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The role of collective redress actions to achieve full compensation for violations of European Union Competition Law

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1 GENERAL INTRODUCTION

1.1 Competition Law Enforcement in the European Union: Background and Overview

1.1.1 The Relationship between Public and Private Enforcement of EU Competition Law

The key provisions of competition law are set out in the Treaty on the Functioning of the European Union (TFEU): Article 101, which prohibits restrictive agreements, and Article 102, which prohibits the abuse of a dominant position.[1] The enforcement of competition law is an increasingly prominent and important policy area for the European Union. Its role is to ensure that competition within the EU's internal market is neither restricted nor distorted by anticompetitive conduct. For the sake of clarity, it should be noted that the terms 'competition law' and 'antitrust' are used as synonyms in this research project. The same applies to 'collective (redress) actions' and 'class actions'.

In general, the enforcement of EU competition law aims at achieving three closely interrelated objectives:[2]

- to detect and bring anticompetitive practices to an end;
- to punish antitrust infringers, and to deter them and others from breaching the law in the future;
- to achieve corrective justice through compensation.

These objectives can be achieved through two main models: public and private enforcement.

The first two objectives can be primarily attained by public enforcement. Both detection and punishment have been pursued by a multi-layered setting of public enforcers: the European Commission at the EU level, and national courts and national competition authorities (NCAs) at the national level. The role of the national actors has been significantly increased after the adoption of Council Regulation 1/2003.[3] The key measures included, *inter alia*, the following: (a) stimulating national courts' activity in the enforcement of EU competition law; (b) decentralising the enforcement of EU competition rules; and (c) strengthening the possibility for individuals to seek redress before national courts. To that extent, national authorities have been empowered to enforce EU antitrust rules alongside the Commission. After more than a decade, the new system can be described as a success surpassing expectations; around 85% of all the enforcement decisions are taken by NCAs.[4] Another aim of the joint enforcement model was to move some of the workload to

[1] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[2] On these objectives, see, for example, Assimakis Komninos, *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 1; Wouter PJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2008) 32(1) World Competition 3, 3-18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458> accessed 28 October 2018; Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford University Press 2003) 229.

[3] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L 1/1.

[4] See European Commission, 'EU Competition Policy in Action' (2016) Luxembourg: Publications Office of the European Union, 5 <http://ec.europa.eu/competition/publications/kd0216250enn.pdf> accessed 22 October 2018. It was found that between 1 May 2004 and 31 December 2012 there were 1,334 investigations of the NCAs and 646 envisaged

national actors, allowing the European Commission to use its resources on the most serious violations, especially hard-core cartels. In comparison with other types of infringements (such as abuse of dominance), cartels require much more attention due to their covert nature. Two major amendments have led to the rise of anti-cartel enforcement in recent years. First, the amount of fines imposed on convicted cartels has rapidly increased after the adoption of the 2006 Guidelines on antitrust fines.[5] Second, the 2006 Leniency Notice has enhanced the rate of cartel detection.[6] After more than 10 years of combined efforts by the EU and its member states, it can be said that public enforcement has reached maturity in fighting antitrust violations.

The main tool for achieving the objective of compensation appears to be private enforcement, and more specifically private actions for damages. However, even if many attempts have been made to facilitate private enforcement, it remains underdeveloped across the EU. Private enforcement was largely expected to grow to a well-functioning and well-developed system after the adoption of Regulation 1/2003.[7] However, the number of damages actions did not increase. During the same period, the objective to facilitate antitrust damages actions was reinforced by the Court of Justice of the European Union (CJEU). In its decision in *Courage v. Crehan*,[8] the Court asserted that the full effectiveness of Articles 101 and 102 TFEU would be put at risk if individuals were not allowed to claim damages caused by competition law violations.[9] Furthermore, actions for damages can contribute to the maintenance of effective competition in the EU.[10] The ruling in *Courage* was subsequently clarified in *Manfredi*,[11] where the CJEU noted that a claim for compensation should be allowed when there is a causal link between the harm suffered and the anticompetitive conduct.[12] Following the CJEU rulings, the Commission aimed at identifying key barriers to the further promotion of antitrust damages actions in its policy proposals in the Green Paper[13] and the White Paper.[14] Both documents identified problems needing to be addressed; however, private enforcement in the EU has remained underdeveloped in compensating antitrust victims, especially if they suffered low value harm (typically consumers) or if they were indirect purchasers. Nevertheless, the EU expects that the failure in compensating victims will be remedied by the adoption of the Directive on damages actions.[15] Its main objective is to ensure that any victim who has suffered harm caused by antitrust infringement can effectively exercise the right to claim *full*

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final decisions. For further discussion, see Wouter PJ Wils, 'Ten Years of Regulation 1/2003 - A Retrospective' (2013) 4(4) Journal of European Competition Law and Practice 293, 295-296.

[5] Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) of Regulation No 1/2003' [2006] OJ C210/2.

[6] Commission, 'Notice on Immunity from Fines and Reduction of Fines in Cartel Cases' [2006] OJ C298/17.

[7] Assimakis Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) The Competition Law Review 5, 7; Thomas Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action' (2007) 44(2) Common Market Law Review 431, 434.

[8] Case C-453/99 *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297.

[9] ibid para. 26.

[10] ibid para. 27.

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

[12] ibid para. 61.

[13] Commission, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules' COM (2005) 672 final.

[14] Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM (2008) 165 final.

[15] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349.

compensation.[16] In order to ensure the achievement of full compensation, both direct and indirect purchasers have the right to claim compensation.[17] With regard to mass harm situations, the European Commission published the *horizontal* Recommendation that sets out a series of common, *non-binding* principles for collective redress mechanisms across all legal fields.[18] The latter package, consisting of the Directive and the Recommendation, is hereafter called the EU private antitrust reform.

According to the European Commission, public and private enforcement are complementary mechanisms for ensuring the effective enforcement of Articles 101 and 102 TFEU.[19] Public enforcement is aimed at prevention, detection and deterrence of violations, while private enforcement is designed to compensate victims. Moreover, the European Commission indicated that private enforcement by means of damages actions may complement public enforcement, but should not replace or jeopardise it.[20] The majority of antitrust commentators see the ideal antitrust enforcement combining both public and private enforcement.[21] However, determining the optimal interplay between both models is very difficult, as strengthening private enforcement inevitably jeopardises the functioning of public enforcement, such as the leniency programme.

1.1.2 Public Enforcement: The Real Enforcement Mode of Antitrust Enforcement

The fundamental objective of EU antitrust enforcement is to prevent the distortion of competition within the internal market, thus ensuring that companies compete on equal terms in different EU countries. Moreover, it should reduce prices and improve quality, which is primarily beneficial to consumers. This research project is in agreement with commentators who argue that antitrust enforcement is primarily achieved by deterrence and prevention.[22] The underlying logic is that it is better to prevent and discourage anticompetitive behaviour than trying to remedy all the negative effects caused by infringements *post hoc*. From an economic perspective, the objective of any enforcement action is also strongly related to deterrence.[23] Maximal societal benefit is achieved when potential wrongdoers are prevented from engaging in anticompetitive behaviour. But if the competition law violation has occurred, the negative impacts of the harm can be remedied through the objective of compensation, at least in theory. Here, the injured parties perform the main role: they can bring damages actions in order to obtain full compensation for loss incurred. If considering antitrust violations more broadly, they can be as well characterised as torts. The importance of torts

[16] ibid arts. 1, 3.
[17] ibid art. 14.
[18] Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights COM(2013) 3539/3.
[19] Commission Staff Working Document Executive Summary of the Impact Assessment Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM (2013) 404 final, para. 29.
[20] White Paper (n 14) sec. 1.3.
[21] See, for example, Komninos (n 2) 9; Spencer W Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law' (2006) 29(6) World Competition 367, 367; Clifford A Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27(1) World Competition 13, 13.
[22] Wouter PJ Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition 473, 481; Richard A Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) 266.
[23] See, for example, Sonja E Keske, 'Group Litigation in European Competition Law: A Law and Economics Perspective' (2009) Erasmus University Rotterdam, 22 <https://repub.eur.nl/pub/17790/Sonja%20Keske%20Thesis[lr].pdf> accessed 22 October 2018.

in the EU competition law has especially increased after the adoption of the Directive on antitrust damages.[24] The main role of damages in torts is to put the claimant in the position that the violation has not taken place. When looking to torts from a broader perspective, some say that deterrence as well can be regarded as one of the functions of tort law.[25] Others go even further claiming that compensation should not be seen as a goal of tort law, but rather an instrument to achieve better prevention.[26] However, the latter approach is primarily related to the law and economic analysis of accident law.[27] The purpose of damages in (accident) tort law is not to compensate victims, but to give the incentives for potential injurers to avoid the accident, which causes harm to victims. In contrast, the EU's antitrust enforcement is framed in a way that detection and prevention of violations is primarily achieved by public enforcement.

First, public enforcement has a number of investigative and sanctioning powers to bring antitrust violations to an end. To start with, competition authorities have the power to conduct dawn raids at the premises of businesses, aiming to find out violations of the competition law, such as cartels.[28] Furthermore, antitrust authorities are empowered to request information from undertakings, regardless if they are suspected of infringing the competition rules or not.[29] Special attention requires a leniency program for detecting disguised cartels and for obtaining evidence that would prove their harm and effects. Under this program, cartel participants can be granted either total immunity or a reduction from administrative fines in case they self-report to competition authorities.[30] As such, the leniency program has the ability to destabilise cartels by creating suspicion and distrust among them.[31] It obviously has a strong deterrent effect on both existing and future cartels. Administrative fines are employed as another tool for creating prevention and deterrence. Fines can be imposed on all types of antitrust violations, including cartel and non-cartel violations. According to the European Commission, the imposition of fines not only punishes the undertakings involved (specific deterrence), but also deters other persons from engaging in or continuing behaviour contrary to competition rules (general deterrence).[32] In fact, the magnitude of

[24] See, for example, Okeoghene Odudu and Albert Sanchez-Graells, 'The Interface of EU and National Tort Law: Competition Law', in Paula Giliker (ed), *Research Handbook on EU Tort Law*' (Edward Elgar Publishing 2017).

[25] For further discussion, see Mark A Geistfeld, 'The Coherence of Compensation-Deterrence Theory in Tort Law' (2013) 61 New York University Law and Economics Working Papers 383 <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1350&context=nyu_lewp> accessed 22 October 2018; Zenon Zabinski and Bernard S Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2013) Northwestern Law & Econ Research Paper No. 13-09 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161362> accessed 22 October 2018.

[26] Michael Faure, 'Economic Optimization of Tort Law', in Helmut Koziol (ed.) *The Aims of Tort Law: Chinese and European Perspectives* (Jan Sramek Verlag KG 2017) 80-81.

[27] For further discussion, see Steven Shavel, Economic Analysis of Accident Law' (2002) Harvard Law School, Discussion Paper No. 396 <http://www.fd.unl.pt/docentes_docs/ma/LTF_MA_24338.pdf> accessed 22 October 2018.

[28] Dawn raids of the European Commission are defined in Article 20 of the Regulation 1/2003. The legal basis to undertake inspections in member states depend on a case-by-case basis. For example, in Portugal inspections are enshrined in Article 18(1)c of the Portuguese Competition Act (Law 19/20123, of 8 May), while in Poland the inspections are set in Articles 105a-105l of the Polish Act of 16 February 2007 on Competition and Consumer Protection.

[29] Pursuant to Article 18 of Regulation 1/2003, the Commission has the power to require undertakings and associations of undertakings to provide it with all necessary information. Information can be requested by letter (Article 18(2)) or by decision (Art. 18(3)). The legal rules on collecting information in member states are embedded in national laws.

[30] At the EU level, the leniency program is regulated under the Notice on Immunity from Fines (n 6). In member states, each jurisdiction has own rules, but based on the EU Notice.

[31] Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012) ZEW Discussion Paper No. 12-050, 18 <http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf> accessed 22 October 2018.

[32] For the discussion on both types of deterrence, see European Commission Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2, para. 4.

the recent European Commission's fines shows their potential to contribute to both specific and general deterrence: for example, truck producers were fined 3.8 billion euros for participation in a cartel under Article 101 TFEU[33], and Google 2.4 billion euros for abusing its market dominance under Article 102 TFEU.[34] Fines are significantly lower in member states, but they may also bring positive impacts on deterrence.[35]

Second, public enforcement constitutes a systematic approach to the enforcement of competition law. Fines are imposed pursuant to an agreed set of methods. The basic amount is calculated as a percentage of the value of the sales connected with the infringement, multiplied by the number of years the infringement has been taking place.[36] The amount can be lowered if there are mitigating factors, or it can be raised if there are aggravating conditions. The main rule is that the fine cannot exceed 10% of the infringing company's total turnover in the preceding business year.[37] A leniency program also functions according to a strictly defined system. Only an immunity applicant receives a 100% fine reduction. In order to obtain total immunity, a company must be the first one to inform the Commission of an undetected cartel and must also fully cooperate throughout the procedure by providing all the evidence in its possession.[38] Other companies can apply for a reduction of the fine if they provide evidence that gives "significant added value".[39] The first company to meet these conditions is granted 30-50% reduction, the second 20-30% and subsequent companies up to 20% reduction.

On this point, it should be stressed that the European Commission regards administrative (public) fines as an appropriate and effective deterrence mechanism.[40] At first blush, the EU has a basis for this reasoning. As mentioned before, cartel prosecution has achieved a lot of success: the leniency policy has significantly increased the number of cartel decisions, while the amount of fines imposed on wrongdoers has increased substantially during the last years, reaching unprecedented highs.[41] However, despite the improved level of enforcement activities, EU fine levels have been criticized for being too low to achieve optimal deterrence.[42] There is a counterargument that the

[33] *Trucks* (Case COMP/39824) Commission Decision of 19 July 2016 [2017] OJ C 108/6. The European Commission has found that five companies (MAN, Volvo/Renault, Daimler, Iveco, and DAF) were involved in a cartel and hence has imposed a record fine of 2.9 billion euros. On 27 September 2017, the Commission fined Scania for more than 880 million euros for its participation in the same trucks cartel. On the contrary to other companies, Scania decided not to settle with the Commission. Therefore, the European Commission continued the proceedings under the standard cartel procedure.

[34] *Google Search (Shopping)* (CASE AT.39740) Commission Decision of 27 June 2017 [2017] C(2017) 4444 final.

[35] In France, for instance, the NCA imposed a record fine of 534 million euros on three mobile operators for a price-fixing conspiracy. See the Decision of 30 November 2005, Counseil de la Concurrence (Competition Council), No. 05-D-65. In Lithuania, the NCA gave a fine of 36 million euros to the world's largest gas producer Gazprom for abusing its dominant position in the Lithuanian market. See *GAZPROM*, Decision of 10 June 2014 of the Competition Council, No. 2S-3/2014.

[36] Guidelines on the Method of Setting Fines (n 5) paras. 9-35.

[37] ibid.

[38] Notice on Immunity from Fines (n 6) para. 12.

[39] ibid.

[40] See, for example, Alexander Italianer, 'Fighting Cartels in Europe and the US: Different Systems, Common Goals' (Annual Conference of the International Bar Association, Boston, 9 October 2013), 4.

[41] European Commission, 'Cartel Statistics' <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 13 October 2018. For example, during the last 4 years (2014-2017), the European Commission imposed fines totalling 6 billion euros.

[42] Mario Mariniello, 'Do European Fines Deter Price Fixing?' (2013) 4 Bruegel Policy Review, 2-4; Smuda (n 31) 18-21; Marie L Allain, Marcel Boyer, Rachidi Kotchoni and Jean P Ponssard, 'Are Cartel Fines Optimal? Theory and

Commission's fining policy to a large extent fulfils the standards of the optimal deterrence theory.[43] According to this theory, the optimal level of deterrence is achieved when the enforcement tools are able to impose a penalty, equivalent to (at least) the violation's anticipated 'net harm to others'[44], divided by the probability of detection and proof of the infringement.[45] In other words, the imposed penalty needs to outweigh the financial benefits of antitrust violation. However, even though antitrust fines have reached very high levels, it should be agreed with critics that optimal deterrence has not yet been achieved. The best indication of suboptimal enforcement is the degree of recidivism. For instance, seven years after the revised 2006 fining guidelines, there were at least 15 recidivists in 10 cases.[46] Furthermore, many large and small cartels have been discovered in recent years, suggesting that public enforcement fails to fully deter wrongdoers.[47] On the one hand, the facilitated number of detected and convicted cartels may show the increasing competence of public authorities in enforcing competition rules. On the other hand, it is questionable whether leniency is the best criteria for assessing the effectiveness of public enforcement and its deterrence effect. Under this program, whistle-blowers come forward on a voluntary basis and provide crucial information to competition authorities for conducting further investigation. Some studies find that only up to around 30% of cartels are detected, at best.[48] However, it is equally true that no one can precisely estimate how many cartels remain undetected.

Despite its shortcomings, public enforcement seems to be the primary enforcement mechanism of EU competition law. Under the current private enforcement mechanism, damages actions do not seem to be well suited to contribute to deterrence. This is notably due to the following limitations:

- Private enforcement lacks investigative powers;
- Incentive to sue depends on private interest to litigate;
- Private actors bring low risk cases, typically following a decision of the public enforcer;
- Access to documents (especially if they are related to leniency and settlement) is limited;
- Many private actions (especially collective ones) are determined to be settled for low awards.

All these points will be debated in the dissertation.

Evidence from the European Union' (2013) CIRANO 2013s-24, 17-20 <https://www.cirano.qc.ca/pdf/publication/2013s-24.pdf> accessed 22 October 2018.

[43] John M Connor and Douglas J Miller, 'Determinants of EC Antitrust Fines for Members of Global Cartels' (2013) 32-34 <http://ssrn.com/abstract=2229358> accessed 22 October 2018.

[44] The 'net harm to others' encompasses cartel overcharges and the allocative inefficiency. See John M Connor and Robert H Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 Cardozo Law Review 427, 455.

[45] See, for example, William M Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 University of Chicago Law Review 652, 656, 666-668.

[46] Italianer (n 40) 4. See also Damien Geradin and Katarzyna Sadrak, 'The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions between 2000 and 2017' (2017) TILEC Discussion Paper DP 2017-018, 9-10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958317> accessed 3 September 2018.

[47] For example, in March 2017 the European Union and German antitrust authorities started investigating potential German auto industry cartel involving VW, Audi, Porsche, Mercedes and BMW. Daimler was the whistle-blower under the EU's leniency program. Following the 10 percent of a firm's revenue rule, German car manufactures may face the fine of around 50 billion euros, should the violation was proved. In Lithuania, for example, the largest ever cartel was recently detected between two companies. See *UAB Mantinga, UAB Maxima*, Decision 4 December 2014 of the Competition Council, No. 2S-14/2014.

[48] It is calculated that only up to 33% of cartel infringements are detected in the European Union. See Smuda (n 31) 19; Emmanuel Combe, Constance Monnier-Schlumberger, 'Les Amendes Contre les Cartels: La Commission Europe´enne en Fait-elle Trop? (2009) 4 Concurrences 41, 41-43. From the US experience, see Connor and Lande (n 44) 486-490.

1.1.3 Private Enforcement: The Current and the Potential Role in the Competition Law System

The primary function of private enforcement is compensatory, at least in the EU context. The main objective of the Directive on damages actions is to ensure that any victim can effectively exercise the right to claim full compensation. This objective demands to achieve at least three goals. First, both direct and indirect purchasers have the right to claim compensation. Second, victims have the right to claim compensation for actual losses, loss of profit, plus the payment of interest. Third, the achievement of full compensation should not lead to overcompensation, whether by means of punitive, multiple or other damages.[49] As regards deterrence, its potential effect is mentioned neither in the recitals nor in the Directive on damages actions itself. Back in 2008, the European Commission claimed that improving compensatory justice will 'inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.'[50] It would be surprising if the Directive would deny the potential of damages actions to contribute to deterrence as a side effect.

There is no agreement among commentators on the scope of private enforcement; they disagree on whether damages actions has or should have direct, indirect, or no impact on deterrence.

As regards direct effect, some scholars argue that antitrust damages actions supplement deterrence by adding punitive components.[51] Hüschelrath and Peyer assume a deterrence objective of private antitrust enforcement, because courts enhance deterrence through any enforcement action.[52] Another view is that private enforcement lays a solid foundation for optimal sanctioning.[53] However, this approach is typically backed up by antitrust professionals from the United States, where private enforcement serves both the objectives of compensation and deterrence.[54] When both goals overlap, the Supreme Court seems to prioritise deterrence over compensation.[55] One of the reasons for a more deterrence-based approach has been the impact of the Chicago School.[56] One of the arguments is that the achievement of compensation is very complicated, because it is very hard

[49] Directive (n 15) art. 3

[50] White Paper (n 14) sec. 1.2.

[51] For further discussion on the deterrent effect of damages actions, see Ernst J Mestmäcker, 'The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order' (2000) 1(3) European Business Organization Law Review 401, 422; Alison Jones and Brenda Sufrin, *EC Competition Law, Text, Cases, and Materials*, (2nd edn, Oxford University Press 2004) 1192; Jonathan B Baker, 'Private Information and the Deterrent Effect of Antitrust Damage Remedies' (1988) 4(2) The Journal of Law, Economics, and Organization 385.

[52] Kai Hüschelrath and Sebastian Peyer, 'Public and Private Enforcement of Competition Law – A Differentiated Approach' (2013) Centre for European Economic Research, Discussion Paper No. 13-029, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278839> accessed 22 October 2018. The authors argue that the compensatory mechanism only relates to the narrow side of private actions, which encompasses mainly damages. This approach ignores other type of cases of private enforcement brought to the courts. It follows that court actions contribute to the deterrence effect of all enforcement actions.

[53] For further dicussion on optimal sanctioning through private antitrust actions, see William Breit and Kenneth Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 Journal of Law and Economics 405; William M Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 University of Chicago Law Review 652.

[54] This view has been supported by the Supreme Court. See, for example, *Pfizer, Inc. v. Gov.'t of India*, 434 U.S. 308, 314 (1978).

[55] See, for example, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The interaction between compensation and deterrence is discussed in Chapter 3.

[56] The so-called Chicago School started to influence antitrust case law in the late 1970s, when some Chicago School scholars were appointed to federal courts. For a discussion, see Hannah L Buxbaum, 'Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs', in Basedow (ed.) *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 43-46; Warren F Schwartz, 'An Overview of the Economics of Antitrust Enforcement' (1980) 68 Georgia Law Journal 1075, 1086.

to identify and compensate victims. Therefore, deterrence should be the actual objective of private enforcement. To sum up, private enforcement in the US is an alternative to, rather than a supplement to public enforcement in deterring antitrust infringers. Indeed, this is not the approach that European counterparts are seeking for.

With regard to indirect effect, damages actions are considered to primarily provide compensation, but deterrence can be viewed as a welcome side-effect of damages actions.[57] To a similar extent, some argue that private actions produce deterrence as a beneficial side effect.[58] In that regard, private actions for damages can be seen as a positive social instrument, enhancing the probability of detection and raising the expected cost of infringements.[59] In other words, damages actions that function effectively may also extend the deterrence effect of competition law.

The critics of private enforcement criticise its impact on deterrence and enforcement from at least two perspectives. First, in the *Pfleiderer* case the Advocate General Mazák stressed that the role of private actions for damages is of far less importance than that of public enforcement in ensuring compliance with Articles 101 and 102 TFEU.[60] Therefore, because of the limited and reduced role of private enforcement, Mazák hesitated to label damages actions as one of the element of the enforcement mechanism. After the adoption of the Directive on damages actions, Mazák's opinion remains applicable, because the Directive preserves strong public enforcement by imposing various limitations on damages claims. Second, Wils argues that public enforcement is better designed and equipped to deter antitrust violations than private enforcement.[61] First, public enforcement has more effective investigative and sanctioning powers than private enforcement. Second, private parties are incentivised by private motives which typically deviate from the general interest. Third, private enforcement is costlier than public enforcement due to the allocation and determination of damages and court proceedings involved. Wils does not even see private enforcement as having a complementary function to public enforcement, as deterrence can if needed be simply enhanced by raising public fines rather than facilitating antitrust damages actions.[62] Wils' approach has attracted both criticism and support. On the one hand, Jones claims that Wils' approach is more applicable when a policy choice needs to be made between either solely public enforcement or solely private enforcement.[63] On the other hand, Marcos and Graells state that antitrust harm can be so widespread

[57] Philipp Fabbio, Private Actions for Damages, Loyola University <https://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/newsviews/fabbio.pdf> accessed 22 October 2018.

[58] Jeroen S Kortmann and Christoforus RA Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States Are (Right to be) Less than Enthusiastic' (2009) 30(7) European Competition Law Review 340, 341.

[59] Paolisa Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?' (2008) 33(1) European Law Review 23, 26.

[60] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011], Opinion of Advocate General Mazák delivered on 16 December 2010. para. 40. In 2010, Mazák, prior to the adoption of the Directive on damages actions, asserted that the Commission and national competition authorities had much more powers than damages actions in ensuring compliance with Articles 101 and 102 TFEU. However, after the adoption of the Directive, not much has changed, as the role of damages actions remains significantly reduced: private enforcement is dependent on public enforcement, damages multipliers have been prohibited, leniency statements are unavailable to victims, and the Directive contains no provisions on collective redress actions.

[61] Wils (n 22) 11.

[62] ibid 16.

[63] Clifford A Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27(1) World Competition 13, 19.

that identifying victims becomes very difficult, especially if they are indirect purchasers.[64] In other words, damages actions are ill suited to compensate all type of victims.

This paper takes the approach that damages actions—even the compensation-oriented—can contribute to deterrence and enforcement, but a more wide-ranging and independent role needs to be ensured. Obviously, this goal cannot be achieved under the current EU private enforcement mechanism, as the Directive on damages actions does not include provisions on collective redress actions. The logic behind is that by effectively aggregating claims (especially the ones that otherwise would remain unheard), collective actions would not only increase the level of compensation, but may also contribute to deterrence thought the enlarged group of claimants.

1.1.4 The Interaction between Antitrust Collective Actions in the European Union and the United States

In June 2013, the European Commission published the horizontal Recommendation that sets out a series of common, *non-binding* principles for collective redress mechanisms across all legal fields.[65] On the one hand, the Recommendation seeks to facilitate access to justice and enable compensation in mass harm situations. On the other hand, it aims to prevent litigation abuses through appropriate safeguards: by avoiding contingency fee agreements and opt-out schemes, and by imposing strict limitations on third-party funding as well as on actions brought by representatives. Together, these safeguards should act as a protection mechanism against the perceived litigation abuses that have occurred in US class actions.

In June 2013, it was decided that the implementation of the Recommendation will be assessed by 26 July 2017, and further legislative measures will be proposed if found necessary. With delay, the European Commission assessed the practical implementation of the Recommendation by issuing the Report on 26 January 2018.[66] The findings of the Report have been included in the subsequent legislative package "New Deal for Consumers", which aims at increasing the possibilities for consumers to defend their rights. On 11 April 2018, the European Commission published two proposals for the directives:

- Directive on better enforcement and modernisation of EU consumer protection rules[67]; and
- Directive on representative actions for the protection of the collective interests of consumers.[68]

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[64] Francisco Marcos and Alberto Sánchez Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?' (2008) InDret, 8-9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371050> accessed 21 October 2018.

[65] Recommendation (n 18).

[66] Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) COM(2018) 40 final.

[67] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM(2018) 185/3.

The Commission did not publish a proposal for a Directive on antitrust damages nor included specific antitrust provisions in the above-mentioned proposals. The expectations were high, as the 2013 Recommendation was published together with the draft of the Directive on damages actions, showing a particular interest (at least at that time) to enhance the possibilities for victims to claim damages for harm resulting from infringements of competition law.

While the EU is evaluating ways to facilitate damages actions, private enforcement has always played the important role in the US antitrust enforcement mechanism. As mentioned before, the US system aims to achieve the objectives of compensation as well as deterrence, but the latter predominates when both intersect. When the American class action rule emerged, it became one of the most important methods of deterrence. In marked contrast with the EU, the class action mechanism is very liberal, allowing for private attorneys to enforce antitrust rules aggressively through the so-called private attorney general mechanism. This device combines a set of measures that are aimed at facilitating deterrence: treble damages, contingency fees, opt-out schemes, broad discovery rules, joint and several liability, and the one-way-fee shifting. When combined, these remedies ensure that the expected compensation outweighs the risks involved in complex antitrust actions. However, class action lawsuits remain highly controversial to this day. On the one hand, critics argue that class actions force defendants to settle cases lacking merit.[69] Furthermore, class actions largely fail in compensating victims and deterring wrongdoers. On the other hand, the proponents of class actions assert that there is no reliable empirical evidence proving the supposed negative impacts of class action lawsuits.[70]

Despite the opposing views in the US, the European Commission (as well other EU institutions) has seen American-style class actions only from a negative perspective, having a high potential of abusive litigation. As such, the Commission encourages member states to incorporate robust safeguards against abusive litigation.[71] One view may be that the Commission is right in seeking to preserve its legal traditions and those of its member states. Another view may be that the Commission is too careful without objective justification. To sum up, the research pays particular attention to these contrasting approaches.

1.2 RESEARCH APPROACH: PHD DISSERTATION CONSISTING OF ARTICLES

This PhD dissertation is based on 'a collection of separate scientific treatises' under Article 13 of the Leiden University PhD Regulations. The thesis consists of 6 articles, which were published in peer reviewed legal journals. These articles are further regarded as chapters in the PhD dissertation. Table 1 below overviews the originality of the chapters.

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[68] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC COM(2018) 184 final.

[69] See, for example, John T Rosch, 'Designing a Private Remedies System for Antitrust Cases-Lessons Learned from the U.S. Experience' (2011) Remarks before the 16th Annual EU Competition Law and Policy Workshop, 10; Jonathan M Landers, 'Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma' (1974) 47 Southern California Law Review 842, 843.

[70] See, for example, Joshua P Davis and Robert H Lande, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2013) 48 Georgia Law Review 1, 39.

[71] Recommendation (n 18). The Commission rejects opt-out schemes, contingency fees and any type of the damage multiplier. In addition, the third-party funding remains subject to strict conditions.

Table 1. An overview of the published articles of the PhD dissertation

Chapter	Title	(Year) Journal publication	Citation standards
1.	General Introduction	—	OSCOLA
2.	Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress	(2014) 7(1) European Journal of Legal Studies 125	European University Institute
3.	The Potential of Antitrust Collective Litigation in 2017: Beyond the Recommendation and the Directive	(2017) 4 European Journal of Comparative Law and Governance 337	BRILL
4.	The Impact of Contingency Fees on Collective Antitrust Actions: Experiments from Lithuania and Poland	(2016) 41(3-4) Review of Central and Eastern European Law 368	BRILL
5.	The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement	(2017) 62(3) The Antitrust Bulletin 603	Bluebook
6.	The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation	(2018) 49 (1) International Review of Intellectual Property and Competition Law 63	Springer
7.	A More Forceful Collective Redress Schemes in EU Competition Law: What is the Potential for Achieving Full Compensation?	(2017) 18 (4) European Journal of Law Reform 451	Eleven Journals
8.	General Conclusion	—	OSCOLA

This format was chosen because it provides a greater insight into the research that examines the long-awaited private antitrust reform. Publishing an article in an academic journal entails three benefits: *first*, the preparation of a draft meeting the criteria for publication in peer-reviewed legal journals demands a versatile research and more thorough planning; *second*, the draft generates very useful and insightful comments from peer reviewers; *third*, the publication receives reactions from the readers. When combined, these advantages give the opportunity to identify controversial measures, and to provide unbiased and valid research.

Despite the positive aspects, the drawbacks should be outlined as well. The main issue is that this approach raises some deviations and inaccuracies among the chapters. To start with, each chapter was written as a part of the dissertation, aiming to contribute to answering the main research question. At the same time, every chapter should be seen as a separate piece, which went through a different publication process. First, every draft was submitted to the legal journal corresponding with the research objectives of that draft. Second, a peer review process for journal publication asked to make amendments that would comply with journal's objectives and priorities. Third, each journal asked to comply with its publication standards: citation, style, punctuation and consistency. The outcome is that various procedures for publication undermined the consistency among chapters, especially when the chapter was subject to a double peer review.

It should be stressed that a PhD consisting of *only* peer-reviewed articles is a complex type of dissertation consisting of different pieces, albeit of the same subject. According to Article 13 of

Leiden University's PhD Regulations, a dissertation consisting of articles "should demonstrate a connection in terms of content between the different parts" and "should include an introductory chapter or a conclusion in which this connection is explained." This may be possible for example when only a few of the articles are published in peer-reviewed journals, while other parts of the dissertation are not. Indeed, the inclusion of only an introductory chapter or a conclusion is insufficient in case a PhD consists of *only* peer-reviewed articles, because it would consist of different pieces of the same topic instead of a cohesive whole. In order to harmonise the dissertation, all chapters include the common changes in their introduction. More specifically, the introduction includes the common sections: A. Research question and scope; B. Methodology and limitations; C. Overview of the research material; D. Structure. The common sections on methodology and research question are of particular importance. As regards methodology, it includes a careful assessment of the application of the comparative research method. It allows defining the general research approach that outlines the common methods and principles applied throughout the dissertation, consisting of six articles published in different journals. Moreover, it reflects how different approaches of comparative method are combined throughout the research. As regards a section on research sub-questions, some questions have already been raised in original articles, while in others it is a logical consequence of a debate in original introduction and abstract. In other words, this section consolidates what has already been said in original versions. Overall, the research sub-questions help to better assess each chapter's contribution to the main research question, and what elements chapters do share. It also reveals any exceptional features in each of them. In each conclusion of a chapter the substance remains, just the text is changed and restructured. This helps to show more directly the answer to the research sub-question and its contribution to the thesis' research question. The section on the research material compliments others by identifying crucial material for research, but also its shortcomings. This comprehensive way of showing a connection between the chapters may be criticised as excessive. However, again, this PhD consists only of peer-reviewed articles. The decision has been that a detailed explanation of methodology and research questions will demonstrate the needed connection between the chapters. This approach is the best considering the circumstances, since this type of dissertation has no perfect approach in ensuring connection among chapters as it evolves through different publication procedures.

It should be stressed that private antitrust enforcement has developed further after each publication. Moreover, additional material has been found in the later stage of the dissertation. In order to show the latest picture of private enforcement and collective actions, the final version of the dissertation includes amendments in the main text. On this basis, chapters 2, 3, 5, 6 and 7 are amended. These amendments are summarised in the appendix, and the common changes in introduction and conclusion are not shown there. Chapter 4 does not include the appendix, because no amendments are made in the main text. The clarification needs to be made that the main text is amended, aiming to provide additional information, and no changes are made regarding the context of the published articles. Finally, all chapters maintain the original citation standards of the published articles, but a common layout is used throughout the dissertation in order to facilitate reading.

To conclude, it should be noted that the PhD-candidate was granted the EU Fulbright Schuman scholarship for conducting research at Stanford University and the University of Michigan during the academic year 2015-2016. The research was jointly financed by the US State Department and

the Directorate-General for Education and Culture of the European Commission. All chapters, except for Chapter 2, are based on the study performed in the United States.

1.3 SCOPE AND RESEARCH QUESTION

Private antitrust enforcement can be defined from two of its meanings: broad and narrow.[72] On the broad side, private enforcement includes all actions related to private enforcement, such as damages actions, injunctive relief or defensive actions. On the narrow side, private enforcement is only attributed to damages actions. As regards collective redress, the European Commission takes a wider approach: victims are entitled to claim compensation or to seek injunctive relief.[73] However, considering that compensation is the leading goal of the Directive on damages actions, this thesis primary analyses collective redress mechanism from a compensatory perspective. The scope of the study encompasses three types of antitrust collective (redress) actions:

- A representative collective action;
- A party-initiated collective/class action;
- A class/collective settlement based on an opt-out system.

Another type of claims' aggregation model—Special Purpose Vehicle (SPV)—is not considered as a traditional collective action mechanism. Under this model, SPV purchases several claims and bring them together to the court, albeit the purchase typically encompasses claims generating high financial value. Therefore, SPV is not the aggregation model related to the traditional collective litigation that seeks to aggregate all types of victims, including the ones who suffered low value harm. Nevertheless, the analysis of SPV is valuable for comparing different claims' aggregation models.

In general, collective redress schemes appear to be one of the main, if not the main tool for contributing to achieving full compensation: to enable *anyone* who has suffered harm caused by an infringement of competition law to effectively exercise the right to claim and obtain full compensation.[74] By aggregating multiple claims, collective action mechanism allows tackling common legal, factual and economic issues together. In turn, it creates economies of scale by allowing victims to share the costs of litigation. Without doubt, collective actions are of particular importance in antitrust violations, where the harm is often widespread among vulnerable victims: direct purchasers who suffered low harm and indirect purchasers who incurred loss down the supply chain. It is highly unlikely that these victims would bring claims individually, because they are financially unprofitable. Therefore, collective actions appear to be the only tool allowing for vulnerable victims to defend their rights in courts.

However, the extent to which full compensation is enhanced depends on how collective actions are designed and incorporated in antitrust enforcement scheme. In order to find the best mechanism for the EU, different policy options are compared in the dissertation:

[72] Komninos (n 7) 1.
[73] Recommendation (n 18) art. 3.
[74] Directive (n 15) arts. 1,3.

- *Aggregation model of victims*: opt-in vs. opt-out
- *Type of damages*: single damages vs. damage multipliers
- *Financing model*: hourly fees vs. contingency fees
- *Representation model*: representative (public) organisations vs. private attorneys
- *Level of disclosure*: no access to leniency and settlements submissions vs. access to such documents

These options lie between two extremes. On the one hand, a more careful approach including measures such as opt-in and/or single damages may prevent abusive litigation, but may simultaneously distort the achievement of full compensation. On the other hand, a more forceful approach, including opt-out schemes and/or contingency fees, may increase effectiveness in compensating victims but also may attract the perceived litigation abuses of US class actions: unmeritorious suits, blackmail settlements and overpayment of class counsels. These approaches are contrasted and their potential impact on full compensation is analysed. As regards abusive litigation, this phenomenon is discussed only as much as it is needed for analysing the scope of full compensation.

Another point requiring clarification is that this dissertation perceives collective actions primarily providing compensation and not creating deterrence. Therefore, it is not in favour of the US class action mechanism, which seeks to deter wrongdoers by imposing punitive damages. The American mechanism is rather seen providing valuable lessons on how effective deterrence-based class actions can be in fulfilling the objectives of compensation. Moreover, this research does not support the view that antitrust collective actions can only serve the compensatory function. Instead, it is regarded that effective collective redress mechanisms have a possibility to contribute, as a side effect, to deterrence. Simply put, the idea is that if more victims are compensated (especially when their claims would not be otherwise litigated), the cost of the violation is increased for infringers. Apart from the United States, the project analyses the experiences in the European Union member states, particularly where antitrust collective actions have been brought for compensating victims, or at least have a high potential for being so. If EU-style collective actions produce deterrence effects to greater or lesser degree, the contribution to the overall framework of competition law enforcement can also be determined. Therefore, not only the impact of antitrust collective actions on compensating victims is assessed, but also the potential of these actions in reducing the shortcomings of public enforcement, namely low detection rates and insufficient fines.

To sum up, the principal purpose of the dissertation is to assess the impact of antitrust collective actions (in any form possible in the EU context) on full compensation. Specifically, the focus is on the ability of collective actions to aggregate and compensate vulnerable victims. An additional but secondary objective is to assess whether these actions—apart from their compensatory function—can produce deterrence as a side effect.

To summarise, the question at the heart of this PhD dissertation is as follows:

Can collective redress actions contribute to achieving the objective of full compensation as stated in the EU Directive on antitrust damages actions? If so, which mechanism(s) would be the most effective from a theoretical and practical perspective to facilitate full compensation, and can these mechanism(s), as a side effect, contribute to deterrence?

This question entails examining the compensatory effectiveness of different collective action mechanisms. By doing this, the research seeks to complete three objectives. The first is to assess whether available EU-style collective actions are effective in achieving full compensation. The second is to suggest how the EU law on collective redress could be improved for a better achievement of full compensation. For this purpose, two private antitrust enforcement models are juxtaposed: the deterrence-based in the United States and the compensation-oriented in the European Union. A selected comparative analysis allows designing more forceful collective action mechanism(s) that would be possible in EU competition law, at least in theory. In turn, the potential of these mechanism(s) in compensating victims is discussed. The third is to analyse the likelihood of these mechanism(s), as well as of the available EU-style collective redress schemes, to contribute to deterrence as a side-effect.

The dissertation includes 6 sub-research questions (one per chapter) in order to harmonise the text and to reinforce the findings for answering the dissertation's research question. As mentioned before, the research sub-questions consolidates what has already been published in original articles; either these questions were already raised or that they are a logical outcome of a discussion in introduction and abstract. The sub-research questions are the following.

1. *Does the enforcement of EU competition law fulfil its objectives of compensation and deterrence? If not, which provisions of collective actions, existing in various forms in different states, and which EU's legislative instruments would better contribute to achieving these objectives?*

This question encompasses several aspects in Chapter 2. First, it reviews the existing shortcomings and obstacles in competition law enforcement in the European Union. As regards public enforcement, deterrence is assessed by analysing the effectiveness of leniency policy and administrative (public) fines. With regard to private enforcement, it analyses the common obstacles in private antitrust litigation that apply to EU member states. Second, this Chapter explores the preliminary options on how to design the EU policy for increasing the chances to bring successful collective actions.

2. *How well do antitrust class actions in the United States fulfil compensation objectives and to what extent can they facilitate deterrence?*

The analysis of the American system in Chapter 3 gives a better response to the main research question. Even though deterrence is not the primary objective of the EU private antitrust reform, an assessment of the US system is crucial for evaluating the potential of collective actions in contributing to antitrust enforcement through increased deterrence. Moreover, Chapter 3 gives an overview on how effective deterrence-based US class actions—being much more forceful than EU

compensation-oriented actions—are in compensating victims. The effectiveness of compensation is assessed by examining the predominant controversies: (1) class members obtain little or no compensation; (2) the compensation mechanism is framed to (largely) overpay attorneys; (3) class actions do not compensate the real victims. The discussion on deterrence emphasises one major controversy: class actions giving little or no weight to deterrence. The optimal deterrence theory is applied to assess the role of class actions in deterring wrongdoers. The combined results provide a background for further analysis on how effective EU-style collective actions can be in compensating victims under the principle of full compensation.

3. *What lessons can be learned from Lithuania and Poland about the impact of contingency fees on achieving compensatory effectiveness in antitrust collective actions?*

This question is debated in Chapter 4. When compared with other EU member states, Lithuania and Poland appear to be the most suitable examples for assessing the potential impact of contingency fees on compensating victims. First, both countries have granted a relatively active role to the group lawyer in comparison with the few other EU countries where attorneys are allowed to be part of collective litigation. Second, among these states, Lithuania and Poland permit contingency fees with the least restrictions.

4. *What impact has the Recommendation on collective redress brought on the member states' policy on collective redress, and what effect could its provisions have if the Recommendation ever takes a binding form? How do EU-style provisions on collective redress interact with US class actions?*

By addressing this question, Chapter 5 critically analyses the proposed European Commission's approach on collective redress. It debates whether this approach, focusing on the US system and its perceived problems, is the most suitable for seeking effectiveness in compensating victims. The discussion is elaborated by analysing insights from the pro-active EU member states, which disregard some provisions of the Commission's approach and instead allow US-style measures in some fashion.

5. *To what extent can the EU private antitrust reform achieve the objective of full compensation? What is the impact of antitrust collective litigation on full compensation, and what is the role (if any) of US-style deterrence-based measures in this respect?*

In Chapter 6, the following steps are taken to answer this question. First, it examines the impact of the indirect purchasers' rule on full compensation. Second, it analyses how the key provisions of the EU private antitrust reform interact with full compensation and public enforcement. Third, it scrutinises the necessity of US deterrence-based measures in the EU's compensation-oriented system.

6. *To what extent can the best possible collective redress mechanism in EU competition law, combining the deterrence-based tools, achieve the objective of full compensation, and what is its eventual side effect (if any) on deterrence?*

Chapter 7, considering the failure of available EU-style collective actions to contribute to achieving full compensation, explores three forceful but hypothetical mechanisms that include different type of deterrence-based remedies. The main purpose is to evaluate their effectiveness for facilitating the objective of full compensation. After assessing them, Chapter 7 designs the best possible mechanism that is within the limits of full compensation as well as within the legal traditions (at least in some member states). Subsequently, this mechanism is examined from two perspectives: one regards its impact on full compensation; another considers its likelihood of facilitating deterrence through an enhanced compensatory mechanism.

1.4 METHODOLOGY AND LIMITATIONS

It follows from the above that the study takes a comparative legal research approach.[75] It has been chosen for the following reasons. First, antitrust collective actions have been rare in EU member states. Therefore, by limiting the analysis to one jurisdiction (even to the most advanced one), the impact of collective actions on full compensation is unlikely to be properly assessed. Second, by comparing different legal systems, a more insightful assessment can be made about the shortcomings of private enforcement, and what the role collective actions can play in solving them. Third, comparative law helps to improve the technicality of law.[76] In comparison with other legal research methods, comparative law is the best suited to define the 'better' elements of collective actions, needed for answering the research question.

This research examines collective action schemes in France, Lithuania, Poland, the United States, the United Kingdom, and the Netherlands. One of the reasons for choosing these jurisdictions was the linguistic abilities of the author. Another reason was author's legal and cultural background. Coincidentally, the chosen countries are arguably the best suited to draw valuable lessons about antitrust collective actions. France and the UK are jurisdictions that have failed to aggregate claims on an opt-in basis. Furthermore, the UK has recently introduced opt-out collective actions and, as a result, two important claims have been brought to the Competition Appeal Tribunal. The Netherlands is a plaintiff-friendly jurisdiction for having an opt-out settlement procedure and favourable rules on the 'loser pays' principle. Both the UK and the Netherlands allow third-party funding. Lithuania and Poland allow a group advocate signing a contingency-fee agreement in collective actions. Furthermore, Lithuania is included for being the jurisdiction of the author's primary legal training. Finally, the US has by far the most experienced collective action mechanism in the world. Its analysis allows providing many lessons on how effective class actions can be in compensating victims and deterring wrongdoers. In conclusion, the relevance of the legal culture of EU member states in examining the antitrust perspective should be emphasised. Indeed, the trends in the civil procedure may be applied in shaping collective litigation. However, the cultural aspect has not been examined in any detail for the countries dealt with. The inclusion of this aspect would be too broad in the context of this dissertation, as an efficient and effective analysis would demand

[75] For a discussion on positive aspects of comparative legal analysis, see Mary A Glendon, Paolo G Carozza and Colin B Picker, *Comparative Legal Traditions in a Nutshel* (3d edn, Thomson West 2008) 7; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3d edn, Oxford University Press 1998) 3; Pier G Monateri, 'Legal Formants and Competitive Models: Understanding Comparative Law from Legal Process to Critique in Cross-System Legal Analysis' (2008) University of Torino. School of Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317302> accessed 25 October 2018.

[76] See, for example, Mathias M Siems, 'Bringing in Foreign Ideas: The Quest for "Better Law" in Implicit Comparative Law' (2014) 9 Journal of Comparative Law 119, 120-24.

comparing the long-standing legal culture in old EU member states with the legal culture in newer member states. The research is more specific – it examines the specific elements of collective redress (such as, opt-out/opt-in aggregation mechanisms, contingency fees or double damages) that may shape the future of collective litigation at the EU level. These elements are highly untested in the EU's litigation context, and some of them are considered against legal traditions in member states.

Overall, the selection of countries may seem too broad, potentially hindering the research.[77] However, the choice of legal systems is influenced by the main research question. Each jurisdiction is analysed and compared with others to the extent needed to address the research objectives. Moreover, by conducting a comparative analysis between the EU and the US, the thesis aims to provide suggestions on how the EU law on collective redress could be improved for fulfilling the standards of full compensation, if there is such a need at all. More specifically, the comparison is made at are three levels: 1) EU member states 2) the European Commission's approach 3) US. Therefore, a cross-level research demands a comprehensive form of comparative method.

First, the research takes a functionalist comparative approach. Functionalism in comparative law relies on the following premises: 1) legal systems face similar legal problems; 2) different legal solutions are taken to solve these problems in different countries; 3) legal systems achieve similar (or even the same) results, despite diverging legal paths.[78] In other words, the functional approach looks at common legal problems and diverging ways they are dealt within the compared legal systems. The functional analysis in this thesis is twofold. On the narrow side, the project looks at common problems of private antitrust enforcement in the European Union, and its member states. The major aim is to develop a critical understanding of why victims remain uncompensated, and how (and whether at all) this issue has been dealt with collective actions in different EU states. On the broad side, the comparative analysis juxtaposes the compensation problem in the EU and the US. The assumption is made that the failure to effectively compensate victims is similar at the end, even though the US has a more forceful private enforcement mechanism than the EU. Another problem in common is that antitrust violation generates a widespread harm (often down the supply chain), and reaching end-consumers is a complicated task. The risk inherent in this comparison is that applying an American legal approach to solving similar problems in the EU context may not work, because both systems differ in terms of rationale, design, and stated goals. Furthermore, despite sharing some commonalities, the American class action system faces additional problems that are not reported in the EU context: blackmail settlements and overpayment of class counsels. Another viewpoint is that the problems related to private antitrust enforcement are not the same throughout the EU member states. For example, the ability to receive compensation largely depends on whether victims are located in a country with favourable rules on private antitrust litigation or not. It is clear that functional comparative approach alone is insufficient to fully address the research question; it needs to be complemented with other comparative approaches.

[77] On the negative aspects of a too broad comparative approach, see Zweigert and Kötz (n 75) 41.

[78] For further discussion, see Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method, 9-10 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf> accessed 25 October 2018; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 342.

Second, a structurally comparative approach is used in the research. According to some scholars, the structural approach is part of the functional approach.[79] Others present the structural method as an alternative to the functional one.[80] The latter approach is taken by this thesis, because both methods are seen as independent from each other. Structuralism gives a broad insight into comparative law, because it compares the structures of legal systems and even legal families. The structure can be classified by comparing a collection of components or one specific criterion within the totality of each legal system. As regards antitrust collective actions, the decisive condition for categorising the totality, as well as a structure, is the direction of these actions: whether they are deterrence-based or compensation-based.

Third, the study applies the comparative analytical approach. This approach distinguishes different elements within the compared legal systems in order to assess the interactions between them. Therefore, it is subject to the precision of details. In this dissertation, the analytical approach is used to isolate and compare different elements of private enforcement, and of collective actions especially, and to assess their potential contribution to the achievement of full compensation.

Fourth, the research, where necessary, compares available empirical data, mostly quantitative sources. It focuses on data that can construct a contextual knowledge base for answering research questions. Quantitative comparison, for instance, is used to overview whether administrative (public) fines are sufficient to deter wrongdoers, and hence to give recommendations on whether public enforcement needs to be strengthened. Furthermore, a quantitative comparison is applied when evaluating the predominant controversies in US antitrust class actions. Although the quantitative study provides data that is descriptive, it may be limited for at least two reasons: first, it may focus on testing rather than generating the hypothesis (so-called the confirmation bias); second, the data provided may be too abstract to apply in specific situations.[81] Another weakness is that different quantitative studies may produce different (sometimes even contradictory) results on the same subject. Despite its limitations, the quantitative approach can be viewed as scientifically objective and rational, thereby facilitating the overall discussion.

These approaches of comparative law are applied directly or indirectly in all chapters of the thesis, with the exception of the comparison of empirical data.[82] Indeed, the combination of the functional, structural and analytical methods is desirable when the comparison is made at different levels[83], and in this thesis it is a three-level comparison. The research approach in each chapter is chosen on its research aims. Chapter 2 primarily utilises the functional method, especially when analysing the common obstacles of public and private enforcement of EU competition law. A comprehensive comparison of available empirical data is performed in Chapter 3 in order to assess the effectiveness of US antitrust class actions in compensating victims and deterring wrongdoers. The analytical approach is taken in Chapter 4, in particular when analysing the relationships between the different

[79] See, for example, Kingsley Davis, 'The Myth of Functional Analysis as a Special Method in Sociology and Anthropology' (1959) 24 American Sociological Review 757, 757.
[80] See, for example, Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 81-82. Michaels (n 78) 340-43.
[81] Robert B Johnson, and Larry B Christensen, *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (4th edn, SAGE Publications, 2010) 429.
[82] The comparison of empirical data is applied to greater or lesser degree in chapters 2, 3, 7.
[83] Hoecke (n 78); Renaud Dehousse, 'Comparing National EU Law: The Problem of Level of Analysis' (1994) 42(4) American Journal of Comparative Law 761, 770-772.

elements of contingency fees in Lithuania and Poland. In Chapter 5, there are two prevailing methods of comparative law: structural and analytical. The former compares the EU's compensation-oriented collective redress scheme (based on a careful approach) with the US deterrence-based class actions (based on a forceful approach). The latter isolates US-style collective actions elements in the EU member states in order to assess the interplay between them and with the European Commission's approach. Chapter 6 primarily combines structural and analytical approaches. As regards the structural approach, it compares a set of components that characterise the EU's compensation-based and US deterrence-based private antitrust enforcement schemes. The analytical approach is twofold: first, it isolates the main elements of the EU private antitrust reform; second, it distinguishes the respective private antitrust elements within the EU and US systems. Chapter 7 primarily applies functional and analytical approaches. The former focuses on the solutions taken by the EU member states, and on the solutions that they could potentially take. The latter defines the elements that would be applicable for the EU's best possible antitrust collective redress mechanism.

Obviously the research methodology outlined is not perfect and does face some pitfalls, including, *inter alia*:

First, combining various comparative law approaches creates incoherence between chapters. *Second*, some comparative assessments leave no choice but to rely on assumptions or common sense.[84] *Third*, the author's legal training, knowledge of languages and cultural background are the main reasons for selecting the discussed countries. *Fourth*, comparative lawyers may intentionally or unintentionally rely on reasoning that supports their study.[85]

These drawbacks may undermine the conclusions made by the research project. However, no methodology is without its limitations. A positive point is that diversity in comparative law has the advantage of broadening the horizons of research techniques. Of course, variety does not remove the significant limitation of: the lack of practice of antitrust collective actions in EU member states. In fact, a comprehensive comparative analysis demands practical insights.[86] Despite a lack of practices, the thesis comparatively applies the EU experiences in the context of the US class action mechanism, which has longstanding practice in the field. The question of how to compare two inherently different collective litigation cultures arises: the US being deterrence-oriented and more forceful one, with the EU being the compensation-based and more cautious one. The answer is that this analysis would never be ideal. However, comparative legal research, like any other legal method, is well suited to make proposals, and in the context of this thesis to provide suggestions on how the EU law on collective redress could be improved for ensuring more effective compensation.

For future (academic) discussions, it is useful to present the hypothetical framework for the main points of departure for legal analysis when (if ever) there will be more practical examples leading to actual compensation awards to vulnerable victims in the EU. It will be interesting to follow the most pro-active states, such as the Netherlands and the UK. Hopefully, the UK's approach on

[84] Zweigert and Kötz (n 75) 35.
[85] See, for example, Holger Spamann, 'Large-Sample, Quantitative Research Designs for Comparative Law?' (2009) Harvard Law School, Discussion Paper No. 32, 6-7 <http://www.law.harvard.edu/programs/olin_center/> accessed 22 October 23.
[86] Zweigert and Kötz (n 75) 33.

private antitrust enforcement will stay the same regardless of Brexit. If antitrust collective redress became the norm rather than the exception (hopefully also in other countries than the ones mentioned above), the comparative legal method, especially analytical and functional approaches, may be applied. In the first place, the elements that determine the outcomes of collective actions should be compared: a) the effectiveness of the principle of full compensation, especially what proportional compensation victims receive; b) the effectiveness of an aggregation model to collect victims (both direct and indirect) and inform about their rights. If only one country was active in the field (for example, the Netherlands), doctrinal legal research method could be applied. The development of antitrust collective actions could be examined as well as how they have been applied through case law. However, a purely doctrinal research should be met with scepticism as it is questionable whether any EU jurisdiction will have a high number of case law (at least in the near future) that would be sufficient for a comprehensive doctrinal research on antitrust collective redress.

In the end, it should be explained why the law and economics assessment has not been systematically applied in the thesis. As mentioned, the construction of the methodology is guided by the research question. Its main objective is to assess the potential of antitrust collective actions, in any possible form, to contribute to achieving full compensation in the EU. Indeed, competition law and economics are more associated with other aims, which are further explained.

First, private antitrust enforcement and collective action instruments can be examined from a perspective of deterrence and competition law enforcement.[87] One option regards the role of private enforcement in ensuring optimal sanctioning (punishment) and optimal competition law enforcement.[88] A similar approach is applied when law and economics literature deals with tort issues. As discussed in Section 1.1.2, the goal of damages in (accident) tort law is to ensure optimal precaution. Another option considers a study on enhancing the predictability and accuracy of antitrust enforcement. It aims to achieve three objectives: a) decreasing the likelihood of enforcement errors; b) providing a background to businesses for predicting the outcomes of law enforcement; c) to inform about the negative effects of over-facilitated enforcement of competition law.[89] From these perspectives, the systematic application of law and economics in examining full compensation would be excessive, because deterrence and enforcement are regarded as secondary objectives of the thesis.

Second, competition law and economics analyse different market structures and why these structures work or do not work. One of the most popular debates concerns perfect competition. The theoretical model aims to determine the economic equilibrium – a model in which the demand and

[87] For further discussion on the law and economics in antitrust collective litigation, see Sonja E Keske, 'Group Litigation in European Competition Law: A Law and Economics Perspective' (2009) Erasmus University Rotterdam <https://repub.eur.nl/pub/17790/Sonja%20Keske%20Thesis[lr].pdf> accessed 23 October 2018.

[88] For a discussion on optimal sanctioning, see Wouter PJ Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition 183; William Breit and Kenneth Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28(4) Journal of Law and Economics 405. For a discussion on optimal antitrust enforcement, see the works of Wouter PJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008); *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002).

[89] See, for example, Stefan Bueh, 'Enforcing Competition Law in the Presence of Legal Uncertainty: An Economist's Perspective' (20th St. Gallen International Competition Law Forum ICF, 4-5 April 2013).

supply curves intersect.[90] Perfect competition is typically contrasted with monopoly. From a law and economics perspective, the impact of monopoly power on profit-maximising and prices are discussed.[91] To sum up, this approach has little relevance for the thesis' discussion on compensation effectiveness, as it scrutinises the functioning of different market structures.

Third, economics in competition law deals with the so-called welfare standard: total welfare versus consumer welfare.[92] The total welfare is a broad approach that seeks to maximise the aggregate value of the consumer and producer surplus. However, there is a possibility that consumer welfare decreases, because the profits (surplus) of producers outweigh this decrease, resulting in a positive total welfare.[93] As regards consumer welfare, it is a narrow approach that aims at maximising consumer surplus, but prevents producers from receiving offsetting gains. The comparison between total welfare and consumer welfare is often associated with merger control[94], analysis that is not part of this thesis. Consumer welfare appears to be one of the most important goals of EU competition policy.[95] However, the issue is that the definition of consumer welfare has not been much developed by the European Commission; its scope is unknown. In economic terms, consumer surplus occurs when the price that consumers actually pay for goods or services is less than the price they are willing or able to pay. Consumer welfare in law and economics is undoubtedly an interesting topic. However, this analysis is excessive in the context of this thesis, as it goes beyond its objectives, examining various policy measures for improving antitrust collective actions.

Fourth, law and economics in tort law deals with the principle of full compensation, yet to a limited extent.[96] The criterion for analysing full compensation is based on the rule of negligence (or carelessness), taking into account the pre-tort position of the victim. However, the application of the rule of negligence in antitrust cases is quite irrelevant, as a large majority of violations are conducted intentionally by wrongdoers (for examples, cartels). Therefore, it has no added value for the thesis.

To conclude, the most widespread approaches of (competition) law and economics have been presented; however, none of them are directly related to the objectives of the thesis. Nevertheless, some elements of law and economics are included in the thesis for a more insightful discussion. First, the deterrence effect of EU administrative (public) fines is assessed by evaluating the quantitative findings of the law and economics. Second, the optimal deterrence theory is applied in

[90] See, for example, Oles Andriychuk 'The Concept of Perfect Competition as the Law of Economics: Addressing the Homonymy Problem' (2011) 62(4) Northern Ireland Legal Quarterly 523, 525-526.
[91] See, for example, Johannes Paha, 'The Economics of Competition (Law)' (2012) Justus-Liebig-University, 19-25 <http://www.uni-giessen.de/fbz/fb02/fb/professuren/vwl/goetz/kontakt/mitarbeiter/pahaordner/WPuS%20Begleittext> accessed 7 February 2019.
[92] Keske (n 87) 14-19; Mark Glick, 'The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust' (2018) Roosevelt Institute Working Paper <http://rooseveltinstitute.org/wp-content/uploads/2018/11/The-Unsound-Theory-Behind-the-Consumer-and-Total-Welfare-Goal-in-Antitrust-final.pdf> accessed 7 February 2019.
[93] For further discussion on a surplus, see Svend Albæk, 'Consumer Welfare in EU Competition Policy' (2013) 70-71 <http://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf> accessed 7 February 2019.
[94] ibid 72-74.
[95] Joaquín Almunia, 'Competition and Consumers: The Future of EU Competition Policy' speech at European Competition Day, Madrid, 12 May 2010.
[96] See, for example, Peter van Wijck and Jan Kees Winters, 'The Principle of Full Compensation in Tort Law' (2001) 11(3) European Journal of Law and Economics 319; Ram Singh, ''Full' Compensation Criteria in the Law of Torts: An Enquiry into the Doctrine of Causation' (2012) Centre for the Study of Law and Governance Jawaharlal Nehru University <https://www.jnu.ac.in/sites/default/files/u63/02-Full%20Compensation%20%28Ram%20Singh%29.pdf> accessed 16 February 2019.

measuring the role of US class actions in deterring infringers. The economic perspective gives a broader picture of how (if at all) compensatory collective actions can facilitate antitrust enforcement. To sum up, law and economics is used as much as is needed for answering the research question; a systematic application of law and economics would be excessive and could jeopardise the coherence of the comparative method, which examines the impact of full compensation on antitrust collective actions.

1.5 RESEARCH STRUCTURE

The dissertation is divided into 8 chapters. Chapter 2 explores the initial options for designing collective redress schemes for the removal of obstacles to the enforcement of competition law. Chapter 3 examines how well US antitrust class actions led by private attorney generals fulfil compensation objectives, and to what extent they can enhance deterrence. In Chapter 4, the EU and US systems are analysed through the lens of Lithuania and Poland; two EU member states where antitrust lawyers are allowed to act as private investors through contingency fees in collective actions. In Chapter 5, the effectiveness of collective actions is examined under two circumstances: one when relying on the proposed principles of the Recommendation; another when relying on the experiences of those EU member states not fully following the guidelines of the European Commission. Chapter 6 scrutinises the rationale of full compensation and investigates the importance of deterrence-based remedies in the EU's compensation-oriented system. Chapter 7 examines whether the EU's best possible collective redress mechanism is able to fully compensate victims of antitrust infringement, and whether it can bring positive effects on deterrence. The thesis ends with Chapter 8, which summarises the key insights of the PhD dissertation.