatives to enhance the institution of collective actions would be to cap costs, by empowering national courts to derogate from the normal cost rules and adjust the court fees so that only reasonable and proportionate legal costs could be recovered from the losing party. In this context, the recommendations of the OFT on capping parties' cost liabilities²²³ and the possibility in Germany of adjusting the litigation costs of the claimant in a competition case²²⁴ could serve as inspiration. However, it would arguably be necessary to ensure that cost-capping would not undermine the incentives created by contingency fee arrangements in meritorious damages actions.

In addition, the application of the 'loser pays' principle should be limited in line with Directive 2004/48/EC on the enforcement of intellectual property rights, thus allowing courts to derogate from the 'loser pays' principle if its application does not result in a fair outcome in the case in question.

5. CONCLUSIONS

The possible introduction of an EU collective redress mechanism alone would not suffice to significantly increase access to justice, but its effectiveness will depend on the particular model adopted as well as the available funding and the incentives for bringing collective actions. This is because bringing competition law damages actions is costly and time-consuming, the damages awarded tend to be small in the EU, and the outcome uncertain.²²⁵ Therefore, the risks of bringing an action seldom outweigh the potential benefits. The lack of incentive, combined with the fact that, in general, the 'loser pays' principle is applied in most Member States,²²⁶ thus increases the risks of bringing a competition law damages action as the claimant may have to pay the defendant's litigation costs in addition to his own costs. Furthermore, the lack of opt-out collective actions makes virtually all low-value cases difficult to enforce.²²⁷

Since public funding is decreasing,²²⁸ alternative funding is required as it is not likely to be feasible that representative bodies will have the resources and the interest to bring all meritorious cases. Contingency fees or third party funding could serve to provide the necessary incentives to bring complex, but meritorious collective actions. Law firms would also, in general, have the required expertise to bring collective competition law

²²³ Office of Fair Trading, 'Private actions in competition law: effective redress for consumers and business', Recommendations from the Office of Fair Trading, OFT916resp, November 2007, pp 33-34.

²²⁴ Cf. Wagner, 'Litigation costs and their recovery: the German experience' (2009) 28 (3) *C.J.Q.* 367, pp 374-375.

²²⁵ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, p 55 and Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

²²⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

²²⁷ Cf. Lang, 'Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims' (2001) 24 (2) *World Competition* 285, p 290.

²²⁸ Cf. Hodges, 'Europeanization of civil justice: trends and issues' (2007) 26 (Jan) *C.J.Q.* 96, pp 99-100.

damages actions. Because lawyers would only be paid if the action were successful, they would have a strong incentive only to pick cases that are likely to be profitable.

In the United States, virtually all class actions are brought on a contingency fee basis.²²⁹ Admittedly, the U.S. model may have its flaws and it is possible that contingency fees may sometimes lead to abuse by lawyers.²³⁰ However, there is some evidence that indicates that this risk would usually be even greater when the lawyer is working on an hourly fee.²³¹ In any case, the risks involved in contingency fees could be minimized if sufficient safeguards were put in place. Due to the costs and the uncertain outcome of antitrust cases, it is normally not worth bringing a frivolous action. Moreover, U.S. courts can reject a claim fairly easily if the claimant cannot prove the existence of an antitrust injury and that his claim is plausible.²³² Consequently, the situations in which abuses could occur are limited. The U.S. experience of contingency fees could therefore serve as an inspiration in the EU, although the model chosen should try to avoid the risks related to contingency fees by providing appropriate safeguards and by adjusting the use of contingency fees to the European legal and social context.

In fact, modified contingency fees already exist in some Member States as discussed above. But, at present, U.S.-style contingency fees do not seem to have much support in the EU.²³³ France is strongly opposed to any Union legislation regarding costs rules, on the basis that they fall under Member States' competence,²³⁴ and it may be difficult to find sufficient political support for any binding harmonizing measures in this area. However, the introduction of an EU collective redress mechanism should at least be combined with an obligation for Member States to ensure sufficient funding of collective actions. Member States could then design their own appropriate models by combining elements such as some form of contingency fees, third party funding and

²²⁹ Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2735.

²³⁰ But overall, there is little evidence of strike suits in antitrust. Cf. Foer, *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States*, available at <http://www.antitrustinstitute.org/node/11001> and Davis & Cramer, 'Antitrust, Class Certification, and the Politics of Procedure', University of San Francisco Law Research Paper No. 2010-06, p 978, available at <http://ssrn.com/abstract=1578459>. Thus, it is unlikely that contingency fees will frequently result in abuse.

²³¹ Cf. Helland & Tabarrok, 'Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 (2) *Journal of Law, Economics & Organization* 517, p 540. Although the empirical study conducted by Helland and Tabarrok concerned tort, contract, real property and medical malpractice cases and not antitrust damages actions, the fact that antitrust damages actions tend to be costly, time-consuming and complex arguably suggests that rational lawyers would not be interested in pursuing such actions, unless they believed that the actions were likely to be successful. Cf. also Schnell, who argues that abuses usually occur in other fields than in the field of antitrust. Schnell, 'Class Action Madness in Europe – a Call for a More Balanced Debate' (2007) 28 (11) *E.C.L.R.* 617, p 618.

²³² Cf. Sittenreich, 'The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions' (2010) 78 April *Fordham L. Rev.* 2701, p 2749.

²³³ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 2.4.2008, pp 74-75.

²³⁴ Autorités françaises, 'Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante – Observations des autorités françaises', p 3.

legal insurance in taking into consideration the particular features of their civil procedures.

In addition, the Commission should issue recommendations regarding contingency fees, including appropriate safeguards for ensuring that they would not lead to abuse. For instance, courts could be empowered to approve and adjust contingency fees. In the long term, once some experience of the new collective redress mechanism has been gathered, it may be necessary to introduce contingency fees by legislation if the funding available in the Member States and the incentives for bringing collective actions prove unsatisfactory.

Finally, the Commission should propose binding rules regarding cost capping and the possibility for derogation from the 'loser pays' principle as these would increase access to justice by reducing the costs for bringing collective actions. It would also be more probable that Member States would support such measures if they were limited to particular situations necessitated by fairness considerations. Furthermore, as this type of adjustment of the costs rules already exists with regard to actions to enforce intellectual property rights, it shows that EU legislation on cost rules is feasible, at least to a limited extent.